

ELECTRONIC PAGERS – MAY A LAW ENFORCEMENT OFFICER ACCESS THE MEMORY DURING A SEARCH INCIDENT TO ARREST?

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As electronic technology becomes more readily available, law enforcement officers will increasingly encounter some form of electronic device during a search incident to a lawful arrest. Perhaps no form of electronic technology is more widely in use today than electronic pagers. Individuals in all walks of life use these devices, and electronic pagers are especially widespread among those involved in the illegal drug trade.¹ Consider this typical scenario: A law enforcement officer arrests an individual and, while searching the individual incident to that arrest, discovers an electronic pager attached to the individual's belt. While the seizure of that electronic pager is clearly permissible, the more difficult question to answer is this: May a law enforcement officer access the information stored in the memory of that electronic pager during the search incident to arrest? Or, must the law enforcement officer obtain a search warrant before accessing the memory of the pager?

BACKGROUND

It is firmly ingrained in our system of law that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth

¹ *United States v. Frost*, 999 F.2d 737, 739 (3rd Cir. 1993)(noting that electronic pagers are "commonly used in drug trafficking")

Amendment, subject only to a few specifically established and well-delineated exceptions."² It has long been recognized that a search conducted incident to a lawful custodial arrest "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."³ In *United States v. Robinson*,⁴ the Supreme Court noted "two historical rationales for the search incident to arrest exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial."⁵ The Supreme Court later outlined the permissible scope of a search incident to arrest in the 1969 case of *Chimel v. California*,⁶ where they held:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee

² *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)(emphasis in original)(citation omitted)

³ *United States v. Robinson*, 414 U.S. 218, 235 (1973)

⁴ *Id.*

⁵ *Id.*

⁶ 395 U.S. 752 (1969)

might reach in order to grab a weapon or evidence items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.⁷

Additionally, a law enforcement officer may also search the contents of a container found on or near the arrestee during a search incident to arrest. As the Supreme Court noted in *New York v. Belton*⁸:

Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.⁹

A search incident to arrest may only be conducted when two (2)

requirements have been met. First, there must have been a lawful custodial arrest. At a minimum, this requires that (1) probable cause exist to believe that the arrestee has committed a crime and (2) an arrest is actually made. A search incident to arrest may not be conducted in a situation where an actual arrest does not take place.¹⁰ The second requirement for a lawful search incident to arrest is that the search must be “substantially contemporaneous” with the arrest.¹¹ In *United States v. Turner*,¹² the court stated that a search incident to arrest must be conducted “at about the same time as the arrest.”¹³ While very general, this comment reiterates the Supreme Court's mandate that, when a search is too remote in time or place from the arrest, the search cannot be justified as incident to the arrest.¹

In sum, a law enforcement officer may, during a search performed contemporaneously with a lawful arrest, search the arrestee's person, the area “within his immediate control,” and any containers found on or near his person. With that background, we can now turn our attention to the issue of whether a law enforcement officer may lawfully access the memory of an electronic pager during a valid search incident to arrest.

¹⁰ See *Robinson*, 414 U.S. at 235; *McCardle v. Haddad*, 131 F.3d 43 (2nd Cir. 1997)(search incident to arrest not valid where 10 minute detention in backseat of patrol vehicle did not amount to an arrest)

¹¹ *Belton*, 453 U.S. at 460. See also *Stoner v. California*, 376 U.S. 483, 486 (1964) and *Preston v. United States*, 376 U.S. 364, 367-368 (1964)

¹² 926 F.2d 883 (9th Cir.), cert. denied, 502 U.S. 830 (1991)

¹³ *Id.* at 887

¹ *Preston*, 376 U.S. at 367

⁷ *Id.* at 762-763

⁸ 453 U.S. 454 (1981)

⁹ *Id.* at 461

DISCUSSION

The first case to address the issue of accessing the memory of an electronic pager during a search incident to arrest was *United States v. Chan*.² In *Chan*, federal agents seized an electronic pager that was in the defendant's possession and subsequently searched the pager incident to the arrest "by activating its memory and retrieving certain telephone numbers that were stored in the pager."³ In denying the defendant's motion to suppress the evidence obtained in the search of the electronic pager, the court found that the search was legally conducted incident to the defendant's arrest. In addressing the issue, the court analogized the information stored in the memory of an electronic pager to the contents of a closed container. Citing to the Supreme Court's decision in *Belton*, the court held that "the general requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest. The search conducted by activating the pager's memory is therefore valid."⁴

The holding of the court in *Chan* was endorsed in the case of *United States v. Ortiz*.⁵ In *Ortiz*, the Seventh Circuit Court of Appeals held that the activation and retrieval of information from an electronic pager during a search incident to arrest was permissible under the Fourth Amendment. Here, the defendant was arrested in a parking lot and federal agents seized an electronic pager. Shortly thereafter, "one of the agents pushed a button on Ortiz's digital pager, which revealed the numeric messages previously

transmitted to the pager."⁶ At trial, the defendant's motion to suppress the evidence obtained from the pager was denied, and he appealed. In affirming the trial court's decision, the court held that:

An officer's need to preserve evidence is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest. Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed by merely turning off the power or touching a button. Thus, it is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence.⁷

The Fourth Circuit Court of Appeals has similarly held that during a search incident to arrest a law enforcement officer may access the memory of an electronic pager. In *United States v. Hunter*,⁸ the defendant attempted to suppress evidence of telephone numbers taken from his electronic pager by law

² 830 F. Supp. 531 (N.D. Cal. 1993)

³ *Id.* at 533

⁴ *Id.* at 536

⁵ 84 F.3d 977 (7th Cir.), *cert. denied*, 519 U.S. 900 (1996)

⁶ *Id.* at 983

⁷ *Id.* at 984 [citing *Robinson*, 414 U.S. at 226 and *United States v. Meriwether*, 917 F.2d 955, 957 (6th Cir. 1990)]

⁸ 166 F.3d 1211 (9th Cir. 1998), *cert. denied*, 525 U.S. 1185 (1999)

enforcement officers during a warrantless search following his arrest for narcotics violations. Again, the defendant's motion was denied because the court found the search to be lawful incident to the defendant's arrest. In its decision, the court noted that "Hunter presumably had a reasonable expectation of privacy in the contents of the pager's memory."⁹ Nonetheless, the court noted, "after his arrest, the contours of Hunter's rights are somewhat different. They are tempered by an arresting officer's need to preserve evidence."¹⁰

in the pager's memory. Additionally, a suspect may destroy evidence by either turning the pager off or simply touching a button. These factors justify the warrantless search of an electronic pager seized during a lawful search incident to arrest.

CONCLUSION

In sum, the United States Supreme Court has never directly addressed the scope of a search incident to arrest involving the memory of an electronic pager. However, the federal courts that have addressed the issue have uniformly allowed law enforcement officers to access the information contained in the memory of an electronic pager during a search incident to a lawful arrest.¹¹ These courts, relying upon the Supreme Court's decision in *Robinson, supra*, have consistently recognized a law enforcement officer's need to prevent the destruction of evidence as a basis for conducting a search incident to a lawful arrest. Because an electronic pager has a finite memory, incoming pages may destroy evidence currently contained

⁹ *Id.* [citing *United States v. Chadwick*, 433 U.S. 1, 10-11 (1977)]

¹⁰ *Id.* (citation omitted)

¹¹ See also *United States v. Lynch*, 908 F. Supp. 284 (D.V.I. 1995)(holding that "search and retrieval of the telephone numbers from [the defendant's] pager was justified as being incident to a valid arrest"); *United States v. Reyes*, 922 F. Supp. 818 (S.D.N.Y. 1996)(search of pager fell within search incident to arrest exception to the Fourth Amendment); *United States v. Thomas*, 114 F.3d 403 (3rd Cir. 1997)(dicta); and *Yu v. United States*, 1997 WL 423070 (S.D.N.Y. 1997)