

BLOG POST

Searching Mobile Phones

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When I lived in Washington, D.C., I had a brand new Motorola Razr. This made me cool. The only – hey, why are you laughing? Stop it. Okay. Where was I? Yes, my Razr. Near as I can tell, the only thing that my Razr could not do was this: text. And tweet, check Facebook, give me directions, download apps, and play Words with Friends. Well, and now that I think of it, I couldn't watch YouTube clips, store documents, take pictures, edit pictures, take videos, talk to Siri, illuminate the screen with a fake Zippo lighter during a concert, and listen to music.

Hmm. I guess my Razr wasn't so cool after all. But you know what is? My iPhone.

My belated realization of the wow! factor of my flip phone is a lot like what law enforcement has seen in this day and age, where a mobile phone is lot less like an accessory and a whole lot more like an appendage. Searching a mobile phone incident to an arrest used to be simple, like taking a look at the recent call log, or inspecting the outgoing call list, or maybe listening to a voicemail or two. But the ubiquitous nature of smart phones – and what they can do – changed that dramatically. Now, a search of a smart phone incident to arrest is liable to turn up a great deal more information than incoming and outgoing calls. It can turn up coded text messages to arrange meetings. Or include pictures of confederates. Or Google searches for drug ingredients. Or any number of other things (horrifying selfies, if my former prosecution experience is any indication) that are incriminating or even just embarrassing – but enormously useful to state officers and federal agents.

The trouble is that state officers and federal agents just aren't constitutionally entitled to generally rummage through the contents of someone's life – and that's really what a smart phone contains. In *Riley v. California*, U.S. Supreme Court, No. 13-132, the Supremes mandated that there has to be a search warrant that issued based on probable cause that the arrestee committed a crime and that the mobile phone has a link to that crime that would justify such a search. There are exceptions that allow a warrantless search – exigent circumstances, of course – but those are narrow and rare.

Does the ruling make us less safe? Sure does. When “[t]he sum of an individual's private life can be reconstructed” through the phone records, emails, photos, and internet browsing histories on a smart phone, then catching criminals becomes that much easier. But, as the Court recognized, the opportunity cost of increased privacy is decreased security. It's a subject certainly worthy of debate – the pendulum swung in favor of security after 9-11 (in the form of the Patriot Act). The Supremes' decision swings the pendulum back in the direction of privacy.