"THE FEDERAL CORNER"

Waiting for the Supreme Court to Address *Riley* and the Border Search Doctrine

Buck Files

Almost four years ago, the Supreme Court held that the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) [Opinion by Chief Justice Roberts, in which Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan joined. Justice Alito filed an opinion concurring in part and concurring in the judgment.]

Writing for the Court, Chief Justice Roberts concluded his opinion with this admonition to all law enforcement officers:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,' *Boyd, supra,* at 630, 6 S.Ct. 524. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. *Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.* (emphasis added)

What the Court has not addressed is whether the holding in *Riley* impacts the Border Search Doctrine.

In the first fifteen days of March, the United States Courts of Appeal for the Fifth and Eleventh Circuits were confronted with that issue. *See United States v. Molina-Isidoro,*___F.3d___, 2018 WL 1101361 (5th Cir. March 1, 2018) [Panel: Circuit Judges Davis, Haynes and Costa. Opinion by Judge Costa.] and *United States v. Vergara*, ___F.3d___, 2018 WL 1324589 (11th Cir. March 15, 2018) [Panel: Circuit Judges William Pryor, Jill Pryor (dissenting) and Clevenger. Opinion by Judge William Pryor]. Each Court determined that the holding in *Riley* did not apply and affirmed the defendant's conviction and sentence.

I ran this query through WestLaw's All Federal database: da(after 2/28/2014) & Riley & "border search." In addition to *Molina* and *Vergara*, there were twenty-three District Court cases, but only one Court of Appeals case that included those two terms: *United States v. Gonzalez*, 658 Fed.Appx. 867 (9th Cir. 2016) [Panel: Circuit Judges Rawlinson and Bea, and Judge Eaton, sitting by designation. (Memorandum Opinion)]. The opinion devotes only twenty-nine lines to the defendant's *Riley* argument and ends with this comment:

> *Riley* did not address border searches, and expressly acknowledged that 'even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone.' ... Thus, *Riley* does not provide sufficient justification to excuse Gonzalez's untimely filing of her motion to suppress.

FROM JUDGE COSTA'S OPINION IN *MOLINA-ISIDORO*

[An Overview of the Opinion]

After discovering kilos of meth in the suitcase Maria Isabel Molina–Isidoro was carrying across the border, customs agents looked at a couple of apps on her cell phone. Molina argues that the evidence found during this warrantless search of her phone should be suppressed. Along with amici, she invites the court to announce general rules concerning the application of the government's historically broad border-search authority to modern technology for which the Supreme Court has recognized increased privacy interests. *See Riley v. California*, —– U.S. ——–, 134 S.Ct. 2473, 2489–91, 2493, 189 L.Ed.2d 430 (2014). We decline the invitation to do so because the nonforensic search of Molina's cell phone at the border was supported by probable cause. That means at a minimum the agents had a good-faith basis for believing the search did not run afoul of the Fourth Amendment.

* * *

[The Facts in More Detail]

Molina attempted to enter the United States at a border crossing in El Paso. Customs and Border Protection officers 'detected anomalies' while x-raying her suitcase. When they questioned Molina, she acknowledged owning the suitcase but claimed that it only contained clothing.

At a secondary inspection area, in response to questions about her travels, Molina said she had delivered clothing to her brother in Juarez, Mexico and would be flying home to Tijuana, Mexico from El Paso. At that point, an officer opened Molina's suitcase and noticed a modification. After rescanning the suitcase, the officers located an 'anomaly ... covered by electrical tape.' That anomaly was a hidden compartment, which held 4.32 kilograms of a white crystal substance. A drug-sniffing dog alerted officers to the presence of narcotics, and the crystal substance field-tested positive for methamphetamine. Later laboratory tests confirmed that result.

* * *

Either at that point, or during the questioning, agents searched Molina's phone, looking at Uber and WhatsApp. They did not ask for, and Molina did not provide, consent for that search. The agents found the following (paraphrased) conversation on Molina's WhatsApp:

> Molina advised Raul that she was headed to El Paso, and requested [that] Raul ... send her the information for the Uber. Molina advise[d] Raul that she had arrived in El Paso. Raul responded that he sent her the information for the Uber. Raul sent a picture [o]f a credit card, front and back, and told Molina to use that credit card information to pay for [the] Uber. Raul sent information regarding

> a hotel located in Juarez, Mexico. Raul directed Molina to Hotel Suites in Colonia Playas, Room #10, and advised Molina that the stuff [was] located there. Molina advised Raul that she [had] arrived [at] the room but no one was there. Raul stated he w[ould] get a hold of them. Molina then responded that the guy [had been] asleep [but had now] opened the door. Raul sent another picture of a Southwest Airlines flight itinerary. The itinerary listed Molina as the passenger o[n] a flight departing El Paso at 5:15 P.M. with a final destination of Ft. Lauderdale, Florida. Molina advised Raul that she got the stuff and was headed back to El Paso.

* * *

[The Court Avoids the Fourth Amendment Issue]

We do not decide the Fourth Amendment question. The fruits of a search need not be suppressed if the agents acted with the objectively reasonable belief that their actions did not violate the Fourth Amendment.

* * *

[The Border Search Doctrine]

The agents searching Molina's phone reasonably relied on the longstanding and expansive authority of the government to search persons and their effects at the border.

* * *

This evidence made it highly likely Molina was engaged in drug trafficking and created a fair probability that the phone contained communications with the brother she supposedly visited (or whoever was the actual source of the drugs) and other information about her travel to refute the nonsensical story she had provided. Indeed, the incriminating evidence obtained against Molina even before the phone search was so strong that we doubt the information from WhatsApp was needed to convict her. But the government used that evidence during the bench trial and does not urge harmless error.

The existence of probable cause means the only way Molina can show the search was unlawful is if a warrant was required. But as we have already explained, no court has ever required a warrant to support searches, even nonroutine ones, that occur at the border. Although our court had not addressed border searches of an electronic device at the time of this search, a number of circuits had and none had required a warrant.

* * *

[The *Riley* Issue]

Molina argues that *Riley* changes all that. Although most circuits to decide the issue had applied the search-incident-to-arrest doctrine to cell phones, the Supreme Court took a different view. In doing so, it relied on the heightened

privacy interest in smart phones given their immense storage capacity and the inapplicability of the traditional search-incident-to-arrest rationale to these searches. But *Riley* left open the possibility that 'other case-specific exceptions may still justify a warrantless search of a particular phone.'

That caveat means it was reasonable for the agents to continue to rely on the robust body of pre-Riley caselaw that allowed warrantless border searches of computers and cell phones. What is more, not a single court addressing border searches of computers since Riley has read it to require a warrant. (emphasis added)

* * *

[The Officer Acted in Good Faith]

Given the state of the law when agents looked at the apps on Molina's phone, it was eminently reasonable for them to think that the probable cause they had to believe it contained evidence of drug crimes made the search a lawful one.

* * *

Because the officers acted in good faith in searching the phone, the judgement of the district court is affirmed.

FROM JUDGE PRYOR'S OPINION IN *VERGARA*

[An Overview of the Opinion]

This appeal presents the issue whether warrantless forensic searches of two cell phones at the border violated the Fourth Amendment. U.S. Const. amend IV. Hernando Javier Vergara appeals the denial of his motion to suppress evidence found on two cell phones that he carried on a cruise from Cozumel, Mexico to Tampa, Florida. He argues that the recent decision of the Supreme Court in *Riley v. California,* —– U.S. ——–, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)—that the search-incident-to-arrest exception to the warrant requirement does not apply to searches of cell phones—should govern this appeal. But we disagree. The forensic searches of Vergara's cell phones occurred at the border, not as searches incident to arrest, and border searches never require a warrant or probable cause.

* * *

[The Facts in More Detail]

Vergara returned to Tampa, Florida on a cruise ship from Cozumel, Mexico, with three phones: a Samsung phone inside a bag in his luggage, an LG phone, and an iPhone. Christopher Ragan, an officer with Customs and Border Protection, identified Vergara and searched his luggage. When Ragan found the Samsung phone in Vergara's luggage, he asked Vergara to turn the phone on and then looked through the phone for about five minutes. During this search, Ragan found a video of two topless female minors. After watching a few seconds of that video,

Ragan called investigators for the Department of Homeland Security.

After viewing the video and interviewing Vergara, Terri Botterbusch, a special agent with the Department of Homeland Security, decided to have all three phones forensically examined. Agents later returned the iPhone to Vergara's niece after a forensic examination revealed that it did not contain any child pornography.

A forensic examination of the Samsung and LG phones conducted that day revealed more than 100 images and videos, 'the production of which involved the use of a minor engaging in sexually explicit conduct and the visual depictions were of such conduct.' Neither the earlier manual search nor the forensic examinations damaged the phones. A grand jury later indicted Vergara on two counts: (1) that he 'did knowingly transport in and affecting interstate and foreign commerce one or more visual depictions, the production of which involved the use of a minor engaging in sexually explicit conduct and such visual depictions were of such conduct'; and (2) that he 'did knowingly possess numerous matters that had been shipped and transported using any means and facility of interstate and foreign commerce, including by computer, which matters contained visual depictions of minors engaging in sexually explicit conduct and the production of which involved the use of minors engaging in sexually explicit conduct.' *See* 18 U.S.C. § 2252(a)(1), (b)(1); 18 U.S.C. § 2252(a)(4)(B), (b)(2).

[Vergara Loses the Suppression Issue]

Vergara filed a motion to suppress the evidence obtained from his cell phones. The court held a suppression hearing, at which Ragan and Botterbusch testified, and later denied Vergara's motion.

* * *

[The *Riley* Issue in the District Court]

The district court also rejected Vergara's argument that *Riley v. California*, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), required the agents to obtain a warrant before conducting the forensic search. It reasoned that *Riley* did not apply to border searches. It agreed with the government that 'if [Vergara] had entered the country with child pornography images in a notebook, the notebook would have been subject to inspection, and he cannot be allowed to insulate himself from inspection by storing child pornography electronically on his cell phone.' And it concluded that, in any event, the search was supported by reasonable suspicion.

* * *

[The Border Search Doctrine]

The forensic searches of Vergara's phones required neither a warrant nor probable cause. 'The Supreme Court has consistently held that border searches are not subject to the probable cause and warrant requirements of the Fourth

Amendment.'

* * *

The 'longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself.'

* * *

[The Court Rejects the *Riley* Issue]

Vergara argues that *Riley* required a warrant for both the manual and the forensic searches of his phones, but he challenges only the forensic searches because no evidence from the manual search was admitted as evidence against him. In *Riley*, the Supreme Court addressed the constitutionality of warrantless manual searches of cell phones following the arrest of two defendants in the United States. 134 S.Ct. at 2480–82. *And the Supreme Court expressly limited its holding to the search-incident-to-arrest exception. It explained that 'even though [that] exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone.'* (emphasis added)

* * *

We affirm Vergara's judgment of conviction and sentence.

[My Thoughts]

- Since the count is now twenty-six wins for the Government and zero for the defendant, why am I even concerned with *Riley* and the Border Search Doctrine? Because, I would answer, I have read Judge Jill Pryor's dissent in *Vergara* which reads, in part, as follows:

  In this case we decide for the first time whether a warrantless forensic search of a cell phone at the United States border comports with the Fourth Amendment.

  * * *

  I agree with the majority that the government's interest in protecting the nation is at its peak at the border, but I disagree with the majority's dismissal of the significant privacy interests implicated in cell phone searches, as articulated by the Supreme Court in *Riley v. California*, —– U.S. ——–, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). *Because Riley* did not involve a border search, *I acknowledge that I can, at best, attempt to predict how the Supreme Court would balance the interests here. But my weighing of the government's heightened interest at the border with Vergara's privacy interest in his cell phones leads me to a result different than the majority's. I respectfully dissent because, in my view, a forensic search of a cell phone at the border requires a warrant supported by probable cause.* (emphasis added)

- Surely Judge Pryor cannot be the only Court of Appeals Judge with this view. Eventually, the Supreme Court will write on this issue – hopefully, sooner rather than later. Until then, defense lawyers must continue to raise the *Riley* issue.