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Ryan Zabel

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RECENT DEVELOPMENT

MOATS V. STATE: A CELL PHONE SEIZED INCIDENT TO ARREST MAY BE RETAINED IN ORDER FOR POLICE TO OBTAIN A SEARCH WARRANT WITHOUT SUSPICION AT THE TIME OF THE SEIZURE THAT THE PHONE CONTAINS EVIDENCE OF THE CRIME.

By: Ryan Zabel

The Court of Appeals of Maryland held that police may retain a cell phone seized incident to a lawful arrest for as long as reasonably necessary to acquire a search warrant. *Moats v. State*, 455 Md. 682, 697, 168 A.3d 952, 961 (2017). The police do not need suspicion at the time of the seizure that the cell phone contains evidence of the crime. *Id.* The court ruled that holding a cell phone for three days following the release of the arrestee to obtain a search warrant for the phone was permissible. *Id.* Additionally, the court held that there was probable cause for the judge to issue the warrant. *Id.* at 698, 168 A.3d at 961. Therefore, denial of the motion to suppress evidence obtained from the phone was proper. *Id.*

In January 2015, Timothy Alan Moats (“Moats”) and three other teenagers were driving in Moats’ car. Moats provided marijuana and suboxone to the other passengers. One of the passengers later alleged that they were sexually assaulted that evening. Two weeks later, Sergeant Zimmerman (“Zimmerman”) interviewed all passengers, including Moats. During the interview, Moats admitted to using drugs but denied involvement in the sexual assault. Based on his admission of distributing drugs, police obtained an arrest warrant for Moats.

On January 23, 2015, Moats was arrested and transported to Garrett County jail, where his cell phone was seized. Moats was released from custody the following day, and the police retained control of his cell phone. On January 26, 2015, Zimmerman prepared an application and affidavit for a search warrant of the phone. The affidavit included Moats’ admission to drug distribution and information gained during the other interviews. Additionally, the affidavit contained Zimmerman’s training and experience, particularly relating to evidence typically found on cell phones during drug and sexual assault investigations. A judge issued a search warrant, and upon investigation, sexually explicit photographs and a video of Moats’ girlfriend were discovered on the phone. Moats’ girlfriend was 15 years old at the time the images were taken, and because Moats was 18, he was charged with possession of child pornography.

Prior to trial, Moats filed a motion to suppress the information obtained from his cell phone as fruit of an illegal search. Moats’ motion was denied, and he was convicted on one count of possession of child pornography. Moats appealed the lower court’s denial of his motion to suppress. The

Court of Special Appeals of Maryland held that police were justified in retaining the cell phone in anticipation of the search warrant. Additionally, the court found the information provided in the affidavit supported a reasonable inference that evidence of the crime would be discovered on the phone. The court also held that even if there was no substantial basis for the issuance of a warrant, Zimmerman acted in good faith in preparing the affidavit and obtaining the warrant prior to the search. For these reasons, the Court of Special Appeals of Maryland affirmed the lower court's decision.

The Court of Appeals of Maryland granted *certiorari*. *Moats*, 455 Md. at 693, 168 A.3d at 958. The court was confronted with two issues. The first issue on appeal was if Moats' suspected involvement in a crime, coupled with Zimmerman's belief that a cell phone could have been used in that crime, constituted probable cause to seize and search Moats' cell phone. *Id.* The second issue was whether the good faith exception to the exclusionary rule applied. *Id.* However, since the court found the first question to be sufficient, it did not consider the second issue. *Id.*

The court began its analysis by examining the retention of the cell phone while police obtained a search warrant. *Moats*, 455 Md. at 694, 168 A.3d at 959. Police may automatically seize a cell phone from an arrestee during an arrest without any suspicion that the cell phone contains evidence of a crime. *Id.* at 695, 697, 168 A.3d at 959, 961 (citing *Riley v. California*, 135 S.Ct. 2473, 189 L.Ed.2d 430 (2014)). The court determined that the three days it took to obtain the search warrant was not an unreasonable delay. *Moats*, 455 Md. at 697, 168 A.3d at 961. The court also noted that Moats' release from custody did not remove the authority of police to retain the cell phone until they obtained a search warrant. *Id.*

The court next addressed the search warrant and search of the cell phone. *Moats*, 455 Md. at 698, 168 A.3d at 961. When warrants are reviewed for probable cause, they must meet the substantial basis standard. *Id.* This standard requires a neutral magistrate to find a substantial basis for concluding that evidence of wrongdoing will be uncovered by the search to satisfy the Fourth Amendment. *Id.* at 700, 168 A.3d at 962 (citing *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317 (1983)).

The court found that the issuing judge had substantial basis for concluding there was probable cause to conduct a search of the phone. *Moats*, 455 Md. at 704, 168 A.3d at 965. The affidavit contained substantial basis that the cell phone contained evidence of the drug distribution charges and the sexual assault allegation. *Id.* The court noted that the judge has discretion to defer to the experience and expertise of a police officer in determining if there is a reasonable inference that evidence will be found in the location specified in the warrant. *Id.* at 702, 168 A.3d at 963. The court determined that the affidavit, which included Moats' confession of drug distribution and information about the pending sexual assault investigation, gave the judge a substantial basis to find probable cause that Moats' cell phone would contain evidence of these crimes. *Id.* at 702-04, 168 A.3d at 963-65.

Judge Greene and Judge Adkins concurred, based on the concern that without a temporal requirement search warrants issued for cell phones will go far beyond the Fourth Amendment. *Moats*, 455 Md. at 705, 168 A.3d at 965. They argued that the particularity requirement of the Fourth Amendment prevents cell phone warrants from giving uninhibited access. *Id.* Thus, the majority's decision constituted an unnecessary invasion of privacy by permitting an overly broad search. *Id.*

In *Moats* the Court of Appeals of Maryland held that police may seize and retain an arrestee's cell phone for as long as reasonably necessary to seek a search warrant. This holding clarifies precedent regarding cell phones automatically being seized upon a lawful arrest and allows the cell phone to be retained even beyond the release of the arrestee. Additionally, it shows the deference given to police officers when there is a question about probable cause in a search warrant. This high level of deference could open the door to warrants allowing uninhibited searches of a cell phones, potentially infringing on privacy rights of individuals.