STATE OF FLORIDA, Plaintiff, v. RICARDO H. GLASCO, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2010-CF-021349-AXXX-XX. February 24, 2011. John M. Harris, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

THIS CAUSE came before the Court upon the Defendant's Motion to Suppress Evidence, filed on September 24, 2010, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure. The Court has heard and considered the arguments of counsel and has carefully reviewed the motions, together with the other evidence presented. Based upon this review, and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

a. The Defendant requests that the Court suppress any and all evidence obtained as a result of the unlawful search of the Defendant's cellular telephone on or about February 8, 2010 by the Rockledge Police Department, including: texts, pictures, the call history, and/or observations made by Officer James Clark.

b. During the hearing on the Defendant's motion, the State and Defendant stipulated to the facts as outlined in the Defendant's motion and agreed that the hearing concerned a legal issue rather than a factual issue.

The State presented the testimony of Officer James Clark of the Rockledge Police Department. Officer Clark testified that on February 8, 2010, he conducted a search of the Defendant's person and backpack at the scene of the Defendant's arrest. Officer Clark testified that he found the Defendant's cell phone while searching his person at the scene, but then later examined the cell phone further at the police station while the Defendant was still being processed. Officer Clark testified that he found text messages regarding the sale of cocaine while he was looking through the Defendant's phone.

On cross-examination, Officer Clark acknowledged that the cell phone was discovered after the Defendant was handcuffed. He further acknowledged that once the Defendant was handcuffed, there were no concerns for officer safety and there was no fear that the cell phone would be concealed or destroyed.

Officer Clark did not have a warrant to search the Defendant's cell phone, and testified that there were no circumstances stopping him from obtaining a search warrant for the cell phone.

c. The Defendant argues that the evidence found in his cell phone should be suppressed because, without a warrant, the search was unreasonable and violative of his Fourth Amendment rights. However, the State argues that the rationale of the United States Court of Appeals for the Fifth Circuit in U.S. v. Finley, 477 F.3d 250 (5th Cir. 2007), applies. In Finley, police officers conducted a controlled purchase of methamphetamine and following Finley's arrest, the officers searched Finley's person and found a cell phone in his pocket. One of the officers later searched Finley's cell phone for call records and text messages, several of which appeared to relate to narcotics. The Fifth Circuit denied Finley's motion to suppress the text messages found on his cell phone, reasoning that it is well-settled that a full search of an arrestee is reasonable under U.S. v. Robinson, 414 U.S. 218 (1973). The Fifth Circuit further noted that the permissible scope of a search incident to arrest extended to containers on the arrestee's person under both New York v. Belton, 453 U.S. 454 (1981) and Robinson. Thus, the State argues that the Defendant's cell phone is a container, the search of which is justified pursuant to a lawful arrest.

d. The Defendant relies on State v. Smith, 920 N.E.2d 949 (Ohio 2009), in which the Ohio Supreme Court disagreed with the categorization the courts made in Finley and held that a cell phone was not a closed container under the Fourth Amendment. In Smith, police officers arranged a controlled purchase of crack cocaine and recorded cell phone conversations made in arranging the purchase. After arresting Smith, the officers seized a cell phone found on his person during the arrest. They eventually discovered phone numbers and call records from Smith's cell phone that confirmed he was the individual with whom police officers arranged the purchase of crack cocaine. In determining whether the Fourth Amendment prohibits the warrantless search of cell phones incident to arrest, the Ohio Supreme Court first held that a cell phone is not a closed container and reasoned that cell phones did not match the Belton decision's definition of any

object that is capable of holding another object. The Ohio Supreme Court recognized that there were legitimate concerns in allowing warrantless searches of cell phone and smartphones due to the rapid advancements made in cell phone technology. Thus, the Ohio Supreme Court determined cell phones were not containers, and individuals have a heightened privacy interest in the contents of their cell phones; therefore, law enforcement may not search the contents of a cell phone incident to a lawful arrest without a warrant.

The Defendant also cites to the case of U.S. v. Park, 2007 WL 1521573 (N.D. Cal. May 23, 2007), in which the United States District Court for the Northern District of California, distinguished modern cell phones from pagers and address books. In Park, the defendants moved to suppress warrantless searches of their cell phones that occurred about an hour and a half after their arrests. The California District Court determined the search was not contemporaneous with the arrest and, thus, would only be lawful if the searches were limited to the arrestee's persons and did not include possessions within their immediate control. Unlike Finley, the court in Park found that a cell phone was a possession within immediate control as opposed to part of an arrestee's person. The California District Court reasoned that, unlike address books or pagers, modern cell phone record calls, contain address books, calendars, text and voice messages, video, pictures, and email; and are capable of storing an immense amount of highly personal information. The California District Court also distinguished cases that upheld searches of pagers incident to arrest, finding that searches of pagers implicated significantly fewer privacy interests considering the technological differences between modern cell phones and pagers. The court further noted that the searches of cell phones at issue went significantly beyond the original rationales for the search incident to arrest exception, police officer safety and evidence preservation, as officers performed the searches for a purely investigatory purpose.

e. Like the Finley case, which was cited by the State, several courts have concluded that officers may retrieve text messages and other information from cell phones seized in a search incident to a lawful arrest. See e.g., U.S. v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009); U.S. v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009); U.S. v. Santillan, 571 F. Supp. 2d 1093, 1102-1103 (D. Ariz. 2008); U.S. v. Deans, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008).

The courts that have validated searches of cell phones incident to a lawful arrest have used several different theories; most courts authorize the search of cell phones incident to a lawful arrest on the idea that the immediate search prevents destruction of evidence that may possibly be contained in the phone. See U.S. v. Mercado-Nava, 486 F. Supp. 2d 1271, 1278 (D. Kan. 2007); U.S. v. Valdez, 2008 WL 360548 at 23 (E. D. Wis. Feb. 8, 2008). Some courts have treated cell phones like closed containers to validate searches of cell phones. See U.S. v. Finley, 477 F.3d 250, 260 (5th Cir. 2007); U.S. v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009). Some courts validate the search of cell phones because of their similarities with pagers; others have analogized searches of wallets and address books to cell phones because they contain the same information. See U.S. v. Brookes, 2005 WL 1940124 at 3 (D. V.I. 2005); U.S. v. Finley, 477 F.3d 250, 260 (5th Cir. 2007); U.S. v. Cote, 2005 WL 1323343 at 6 (N.D. Ill. May 26, 1996). Some courts simply rely on the fact that the arrest was lawful, so the search of the cell phone was also lawful pursuant to search incident to lawful arrest. See U.S. v. Mendoza, 421 F.3d 663, 668 (8th Cir. 2005); U.S. v. Dennis, 2007 WL 3400500 (E.D. Ky. Nov. 13, 2007).

f. However, like the cases cited by the Defendant, other courts have invalidated warrantless searches of cellular phones seized incident to arrest. See, e.g., U.S. v. Quintana, 594 F. Supp. 2d 1291, 1301 (M.D. Fla. 2009); U.S. v. McGhee, 2009 WL 2424104 at 3-4 (D. Neb. July 21, 2009); State v. Smith, 920 N.E.2d 949 (Ohio 2009); U.S. v. Wall, 2008 WL 5381412 at 3 (S.D. Fla. Dec. 22, 2008); U.S. v. Park, 2007 WL 1521573 at 8-9 (N.D. Cal. May 23, 2007).

Although there is conflicting case law among the federal circuits, and the majority of cases “trend heavily in favor of finding that the search incident to arrest or exigent circumstances exceptions apply to searches of the contents of cell phones,” (U.S. v. Wurie, 612 F. Supp. 2d 104, 109-110 & n. 9 (D. Mass. 2009)), this Court finds the reasoning in the holdings of the minority position among cases that have considered whether cell phones may be searched incident to a lawful arrest but without a search warrant to be more persuasive.

Specifically, U.S. v. Wall, 2008 WL 5381412 at 4 (S.D. Fla. Dec. 22, 2008), and State v. Smith, 920 N.E.2d 949, 956 (Ohio 2009), have focused their analysis on how the original Chimel justifications of officer safety and preservation of evidence, apply in the context of cell phones.

In Wall, the defendant was arrested after DEA agents witnessed him and a co-defendant participate in a drug transaction. Pursuant to the lawful arrest, agents performed a search of the defendant's person and the truck. Found on the defendant's person were two cell phones, which a DEA agent subsequently searched during the booking process and which revealed incriminating text messages. The government sought to introduce the text messages at trial, and the defendant moved to suppress them as a violation of the Fourth Amendment. In the court's analysis of the issue of "whether an exception to the Fourth Amendment warrant requirement permits law enforcement to search the information stored on a cell phone without a warrant," the Southern District of Florida first began by recognizing that most relevant case law dealt with the search of pagers. The court then discussed the justifications for searches incident to lawful arrest. First, the court refused to allow the justification for officer safety stating that "[t]he content of a text message on a cell phone presents no danger of physical harm to the arresting officers or others." Wall at 3. The court then found that the justification regarding destruction of evidence was likewise not satisfied because "[o]nce Wall was in the custody of police officers, and the phones were removed from his possession, he could not longer exercise any control over them. Thus, the threat that messages would be destroyed was extinguished once law enforcement gained sole custody over the phones." Id. at 4.

Similarly, in Smith, the defendant was arrested on drug-related charges and was subsequently searched by police. The search produced a cell phone, located in the defendant's pocket, which police placed in the cruiser while continuing to search the residence for evidence. Testimony revealed that part of the search of the cell phone took place when officers returned to the station to book the suspect. Officers confirmed, based on call records, that the phone had been used to conduct the drug transaction. The defendant moved to suppress the evidence, arguing that the warrantless search of the cell phone was a violation of his Fourth Amendment rights. In the court's analysis of the issue of whether the Fourth Amendment prohibits the warrantless search of the contents of a cell phone incident to a lawful arrest, the Ohio Supreme Court first addressed how a cell phone should be characterized. The court discussed recent courts' analogies of cell phones to closed containers, but refused to adopt this analogy holding that "a cell phone is not a closed container for purposes of the Fourth Amendment analysis." Smith at 954. The court stated, "[g]iven their unique nature as multifunctional tools, cell phones defy easy categorization . . . They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, which makes them distinguishable from laptop computers . . . [t]heir ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain." Id. at 955.

The court went on to hold that "[o]nce the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone is neither lost nor erased." Id. The court further concluded, "[e]ven if one accepts the premise that the call records on Smith's phone were subject to imminent permanent deletion, the state failed to show that it would be unable to obtain call records from the cell phone service provider . . ." Id. at 956.

Additionally, this court finds the court's analysis in U.S. v. Quintana, 594 F. Supp. 2d 1291, 1301 (M.D. Fla. 2009), persuasive and constitutionally sound. In Quintana, the defendant was arrested for driving with a suspended license and placed in handcuffs; without the defendant's permission, the arresting officer removed the cell phone from the defendant's pocket and began looking through information in the cell phone, including a digital photo album, hoping to find evidence related to the odor of marijuana in the defendant's vehicle. Upon searching the phone, the officer found a photo of what he characterized as a "marijuana grow house." The defendant moved to suppress the evidence obtained from his cell phone. In its analysis, the Middle District of Florida first cited Chimel and its original justifications for searches incident to lawful arrest; however, the court dismissed the idea that the officer's search of the phone was justified by a need to preserve evidence on the phone stating that "[t]his type of search is not justified by the twin rationales of Chimel and pushes the search-incident-to-arrest doctrine beyond its limits." Quintana at 1300.

Instead, the court focused on whether the officer was justified in searching the defendant's phone for a crime other than the one in which he was arrested. The court found that because the defendant was arrested for driving with a suspended license, the officer was not justified in searching the phone for evidence relating to the marijuana odor. The court relied on oral argument from what was then the forthcoming case of Arizona v. Gant, 129 S. Ct. 1710 (2009) [21 Fla. L. Weekly S781a], where Justice Scalia stated that "if you're going to use [the preservation-of-evidence] rationale you have to link the reason for the arrest with the likelihood that there would be any evidence found in the car that would support the arrest." The Quintana court concluded that "Justice Scalia seemed skeptical that law enforcement could arrest someone and then 'rummage around for evidence of a different crime.' " Quintana at 1300. Thus, it appears the holding in Gant should be extended from the automobile context to cell phones.

To elaborate, the Supreme Court's decision in Gant reinstated the importance of the Chimel decision's twin rationales for the search incident to arrest exception, and in this Court's opinion, neither one authorizes searching cell phones incident to arrest. Cell phones pose no threat to police officer safety, and unlike bags, boxes, and luggage that could hold weapons, cell phones are incapable of carrying such things. Additionally, the preservation of evidence rationale does not support searching cell phones incident to arrest. Once police officers seize a cell phone, there is no longer any risk that an arrestee could reach the phone to destroy evidence, and any risk that cell phones would automatically delete information after police officers effectuate an arrest is negligible in observing the enormous amount of information cell phones can store. Further, the simple fact that an item is a cell phone does not create an exigent circumstance; therefore, law enforcement officers should obtain a warrant before searching the contents of a cell phone.

The Gant decision was also cited by the court in U.S. v. McGhee, 2009 WL 2424104 (D. Neb. July 21, 2009). McGhee was charged with conspiring to distribute and possess with intent to distribute crack cocaine; police officers obtained a warrant for McGhee's arrest. When police executed the warrant and arrested McGhee, they searched his person incident to arrest, finding a cell phone. The police documented the contact list on McGhee's cell phone at the scene of his arrest. The court determined that police officers were not justified in performing a warrantless search of an arrestee's cell phone incident to arrest and accordingly suppressed information gleaned from the phone. The court explained, consistent with the Supreme Court's opinion in Gant, that it was unreasonable for the police to believe that searching McGhee's cell phone would produce evidence of the arrest for a drug conspiracy. The court further reasoned that McGhee's cell phone posed no risk of harm to the police officers, and there was no evidence suggesting that McGhee's cell phone concealed any contraband or destructible evidence.

Lastly, the rationale of the court's opinion in U.S. v. Park, 2007 WL 1521573 (N.D. Cal. May 23, 2007) also adheres to the principles of the Fourth Amendment. As previously noted, the Northern District of California suppressed the contents of the cell phone expressing concern that not only were the justifications of Chimel v. California, 395 U.S. 752 (1969) not present when the phone was searched at the station house, but that cell phones also store "immense amounts of private information," and officers should have obtained a warrant before searching the cell phone.

g. This Court agrees with the reasoning in the opinions of Wall, Smith, Quintana, McGhee and Park, and finds that these opinions uphold the protections of the Fourth Amendment and show deference to the warrant requirement. When an officer arrests someone who has a cell phone in their possession, there may very well be reason to suspect that the phone contains valuable information, particularly in drug-related arrests. The call logs and address books could help link a defendant to a particular drug transaction and could provide the identities of other persons involved in the illegal activity; however, these are exactly the types of situations where probable cause could be used to obtain a warrant.

The reality is that most information stored on a cell phone will remain there long enough for a warrant to be secured and that numbers "lost" from recent call lists are readily obtainable from the service provider. Cell phones are outside the ambit of the search incident to arrest exception's reach because of their capacity for storing vast quantities of intimately personal data. If courts continue to allow the unfettered exploration of this personal data, then courts are permitting the government to execute an unwarranted search of the cell

phone user's life and habits. This intrusion cannot reasonably be justified by the rationales of officer safety and evidence preservation; therefore, a simple seizure of the cell phone must suffice until a warrant can be procured.

Accordingly, it is ORDERED AND ADJUDGED:

The Defendant's Motion to Suppress Evidence obtained from the warrantless search of his cell phone is GRANTED.