



The D.C. Circuit limits the ability of the police to seize cell phones from the homes of people suspected of committing crimes



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In *United States v. Griffith*, ___ F.3d ___, 2017 WL 3568288 (D.C. Cir. Aug. 18, 2017), the United States Court of Appeals for the District of Columbia described the issue before the Court as follows: “Most of us nowadays carry a cell phone. And our phones frequently contain information chronicling our daily lives—where we go, whom we see, what we say to our friends, and the like. When a person is suspected of a crime, his phone thus can serve as a fruitful source of evidence, especially if he committed the offense in concert with others with whom he might communicate about it. Does this mean that, whenever officers have reason to suspect a person of involvement in a crime, they have probable cause to search his home for cell phones because he might own one and it might contain relevant evidence? That, in essence, is the central issue raised by this case.” *Id.* at * 1. The relevant facts are as follows.

In January 2013, police obtained a warrant to search Defendant Ezra Griffith’s residence in connection with their investigation of a homicide committed more than one year earlier. Investigators concluded that the shooting related to a conflict between rival gangs. The officers knew Griffith was a member of one of the gangs and suspected that he drove the getaway car that surveillance footage had captured circling the scene. Two months after the shooting, police found a vehicle matching the surveillance footage and registered to Griffith’s mother. Eight months later, a detective met with Griffith’s mother who confirmed that Griffith had been the vehicle’s principal user.

During much of the year-long investigation, Griffith had been incarcerated on unrelated charges. Detectives obtained recordings of Griffith’s jailhouse phone calls made on the day they interviewed his mother. Griffith initiated four calls that day: two to his home number (where his mother lived) and two to his grandmother’s home phone. In one of the calls, Griffith spoke to Dwayne Hilton, another suspect in the shooting, and said, “man you know it’s about that.” The two briefly discussed a “whip” (slang for car) before Hilton changed the subject. In another call, Griffith’s brother reported that fellow gang member Carl Oliphant needed to speak with Griffith. Oliphant did not have a cell phone, so Griffith’s brother walked with a phone to Oliphant’s house. Griffith then briefly explained to Oliphant that detectives had been investigating the car.

In September 2012, Griffith was released from his confinement on the unrelated charges after serving approximately 10 months. Detectives learned that Griffith moved into an apartment owned by his girlfriend, Sheree Lewis. In January 2013, police sought a warrant to search Lewis’s apartment.

The bulk of the ten-page affidavit supporting the search warrant explained Griffith’s suspected involvement in the homicide committed more than one year beforehand. The affiant, a 22-year veteran of the police

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department, recounted the evidence and expressed his belief that Griffith had been the getaway driver. The affidavit also described the evidence that Griffith now lived with Lewis in her apartment.

Two sentences in the affidavit then set out the basis for believing incriminating evidence would be discovered in the apartment: “Based upon your affiant’s professional training and experience and your affiant’s work with other veteran police officers and detectives, I know that gang/crew members involved in criminal activity maintain regular contact with each other, even when they are arrested or incarcerated, and that they often stay advised and share intelligence about their activities through cell phones and other electronic communication devices and the Internet, to include Facebook, Twitter and E-mail accounts. Based upon the aforementioned facts and circumstances, and your affiant’s experience and training, there is probable cause to believe that secreted inside of [Lewis’s apartment] is evidence relating to the homicide discussed above. Id. at * 2. The affidavit then concluded by enumerating the items the officers sought to seize from the apartment, principally any cell phones and electronic devices found there.

On January 4, 2013, a magistrate judge granted the application for a search warrant. Three days later, on January 7, a team of officers executed the search. The officers arrived at 7:10 AM and surrounded the building. When they knocked on the door and announced that they had a search warrant, an officer assigned to contain the premises observed an arm throw an object out of the apartment’s window. The officer determined that the object was a firearm and, then, glanced at the window and saw Griffith looking back at him. About thirty (30) seconds after the officers knocked on the door and announced that they had a search warrant, Lewis opened the door. Officers found three people inside the apartment: Lewis, Griffith, and a six-year-old child. Officers knew one of those three people had tossed the gun out of the window. Officers seized the gun and also seized a number of cell phones recovered in the course of their search of the apartment.

Based on the containment officer’s identification of him, the Government charged Griffith with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Griffith moved to suppress all tangible evidence seized under the search warrant, including the gun. Griffith challenged the warrant as facially invalid, arguing that there was no evidence he had ever owned a cell phone or other electronic device, or that any such device would be found in the apartment. The Government argued that the warrant was supported by probable cause or that, at a minimum, the good-faith exception to the exclusionary rule applied.

The District Court denied Griffith’s suppression motion. The District Court declined to decide whether the warrant was supported by probable cause and held instead that, regardless, the good-faith exception to the exclusionary rule applied. At trial, a jury convicted Griffith of unlawful possession of a firearm by a felon. Griffith then appealed his conviction and specifically challenged the District Court’s denial of his suppression motion.

On appeal, the D.C. Circuit held that the prevalence of mobile devices in our society did not mean that police could assume that a suspect possessed a cell phone when requesting a search warrant. The D.C. Circuit summarized its view by noting: “The warrant authorized officers to search for and seize all cell phones and other electronic devices in Griffith’s residence. The supporting affidavit, however, offered almost no reason to suspect that Griffith in fact owned a cell phone, or that any phone or other device containing incriminating information would be found in his apartment. In our view, the fact that most people now carry a cell phone was not enough to justify an intrusive search of a place lying at the center of the Fourth Amendment’s protections—a home—for any phone Griffith might own.” Id. Therefore, the D.C. Circuit agreed with Griffith that the warrant to search his residence was not supported by probable cause. The D.C. Circuit also rejected the Government’s arguments that, even if the warrant was invalid, the firearm still need not have been excluded from the evidence against him under the good-faith exception. As a result, the D.C. Circuit vacated Griffith’s conviction.

As for the language of the search warrant, the D.C. Circuit noted that a search warrant cannot rely upon conclusory statements. The D.C. Circuit went on to note the difference between a search warrant and an

arrest warrant. “An arrest warrant rests on probable cause to believe that the suspect committed an offense; it thus primarily serves to protect an individual’s liberty interest against an unreasonable seizure of his person. A search warrant, by contrast, is grounded in probable cause to believe that the legitimate object of a search is located in a particular place. Rather than protect an individual’s person, a search warrant safeguards an individual’s interest in the privacy of his home and possessions against the unjustified intrusion of the police.” Id. at * 3.

Therefore, probable cause to arrest a person will not itself justify a warrant to search the arrestee’s property. Regardless of whether an individual is validly suspected of committing a crime, an application for a search warrant concerning an arrestee’s property or possessions must demonstrate cause to believe that evidence is likely to be found at the place to be searched. There must be a nexus between the item to be seized and criminal behavior.

In the appeal before it, the D.C. Circuit found that the search warrant was unconstitutionally overbroad. The affidavit conveyed no reason to think that Griffith owned a cell phone. There was no observation of Griffith’s using a cell phone; no information about anyone having received a cell phone call or text message from him; no record of officers recovering any cell phone in his possession at the time of his previous arrest (and confinement) on unrelated charges; and no indication otherwise of his ownership of a cell phone at any time.

Accordingly, to justify a search of the apartment to seize any cell phone owned by Griffith, the police needed reason to think not only that he possessed a phone, but also that the device would be located in the home and would contain incriminating evidence about his suspected offense. The affidavit in this case set out no reason to believe the phone was likely to be found at the place to be searched.

The D.C. Circuit also opined that the assumption that most people own a cell phone does not automatically justify an open-ended warrant to search a home anytime officers seek a person’s phone. Instead, such a search would rest on a second assumption: that the person (and his cell phone) would be home. Here, “[t]he upshot is that the information in the warrant application might well have supported an arrest warrant for Griffith—which in turn presumably would have occasioned a search of him incident to his arrest, and an ensuing seizure of any cell phone he owned in the most likely place to find it (on his person). But the government instead elected to seek license to conduct a full-scale search of his entire home based on the possibility that he owned a phone and that a phone found there might be his.” Id. at * 6. As a result, the D.C. Circuit found that the police violated Griffith’s Fourth Amendment rights and that the District Court erred in denying Griffith’s motion to suppress.

Finally, the D.C. Circuit rejected the Government’s argument and the District Court’s conclusion that the evidence of the possession of the gun should not be excluded from being used as evidence against Griffith based upon the good-faith exception to the exclusionary rule. The D.C. Circuit determined that the affidavit fell short to such an extent that it precluded an objective officer’s good-faith reliance on the warrant. So, the good-faith exception did not apply.

Circuit Judge Janice Rogers Brown dissented from the majority’s opinion. Justice Brown stated that she would rule that the good-faith exception to the exclusionary rule did apply in this case because the police acted in good faith and scrupulously observed the letter of the law.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.