



Does a warrantless, forensic search of a cell phone at the United States border violate the Fourth Amendment? The Eleventh Circuit says, “No.”



April 2018

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Article Source : http://www.patc.com/weeklyarticles/2018_us_v_vergara_chapman.pdf

In *United States v. Vergara*, ___ F.3d ___, 2018 WL 1324589 (11th Cir. Mar. 15, 2018), Defendant Hernando Javier Vergara was convicted, after a bench trial, of possession and transportation of child pornography. Vergara appealed, arguing that the warrantless search of his cell phone at the United States border that he had on him as he returned to Tampa, Florida, from a cruise to Cozumel, Mexico, violated his Fourth Amendment rights and was contrary to the United States Supreme Court’s holding in *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014). The relevant facts are as follows.

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.

However, 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) for transportation of child pornography and (2) for possession of child pornography.

Thereafter, Vergara filed a motion to suppress the evidence obtained from his cell phones. The District Court held a hearing on Vergara’s motion to suppress at which Ragan and Botterbusch testified. At the conclusion of the hearing, the District Court denied Vergara’s motion. Specifically, the District Court ruled that the initial, manual search of Vergara’s phones did not require reasonable suspicion and found that “in any event, . . . Agent Ragan had reasonable suspicion to search the applications and settings of the phone for evidence of child pornography.” The District Court also rejected Vergara’s argument that the Supreme Court’s holding in *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014), required the agents to obtain a warrant before conducting the forensic search because the District Court reasoned that *Riley* did not apply to border searches. The District Court 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.” Regardless, the District Court concluded that the search was supported by reasonable suspicion. At a later

bench trial, the District Court found Vergara guilty of both counts and later sentenced him to ninety-six months imprisonment on each count concurrently followed by supervision for life. Vergara timely appealed.

The United States Court of Appeals for the Eleventh Circuit began its opinion by reminding that the Fourth Amendment ordinarily requires a warrant by law enforcement officials to discover evidence of criminal wrongdoing. *Riley*, 134 S.Ct at 2482. However, searches at the border “from before the adoption of the Fourth Amendment have been considered to be reasonable by the single fact that the person or item in question had entered into our country from outside.” *United States v. Ramsey*, 431 U.S. 606, 619 (1977). The Eleventh Circuit opined that border searches “never” require probable cause or a warrant. *Id.* Finally, the Eleventh Circuit explained that federal courts require only reasonable suspicion at the border for highly intrusive searches of a person’s body such as a strip search or an x-ray examination. *United States v. Alfaro-Moncada*, 607 F.3d 720, 729 (11th Cir. 2010).

In this case, the Eleventh Circuit agreed with the District Court that the border agents had not violated Vergara’s Fourth Amendment rights when they searched his cell phones without a warrant. The Eleventh Circuit rejected Vergara’s argument that the Supreme Court’s holding in *Riley* provided any support for his motion to suppress. Instead, the Eleventh Circuit noted that the Supreme Court expressly limited its holding in *Riley* to the search-incident-to-arrest exception to the Fourth Amendment’s warrant requirement. The Supreme Court 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.” *Riley*, ___ U.S. ___, 134 S. Ct. at 2494.

In sum, the Eleventh Circuit opined that the Supreme Court has consistently held that border searches are not subject to the probable cause and warrant requirements of the Fourth Amendment. Instead, they are simply subject to the Fourth Amendment’s more amorphous reasonableness standard. This longstanding recognition (i.e., that searches at the United States’ borders without probable cause and without a warrant are, nevertheless, reasonable) has a history as old as the Fourth Amendment itself, and there has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause.

Accordingly, the Eleventh Circuit explained that, at the border, the highest standard for a search is reasonable suspicion. Because Vergara did not challenge the District Court’s finding that the border agents possessed a reasonable suspicion to search his cell phones, the Eleventh Circuit affirmed the District Court’s denial of Vergara’s motion to suppress and also affirmed his convictions and sentence.

However, the Eleventh Circuit was not unanimous in its decision. Circuit Judge Jill Pryor authored a dissenting opinion in which she stated that she would have reversed the District Court’s denial of Vergara’s motion to suppress because, in her opinion, a forensic search of a cell phone at the border requires a warrant supported by probable cause. Judge Pryor explained that Vergara had a significant privacy interest that the majority discounted in reaching its conclusion. Judge Pryor further explained that cell phones are fundamentally different from any object traditionally subject to a Government search at the border. Specifically, cell phones contain very personal data that, unlike the mail or other personal belongings, can reveal very private, personal information about a person. Therefore, Judge Pryor would require the Government to establish probable cause before border protection officers could conduct a forensic search of an individual’s cell phone without a warrant. Because no warrant was obtained and because the Government did not make a showing that the border agents had probable cause to search Vergara’s cell phone, Judge Pryor dissented from the majority’s holding.