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DeWolfe takes cellphone-search case to Supreme Court

Public defender claims Fourth Amendment violation

By: Steve Lash Daily Record Legal Affairs Writer December 6, 2017

Maryland Public Defender Paul B. DeWolfe (file photo)

The mere contention that criminals use cellphones to memorialize their crimes cannot be sufficient to secure a warrant to search a suspect's phone, Maryland's public defender has stated in papers urging the U.S. Supreme Court to review and overturn a man's robbery, assault and theft convictions.

Rather, police must allege a "case-specific nexus between the phone and the crime" to secure a constitutionally valid search warrant, Paul B. Dewolfe stated in the review petition he filed with the justices last week on behalf of Timothy Stevenson.

DeWolfe's request follows the Supreme Court's 2014 decision in *Riley v. California* that police must, in the absence of an emergency, secure a warrant to search a cellphone seized from a suspect incident to an arrest. The justices, however, did not say what links between the suspected crime and the cellphone's contents police must assert to secure a warrant.

In Stevenson's case, police secured a search warrant by saying their training and experience indicated evidence related to violent crime is often found on cellphones because criminals often photograph their misdeeds.

Indeed, the damning evidence against Stevenson at trial was a cellphone photograph of his robbery victim after the July 2015 attack in Glen Burnie. Stevenson was convicted of first- and second-degree assault, robbery, reckless endangerment and theft of property under $1,000, convictions the Maryland Court of Appeals affirmed on appeal in August.

In the papers filed with the justices, DeWolfe said upholding a search warrant based on such a generalized statement from police would convert the Fourth Amendment's prohibition on unreasonable searches "from a meaningful safeguard into a meaningless formality and effectively (leave) the place in which more than 90 percent of American adults store a digital record of nearly every aspect of their lives without constitutional protection."

The Supreme Court should hear Stevenson's appeal and give the search-warrant requirement "force by ensuring that it is not used to justify the type of general warrant to rummage through a cache of every suspect's most private thoughts, communications, activities, associations, interests, and relationships that the Fourth Amendment was designed to protect against," DeWolfe wrote in the brief cosigned by Assistant Public Defenders Kiran Iyer and Katherine P. Rasin, the attorney of record before the justices.

"By interpreting the Fourth Amendment's probable cause requirement to demand a case-specific nexus between the alleged crime and the phone, (the Supreme Court) would ensure that cellphone data receives protection commensurate with the privacy interests at stake," DeWolfe added.

Maryland Attorney General Brian E. Frosh has waived his right to respond to DeWolfe's brief unless the justices request a response. The waiver was submitted Tuesday by Assistant Attorney General Carrie J. Williams.

The Supreme Court has not stated when it will vote on whether to hear Stevenson's appeal. The case is docketed at the Supreme Court as *Timothy Stevenson v. State of Maryland*, No. 17-796.

'Not unreasonable inference'

The Court of Appeals, in affirming Stevenson's convictions, said deference is owed to the training and expertise to officers seeking search warrants and the judges who issue them.

Judges could validly infer "that persons use cellphones to communicate and that evidence of the crimes being investigated, and any related crimes, would be found on (the suspect's) cellphone," Chief Judge Mary Ellen Barbera wrote for the 5-2 majority. "This was not an unreasonable inference to draw, considering not only the prevalence of cellphones but also the degree of detail of one's daily life that is often contained in a cellphone."

Barbera added, however, that "not every affidavit will (or should) result in issuance of a warrant" to search a cellphone.

Judge Sally D. Adkins, in disagreeing with the majority, said the search warrant was so broad and supported by mere generalities linking cellphone use to criminal activity as to violate the Stevenson's constitutional rights. To be valid, a warrant must state more specifically the evidence expected to be found on the devices and not a temporal or general description, she added.

"I fear that the majority has paved the way for law enforcement to search a cellphone without a nexus between the criminal activity and the phone to be searched," Adkins wrote in a minority opinion Judge Clayton Greene Jr. joined.

But Adkins and Greene said they would have upheld the search of the cellphone because the police relied on their good-faith belief that the warrant was constitutionally valid.

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