



Roll Call Reporter

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LEGAL UPDATE FOR MARYLAND LAW ENFORCEMENT OFFICERS

Information Necessary to Supply Probable Cause for a Warrant to Search a Cell Phone

Question: Does an individual's suspected involvement in a crime and a police officer's reasonable belief that a cell phone could be used in that crime constitute sufficient probable cause to apply for a search warrant to search the contents of the phone?

Answer: Yes. If the application for a search of the cell phone sufficiently details the course of the investigation, connects the nature of the crime(s) to evidence that can be found in cell phones, and establishes the officer's pertinent training and experience, a reviewing judge should find that the totality of the circumstances supports a finding of probable cause upon which to issue the warrant.

Case: *Timothy Alan Moats v. State of Maryland*
Court of Appeals of Maryland
Decided August 31, 2017

The Suspect's Drug Use, the Party, and Alleged Sexual Assault

One night in early January 2015, Timothy Alan Moats and three other teenagers, including one female, were riding in Moats' car through parts of Garrett County. During the ride, Moats provided

the car's occupants with marijuana and Suboxone, a prescription drug used to treat opioid addiction. Moats crushed the pill with a lighter, snorted some of it, and then passed it to the others. Later that night, the four teenagers arrived at a party, where the female who had been in Moats' car (name withheld) was allegedly sexually assaulted.

The Investigation and the Arrest

Approximately two weeks later, Sergeant Robert Zimmerman of the Garrett County Sheriff's Office interviewed the victim of the sexual assault, who recounted what happened, including Moats' use of Suboxone in the car and the alleged sexual assault at the party. Sergeant Zimmerman proceeded to interview Moats and the other occupants of the car.

Moats told Sergeant Zimmerman that he and the others had used drugs in the car, but he denied any involvement in the sexual assault at the party. Based on Moats' admission and information gleaned from the interviews of the victim and the others, Sergeant Zimmerman obtained a warrant for Moats' arrest only as to the drug charges. Moats was arrested on January 23, 2015, and transported to the Garret County jail.

At the jail, Moats was searched and his cell phone was seized by police. Moats was released from custody on January 24, 2015. However, his cell

phone was not returned to him. Sergeant Zimmerman retained it to obtain further information on both the drug charges and the ongoing sexual assault investigation.

The Warrant Application to Search the Cell Phone and the Issuance of the Warrant

On January 26, 2015, two days after Moats' release, Sergeant Zimmerman prepared an application and affidavit for a warrant to search the cell phone. Sergeant Zimmerman included in the affidavit Moats' admission to distribution of Suboxone and marijuana. He also set forth his interview with the alleged sexual assault victim, including her description of the drug use in Moats' car. The interviews with the other passengers, who also confirmed the drug use, were also included, as was an interview with a fifth witness. The affidavit also described Moats' arrest and the seizure of his cell phone incident to arrest.

As to his training and experience, Sergeant Zimmerman stated in the Affidavit that:

Your Affiant knows through his training and experience as a Criminal Investigator that individuals who participate in such crimes communicate via cellular telephones, via text messages, calls, e-mails, etc.

The Affidavit then set forth a more detailed history of Sergeant Zimmerman's training and experience, including his work with a Narcotics Task Force and with crimes involving CDS. Sergeant Zimmerman also included language that, based upon the information received, as well as his observations, training, knowledge and expertise as a member of the Sheriff's Office's Criminal Investigations Division, there was probable cause to believe that evidence related to the crimes of sexual assault and drug distribution would be contained in the cell phone.

Finally, the Affidavit included detailed information regarding the types of cell phone data to be searched, including the following:

Any and all electronic data processing and storage devices located in the cell phone; any phone call records being sent or received on these devices; any text mail messages sent or received on these devices; any stored, unsorted, unsorted phone numbers on these devices, any photographs stored on these devices, any external memory devices used on these devices in or incidental to the [sexual assault and/or CDS crimes].

Financial and accounting data was also included in the scope of the warrant application. The warrant application made clear the search of the cell phone was to be performed by Sergeant Zimmerman or, if necessary, a competent forensic cellular telephone examiner. Later that day, a district court judge issued the warrant.

The Search of the Cell Phone and the Child Pornography Charges

Detective Keith Parks conducted a forensic investigation of the cell phone. He discovered sexually explicit photographs and a video of young female taken between January 16 and 21, 2015. It was eventually learned that the female was Moats' girlfriend, who was fifteen years old at the time the images were recorded. Moats was eighteen at the time. As a result, Moats was charged with possessing child pornography.

The Motion to Suppress, the Trial Court's Ruling, and the Conviction

Moats moved to suppress the cell phone and the evidence obtained from the search of it. His attorney argued that his arrest was not supported by probable cause, and, therefore, the cell phone and its contents should be suppressed. He also argued that the continued retention of his cell phone after Moats' release was an illegal warrantless seizure.



Thus, he argued, even the subsequent search pursuant to a warrant was tainted, and the evidence had to be suppressed. Finally, Moats argued that the application for the warrant did not set forth sufficient probable cause. The circuit court denied the motion, and by agreement of the parties, Moats stood trial for one count of possession of child pornography. He was convicted and appealed.

The Decision(s) on Appeal

The Court of Special Appeals affirmed the ruling of the circuit court. However, the Court of Appeals, Maryland's highest appellate court, agreed to review the case. The Court of Appeals determined that, since there was no contested issue as to the probable cause for Moats' arrest or the initial seizure of his phone, it would focus on the issue the continued seizure of the phone after Moats' release from jail. **Importantly, the court held that the police may hold a cell phone seized pursuant to a lawful arrest as long as is reasonably necessary to seek a search warrant.** In this case, the warrant was obtained three days after Moats' release.

As to the warrant itself, the court found that it was supported by probable cause and that the issuing judge had a "substantial basis" for concluding that probable cause existed. The court also found that there was a substantial basis upon which the issuing judge properly concluded that evidence of the crimes charged and the one being investigated (sexual assault) could be contained in Moats' cell phone. The court pointed out that judges who issue search warrants are permitted to defer (within reason) to the officer's expertise and experience in deciding where evidence of a crime might be found. Issuing judges may also consider such expertise and experience in assessing what is to be made of facts that, to a layperson, might seem insignificant.

Here, Sergeant Zimmerman's detailed Affidavit established both his experience and expertise and the reviewing judge was allowed to pay deference to it. Thus, the court held that, regardless of the "broad array" of information a cell phone may hold,

police nonetheless may, and in this case did, seize a cell phone and search its digital contents pursuant to a duly authorized warrant that complies in all respects with the dictates of the Fourth Amendment. Accordingly, Moats' conviction was upheld.

Note: In examining an affidavit in support of a warrant to search a cell phone, as in any other warrant application, judges always must consider the totality of the information contained in the affidavit. Not every affidavit will (or should) result in issuance of a warrant to search a cell phone. The nature of the crimes at issue, the course of the investigation, and the officer's training, experience, and expertise all come into play. Here, the crimes at issue were CDS violations and sexual assault. There was a more than reasonable inference that, based on the evidence gathered, Moats' cell phone would contain evidence related to those crimes. Other crimes, such as traffic offenses, public nuisance crimes (hindering, disorderly conduct, etc.), and the like, may not support such an inference. Even in cases where the connection between the suspected crime and the cell phone is more likely to be established, such as drug crimes and sexual assault, the lack of factual detail or other circumstances might lead to a conclusion by the issuing judge that probable cause is lacking. Thus, the more detail, the better. Finally, an officer should not delay in seeking the search warrant once the cell phone has been seized. An unreasonable delay could jeopardize the validity of any search subsequently conducted pursuant to a warrant.

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