Are Cellphone Searches and Seizures by Police Upon Arrest Charter-Protected?

This article was written by a law student for the general public.

Introduction

In *R v Fearon*, the Supreme Court of Canada considered when a cellphone search by police upon arrest breaches the section 8 *Charter* right against unreasonable search and seizure. This required the court to balance law enforcement against individual liberty and dignity.[1]

Facts

Police arrested Mr. Fearon for robbing a jeweler with a handgun. They didn't find any jewelry or a handgun when they arrested him. However, police did find a cellphone in his pocket during a pat-down search. They searched the phone and found a draft text message referring to jewelry and a photo of the handgun used during the robbery.[2]

Case History

The Ontario Court of Justice decided that searching Fearon's cellphone did not breach his section 8 *Charter* right to be protected from unreasonable search and seizure. It also decided that the photos and text seized by the police could be used as evidence against Fearon. [3] The Ontario Court of Appeal agreed with those decisions.[4]

Issue

Did searching Fearon's cellphone breach the section 8 *Charter* right against unreasonable search and seizure? If so, should the evidence police found on the cellphone be used as evidence against him?

Decision

The Supreme Court decided that searching Fearon's cellphone violated section 8 of the *Charter* because the police did not provide detailed evidence about what was searched, how and why. [5] Despite this breach, the Court decided that the evidence found by police on the cellphone could be used as evidence against him in his trial.

Analysis

As some cellphones are the "functional equivalent of computers," searching them can be very significant intrusions on privacy.[6] Increased cellphone use led the Court to conclude that there needs to be a better balance between law enforcement and privacy interests.

Three conditions would keep cellphone searches compliant with the *Charter*:[7]

1) the arrest must be lawful

2) the search must be connected to the arrest

3) the extent of the search must be limited to the arrest

Even though cellphones often contain a lot of information, the Court decided that these limitations could minimize the invasion of privacy.[8] For example, limiting the search to what could be connected to the arrest prevents police from searching all of the cellphone's contents. In this case, police were limited to Fearon's recently sent or drafted e-mails, text messages, photos, and the call log, because these were the only items that had a potential link to the robbery.[9]

However, because searches like this pose a risk of broad invasions of privacy, the Court added a further step to protect suspects in cellphone searches. Now, police must take detailed notes about what and how they search a device.[10] This helps prevent the police's extraordinary search power from being abused and allows judges to later review the constitutionality of the search.[11] Here, because there was an insufficient record of what police searched, how and why, the Court decided that the search breached Fearon's section 8 *Charter* right to be protected from unreasonable search and seizure.[12] Despite this breach, the Court still allowed use of the evidence found on the cellphone for three reasons:

1) police made an honest and reasonable mistake that was not considered misconduct that requires excluding the evidence

2) Fearon did not establish that the invasion of his privacy had been particularly serious

3) The evidence is reliable, so excluding it would undermine the justice system

Conclusion

The Supreme Court acknowledged that cellphones have changed the nature and form of information stored on the devices that we carry. It also stressed that the *Charter* right against unreasonable search and seizure is important. However, section 8 of the *Charter* does not preclude searching cellphones upon arrest. While the increased use of cellphones raises the risk of invading privacy, it is possible to limit the manner of such searches. The Court imposed stringent search conditions, such as requiring detailed information about what was searched, to ensure that cellphone searches upon arrest are compliant with section 8 of the *Charter*. For a more in-depth analysis of *R v Fearon*, visit The Court.

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[1] *R v Fearon,* [2014] 3 SCR 621 at para 14 .

[2] *Ibid* at para 8.

[3] *Ibid* at para 9.

[4] *Ibid* at para 10.

[5] *Ibid* at para 87.

[6] *Ibid* at para 54.

[7] *Ibid* at para 83.

[8] *Ibid* at para 57.

[9] *Ibid* at para 76.

[10] *Ibid* at para 82.

[11] *Ibid.*

[12] *Ibid* at 88.