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Searches and Seizures—Probationary Searches: The North Dakota Supreme Court Upholds Cell Phone Searches of Probationers State v. Gonzalez, 2015 ND 106, 862 N.W.2d 535

Connor Melvie

SEARCHES AND SEIZURES—PROBATIONARY SEARCHES: THE NORTH DAKOTA SUPREME COURT UPHOLDS CELL PHONE SEARCHES OF PROBATIONERS

State v. Gonzalez, 2015 ND 106, 862 N.W.2d 535

ABSTRACT

In *State v. Gonzalez*, the North Dakota Supreme Court held that probationers are subject to warrantless searches of their cell phones pursuant to their probationary conditions and a finding of reasonable suspicion. The court concluded that since Gonzalez's probationary terms allowed for a search of his residence and vehicle, the search would reasonably allow for the searching of items—which could contain evidence—within these locations. Since the cell phones found were items within the confines of his residence and vehicle, the search of the cell phones was upheld as a reasonable probationary search. This case demonstrates the broad search powers the State is afforded when a search is deemed a probationary search. This decision has significant implications because cell phone searches of probationers may be a stepping stone to other warrantless "special needs" searches of cell phones in North Dakota.

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I. FACTS

In January of 2004, Garron Gonzalez pled guilty to two counts of gross sexual imposition.[1] In addition to incarceration, Gonzalez was sentenced to five years of probation.[2] His probationary terms, in part, required that "he submit to a search of his vehicle or place of residence by any probation officer at any time of the day or night."[3] Additional terms included not having unsupervised contact with females under eighteen or possessing sexually stimulating materials.[4]

In December of 2010, the Mandan Police Department notified Gonzalez's probation officer that Gonzalez was being investigated for having contact with a minor.[5] Pursuant to this information, the probation officer and law enforcement searched Gonzalez's residence and vehicle.[6] Ultimately, the officers seized two smartphone cell phones found in his

1. State v. Gonzalez, 2015 ND 106, ¶ 2, 862 N.W.2d 535, 538.
2. *Id.*
3. *Id.* ¶ 3.
4. *Id.*
5. *Id.* ¶ 4.
6. *Id.*

residence and vehicle—one in each—believing that they contained evidence of contact with a minor.[7] After seizing the phones, the probation officer accessed the phones and looked through them.[8] Subsequently, the officer found evidence of Gonzalez violating his probationary terms and arrested Gonzalez.[9] Notably, the probation officer also searched the phones at a later date to compile further evidence against Gonzalez.[10]

The State alleged Gonzalez had violated two conditions of his probation: no contact with a minor under the age of eighteen and no possessing sexually stimulating material.[11] The district court agreed Gonzalez violated his conditions and revoked Gonzalez's probation.[12] As a result, the court resentenced him to twenty years, to run consecutively, on his two gross sexual imposition charges.[13]

In August of 2012, Gonzalez filed an application for post-conviction release, and the district court ordered a new hearing for the petition of revocation.[14] Prior to this hearing, Gonzalez filed a motion to suppress evidence.[15] The evidence he wished to suppress was the information obtained from the cell phone searches.[16] His basis for the suppression was that the State violated his Fourth Amendment rights by conducting a search without a warrant or one reasonable pursuant to his probationary terms.[17] The court denied the motion because "Gonzalez had notice that any of his personal effects were subject to the search condition and the warrantless search of the cell phones was reasonable."[18] On appeal, Gonzalez argued the district court erred in denying his motion to suppress evidence based upon what his probationary terms stated, the unreasonableness of the search, and by violating his Fourth Amendment rights.[19]

II. LEGAL BACKGROUND

The Fourth Amendment to the United States Constitution and article I, section 8 of the North Dakota Constitution protects citizens from

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* ¶ 29, 862 N.W.2d at 543.
11. *Id.* ¶ 5, 862 N.W.2d at 538.
12. *Id.*
13. *Id.*
14. *Id.* ¶ 6.
15. *Id.* ¶ 7.
16. *Id.*
17. *See id.*
18. *Id.*
19. *Id.* ¶ 10, 862 N.W.2d at 539.

unreasonable searches and seizures by the government.[20] The general rule regarding searches and seizures is that law enforcement must obtain a search warrant to either conduct a search or seize evidence.[21] However, a warrant may not be necessary if the search in question falls within one of the recognized exceptions to the search warrant rule.[22]

A. CONDITIONS OF PROBATIONERS

One of the recognized exceptions to the warrant requirement is searches of probationers.[23] Therefore, probationers can be the subject of a search without the need to first receive a search warrant.[24] The rationale for this exception is that probationers are afforded less privacy than an ordinary, law-abiding citizen.[25] Probationers have demonstrated their willingness to commit a crime and harm society; therefore, the government has a legitimate interest in preventing further harm from a known perpetrator.[26] As a result, probationers are commonly subjected to abridged freedoms, such as a reduction in privacy in the form of relaxed warrant requirements on searches.[27]

In North Dakota, courts can "[s]ubmit the defendant's person, place of residence, or vehicle to search and seizure by a probation officer at any time of the day or night, with or without a search warrant" by stating so in the probationer's terms.[28] Furthermore, once a search is underway, the courts have allowed items found within the enumerated search area to be searched as well, even though the terms of probation did not explicitly list the item.[29] In *United States v. Yuknavich*,[30] a federal appellate court allowed a computer within a probationer's residence to be searched.[31] While the computer was not explicitly listed under the term of probation, the court allowed the additional search of the computer because the terms of probation stated that the probationer's internet usage would be monitored.[32] Therefore, the item searched must be related to the underlying crime or the

20. *See* U.S. CONST. amend. IV; N.D. CONST. art. I, § 8.
21. *See* State v. Hurt, 2007 ND 192, ¶ 6, 743 N.W.2d 102, 104.
22. *Id.*
23. *See* State v. Adams, 2010 ND 184, ¶ 12, 788 N.W.2d 619, 623.
24. *See id.* ¶¶ 11-12.
25. *See* United States v. Knights, 534 U.S. 112, 119-20 (2001).
26. *See id.* at 120-21.
27. *See id.* at 121-22.
28. N.D. CENT. CODE § 12.1-32-07, -07(4)(n) (2015).
29. State v. Gonzalez, 2015 ND 106, ¶ 17, 862 N.W.2d, 535, 540.
30. 419 F.3d 1302 (11th Cir. 2005).
31. *Yuknavich*, 419 F.3d at 1311.
32. *See id.* at 1310-11.

probationary terms, as the probationer should have notice of the possible searches they may be subjected to during probation.[33]

B. REASONABLENESS

Additionally, the search must have been reasonable under the Fourth Amendment's reasonableness standard.[34] Under the reasonableness standard, courts "assess[], on the one hand, the degree to which [the search or seizure] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[35] Therefore, the United States Supreme Court has held that a warrantless search of a probationer, supported by reasonable suspicion and pursuant to a probationer's conditions, satisfies the reasonableness standard of the Fourth Amendment.[36]

III. THE COURT'S ANALYSIS

Justice Sandstrom delivered the opinion of the court in *Gonzalez*.[37] Notably, the court analyzed four issues. First, whether the terms of Gonzalez's probation gave law enforcement the right to search his cell phones.[38] Second, whether cell phones of probationers are afforded more protection than other personal property.[39] Third, whether the probation officer had reasonable suspicion to conduct the search.[40] Fourth, whether the subsequent searches of the cell phones days later were lawful.[41] The court affirmed the district court on all issues and ruled in favor of the State.[42]

A. EQUATING CELL PHONES TO CONTAINERS

Gonzalez's cell phones were valid search items because they were found within Gonzalez's residence and vehicle, which could be searched according to Gonzalez's probationary terms.[43] While the cell phones were

33. *Gonzalez*, ¶ 18, 862 N.W.2d at 540-41.
34. *See id.* ¶ 25, 862 N.W.2d at 542.
35. Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999).
36. United States v. Knights, 534 U.S. 112, 122 (2001).
37. Justice Sandstrom was joined by the entirety of the court: Justices Crothers, McEvers, Kapsner (concurring in the result only), and Chief Justice VandeWalle. *Gonzalez*, ¶ 32, 862 N.W.2d at 543.
38. *Id.* ¶ 14, 862 N.W.2d at 539-40.
39. *Id.* ¶ 20, 862 N.W.2d at 541.
40. *Id.* ¶¶ 24-25, 862 N.W.2d at 542.
41. *Id.* ¶ 28, 862 N.W.2d at 543.
42. *Id.* ¶ 31.
43. *Id.* ¶ 16, 862 N.W.2d at 540.

not explicitly listed under his terms, common sense and precedent dictate that containers found within the listed areas must also be allowed to be searched as well.[44] If the court ignored this rationale, "[A] probation officer could search [the probationer's] house or vehicle and seize any evidence found in *plain sight* but would not be authorized to search anything located in the house or vehicle where evidence of a probation violation may be contained . . . ."[45]

In *Adams*, a safe found within a residence—although not expressly stated in the probationer's conditions[46]—was allowed to be searched without a warrant, pursuant to the probationer's terms.[47] The *Adams* court, much like the *Gonzalez* court, stated that "[t]o conclude the search [of the safe] was unreasonable would give probationers the ability to effectively render warrantless probation searches meaningless, because probationers could avoid warrantless searches merely by securing items in a locked box."[48] Notably, the court's treatment of containers found in probationary searches is quite similar to containers found in cars, pursuant to a search incident to an arrest or under the automobile exception.[49] Ultimately, the *Gonzalez* court ruled that searching items that are related to the underlying offense and within an enumerated area under the terms of probation, such as cell phones, puts the probationer on notice and is a reasonable search under the Fourth Amendment.[50]

B. DISTINGUISHING RILEY V. CALIFORNIA

The court also disagreed with Gonzalez that probationer's cell phones are held to a higher standard of protection than most personal property.[51] Essentially, Gonzalez argues cell phones contain details about many aspects of people's lives, from personal to professional, and to hold them out as an

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44. *See id.* ¶ 17.

45. *Id.* (emphasis added).

46. The probationer's terms in *Adams* included a search of her person, residence, vehicle, or any accessible property. State v. Adams, 2010 ND 184, ¶ 2, 788 N.W.2d 619, 621.

47. *Id.* ¶ 17, 788 N.W.2d at 625.

48. *Id.*

49. The search incident to arrest exception allows law enforcement to conduct a warrantless search of an arrestee and their immediate area for weapons or evidence, contemporaneous with the arrest. *See* Chimel v. California, 395 U.S. 752, 763 (1969). *Illinois v. Lafayette* expanded this search to containers. 462 U.S. 640, 648 (1983). The automobile exception (or *Carroll* Doctrine) allows law enforcement to execute a warrantless search of a vehicle if the officer has probable cause that evidence of a crime is present within the vehicle. *See* Carroll v. United States, 267 U.S. 132, 149 (1925). *California v. Acevedo* allowed searches of containers in vehicles as long as probable cause existed for the container as well. 500 U.S. 565, 576 (1991).

50. *Gonzalez*, ¶ 18, 862 N.W.2d at 540-41.

51. *See id.* ¶¶ 20-22, 862 N.W.2d at 541.

ordinary piece of property is absurd.[52] Therefore, Gonzalez contends that cell phones require a warrant to be searched, even in the case of probationers.[53] To provide support for this proposition, Gonzalez relies on *Riley v. California*.[54] In *Riley*, the U.S. Supreme Court found that a cell phone search pursuant to a search incident to an arrest was unreasonable without a search warrant.[55] The *Riley* Court reasoned, similarly as Gonzalez did, that cell phones hold "the privacies of life" for numerous people.[56]

However, as the *Gonzalez* court contends, the search incident exception and the probation exception are quite different.[57] One of the primary reasons for the search incident exception is to protect an officer's safety.[58] Searches incident to an arrest were largely performed to ensure the arrestee did not have a weapon that could be used to injure an arresting officer.[59] Therefore, searching an arrestee's cell phone is unlikely to address this concern.[60]

Furthermore, probationary searches are performed only after an individual is convicted of a crime; a search incident to an arrest, on the other hand, is performed upon somebody who has only been arrested and is a suspect of a crime.[61] Probation is a sentence for committing a crime, and the government has a legitimate interest in preventing further crime from being committed.[62] Not only does a probationer often consent to the terms of probation in lieu of potential incarceration, but the State has the right to use reasonable means to prevent further crimes from being committed.[63] Therefore, especially when a search of a cell phone can produce significant evidence of wrong-doing related to the underlying offense, the State's warrantless search of these items is permitted.[64] The *Riley* Court recognized the unique differences of the search incident exception by stating, "[O]ther case-specific exceptions may still justify a warrantless

52. *See* Brief of Appellant at 19-20, State v. Gonzalez, 2015 ND 106, 862 N.W.2d 535 (No. 20140213).
53. See *Gonzalez*, ¶ 20, 862 N.W.2d at 541.
54. *Id.*
55. *See* Riley v. California, 134 S. Ct. 2473, 2485 (2014).
56. *Id.* at 2494-95 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
57. *Gonzalez*, ¶ 23, 862 N.W.2d at 541.
58. *Id.* ¶ 21.
59. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969).
60. *Riley*, 134 S. Ct. at 2484-85.
61. *See Gonzalez*, ¶ 23, 862 N.W.2d at 541-42.
62. *Id.* at 542.
63. *See id.*
64. *See id.*

search of a particular phone."[65] Due to the stark differences, the *Gonzalez* court elected to distinguish *Riley* and ruled the cell phones fell within the probation exception to the search warrant requirement.[66]

C. REASONABLENESS

The court also established reasonable suspicion, under the reasonableness clause of the Fourth Amendment, was present.[67] The court determined this by employing the totality of the circumstances test.[68] Under this test, the court looked at whether the probation officer had reasonable suspicion that Gonzalez was "engaging in unlawful activity."[69] If the requisite reasonable suspicion was present, the search of the cell phones was reasonable.[70]

The court's analysis largely fell on Gonzalez's specific probationary conditions and the pending investigation by the Mandan Police Department.[71] Since Gonzalez's conditions stated he could not have contact with minor, the investigation of him having contact with a minor gave the probation officer enough suspicion to search Gonzalez's residence, vehicle, and any contents within these areas that may provide evidence that Gonzalez violated his terms.[72]

D. SUBSEQUENT SEARCHES

Additionally, the court ruled the subsequent searches of the cell phones in the days after the initial search did not violate Gonzalez's rights under the Fourth Amendment.[73] After evidence was found on the phones of Gonzalez violating his probationary conditions, he lacked a privacy interest in them according to the court.[74] Furthermore, additional searches of them, after the fact, would not impede upon his rights.[75] For support, the court invoked the words used in *United States v. Burnette*, stating that "[o]nce an item in an individual's possession has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate

65. *Riley*, 134 S. Ct. at 2494.
66. *Gonzalez*, ¶ 23, 862 N.W.2d at 542.
67. *Id.* ¶ 27, 862 N.W.2d at 543.
68. *Id.*
69. *Id.*
70. *See id.* ¶ 26, 862 N.W.2d at 542.
71. *See id.* ¶ 27, 862 N.W.2d at 543.
72. *See id.* at 542-43.
73. *Id.* ¶ 30, 862 N.W.2d at 543.
74. *Id.* ¶ 29.
75. *Id.*

uninterrupted possession of the police, may be conducted without a warrant."[76]

IV. IMPACT OF DECISION

The *Gonzalez* decision is likely one of many cases in the near future in which the North Dakota Supreme Court will have to address a "cell phone" search. Cell phones are no longer a simple means of communication; they are an intimate part of a person's life. This cuts both ways for law enforcement. On the one hand, law enforcement has a way of gaining very detailed information about an individual and any potential criminal behavior; on the other hand, individuals may have a heightened expectation of privacy with cell phones—such was the case in *Riley*.[77] In which case, law enforcement is not permitted from uncovering this information without a warrant.

A. HOW CELL PHONES ARE TO BE VIEWED

One of the most interesting arguments made by the court in *Gonzalez* is that cell phones are generally nothing more than containers.[78] The court essentially equates Gonzalez's smartphone cell phones to the safe found in *Adams*.[79] Notably, a safe may contain important paperwork pertaining to an individual, such as a passport, or conceal evidence of a crime, such as a bag of marijuana. However, a safe generally does not have a contact list, personal messages, photos, a browsing history, a GPS feature to track previous locations, and "apps" that could give away intimate details about a person's life.[80] For example, a weight-loss app likely displays a person's weight; a banking app may display a person's finances; and a school-related app can access a person's grades.

The *Riley* Court recognized the inherent problems with equating a cell phone to other personal property and determined one's privacy interest in cell phones is heightened.[81] The North Dakota Supreme Court addresses this issue in *Gonzalez* by claiming probationers, in general, have a diminished expectation of privacy.[82] Therefore, a probationer's terms—putting him or her on notice—and a probation officer's reasonable suspicion are enough to overcome what little expectations a probationer

76. *Id.* (quoting United States v. Burnette, 698 F.2d 1038, 1049 (9th Cir. 1983)).
77. *See* Riley v. California, 134 S. Ct. 2473, 2494-95 (2014).
78. *See Gonzalez*, ¶ 17, 862 N.W.2d at 540.
79. *See id.*
80. *See Riley*, 134 S. Ct. at 2490.
81. *See id.* at 2494-95.
82. *See Gonzalez*, ¶ 23, 862 N.W.2d at 542.

may have pertaining to a warrantless search of a cell phone.[83] Should this rationale be expanded to other warrantless searches?

B. INFLUENCE ON OTHER "SPECIAL NEEDS" SEARCHES IN NORTH DAKOTA

The probation exception is but one exception to the warrant requirement. Other such exceptions include search incident to arrest, the automobile exception, inventory searches of vehicles, public employee searches, school searches of students, or border searches, just to name a few.[84] Additionally, "the Supreme Court has held that certain programmatic searches do not require a warrant or probable cause when they are conducted in furtherance of a government 'special need' other than investigation of criminal activity."[85] However, the North Dakota Supreme Court has issued very few decisions on cell phone searches and none within the contexts of these search exceptions, other than the *Gonzalez* decision. Therefore, *Gonzalez* gave us an indication as to how North Dakota is going to approach these types of cases. Applying this "watered-down" expectation of privacy approach to these "special needs" cases should allow for more warrantless searches of cell phones, as long as the public official has reasonable suspicion to believe a policy violation or crime has been committed.

For example, it has been long recognized that students attending public schools are not afforded their full constitutional rights due to the safety concerns inherent in such a setting.[86] It would seem, based on the *Gonzalez* decision, that a warrantless search of a student's cell phone—which many grade-schoolers likely carry these days—would be valid, as long as the teacher or other staff member had reasonable suspicion that the student was violating a policy of the school or breaking a law. Therefore, something as simple as texting in class—likely a violation of classroom policy—could allow the teacher the ability to search through the student's phone. This hopefully would end once the teacher's suspicions are confirmed or denied. Likewise, public employees, such as a public university professor, could also be subject to warrantless searches of their cell phones. While the court's decision in *Gonzalez* only applied to probationers, the court's analysis will likely pave the way for an expansion to these other "special

83. *See id.* ¶ 25, 862 N.W.2d at 542.

84. *Warrantless Searches and Seizures*, INVESTIGATIONS AND POLICE PRACTICES, 44 GEO. L.J. ANN. REV. CRIM. PROC. 48, 48 (2015).

85. *Id.* at 165.

86. Pat Garza, *Privacy Policy: Riley v. California and Cellphone Searches in Schools*, 78 TEX. B.J. 128, 129 (2015).

needs" cases. In particular, students of public schools and public employees could soon find themselves having their cell phones searched without the need for a warrant.

V. CONCLUSION

In *Gonzalez*, the North Dakota Supreme Court held that a warrantless search of a probationer's cell phones was reasonable, as long as supported by reasonable suspicion and the terms of probation.[87] The court distinguished this case from the *Riley* decision by stating that "the warrantless search of a cell phone under a probation search condition is different from a search incident to arrest."[88] Notably, probationers enjoy a diminished expectation of privacy compared to ordinary citizens. Since this is a common theme in "special needs" cases, the court will have to decide whether warrantless cell phone searches are limited to probationers or extend to other "special needs" groups, such as students and public employees.

*Connor Melvie**

87. *Gonzalez*, ¶ 30, 862 N.W.2d at 543.

88. *Id.* ¶ 23, 862 N.W.2d at 542.

* 2017 J.D. candidate at the University of North Dakota School of Law. I would like to dedicate this article to my family—Loren, Roxann, Brenden, and Devin. I also want to give a special thanks to my elder brother for challenging my thoughts and ideas every step of the way, for without which, I may not be where I am today.