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# No Discipline for Officer's Refusal To Consent To Cell Search

**TURIANO V. CITY OF PHOENIX**

CV-21-01428-PHX-MTL

By: Michael Silander & Muna Busailah

Question - Can you be disciplined for refusing to produce your personal cell phone for an administrative search?

Answer - In sum, peace officers can expect that their personal cell phones, if purchased by themselves, may generally not be searched by their employers, unless a specific policy or regulation gives the officer notice that those phones are subject to searches.

In August 2017 veteran Phoenix Police Officer Christopher Turiano fired a 40mm OC direct impact round at a political rally protester, striking that protester in the groin area. Turiano was part of the Department's Tactical Response Unit ("TRU"), a specialty detail responsible for crowd control and intervention at large events and protests. The rally, held in support of then-president Donald Trump, devolved into violence. Turiano discharged his launcher in response to the protester kicking a tear gas canister toward police. The injured protester

and others filed a class action suit against Turiano and TRU, alleging excessive force.

Four years after the incident, a media report was released regarding the existence of a challenge coin commemorating the protest and shooting incident. One side of the coin depicted a caricature of the protester being struck in the groin by Turiano's munition along with the words "Good Night Left Nut," a phrase resembling the neo-Nazi slogan "Good Night Left Side." The other side of the coin included the date and location of the protest and the phrase "Make America Great Again One Nut at a Time."

The Department initiated an investigation regarding the creation of the challenge coin. The investigators requested that Turiano and his TRU colleagues agree to provide access to their cell phone data. All officers refused the request.

Shortly thereafter, the Department informed Turiano that he was compelled to consent to a targeted search of his stored cell phone data. Turiano was further informed that he would be subject to discipline "up to and including termination" if he failed to comply. Turiano refused and the Department sought to discipline him for insubordination. Turiano filed a lawsuit, seeking to prevent the Department from disciplining him based on his refusal.

The District Court granted Turiano's motion and issued an injunction preventing the Department from disciplining Turiano based on his refusal to give the Department access to his personal cell phone data. In doing so, the court carefully dissected the scope of the Fourth Amendment as it pertains to law enforcement personnel and



provided helpful guidance regarding officers' privacy rights regarding personal cell phone data.

Citing Supreme Court precedence, the court reiterated that an officer must satisfy two prongs to prevail against a search by his department/employer: First, the officer must have a reasonable expectation of privacy in the item searched. Second, the Department's search must be unreasonable "under all the circumstances."

1. Turiano had a reasonable expectation of privacy

The first prong is broken down into two sub-parts – one subjective, the other objective: First, "[a] reasonable expectation of privacy exists where 'a person ha[s] exhibited an actual (subjective) expectation of privacy.'" In other words, the officer must actually believe that he had a protected privacy right and, that his cell phone data was protected from being searched. Second, that subjective expectation of privacy must be objectively reasonable. This simply means that the officer's belief cannot be far-fetched or speculative but must, in the eyes of an average person, make sense.

Applying those sub-parts, the court "easily [concluded] that Turiano has a reasonable expectation of privacy in the imaged [cell phone] data..." The court reasoned that the data at issue was on Turiano's personal cell phone, the department did not purchase the phone nor pay for the data plan, that Turiano generally did not use the phone for work purposes, and that no other department employee had access to his phone.

It is important to note, however, that the court came to this conclusion in part because this

particular employer, the Phoenix PD, did not have a policy or regulation giving its employees notice that cell phones may be searched. If such a policy or regulation exists, the employee is deemed to be on notice, which means there is no reasonable expectation of privacy. So, you should carefully review your employer's policies to determine whether they contain any such notice.

2. The workplace exception does not apply to the cell phone data search

Having determined that Turiano's subjective expectation of privacy was objectively reasonable, the court looked at the second prong – whether the department's search was reasonable "under all the circumstances."

Before doing so, the court examined the so-called "workplace exception" as applied in this case. The workplace exception permits public employers, including law enforcement agencies, to conduct warrantless searches for non-investigatory work-related purposes or to investigate workplace misconduct. The scope of those searches is limited and does not include searching, for example, an employee's home without the need for probable cause and a warrant. Instead, the court explained that the workplace exception is limited to those searches that are conducted in the "workplace context." This includes "those areas and items that are related to work and are generally within the employer's control." For example, courts have held that "searches of employees' locked personal safes, medical records, and homes are outside the scope of the workplace exception."

More importantly, the court also found that "[a]t least two courts have held that a public employer's search of an employee's personal cell phone to



obtain information concerning work-related misconduct was outside the scope of the workplace exception.” The district court in Turiano agreed with those courts for three reasons:

First, the court found that “a personal cell phone is just that – personal” – and is not within the employer’s control.

Second, the court found that “a personal cell phone... contains sensitive personal information that is entirely unrelated to an individual’s employment.”

Third, the court reasoned that cell phones are such an integral part of most people’s lives that the mere presence of the phone at the workplace does not mean it is in a “workplace context” for purposes of the workplace exception.

For these reasons, the court concluded that the workplace exception did not apply to Turiano’s personal cellphone.

3. The Department’s search was unreasonable

Where the workplace exception does not apply, the issue of whether the department’s search was reasonable is moot. Without the exception, the employer must have probable cause and a warrant to conduct the search.

Nonetheless, the court analyzed whether “reasonableness” existed. The court found it did not.

To be reasonable, the search must be (1) “justified at its inception” and (2) “reasonably related in scope to the circumstances which justified the interference in the first place.”

In a public employment context, a search is justified in its inception “when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct.” This is akin to the “reasonable suspicion” standard that you are all familiar with. Here, the Department’s sole justification for searching Turiano’s cell phone was that the data may contain evidence that was generated close to the time of the 2017 protest incident and the subsequent coin creation. In the court’s view, this alleged nexus fell far short of satisfying the justification prong. While the department may have suspected (or hoped) that Turiano’s cell phone would contain incriminating data, that suspicion was not, in the court’s view, reasonable.

Because the department did not satisfy the first prong (“justified at its inception”), the court did not need to address whether the search was “reasonably related in scope to the circumstances which justified the interference in the first place.” Nonetheless, the court again went out of its way to provide additional guidance, this time regarding the required nexus between the justification and the scope of the search, i.e., prong number two.

4. Insufficient nexus between the justification and the scope of the search

The Department’s justification for searching Turiano’s cell phone data was the belief that the data would reveal evidence of who designed, created, and distributed the challenge coin. The Department conceded it neither had evidence nor a suspicion that Turiano himself was the perpetrator. Instead, the scope of the search targeted potential wrongdoing of other officers,



who the Department hoped would be incriminated by the cell phone data. The court found that absent “some quantum of individualized suspicion” against Turiano himself, the search failed to satisfy the second prong. The Court found a cell phone search affects Turiano’s substantial privacy interests and thereby found this prong, too, had not been satisfied.

5. Irreparable harm, the balance of hardships and public interest

To prevail on his motion, Turiano had to show (1) that irreparable harm would result if the motion was denied and (2) that Turiano’s hardships, if the motion was denied, would outweigh the public interests in disclosing the cell phone data. The court found that the illegal search violated Turiano’s constitutional rights (under the Fourth Amendment), which automatically made the harm irreparable. As for hardships, the court stated: “The balance of hardships tips sharply toward appellants [including Turiano], who face a stark choice – either violation of their constitutional rights or loss of their jobs.”

By satisfying the harm and hardship elements (in addition to showing that his expectation of privacy was reasonable, and the department’s search was unreasonable), the court granted Officer Turiano’s motion and enjoined the Department from disciplining him for his refusal to consent to a search of his personal cell phone data.

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*Michael Silander defends the rights of peace officers in administrative hearings, discrimination and harassment proceedings, and in state and federal courts. He has over 20 years of litigation experience and serves as general counsel for public agencies.*