

Don't Text & Drive...but Can the Police Search Your Cell Phone at the Traffic Stop?

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"The plaintiffs have not explained why the City of Chicago had no authority to enact legislation designed to protect the safety of its roads in this way, nor can we think of any restriction on its powers under either federal or state law that is so obvious we would need to take note of it here. The district court correctly dismissed the plaintiffs' Fourth Amendment claim."

Schor v. City of Chicago, 576 F.3d 775, 779 (7th Cir. 2009)

Hands Free Means Hands Free in Chicago



In case anyone was wondering, those Hands Free laws are Constitutional, at least in Illinois.

In Chicago, three drivers ticketed for driving while on the phone challenged the Constitutionality of the "Hands Free" law. *Schor*, 779.

The law states no person is to drive a vehicle while using a cell phone, unless they have a hands free device (or three other exceptions).

The Plaintiffs claimed the police violated the 4th Amendment when the Plaintiffs were pulled over for talking on the phone.

It is well established law that the Fourth Amendment is not violated if a police officer has probable cause for a traffic stop. *Schor*, 779.

In this case, the police officers saw the Plaintiffs violating the Hands Free law by using their cell phones without a hands free device. As such, the violation of the valid traffic law provided probable cause for the officers to stop the Plaintiffs. *Scho*, 779.

Cell Phone Search During a Traffic Stop?

If someone is stopped for breaking a Hands Free law, an interesting question is whether the police can do a warrantless search of the cell phone.

As a preliminary matter, a person has a reasonable expectation of privacy over their cell phone. *United States v. Finley*, 477 F.3d 250, 259-260 (5th Cir. 2007).

In *United States v. Zavala*, the police officer checked a driver's cell phone during a traffic stop.

The Government argued that a "phone check" was the same as asking for someone's driver's license and proof of insurance. *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008).

The Court thought otherwise, stating that a cell phone is totally different than a driver's license and proof of insurance. First, a cell phone is not issued by the state, like a driver's license, nor required by law, such as proof of insurance in most states. *Zavala*, 577. The Court noted that cell phones are more than just calling devices, containing private information, such as text messages and address books.

The Court went on to state that going through a cell phone at a traffic stop was like "general rummaging in order to discover incriminating evidence." *Zavala*, 577.

Conversely, the *Finley* Court held that a warrantless search of a cell phone was proper after the arrest of a suspect, thus there was no Fourth Amendment violation in retrieving the call records and text messages from the suspect's cell phone. *Finley*, 259-260.

What will be the search and seizure law if someone is stopped for breaking a Hands Free law? A court in [one of the 18 \(and growing\) states](#) with Hands Free laws will answer this question.

Bow Tie Thoughts

It will be an interesting question if a police officer making a traffic stop can ask for an individual's phone to verify the time of the last call and if that search would violate the Fourth Amendment.

I personally think it would violate the Fourth Amendment. I believe courts would follow the logic of *Zavala*, because of the personal information contained on Smartphones, and prohibit the search of a cell phone on a traffic stop for violating a Hands Free law. The practice also just smacks of "rummaging" in someone's phone "in order to discover incriminating evidence." However, this is an unsettled issue of law.

