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Court OKs warrantless cell phone searches

T.O. man's drug case
may go to high court

By Raul Hernandez

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Relying on old U.S. Supreme Court cases, California's highest court ruled police can take a cell phone from a suspect shortly after he is arrested and go through the text messages to look for evidence without getting a search warrant.

The state's high court ruled in a Fourth Amendment decision handed down Monday that involved the 2007 arrest of a Thousand Oaks man who purchased the drug Ecstasy from a police informant. After the arrest, a Ventura County Sheriff's Department deputy found a text message on the man's cell phone implicating him in a narcotics transaction.

The ruling drew criticism from criminal lawyer Jay Leiderman, who represented Gregory Diaz on his April 25, 2007, arrest for drugs, which resulted in the California Supreme Court ruling.

Leiderman, of Ventura, called the

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Lawyer criticizes state court ruling

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decision "weak" and a "scary one" because it relies on old U.S. Supreme Court cases that have nothing to do with today's modern technology, such as cell phones or smart phones, which can store tens of thousands of pieces of information.

"This type of thing opens up the doors for Big Brother to come flying in," he said.

Leiderman didn't handle Diaz's appeal. That was done through a lawyer appointed by the state Supreme Court, Lyn A. Woodward of Pacific Grove. Woodward said Tuesday that she will petition the U.S. Supreme Court to review the state Supreme Court's decision.

In its ruling, the state high court stated such a search was valid because the suspect was under arrest, citing a U.S. Supreme Court binding precedent.

According to the court documents: Diaz was arrested by Deputy Victor Fazio, who saw him participate in a drug transaction with a police informant. Diaz drove the informant to

the drug dealer, and the sale took place in the backseat of Diaz's car. The deputy stopped Diaz and arrested him for being a co-conspirator in the sale of drugs.

Six Ecstasy pills and a small amount of marijuana were found in Diaz's pocket, along with his cell phone. Diaz denied knowledge of the drug transaction. The deputy went through his text messages and found a numerical text message that was connected to a drug deal. Diaz then admitted to participating in the drug sale after being shown the message, according to court documents.

Leiderman said his client got three years' probation and about 150 days in jail. Diaz is now working full time, pursuing a college degree and successfully completed his probation, Leiderman said.

Writing the concurring opinion, Associate Justice Joyce Kennard said police may, without obtaining a search warrant, view or listen to information electronically stored on a mobile phone that a suspect was carrying when he or she was arrested.

In a dissenting opinion, Associate Justice Kathryn

Werdegard said state justices are relying on two U.S. Supreme Court cases that do not involve cell phones. Werdegard said the 1974 case, *United States v. Edwards*, involves the search of a suspect's clothing. A 1973 case, *United States v. Robinson*, involves the search of small physical containers, such as a crumpled cigarette package.

"In my view, electronic communication and data storage devices carried on the person — cellular phones, smart phones and handheld computers — are not sufficiently analogous to the clothing considered in *Edwards* or the crumpled cigarette package in *Robinson* to justify a blanket exception to the Fourth Amendment's warrant requirement," Werdegard stated.

However, Kennard also cited a third U.S. Supreme Court case, *United States v. Chadwick*. The 1977 case said police may, without obtaining a warrant, inspect a mobile phone carried by a suspect at the time of arrest, by viewing or listening to its electronically stored data, even when a substantial time has elapsed since the arrest.

Werdegard noted the *Chadwick* case is more than 30 years old and didn't taken into account the new mobile phones or related devices that can hold "hundreds or thousands of messages, photographs, videos, maps, contacts, financial records, memoranda and other documents as well as records of the user's telephone calls and Web browsing."

Leiderman said people should have strong passwords or not drive with their cell phones or smart phones in their pockets. Keeping the cell phone out of your pocket might lead to a different judicial result, he said, because the cell phone is not in the possession of the person being arrested.

Leiderman accused the California Supreme Court of laying its judicial responsibility on the steps of the U.S. Supreme Court so it comes down with a ruling that is tailored to address the latest technology.

"This was one of the most weak and disappointing California Supreme Court decisions I've seen," Leiderman said.