

## Searching Cell Phones for Evidence of Texting While Driving

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The Ohio Supreme Court recently ruled that cell phones generally cannot be searched without a warrant incident to arrest. That court's decision is [here](#). The law in North Carolina appears to be otherwise, as I've noted [here](#) and [here](#). But reading the Ohio decision reminded me of a topic some colleagues and I were discussing recently: can an officer who has stopped a driver for a traffic infraction, and who suspects that the driver was texting while driving, search the driver's cell phone for evidence -- such as a time-stamped text message from just before the stop?

The backdrop, as most readers probably know, is that effective December 1, 2009, new [G.S. 20-137.4A](#) makes it illegal to read or compose text messages while driving. It's a misdemeanor for school bus drivers, but for the rest of us, penalties are slight. It is "an infraction . . . punishable by a fine of one hundred dollars . . . and the costs of court. No drivers license points or insurance surcharge shall be assessed as a result of a violation of this section," and a violation isn't negligence per se.

If texting while driving were a crime, and if the officer had probable cause to believe that the driver had committed it, the officer almost certainly could search the cell phone for evidence: the vehicle exception to the warrant requirement would probably apply, and the officer might have an exigent circumstances justification to boot, because any delay in searching the phone might result in the critical evidence being crowded out by newer text messages. Finally, in many cases, the officer could probably choose to arrest the driver, and could search the phone incident to the arrest. G.S. 15A-401(b)(1) (officers may arrest for any criminal offense committed in their presence).

Given that texting while driving is an infraction, though, how much investigative authority do officers have? I couldn't find much law on this issue, particularly in North Carolina, so I don't have a definitive answer. But I do have some food for thought:

- An officer's authority to investigate an infraction is likely less than the officer's authority to investigate a criminal offense. For example, G.S. 15A-242 appears to authorize the issuance of search warrants in connection with any criminal offense, but not infractions. And of course, officers may not arrest for infractions.
- In fact, one could read G.S. 15A-1113(b) to mean that an officer must simply "cite and release" for an infraction, i.e., that no additional investigation is permitted. There are out-of-state cases that provide some support for that idea. *See, e.g., Washington v. Duncan*, 43 P.3d 513 (Wash. 2002) (declining to permit investigatory stops based on suspicion of a civil infraction); *Minnesota v. Holmes*, 569 N.W.2d 181 (Minn. 1997) (parking violations insufficient to warrant investigatory search).
- The North Carolina case that's closest to point, though, suggests that officers do have *some* investigative authority in connection with infractions. In *State v. Parker*, 183 N.C. App. 1 (2007), the court of appeals stated, "When a law enforcement officer stops a motorist based on probable cause to believe the motorist has committed a traffic infraction, the detention may last only as long as necessary to effectuate the purpose of investigating that infraction."

The question is exactly how far that authority goes, and as I've already confessed, I don't have a clear answer. I do know that to sustain a search like the one under consideration, the state would need to show (1) that such a search is consistent with North Carolina's statutory scheme, and (2) that it is reasonable under the Fourth Amendment. Anyone

have any relevant authorities to share on either issue, beyond the ones discussed above? Any opinions about the reasonableness of such a search?