Montana Law Review Online

Volume 83 Article 6

8-21-2022

PREVIEW; State v. Mefford: *Scope of Consent Searches in a Digitalized World*

Spencer Pedemonte
spencer.pedemonte@umontana.edu

Recommended Citation
Spencer Pedemonte, PREVIEW; State v. Mefford: *Scope of Consent Searches in a Digitalized World*, 83 Mont. L. Rev. Online 86 (2022).

PREVIEW; State v. Mefford: *Scope of Consent Searches in a Digitalized World*

Spencer Pedemonte*

The Montana Supreme Court will review argument *en banc* in *State v. Mefford*. Chad Wright and Kristen L. Peterson submitted briefs on behalf of the defendant and appellant, Bradley Mefford. Austin Knudsen, Tammy K. Plubell, Jonathan Krauss, Eileen Joyce and Samm Cox submitted a brief on behalf of the plaintiff and appellee, the State of Montana. The Court has also granted Alex Rate of the American Civil Liberties Union of Montana and Brett Max Kaufman of the American Civil Liberties Union leave to participate as *Amici Curiae*.

I. INTRODUCTION

In *State v. Mefford*, the Court is asked to determine whether a parolee's federal and state constitutional rights were violated when a parole officer switched between applications while conducting a search of the parolee's phone. In dispute is whether the parolee consented to the search of only the Facebook Messenger app or other apps, which contained child pornography.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of Saturday, November 26, 2016, Bradley Mefford ("Mefford") left his apartment building to sit in his car in the apartment's parking lot.[1] Mefford's GPS monitor alerted Parole Officer Jake Miller to his curfew violation of being outside his residence from 12:00 a.m. to 3:00 a.m.[2] P.O. Miller attempted to call Mefford, but his phone was disconnected.[3]

Three days after the violation, on November 29, 2016, Mefford had a scheduled parole reporting day.[4] Parole Officers Finley and Miller arrived at Mefford's residence to conduct a home check.[5] P.O. Finley inquired about the curfew violation, and Mefford explained he was sitting in his car in the parking lot to obtain better Wi-Fi so he could message his daughter, Faith.[6] Skeptical of his story, P.O. Miller asked Mefford if he

---

* J.D. Candidate, Alexander Blewett III School of Law at the University of Montana, Class of 2023.
[1] Appellant's Opening Brief at 3, *State v. Mefford* (Mont. Oct. 29, 2021) (No. DA 20-0330), *available at* https://supremecourtdocket.mt.gov/.
[2] Brief of Appellee at 7, *State v. Mefford* (Mont. Apr. 29, 2021) (No. DA 20-0330), *available at* https://supremecourtdocket.mt.gov/.
[3] Appellant's Opening Brief, *supra* note 1, at 5 (quoting Trial Tr. at 10, Jan. 7, 2019).
[4] *Id.* at 4.
[5] *Id.* at 5.
[6] *Id.* at 5–6.

"could view the phone to confirm his story."[7] Mefford instructed his girlfriend to give his phone to P.O. Miller "so [he could] show him the messages from the time and date that was of concern."[8]

P.O. Miller looked at Mefford's Facebook Messenger app and found messages consistent with the time period in question.[9] P.O. Miller remained skeptical of Mefford's story, however, because "the profile picture associated with Faith's Messenger account didn't appear to be a younger female like he had described."[10] P.O. Miller then opened the photo gallery on Mefford's phone "to confirm that his daughter was the person sending these messages."[11]

Upon P.O. Miller's search of Mefford's photo gallery, he observed photos that he knew were "not . . . right."[12] P.O. Miller saw photos of "young females who were nude, or young children that were in sexual acts with animals."[13] The officers immediately detained Mefford.[14] His phone was seized and turned over to law enforcement.[15]

In April of 2018, the State charged Mefford with one count of sexual abuse of children, under Mont. Code Ann. § 45-5-625(1)(e) (2015), for possessing photographic images of child pornography.[16] Mefford filed a motion to "suppress any evidence resulting from the search of his phone, which served as the basis for later search warrants."[17] The district court denied his motion.[18] The case proceeded to trial, and Mefford was found guilty.[19]

III. ARGUMENTS

A. Appellant's Arguments

On appeal, Mefford argues the district court erred in denying his motion to suppress because the search of his photo app was a warrantless intrusion violating Montana law, the Montana Constitution, and the United States Constitution.[20]

First, Mefford argues P.O. Miller exceeded the scope of Mefford's consent. Mefford argues that the scope of consent is measured by the

---

[7] *Id.* at 6.
[8] *Id.*
[9] *Id.* at 7.
[10] *Id.* (quoting Trial Tr. at 11, Jan. 7, 2019) (internal quotations omitted).
[11] *Id.* at 8 (quoting Trial Tr. at 11, Jan. 7, 2019) (internal quotations omitted).
[12] *Id.* (quoting Trial Tr. at 11–12, Jan. 7, 2019).
[13] Brief of Appellee, *supra* note 2, at 8 (quoting Trial Tr. at 12, Jan. 7, 2019).
[14] Appellant's Opening Brief, *supra* note 1, at 8.
[15] *Id.*
[16] *Id.* at 1; Brief of Appellee, *supra* note 2, at 1.
[17] Appellant's Opening Brief, *supra* note 1, at 2.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 11.

standard of "objective" reasonableness[21] and that this standard is of a "typical reasonable person, not a typical reasonable police officer."[22] In addition, "the scope of a search is generally defined by its expressed object."[23]

Here, Mefford argues P.O. Miller exceeded his scope of consent by going beyond the Facebook Messenger app.[24] Mefford argues his consent could "not reasonably be understood to extend to his personal photo gallery"[25] when he told P.O. Miller the "particular place (Facebook Messenger), the particular time, and the particular person" to confirm his explanation for the curfew violation.[26]

Next, Mefford contends the State cannot justify a warrantless intrusion of his phone based on the conditions of his supervision. Mont. Admin. R. 20.7.1101(7) states "[u]pon reasonable suspicion that the offender has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, and residence of the offender."[27] Mefford maintains the search was not based on a "reasonable suspicion" of illegal activity, and P.O. Miller therefore violated Mont. Admin. R. 20.7.1101(7).[28]

B. Appellee's Arguments

In response, the State argues the denial of Mefford's motion to suppress should be affirmed because the district court's findings were not clearly erroneous.

First, the State notes the Montana Supreme Court reviews motions to suppress evidence only when the lower court's findings of fact are considered clearly erroneous. Findings of fact are considered clearly erroneous only if the lower court definitively misapprehended evidence.[29] In appeals concerning motions to suppress, the Montana Supreme Court's function is not to reevaluate evidence, but instead to defer to lower courts' interpretations and review those de novo.[30]

The State then argues that the district court's finding that Mefford consented to the search of his phone is not clearly erroneous. P.O. Miller asked Mefford if he could "view the phone to confirm his story," which constitutes a request for permission.[31] At trial, both officers testified

---

[21] *Id.* at 17 (quoting Florida v. Jimeno, 500 U.S. 248, 251 (1991)).
[22] *Id.* (quoting Commonwealth v. Ortiz, 90 N.E.3d 735, 739 (Mass. 2018)).
[23] *Id.* (quoting *Jimeno*, 500 U.S. at 251).
[24] *Id.* at 11.
[25] *Id.* at 12.
[26] *Id.* at 20–21.
[27] *Id.* at 25 (quoting MONT. ADMIN. R. 20.7.1101(7) (2015)).
[28] *Id.* at 12.
[29] Brief of Appellee, *supra* note 2, at 18–19 (citing State v. Peoples, 502 P.3d 129, 137 (Mont. 2022)).
[30] *Id.* at 19.
[31] *Id.* at 20 (quoting Trial Tr. at 10–11, 14–15, Jan. 7, 2019).

Mefford consented by giving permission to "look through his phone" and "search his phone."[32] The State contends that the district court's findings were not clearly erroneous because ample evidence implied that Mefford's consent to viewing the phone was not limited to only the Facebook Messenger app, despite Mefford's conflicting testimony.[33]

Finally, the State argues the district court's finding that the officers had reasonable cause to search Mefford's phone was also not clearly erroneous. The State claims that the Montana Supreme Court does not need to evaluate whether the officers performed an invalid probation or parole search because Mefford's only contention at the suppression hearing was whether they exceeded his consent.[34] The State asserts the Montana Supreme Court will not address an issue raised for the first time upon appeal; therefore, Mefford's argument of an invalid search is "unnecessary and irrelevant" to consider here.[35]

C. Amicus Curiae Arguments

In support of the defendant-appellant, the American Civil Liberties Union of Montana and the American Civil Liberties Union (collectively "ACLU") offer two arguments: (1) Due to an ability to generate, store, and access large amounts of personal information, cell phones require "heightened constitutional protections against warrantless searches, analysis, and storage"; and (2) "Consent-based searches of digital data must be narrowly scoped to the owner's explicit permission."[36]

First, the ACLU argues constitutional privacy protections require narrowly circumscribed warrants (or exceptions to the warrant requirement) for cell phone searches because they contain vast quantities of personal information. Relying heavily on *Riley v. California*,[37] the ACLU argues cell phones are distinct from any other object because of their "immense storage capacity," and therefore, "implicate privacy concerns far beyond" traditional objects.[38] Law enforcement's use of advanced forensic tools to easily extract, analyze, and store a suspect's information exacerbates "privacy harms [for] warrantless, unjustified searches."[39]

Next, the ACLU argues consent-based searches of digital data apply only to areas specified by the owner. The ACLU contends Mefford

---

[32] *Id.* (quoting Trial Tr. at 168, 173, 177, Jan. 7, 2019)
[33] *Id.* at 21–22.
[34] *Id.* at 23.
[35] *Id.* (citing State v. Buck, 134 P.3d 53, 77 (Mont. 2006)).
[36] American Civil Liberties Union's Amicus Curiae Brief at i, *State v. Mefford* (Mont. Jan. 1, 2022) (No. DA 20-0330), *available at* https://supremecourtdocket.mt.gov/.
[37] 573 U.S. 373 (2014).
[38] American Civil Liberties Union's Amicus Curiae Brief, *supra* note 36, at 6–7 (quoting *Riley*, 573 U.S. at 393).
[39] *Id.* at 8.

consented only to a search of a single message thread in Facebook Messenger to corroborate his story, yet P.O. Miller developed his own "unannounced rationale to search through Mefford's photos app."[40] Furthermore, the ACLU argues common knowledge of how cell phones work creates reasonable distinctions between consenting to a search of a messaging app from a sweeping search of other personal information.[41] This is important because when dealing with cell phones, consent searches raise unique and important concerns for coercion by law enforcement.

IV. ANALYSIS

The Court's decision here will have huge implications on an individual's privacy regarding police searches. As we transition to a digitally dominated society, the amount of information stored on electronic devices will continue to grow exponentially. Allowing officers access to the breadth of information contained on a cell phone creates a troubling precedent and infringes on state and federal constitutional rights. Here, the Court will likely find that P.O. Miller exceeded Mefford's consent to search the Facebook Messenger app and that case law supports Mefford's arguments.

A. Scope of Consent Exception to Traditional Warrants

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures of "their persons, houses, papers, and effects."[42] This right, however, may be waived and an individual may consent to a search of their property by officers acting outside of the Fourth Amendment constraints.[43]

The scope of an officer's search is controlled by the degree of consent given by the individual. As noted in the Appellant's Opening Brief, scope is measured by "that of 'objective' reasonableness—what would the typical person have understood by the exchange between the officer and the suspect?"[44] For example, consent given to search a car's trunk does not give consent to search the interior of the car, nor does it give consent to search the defendant's person outside of the car. Additionally, the burden of proving scope and voluntariness of the consent falls on the prosecution.[45]

---

[40] *Id.* at 14.
[41] *Id.* at 18–19.
[42] U.S. CONST. amend. IV.
[43] Zap v. United States, 328 U.S. 624, 628 (1946); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).
[44] Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing United States v. Ross, 456 U.S. 798 (1982)); Appellant's Opening Brief, *supra* note 1, at 17.
[45] Bumper v. North Carolina, 391 U.S. 543, 548–549 (1968).

Here, Mefford's contention that P.O. Miller exceeded the scope of his consent is valid. Mefford does not deny he consented to the search of his phone—he clearly offered his phone as evidence—however, only the Facebook Messenger app contained proof of his actions that evening. A typical person would have understood P.O. Miller wanted to search the Facebook Messenger app to corroborate the story, yet P.O. Miller, after reading the corroborating discussion on the Facebook Messenger app, went through Mefford's photo app. Due to the vastness of content a cell phone can store, the Court will likely hold the district court was clearly erroneous in denying Mefford's motion to suppress.

B. Case Law Supports Mefford's Arguments

While the State offers the strong procedural argument that the Montana Supreme Court should defer to lower courts' decisions when reviewing motions to suppress, the Court will need to address two cases contradictory to the district court's decision.

First, at trial, much of the State's argument relied on the criteria in *State v. Peoples*;[46] however, Mefford argues that the State failed to apply them to the facts of this case.[47] The Court in *Peoples* determined a warrantless probation or parole search is valid only when three criteria are met:

> (1) the search is generally authorized by an established state law regulatory scheme that furthers the special government interests in rehabilitating probationers and protecting the public; (2) the probation officer has reasonable cause to suspect, based on awareness of articulable facts, under the totality of the circumstances that the probationer may be in violation of his or her probation conditions or the criminal law; and, (3) the warrantless search must be limited in scope to the reasonable suspicion that justified it in the first instance except to the extent that new or additional cause may arise within the lawful scope of the initial search.[48]

Mefford is correct in noting that the plain language of Mont. Admin. R. 20.7.1101(7) does not authorize the search of a "cell phone," and therefore, the search here fails the first criteria under *Peoples*.[49] Mefford also convincingly maintains that the search must be limited to and based on a probation violation, yet P.O. Miller went outside the confirmation he was seeking in Facebook Messenger and never directly identified what parole violations Mefford violated.[50]

---

[46] 502 P.3d 129 (Mont. 2022).
[47] Appellant's Reply Brief at 7, *State v. Mefford* (Mont. May 31, 2022) (No. DA 20-0330), *available at* https://supremecourtdocket.mt.gov/.
[48] *Id.* at 8 (quoting State v. Peoples, 502 P.3d 129 (Mont. 2022) (internal quotation marks omitted)).
[49] *Id.* at 9.
[50] *Id.* at 12–13.

Next, both Mefford and the ACLU correctly argue that the Court must consider the United States Supreme Court ruling in *Riley*. Both argue that the United States Supreme Court "has never upheld a state law authorizing a search of a probationer's or parolee's cell phone without a warrant or a showing of probable cause."[51] Therefore, *Riley* is the most relevant precedent. The *Riley* Court discusses at length the importance of considering the degree to which warrantless searches intrude upon an individual's privacy.[52]

Although the issue in *Riley* surrounds a different warrantless search exception—search incident to lawful arrest—and some of Mefford and the ACLU's comparisons are a stretch, the Montana Supreme Court will likely consider *Riley* in making their decision. The United States Supreme Court notes that cell phones are now a pervasive and insistent part of daily life, raising privacy implications regarding their immense storage capacity.[53] Here, the Montana Supreme Court will likely find a minor, albeit technical, curfew violation and a limited consent to search will not justify P.O. Miller's ability to search Mefford's "personal photos, text messages, emails, location data, financial information, political news, or health information."[54]

V. CONCLUSION

The Montana Supreme Court's decision in *State v. Mefford* will likely define the contours of law enforcement's ability to search cell phones and other electronic devices, which could greatly impact Montanans' right to privacy. The Court will likely find the district court erred in denying Mefford's motion to suppress because P.O. Miller exceeded Mefford's consent to search and because case law supports Mefford's arguments.

[51] Appellant's Reply Brief, *supra* note 47, at 18.
[52] Riley v. California, 573 U.S. 373, 385–386 (2014).
[53] *Id.* at 386–387, 393–394.
[54] Appellant's Reply Brief, *supra* note 47, at 18–19.