Delayed RESPONSE

SEIZED DIGITAL DEVICES CANNOT WAIT FOREVER.

WRITTEN BY **PIERRE GROSDIDIER**

THE U.S. COURT OF APPEALS FOR THE 2ND CIRCUIT HELD that waiting 31 days to secure a search warrant for a seized tablet violated the Fourth Amendment.[1] The court nonetheless declined to apply the exclusionary rule because the error was isolated and "an objectively reasonable officer" would not have known of the error in light of existing precedent.[2] A state trooper found Kirkland Smith slumped over his car's steering wheel and reeking of alcohol. The trooper confiscated Smith's tablet, which displayed a picture evocative of child pornography. The trooper waited 31 days to secure a search warrant that, once granted, helped reveal ample contraband. Smith conditionally pleaded guilty and appealed the denial of his motion to suppress on the basis that the police had waited too long to secure the warrant.

The Fourth Amendment protects persons against unreasonable searches and seizures. A Fourth Amendment seizure occurs when authorities "meaningfully interfere" with suspects' possessory interest in their personal property.[3] Warrantless seizures are legal to protect evidence but assume that authorities will diligently secure a search warrant. This diligence is required to minimize the interference with the suspect's possessory interest in case the search reveals no contraband, or the contraband is segregable, or the seizure proves improper. An unreasonably long delay in securing a search warrant following a warrantless seizure violates the Fourth Amendment.[4]

The 2nd Circuit analyzed the reasonableness of the delay under its four-factor test, which considers "[1] the length of the delay, [2] the importance of the seized property to the defendant, [3] whether the defendant had a reduced property interest in the seized item, and [4] the strength of the state's justification for the delay."[5]

The court held that a 31-day delay was presumptively unreasonable and weighed substantially in the defendant's favor as the warrant application required little effort.

The court acknowledged the wealth of personal information that can be stored on a tablet (beyond that justifying the search) and the "broader constitutional protection" that the U.S. Supreme Court accorded to seized digital devices.[6] Nevertheless, because Smith acknowledged his tablet was redundant and never requested its return, the second factor weighed in the government's favor.

Probable cause to believe the tablet contained contraband reduced Smith's property interest only for so long as the reasonable wait time to secure a search warrant. Because Smith never consented to the tablet's seizure and search, the court held that the third factor was either neutral or weighed in Smith's favor.

Finally, the record showed that the investigator scarcely worked on the case until he applied for the warrant. His allegedly busy docket or large rural coverage area could not excuse his belatedness. The Fourth Amendment imposes a duty to prioritize securing a warrant after a seizure. Only a specific overriding excuse, like a pressing investigation, could justify a delay. The alternative would simply invite and excuse more delay. This final factor, therefore, weighed in Smith's favor. Collectively, the factors led to the conclusion that the month-long delay was unreasonable under the Fourth Amendment. **TBJ**

Costa Rica Luxury Home Rental & Sales

playaconchalrealty.com

- Reserva Conchal Beach Club & Spa
- 4 BR, 4 BA 3200 Sq Ft
- Texas Attorney Owner/Manager
- White Sand, Snorkle, Golf, Tennis, Scuba, Fishing, Jet Ski, Sailing, Jungle Tours
- Robert Trent Jones Golf Course
- 45 minute drive from Liberia Airport
- Vehicle Available
- Concierge Service
- Airport Transport
- Daily Maid Service

For Reservations

Email: jqplayaconchalrealty@gmail.com

Phone: 713-670-6069

NOTES

1. *United States v. Smith,* 967 F.3d 198, 202 (2d Cir. 2020).
2. *Id.*
3. *Id.* at 205.
4. *United States v. Mitchell,* 565 F.3d 1347, 1350 (11th Cir. 2009) (21-day wait to secure a search warrant was unreasonable under the facts of the case).
5. *Smith,* 967 F.3d at 206. The U.S. Court of Appeals for the 5th Circuit has no equivalent test, but other circuit appellate courts do. *Id.* n.1 (citing cases from the 3rd, 4th, 7th, 9th, 10th, and 11th Circuit Courts of Appeals that have considered this issue). For a pre-*Riley* Texas case applying the *Mitchell* analysis, *see United States v. Lowe,* No. H-10-813-2, 2011 WL 1831593 (S.D. Tex. May 12, 2011).
6. *Id.* at 207 (citing *Riley v. Calif.,* 573 U.S. 373 (2014)).

PIERRE GROSDIDIER is an attorney in Houston. He belongs to the first group of attorneys certified in construction law by the Texas Board of Legal Specialization in 2017. Grosdidier's practice also includes data privacy and unauthorized computer access issues and litigation. Prior to practicing law, he worked in the process control industry. Grosdidier holds a Ph.D. from Caltech and a J.D. from the University of Texas. He is a member of the State Bar of Texas, an AAA Panelist, a registered P.E. in Texas (inactive), a member of the Texas Bar Foundation, a fellow of the American Bar Foundation, and the State Bar of Texas Computer & Technology Section treasurer for 2020-2021.