STATE COURT
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Citing Rule Against "Log Rolling," Oklahoma Supreme Court Overturns Comprehensive State Tort Reform

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The practice of tucking tax breaks or other legislative favors for special interests into "must pass" federal legislation has become commonplace in the U.S. Congress, as nothing in the U.S. Constitution limits or forbids this tactic. However, in the vast majority of states, such "log rolling" is prohibited by constitutional provisions limiting legislation to a "single subject." On June 4, the Oklahoma Supreme Court invoked that state constitution's version of this rule and invalidated the Comprehensive Lawsuit Reform Act of 2009. This article will briefly explain state rules against log rolling, discuss how the Oklahoma Court applied its rule in *Douglas v. Cox Retirement Properties*,[1] and note the decision's impact in Oklahoma and nationally.

I. Log Rolling and the Single Subject Rule

Black's Law Dictionary defines log rolling as "a legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature."[2] As one assessment of single subject rules related, "Not surprisingly, legislative log rolling is as old as the legal system itself."[3] By inserting unpopular and unrelated provisions into a popular bill, the log rolling legislator forces her colleagues to vote for ideas they might otherwise oppose.

Beginning with New Jersey in 1844, over the years, forty-three states have added single subject rules for state legislation to their respective constitutions.[4] The precise wording of these rules differs from state to state, but the Oklahoma constitutional provision at issue in *Douglas* is generally representative: "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title . . ."[5] As one would expect, state courts have been called upon regularly to interpret and apply the very general terms of these general constitutional mandates, resulting in "thousands of cases."[6]

II. Judicial Nullification and the Comprehensive Lawsuit Reform Act of 2009

Over the last two decades, plaintiffs' lawyers and others who oppose state civil justice reforms—commonly known as

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Florida Supreme Court Requires Fourth Amendment Protections for Emerging Technology

*by Caroline Johnson Levine**

In *Smallwood v. State of Florida*, the Florida Supreme Court 2013 FL 1130 (Fla. 2013), the Florida Supreme Court held by a 4-2 margin that law enforcement officers are required to obtain a search warrant to view information contained within a cell phone found in the possession of an arrested suspect.[1] The May 2, 2013 decision restricted an arresting officer's ability to search property found on an arrestee.

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with the ruling, which offered very little guidance, beyond the concurrence's peanut butter cookie analogy, on what would be constitutional. Opinions at this early stage vary from one former Senator saying "Based on [the Court's] interpretation, you'd have to pass at least 90 separate bills,"[12] to a current Senator remarking, "It seems very simple to me."[13] That latter Senator's approach: break up the CLRA into five separate bills.[14]

The court's ruling has also prompted legislators to reevaluate how judges are selected in the state, as well as putting limits on judicial tenure are also being cosidered.[154] Oklahoma is one of thirteen states that use the "Missouri Plan," a method in which judges are appointed by the governor after nomination by a commission.[165] Oklahoma may consider changing to a method that is more like the federal methodapproach ofto selection, as the nearby states Tennessee and Kansas have both transitioned toutilize. In Kansas, the legislature recently adopted a federal methodthat approach for choosing its intermediate appellate court judges. Similarly, Tennessee abandoned the Missouri Plan in favor of the federal method for its sSupreme cCourt justices; state voters will have the final say on the new plan in November 2014, which voters will vote to formally adopt in November 2014.

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Endnotes

1. 2013 OK 37, __ P.3d __ , *available at* http://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=469532.

2. Black's Law Dictionary 849 (5th ed. 1979).

3. Stanley R. Kaminski and Elinor L. Hart, *Log Rolling Versus the Single Subject Rule*, 80 USLW 1156 (Feb. 28, 2012), *available at* http://www.duanemorris.com/articles/static/kaminski_hart_bloombergbna_022812.pdf.

4. *Id.* (citing Kurt G. Kastorf, *Logrolling Gets Logrolled*, 54 Emory L. J. 1633, 1641 (2005)).

5. Okla. Const. art. 5, § 57.

6. Kaminski and Hart, *supra* note 3, at 3 (citing Michael D. Gilbert, *Single Subject Rule and the Legislative Process*, 67 U. Pitt. L. Rev. 803, 806 (2006)).

7. Victor E. Schwartz, Mark A. Behrens, and Mark D. Taylor, *Who Should Make America's Tort Law: Courts or Legislatures?*, WLF Monograph (Mar. 1997); *see also Fact Sheet: Cases Where "Tort Reforms" Have Been Held Unconstitutional*, Center for Justice and Democracy, *available at* http://centerjd.org/content/fact-sheet-cases-where-tort-reforms-have-been-held-unconstitutional-2011.

8. Douglas v. Cox Retirement Properties, No. 110270, slip op. at 15 n.3 (Okla. June 4, 2013) (Winchester, J. dissenting).

9. HB 2128, 53rd Leg., 1st Sess. (Okla. 2011) ("An Act relating to damages"); SB 862, 53rd Leg., 1st Sess. (Okla. 2011) ("An Act relating to liability").

10. Michael McNutt, *Oklahoma lawsuit reform measure tossed out*, The Oklahoman, June 4, 2013, *available at* http://newsok.com/oklahoma-lawsuit-reform-measure-tossed-out/article/3841673.

11. Patrick B. McGuigan, *OK Gov. Fallin now has the call on special session to remedy Court's tort slap down*, OkalahomaWatchdog.org, July 18, 2013, http://watchdog.org/96294/ok-gov-fallin-now-has-the-call-on-special-session-to-remedy-courts-tort-slap-down/.

12. *Id.*

13. *Oklahoma Law Makers to Revive Lawsuit Limits*, Ins. J., June 10, 2013, *available at* http://www.insurancejournal.com/news/southcentral/2013/06/10/294903.htm.

14. Press Release, Oklahoma State Senate, Sen. Loveless Plans to File Bills Restoring Tort Reform after State Supreme Court Strikes Down 2009 Measure (June 4, 2013), *available at* http://www.oksenate.gov/news/press_releases/press_releases_2013/pr20130604a.htm.

15. McGuigan,http://watchdog.org/96294/ok-gov-fallin-now-has-the-call-on-special-session-to-remedy-courts-tort-slap-down/ *supra* note 11.

16. See www.statecourtsguide.com for more information.

Florida Supreme Court Requires Fourth Amendment Protections for Emerging Technology

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I. The Trial Court

Cedric Tyrone Smallwood was a convicted felon who was suspected of committing a robbery while using a firearm.[2] On the day of the robbery, a masked man entered a convenience store, displayed a silver handgun and demanded money from the clerk.[3] The clerk testified that he knew the identity of the robber, who was a frequent customer.[4] Additionally, two witnesses observed Smallwood fleeing the store.[5]

Upon arresting Smallwood, an officer collected a cellular telephone from Smallwood's pocket and viewed the photographs contained therein.[6] The officer discovered that the photographs were taken subsequent to the robbery and depicted a similar handgun and a stack of money.[7] Upon hearing about this evidence, the prosecutor obtained a search warrant in order to view the photographs. However, the defendant's attorney argued that the police officer had previously violated

the defendant's Fourth Amendment right to be free from an unreasonable search and seizure by viewing the photographs without a warrant.[8]

The trial court allowed the photographs to be used in the trial and denied the defendant's suppression arguments by relying on *New York v. Belton*[9] (authorizing a search incident to arrest of a motor vehicle's containers within an arrestee's reach) and *United States v. Finley*[10] (authorizing a search of the contents of an arrestee's cellular telephone).[11]

II. The Appellate Court

Florida's First District Court of Appeal affirmed the trial court's ruling, while recognizing that "such searches have been held both valid and invalid by various state and federal courts."[12]

The appellate court noted that some federal courts have authorized the search of data devices discovered on arrested suspects in order to ensure the preservation of evidence. In *United States v. Young*,[13] the Fourth Circuit authorized a warrantless search when "officers arrested the defendant for drug-related crimes and discovered a cell phone on his person, and then searched the phone and copied down text messages found therein."[14] Additionally, in *United States v. Ortiz*,[15] the "Seventh Circuit found it was 'imperative' that officers be permitted to retrieve numbers from electronic pagers incident to [a drug related] arrest to 'prevent its destruction as evidence,' because incoming pages may destroy stored numbers on pagers that have limited memory, and the contents of some pagers can be destroyed by turning off the pager or pushing a button."[16]

Nevertheless, the appellate court expressed concern that the United States Supreme Court ruling in *Robinson*,[17] which authorized a complete and thorough search of an arrested suspect and his possessions, relied upon by the trial court, could not have anticipated the subsequent development of a portable telephone capable of containing a large amount of personal information about an arrested suspect.[18] In *Robinson*, an officer arrested a suspect for driving with a revoked driver's license and during a search incident to arrest of the suspect, the officer located a cigarette pack containing heroin.[19] However, the appellate court felt constrained by the conformity clause of "article I, section 12 of the Florida Constitution, which mandates we follow United States Supreme Court precedent in the area of search and seizure."[20]

Therefore, the appellate court felt compelled to rely upon the holding in *Robinson*, "in which the United States Supreme Court held that the search-incident-to-arrest warrant exception permits a search and inspection of the contents of personal items found on the arrestee, even if it is unlikely that the arrestee has a weapon or evidence related to the crime on his person."[21] Accordingly, the appellate court certified this issue to the Florida Supreme Court as a matter of "great public importance."[22]

III. The Supreme Court

Overruling the trial and appellate court decisions, the Florida Supreme Court found that "*Robinson* is neither factually nor legally on point"[23] in this case and held "that the conformity clause does not require Florida courts to apply the holding of *Robinson* to the search of the electronic device cell phone incident to an arrest."[24] Additionally, the court found that the conformity clause "does not apply with regard to [contrary] decisions of other federal courts."[25]

The court relied on the United States Supreme Court ruling in *Arizona v. Gant*[26] to hold that an arrested suspect's cellular telephone cannot be searched, without a warrant, by law enforcement to discover evidence of a crime. Interestingly, *Gant* did not involve a law enforcement search or seizure of an electronic device. Gant committed the crime of driving with a suspended driver's license and after he exited his vehicle and walked towards officers, Gant was arrested and his vehicle was searched, resulting in the discovery of cocaine in Gant's vehicle.[27] *Gant* held that officers could not search the vehicle of an arrested suspect, if the suspect had been safely removed from the vehicle and there existed no demonstrable concern regarding officer safety or preservation of evidence, without first obtaining a search warrant.[28]

The seminal finding of this decision is the court's view that a cellular telephone is essentially a miniature computer and that "allowing law enforcement to search an arrestee's cell phone without a warrant is akin to providing law enforcement with a key to access the home of the arrestee. . . .We refuse to authorize government intrusion into the most private and personal details of an arrestee's life without a search warrant simply because the cellular phone device which stores that information is small enough to be carried on one's person."[29]

IV. Dissent

The Florida Supreme Court decision in *Smallwood* revealed strong opposition between the four justices in the majority opinion and the two dissenting justices.

Chief Justice Polston concurred in the dissenting opinion authored by Justice Canady, which noted that four "of the federal circuit courts of appeals have addressed the issue we consider in this case. And they all have

concluded that a search of the contents of a cell phone found on the person of an arrestee is within the proper scope of a search incident to arrest under *United States v. Robinson*."[30]

The dissent noted that *United States v. Murphy*[31] recognized "prior holdings 'that officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest' and rejecting defendant's 'argument that the government must ascertain a cell phone's storage capacity in order to justify a warrantless search of that phone incident to arrest.'"[32] Additionally, *United States v. Finley*[33] held that "'the call records and text messages retrieved from [defendant arrestee's] cell phone' were not subject to suppression."[34] Further, both *United States v. Pineda-Areola*[35] and *Silvan W. v. Briggs*[36] held that the officers could search the contents of cellular telephones found on an arrestee's person.[3]

The dissent argued that the majority's view in this case held "the potential to work much mischief in Fourth Amendment law."[38] Further, the dissent notes that there existed no issue in this case, as argued by the majority, regarding law enforcement's access to "remotely stored data" through the portal of Smallwood's telephone.[39] Finally, the dissent reasons that "it is unquestionable that individuals frequently possess on their persons items with 'highly personalized and private information,'" however, items "found on the person of an arrestee are subject to inspection as a consequence of the arrest."[40]

The majority responded to the dissent by arguing that the dissent's statements defy "logic and common sense in this digital and technological age."[41] Further, the majority finds that for "the dissent to contend that a cellular phone does not carry information of a different 'character' than other types of personal items an individual may carry on his person is to ignore the plainly (and painfully) obvious."[42] Therefore, the majority "decline[d] to adopt the contrary positions of the decisions relied upon by the dissent."[43]

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Endnotes

1 Smallwood v. State of Florida, No. SC11-1130 (Fla. 2013), *available at* http://www.floridasupremecourt.org/decisions/2013/sc11-1130.pdf.

2 *Smallwood,* slip op. at 2.

3 *Id.*

4 *Id.*

5 *Id.* at 3.

6 *Id.* at 4.

7 *Id.*.

8 *Id.* at 5.

9 New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981).

10 United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).

11 *Smallwood,* slip op. at 6.

12 *Id.* at 8.

13 United States v. Young, 278 Fed. Appx. 242, 245 (4th Cir. 2008).

14 Smallwood v. State of Florida, 61 So.3d 448, 454 (Fla. 1st DCA 2011).

15 United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996).

16 Smallwood, 61 So.3d at 454.

17 414 U.S 218, 94 S.Ct. 467 (1973).

18 *Id.* at 448.

19 United States v. Robinson, 414 U.S 218, 220-223, 94 S.Ct. 467 (1973).

20 Smallwood v. State of Florida, 61 So.3d 448 (Fla. 1st DCA 2011).

21 *Smallwood*, slip op. at 8.

22 *Id.* at 9.

23 *Id.* at 11.

24 *Id.* at 12.

25 *Id.* at 11.

26 Arizona v. Gant, 556 U.S 332, 129 S.Ct. 1710 (2009).

27 *Id.* at 336.

28 *Id.* at 351.

29 *Smallwood*, slip op. at 28.

30 *Id.* at 34.

31 United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009).

32 *Smallwood,* slip op at 34.

33 United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007).

34 *Smallwood*, slip op. at 28.

35 United States v. Pineda-Areola, 372 Fed. Appx. 661, 663 (7th Cir. 2010)(unpublished).

36 Silvan W. v. Briggs, 309 Fed. Appx. 216, 225 (10th Cir. 2009) (unpublished).

37 *Smallwood,* slip op. at 28.

38 *Id.* at 35

39 *Id.* at 36.

40 *Id.* at 37.

41 *Id.* at 17.

42 *Id.*

43 *Id.* at 28.