ELEVENTH CIRCUIT DISCUSSES SEARCH INCIDENT TO ARREST FOR CIVIL "ARREST WARRANTS"

September 2016

Article Source: http://www.llrmi.com/articles/legal_update/2016_united_state_v_phillips.shtml

On August 23, 2016, the Eleventh Circuit Court of Appeals decided *the United States v. Phillips*[i], in which they examined whether a search incident to arrest based upon an arrest for writ of bodily attachment was reasonable under the Fourth Amendment. The relevant facts of *Phillips*, taken directly from the case, are as follows:

> In early 2014, Phillips was a wanted man. Police sought to question him about a recent shooting in Miami and to arrest him for failing to pay child support. In February, a Florida court issued a writ of bodily attachment for unpaid child support that "ordered" the police to "take [Phillips] into custody . . . and confine him [Phillips] in the county jail." But the writ allowed Phillips to "purge this contempt and be immediately released from custody at any time by the payment of the sum of $300.00." Two days later, the Miami-Dade Police Department issued a "Wanted for Questioning" flyer, which included Phillips's name and picture and mentioned the recent shooting and the writ of bodily attachment. The flyer instructed the police to detain Phillips on sight.
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> On March 1, Officer Nelson Rodriguez spotted Phillips on the same street corner where the shooting had occurred. Officer Rodriguez knew about the flyer and the writ of bodily attachment. As Officer Rodriguez approached Phillips to arrest him, Phillips reached down toward his waistband. Fearing the worst, Officer Rodriguez grabbed Phillips's right hand and felt a metal bulge in his waistband. Officer Rodriguez removed the bulge, which was a loaded .380 caliber firearm. Phillips, a convicted drug dealer, was not allowed to have a firearm. A federal grand jury indicted Phillips on one count of being a felon in possession of a firearm and an armed career criminal, 18 U.S.C. §§ 922(g)(1), 924(e)(1).[ii]

Phillips filed a motion to suppress the firearm and the district court denied the motion. He pled guilty with the right to appeal the denial of the motion to suppress. Phillips then filed a timely appeal with the Eleventh Circuit Court of Appeals and argued that an officer is not permitted to conduct a search incident to arrest, consistent with the Fourth Amendment, when a person is taken into custody on a civil writ of bodily attachment.

The issue on appeal was whether a civil writ of bodily attachment based on unpaid child support is a "warrant" within the meaning of the Fourth Amendment such that a search incident to arrest is permitted.

In deciding this issue, the Eleventh Circuit examined the Fourth Amendment and noted that, for a warrant to be valid, it had to be sworn and supported by probable cause. The court also observed that in Florida, where Phillips' case occurred, "a court will issue a writ of bodily attachment for unpaid child support if it determines, by the preponderance of the evidence, that a person is liable for civil contempt" of court.[iii] The court went on to explain

> **The Fourth Amendment does not require warrants to be based on probable cause of a crime, as opposed to a civil offense**. Nothing in the original public meaning of "probable cause" or "Warrants" excludes civil offenses. At the Founding, "probable cause" meant "made under circumstances which warrant suspicion." *Locke v*. *United States*, 11 U.S. 339, 348 (1813) (Marshall, C.J.)…
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> **Writs of bodily assistance for unpaid child support satisfy these definitions. Florida courts issue the writ only after they find a person liable for civil contempt by a preponderance of the evidence—a standard of proof that is *higher* than probable cause**, *see United States v*. *Sokolow*, 490 U.S. 1, 7 (1989). **And a writ of bodily attachment is a "warrant," originally defined: it orders the contemnor's arrest and "direct[s]" that he "be brought before the court**." Fla. Fam. L.R.P. 12.615(c)(2)(B).
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> **That a writ of bodily attachment is based on civil contempt, as opposed to a crime, makes no difference.** Civil warrants were common at the Founding and up through the ratification of the Fourteenth Amendment. *See*, *e.g*., *U.S*. *ex rel*. *Deimel v*. *Arnold*, 69 F. 987 (7th Cir. 1895) (writ of capias ad satisfaciendum); *Curry v*. *Johnson*, 13 R.I. 121 (1880) (writ of replevin); *Semayne's Case*, 77 Eng. Rep. 194 (1604) (writ of replevin); Davies, *supra*, at 585 & n.94 (writ of assistance); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins*, *Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1370 (1983) (writ of assistance). **Civil arrest warrants were (and still are) subject to the same standards as criminal arrest warrants.** *See West v*. *Cabell*, 153 U.S. 78, 85-86 (1894).[iv]

The court, having determined that civil arrest warrants are subject to the same Fourth Amendment standards as criminal warrants also compared civil contempt warrants to bench warrants. The court noted that the Eleventh Circuit, as well as the Second and Seventh Circuits, have held that bench warrants satisfy the Fourth Amendment and note that this is the case even where the bench warrant is based on civil contempt.[v]

In light of the above, the Eleventh Circuit held

> **We conclude that a writ of bodily attachment for unpaid child support is a warrant for purposes of the Fourth Amendment.** With possible exceptions not relevant here, *see* Amar, *supra*, at 762 n.9, 780, an arrest based on a valid warrant is *per se* reasonable.

Accordingly, Officer Rodriguez could arrest Phillips based solely on the civil writ of bodily attachment for unpaid child support. And because Officer Rodriguez legally arrested Phillips, he could recover the firearm from Phillips's waistband as part of a search incident to arrest. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2174-76 (2016).[vi] [emphasis added]

Thus, the court affirmed the denial of the motion to suppress

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[i] No. 14-146660 (11th Cir. Decided August 23, 2016)
[ii] Id. at 2-3
[iii] Id. at 8
[iv] Id. at 9-10
[v] Id. at 11
[vi] Id. at 13