

Court orders disclosure of officer's private and personal cell phone records to criminal defense attorney

Officers were looking for a car that might contain a person suspected of having just overdosed on heroin at a local store. There was information that a person in the car was giving CPR to the overdose victim. An officer saw Ortiz's car weaving and driving erratically. The officer stopped Ortiz and ultimately arrested him for DUI. Ortiz was not involved in the overdose situation. Ortiz claimed that there was no reasonable suspicion for the stop and that the officer's explanation about the overdose was pretextual. Ortiz sought an order from the trial court that the police officer be required to surrender his personal cell phone records for the time surrounding the stop and the arrest.

The trial court, sustained by the New Mexico Court of Appeals, made a number of findings that would surprise any scholar familiar with electronic communications records. The court found that the officer's personal phone records for the time that he was on duty and in a marked patrol car and engaged in official duties were records under the control of the state. The court also found that neither the United States Constitution nor the New Mexico Constitution gave the officer a right of privacy in his cell phone records (though this finding did not extend to the *content* of communications). The court also found that the federal Electronic Communications Privacy Act did not apply to this situation. The federal law requires that no cell phone records can be disclosed to law enforcement unless there are reasonable grounds to believe that the records are relevant and material to an investigation. Ortiz's defense attorney didn't use the term "fishing expedition" in the demand for the cell phone records, but offered no substantive basis to show that the threshold for the federal statute had been met.

The officer asserted his privacy rights under the federal and state constitutions and declined to provide the cell phone records. The prosecution supported the officer in his exercise of constitutional rights and maintained that the Constitution and plainly written federal statute barred the State from coercing the officer to give up his personal records. In response, the trial court dismissed the DUI and other charges against Ortiz. The court of appeals sustained the trial court. This case serves as a warning, at the very least in New Mexico, of the courts' willingness to attempt to exercise control over an officer's communication records, with no substantive basis for doing so and in a fairly plain violation of the Electronic Communications Privacy Act, when the officer is on duty, in a marked vehicle, and on official business. *State v. Ortiz*, 215 P.3d 811 (N.M. App. 2009).