Searches of Digital Devices: VU, Fearon, and Three Thorny Issues

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SEARCHES OF DIGITAL DEVICES: *VU*, *FEARON*, AND THREE THORNY ISSUES

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When are investigators allowed to search a digital electronic device, such as a computer or cell phone? Are there special warrant requirements for these kinds of searches? Can the police rely on the power of search incident to arrest to examine a digital device such as a cell phone? While I do not offer a detailed or exhaustive summary of the law of electronic searches – a topic which has received considerable (and welcome) attention in recent years[1] -- these are a few of the issues I hope to address in this paper and my associated presentation.

There are two common ways the police will come into possession of an electronic device that contains digital evidence. First, the police might locate an electronic device in the course of executing a search warrant on a physical location, such as a residence or motor vehicle. Second, the police might find the electronic device in a suspect's possession during the course of a lawful arrest. These two scenarios correspond with the circumstances of the two leading Supreme Court cases on searches of electronic devices: ***R v Vu***,[2] and the forthcoming ***R v Fearon***.[3] I hope to provide an overview of the issues raised by ***Vu*** and ***Fearon***, then briefly identify and describe three unresolved "thorny issues" surrounding the search of electronic devices – tricky questions that I expect investigators, counsel, and the courts will continue to confront in the months and years ahead.

DO THE POLICE REQUIRE SPECIFIC AUTHORIZATION TO SEARCH A COMPUTER? (*R V VU*)

Section 487 of the *Criminal Code* empowers judges to grant warrants for the search of a "building, receptacle, or place." The power to search a "building, receptacle, or place" has been traditionally understood to implicitly authorize searches of receptacles or containers stored within that place. For example, the power to search a residence has, unsurprisingly, also endowed police with authority to open a filing cabinet or cupboard within the residence and examine its contents, so long as officers were searching for a piece of evidence (or category of evidence) for which search had been authorized by the warrant.

In ***Vu***, the Supreme Court addressed the issue of whether an authorization to search a residence for "documents" also implicitly authorized the police to search any computers found within that

[1] In particular, for two excellent papers addressing the same topics, see Scott C. Hutchison, *Apres Vu: Searches of Computers in 2014*, and Eric V. Gottardi, *Searches of Cell Phones and Other Electronic Devices*, presented at the 2014 Federation of Law Societies of Canada National Criminal Law Program, July 2014 (Halifax, Nova Scotia).
[2] ***R v Vu***, 2013 SCC 60.
[3] Leave to appeal allowed July 11, 2013 (see ***Fearon v R***, 2013 CanLII 42522), oral argument heard May 23, 2014, with decision reserved: <http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35298>.

residence for such "documents." In other words, the issue was whether a computer is an ordinary "container" that can be examined pursuant to the authority of a search warrant, or whether there is something qualitatively different about a computer that demands separate prior judicial authorization before it may be searched by police.

Facts and Background

In ***Vu***, the police had obtained a warrant to search a residence for evidence of the theft of electricity. The warrant specifically authorized the police to search for "documentation identifying the owners and/or occupants of the residence." The warrant authorized the police to search for "computer generated notes," but did not specifically refer to computers, and did not provide explicit authority to search any computers or electronic devices that might be found within the residence.

The police executed the search warrant and found evidence of a marijuana grow operation. Officers also seized and examined two computers and a cell phone found within the residence. These devices revealed evidence connecting Mr. Vu to the residence. For example, a video security system was connected to one of the computers, and the video footage that was recorded on one of the computers showed a vehicle registered to Mr. Vu parked in the driveway of the residence. The cell phone also contained a photograph of Mr. Vu.

The trial judge concluded that the authority to search the residence for identity documents, as conferred by the search warrant, did not also authorize a search of the computers or the cell phone.[4] The British Columbia Court of Appeal disagreed, concluding that a "warrant authorizing a search of a specific location for specific things confers on those executing that warrant the authority to conduct a reasonable examination of anything at that location within which the specified things might be found"[5] – including the electronic devices within the residence. The Court of Appeal held that the reference to "documents" in the search warrant also extended to electronic documents stored on a computer.

Computer Searches Require Specific Authorization: *Vu*

Justice Cromwell's cogent reasons, written on behalf of a unanimous court, firmly rejected the suggestion that electronic devices are "just another receptacle," and emphasized how digital "receptacles" such as computers are distinct from physical containers such as briefcases, cupboards, and filing cabinets. Building on Justice Fish's now-famous observation in ***Morelli*** that it is "difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search

[4] ***R v Vu***, 2010 BCSC 1260 at paras. 60-69.
[5] ***R v Vu***, 2011 BCCA 536 at para. 63.