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Panel Expands Prison Contraband Definition to Cellphones

John Caher, New York Law Journal

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ALBANY - An appeals court in Albany has extended the scope of "dangerous" prison contraband to include cellphones, in a ruling that allows authorities to crack down on devices that are used not only to chat with loved ones and consult with attorneys but also to intimidate witnesses and conduct drug deals.

Prison authorities across the country are struggling to keep cellphones away from inmates, with limited success. But a decision last week by the Appellate Division, Third Department, significantly raises the stakes for inmates who break the rules in New York.

In a unanimous opinion by Justice John Egan Jr. ([See Profile](#)), the court upheld an inmate's conviction for possessing "dangerous" contraband, which added 3 to 6 years to the 25-year-to-life term he was already serving for murder, attempted murder and robbery.

The court said possession of the phone, while not inherently dangerous, created a substantial security risk in part by allowing the inmate to prevent authorities from monitoring and recording his calls.

[People v. Green](#), 105179, affirmed a decision by Sullivan County Judge Frank LaBuda ([See Profile](#)), who had presided over defendant Barry Green's trial on a charge of first-degree promoting prison contraband.

Records show that in 2009, a corrections officer at the Woodbourne Correctional Facility was making his rounds when he noticed that a towel was covering the window of Green's cell and heard portions of a one-way conversation. A subsequent search yielded a cellphone hidden in the inmate's buttocks and a charger stashed in his cell.

Sullivan County District Attorney James Farrell pursued a charge of first-degree promoting prison contraband, a felony that requires finding an inmate possessed "dangerous contraband." If prison contraband is not deemed dangerous, it's generally a misdemeanor punishable by no more than one year in jail.

Green was convicted of the felony count and was sentenced to a 3-to-6 year term as a second felony offender, after LaBuda found that a prison cellphone is an inherent security risk.

"This court fully finds that as a matter of law a cellphone, no matter how a defendant may use it, is inherently dangerous," LaBuda said in *People v Greene*, 2011 NY Slip Op 21200.

On appeal, Green acknowledged he violated prison rules by possessing the phone and using it to address marital issues with his family. But he disputed that it constituted dangerous contraband.

The Third Department, which in the past had upheld guilty pleas where the element of dangerousness was not contested, disagreed, and for the first time found that cellphone possession in prison creates a danger.

Egan observed that Penal Law §205.25 defines "dangerous contraband" as that "which is capable of such use as may endanger the safety of a detention facility or any person therein."

He said the Court of Appeals has in a number of decisions—primarily [People v. Finley](#), 10 NY3d 647 (2008)—advised that the test of dangerousness is whether there is a "substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about major threats to a detention facility's institutional safety or security." The high court has also said that items not considered inherently dangerous can be inferred dangerous with proof of their potential to create a hazardous situation within a facility.

Here, Egan said, prison officials had testified to the potential of cellphones to undermine security and bypass a standard practice in which inmate telephone calls are monitored and recorded.

"Based upon our review of the record as a whole—particularly the detailed and specific testimony offered by the supervising superintendent—we are satisfied that the people met their burden of establishing that the cellphone seized from defendant constituted dangerous contraband," Egan wrote in an opinion joined by justices Leslie Stein ([See Profile](#)), William McCarthy ([See Profile](#)) and Robert Rose ([See Profile](#)).

Egan said the court's decision is consistent with one by the Appellate Division, Fourth Department, that found that an inmate's possession of a drawing of the recreation yard constituted possession of dangerous contraband because the sketch could be used to aid an escape (see *People v. Wilson*, 56 AD3d 1266 (2008)).

Farrell argued the appeal for the prosecution on March 24. Jane Bloom of Monticello appeared for Green.

Anthony Annucci, acting commissioner of the state Department of Corrections and Community Supervision (DOCCS), praised the decision.

"It is gratifying that the Appellate Division acknowledges that a cell phone, a common item outside prison, inside a facility, and for a host of reasons, should be considered a dangerous weapon," Annucci said. "This decision should greatly assist the department in its effort to run

safe and secure institutions, serving as a strong deterrent against the smuggling of cell phones by inmates."

In recent years, prison officials nationwide have battled to keep cellphones out of the hands of inmates. The issue became especially prominent after authorities found a telephone in the cell of mass murderer Charles Manson in California.

Congress enacted and President Barack Obama signed legislation making possession of a wireless device in a federal penitentiary a felony punishable by an extra year behind bars. The Third Department, in elevating possession of a cellphone to a felony, makes the consequences in New York considerably more severe.

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