



April 27, 2020

Legal Update

Korean Supreme Court Reaffirms Prior Ruling on Illegal Search Warrants

Recently, the Korean Supreme Court held that the seizure is unlawful if a government investigator only shows the cover page of a warrant when seizing an item, such as a mobile phone from a suspect, despite the suspect's request to see the other parts of the warrant.¹

This decision is in line with the Supreme Court's more recent trend of requiring stricter abidance of the criminal procedures.

Case Summary

In the current case, the court of first instance held that the investigation was legal and the warrant was valid, reasoning that after the mobile phone was seized, the suspect's attorney participated in the investigation and was allowed to review the other part of the warrant.

¹ See Supreme Court Judgment 2019Mo3526 dated April 16, 2020

However, the Supreme Court reversed the lower court's ruling, given that the investigator did not respond to the suspect's request to see the other part of the warrant when the investigator actually took possession of the mobile phone from the suspect. In its decision, the Supreme Court clarified that showing only the cover page of a warrant is not a proper "presentation" of the warrant, which violates the Korean Constitutional Law and the Criminal Procedure Act.

Search & Seizure Warrants

Under the Criminal Procedure Act (the "Act"), a search and seizure warrant may be issued only for the items deemed to be connected with the suspected crime,² with the items to be searched or seized and the place of the search or seizure clearly specified in the warrant.³ Also, the warrant must be shown to the person, who is subject to the search or seizure.⁴

These legal requirements follow the constitutional principles on warrants, and aim to minimize the infringement of privacy and property rights of individuals, while also providing an opportunity to appeal any illegal search and seizure by the government.

Further, under the Act, the government authority must "show" or "present" the warrant to the person subject to the search or seizure. On its face, the law does not require the government authority to provide a "copy" of the warrant to the subject. In practice, this caused confusion on what is an appropriate "showing" of a warrant (e.g., how long it should be shown, which parts should be shown or may not be shown). There were incidents, where individuals underwent a search and seizure without verifying what was specifically contained in the warrant.

Moreover, in practice, a search and seizure warrant is relatively easy to obtain compared to an arrest warrant. Also, there are differences in the search and seizure method and procedures among government investigative agencies, which has continuously raised concerns that corporate business information or personal information are excessively searched and seized by the government agencies.

² See Articles 106(1) and 219 of the Act.

³ See Article 114(1) of the Act.

⁴ See Articles 118 and 219 of the Act.

Supreme Court's Prior Decisions Related to Search & Seizure

In this regard, the Supreme Court ruled that:

1. If there are multiple persons subject to the search and seizure, the warrant must be shown to each and every individual. Even though the government agency presented the warrant to the person in charge of the office upon commencing the search and seizure, if any items owned by any other person in the office are to be seized, the warrant must be shown to all relevant persons.⁵
2. The scope of the search and seizure must be limited to the suspected crime, taking into account that printing or copying of any electronic storage devices, such as a USB flash drive, is considered to be part of the search and seizure process initiated by a single warrant. And the right to participate in the copying, searching, and printing of the seized data should be guaranteed to the person subject to the search and seizure and his/her counsel.⁶
3. In addition, on site, a detailed list of each file and item seized must be issued immediately after the search and seizure is over, in order to provide the person subject to the search and seizure an opportunity to exercise his/her rights, including filing an appeal for any violation of law during the search and seizure.⁷

In an earlier decision, the Supreme Court, in 2017, held that the government agency enforcing a search and seizure warrant must show the warrant to the person subject to the search and seizure. The Court reasoned that the purpose of such a showing is so that the person subject to the search and seizure can check whether the warrant was properly issued by a court judge, and that the required elements/items⁸ are expressly contained in the warrant.⁹

⁵ See Supreme Court Judgment 2008Do763 dated March 12, 2009.

⁶ See Supreme Court Judgment 2011Mo1839 dated July 16, 2015

⁷ See Supreme Court Judgment 2017Do13263 dated February 8, 2018.

⁸ E.g., the offense, the place, person, or items to be searched.

⁹ See Supreme Court Judgment 2015Do12400 dated September 21, 2017.

What Companies Should Know

With greater digitalization of business and individual activities, the need from government side to search and seize digital devices has increased dramatically. However, laws and the government's practical handling are lagging behind current realities to tackle the various and evolving legal and privacy issues arising out of such trends.

Consequently, corporations sometimes do not receive or exercise full legal rights when they become subject to a sudden search and seizure by government authorities. Companies sometimes do not have the opportunity to participate during the whole procedure, or to fully review the warrant, or to have the assistance of their counsel. Further, it can be sometimes difficult for corporations to understand the proper context, the reasons, or the scope of the search and seizure to which they are subject.

Thus, it would be prudent for companies to understand the trends we are seeing from the recent Supreme Court decisions, including the above-mentioned decision, and if and when necessary, request and receive prompt assistance of counsel.

About Shin & Kim's Criminal Defense Litigation Practice:

Our Criminal Defense Litigation Practice Group continues to strengthen its capabilities through the addition of various former government officials, including former high-ranking prosecutors.

In 2019, the former Prosecutor General of Korea, Mr. Jin Tae KIM, joined Shin & Kim. In addition, the former Deputy Chief Prosecutor of the Goyang Branch of Uijeongbu District Prosecutors' Office, Mr. Ho-Chul SHIN, and Mr. Kitae PARK, a former prosecutor in the Seoul District Public Prosecutors' Office also joined the firm.

In the first quarter of 2020, Ms. Noh-Kong LEE, the first female Deputy Chief Prosecutor of the Seoul Central District Prosecutors' Office, and Mr. Young-Jae LEE, a former Executive Officer of the Korean National Police Agency have been recruited.

Should you have any questions or if we can be otherwise helpful, please do not hesitate to contact the professionals listed on this communication.

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