TENTH CIRCUIT

Legal Advisor

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CONSENSUAL SEARCHES OF HOMES

BY MIKE CUSICK

The consensual search is probably the most common tool an officer has to conduct the search of a home absent probable cause for a search warrant. Even if a defendant is arrested in his home, the search is normally limited to the area within his reach. The consensual search allows a much broader exploration. It is important to remember that in a consensual search, the individual is waiving his constitutional rights protecting him from unreasonable searches and seizures. Therefore the burden is on the prosecution, at a hearing where the defendant seeks to have the evidence suppressed, to prove that the consent was freely and voluntarily given.

The general rule is that a consent to search must be voluntary and the person giving the consent must have the authority to do so, or appear to have the authority. See *United States v. Matlock*, 94 S. Ct. 988 (1974). In *Matlock*, the United States Supreme Court recognized that co-habitants, who have joint access, common authority over, or other sufficient relationship to premises or property, may consent to a search.

In general, people living at a home may consent to a search. Their length of stay at the home is not as important as their ability to have access to the residence. If there is a certain room or area where one occupant has exclusive control, other occupants cannot consent to a search of the area or room exclusively controlled by another. The case law is clear that landlords and motel/hotel employees cannot consent to the search of the home or room under the control of a tenant or guest.

In *Saavedra v State*, 622 So.2d 952 (1993), the Florida Supreme Court considered the issue of whether a minor who shares a home with a parent may grant consent to search the home. The Court said that the test is whether the officer has a reasonable belief that the minor shares joint authority over the home with a parent. Factors to be considered include the minor's age, maturity and intelligence, whether the minor had permission to allow others to enter the home, whether the minor has a key to the home, and whether the minor shared common household duties with the parent. In *Saavedra*, the Court suppressed the evidence obtained during the search, finding that the officer did not inquire into any of these factors before conducting the search.

Another issue that arises on some occasions is whether a search may be conducted when one

occupant consents to the search, but another occupant refuses to consent. In *Silva v. State*, 344 So.2d 559 (1977), a girlfriend consented to the search of jointly occupied premises while the boyfriend denied the request from law enforcement. The Florida Supreme Court held that officers may not conduct a search where one occupant refuses to grant consent. This principal was followed in *Smith v. State*, 465 So.2d 603 (1985). Smith refused to allow officers to search his home. Officers then spoke to his sister, who lived with him. She consented to a search of the home. A panel of the Third District Court of Appeal ruled that the evidence obtained during the search should be suppressed since one of the occupants of the home had refused to consent to the search.

Recently, an exception to this general rule was recognized by the Fourth District Court of Appeal. In *State v. S.B.,* 758 So.2d 1253 (2000), police had information that S.B., a minor, was selling drugs and weapons. He was arrested by law enforcement after he was observed selling cannabis. He refused a request by law enforcement to search his room. After informing S.B.'s father of the arrest, the father consented to a search of S.B.'s room. While S.B. lived with his mother, the father owned the home and had a key to it. The Court, after reviewing similar cases from other state and federal courts, decided to follow the clear trend which recognized the right of a parent to grant consent to search a minor child's bedroom over the objection of the child.

In closing, law enforcement should follow these guidelines in obtaining consent to search a home:

1. Make sure the consent is knowingly and voluntarily obtained. The question seeking consent should be phrased in a manner making it clear that the person can refuse. It must be clear that the request is just that and is not a command or order.
2. While a signed consent form is not required, it is great evidence to rebut a defendant's later claim that he did not consent to the search.
3. Identify the individual's relationship to the home. Does the person live there? Does the person have authority to consent to the search? Are there any areas in the home that are exclusively possessed by someone else?
4. If the person is a minor, find out the minor's age. Determine, through questioning, the minor's maturity and intelligence. Does the minor have authority to admit others? Does the minor have a key to the home? Does the minor share household duties, such as babysitting younger siblings or keeping up the house? The courts will require clear and convincing evidence of authority and voluntary consent where a minor is involved.
5. If consent is withdrawn during the search, or if another occupant objects to the search, discontinue searching. If probable cause developed during the initial search, secure the home and obtain a search warrant.

ALL UNDERCOVER PROSTITUTION CASES MUST BE AUDIOTAPED OR VIDEOTAPED

In the future, the State Attorney's Office will require that transactions involving undercover prostitution cases be audiotaped or videotaped so that the eventual trier of fact can hear and, if possible, see the transaction take place. This policy will protect individual officers and make the cases easier to prove. While there may be rare exceptions to this policy, the general rule will be that the prosecution will not proceed without the tape.

********** FROM THE COURTS **********

EVIDENCE WAS SUFFICIENT TO ESTABLISH VALUE FOR GRAND THEFT

The defendant was charged with grand theft. At trial, the victim testified that the defendant took a two or three year old 25-inch television which was replaced for $360, a three year old video camera purchased for $600 and replaced for $499, shoes costing $65, a piggy bank containing about $50, and jewelry, one item of which was a four year old tennis bracelet purchased for $2500. The defendant was convicted as charged. On appeal, the defendant argued that the state had not provided sufficient evidence of value. The Fifth District rejected this argument and affirmed, holding that the minimum value necessary was established by the number of items stolen, their newness, and their individual purchase prices. *Sylvester v. State*, 25 FLW D2291 (Fla. 5th DCA Sept.22, 2000).

FIRST APPEARANCE JUDGE MAY ALWAYS CHANGE BOND SET ON A WARRANT

The defendant was arrested on a warrant which set a $20,000 bond. At first appearance, the judge determined that a lesser bond would be appropriate but ruled that he was not authorized to modify the bond because of an administrative order which allowed the judge placing a bond on a warrant to provide that it could not be changed at first appearance. The defendant sought review of the administrative order in the Fifth District, and the Fifth District quashed the order. On appeal, the Supreme Court affirmed the Fifth District, holding that in the case of an arrest warrant, as opposed to a capias, the first appearance judge may not be precluded from setting what he or she views as a reasonable bond. *State v. Norris*, 25 FLW S714 (Fla. Sept. 28, 2000).

MERE ODOR OF ALCOHOL WILL NOT SUPPORT ORDERING A BLOOD TEST

The defendant was charged with DUI and filed a motion to suppress the results of a blood test. The facts upon which the motion was based were that the defendant was involved in an accident which rendered him unconscious. Although there was no evidence that he had caused the accident, an officer ordered that blood be drawn from him while he was still unconscious because the officer smelled the odor of alcohol on his breath. The trial court granted the motion, and on appeal, the Fourth District affirmed, holding that the mere odor of alcohol on a driver's breath is insufficient to give an officer the reasonable belief that the driver is under the influence necessary to order a blood test. *State v. Kliphouse*, 25 FLW D2309 (Fla. 4th DCA Sept. 27, 2000).

ATTEMPTED SECOND DEGREE MURDER IS A CRIME IN FLORIDA

The defendant was convicted of attempted second degree murder. On appeal, he argued that the crime of attempted second degree murder does not exist in Florida. The Supreme Court rejected this argument and affirmed. *Brown v. State*, 25 FLW S792 (Fla. Oct.5, 2000).

STATE HAS OBLIGATION TO DISCLOSE CHANGES IN WITNESS'S STORY TO DEFENSE

The defendant was charged with second degree murder. Prior to trial, the state provided the name of a witness in discovery. In that witness's statement to police and at her deposition, she said that she had not seen the shooting of the victim by the defendant. However, at trial she testified that she had seen the shooting and acknowledged telling the police of the change in her story about a month before the trial. Over defense objection, the court allowed the testimony and did not hold a *Richardson* hearing to determine if there had been a discovery violation. The defendant was convicted as charged. On appeal, the Supreme Court reversed, holding that the state's non-disclosure of a change in a witness's statement can constitute a discovery violation. *State v. Evans*, 25 FLW S744 (Fla. Oct. 5, 2000).

GAINING ENTRY THROUGH SUBTERFUGE IN ORDER TO COMMIT A CRIME IS STILL BURGLARY

The defendant was charged with burglary. At his trial, the evidence established that he obtained entry to the victims' home by the subterfuge of needing to use their bathroom. He then pulled a gun on them, tortured them, and robbed them. He was convicted as charged. On appeal, the Third District affirmed, holding that the consensual entry into a dwelling with the intent to commit a crime, when obtained by subterfuge, is a burglary. *Alvarez v. State*, 25 FLW D2379 (Fla. 3d DCA Oct. 4, 2000).

M E M O R A N D U M

TO: **All law enforcement agencies in Polk County**

FROM: **Jerry Hill, State Attorney**

RE: **Change in procedure for copying audio and video tapes**

In the past when a copy of a audio or video tape was needed for the prosecution, an investigator from our office would come to the evidence room, check out the tape and copy it. Because of the volume of investigative requests for such material, that procedure will no longer be possible. In the future, the trial assistant will send a written request to the evidence custodian requesting a copy of the tape. The evidence custodian should return a copy of the tape with a copy of the request to the trial assistant.

Tenth Circuit
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