TENTH CIRCUIT

Legal Advisor

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WHO IS THAT GIVING YOU CONSENT TO SEARCH?

BY PAUL BUEKER

Hypothetical: You are investigating an individual whom you suspect to be trafficking in narcotics. You discover through your investigation that he may have a substantial amount stashed at a storage unit. The renter of the storage unit on the rental contract is someone other than the suspect. You go to this individual and she tells you that the suspect gave her money, told her to rent the unit and he pays the monthly rent. She also tells you that he put a padlock on the unit, that she does not have a key for it, and further that she has never even been to the unit. You ask her for consent to search the unit and she signs a consent waiver form allowing the search. A trafficking amount of narcotics is found in the unit and the suspect is charged. Can this person give you valid consent to search the unit?

As a general rule in Florida, searches without a warrant are illegal. Warrantless searches may be legal if there are certain circumstances present such as: exigent circumstances, search incident to arrest, inventory search, or consent to search. Law enforcement can search property if the person who has authority over the property gives voluntary consent to search. Sometimes the person who may have authority over the property to be searched is different than the suspect or the person who is eventually charged. Often, more than one person has authority over the property, for example roommates.

Third party consent is the legal term used to describe situations where an individual gives consent to search property which results in incriminating evidence against another person. A classic example is when a mother gives consent to search her son's bedroom and bedroom furniture resulting in drug charges against the son.

Law enforcement officers must take special precautions when they suspect that an individual is giving consent to search property that may result in someone else being charged with the fruits of the search. The first precaution that needs to be taken is to know identity of the person giving you consent to search. Details of the person giving consent need to be documented so that months later in court, this person can be located and called to testify. Details concerning the voluntary nature of the consensual search should also be documented so that months later in court when this person changes her mind because her son is now in trouble, we can effectively rebut her new testimony. A signed consent form is some of the best evidence we can present in court months later.

The second and perhaps even more important precaution is that the relationship of the consenting person to the property to be searched needs to be investigated. Questions need to asked of the individual to determine whether the person has authority over the property to be searched. The law is that only that person who has common authority over the property to be searched can give valid consent to search it. This means that the person must have the ability to enter the property at will and exercise control over the property or use the property. It is not enough that the person owns the property.

Case law has repeatedly shown that simply owning property on paper does not give that person the right to consent to search of that property. A hotel owner, or night clerk, cannot give consent to search a hotel room which is rented to someone, even if the tenant is temporarily absent. A condo owner, who has the right to enter and inspect his property that he has rented out, cannot give consent to search property which is currently rented. Parents who helped an adult child buy a house and who may be on the deed cannot give consent to search the house if they don't live there, don't have a key, and don't have the right to enter and leave the house without the child being there. A roommate cannot give consent to search another roommate's bedroom if the roommate does not have the authority to enter and exercise control over that bedroom.

It is also important to investigate the person giving consent because sometimes it is later discovered that the information given was not accurate. What if, months later, it is discovered that the person who granted consent to search claiming that they had authority over the property was mistaken or worse yet was untruthful. The courts won't necessarily suppress the search depending upon whether the law enforcement officer asked enough questions of the person. It is important that lots of questions are asked so that if it is later found that this person couldn't give valid consent that it was not our fault but that consenting person's fault.

Some of the questions that need to be asked are: What is your relationship to the suspect? Do you own the property? Do you rent the property to other people? How often do you enter the property in question? Do you use the property whenever you want or do you need permission from someone else? How do you use the property? Are you allowed to exercise control over the property? These are the types of questions to be asked that will protect us later.

Please remember that, if the defendant refuses to give you permission to search, you cannot go to the defendant's spouse, friend or roommate to obtain permission. If you feel strongly that the defendant is not going to consent to the search, you may choose not to ask the defendant but rather to seek consent from the spouse, friend or roommate.

Finally, to address the hypothetical, this was a real case where the judge suppressed the evidence found in the storage unit. He stated in his written order "the authority which justifies the third party consent does not rest upon the law of property but rests rather on mutual use of the property by persons generally having joint access or control for most purposes." Because the renter of the unit did not have access or control of the unit she did not have the right to consent. In hindsight, law enforcement officers could have done nothing different because there was not yet probable cause to get a warrant to search. There was the reasonable belief that this person who rented the property could give consent. Granted it is a little unusual situation but it will come up again.

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

OFFICER'S TRAINING AND OBSERVATIONS MADE CHEMICAL ANALYSIS UNNECESSARY

The defendant was charged with possession of marijuana. At his trial, the arresting officer testified that based on his training, his four years of experience handling marijuana, the form, odor and appearance of a cigar found in the defendant's car, and the defendant's admissions, the cigar contained marijuana. The court then admitted the cigar into evidence over the defendant's objection. The defendant was convicted as charged, and on appeal, the Fifth District affirmed, holding that chemical or scientific evidence is not always necessary to prove that a particular substance is an illegal drug. *Robinson v. State*, 27 FLW D968 (Fla. 5th DCA Apr. 26, 2002).

OFFICERS' TESTIMONY MADE CRITICAL EVIDENCE ADMISSIBLE

The defendant was charged with aggravated battery with a deadly weapon. At his trial, the evidence established that he hit his wife with a beer bottle. Over defense objection, the state introduced a 911 call made by his wife about an hour after the attack in which she said her husband was beating up on her. Deputies who responded to the call testified that they found her running down a road with a bloody towel held to her head. They described her as visibly frightened, upset, and crying. The defendant was convicted as charged. On appeal, the First District affirmed, holding that under the circumstances of the case, the excited utterance exception to the hearsay rule applied even though the declarant's statement was made an hour after the attack. *Werley v. State*, 27 FLW D862 (Fla. 1st DCA Apr. 16, 2002).

LOCATION OF FINGERPRINTS MADE THEM SUFFICIENT EVIDENCE TO PROVE DEFENDANT'S GUILT

The defendant, a juvenile, was charged with armed burglary and grand theft of a firearm. At his trial, the only evidence which connected him to the burglary was a fingerprint that belonged to him which was found on a kitchen window of the burglarized residence. The window was on the back side of the house and was seven feet above the ground. Its lock was broken as was a soap dispenser beneath it. The court found the defendant to be guilty as charged, and on appeal, the Fifth District affirmed, holding that the location of the fingerprint at the burglar's point of entry and in a place not generally accessible to the defendant made the print sufficient evidence to support the finding of guilt. *K.S. v. State*, 27 FLW D905 (Fla. 5th DCA Apr. 19, 2002).

TAKING AND RUNNING LICENSE TURNED ENCOUNTER INTO DETENTION

The defendant was charged with possession of cocaine and filed a motion to suppress. The facts on which the motion was based were that an officer was dispatched to check out a report of a person asleep in a van parked in an industrial area. When the officer located the van, he tapped on the window and woke the defendant. The defendant got out of the van and produced his driver's license at the officer's request for identification. The officer ran the license and discovered an outstanding warrant for the defendant. He arrested the defendant and later found cocaine on the seat of the patrol car in which he placed him. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fourth District reversed, holding that although the officer's initial contact with the defendant was a consensual encounter, the officer's action of keeping and running the license turned the contact into a detention which was not justified by a reasonable suspicion of criminal activity. *Baez v. State*, 27 FLW D839 (Fla. 4th DCA Apr. 10, 2002).

VICTIM'S REFUSAL OF TREATMENT DID NOT LET THE DEFENDANT OFF THE HOOK

In this Polk County case, the defendant was charged with DUI manslaughter. At his trial the evidence established that after the accident on which the charge was based, the victim was taken to a hospital where he refused to have a blood transfusion because of his religious beliefs. Thereafter he died. The defendant was convicted as charged, and on appeal the Second District affirmed, holding that a victim's failure to seek treatment is not an intervening cause which excuses a defendant from responsibility for a criminal act. *Klinger v. State*, 27 FLW D852 (Fla. 2d DCA Apr. 12, 2002>

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