



ROLL CALL REPORTER

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The Doctrine of Apparent Authority and the Search of Leased Premises

QUESTION: Are landlords generally authorized to consent to warrantless searches of leased premises?

ANSWER: No. Generally, a landlord cannot consent to the search of his tenant's premises when the lease is still valid. However, based upon the circumstances, including those where the lease has been terminated or the premises abandoned, the landlord may have actual or apparent authority to consent to the search.

CASE: *Chad Eason Frobouck v. State of Maryland*
Court of Special Appeals of Maryland, Decided June 6, 2013

In this recent case, the Court of Special Appeals once again dealt with the issue of warrantless searched of leased premises. In April, 2009, Chad Eason Frobouck ("Frobouck") and his partner entered into a commercial lease with Scott Mapes, the owner of a shopping plaza in Maugansville, Maryland. Frobouck leased the building located at 18020 Maugans Avenue for a period of approximately one year, beginning April 15, 2009 and running through April 30, 2010. After that, the lease became month to month. Frobouck said that the building would be used for his business, a scanning and digital data storage firm. The lease provided in part that rent was due on the first of each month and that non-payment of rent for a period of five days past the first day of the month "shall constitute an event of default." In the event of a default, the landlord could, at any time thereafter, give written notice to the tenant describing the default and stating that the lease would expire on a date specified in the notice.

Frobouck failed to make the rent payment on August 1, 2010. On August 3, the landlord, Mr. Mapes, left voicemail messages on Frobouck's cellphone and on his partner's cellphone regarding the past due payment. When he called both men several days later, their cellphones had been disconnected. Emails sent by Mr. Mapes also went unanswered. The tenant in the building next to Frobouck's said that he had not seen him or his partner. So, the landlord assumed Frobouck had "cleared out and gone." On August 13, Mr. Mapes, acting in the belief that the lease had expired, assumed possession of the property. Before doing so, however, he failed to notify Frobouck "via postal mail or personal service of any default on the lease." Critically, such written notice was required by the terms of the lease. When Mr. Mapes tried to open the door, he found that the lock had been changed. He drilled the lock, entered the property, and discovered that it had been "trashed." He saw "lots of pot" inside of the building and immediately called the police.

Sheriff's Deputy Matthew Bragunier responded to the call and Mr. Mapes "invited" him inside of the building. Before he entered the building, Deputy Bragunier could smell an overwhelming scent of unburnt marijuana. After being invited inside, Deputy Bragunier saw numerous marijuana plants

in plain view. He exited the building and contacted the Narcotics Task Force (NTF). Agent Bryan Glines of the NTF arrived a short time later. When Agent Glines arrived, Deputy Bragunier explained what had taken place. Mr. Mapes also explained to the deputies why and how he had taken possession of the premises. Agent Glines then called the attorney/police legal advisor in his office. The attorney advised Agent Glines to have Mr. Mapes execute a consent to search form. Mr. Mapes signed the consent to search form.

A search was conducted, the evidence was seized, and Frobouck was charged with manufacturing marijuana. He filed a motion to suppress, arguing that the landlord's failure to provide the required *written* notice of the default prevented him, and subsequently the police, from legally entering the premises. The court disagreed and found that, although Frobouck did have standing to challenge the entry into the building, the person who first entered was not a State agent (in other words, Mr. Mapes was not a deputy sheriff or police officer). The court further found that the officers reasonably relied on Mr. Mapes' *apparent authority* to allow them into the premises. Consequently, the judge denied the motion and Frobouck was convicted. He appealed.

The Court of Special Appeals upheld the conviction. However, it first pointed out that, generally, a landlord cannot consent to the search of his tenant's property when *the lease is still valid*. In other words, a landlord's consent, standing alone, is usually not enough to render the search legal. Adding to the complexity of the issue, obtaining consent from a "third party" (person other than landlord or tenant) who has "common" or "apparent" authority over the premises may be enough to justify the search. Such person may not be an actual "tenant," but rather someone who uses the property with the consent of the tenant(s) and has joint access or control for most purposes. Here, based on the information they had, the officers reasonably believed that the landlord was the property owner in valid possession of the premises and had the authority to consent to the search. Thus, the search of the building and the seizure of the evidence in it were constitutional.

NOTE: The doctrine of apparent authority is not restricted to leased premises and officers must be aware that before concluding someone has "apparent authority" to allow a search, they must make some effort to critically assess the situation. In other words, the more questions, and the more information obtained, the better. Officers are not required to review the actual lease and its provisions; they can accept the representations of those who called them and those on the scene. A reviewing court will apply the "reasonable person" standard to determine whether a reasonable person in the officer's place would have concluded that the person seeming to have apparent authority actually had it. Establishing apparent authority is a fact-based inquiry and courts will give officers the benefit of the doubt as was done in this case. However, if the officers act on a mistake of law, such as a belief that all landlords have the right to allow police access, the resulting search will be deemed unconstitutional. Another issue in this case that was essentially ignored was the deputy's smelling unburnt marijuana coming from the building. The issue is whether the odor provided "exigent circumstances" to enter without a warrant and without permission from anyone. In a footnote, the court answered in the negative. There was no exigency because the building was vacant and, as a result, no "perpetrator" was actively engaged in a crime.

By John F. Breads, Jr., Director of Legal Services, Local Government Insurance Trust

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