



ROLL CALL REPORTER

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Issues to Consider in “Consent” Searches

QUESTION: Must a court accept an officer’s testimony as the critical factor in determining the validity of “consent” to search?

ANSWER: No. The voluntariness of consent to search is a heavily factual question, dependent not just on the searching officer’s testimony, but all of the circumstances bearing on consent.

CASE: *United States v. Jamaal Antonio Robertson*, Fourth Circuit Ct. of Appeals
Decided December 3, 2013

In this recent case decided by our federal appellate court, common issues related to “consent” to search during a street encounter were again front and center. The facts of the case showed that, on April 4, 2011, the Durham Police Department received a call reporting an altercation in the MacDougald Terrace neighborhood. The caller said that three African-American males in white t-shirts were chasing an individual who was holding a firearm. Officer Doug Welch drove to the area in his patrol car. After arriving, he approached a group of people who were standing near where the foot chase was reported. The group was apparently uninvolved in the chase, however, and was unable to give Officer Welch any information.

Officer Welch began to walk back to his patrol car. As he did, he noticed a group of six or seven individuals in a sheltered bus stop. Three of the individuals were African-American males wearing white t shirts. Jamaal Robertson was in the bus shelter but was wearing a dark colored shirt. Officer Welch approached the individuals to investigate. By this time, three or four other officers were also on the scene. Their patrol cars were parked nearby, adjacent to Officer Welch’s car. While the other officers spoke to the individuals wearing the white t shirts, Officer Welch focused on Robertson who remained seated in the shelter with his back against the shelter wall. Officer Welch stopped in front of Robertson, about ten to twelve feet away.

Officer Welch asked Robertson if he had anything “illegal” on him. Robertson did not reply. Officer Welch then waved Robertson forward in order to search him, while asking for Robertson’s consent to search at the same time. In response to the officer’s hand gesture, Robertson stood up, walked about six feet towards the officer, turned around, and raised his hands. During the search, Officer Welch recovered a firearm from Robertson’s waistband.

Robertson was indicted for illegal possession of a firearm. Prior to trial, he moved to suppress all the evidence seized during the search. He argued that he was simply obeying the officer’s order to stand up and move forward, and that he never “consented” to any search of his person. The trial court denied the motion. Robertson pled guilty but appealed the ruling on his motion to suppress.

The United States Court of Appeals for the Fourth Circuit reversed. The court ruled that , in determining whether “consent” is valid depends on a subjective viewing of the totality of the

circumstances, including things such as the officer's conduct, the numbers of officers present, the time of the encounter, and characteristics of the individual who was searched, such as age and education. Whether the individual searched was informed of his right to decline the search is a "highly relevant" factor.

Here, in applying the factors, the court found based solely upon the officer's testimony, that the Fourth Amendment had been violated. The court said the case turned on the difference between "voluntary consent to a request versus begrudging submission to a command." It found that Robertson's behavior was far more submission to a command rather than consent. The court based its conclusion on the number of officers present, the number of police cars in the immediate vicinity, and the number of holstered weapons. Further, prior to responding to Officer Welch, Robertson had seen the other individuals get "handled by" other officers. The court further found that the officer's initial questioning of Robertson was accusatory, not investigative, and that the officer essentially had blocked Robertson's exit and that waving him forward was much more of a command than anything else. Finally, Officer Welch admitted that he had never told Robertson that he had a right to refuse to be searched. In view of the totality of the circumstances, it was communicated to Robertson that he was not free to leave or to refuse the officer's request to search.

NOTE: Always keep in mind that the prosecution bears a heavy burden to prove consent. In this regard, "friendly conversation" rather than accusatory questions goes a long way in consent cases. The less coercive or intimidating the atmosphere, the more likely it is that valid consent will be found by the court. Also, if you have a written consent form, use it. In it, establish the suspect's age and level of education.

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