



CLAIMS BRIEF

Issue No. 43

March 2014

You Say Yes - I Say No Warrantless Consent Searches of Jointly Occupied Residences

A warrant is generally required for a search of a home. However, certain categories of permissible warrantless searches have long been recognized by the courts. Consent searches occupy one of these categories. Consent searches are an invaluable investigatory technique and a wholly legitimate aspect of effective police activity. The issue of who can give the police consent to search, however, is not always a simple one, especially when there is more than one occupant in a residence. It is the purpose of this Claims Brief to try to solve the legal puzzle and identify the hard and fast principles that officers in the field must apply.

Who can consent to a warrantless search of premises?

If there is just *one* occupant, the answer is simple: the occupant can consent to police entry and search of the premises. In other words, if I say yes, and I am the only one who can say yes or no, then yes wins. But what if I am not the only one who can say yes or no? Prior to 2006, it seemingly was unquestioned that police officers could search *jointly* occupied premises if just *one* of the occupants consented. It did not matter if the consenting occupant was or was not at the premises—the consent of one occupant was enough. But the issue of consent when there is more than one occupant has always complicated the issue and continues to do so today.

If I am at the premises and object to a warrantless search, can I override the consent given by another occupant who is also at the premises?

The decision in *Georgia v. Randolph*

In 2006, the Supreme Court of the United States recognized a narrow exception to the rule that the consent of just one occupant was sufficient to justify a warrantless search of a residence. In *Georgia v. Randolph*, the Court decided that the consent of one occupant was not enough *if there was another occupant physically present who objected to the search*. So, at least since 2006, if you say yes, and I say no, no wins (assuming that I am there at the time to voice my objection).

What if an occupant at the premises says yes, but another who is not at the premises tells the police no?

The decision in *Fernandez v. California*

It has been eight years since *Georgia v. Randolph* was decided. Now, in 2014, the issue of consent searches of jointly occupied residences has again attracted the attention of the Supreme Court. The issue this time is whether a joint occupant in police custody could override the consent to search given by another occupant who was still at the residence.

The Case: In the case of *Fernandez v. California*, police were searching for a gang member who had just assaulted and robbed another man in an alley. The responding officers were told by a witness that “the guy is in the apartment.” When officers looked toward the apartment building pointed to by the witness, they saw a man run through the alley and into the apartment building. A minute or two later, the officers heard sounds of screaming and fighting coming from an apartment in the building. Officers ran to the apartment and knocked on the door. Roxanne Rojas answered the door. She was holding a baby and appeared to be crying. Her face was red, and she had a large bump on her nose. The officers also saw blood on her shirt and hand from what appeared to be a fresh injury. Rojas told the police that she had been in a fight. Officer Cirrito asked if anyone else was in the apartment, and Rojas said that her 4-year old son was the only other person there.

At this point, Officer Cirrito asked Rojas to step out of the apartment so that he could conduct a “protective sweep.” That is when Walter Fernandez came to the door wearing only his boxer shorts. He appeared angry and said: “You don’t have any right to come in here. I know my rights.” Suspecting that Fernandez had assaulted Rojas, the officers removed him from the apartment and then placed him under arrest. The victim of the beating and robbery quickly identified Fernandez as the man who attacked him. Fernandez was taken to the police station for booking.

One hour later, Detective Clark went back to the apartment and informed Rojas that Fernandez had been arrested. He then asked Rojas for her consent to search the apartment. Rojas consented verbally and in writing. In the apartment, the police found gang paraphernalia, a butterfly knife, clothing that matched the description of the clothing worn by the robbery suspect, and ammunition. Officers also found a sawed-off shotgun.

Fernandez was charged under California law with robbery, infliction of bodily punishment on a spouse, cohabitant, or child’s parent, possession of a firearm by a felon, possession of a short-barreled shotgun, and felony possession of ammunition. Prior to his trial, Fernandez moved to suppress the evidence against him. The motion was denied and Fernandez entered a plea of guilty to two of the charges and was sentenced to fourteen years of imprisonment. Fernandez appealed the denial of his motion to suppress the evidence.

The Outcome: The California Court of Appeal upheld the trial court and Fernandez asked the Supreme Court to review his case. The Supreme Court agreed and issued its decision on February 25, 2014. In it, the Supreme Court also upheld the lower court, holding that a joint occupant of a residence who is *absent due to a lawful detention or arrest* “stands in the same shoes as an occupant who is absent for any other reason.” In other words, if you are not there to object, consent can be given by the occupant who is there, regardless of whether you are in police custody or not. The only caveat is that, if the absent joint occupant is in police custody at another location, his/her detention or arrest must be lawful. This prevents the police from unlawfully removing a joint occupant from a residence simply to obtain consent from the occupant who stays behind.

The Legal Principles to Follow

All of this is one more example of just how difficult a police officer’s job is. How can officers be expected to have at their fingertips legal principles that have taken an army of judges and lawyers decades to establish? The hard answer is that police officers *have* to know these principles because it is their conduct, and not the conduct of judges, that is scrutinized by the courts to determine whether or not the Fourth Amendment has or has not been violated. From

what we have discussed, one better practice measure is to obtain both *verbal and written* consent to search from an occupant. As to the legal principles, they are set forth below. Remember, all of these principles apply equally to whatever term is applied to a person having “common authority” over the premises, whether the term is occupant, resident, renter, lessee, roommate, tenant, etc. Here are the principles:

1. An occupant at the premises can give police consent to search or refuse such consent.
2. If there is more than one occupant, *i.e.*, joint occupants, an occupant at the premises can give police consent to search. The police do not need the consent of every occupant who is present. And, obviously, an occupant who is not present plays no role.
3. If there is more than one occupant, and one or more occupants at the premises consent, but one or more occupants who are also present expressly object, the police do *not* have consent to search.
4. If a joint occupant is absent from the premises because he/she is lawfully detained by police or under arrest, and that occupant expressly objects to a warrantless search, the police can still gain consent from an occupant at the premises.
5. The reasonableness of police conduct is the test under the Fourth Amendment. Despite confusing and changing circumstances, officers must act reasonably under the circumstances presented.

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