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Constitutional Law: Search and Seizure in California: Consent Notes and

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CONSTITUTIONAL LAW: SEARCH AND SEIZURE IN CALIFORNIA: CONSENT.

As the volume of cases involving the legality of search and seizure has become more staggering, the question of whether the evidence obtained in a search is admissible appears as the overriding issue in many criminal cases. The solution to the problem, however, is clouded by the necessities of law enforcement and a few cases of over-zealous police work. In many of these cases the prosecution relies on the fact that the search was conducted with the voluntary consent of the accused. For it is not necessary to show that the search was reasonable as incident to a proper arrest when the search was made with the defendant's consent.[1]

The question of whether consent has been given to a search and seizure is a close one. It is the purpose of this note to briefly demonstrate the closeness of the question and under what circumstances the courts have felt that sufficient consent has been given.

A survey of the cases reveals three main problem areas: (1) the voluntary character of the consent to a search, (2) where consent has been given by one other than the defendant, and (3) the purpose of the search as related to the extent of the consent given.

In order for consent to vitiate an otherwise unreasonable search, the consent must be given voluntarily.[2] The question of voluntariness frequently arises when there is a doubt whether the consent was given freely or in response either to an express or implied assertion of authority. In *People v. Michael*,[3] three police officers, who identified themselves as such, were admitted to the defendant's home by her mother and, pursuant to their query whether she had any narcotics, defendant and her mother produced narcotics and hypodermic equipment, whereupon the defendant was arrested. The court, taking into consideration that the appearance of four officers at the door may be a disturbing experience to a distraught or timid woman, nevertheless stated that to hold as a matter of law that the mother's consent was given in response to an unlawful assertion of authority would interfere with a policeman's reasonable performance of his duty. Furthermore the court held that this question of voluntary consent was a question of fact for the trial court.

Another common situation in which the question of voluntariness is frequently litigated occurs when the defendant is under arrest and in actual physical custody when the consent is obtained by the searching officers. The courts have generally held that arrest, in itself, is not such an assertion of authority as to make an otherwise free and valid consent involuntary.[4] However, in *People v. Wilson*,[5] the accused was arrested for vagrancy when he was actually suspected of bookmaking. After the arrest the officers obtained permission to search the defendant's automobile. The court held that the defendant had been improperly arrested; that consent given after a person has been improperly arrested, and without informing him of his legal right to refuse, was not real or proper consent.

Not only can the necessary voluntary consent be given verbally, but the courts are agreed that certain conduct may be sufficient to convey the necessary expression of consent to the searching officers.[6] In *People v. Smyre*,[7] the defendant opened the door three-quarters of the way and then stepped back and set down on a bed. The court held that these actions constituted sufficient consent.

Often, either because the suspect has fled, or has been arrested, the consent to search

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[1] People v. Gorg, 45 Cal.2d 776, 291 P.2d 469 (1955). See also People v. Melody, 164 Cal. App.2d 728, 331 P.2d 72 (1958).

[2] People v. McGree, 196 Cal.App.2d 458, 16 Cal.Rptr. 625 (1961).

[3] 45 Cal.2d 751, 290 P.2d 852 (1955).

[4] People v. Luyan, 141 Cal.App.2d 143, 296 P.2d 93 (1956).

[5] 145 Cal.App.2d 1, 301 P.2d 974 (1956).

[6] People v. Burke, 47 Cal.2d 45, 301 P.2d 241 (1956). The defendant was suspected of using narcotics. When the officers knocked on the door, the defendant opened the door and walked back into the center of the room. The court found that this was sufficient consent to validate any possible

the defendant's automobile (or other property) is obtained from some other person. If such other person has apparent authority, consents to entry, and the entry is made in good faith, it is not unlawful.[8] The courts have held that even consent given by a defendant's mistress is sufficient to authorize a valid and legal search.[9]

In *People v. Hughes*[10] the court discussed a situation in which the husband was in bed and asleep when the wife permitted officers to enter and search their premises. The defendant, in claiming that the wife's consent was insufficient, relied on *People v. Carter*,[11] where the court discussed the extent of the wife's authority to permit people to enter the family home in the absence of the husband. The court created the implication that she has no such authority when the husband is home. The *Hughes* court, however, declared this implication to be dicta and stated that in a fact situation similar to that in *Carter* a finding of lack of consent might be upheld. The court took the view that since the wife had apparent authority and control of the house, her consent was sufficient.

The courts have also held that anyone in joint occupancy of the premises may give consent to search which is binding upon the co-tenant.[12] However, there is no reasonable basis for a general assumption that every person who happens to be in the house has authority to give permission to do acts on the premises which the searching officers could not legally do without sufficient consent.[13]

It is clear that if the defendant is a tenant of an apartment house, as distinguished from a private home there must be evidence to give the officer reason to believe that the manager or other person has authority to consent to the officer's entry.[14]

A difficult question arises when the officers are given consent to search for one purpose, and discover evidence of a different nature than that ostensibly sought. In *People v. Roberts*[15] officers discovered stolen property in the defendant's apartment. The defendant objected to the admission into evidence of the seized property, claiming that the search warrant was issued on evidence which was the product of an illegal search. The illegal search complained of took place when the officers came to question the suspect. As they stood outside the apartment, they heard moans and other sounds which indicated that someone was in distress in the apartment. The manager of the apartment house let the officers into the defendant's room. While the officers searched for the injured person, one of the policemen picked up a radio, checked the serial number and found it to be stolen property. It was upon this evidence that the subsequent search warrant was issued.

Even though there was no injured person inside the apartment, the court stated that while the officers knew the manager did not have the authority to let them into the apartment, they did have the right to go into the rooms to search for a wounded or injured person. While stating that when the right to search is obtained ostensibly for one purpose, it may not be used in reality for another, the court held that the officers

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unreasonable search. See also People v. Baca, 198 Cal.App.2d 391, 17 Cal.Rptr. 779 (1962); People v. Holland, 148 Cal.App.2d 933, 307 P.2d 703 (1957).

[7] 164 Cal.App.2d 833, 330 P.2d 67 (1958).

[8] People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513 (1956). Evidence was obtained in a murder trial through a search of the defendant's room without a search warrant. Permission for the search was given by the caretaker and the owner of the property.

[9] People v. Howard, 166 Cal.App.2d 638, 334 P.2d 105 (1959). See also People v. Cunningham, 188 Cal.App.2d 606, 10 Cal.Rptr. 604 (1961); and People v. Smith, 183 Cal.App.2d 670, 6 Cal. Rptr. 866 (1960) in which the court held that the defendant's mistress had sufficient apparent control and possession of the premises to give a valid consent which was binding on the defendant.

[10] 183 Cal.App.2d 107, 6 Cal.Rptr. 643 (1960).

[11] 48 Cal.2d 737, 312 P.2d 665 (1957).

[12] People v. Ransome, 180 Cal.App.2d 140, 4 Cal.Rptr. 347 (1960). See also People v. Silva, 140 Cal.App.2d 791, 296 P.2d 942 (1956).

[13] People v. Carswell, 149 Cal.App.2d 395, 308 P.2d 852 (1957).

[14] People v. Roberts, 47 Cal.2d 374, 303 P.2d 721 (1956).

[15] 47 Cal.2d 374, 303 P.2d 721 (1956).

did not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered.[16]

Thus it has been held that under certain circumstances, evidence obtained while "frisking" a suspect is admissible as obtained in a reasonable search.[17] The courts hold that an officer has the right to protect himself from attack with a hidden weapon, and that other evidence obtained while conducting such a search is admissible.[18] It has also been held that evidence found while disrobing a patient in a hospital, preparatory to medical treatment, is admissible.[19]

From this brief survey of the cases, certain general principles can be formulated which, though easy to state, are sometimes difficult to apply in the particular case. The courts have continued to hold that the consent must be voluntary as opposed to submission to authority. And they have established rules as to who, other than the defendant, may give a binding consent. It would seem, however, that in many of the cases considered, the courts have placed a great temptation in the way of law enforcement officials. For in their zeal to protect the public, police officers may be tempted to invent facts allowing them to search defendants' premises without all of the safeguards laid down by the courts and the constitution.

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[16] *Id.* at 379, 303 P.2d at 723.

[17] People v. Collier, 169 Cal.App.2d 12, 336 P.2d 582 (1959). See also People v. Okamota, 177 Cal.App.2d 407, 2 Cal.Rptr. 182 (1960); People v. Wright, 153 Cal.App.2d 35, 313 P.2d 868 (1957).

[18] People v. Collier, *supra* note 17.

[19] People v. Gonzales, 182 Cal.App.2d 276, 5 Cal.Rptr. 920 (1960).