Chapter 8—
Searches with Consent

Introduction

The general rule under the Fourth Amendment is that searches must be with a warrant for the search to be valid. An exception is searches with consent. This exception is important because it is used every day by the police in a variety of situations. The requests, "May I search your car?" or "Would you mind if I come in and search your apartment?" or "May I look around?" are routinely heard by the public from the police.

To be valid, consent must be voluntary and intelligent, based on a totality of circumstances. "Voluntary" means the consent was not forced or coerced; "intelligent" means the person giving consent must know what he or she is doing. Mere silence or failure to object to a search does not necessarily indicate valid consent. Written consent is not constitutionally required, but it goes a long way toward proving the validity of the consent if later challenged in court.

Aside from the need for the consent to be voluntary and intelligent, there are other important principles in consent searches. First, consent to enter a dwelling does not necessarily mean consent to search. If a container or closet is to be opened after entry, for example, another consent must be sought by the police. Second, warning the occupant that he or she has the right to re-fuse permission is not necessary for the consent to be valid. Third, the scope of an allowable search depends on the type of consent given. For example, the consent to search a garage does mean consent to search an adjoining house or barn. In a recent case, the Court held that a warrantless search of a shared dwelling over the express refusal of consent by a physically present resident violates the Fourth Amendment.

The following types of consent are valid, if voluntary and intelligent: consent given by a wife or husband, by a roommate (as to areas used in common), by the driver of a vehicle (even if he or she is not the owner of the vehicle), and by high school administrators. On the other hand, consent given by the following are not valid: consent given by a child, a landlord, a lessor, a hotel clerk by college and university administrators, and business employees.

The leading cases briefed in this chapter on searches with consent are *Bumper v. North Carolina, Schneckloth v. Bustamonte*, and *Georgia v. Randolph*.

Stoner v. California
376 U.S. 483 (1964)

CAPSULE: A hotel clerk cannot give consent to search the room of a hotel guest.

FACTS: Two men were described to the police by eyewitnesses after a robbery of a food market in California. Soon thereafter, a checkbook

belonging to Stoner was found in an adjacent parking lot and turned over to the police. Checkbook stubs indicated that checks had been made out to a hotel in a nearby city. Upon checking the records in that city, the police learned that Stoner had a criminal record. The police then obtained a photograph of Stoner. Eyewitnesses identified the man in the photograph as one of the men involved in the robbery. Without an arrest or search warrant, the police went to the hotel where the suspect resided. The hotel clerk notified the police that the suspect was not in his room, but consented to open the room for them. After gaining entrance to the room, the police made an extensive search and discovered articles like those described by the eyewitnesses to the robbery. Stoner was arrested two days later in another state and extradited to California. He was charged with and convicted of armed robbery.

ISSUE: May a hotel clerk give valid consent to a warrantless search of the room of one of the occupants? NO.

SUPREME COURT DECISION: A hotel guest is entitled to protection against unreasonable searches and seizures. This cannot be waived by the consent of a hotel clerk.

REASON: "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed . . ."

CASE SIGNIFICANCE: A hotel guest has a reasonable expectation of privacy that cannot be waived by the hotel management simply because the management has the key. A wife can consent to the search of a house, parents can consent to the search of a child's room (with some exceptions), or a roommate to the search of a dormitory room; but a hotel clerk cannot consent to a search of the room of a guest. Note, however, that if the police want to arrest a suspect in a room, the fact that access to the room was made by borrowing a key from the hotel clerk does not invalidate the arrest. The rule on consent, therefore, differs in arrest and in search cases.

Bumper v. North Carolina
391 U.S. 543 (1968)

CAPSULE: Consent obtained by deception through a claim of lawful authority, which did not in fact exist, is not voluntary. A search conducted by virtue of a warrant cannot later be justified by consent if the warrant turns out to be invalid.

FACTS: During a rape investigation, and prior to his arrest, officers went to Bumper's home where he lived with his grandmother. One of the four officers

went to the door and was met by the grandmother. When the officer announced that he had a warrant to search the house (although he did not), the grandmother responded "Go ahead" and opened the door. The officers found a rifle in the kitchen that was seized and entered as evidence. Bumper was subsequently charged with and convicted of rape.

ISSUE: Can a search be justified as lawful on the basis of consent when the alleged consent is given only after the official conducting the search asserts possession of a warrant? NO.

SUPREME COURT DECISION: The alleged consent in this case was not voluntary because it was obtained by deception through a claim of lawful authority that did not exist. A search conducted by virtue of a warrant cannot later be justified by consent if the warrant turns out to be invalid.

REASON: "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.... When a law officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is [rife] with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."

CASE SIGNIFICANCE: Consent to search is not valid if permission is given as a result of police misrepresentation or deception. In this case, the police said they had a warrant when, in fact, they did not. Lower courts are divided on the related issue of whether consent is valid if the officer does not have a warrant but threatens to obtain one. That issue has not been resolved by the Supreme Court.

Schneckloth v. Bustamonte
412 U.S. 218 (1973)

CAPSULE: Voluntariness of consent to search is determined from the totality of circumstances, of which consent is only one element.

FACTS: An officer on routine patrol stopped an automobile containing Bustamonte and five others after observing that a headlight and the license plate light were burned out. When the driver could not produce a driver's license, the officer asked if any of the others had any type of identification. Only one, Joe Alcala, was able to produce a driver's license. He explained that the vehicle belonged to his brother. The men were ordered out of the car, and

the officer asked Alcala if he could search the car. Alcala replied, "Sure, go ahead." Prior to the search, no one had been threatened with arrest or given the impression they were suspected of any wrongdoing. Alcala assisted in the search by opening the trunk and glove compartment. During the search, the officer found three checks under the left rear seat that had been stolen from a car wash. Using the checks as evidence, Bustamonte was convicted of possession of a check with intent to defraud.

ISSUE: Is knowledge by a suspect of the right to refuse consent required for consent to a search to be valid? NO.

SUPREME COURT DECISION: Voluntariness of consent to search is to be determined from the totality of the circumstances, of which consent is one element. Knowledge of the right to refuse consent is not a prerequisite for voluntary consent.

REASON: "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, expressed or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent."

CASE SIGNIFICANCE: In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court said that the suspect must be made aware of the right to remain silent during questioning if responses to questions are later to be admissible in court. *Schneckloth* says that there is no such requirement in consent search cases. The suspect does not have to be advised that he or she has the right to refuse consent for the search to be valid. All that is required is that the consent be voluntary. The Court also said that "voluntariness is a question of fact to be determined from all the circumstances; and, while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent." The police must prove that consent is voluntary; however, unlike *Miranda*, where the police must say "you have the right to remain silent," the police in consent searches do not have to say "you have the right to refuse consent."

Florida v. Royer
460 U.S. 491 (1983)

CAPSULE: More serious intrusion of personal liberty than is allowable on mere suspicion of criminal activity taints the consent and makes the search illegal.

FACTS: Police observed an individual in Miami International Airport who fit a so-called "drug courier profile" of being young, nervous, casually dressed, with heavy American Tourister luggage, and paying for a one-way ticket in cash under an assumed name. Based on this information, the officers approached the suspect. Upon request, but without oral consent, Royer produced his airline ticket and driver's license with his correct name. When questioned about the discrepancy in names, Royer responded that a friend had bought the ticket under that friend's name. Without returning Royer's airline ticket or license, the officers then informed him that he was suspected of trafficking in narcotics and requested that he follow them to a room 40 feet away. Without consent, Royer's luggage was brought to the room. Although he did not respond to the officer's request to consent to a search of the luggage, Royer produced a key and opened one of the suitcases. Marijuana was found in the suitcase. When the suspect said that he did not know the combination to the other suitcase but that he did not object to its being opened, the officers pried open the suitcase and found more marijuana. Royer was then informed he was under arrest. He pleaded nolo contendere and was convicted of felony possession of marijuana.

ISSUE: Is evidence obtained through a consent search admissible in court if the initial detention of the suspect was without probable cause, and in violation of the Fourth Amendment? NO.

SUPREME COURT DECISION: At the time the suspect consented to the search of his luggage, "... the detention to which he had been subjected was a more serious intrusion of his personal liberty than was allowable on mere suspicion of criminal activity ..."; thus, the consent was tainted by illegality and could not justify the search.

REASON: "When the detectives identified themselves as narcotics agents, told respondent he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his airline ticket and driver's license and without indicating in any way that he was free to depart, respondent was effectively seized for purposes of the Fourth Amendment. At the time respondent produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity. What had begun as a consensual inquiry in a public place escalated into an investigatory procedure

in a police interrogation room, and respondent, as a practical matter, was under arrest at that time. Moreover, the detectives' conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry v. Ohio* line of cases."

CASE SIGNIFICANCE: Consent given after an illegal act by the police is not valid because such consent is tainted. For the consent to be valid, the police must be careful that no illegal act precedes it because once the illegal act is committed, consent cannot cure it. The only possible exception is if the taint has somehow been purged by an independent source, inevitable discovery, etc. In this case, however, consent did not purge the taint.

Illinois v. Rodriguez
497 U.S. 177 (1990)

CAPSULE: Searches in which the person giving consent has "apparent authority" are valid.

FACTS: After being summoned to a house, the police were met by Gail Fischer, who showed signs of a severe beating. She informed the officers that she had been assaulted by Rodriguez earlier that day in an apartment. Fischer and the police subsequently drove to the apartment of Rodriguez because she stated that Rodriguez would be asleep at that time and that she could let them into the apartment with her key so that they could arrest him. Several times she referred to the apartment as "our" apartment and stated that she had clothes and furniture there. She did not tell the police, however, that she was no longer living there. Upon entrance, without a warrant but with a key and permission provided by Fischer, the police saw in plain view drug paraphernalia and containers filled with cocaine. The officers seized these and other drug paraphernalia found in the apartment where Rodriguez was sleeping. Rodriguez was arrested and charged with possession of a controlled substance with intent to deliver. On appeal, the Circuit Court suppressed the evidence, holding that at the time Fischer consented to the entry of the apartment, she did not have common authority over it because she had actually moved out several weeks earlier.

ISSUE: Is a warrantless entry and subsequent search, based on the consent of a person whom the police believed to have possessed common authority over the premises, but who in fact did not have such authority, valid? YES.

SUPREME COURT DECISION: The warrantless entry of private premises by the police is valid if based on the consent of a third party whom the police reasonably believed to possess common authority over the premises, but who in fact did not have such authority.

REASON: The appellate court was correct in determining that Fischer had no common authority over the apartment; however, the State contended that even if she did not have the authority to consent, it should suffice to validate the entry that the law enforcement officers reasonably believed she did. Furthermore, the Fourth Amendment only protects against unreasonable searches, not searches performed without the owner's consent. The "reasonableness" clause of the Fourth Amendment "... does not demand that the government be factually correct in its assessment ..." Furthermore, "[t]he Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape."

CASE SIGNIFICANCE: This case reiterates the "apparent authority" rule in searches with consent. The rule says that consent given by a third party whom the police reasonably believe to possess common authority over the premises is valid even if it is later established that the person did not in fact have that authority. In this case, the girlfriend, who gave consent and provided the key, had moved out of the apartment. She led the police to the house and allowed them entry by using her key. She did not tell them that she no longer lived there. The officers reasonably believed that she had authority to give consent, hence the entry was valid, and the evidence subsequently obtained was admissible. It is important to note, however, that for the "apparent authority" rule to apply, the belief by the police must be reasonable, considering the circumstances.

Florida v. Jimeno
499 U.S. 934 (1991)

CAPSULE: Consent justifies the warrantless search of a container in a car if it is objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to open that container.

FACTS: A Dade County police officer overheard Jimeno arranging what appeared to be a drug transaction over a public telephone. The officer followed Jimeno's car and saw him make an illegal right turn at a red light. The officer stopped Jimeno to issue a traffic citation. After informing Jimeno why he had been stopped, the officer stated that he had reason to believe that Jimeno was carrying narcotics in his car and asked permission to search the car. The officer explained that Jimeno did not have to grant permission, but Jimeno stated that he had nothing to hide and gave consent to the search. Pursuant to the search, the officer found a kilogram of cocaine in a brown paper bag located on the floorboard of the passenger compartment. Jimeno was convicted of possession with the intent to distribute cocaine.

ISSUE: Does consent for the police to search a vehicle extend to closed containers found inside the vehicle? YES.

SUPREME COURT DECISION: "A criminal suspect's Fourth Amendment right to be free from unreasonable searches is not violated when, after he gives police permission to search his automobile, they open a closed container found within the car that might reasonably hold the object of the search."

REASON: "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? The question before us, then, is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is."

"The scope of a search is generally defined by its expressed object. In this case, the terms of the search's authorization were simple. Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. Trujillo had informed the respondent that he believed the respondent was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search the respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. 'Contraband goods rarely are strewn across the trunk or floor of a car.' The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor." [Citations omitted].

CASE SIGNIFICANCE: In an earlier case, *United States v. Ross*, 102 S. Ct. 2157 (1982), the Court held that when the police have probable cause to justify a warrantless search of a car, they may search the entire car and open the trunk and any packages or luggage found therein that could reasonably contain the items for which they have probable cause to search. This case reiterates that holding, although with a different twist.

The immediate issue in this case is whether it was "objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to open the particular container." The issue was not one of probable cause, but the scope of the suspect's consent to search. The Court concluded that the authorization to search given by the suspect to the police "extended beyond the car's interior surfaces to the bag, since Jimeno did not place any explicit limitation on the scope of the search and was aware that Trujillo [the officer] would be looking for narcotics in the car, and since a reasonable person may be expected to know that narcotics are generally carried in some form of container." The Court added that there is "no basis for adding to the Fourth

Amendment's basic test of objective reasonableness a requirement that, if the police wish to search closed containers within a car, they must separately request permission to search each container."

This case defines the extent of what the police can do in cases of searches based on consent. The police do not need specific consent to look at each container. The Court said that, in these cases, the Fourth Amendment is satisfied if, given the circumstances, "it is objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to open the particular container." Conversely, this depends upon what the police are looking for and the possibility that the item or items can be found in that container.

Georgia v. Randolph
547 U.S. 103 (2006)

CAPSULE: "... a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."

FACTS: After a separation between Randolph and his wife and her return to the household, the wife notified police of a domestic dispute where Randolph took their son away. When officers responded, the wife told them that her husband was a cocaine user. Shortly after the police arrived, Randolph returned. Randolph denied cocaine use, and countered that it was his wife who abused drugs. Later, the wife reaffirmed Randolph's drug use and told police there was "drug evidence" in the house. An officer asked Randolph for permission to search the house, which he unequivocally refused. The officer then asked the wife for consent to search, which she readily gave. She led officer to a bedroom that she identified as Randolph's, where officers found a section of a drinking straw with a powdery residue suspected to be cocaine. Officers then contacted the district attorney's office, who instructed him to stop the search and apply for a warrant. When the officers returned to the house, the wife withdrew her consent. The police took the straw to the police station, along with the Randolphs. After obtaining a search warrant, officers returned to the house and seized further evidence of drug use. Randolph was indicted for possession of cocaine.

ISSUE: Is a warrantless search of a shared dwelling valid when one occupant gives consent but another occupant who is present expressly refuses to consent? No.

SUPREME COURT DECISION: "We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by

a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."

REASON: In previous cases, the Court recognized the validity of searches based on voluntary consent of an individual who shares common authority over property to be searched. None of the co-occupant consent-to-search cases, however, included the circumstances of a second occupant physically present and refusing permission to search. "... it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions." "The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." "Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." "So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it."

CASE SIGNIFICANCE: Consent is an exception to the Fourth Amendment rule requiring probable cause and a warrant in search and seizure cases. This case resolves an issue that was not previously addressed by the Court: whether consent by an occupant of a dwelling over the expressed objection of another occupant authorizes the police to conduct a warrantless search. Previous U.S. Supreme Court cases held that one consent sufficed. Those cases, however, did not involve similar circumstances, as in this case where the other occupant, the husband, was present and specifically refused to give consent. In previous cases, the other occupant either was away or did not expressly refuse consent. In this case, the Court held the search invalid as to the occupant who specifically refused consent. The majority stated, however, that this ruling does not apply to instances when: (1) "the police must enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists," and (2) in cases where the purpose of the entry is "to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to occur, however much a spouse or other co-tenant objected." The Court also held that this ruling does not apply to cases where

the person giving consent is in a position of authority in a "recognized hierarchy," such as parent and child. Finally, the Court ruled that the police could not remove one of the occupants deliberately to prevent the person from refusing consent. Despite this ruling, other issues remain unresolved, such as: Must the police expressly inform all the occupants that they have a right to refuse consent? How is that consent expressed? Does silence mean consent or refusal? The safer practice is for police officers to make sure occupants of equal status in the house give their expressed consent and obtain that consent in writing.