Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Mastering Consent Searches

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134 S.Ct. 1126
Supreme Court of the United States

Walter FERNANDEZ, Petitioner
v.
CALIFORNIA.

No. 12–7822
|
Argued Nov. 13, 2013.
|
Decided Feb. 25, 2014.

Synopsis

Background: Defendant was convicted in the Superior Court, Los Angeles County, No. BA363324, William C. Ryan, J., of second degree robbery and willful infliction of corporal injury on a spouse, cohabitant, or child's parent. Defendant appealed. The California Court of Appeal, Suzukawa, J., affirmed, 208 Cal.App.4th 100, 145 Cal.Rptr.3d 51. After the California Supreme Court denied defendant's petition for review, certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

police could conduct warrantless search of defendant's apartment following defendant's arrest based on consent to the search by a woman who also occupied the apartment, abrogating *United States v. Murphy,* 516 F.3d 1117, and

defendant's objection to search, made at the threshold of the apartment, did not remain effective until he changed his mind and withdrew his objection.

Affirmed.

Justice Scalia filed concurring opinion.

Justice Thomas filed concurring opinion.

Justice Ginsburg filed dissenting opinion in which Justice Sotomayor and Justice Kagan joined.

****1127** *Syllabus*[*]

***292** Police officers observed a suspect in a violent robbery run into an apartment ****1128** building, and heard screams coming from one of the apartments. They knocked on the apartment door, which was answered by Roxanne Rojas, who appeared to be battered and bleeding. When the officers asked her to step out of the apartment so that they could conduct a protective sweep, petitioner came to the door and objected. Suspecting that he had assaulted Rojas, the officers removed petitioner from the apartment and placed him under arrest. He was then identified as the perpetrator in the earlier robbery and taken to the police station. An officer later returned to the apartment and, after obtaining Rojas' oral and written consent, searched the premises, where he found several items linking petitioner to the robbery. The trial court denied petitioner's motion to suppress that evidence, and he was convicted. The California Court of Appeal affirmed. It held that because petitioner was not present when Rojas consented to the search, the exception to permissible warrantless consent searches of jointly occupied premises that arises when one of the occupants present objects to the search, *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208, did not apply, and therefore, petitioner's suppression motion had been properly denied.

Held : *Randolph* does not extend to this situation, where Rojas' consent was provided well after petitioner had been removed from their apartment. Pp. 1131 – 1137.

(a) Consent searches are permissible warrantless searches, *Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 231–232, 93 S.Ct. 2041, 36 L.Ed.2d 854, and are clearly reasonable when the consent comes from the sole occupant of the premises. When multiple occupants are involved, the rule extends to the search of the premises or effects of an absent, nonconsenting occupant so long as "the consent of one who possesses common authority over [the] premises or effects" is obtained. *United States v. Matlock,* 415 U.S. 164, 170, 94 S.Ct. 988, 39 L.Ed.2d 242. However, when "a physically present inhabitan[t]" refuses to consent, that refusal "is dispositive as to him, regardless of the consent of a fellow occupant." *Randolph,* 547 U.S., at 122–123, 126 S.Ct. 1515. A controlling factor in *Randolph* was the objecting occupant's physical presence. See, *e.g., id.,* at 106, 108, 109, 114, 126 S.Ct. 1515. Pp. 1131 – 1134.

***293** (b) Petitioner contends that, though he was not present when Rojas consented, *Randolph* nevertheless controls, but neither of his arguments is sound. Pp. 1134 – 1137.

(1) He first argues that his absence should not matter since it occurred only because the police had taken him away. Dictum in *Randolph* suggesting that consent by one occupant might not be sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," 547 U.S., at 121, 126 S.Ct. 1515, is best understood to refer to situations in which the removal of the potential objector is not objectively reasonable. Petitioner does not contest the fact that the police had reasonable grounds for his removal or the existence of probable cause for his arrest. He was thus in the same position as an occupant absent for any other reason. Pp. 1134 – 1135.

(2) Petitioner also argues that the objection he made while at the threshold remained effective until he changed his mind and withdrew it. This is inconsistent ****1129** with *Randolph* in at least two important ways. It cannot be squared with the "widely shared social expectations" or "customary social usage" upon which *Randolph* 's holding was based. 547 U.S., at 111, 121, 126 S.Ct. 1515. It also creates the sort of practical complications that *Randolph* sought to avoid by adopting a "formalis[tic]" rule, *id.,* at 121, 126 S.Ct. 1515, *e.g.,* requiring that the scope of an objection's duration and the procedures necessary to register a continuing objection be defined. Pp. 1134 – 1137.

(c) Petitioner claims that his expansive interpretation of *Randolph* would not hamper law enforcement because in most cases where officers have probable cause to arrest a physically present objector they also have probable cause to obtain a warrant to search the premises that the objector does not want them to enter. But he misunderstands the constitutional status of consent searches, which are permissible irrespective of the availability of a warrant. Requiring officers to obtain a warrant when a warrantless search is justified may interfere with law enforcement strategies and impose an unmerited burden on the person willing to consent to an immediate search. Pp. 1136 – 1137.

208 Cal.App.4th 100, 145 Cal.Rptr.3d 51, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. SCALIA, J., and THOMAS, J., filed concurring opinions. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

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Opinion

Justice ALITO delivered the opinion of the Court.

***294** Our cases firmly establish that police officers may search jointly occupied premises if one of the occupants[1] consents. See *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). In *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), we recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, we consider whether *Randolph* applies ****1130** if the objecting occupant is absent when another occupant consents. Our opinion in *Randolph* took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present. We therefore refuse to extend *Randolph* to the very different situation in this case, where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.

***295** I

A

The events involved in this case occurred in Los Angeles in October 2009. After observing Abel Lopez cash a check, petitioner Walter Fernandez approached Lopez and asked about the neighborhood in which he lived. When Lopez responded that he was from Mexico, Fernandez laughed and told Lopez that he was in territory ruled by the "D.F.S.," *i.e.,* the "Drifters" gang. App. 4–5. Petitioner then pulled out a knife and pointed it at Lopez' chest. Lopez raised his hand in self-defense, and petitioner cut him on the wrist.

Lopez ran from the scene and called 911 for help, but petitioner whistled, and four men emerged from a nearby apartment building and attacked Lopez. After knocking him to the ground, they hit and kicked him and took his cell phone and his wallet, which contained $400 in cash.

A police dispatch reported the incident and mentioned the possibility of gang involvement, and two Los Angeles police officers, Detective Clark and Officer Cirrito, drove to an alley frequented by members of the Drifters. A man who appeared scared walked by the officers and said: " '[T]he guy is in the apartment.' " *Id.,* at 5. The officers then observed a man run through the alley and into the building to which the man was pointing. A minute or two later, the officers heard sounds of screaming and fighting coming from that building.

After backup arrived, the officers knocked on the door of the apartment unit from which the screams had been heard. 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 present.

***296** After Officer Cirrito asked Rojas to step out of the apartment so that he could conduct a protective sweep, petitioner appeared at the door wearing only boxer shorts. Apparently agitated, petitioner stepped forward and said, " 'You don't have any right to come in here. I know my rights.' " *Id.,* at 6. Suspecting that petitioner had assaulted Rojas, the officers removed him from the apartment and then placed him under arrest. Lopez identified petitioner as his initial attacker, and petitioner was taken to the police station for booking.

Approximately one hour after petitioner's arrest, Detective Clark returned to the apartment and informed Rojas that petitioner had been arrested. Detective Clark requested and received both oral and written consent from Rojas to search the premises.[2] In the apartment, the police ****1131** found Drifters gang paraphernalia, a butterfly knife, clothing worn by the robbery suspect, and ammunition. Rojas' young son also showed the officers where petitioner had hidden a sawed-off shotgun.

B

Petitioner was charged with robbery, Cal.Penal Code Ann. § 211 (West 2008), infliction of corporal injury on a spouse, cohabitant, or child's parent, § 273.5(a), possession of a firearm by a felon, § 12021(a)(1)(West 2009), possession of a ***297** short-barreled shotgun, § 12020(a)(1), and felony possession of ammunition, § 12316(b)(1).

Before trial, petitioner moved to suppress the evidence found in the apartment, but after a hearing, the court denied the motion. Petitioner then pleaded *nolo contendere* to the firearms and ammunition charges. On the remaining counts —for robbery and infliction of corporal injury—he went to trial and was found guilty by a jury. The court sentenced him to 14 years of imprisonment.

The California Court of Appeal affirmed. 208 Cal.App.4th 100, 145 Cal.Rptr.3d 51 (2012). Because *Randolph* did not overturn our prior decisions recognizing that an occupant may give effective consent to search a shared residence, the court agreed with the majority of the federal circuits that an objecting occupant's physical presence is "indispensible to the decision in *Randolph*." *Id.,* at 122, 145 Cal.Rptr.3d, at 66.[3] And because petitioner was not present when Rojas consented, the court held that petitioner's ***298** suppression motion had been properly denied. *Id.,* at 121, 145 Cal.Rptr.3d, at 65.

The California Supreme Court denied the petition for review, and we granted certiorari. 569 U.S. ——, 133 S.Ct. 2388, 185 L.Ed.2d 1103 (2013).

II

A

The Fourth Amendment prohibits unreasonable searches and seizures and provides that a warrant may not be issued **1132 without probable cause, but "the text of the Fourth Amendment does not specify when a search warrant must be obtained." *Kentucky v. King,* 563 U.S. ——, ——, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011). Our cases establish that a warrant is generally required for a search of a home, *Brigham City v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), but "the ultimate touchstone of the Fourth Amendment is 'reasonableness,' " *ibid.*; see also *Michigan v. Fisher,* 558 U.S. 45, 47, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (*per curiam*). And certain categories of permissible warrantless searches have long been recognized.

Consent searches occupy one of these categories. "Consent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 231–232, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). It would be unreasonable—indeed, absurd—to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search. The owner of a home has a right to allow others to enter and examine the premises, and there is no reason why the owner should not be permitted to extend this same privilege to police officers if that is the owner's choice. Where the owner believes that he or she is under suspicion, the owner may want the police to search the premises so that their suspicions are dispelled. This may be particularly important where the owner has a strong interest in the apprehension of the perpetrator of a crime and believes *299 that the suspicions of the police are deflecting the course of their investigation. An owner may want the police to search even where they lack probable cause, and if a warrant were always required, this could not be done. And even where the police could establish probable cause, requiring a warrant despite the owner's consent would needlessly inconvenience everyone involved—not only the officers and the magistrate but also the occupant of the premises, who would generally either be compelled or would feel a need to stay until the search was completed. *Michigan v. Summers,* 452 U.S. 692, 701, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).[4]

While it is clear that a warrantless search is reasonable when the sole occupant of a house or apartment consents, what happens when there are two or more occupants? Must they all consent? Must they all be asked? Is consent by one occupant enough? The Court faced that problem 40 years ago in *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

In that case, Matlock and a woman named Graff were living together in a house that was also occupied by several of Graff's siblings and by her mother, who had rented the house. While in the front yard of the house, Matlock was arrested for bank robbery and was placed in a squad car. Although the police could have easily asked him for consent to search the room that he and Graff shared, they did not do so. Instead, they knocked on the door and obtained Graff's permission to search. The search yielded incriminating **1133 evidence, which the defendant sought to suppress, but this Court held that Graff's consent justified the warrantless search. As the Court put it, "the consent of one who possesses *300 common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id.,* at 170, 94 S.Ct. 988.

In *Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), the Court reaffirmed and extended the *Matlock* holding. In *Rodriguez,* a woman named Fischer told police officers that she had been assaulted by Rodriguez in what she termed " 'our' apartment." 497 U.S., at 179, 110 S.Ct. 2793. She also informed the officers that Rodriguez was asleep in the apartment, and she then accompanied the officers to that unit. When they arrived, the officers could have knocked on the door and awakened Rodriguez, and had they done so, Rodriguez might well have surrendered at the door and objected to the officers' entry. Instead, Fischer unlocked the door, the officers entered without a warrant, and they saw drug paraphernalia and containers filled with white powder in plain view.

After the search, the police learned that Fischer no longer resided at the apartment, and this Court held that she did not have common authority over the premises at the time in question. The Court nevertheless held that the warrantless entry was lawful because the police reasonably believed that Fischer was a resident. *Id.,* at 188–189, 110 S.Ct. 2793.

B

While consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search, we

recognized a narrow exception to this rule in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). In that case, police officers responded to the Randolphs' home after receiving a report of a domestic dispute. When the officers arrived, Janet Randolph informed the officers that her estranged husband, Scott Randolph, was a cocaine user and that there were "items of drug evidence" in the house. *Id.*, at 107, 126 S.Ct. 1515 (internal quotation marks omitted). The officers first asked Scott for consent to search, but he "unequivocally refused." *Ibid.* The officers then turned to Janet, and ***301** she consented to the search, which produced evidence that was later used to convict Scott for possession of cocaine.

Without questioning the prior holdings in *Matlock* and *Rodriguez,* this Court held that Janet Randolph's consent was insufficient under the circumstances to justify the warrantless search. The Court reiterated the proposition that a person who shares a residence with others assumes the risk that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." 547 U.S., at 111, 126 S.Ct. 1515. But the Court held that "*a physically present inhabitant's* express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." *Id.*, at 122–123, 126 S.Ct. 1515 (emphasis added).

The Court's opinion went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present. Again and again, the opinion of the Court stressed this controlling factor. See *id.*, at 106, 126 S.Ct. 1515 ("present at the scene"); *ibid.* ("physically present"); *id.*, at 108, 126 S.Ct. 1515 ("a co-tenant who is present"); *id.*, at 109, 126 S.Ct. 1515 ("physically present"); *id.*, at 114, 126 S.Ct. 1515 ("a present and objecting co-tenant"); *id.*, at 119, 126 S.Ct. 1515 (a co-tenant "standing at the door and ****1134** expressly refusing consent"); *id.*, at 120, 126 S.Ct. 1515 ("a physically present resident"), *id.*, at 121, 126 S.Ct. 1515 ("a physically present fellow tenant objects"); *ibid.* ("[A] potential defendant with self-interest in objecting is at the door and objects"); *id.*, at 122, 126 S.Ct. 1515 ("[A] physically present inhabitant's express refusal of consent to a police search is dispositive as to him"). The Court's opinion could hardly have been clearer on this point, and the separate opinion filed by Justice BREYER, whose vote was decisive, was equally unambiguous. See *id.*, at 126, 126 S.Ct. 1515 (concurring) ("The Court's opinion does not apply where the objector is not present 'and object[ing]' ").

III

In this case, petitioner was not present when Rojas consented, but petitioner still contends that *Randolph* is ***302** controlling. He advances two main arguments. First, he claims that his absence should not matter since he was absent only because the police had taken him away. Second, he maintains that it was sufficient that he objected to the search while he was still present. Such an objection, he says, should remain in effect until the objecting party "no longer wishes to keep the police out of his home." Brief for Petitioner 8. Neither of these arguments is sound.

A

We first consider the argument that the presence of the objecting occupant is not necessary when the police are responsible for his absence. In *Randolph,* the Court suggested in dictum that consent by one occupant might not be sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." 547 U.S., at 121, 126 S.Ct. 1515. We do not believe the statement should be read to suggest that improper motive may invalidate objectively justified removal. Hence, it does not govern here.

The *Randolph* dictum is best understood not to require an inquiry into the subjective intent of officers who detain or arrest a potential objector but instead to refer to situations in which the removal of the potential objector is not objectively reasonable. As petitioner acknowledges, see Brief for Petitioner 25, our Fourth Amendment cases "have repeatedly rejected" a subjective approach. *Brigham City,* 547 U.S., at 404, 126 S.Ct. 1943 (alteration and internal quotation marks omitted). "Indeed, we have never held, outside limited contexts such as an 'inventory search or administrative inspection ..., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment.' " *King,* 563 U.S., at ——, 131 S.Ct., at 1859.

Petitioner does not claim that the *Randolph* Court meant to break from this consistent practice, and we do not think that it did. And once it is recognized that the test is one of objective reasonableness, petitioner's argument collapses. ***303** He does not contest the fact that the police had reasonable grounds for removing him from the apartment so that they could speak with Rojas, an apparent victim

of domestic violence, outside of petitioner's potentially intimidating presence. In fact, he does not even contest the existence of probable cause to place him under arrest. We therefore hold that an occupant 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.

This conclusion does not "make a mockery of *Randolph,*" as petitioner protests. Brief for Petitioner 9. It simply accepts *Randolph* on its own terms. The *Randolph* holding unequivocally requires the **1135 presence of the objecting occupant in every situation other than the one mentioned in the dictum discussed above.

B

This brings us to petitioner's second argument, viz., that his objection, made at the threshold of the premises that the police wanted to search, remained effective until he changed his mind and withdrew his objection. This argument is inconsistent with *Randolph* 's reasoning in at least two important ways. First, the argument cannot be squared with the "widely shared social expectations" or "customary social usage" upon which the *Randolph* holding was based. See 547 U.S., at 111, 121, 126 S.Ct. 1515. Explaining why consent by one occupant could not override an objection by a physically present occupant, the *Randolph* Court stated:

> "[I]t 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." *Id.,* at 113, 126 S.Ct. 1515.

It seems obvious that the calculus of this hypothetical caller would likely be quite different if the objecting tenant *304 was not standing at the door. When the objecting occupant is standing at the threshold saying "stay out," a friend or visitor invited to enter by another occupant can expect at best an uncomfortable scene and at worst violence if he or she tries to brush past the objector. But when the objector is not on the scene (and especially when it is known that the objector will not return during the course of the visit), the friend or visitor is much more likely to accept the invitation to enter.[5] Thus, petitioner's argument is inconsistent with *Randolph* 's reasoning.

Second, petitioner's argument would create the very sort of practical complications that *Randolph* sought to avoid. The *Randolph* Court recognized that it was adopting a "formalis[tic]" rule, but it did so in the interests of "simple clarity" and administrability. *Id.,* at 121, 122, 126 S.Ct. 1515.

The rule that petitioner would have us adopt would produce a plethora of practical problems. For one thing, there is the question of duration. Petitioner argues that an objection, once made, should last until it is withdrawn by the objector, but such a rule would be unreasonable. Suppose that a husband and wife owned a house as joint tenants and that the husband, after objecting to a search of the house, *305 was convicted and sentenced to a 15–year prison term. Under petitioner's proposed rule, the wife would be unable to consent to a search of the house 10 years **1136 after the date on which her husband objected. We refuse to stretch *Randolph* to such strange lengths.

Nor are we persuaded to hold that an objection lasts for a "reasonable" time. "[I]t is certainly unusual for this Court to set forth precise time limits governing police action," *Maryland v. Shatzer,* 559 U.S. 98, 110, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010), and what interval of time would be reasonable in this context? A week? A month? A year? Ten years?

Petitioner's rule would also require the police and ultimately the courts to determine whether, after the passage of time, an objector still had "common authority" over the premises, and this would often be a tricky question. Suppose that an incarcerated objector and a consenting co-occupant were joint tenants on a lease. If the objector, after incarceration, stopped paying rent, would he still have "common authority," and would his objection retain its force? Would it be enough that his name remained on the lease? Would the result be different if the objecting and consenting lessees had an oral month-to-month tenancy?

Another problem concerns the procedure needed to register a continuing objection. Would it be necessary for an occupant to object while police officers are at the door? If presence at the time of consent is not needed, would an occupant have to be present at the premises when the objection was made? Could an objection be made pre-emptively? Could a person like Scott Randolph, suspecting that his estranged wife might invite the police to view his drug stash and paraphernalia, register an objection in advance? Could this be done by posting a sign in front of the house? Could a

standing objection be registered by serving notice on the chief of police?

Finally, there is the question of the particular law enforcement officers who would be bound by an objection. Would ***306** this set include just the officers who were present when the objection was made? Would it also apply to other officers working on the same investigation? Would it extend to officers who were unaware of the objection? How about officers assigned to different but arguably related cases? Would it be limited by law enforcement agency?

If *Randolph* is taken at its word—that it applies only when the objector is standing in the door saying "stay out" when officers propose to make a consent search—all of these problems disappear.

In response to these arguments, petitioner argues that *Randolph* 's requirement of physical presence is not without its own ambiguity. And we acknowledge that if, as we conclude, *Randolph* requires presence on the premises to be searched, there may be cases in which the outer boundary of the premises is disputed. The Court confronted a similar problem last Term in *Bailey v. United States,* 568 U.S. ——, 133 S.Ct. 1031, 185 L.Ed.2d 19 (2013), but despite arguments similar to those now offered by petitioner, the Court adopted a rule that applies only when the affected individual is near the premises being searched. Having held that a premises rule is workable in that context, we see no ground for reaching a different conclusion here.

C

Petitioner argues strenuously that his expansive interpretation of *Randolph* would not hamper law enforcement because in most cases where officers have probable cause to arrest a physically present objector they also have probable cause to search the premises that the objector does not want them to enter, see Brief for Petitioner 20–23, but this argument misunderstands ****1137** the constitutional status of consent searches. A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant. Even with modern technological advances, the warrant procedure imposes burdens on the officers who wish to search, the magistrate who must review ***307** the warrant application, and the party willing to give consent. When a warrantless search is justified, requiring the police to obtain a warrant may "unjustifiably interfer[e] with legitimate law enforcement strategies." *King,* 563 U.S., at ——, 131 S.Ct., at 1860. Such a requirement may also impose an unmerited burden on the person who consents to an immediate search, since the warrant application procedure entails delay. Putting the exception the Court adopted in *Randolph* to one side, the lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent. Such an occupant may want the police to search in order to dispel "suspicion raised by sharing quarters with a criminal." 547 U.S., at 116, 126 S.Ct. 1515; see also *Schneckloth,* 412 U.S., at 243, 93 S.Ct. 2041 (evidence obtained pursuant to a consent search "may insure that a wholly innocent person is not wrongly charged with a criminal offense"). And an occupant may want the police to conduct a thorough search so that any dangerous contraband can be found and removed. In this case, for example, the search resulted in the discovery and removal of a sawed-off shotgun to which Rojas' 4–year–old son had access.

Denying someone in Rojas' position the right to allow the police to enter *her* home would also show disrespect for her independence. Having beaten Rojas, petitioner would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power.

* * *

The judgment of the California Court of Appeal is affirmed.

It is so ordered.

Justice SCALIA, concurring.

Like Justice THOMAS, I believe *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), was wrongly decided. I nonetheless join ***308** the Court's opinion because it is a faithful application of *Randolph*. I write separately to address the argument that the search of petitioner's shared apartment violated the Fourth Amendment because he had a right under property law to exclude the police. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 17–23. The United States dismisses that argument, pointing to our statement in *United States v. Matlock,* 415 U.S. 164, 171, n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), that a cotenant's ability to consent to a search "does not rest upon the law of property, with

its attendant historical and legal refinements." See Brief for United States as *Amicus Curiae* 23.

I do not think the argument can be so easily dismissed. To be sure, under *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), "property rights 'are not the sole measure of Fourth Amendment violations.' " *Florida v. Jardines,* 569 U.S. 1, ——, 133 S.Ct. 1409, 1414, 185 L.Ed.2d 495 (2013). But as we have recently made clear, "[t]he *Katz* reasonable-expectations test 'has been *added to,* not *substituted for,*' the traditional property-based understanding of the Fourth Amendment." *Id.,* at ——, 133 S.Ct., at 1417 (quoting *United States v. Jones,* 565 U.S. ——, ——, 132 S.Ct. 945, 952, 181 L.Ed.2d 911 (2012)). I would ****1138** therefore find this a more difficult case if it were established that property law did not give petitioner's cotenant the right to admit visitors over petitioner's objection. That difficulty does not arise, however, because the authorities cited by the *amicus* association fail to establish that a guest would commit a trespass if one of two joint tenants invited the guest to enter and the other tenant forbade the guest to do so. Indeed, what limited authority there is on the subject points to the opposite conclusion. See, *e.g.,* 86 C.J.S., Tenancy in Common § 144, p. 354 (2006) (a licensee of one tenant "is not liable in trespass to nonconsenting cotenants"); *Dinsmore v. Renfroe,* 66 Cal.App. 207, 212–214, 225 P. 886, 888–889 (1924); *Buchanan v. Jencks,* 38 R.I. 443, 446–451, 96 A. 307, 309–311 (1916) (and cases cited therein); cf. 2 H. Tiffany, Real Property § 457, ***309** p. 274 (3d ed. 1939) (endorsing the opposite view but acknowledging that "there is little authority" on the question). There accordingly is no basis for us to conclude that the police infringed on any property right of petitioner's when they entered the premises with his cotenant's consent.

Justice THOMAS, concurring.

I join the opinion of the Court, which faithfully applies *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). I write separately to make clear the extent of my disagreement with *Randolph*.

I dissented in *Randolph* because the facts of that case did not implicate a Fourth Amendment search and never should have been analyzed as such. *Id.,* at 145, 126 S.Ct. 1515 (THOMAS, J., dissenting) ("[N]o Fourth Amendment search occurs where ... the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing by the accused"). Instead of deciding the case on that narrow ground, the majority in *Randolph* looked to "widely shared social expectations" to resolve whether the wife's consent to a search should control over her husband's objection. *Id.,* at 111, 126 S.Ct. 1515. I find no support for that novel analytical approach in the Fourth Amendment's text or history, or in this Court's jurisprudence. See *id.,* at 128–131, 126 S.Ct. 1515 (ROBERTS, C.J., dissenting). Accordingly, given a blank slate, I would analyze this case consistent with THE CHIEF JUSTICE's dissent in *Randolph* : "A warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it." *Id.,* at 128, 126 S.Ct. 1515. That is because "[c]o-occupants have 'assumed the risk that one of their number might permit [a] common area to be searched.' " *Ibid.* (quoting *United States v. Matlock,* 415 U.S. 164, 171, n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)). In this case, the trial court found that Rojas' consent was voluntary, see *ante,* at n. 2, and petitioner does not contest that Rojas had common authority over the premises. That should be the end of the matter.

Justice GINSBURG, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

***310** The Fourth Amendment guarantees to the people "[t]he right ... to be secure in their ... houses ... against unreasonable searches and seizures." Warrants to search premises, the Amendment further instructs, shall issue only when authorized by a neutral magistrate upon a showing of "probable cause" to believe criminal activity has occurred or is afoot. This Court has read these complementary provisions to convey that, "whenever practicable, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure." ****1139** *Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The warrant requirement, Justice Jackson observed, ranks among the "fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson v. United States,* 333 U.S. 10, 17, 68 S.Ct. 367, 92 L.Ed. 436 (1948). The Court has accordingly declared warrantless searches, in the main, "*per se* unreasonable." *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (internal quotation marks omitted); see *Groh v. Ramirez,* 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). If this main rule is to remain hardy, the Court has explained, exceptions to the warrant requirement must be "few in number and carefully delineated." *United States v. United States Dist. Court for Eastern Dist. of Mich.,* 407 U.S. 297, 318, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); see *Kyllo v. United States,* 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

Instead of adhering to the warrant requirement, today's decision tells the police they may dodge it, nevermind ample time to secure the approval of a neutral magistrate. Suppressing the warrant requirement, the Court shrinks to petite size our holding in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), that "a physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant," *id.*, at 122–123, 126 S.Ct. 1515.

***311** I

This case calls for a straightforward application of *Randolph*. The police officers in *Randolph* were confronted with a scenario closely resembling the situation presented here. Once the police arrived at Janet and Scott Randolph's shared residence, Scott Randolph "unequivocally refused" an officer's request for permission to search their home. *Georgia v. Randolph,* 547 U.S. 103, 107, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). The officer then asked Janet Randolph for her consent to the search, which she "readily gave." *Ibid.* The sequence here was similar. After Walter Fernandez, while physically present at his home, rebuffed the officers' request to come in, the police removed him from the premises and then arrested him, albeit with cause to believe he had assaulted his cohabitant, Roxanne Rojas. At the time of the arrest, Rojas said nothing to contradict Fernandez' refusal. About an hour later, however, and with no attempt to obtain a search warrant, the police returned to the apartment and prevailed upon Rojas to sign a consent form authorizing search of the premises. See *infra,* at 1143, n. 5.

The circumstances triggering "the Fourth Amendment's traditional hostility to police entry into a home without a warrant," 547 U.S., at 126, 126 S.Ct. 1515 (BREYER, J., concurring), are at least as salient here as they were in *Randolph*. In both cases, "[t]he search at issue was a search solely for evidence"; "[t]he objecting party," while on the premises, "made his objection [to police entry] known clearly and directly to the officers seeking to enter the [residence]"; and "the officers might easily have secured the premises and sought a warrant permitting them to enter." *Id.,* at 125–126, 126 S.Ct. 1515. Here, moreover, with the objector in custody, there was scant danger to persons on the premises, or risk that evidence might be destroyed or concealed, pending request for, and receipt of, a warrant. See *id.,* at 126, 126 S.Ct. 1515.

Despite these marked similarities, the Court removes this case from *Randolph* 's ambit. The Court does so principally ***312** by seizing on the fact that Fernandez, unlike ****1140** Scott Randolph, was no longer present and objecting when the police obtained the co-occupant's consent. *Ante,* at 1133 – 1134. But Fernandez *was* present when he stated his objection to the would-be searchers in no uncertain terms. See App. 6 ("You don't have any right to come in here. I know my rights." (internal quotation marks omitted)). The officers could scarcely have forgotten, one hour later, that Fernandez refused consent while physically present. That express, on-premises objection should have been "dispositive as to him." *Randolph,* 547 U.S., at 122, 126 S.Ct. 1515.[1]

The Court tells us that the "widely shared social expectations" and "customary social usage" undergirding *Randolph* 's holding apply only when the objector remains physically present. *Ante,* at 1135 (internal quotation marks omitted). *Randolph* 's discussion of social expectations, however, does not hinge on the objector's physical presence *vel non* at the time of the search. "[W]hen people living together disagree over the use of their common quarters," *Randolph* observes, "a resolution must come through voluntary accommodation, not by appeals to authority." 547 U.S., at 113–114, 126 S.Ct. 1515. See also *id.,* at 114, 126 S.Ct. 1515 ("[T]here is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations ***313** to outsiders."); *id.,* at 115, 126 S.Ct. 1515 ("[T]he cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place."). *Randolph* thus trained on whether a joint occupant had conveyed an objection to a visitor's entry, and did not suggest that the objection could be ignored if the police reappeared post the objector's arrest.

A visitor might be less reluctant to enter over a joint occupant's objection, the Court speculates, if that visitor knows the objector will not be there. See *ante,* at 1135 – 1136. "Only in a Hobbesian world," however, "would one person's social obligations to another be limited to what the other [, because of his presence,] is ... able to enforce." *United States v. Henderson,* 536 F.3d 776, 787 (C.A.7 2008) (Rovner, J., dissenting). Such conjectures about social behavior, at any rate, shed little light on the constitutionality of this warrantless home search, given the marked distinctions between private interactions and police investigations. Police, after all, have

power no private person enjoys. They can, as this case illustrates, put a tenant in handcuffs and remove him from the premises.

Moreover, as the Court comprehended just last Term, "the background social norms that invite a visitor to the front door do not invite him there to conduct a search." **1141 *Florida v. Jardines,* 569 U.S. 1, ——, 133 S.Ct. 1409, 1416, 185 L.Ed.2d 495 (2013). Similarly here, even if shared tenancy were understood to entail the prospect of visits by unwanted social callers while the objecting resident was gone, that unwelcome visitor's license would hardly include free rein to rummage through the dwelling in search of evidence and contraband.[2]

*314 Next, the Court cautions, applying *Randolph* to these facts would pose "a plethora of practical problems." *Ante,* at 1135. For instance, the Court asks, must a cotenant's objection, once registered, be respected indefinitely? Yet it blinks reality to suppose that Fernandez, by withholding consent, could stop police in their tracks eternally. Cf. *ante,* at 1135 – 1136 (imagining an objector behind bars serving his sentence, still refusing permission to search his residence). To mount the prosecution eventuating in a conviction, of course, the State would first need to obtain incriminating evidence, and could get it easily simply by applying for a warrant. Warrant in police hands, the Court's practical problems disappear.

Indeed, as the Court acknowledges, see *ante,* at 1136 – 1137, reading *Randolph* to require continuous physical presence poses administrative difficulties of its own. Does an occupant's refusal to consent lose force as soon as she absents herself from the doorstep, even if only for a moment? Are the police free to enter the instant after the objector leaves the door to retire for a nap, answer the phone, use the bathroom, or speak to another officer outside? See Brief for Petitioner 28. Hypothesized practical considerations, in short, provide no cause for today's drastic reduction of *Randolph* 's holding and attendant disregard for the warrant requirement.

II

In its zeal to diminish *Randolph,* today's decision overlooks the warrant requirement's venerable role as the *315 "bulwark of Fourth Amendment protection." *Franks v. Delaware,* 438 U.S. 154, 164, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Reducing *Randolph* to a "narrow exception," the Court declares the main rule to be that "consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search." *Ante,* at 1133. That declaration has it backwards, for consent searches themselves are a " 'jealously and carefully drawn' exception" to "the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se*." *Randolph,* 547 U.S., at 109, 126 S.Ct. 1515 (quoting *Jones v. United States,* 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958)). See also *Jardines,* 569 U.S., at ——, 133 S.Ct., at 1414 ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' "); **1142 *Payton v. New York,* 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) ("[T]he physical entry of the home is the chief evil against which ... the Fourth Amendment is directed." (internal quotation marks omitted)).[3]

*316 In this case, the police could readily have obtained a warrant to search the shared residence.[4] The Court does not dispute this, but instead disparages the warrant requirement as inconvenient, burdensome, entailing delay "[e]ven with modern technological advances." *Ante,* at 1137. Shut from the Court's sight is the ease and speed with which search warrants nowadays can be obtained. See *Missouri v. McNeely,* 569 U.S. ——, ——, 133 S.Ct. 1552, 1561–1562, 185 L.Ed.2d 696 (2013) (observing that technology now "allow[s] for the more expeditious processing of warrant applications," and citing state statutes permitting warrants to be obtained " remotely through various means, including telephonic or radio communication, electronic communication ..., and video conferencing"). See also Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 29 (describing California's procedures for electronic warrant applications). With these developments in view, dilution of the warrant requirement should be vigilantly resisted.

*317 Although the police have probable cause and could obtain a warrant with dispatch, if they can gain the consent of someone **1143 other than the suspect, why should the law insist on the formality of a warrant? Because the Framers saw the neutral magistrate as an essential part of the criminal process shielding all of us, good or bad, saint or sinner, from unchecked police activity. See, *e.g., Johnson v. United States,* 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) ("The point of the Fourth Amendment ... is not that it denies law enforcement the support of the usual inferences which

reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."). "The investigation of crime," of course, "would always be simplified if warrants were unnecessary." *Mincey v. Arizona,* 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). "But the Fourth Amendment," the Court has long recognized, "reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Ibid.* See also *Randolph,* 547 U.S., at 115, n. 5, 126 S.Ct. 1515 ("A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.").

A final word is in order about the Court's reference to Rojas' autonomy, which, in its view, is best served by allowing her consent to trump an abusive cohabitant's objection. See *ante,* at 1137 ("Denying someone in Rojas' position the right to allow the police to enter *her* home would also show disrespect for her independence.").[5] Rojas' situation is not ***318** distinguishable from Janet Randolph's in this regard. If a person's health and safety are threatened by a domestic abuser, exigent circumstances would justify immediate removal of the abuser from the premises, as happened here. Cf. *Randolph,* 547 U.S., at 118, 126 S.Ct. 1515 ("[T]his case has no bearing on the capacity of the police to protect domestic victims.... No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence...."). See also *Brigham City v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) ("[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."). Domestic abuse is indeed "a serious problem in the United States," *Randolph,* 547 U.S., at 117, 126 S.Ct. 1515 (citing statistics); appropriate policy responses to ****1144** this scourge may include fostering effective counseling, providing public information about, and ready access to, protective orders, and enforcing such orders diligently.[6] As the Court ***319** understood in *Randolph,* however, the specter of domestic abuse hardly necessitates the diminution of the Fourth Amendment rights at stake here.

* * *

For the reasons stated, I would honor the Fourth Amendment's warrant requirement and hold that Fernandez' objection to the search did not become null upon his arrest and removal from the scene. "There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion." *Kentucky v. King,* 563 U.S. ——, ——, 131 S.Ct. 1849, 1866, 179 L.Ed.2d 865 (2011) (GINSBURG, J., dissenting). I would therefore reverse the judgment of the California Court of Appeal.

All Citations

571 U.S. 292, 134 S.Ct. 1126, 188 L.Ed.2d 25, 82 USLW 4102, 14 Cal. Daily Op. Serv. 1936, 2014 Daily Journal D.A.R. 2222, 24 Fla. L. Weekly Fed. S 553

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 We use the terms "occupant," "resident," and "tenant" interchangeably to refer to persons having "common authority" over premises within the meaning of *Matlock*. See *United States v. Matlock,* 415 U.S. 164, 171, n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

2 Both petitioner and the dissent suggest that Rojas' consent was coerced. *Post,* at 1143, n. 5 (opinion of GINSBURG, J.). But the trial court found otherwise, App. 152, and the correctness of that finding is not before us. In suggesting that Rojas' consent was coerced, the dissent recites portions of Rojas' testimony from the suppression hearing that the trial judge appears to have rejected. *Ibid.* Similarly, the jury plainly did not find Rojas to be credible. At trial, she testified for the defense and told the jury, among other things, that the wounds observed by the officers who came to her door were not inflicted by petitioner but by a woman looking for petitioner during a fight. 208 Cal.App.4th 100, 109–110, 145

Cal.Rptr.3d 51, 56 (2012). The jury obviously did not believe this testimony because it found petitioner guilty of inflicting corporal injury on her.

3 See *United States v. Cooke,* 674 F.3d 491, 498 (C.A.5 2012) ("*Randolph* was a narrow exception to the general *Matlock* rule permitting cotenant consent, relevant only as to physically present objectors"); *United States v. Hudspeth,* 518 F.3d 954, 960 (C.A.8 2008) (concluding that "the narrow holding of *Randolph,* which repeatedly referenced the defendant's physical presence *and* immediate objection is inapplicable"); *United States v. Henderson,* 536 F.3d 776, 777 (C.A.7 2008) (recognizing that "*Randolph* left the bulk of third-party consent law in place; its holding applies only when the defendant is both present and objects to the search of his home"); *United States v. McKerrell,* 491 F.3d 1221, 1227 (C.A.10 2007) ("*Randolph* carefully delineated the narrow circumstances in which its holding applied, and ... *Randolph* consciously employed a rule requiring an express objection by a present co-tenant"); but see *United States v. Murphy,* 516 F.3d 1117, 1124–1125 (C.A.9 2008) (holding that "when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant" because "[o]nce a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects").

4 A main theme of the dissent is that the police in this case had probable cause to search the apartment and therefore could have obtained a warrant. Of course, this will not always be so in cases in which one occupant consents to a search and the other objects, and the dissent does not suggest that a warrant should be required only when probable cause is present. As a result, the dissent's repeated references to the availability of a warrant in this case are beside the point.

5 Although the dissent intimates that "customary social usage" goes further than this, see *post,* at 1140, the dissent provides no support for this doubtful proposition. In the present case, for example, suppose that Rojas had called a relative, a friend, a supportive neighbor, or a person who works for a group that aids battered women and had invited that individual to enter and examine the premises while petitioner was in jail. Would any of those invitees have felt that it was beyond Rojas' authority to extend that invitation over petitioner's objection?

Instead of attempting to show that such persons would have felt it improper to accept this invitation, the dissent quickly changes the subject and says that "conjectures about social behavior shed little light on the constitutionality" of the search in this case. *Post,* at 1140. But the holding in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), was based on "widely shared social expectations" and "customary social usage." See *Id.*, at 111, 121, 126 S.Ct. 1515. Thus, the dissent simply fails to come to grips with the reasoning of the precedent on which it relies.

1 The Court is correct that this case does not involve a situation, alluded to in *Randolph,* where "the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Georgia v. Randolph,* 547 U.S. 103, 121, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). Here, as in *Randolph,* no one disputes that the police had probable cause to place the objecting tenant under arrest. But had the objector's arrest been illegal, *Randolph* suggested, the remaining occupant's consent to the search would not suffice. The suggestion in *Randolph,* as the Court recognizes, see *ante,* at 1134 – 1135, is at odds with today's decision. For "[i]f the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made." *United States v. Murphy,* 516 F.3d 1117, 1124–1125 (C.A.9 2008).

2 Remarkably, the Court thinks my disagreement with its account of the applicable social norms distances me from *Randolph* 's understanding of social expectations. See *ante,* at 1135, n. 5. Quite the opposite. *Randolph* considered whether "customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection"; social practice in such circumstances, the Court held, provided no cause to depart from the " 'centuries-old principle of respect for privacy of the home.' " 547 U.S., at 115, 121, 126 S.Ct. 1515 (quoting *Wilson v. Layne,* 526 U.S. 603, 610, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). See also 547 U.S., at 115, 126 S.Ct. 1515 ("Disputed permission is ... no match for this central value of the Fourth Amendment...."). I would so hold here. Today's decision, by contrast, provides police with ready means to nullify a cotenant's objection, and therefore "fails to come to grips with the reasoning of [*Randolph*]." *Ante,* at 1135, n. 5.

3 I agree with the Court that when a sole owner or occupant consents to a search, the police can enter without obtaining a warrant. See *ante,* at 1131 – 1132. Where multiple persons occupy the premises, it is true, this Court has upheld warrantless home searches based on one tenant's consent; those cases, however, did not involve, as this case does, an

occupant who told the police they could not enter. See *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (police relied on cotenant's consent to search when other tenant had already been detained in a nearby squad car); *Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (same, when the other tenant was asleep in the bedroom). The Court's rationale for allowing a search to proceed in those instances—that co-occupants "assum[e] the risk that one of their number might permit the common area to be searched," *Matlock,* 415 U.S., at 171, n. 7, 94 S.Ct. 988—does not apply where, as here, an occupant on the premises explicitly tells the police they cannot search his home *sans* warrant. See *United States v. Henderson,* 536 F.3d 776, 788 (C.A.7 2008) (Rovner, J., dissenting) (in such circumstances, the objector "has not assumed the risk that his co-tenant may subsequently admit the visitor, because all choice has been taken from him in his involuntary removal from the premises").

4 The Court dismisses as "beside the point" the undeniable fact that the police easily could have obtained a warrant. *Ante,* at 1132, n. 4. There may be circumstances, the Court observes, in which the police, faced with a cotenant's objection, will lack probable cause to obtain a warrant. That same argument was considered and rejected by the Court in *Randolph,* which recognized that "alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside." 547 U.S., at 120, 126 S.Ct. 1515. Moreover, it is unlikely that police, possessing an objective basis to arrest an objecting tenant, will nevertheless lack probable cause to obtain a search warrant. Probable cause to arrest, I recognize, calls for a showing discrete from the showing needed to establish probable cause to search a home. But "where, as here, a suspect is arrested at or near his residence, it will often 'be permissible to infer that the instrumentalities and fruits of th[e] crime are presently in that person's residence.' " Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 25 (quoting 2 W. LaFave, Search and Seizure § 3.1(b) (5th ed. 2011)). And as the Court observed in *Randolph,* if a warrant may be impeded by a tenant's refusal to consent, "[a] co-tenant acting on [her] own initiative may be able to deliver evidence to the police, and ... tell the police what [s]he knows, for use before a magistrate in getting a warrant." 547 U.S., at 116, 126 S.Ct. 1515 (citation omitted).

5 Although the validity of Rojas' consent is not before us, the record offers cause to doubt that her agreement to the search was, in fact, an unpressured exercise of self-determination. At the evidentiary hearing on Fernandez' motion to suppress, Rojas testified that the police, upon returning to the residence about an hour after Fernandez' arrest, began questioning her four-year-old son without her permission. App. 81, 93. Rojas asked to remain present during that questioning, but the police officer told her that their investigation was "going to determine whether or not we take your kids from you right now or not." *Id.,* at 93. See also *ibid.* ("I felt like [the police] were going to take my kids away from me."). Rojas thus maintained that she felt "pressured" into giving consent. *Id.,* at 93–94. See also *id.,* at 93 ("I felt like I had no rights."). After about 20 or 30 minutes, Rojas acceded to the officer's request that she sign a consent form. Rojas testified that she "didn't want to sign [the form]," but did so because she "just wanted it to just end." *Id.,* at 100.

The trial court found Rojas' testimony at the suppression hearing "believable at points and unbelievable at other points," and concluded that the police conduct did not amount to "duress or coercion." *Id.,* at 152. The trial court agreed, however, that Rojas "may have felt pressured." *Ibid.*

6 See generally National Council of Juvenile and Family Court Judges, Civil Protection Orders: A Guide for Improving Practice (2010), online at http://www.ncjfcj.org/sites/default/files/cpo_guide.pdf (all Internet materials as visited Feb. 21, 2014, and available in Clerk of Court's case file); Epidemiology and Prevention for Injury Control Branch, California Statewide Policy Recommendations for the Prevention of Violence Against Women (2006), online at http://www.cdph.ca.gov/programs/Documents/VAWSPP–EPIC.pdf.

126 S.Ct. 1515
Supreme Court of the United States

GEORGIA, Petitioner,
v.
Scott Fitz RANDOLPH.

No. 04-1067.
|
Argued Nov. 8, 2005.
|
Decided March 22, 2006.

Synopsis
Background: Defendant charged with possession of cocaine moved to suppress cocaine discovered in search of marital residence based on his wife's consent. The Superior Court, Sumter County, George M. Peagler, Jr., J., denied motion. Defendant sought interlocutory appeal. The Court of Appeals of Georgia, 264 Ga.App. 396, 590 S.E.2d 834, reversed. State petitioned for certiorari review. The Georgia Supreme Court, 278 Ga. 614, 604 S.E.2d 835, affirmed. Certiorari was granted.

The United States Supreme Court, Justice Souter, held that warrantless search was unreasonable as to defendant who was physically present and expressly refused to consent, abrogating *United States v. Morning,* 64 F.3d 531, *United States v. Donlin,* 982 F.2d 31, *United States v. Hendrix,* 595 F.2d 883, *United States v. Sumlin,* 567 F.2d 684, *Love v. State,* 138 S.W.3d 676, *Laramie v. Hysong,* 808 P.2d 199.

Affirmed.

Justices Stevens and Breyer filed concurring opinions.

Chief Justice Roberts filed dissenting opinion in which Justice Scalia joined.

Justices Scalia and Thomas filed dissenting opinions.

Justice Alito did not participate.

****1516 *103** *Syllabus*[*]

Respondent's estranged wife gave police permission to search the marital residence for items of drug use after respondent, who was also present, had unequivocally refused to give consent. Respondent was indicted for possession of cocaine, and the trial court denied his motion to suppress the evidence as products of a warrantless search unauthorized by consent. The Georgia Court of Appeals reversed. In affirming, the State Supreme Court held that consent given by one occupant is not valid in the face of the refusal of another physically present occupant, and distinguished *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242, which recognized the permissibility of an entry made with the consent of one co-occupant in the other's absence.

Held: In the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry renders warrantless entry and search unreasonable and invalid as to him. Pp. 1520-1528.

(a) The Fourth Amendment recognizes a valid warrantless entry and search of a premises when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, and no present co-tenant objects. *Matlock, supra,* at 170, 94 S.Ct. 988; *Illinois v. Rodriguez,* ****1517** 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148. The constant element in assessing Fourth Amendment reasonableness in such cases is the great significance given to widely shared social expectations, which are influenced by property law but not controlled by its rules. Thus, *Matlock* not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but also stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understandings about the authority that co-inhabitants may exercise in ways that affect each other's interests. Pp. 1520-1521.

(b) *Matlock's* example of common understanding is readily apparent. The assumption tenants usually make about their common authority when they share quarters is that any one of them may admit visitors, with the consequence that a guest obnoxious to one may be admitted in his absence. *Matlock* placed no burden on the police to eliminate the possibility of atypical arrangements, absent reason to doubt that the regular scheme was in place. Pp. 1521-1522.

***104** (c) This Court took a step toward addressing the issue here when it held in *Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85, that overnight houseguests have a legitimate expectation of privacy in their temporary quarters. If that customary expectation is a foundation of a houseguest's Fourth Amendment rights, it should follow that an inhabitant of shared premises may claim at least as much. In fact, a co-inhabitant naturally has an even stronger claim. No sensible person would enter shared premises based on one occupant's invitation when a fellow tenant said to stay out. Such reticence 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. Absent some recognized hierarchy, *e.g.,* parent and child, there is no societal or legal understanding of superior and inferior as between co-tenants. Pp. 1522-1523.

(d) Thus, a disputed invitation, without more, gives an officer no better claim to reasonableness in entering than the officer would have absent any consent. Disputed permission is no match for the Fourth Amendment central value of "respect for the privacy of the home," *Wilson v. Layne,* 526 U.S. 603, 610, 119 S.Ct. 1692, 143 L.Ed.2d 818, and the State's other countervailing claims do not add up to outweigh it.

A co-tenant who has an interest in bringing criminal activity to light or in deflecting suspicion from himself can, *e.g.,* tell the police what he knows, for use before a magistrate in getting a warrant. This case, which recognizes limits on evidentiary searches, has no bearing on the capacity of the police, at the invitation of one tenant, to enter a dwelling over another tenant's objection in order to protect a resident from domestic violence. Though alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside, nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. Pp. 1523-1526.

(e) There are two loose ends. First, while *Matlock's* explanation for the constitutional sufficiency of a co-tenant's consent to enter and search recognized a co-inhabitant's "right to permit the inspection in his own right," ****1518** 415 U.S., at 171, n. 7, 94 S.Ct. 988, the right to admit the police is not a right as understood under property law. It is, instead, the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. The question here is whether customary social understanding accords the consenting tenant authority to prevail over the co-tenant's objection, a question *Matlock* did not answer. Second, a fine line must be drawn to ***105** avoid undercutting *Matlock*-where the defendant, though not present, was in a squad car not far away-and *Rodriguez*-where the defendant was asleep in the apartment and could have been roused by a knock on the door; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not part of the threshold colloquy, loses out. Such formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance specifically to avoid a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when no fellow occupant is on hand, the other according dispositive weight to the fellow occupant's expressed contrary indication. Pp. 1527-1528.

(f) Here, respondent's refusal is clear, and nothing in the record justifies the search on grounds independent of his wife's consent. P. 1528.

278 Ga. 614, 278 Ga. 614, 604 S.E.2d 835, affirmed.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., joined. STEVENS, J., *post,* p. 1528, and BREYER, J., *post,* p. 1529, filed concurring opinions. ROBERTS, C.J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 1531. SCALIA, J., *post,* p. 1539, and THOMAS, J., *post,* p. 1541, filed dissenting opinions. ALITO, J., took no part in the consideration or decision of the case.

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Opinion

Justice SOUTER delivered the opinion of the Court.

***106** The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). The question here is whether such an evidentiary seizure is likewise lawful ****1519** with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

I

Respondent Scott Randolph and his wife, Janet, separated in late May 2001, when she left the marital residence in Americus, Georgia, and went to stay with her parents in Canada, taking their son and some belongings. In July, she returned to the Americus house with the child, though the record does not reveal whether her object was reconciliation or retrieval of remaining possessions.

***107** On the morning of July 6, she complained to the police that after a domestic dispute her husband took their son away, and when officers reached the house she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern that his wife might take the boy out of the country again; he denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers, Sergeant Murray, went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug use, but also volunteered that there were " 'items of drug evidence' " in the house. Brief for Petitioner 3. Sergeant Murray asked Scott Randolph for permission to search the house, which he unequivocally refused.

The sergeant turned to Janet Randolph for consent to search, which she readily gave. She led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue he suspected was cocaine. He then left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When Sergeant Murray returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs. After getting a search warrant, they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine.

He moved to suppress the evidence, as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal. The trial court denied the ***108** motion, ruling that Janet Randolph had common authority to consent to the search.

The Court of Appeals of Georgia reversed, 264 Ga.App. 396, 590 S.E.2d 834 (2003), and was itself sustained by the State Supreme Court, principally on the ground that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search," 278 Ga. 614, 604 S.E.2d 835, 836 (2004). The Supreme Court of Georgia acknowledged this Court's holding in *Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242, that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared," ****1520** *id.,* at 170, 94 S.Ct. 988, and found *Matlock* distinguishable just because Scott Randolph was not "absent" from the colloquy on which the police relied for consent to make the search. The State Supreme Court stressed that the officers in *Matlock* had not been "faced with the physical presence of joint occupants, with one consenting to the search and the other objecting." 278 Ga., at 615, 604 S.E.2d, at 837. It held that an individual who chooses to live with another assumes a risk no greater than " 'an inability to

control access to the premises during [his] absence,' " *ibid.* (quoting 3 W. LaFave, Search and Seizure § 8.3(d), p. 731 (3d ed.1996) (hereinafter LaFave)), and does not contemplate that his objection to a request to search commonly shared premises, if made, will be overlooked.

We granted certiorari to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search.[1] 544 U.S. 973, 125 S.Ct. 1840, 161 L.Ed.2d 722 (2005). We now affirm.

***109** II

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se,* *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Coolidge v. New Hampshire,* 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), one "jealously and carefully drawn" exception, *Jones v. United States,* 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, *Rodriguez,* 497 U.S., at 181, 110 S.Ct. 2793. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, *Matlock, supra,* at 170, 94 S.Ct. 988, and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant, *Rodriguez, supra,* at 186, 110 S.Ct. 2793. None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained.[2] The significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock.*

A

The defendant in that case was arrested in the yard of a house where he lived with a Mrs. Graff and several of her ****1521** ***110** relatives, and was detained in a squad car parked nearby. When the police went to the door, Mrs. Graff admitted them and consented to a search of the house. 415 U.S., at 166, 94 S.Ct. 988. In resolving the defendant's objection to use of the evidence taken in the warrantless search, we said that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id.,* at 170, 94 S.Ct. 988. Consistent with our prior understanding that Fourth Amendment rights are not limited by the law of property, cf. *Katz v. United States,* 389 U.S. 347, 352-353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), we explained that the third party's "common authority" is not synonymous with a technical property interest:

> "The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." 415 U.S., at 171, n. 7, 94 S.Ct. 988 (citations omitted).

See also *Frazier v. Cupp,* 394 U.S. 731, 740, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) ("[I]n allowing [his cousin to share use of a duffel bag] and in leaving it in his house, [the suspect] must be taken to have assumed the risk that [the cousin] would allow someone else to look inside"). The common authority that counts under the Fourth Amendment may thus be broader than the rights accorded by property law, see *Rodriguez, supra,* at 181-182, 110 S.Ct. 2793 (consent is sufficient when given by a person who reasonably appears to have common authority but who, in fact, has no property interest in the premises searched), although its limits, too, reflect specialized tenancy arrangements apparent to the police, see ***111** *Chapman v. United States,* 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord could not consent to search of tenant's home).

The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. Cf. *Rakas v. Illinois,* 439 U.S. 128, 144, n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (an expectation of privacy is reasonable if it has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society"). *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes

consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.

B

Matlock's example of common understanding is readily apparent. When someone comes to the door of a domestic dwelling with a baby at her hip, as Mrs. Graff did, she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious ****1522** to one may nevertheless be admitted in his absence by another. As *Matlock* put it, shared tenancy is understood to include an "assumption of risk," on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, the chance of such an eccentric scheme is too remote to expect visitors to investigate a particular ***112** household's rules before accepting an invitation to come in. So, *Matlock* relied on what was usual and placed no burden on the police to eliminate the possibility of atypical arrangements, in the absence of reason to doubt that the regular scheme was in place.

It is also easy to imagine different facts on which, if known, no common authority could sensibly be suspected. A person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant. See *Chapman v. United States, supra* (landlord); *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (hotel manager). A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, *Chapman, supra,* at 617, 81 S.Ct. 776, and a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room, see *Stoner, supra,* at 489, 84 S.Ct. 889; see also *United States v. Jeffers,* 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951) (hotel staff had access to room for purposes of cleaning and maintenance, but no authority to admit police). In these circumstances, neither state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person occupying the premises. And when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; "a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted," 4 LaFave § 8.4(c), at 207 (4th ed.2004), but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom.

***113** C

Although we have not dealt directly with the reasonableness of police entry in reliance on consent by one occupant subject to immediate challenge by another, we took a step toward the issue in an earlier case dealing with the Fourth Amendment rights of a social guest arrested at premises the police entered without a warrant or the benefit of any exception to the warrant requirement. *Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), held that overnight houseguests have a legitimate expectation of privacy in their temporary quarters because "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest," *id.,* at 99, 110 S.Ct. 1684. If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim.

To begin with, 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 ****1523** 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. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.[3]

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, ***114** a resolution must come through voluntary accommodation, not by appeals to authority. Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law, that "[e]ach cotenant ... has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants." 7 R. Powell, Powell on Real Property § 50.03[1], p. 50-14 (M. Wolf gen. ed.2005). The want of any recognized superior authority among disagreeing tenants is also reflected in the law's response when the disagreements cannot be resolved. The law does not ask who has the better side of the conflict; it simply provides a right to any co-tenant, even the most unreasonable, to obtain a decree partitioning the property (when the relationship is one of co-ownership) and terminating the relationship. See, *e.g.,* 2 H. Tiffany, Real Property §§ 468, 473, 474, pp. 297, 307-309 (3d ed.1939 and 2006 Cum.Supp.). And while a decree of partition is not the answer to disagreement among rental tenants, this situation resembles co-ownership in lacking the benefit of any understanding that one or the other rental co-tenant has a superior claim to control the use of the quarters they occupy together. In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.

D

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. Accordingly, in the balancing ***115** of competing individual and governmental interests entailed by the bar to unreasonable searches, *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 536-537, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place. Since we hold to the "centuries-old principle of respect for the privacy of the home," *Wilson v. Layne,* 526 U.S. 603, 610, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people," *Minnesota v. Carter,* 525 U.S. 83, 99, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) ****1524** (KENNEDY, J., concurring). We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown," *Miller v. United States,* 357 U.S. 301, 307, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) (internal quotation marks omitted).[4]

Disputed permission is thus no match for this central value of the Fourth Amendment, and the State's other countervailing claims do not add up to outweigh it.[5] Yes, we recognize the consenting tenant's interest as a citizen in bringing criminal ***116** activity to light, see *Coolidge,* 403 U.S., at 488, 91 S.Ct. 2022 ("[I]t is no part of the policy underlying the Fourth ... Amendmen[t] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals"). And we understand a co-tenant's legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal, see 4 LaFave § 8.3(d), at 162, n. 72 ("The risk of being convicted of possession of drugs one knows are present and has tried to get the other occupant to remove is by no means insignificant"); cf. *Schneckloth,* 412 U.S., at 243, 93 S.Ct. 2041 (evidence obtained pursuant to a consent search "may insure that a wholly innocent person is not wrongly charged with a criminal offense").

But society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search. The co-tenant acting on his own initiative may be able to deliver evidence to the police, *Coolidge, supra,* at 487-489, 91 S.Ct. 2022 (suspect's wife retrieved his guns from the couple's house and turned them over to the police), and can tell the police what he knows, for use before a magistrate in getting a warrant.[6] The reliance ***117** on a co- ****1525** tenant's information instead of disputed consent accords with the law's general partiality toward "police action taken under a warrant [as against] searches and seizures without one," *United States v. Ventresca,* 380 U.S. 102, 107, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers," *United States v. Lefkowitz,* 285 U.S. 452, 464, 52 S.Ct. 420, 76 L.Ed. 877 (1932).

Nor should this established policy of Fourth Amendment law be undermined by the principal dissent's claim that it shields spousal abusers and other violent co-tenants who will refuse to allow the police to enter a dwelling when their victims ask the police for help, *post,* at 1537 (opinion of ROBERTS, C.J.) (hereinafter the dissent). It is not that the dissent exaggerates violence in the home; we recognize that domestic abuse is a serious problem in the United States. See U.S. Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women 25-26 (2000) (noting that over 20 million women and 6 million men will, in the course of their lifetimes, be the victims of intimate-partner abuse); U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Costs of Intimate Partner Violence Against Women in the United States 19 (2003) (finding that nearly 5.3 million intimate-partner victimizations, which result in close to 2 million injuries and 1,300 deaths, occur among women in the United States each year); U.S. Dept. of Justice, Bureau of Justice Statistics, Crime Data Brief, C. Rennison, Intimate Partner Violence, 1993-2001 (Feb.2003) (noting that in 2001 intimate-partner violence made up 20% of violent crime against women); see also Becker, The ***118** Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. Chi. L.Rev. 453, 507-508 (1992) (noting that women may feel physical insecurity in their homes as a result of abuse from domestic partners).

But this case has no bearing on the capacity of the police to protect domestic victims. The dissent's argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence. No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, 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 (or soon will) occur, however much a spouse or other co-tenant objected. (And since the police would then be lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause, see *Texas v. Brown,* 460 U.S. 730, 737-739, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion).) Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes. See ****1526** 4 LaFave § 8.3(d), at 161 ("[E]ven when ... two persons quite clearly have equal rights in the place, as where two individuals are sharing an apartment on an equal basis, there may nonetheless sometimes exist a basis for giving greater recognition to the interests of one over the other.... [W]here the defendant has victimized the third-party ... the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections" (internal quotation marks omitted; third omission in original)). The undoubted right of the police ***119** to enter in order to protect a victim, however, has nothing to do with the question in this case, whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent.[7]

None of the cases cited by the dissent support its improbable view that recognizing limits on merely evidentiary searches would compromise the capacity to protect a fearful occupant. In the circumstances of those cases, there is no danger that the fearful occupant will be kept behind the closed door of the house simply because the abusive tenant refuses to consent to a search. See *United States v. Donlin,* 982 F.2d 31, 32 (C.A.1 1992) (victimized individual was already outside of her apartment when police arrived and, for all intents and purposes, within the protective custody of law enforcement officers); *United States v. Hendrix,* 595 F.2d 883, 885-886 (C.A.D.C.1979) *(per curiam)* (even if the consent of the threatened co-occupant did not justify a warrantless search, the police entry was nevertheless allowable on exigent circumstances grounds); *People v. Sanders,* 904 P.2d 1311, 1313-1315 (Colo.1995) (en banc) (victimized individual gave her consent to search away from her home and was not present at the time of the police visit; alternatively, exigent circumstances existed to satisfy the warrantless exception); *Brandon v. State,* 778 P.2d 221, 223-224 (Alaska App.1989) (victimized individual consented away from her home and was not present at the time of the police visit); *United States v. Davis,* 290 F.3d 1239, 1241 (C.A.10 2002) (immediate harm extinguished after husband "order[ed]" wife out of the home).

***120** The dissent's red herring aside, we know, of course, that alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside. The consenting tenant may simply not disclose enough information, or information factual enough, to add up to a showing of probable cause, and there may be no exigency to justify fast action. But nothing in social custom or its

reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. 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.[8]

**1527 E

There are two loose ends, the first being the explanation given in *Matlock* for the constitutional sufficiency of a co-tenant's consent to enter and search: it "rests ... on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right ...." 415 U.S., at 171, n. 7, 94 S.Ct. 988. If *Matlock*'sss co-tenant is giving permission "in his own right," how can his "own right" be eliminated by another tenant's objection? The answer appears in the very footnote from which the quoted statement is taken: the "right" to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the *121 private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection. The *Matlock* Court did not purport to answer this question, a point made clear by another statement (which the dissent does not quote): the Court described the co-tenant's consent as good against "the absent, nonconsenting" resident. *Id.,* at 170, 94 S.Ct. 988.

The second loose end is the significance of *Matlock* and *Rodriguez* after today's decision. Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

This is the line we draw, and we think the formalism is justified. 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 *122 expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-tenant consent case **1528 would turn into a test about the adequacy of the police's efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent,[9] albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.

III

This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of *123 the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified

entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.

The judgment of the Supreme Court of Georgia is therefore affirmed.

It is so ordered.

Justice ALITO took no part in the consideration or decision of this case.

Justice STEVENS, concurring.

The study of history for the purpose of ascertaining the original understanding of constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes. In both situations the facts uncovered by the study are usually relevant but not necessarily dispositive. This case illustrates why even the most dedicated adherent to an approach to constitutional interpretation that places primary reliance on the search for original understanding would recognize the relevance of changes in our society.

At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a "house" or "castle" unless authorized to do so by a valid warrant. See *Semayne's Case,* 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B.). Every occupant of the home has a ***124** right-protected by the common law for centuries and by the Fourth Amendment since 1791-to refuse entry. When an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right. To be sure that the waiver is voluntary, it is sound practice-a practice some Justices of this Court thought necessary to make the waiver ****1529** voluntary[1]-for the officer to advise the occupant of that right.[2] The issue in this case relates to the content of the advice that the officer should provide when met at the door by a man and a woman who are apparently joint tenants or joint owners of the property.

In the 18th century, when the Fourth Amendment was adopted, the advice would have been quite different from what is appropriate today. Given the then-prevailing dramatic differences between the property rights of the husband and the far lesser rights of the wife, only the consent of the husband would matter. Whether "the master of the house" consented or objected, his decision would control. Thus if "original understanding" were to govern the outcome of this case, the search was clearly invalid because the husband did not consent. History, however, is not dispositive because it is now clear, as a matter of constitutional law, that ***125** the male and the female are equal partners. *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

In today's world the only advice that an officer could properly give should make it clear that each of the partners has a constitutional right that he or she may independently assert or waive. Assuming that both spouses are competent, neither one is a master possessing the power to override the other's constitutional right to deny entry to their castle.

With these observations, I join the Court's opinion.

Justice BREYER, concurring.

If Fourth Amendment law forced us to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, I believe we should choose the first. That is because, as THE CHIEF JUSTICE'S dissent points out, a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases), and the consenting party's joint tenancy diminishes the objecting party's reasonable expectation of privacy.

But the Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms "unreasonable searches and seizures." And this Court has continuously emphasized that "[r]easonableness ... is measured ... by examining the totality of the circumstances." *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996); see also *Illinois v. Wardlow,* 528 U.S. 119, 136, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (STEVENS, J., concurring in part and dissenting in part); *Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *Michigan v.* ****1530** *Chesternut,* 486 U.S. 567, 572-573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *Florida v. Royer,* 460 U.S. 491, 506, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion).

The circumstances here include the following: The search at issue was a search solely for evidence. The objecting ***126** party was present and made his objection known clearly and directly to the officers seeking to enter the house. The officers did not justify their search on grounds of possible evidence destruction. Cf. *Thornton v. United States,* 541 U.S. 615, 620-622, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004); *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 623, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Schmerber v. California,* 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). And, as far as the record reveals, the officers might easily have secured the premises and sought a warrant permitting them to enter. See *Illinois v. McArthur,* 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001). Thus, the "totality of the circumstances" present here do not suffice to justify abandoning the Fourth Amendment's traditional hostility to police entry into a home without a warrant.

I stress the totality of the circumstances, however, because, were the circumstances to change significantly, so should the result. The Court's opinion does not apply where the objector is not present "and object[ing]." *Ante,* at 1527.

Moreover, the risk of an ongoing crime or other exigent circumstance can make a critical difference. Consider, for example, instances of domestic abuse. See *ante,* at 1525. "Family disturbance calls ... constitute the largest single category of calls received by police departments each year." Mederer & Gelles, Compassion or Control: Intervention in Cases of Wife Abuse, 4 J. of Interpersonal Violence 25 (Mar.1989) (emphasis deleted); see also, *e.g.,* Office of the Attorney General, California Criminal Justice Statistics Center, Domestic Violence Related Calls for Assistance, 1987-2003, County by Year, http://ag.ca.gov/cjsc/publications/misc/dvsr/tabs/8703.pdf (as visited Mar. 1, 2006, and available in Clerk of Court's case file) (providing data showing that California police received an average of 207,848 domestic violence related calls each year); Cessato, Defenders Against Domestic Abuse, Washington Post, Aug. 25, 2002, p. B8 ("In the District [of Columbia], police report that almost half of roughly 39,000 violent crime calls received in 2000 involved domestic violence"); Zorza, Women Battering: High Costs ***127** and the State of the Law, Clearinghouse Review, 383, 385 (Special Issue 1994) ("One-third of all police time is spent responding to domestic disturbance calls"). And, law enforcement officers must be able to respond effectively when confronted with the possibility of abuse.

If a possible abuse victim invites a responding officer to enter a home or consents to the officer's entry request, that invitation (or consent) itself could reflect the victim's fear about being left alone with an abuser. It could also indicate the availability of evidence, in the form of an immediate willingness to speak, that might not otherwise exist. In that context, an invitation (or consent) would provide a special reason for immediate, rather than later, police entry. And, entry following invitation or consent by one party ordinarily would be reasonable even in the face of direct objection by the other. That being so, contrary to THE CHIEF JUSTICE'S suggestion, *post,* at 1537, today's decision will not adversely affect ordinary law enforcement practices.

****1531** Given the case-specific nature of the Court's holding, and with these understandings, I join the Court's holding and its opinion.

Chief Justice ROBERTS, with whom Justice SCALIA joins, dissenting.

The Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation. The rule the majority fashions does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room. And the cost of affording such random protection is great, as demonstrated by the recurring cases in which abused spouses seek to authorize police entry into a home they share with a nonconsenting abuser.

***128** The correct approach to the question presented is clearly mapped out in our precedents: The Fourth Amendment protects privacy. If an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government. And just as an individual who has shared illegal plans or incriminating documents with another cannot interpose an objection when that other person turns the information over to the government, just because the individual happens to be present at the time, so too someone who shares a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present.

A warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it. Co-occupants have "assumed the risk that one of their number might permit [a] common area to be searched." *United States v. Matlock,* 415 U.S. 164, 171, n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Just as Mrs. Randolph could walk upstairs, come down, and turn her husband's cocaine straw over to the police, she can consent to police entry and search of what is, after all, her home, too.

I

In *Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), this Court stated that "[w]hat [a person] is assured by the Fourth Amendment ... is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.' " *Id.,* at 183, 110 S.Ct. 2793. One element that can make a warrantless government search of a home " 'reasonable' " is voluntary consent. *Id.,* at 184, 110 S.Ct. 2793; *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Proof of voluntary consent "is not limited to proof that consent was given by the defendant," but the government "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship ***129** to the premises." *Matlock, supra,* at 171, 94 S.Ct. 988. Today's opinion creates an exception to this otherwise clear rule: A third-party consent search is unreasonable, and therefore constitutionally impermissible, if the co-occupant against whom evidence is obtained was present and objected to the entry and search.

This exception is based on what the majority describes as "widely shared social expectations" that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation." ****1532** *Ante,* at 1521, 1523. But this fundamental predicate to the majority's analysis gets us nowhere: Does the objecting co-tenant accede to the consenting co-tenant's wishes, or the other way around? The majority's assumption about voluntary accommodation simply leads to the common stalemate of two gentlemen insisting that the other enter a room first.

Nevertheless, the majority is confident in assuming-confident enough to incorporate its assumption into the Constitution-that an invited social guest who arrives at the door of a shared residence, and is greeted by a disagreeable co-occupant shouting " 'stay out,' " would simply go away. *Ante,* at 1523. The Court observes that "no sensible person would go inside under those conditions," *ibid.,* and concludes from this that the inviting co-occupant has no "authority" to insist on getting her way over the wishes of her co-occupant, *ibid.* But it seems equally accurate to say-based on the majority's conclusion that one does not have a right to prevail over the express wishes of his co-occupant-that the objector has no "authority" to insist on getting *his* way over his co-occupant's wish that her guest be admitted.

The fact is that a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations. A relative or good friend of one of two feuding roommates might well enter the apartment over the objection of the other roommate. The reason the invitee ***130** appeared at the door also affects expectations: A guest who came to celebrate an occupant's birthday, or one who had traveled some distance for a particular reason, might not readily turn away simply because of a roommate's objection. The nature of the place itself is also pertinent: Invitees may react one way if the feuding roommates share one room, differently if there are common areas from which the objecting roommate could readily be expected to absent himself. Altering the numbers might well change the social expectations: Invitees might enter if two of three co-occupants encourage them to do so, over one dissenter.

The possible scenarios are limitless, and slight variations in the fact pattern yield vastly different expectations about whether the invitee might be expected to enter or to go away. Such shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support for its basic assumption-that an invited guest encountering two disagreeing co-occupants would flee-beyond a hunch about how people would typically act in an atypical situation.

And in fact the Court has not looked to such expectations to decide questions of consent under the Fourth Amendment, but only to determine when a search has occurred and whether a particular person has standing to object to a search. For these latter inquiries, we ask whether a person has a subjective expectation of privacy in a particular place, and whether "the expectation [is] one that society is prepared to recognize as 'reasonable.' " *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring); see *Minnesota v. Olson,* 495 U.S. 91, 95-96, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (extending *Katz* test to standing

inquiry). But the social expectations concept has not been applied to all questions arising under the Fourth Amendment, least of all issues of consent. A criminal might have a strong expectation that his longtime confidant will not allow the government to listen to their private conversations, but however profound his shock might be ***131** upon betrayal, ****1533** government monitoring with the confidant's consent is reasonable under the Fourth Amendment. See *United States v. White,* 401 U.S. 745, 752, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (plurality opinion).

The majority suggests that "widely shared social expectations" are a "constant element in assessing Fourth Amendment reasonableness," *ante,* at 1521 (citing *Rakas v. Illinois,* 439 U.S. 128, 144, n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)), but that is not the case; the Fourth Amendment precedents the majority cites refer instead to a "legitimate expectation of *privacy,*" *Id.,* at 143, n. 12, 99 S.Ct. 421 (emphasis added; internal quotation marks omitted). Whatever social expectation the majority seeks to protect, it is not one of privacy. The very predicate giving rise to the question in cases of shared information, papers, containers, or places is that privacy has been shared with another. Our common social expectations may well be that the other person will not, in turn, share what we have shared with them with another-including the police-but that is the risk we take in sharing. If two friends share a locker and one keeps contraband inside, he might trust that his friend will not let others look inside. But by sharing private space, privacy has "already been frustrated" with respect to the lockermate. *United States v. Jacobsen,* 466 U.S. 109, 117, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). If two roommates share a computer and one keeps pirated software on a shared drive, he might assume that his roommate will not inform the government. But that person has given up his privacy with respect to his roommate by saving the software on their shared computer.

A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by a variety of labels-courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant.

***132** II

Our cases reflect this understanding. In *United States v. White,* we held that one party to a conversation can consent to government eavesdropping, and statements made by the other party will be admissible at trial. 401 U.S., at 752, 91 S.Ct. 1122. This rule is based on privacy: "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police .... [I]f he has no doubts, or allays them, or risks what doubt he has, the risk is his." *Ibid.*

The Court has applied this same analysis to objects and places as well. In *Frazier v. Cupp,* 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), a duffel bag "was being used jointly" by two cousins. *Id.,* at 740, 89 S.Ct. 1420. The Court held that the consent of one was effective to result in the seizure of evidence used against both: "[I]n allowing [his cousin] to use the bag and in leaving it in his house, [the defendant] must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Ibid.*

As the Court explained in *United States v. Jacobsen, supra*:

> "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth ****1534** Amendment does not prohibit governmental use of the now nonprivate information: 'This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.' " ***133** *Id.,* at 117, 104 S.Ct. 1652 (quoting *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976)).

The same analysis applies to the question whether our privacy can be compromised by those with whom we share common living space. If a person keeps contraband in common areas of his home, he runs the risk that his co-occupants will deliver the contraband to the police. In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), Mrs. Coolidge retrieved four of her husband's guns and the clothes he was wearing the previous night and handed them over to police. We held that these items were properly admitted at trial because "when Mrs. Coolidge of her own accord produced the guns and clothes for inspection, ... it was not incumbent

on the police to stop her or avert their eyes." *Id.,* at 489, 91 S.Ct. 2022.

Even in our most private relationships, our observable actions and possessions are private at the discretion of those around us. A husband can request that his wife not tell a jury about contraband that she observed in their home or illegal activity to which she bore witness, but it is she who decides whether to invoke the testimonial marital privilege. *Trammel v. United States,* 445 U.S. 40, 53, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). In *Trammel,* we noted that the former rule prohibiting a wife from testifying about her husband's observable wrongdoing at his say-so "goes far beyond making 'every man's house his castle,' and permits a person to convert his house into 'a den of thieves.' " *Id.,* at 51-52, 100 S.Ct. 906 (quoting 5 J. Bentham, Rationale of Judicial Evidence 340 (1827)).

There is no basis for evaluating physical searches of shared space in a manner different from how we evaluated the privacy interests in the foregoing cases, and in fact the Court has proceeded along the same lines in considering such searches. In *Matlock,* police arrested the defendant in the front yard of a house and placed him in a squad car, and then obtained permission from Mrs. Graff to search a shared bedroom for evidence of Matlock's bank robbery. 415 U.S., at 166, 94 S.Ct. 988. Police certainly could have assumed that Matlock ***134** would have objected were he consulted as he sat handcuffed in the squad car outside. And in *Rodriguez,* where Miss Fischer offered to facilitate the arrest of her sleeping boyfriend by admitting police into an apartment she apparently shared with him, 497 U.S., at 179, 110 S.Ct. 2793, police might have noted that this entry was undoubtedly contrary to Rodriguez's social expectations. Yet both of these searches were reasonable under the Fourth Amendment because Mrs. Graff had authority, and Miss Fischer apparent authority, to admit others into areas over which they exercised control, despite the almost certain wishes of their *present* co-occupants.

The common thread in our decisions upholding searches conducted pursuant to third-party consent is an understanding that a person "assume[s] the risk" that those who have access to and control over his shared property might consent to a search. *Matlock,* 415 U.S., at 171, n. 7, 94 S.Ct. 988. In *Matlock,* we explained that this assumption of risk is derived from a ****1535** third party's "joint access or control for most purposes" of shared property. *Ibid.* And we concluded that shared use of property makes it "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right." *Ibid.*

In this sense, the risk assumed by a joint occupant is comparable to the risk assumed by one who reveals private information to another. If a person has incriminating information, he can keep it private in the face of a request from police to share it, because he has that right under the Fifth Amendment. If a person occupies a house with incriminating information in it, he can keep that information private in the face of a request from police to search the house, because he has that right under the Fourth Amendment. But if he shares the information-or the house-with another, that other can grant access to the police in each instance.[1]

***135** To the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed. Mr. Randolph acknowledged this distinction in his motion to suppress, where he differentiated his law office from the rest of the Randolph house by describing it as an area that "was solely in his control and dominion." App. 3. As to a "common area," however, co-occupants with "joint access or control" may consent to an entry and search. *Matlock, supra,* at 171, n. 7, 94 S.Ct. 988.

By emphasizing the objector's presence and noting an occupant's understanding that obnoxious guests might "be admitted in [one's] absence," *ante,* at 1522, the majority appears to resurrect an agency theory of consent suggested in our early cases. See *Stoner v. California,* 376 U.S. 483, 489, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (stating that a hotel clerk could not consent to a search of a guest's room because the guest had not waived his rights ***136** "by word or deed, either directly or through an agent"); *Chapman v. United States,* 365 U.S. 610, 616-617, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961). This agency theory is belied by the facts of *Matlock* and *Rodriguez*-both defendants were present but simply not asked for consent-and the Court ****1536** made clear in those cases that a co-occupant's authority to consent rested not on an absent occupant's delegation of choice to an agent, but on the consenting co-occupant's "joint access or control" of the property. *Matlock, supra,* at 171, n. 7, 94 S.Ct. 988; see *Rodriguez, supra,* at 181, 110 S.Ct. 2793; *United States v. McAlpine,* 919 F.2d 1461, 1464, n. 2 (C.A.10 1990) ("[A]gency analysis [was] put to rest by the Supreme Court's reasoning in *Matlock*").

The law acknowledges that although we might not expect our friends and family to admit the government into common areas, sharing space entails risk. A person assumes the risk that his co-occupants-just as they might report his illegal activity or deliver his contraband to the government-might consent to a search of areas over which they have access and control. See *United States v. Karo,* 468 U.S. 705, 726, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) (O'Connor, J., concurring in part and concurring in judgment) (finding it a "relatively easy case ... when two persons share identical, overlapping privacy interests in a particular place, container, or conversation. Here *both* share the power to surrender each other's privacy to a third party").

III

The majority states its rule as follows: "[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." *Ante,* at 1526.

Just as the source of the majority's rule is not privacy, so too the interest it protects cannot reasonably be described as such. That interest is not protected if a co-owner happens to be absent when the police arrive, in the backyard gardening, asleep in the next room, or listening to music ***137** through earphones so that only his co-occupant hears the knock on the door. That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive. Usually when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought. See *California v. Acevedo,* 500 U.S. 565, 574, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). We should not embrace a rule at the outset that its *sponsors* appreciate will result in drawing fine, formalistic lines. See *ante,* at 1527.

Rather than draw such random and happenstance lines-and pretend that the Constitution decreed them-the more reasonable approach is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others, and that the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government. Such a rule flows more naturally from our cases concerning Fourth Amendment reasonableness and is logically grounded in the concept of privacy underlying that Amendment.

The scope of the majority's rule is not only arbitrary but obscure as well. The majority repeats several times that a present co-occupant's refusal to permit entry renders the search unreasonable and invalid "as to him." *Ante,* at 1519, 1526, 1528. This implies entry and search would be reasonable "as to" someone else, presumably the consenting co-occupant and any other absent co-occupants. The normal Fourth Amendment rule is that items discovered ****1537** in plain view are admissible if the officers were legitimately on the premises; if the entry and search were reasonable "as to" Mrs. Randolph, based on her consent, it is not clear why the cocaine straw should not be admissible "as to" Mr. Randolph, as discovered in plain view during a legitimate search "as ***138** to" Mrs. Randolph. The majority's differentiation between entry focused on discovering whether domestic violence has occurred (and the consequent authority to seize items in plain view), and entry focused on searching for evidence of other crime, is equally puzzling. See *ante,* at 1525-1526. This Court has rejected subjective motivations of police officers in assessing Fourth Amendment questions, see *Whren v. United States,* 517 U.S. 806, 812-813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), with good reason: The police do not need a particular reason to ask for consent to search, whether for signs of domestic violence or evidence of drug possession.

While the majority's rule protects something random, its consequences are particularly severe. The question presented often arises when innocent co-tenants seek to disassociate or protect themselves from ongoing criminal activity. See, *e.g., United States v. Hendrix,* 595 F.2d 883, 884 (C.A.D.C.1979) *(per curiam)* (wife asked police " 'to get her baby and take [a] sawed-off shotgun out of her house' "); *People v. Cosme,* 48 N.Y.2d 286, 288-289, 293, 422 N.Y.S.2d 652, 397 N.E.2d 1319, 1320, 1323 (1979) (woman asked police to remove cocaine and a gun from a shared closet); *United States v. Botsch,* 364 F.2d 542, 547 (C.A.2 1966). Under the majority's rule, there will be many cases in which a consenting co-occupant's wish to have the police enter is overridden by an objection from another present co-occupant. What does the majority imagine will happen, in a case in which the consenting co-occupant is concerned about the other's criminal activity, once the door clicks shut? The objecting co-occupant may pause briefly to decide whether to destroy any evidence of wrongdoing or to inflict retribution on the

consenting co-occupant first, but there can be little doubt that he will attend to both in short order. It is no answer to say that the consenting co-occupant can depart with the police; remember that it is her home, too, and the other co-occupant's very presence, which allowed him to object, may also prevent the consenting co-occupant from doing more than urging the police to enter.

***139** Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situations, a context in which the present question often arises. See *Rodriguez,* 497 U.S., at 179, 110 S.Ct. 2793; *United States v. Donlin,* 982 F.2d 31 (C.A.1 1992); *Hendrix, supra; People v. Sanders,* 904 P.2d 1311 (Colo.1995) (en banc); *Brandon v. State,* 778 P.2d 221 (Alaska App.1989). While people living together might typically be accommodating to the wishes of their co-tenants, requests for police assistance may well come from co-inhabitants who are having a disagreement. The Court concludes that because "no sensible person would go inside" in the face of disputed consent, *ante,* at 1523, and the consenting co-tenant thus has "no recognized authority" to insist on the guest's admission, *ibid.,* a "police officer [has] no better claim to reasonableness in entering than the officer would have in the absence of any consent at all," *ibid*. But the police officer's superior claim to enter is obvious: Mrs. Randolph did not invite the police to join her for dessert and coffee; the officer's precise purpose in knocking on the door was to assist with a dispute between the Randolphs-one in which Mrs. Randolph felt the need for the protective presence ****1538** of the police. The majority's rule apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects.[2]

***140** The majority acknowledges these concerns, but dismisses them on the ground that its rule can be expected to give rise to exigent situations, and police can then rely on an exigent circumstances exception to justify entry. *Ante,* at 1524-1525, n. 6. This is a strange way to justify a rule, and the fact that alternative justifications for entry might arise does not show that entry pursuant to consent is unreasonable. In addition, it is far from clear that an exception for emergency entries suffices to protect the safety of occupants in domestic disputes. See, *e.g., United States v. Davis,* 290 F.3d 1239, 1240-1241 (C.A.10 2002) (finding no exigent circumstances justifying entry when police responded to a report of domestic abuse, officers heard no noise upon arrival, defendant told officers that his wife was out of town, and wife then appeared at the door seemingly unharmed but resisted husband's efforts to close the door).

Rather than give effect to a consenting spouse's authority to permit entry into her house to avoid such situations, the majority again alters established Fourth Amendment rules to defend giving veto power to the objecting spouse. In response to the concern that police might be turned away under its rule before entry can be justified based on exigency, the majority creates a new rule: A "good reason" to enter, coupled with one occupant's consent, will ensure that a police officer is "lawfully in the premises." *Ante,* at 1525. As support for this "consent plus a good reason" rule, the majority cites a treatise, which itself refers only to *emergency* entries. *Ante,* at 1525-1526 (citing 4 W. LaFave, Search and Seizure § 8.3(d), p. 161 (4th ed.2004)). For the sake of defending what it concedes are fine, formalistic lines, the majority ***141** spins out an entirely new framework for analyzing exigent circumstances. Police may now enter with a "good reason" to believe that "violence (or threat of violence) has just occurred or is about to (or soon will) occur." *Ante,* at 1525. And apparently a key factor allowing entry with a "good reason" short of exigency is the very consent of one co-occupant the majority finds so inadequate in the first place.

The majority's analysis alters a great deal of established Fourth Amendment law. The majority imports the concept of "social expectations," previously used only to determine when a search has occurred and whether a particular person has standing to object to a search, into questions of consent. *Ante,* at 1521, 1522. To ****1539** determine whether entry and search are reasonable, the majority considers a police officer's subjective motive in asking for consent, which we have otherwise refrained from doing in assessing Fourth Amendment questions. *Ante,* at 1525-1526. And the majority creates a new exception to the warrant requirement to justify warrantless entry short of exigency in potential domestic abuse situations. *Ibid.*

Considering the majority's rule is solely concerned with protecting a person who happens to be present at the door when a police officer asks his co-occupant for consent to search, but not one who is asleep in the next room or in the backyard gardening, the majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy. Perhaps one day, as the consequences of the majority's analytic approach become clearer, today's opinion will be treated the same way the

majority treats our opinions in *Matlock* and *Rodriguez*-as a "loose end" to be tied up. *Ante,* at 1527.

One of the concurring opinions states that if it had to choose between a rule that a cotenant's consent was valid or a rule that it was not, it would choose the former. *Ante,* at 1529 (opinion of BREYER, J.). The concurrence advises, ***142** however, that "no single set of legal rules can capture the ever-changing complexity of human life," *ibid.,* and joins what becomes the majority opinion, "[g]iven the case-specific nature of the Court's holding," *ante,* at 1531. What the majority establishes, in its own terms, is "*the rule* that a physically present inhabitant's express refusal of consent to a police search *is dispositive* as to him, regardless of the consent of a fellow occupant." *Ante,* at 1528 (emphasis added). The concurrence joins with the apparent "understandin[g]" that the majority's "rule" is not a rule at all, but simply a "case-specific" holding. *Ante,* at 1530-1531 (opinion of BREYER, J.). The end result is a complete lack of practical guidance for the police in the field, let alone for the lower courts.

* * *

Our third-party consent cases have recognized that a person who shares common areas with others "assume[s] the risk that one of their number might permit the common area to be searched." *Matlock,* 415 U.S., at 171, n. 7, 94 S.Ct. 988. The majority reminds us, in high tones, that a man's home is his castle, *ante,* at 1524, but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner's castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects. Rather than constitutionalize such an arbitrary rule, we should acknowledge that a decision to share a private place, like a decision to share a secret or a confidential document, necessarily entails the risk that those with whom we share may in turn choose to share-for their own protection or for other reasons-with the police.

I respectfully dissent.

Justice SCALIA, dissenting.

I join the dissent of THE CHIEF JUSTICE, but add these few words in response to Justice STEVENS' concurrence.

***143** It is not as clear to me as it is to Justice STEVENS that, at the time the Fourth Amendment was adopted, a police officer could enter a married woman's home over her objection, and could not enter with only her consent. Nor is it clear to me that the answers to these questions depended solely on who owned the house. It is entirely clear, however, ****1540** that *if* the matter *did* depend solely on property rights, a latter-day alteration of property rights would also produce a latter-day alteration of the Fourth Amendment outcome-without altering the Fourth Amendment itself.

Justice STEVENS' attempted critique of originalism confuses the original import of the Fourth Amendment with the background sources of law to which the Amendment, on its original meaning, referred. From the date of its ratification until well into the 20th century, violation of the Amendment was tied to common-law trespass. See *Kyllo v. United States,* 533 U.S. 27, 31-32, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); see also *California v. Acevedo,* 500 U.S. 565, 581, 583, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (SCALIA, J., concurring in judgment). On the basis of that connection, someone who had power to license the search of a house by a private party could authorize a police search. See 1 Restatement of Torts § 167, and Comment *b* (1934); see also *Williams v. Howard,* 110 S.C. 82, 96 S.E. 251 (1918); *Fennemore v. Armstrong,* 29 Del. 35, 96 A. 204 (Super.Ct.1915). The issue of *who* could give such consent generally depended, in turn, on "historical and legal refinements" of property law. *United States v. Matlock,* 415 U.S. 164, 171, n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). As property law developed, individuals who previously could not authorize a search might become able to do so, and those who once could grant such consent might no longer have that power. But changes in the law of property to which the Fourth Amendment referred would not alter the Amendment's meaning: that anyone capable of authorizing a search by a private party could consent to a warrantless search by the police.

***144** There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. The Fifth Amendment provides, for instance, that "private property" shall not "be taken for public use, without just compensation"; but it does not purport to define property rights. We have consistently held that "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' " *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (quoting *Board of Regents of*

State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). The same is true of the Fourteenth Amendment Due Process Clause's protection of "property." See *Castle Rock v. Gonzales,* 545 U.S. 748, 756, 125 S.Ct. 2796, 2803, 162 L.Ed.2d 658 (2005). This reference to changeable law presents no problem for the originalist. No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights. If it is indeed true, therefore, that a wife in 1791 could not authorize the search of her husband's house, the fact that current property law provides otherwise is no more troublesome for the originalist than the well-established fact that a State must compensate its takings of even those property rights that did not exist at the time of the founding.

In any event, Justice STEVENS' panegyric to the *equal* rights of women under modern property law does not support his conclusion that "[a]ssuming ... both spouses are competent, neither one is a master possessing the power to override the other's constitutional right to deny entry to their castle." *Ante,* at 1529. The issue at hand is what to do when there is a *conflict* between two equals. Now that women have authority to consent, as Justice STEVENS claims men alone once did, it does not follow that the spouse who *refuses* consent should be the winner of ****1541** the contest. Justice STEVENS could just as well have followed the same historical developments to the opposite conclusion: Now that ***145** "the male and the female are equal partners," *ibid.,* and women can consent to a search of their property, men can no longer obstruct their wishes. Men and women are no more "equal" in the majority's regime, where both sexes can veto each other's consent, than on the dissent's view, where both sexes cannot.

Finally, I must express grave doubt that today's decision deserves Justice STEVENS' celebration as part of the forward march of women's equality. Given the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out? The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes-which is, curiously enough, *precisely* the power that Justice STEVENS disapprovingly presumes men had in 1791.

Justice THOMAS, dissenting.

The Court has long recognized that "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda v. Arizona,* 384 U.S. 436, 477-478, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Consistent with this principle, the Court held in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), that no Fourth Amendment search occurs where, as here, the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing by the accused. *Id.*, at 486-490, 91 S.Ct. 2022. Because *Coolidge* squarely controls this case, the Court need not address whether police could permissibly have conducted a general search of the Randolph home, based on Mrs. Randolph's consent. I respectfully dissent.

In the instant case, Mrs. Randolph told police responding to a domestic dispute that respondent was using a substantial ***146** quantity of cocaine. Upon police request, she consented to a general search of her residence to investigate her statements. However, as the Court's recitation of the facts demonstrates, *ante,* at 1519, the record is clear that no such general search occurred. Instead, Sergeant Brett Murray asked Mrs. Randolph where the cocaine was located, and she showed him to an upstairs bedroom, where he saw the "piece of cut straw" on a dresser. Corrected Tr. of Motion to Suppression Hearing in Case No. 2001R-699 (Super. Ct. Sumter Cty., Ga., Oct. 3, 2002), pp. 8-9. Upon closer examination, Sergeant Murray observed white residue on the straw, and concluded the straw had been used for ingesting cocaine. *Id.,* at 8. He then collected the straw and the residue as evidence. *Id.*, at 9.

Sergeant Murray's entry into the Randolphs' home at the invitation of Mrs. Randolph to be shown evidence of respondent's cocaine use does not constitute a Fourth Amendment search. Under this Court's precedents, only the action of an agent of the government can constitute a search within the meaning of the Fourth Amendment, because that Amendment "was intended as a restraint upon the activities of *sovereign authority,* and was not intended to be a limitation upon other than governmental agencies." *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921) (emphasis added). See also *Coolidge,* 403 U.S., at 487, 91 S.Ct. 2022. Applying this principle in *Coolidge,* the Court held that when a citizen leads police officers into a home shared with her ****1542** spouse to show them evidence relevant to their investigation into a crime, that citizen is not acting as an agent of the police, and thus no Fourth Amendment search has occurred. *Id.,* at 488-498, 91 S.Ct. 2022.

Review of the facts in *Coolidge* clearly demonstrates that it governs this case. While the police interrogated Coolidge as part of their investigation into a murder, two other officers were sent to his house to speak with his wife. *Id.,* at 485, 91 S.Ct. 2022. During the course of questioning Mrs. Coolidge, the ***147** police asked whether her husband owned any guns. *Id.*, at 486, 91 S.Ct. 2022. Mrs. Coolidge replied in the affirmative, and offered to retrieve the weapons for the police, apparently operating under the assumption that doing so would help to exonerate her husband. *Ibid.* The police accompanied Mrs. Coolidge to the bedroom to collect the guns, as well as clothing that Mrs. Coolidge told them her husband had been wearing the night of the murder. *Ibid.*

Before this Court, Coolidge argued that the evidence of the guns and clothing should be suppressed as the product of an unlawful search because Mrs. Coolidge was acting as an " 'instrument,' " or agent, of the police by complying with a " 'demand' " made by them. *Id.*, at 487, 91 S.Ct. 2022. The Court recognized that, had Mrs. Coolidge sought out the guns to give to police wholly on her own initiative, "there can be no doubt under existing law that the articles would later have been admissible in evidence." *Ibid.* That she did so in cooperation with police pursuant to their request did not transform her into their agent; after all, "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.,* at 488, 91 S.Ct. 2022. Because the police were "acting normally and properly" when they asked about any guns, and questioning Mrs. Coolidge about the clothing was "logical and in no way coercive," the Fourth Amendment did not require police to "avert their eyes" when Mrs. Coolidge produced the guns and clothes for inspection.[1] *Id.*, at 488-489, 91 S.Ct. 2022.

***148** This case is indistinguishable from *Coolidge,* compelling the conclusion that Mrs. Randolph was not acting as an agent of the police when she admitted Sergeant Murray into her home and led him to the incriminating evidence.[2] Just as Mrs. Coolidge could, of her own accord, have offered her husband's weapons and clothing to the police without implicating the Fourth Amendment, so too could Mrs. ****1543** Randolph have simply retrieved the straw from the house and given it to Sergeant Murray. Indeed, the majority appears to concede as much. *Ante,* at 1524 ("The co-tenant acting on his own initiative may be able to deliver evidence to the police, *Coolidge, supra,* at 487-489 ..., 91 S.Ct. 2022, and can tell the police what he knows, for use before a magistrate in getting a warrant"). Drawing a constitutionally significant distinction between what occurred here and Mrs. Randolph's independent production of the relevant evidence is both inconsistent with *Coolidge* and unduly formalistic.[3]

Accordingly, the trial court appropriately denied respondent's motion to suppress the evidence Mrs. Randolph provided ***149** to the police and the evidence obtained as a result of the consequent search warrant. I would therefore reverse the judgment of the Supreme Court of Georgia.

All Citations

547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208, 74 USLW 4176, 06 Cal. Daily Op. Serv. 2399, 2006 Daily Journal D.A.R. 3375, 19 Fla. L. Weekly Fed. S 138

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 All four Courts of Appeals to have considered this question have concluded that consent remains effective in the face of an express objection. See *United States v. Morning,* 64 F.3d 531, 533-536 (C.A.9 1995); *United States v. Donlin,* 982 F.2d 31, 33 (C.A.1 1992); *United States v. Hendrix,* 595 F.2d 883, 885 (C.A.D.C.1979) *(per curiam); United States v. Sumlin,* 567 F.2d 684, 687-688 (C.A.6 1977). Of the state courts that have addressed the question, the majority have reached that conclusion as well. See, *e.g., Love v. State,* 355 Ark. 334, 342, 138 S.W.3d 676, 680 (2003); *Laramie v. Hysong,* 808 P.2d 199, 203-205 (Wyo.1991); but cf. *State v. Leach,* 113 Wash.2d 735, 744, 782 P.2d 1035, 1040 (1989) (en banc) (requiring consent of all present co-occupants).

2 Mindful of the multiplicity of living arrangements, we vary the terms used to describe residential co-occupancies. In so doing we do not mean, however, to suggest that the rule to be applied to them is similarly varied.

3 Cf. *Mincey v. Arizona,* 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (acknowledging the right of police to respond to emergency situations "threatening life or limb" and indicating that police may conduct a warrantless search provided that the search is " 'strictly circumscribed by the exigencies which justify its initiation' ").

4 In the principal dissent's view, the centuries of special protection for the privacy of the home are over. The dissent equates inviting the police into a co-tenant's home over his contemporaneous objection with reporting a secret, *post,* at 1539 (opinion of ROBERTS, C.J.), and the emphasis it places on the false equation suggests a deliberate intent to devalue the importance of the privacy of a dwelling place. The same attitude that privacy of a dwelling is not special underlies the dissent's easy assumption that privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police. *Post,* at 1533.

5 A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search. See *Mincey,supra,* at 393, 98 S.Ct. 2408 ("[T]he privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law"); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) ("The warrant requirement ... is not an inconvenience to be somehow 'weighed' against the claims of police efficiency").

6 Sometimes, of course, the very exchange of information like this in front of the objecting inhabitant may render consent irrelevant by creating an exigency that justifies immediate action on the police's part; if the objecting tenant cannot be incapacitated from destroying easily disposable evidence during the time required to get a warrant, see *Illinois v. McArthur,* 531 U.S. 326, 331-332, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (denying suspect access to his trailer home while police applied for a search warrant), a fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement, cf. *Schmerber v. California,* 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (warrantless search permitted when "the delay necessary to obtain a warrant ... threatened the destruction of evidence" (internal quotation marks omitted)).

Additional exigent circumstances might justify warrantless searches. See, *e.g., Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 298, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (hot pursuit); *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (protecting the safety of the police officers); *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) (imminent destruction to building); *Johnson v. United States,* 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (likelihood that suspect will imminently flee).

7 We understand the possibility that a battered individual will be afraid to express fear candidly, but this does not seem to be a reason to think such a person would invite the police into the dwelling to search for evidence against another. Hence, if a rule crediting consent over denial of consent were built on hoping to protect household victims, it would distort the Fourth Amendment with little, if any, constructive effect on domestic abuse investigations.

8 The dissent is critical that our holding does not pass upon the constitutionality of such a search as to a third tenant against whom the government wishes to use evidence seized after a search with consent of one co-tenant subject to the contemporaneous objection of another, *post,* at 1536. We decide the case before us, not a different one.

9 See 4 LaFave § 8.1, at 4 ("The so-called consent search is frequently relied upon by police as a means of investigating suspected criminal conduct" (footnote omitted)); Strauss, Reconstructing Consent, 92 J.Crim. L. & C. 211, 214 (2001-2002) ("Although precise figures detailing the number of searches conducted pursuant to consent are not-and probably can never be-available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year" (footnote omitted)).

1 See, *e.g., Schneckloth v. Bustamonte,* 412 U.S. 218, 284-285, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (Marshall, J., dissenting) (pointing out that it is hard to comprehend "how a decision made without knowledge of available alternatives can be treated as a choice at all," and arguing that "[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police").

2 Such advice is surely preferable to an officer's expression of his or her desire to enter and to search in words that may be construed either as a command or a question. See *id.,* at 275-276, 93 S.Ct. 2041 (Douglas, J., dissenting) (noting

that " '[u]nder many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law' " (quoting *Bustamonte v. Schneckloth,* 448 F.2d 699, 701 (CA9 1971))).

1 The majority considers this comparison to be a "false equation," and even discerns "a deliberate intent to devalue the importance of the privacy of a dwelling place." *Ante,* at 1524, n. 4. But the differences between the majority and this dissent reduce to this: Under the majority's view, police may not enter and search when an objecting co-occupant is *present at the door,* but they *may* do so when he is asleep in the next room; under our view, the co-occupant's consent is effective in both cases. It seems a bit overwrought to characterize the former approach as affording great protection to a man in his castle, the latter as signaling that "the centuries of special protection for the privacy of the home are over." *Ibid.* The Court in *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), drew the same comparison the majority faults today, see *id.,* at 171, n. 7, 94 S.Ct. 988, and the "deliberate intent" the majority ascribes to this dissent is apparently shared by all Courts of Appeals and the great majority of State Supreme Courts to have considered the question, see *ante,* at 1520, n. 1.

The majority also mischaracterizes this dissent as assuming that "privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police." *Ante,* at 1524, n. 4. The point, of course, is not that a person waives his privacy by sharing space with others such that police may enter at will, but that sharing space necessarily entails a limited yielding of privacy *to the person with whom the space is shared,* such that the other person shares authority to consent to a search of the shared space. See *supra,* at 1531, 1533-1536.

2 In response to this concern, the majority asserts that its rule applies "merely [to] evidentiary searches." *Ante,* at 1526. But the fundamental premise of the majority's argument is that an inviting co-occupant has "no recognized authority" to "open the door" over a co-occupant's objection. *Ante,* at 1523; see also *ante,* at 1519 ("[A] physically present co-occupant's stated refusal to permit *entry* prevails, rendering the warrantless search unreasonable and invalid as to him" (emphasis added)); *ante,* at 1522-1523 ("[A] caller standing at the door of shared premises would have no confidence ... to *enter* when a fellow tenant stood there saying 'stay out' " (emphasis added)); *ante,* at 1523 ("[A] disputed invitation, without more, gives a police officer no ... claim to reasonableness in *entering*" (emphasis added)). The point is that the majority's rule transforms what may have begun as a request for consent to conduct an evidentiary search into something else altogether, by giving veto power over the consenting co-occupant's wishes to an occupant who would exclude the police from *entry*. The majority would afford the now quite vulnerable consenting co-occupant sufficient time to gather her belongings and leave, see *ante,* at 1525, apparently putting to one side the fact that it is her castle, too.

1 Although the Court has described *Coolidge* as a " 'third party consent' " case, *United States v. Matlock,* 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), the Court's opinion, by its own terms, does not rest on its conception of Mrs. Coolidge's authority to consent to a search of her house or the possible relevance of Mr. Coolidge's absence from the scene. *Coolidge,* 403 U.S., at 487, 91 S.Ct. 2022 ("[W]e need not consider the petitioner's further argument that Mrs. Coolidge could not or did not 'waive' her husband's constitutional protection against unreasonable searches and seizures"). See also *Walter v. United States,* 447 U.S. 649, 660-661, n. 2, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (White, J., concurring in part and concurring in judgment) ("Similarly, in *Coolidge v. New Hampshire,* the Court held that a wife's voluntary action in turning over to police her husband's guns and clothing did not constitute a search and seizure by the government").

2 The Courts of Appeals have disagreed over the appropriate inquiry to be performed in determining whether involvement of the police transforms a private individual into an agent or instrument of the police. See *United States v. Pervaz,* 118 F.3d 1, 5-6 (C.A.1 1997) (summarizing approaches of various Circuits). The similarity between this case and *Coolidge* avoids any need to resolve this broader dispute in the present case.

3 That Sergeant Murray, unlike the officers in *Coolidge,* may have intended to perform a general search of the house is inconsequential, as he ultimately did not do so; he viewed only those items shown to him by Mrs. Randolph. Nor is it relevant that, while Mrs. Coolidge intended to aid the police in apprehending a criminal because she believed doing so would exonerate her husband, Mrs. Randolph believed aiding the police would implicate her husband.

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984 F.2d 948
United States Court of Appeals,
Eighth Circuit.

Gregory J. McMASTER, Appellant,

v.

Orville PUNG, Commissioner, Minnesota Department of Corrections; Frank W. Wood, Warden, Minnesota Correctional Facility—Oak Park Heights; David Crist, Assistant to the Warden, Minnesota Correctional Facility—Oak Park Heights; Dennis Benson, Associate Warden, Minnesota Correctional Facility—Oak Park Heights; Richard Hagelberger, Due Process Prosecutor, Minnesota Correctional Facility—Oak Park Heights; Sheila Johnson, Officer, Minnesota Correctional Facility—Oak Park Heights; Harold Hansen, Hearing Officer, Minnesota Department of Corrections; James Ryan, Hearing Officer, Minnesota Department of Corrections; Mike Green, Caseworker, Minnesota Correctional Facility—Oak Park Heights; Steve Lydon, Head of Internal Affairs, Minnesota Correctional Facility—Oak Park Heights; Penny Karasch, Mail Room Supervisor, Minnesota Correctional Facility—Oak Park Heights, in their individual and official capacities, Appellees.

No. 92–1625.
|
Submitted Nov. 12, 1992.
|
Decided Jan. 29, 1993.

Synopsis

Inmate brought civil rights action against Minnesota Department of Corrections officials, alleging violations of his constitutional rights to due process, assistance of counsel, and access to courts. The United States District Court for the District of Minnesota, J. Earl Cudd, United States Magistrate Judge, recommended that officials' motion for summary judgment be granted, and James M. Rosenbaum, J., adopted report and recommendation and granted officials' motion for summary judgment. Inmate appealed. The Court of Appeals, McMillian, Circuit Judge, held that: (1) officials' refusal to allow inmate's wife to testify in person at his disciplinary hearing did not violate inmate's due process rights; (2) inmate's Sixth Amendment right to effective assistance of counsel was not violated by ban on contact visits with his female attorney; (3) officials were justified in inspecting inmate's legal mail to and from his female attorney in his presence; and (4) inmate failed to establish that he was denied access to courts.

Affirmed.

Attorneys and Law Firms

***950** Jack S. Nordby, Minneapolis, MN, argued (John R. Wylde, on brief), for appellant.

M. Jacqueline Regis, St. Paul, MN, argued (Hubert H. Humphrey, III, on brief), for appellees.

Before McMILLIAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and BENSON,[*] Senior District Judge.

Opinion

McMILLIAN, Circuit Judge.

Gregory J. McMaster appeals from a final order entered in the District Court[1] for the District of Minnesota granting summary judgment in favor of Minnesota Department of Corrections officials in his 42 U.S.C. § 1983 civil rights action. *McMaster v. Pung,* No. 4–91–236 (D.Minn. Feb. 24, 1992) (order). Appellant alleged violations of his constitutional rights to due process, assistance of counsel and access to the courts. The district court found that no genuine issue of material fact existed because none of appellant's due process or Sixth Amendment rights were violated by the prison officials. Appellant argues that in granting summary judgment in favor of appellees, the district court ignored numerous documented and relevant facts. For the reasons discussed below, we affirm the order of the district court.

Appellant is an inmate currently incarcerated in the Minnesota Correctional Facility at Oak Park Heights (MCF–OPH), where he is serving a life sentence for the murder of a police officer. Appellant's wife had an intimate relationship

with appellee Correctional Officer Sheila Johnson prior to Johnson's employment at MCF–OPH. Appellant was aware of his wife's relationship with Johnson. On October 19, 1990, appellant approached Johnson and asked her to cover up a planned sexual encounter between appellant and his female attorney. Johnson indicated to appellant ***951** that she was not scheduled to be on duty during appellant's planned liaison with his female attorney and that she would report any such activity. Appellant made reference to his wife's relationship with Johnson and threatened Johnson not to say anything and to make sure she was on duty.

On October 23, 1990, one of appellant's attorneys visited him at MCF–OPH in her role as his attorney in a private room provided for attorney-client meetings. Because Johnson had reported her conversation with appellant to prison authorities, correctional officers maintained covert surveillance of the meeting room. After the correctional officers observed appellant and his attorney engage in sexual activity, they entered the room, and removed appellant. The Department of Corrections thereafter barred the female attorney from MCF–OPH for six months for threatening the security of the institution. Disciplinary proceedings were brought against appellant; he was charged with disobeying a direct order, extortion, threatening others, and planned sexual misconduct. Appellant pled guilty to the planned sexual misconduct charge and a disciplinary hearing was scheduled on the remaining charges.

During the investigation, correctional officials restricted appellant's legal correspondence with the female attorney: all legal mail to or from the female attorney would be inspected for contraband in appellant's presence. On one occasion, an envelope marked “legal mail” from appellant to his female attorney was intercepted and opened in appellant's presence. A birthday card was seized as contraband and the rest of the material was mailed.

As part of the institution's investigation, appellant requested a tape-recorded interview which he had given the appellees. During the interview, appellant made many allegations regarding Johnson which required further investigation. Appellant requested that his wife be permitted to testify on his behalf at the disciplinary hearing. The hearing officers did not allow appellant's wife to testify in person, but they did allow her to submit an affidavit supporting appellant. Appellant's disciplinary hearing was held on December 12, 1990, and he was found guilty. Appellant appealed the decision of the hearing officers to the warden, who affirmed the hearing officers' decision.

On April 4, 1991, appellant filed a complaint under 42 U.S.C. § 1983 in federal district court alleging violation of his constitutional rights to due process, assistance of counsel, and access to the courts by Minnesota correctional officials, arising from the restriction on his privileged mail between him and his female attorney, the denial of the right to present witnesses on his own behalf at the disciplinary hearing, the denial of access to prison records for use at the disciplinary hearing, and the denial of the right to an impartial hearing board and appeal. The district court referred the case to United States Magistrate Judge J. Earl Cudd. On December 27, 1991, Magistrate Judge Cudd filed a Report and Recommendation recommending that appellees' motion for summary judgment be granted and appellant's amended complaint be dismissed because appellant's claims were conclusory, did not involve genuine issues of material fact, and did not state a claim for which relief can be granted. On February 25, 1992, the district court adopted the magistrate judge's Report and Recommendation and granted appellees' motion for summary judgment. This appeal followed.

For reversal, appellant argues that the district court erred in granting summary judgment because there are genuine issues of material fact in dispute regarding his disciplinary hearing. He argues that appellees did not allow him to present witnesses, denied him access to prison records and denied him an impartial hearing board and appeal. Appellant also argues that appellees violated his Sixth Amendment rights by banning contact visits with his female attorney and violated his Fourteenth Amendment due process rights by inspecting his legal mail. We review the order of summary judgment de novo and adopt the standards employed by the district court. *See* ***952** *Schrader v. Royal Caribbean Cruise Line, Inc.,* 952 F.2d 1008, 1013 (8th Cir.1991). The standard for reviewing summary judgment orders is well established:

> Summary judgment is appropriate when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. In order to preclude the entry of summary judgment, it is incumbent upon the nonmoving party to make a sufficient showing on every essential element of its case on which it bears the burden of proof. In determining whether the grant of a motion for summary judgment is appropriate in a particular case, the evidence must be viewed in the light most favorable to the nonmoving party.

Osborn v. E.F. Hutton & Co., 853 F.2d 616, 618 (8th Cir.1988) (citations omitted).

DENIAL OF RIGHT TO CALL WITNESSES

Appellant argues that appellees' refusal to allow his wife to testify in person at his disciplinary hearing violated his due process rights. We agree with the district court that correctional officers had reason to believe that appellant was an escape risk and that the presence of his wife inside the prison posed a security risk. While an inmate is normally entitled to present witnesses at a disciplinary hearing, that right must be balanced against the legitimate needs of the prison, including the prevention of undue security risks. *Wolff v. McDonnell,* 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974). Therefore, the exclusion of appellant's wife from the disciplinary hearing did not violate appellant's constitutional rights. Moreover, we note that her testimony was submitted to the hearing board by affidavit.

ACCESS TO THE TAPE–RECORDED INVESTIGATORY INTERVIEW

Appellant argues that appellees' refusal to provide his counsel with a copy of the taped interview violated his due process rights.[2] We agree with the district court that appellant failed to allege that he suffered any prejudice or injury as result of the refusal to provide his counsel with a copy of the tape. Appellant was free to discuss the interview with his attorney and the tape was not introduced into evidence during appellant's disciplinary hearing.

IMPARTIAL HEARING BOARD AND APPEAL

Appellant argues that his due process rights were violated because he asserts that correctional officers Hansen, Ryan, and Wood, who served on the hearing board, were biased against him. Appellant contends that the hearing board failed to maintain its impartiality and manipulated the outcome by meeting and discussing the proceeding with Johnson and the warden. Appellant argues this bias denied him an impartial hearing and appeal.

The district court found appellant's claim of bias was entirely conclusory and without merit. Appellant provided no factual basis for his claim of "bias" on the part any of the hearing officers. None of the hearing officers was involved in the underlying incident. Therefore, we agree with the district court that appellant did not establish a claim of denial of an impartial hearing or appeal because the hearing officers were biased against him.

SIXTH AMENDMENT CLAIM

Appellant argues his Sixth Amendment rights to effective assistance of counsel were violated by the ban on contact visits with his female attorney and restrictions on his use of the telephone while he was in administrative segregation. The district court found that because appellant was being disciplined for his intimate contact with his female attorney, his Sixth ***953** Amendment rights were not implicated. We agree. While prisoners have a general right to consult with their legal counsel, that right is not absolute and correctional officials may prohibit disruptive attorneys from their institutions. *See Lynott v. Henderson,* 610 F.2d 340, 342 n. 1 (5th Cir.1980); *Cruz v. Beto,* 603 F.2d 1178, 1185 (5th Cir.1979).

Appellant was not denied access to legal counsel. He was allowed telephonic contact and consultation through the mails with his female attorney when he was not in administrative segregation. Limitations imposed on appellant while he was in administrative segregation did not violate appellant's Sixth Amendment rights. *See Benzel v. Grammer,* 869 F.2d 1105, 1108 (8th Cir.1989). Prison officials may restrict a prisoner's telephone privileges in a reasonable manner. *Id.* Moreover, in addition to his female attorney, appellant was represented at all times by another (male) attorney and appellees did not restrict appellant's contact visits with him.

INTERFERENCE WITH LEGAL MAIL

Appellant alleged that the inspection of his legal mail by correctional officers violated his constitutional rights. The district court disagreed because the inspection of privileged mail by prison officials does not violate any constitutional right when officials open and inspect the mail in the inmate's presence. *See Wolff v. McDonnell,* 418 U.S. at 576–77, 94 S.Ct. at 2985. We agree. Prison officials may institute a policy of censoring or withholding certain types of mail if:

> (1) the regulation or practice furthers "an important or substantial government interest unrelated to the suppression of expression," such as institutional security, and (2) "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."

Valiant–Bey v. Morris, 829 F.2d 1441, 1443 (8th Cir.1987).

After applying the above principles, we agree with the district court's finding that appellant's female attorney was a threat to the security and orderly administration of MCF–OPH. As such, correctional officers were justified in inspecting appellant's legal mail to and from the female attorney in his presence.

ACCESS TO THE COURTS

Appellant also contends that the cumulative effect of the ban on contact visits with his female attorney, the mail restrictions, and the restrictions on his telephone privileges while in administrative segregation denied him access to the courts. Prison officials may not deny or obstruct an inmate's access to the courts to present a claim. *See Bounds v. Smith,* 430 U.S. 817, 821, 97 S.Ct. 1491, 1494, 52 L.Ed.2d 72 (1977); *Johnson v. Avery,* 393 U.S. 483, 485, 89 S.Ct. 747, 748, 21 L.Ed.2d 718 (1969). In order to state a claim an inmate must make some showing of prejudice or actual injury as a result of the prison officials' conduct. *See Sands v. Lewis,* 886 F.2d 1166, 1171 (9th Cir.1989); *Peterkin v. Jeffes,* 855 F.2d 1021, 1041 (3d Cir.1988). Appellant made no showing that he was in fact denied access to the courts or that he was prejudiced by prison officials' actions.

Accordingly, we affirm the order of the district court.

All Citations

984 F.2d 948

Footnotes

* The Honorable Paul Benson, Senior United States District Judge for the District of North Dakota, sitting by designation.

1 The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota. The case was referred to the Honorable J. Earl Cudd, United States Magistrate Judge for the District of Minnesota, pursuant to 28 U.S.C. § 636(b).

2 Charges made by appellant against Johnson during the tape-recorded interview required further investigation. The tape was turned over to MCF–OPH's Internal Affairs Special Investigator. An internal affairs investigation was conducted and the tape became part of the confidential data pursuant to Minn.Stat. § 13.39 until that investigation was completed. The tape also contained private personnel data protected under Minn.Stat. § 13.43. Based on the investigation by internal affairs, the tape could not be released under Minnesota law until the investigation was complete.

859 P.2d 211
Supreme Court of Colorado,
En Banc.

The PEOPLE of the State of Colorado, Plaintiff–Appellant,

v.

Jose Luis OLIVAS, aka Sergio Olivas, Defendant–Appellee.

No. 93SA116.
|
Oct. 4, 1993.

Synopsis

Defendant was charged with possession of marijuana and possession of marijuana with intent to distribute. The District Court, El Paso County, Mary Jane Looney, J., suppressed evidence of marijuana discovered in automobile being driven by defendant and appeal was taken. The Supreme Court, Erickson, J., held that consent of defendant to search of automobile authorized search of door panel, after officer peering through crack in panel saw what he believed to be packets of drugs.

Reversed and remanded.

Attorneys and Law Firms

***212** John Suthers, Dist. Atty., Fourth Judicial District, Larry E. Schwartz, Deputy Dist. Atty., Colorado Springs, for plaintiff-appellant.

David F. Vela, Colorado State Public Defender, William Trujillo, Deputy State Public Defender, Colorado Springs, for defendant-appellee.

Opinion

Justice ERICKSON delivered the Opinion of the Court.

This is an interlocutory appeal by the prosecution pursuant to C.A.R. 4.1. The defendant, Jose Luis Olivas, a/k/a Sergio Olivas Ortiz, a/k/a Sergio Olivas, was charged with possession of marijuana and possession of marijuana with intent to distribute. *See* § 18–18–106(4), 8B C.R.S. (1986), and § 18–18–106(8), 8B C.R.S. (1986). Following a preliminary hearing, the defendant was bound over for trial on both counts. The defendant filed a motion to suppress the marijuana seized as a result of the search of the 1977 Buick he was driving even though he had consented to the search at the time of his arrest. After a hearing, the trial court suppressed the marijuana seized in the search. We reverse and remand for further proceedings consistent with this opinion.

I

On November 22, 1992, Trooper Miranda of the Colorado State Patrol stopped the defendant, who was driving a 1977 Buick, because the windshield was cracked. The stop occurred at approximately 8:00 p.m. on Interstate 25 near Colorado Springs. Trooper Miranda learned the automobile which the defendant was driving had New Mexico license plates which were not registered in New Mexico computer records. After the stop occurred, Trooper Miranda asked the defendant to produce his driver's license. He produced a license issued by the state of Texas and told Trooper Miranda that he was en route to Denver from El Paso, Texas. He did not have registration papers or any evidence of ownership and said that the Buick belonged to Ramon Gutierrez of Las Cruces, New Mexico. The defendant also volunteered that there were some items in the glove compartment. When the glove compartment was opened it contained no vehicle registration documents or anything to establish ownership, valid insurance coverage, or vehicle identification. Trooper Miranda issued a warning ticket to the defendant for the cracked windshield and asked whether he was carrying illegal weapons, illegal drugs, or large amounts of money.[1] ***213** The defendant said "no," and at Trooper Miranda's request, voluntarily consented to a search of the automobile.[2]

During the search, Trooper Miranda opened the trunk and saw that it contained no luggage. When Trooper Miranda inspected the automobile's spare tire compartment, the defendant commented that there weren't any drugs in there. The search of the automobile revealed no evidence of contraband until Trooper Miranda noticed that the panel on the left front door of the Buick was loose and was separated from the door by one to two inches. Trooper Miranda testified that he looked behind the loose driver's side door panel with a flashlight and without touching the panel saw plastic packages. Trooper Miranda then pulled a loose section of the panel back and observed what appeared to be plastic packages of marijuana. When the door panel was subsequently removed, small plastic packages containing

forty-nine pounds of marijuana were found. The defendant initially claimed that he did not know that marijuana was hidden in the door. After he was advised of his rights and made a statement, the defendant was told that he could be prosecuted as a special offender if more than 100 pounds of marijuana were found in the automobile.[3] At that point the defendant replied that the automobile did not contain that much marijuana.

The primary question before the trial court was the scope of the consent given by the defendant to search the automobile which he was driving. The trial court considered significant the fact that the defendant was not advised he could refuse to give his consent to the search. The trial court also questioned whether Trooper Miranda could see behind the panel before it was pulled away from the door. After considering all of the factors involved, the trial court stated:

> [T]he primary issue seems to be the scope of the search. It appears to me although Mr. Olivas did consent and agreed that the car would be searched and apparently cooperated in the search of the trunk, I would not find based on the consent form I have or on any testimony that I heard that [the] consent extended to pry off the panels of the car. [The car] was basically destroyed on the inside. And I would find the officer went in fact beyond the scope of what is an admissible search and would therefore suppress the evidence that was seized after he had pried off the panels.
>
> It seems to me also that although it's not required under case law, that the forms the police department use really should have the right to refuse on those forms. It appears to me that would be a lot more—I guess a lot more indicative of their intent if they would simply state on the form, "You need not sign this form, but if you do consent, we will proceed to search at that point."
>
> So what I would find is that the scope of the search was beyond what would be acceptable, based on the kind of consent ***214** that was given in this case, therefore suppress the evidence that was seized.

II

In the absence of a clear statement that a suppression ruling is grounded on the Colorado Constitution, as opposed to the United States Constitution, the presumption is that a trial court relied on federal constitutional law in reaching its decision. *People v. McKinstrey,* 852 P.2d 467, 469 (Colo.1993); *People v. Inman,* 765 P.2d 577, 578 (Colo.1988). Therefore, the sole issue in this interlocutory appeal is whether the Fourth Amendment requires suppression of the evidence.

The prosecution claims that the search behind the door panels of the automobile was constitutionally permissible because it would have been objectively reasonable for the defendant to understand that by consenting to a "complete" search of the automobile, he also consented to the search of those parts of the automobile that provide places where narcotics could be hidden, such as behind loose door panels, in the crevices of the trunk, or behind the spare tire. We agree, and conclude that the trial court erred in its determination that the search behind the door panels of the automobile exceeded the scope of consent given by the defendant.

III

A

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. *Minnesota v. Dickerson,* 508 U.S. 366, ——, 113 S.Ct. 2130, 2135, 124 L.Ed.2d 334 (1993); *Florida v. Jimeno,* 500 U.S. 248, ——, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991). "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Jimeno,* at ——, 111 S.Ct. at 1803 (quoting *Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990)). The United States Supreme Court has long approved consensual searches. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973). Consent to search eliminates the requirement for a search warrant so long as the search is reasonable and within the scope of the consent. *People v. Kennard,* 175 Colo. 479, 488 P.2d 563 (1971).

The scope of a warrantless search is generally defined by its expressed object, *United States v. Ross,* 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982), and a consensual search may not legally exceed the scope of the consent supporting it. *Walter v. United States,* 447 U.S. 649, 656–57, 100 S.Ct. 2395, 2401, 65 L.Ed.2d 410 (1980). "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?" *Jimeno,* 500 U.S. at ——, 111 S.Ct. at 1804. Whether a

search remained within the boundaries of the consent is a factual question to be determined from the totality of the circumstances, and the trial court's factual determinations will be upheld on appeal unless they are clearly erroneous. *United States v. Espinosa,* 782 F.2d 888, 890 (10th Cir.1986); *United States v. Sierra Hernandez,* 581 F.2d 760 (9th Cir.), *cert. denied,* 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978).

B

The question presented in this case is whether the defendant's general consent to search the automobile included consent to search areas behind loose door panels that police officers believed might contain contraband. The United States Tenth Circuit Court of Appeals has consistently upheld similar consent searches of automobiles.

In *United States v. Torres,* 663 F.2d 1019 (10th Cir.1981), the Tenth Circuit upheld a consensual search of the area behind a door panel of an automobile after a police officer was able to see suspected stolen money in the well of an ashtray he had pulled out from the door. In finding that the search had not exceeded the scope of ***215** general consent that the defendant had given to authorities to perform a "complete" search of the automobile, the court stated:

> Unquestionably, [the defendant] gave his voluntary consent when he signed the form which was provided him. This explained that a complete search was to be made, and thus, of course, it logically follows permission to search contemplates a thorough search. If not thorough it is of little value. A complete search was authorized, and it should have been anticipated that it would be a careful one, although the defendant may have thought that the officers might overlook the money.

Id. at 1027 (citations omitted).

In *United States v. Espinosa,* 782 F.2d 888 (10th Cir.1986), the Tenth Circuit again upheld a consensual search of the area behind an automobile's left rear quarter panel when an officer lifted an unsecured corner of the panel and discovered cocaine. The court said:

> Defendant stood beside his car expressing no concern during this thorough and systematic search. The search lasted approximately fourteen minutes. At no time did defendant attempt to retract or narrow his consent. Failure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of the consent.

Id. at 892.

A similar consensual search of a rear quarter panel of an automobile was upheld by the Tenth Circuit in *United States v. Pena,* 920 F.2d 1509 (10th Cir.1990), when the police investigation indicated that a solid object was being hidden in that area. In rejecting the defendant's claim that such a search exceeds the scope of consent, the court reiterated its holding in *Espinosa* that the "failure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of the consent." *Id.* at 1515.

We believe these cases provide appropriate guidance on the question of a police officer's ability to search an automobile when the person providing the consent initially agrees to a general and "complete search of [the] vehicle and contents."[4] It is true that the scope of a consensual automobile search is not limitless, and that the search remains bounded by concepts of reasonableness. *Jimeno,* 500 U.S. at ——, 111 S.Ct. at 1803. A suspect also remains free to completely withhold his consent if he so chooses, and may place limits on the scope of the consent which he gives.[5] However, when a suspect signs a general consent form authorizing "a complete search of [the] vehicle and [its] contents," it is reasonable ***216** for a police officer to believe that he may search areas of the automobile that extend beyond the passenger compartment and trunk if the facts and circumstances surrounding the search and investigation provide the officer with a sufficient basis to believe that contraband was hidden in those areas and the suspect fails to affirmatively limit the search away from those areas. *See Jimeno,* 500 U.S. at ——, 111 S.Ct. at 1804 (stating that a suspect may delimit the scope of consent, but if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring more explicit authorization); *see also People v. Kennard,* 175 Colo. 479, 488 P.2d 563 (1971).

C

When analyzed within the framework of an objective reasonableness test, the trial court's factual determination that the search of the defendant's automobile exceeded the scope of his consent is clearly erroneous. Trooper Miranda, after giving the defendant a warning ticket for the cracked windshield, asked the defendant whether he was carrying

illegal weapons, illegal drugs, or large amounts of money. The defendant replied in the negative. Trooper Miranda then requested, and received, the defendant's consent to search the automobile for those items. At that point, "a complete search was authorized and it should have been anticipated that it would be a careful one, although the defendant may have thought that the officers might overlook the [drugs]." *Torres,* 663 F.2d at 1027.

Although the defendant was standing only a short distance away at the time Trooper Miranda looked behind the door panel, there is no indication that the defendant ever expressly or impliedly made any attempt to limit the scope of the search so as not to include the area behind the loose door panels. The defendant knew that the object of the search was illegal weapons or drugs. Smugglers of these types of items generally do not leave them scattered loosely throughout the vehicle, but instead hide the illegal products out of sight or in containers. *Jimeno,* 500 U.S. 248, 111 S.Ct. at 1804. An experienced law enforcement officer might reasonably believe that the area behind a loose door panel is a likely place to hide contraband while it is being transported on interstate highways. It is therefore objectively reasonable, both from the defendant's and the trooper's perspective, that a complete search of the defendant's automobile for the express purpose of searching for illegal drugs would include looking behind a suspiciously loose door panel.[6] Under these circumstances, Trooper Miranda's search behind the loose driver's side door panels of the automobile which the defendant was driving was reasonable and the trial court's finding to the contrary is clearly erroneous.

IV

Under the facts of this case, the suppression order was clearly erroneous. The order is reversed and the case remanded for further proceedings consistent with this opinion.

All Citations

859 P.2d 211

Footnotes

1 Once Trooper Miranda had lawfully stopped the defendant for a routine traffic violation, there was no level of suspicion required to request the defendant's voluntary consent to search the automobile. However, it is evident to us that the trooper, a fourteen-year veteran with the Colorado State Patrol, reasonably suspected that contraband was present in the automobile. The subsequent investigation suggested a particular "drug courier profile" which prompted Trooper Miranda to ask whether there was any contraband in the vehicle and to request the defendant's consent to search the automobile.

The defendant told Trooper Miranda that the automobile belonged to Raymond Gutierrez of Las Cruces, New Mexico, a town which is located not far from the Mexican border. The defendant, who was licensed to drive in Texas, and was driving an automobile bearing questionable New Mexico license plates, also stated that he was en route to Denver from El Paso, Texas, but he carried no luggage or other items indicative of an interstate trip, and possessed nothing other than a jacket which was in the back seat of the automobile. Moreover, when requested to do so, the defendant could produce no evidence of ownership or right to possession of the automobile and had no specific knowledge of the contents of the glove compartment.

2 The defendant gave his consent by signing a consent form. Because the defendant was unable to adequately read an English version of the consent form, he instead read and signed an equivalent form that was written in Spanish. The consent to search form provided that,

> I, Sergio L. Ortiz, authorize Michael A. Miranda and Russell Wise officers of the Colorado State Patrol, to conduct a complete search of my vehicle and contents, and/or premises; MAKE: Buick; MODEL: LeSabre; COLOR: White/Red; TYPE: 4–Door; VIN: 4P69K7X115460/727AJB (NM); Located: Colo. 25; 3 Mi. S. Monument.
>
> This written permission is being given by me to the above named officers voluntarily and without threats or promises of any kind.

The consent form was executed on November 22, 1992, at 8:30 p.m. and was witnessed by Trooper Miranda. At the time the form was executed, the defendant gave no indication to Trooper Miranda that he did not understand the contents of the form.

3 Following his arrest, the defendant also signed a Spanish version of an advisement of rights form which contained the complete advisement as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

4 The consent form the defendant signed authorizes "[o]fficers of the Colorado State Patrol to conduct a complete search of my vehicle and contents." The defendant signed a form containing this provision printed in Spanish.

5 The trial court indicated that the police should be required to notify the suspect that he is free to withhold his consent to search and that failure to so notify the defendant suggests that the search went beyond the scope of consent. The trial court stated that "although it is not required under case law, the forms the police department use really should have the right to refuse on those forms. It appears to me that would be a lot more ... indicative of their intent if they would simply [tell the suspect that he need not consent to the search]."

As the trial court correctly stated, the police are not necessarily required to inform a suspect that he may withhold consent. The issue of notification is not relevant to the question of scope of consent, but instead relates to whether the defendant's consent to search was voluntary. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 248–49, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854 (1973) (stating 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 a voluntary consent"). The totality of the circumstances test adopted in *Schneckloth* to determine the voluntariness of consent appropriately considers whether the defendant was, or should have been, aware of his right to withhold consent. However, in this case, it is not disputed that the defendant voluntarily consented to "a complete search" of his vehicle, and we do not consider the voluntariness question on appeal. The trial court should not have interjected considerations relating to voluntariness into an analysis of the scope of consent.

6 Contrary to the trial court's finding, the record indicates that Trooper Miranda made no effort to "pry off" the door panel or door to search for drugs. Rather, when confronted with a loose door panel, coupled with his training and experience in the investigation of drug smuggling, Trooper Miranda pulled an already loose panel away from the door a couple of inches to look behind it. It is not unreasonable to conduct such a search in this case. We believe it is also significant that no destruction of the defendant's property occurred as a result of the challenged search. *See United States v. Strickland,* 902 F.2d 937 (11th Cir.1990) (stating that "although an individual consenting to a vehicle search should expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts, or its contents"). The destruction to the door of the automobile which concerned the trial court occurred only after the officers had discovered that forty-nine pounds of marijuana were secreted behind the door panels.

End of Document

58 Ill.2d 83
Supreme Court of Illinois.

The PEOPLE of the State of Illinois, Appellee,

v.

William STACEY, Appellant.

No. 40892.
|
Sept. 17, 1974.

Synopsis

Petition for postconviction hearing in which defendant, who had been convicted of murder, charged error in the admission into evidence of his confession and a bloodstained shirt which had been taken from his home without a search warrant. The Circuit Court, Joseph A. Power, J., dismissed the postconviction petition on the grounds of res judicata, and he appealed. The Supreme Court, Ryan, J., held that defendant assumed the risk that his wife would consent to a search of bedroom including the bottom dresser drawer from which the bloodstained shirt was taken, and thus wife's consent to the search was valid, and trial court properly dismissed the postconviction hearing on the basis of res judicata.

Affirmed.

Attorneys and Law Firms

***84** ****25** James J. Doherty, Public Defender, Chicago, for appellant.

William J. Scott, Atty. Gen., Springfield, and Bernard Carey, State's Atty., Chicago (James B. Zagel, Asst. Atty. Gen., and Patrick T. Driscoll, Jr., and William F. Linkul, Asst. State's Attys., of counsel), for the People.

Opinion

***85** RYAN, Justice.

In 1958 defendant was convicted by a jury in the circuit court of Cook County for the murder of Darlene Todd and was sentenced to 299 years' imprisonment. In 1962 this court affirmed that conviction. (People v. Stacey, 25 Ill.2d 258, 184 N.E.2d 866.) In 1967 the defendant filed a petition for a post-conviction hearing (Ill.Rev.Stat.1965, ch. 38, par. 122-1) in which he charged error of constitutional dimension in the admission into evidence of his confession and a blood-stained shirt which had been taken from his home without a search warrant. The trial court dismissed the post-conviction petition on the grounds of Res judicata. An appeal was taken from the dismissal, and the record was filed and the case docketed in this court in 1967. No further action was taken to prosecute the appeal, and no effort was made to have the appeal dismissed. On October 1, 1973, the opinion of this court in People v. Nunn, 55 Ill.2d 344, 304 N.E.2d 81, was filed. It is the defendant's position that our decision in Nunn restored life to the contention of his post-conviction petition insofar as it challenged the legality of the search for and seizure of his blood-stained shirt from his home. This court in its previous opinion had held that the search was consented to by his wife.

The facts have been set out in our previous decision and will only be restated here to the extent necessary to consider the issue of whether the consent of the defendant's wife was sufficient to excuse the warrant requirement of the fourth amendment of the Federal Constitution.

Mrs. Todd was murdered on November 22, 1957. Defendant was a photographer who had an appointment to photograph Mrs. Todd's baby at her home. The police arrested the defendant in his home at about 9 p.m. the same evening and, after questioning him, noticed scratches on his arm, his nose and a spot of blood on his undershirt. Police officers were then sent to the defendant's home to ***86** obtain the shirt he had been wearing that day. At the hearing on the motion to suppress, the defendant's wife testified that her husband had changed shirts during the day and that during the evening he had informed her that the shirt 'is in the bottom drawer.' ****26** After the police had taken the defendant to the police station she went into their bedroom, took the shirt from the bottom drawer of the dresser, looked at it and then put it back in the drawer. Later when her father came to their apartment she again took the shirt from the bottom drawer and showed it to him. Her father told her that she should not let her mother take the shirt to be washed with the other clothes because it might have something to do with what the police were talking to the defendant about. When the policemen asked her for the shirt she went to the bedroom and obtained the shirt from the bottom dresser drawer and gave it to them. The policemen did not go into the bedroom. In the previous decision in this case, this court stated that even if the defendant's remarks to the officers at the police station could not be construed as a consent to the officers to obtain the shirt 'it is quite clear that Mrs. Stacey deliberately saved the shirt for evidence and that

she voluntarily surrendered it to the police. Her consent was sufficient.' 25 Ill.2d at 265, 184 N.E.2d at 869.

In People v. Nunn, this court in discussing searches consented to by third persons stated:
'The problem is not a new one in Illinois. Generally stated, we have followed the rationale that an equal or greater right to the use or occupancy of premises gives such co-occupant the right to consent to a search of the premises, and that any evidence found therein is admissible against a nonconsenting co-occupant.' (55 Ill.2d at 347, 304 N.E.2d at 83.)

One of the cases we cited as following this rationale was the previous decision of this court in this case.

***87** In Nunn, relying heavily on Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, we held that if a person has a reasonable expectation of privacy then a search may only be had pursuant to a search warrant or the personal consent of the person subjected to the search. If such expectation of privacy exists it could not be waived by another. We held in Nunn that to the extent that the previous decisions of this court (including our previous decision in People v. Stacey, 25 Ill.2d 258, 184 N.E.2d 866) are inconsistent with Katz these decisions were overruled.

Subsequent to our decision in Nunn the United States Supreme Court on February 20, 1974, rendered its decision in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242. In that case the defendant was arrested in the front yard of a house in which he lived along with a Mrs. Graff. The officers then entered the house and with the consent of Mrs. Graff but without a search warrant searched the house, including a bedroom which she said was jointly occupied by the defendant and herself. The defendant and Mrs. Graff had been living together for some time as husband and wife. During the course of the search the officers found, in a diaper bag in the only closet in the bedroom, money allegedly stolen from the Federally insured bank which the defendant was charged with having robbed. Concerning consent searches as between husband and wife the court stated: '* * * more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.' (415 U.S. at 170, 94 S.Ct. at 993, 39 L.Ed.2d at 249.) Citing Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684, and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, the court stated: 'These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, ***88** but may show that permission to search was obtained from a third party who possessed ****27** common authority over or other sufficient relationship to the premises or effects sought to be inspected.' (415 U.S. at 171, 94 S.Ct. at 993, 39 L.Ed.2d at 249-250.) Keyed to this statement is footnote 7 (415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 993, 39 L.Ed.2d 242), which states:
'Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord could not validly consent to the search of a house he had rented to another), Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.'

Thus, this court in Nunn and the United States Supreme Court in Matlock have both rejected the right of a third party to consent to a warrantless search based on a property-interest concept. Although Matlock did not adopt the 'expectation of privacy' test of Nunn, the results in the two cases are not inconsistent. If one has consented to the 'mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be ***89** searched,' these facts would indicate that the co-occupant has likewise surrendered his expectation of privacy in the property. In Nunn a room had been set aside in the mother's house for the exclusive use of the son and the mother had been permitted into the room only for the purpose of cleaning. Prior to the search consented to by the mother, the son had left the house and had locked the room and instructed his mother to allow no one to enter the room. Thus, the mother did not have 'mutual use' of the defendant's room, nor could

it be said that the mother 'generally had joint access or control for most purposes' of the room.

Although we do not feel that the two tests discussed above would dictate different results in this case, we find it advisable to conform the test applied by this court in determining the validity of warrantless searches consented to by one other than the accused to that applied by the United States Supreme Court. We therefore find that the defendant's subjective 'expectation of privacy' is irrelevant and the validity of the search in this case is to be judged by the more objective 'common authority' test of Matlock.

Turning now to the facts in the present case we find a relationship between the defendant and his wife, as it relates to the use and occupancy of the apartment and the bedroom, quite different from that which existed between the defendant and his mother in Nunn. Although the evidence shows that the bottom dresser drawer from which the shirt was taken was used by the defendant alone, the dresser was located in the bedroom mutually used by the defendant and his wife. Instead of establishing limited access to and control of the bedroom, the dresser, or the bottom drawer of the dresser, the evidence establishes a mutual use and control of the room and its equipment and the wife's right of access to the bottom dresser drawer. The dresser was not locked and the wife was not instructed not to look into ****28** the drawer. To the contrary, the ***90** defendant told his wife that the shirt was in the bottom drawer, and her conduct in opening the drawer, looking at the shirt, returning it, and then subsequently again removing it from the drawer to show it to her father and again returning it, indicates that she had free access to this drawer. The mere fact that the defendant alone may have used this dresser drawer while his wife may have used another or another dresser does not indicate that the wife was denied the mutual use, access to or control of the drawer.

Such a contention would be similar to that rejected in Frazier v. Cupp (1969), 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684, wherein the defendant and another shared the joint use of a duffle bag. The defendant contended that the other person, who had consented to the search of the bag, only had permission to use one compartment of the duffle bag and that he thus had no authority to consent to the search of the other compartments from which the incriminating evidence against the defendant had been taken. Here, as in Frazier, we must hold that in view of the mutual use of the bedroom, the wife's right to access to the dresser drawer located in that room, the defendant's disclosure to his wife that the shirt was in the drawer and his lack of instruction denying her and others access to the drawer, the defendant clearly assumed the risk that his wife would consent to a search of the room, including the bottom dresser drawer from which the blood-stained shirt was taken.

The search consented to by the wife was not contrary to Katz v. United States, People v. Nunn, or United States v. Matlock. The consent was valid, as it was previously held to be by this court in 25 Ill.2d 258, 184 N.E.2d 866, and the trial court properly dismissed the post-conviction hearing petition on the basis of Res judicata.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

All Citations

58 Ill.2d 83, 317 N.E.2d 24

16 Ill.App.3d 440
Appellate Court of Illinois, First District, Second Division.

PEOPLE of the State of
Illinois, Plaintiff-Appellee,
v.
Ernestine WILLIAMS, Defendant-Appellant.

Nos. 57345, 57848.
|
Dec. 11, 1973.

Synopsis

Defendant was convicted in Circuit Court, Cook County, Marvin E. Aspen, J., of possession of heroin and she appealed. The Appellate Court, Leighton, J., held that where defendant made a prima facie case that officer lacked probable cause to make the arrest, the burden of going forward shifted to the state; that testimony by arresting officer that he did not have an arrest warrant and had not seen defendant violate any law established a prima facie case that there was no probable cause; and that testimony by arresting officer concerning the reliability of informer who told him that defendant would be in possession of heroin was so inconsistent and uncertain as to demonstrate a lack of proof as to the alleged informer's reliability and even his existence and did not establish probable cause for the arrest.

Reversed and remanded with directions.

Attorneys and Law Firms

***441** ****679** Sam Adam, Edward M. Genson, Arnette R. Hubbard, Chicago, for defendant-appellant.

Bernard Carey, State's Atty., Chicago, for plaintiff-appellee; Kenneth L. Gillis, Asst. State's Atty., of counsel.

Opinion

LEIGHTON, Justice:

A one-count indictment charged the defendant, Ernestine Williams, with unlawful possession of heroin. She waived trial by jury, was convicted and sentenced to serve one to two years. Prior to her trial, defendant filed a motion to suppress evidence which she alleged was illegally seized at the time of her arrest.

I.

In support of the motion, she called Robert Smith, a Chicago police officer who testified that at approximately 9:00 P.M. on March 25, 1971, he arrested defendant while she was walking south, near 1358 South Ashland Avenue, Chicago. Smith testified that he had neither a warrant for defendant's arrest nor one that authorized the search of her person. He conceded that before he arrested defendant, he did not see her violate any law. Nonetheless, he took defendant into custody, and she was transported to the 12th District Vice Office of the Chicago Police Department. Smith testified that in the police station, he searched her coat and found '* * * a quantity of white powder.' At the end of his direct examination, Smith's police report of defendant's arrest was given to her counsel. Thereafter, Smith was cross-examined.

Smith was asked whether at about 5:30 P.M. on the 25th of March 1971 he received a telephone call at the 12th District Police Station in Chicago. He said he did; that he recognized the voice because for '* * * approximately a year, I would say,' he had known the individual who called him; and that during the year, he had talked with this individual about ten times. On a number of occasions, '* * * I would say maybe ten or more,' he had met this individual and had received information from him concerning narcotics, 'I would say approximately four times.' He acted on the information he received and recovered narcotics ***442** in every instance. He made four arrests, two of which resulted in convictions '* * * and two pending that was approximately a year ago (sic).' In addition to matters concerning narcotics, this individual gave information about gambling which led to the recovery of a quantity of gambling slips '* * * a form of gambling that comes out in Puerto Rican papers every Wednesday, they take a collection, it is pretty hard to explain.'

In answer to further questions, Smith testified that in the telephone conversation of March 25, the individual who called told him that he and several addicts were waiting for defendant to come with some heroin to the poolroom of a tavern at 1358 South Ashland Avenue; and that defendant arrived at the tavern every night, at approximately 6:00 P.M. The individual said that defendant * * * was on her ****680** way'; and that on the 24th of March, the evening before, at approximately 8:00 P.M., he (the individual) had purchased three capsules of heroin from defendant for $9. Based on this information, Smith said he and his fellow officers proceeded directly to the location described to him. He knew the defendant '* * * from prior arrests.' When

he was asked the number of prior arrests through which he knew defendant, Smith replied, 'One arrest.' Then, he was subjected to redirect examination by defendant's counsel.

Smith was asked if he could name the two persons whose narcotics convictions resulted from information given him by the individual who called him the evening of March 25, 1971. He answered, 'I don't recall the names right now.' He was asked if he could name the two whose cases he said were pending on March 25, 1971. He answered, 'I don't recall.' When he was asked if he could name the person who was arrested on the gambling charge, he gave a phonetic spelling, saying, 'I could be wrong on the spelling.' As to when the arrest took place, Smith responded, 'I don't recall the time.' When asked how long before the 25th of March, 1971 the arrest had been made, his response was, 'I don't recall at this time.' Smith was dismissed. No other witness was called; no other evidence was introduced. The trial court denied the motion to suppress.

From these facts, defendant presents two issues. 1. Whether the trial court erred in denying defendant's motion to suppress evidence. 2. Whether the sentence imposed posed by the trial court is excessive.

II.

In a proceeding to suppress evidence, the burden of proving that the search and seizure were unlawful is on the defendant. (Ill.Rev.Stat.1969, ch. 38, par. 114—12(b).) However, the burden of proving ***443** the validity of an arrest is shifted to the state when a defendant shows he was doing nothing unusual at the time of his arrest, and he makes a prima facie case that the police lacked probable cause to arrest him. In such event, the burden of going forward with evidence to negate lack of probable cause shifts to the state. People v. Moncrief, 131 Ill.App.2d 770, 268 N.E.2d 717.

In this case, defendant called as her witness Robert Smith, the officer who arrested her. She proved by his testimony that she was doing nothing unusual, nor was she violating any law when he arrested her. Thus, she made a prima facie case that the officer lacked probable cause to make the arrest. (People v. King, 12 Ill.App.3d 355, 298 N.E.2d 715.) Therefore, the burden of going forward with evidence shifted to the State. (People v. Cassell, 101 Ill.App.2d 279, 243 N.E.2d 363.) However, the State did not call a witness, or introduce any evidence, but cross-examined Smith in order to prove that, in fact, there was probable cause for defendant's arrest. Smith proceeded to testify to information which he purportedly received from an informer, and to the reliability of the informer. Smith testified that he arrested defendant because an unidentified individual called about 5:30 P.M. on the 25th of March, 1971, and told him that defendant was expected in a tavern on South Ashland Avenue with heroin. The reliability of this informer was based on Smith's statement that on four occasions narcotics information from the individual had produced four arrests that resulted in two convictions and two pending cases. In addition, Smith said that this individual had furnished him information that led to a gambling raid.

Smith's testimony was weakened by the fact that he arrested defendant at approximately 9:00 P.M., not 6:00 P.M., the hour allegedly given him by the informer as defendant's arrival time at the tavern. Moreover, the written report he made of defendant's arrest contained a narrative, apparently in his handwriting, that differed from his testimony. It stated that defendant was arrested in a narcotic raid in front of 1358 South Ashland Avenue ****681** (Smith had testified that he arrested defendant as she was walking south on Ashland Avenue). The report stated that defendant was found in possession of a brown bottle containing seventy-five pink capsules of white powder (Smith had testified that in the police station he found a quantity of white powder in defendant's coat pocket). Although Smith testified that he arrested defendant on reliable information, he could not recall the names of the persons who had been convicted nor of the two whose cases he said were pending on March 25, 1971. There was inconsistency in Smith's testimony concerning the period of time he had known the allegedly reliable informer and the period of time within which he obtained information from him. Although ***444** he had two partners with whom he worked in narcotics cases, he alone claimed to know the identity of the informer. Three other policemen, according to Smith, were involved in defendant's arrest; yet, his cross-examination testimony is the State's only evidence in support of the claim that a reliable informer's tip was the ground for defendant's arrest.

In the hearing of a motion to suppress evidence, the State must show the grounds for the arresting officer's belief, including facts relating to the credibility of an informer, where information from an informer is the basis of that belief. (Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; People v. McCray, 33 Ill.2d 66, 210 N.E.2d 161.) Probable cause for an arrest may be based on information from an informer, if reliability of that informer has been previously established, People v. Durr, 28 Ill.2d 308, 192

N.E.2d 379; or has been independently corroborated, People v. McFadden, 32 Ill.2d 101, 203 N.E.2d 888.

It is our judgment that Smith's cross-examination testimony did not discharge the State's burden of proof concerning the informer. In fact, Smith's testimony was inconsistent and uncertain; it demonstrated a woeful lack of proof, not only as to the alleged informer's reliability but even as to his existence. From a leading case, we are reminded of the statement made by our Supreme Court that an '* * * informer's past reliability should not be left to inference, when it is such an easy matter to show the accuracy of the previous tips.' People v. McClellan, 34 Ill.2d 572, 574, 218 N.E.2d 97, 98.

For these reasons, we conclude that the trial court erred in denying defendant's motion to suppress the evidence she alleged was illegally seized at the time of her arrest. (People v. Mason, 1 Ill.App.3d 302, 274 N.E.2d 216; compare People v. Young, 4 Ill.App.3d 602, 279 N.E.2d 392.) Having reached this conclusion, we will not decide whether the sentence imposed by the trial court is excessive. The judgment is reversed and the cause is remanded with directions that the trial court enter an order sustaining defendant's motion to suppress; and for further proceedings, not inconsistent with the views expressed in this opinion.

Reversed and remanded with directions.

STAMOS, P.J., and HAYES, J., concur.

All Citations

16 Ill.App.3d 440, 306 N.E.2d 678

199 N.J. 407
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Respondent,
v.
Angela BAUM, Defendant,
and
Jermel Moore, Defendant–Appellant.

Argued March 11, 2008.
|
Re-argued Sept. 8, 2008.
|
Decided June 15, 2009.

Synopsis

Synopsis

Background: Two defendants, who were indicted for possession of a controlled dangerous substance and possession, more than 50 grams, filed motion to suppress evidence seized during course of traffic stop. The Superior Court, Law Division, Somerset County, granted the motion. State appealed. The Superior Court, Appellate Division, 393 N.J.Super. 275, 923 A.2d 276, reversed and remanded. One defendant filed motion for leave to appeal.

Holdings: The Supreme Court, Hoens, J., held that:

defendant did not have standing to assert co-defendant's right to be free from self-incrimination as the basis for motion to suppress the fruits of vehicle search;

defendant had standing to argue that search of vehicle in which he was a passenger that led to discovery of contraband and the charge that he possessed it was unreasonable;

initial stop of automobile in which defendant was a passenger was justified by the absence of a required inspection sticker; and

traffic stop was not unreasonably extended or more intrusive than necessary.

Judgment of Appellate Division affirmed as modified; case remanded.

Wallace, Jr., J., dissented and filed opinion in which Long, J., joined.

Attorneys and Law Firms

****1129** Shara P. Saget and Mark H. Friedman, Assistant Deputies Public Defender, argued the cause for appellant (Yvonne Smith Segars, Public Defender, attorney; Ms. Saget, on the letter briefs).

Natalie A. Schmid Drummond, Deputy Attorney General, argued the cause for respondent (Anne Milgram, Attorney General of New Jersey, attorney).

Opinion

Justice HOENS delivered the opinion of the Court.

***411** This Court granted defendant Jermel Moore's motion for leave to appeal from the Appellate Division's judgment that reversed the trial court's order suppressing evidence. From the time when the suppression motion was filed before the trial court and continuing through the argument and decision on appeal, defendant framed the issue in terms of his assertion that the items he sought to suppress had been seized during a warrantless search of the automobile in which he was a passenger.

During the proceedings before this Court, however, it became apparent that the critical element in defendant's analysis was the alleged illegal detention and coercive interrogation of the vehicle's driver, co-defendant Angela Baum. That is, defendant argued that ***412** the warrantless search of the automobile was unconstitutional because it was based on the incriminating statements Baum made at a time when her constitutional rights were being violated. We therefore entertained supplemental briefs and oral arguments by the parties addressed to whether defendant had standing to assert Baum's right to be free from self-incrimination as the basis for his motion to suppress the fruits of the automobile search.

It has become plain that, regardless of the theory on which defendant's suppression motion was considered and decided by the motion court and the appellate panel, its essential predicate was the attempted vicarious assertion of Baum's constitutional right against self-incrimination. That right, however, both as articulated in the ****1130** Fifth Amendment

of the United States Constitution and as embraced in our statutory and common law, is a purely personal one. We therefore conclude that defendant lacks standing to assert the violation of that right as the basis for his challenge to the search at issue.

In the alternative, because defendant's possessory interest in the contraband affords him automatic standing to challenge the warrantless search of the automobile, we have separately considered his motion in that light. Having done so, we conclude that the Appellate Division correctly analyzed the issue and applied the appropriate precedents in reaching its judgment.

We affirm and modify the decision of the Appellate Division vacating the order of suppression, and we remand this matter for further proceedings.

I.

The facts and circumstances surrounding the stop and search of the automobile in which defendant was a passenger are fully described in the published decision of the Appellate Division, *see State v. Baum,* 393 *N.J.Super.* 275, 280–84, 923 *A.*2d 276 (App.Div.2007), and we therefore need only summarize them briefly.

***413** Late at night, a Bernards Township police officer saw a vehicle with tinted windows at a gas station near the entrance to Route 78. He noticed that the vehicle had a New Jersey license plate but no inspection sticker. He then learned that the owner's license was suspended but that there were no reports that the vehicle had been stolen. The officer saw the vehicle leave the gas station and turn onto the ramp leading to the highway, which he described as a known drug courier route. He stopped the vehicle, radioed the license plate information and his location to police headquarters, and approached. Everything that followed was captured on the patrol car's video recording system.

When Baum, the driver, could not produce a license or an insurance card, and when she turned over a vehicle registration that was not in her name or in the name of any of the passengers, the officer asked her to step out of the vehicle. As his inquiries continued, defendant, who was the front seat passenger, and Baum, who was standing behind the vehicle and in front of the patrol car, gave the officer conflicting explanations and answers, providing different information about where they had been and where they were going. When the officer questioned her further, Baum's responses were inconsistent with what she had said earlier.

Because Baum had neither a license nor any other form of identification with her, the officer asked for her name, address, and birth date in order to verify that she was a validly licensed driver. Due to other, unrelated police business on the radio, it took several minutes for the officer to transmit that request and receive a response. While he was waiting for that information, he continued to make inquiries of her. As the encounter continued, the officer told Baum that her answers did not match defendant's, and he made his disbelief apparent. Another officer arrived and stood nearby.

Eventually, the first officer told Baum that he suspected that there was something in the car that should not be there and asked her if she wanted to tell him what was going on. Baum said that ***414** they had been smoking marijuana earlier but that she did not know whether defendant had brought any into the car. When the officer said that he could summon a drug-sniffing dog, Baum admitted that there was marijuana in the car, but told him that it belonged to defendant.

A short time later, the officer learned from the dispatcher that Baum's license was suspended, at which point he arrested ****1131** her and advised her of her rights. *See Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966). She then waived her rights and revealed where in the vehicle a container of drugs could be found. When the officers located it, they found cocaine and marijuana inside. After being advised of his rights, defendant told the officers that the cocaine was his, but that the marijuana was Baum's. The entire encounter, from the time of the initial stop through Baum's arrest, lasted twenty-six minutes.

II.

Based on the evidence retrieved from the vehicle, defendant and Baum were indicted for possession of a controlled dangerous substance (cocaine), *N.J.S.A.* 2C:35–10(a)(1), and possession, more than fifty grams, (marijuana), *N.J.S.A.* 2C:35–10(a)(3). Both Baum and defendant filed motions to suppress the evidence discovered in the vehicle in which they challenged the warrantless search conducted at the roadside.

The Law Division judge conducted a hearing on the motions during which he reviewed the videotape taken by equipment

located in the police cruiser and which depicted the stop, the officer's questioning of both Baum and defendant, and the search. In addition, the officer who initiated the stop and conducted the investigation testified. After considering the evidence, the court granted the motion suppressing the drugs found in the vehicle.

In its analysis, the motion court concluded that the initial vehicle stop was lawful and that the length of time involved in the stop and the investigation, although somewhat delayed, was permissible because of the time needed to receive information about ***415** Baum's license. Nonetheless, the court found that the officer's behavior toward Baum was coercive, that the questioning of her amounted to an impermissible custodial interrogation, and that the officer should have given her the warnings required by *Miranda* after she admitted that they had been smoking marijuana earlier. In addition, the motion court concluded that the information provided by Baum was insufficient to constitute the specific and articulable facts needed to support the warrantless search of the vehicle. The court therefore granted the suppression motion.

The Appellate Division reversed the suppression order and directed that the evidence seized could be used in the prosecution of both defendant and Baum. *Baum, supra,* 393 *N.J.Super.* at 292, 923 *A.*2d 276. In its analysis, the appellate panel reasoned that the officer's suspicions increased as the answers to his questions about the vehicle and its occupants continued to yield conflicting responses. The panel commented that, under such circumstances, "the constitution does not require police officers to ignore the suspicion engendered by these conflicts, provided the detention is not unduly extended." *Id.* at 288, 923 *A.*2d 276. The panel noted that officers must investigate using the "least intrusive" techniques in a way "likely to confirm or dispel their suspicions quickly," *id.* at 287, 923 *A.*2d 276, and recognized that this Court has imposed restrictions based on whether a particular encounter has become more intrusive than necessary, *id.* at 288, 923 *A.*2d 276.

Noting that it was reasonable for the officer to separate Baum, the driver, from defendant, the front seat passenger, and finding that Baum's responses gave the officer reason to suspect that there were drugs in the vehicle, the appellate panel disagreed with the motion court's conclusion that the search was conducted without probable cause. *Id.* at 289–90, 923 *A.*2d 276. Further, the panel rejected the argument that the officer's comment to Baum ****1132** that he could summon a drug-sniffing dog was unduly coercive, *id.* at 290, 923 *A.*2d 276, and disagreed that the roadside questioning of Baum constituted a custodial interrogation, ***416** *id.* at 291, 923 *A.*2d 276. Finally, the panel observed that even if the encounter amounted to a custodial interrogation, the circumstances were sufficiently exigent to obviate the need for a warrant and to permit the search of the vehicle. *Id.* at 291–92, 923 *A.*2d 276.

We granted defendant's motion for leave to appeal, 192 *N.J.* 473, 932 *A.*2d 25 (2007), and we heard oral argument on the merits on March 11, 2008. Following oral argument, we directed the parties[1] to file supplemental briefs focused on whether defendant had standing to raise a challenge to a potential violation of Baum's right against self-incrimination. We thereafter heard and considered additional oral arguments directed to that question. We now affirm.

III.

We begin with our evaluation of the question addressed in the supplemental briefing, namely, whether defendant has standing to assert that the questioning of Baum violated her rights against self-incrimination. That issue arises based on two separate arguments on which defendant relied during the initial argument on the appeal, each of which was an important part of the ***417** motion court's basis for deciding to suppress the evidence found in the automobile. In particular, defendant first asserted that the officer's questioning of Baum amounted to a custodial interrogation during which she was not advised of her *Miranda* rights. He further argued that even if the questioning did not meet that test, it was unduly prolonged and coercive, with the result that it overcame her will and elicited from her an involuntary confession.

The most direct answer to the question that we posed in our request for supplemental briefs is that we have not and we do not today accord standing to a third party, like defendant, to vicariously assert that another's right against self-incrimination has been violated. Regardless of whether the question is analyzed in terms of Fifth Amendment jurisprudence, or seen in light of the state-based counterpart found in our common law, *see State v. Brown,* 190 *N.J.* 144, 153, 919 *A.*2d 107 (2007) (observing that our Constitution does not include a provision that mirrors the Fifth Amendment; recognizing its deep roots in our common law, and codification in statute and evidence rule

(quoting *State v. Muhammad,* 182 *N.J.* 551, 567, 868 *A.*2d 302 (2005))), the result is the same.

The Fifth Amendment affords individuals the right to be free from self-incrimination; ****1133** the United States Supreme Court has never interpreted it to create a broader right that would extend that protection to a third party. Rather, that Court has long held that "the privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.' " *Bellis v. United States,* 417 *U.S.* 85, 89–90, 94 *S.Ct.* 2179, 2184, 40 *L.Ed.*2d 678, 684 (1974) (quoting *United States v. White,* 322 *U.S.* 694, 701, 64 *S.Ct.* 1248, 1252, 88 *L.Ed.* 1542, 1547 (1944)). As the Court noted in *Bellis,* not only is it true that "the Fifth Amendment privilege is a purely personal *one,*" but the Court regards this to be a "fundamental policy limiting the scope of the privilege." *Id.* at 90, 94 *S.Ct.* at 2184, 40 *L.Ed.*2d at 684–85.

***418** This limitation on the Fifth Amendment, as affording an entirely personal right, has been understood among the federal courts to support the conclusion that the Fifth Amendment "cannot be asserted vicariously."[2] *United States v. Fortna,* 796 *F.*2d 724, 732 (5th Cir.), *cert. denied,* 479 *U.S.* 950, 107 *S.Ct.* 437, 93 *L.Ed.*2d 386 (1986); *see United States v. Ward,* 989 *F.*2d 1015, 1020 (9th Cir.1992) (concluding that defendant "ha[d] no standing to assert the ... Fifth Amendment rights of others"); *United States v. Richardson,* 1 *F.Supp.*2d 495, 497 (D.V.I.1998) (recognizing general rule that "defendants do not have standing to raise a third-party's Fifth Amendment violations for their own defense").

Similarly, state courts that have considered whether to permit a vicarious assertion of a claimed Fifth Amendment violation have agreed with the analysis of their federal counterparts. *See, e.g., State v. Ducharme,* 601 *A.*2d 937, 941 (R.I.1991) ("One may not complain about compulsion that may be applied to another, even though that application may result in the production of evidence that may be used against a defendant."); *State v. Hawkins,* 490 *So.*2d 594, 598–99 (La.Ct.App.) (holding that defendant did not have standing to allege that statements used to support search warrants were obtained in violation of third party's Fifth Amendment rights), *cert. denied,* 494 *So.*2d 1174 (La.1986).

***419** Although our Constitution does not include language like that found in the Fifth Amendment, a similar privilege is guaranteed by both statute, *N.J.S.A.* 2A:84A–19, and our evidence rules, *N.J.R.E.* 503. In general, our analysis of this protection has been somewhat more expansive than that employed in the federal courts; we have often confronted questions that have compelled us to look beyond the mere recitation of the warnings required by *Miranda* and to consider separately the demands of these longstanding common law principles. *See, e.g.,* ****1134** *State v. O'Neill,* 193 *N.J.* 148, 176–77, 936 *A.*2d 438 (2007) (considering effectiveness of *Miranda* warnings where incriminating statements had already been elicited); *State v. A.G.D.,* 178 *N.J.* 56, 68, 835 *A.*2d 291 (2003) (recognizing impact of failure to reveal existence of arrest warrant on voluntariness); *cf. State v. Deatore,* 70 *N.J.* 100, 112, 358 *A.*2d 163 (1976) (extending analysis based on right against self-incrimination to question of propriety of cross-examination on post-arrest silence).

As to the narrow issue before this Court, however, an analysis of our own protection against self-incrimination yields the same conclusion as that announced by the courts that have interpreted the Fifth Amendment. As with the *Miranda* warnings, the purpose advanced by our statute and rule is to protect the individual's right against self-incrimination rather than to advance the goals of another who tries to claim the benefit of that purely personal right. Were we to part company with the federal courts on this issue and allow defendant to vicariously assert Baum's right against self-incrimination, we would adopt an approach that would, in effect, read *Miranda* in a manner so inconsistent with the clear guidance of our federal counterparts as to be inappropriate. As we have recognized, the United States Supreme Court "has advised against extending *Miranda* unless the holding 'is in harmony with Miranda's underlying principles.' " *State v. Boretsky,* 186 *N.J.* 271, 278, 894 *A.*2d 659 (2006) (quoting *Fare v. Michael C.,* 442 *U.S.* 707, 717, 99 *S.Ct.* 2560, 2568, 61 *L.Ed.*2d 197, 207 (1979)).

***420** We see no basis in this record on which to expand the protections against self-incrimination so as to permit a third party, such as defendant, to assert a violation vicariously. Therefore, we conclude that, to the extent that defendant's suppression motion was based on a claimed violation of Baum's right against self-incrimination, it should have been denied.

IV.

Our conclusion that the right against self-incrimination is a personal one, however, does not entirely resolve the issue before the Court. Defendant argues that the Fifth Amendment would only be the correct focus of his challenge if the State were attempting to use Baum's statements against him directly and if, as a result, he sought to suppress those statements.[3] He contends, however, that his motion to suppress was not an effort to attack any statement that Baum made, and therefore urges us to conclude that it was not based on the Fifth Amendment at all.

Instead, defendant argues that his suppression motion was, and is, based on his right to be free from an unreasonable search and seizure as guaranteed by the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution. He points out that because he was charged with possession of the contraband that was eventually found in the automobile, he has automatic standing to challenge the search. That is, he asserts that the stop of the vehicle, the continued investigation conducted by the officer, and the eventual search of the vehicle, which uncovered the drugs that are the basis of the criminal charges against him, were unreasonable. ****1135** He contends that this ground for his suppression motion is entirely separate ***421** from the statements Baum made or any violation of her rights against self-incrimination.

The State responds with two alternative arguments, either of which would require that we conclude that the search was permissible. First, the State asserts that the alleged Fifth Amendment violation was so inextricably intertwined in the continuing investigation by the officer that defendant cannot challenge the search or the fruits thereof except by an attack on the circumstances that led to Baum's statements. Second, the State asserts that even if this Court only analyzes the challenge to the search of the vehicle through the Fourth Amendment and Article I, Paragraph 7, as to which defendant concededly has standing, the Appellate Division's analysis is unassailable and its judgment that the suppression motion should have been denied must be affirmed.

We address these arguments in turn. Our analysis of the question before the Court in this appeal is informed by our recent decisions addressing the applicable principles governing warrantless searches of automobiles, *see State v. Pena–Flores,* 198 *N.J.* 6, 28–30, 965 *A.*2d 114 (2009), and standing to challenge warrantless searches generally, *see State v. Johnson,* 193 *N.J.* 528, 541–46, 940 *A.*2d 1185 (2008). The reasoning and the historical underpinnings of the doctrines that are expressed in those decisions are thorough and, although each of these decisions is relevant to our analysis, we need not recite their essential principles here.

Rather, we note that, as we held in *Johnson,* both the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Id.* at 541, 940 *A.*2d 1185 (quoting *U.S. Const.* amend. IV and *N.J. Const.* art. I, ¶ 7). When circumstances have warranted it, we have construed Article I, Paragraph 7 so as to give our citizens greater protection against unreasonable searches and seizures than the rights as analyzed under the Federal Constitution, *see, e.g., State v. Eckel,* 185 *N.J.* 523, 538, 888 *A.*2d 1266 (2006) (noting that "we have not hesitated in the ***422** past to afford our citizens greater protection against unreasonable searches and seizures under Article I, Paragraph 7 than would be the case under its federal counterpart"); *State v. Carty,* 170 *N.J.* 632, 639, 790 *A.*2d 903 (2002) (acknowledging that "consent searches under the New Jersey Constitution are afforded a higher level of scrutiny"); *State v. Johnson,* 68 *N.J.* 349, 353–54, 346 *A.*2d 66 (1975) (interpreting Article I, Paragraph 7 to give individuals greater protection than is provided by Fourth Amendment), and it is in our rules governing standing that the different path we have followed is most plain.

There is no question that defendant has standing to argue that the search of the vehicle that led to the discovery of the contraband and the charge that he possessed it was unreasonable. Our longstanding jurisprudence accords a defendant automatic standing to move to suppress evidence derived from a claimed unreasonable search or seizure "if he has a proprietary, possessory or participatory interest in either the place searched or the property seized." *State v. Alston,* 88 *N.J.* 211, 228, 440 *A.*2d 1311 (1981). We have explained this to mean as well that a defendant has standing if he "is charged with an offense in which possession of the seized evidence at the time of the contested search is an essential element of guilt." *Ibid.*

It follows that because defendant was charged with a possessory offense, if his ****1136** challenge is solely to the search of the automobile, he has automatic standing to move to suppress the drugs found in that vehicle. It was in this context that the motion court and the Appellate Division should have considered the arguments. Instead, it appears that the motion court, without recognizing that there was an impermissible, embedded challenge to the

questioning of Baum, made its findings, and its decision, on that basis. As a consequence, the Appellate Division also did not consider whether the order suppressing the evidence could be sustained, absent the motion court's finding that the questioning of Baum was coercive.

***423** Although the statements made by Baum led to the discovery of the drugs, we must separate her words from the claim as to which defendant has standing. That they are intertwined cannot be avoided; that the motion court found that the questioning of Baum was coercive and amounted to a custodial interrogation certainly complicates our effort to address the question independent of that inappropriate underpinning. Nonetheless, viewing the facts relating to the initial stop of the vehicle and the continuing encounter in accordance with the framework of the issues and the considerations as to which defendant has automatic standing, and apart from the arguments about Baum's constitutional rights, we agree with the Appellate Division that the motion court erred in its analysis and application of the appropriate legal principles.[4]

Viewing the facts as they unfolded through the lens of the Fourth Amendment and Article I, Paragraph 7, we conclude, as did the Appellate Division, that the motion to suppress should have been denied. Applying our usual rules governing automobile stops to these facts, we begin with the recognition that the detention, even if brief, qualifies as a "seizure" of "persons" within the meaning of the Fourth Amendment. *State v. Dickey,* 152 *N.J.* 468, 475, 706 *A.*2d 180 (1998) (quoting *Whren v. United States,* 517 *U.S.* 806, 809–10, 116 *S.Ct.* 1769, 1772, 135 *L.Ed.*2d 89, 95 (1996)). "Therefore, any automobile stop, however brief, must satisfy the Fourth Amendment's basic requirement of 'reasonableness.' " *State v. Hickman,* 335 *N.J.Super.* 623, 634, 763 *A.*2d 330 (App.Div.2000) (quoting *Dickey, supra,* 152 *N.J.* at 475, 706 *A.*2d 180).

***424** Here, the initial stop of the automobile was justified by the absence of a required inspection sticker. The officer's request to see Baum's license, along with the other documents relevant to the inquiry about the automobile, was entirely permissible. So, too, were his rather routine questions to both Baum and defendant as to their route of travel and their purpose. In this encounter, the officer quickly learned that the driver could not produce her driver's license or the other credentials relating to the automobile. He also learned in the earliest moments of the stop that she could not identify the owner of the vehicle, referring to defendant as having that information. His routine questions to defendant, which were designed to identify who owned the vehicle, did not yield that information either, as ****1137** defendant equivocated about just who that might be.

More to the point, in response to simple and straightforward questions about their travel during the day, the officer was given directly contrary, mutually exclusive explanations from the driver and defendant. These circumstances supported the continued inquiries by the officer, *see Dickey, supra,* 152 *N.J.* at 479–80, 706 *A.*2d 180; *Hickman, supra,* 335 *N.J.Super.* at 637–38, 763 *A.*2d 330, and his suspicions about the possibility of some illegal activity beyond Baum's licensing and the inspection status of the vehicle were justifiably aroused. As we have held, when the reasonable inquiries by the officer related to the circumstances that justified the stop " 'give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions.' " *Dickey, supra,* 152 *N.J.* at 479–80, 706 *A.*2d 180 (alteration in original) (quoting *United States v. Johnson,* 58 *F.*3d 356, 357–58 (8th Cir.), *cert. denied,* 516 *U.S.* 936, 116 *S.Ct.* 348, 133 *L.Ed.*2d 245 (1995)). At that point, the officer may give voice to his suspicions in an effort to dispel them if that technique is most likely to be effective. *See id.* at 477, 706 *A.*2d 180; *State v. Davis,* 104 *N.J.* 490, 504, 517 *A.*2d 859 (1986) (framing inquiry as to whether officer used techniques that would both be least intrusive and be effective in shortest time).

***425** Although a continued detention may amount to an arrest if it is longer than needed or if it becomes "more than 'minimally intrusive,' " *see Dickey, supra,* 152 *N.J.* at 478, 706 *A.*2d 180, the entire encounter here was relatively brief. Moreover, it is undisputed that the only reason for its continuation, apart from the unresponsive and conflicting answers the participants were giving to the officer, was the unusually busy radio traffic that impeded a prompt response to the officer's inquiry about whether Baum had a valid driver's license. All parties agree that, in total, the encounter lasted approximately twenty-six minutes, and we see nothing excessive about that length of time.

Moreover, during the stop and the officer's investigation, defendant remained seated inside the vehicle; it was Baum who was standing outside of, and at the rear of, the vehicle. As to Baum, there is no question that removing her from the vehicle that had been lawfully stopped is permitted. *State v. Smith,* 134 *N.J.* 599, 611, 637 *A.*2d 158 (1994); *see Pena–Flores, supra,* 198 *N.J.* at 31 n. 7, 965 *A.*2d 114 (describing right of officer to remove driver from lawfully stopped vehicle

as "established precedent"). Regardless of whether the driver was inside or at the rear of the vehicle, however, there is nothing in this record that suggests any unreasonable or intrusive investigatory technique focused on defendant. We concur with the conclusion of the appellate panel that there is nothing "unreasonably extended, or ... more intrusive than necessary" in this stop and in this investigation. *Baum, supra,* 393 *N.J.Super.* at 289, 923 *A.*2d 276.

We recognize that defendant asserts that the questioning of Baum, and in particular the officer's tone and his reference to the drug-sniffing dog,[5] make the subsequent search of the vehicle ***426** constitutionally infirm. We, however, cannot overlook the fact that this is in reality an argument relating to the self-incrimination ****1138** claim, as to which defendant lacks standing. Nor can we escape the fact that much of the motion court's analysis and factual findings were driven by the court's focus on the interrogation of Baum and its conclusion that her rights to be free from self-incrimination had been violated. Those views, as we have explained, arise from rights that defendant had no standing to assert. Viewing the totality of the circumstances of the encounter solely through the prism of those that are defendant's to raise about the constitutionality of the search, we agree with the appellate panel's conclusion that the search was not unreasonable and that the motion to suppress should have been denied.

V.

We affirm, as modified, the judgment of the Appellate Division, reversing the grant of the motion to suppress and remanding the matter for further proceedings.

Justice WALLACE, JR., dissenting.

The majority concludes that any asserted Fifth Amendment violation was personal to codefendant Baum, and therefore defendant Moore lacks standing to raise the issue as part of his Fourth Amendment claim of an unreasonable search and seizure. I respectfully dissent.

As a preliminary matter, there may be some question whether the issue of defendant's standing to challenge the search is properly before the Court. The standing issue was not raised before the trial court or the Appellate Division and it was not discussed by the State in its brief to the Supreme Court. We faced the same issue in a Fourth Amendment case, in which we concluded that because the standing issue "raises important questions ***427** in the administration of criminal justice in this state," we should address the issue. *State v. Alston,* 88 *N.J.* 211, 219, 440 *A.*2d 1311 (1981). For that same reason, I agree that we should address this issue.

It may be that the standing issue was not raised below because, in light of this Court's rule of automatic standing for possessory offenses adopted in *Alston,* the parties and the courts did not consider that standing was an issue. *See id.* at 228, 440 *A.*2d 1311. In *Alston* this Court traced the federal law on standing and noted that in cases in which an essential element of the crime charged is possession of the seized property at the time of the contested search, the United States Supreme Court abandoned the "automatic standing" rule previously adopted in *Jones v. United States,* 362 *U.S.* 257, 263, 80 *S.Ct.* 725, 732, 4 *L.Ed.*2d 697, 703 (1960). *Id.* at 221–24, 440 *A.*2d 1311. The *Alston* Court noted that under the federal search and seizure law, "standing to challenge the prosecutorial use of evidence obtained in violation of the Fourth Amendment is not enjoyed by a mere passenger in a searched automobile even if he alleges ownership of the property seized." *Id.* at 224, 440 *A.*2d 1311. However, this Court parted company with that view of standing and "construe[d] Article I, paragraph 7 of our State Constitution to afford greater protection." *Id.* at 226, 440 *A.*2d 1311. The Court held that "a criminal defendant is entitled to bring a motion to suppress evidence obtained in an unlawful search and seizure if he has a proprietary, possessory or participatory interest in either the place searched or the property seized." *Id.* at 228, 440 *A.*2d 1311. Further, this Court made it clear that

> when the charge against defendant includes an allegation of a possessory interest in property seized such as would confer standing, under the traditional test we retain today, to object to prosecutorial use of evidence obtained in an unlawful search and seizure, the defendant has automatic standing to bring a suppression motion under *R.* 3:5–7, as "a person claiming to be aggrieved by an ****1139** unlawful search and seizure and having reasonable grounds to believe that the evidence attained may be used against him in a penal proceeding."
>
> [*Id.* at 228–29, 440 *A.*2d 1311 (quoting *R.* 3:5–7(a)).]

Recently this Court reviewed our standing jurisprudence in *State v. Johnson,* 193 *N.J.* 528, 544–46, 940 *A.*2d 1185 (2008). The ***428** Court explained that "[f]ollowing *Alston,* our courts have consistently applied the automatic standing rule to defendants charged with possessory offenses, regardless

of whether they had an expectation of privacy in the area searched." *Id.* at 545, 940 *A*.2d 1185; *see also State v. Smith,* 155 *N.J.* 83, 102, 713 *A*.2d 1033 (1998); *State v. Clausell,* 121 *N.J.* 298, 325–26, 580 *A*.2d 221 (1990); *State v. Cleveland,* 371 *N.J.Super.* 286, 295–96, 852 *A*.2d 1150 (App.Div.), *certif. denied,* 182 *N.J.* 148, 862 *A*.2d 57 (2004); *State v. Arthur,* 287 *N.J.Super.* 147, 154–55, 670 *A*.2d 592 (App.Div.), *rev'd on other grounds by* 149 *N.J.* 1, 12–13, 691 *A*.2d 808 (1997); *State v. Mollica,* 114 *N.J.* 329, 340, 554 *A*.2d 1315 (1989); *State v. Saunders,* 75 *N.J.* 200, 208–09, 381 *A*.2d 333 (1977).

To be sure, this Court has noted that a defendant generally may assert only his or her constitutional rights. *Saunders, supra,* 75 *N.J.* at 208–09, 381 *A*.2d 333. Despite that, when appropriate, this Court has concluded that "when the party raising the claim 'is not simply an interloper and the proceeding serves the public interest, standing will be found.' " *Clausell, supra,* 121 *N.J.* at 324, 580 *A*.2d 221 (quoting *In re Quinlan,* 70 *N.J.* 10, 34–35, 355 *A*.2d 647 (1976)).

In *Saunders, supra,* the defendant and the accomplice were indicted for rape and related charges. 75 *N.J.* at 203, 381 *A*.2d 333. At trial, the defendant asserted that the two complainants consented to sexual intercourse in exchange for drugs. *Ibid.* The trial court, over the defendant's objection, charged fornication as a lesser included offense. *Ibid.* The jury found the defendant not guilty of the charges in the indictment, but guilty of fornication. *Ibid.* The defendant moved for acquittal, contending the fornication statute was unconstitutional. *Ibid.* That motion was denied, and defendant's challenge before the Appellate Division was rejected. *Ibid.* This Court granted certification and reversed, addressing first the State's argument that the defendant lacked standing based on the "general principle that a litigant as to whom application of a statute would be constitutional lacks standing to attack the statute by asserting the constitutional rights of others." ***429** *Id.* at 208, 381 *A*.2d 333. After noting that the rule of standing generally "limits a criminal defendant to constitutional claims related to his own conduct," *ibid.,* this Court stated:

> We think it would be inappropriate to refuse to review the constitutionality of *N.J.S.A.* 2A:110–1 on the fortuitous ground that the defendant's act may have constituted a violation of other criminal statutes such as public or private lewdness. We therefore conclude that the salutary purposes of the usual rules of standing should not operate in these circumstances to prevent defendant from challenging *N.J.S.A.* 2A:110–1 as unconstitutional on its face.
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> [*Id.* at 209–10, 381 *A*.2d 333.]

In *Mollica, supra,* this Court faced the issue of whether one of the defendants, Primo Mollica, had standing to challenge the seizure of telephone toll records from another individual's hotel room. 114 *N.J.* at 337, 554 *A*.2d 1315. The State argued that Mollica was limited to contesting the seizure of items from his hotel room, but that he lacked standing to challenge the prior warrantless seizure of the hotel telephone toll records from the codefendant's room. *Ibid.* This Court noted that as a ****1140** matter of state constitutional doctrine, New Jersey applies a broad standard in standing issues, " 'namely, that a criminal defendant is entitled to bring a motion to suppress evidence obtained in an unlawful search and seizure if he has a proprietary, possessory or participatory interest in either the place searched or the property seized.' " *Id.* at 339, 554 *A*.2d 1315 (quoting *Alston, supra,* 88 *N.J.* at 228, 440 *A*.2d 1311). The Court then declared that there was a "sufficient connection between the telephone toll records and the underlying criminal gambling ... and a sufficient relationship between the defendant and the gambling enterprise, to establish a participatory interest on the part of defendant in this evidence" for the defendant to have standing to challenge the validity of the seizures of the toll records. *Id.* at 340, 554 *A*.2d 1315.

As I understand the majority opinion, despite the clear proprietary, possessory, or participatory interest that a defendant may have in property seized, if a coerced statement of a codefendant resulted in the police receiving information to support a warrantless search, the defendant may not raise that constitutional violation as part of his or her challenge to the search. In my view, our ***430** automatic standing rule should allow a passenger in a vehicle to challenge a search of the vehicle when there is an allegation that the driver's Fifth Amendment rights were violated and that such violation led to the search of the vehicle. Unfortunately, the majority opinion will now lead to the result that the driver of a vehicle (in this case, codefendant) may challenge the search of the vehicle for the violation of his or her Fifth Amendment rights, but the passenger (in this case, defendant) may not make that same challenge because the Fifth Amendment challenge is personal to another person.

In the present case the circumstances overwhelmingly cry out for the Court to extend standing to defendant to raise the asserted violations of codefendant's Fifth Amendment rights. Defendant obviously is not an interloper and has a proprietary, possessory, or participatory interest in the property seized. Both defendant and codefendant claimed

that the search of the vehicle and the resulting seizure of contraband were fruits of the illegal detention of codefendant that resulted in her involuntary statements to the police. Specifically, both defendants argued that the police officer's questioning of codefendant was overly invasive, unrelated to the purpose of the stop, and lasted longer than necessary to effectuate the purpose of the stop, resulting in a violation of both defendants' Fourth Amendment rights to be free from unreasonable searches and seizures. Further, defendant argued that codefendant's Fifth Amendment rights were violated because she was in custody and subject to custodial interrogation without the benefit of *Miranda*[1] warnings. The trial court agreed. Based on that finding, the violation of codefendant's constitutional rights directly affected defendant to his detriment.

I conclude that defendant has a sufficient connection to the asserted coerced statements from codefendant such that the usual rules of standing should not deprive him of the right to challenge ***431** the search based on the claimed violation of codefendant's constitutional rights. Under the circumstances here, the Fifth Amendment and the Fourth Amendment challenges are so inextricably bound together that defendant has standing to challenge the search both on his Fourth Amendment right to be free from unreasonable seizures, and on codefendant's Fifth Amendment right to be free from custodial interrogation that is ****1141** both coercive and without the benefit of *Miranda* warnings. I find no justification to parse the standing issue to allow one defendant to raise the constitutional violation but not the other.

Because I conclude that defendant has standing to challenge the search and seizure, and because there was sufficient credible evidence for the trial court to find that the questioning of codefendant was coercive and not preceded by *Miranda* warnings, I find no basis to interfere with the trial court's judgment to suppress the evidence.

Justice LONG joins in this opinion.

For affirmance as modified/remandment—Chief Justice RABNER and Justices LaVECCHIA, ALBIN, RIVERA–SOTO and HOENS—5.

For reversal—Justices LONG and WALLACE—2.

All Citations

199 N.J. 407, 972 A.2d 1127

Footnotes

1 After the initial oral argument and after this Court had directed the parties to submit the supplemental briefs, counsel for Baum filed a separate motion seeking to participate in the appeal. Unlike defendant, Baum had not appeared for the second day of the suppression hearing, at which time a bench warrant was issued for her arrest, and had not participated in the appeal from the trial court order. We denied her motion for leave to participate in accordance with longstanding principles because she was, and remains, a fugitive. *See Matsumoto v. Matsumoto,* 171 *N.J.* 110, 119–20, 792 *A.*2d 1222 (2002) (commenting that " 'fugitive from justice may not seek relief from the judicial system whose authority he or she evades' " (quoting Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine,* 87 *J.Crim. L. & Criminology* 751, 752 (1997))); *State v. Morales,* 91 *N.J.* 213, 450 *A.*2d 542 (1982) (summarily dismissing appeal because of fugitive status of defendant); *State v. Rogers,* 90 *N.J.* 187, 189–90, 447 *A.*2d 537 (1982) (dismissing appeal of fugitive over objection raised concerning importance of issue); *State v. Ackerson,* 25 *N.J.L.* 209, 211 (Sup.Ct.1855) (equating fugitive status with contempt that negates defendant's entitlement to consideration by judiciary).

2 Some federal courts have theorized that there might be an exception to this rule if police conduct directed toward a co-defendant in violation of the co-defendant's Fifth Amendment right was "so shocking and intentional that ... introduction [of evidence obtained as a result] could deny the defendant a fair trial." *United States v. Richardson,* 1 *F.Supp.*2d 495, 497 (D.V.I.1998); *see, e.g., United States v. Fortna,* 796 *F.*2d 724, 732 n. 8 (5th Cir.) (noting that defendant may have standing if third party's statements were derived through "shocking and intentional police misconduct"), *cert. denied,* 479 *U.S.* 950, 107 *S.Ct.* 437, 93 *L.Ed.*2d 386 (1986); *United States v. Chiavola,* 744 *F.*2d 1271, 1273 (7th Cir.1984) (recognizing exception where evidence is obtained by "extreme coercion or torture"); *Bradford v. Johnson,* 476 *F.*2d 66, 66 (6th Cir.1973) (holding that defendant's rights were violated by government's "knowing use of coerced testimony obtained by torture, threats and abuse of a witness"). We need not consider recognizing such an exception in this matter because we do not regard the assertions in this record as constituting a "shocking and intentional" violation of Baum's rights.

3 As defendant correctly points out, Baum's statements would not be admissible in the prosecution of defendant in any event, and a vicarious assertion of her Fifth Amendment right for that purpose would be unnecessary. *See State v. Young,* 46 *N.J.* 152, 156, 215 *A.*2d 352 (1965) (holding that it is "beyond dispute" that out-of-court statement of co-defendant is inadmissible against another defendant based on hearsay and confrontation rights).

4 We need not address the separately raised argument to the effect that the Appellate Division overstepped its bounds in undertaking its independent review of the videotape of the stop and the investigation of Baum and of defendant. *See State v. Elders,* 192 *N.J.* 224, 244, 927 *A.*2d 1250 (2007) (noting that availability of videotape does not extinguish deference owed to trial court). We are satisfied that the panel's review of that videotape was not intended to and did not lead it to substitute its view of the facts for that of the motion judge. Instead, its review assisted it in its evaluation of the motion court's application of legal principles to the essentially undisputed facts it had recited.

5 We decline the invitation to consider whether the reference to the dog was so unduly coercive as to be constitutionally infirm. By the time the officer said that he could have a dog brought to the scene, he had discovered that Baum did not have a valid license and Baum had already admitted that some of her earlier responses were false and that they had been involved in illegal use of narcotics earlier in the day. On this record and in light of defendant's lack of standing, we need not address this argument.

1 *Miranda v. Arizona,* 384 *U.S.* 436, 473, 86 *S.Ct.* 1602, 1627, 16 *L.Ed.*2d 694, 723 (1966).

307 N.J.Super. 204
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Christopher M. CRUMB,
Defendant–Appellant.

Argued Dec. 10, 1997.
|
Decided Dec. 24, 1997.

Synopsis

Defendant was convicted by the Superior Court, Law Division, Atlantic County, of first-degree murder. Defendant appealed. The Superior Court, Appellate Division, Shebell, P.J.A.D., held that: (1) trial court was not required to charge on theory that defendant was accomplice of companion in perpetrating killing; (2) writings of defendant showing hatred of Blacks were admissible to show motive for killing of Black man who was stranger to defendant; (3) anti-Semitic writings of defendant were admissible to show defendant's hatred of identifiable groups of people; (4) jury committed harmless error by failing to instruct jury that prior crimes evidence could not be used to determine that defendant was predisposed to attack victim; (5) police were lawfully in position to view inculpatory evidence in plain view, when they entered defendant's bedroom at request of his mother; (6) police had probable cause to believe that papers in plain view were evidence of criminal activity, sufficient to allow their seizure; and (7) jury instructions did not constitute plain error.

Affirmed.

Attorneys and Law Firms

****954** ***210** Lon Taylor, Assistant Deputy Public Defender, for defendant-appellant (Ivelisse Torres, ****955** Public Defender attorney; Mr. Taylor, of counsel, and on the brief).

Linda K. Danielson, Deputy Attorney General, for plaintiff-respondent (Peter Verniero, Attorney General, attorney; Ms. Danielson, of counsel, and on the brief).

Before Judges SHEBELL, D'ANNUNZIO and COBURN.

Opinion

The opinion of the court was delivered by

SHEBELL, P.J.A.D.

Defendant was indicted in Atlantic County as follows: count one, first degree murder (*N.J.S.A.* 2C:11–3(a)(1) and –3(a)(2)); count two, third degree possession of a weapon, a walking cane, with a purpose to use it unlawfully against the person of another (*N.J.S.A.* 2C:39–4(d)); and count three, assault with ill will, hatred, or bias (*N.J.S.A.* 2C:12–1(e)). Count three was severed by the trial judge, and defendant was tried before a jury from May 3 to 17, 1995. He was found guilty on both counts. On June 16, ***211** 1995, count two, possession of a weapon for an unlawful purpose, was merged with count one, murder, and defendant was sentenced to a custodial term of life with a thirty-year parole ineligibility period.

Defendant appeals, raising the following legal arguments:

POINT I

> THE TOTAL OMISSION OF AN INSTRUCTION ON ACCOMPLICE LIABILITY, INCLUDING THE OMISSION OF AN EXPLANATION THAT AN ACCOMPLICE MIGHT HAVE A LESS CULPABLE MENTAL STATE THAN A PRINCIPAL, VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (Not Raised Below).

POINT II

> THE GENOCIDAL RACIST MATERIAL SEIZED FROM DEFENDANT'S BEDROOM FIVE MONTHS PRIOR TO THE INCIDENT SHOULD HAVE BEEN EXCLUDED SINCE IT DID NOT FALL WITHIN ANY EXCEPTION REGARDING EXCLUSION OF PRIOR BAD–ACTS EVIDENCE AND WAS FAR MORE PREJUDICIAL THAN PROBATIVE.

POINT III

> THE GENOCIDAL ANTI–SEMITIC AND OTHER HATE MATERIAL SEIZED FROM DEFENDANT'S BEDROOM FIVE MONTHS PRIOR TO THE INCIDENT SHOULD HAVE BEEN EXCLUDED SINCE IT DID NOT FALL WITHIN ANY EXCEPTION REGARDING EXCLUSION OF PRIOR

BAD ACTS EVIDENCE AND WAS FAR MORE PREJUDICIAL THAN PROBATIVE.

POINT IV

THE TRIAL COURT'S INSTRUCTION CONCERNING THE USE OF THE OTHER BAD–ACT EVIDENCE WAS INADEQUATE AND DENIED DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL. (Not Raised Below).

POINT V

THE MATERIAL OBTAINED FROM DEFENDANT'S BEDROOM IN HIS ABSENCE WAS IMPROPERLY ADMITTED INTO EVIDENCE SINCE IT WAS THE PRODUCT OF A WARRANTLESS AND NONCONSENSUAL SEARCH.

POINT VI

THE TRIAL COURT'S INSTRUCTION REGARDING THE JURY'S OBLIGATION TO ASSESS THE CREDIBILITY OF "A CERTAIN STATEMENT ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT" ERRONEOUSLY OMITTED ANY REFERENCE TO THE CREDIBILITY OF THE MULTIPLE WRITTEN STATEMENTS SEIZED BY POLICE AS WELL AS THE VARIOUS ALLEGED ADMISSIONS MADE BY DEFENDANT TO FIVE DIFFERENT PERSONS, THEREBY DEPRIVING DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL. (Not Raised Below).

****956 *212** *POINT VII*

THE ACCUMULATION OF ERRORS DENIED DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL.

During the morning of February 4, 1993, Detectives Michael Quigley and James A. Frohner of the Egg Harbor Township Police Department went to the trailer home where the twenty-year-old defendant lived with his mother and his step-father. Defendant was not home, but his mother invited the officers in and insisted that they take a look at his bedroom. The bedroom door was off of its hinges and the room was in disarray. The officers observed certain writings in the room. They left and then returned at about noon to take notes. Quigley eventually left the trailer and applied for and was granted a search warrant. Pursuant to the warrant, at approximately 5:00 p.m., Quigley, Frohner, and others collected various items from the bedroom, and Frohner took photographs. The evidence seized included writings and drawings demonstrating defendant's racial and anti-Semitic beliefs and affiliations. More details concerning the events of February 4, 1993 will follow.

On July 13, 1993, five months after this evidence was seized, Roy Dick, an African American man in his seventies, was brutally beaten in Atlantic City. He died of his injuries on July 19, 1993, without regaining consciousness. He was a frail man, about five feet, two inches tall, who spent much of his time cleaning up the streets and parking lots. He could not walk very well and was hunched-over, moving only a half an inch at a time. He used canes and an old broom. He wore hats and old long coats, even in the summer.

Defendant's friends and acquaintances explained that during the Summer of 1993, defendant had strong beliefs about various groups of people. A friend of defendant's since high school recalled that defendant shaved his head to be a part of the skinhead faith. The friend said defendant had mixed feelings about actually being a skinhead, but "he acted the faith," and expressed strong feelings about black, Jewish, and Puerto Rican people. Defendant had a tattoo that said "white" on his right ***213** wrist and one that said "power" on his left wrist. He wore black combat boots with red laces to symbolize neo-Nazi beliefs.

During the Summer of 1993, Tabitha Buntele, then seventeen years old, lived with her mother in the same trailer park where defendant resided with his mother and step-father. She was five feet, four inches tall and weighed about one hundred pounds. At that time, she and defendant, who was twenty years old, were friends. Buntele was with defendant on the night of July 12, 1993, and into the morning of July 13, 1993. They decided to go to the Chelsea Pub in Atlantic City, as defendant used to work there and knew a lot of people. Sometime after midnight, Buntele drove the two of them to the Pub in her mother's car, a gray 1987 Reliant K. They parked in the rear of the parking lot near the bushes. While at the Pub, they drank and played pool. Buntele estimated she had two or three "nuclear kamikazes." She said defendant was drinking beer, but she did not remember how many he had.

The Pub's bartender recalled seeing defendant and a girl at the bar during the early morning hours, but said that defendant did not want anything to drink. He estimated that the couple was in the bar for about fifteen to twenty minutes sometime between 3:30 a.m. and 4:30 a.m.

Buntele recounted that when they left the Pub, they walked a couple of blocks to the Trop World Hotel Casino because defendant wanted to talk to one of their mutual friends who worked there. During the walk, defendant did not appear to be drunk. They spoke to the friend and agreed to pick him up at a bar and grill, two blocks from Trop World, when he got off of work at 8:00 a.m. According to the friend, defendant did not appear to be drunk or under the influence of alcohol. Buntele and defendant walked back to the car which was still parked at the Pub.

Buntele recalled that before getting into the car, defendant said that he needed to urinate and went behind some bushes. She saw a small, skinny black man wearing a long trench coat near those bushes, and opined that he was "a bum." She saw defendant swing his hand at the man "[l]ike he was throwing something," ***214** and tell him "to get ****957** lost." Defendant was a foot or two away from the man, within arm's reach, but she could not tell whether defendant actually hit the man. The man walked off a couple of feet through an opening in the bushes and defendant followed. Buntele was not able to see what the men were doing and could not hear anything. She did not see or hear anyone else in the area. About a minute later, defendant came from the bushes and said: "get in the car. Let's go." Once in the car, he told her, "I think I just beat somebody up." They left the parking lot and went to a McDonald's by the bus station. After getting something to eat at the drive-through window, they drove back to Egg Harbor Township. During the morning, defendant told Buntele that he kicked the man once or twice.

During the early morning hours of July 13, 1993, a woman who lived at 17 South Chelsea Avenue was awakened by the sound of a lady repeatedly screaming, "no." She looked out the window and saw a white male getting into the driver's side of a car which was parked in the parking lot of the Pub. The woman described the car as light in color and having a box shape. At trial, she was shown a photograph which she identified as the car she had seen that morning. She said that a woman was seated in the passenger's seat. She went back to bed and a few minutes later, she heard police vehicles. She looked out and saw police officers and ambulance personnel assisting an individual on the other side of the fence. On cross-examination, she acknowledged that she had described the white man as being in his early thirties and of average build. She explained that she was looking at the top of his head from her second story window and she guessed his age because he was not an old person and was at least of driving age.

Another resident of the second floor of the same rooming house testified that at 4:34 a.m. on July 13, 1993, he heard someone say in a loud voice, "come on." The noise was coming from the direction of the parking lot of the Pub. He looked out of the window, but did not see anything so he went and sat down. He then heard a real loud crack like someone was hit with a stick. ***215** He said it was not a regular sound. He went back to the window, and saw a girl and a guy run and jump into a gray, K car. From a photograph at trial, he identified the gray car he had seen that morning. He also said the female got into the passenger's seat, explaining the male was the last to come out of the yard and he went around the back and got into the driver's side. The witness went out onto his fire escape and saw someone lying down in the yard trying to sit up. He went down and saw it was Dick. Dick was moaning and his face was "all puffed out" with blood coming from it.

The witness went to Pacific Avenue where he flagged-down a police car. The officer followed the witness to the parking lot, and found Dick injured about the face with a lot of blood coming out of his mouth and around his nose. There were a couple of canes and a hat near Dick.

The witness described the two perpetrators as being white and having blond hair. The female "had something big in her hair, like a ribbon or something" which was pink. The male was "pretty tall," about six feet, and "biggish," and the girl was "kind of short" in comparison with him, about five feet, six inches. The male was wearing a light-colored or white T-shirt. On cross-examination, he acknowledged that he had said that the male appeared to be in his mid-twenties.

At 5:07 a.m., the paramedics transported Dick to Atlantic City Medical Center. He arrived at the hospital in a comatose state. He had a collapsed left lung, multiple fractures of the bones of the mid-face, and fractures of the walls of the maxillary sinus on either side of the nose, so severe that "they were almost unrecognizable." The nasal bones and the part of the nose that extends backwards and lies beneath the brain were also fractured. There were also fractures of the zygoma bone which runs along the cheek and of both orbits around the eyes. His sternum and four ribs were fractured, and he had extensive hemorrhaging of his right arm indicative of at least three blows. He was unable to survive these injuries.

Later on the morning of July 13, 1993, Buntele went to defendant's house to awaken ****958** him to go to Atlantic

City to pick up their ***216** mutual friend from work. Defendant stopped at the Pub and walked into the bushes for a couple of seconds. When he came back into the car, he told Buntele that he found medical examiner's gloves there.

Defendant's longtime friend recounted that on the day after the incident, defendant showed him a newspaper account of Dick's beating and said that the article was about him, as the previous evening he "beat up some old guy" near the Pub on Chelsea Avenue. Defendant was "kind of hyper" and somewhat exuberant about the incident, stating that the man was black and referring to him as an "old dirty man" and a bum who looked like "a scum." Defendant said that the man had swatted his cane in defendant's direction, but had not struck him. Defendant said he hit the man in the back of the head as the man walked past him and that when the "old guy" fell down, he "[s]tarted kicking and stomping him." He said Buntele cheered him on. Two of defendant's friends were also present during this conversation.

Detective Carl Rando of the Atlantic City Police Department received a phone call from Buntele's boyfriend at approximately 2:00 a.m. on July 16, 1993. As a result of that call, he and Detective Gasparo drove to the trailer park where defendant lived in Egg Harbor Township at approximately 3:30 a.m. They observed a gray 1987 Reliant K car there and noted the license plate number. They next saw three people getting into the K car, a female and two males. Two of these people fit the descriptions given, so the detectives followed the vehicle and eventually stopped it. The three were transported in separate cars to an office of the Atlantic County Prosecutor for questioning.

On July 16, 1993, Sergeants Anthony Porcelli and Raymond Bolis, of the homicide unit of the prosecutor's office, met with defendant who was incarcerated. Bolis advised defendant of his *Miranda*[1] rights, and at 9:53 a.m., defendant signed a *Miranda* ***217** form, waiving his rights and agreeing to speak to the officers. Initially, defendant denied he had any altercation with an older man in Atlantic City. However, at approximately 10:30 a.m., he told the officers that he left the Chelsea Pub and walked to the rear of the property through a fence to relieve himself, when an older man came up to him and swung a cane at him. He noted that he was not hit by the cane. Defendant admitted he struck the man in the head and face area with his fist at least two times, causing the man to fall to the ground. Defendant said that he was with a female, but that she was sitting in the car and had nothing to do with the assault.

At 11:30 a.m., in a taped statement, defendant said he had initially denied there was any altercation because he was afraid of going to jail. He continued that at 10:00 p.m. on July 12, 1993, Buntele picked him up in her mother's car at the 1400 Bar in Egg Harbor Township and they went to the Chelsea Pub, arriving at 10:30 p.m. Defendant said he had two or three beers in the 1400 Bar and about three beers in the Pub.

According to defendant, they left the Pub and walked to Trop World to talk to a friend who worked there. After about ten minutes, they returned to the Pub parking lot. Defendant went to urinate out by the back fence. He went through a cut in the fence into the rear yard of a green house. He said a dark-skinned older man approached him and swung a cane. Defendant grabbed the cane and hit the man in the face. Defendant "possibly" hit the man again. The man fell down and did not get up. Defendant then got in the car and told Buntele that he had "hit somebody" and they had to leave. Buntele drove them to the Trump Plaza parking garage, and they went for a walk on the boardwalk for about a half-hour, before going to McDonald's.

Defendant told the officers that he went back to the area of the Pub at 8:00 a.m. because he wanted to see if "the guy was alright." The man was gone and defendant "thought he left." Defendant said he did not mean to do it and did not want to hurt the man. ***218** Detective Bolis testified that Dick was found in the very spot where defendant admitted that he had hit an older man.

****959** Defendant was held at the County Jail in Mays Landing, where Arthur Thomas, an African American prison inmate, claimed to have spoken to defendant on July 16 or 17, 1993. Defendant allegedly told Thomas he was a skinhead and did not like blacks, Puerto Ricans, Hispanics, and Jews. Defendant told Thomas he went into the bushes to urinate, and an old man had raised his cane to him. As a result, he kicked and beat the old man, who he referred to as scum. Then, the girl he was with went through the man's pockets. Defendant said he did not "leave the guy for dead" like the newspapers were saying. Thomas claimed defendant said his parents were going to pay off Buntele to testify on defendant's behalf and that he was going to "play like" he was "crazy" to get away with the crime. Thomas allegedly witnessed defendant demonstrating to another inmate how he had stomped, punched, and kicked the old man. Thomas lent defendant his white shoe laces so he did not have to go to court wearing his red shoe strings which symbolized Nazism.

Thomas also indicated that in June 1993, before the attack on Dick, Thomas and defendant were housed together in the same jail for a couple of days. According to Thomas, defendant, who had a shaved head at the time, put Nazi signs on the walls and on his desk. Thomas had an extensive criminal record and acknowledged that the assistant prosecutor had written a letter to the Parole Board advising that Thomas had been cooperating in defendant's case.

After Dick's death, on July 19, 1993, defendant was charged with murder. The next day, Detective Burke went to the Atlantic County Justice Facility to advise defendant. Defendant then told Burke he "may have hit the guy more than twice." Burke advised defendant of his constitutional rights. Defendant said he was willing to waive his rights and speak to Burke and then told Burke that Buntele was not involved and that she stayed near the car. Defendant also said he did not take anything from the victim.

***219** A girlfriend of the defendant testified that he called her from jail twice and on the second occasion, told her he had kicked a black bum in the head when he and Buntele had gone to Atlantic City looking for black bums to beat up. She further stated that before receiving these calls, she saw Buntele in Absecon, and Buntele bragged that she was involved in the assault and "did most of it," and was the one kicking Dick in the head.

According to Buntele, she and defendant had been no more than friends up until the point that they were brought to the prosecutor's office on July 16, 1993. After that, they became boyfriend and girlfriend. This was defendant's idea, and they wrote letters to each other almost every day and spoke on the telephone. She also visited defendant in jail, and by October 1993, they were planning to get married, and she began using the surname Crumb. Defendant did not want her to testify as a State's witness and suggested she say she was drunk or high when she gave the statement on July 16, 1993. He also suggested they claim they left the Pub at 2:30 a.m. She broke their engagement because defendant became possessive, calling her constantly at home and at work, insisting that she visit him all of the time, and not allowing her to talk to her friends.

Defendant did not testify, but several character witnesses testified that he was not violent. Defendant's friend of four years said he observed defendant in the company of a black friend quite often and that defendant had several Jewish friends. The witness acknowledged that defendant would occasionally tell Jewish jokes, but he never said any racial slurs, and he never heard defendant use "the N word." He was aware that defendant was interested in Adolph Hitler and neo-Nazism, and admitted he had seen him with a shaved head wearing black boots with red laces, and knew the significance of such attire.

I

Defendant first contends that the judge's failure to give a jury instruction on accomplice liability on count one, murder, violated ***220** defendant's rights to due process and a fair trial. He asserts the trial judge should have instructed the jury that an accomplice might have a less culpable mental state than a principal. Defendant's appellate counsel ****960** refers to Buntele's possible involvement in the attack and suggests that defendant may have been attempting to protect Buntele by denying to the police that she had any involvement in the incident. Therefore, defendant's counsel argues that it was the judge's obligation to give such a charge, *sua sponte,* even if it was inconsistent with the defense theory and was not requested. Defendant cites *State v. Powell,* 84 *N.J.* 305, 318–19, 419 *A.*2d 406 (1980) and *State v. Ramseur,* 106 *N.J.* 123, 270 n. 62, 524 *A.*2d 188 (1987).

We recognize that in a murder case, the judge has an obligation to charge the applicable law to the jury even when not requested. *State v. Powell, supra,* 84 *N.J.* at 318, 419 *A.*2d 406. Here, however, an accomplice liability charge was not required.

N.J.S.A. 2C:2–6 provides in pertinent part:

> c. A person is an accomplice of another person in the commission of an offense if:
>
> (1) With the purpose of promoting or facilitating the commission of the offense; he
>
> (a) Solicits such other person to commit it;
>
> (b) Aids or agrees or attempts to aid such other person in planning or committing it[.]

Where a defendant is charged as an accomplice, the trial judge must instruct the jury that to find defendant guilty of a crime under a theory of accomplice liability, it must find that he or she "shared in the intent which is the crime's basic element, and at least indirectly participated in the commission

of the criminal act." *State v. Fair,* 45 *N.J.* 77, 95, 211 *A.*2d 359 (1965). Furthermore, the charge must equally relate those principles to the degrees of the offense involved. *State v. Weeks,* 107 *N.J.* 396, 405, 526 *A.*2d 1077 (1987). In other words, when an alleged accomplice is charged with a different degree offense than the principal or when lesser included offenses are submitted to the jury, the trial judge has a duty to "carefully impart [ ] to the jury the distinctions ***221** between the specific intent required for the grades of the offense." *Id.* at 410, 526 *A.*2d 1077.

Needless to say, the obligation to provide the jury with instructions regarding accomplice liability arises only in situations where the evidence will support a conviction based on the theory that a defendant acted as an accomplice. *State v. Bielkiewicz,* 267 *N.J.Super.* 520, 527, 632 *A.*2d 277 (App.Div.1993). In this case, the prosecution's theory was that defendant alone attacked Dick. That is clear from the prosecutor's opening and closing statements and the State's admission into evidence of defendant's statement in which he maintained that Buntele was sitting in the car and had nothing to do with the assault. Furthermore, the indictment charged defendant with purposely or knowingly inflicting serious bodily injury to Dick resulting in his death. It did not charge that defendant was an accomplice.

The defense theory was that someone other than defendant and Buntele committed the murder. Defense counsel cross-examined the bartender regarding his telling the police that he had seen another couple in the Pub that night. Defense counsel emphasized this point in summation and pointed out the inconsistencies between how the neighbors who had seen the couple in the parking lot described the man and woman and how defendant and Buntele claimed to dress and look that night. Defendant's attorney argued that the person who defendant admittedly hit once or twice was not Dick.

Neither the State's version of what occurred nor the defense's version of what occurred warranted a *Bielkiewicz* charge. Under the State's theory, defendant was culpable as a principal, and under the defense's theory, defendant was not involved in the murder of Dick. Nonetheless, defendant suggests that a *Bielkiewicz* charge was required for the scenario which was "indicated" by the record that Buntele was the principal and defendant was an accomplice. We reject this contention. Even if Buntele was involved in the attack, once defendant was identified as a participant in the beating of Dick, there was no evidence from which the ***222** jury could have differentiated between his culpability and that of Buntele. *State v. Rue,* 296 *N.J.Super.* 108, 116, 686 *A.*2d 348 (App.Div.1996), *certif. denied,* ****961** 148 *N.J.* 463, 690 *A.*2d 611 (1997). Moreover, as the State points out, defendant was not prejudiced because the jury was given the opportunity under the jury instruction to assess his precise culpability and find him guilty of murder, passion/provocation manslaughter, aggravated manslaughter, reckless manslaughter, aggravated assault, or simple assault.

Defendant argues that an accomplice liability charge was necessary particularly in light of the prosecutor's alleged misstatement of the law in her summation:

> So if you have a distraction in your mind about Tabitha Buntele's responsibility for any of this, put it aside. She's not on trial. *And even if she had done something, that doesn't take any responsibility away from him, nothing.*
>
> [Emphasis added.]

Defendant asserts that in the emphasized portion of that quote, the prosecutor misstated a key element of accomplice liability. We disagree. The prosecutor did not suggest that an accomplice is guilty of the same degree offense as the principal. Rather, the prosecutor suggested that if Buntele was an accomplice, defendant would be no less responsible for his acts as the principal actor.

In light of defendant's failure to request such a charge at trial, any error must be disregarded by this court unless it was clearly capable of producing an unjust result. *R.* 2:10–2; *State v. Cofield,* 127 *N.J.* 328, 341, 605 *A.*2d 230 (1992). Here, the omission of an accomplice liability charge was not error at all, let alone plain error capable of producing an unjust result. There was no rational basis for an accomplice liability charge. Such a charge would have prejudiced defendant and also tended to detract from his theory of defense.

II

Defendant next contends that at trial, the judge erred in refusing to exclude from evidence the genocidal racist material seized from defendant's bedroom five months *before* the attack on ***223** Dick. Earlier, the judge had, on May 5 and 12, 1994, conducted a hearing on defendant's motion to suppress items seized as a result of the search with a warrant of defendant's bedroom on February 4, 1993. The judge determined that the racist and anti-Semitic material seized from defendant's bedroom should be excluded because it was inflammatory and the risk of undue prejudice substantially

outweighed the material's probative value as to defendant's motive.

The State filed an interlocutory appeal, and we concluded that the trial court had abused its discretion. *State v. Crumb,* 277 *N.J.Super.* 311, 316, 649 *A.*2d 879 (App.Div.1994). We held that the probative value of written material expressing defendant's hatred of blacks was not outweighed by danger of unfair prejudice, and that the admissibility of the remaining anti-Semitic materials should be determined at trial. *Id.* at 319–20, 649 *A.*2d 879.

Defendant's mother, Sharon Crumb, testified at the May 1994 hearing that in February 1993, she lived with her husband and defendant at the Karl Le Trailer Park. According to his mother, defendant's bedroom was apparently ten feet by eight feet or ten feet, and contained a couch, two bureaus, a night table, a mirror, and a closet. Kalin, who is Sharon's sister and defendant's aunt, lived in the same trailer park and stored clothes in the closet in defendant's room.

The trailer home was in Sharon's and her husband's names. Defendant's mother claimed he paid rent to her according to an arrangement wherein defendant would babysit for Kalin's children for $30 or $40 per week and defendant or Kalin would give her half of that money. She said defendant was responsible for cleaning his own room, and that in the Summer of 1992, she and defendant had a fight because she had entered his bedroom and cleaned it without his permission. As a result, she was not allowed access to his bedroom without first asking his permission. She explained that the hinges at the top of the door were bending off so her husband removed the door.

***224** The mother testified that Detectives Quigley and Frohner of the Egg Harbor Township Police Department came to her trailer on February 4, 1993. She had known Quigley for two or three years, had dealt with him about three or four times, and had previously called him for help because she ****962** was concerned about the people defendant was "hanging out" with.

On February 4, 1993, Quigley and Frohner advised the mother that they wanted to ask her son a few questions. She told them that he was not home, but invited them in. The officers asked what defendant had been up to, and she responded, "I don't know, go look, go look at his room." She said the officers did not ask to look at the room. The room was a mess, and she wanted them to see that defendant "wasn't in his right mind at the time." He had previously written "go to hell" on the mirror which she washed off. She was concerned because defendant's friends were involved in satanic activities. She wanted Quigley to know that defendant needed help and that she was not making up that defendant was involved in satanic activities. On a previous occasion, she had explained to Quigley and others that defendant and his friends had an altar at a slaughterhouse where they congregated, but they did not believe her.

The mother said the officers went right into defendant's bedroom, and after they had been in there for ten minutes, she looked in and saw them going through defendant's drawers, looking at papers. She said Quigley had his hand in the night table drawer and the other officer was looking in a bureau drawer. She said she went into the living room and cried because she did not think that the officers had a right to do what they were doing. She did not ask the officers to stop because she was afraid and intimidated, and did not know that she could. She was not presented with a consent to search form nor did the officers tell her that she had a right to refuse to let them search.

She asserted that when the detectives had been in defendant's room for a half-hour, Quigley came out and asked if defendant had given her permission to go into his bedroom or to open his night ***225** table drawer. She told him no, but said she went in anyway. Quigley said he had found some papers about Jews and that he needed to make a phone call to see if he could take them. He then left the trailer to make the call, and the other officer remained in defendant's bedroom. Quigley returned five or ten minutes later and told her he would be back with a search warrant. He went into defendant's bedroom where he and the other officer remained for another forty minutes. At approximately 11:30 a.m., they left, saying they would be coming back with a search warrant. After they left, she opened the drawer to defendant's night table and saw three papers neatly piled. She took the papers and drove to Kalin's trailer. However, the two returned to the mother's and put the papers back in the drawer. Frohner returned at about 3:00 p.m. and took pictures of the bedroom. He sat with the mother and her sister until the search warrant arrived after 5:00 p.m. The officers then seized items from defendant's bedroom.

On cross-examination, the mother was shown pictures which depicted what her son's room looked like on February 4, 1993. She acknowledged that there were "[m]aybe some papers on the floor" and that writings on the wall included,

"ACS" [Atlantic City Skinheads], "white power," and a satanic drawing of a person with a sickle, and swastikas.

Quigley testified that he had known defendant since he was fourteen or fifteen years old, and that defendant's mother had contacted him for help and advice in dealing with defendant. He testified that on the morning of February 4, 1993, he and Frohner went to the trailer to investigate allegations of two victims who had identified defendant as the perpetrator in two separate sexual assaults. The second victim had reported the assault to police on February 1, 1993. Quigley went to the trailer to discuss the allegations with defendant, not to search.

According to Quigley, defendant's mother answered the door and said that her son was not home and had not come home the night before. She said she was very concerned, as she feared he ***226** was getting more deeply involved in the skinhead movement and satanism. In the living room were twenty-five to fifty copies of a pamphlet which listed the names and addresses of different affiliations of the KKK and white power groups. The mother gave Quigley a copy. She wanted Quigley "to take a look at" her son's bedroom so he could see what defendant had done to ****963** his room in the five years that they had lived in the trailer home. It was her idea that the officers go into the bedroom and he had asked if she had free access to defendant's room, if defendant paid rent, and whether the door was locked. She replied that she did have access, and complained that defendant did not pay rent because he did not work, and he did not clean his room. Before entering the room, Quigley said: "[y]ou know, Mrs. Crumb, before we go in the room, I want to advise you we are investigating Chris for two aggravated sexual assaults." She replied that she understood that and told the officers to "go in the room if you like." Quigley was satisfied that she had authority to let them go into the room.

The room was a mess with clothes and papers all over the place. Quigley said they did not go in the drawers to either the night stand or the dressers. There were papers on top of the bureau, on the couch, and on the floor. Quigley saw on the couch a drawing of a female, with her legs spread, which said, "Kristine Kapinski," and "[p]lease do not rape me." Kapinski was the victim of the first sexual assault. Frohner found another paper which appeared to portray a planned burglary of Weed's Texaco station on Black Horse Pike in McKey City. A third document on the couch referenced an abandoned building known as the slaughterhouse which had been set on fire.

Quigley believed that these three papers were evidence of crimes. At about 12:00 noon, he left and drove to a pay phone to call his supervisor, while Frohner remained at the trailer. The captain advised Quigley not to remove anything from the bedroom but to write down anything that was of evidential value. Quigley returned to the trailer home to take notes of the three items they had seen. Although he believed that he had cause to search the ***227** room based on the three documents found in plain view, he thought it would be best to obtain a search warrant. He acknowledged he did not tell the mother she had the right to refuse to allow the officers to look in the room. He said he was in the room for only five minutes before he left to make the call and five minutes after he made the call. He then left to get a search warrant. Frohner left with him, but went back to the trailer in case defendant returned. Quigley did not take anything with him, but listed the three documents seen in the bedroom in his affidavit for the search warrant, which was issued at 5:15 p.m. Quigley returned to the trailer with the warrant and confiscated the three documents and other items which were evidence of the sexual assault cases. Defendant was charged with the crimes later that night.

Frohner's testimony at the suppression hearing regarding what occurred on February 4, 1993, was consistent with Quigley's. Frohner stated that when Quigley went for the search warrant, he waited for a few hours with both women and he watched television and read a book. Eventually he received a call on his cellular telephone informing him that a judge had issued a warrant. At that point, Frohner went back into the bedroom and took photographs. Quigley and two other men from the Prosecutor's Office arrived and a search was conducted of the bedroom. Nine items were seized: (1) assorted hand bills; (2) a black ring binder; (3) assorted papers from the night stand; (4) a box cutter from the night stand; (5) a pillow case; (6) assorted papers from the clothes hamper; (7) assorted papers from the top of the dresser; (8) a paperback book entitled, *Satan Wants You,* and assorted papers from the closet; and (9) two letters from the door.

Following the testimony, defense counsel conceded that the search warrant was sufficient on its face. However, counsel argued that the information in the warrant was based on an illegal search because there was no consent, as defendant's mother did not have the legal capability to consent to a search of her adult son's bedroom.

***228** The judge in an oral decision found that when the officers initially went into the room, it was at the insistence of defendant's mother and that they saw in plain view three

papers which appeared to be evidence of crimes. Based on these findings, the judge denied defendant's motion to suppress the evidence. However, he ruled that the evidence seized from defendant's bedroom, such as the writings and drawings which suggested defendant's racist and anti-Semitic beliefs and affiliations, ****964** would not be admissible in the State's case in chief because it was inflammatory and the risk of undue prejudice substantially outweighed the material's probative value regarding defendant's motive. Since the material would be admissible in prosecuting the bias crime, the court severed the third count for a separate trial.

We granted leave to the State to appeal from that pre-trial order and, in a decision published on November 22, 1994, reversed that part of the order excluding the written material. *State v. Crumb, supra,* 277 *N.J.Super.* at 322, 649 *A.*2d 879. We affirmed that part of the order severing the third count. *Id.* at 321, 649 *A.*2d 879.

In our opinion, we called for some caution as to the admissibility of the material. *Ibid.* We recognized that the record developed at trial could differ substantially from the record developed on the suppression motion, and therefore, ruled that the trial judge "must be sensitive to any significant differences between the record on this appeal and what occurs at trial and the impact of those differences on issues of relevance and undue prejudice, even with regard to the material calling for the deaths of blacks." *Ibid.*

As to the written material that did not specifically mention black people, we concluded that the trial judge should not have excluded it in a pre-trial ruling and instead should have awaited its offer during the context of the trial. *Id.* at 320, 649 *A.*2d 879. Although this evidence did not expressly refer to black people, we indicated it had probative value because it showed defendant's commitment to theories of racial superiority, and "tend[ed] to reinforce and give context to defendant's expressions of hostility ***229** toward blacks." *Ibid.* If offered in the State's case, the trial judge would have to evaluate its probative value and the risk of undue prejudice pursuant to *N.J.R.E.* 403. *Id.* at 320–21, 649 *A.*2d 879.

At trial, the judge, over defense counsel's objections, allowed into evidence photographs of defendant's bedroom taken by Frohner. One depicted writings on the wall, stating "ACS," "white power," "under siege," and "fade to black," and a swastika and a symbol of a round circle with an X or a T through it. Another showed various papers strewn about the room and soda bottles and dirty glasses. Also admitted was a writing of a circle with a star in it attached to a door which was off of the hinges, as well as posters of Motley Crue, Megadeth, and Metallica.

Quigley testified about several items removed from defendant's bedroom, which defendant had confirmed at an interview at police headquarters were materials he had written. Toward the beginning of Quigley's testimony about defendant's writings, the judge interjected and instructed the jury that it must not convict defendant because of his beliefs and that it should consider this material only as evidence of defendant's state of mind at the time of the incident.

Several items were then entered into evidence: 1) A black loose leaf notebook with a drawing on the cover of an individual resembling Adolph Hitler with a circle and a star and a snake with the words along the side, "Adolph Hitler was definitely ahead of his time. Long live the Skin Heads, CJ, CJ;" 2) A page of a spiral notebook on which was written "American Skin Heads" and "Neo–Nazi," with a picture of a swastika and someone saying, "get him" with an arrow pointing to the person and the words "white power" and an emblem of a Celtic cross in a circle in which was the phrase "kill them fucking niggers," and underneath the symbol was written "Kill them dead. Kill 'em all. White Power;" 3) A blow-up of a writing, stating "Nazi pretty boys," a swastika, and then "American Skin Heads," and then below that was a circle with a cross with the words, "kill them fucking niggers," and "white power" and a page containing writings about tattoos including ***230** "right hand white with banner," and "left hand power with banner;" 4) A drawing of a circle and cross and the words, "kill 'em, kill 'em dead. Kill 'em all," and "white power."

After these four items had been admitted, defense counsel objected to the admission of a blow-up of a writing saying "SS" at the top and "Sig Heil" in the middle. Below the writing was a drawing of a dark-skinned individual saying "can't we just get along," and a second individual saying, "die nigger ****965** scum," and below the picture it said, "Rodney King beating." The judge remarked that the evidence was getting cumulative, but admitted it. A blow-up of another page was also admitted. On the top of it was written "great ideas" and then the initials "FOMA," with the words underneath each corresponding letter: "death for *f*ree," "[t]hey *o* we," and "*m* inority." (Emphasis added.) It was unclear what was written underneath the "A." Also on that page was written, "MFA," for "Minority Free America," and

descriptions of clothing including black combat boots with red laces.

At that juncture, the judge indicated that he would not permit anymore evidence of this type "unless it really says or shows something substantially different than what you have already shown there." The jury was excused and the prosecutor made a proffer outside of the presence of the jury. The judge refused to admit several items offered, but did agree to admit a page from the notebook stating, "Adolph Hitler," "I totally agree on all of his thoughts," and "his attitude toward the minorities and views was [sic] about the same. I would have done it if I had the power."

The judge also admitted an August 31, 1992, entry in defendant's notebook stating, "I am going to be a Skin Head really soon," and a portion of a letter stating:

> I'm still with Atlantic City Skin Heads. I went to the extreme, shaved my head and got my Dr. Martin boots, my black bomber jacket, more tatoos [sic]. Got a few skulls on my lower left arm, a Celtic cross on my upper left arm, on my upper right arm I got a Viking grim reaper, stillman, and then inverted cross and white power across my wrist.

The judge admitted the words to a song, entitled "Hatred Inside," by Megadeth which defendant wrote in a notebook:

> ***231** Welcome to this F'd up world where you will live and die. There are no ways to change the hatred that I feel inside. They're trying to kill us one by one and we're doing nothing to stop them. You should listen to what I say before you become a victim.
>
> [W]e should join together in unity and help to destroy them all. United we stand, divided we fall. They run the streets and our lands like it is their own, robbing our men and raping our women and stealing from our homes.
>
> ....
>
> Then they deserve to die, all of them, for being on this earth. They should have killed all of them at their f'g birth.

Defendant argues that we are not bound by our earlier decision in *Crumb, supra,* since the law of the case doctrine is discretionary and not irrevocably binding. In any event, we find no reason to disagree with that earlier decision. This court has already decided, in a well-reasoned published opinion, that the subject material was admissible.

We will assume for purposes of our discussion that both *N.J.R.E.* 404(b) and *N.J.R.E.* 403 are implicated in determining the admissibility of the evidence objected to. The material seized from defendant's bedroom, which was admittedly written by him, may arguably be considered "[e]vidence of other crimes, wrongs, or acts" within the meaning of *N.J.R.E.* 404(b). Although defendant's writings are constitutionally protected free expressions of his racial beliefs and are not themselves unlawful, they nonetheless may be interpreted by a jury to constitute other wrongs or acts. Although evidence excluded under *N.J.R.E.* 404(b) is often referred to as "other crime evidence," the rule also excludes evidence of other wrongs and acts which may not necessarily be unlawful. Richard J. Biunno, *Current N.J. Rules of Evidence,* comment 7 on *N.J.R.E.* 404 (1997–1998); *See State v. Kittrell,* 279 *N.J.Super.* 225, 237–38, 652 *A.*2d 732 (App.Div.), *certif. granted,* 142 *N.J.* 573, 667 *A.*2d 190 (1995) (considering admissibility of evidence under *N.J.R.E.* 404(b) that suspect arrested on CDS charges had a beeper on his possession).

In the recent case of *State v. Nance,* 148 *N.J.* 376, 689 *A.*2d 1351 (1997), our Supreme Court held that evidence of prior jealous ***232** episodes by the defendant toward his former girlfriend was admissible to show his motive in shooting her male friend. ****966** *Id.* at 382–84, 386, 689 *A.*2d 1351. Similarly, here, evidence of defendant's prior writings demonstrating his racial hatred was admissible to show his motive in beating Dick.

Of course, even if the material seized from defendant's bedroom regarding his racist beliefs was admissible under *N.J.R.E.* 404(b) to prove motive, the trial judge may in his discretion exclude it under *N.J.R.E.* 403, if its probative value is outweighed by its prejudicial impact. A four-part test is used for determining when extrinsic evidence of other crimes or wrongs is admissible:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [*State v. Cofield, supra,* 127 *N.J.* at 338, 605 *A.*2d 230.]

Determinations of the admissibility of "other crimes, wrongs, or acts" evidence are left to the discretion of the trial court. *State v. Marrero,* 148 *N.J.* 469, 483, 691 *A.*2d 293 (1997); *State v. Nance, supra,* 148 *N.J.* at 387, 689 *A.*2d 1351. The trial judge's decision in this regard is entitled to deference and is to be reviewed under "an abuse of discretion standard." *Ibid.*

Under the first prong of the *Cofield* test, evidence of defendant's racist writings was relevant to the material issue of defendant's motive in attacking Dick. The State charged defendant with "purposely or knowingly" causing Dick's death. As noted in *State v. Crumb, supra,* the written material regarding defendant's hatred of and death wish for black people showed defendant's motive and state of mind. 277 *N.J.Super.* at 317–18, 649 *A.*2d 879. Defendant's state of mind was a relevant issue because "[w]ithout it, a jury would not know the context of Roy Dick's death and might be resistant to the idea that a young man purposely would ***233** inflict deadly harm on an elderly stranger without any apparent reason such as theft or substantial provocation." *Id.* at 318, 649 *A.*2d 879.

Defendant argues on appeal that the prior bad acts evidence about his hatred of blacks was "global in nature" and "far removed" from any specific motive at the time of the attack. Defendant argues that the motive evidence must have a more specific link to the particular crime. *State v. Nance, supra,* 148 *N.J.* at 382–84, 689 *A.*2d 1351 (prior jealous episodes by the defendant toward former girlfriend admissible to show motive in shooting her male friend); *State v. Baldwin,* 47 *N.J.* 379, 391, 221 *A.*2d 199, *cert. denied,* 385 *U.S.* 980, 87 *S.Ct.* 527, 17 *L.Ed.*2d 442 (1966) (evidence that the victim was going to testify against the defendant in a robbery trial admissible to show motive in killing the victim).

That the link in those cases may have been more specific does not mean it was erroneous here to admit the evidence to show motive. In *Crumb, supra,* we cited *United States v. Mills,* 704 *F.*2d 1553, 1558–59 (11th Cir.1983), *cert. denied,* 467 *U.S.* 1243, 104 *S.Ct.* 3517, 82 *L.Ed.*2d 825 (1984), wherein the court held that membership in an Aryan Brotherhood prison gang and letters defendant wrote describing the brotherhood's activities were admissible to show that he killed a fellow inmate as retribution for a wrong perpetrated on a brotherhood member in another prison. 277 *N.J.Super.* at 319–20, 649 *A.*2d 879. The defendant had tried to exclude the evidence under *F.R.E.* 404(b) as evidence of other crimes, wrongs or acts and under *F.R.E.* 403 as unduly prejudicial. 277 *N.J.Super.* at 319–20, 649 *A.*2d 879 (citing *United States v. Mills,* 704 *F.*2d 1553, 1558–59 (11th Cir.1983), *cert. denied,* 467 *U.S.* 1243, 104 *S.Ct.* 3517, 82 *L.Ed.*2d 825 (1984)). The Court of Appeals disagreed and ruled that the letter " 'pertained to a chain of events forming the context, nature and set-up of the crime,' and that the evidence was necessary '[t]o make the crime comprehensible to a jury.' " *Id.* at 320, 649 *A.*2d 879 (quoting *Mills, supra,* 704 *F.*2d at 1559).

***234** We find that the same rationale applies here, as defendant's written materials supplied a motive for an otherwise incomprehensible ****967** crime. The motive was at first baffling since robbery was ruled out because Dick had over $100 in his possession when he arrived at the hospital. The other crimes evidence was necessary for the proof of motive. *State v. Marrero, supra,* 148 *N.J.* at 482, 691 *A.*2d 293 (citing *State v. Stevens,* 115 *N.J.* 289, 301, 558 *A.*2d 833 (1989)).

In *Crumb, supra,* we recognized that at the time of the interlocutory appeal, we could not consider all of the circumstances that occurred at trial and their impact on the issues of relevance and prejudice. 277 *N.J.Super.* at 321, 649 *A.*2d 879. Defendant argues that the actual trial was far more replete with evidence of defendant's hatred of blacks than the limited pre-trial record. However, on interlocutory appeal, we noted the extensive evidence of defendant's writings, which included such phrases, as "Die Nigger Scum," and "White is Right," "Kill them Fucking Niggers," and "White Power." *Id.* at 315–16, 649 *A.*2d 879. Nothing admitted at trial was any more inflammatory even considering the alleged cumulative nature of the evidence. We anticipated testimony of the nature admitted at trial from the witnesses as to defendant's racist views. We specifically stated that the written material corroborated "the anticipated testimony of Frolich and Thomas regarding defendant's race-related statements to them." *Id.* at 319, 649 *A.*2d 879.

Finally, still in regard to the first prong, defendant asserts that our earlier decision centered on the unrealized speculation that the written material would be relevant to the issue of self-defense. However, our decision that the written material should be admissible was not centered on the self-defense theory.

We provided three other reasons for the relevance of this evidence: (1) the written material provided "compellingly powerful evidence of a motive which helps to explain an otherwise inexplicable act of random violence"; (2) noting

that defendant may be entitled to a jury instruction regarding lesser included offenses ***235** such as aggravated and reckless manslaughter, we stated that the written material had substantial probative value to the State in establishing that defendant acted with the necessary culpability, "extreme indifference to human life," that distinguishes those two types of manslaughter; and (3) the written material belied the suggestion that defendant had a concern for the victim's well-being as he implied by having told police that he returned to the scene in the morning. *Id.* at 317–18, 649 *A.*2d 879. Regarding self-defense, we simply added that the material tended to cast doubt on defendant's self-serving statement that Dick initiated the confrontation by swinging his cane at defendant. *Id.* at 317, 649 *A.*2d 879. The material was relevant to defendant's credibility on the issue of the need to defend himself and to meet any claim of imperfect self-defense. *Id.* at 318, 649 *A.*2d 879.

As to the second prong, defendant argues that the material seized from his bedroom was neither similar in kind nor close in time to the incident. Again, defendant argues that the evidence showed only general hatred toward black people and others without a specific link to the incident. Defendant argues that this court in *Crumb* mistakenly relied on *State v. Carter,* 91 *N.J.* 86, 449 *A.*2d 1280 (1982), where there was evidence that the defendants had a relationship with the murdered black man's family which could cause them to retaliate by randomly killing others. *Crumb, supra,* 277 *N.J.Super.* at 319, 649 *A.*2d 879. Defendant further argues that defendant's writings were not similar to the incident. We find no merit to any of these arguments and have discussed them previously. *R.* 2:11–3(e)(2).

As defendant concedes that the third prong of the *Cofield* test has been satisfied, we need not comment. The fourth prong of the *Cofield* test was sufficiently discussed in *State v. Crumb, supra,* 277 *N.J.Super.* at 319, 649 *A.*2d 879. We recognized that the material was potentially inflammatory, but concluded that defendant's race hatred as expressed in that material was central to the case. *Ibid.* We remain persuaded that the probative value of the material expressing defendant's death wish for black people was ***236** not outweighed by the risk of undue prejudice. *Id.* at 320, 649 *A.*2d 879. Although the State had several additional documents, the judge limited the admission of the evidence. ****968** Moreover, the judge gave a limiting instruction at the time that the evidence was being admitted and in his final charge to the jury. Thus, any undue prejudice was reduced significantly. *N.J.R.E.* 105; *State v. Nance, supra,* 148 *N.J.* at 386–87, 689 *A.*2d 1351.

We conclude that the trial judge did not abuse his discretion in admitting into evidence the racist material seized from defendant's bedroom. *State v. Marrero, supra,* 148 *N.J.* at 483–84, 691 *A.*2d 293.

III

Defendant further maintains that the trial court erred in refusing to exclude from evidence the genocidal anti-Semitic and other hate material seized from defendant's bedroom. He argues that this evidence did not fall within any exception to the rule of exclusion of prior bad acts evidence and was far more prejudicial than probative. At trial, defense counsel also objected to the admission of evidence of any Nazi-type items. The judge overruled this objection and allowed in evidence a drawing of Adolph Hitler with the words, "Adolph Hitler was definitely ahead of his time, long live the Skin Heads"; various writings referring to the skinhead organization and neo-Nazism; a picture of a swastika; a writing in a notebook stating, "Adolph Hitler," "I totally agree on all of his thoughts," and "his attitude toward the minorities and views was [sic] about the same. I would have done it if I had the power."

As previously stated in *Crumb, supra,* defendant's hatred of Jewish people was relevant and probative of defendant's motive for the random killing of Dick. 277 *N.J.Super.* at 320, 649 *A.*2d 879. We explained the connection:

> Although this material does not mention black people, it does have probative value in establishing defendant's commitment as a "skinhead" to racial confrontation and his adherence to theories of racial supremacy. Thus, it tends to reinforce and give context to defendant's expressions of hostility toward blacks, and would rebut any ***237** expressed or implied suggestion that the written material referring to blacks was an isolated aberration.
>
> [*Ibid.*]

This anti-Semitic material, like the racist material, was relevant to the issue of defendant's state of mind regarding hatred of certain groups of people. Thus, it also tended to show the reason for an otherwise inexplicable act.

Defendant further contends that the non-racist genocidal material was not close in time or similar in kind to the incident, arguing "some" of this material "may" have been written almost one year prior to the incident. However, there is no evidence to demonstrate that these writings were written

a year before the incident. These writings were discovered in defendant's possession only five months before the incident and do not appear to have been remote in light of defendant's continuing conduct and attire.

Defendant also argues that the anti-Semitic writings and drawings, blown up ten times their original size for the jury's viewing, were unduly prejudicial. Referring to the anti-semitic material, we cautioned the trial court "to evaluate its probative value and the risk of undue prejudice under *N.J.R.E.* 403, in the circumstances of the case as they evolve at trial." *Id.* at 320–21, 649 *A.*2d 879. In response to counsel's objection at trial, the judge questioned why the items were blown up. The prosecutor explained that this was done to save time in passing them around to the jury and because most of them were pages attached in a spiral notebook which could not be easily passed around.

Any possible prejudice was eliminated by the judge's limiting the amount of evidence admitted. The notebook found in defendant's room contained about one hundred pages, but the judge allowed the prosecutor to admit only a few. After four items had been admitted, defense counsel objected to the admission of additional items and the judge observed that the evidence was getting cumulative. Although he allowed the prosecutor to admit a few more pages, he refused to admit several items the State had presented. The judge did not abuse his discretion in admitting ***238** into evidence some of the anti-Semitic material seized from defendant's bedroom. *State v. Marrero, supra,* 148 *N.J.* at 483–84, 691 *A.*2d 293. He properly followed ****969** our decision that this material had probative value.

IV

Defendant asserts for the first time that the judge gave an inadequate instruction on the use of "other bad acts" evidence denying defendant due process of law and a fair trial. We find this contention to be entirely unfounded. *R.* 2:11–3(e)(2). Defendant's additional claim that these instructions were also erroneous because they failed to refer to the lesser forms of homicide is also without merit. *Id.* Contrary to defendant's contention, these instructions did not have the capacity to cause the jury to focus solely on the murder charge and equate defendant's genocidal hatred of blacks with the murder of Dick, rather than with a lesser motive to assault without the purpose to commit murder. Defendant provides no authority to support the proposition that a judge is required to refer to the lesser forms of homicide in giving a limiting instruction on the proper use of other bad acts evidence.

V

Defendant also alleges plain error in that the instructions failed to inform the jury that it could not consider the other bad-acts evidence until after it had determined, from independent evidence, that defendant committed the homicide. We agree that the law is that the jury should be instructed that it cannot consider the "other crimes, wrongs, or acts" evidence until it has found defendant guilty of the homicide beyond a reasonable doubt independently from the other evidence. *State v. Marrero, supra,* 148 *N.J.* at 495–96, 691 *A.*2d 293. However, in light of the otherwise comprehensive limiting instruction, the failure to include this language in the instruction was at most harmless error. *See State v. Hunt,* 115 *N.J.* 330, 363–64, 558 *A.*2d 1259 (1989) (holding ***239** that failure to give a limiting instruction on the proper use of "other crimes, wrongs, or acts" evidence was harmless error).

Defendant's related contention that the instructions were erroneous because they failed to explicitly inform the jury not to use the evidence to determine that defendant was predisposed to commit the attack is likewise harmless error. An anti-propensity instruction is an important part of a limiting instruction on the proper use of "other crimes, wrongs, or acts" evidence. *State v. Marrero, supra,* 148 *N.J.* at 496, 691 *A.*2d 293. In *Marrero,* the judge did not specifically inform the jury that it could not use the other crime evidence to conclude that the defendant was a bad person or that he had the propensity to commit the crime for which he was on trial. *Id.* at 495, 691 *A.*2d 293. Our Supreme Court nevertheless found that the instruction was adequate because the judge implicitly told the jurors that they could not use the other crime evidence for propensity when it instructed them not to use such evidence for any other purpose except for motive and intent on the homicide charge. *Id.* at 496, 691 *A.*2d 293.

Here, the judge not only instructed the jury not to use the material seized from defendant's bedroom for any other purpose except for motive and state of mind, he, unlike the trial judge in *Marrero, id.* at 495, 691 *A.*2d 293, instructed the jury not to use the evidence to conclude that defendant was a bad person and therefore must be guilty of murder. It is implicit in this instruction that the jury could not use the other bad acts evidence for propensity.

Here, as in *Marrero,* there is, at worst, an incomplete charge as opposed to a misstatement of the law. *Id.* at 496, 691 *A.*2d 293. In light of the otherwise comprehensive instruction, the omissions were not "clearly capable of producing an unjust result." *R.* 2:10–2.

VI

Defendant next urges that all of the material obtained from his bedroom must be suppressed since it was obtained as a result of a ***240** warrantless and nonconsensual search, whereby three incriminating papers were found which provided a key basis for the subsequent search warrant. We disagree.

While in the bedroom at the invitation and insistence of defendant's mother, the detectives saw three papers which they listed in ****970** the affidavit accompanying the application for a search warrant. Quigley saw two of the documents on the couch: (1) a drawing of a female, with her legs spread, which said, "Kristine Kapinski," and "[p]lease do not rape me;" (2) and a document which referenced an abandoned building known as the slaughterhouse which had been set on fire. Frohner saw the third document in plain view; a paper which appeared to portray a planned burglary of a local business, Weed's Texaco station, because it referenced where the station's safe was located.

The motion judge found that this was not a search, as the officers went into the bedroom at the insistence of defendant's mother and saw in plain view three papers which appeared to be evidence of multiple crimes. Based on those findings, he denied the motion to suppress the evidence. In *Crumb, supra,* 277 *N.J.Super.* at 311, 649 *A.*2d 879, we did not address this issue.

On appeal, defendant contends that these three papers found in defendant's bedroom were the result of a warrantless search of defendant's bedroom without a valid consent. He maintains that his mother did not and in fact could not consent to such a search.

Both officers testified that they did not search the room during the initial visit, they did not open any drawers, and they simply took a look at the room at the insistence of defendant's mother. Defendant points out that on cross-examination, Quigley acknowledged that in the affidavit accompanying the search warrant application, he indicated that "Mrs. Crumb gave the detectives verbal consent to search the room." Quigley then clarified that when he went in the room the first time, he really did not conduct a search and that the papers he viewed were in plain view lying around the room. He did not open any drawers. Defendant also points out that on cross-examination, Frohner acknowledged that ***241** he wrote in his report that when he and Quigley were at the trailer home the first time they "discontinued the consent to search, exited the suspect['s] room and departed from the residence." However, he explained that although he used the word "searched" in the report, it was not an actual search—they went into the room and looked at things.

As long as the detectives observed the three documents in plain view, it is of no importance whether they also searched before obtaining the search warrant, as no other evidence was relied upon to obtain the warrant except the three items. The judge at the suppression hearing had the opportunity to hear and observe the testimony of the officers and defendant's mother. He made a decision to accept as credible the testimony of the two detectives and to discount the testimony of defendant's mother. The findings of the judge, who had the opportunity to see and hear the witnesses and also had a feel for the case, are entitled to deference. *State v. Johnson,* 42 *N.J.* 146, 161, 199 *A.*2d 809 (1964). There was sufficient credible evidence in the record to support the trial judge's finding that the items were found in plain view. *Id.* at 162, 199 *A.*2d 809.

Nonetheless, the officers' actions implicate the Fourth Amendment and must be analyzed in terms of a search and seizure. The plain view doctrine is a recognized exception to the warrant requirement. *State v. Boynton,* 297 *N.J.Super.* 382, 394, 688 *A.*2d 145 (App.Div.), *certif. denied,* 149 *N.J.* 410, 694 *A.*2d 195 (1997). When evidence is in plain view, police have the power to seize evidence without a warrant. *Ibid.* However, "[f]or the plain view exception to apply, the police officer must rightfully occupy a position from which the evidence can be viewed." *Ibid.* (citing *State v. Bruzzese,* 94 *N.J.* 210, 235–38, 463 *A.*2d 320 (1983), *cert. denied,* 465 *U.S.* 1030, 104 *S.Ct.* 1295, 79 *L.Ed.*2d 695 (1984)). The seizure is lawful "[w]here the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant ***242** requirement." *Coolidge v. New Hampshire,* 403 *U.S.* 443, 465, 91 *S.Ct.* 2022, 2037, 29 *L.Ed.*2d 564, 582 (1971).

A warrantless search, particularly of a home, is presumptively unreasonable and illegal and will be justified only if it falls within a specific exception to the warrant requirement of the Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution. **971 *State v. Bolte,* 115 *N.J.* 579, 585, 560 *A.*2d 644, *cert. denied,* 493 *U.S.* 936, 110 *S.Ct.* 330, 107 *L.Ed.*2d 320 (1989); *State v. Dominick,* 298 *N.J.Super.* 108, 111, 688 *A.*2d 1138 (Law Div.1996). The burden is on the State to prove that a warrantless search was justified by one of the exceptions. *State v. Young,* 87 *N.J.* 132, 142, 432 *A.*2d 874 (1981). Consent is a well-recognized exception to the warrant requirement. *State v. Smith,* 291 *N.J.Super.* 245, 258, 677 *A.*2d 250 (App.Div.1996), *certif. granted,* 149 *N.J.* 33, 692 *A.*2d 47 (1997); *State v. Allen,* 113 *N.J.Super.* 245, 251, 273 *A.*2d 587 (App.Div.1970). Consent may be obtained from a third party so long as the consenting party has the authority to bind the other party. *State v. Douglas,* 204 *N.J.Super.* 265, 276, 498 *A.*2d 364 (App.Div.1985), *certif. denied,* 102 *N.J.* 378, 508 *A.*2d 242 (1985) and 102 *N.J.* 393, 508 *A.*2d 253 (1986).

Thus, the detectives must have been rightfully present in defendant's bedroom to have the license to seize the three papers which they saw in plain view. Although they did not actually seize the papers on the initial visit into defendant's bedroom, they did use evidence of those papers as the basis upon which they requested a search warrant. Therefore, the same standards apply.

The legal test for determining whether defendant's mother had authority to admit the police officers "to take a look at" defendant's bedroom is constitutionally no different than the standard used to determine whether she had authority to consent to a search of the room. *People in Interest of R.A.,* 937 *P.*2d 731, 737 n. 6 (Colo.1997) ("A consent to enter a residence, like a consent to search, implicates the same concerns.") The Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protect "[t]he right of the people to be *243 secure in their persons, houses, papers, and effects, against unreasonable searches *and* seizures...." *U.S. Const.* amend. IV; *N.J. Const.* art. 1, ¶ 7 (emphasis added); *see also Bruzzese, supra,* 94 *N.J.* at 216, 463 *A.*2d 320.

Although the detectives entered defendant's bedroom for the limited purpose of taking a look at it, their entrance into defendant's bedroom nonetheless constituted a "search" in the constitutional sense. *See Bruzzese, supra,* 94 *N.J.* at 235, 463 *A.*2d 320 (analyzing as a search and seizure issue, officers' action of following the defendant into his bedroom in effecting an arrest warrant resulting in plain view discovery of evidence, even though no exploratory search took place).

To determine whether a valid consent to search was given, the State must prove that defendant's mother possessed "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock,* 415 *U.S.* 164, 171, 94 *S.Ct.* 988, 993, 39 *L.Ed.*2d 242, 250 (1974). The *Matlock* "common authority" rule looks to the consenting party's right to consent "in his [or her] own right" and circumstances showing that the accused had "assumed the risk." *State v. Douglas, supra,* 204 *N.J.Super.* at 277, 498 *A.*2d 364; 3 Wayne R. LaFave, *Search and Seizure* § 8.4(b), at 768 (3d ed.1996). Significantly, a police officer need not be factually correct; the officer need have only a reasonable belief that the consenting party has sufficient control over the property to consent to its being searched. *State in the Interest of C.S.,* 245 *N.J.Super.* 46, 50, 583 *A.*2d 785 (App.Div.1990) (citing *Illinois v. Rodriguez,* 497 *U.S.* 177, 184, 110 *S.Ct.* 2793, 2799, 111 *L.Ed.*2d 148, 159 (1990)).

New Jersey is among the overwhelming majority of courts holding that a parent has the right to consent to the search of the property of his or her son or daughter. 3 LaFave, *supra,* § 8.4(b), at 765; *State in the Interest of C.S., supra,* 245 *N.J.Super.* at 49, 583 *A.*2d 785; *State v. Douglas, supra,* 204 *N.J.Super.* at 278–80, 498 *A.*2d 364 (holding mother could consent to the search of her son's bedroom). Even in cases where the child has reached *244 adulthood, courts have been reluctant to find that the son or daughter had exclusive possession of a room in the parent's home. 3 LaFave, *supra,* § 8.4(b), at 769.

This capacity to consent has alternatively been based on the parent's authority as head of the household or owner of the property, the exercise of parental responsibility over **972 the child, or as a co-tenant or co-occupant. *State v. Douglas, supra,* 204 *N.J.Super.* at 279, 498 *A.*2d 364; 3 LaFave, *supra,* § 8.4(b), at 765–71. In situations where another family member uses a part of the child's room for storage or other purposes, courts have concluded that the child did not have sufficiently exclusive possession of the room to render ineffective the parent's authority to consent. *See United States v. Mix,* 446 *F.*2d 615, 618 (5th Cir.1971); *State v. Jones,* 193 *Conn.* 70, 475 *A.*2d 1087, 1094 (1984); *Stokes v. State,* 548 *So.*2d 118, 122 (Miss.1989), *cert. denied,* 493 *U.S.* 1029, 110 *S.Ct.* 742, 107 *L.Ed.*2d 759 (1990); 3 LaFave, *supra,* § 8.4(b), at 766.

Another factor considered in determining whether the child had exclusive possession of the room is whether the child paid rent for the room. *United States v. Block,* 590 *F.*2d 535, 538 (4th Cir.1978); 3 LaFave, *supra,* § 8.4(b), at 766. An informal agreement that the child would pay rent when able to do so with no specified amount fixed has been held inadequate to give the child exclusive possession of the room. *State v. Swenningson,* 297 *N.W.*2d 405, 406 (N.D.1980). Cases which have upheld a parent's authority to consent to the search of the room of an adult son or daughter still living at home have turned on whether the adult offspring paid rent or utility bills and whether the parent had access to the room. *United States v. Evans,* 27 *F.*3d 1219, 1230 (7th Cir.1994); *Smith v. State,* 264 *Ga.* 87, 441 *S.E.*2d 241, 243 (1994); *State v. Packard,* 389 *So.*2d 56, 58 (La.1980), *cert. denied,* 450 *U.S.* 928, 101 *S.Ct.* 1385, 67 *L.Ed.*2d 359 (1981). Another consideration is whether the parent had ready access to the defendant-child's room to clean it. *Perry v. State,* 538 *N.E.*2d 950, 951 (Ind.1989); 3 LaFave, *supra,* § 8.4(b), at 766.

***245** The Fourth Amendment proscribes only those searches and seizures that are judicially determined to be unreasonable. *Bruzzese,* 94 *N.J.* at 217, 463 *A.*2d 320. "Indeed the touchstone of the Fourth Amendment is reasonableness." *Ibid.* "Fourth Amendment issues are complex and are 'peculiarly dependent upon the facts involved.' " *State v. Zapata,* 297 *N.J.Super.* 160, 171, 687 *A.*2d 1025 (App.Div.1997) (quoting *State v. Anderson,* 198 *N.J.Super.* 340, 348, 486 *A.*2d 1311 (App.Div.), *certif. denied,* 101 *N.J.* 283, 501 *A.*2d 946 (1985)).

We conclude that under the circumstances presented here, the entry into defendant's bedroom was reasonable. Objectively, a police officer would have reasonably believed that defendant's mother had authority to admit the police authorities into defendant's bedroom. Family members had access to defendant's bedroom, as the door to defendant's bedroom was off of the hinges and leaning against the wall inside of the room. In *State v. Douglas, supra,* we concluded that where there was no door separating the defendant-child's bedroom from the remainder of the apartment, there could be no expectation of privacy. 204 *N.J.Super.* at 280, 498 *A.*2d 364. Although defendant's mother claimed that she no longer cleaned defendant's room, she admitted that she had recently gone in there to wipe off writing on the mirror. Furthermore, defendant's aunt was allowed to store clothes in the closet in defendant's room. Defendant's mother was co-owner of the trailer home along with her husband, and although she claimed defendant paid rent, she essentially acknowledged that the agreement was informal. Further, the judge rejected her testimony that defendant paid rent. It is significant that the mother was concerned that her son was involved with the wrong people; by insisting that the officers look at his bedroom, she was exercising parental responsibility over her son's behavior.

There was no reason for the detectives to believe that defendant's mother had any less than the normal free access to all of the rooms in the trailer that heads of households typically exercise. Because she had joint access to the bedroom, defendant ***246** assumed the risk that his mother might permit the room to be searched. Since defendant's mother could consent to the search of her son's bedroom, she had authority to ask the officers "to take a look at" defendant's bedroom. Thus, the officers were rightfully present in defendant's bedroom when they saw the three items in plain view.

For an item found in plain view to be admissible, the police officer must (1) be legally in a position to view the evidence; ****973** and (2) have probable cause to associate the item with criminal activity. *State v. Damplias,* 282 *N.J.Super.* 471, 477–78, 660 *A.*2d 570 (App.Div.1995). As we have concluded that the detectives were rightfully present in defendant's bedroom, and thus, were legally in a position to view the papers, only the second requirement need be discussed further.

Defendant argues that prong two is absent in that Quigley and Frohner were given permission only to view the disarray of the bedroom and that by picking up defendant's personal papers and reading them, the detectives exceeded the scope of the permission that they were given. He argues that the incriminatory nature of the papers was not immediately apparent, and therefore, not in plain view.

Defendant relies on *Arizona v. Hicks,* 480 *U.S.* 321, 325–26, 107 *S.Ct.* 1149, 1153, 94 *L.Ed.*2d 347, 354–55 (1987), in which the Court held that the police officer's movement of stereo equipment in order to obtain serial numbers during an unrelated warrantless search of the accused's apartment, absent probable cause to believe the equipment was stolen, was an unreasonable search in violation of the Fourth Amendment. He also relies on *Coolidge v. New Hampshire, supra,* 403 *U.S.* at 466, 91 *S.Ct.* at 2038, 29 *L.Ed.*2d at 583, in which the Court held that for a plain view search to be valid, it must be "immediately apparent" that the incriminating evidence is seizable as evidence of a crime.

The present matter is distinguishable from *Hicks* and *Coolidge* in that here the detectives could readily tell that there was ***247** probable cause that the papers were evidence of criminal activity. Defendant's contention that the incriminatory nature of these papers was not immediately apparent is contrary to their testimony and the evidence. The detectives were in the bedroom for only five minutes when they saw these papers. One paper bore the name of one of the victims of the sexual assaults that the officers were investigating with the writing, "[p]lease do not rape me"; the second referenced an abandoned building which the officers knew had been burned down under suspicious circumstances; and the third portrayed an apparent planned burglary outlining a local gas station including the location of the safe. These papers were in plain view lying around the room and the incriminating nature of the papers viewed was obvious and immediately apparent. The facts do not support the defendant's view that the detectives exceeded the scope of the consent granted them. *Cf. State v. Younger,* 305 *N.J.Super.* 250, 702 *A.*2d 477 (App.Div.1997) (holding that officers exceeded the scope of consent to search for a gun by opening a small change purse containing drugs).

In *United States v. Crouch,* 648 *F.*2d 932 (4th Cir.), *cert. denied,* 454 *U.S.* 952, 102 *S.Ct.* 491, 70 *L.Ed.*2d 259 (1981), federal agents, who were executing a search warrant directed at the seizure of chemicals and drug paraphernalia, removed letters from unsealed envelopes. *Id.* at 933. After examining the letters, the agents seized them because they contained information relating to the manufacture of a controlled substance. *Ibid.* The court upheld the seizure under the plain view doctrine, adding that it "attach[ed] no significance to the fact that some cursory reading of the letters was necessary in order to establish their nature." *Ibid.Accord Mapp v. Warden,* 531 *F.*2d 1167, 1172 (2d Cir.), *cert. denied,* 429 *U.S.* 982, 97 *S.Ct.* 498, 50 *L.Ed.*2d 592 (1976) (holding that rent receipts were properly seized in plain view even though their incriminating nature was apparent only after the police noticed a suspicious name on them.)

The detectives' cursory reading of these three papers to ascertain their nature was not significant. It was within the scope of ***248** the permission that they were given to take a look at defendant's bedroom. As the State notes, the incriminating character of these drawings and writings "became clear at a glance." Thus, the judge did not err in refusing to suppress the material obtained from defendant's bedroom. The warrantless entry into defendant's bedroom was justified under the consent exception to the warrant requirement. The three incriminating papers seen in plain view were permissibly used to obtain a search warrant.

****974** VII

For the first time on appeal, defendant argues that the trial judge's instruction regarding the jury's obligation to assess the credibility of defendant's statement erroneously omitted any reference to the credibility of the multiple written statements seized by police and the various alleged admissions made by defendant to five different persons. Defendant asserts that the charge erroneously did not refer to his statement to the prosecutor's investigator, his statements in his writings, and his statements to non-police witnesses. Defendant points out that the new Model Jury Charge on "Statements of Defendant," revised after the conclusion of this trial, is not limited to custodial statements.

In determining whether a charge was erroneous, the portions alleged to be erroneous cannot be read in isolation; the charge must be read as a whole to determine its overall effect. *State v. Wilbely,* 63 *N.J.* 420, 422, 307 *A.*2d 608 (1973). Nonetheless, erroneous instructions on matters which are material to the jury's deliberation on criminal charges are presumed to be reversible error. *State v. Warren,* 104 *N.J.* 571, 579, 518 *A.*2d 218 (1986). Although this presumption of prejudicial error exists even when no objection to the charge was raised below, *State v. Federico,* 103 *N.J.* 169, 176, 510 *A.*2d 1147 (1986), nonetheless, where "defendant did not request or object to the court's failure to give" certain instructions to the jury, we will reverse a conviction only where the omission was erroneous in view of the nature of the evidence presented at trial and was "clearly capable of producing ***249** an unjust result." *R.* 2:10–2; *State v. Jordan,* 147 *N.J.* 409, 421–22, 688 *A.*2d 97 (1997); *State v. Baldwin,* 296 *N.J.Super.* 391, 395, 686 *A.*2d 1260 (App.Div.), *certif. denied,* 149 *N.J.* 143, 693 *A.*2d 112 (1997).

In *State v. Hampton,* our Supreme Court ruled that where an out-of-court inculpatory statement consists of the defendant's confession to police, the jury should be instructed to decide whether, in view of "all the circumstances attending," the statement is true or untrue, and if untrue, to "treat it as inadmissible and disregard it for purposes of discharging their function as fact finders on the ultimate issue of guilt or innocence." 61 *N.J.* 250, 272, 294 *A.*2d 23 (1972). The New Jersey Rules of Evidence codified the *Hampton* holding and

state that if the judge admits a defendant's statement, "the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible." *N.J.R.E.* 104(c).

A *Hampton* instruction is "designed to 'insure to a defendant an unfettered factual consideration by the jury of the credibility' of all or part of his confession." *State v. Boyle,* 198 *N.J.Super.* 64, 74, 486 *A.*2d 852 (App.Div.1984) (quoting *State v. Bowman,* 165 *N.J.Super.* 531, 537, 398 *A.*2d 908 (App.Div.1979)). Where a defendant's oral or written statements, admissions, or confessions are introduced in evidence, the *Hampton* charge must be given whether or not it is requested. *State v. Jordan, supra,* 147 *N.J.* at 425, 688 *A.*2d 97. The Court stated that by using the term "shall" in *N.J.R.E.* 104(c), it recognized that a *Hampton* instruction is required. *Ibid.*

In *State v. Baldwin, supra,* a panel of this court stated that "a special cautionary instruction is not required when a defendant has allegedly made a voluntary inculpatory statement to a non-police witness without being subjected to any form of physical or psychological pressure." 296 *N.J.Super.* at 398, 686 *A.*2d 1260. Although in *State v. Jackson,* 289 *N.J.Super.* 43, 51, 672 *A.*2d 1254 (App.Div.1996), *certif. denied,* 148 *N.J.* 462, 690 *A.*2d 609 (1997), a ***250** case cited by defendant, this court had earlier held that "[a]ny statement of a defendant" is subject to the requirement of *Hampton* and *N.J.R.E.* 104(c), the *Baldwin* court "disagree[d] with the *Jackson* panel's broad pronouncement" and noted that in *Jackson* the spontaneous statements involved were made to the police. *State v. Baldwin, supra,* 296 *N.J.Super.* at 398–99, 686 *A.*2d 1260.

We will not join in the controversy because in any event, the failure to give a *Hampton* charge is not reversible error *per se. State v. Jordan, supra,* 147 *N.J.* at 425, 688 *A.*2d 97. "It is reversible error only when, in the ****975** context of the entire case, the omission is 'clearly capable of producing an unjust result....' " *Ibid.* (quoting *R.* 2:10–2). Here, the judge did give a *Hampton* charge, but referred only to defendant's statement in the singular. We see no possibility that the jurors failed to recognize that they were to assess the credibility of all of defendant's alleged out-of-court statements in determining whether to consider those statements as evidence of defendant's guilt.

VIII

Defendant also urges us to find that the trial judge committed plain error by failing to give a *Kociolek* charge (*State v. Kociolek,* 23 *N.J.* 400, 129 *A.*2d 417 (1957)), as to the statements to Thomas and defendant's two friends. The *Kociolek* charge concerns the reliability of an inculpatory statement made by the defendant to any witness. *Id.* at 421–23, 129 *A.*2d 417. As explained in *Kociolek,* "in view of the generally recognized risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer," the jury should be instructed to "receive, weigh and consider such evidence with caution." *Id.* at 421, 129 *A.*2d 417. In *State v. Jordan, supra,* our Supreme Court stated that, like the *Hampton* charge, the *Kociolek* instruction must be given whether or not it is specifically requested. 147 *N.J.* at 428, 688 *A.*2d 97.

The State argues that defendant did not allege that Thomas and defendant's two friends misconstrued or misrecollected; rather, he ***251** asserted they lied. Even if correct, it would not negate the duty to instruct the jury to receive, weigh, and consider the evidence with caution. Nonetheless, we are convinced beyond any doubt that here the lengthy charge on credibility adequately instructed the jury on how to assess the witnesses' credibility. Although in *State v. Jordan, supra,* the Court noted that a general instruction on assessing credibility, absent specific credibility instructions concerning a defendant's statements, "may not always sufficiently impart to a jury its responsibilities and limitations," the failure to give a *Kociolek* charge is not reversible error *per se.* 147 *N.J.* at 428, 688 *A.*2d 97.

Where such a charge has not been given, its absence must be viewed within the factual context of the case and the charge as a whole to determine whether its omission was capable of producing an unjust result. *Ibid.* "There may be a rare case where failure to give a *Kociolek* charge alone is sufficient to constitute reversible error, or there may be a case where the omission of a *Kociolek* charge in combination with other errors (for example, no *Hampton* charge) may be reversible as plain error." *Ibid.* We have found no reported case in which a failure to include a *Kociolek* charge has been regarded as plain error. *Id.* at 427, 129 *A.*2d 417; *State v. Baldwin, supra,* 296 *N.J.Super.* at 400, 686 *A.*2d 1260. In any event, under the facts of this case, the failure to give a *Kociolek* charge was not capable of producing an unjust result. Here, the *Hampton*

charge, along with the general and comprehensive credibility instructions, was sufficient.

IX

We reject defendant's contention that the accumulation of errors denied him due process of law and a fair trial. *See State v. Orecchio,* 16 *N.J.* 125, 129, 106 *A.*2d 541 (1954) (noting that where aggregate of errors render a trial unfair, a new trial is warranted.) Contrary to defendant's contention, any alleged errors were either not errors at all or were not prejudicial. "A defendant is entitled to a fair trial but not a perfect one." ***252** *State v. Marshall,* 123 *N.J.* 1, 170, 586 *A.*2d 85 (1991) (*Marshall I*), *cert. denied,* 507 *U.S.* 929, 113 *S.Ct.* 1306, 122 *L. Ed.*2d 694 (1993) (quoting *Lutwak v. United States,* 344 *U.S.* 604, 619, 73 *S.Ct.* 481, 490, 97 *L.Ed.* 593, 605 (1953)). The evidence of defendant's guilt was so clear and overwhelming that none of the errors alleged was capable of impairing the jury's ability to afford defendant a fair trial. Defendant's convictions are, therefore, sustained.

Affirmed.

All Citations

307 N.J.Super. 204, 704 A.2d 952

Footnotes

1 *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966).

848 N.W.2d 670
Supreme Court of North Dakota.

STATE of North Dakota, Plaintiff and Appellee
v.
Jennifer Lynn DANIELS,
Defendant and Appellant.

No. 20130339.
|
June 24, 2014.

Synopsis

Background: Defendant was convicted pursuant to a conditional guilty plea in the District Court, Burleigh County, South Central Judicial District, Bruce B. Haskell, J., of possession of controlled substances, and she appealed.

The Supreme Court, Kapsner, J., held that search of defendant's purse was not valid under consent exception to warrant requirement.

Reversed and remanded.

Gerald W. VandeWalle, C.J., concurred in result.

Sandstrom, J., filed a dissenting opinion.

Attorneys and Law Firms

***671** Dawn M. Deitz, Assistant State's Attorney, Bismarck, ND, for plaintiff and appellee.

Chad R. McCabe, Bismarck, ND, for defendant and appellant.

Opinion

KAPSNER, Justice.

[¶ 1] Jennifer Lynn Daniels appeals a district court judgment and order deferring imposition of sentence entered following Daniels' conditional plea of guilty to Possession of Alprazolam and Possession of Carisoprodol, both class C felonies. We hold the deputy's warrantless search of Daniels' purse was not justified under the consent exception to the search warrant requirement of the Fourth Amendment of the United States Constitution. We reverse the district court's judgment and order deferring imposition of sentence and denial of Daniels' motion to suppress, and we remand with instructions to allow Daniels to withdraw her conditional guilty pleas.

I

[¶ 2] In January 2013, a Burleigh County Sheriff Deputy stopped a vehicle for expired registration. Daniels was sitting in the front passenger's seat. The deputy asked the driver, Daniels, and another passenger for identification, and Daniels retrieved her North Dakota driver's license from her purse. The deputy saw Daniels grab her purse and remove her identification from the purse.

[¶ 3] The deputy obtained consent from the driver to search the vehicle, and the deputy asked the occupants to step out to the front of the vehicle. The deputy did not give the occupants any other instructions and did not tell anyone to leave anything or take anything with them. Daniels exited the vehicle, but left her purse inside. Daniels was aware that the deputy was going to search the vehicle. The deputy did not get permission from Daniels or the other passenger to search their belongings. Daniels did not give the driver permission to use or consent to a search of her purse.

***672** [¶ 4] While searching the vehicle, the deputy searched a purse located on the floorboard of the front passenger's seat, which belonged to Daniels. In the purse, he found an Advil container that had an assortment of pills in it. Lab tests confirmed that the pills were Alprazolam and Carisoprodol. Daniels was arrested for Possession of Alprazolam and Possession of Carisoprodol, both class C felonies.

[¶ 5] Daniels moved to suppress the evidence obtained in the search, arguing that the driver's consent to the search of the vehicle did not extend to a search of Daniels' purse, and the search was therefore warrantless and unconstitutional. The district court denied Daniels' motion, and Daniels conditionally pled guilty, reserving the suppression issue for appeal.

II

[¶ 6] Daniels argues the warrantless search of her purse was unconstitutional because the deputy did not have her consent

to search the purse and the driver's consent to search the vehicle did not extend to a search of her purse. "The Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, protects individuals from unreasonable searches and seizures." *State v. Guscette,* 2004 ND 71, ¶ 7, 678 N.W.2d 126 (citation omitted). This Court has previously concluded that an individual's purse is an area subject to Fourth Amendment protection from unreasonable searches and seizures. *See State v. Tognotti,* 2003 ND 99, ¶ 20, 663 N.W.2d 642 ("A purse, like a billfold, is such a personal item that it logically carries for its owner a heightened expectation of privacy, much like the clothing the person is wearing."). For a search to be reasonable under the Fourth Amendment, a warrant is required, unless an exception to the warrant requirement applies. *State v. Genre,* 2006 ND 77, ¶ 17, 712 N.W.2d 624. It is the State's burden to show that an exception to the search warrant requirement applies. *State v. Mitzel,* 2004 ND 157, ¶ 12, 685 N.W.2d 120.

[¶ 7] One exception to the warrant requirement is consent. *State v. Uran,* 2008 ND 223, ¶ 6, 758 N.W.2d 727 (citation omitted). The same standard is used to analyze cases under the consent exception, regardless of whether the search was of a vehicle or of a house. *See id.* at ¶ 7 (applying the United States Supreme Court's reasoning in a vehicle search case, *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991), to a search of a house). "The scope of consent is measured objectively by what a reasonable person would have understood by the exchange between the police and the suspect." *Id.* (citations omitted). In this case, consent was the only justification for the warrantless search of Daniels' purse offered by the State and relied on by the district court.

[¶ 8] When reviewing a district court's decision on a motion to suppress, this Court defers to the district court's findings of fact, recognizing the district court is in the best position to assess the credibility of witnesses and weigh the evidence. *Genre,* 2006 ND 77, ¶ 12, 712 N.W.2d 624. Although generally issues concerning the existence of consent and whether a search exceeds the scope of consent are considered questions of fact, *see State v. Graf,* 2006 ND 196, ¶ 10, 721 N.W.2d 381 and *State v. DeCoteau,* 1999 ND 77, ¶ 9, 592 N.W.2d 579, in this case, Daniels alleges the district court misapplied the law concerning consent. "Questions of law are reviewed under the de novo standard of review." *Genre,* 2006 ND 77, ¶ 12, 712 N.W.2d 624 (citation omitted).

***673** III

[¶ 9] The State argues that the driver's consent to the search of the vehicle extended to the containers inside the vehicle, including Daniels' purse. In support of its argument, the State relies on *State v. Tognotti,* 2003 ND 99, 663 N.W.2d 642. In *Tognotti,* an officer stopped a vehicle driven by the female defendant for driving at night with the headlights off. *Id.* at ¶ 3. A male passenger of the vehicle was arrested on an outstanding warrant, and the officer searched the vehicle incident to the passenger's arrest. *Id.* During the search, the officer searched the defendant's purse, which she had left in the vehicle, and discovered drug paraphernalia. *Id.* The defendant moved to suppress evidence from the search, that motion was granted, and the State appealed. *Id.* at ¶¶ 4–5.

[¶ 10] On appeal, this Court held "an arresting officer's search of a purse belonging to a nonarrested occupant which is voluntarily left in the vehicle is a valid search *incident to the arrest of a passenger* in the vehicle." *Id.* at ¶ 14 (emphasis added). This Court's ruling was based on the conclusion that "imposing a restriction on searches of a vehicle incident to arrest based upon ownership of containers or other articles inside the vehicle unnecessarily dims the bright-line rule as announced by *Belton.*" *Id.* at ¶ 11. *Belton* 's bright-line rule allowed police to search the passenger compartment of a vehicle incident to the arrest of the occupants, in order to "remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape and ... prevent the concealment or destruction of evidence." *Tognotti,* 2003 ND 99, ¶ 8, 663 N.W.2d 642 (citing *New York v. Belton,* 453 U.S. 454, 457–61, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)) (internal quotation marks omitted).

[¶ 11] The viability of our holding in *Tognotti* is questionable, in light of *Arizona v. Gant,* 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). However, we need not address the merits of our holding in *Tognotti,* because that case is distinguishable from this case in a crucial way: *Tognotti* applied to searches incident to arrest, and this case deals with a search based on consent. Exceptions to the search warrant requirement are "jealously and carefully drawn." 68 Am. Jur. 2d *Searches and Seizures* § 114; *see also State v. Gilberts,* 497 N.W.2d 93, 97 (N.D.1993), *overruled on other grounds by State v. Tognotti,* 2003 ND 99, 663 N.W.2d 642 ("Warrantless searches, to be valid, must fall within a narrow and specifically delineated exception to the warrant requirement of the Fourth Amendment."). "The scope

of a search must be strictly tied to and justified by the circumstances that permit its initiation." *Gilberts,* at 97 (citing *Terry v. Ohio,* 392 U.S. 1, 18, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The justifications and standards behind each exception are not interchangeable, and cannot be combined, as the State seeks to do here.

[¶ 12] This case deals only with the consent exception to the search warrant requirement. The concerns that justified a search under the bright-line rule in *Belton* and *Tognotti*—officer safety and preservation of evidence—are not at issue in a consent case. Therefore, even assuming it is still valid law, *Tognotti* does not control this case.

IV

[¶ 13] Daniels argues a driver's consent to a search of a vehicle does not justify a search of a purse which the officer knows belongs to a third party. Consent may be given by an individual with actual authority or apparent authority. ***674** *State v. Zimmerman,* 529 N.W.2d 171, 175 (N.D.1995). Apparent authority exists where a person of reasonable caution would believe, based on the facts available to the officer at the time of consent, that the consenting party had authority over the place or thing to be searched. *State v. Fischer,* 2008 ND 32, ¶ 12, 744 N.W.2d 760. Authority to consent to a search may be exclusive to one individual, or two or more people may have common authority. *State v. Swenningson,* 297 N.W.2d 405, 407 (N.D.1980).

[¶ 14] Although we have not previously addressed this issue, courts in other jurisdictions have concluded that a driver's consent to a warrantless vehicle search was not a valid consent to search a passenger's personal property found in the vehicle. In *People v. James,* 163 Ill.2d 302, 206 Ill.Dec. 190, 645 N.E.2d 195, 197 (1994), the defendant was a passenger in an automobile that was stopped by police. The driver and passengers, all women, were ordered out of the car, at which time the defendant left her purse on the front passenger's seat. *Id.* Unbeknownst to the defendant, the driver consented to a search of the vehicle, during which officers searched the defendant's purse and found cocaine. *Id.* The officer did not attempt to ascertain who owned the purse before he searched it. *Id.*, 206 Ill.Dec. 190, 645 N.E.2d at 203. The defendant filed a motion to suppress based on a lack of consent to search, which was granted by the district court, but reversed by the court of appeals. *Id.,* 206 Ill.Dec. 190, 645 N.E.2d at 197.

[¶ 15] On appeal, the Illinois Supreme Court concluded that the officer should have ascertained who owned the purse before he searched it. *Id.,* 206 Ill.Dec. 190, 645 N.E.2d at 203. The court reasoned that a purse is normally carried by a woman, and all three of the adult vehicle occupants were women, so the purse could have belonged to any of them. *Id.* The court also noted, "It would have been unreasonable for the officer to believe [the driver] shared some common use in the purse with one of the passengers in the vehicle, since a purse is generally not an object for which two or more persons share common use and authority." *Id.* The court concluded the officer's conduct in searching the purse without first obtaining the defendant's consent was not objectively reasonable. *Id.; see also State v. Friedel,* 714 N.E.2d 1231, 1238–43 (Ind.Ct.App.1999) (holding a driver's consent to the search of an automobile did not include consent to search the passenger's purse, which was left in the vehicle); *State v. Frank,* 650 N.W.2d 213, 216–19 (Minn.Ct.App.2002) (holding a driver's consent to the search of a vehicle did not extend to a suitcase owned by a third party); *State v. Caniglia,* 1 Neb.App. 730, 510 N.W.2d 372, 373–74 (1993) (holding a driver's consent to the search of a vehicle did not extend to a passenger's makeup purse found in the vehicle); *State v. Suazo,* 133 N.J. 315, 627 A.2d 1074, 1077–78 (1993) (holding that a driver's consent to the search of a vehicle does not include the authority to permit a search of the luggage of other passengers); *State v. Zachodni,* 466 N.W.2d 624, 628 (S.D.1991) (holding a driver's consent to a search of a vehicle did not extend to a search of the passenger's purse), *abrogated on other grounds by State v. Akuba,* 686 N.W.2d 406 (S.D.2004).

[¶ 16] Similarly, in *United States v. Munoz,* 590 F.3d 916, 919 (8th Cir.2010), the defendant was driving a car rented by the passenger, when the defendant was stopped for speeding. The trooper asked the defendant for permission to search the vehicle, but the defendant replied that the trooper would have to ask the passenger. *Id.* The trooper then asked the passenger, and she consented to the search. *Id.* at 920. The trooper began searching the front passenger area and found a backpack ***675** on the floorboard. *Id.* The trooper did not know who the backpack belonged to, but he searched it anyway, and found a handgun, a digital scale, and a small quantity of methamphetamine. *Id.* The trooper then asked the passenger who the backpack belonged to, and she said it belonged to the defendant. *Id.* The defendant later moved to suppress the evidence found in the trooper's search of his backpack, arguing the passenger's consent did not include a

search of his backpack, and that motion was denied. *Id.* at 920, 922.

[¶ 17] On appeal, the Eighth Circuit Court of Appeals noted that the defendant was the owner of the backpack, and there was no evidence the passenger had joint use of it, so she did not have common authority to consent to a search. *Id.* at 922. The court also noted the trooper could not have reasonably believed the passenger had authority to consent to the search of the backpack, because there were two possible owners and the trooper had not ascertained ownership of the backpack before searching it. *Id.* at 923. The court held the passenger's consent to search the car did not include the defendant's backpack. *Id.* at 922–23; *see also United States v. Welch,* 4 F.3d 761, 764–65 (9th Cir.1993) (holding one individual's valid consent to a search of a shared car did not extend to a search of the other individual's purse found within the car), *overruled on other grounds by United States v. Kim,* 105 F.3d 1579, 1580–81 (9th Cir.1997).

[¶ 18] In this case, the purse belonged to Daniels. According to testimony given at the evidentiary hearing, the driver never had permission to use Daniels' purse, and Daniels never gave the driver authority to consent to a search of her purse. Thus, the driver had no actual authority, either exclusive or common authority, over the purse. Further, the deputy testified that he saw Daniels retrieve her identification "[f]rom her purse." The deputy knew that Daniels had been sitting in the front passenger's seat. When conducting his search, the deputy found Daniels' purse on the floorboard in front of the passenger's seat, where Daniels had been sitting. It was not just a possibility that the purse belonged to someone other than the driver; the deputy knew the purse belonged to Daniels.

[¶ 19] Based on these facts, we conclude no reasonable person would have understood the driver's consent to the search of the vehicle to extend to a purse left in the vehicle, which the officer knew belonged to a third party. It would have been objectively reasonable for the deputy to obtain Daniels' consent to search the purse. Although this requirement may pose an additional burden to law enforcement searching vehicles under the consent exception to the search warrant requirement, it is a justified burden. A warrantless search based solely on consent pits fundamental constitutional protections against an utter lack of legal justification for the search. It is expedient to narrow the scope of such searches and to require additional consent to search constitutionally protected areas that a reasonable person would understand did not fall within the scope of the original consent.

V

[¶ 20] Daniels also argues that her failure to object to the search of her purse and her conduct of leaving her purse in the vehicle did not amount to the consent necessary to establish an exception to the search warrant requirement. This Court's position on the conduct required to establish the consent exception is clear: "[T]o sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent, ***676** rather than merely showing that the person took no affirmative actions to stop the police from [searching]." *State v. Avila,* 1997 ND 142, ¶ 17, 566 N.W.2d 410 (citing *United States v. Jaras,* 86 F.3d 383, 390 (5th Cir.1996) (consent cannot be inferred from silence and failure to object when police do not expressly or implicitly request consent); *United States v. Shaibu,* 920 F.2d 1423, 1427 (9th Cir.1990) (absent specific request by police for permission to enter a home, government may not show consent to enter from defendant's failure to object to entry because "[t]o do so would be to justify entry by consent and consent by entry"); *United States v. Wenzel,* 485 F.Supp. 481, 483 (D.Minn.1980) (failure to order uninvited officer to leave apartment is "hardly enough to establish consent"); *Robinson v. State,* 578 P.2d 141, 144 (Alaska 1978) (where defendant at no time indicated consent to officers' presence except by silence, failure to demand that officers leave was not voluntary consent); *Ingram v. State,* 364 So.2d 821, 822 (Fla.Ct.App.1978) (submission to apparent authority of officer is not necessarily consent to search, and a showing of acquiescence without at least tacit consent is not sufficient to prove consent); 1 W. Ringel, *Searches & Seizures, Arrests and Confessions* § 9.3 (2d ed.1997); 2 J. Cook, *Constitutional Rights of the Accused* § 4:55 (3d ed.1996)); *see also Graf,* 2006 ND 196, ¶ 10, 721 N.W.2d 381; *DeCoteau,* 1999 ND 77, ¶ 11, 592 N.W.2d 579.

[¶ 21] The State argues that, because the driver consented to a search of the vehicle, Daniels heard this consent, Daniels left her purse in the car despite being free to take it with her, and Daniels did not object to the search, Daniels implicitly consented to the search, under the totality of the circumstances. The State relies on *Tognotti,* 2003 ND 99, ¶¶ 15–22, 663 N.W.2d 642, in which this Court analyzed a search of a driver's purse left in the passenger compartment of a vehicle during a vehicle search incident to arrest of

a passenger. In that case, under existing caselaw, a valid exception to the search warrant requirement already applied to everything in the passenger compartment of the vehicle. *Id.* at ¶ 15. This Court concluded that, "If the officer did not instruct Tognotti to leave the purse in the vehicle, he was entitled to search it incident to the arrest of [the] passenger...." *Id.* at ¶ 21. However, this Court was not suggesting that, by merely leaving the purse behind when she was free to take it, Tognotti's actions constituted consent under the consent exception to the search warrant requirement. Our holding simply noted that, by leaving the purse behind voluntarily, the purse remained in the area that was already covered by the search incident to arrest exception to the warrant requirement.

[¶ 22] Similarly, the State points to *United States v. Padilla,* an unpublished Eighth Circuit Court of Appeals case in which a vehicle itself was the subject of a search, pursuant to the consent of the driver, who had common authority over the vehicle. 242 F.3d 378, 2000 WL 1533260, *1 (8th Cir.2000); *see also United States v. Eldridge,* 984 F.2d 943, 948 (8th Cir.1993) (explaining that the consent exception applies where the driver of the car consents, because the driver is the person who has immediate possession and control over the vehicle, and therefore has common authority). In *Padilla,* a valid exception to the search warrant requirement already applied to the vehicle. *Id.* at *1. The owner of the vehicle later claimed the search was invalid without his consent, and the court reasoned that "[f]ailure to object to a search when there is ample opportunity to assert a superior interest in priority of ownership results in a valid search." *Id.* at *1 (citing *Eldridge,* 984 F.2d at 948). ***677** However, the court was not suggesting that the owner's failure to object amounted to consent. Rather, as in *Tognotti,* the court was stating that, in the absence of an objection by the owner, the underlying search of the vehicle itself based on the driver's consent remained valid.

[¶ 23] The State's reliance on these cases is misplaced. "Totality of the circumstances" is not the test we use to analyze the scope of consent. Even if it were, these cases do not hold that a failure to object amounts to consent. They simply note that, by failing to object, the items remained within the scope of an already established exception to the search warrant requirement. As we have noted, no valid underlying exception to the search warrant requirement applied in this case. The driver's consent to a search of the vehicle did not extend to a search of Daniels' purse.

[¶ 24] In this case, the deputy knew the purse in question belonged to Daniels. She alone had authority to consent to a search of the purse. Although Daniels was nearby at all times, the deputy never asked for Daniels' consent to search the purse, and Daniels never told the deputy he could search it. The deputy did not tell Daniels to leave her purse in the vehicle and did not tell her she could take it with her. Daniels did leave her purse in the vehicle, despite knowing that the vehicle was going to be searched. Daniels testified that she thought she had to leave her purse in the vehicle, and she did not know she could take it with her. Daniels clearly took no affirmative action to stop the deputy from searching her purse. However, under the circumstances, she had no duty to do so. In situations where a constitutional protection applies and consent alone serves as the basis for conducting a search, the onus is on the officer to ensure that he has received valid consent; it is not on the individual to make sure her rights are upheld. We conclude no reasonable person would have understood Daniels' conduct to amount to consent. If the deputy wanted to rely on Daniels' consent to support an otherwise baseless search of her purse, it was his duty to establish that consent had been affirmatively granted. Because he did not do so, we hold the deputy's reliance on consent as a basis for searching Daniels' purse was objectively unreasonable.

VI

[¶ 25] The facts in this case do not establish that Daniels consented to a search of her purse. Similarly, the driver's consent to a search of the vehicle did not extend to the search of Daniels' purse. We therefore hold the deputy's warrantless search of Daniels' purse was not justified under the consent exception to the search warrant requirement of the Fourth Amendment of the United States Constitution. Consent was the only exception argued by the State. The search therefore violated the Fourth Amendment. "The exclusionary rule requires suppression of evidence obtained in a search that violates the Fourth Amendment." *State v. Handtmann,* 437 N.W.2d 830, 836–37 (N.D.1989) (citation omitted). Because we conclude the warrantless search of Daniels' purse violated her Fourth Amendment rights, we hold the evidence obtained from the search of her purse should have been suppressed.

VII

[¶ 26] Daniels also argues that, even if the search was proper under the Fourth Amendment, the North Dakota State Constitution affords greater protection, and the search was therefore unconstitutional under that protection. It is not necessary for us to address this issue, as we hold the search was unconstitutional under the ***678** Fourth Amendment of the United States Constitution.

VIII

[¶ 27] We reverse the district court's judgment and order deferring imposition of sentence and denial of Daniels' motion to suppress, and we remand with instructions to allow Daniels to withdraw her conditional guilty pleas.

[¶ 28] LISA FAIR McEVERS, and DANIEL J. CROTHERS, JJ., concur.

GERALD W. VANDE WALLE, C.J., concurs in the result.

SANDSTROM, Justice, dissenting.
[¶ 29] I respectfully dissent.

[¶ 30] I disagree with the majority's conclusion that the evidence obtained from the search of Daniels' purse should have been suppressed. Although the cited cases as presented in the majority opinion appear to support the majority's conclusion, a closer examination of those cases and other Fourth Amendment jurisprudence reveals a different result is necessary.

[¶ 31] The majority correctly concludes the scope of a warrantless search incident to arrest can be different from the scope of a search conducted after law enforcement obtains consent. *See People v. Williams,* 114 Cal.App.3d 67, 72, 170 Cal.Rptr. 433 (1980) ("A voluntary consent to search creates a separate and independent exception to the warrant requirement and justifies a warrantless search of all areas covered by the consent over which defendant had authority."); *State v. Frank,* 650 N.W.2d 213, 217 (Minn.Ct.App.2002) ("The automobile exception and the consent exception to the warrant requirement are separate and distinct doctrines."). On the basis of the foregoing caselaw, I agree *Tognotti* is not necessarily controlling in this case, because that case relies on the search incident to arrest exception to the Fourth Amendment's warrant requirement. *See State v. Tognotti,* 2003 ND 99, 663 N.W.2d 642. Nevertheless, a thorough review of Fourth Amendment caselaw clearly demonstrates that under the specific facts of this case, the search of Daniels' purse was proper because she gave law enforcement her implied consent to perform the search.

[¶ 32] The facts in this case are undisputed. The deputy obtained consent from the driver to search the vehicle. Nevertheless, the deputy did not get permission from Daniels to search her belongings. The record, however, also shows Daniels was present when the driver consented to the search and was aware the deputy was going to search the vehicle.

[¶ 33] The majority claims, at ¶ 14, that courts in other jurisdictions have concluded that a driver's consent to a warrantless search was not a valid consent to search a passenger's personal property found in the vehicle. Each of the cases cited by the majority differs materially from the facts of this case in which Daniels, the passenger, was present, knew the driver had given consent to the search of the vehicle, and did not object to the search of her purse which was in the vehicle. For example, the majority, at ¶¶ 14–15, relies heavily on *People v. James,* 163 Ill.2d 302, 206 Ill.Dec. 190, 645 N.E.2d 195 (1994), to support its conclusion the search in this case was improper. The facts of *James,* however, differ significantly from this case because the passenger in *James* did not know the driver had given consent to search the vehicle. *See James,* 206 Ill.Dec. 190, 645 N.E.2d at 203. The other cases cited by the majority are likewise materially different. *See, e.g., State v. Friedel,* 714 N.E.2d 1231, 1239 (Ind.Ct.App.1999) ("The record is unclear as to whether [the passenger] heard [the driver] ***679** give the officers consent to search his vehicle and the trial court made no factual finding regarding this matter."); *State v. Frank,* 650 N.W.2d 213, 215 (Minn.Ct.App.2002) ("Out of appellant's hearing, Officer Engum asked S.J. for permission to search the vehicle...."); *State v. Caniglia,* 1 Neb.App. 730, 510 N.W.2d 372, 374 (1993) ("While Officer Farrow sought the driver's consent and proceeded to search the van, Officer Muller questioned Caniglia."). Other courts have similarly concluded that when an individual is present but not within hearing and is not aware that someone else has given consent to a search, that individual's consent may not be implied by the individual's silence or failure to object. *See United States v. Jaras,* 86 F.3d 383, 390–91 (5th Cir.1996) ("Jaras was not present when Salazar gave his consent to search the vehicle, and there is no evidence in the record that Jaras even heard Officer Mitchell ask Salazar for permission to search the car. We do not think that consent may reasonably be implied from Jaras's silence

or failure to object because Officer Mitchell did not expressly or impliedly ask for his consent to search.").

[¶ 34] On the other hand, the Delaware Supreme Court has established that when an individual with superior possessory rights is present, the non-assertion of those ownership rights may be viewed as impliedly consensual. *Ledda v. State,* 564 A.2d 1125, 1128–29 (Del.1989). The Delaware Court went further in a subsequent case:

> [W]hen a person with equal or greater authority to consent to a search is present, if a search is authorized by a third party, there is a duty to object. *Ledda v. State,* 564 A.2d at 1128–29. In this case, even though Scott was present, he failed to countermand Jenkins' consent at any time during the search. Jenkins had the authority to consent to the search of the apartment, in the absence of any objection by Scott. *Ledda v. State,* 564 A.2d at 1128–29. Assuming arguendo that Scott's authority to consent to a search was equal to Jenkins' authority, we hold that Scott's failure to object constituted his implied consent to the search authorized by Jenkins. *Id.*

Scott v. State, 672 A.2d 550, 553 (Del.1996).

[¶ 35] Unlike in the cases cited by the majority in which law enforcement asked for consent outside of the passenger's hearing or without the passenger's knowledge, Daniels, in this case, was present and knew of the driver's consent but failed to object to a search of her purse. Daniels had greater authority as to her purse in the vehicle. She heard the driver consent to a search of the vehicle, and she did not object. Under the clear holdings in Delaware validating searches analogous to the one in this case, and because the majority has failed to cite any case to the contrary, I would affirm the district court's decision to deny Daniels' motion to suppress.

[¶ 36] DALE V. SANDSTROM, J.

All Citations

848 N.W.2d 670, 2014 ND 124

13 F.3d 498
United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,

v.

Pedro INFANTE–RUIZ, Defendant, Appellant.

No. 93–1175.
|
Heard Sept. 10, 1993.
|
Decided Jan. 25, 1994.

Synopsis

Defendant pled guilty in the United States District Court for the District of Puerto Rico, Hector M. Laffitte, J., to knowingly receiving while fugitive from justice firearm transported in interstate commerce, and he appealed. The Court of Appeals, Levin H. Campbell, Senior Circuit Judge, held that: (1) defendant had not repudiated privacy interest in his briefcase which was in locked trunk of automobile in which he was passenger; (2) police officers did not have probable cause to search briefcase; (3) gun in briefcase would not have been inevitably discovered; and (4) driver of automobile did not consent to search of briefcase.

Reversed; judgment vacated.

Attorneys and Law Firms

***500** Laura Maldonado Rodriguez, Asst. Federal Public Defender, with whom Benicio Sanchez Rivera, Federal Public Defender, was on brief, for defendant-appellant.

Jose A. Quiles–Espinosa, Sr. Litigation Counsel, with whom Charles E. Fitzwilliam, U.S. Atty., was on brief, for U.S.

Before STAHL, Circuit Judge, ALDRICH and CAMPBELL, Senior Circuit Judges.

Opinion

LEVIN H. CAMPBELL, Senior Circuit Judge.

Defendant-appellant Pedro Infante Ruiz was indicted in the United States District Court for the District of Puerto Rico for having knowingly received while a fugitive from justice a firearm transported in interstate commerce. 18 U.S.C. §§ 922(g)(2) and 924(a). After the district court denied a motion in limine to suppress evidence, Infante entered a plea of guilty, with his plea being conditioned on the outcome of an appeal of the court's evidentiary ruling. Infante duly appealed, and we now reverse the district court's denial of a motion to suppress and vacate appellant's conviction.

I.

On October 8, 1991, Infante and two associates were driving a rented 1991 Mazda 626 in the vicinity of Parguera, Lajas, Puerto Rico, when they stopped to buy food at a local eatery. Officers of the Puerto Rico police were following the car, looking for an opportunity to arrest Infante on an outstanding warrant from Florida on federal narcotics charges. After the car stopped, the officers surrounded the vehicle and placed Infante under arrest. Infante resisted but was eventually restrained and placed inside a nearby unmarked squad car.

One of the arresting officers, Sergeant David Padilla Velez, asked the driver of the car, a Felipe de la Paz, for consent to search the vehicle. De la Paz verbally gave his consent, and Sgt. Padilla searched the passenger compartment. Sgt. Padilla then asked de la Paz for the key to the car's trunk. Although Sgt. Padilla did not explicitly ask for de la Paz's consent to search the trunk, de la Paz handed over the key to the trunk in response to the request and stood by without objection as the trunk was being searched.

Two briefcases, one brown and one black, were inside the trunk. De la Paz, upon inquiry by Sgt. Padilla, said that he was the owner of the brown briefcase. Sgt. Padilla opened and searched the brown briefcase, apparently without objection by de la Paz.

Sgt. Padilla then asked de la Paz who owned the black briefcase. De la Paz answered that it belonged to Infante. Without expressly asking for de la Paz's consent, but without any express objection from him, Sgt. Padilla then opened the unlocked briefcase belonging to Infante. Inside were various documents belonging to Infante, as well as items belonging to de la Paz and others. Also inside was a loaded .22 caliber Derringer pistol.

Infante was later charged with knowingly receiving while a fugitive from justice a firearm transported in interstate

commerce. De ***501** la Paz and the other passenger were not arrested.

Infante moved to suppress the gun, arguing that it had been seized in violation of the Fourth Amendment. In an oral ruling, the district court denied the motion to suppress. The defendant later pleaded guilty to the charge, reserving his right to appeal from the court's denial of his motion to suppress. We now hold that the search of Infante's briefcase was unlawful and that the pistol should have been suppressed.

II.

The district court upheld the warrantless search of Infante's briefcase on four grounds: (1) Infante's lack of privacy interest in the suitcase; (2) probable cause; (3) a finding that the weapon would have been inevitably discovered; and (4) the drivers' consent. In reviewing a district court's denial of a suppression motion, we uphold its findings of fact unless they are clearly erroneous. *United States v. Sanchez,* 943 F.2d 110, 112 (1st Cir.1991); *United States v. Cruz Jimenez,* 894 F.2d 1, 7 (1st Cir.1990). The court's ultimate conclusion, however, is subject to plenary review, *Sanchez,* 943 F.2d at 112; *United States v. Curzi,* 867 F.2d 36, 42 (1st Cir.1989), as "[f]indings of reasonableness ... are respected only insofar as consistent with federal constitutional guarantees." *Ker v. California,* 374 U.S. 23, 33, 83 S.Ct. 1623, 1630, 10 L.Ed.2d 726 (1963). We will, "where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that [we] can determine for [ourselves] whether in the decision as to reasonableness the fundamental—*i.e.,* constitutional—criteria ... have been respected." *Id.* at 34, 83 S.Ct. at 1630.

Applying these principles, we discuss in turn each of the grounds for upholding the search offered by the district court.

A. *Infante's Privacy Interest in the Briefcase*

The district court found that Infante had no privacy interest in the briefcase and concluded that the lack of such an interest provided a sufficient basis to deny the suppression motion. The district court found that Infante had left the unlocked briefcase in the trunk of the Mazda for a period of some days, even when he was not a passenger, and that he allowed de la Paz and others to place possessions of their own inside it. The district court found that the briefcase "was not under the control of the defendant" and that Infante had no Fourth Amendment privacy rights that could have been violated by its search.

While the district court cited no authority, the best analogy we could find for the district court's reasoning is *California v. Greenwood,* 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). There, the police searched without a warrant the contents of garbage bags left at the curb outside the defendants' home. The Court held that the defendants "exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection." *Id.* at 40, 108 S.Ct. at 1628. It was "common knowledge," said the Court, that garbage bags left for pick up are "readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* (footnotes omitted). The defendants were considered to have left their refuse "in an area particularly suited for public inspection and ... consumption, for the express purpose of having strangers take it." *Id.* at 40–41, 108 S.Ct. at 1629 (internal quotation omitted).

The facts in this case, however, are clearly distinguishable from *Greenwood.* Storing items inside a closed briefcase inside a locked car trunk did not reveal a willingness on the part of Infante to "expose" such items to the public. Moreover, nothing in the circumstances indicated that Infante had abandoned the briefcase, relinquished authority over it, or left it open to "public inspection and consumption." De la Paz's identification of the briefcase as belonging to Infante indicated that, among his friends, the case was still believed to belong to Infante. While there is evidence that Infante's confederates felt entitled to place items of their own within it, he did nothing to indicate its availability to the public generally nor did his actions betray an intention to forego an owner's normal right ***502** to exclude those he wished to exclude. By the time of the search, Infante himself was once more a passenger in the car carrying his briefcase.

We think it is clear, therefore, that Infante did not repudiate his privacy interest in the briefcase by placing it in the trunk of the Mazda. While he indicated a willingness to share access with a few friends, he in no way opened the case to public access. We therefore hold that Infante had a privacy interest in the briefcase and that the district court's finding to the contrary was in error.

B. *Probable Cause*

The district court also concluded that the search was justified by probable cause. It is now established that if the police have probable cause to believe that either a vehicle or a

container within a vehicle contains contraband, evidence of crime, or other matter that may lawfully be seized, no Fourth Amendment violation occurs when the police open and search the container without a warrant. *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *California v. Acevedo,* 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). The district court found here that because Infante was a federal fugitive and that the other occupants were allegedly under suspicion for trafficking in drugs, the police officers could have reasonably believed that the car's occupants were "dangerous people" and that contraband or weapons would be in the automobile. The district court supported its finding by saying it was "conventional wisdom" that "drug traffickers carry weapons."

But in order for probable cause to search to exist, the officer must have reasonably trustworthy information of supporting facts and circumstances such as would persuade a person of reasonable caution to believe the search is justified. 3 Charles Alan Wright, Federal Practice and Procedure: Criminal 2d § 662 at 579 (1982). Certainty is not required. *Id.* But in the absence of supporting facts, the officer's suspicion or personal belief that probable cause exists is not enough. *Id.* at 582. Thus it was not enough here that the suspected vehicle contained persons with serious drug trafficking records. There had to be particular facts indicating that, at the time of search, the vehicle or a container within it carried contraband, evidence of crime, or other seizable matter. *Id.* at 2664.

The government conceded at oral argument that the police officers who conducted the search had no concrete information that Infante and his friends were transporting drugs or weapons at the time of the stop. The probable cause standard could not be satisfied merely by dependence on "conventional wisdom" or by the "dangerous" reputation of Infante and his associates.[1] ***503** *See United States v. Harris,* 403 U.S. 573, 582, 91 S.Ct. 2075, 2081, 29 L.Ed.2d 723 (1971) (suspect's reputation, standing alone, is insufficient to support probable cause).

C. *Inevitable Discovery*

As a third ground for denying the suppression motion, the district court found that the Derringer pistol would have been inevitably found. According to the district court, because the Mazda was a rental car, the officers would have taken custody of the car, and the car would have had to be inspected before the vehicle was returned. The gun inevitably would have been found in the inspection of the vehicle. On the present record, however, this argument is unsupported and must be rejected.

The inevitable discovery doctrine, an exception to the exclusionary rule, applies when "the government can prove that the evidence would have been admitted regardless of any overreaching." *Nix v. Williams,* 467 U.S. 431, 447–48, 104 S.Ct. 2501, 2511, 81 L.Ed.2d 377 (1984). The government bears the burden of showing, by reference to "demonstrated historical facts" and by a preponderance of the evidence, that the information or item would inevitably have been discovered by lawful means. *Id.* at 444–45 & n. 5, 104 S.Ct. at 2509–10 & n. 5.

Furthermore, to be permissible under the Fourth Amendment, warrantless inventory searches must be conducted according to standardized procedures. *South Dakota v. Opperman,* 428 U.S. 364, 372–75, 96 S.Ct. 3092, 3098–3100, 49 L.Ed.2d 1000 (1976); *Colorado v. Bertine,* 479 U.S. 367, 374 n. 6, 375, 107 S.Ct. 738, 742 n. 6, 743, 93 L.Ed.2d 739 (1987); *Florida v. Wells,* 495 U.S. 1, 4–5, 110 S.Ct. 1632, 1635–36, 109 L.Ed.2d 1 (1990). Any "discretion [must be] exercised according to standard criteria and on the basis of something other than suspicion of criminal activity." *Bertine,* 479 U.S. at 375, 107 S.Ct. at 1902.

The government cites *United States v. Mancera–Londoño,* 912 F.2d 373, 375–77 (9th Cir.1990), in support of its argument here. In *Mancera–Londoño,* the Ninth Circuit upheld a warrantless search of several suitcases found in a rented station wagon, after the arrest of two suspects who had been using the car to transport drugs. The court held that it was "legitimate" for the DEA agents involved in the arrest to take custody of the vehicle after the arrest of the two suspects, as apparently no one else was available to return the car to the rental company. *Id.* at 376.

The agents in *Mancera–Londoño* testified that after a rented vehicle is seized, the DEA's standard policy was to return the car to the rental agency after "a complete inventory of the car." The policy, though oral only, was, according to testimony, identical to the policy found in the DEA Manual regarding the search of cars seized for forfeiture. *Id.* at 375–76. Also, the agents testified that DEA policy required searching of all closed containers. *Id.* at 376. *See also Wells,* 495 U.S. at 4–5, 110 S.Ct. at 1635–36 (in order to justify searching closed containers during an inventory search, officers must be acting pursuant to a specific policy regarding closed containers).

In the present case, however, the record is barren of evidence that would support the district court's finding that the discovery of the gun was inevitable. First, the government has not met its burden of showing that the officers could have taken "legitimate custody" of the vehicle but for the discovery of the gun, *see United States v. Jenkins,* 876 F.2d 1085, 1089 (2d Cir.1989), and that the officers indeed would have taken such custody inevitably. *See United States v. Silvestri,* 787 F.2d 736, 744 (1st Cir.1986) (noting that a "basic concern" in inevitable discovery cases is whether both the discovery of the legal means and the use of that means are truly inevitable), *cert. denied,* 487 U.S. 1233, 108 S.Ct. 2897, 101 L.Ed.2d 931 (1988). In *Mancera–Londoño,* both persons connected with the vehicle were arrested. Here, however, only Infante —a passenger—was arrested. Insofar as appears, the police were not ***504** compelled by the mere discovery and arrest of Infante to seize the car within which he was riding and return it to the rental company. There was no testimony, and no evidence otherwise, that the car would have been impounded or seized if the gun had not been found, or that without impoundment the car would have otherwise remained on the side of a public highway or city street. *See United States v. Ramos–Morales,* 981 F.2d 625, 626 (1st Cir.1992), *cert. denied,* 508 U.S. 926, 113 S.Ct. 2384, 124 L.Ed.2d 287 (1993).

Second, the government failed to introduce any evidence that their actions were controlled by established procedures and standardized criteria, as required by *Opperman, Bertine,* and *Wells, supra.* No officer testified that a policy dictated that they seize the car, search its contents including closed containers, and return it to the rental agency. The government did not introduce into evidence a written policy to that effect, nor did any officer testify that an oral policy or established routine existed.

Though no officer testified that regulations directed the making of an inventory search, one officer did testify that certain regulations governed how inventory searches were to be conducted when they in fact were performed. The officer testified that the regulations required the officers to keep a list of everything seized from the vehicle. When asked if he had followed such regulations in this case, however, the officer testified that he had not. The inventory list that was introduced at trial did not list the gun.

In the absence of specific evidence of standardized procedures making inevitable the seizure of the car, the search of the trunk, and the opening of the closed briefcase, and in light of the fact that the officers on the scene failed to comply with the established regulations that did exist, we hold that the government failed to carry its burden of showing that the gun would have been inevitably discovered.

D. *Consent*

The government argues on appeal that the evidence and the court's findings indicate that the driver of the Mazda, de la Paz, consented to the search of Infante's briefcase. While there was no evidence that de la Paz consented to a search of Infante's briefcase specifically, the district court felt it "a reasonable conclusion that when the police searched the trunk or asked permission to Freddie [de la Paz] to open the trunk ... there was consent to open the trunk...." From this the government would have us infer de la Paz's consent to search Infante's closed briefcase located within the trunk. While the question is close, we are unable to find that de la Paz consented to the briefcase search.

The evidence shows that de la Paz had access to the briefcase for several days and that de la Paz's property was co-mingled with Infante's inside the briefcase. It appears, therefore, that de la Paz had sufficient authority over the briefcase to consent to its search if he in fact had chosen to do so. *See Frazier v. Cupp,* 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (owner of duffel bag, in allowing friend to use bag jointly and in leaving it at friend's house, assumed risk that friend would consent to its search); *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (search of diaper bag in bedroom closet permissible when based on consent of one with common authority over bedroom); *cf. United States v. Welch,* 4 F.3d 761, 764 (9th Cir.1993) (one occupant of rental car had no authority to consent to search of another occupant's purse where there was no evidence of joint access to or shared control over the purse).

It was not reasonable, however, for the police officers to have believed that de la Paz gave his consent to the search of Infante's briefcase. Under *Florida v. Jimeno,* 500 U.S. 248, ——, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991), a Fourth Amendment violation occurs when it is not "objectively reasonable" under the circumstances for a police officer to believe that the scope of a suspect's consent permitted the officer to open a particular container within a car. In *Jimeno,* the driver's general consent to search the vehicle was found sufficient to authorize the search of a paper bag on the floorboard containing cocaine. The Court held that it was objectively reasonable for ***505** the officer to believe that the suspect's general consent to search the car included his

consent to search containers within the car that might contain drugs. *Id.* at ——, 111 S.Ct. at 1804. The Court noted that the officer had informed the suspect that he was under suspicion for carrying narcotics, and that the suspect had not placed any explicit limitation on the scope of the search. *Id.*

The instant case is distinguishable on its facts from *Jimeno.* Unlike *Jimeno,* Sgt. Padilla did not notify de la Paz that he was looking for drugs, making it somewhat more difficult to impute to de la Paz consent to search every container within the car that might contain drugs. Moreover, Infante's briefcase was secured inside the locked trunk rather than lying on the floorboard. *Cf. id.* at ——, 111 S.Ct. at 1804 ("It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.").

Still, were the above the sole distinctions, *Jimeno* would seem to allow a finding of consent. Infante's arrest warrant related to drug-dealing and de la Paz' furnishing of the keys to the trunk is consistent with granting permission to search within the trunk. What leads us to hold that the scope of de la Paz's consent did *not* include defendant's briefcase, is that de la Paz's general permission to search the car and its trunk was qualified by de la Paz's further statement to the officer, before the latter opened and searched the briefcase, that the briefcase belonged to Infante. Even though Infante was nearby, handcuffed in the squad car, the police officers never sought his permission to search his briefcase. We do not think that it was "objectively reasonable," in these circumstances, for the officer to believe that de la Paz's prior consent to search the vehicle and its trunk encompassed opening that particular briefcase, later clearly identified by de la Paz as belonging solely to another nearby passenger. De la Paz's identification of the briefcase as belonging to another nearby passenger suggested precisely the contrary. *See Jimeno,* 500 U.S. at ——, 111 S.Ct. at 1804 ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). At very least, the scope of de la Paz's consent was ambiguous —an ambiguity that could have been but was not clarified by further inquiry of de la Paz, Infante or both.

III.

As none of the grounds offered to uphold the search of the briefcase survives analysis, appellant's motion to suppress the fruits of the search should have been granted. The district court's denial of appellant's motion to suppress is reversed and the judgment vacated. The defendant may withdraw his plea of guilty below.

So ordered.

All Citations

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Footnotes

1 A related argument for upholding the search, which the government did not press below and waived on appeal, was that the search was justified as incident to Infante's lawful arrest under the warrant. *New York v. Belton,* 453 U.S. 454, 457, 460, 101 S.Ct. 2860, 2862, 2864, 69 L.Ed.2d 768 (1981). Under *Belton,* when a police officer makes a lawful custodial arrest of the occupant of an automobile, the officer may, "as a contemporaneous incident of that arrest," search the car's passenger compartment and any containers found within it. *Id.* at 460–61 & n. 4, 101 S.Ct. at 2864 & n. 4. The "passenger compartment" has been interpreted to mean those areas reachable without exiting the vehicle and without dismantling door panels or other parts of the car. *See* Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.7 at 277 (1984). The *Belton* doctrine has thus been extended to allow warrantless searches of the rear section of a station wagon and the trunk area of a hatchback, when these areas are accessible from inside the vehicle. *United States v. Pino,* 855 F.2d 357, 364 (6th Cir.1988) (station wagon), *cert. denied,* 493 U.S. 1090, 110 S.Ct. 1160, 107 L.Ed.2d 1063 (1990); *United States v. Russell,* 670 F.2d 323, 327 (D.C.Cir.) (hatchback), *cert. denied,* 457 U.S. 1108, 102 S.Ct. 2909, 73 L.Ed.2d 1317 (1982).

The Supreme Court in *Belton* expressly excluded trunks from its holding, 453 U.S. at 460–61 n. 4, 101 S.Ct. at 2864 n. 4 as the Court may have assumed that all car designs were such as to prevent passengers from reaching into the trunk from the back seat and seizing a weapon or evidence there. In the instant case, however, the vehicle was a 1991 Mazda 626 sedan, which appears to have had a divided rear seat permitting one or both segments to be lowered, allowing direct access to the trunk from the passenger compartment. *See Road Test: Sedans,* 56 Consumer Reports 475 (1991). If this was the design, there may have been little difference for purposes of the *Belton* doctrine between

a trunk of the Mazda and the rear portion of a station wagon or the rear compartment of a hatchback. But as the government failed to make this argument either below or on appeal, and as the record is entirely without evidence as to how accessible the Mazda's trunk may have been to persons seated within the car, we do not reach the novel question of whether *Belton* should be extended in this way.

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