Search by Consent

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PART V

Deception, Fraud, and Misrepresentation

There is little doubt that entry into premises protected by the fourth amendment which is accomplished by deceit and subterfuge can violate the possessor's constitutional rights. And further, any search conducted thereafter is fatally infected by the manner of entry. *Gouled* v. *United States*, 255 U.S. 298 (1921). More recently, Justice Stewart pointed out that the fourth amendment "can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area." *Hoffa* v. *United States*, 385 U.S. 293, 301 (1966).

In *People* v. *Coghlan*, 537 P. 2d 745 (Colo. 1975) (en banc), the defendant was a burglary suspect. Police initially gained admittance to her apartment on the pretext that they wanted to discuss with her an unsolved and unrelated crime (assault) in which she was the victim. Once inside, consent to search was obtained, and incriminating evidence found and seized. The court held that such consent was not given freely and voluntarily. See also *United States* v. *Griffin*, 530 F. 2d 739, 743 (7th Cir. 1976) (trickery, fraud, or misrepresentation on the part of police to gain entry undermines the voluntariness of any consent); *Smith* v. *Rhay*, 419 F. 2d 160 (9th Cir. 1969) (use of parole officer's extraordinary search authority to gain entry violates parolee's fourth amendment right when officer acts on behalf of sheriff in criminal investigation).

The result will be the same whether the deception induces permission to enter or goes directly to the consent. As stated by the Maine Supreme Court:

> "It is a well established rule in the federal courts that a consent search is unreasonable under the Fourth Amendment if the consent was induced by deceit, trickery or misrepresentation of the officials making the search." *State* v. *Barlow*, 320 A. 2d 895, 900 (Me. 1974).

See also *United States* v. *Berkowitz*, 429 F. 2d 921, 925 (1st Cir. 1970) (dictum) (when consent is given, courts must inquire whether consent was the product of deceit); *United States* v. *Pugh*, 417 F. Supp. 1019 (W. D. Mich. 1976) (consent to agent's request to copy and audit pharmacy records is not a voluntary consent to search and seize prescriptions for criminal prosecutions).

Some courts have held that there must be an affirmative or positive act of misrepresentation on the part of an officer to vitiate the consent to enter or search. *United States* v. *Robson*, 477 F. 2d 13 (9th Cir. 1973) (failure of IRS agents to disclose potential criminal ramifications of tax audit did not rise to an "affirmative misrepre-

sentation" nullifying a voluntary consent); *Mann* v. *Superior Court of San Bernardino County*, 472 P. 2d 468, 472–73 (Cal. 1970) (en banc), cert. denied 400 U.S. 1023 (1971) (consent voluntary where no active deception, such as officer claiming to be friend or delivery man, or otherwise conceals identity); *People* v. *Gurley*, 100 Cal. Rptr. 407 (Cal. App. 1972) (in absence of fraud, ruse, or subterfuge by officers, fact that accused may have been under subjective misapprehension as to officers' intent will not invalidate his consent to search).

The recognized exception to the general rule is found in cases involving undercover operations. In considering the problem of entry to an occupied hotel room by an undercover agent and the subsequent "seizure" of conversations therein, the Supreme Court has said the agent does not enter by stealth, but rather by invitation. Such authorization to enter is nothing more than the result of a wrongdoer's misplaced confidence. The agent's failure to disclose his role as an informer does not invalidate the consent to enter. *Hoffa* v. *United States, supra*. See also *Lopez* v. *United States*, 373 U.S. 427 (1963) (consent entry of Federal undercover agent); *Brantley* v. *State*, 317 So. 2d 337 (Ala. Crim. App. 1974), rev'd on other grounds 317 So. 2d 345 (Ala. 1975) (undercover operation, entry under guise of friendship does not vitiate subsequent consent to search, officers may use deception and artifice when acting in good faith to detect crime); *Commonwealth* v. *Brown*, 261 A. 2d 879 (Pa. 1970) (presence of deception or misrepresentation in undercover dealings with suspect does not require suppression; officers need not be completely open and truthful).

Physical and Mental Condition—Age, Background, and Experience

Among the important factors bearing on the issue of voluntariness is the physical or mental condition of the consenting party. A mentally incompetent person simply is incapable of granting officers permission to search. He must have sufficient mental awareness to know what he is doing and appreciate the nature and significance of his action. Even if the officers have a genuine belief that the consenting party is of sound mind and acting deliberately, the consent fails if a court later determines that he lacked mental capacity. *United States* v. *Elrod*, 441 F. 2d 353 (5th Cir. 1971). See also *Manning* v. *Jarnigan*, 501 F. 2d 408, 412 (6th Cir. 1974) (recognition that previous commitment to State mental hospital on six occasions is relevant factor in determining voluntariness); *United States ex rel. Daley* v. *Yeager*, 415 F. 2d 779 (3d Cir. 1969), cert. denied 397 U.S. 924 (1970) (consent involuntary where obtained from one in a weakened condition from loss of sleep and history of schizophrenia).

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The validity of a consent has occasionally been attacked on grounds that the consenting party was intoxicated. The general rule is that drinking or even intoxication alone will not necessarily destroy the effectiveness of a consent. *United States* v. *Leland*, 376 F. Supp. 1193 (D. Del. 1974) (defendant intoxicated to extent he was unfit to drive, unsteady, and difficult to rouse, was sufficiently rational to give voluntary consent); *Allen* v. *State*, 297 So. 2d 391 (Ala. Crim. App. 1974) (defendant who had been drinking not suffering from impairment of mind sufficient to negate voluntary consent); *State* v. *Strange*, 334 So. 2d 182 (La. 1976) (drinking alone not sufficient to render consent involuntary); *State* v. *Berry*, 526 S.W. 2d 92 (Mo. App. 1975) (consent voluntary when obtained from defendant who was "intoxicated to some extent"). In each of the foregoing cases, the court made reference to and applied the test used to determine the admissibility of a confession obtained from an intoxicated person.

The *degree* of intoxication, of course, is the critical point, and where the evidence shows the consent was not the product of a rational intellect and free will, it will be disallowed as involuntary. *United States* v. *Shropshire*, 271 F. Supp. 521 (E.D. La. 1967) (defendant drinking heavily for hours and intoxicated to some degree); *State* v. *Smith*, 178 N.W. 2d 329 (Iowa 1970) (intoxicated for 3 days); *State* v. *Gordon*, 549 P. 2d 886 (Kan. 1976) (in semiconscious state at hospital following accident).

Nothing should preclude an officer from seeking consent to search simply because the party asked has been drinking. But where it is apparent that the individual is so intoxicated that he does not know the nature and consequences of his act, the prudent approach, absent an emergency, is to allow for a period of recovery or "sobering up" before requesting consent. The same general rule would apply equally to cases where the consenting party is under the influence of narcotics.

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tariness. The case of the younger and more inexperienced accused will receive more careful scrutiny than that of the hardened, inveterate offender. *Mobley* v. *State*, 335 So. 2d 880 (Fla. App. 1976) is illustrative. The court held that the consent obtained by police from a youth barely 18 years old and with very little education was involuntary. The court noted that such a person was "impressionable and vulnerable," particularly since the consent was secured at police headquarters. See also *In the Interest of R.L.J.* 336 So. 2d 132 (Fla. App. 1976) (consent from 14-year-old suspect of no unusual maturity not the result of a free and unconstrained choice); *People* v. *Gonzalez*, 347 N.E. 2d 575 (N.Y. 1976) (newlyweds under 20 years of age with very limited prior contact with police did not give voluntary consents; they were not "case-hardened sophisticate[s] in crime, calloused in dealing with police. . . ."). Compare these decisions with *Earls* v. *State of Tennessee*, 379 F. Supp. 576 (E.D. Tenn. 1974) (49-year-old male with some college education and who had served in two wars, consent voluntary); *Mack* v. *State*, 298 So. 2d 509 (Fla. App. 1974) (24-year-old with 3 years of college and prior arrest record, consent voluntary); *State* v. *Evans*, 533 P. 2d 1392 (Ore. App. 1975) (17-year-old with prior contacts with police and familiarity with his rights in criminal matters, consent voluntary); *Commonwealth* v. *Dressner*, 336 A. 2d 414 (Pa. Super. Ct. 1975) (education, intelligence, and experience of consenter should be considered; defendant police officer with understanding of investigative procedures and constitutional rights gave voluntary consent).

Number of Officers

Simply because a person is accosted by several officers does not mean a consent subsequently obtained is coerced and involuntary. What they say and how they act will be as important as the number of officers. Thus, 2 officers who threaten and intimidate a suspect may invalidate a consent, whereas 10 officers who act with deference and restraint may achieve the opposite result.

Cases in which the court has seized upon sheer numbers as a coercive factor usually disclose other exacerbating circumstances. See *United States* v. *West*, 486 F. 2d 468 (6th Cir. 1973), cert. denied 416 U.S. 955 (1974) (dictum) (eight officers who pointed shotgun at defendant and falsely advised they could obtain warrant); *United States* v. *Whitlock*, 418 F. Supp. 138 (E.D. Mich. 1976) (five Federal agents surrounding handcuffed accused at gunpoint); *United States* v. *Edmond*, 413 F. Supp. 1388 (E.D. Mich. 1976) (between 5 and 10 officers with open display of weapons); *People* v. *Gonzalez*, 347 N.E. 2d 575 (N.Y. 1976) (nine Federal agents "swarming" over small apartment of youthful defendants).

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Where aggravating factors are not evident, the number of officers alone will not have an adverse effect on the consent. The presence of a large number of officers in an apartment does not present a situation which is *per se* coercive. *People* v. *Reed*, 224 N.W. 2d 867, 878 (Mich. 1975), cert. denied 422 U.S. 1044 (1975). Other decisions reaching the same conclusion are *United States* v. *Peterson*, 524 F. 2d 167 (4th Cir. 1975), cert. denied 423 U.S. 1088 (1976) (mere presence of officers and FBI Agents, absent any indication of coercion, does not vitiate consent); *United States* v. *Boston*, 508 F. 2d 1171 (2d Cir. 1974), cert. denied 421 U.S. 1001 (1975) (consent voluntary despite presence of four armed FBI Agents); *United States* v. *Jones*, 475 F. 2d 723 (5th Cir. 1973), cert. denied 414 U.S. 841 (1973) (five to seven FBI Agents, consent voluntary); *State* v. *O'Conner*, 320 So. 2d 188 (La. 1975) (consent voluntary in presence of 10 officers).

Time of Search

The time of day can be a relevant circumstance in deciding the voluntariness of consent. Arousal of a family by police in the dead of night is a practice abhorred by the law, and is condemned even when a search of the dwelling is authorized by warrant (absent special circumstances). *United States ex rel. Boyance* v. *Myers*, 398 F. 2d 896 (3d Cir. 1968). The late Justice Frankfurter had this to say:

> "Modern totalitarianisms have been a stark reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man . . . . Searches of the dwelling house were the special object of this universal condemnation of official intrusion. Nighttime search was the evil in its most obnoxious form." *Monroe* v. *Pape*, 365 U.S. 167, 209–10 (1961) (dissent).

An unusual hour alone will not taint an otherwise voluntary consent to search. *People* v. *Johnson*, 329 N.E. 2d 464 (Ill. App. 1975) (2 a.m.); *State* v. *O'Conner*, 320 So. 2d 188 (La. 1975) (3 a.m.). But the time of search will be examined carefully by a reviewing court, and can be highly damaging when combined with other

factors suggesting coercion. Thus, where six armed officers entered a women's dormitory for migrant workers at 4:30 a.m. while the undressed residents were asleep, went into darkened rooms with flashlights, and demanded the occupants' papers, all of this without warrant, the actions could not be approved as the product of voluntary consent. *Illinois Migrant Council* v. *Pilliod,* 398 F. Supp. 882 (N.D. Ill. 1975), aff'd 540 F. 2d 1062 (7th Cir. 1976).

As a general rule, officers should avoid seeking consent to search during nighttime hours. Only in extraordinary circumstances, as where evidence sought is in imminent danger of destruction or removal, should such an effort be made.

Manner of Request

Mistreatment of a person from whom permission to search is sought will jeopardize the voluntariness of consent. An overbearing and intimidating attitude by the officer will elicit nothing more than acquiescence, which falls far short of the free relinquishment of rights required for valid consent.

In *State* v. *Ahern,* 227 N.W. 2d 164 (Iowa 1975), the State attempted to justify a consent to search following a forcible, warrantless entry. An officer kicked in an apartment door and immediately arrested the person inside for possession of marihuana observed in plain view. He then told the prisoner that he was going to search the place for narcotics, and that the prisoner "would save everybody a lot of trouble" by disclosing the location of the contraband. The arrestee cooperated. The court ruled the consent involuntary.

A Federal appellate court likewise held consent to search a suitcase involuntary where the consenting party was ordered out of the bus in which he was riding by Federal officers, and "told" to open his suitcase. Compliance with this command did not amount to a voluntary consent. *United States* v. *Rodriguez,* 525 F. 2d 1313 (10th Cir. 1975).

A particularly egregious case of coercion and duress is found in *United States* v. *Brennan,* 251 F. Supp. 99 (N.D. Ohio 1966). Noisy entry was made to defendant's premises at 5 a.m. by officers in a number of cars with flashing lights. The defendant was roused, encircled by agents with guns, and advised six times he was under arrest. He executed a consent to search form when told, "Sign this and we won't disturb the kids." The Federal court condemned the consent as involuntary, describing such tactics as "a clever method of depriving people of their constitutional rights by terrorizing them and their families in the darkness of the night with lights, guns, intimidation, false accusations, and a suggestion to go into the house of the victim." *Id.* at 106. (See also decisions cited in Use of Force and Threats, Submission to Authority, Number of Officers, and Time of Search, *supra.*)

The words and manner chosen by an officer are important in obtaining truly voluntary consent. The language must convey a request, not a command; the demeanor of the officer must be such as to allow a free choice, not surrender to the inevitable. It serves the officer best when the request for consent is simple and direct, and where he avoids intimidation by the volume, inflection, or ambiguous meaning of his words.

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Cooperation of Consenting Party

The prosecution's burden of proof to show voluntary consent is more easily satisfied when permission is obtained from a cooperative defendant who actively assists in the search. The principle has been summarized as follows:

> "When a defendant not only consents to a search, but actively assists the officers, either by directing them to the evidence sought or by voluntarily providing a key or other means to gain access to the place to be searched, his consent will generally be regarded as voluntary, especially if he expressly cooperates to get a 'break.' There is hardly better evidence of voluntariness than that which shows that the defendant did more than was requested of him." 9 ALR 3d 858, 883 (1966).

In *State* v. *Knaubert,* 550 P. 2d 1095 (Ariz. App. 1976), the defendant was taken into custody in connection with several rapes, a robbery, and murder. Shortly after, he confessed. Following the confession, police asked defendant about the location of a gun used in the commission of the crimes. The defendant offered considerable assistance in locating the weapon, but later challenged the police search on grounds that his consent was involuntary. The court rejected his argument, holding the "degree of affirmative assistance given to the police is relevant in determining whether consent exists." The defendant's active coopera-

tion persuaded the court that consent was freely given.

Numerous decisions have reached the same conclusion. See, e.g., *United States* v. *Ciovacco*, 518 F. 2d 29 (1st Cir. 1975); *United States* v. *Torres*, 354 F. 2d 633 (7th Cir. 1966); *Connelly* v. *Parkinson*, 405 F. Supp. 811 (D.S.D. 1975); *Santos* v. *Bayley*, 400 F. Supp. 784 (M.D. Pa. 1975); *State* v. *Page*, 206 So. 2d 503 (La. 1968); *Commonwealth* v. *Aguiar*, 350 N.E. 2d 436 (Mass. 1976). Other cases are collected at 9 ALR 3d 874, 883.

What prompts the consenting party to assist police in conducting the search is of little consequence. Thus where the consenter volunteers his help to police in locating evidence in order to implicate another and to shift the blame from himself, *People* v. *Cannon*, 323 N.E. 2d 846 (Ill. App. 1975); or assists officers with confidence that the evidence sought is too well concealed to be found, *State* v. *Sherron*, 463 P. 2d 533 (Ariz. 1970), *Commonwealth* v. *Dressner*, 336 A. 2d 414 (Pa. Super. Ct. 1975); or tries to "bluff" his way out of a difficult situation, *People* v. *Benson*, 544 P. 2d 646 (Colo. App. 1975), *State* v. *Rush*, 497 S.W. 2d 213 (Mo. App. 1973); or denies ownership of the evidence sought, *United States* v. *Katz*, 238 F. Supp. 689 (S.D. N.Y. 1965), the consent has been deemed voluntary.

By contrast, the refusal, resistance, or protestation of a person which precedes a search is compelling evidence of an involuntary consent. *Sarga* v. *State*, 322 So. 2d 592 (Fla. App. 1975) (compliance with officer's third demand after two earlier refusals, consent involuntary); *Samuels* v. *State*, 318 So. 2d 190 (Fla. App. 1975) (consent involuntary where defendant initially denied permission and even contested officer's authority to search); *People* v. *Taylor*, 333 N.E. 2d 41 (Ill. App. 1975) (search unlawful after express assertion of right to bar search until warrant obtained).

A Federal appellate court recently found a consent to search premises involuntary where the consenting party initially refused and later, under heavy pressure, changed her mind. Based on an informant's tip, officers went to the home of a robbery suspect's girlfriend, where he was reported living. They had neither arrest nor search warrants. The suspect was unexpectedly found there, arrested, and removed to a patrol car. The girlfriend, an 18-year-old grade school dropout, was asked for permission to search the premises. She denied the request. Two officers then took her "crying" and "scared to death" to the kitchen where after 20 to 30 minutes, she yielded. The court held the consent coerced, nothing more than submission to authority. *United States* v. *Mayes*, 552 F. 2d 729 (6th Cir. 1977).

Summary

The test is simple. If the consent is voluntary, considering all the circumstances, the search is lawful. The problem arises, of course, in the application of this "simple" test. Given the myriad of factors which generally surround the granting of consent, and considering the understandably diverse reactions of the courts to different fact patterns, it is a most difficult task to predict how an individual judge is apt to respond to a claim of involuntary consent. Yet that is what is expected of an officer. He must: (1) Anticipate that a consent to search is an attractive target for the defense and will be challenged routinely; (2) be able to recognize the bases upon which the defense will attack; and (3) be prepared to overcome each and every claim of the defense.

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Effective courtroom testimony of an officer is vital if voluntary consent is to be proven. Yet the testimony reflects nothing more than what the officer did or did not do at the scene of the search. So the concern shifts from the courtroom to the house or hotel or roominghouse where the search was made and where the officer applied his knowledge of constitutional law. *Knowledge is the key.*

Court decisions that carefully analyze consent searches identify the problem areas and inform the officer what he must avoid to assure voluntariness. Consider the case of *People* v. *Gonzalez*, 347 N.E. 2d 575 (N.Y. 1976). The New York Court of Appeals provides a checklist of factors relating to voluntariness and discusses each at some length: (1) Custody; (2) resistance of arrestee; (3) number of officers; (4) handcuffing; (5) isolation; (6) background and experience; (7) cooperation; (8) evasiveness; and (9) warning of rights. *United States* v. *Mayes*, 552 F. 2d 729 (6th Cir. 1977); and *Commonwealth* v. *Dressner*, 336 A. 2d 414 (Pa. Super. Ct. 1975), are similar cases.

There is a close parallel in the law between consents and confessions. The circumstances that give rise to a coerced confession will likewise cause an involuntary consent. Indeed, the Supreme Court has borrowed heavily from the large body of confession law to decide consent search cases. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973). Thus the officer burdened with securing and later proving a voluntary consent has ample materials available to guide him.

(Continued Next Month)

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