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THE LEGAL DIGEST

Search by Consent

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PART VI

Effect of Prior Constitutional Violation

Suppose a suspect is arrested without probable cause. During a period of illegal detention following the arrest, he consents to the search of his apartment, which yields evidence of crime. Is the evidence admissible?

The answer to this question requires the application of the derivative evidence rule, or as it is more commonly known, the "fruit of the poisonous tree" doctrine. The most detailed explanation of the principle is found in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), wherein the Supreme Court held that testimonial as well as physical evidence seized as a result of the exploitation of a "primary illegality," such as an unlawful arrest or unreasonable search, is subject to exclusion. The Court recognized two exceptions to the rule: (1) Where the connection between the unlawful conduct and the seizure of evidence is "so attenuated as to dissipate the taint" of the prior illegality (i.e., where the cause-effect relationship is disrupted by intervening circumstances); and (2) where the evidence seized is the product of an "independent source" rather than the prior illegality. The rule requires an exploitation of the constitutional violation, and since exploitation is a question of fact, its application will vary depending on the circumstances of the case. Nonetheless, some general observations can be made.

Many courts agree that the State's burden of proving voluntary consent can be met even though the person consenting is being detained illegally. In other words, there is no *per se* rule of exclusion. In *Phelper* v. *Decker*, 401 F. 2d 232 (5th Cir. 1968), the defendant argued that he was subjected to an unlawful arrest and his subsequent consent to search was the product of the illegal seizure and thus

"The terms and conditions of a consent to search are controlled by the consenting party."

invalid. The court acknowledged that if an arrest is unlawful and if it is exploited to get the consent, the rule of *Wong Sun* bars the use of any evidence seized pursuant to the consent. On the other hand, even conceding the unlawful arrest, a voluntary consent dissipates the taint of the arrest and makes the fruits of the search admissible. The defendant lost his argument when the court applied the latter principle.

The rule stated in *Phelper* has been approved in other jurisdictions, *Manning* v. *Jarnigan*, 501 F. 2d 408 (6th Cir. 1974) (dissent); *Santos* v. *Bayley*, 400 F. Supp. 784 (M.D. Pa. 1975); *State* v. *Cox*, 330 So. 2d 284 (La. 1976) (on rehearing), although voluntary consent given after an illegal arrest requires a heavier burden of proof than where the suspect is lawfully in custody. *United States* v. *Horton*, 488 F. 2d 374, 380 n.5 (5th Cir. 1973), cert. denied 416 U.S. 993 (1974); *United States* v. *Jones*, 475 F. 2d 723 (5th Cir. 1973), cert. denied 414 U.S. 841 (1973).

It is of interest that the court in *Phelper* distinguished between an arrest which is defective for "failure to comply with technical requirements" (e.g., a statute or rule of procedure) and one which amounts to a "gross violation of legal processes" (e.g., a constitutional infirmity). Presumably in the latter case, the court would be more apt to invalidate a consent obtained after the arrest. Cf. *Moffett* v. *Wainwright*, 512 F. 2d 496, 504 (5th Cir. 1975).

Where the consent is prompted by an illegal search or the fruits thereof, the approach taken in the unlawful arrest cases is used. For example, in *Hoover* v. *Beto*, 467 F. 2d 516 (5th Cir. 1972), cert. denied sub nom. *Hoover* v. *Estelle*, 409 U.S. 1086 (1972), the court held that consent to search in the face of an allegedly invalid search warrant was voluntary:

> "Our own view of the testimony is that when [defendant] told [the officer] that his warrant was not necessary and to come on into his home and search wherever he wanted, this constituted clear and convincing evidence of voluntary consent to the search, irrespective of the validity of the warrant. [Defendant] voluntarily consented to and invited the search. That consent was neither coerced nor compelled by the search warrant." *Id.* at 521.

Similarly, in *United States* v. *Hearn*, 496 F. 2d 236 (6th Cir. 1974), cert. denied 419 U.S. 1048 (1974), it was noted that while the use of unlawfully obtained information in procuring consent is a relevant fact in determining voluntariness, a prior illegal search does not necessarily render evidence obtained by a subsequent consensual search inadmissible. See also *United States* v. *Willis*, 473 F. 2d 450, 452 (6th Cir. 1973), cert. denied 412 U.S. 908 (1973).

Where a court is persuaded that the consent was the result of an exploited fourth amendment violation, the ensuing search will be deemed unlawful. Decisions reaching this conclusion are *People* v. *Superior Court of Shasta County*, 455 P. 2d 146 (Cal. 1969) (consent not an intervening independent act which severed connection between prior illegal search and subsequent entry to vehicle); *State* v. *Barwick*, 483 P. 2d 670 (Idaho 1971) (sham arrest for vagrancy and subsequent permission to search so intertwined that the consent did not expunge taint of illegal arrest); *Whitman* v. *State*, 336 A. 2d 515 (Md. Ct. Spec. App. 1975) (though illegal arrest, without more, does not vitiate voluntary consent, it is a circumstance of "enormous psychological effect and compelling significance"; consent invalid); *State* v. *Price*, 260 A. 2d 877 (N.J. Super. Ct. 1970) (implied coercion of illegal arrest relevant factor in deciding voluntariness of consent; consent invalid).

Limitations of Search

Scope of Search

The terms and conditions of a consent to search are controlled by the consenting party. He may authorize a broad general search of his premises, which confers wide latitude on the inspecting officer. Or he may impose restrictions, which substantially narrow the searching officer's power in conducting the search. If the search thereafter extends beyond the limits imposed, it becomes unreasonable and unlawful. Any evidence found is subject to exclusion.

A leading case is *United States* v. *Dichiarinte*, 445 F. 2d 126 (7th Cir. 1971). The defendant was arrested about a mile from his home on a warrant charging him with a Federal narcotics violation. When asked if he had narcotics at his home, the defendant responded, "I have never seen narcotics. You guys come over to the house and look, you are welcome to." Thereupon, the arresting officers took the defendant to his home, where they embarked on a warrantless search for

narcotics. During the search, they came upon and read personal papers of the defendant "to determine whether they gave any hint that defendant was engaged in criminal activity." He was later prosecuted successfully for income tax evasion.

On appeal, a Federal court held that a consent search is reasonable only if kept within the bounds of the actual consent, that the consenting party may limit the extent or scope of the search in the same way that specifications of a warrant limit a search pursuant to that warrant. In this case, the officers, at most, had permission to search for narcotics. When they used this authority to conduct a "general exploratory search," their actions became unreasonable under the fourth amendment.

Dichiarinte stands for the proposition that limits may be imposed based on the object of the search. There are other restrictions circumscribing the actions of searching officers. They are clearly and carefully explained in a 1974 decision of the Maine Supreme Court. In *State* v. *Koucoules*, 343 A. 2d 860 (Me. 1974), the court dealt with the allegation that officers searching for a murder weapon and ammunition clip went beyond the scope of the consent granted by the defendant. The court concluded otherwise. But more importantly, the decision enunciated principles generally applied by both Federal and State courts:

1. A consent search is reasonable and legal to the extent the individual has consented. He determines the bounds and breadth of consent. It may be broad or limited.
2. Limitations may be implied from the language used or conduct displayed by the individual, and such a judgment must be made by the officer using reasonable caution, in light of the particular situation and circumstances.
3. The consenting party may condition his consent on his being present during the search.
4. A time limit may be imposed on the authority to search. But the mere lapse of time between consent and search does not require a reaffirmation of the consent as a condition precedent to a lawful search.
5. Permission may be given to search for a particular object, and the ensuing search remains valid so long as its scope is consistent with an effort to locate that object.
6. A limitation may be placed on the officer as to the area or space within the premises to be searched. *Id.* at 866-72.

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.

The views expressed in *United States* v. *Dichiarinte, supra,* and *State* v. *Koucoules, supra,* are supported in the following decisions: *United States* v. *Griffin*, 530 F. 2d 739, 744 (7th Cir. 1976) (person may limit consent); *United States* v. *Pugh*, 417 F. Supp. 1019 (W.D. Mich. 1976) (consent to inspection and audit of pharmacy records not a consent to seizure of prescriptions); *People* v. *Billington*, 552 P. 2d 500 (Colo. 1976) (en banc) (defendant may limit scope of consent, police thereafter must limit scope of search); *Herron* v. *State*, 456 S.W. 2d 873 (Tenn. Crim. App. 1970), modified 408 U.S. 937 (1972) (consenter may condition the search on his being present); *State* v. *Connolly*, 350 A. 2d 364 (Vt. 1975) (elementary and undisputed that scope of permission to search may be limited).

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The scope of the consent may be restricted by the purpose of the search. For example, where officers are permitted to enter premises to look for a fugitive, they may not convert this authority into a privilege to rummage through bank bags, trash containers, or other spaces which obviously could not hide a man. *Lugar* v. *Commonwealth*, 202 S.E. 2d 894 (Va. 1974). But where the defendant's written consent authorized officers to search premises for heroin, the seizure of amphetamines and methadone found in closed containers was deemed reasonable. They were not found in "impermissible areas." The search was within the scope of the consent. *State* v. *Alderete*, 544 P. 2d 1184 (N.M. App. 1976).

When a person consents to a search of "premises," does he mean to permit the officer to inspect a detached garage, a storage building, or a trash container located in the yard? The question arose in *Commonwealth* v. *Eckert*, 368 A. 2d 794 (Pa. Super. Ct. 1976). The defendant, an armed robbery suspect, gave police a written consent to search his mobile home. When police arrived at the home, they also found a storage shed located 5 to 10 feet from the rear of the trailer on property occupied by the defendant. The consent search form authorized a search of "premises." The shed was searched and evidence found. The court held that "premises" included

the storage shed and indicated the same reasoning would apply to garages, trash barrels, and other outbuildings. The term includes "all property necessarily a part of the premises or so inseparable as to constitute a portion thereof." *Id.* at 797.

Revocation or Modification

Consent to search given voluntarily may be presumed to continue, unless revoked, until all areas to be searched have been examined. Revocation may occur at any time during the course of the search. That part of the search which takes place prior to the recision of consent is a lawful search, and any evidence found during this period will be admissible. On the other hand, evidence seized after consent has been withdrawn will be subject to exclusion. The revocation of consent is simply a denial of a further right to search. It cannot invalidate the authority previously given, but it can terminate that authority.

In *United States* v. *Bily*, 406 F. Supp. 726 (E.D. Pa. 1975), FBI Agents sought authority to search the premises of the defendant, a film collector. They were investigating possible violations of Federal copyright laws. The defendant signed a consent search form, and the Agents embarked on a careful effort to find copies of motion picture films. They seized copies of two films, at which point the defendant said, "That's enough. I want you to stop." Thereafter, a third film was found and seized. The defendant moved to suppress all three films.

The court held that the defendant's statement was "a revocation of consent that took immediate effect." The seizure of the third film was invalid. However, the two found prior to the termination of consent were the products of a lawful search and therefore admissible. See also *United States* v. *Young*, 471 F. 2d 109 (7th Cir. 1972), cert. denied 412 U.S. 929 (1973) (attempted recision alleged by defendant does not render original consent invalid); *Lucero* v. *Donovan*, 354 F. 2d 16 (9th Cir. 1965).

The principle that consent, once granted, may be revoked, has found support in airport terminal search cases. In *United States* v. *Homburg*, 546 F. 2d 1350 (9th Cir. 1976), a Federal appellate court reasoned that a prospective airline passenger impliedly consents to a warrantless screening search as a condition to boarding an aircraft. However, consent to additional searches after a preliminary screening may be revoked if the passenger agrees not to board the plane and instead decides to leave the boarding area. See also *United States* v. *Miner*, 484 F. 2d 1075 (9th Cir. 1973).

Not all decisions have recognized the right of a consenting party to rescind the authority he has conferred on searching officers. It has been held that when voluntary consent to search is given, it may not be countermanded during the search. *People* v. *Kennard*, 488 P. 2d 563, 564 (Colo. 1971) (automobile trunk); *State* v. *Lett*, 178 N.E. 2d 96, 101 (Ohio App. 1961) (premises). Neither case, however, cited any authority for the view that consent to search is irrevocable.

The approach taken by the Federal courts, that consent may be revoked, is reinforced by language of the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). While addressing the problem of fifth and sixth amendment protection during custodial interrogation of a suspect, the Court pointed out:

> "The mere fact that he [defendant] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." *Id.* at 445.

There would seem to be no logical reason why the foregoing language should not apply equally in a consent search situation.

Implied Consent

A specific, unambiguous, affirmative relinquishment of rights is, of course, the objective of an officer seeking consent. And once it is obtained, either orally or in writing, the officer is in a strong position to later prove the consent. However, it is generally agreed that express consent is not always necessary. There are circumstances from which the consent of a party may be inferred. The following sections describe some of these circumstances and how the courts have handled the problem of implied consent.

Silence—Failure to Object

Imagine an officer knocking on the door of a residence. He identifies himself to the person responding and requests permission to enter and search. The resident says nothing. May the officer conclude from his silence that he has consented to an entry and search?

In *United States* v. *Lindsay*, 506 F. 2d 166 (D.C. Cir. 1974), police sought entry to a motel room in the course of an armed robbery investigation. The officers knocked on the door. The occupant opened the door and then stood mute while they entered the room, where evidence of the robbery was found. One of the issues presented was whether the entry of the officers could be justified on the theory of consent. It was held that silence in the face of a group of police at the door

can give rise to no inference of an invitation to enter.

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The weight of authority seems to support the view that silence alone is not consent. An exception may be seen in *Lee* v. *State*, 477 P. 2d 157 (Nev. 1970), in which the Nevada Supreme Court held that silence, when there is a duty to speak or act, can amount to an intelligent waiver of a constitutional right.

It has been said that consent "may be implied from the circumstances surrounding the consenting party's interaction with the authorities, including silence." 65 Geo. L. J. 235 (1976). Yet all the cases supporting such a statement show that the silence of the "consenting party" was accompanied by some other indication of waiver. For example, in *United States* v. *Williams*, 538 F. 2d 549 (4th Cir. 1976), voluntary consent was found where Federal agents knocked on defendant's motel room, identified themselves to the occupant, and went into the room when he "motioned" the agents to enter. While there is no indication the defendant made any statement, his gesture was sufficient to establish consent. See also *United States* v. *Canada*, 527 F. 2d 1374 (9th Cir. 1975), cert. denied 50 L. Ed. 2d 147 (1976) (placement of suitcase on conveyor at airport checkpoint manifests acquiescence in screening process); *United States* v. *Turbyfill*, 525 F. 2d 57 (8th Cir. 1975) (consent may be implied; opening of door and stepping back constituted implied invitation to enter).

Conduct and Gestures

The preceding cases make clear that a consent need not be spoken. It may be in the form of gestures or conduct, so long as freely and voluntarily given. *United States* v. *Griffin*, 530 F. 2d 739 (7th Cir. 1976). In *Griffin*, officers entered an apartment when the party answering the door stepped back and left the door partially open. See also *United States* v. *Williams, supra; United States* v. *Canada, supra; United States* v. *Turbyfill, supra; State* v. *Hyleck*, 175 N.W. 2d 163 (Minn. 1970), cert. denied 399 U.S. 932 (1970) (turning over house keys to friend without reservation or condition for use of police constituted invitation to enter and consent to search house).

The gesture of the consenting party may impose a limitation on the invitation to search. In *Oliver* v. *Bowens*, 386 F. 2d 688 (9th Cir. 1967), officers accosted a known narcotics user on the street and asked if he was still using or carrying narcotics. He answered "no," at which point one officer asked if he minded being checked "to see if he had any marks on him." The defendant made no verbal reply, but extended his arms out sideways. The officer did not scrutinize the arms, but rather conducted a search of his pockets, finding and seizing marihuana. The court found the search unlawful. There was no intended consent to have the officer switch from an inspection of arms to a general search of the defendant's pockets.

Ambiguous or Equivocal Responses

In addition to his many other roles, an officer oftentimes must be a semantician. When seeking consent to search, he must be able to decide what is meant when the resident says, "I have nothing to hide" or "you won't find anything in here." While there are no hard and fast rules, it is apparent that the words of consent need not convey explicitly a relinquishment of rights. The consenting party need not state, "I hereby consent to your search of my house, knowing I have a right to withhold such consent." The most prudent approach an officer can take is to attach the common and reasonable interpretation of language to the consenter's words, and if in doubt, clarify the response by further inquiry. Ask him what he means, as did the Federal agent in *United States* v. *Wiener*, 534 F. 2d 15 (2d Cir. 1976), cert. denied 50 L. Ed. 2d 80 (1976) (Agent: "Do you have any narcotics in the apartment?" Defendant: "If you find any, you can have them." Agent: "Does this mean you are giving us your consent to search the apartment?").

In *United States* v. *Watson*, 423 U.S. 411 (1976), the Supreme Court approved a consent to search where the consenting party used the words "go ahead." Similarly, in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), a consent was sustained where the consenting party responded to an officer's request to search by saying, "Sure, go ahead." In *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), officers, interviewing the defendant's wife in connection with her husband's involvement in a murder, were offered his guns which were stored in the family home. The wife said, "If you would like them, you may take them . . . we have nothing to hide." Among other claims, the defendant argued that the wife could not and did not "waive" his constitutional rights. The Court disregarded this argument, however, holding there was no search or seizure, but rather a "spontaneous, good-faith effort by his wife to clear him of suspicion." 403 U.S. at 489–90. *Coolidge*, therefore, is not a case involving consent. Yet the language of the wife illustrates in what other circumstances might be a clear relinquishment of fourth amendment protection. See also *State* v. *Sherrick*, 402

P. 2d 1 (Ariz. 1965), cert. denied 384 U.S. 1022 (1966) (statement that defendant "had no objection" when asked for permission to search apartment amounted to clear evidence of consent in unequivocal terms).

Permission to Enter

Officers should carefully observe the distinction between an invitation to enter and a consent to search the premises. Consent to entry alone may not justify a search. A recent Maryland case illustrates the point. State officers, investigating a report that a substantial quantity of marihuana was stored in a rented cabin, obtained permission of the defendant (tenant) to enter. Once inside, they asked for permission to conduct a warrantless search. The defendant refused. One officer then examined a "totally innocent" pipe located on a table and decided it contained marihuana. The defendant was arrested for possession, and soon thereafter consented to a search of the cabin, which yielded 584 pounds of marihuana. He subsequently was convicted of possession with intent to distribute.

On appeal, the Maryland court held that the consent to search was involuntary, having been given only after an unlawful examination of the pipe and a resultant illegal arrest. Hence the seizure based on the consent was invalid. The court's analysis of the problem began with the initial entry into the cabin:

> ". . . [P]ermission to enter cannot be equated with a voluntary consent to search the premises. To the contrary, in this case, it is manifest from the record that after the Appellant invited the officers to enter the premises he insisted that they obtain a warrant before searching the premises for suspected marijuana. *An invitation across the threshold of a fixed premises without warrant will not justify a general exploratory search of that premises.*" *Gardner* v. *State*, 363 A. 2d 616, 621 (Md. Ct. Spec. App. 1976) [emphasis added].

The Maryland view has been expressed in other jurisdictions. See, e.g., *United States* v. *Griffin*, 530 F. 2d 739 (7th Cir. 1976) (consent may be limited); *Banks* v. *Pepersack*, 244 F. Supp. 675 (D. Md. 1965) (permission to enter not consent to search); *Duncan* v. *State*, 176 So. 2d 840 (Ala. 1965) (invitation to enter motel room did not constitute consent to search); *State* v. *Peterson*, 155 N.W. 2d 412 (Iowa 1968) (granted request for admission not the same as leave to search private premises); *State* v. *Selmer*, 553 P. 2d 1069 (Ore. App. 1976) (walking through house exceeded bounds of initial permission to enter).

The foregoing decisions should not discourage an officer from seeking an invitation to premises, particularly when the purpose is to conduct an interview. The atmosphere is apt to be better on the inside. Moreover, lawful access to the interior of premises exposes the inside to the casual scrutiny of the officer. And once a proper entry has been made and the officer has established his lawful presence, he may observe whatever is in open view. Such observations do not constitute a search, and any facts thus uncovered may be used to establish probable cause to search or arrest. *Manni* v. *United States*, 391 F. 2d 922 (1st Cir. 1968), cert. denied 393 U.S. 873 (1968). Likewise, physical evidence in plain view is subject to seizure, and because there is no search, a warrant is not necessary to authorize the seizure. *United States* v. *Griffin*, *supra*, at 744; *Robbins* v. *MacKenzie*, 364 F. 2d 45 (1st Cir. 1966), cert. denied 385 U.S. 913 (1966). FBI

(Continued Next Month)

LAW DAY—U.S.A.

May 1, 1978, marks the 21st annual nationwide observance of Law Day—U.S.A. sponsored by the American Bar Association. This year's theme, "The Law: Your Access to Justice," emphasizes the achievement of equal justice for all under law. "Today in our country the least fortunate among us enjoys more equal social justice, more protection of life, liberty, and property, and a greater opportunity for personal freedom than has ever been provided the common man by any other system in recorded history."

By Presidential proclamation and joint resolution of Congress, May 1 of each year has been set aside as a "special day of celebration by the American people in appreciation of their liberties" and as an occasion for "rededication to the ideals of equality and justice under law."

The major purpose of this observance is "to emphasize the values of living under a system of laws and independent courts that protect individual freedom and make possible a a free society."

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