

U.S. v. Cunag (Cunag II)
(9th Cir. 2004) 386 F.3d 888

ISSUE

Does a motel or hotel guest have a reasonable expectation of privacy in a room he acquired with a stolen credit card?

DISCUSSION

The Ninth Circuit continues to explore the issue of whether motel and hotel guests have standing to challenge an entry or search of a room they paid for with stolen credit cards. The court addressed the issue in two recent cases which were covered in previous issues: *U.S. v. Bautista* (Summer 2004) and *U.S. v. Cunag* (Fall 2004). There is now a third case: *Cunag II*. Because the panels in *Bautista* and *Cunag II* utilized an improper method of analysis, it is necessary that we revisit the issue.

On March 26, 2004 a panel of the Ninth Circuit in *U.S. v. Bautista*¹ ruled that a defendant enjoyed a reasonable expectation of privacy in his motel room even though he paid for it with a stolen Visa card. The panel was able to reach this stunning conclusion by applying a so-called “rule” of the Ninth Circuit that states: “*Even if the occupant of a hotel room has procured that room by fraud, the occupant's protected Fourth Amendment expectation of privacy is not finally extinguished until the hotel justifiably takes affirmative steps to repossess the room.*”²

Coincidentally, just a few months later the same issue was presented in another Ninth Circuit case, *U.S. v. Cunag (Cunag I)*.³ In *Cunag I*, however, a different panel chose not to apply the Ninth Circuit's inflexible rule. Instead, it did precisely what the United States Supreme Court has instructed the courts to do: Examine the various circumstances surrounding the defendant's tenancy then, applying common sense, determine whether he could reasonably expect privacy under the circumstance.⁴ Accordingly, the court in *Cunag I* took note of the surrounding circumstances, specifically:

- Cunag checked into a hotel using a fictitious name.
- He paid for the room with a MasterCard in the name of a dead woman.
- Cunag gave the desk clerk two forged notes, purportedly from the dead woman, saying that Cunag had her permission to use her MasterCard.
- Cunag was the person who forged the notes.
- To help convince the clerk that he had the woman's permission to use the card, Cunag printed a phony California ID card in the woman's name and gave a copy to the clerk.

Not surprisingly, the court ruled these circumstances demonstrated that even if Cunag subjectively expected privacy in the room (because he figured he had outsmarted the clerk), this expectation was objectively unreasonable because he had absolutely no right to occupy the room. As the court explained, Cunag procured his room through “deliberate and calculated fraud” and was, therefore, “not a lawful occupant.”

On October 7, 2004, however, the *Cunag* panel recalled its opinion and issued a new one. In *Cunag II*, the panel announced it was no longer basing its decision on an examination of the totality of the circumstances. Instead, like the court in *Bautista*, it would apply the Ninth Circuit's per se “rule.” Nevertheless, it concluded that Cunag did

¹ (9th Cir. 2004) 362 F.3d 584.

² See *U.S. v. Cunag* (9th Cir. 2004) 386 F.3d 888, 895.

³ (9th Cir. 2004) 371 F.3d 1060.

⁴ See *Rawlings v. Kentucky* (1980) 448 U.S. 98, 104; *United States v. Arvizu* (2002) 534 U.S. 266; *United States v. Knights* (2001) 534 U.S. 112, 118.

not have a reasonable expectation of privacy in the room because hotel management had taken affirmative steps to repossess the room by allowing the police to remove Cunag from the premises, and filing a crime report with the police. Consequently,, the court upheld Cunag's conviction.

Although the Ninth Circuit's motel-hotel "rule" is easy to understand and apply, it is flat wrong. The United States Supreme Court has stated in no uncertain terms that Fourth Amendment privacy expectations are not based on the creation or extinction of property rights. As the Court stated in *Rakas v. Illinois*, "[T]he protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."⁵

Just in case there was any doubt on the subject, the Court pointed out in *Rawlings v. Kentucky*, "*Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment."⁶

Moreover, the courts in *Cunag* and *Bautista* compounded their error by improperly substituting an inflexible, per se "rule" (*Privacy expectations in motel and hotel rooms obtained fraudulently remain reasonable unless management has taken steps to repossess the room*) for an analysis of the circumstances that are relevant in determining whether a particular defendant reasonably expected privacy.⁷ As the U.S. Supreme Court has pointed out, "We have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."⁸

Finally, it should be noted that just one year ago, the United States Supreme Court in *U.S. v. Banks* commented on the Ninth Circuit's seeming preoccupation with devising and applying "rules" as opposed to engaging in a commonsense analysis of the various relevant circumstances.⁹ As the Court said elsewhere in *Banks*, "[The Ninth Circuit's] overlay of a categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes."¹⁰

It is possible that the Ninth Circuit's rule might properly be applied where a guest obtained the room lawfully but then something happened that resulted in a legitimate dispute as to his continued tenancy. But where, as in *Cunag* and *Bautista*, the guest plainly acquired the room by means of fraud, the rule is untenable.

⁵ (1978) 439 US 128, 162. ALSO SEE *O'Connor v. Ortega* (1987) 480 U.S. 709, 740; *United States v. Quinn* (1986) 475 U.S. 791, 793 (mem); *Mancusi v. DeForte* (1968) 392 U.S. 364, 367. COMPARE *U.S. v. Bautista* (9th Cir. 2004) 362 F.3d 584, 590 ["Bautista's rental period had yet to expire when the police searched his room. According to our precedent, unless his occupancy had been lawfully terminated when the police conducted their search, Bautista retained a reasonable expectation of privacy in the room. The critical determination is whether or not management had justifiably terminated Bautista's control of the room through private acts of dominion."].

⁶ (1980) 448 U.S. 98, 105.

⁷ See *Illinois v. Gates* (1983) 462 U.S. 213, 230-1.

⁸ *Ker v. California*, 374 U.S. 23, 33. ALSO SEE *United States v. Banks* (2003) 540 U.S. 31, 36; *Ohio v. Robinette* (1996) 519 U.S. 33, 34.

⁹ See *U.S. v. Banks* (2003) 540 U.S. 31, 41 ["It is hard to be more definite than that, without turning the notion of a reasonable time under all the circumstances into a set of sub-rules as the Ninth Circuit has been inclined to do."].

¹⁰ *U.S. v. Banks* (2003) 540 U.S. 31, 42. ALSO SEE *Ohio v. Robinette* (1996) 519 U.S. 33, 34 ["The [Fourth] Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances. In applying this test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."].