U.S. v. Gardner

(6th Cir. 2018) __ F.3d __ [2018 WL 1788054]

Issue

Did a prostitute have apparent authority to consent to a search of a cell phone she shared with her pimp?

Facts

Gardner enticed a 17-year old girl, identified as B.H., to work for him in Detroit as a prostitute. Between tricks, Gardner and B.H. lived together and used a cell phone to arrange for "dates." Thanks to heavy advertising on over 30 websites, a lot of men called the cell phone's number and arranged meetings with B.H. But, as the result of such blatant advertising, Gardner's enterprise also came to the attention of Detroit's vice squad. As the result, an undercover officer called the cell phone, spoke with both Gardner and B.H. and arranged for a "date" with B.H. at a nearby motel. When B.H. entered the motel room, she was detained by officers.

On a dresser in the room, officers spotted a cell phone which, according to B.H., was hers. She then agreed to let officers search the phone, and she provided them with the passcode. During the search, officers found pornographic photos of B.H. Gardner was later arrested and charged with producing child pornography and trafficking a minor for sex. When his motion to suppress the photos was denied, the case went to trial and the jury found him guilty of both charges.

Discussion

Gardner argued that the photos should have been suppressed because B.H. did not have the authority to consent to the search. The court disagreed.

It is settled that a suspect's spouse, roommate, parent, or other third party may consent to a search of property owned or controlled by the suspect if the consenting person had actual or apparent "common authority" over it.[1] Although the term "common authority" as never been helpfully defined, it is seldom difficult for the courts to determine whether it exists. And *Gardner* was no exception. In ruling that B.H. had common authority over the phone, the court explained, "B.H. used the phone to speak with the customer. She used it throughout the day to arrange the details of the get-together. She had the phone, and on that phone, in her possession during the date. She knew the phone's password. And she gave it to the officers."

As a backup argument, Gardner urged the court to rule that the "consent exception" to the warrant requirement should not apply to cell phones. In support of this argument, he cited the Supreme Court's decision in *Riley v. California*[2] in which the Court acknowledged that searches of cell phones are generally much more intrusive than searches of other objects. As the Court pointed out, "Modern cell phones are not just

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[1] See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 179 [consent is sufficient if it was given by "a third party who possesses common authority over the premises"]; *United States v. Matlock* (1974) 415 U.S. 164, 170 ["[T]he 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."]; *People v. Jenkins* (2000) 22 Cal.4th 900, 971 [search may be reasonable "if a person other than the defendant with authority over the premises voluntary consents to the search"].

[2] (2014) __ US __ [134 S.Ct. 2473, 2495].

another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" In response, the court in *Gardner* said, "We appreciate that cell phones have become singular instruments with singular importance to many people, maybe most people. But the third-party consent exception to the warrant requirement applies to cell phones all the same, just like other essential 'effects' protected by the Fourth Amendment."

Finally, Gardner argued that B.H.'s consent was not voluntary because she was "too frightened" to freely do so, and because she knew she was "in trouble" and an officer had "threatened to get a warrant if she did not consent." In response, the court said, "But the apprehension of 'getting into trouble' presents itself in *every* consent-to-search investigation into illegal conduct."

Consequently, the court affirmed Gardner's conviction.

Comment

After *Riley* was decided in 2014, defendants have argued that the Court's discussion of cells phones and privacy expectations indicated that cell phones are just as "private" as homes—maybe more so. This is preposterous. There is absolutely nothing that is as private as a home, or even nearly as private. As the Supreme Court put it, "[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[3] POV

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[3] *Payton v. New York* (1980) 445 U.S. 573, 585.