

Recent Case Report

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People v. Lucatero

(2008) __ Cal.App.4th __ [2008 WL 4193381]

Issue

Under what circumstances can an officer pose as a prospective home buyer in order to see the interior of a suspect's home?

Facts

After being arrested for possession of methamphetamine, a man told police that he bought the drugs from someone inside a home in Porterville. He described the house and said there were bags containing about four pounds of methamphetamine in the trunk of green Nissan Altima in the garage. He also said that, although the house was vacant, a man had been sleeping in the garage, and that he was using a sleeping bag that he kept on a wooden shelf.

An officer drove by the house and noticed a "For Sale" sign out front. So he called the real estate agent and, posing as a prospective buyer, arranged for a viewing. Accompanied by the agent, the officer confirmed there was a green Altima in the garage and a sleeping bag on a wooden shelf. As this information tended to demonstrate the reliability of the informant, the officer was able to obtain a warrant to search the premises.

Lucatero was inside the house when officers arrived. He was arrested after officers found methamphetamine on his person and in an airbag compartment in the Altima. When Lucatero's motion to suppress the evidence was denied, he pled guilty to possession of methamphetamine for sale, and using a false compartment with the intent to conceal a controlled substance.

Discussion

Lucatero argued that the search warrant was defective because it was based on information that the officer had obtained illegally. Specifically, he contended that the real estate agent's consent to enter the house was invalid because the officer had concealed his true identity and purpose. But the court ruled that, despite the misrepresentation, the entry was lawful because a person who opens up his home to anyone who claims to be a prospective buyer impliedly consents to an entry by any such person, regardless of that person's secret intent.

One reason for the court's ruling was that people who list their homes are fully aware that some of the people who respond will not be good-faith buyers. As the court pointed out, "[N]ot all persons who ask to see a listed house are seriously considering a purchase of the home. Some are doing market comparisons; some are doing research for future home-purchasing decisions; some know they cannot afford the home viewed; and some are acting on a whim or are simply curious."

In addition, Lucatero did not have standing to challenge the officer's entry because the owner had effectively opened the house to anyone who accepted his invitation to look around.¹ In the words of the court, the homeowner "undoubtedly contemplated that members of the public interested in the house, whether bona fide potential buyers or not, could and would be entering the home in the company of a realtor to view the house and its interior."

Consequently, the court ruled that the consent to enter given by a real estate agent to an officer posing as a prospective buyer is adequate so long as the officer confines his tour of the premises to areas and rooms that are reasonably believed to be open for inspection.² Said the court:

We believe an investigating officer may pose as a potential buyer and enter a home under this misrepresentation, assuming the officer's actions do not exceed the scope of the consent. The officer must act as a potential buyer and do nothing that would violate the homeowner's legitimately held privacy expectations . . .

Thus, the court ruled the search warrant was valid and the evidence was admissible.

Comment

It is important to distinguish the officer's entry in *Lucatero* with entries under three similar circumstances. First, if an officer identifies himself truthfully to the real estate agent and explains that he wants to look around a listed home for evidence, the officer's entry would be unlawful. This is because the officer would have known that the agent was exceeding the scope of owner's consent, which is impliedly limited to people who appear to be prospective buyers.

For example, in *People v. Jaquez*³ a real estate agent in San Bernardino notified police that a home she was showing contained a large amount of stereo equipment which she suspected had been stolen. She then permitted an officer to enter for the purpose of confirming her suspicions. As a result, the tenant, Jaquez, was arrested. But the court ruled the officer's entry was unlawful because he knew that the agent's authority was "limited, as is all consensual authority, by the terms of the consent and the purpose for which it was given. A real estate agent is authorized to consent to the entry of persons the agent believes in good faith to be potential purchasers of the property."

The second type of case is one in which an occupant allows an undercover officer to enter for a very limited and specific *lawful* purpose. In such cases, the courts summarily rule that such misrepresentations render the consent ineffective. For example, the courts have invalidated entries by undercover officers who claimed to be repairmen,

¹ **NOTE:** Presumably, Lucatero was lawfully on the premises, otherwise he would not have had standing to challenge the search of the Altima. But the court did not explain his connection to the house.

² ALSO SEE *People v. Jaquez* (1985) 163 Cal.App.3d 918, 928 ["A real estate agent's authority to consent to an entry is not vitiated by some secret, deceptive intent harbored in the mind of the person posing as a potential buyer."]. **NOTE:** There is, in fact, a case in which the Court of Appeal ruled that such an entry was unlawful. In 1981, the court in *People v. De Caro* (1981) 123 Cal.App.3d 454 ruled that an insurance investigator unlawfully entered the defendant's home because he had posed as a prospective buyer. The court in *Lucatero*, however, disagreed with the conclusion of the *De Caro* court, and pointed out that its analysis of the issue was superficial and unsound.

³ (1985) 163 Cal.App.3d 918.

deliverymen, building inspectors, and property managers.⁴ (Thus, if the officer in *Lucatero* had received permission from the owner to view the house as a prospective buyer, his entry would have been unlawful. While there does not seem to be a distinction of constitutional magnitude between these two situations, it is likely that it is based more on fair play than cold logic.)

Finally, there are those situations in which an occupant admits an undercover officer for the purpose of buying drugs or engaging in some other criminal enterprise. These are easy, as the courts have consistently taken the position that defendants who open their homes to people they think are fellow crooks must assume the risk of a setup. Thus, in one such case, *Lopez v. United States*, the Supreme Court ruled that an IRS agent “was not guilty of an unlawful invasion of petitioner’s office simply because his apparent willingness to accept a bribe was not real. He was in the office with [Lopez’s] consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without [Lopez’s] knowledge.”⁵ POV

⁴ See *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9 [“Cases holding invalid consent to entry obtained by ruse or trick all involve some positive act of misrepresentation on the part of officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity.”]; *People v. Reyes* (2000) 83 Cal.App.4th 7, 10 [officer identified himself as the driver of a car that had just collided with the suspect’s car outside his home]; *People v. Mesaris* (1970) 14 Cal.App.3d 71 [officer identified himself as a friend of the Sears repairman who was working inside the defendant’s home]; *People v. Robert T.* (1970) 8 Cal.App.3d 990, 993-4 [consent invalid when apartment manger and undercover officer obtained consent to enter to “check the apartment”]; *People v. Miller* (1967) 248 Cal.App.2d 731 [consent to open door invalid when apartment manager knocked on defendant’s door and said, “You have a caller,” at which point the defendant opened the door and officers [the “caller”] saw evidence in plain view]; *People v. Hodson* (1964) 225 Cal.App.2d 554 [officer knocked on defendant’s apartment door and, when defendant said “Who is it?” said he was the manager, at which point defendant opened the door].
⁵ (1963) 373 U.S. 427, 438. ALSO SEE *Hoffa v. United States* (1966) 385 U.S. 293 [“Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. [Hoffa], in a word, was not relying on the security of the hotel room; he was relying on the misplaced confidence that Partin would not reveal his wrongdoing.”]; *U.S. v. Bullock* (5th Cir. 1979) 590 F.2d 117 [undercover ATF agent obtained consent from Bullock, a Ku Klux Klan member, to enter Bullock’s house to discuss joining the Klan].