Recent Case Report

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U.S. v. Perea-Rey

(9th Cir. 2012) __ F.3d. __ [2012 WL 1948973]

Issues

(1) Did a federal agent's entry into an enclosed carport constitute a "search"? (2) If so, was the search lawful?

Facts

Border Patrol agents saw a man illegally enter the United States from Mexico by climbing over a border fence. They followed the man, Pedro Garcia, to a home in Calexico where he opened a gate, walked to the front porch and knocked on the door. The resident of the home, Heriberto Perea-Rey, answered the door and gestured for Garcia to go to a carport on the side of the house. (A photo of the house, gate, and carport is included at the end of this report.)

One of the agents followed Garcia into the carport and detained him. He also detained Perea-Rey who had apparently entered the carport from a side door leading to the house. The agent then knocked on the side door and commanded everyone in the house to step outside. Six men did so. After determining that the men were illegal aliens, the agents arrested Perea-Rey for harboring them.

Perea-Rey filed a motion to suppress the agent's observation of the illegal aliens leaving his house. The district court denied the motion, and Perea-Rey pled guilty. He then appealed the suppression ruling to the Ninth Circuit.

Discussion

Perea-Rey contended that the agent's warrantless entry into the carport constituted a "search," and that it was an illegal search because it was not covered by any of the exceptions to the warrant requirement. The court agreed.

A "SEARCH"? The first issue was whether the agent's act of walking into Perea-Rey's carport constituted a "search" under the Fourth Amendment. For the past 45 years, the term "search" has been defined as an intrusion into a place or thing that infringed on a person's reasonable expectation of privacy.[1] But, as we discussed in the Spring 2012 *Point of View*, the United States Supreme Court ruled in *U.S. v. Jones* that a search also occurred when (1) officers "physically occupied private property" (i.e., trespassed on the property), and (2) their objective was to obtain information.[2] In applying this definition of "search," the court in *Perea-Rey* ruled that a trespass onto private property will result if officers, without having permission, physically entered the home or its "curtilage." Said

[1] See *Maryland v. Macon* (1985) 472 U.S. 463, 469 ["A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."]; *Katz v. U.S.* (1967) 389 U.S. 347, 353 [a "search" occurs if the Government's activities "violated the privacy upon which [the defendant] justifiably relied"]; *Illinois v. Andreas* (1983) 463 U.S. 765, 771 ["If the inspection by the police does not intrude upon a legitimate expectation of privacy, there is no 'search'"].

[2] (2012) __ U.S. __ [132 S.Ct. 945, 949].

the court, "Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches."

Although the term "curtilage" is vague and has little significance nowadays, as a practical matter it ordinarily means the front, back and side yards, plus the driveway.[3] Thus, it was apparent that the agent's act of entering Perea-Rey's front yard, walking over to the carport and entering it was a trespass into the curtilage, which therefore constituted a "search." (Note that the agent's act of entering the carport would also have constituted a search under the traditional definition of the term.)

WAS THE SEARCH ILLEGAL? Like any warrantless search, the agent's search of Perea-Rey's carport would be illegal unless one of the exceptions to the warrant requirement applied, such as consent or exigent circumstances. But none did, and therefore the entry was illegal. Consequently, the court ruled that the agent's observation of the illegal aliens in Perea-Rey's home was the fruit of an illegal search, and that it should have been suppressed.

Comment

There are two things about this decision that should be noted. First, even though a search now occurs when officers walk up to the front door of a home, it would be a legal search because officers, like anyone else, may walk along pathways and other areas on private property to which visitors had been given implied permission to enter. Thus, the court in *Perea-Rey* pointed out that "the knock and talk exception authorizes officers to enter the curtilage to initiate a consensual conversation with the residents of a home."[4] Consequently, if the Border Patrol agent had seen the illegal aliens leaving the house while he was on the pathway leading from the gate to the front porch, the doctrine of implied consent would have rendered his presence there lawful. But because there is no implied permission to enter semi-enclosed carports, the search was unlawful.

Second, regardless of which definition of "search" a court applies, a defendant will still be unable to challenge its legality unless he had a reasonable expectation of privacy in the place or thing that was searched.[5] POV

[3] See *United States v. Dunn* (1987) 480 U.S. 294, 300.

[4] ALSO SEE *People v. Thompson* (1990) 221 Cal.App.3d 923, 943 ["An officer is permitted the same license to intrude as a reasonably respectful citizen."]; *People v. Zichwic* (2001) 94 Cal.App4th 944, 953 ["Just like any other visitor to a residence, a police officer is entitled to walk onto parts of the curtilage that are not fenced off."].

[5] See *Rakas v. Illinois* (1978) 439 US 128, 132 ["The concept of standing … focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was himself the "victim" of the search or seizure."]; *United States v. Payner* (1980) 447 U.S. 727, 731 ["[A] court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights."].