

U.S. v. Cacace et al.

(2nd Cir. 2015) 796 F.3d 176

Issues

(1) Did the wife of a mafia boss give an FBI operative valid consent to enter her home? (2) Did the operative exceed the scope of consent when she stole an address book and, if so, was she then acting as a police agent or a private citizen?

Facts

In the course of an FBI investigation into the mafia's operations in New York, several members of the Colombo crime family were indicted on charges including conspiracy, murder, and racketeering. The defendants included Thomas Gioeli (aka Tommy Shots, aka Tommy Machines), and Dino Calabro (aka Big Dino). Before trial, Calabro and his wife began cooperating with the FBI. Later, Ms. Calabro notified an FBI agent that she could obtain photos of Gioeli and other mafia "captains" that were taken by Gioeli's wife at various social events. She also explained that she and Ms. Gioeli were friends and that Ms. Gioeli had offered to loan her the photos. Because the photos could help establish a conspiracy, the FBI agent told her to go ahead, but he instructed her not to take anything without Ms. Gioeli's permission.

While Ms. Calabro was visiting Ms. Gioeli at her home, and as they looked at the photo albums, Ms. Gioeli left the room for a few minutes during which time Ms. Calabro stole an address book which she gave to the FBI agent. Some of the information in the book was later used by the agent to obtain a warrant to search the Gioelis' home. During the search, agents seized photo albums, address books, cell phones, and wallets containing business cards." The seized items were used by prosecutors in the trial of Gioeli, Calabro, and several others. Gioeli was convicted of three counts of conspiracy to commit murder and was sentenced to 224 months in prison.

Discussion

On appeal to the Second Circuit, Gioeli argued that the address book should have been suppressed because (1) Ms. Calabro's consensual entry into his home was invalid because she had misrepresented the true purpose of her visit; and (2), even if the consent was effective, Ms. Calabro's theft of the address book exceeded the scope of consent.

VALID CONSENT? As a general rule, when an undercover officer or other police agent obtains consent to enter a suspect's home, the consent is effective even though the operative or officer had misrepresented his true purpose. That is because consent to enter or search, unlike a waiver of constitutional rights, need not be "knowing and intelligent."¹

There are, however, limits. But these limits are based, not on rigid rules, but on whether the officer or operative had lied about the fundamental nature of the intrusion. As the Ninth Circuit explained, "Not all deceit vitiates consent. The mistake must extend to the essential character of the act itself rather than to some collateral matter which merely operates as an inducement."² For example, an undercover officer who obtains a drug dealer's consent to enter his home to buy drugs has not lied about the fundamental

¹ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 243 ["[I]t would be next to impossible to apply to a consent search the standard of an intentional relinquishment or abandonment of a known right or privilege."].

² *Theofel v. Farley-Jones* (9C 2004) 359 F3 1066, 1073. Edited.

nature of his intrusion because he did, in fact, enter for the purpose of buying drugs or at least speaking to the suspect about doing so. Although he lied about his underlying motivation, this was immaterial because whenever a person admits a visitor into his home, he can never be certain of the visitor's true purpose. In contrast, consent given to an undercover officer has been deemed ineffective when he claimed he was a deliveryman, building inspector, or property manager; or when the officer truthfully identified himself but claimed he needed to enter because he had received a tip that a bomb had been hidden inside.³

Applying these principals, the court in *Cacace* ruled that Ms. Calabro had initially obtained valid consent because she did, in fact, want to enter for the purpose of looking at photo albums and borrow photos; she merely did not reveal her purpose for doing so. And because her misrepresentation did not extend to the "essential character" of the intrusion, the entry was consensual.

SCOPE OF CONSENT: Even if an officer or operative has made a lawful consensual entry into a house, the entry may become unlawful if he did something that exceeded the scope of consent. As the Supreme Court explained, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer [or operative] and the suspect?"⁴ Applying this standard, it is clear that Ms. Calabro did not exceed the scope of consent when she entered the house, viewed the photo albums and borrowed some photos. The theft of the address book, however, was not consensual and therefore exceeded the scope of consent.

Nevertheless, the court ruled the address book was admissible because, as a general rule, there can be no Fourth Amendment violation if evidence was obtained by a civilian who was not working as a police agent. And when Ms. Calabro stole the book, she was no longer a police agent because she was disobeying the explicit instructions of the FBI agent. Said the court, "Mrs. Calabro exceeded the scope of her government agency; the government did not know of her intent to do so; and, as far as we can ascertain from the record, it had no reason to suspect that she might do anything more than borrow photographs with Ms. Gioeli's permission."⁵

For these reasons, the court ruled the search warrant was valid and the evidence seized during its execution was seized lawfully. POV

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³ See *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9; *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]; *In re Robert T.* (1970) 8 Cal.App.3d 990, 993-94 [apartment manger and undercover officer obtained consent to enter to "check the apartment"]; *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]; *U.S. v. Harrison* (10th Cir. 2011) 639 F.3d 1273, 1280 [officers lied that they sought to enter to investigate a report of bombs on the premises].

⁴ *Florida v. Jimeno* (1991) 500 U.S. 248, 251.

⁵ Also see *People v. Dement* (2011) 53 Cal.4th 1, 35 [officer "specifically told him that he was not to elicit information from defendant on our behalf"].