

Recent Case

People v. Wilkinson

(2008) __ Cal.App.4th __ [2008 WL 2441101]

ISSUES

(1) Was a person acting as a police agent when he went into the defendant's bedroom, seized several computer discs, and viewed their contents? (2) If not, did officers conduct an illegal search when they viewed the discs?

FACTS

Joseph Wilkinson and Jessica Schultze shared an apartment in Sacramento. At some point, Wilkinson entered Jessica's bedroom and modified her computer and webcam so as to secretly record her activities in the room when she was alone or with her boyfriend Harry Sadler. One day Sadler discovered a video file on the computer that showed Wilkinson entering the room when Jessica was gone. Investigating further, Sadler determined that someone had deleted video files on the computer and had repositioned the webcam so as to provide a view of Jessica's bed.

Suspecting Wilkinson, Sadler and Jessica notified Sacramento police. The officer who was dispatched to the call met with Sadler and Jessica, then spoke with Wilkinson and asked if he would consent to a search of his room. He refused. When the officer notified Sadler and Jessica, Sadler asked if he could search Wilkinson's room when Wilkinson was away. The officer testified that he responded, "Well, you can do whatever you want. It's your apartment. But keep in mind, you cannot act as [my] agent . . . I cannot ask you to go into the room, nor can you go into the room believing that you're doing so for myself."

After the officer and Wilkinson left, Sadler entered Wilkinson's room, picked up 15 to 20 discs, and viewed three to five of them on Jessica's computer. The discs contained images of Jessica and Sadler undressing and "some sexual content." Sadler then reentered Wilkinson's room, took all the discs he could find and played five to seven of them. According to the court, these discs contained images of Sadler and Jessica engaging in "sexual conduct."

Sadler reported these discoveries to the officer who had initially responded. He also showed the officer the images on two of the discs he had viewed. When the officer said he would need to see images of Sadler and Jessica having sexual intercourse, Sadler asked if he could "look through more of them" to find what the officer needed. The officer responded, "Yeah," at which point Sadler looked through seven to ten more discs and found some images which were sufficiently graphic.

The officer took the discs back to the station where a detective viewed "several" of them which showed Sadler and Jessica "having sex." The detective then brought Wilkinson to the station and told him what he had seen on the discs. In the course of the interview, Wilkinson explained how he had obtained the images, and he consented to a search of his room. He was subsequently charged with burglary, eavesdropping, and unauthorized access and taking of computer data.

When Wilkinson's motion to suppress the images was denied, he pled no contest to burglary pursuant to a plea agreement.

DISCUSSION

Wilkinson contended that the images should have been suppressed because, (1) Sadler was acting as a police agent when he seized the discs from his room, and (2) even if Sadler was not a police agent, the officer's act of viewing the discs without a warrant constituted an illegal police search.

SADLER'S FIRST SEARCH: As noted, before the officer departed, Sadler asked if he (Sadler) could search Wilkinson's room for computer discs in order to determine whether Wilkinson had copied any files containing images from Jessica's room. The officer replied, "Well, you can do whatever you want. It's your apartment. But keep in mind, you cannot act as [my] agent . . . I cannot ask you to go into the room, nor can you go into the room believing that you're doing so for myself." After the officer left, Sadler entered Wilkinson's room, picked up 15 to 20 discs, viewed a few of them on Jessica's computer, and saw some that contained images of Jessica and Sadler undressing and "some sexual content."

Wilkinson argued that these images should have been suppressed because the officer's response to Sadler's question rendered Sadler a police agent as it constituted police authorization to search. The court pointed out, however, that a private citizen will not be deemed a police agent unless officers "knew of and acquiesced in the private search."¹ In other words, "there must be some evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional." For these reasons, the court ruled that the officer's comments did not transform Sadler into a police agent at that point and, therefore, the images he discovered during his first search were not suppressible.

THE OFFICER'S FIRST SEARCH: As noted, when the officer returned to the apartment, he viewed images on some of the discs that Sadler had obtained from Wilkinson's room. Although Sadler was not a police agent at that point, the officer's act of viewing the contents of the discs constituted a police search because the images were not in the officer's plain view; i.e., he either asked Sadler to show him the images, or did so on his own.

Even so, the courts have ruled that when a civilian provides an officer with evidence that is inside a closed container or which is otherwise not exposed to plain view, the officer's act of opening the container or exposing the evidence without a warrant does not constitute a search if the officer viewed only those things that the citizen had already seen. The theory here is that the owner of the evidence had lost whatever reasonable expectation of privacy he might have had.

The court then ruled that, per Sadler's testimony at the motion to suppress, he only showed the officer "the images that I had already found and looked at." Thus, the officer's act of viewing the images did not constitute a search, which meant the images were admissible.

SADLER'S SECOND SEARCH: Sadler's second search occurred a few minutes later after the officer told him that he needed to see if there were any images of Sadler and Jessica having sexual intercourse. Sadler responded by asking if he (Sadler) could "look through more of them" to find what the officer needed. The officer responded, "Yeah," at which point Sadler looked through seven to ten more discs and found some images that were sufficiently graphic. He then gave these discs to the officer. But the court ruled that these

¹ See *U.S. v. Jacobsen* (1984) 466 U.S. 109, 113 [private citizen may be a police agent if he acted "with the participation" of an officer]; *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 937 [private citizen may be a police agent if he "obtained significant aid from state officials"].

images should have been suppressed because the officer's comment constituted express authorization to search, which rendered Sadler a police agent.²

THE DETECTIVE'S SEARCH: Finally, a detective viewed the images from several discs at the police station. Although this was obviously a police action, his viewing of the images would not have constituted a search if Sadler or Jessica had already seen them. The problem, said the court, was that there was insufficient evidence presented at the motion to suppress for it to determine precisely what images Sadler had viewed (other than those he saw during his first search). Consequently, the court ruled that images viewed by the detective should have been suppressed.

COMMENT

Two things should be noted. First, regarding Wilkinson's confession and consent to search, the court remanded the case back to the trial court to determine whether they were the tainted product of the illegal searches. Second, the suppression of the images in this appeal will probably have little, if any, affect on strength of the case against Wilkinson. This is because the evidence found in Jessica's computer and the large number of images that were ruled admissible would suffice to prove what Wilkinson had done and how he did it. POV

² See *People v. Bennett* (1998) 17 Cal.4th 373, 384, fn.3 [civilian was acting at an officer's request]; *Dyas v. Superior Court* (1974) 11 Cal.3d 628, 633, fn.2 [exclusionary rule applies if officers "requested the illegal search"]; *Stapleton v. Superior Court* (1968) 70 Cal.2d 97, 102 ["[The civilian] entered petitioner's house at the request and as an agent of the police."]; *People v. Tarantino* (1955) 45 Cal.2d 590 [officer requested a sound engineer to plant a bug in a suspect's hotel room]; *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 325 ["Although the private person was the immediate actor, police participation in planning and implementation subjected the expedition and its product to [suppression]."]; *People v. Fierro* (1965) 236 Cal.App.2d 344 [officer requested motel manager to search the defendant's motel room]; *People v. De Juan* (1985) 171 Cal.App.3d 1110, 1120 [search at officers' "behest or instigation"]; *People v. Scott* (1974) 43 Cal.App.3d 723, 726 [citizen "hired and paid by the police"]; *People v. Leighton* (1981) 124 Cal.App.3d 497, 501 ["the police direct[ed] the private citizen to conduct the search"].