

U.S. v. Spivey

(11th Cir. 2017) __ F.3d __ [2017 WL 2782852]

Issue

Under what circumstances will consent to enter a residence be invalidated if officers lied about their objective?

Facts

Caleb Hunt was a burglar. One day while burglarizing a house in south Florida, he happened to notice some things that indicated the residents were engaged in a major identity theft operation. Among other things, he saw a credit card embossing machine and a lot of credit cards. More important (and not coincidentally, he thought), he noticed that the house contained an exceptionally large amount of high-end merchandise. Hunt, who did not subscribe to the notion of “honor among thieves,” then removed the merchandise from the premises and made a mental note that he ought to burglarize this place again. And so he did, and the second burglary was just as successful as the first. But his luck ran out shortly thereafter when he was apprehended while burglarizing another home.

While in jail, Hunt considered his options and eventually concluded that the best one was to snitch off the owners of the house and try to get a reduced sentence. So, he met with agents from the South Florida Organized Fraud Task Force and explained that he had seen “so much high-end merchandise in the house that he burgled it twice.”

In order to confirm Hunt’s story and obtain probable cause, the agents went to the house and spoke with the residents, Eric Spivey and Chenequa Austin. One of the agents identified himself as a burglary investigator and the other said he was a crime-scene technician. Spivey and Austin were happy to see that the police were taking such an interest in the burglaries and so they invited them inside to conduct their investigation. While the “crime-scene technician” pretended to dust for latent prints, the other agent was given a tour through the premises during which he saw the embossing machine, “stacks of credit cards” and “large quantities of expensive merchandise such as designer shoes and iPads.” Spivey and Austin were later arrested and, when their motion to suppress the evidence was denied, they pled guilty to several federal crimes, including aggravated identify theft.

Discussion

Although Spivey and Austin freely consented to the officers’ entry into their home, they argued that their consent was invalid because the officers lied about their purpose. The court rejected the argument.

There is nothing new or shocking about an officer’s use of deception to obtain entry into a suspect’s home. Undercover narcotics officers do it all the time. In these cases, the courts take the position that criminals who invite “fellow criminals” into their homes for an illicit purpose are knowingly taking a chance that the fellow criminal is actually an officer or informant.¹

¹ See *Lewis v. United States* (1966) 385 U.S. 206, 211 [“A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.”]; *Hoffa v. US* (1966) 385 U.S. 293.

In contrast, a consensual entry will be invalidated if the officer lied about his identity and claimed to have a legitimate reason for entering. Thus, the courts have ruled that a suspect's consent to enter his home was ineffective when the officer obtained entry by claiming he was the driver of a car that had just collided with the suspect's car outside his home,² or when the officer identified himself as a friend of the Sears repairman who was currently working inside the house.³ As the California Supreme Court observed, cases in which consent was deemed ineffective "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."⁴

The situation in *Spivey*, however, was different because the officers truthfully identified themselves but lied only about the purpose of their entry. Although this was a somewhat unusual scenario, the court ruled this type of deception was not objectionable because the officers did not lie about their identity (they said they were officers) or the nature of the intrusion (they said they wanted to enter the home). As the Ninth Circuit explained, "Not all deceit vitiates consent. The mistake must extend to the essential character of the [intrusion] itself rather than to some collateral matter which merely operates as an inducement."⁵

There is, however, an exception to this rule. Specifically, a consensual entry by a known officer is ineffective if it was induced by an officer's misrepresentation that he needed to enter because of some emergency. For example entries have been invalidated when officers told the consenting person that they had received a report that there was a bomb on the premises or that they needed to come inside and look for a missing child.⁶

One last thing. Although the court in *Spivey* ruled the officers' entry was lawful, it had reservations about the "crime scene tech" scam. Said the court, "Pretending to be a crime-scene technician and to dust for fingerprints was perhaps silly and unnecessary, but it was relatively insignificant." POV

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² *People v. Reyes* (2000) 83 Cal.App.4th 7, 10.

³ *People v. Mesaris* (1970) 14 Cal.App.3d 71.

⁴ *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9.

⁵ *Theofel v. Farley-Jones* (9th Cir. 2004) 359 F.3d 1066, 1073.

⁶ See *U.S. v. Cacace* (2nd Cir. 2015) 796 F.3d 176, 189; *U.S. v. Harrison* (10th Cir. 2011) 639 F.3d 1273, 1280.