

# Recent Case Report

## **U.S. v. Fay**

(9<sup>th</sup> Cir. June 3, 2005) \_\_ F.3d \_\_ [2005 WL 1313516]

### **ISSUE**

Did Fay have a reasonable expectation of privacy in a bag containing a gun that was located inside his girlfriend's apartment?

### **FACTS**

Mandy Ortiz and Corey Fay lived together in Las Vegas, in an apartment rented by Ortiz. One day during a heated quarrel, someone reported the disturbance to Las Vegas police. When officers arrived, Ortiz told one of them there was a warrant out for Fay's arrest and that he had a gun in the apartment. When the officer confirmed the warrant, he arrested Fay.

At that point, Ortiz told the officers she wanted Fay's gun "out of her house." She then showed them a bag on a shelf in the laundry room and said the gun was inside it. One of the officers reached up and retrieved the bag. As he did so, he noticed it was open and there was a box of ammunition inside it. Although he did not see a gun through the opening, he could see the outline of one on the surface of the bag.

The officer then obtained a warrant to search the bag and, thereafter, seized the gun. Fay was charged with being a felon in possession of a firearm.

### **DISCUSSION**

Fay argued that the officer's act of lifting the bag, thereby exposing the outline of his gun, constituted an illegal "search" and, therefore, the gun should have been suppressed. It seems apparent that, even if it were a "search,"<sup>1</sup> it was not illegal because Ortiz had apparent authority to consent to it.<sup>2</sup>

In any event, the court did not address this issue because it ruled that no "search" occurred. This was because a search results only if officers look inside a place or thing in which there is a reasonable expectation of privacy.<sup>3</sup> Here, however, Fay could not

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<sup>1</sup> See *Arizona v. Hicks* (1987) 480 U.S. 321, 324 ["Officer Nelson's moving of the equipment, however, did constitute a 'search'"].

<sup>2</sup> See *Illinois v. Rodriguez* (1990) 497 U.S. 177 [consent to search a place or thing may be given by the suspect's spouse, roommate, parent, child, or other third person if officers reasonably believed the consenting person had common authority over the place or thing].

<sup>3</sup> See *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' subject to the Warrant Clause."]; *United States v. Jacobsen* (1984) 466 U.S. 109, 113 ["A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."]; *Segura v. United States* (1984) 468 U.S. 796, 806; *Kyllo v. United States* (2001) 533 U.S. 27, 33 ["[A] Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—

reasonably expect the contents of the bag would remain private because the bag was open and located “on a shelf in a common laundry room” to which Ortiz had unlimited access.

Fay’s conviction was affirmed.

**DA’s COMMENT**

The interesting thing about this case is the concurring opinion written by the same judge who wrote the majority opinion, Circuit Judge John Noonan. The judge pointed out that it was unnecessary for the court to have decided the case based on where the bag was located and whether it was open or closed. Instead, it could have simply ruled that if a houseguest tells his host that he has stolen property, guns, or other contraband in a container, and if he brings that container into the host’s house, he simply has no reasonable expectation that the host will not ask to police to “get it out of here.” As Judge Noonan observed:

A guest who brings to his host’s home drug paraphernalia and tells his host that he’s hiding it in the closet has no reason to believe that his host will not telephone the police and tell them to pick the paraphernalia up. . . . On what possible basis can a man committing a crime and admitting that he is doing the criminal deed claim that his confidant should preserve his secret?

What’s remarkable here is that the other two judges on the panel did not join in Judge Noonan’s opinion which, it seems to us, was profoundly sensible. POV

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unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable.”].