Recent Case Report

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People v. Fernandez

(2012) 208 Cal.App.4th 100

Issue

If a resident of a house consents to a search, is the search unlawful if officers had just arrested another resident who, if he had not been arrested and removed from the scene, would have certainly objected to the search?

Facts

At about 11 A.M., a man armed with a knife robbed and stabbed a young man in a high-gang area of Los Angeles. As LAPD officers arrived, they were approached by a man who pointed to a certain apartment and said, "The guy is in the apartment." Just then, a man ran into the apartment, and he matched a general physical and clothing description of the robber. Shortly after that, the officers heard a woman in the apartment scream, followed by the sounds of fighting.

After backup arrived, officers knocked on the door which was answered by a woman named Roxanne Rojas. The officers noticed a "fresh" injury to Ms. Rojas's face and other indications that she had just been beaten. When they asked her to step outside so that they could search for the robber, Walter Fernandez, the man who had just run inside, stepped from behind her and said, "You don't have any right to come in here. I know my rights." The officers promptly arrested Fernandez and removed him from the apartment.

After the robbery victim ID'd Fernandez at a field showup, officers returned to the apartment and obtained Ms. Rojas's consent to search the premises. The search netted, among other things, gang indicia that prosecutors used in court to prove the robbery was gang-related. When officers asked Ms. Rojas about the screaming from the apartment, she said that Fernandez had just beat her. After the trial court denied Fernandez's motion to suppress the evidence, the case went to trial and Fernandez was found guilty of, among other things, robbery (with a gang enhancement) and inflicting corporal injury on a cohabitant. He was sentenced to 14 years in prison.

Discussion

Fernandez argued that the evidence obtained as the result of the consent search should have been suppressed because it was obtained in violation of the U.S. Supreme Court's decision in *Georgia v. Randolph*.[1] In *Randolph*, the Court ruled that if one spouse consents to a search of the family home, but the other spouse objects to the search, officers may not search the premises if the following three circumstances existed:

(1) **SEARCH TO OBTAIN EVIDENCE**: The purpose of the officer's entry or search must have been to search for evidence against the objecting cohabitant.

(2) **EXPRESS OBJECTION**: The nonconsenting cohabitant must have affirmatively voiced an objection.

(3) **OBJECTION IN OFFICERS' PRESENCE**: The nonconsenting cohabitant must have voiced his objection in the officers' presence when they sought to enter or search.

[1] See (2006) 547 U.S. 103.

Although the first two requirements were met here, the third was not. That was because Fernandez was not present when officers sought consent from Ms. Rojas—he had been arrested and was presumably locked in a patrol car down the street. But Fernandez argued that this didn't matter because the Supreme Court in *Randolph* also ruled that officers may not remove a suspect from his home for the purpose of preventing him from objecting.[2] This was, of course, irrelevant because the officers had removed Fernandez from the apartment, not to prevent an objection to a search, but because he had been arrested and would be booked into jail.

Undaunted, Fernandez urged the court to rule that, regardless of the officer's purpose in removing the nonconsenting cohabitant, a consent search is unlawful under *Randolph* if he was unable to object to the search because he had been arrested and removed from the residence before the officers sought consent. Although there is nothing in *Randolph* that would support such an interpretation (and much that would refute it), that is exactly what a panel of the Ninth Circuit ruled in 2008 in the controversial case of *U.S. v. Murphy*.[3]

Fernandez urged the court to adopt the *Murphy* court's reasoning but it declined because *Murphy* was an imprudent decision.[4] After pointing out that "[f]our federal circuit courts and at least two state Supreme Courts" had also rejected the *Murphy* court's analysis[5] [to our knowledge, no circuit court has agreed with it] the court in *Fernandez* joined the majority and ruled that if the objecting cohabitant was not present when officers obtained consent, the search will not be invalidated under *Randolph* on grounds that the reason the objecting cohabitant was not present was that the officers had arrested him and removed him from the scene. Said the court, "As in *Randolph*, the line we draw is a clear one, distinguishing between cases in which a defendant is present and objecting to a search, and those in which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence." Consequently, the court ruled that Ms. Rojas's consent was valid, and that the evidence discovered during the search was properly admitted.

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[2] *Georgia v. Randolph* (2006) 547 U.S. 103, 120 ["So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding possible objection"].

[3] (2008) 516 F.3d 1117.

[4] **NOTE**: Murphy was written by Judge Stephen Reinhardt who, for good reason, is reputed to be the most overruled judge in the history of the United States.

[5] Citing *U.S. v. Hudspeth* (8th Cir. 2008) 518 F.3d 954; *U.S. v. Henderson* (7th Cir. 2008) 536 F.3d 776; *U.S. v. Shrader* (4th Cir. 2012) 675 F.3d 300; *U.S. v. Cooke* (5th Cir. 2012) 674 F.3d 491; *People v. Strimple* (Colo. 2012) 267 P.3d 1219; *State v. St. Martin* (Wis. 2011) 334 Wis.2d 290. Similar rulings were announced in the following cases: *U.S. v. Alama* (8th Cir. 2007) 486 F.3d 1062, 1066 ["Alama was arrested and removed from the scene. At this point, he was like the co-occupant under arrest in a nearby squad car whose consent to search was not required in Matlock."]; *U.S. v. DiModica* (7th Cir. 2006) 468 F.3d 495, 500 ["The officers did not remove DiModica to avoid his objection; they legally arrested DiModica based on probable cause that he had committed domestic abuse."]; *U.S. v. Parker* (7th Cir. 2006) 469 F.3d 1074, 1078 ["[There was no evidence] that the police had taken [defendant] into custody as a mechanism for coercing Johnson's consent. So Johnson's consent to the search was valid as against Parker."]; *U.S. v. Wilburn* (7th Cir. 2007) 473 F.3d 742, 745 ["Wilburn was validly arrested and he was lawfully kept in a place—the back seat of a squad car—where people under arrest are usually held."].

Comment

We think that *Fernandez* could also be interpreted to mean that a suspect's objection to a search of his home is ineffective under *Randolph* unless it was made just before or at the time the officers sought and obtained consent from the co-resident. Remember that the officers in *Fernandez* did not initially seek consent from Ms. Rojas when they knocked on the door. Instead, they told her they were going to conduct a sweep, at which point Fernandez stated his objection to the search and was arrested. Thus, his objection was not contemporaneous with the officer's request for consent to search, which occurred after Fernandez had been removed from the scene. Also note that such an interpretation would be consistent with the *Miranda* rule that an invocation is ineffective if it was not made just before or during custodial interrogation.[6] POV

[6] See *Bobby v. Dixon* (2011) __ US __ [132 S.Ct. 26, 29] ["And this Court has never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation."]; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn.3 ["Most rights must be asserted when the government seeks to take the action they protect against."].