Recent Case Report

U.S. v. Henderson

(7th Cir. 2008) __ F.3d __ [2008 WL 3009968]

ISSUE

If one spouse consents to a search of the family home but the other spouse objects, can officers conduct a search after the objecting spouse was lawfully arrested and removed from the premises?

FACTS

Patricia Henderson phoned 911 in Chicago and reported that her husband had just choked her and had thrown her out of the family home. When officers arrived they spoke with her on the front lawn where she explained what had happened and said she wanted the officers to arrest her husband. Having noticed "red marks" around Patricia's neck, the officers entered the house where they encountered Henderson who told them to "get the fuck out of my house."

After arresting Henderson and removing him from the premises, the officers obtained Patricia's consent to search the attic where officers found crack cocaine, sales paraphernalia, and firearms. As the result, Henderson was charged with possession with intent to distribute and various firearms-related offenses.

DISCUSSION

Henderson argued that his wife's consent to search was invalid, citing the United States 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 objects, the consent is invalid if both of the following circumstances existed:

(1) **OBJECTION IN OFFICERS' PRESENCE**: The objecting spouse must have voiced the objection in the officers' presence when they sought to enter or search.

(2) **OBJECTIVE TO OBTAIN EVIDENCE**: The purpose of the officer's entry or search must have been to obtain evidence against the objecting spouse.

Although both of these requirements were met,[2] the court ruled that a spouse's objection loses its force if, before the search occurred, the objecting spouse was lawfully arrested and removed from the premises. Said the court, "Here, it is undisputed that Henderson objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did."

Consequently, the court ruled the search was lawful and the evidence was admissible.

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

[2] **NOTE**: The court ruled that Henderson's statement—"get the fuck out of my house"—constituted an objection to the search.

COMMENT

Last February, a panel of the Ninth Circuit ruled in *U.S.* v. *Murphy*[3] that an objection to a search made by a temporary occupant of a storage locker remained effective even though the objector had been lawfully arrested for processing methamphetamine in the unit and was sitting in jail when the renter of the unit consented. As we explained in the Summer 2008 edition, the panel's analysis was not only unsound, it ignored the *Randolph* Court's instructions that its ruling must be limited to the unique facts of the case.

The court in *Henderson* was also critical of the *Murphy* court's disregard of the Supreme Court's express instructions. As the court pointed out, *Murphy* "essentially reads the presence requirement out of *Randolph*" even though the Supreme Court "went out of its way to limit its holding to the circumstances of the case: a disputed consent by two then-present residents with authority." It also noted the patent absurdity of *Murphy's* conclusion that "a one-time objection by one [co-tenant] is sufficient to permanently disable the other from *ever* validly consenting to a search of their shared premises."

One other thing. The Court said in *Randolph* that officers may not remove a co-tenant from the residence for the purpose of preventing him from objecting.[4] This was not, however, an issue in *Henderson* because, as noted, the officers removed Henderson for the purpose of taking him to jail after they had lawfully arrested him.[5] POV

[3] (9th Cir. 2008) 516 F.3d 1117.

[4] At p. 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 . . . "].

[5] See *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."].