

U.S. v. Thompson

(7th Cir. 2016) __ F.3d __ [2016 WL 384860]

Issues

(1) When an informant or undercover officer is invited into a suspect's home to plan or commit a crime and, while inside, he uses a hidden audio and video device to record everything he saw and heard, is such an operation illegal because the suspect had not expressly consented to the recording? (2) In any event, should such warrantless recording be deemed unlawful because it constitutes such an extreme invasion of privacy?

Facts

A police informant was enlisted by a drug task force in La Crosse, Wisconsin to attempt to buy crack cocaine from some traffickers in the area. Later the informant phoned one of the traffickers and spoke with a man later identified as Aaron Thompson who told the informant to drive to a certain apartment where Thompson would sell him the drugs. Officers then equipped the informant with two miniaturized audio-video recorders.

When the informant arrived, Thompson invited him inside and the informant handed him \$400. While the informant waited just inside the front door, Thompson walked over to an adjacent bathroom and opened the door, at which point someone in the room handed him the drugs and Thompson handed them to the informant. The informant then left. From where the informant was standing he could see and hear everything that the two devices had recorded.

Based on this information, the officers obtained a warrant and searched the apartment where they found more crack cocaine. Thompson was arrested and, when his motion to suppress the video recordings was denied, he pled guilty.

Discussion

Although Thompson consented to the informant's entry, he argued that, since he had not expressly consented to the audio and video recording, the recording should be suppressed. In addition, he argued that any warrantless use of a video recording device inside a home is unlawful because it constitutes an extraordinary invasion of privacy. The court disagreed with both arguments.

SCOPE OF CONSENT: Officers and police informants who have obtained a suspect's consent to enter his home are not permitted to do anything they were not expressly or impliedly authorized to do by the consenting person. And in determining whether they had complied with this rule, the courts apply a "reasonable person" test. This means that the officer's or informant's presence in the room—and any recording conducted from there—is lawful if he remained in areas to which he was expressly or impliedly invited. As the Supreme Court observed, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"¹

Applying this rule, the court ruled that the informant did not exceed the permissible scope of Thompson's invitation to enter because he stayed just inside the front door,

¹ *Florida v. Jimeno* (1991) 500 US 248, 251.

which Thompson had invited him to do. As the court put it, “Thompson invited the informant into the apartment for the purpose of engaging in a drug transaction. While there, the informant did not see, hear, or take anything that was not contemplated as part of the illegal drug transaction.”

INTRUSIVENESS OF VIDEO RECORDING: Thompson also urged the court to rule that any warrantless use of a hidden video recorder should be deemed illegal because it constitutes an excessive invasion of privacy. Video recording, said Thompson, “is a much greater invasion of privacy than audio recording because much more information can be captured on video.” That is undoubtedly true. But it doesn’t matter because, as noted earlier, an invasion of a defendant’s privacy cannot occur when, as here, the defendant invites a police agent into his home, and the agent’s video recorder merely chronicled what the informant saw or could have seen. Accordingly, the court affirmed Thompson’s conviction. POV

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