

U.S. v. Rahman

(7th Cir. 2015) __ F.3d __ [2015 WL 6841031]

Issue

Did fire investigators exceed a business owner's consent to search for the cause and origin of a fire in his business?

Facts

At about 3:30 A.M., fire broke out in a two story building in Milwaukee that housed four businesses and ten apartments upstairs. During the fire, the second floor collapsed onto the first floor, rendering the building a total loss. The floors did not, however, collapse into the basement, which is a circumstance that will become relevant later.

The owner of one of the businesses, Black & White Café, was Feras Rahman who, when he arrived at the scene, consented to a search of his business to determine the cause and origin of the fire. The relevant parts of the subsequent investigation are as follows:

Day Two: The day after the fire, an ATF investigator noticed that a restaurant across the street had a surveillance camera that pointed in the direction of the café. He reviewed the video and it showed the fire originated “in or above” the cafe and that it did not originate in the basement. Consequently, from this point on the sole purpose of the investigation was to determine the cause of the fire, not its origin. An investigator went into the basement to retrieve the restaurant's alarm box because it “can give investigators the date and time the system detects the outbreak of a fire and because it “might shed light on the fire's cause and origin.”

Day Three: Investigators searched the basement for a safe, laptop, bank bags and receipts that Rahman said were located there. None were found. Because these items were plainly not the cause of the fire, it appears the purpose of the search was to obtain evidence that Rahman set the fire to claim insurance money. But also in the basement they seized a surveillance DVR machine that, unlike the other items, was capable of providing evidence as to the cause of the fire.

Day Four: An investigator searched the basement for any valuables because the absence of pricy items may indicate the fire was set to cover up a burglary, and that the arsonist removed them before starting the fire. No valuables were found.

Day Five: An odor of gasoline was detected on the first floor. An investigator reviewed the surveillance video from a restaurant across the street. It showed that, when Rahman left the café on the night of the fire, he was carrying “a large, white rectangular box.”

The investigators obtained a warrant to search Rahman's home for evidence of arson. Among other things they found a laptop computer inside a white rectangular box which was under the bed. Rahman was subsequently charged with arson and with making false statements to a federal investigator. When his motion to suppress was denied, his case went to trial. He was convicted of making false statements, but acquitted of arson.

Discussion

On appeal to the Seventh Circuit, Rahman argued that his motion to suppress should have been granted because the warrantless “cause and origin” investigation soon became a full-blown criminal investigation that exceeded the scope of his consent. Thus, he

argued that his conviction for making false statements should be overturned because it was based on evidence obtained during those searches.

In *Michigan v. Clifford*, the Supreme Court observed that “[a] burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze,” and that “officials need no warrant to remain for a reasonable time to investigate the cause of the blaze after it has been extinguished.”¹ It also ruled, however, that “additional investigations begun after the fire has been extinguished and fire and police officials have left the scene, generally must be made pursuant to a warrant or the identification of some new exigency.”² Because prosecutors relied solely on Rahman’s consent to search, it appears that no fire or police personnel remained in the building after the fire was extinguished and, as the result not *Clifford’s* exception for immediate investigations, the subsequent warrantless searches did not fall within *Clifford’s* exception for immediate investigations

Consequently the central issue was whether Rahman’s consent to search for the cause and origin of the fire included consent to search for the various items of incriminating evidence that the investigators discovered. He contended it did not because, almost from the outset, the investigators believed he had set the fire and, therefore, their objective was to obtain incriminating evidence—not to determine the cause and origin of the fire. Prosecutors countered that, because arson constitutes a “cause” of a fire, a person’s consent to search for the cause of a fire necessarily includes consent to search for evidence of arson. The court rejected both arguments.

Specifically, the court ruled that, while a search for *direct* evidence of arson falls into the category of a search for the cause of a fire, a search for “secondary and circumstantial” evidence of arson does not. That is because, said the court, a reasonable person who consents to a cause and origin search “would understand the request to be for consent to determine where the fire occurred and what sparked the fire”—not to determine the identity of the person who set the fire.

The question arises: How can anyone determine whether a search of a particular area was a search for circumstantial evidence or direct evidence? The court ruled it depends on the “primary” motivation of the investigators at the time of the search. Said the court, “[T]he term ‘origin and cause’ excludes any search whose *primary object* is to find information of criminal activity.”³ But because motivation is subjective, how can the courts make this determination?

The court ruled it may be reasonable to infer that primary objective of investigators was to find incriminating evidence if (1) the evidence was found in an area of the structure that had already been eliminated as the origin of the fire, and (2) the investigators could not articulate some factual basis for believing that evidence as to the cause of the fire might be found in the area.⁴

Applying this test to the facts of the case, the court ruled that the investigators reasonably believed that the alarm box and surveillance DVR contained evidence as to the

¹ *Michigan v. Clifford* (1984) 464 U.S. 287, 293.

² *Michigan v. Clifford* (1984) 464 U.S. 287, 293.

³ **NOTE:** The court added that investigators who are conducting a lawful search for evidence of cause and origin do not need a warrant to seize evidence of arson that they find while conducting the search.

⁴ **NOTE:** Although the court did not specify the level of proof that is required, it seems likely that reasonable suspicion, based on articulable facts, would suffice.

cause of the fire and were therefore admissible. As for the rest of the evidence—primarily the *absence* of bank bags, a laptop, business receipts, and valuable items—the court ruled that testimony as to their absence should have been suppressed because they were discovered during searches whose primary objective was to find evidence that Rahman had set the fire. POV

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