

#### ISSUE

Did the defendant have a reasonable expectation of privacy in a hotel room he paid for with a stolen credit card?

#### FACTS

Cunag checked into a hotel in Glendale, saying his name was Nelson Iban and paying for the room with a Bank of America MasterCard in the name of a dead woman, Patricia Apan. Desk clerk Miguel Hernandez told Cunag he needed authorization from Apan that Nelson Iban was permitted to use the credit card. So Cunag left the hotel, ostensibly for the purpose of obtaining Apan's written authorization. Actually, he went out and printed a phony DMV ID card in Apan's name. He then returned to the hotel with a photocopy of the phony ID card and two notes addressed to Hernandez from "P. Apan" saying, essentially, that Iban was authorized to use her MasterCard. Hernandez was not at the desk when Cunag returned, but another clerk accepted the documents and rented a room to him.

The next day, Hernandez noticed that the ID card "looked fake," and that the spelling of Apan's name on the MasterCard did not match the spelling on the ID card. He then called DMV and was told the ID card was a forgery. He then phoned the Bank of America and was told there was, in fact, a MasterCard account in Apan's name, but that the address on the ID card did not match the address on the account. He was also informed that the bank was placing a "lock" on the card. Hernandez called Glendale PD.

Three officers, accompanied by Hernandez, went to the room. Cunag answered the door but attempted to close it when he saw a uniformed officer. The officer then detained Cunag in the hallway while the other two entered the room. Inside, they saw stolen mail in the bathroom, on the bed, on the kitchen counter, and in some travel bags. Cunag was charged with possession of stolen mail.

#### DISCUSSION

Cunag contended the officers did not have a legal right to enter the room and, therefore, the mail should have been suppressed. The Government responded that, regardless of whether the entry was lawful, Cunag lacked standing to challenge the officers' entry because he obtained the room with a stolen credit card.

It is settled that evidence obtained as the result of an illegal search is admissible in court against a defendant who does not have "standing" to challenge the search.<sup>1</sup> It is also settled that a defendant can have standing to challenge a search or seizure only if he had a reasonable expectation of privacy in the place or thing that was searched.<sup>2</sup>

The issue, then, was whether a person who pays for a hotel room with a stolen credit card has a protectable privacy interest in the room. The court said no such expectation of privacy would exist *if* the prosecution was able to prove "by a preponderance of the evidence" that the room was "procured by fraud." Did such proof exist? The answer, said the court, was plainly yes:

Cunag procured this room through deliberate and calculated fraud. Like the driver of the stolen car, Cunag was not a lawful occupant. He admitted that when hotel personnel asked him to provide his authorization from the cardholder, he forged

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<sup>1</sup> See *Rakas v. Illinois* (1978) 439 US 128; *United States v. Payner* (1980) 447 US 727, 731; *In re Tyrell J.* (1994) 8 Cal.4<sup>th</sup> 68, 89.

<sup>2</sup> *Rakas v. Illinois* (1978) 439 US 128, 143; *California v. Greenwood* (1988) 486 US 35, 39.

two notes including the signatures of a dead woman, and then manufactured a fraudulent California DMV identification car in response to the request.

Consequently, the court ruled the stolen mail was admissible.

#### DA's COMMENT

On March 26, 2004 the Ninth Circuit issued an opinion in *U.S. v. Bautista*<sup>3</sup> in which it ruled that a person who pays for a motel room with a stolen credit card does, in fact, have a protectable privacy interest in the room. In *Bautista*, the defendant had booked a six-night stay at a motel in San Diego via [www.lodging.com](http://www.lodging.com). He also paid for the room online—using a stolen Visa card. Four days after Bautista checked in, the website notified the motel manager that the card had been reported stolen. The manager called San Diego police who, like the officers in *Cunag*, knocked on the door, eventually entered the room, and saw contraband in plain view.

The court ruled that Bautista had a reasonable expectation of privacy in the motel room even though he paid for it with a stolen credit card. The court was able to reach this remarkable determination by examining the contractual relationship between Bautista and the motel. Here are the court's words:

Bautista's rental period had yet to expire when the police searched his room.

According to our precedent, unless his occupancy had been lawfully terminated when the police conducted their search, Bautista retained a reasonable expectation of privacy in the room. The critical determination is whether or not management had justifiably terminated Bautista's control of the room through private acts of dominion.

The court's statement that the "critical determination" was whether motel management had terminated Bautista's control of the room was plainly erroneous. The issue—as the court in *Cunag* recognized—was whether a reasonable person who pays for a motel room with a stolen credit card has a reasonable expectation of privacy in the room. As the United States Supreme Court explained, "[The] capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."<sup>4</sup>

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<sup>3</sup> (9<sup>th</sup> Cir. 2004) 362 F.3d 583.

<sup>4</sup> *Rakas v. Illinois* (1978) 439 US 128, 143. NOTE: There were other problems with the reasoning in *Bautista* as explained in the report on *Bautista* in the Summer 2004 *Point of View*.