Garden State CLE Presents:

Searches Based Upon Consent

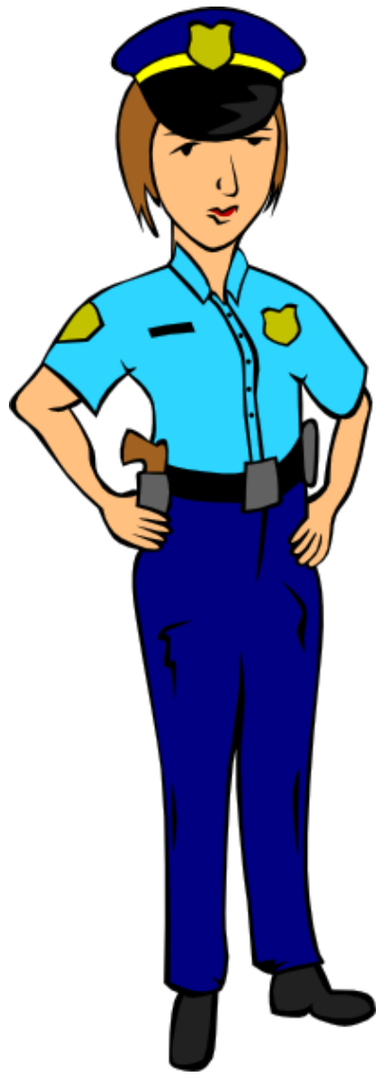
Lesson Plan

Part I - Federal View

The exception to the warrant requirement based upon consent had been well established by the mid-1940's:

Davis v. United States, 328 U.S. 582, 593—594, (1946)

Zap v. United States, 328 U.S. 624 (1946)



By 1968, it had been established that when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.

The precise question left unanswered prior to 1973 was what specifically must the prosecution prove in order to demonstrate that a consent was ‘voluntarily’ given.

1973

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)

[Test for voluntariness is wholly borrowed from the law related to confessions]

In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted.

The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the [defendant's] mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of [a defendant's] responses, they were not in and of themselves determinative.

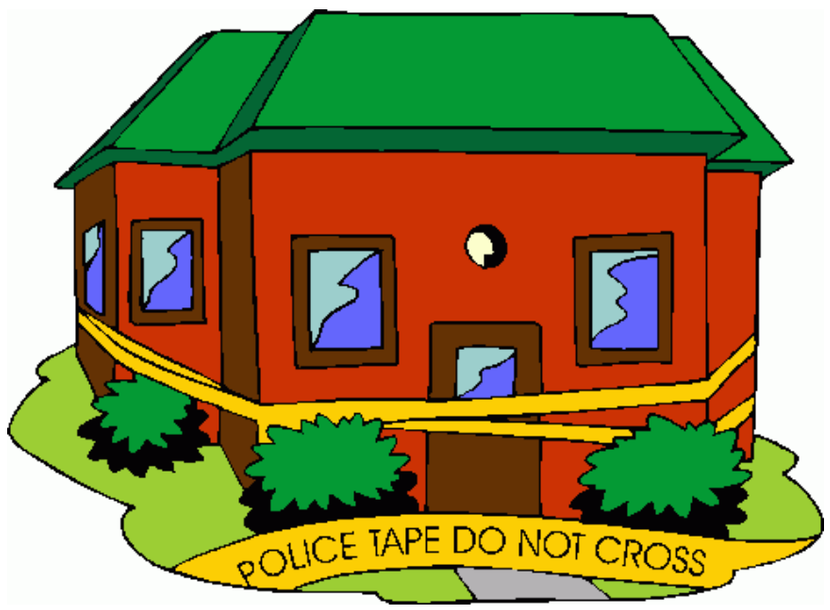
Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

1974

United States v. Matlock, 415 US 164 (1974).

[The common authority rule]

These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.



1990

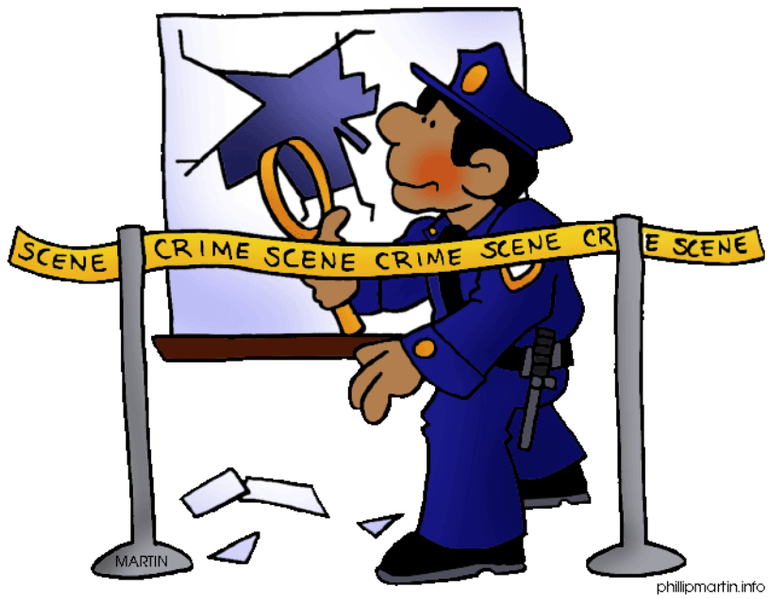
Illinois v. Rodriguez, 497 U.S. 177 (1990).

[Apparent authority]

We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.

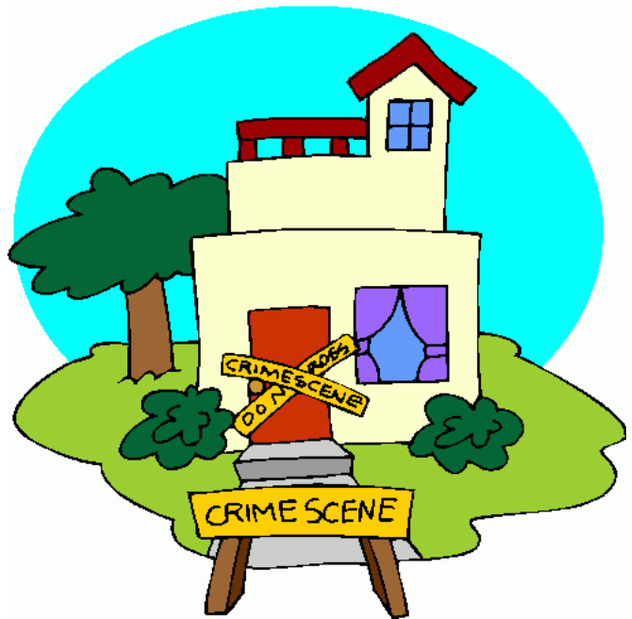
[Contrast - Stoner v. California, 376 US 483 (1964)

Hotel clerk is without authority to consent to search a guest's hotel room.)



[Contrast - Minnesota v. Olson, 495 US 91 (1990). Room of an overnight house guest. "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home."]

[Landlords - A landlord generally does not have authority to consent to a search of a tenant's premises, *Chapman v. United States*, 365 *U.S.* 610 (1961); *State v. Scrotsky*, 39 *N.J.* 410, 189 *A.*2d 23 (1963).]

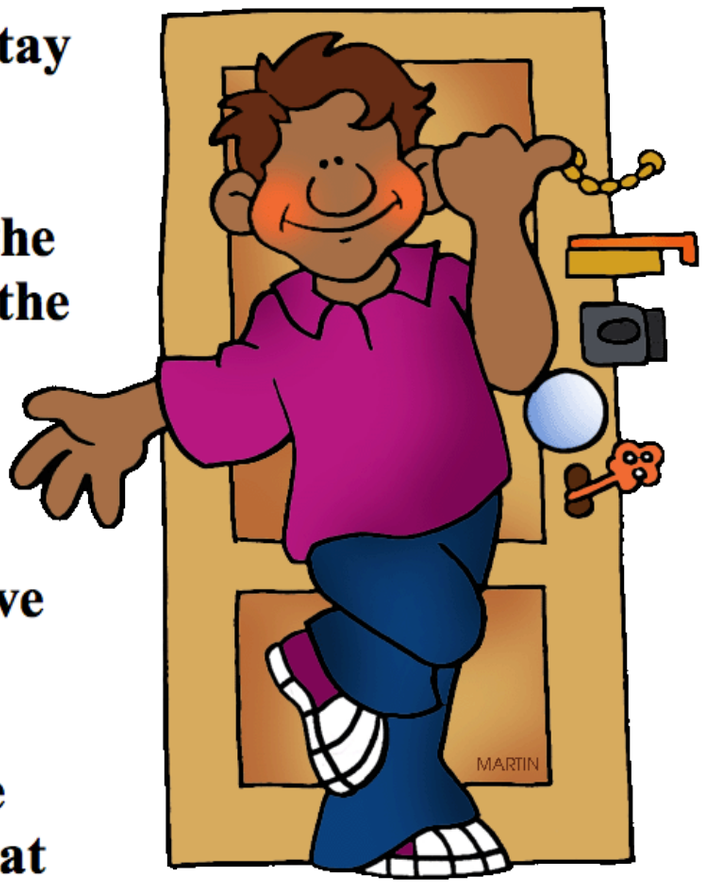


2013

Georgia v. Randolph, 547 U.S. 103 (2013

[Objection to consent search]

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.



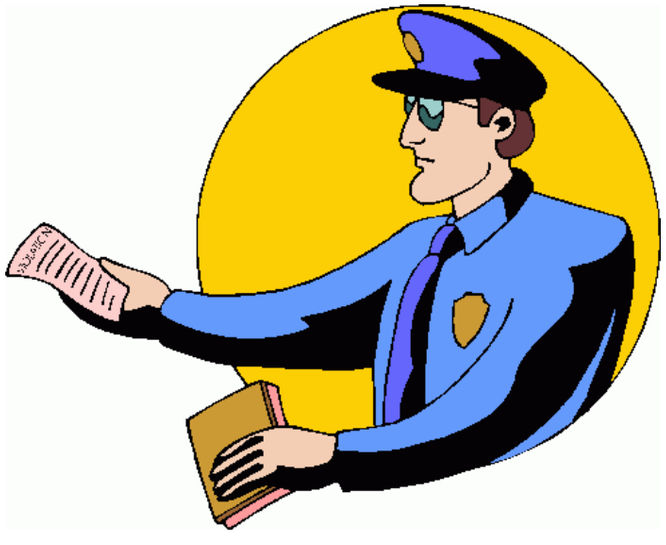
This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.

2014

Fernandez v. California, 134 S. Ct. 1126 (2014).

[Objecting occupant lawfully removed by police]

Police officers observed a suspect in a violent robbery run into an apartment building, and heard screams coming from one of the apartments. They knocked on the apartment door, which was answered by Roxanne Rojas, who appeared to be battered and bleeding. When the officers asked her to step out of the apartment so that they could conduct a protective sweep, petitioner came to the door and objected. Suspecting that he had assaulted Rojas, the officers removed petitioner from the apartment and placed him under arrest. He was then identified as the perpetrator in the earlier robbery and taken to the police station. An officer later returned to the apartment and, after obtaining Rojas' oral and written consent, searched the premises, where he found several items linking petitioner to the robbery. The trial court denied petitioner's motion to suppress that evidence, and he was convicted



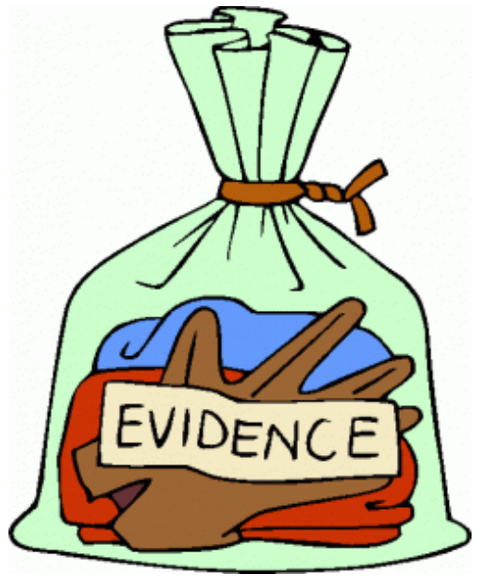
Randolph **does not extend to this situation, where Rojas' consent was provided well after petitioner had been removed from their apartment.**

(a) Consent searches are permissible warrantless searches, and are clearly reasonable when the consent comes from the sole occupant of the premises. When multiple occupants are involved, the rule extends to the search of the premises or effects of an absent, non-consenting occupant so long as "the consent of one who possesses common authority over [the] premises or effects" is obtained. However, when "a physically present inhabitan[t]" refuses to consent, that refusal "is dispositive as to him, regardless of the consent of a fellow occupant." A controlling factor in ***Randolph*** **was the objecting occupant's physical presence**

Dictum in ***Randolph*** **suggesting that consent by one occupant might not be sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," is best understood to refer to situations in which the removal of the potential objector is not objectively reasonable. Petitioner does not contest the fact that the police had reasonable grounds for his removal or the existence of probable cause for his arrest. He was thus in the same position as an occupant absent for any other reason**

Part II - The New Jersey View

1965



State v. King, 44 N.J. 346 (1965).

[Enhanced Burden of proof]

The primary question on this appeal is whether the defendant voluntarily gave his consent to the search of the apartment. The general principles of law which govern this issue are well settled. When an accused consents to a search of his premises, he relinquishes the Fourth Amendment protection which prohibits unreasonable searches and seizures.. Implicit in the very nature of the term consent is the requirement of voluntariness. To be voluntary the consent must be unequivocal and specific and freely and intelligently given.

The burden of proof is on the State to establish by clear and positive testimony that the consent was so given. However, application of these general principles on a case by case basis has often been difficult. There have evolved a number of factors which courts have weighed in determining whether acquiescence to a search has been voluntarily given.

1975

State v. Johnson, 68 *N.J.* 349 (1975).

[First instance of 4th Amendment issue decided under Art. I, para 7 of 1947 State constitution.]

[Set requirements for proof of voluntariness, including knowledge of right to refuse.]

We conclude that under Art. I, par. 7 of our State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver; i.e., where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.

Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. One cannot be held to have waived a right if he was unaware of its existence.

However, in a non-custodial situation, such as is here presented, the police would not necessarily be required to advise the person of his right to refuse to consent to the search. Our decision is only that in such a situation if the State seeks to rely on consent as the basis for a search, it has the burden of demonstrating knowledge on the part of the person involved that he had a choice in the matter

1993

State v. Maristany, 133 NJ 299

[Driver of motor vehicle - Apparent authority]

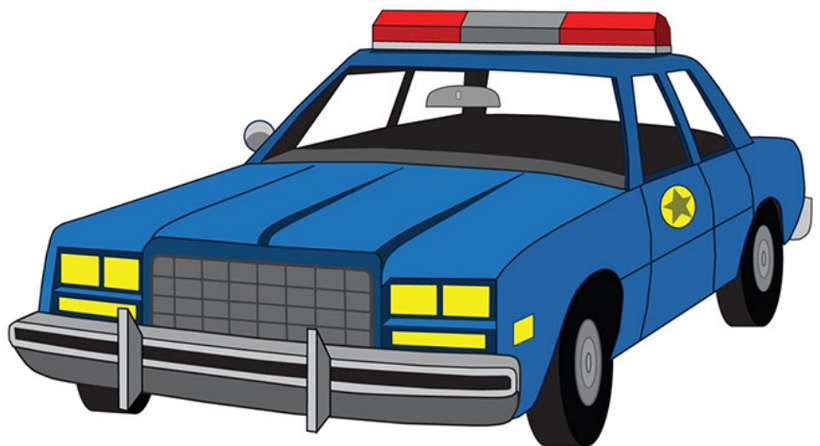
To determine the constitutionality of a search and seizure, we consider whether the conduct of the law-enforcement officer who undertook the search was objectively reasonable. Appearances of control at the time of the search, not subsequent determinations of title or property rights, inform our assessment of the officer's conduct.

A warrantless search is *per se* unreasonable unless it falls within one of a few, well-defined exceptions.. One well-established exception is a search conducted pursuant to consent. To justify a search on the basis of consent, the State must prove that the consent was voluntary and that the consenting party understood his or her right to refuse consent.

Consent may be obtained from the person whose property is to be searched, from a third party who possesses common authority over the property, or from a third party whom the police reasonably believe has authority to consent.

Absent evidence that the driver's control over the car is limited, a driver has the authority to consent to a complete search of the vehicle, including the trunk, glove compartment, and other areas.

[But see companion case - However, in the absence of evidence of joint access to or control over property found in the vehicle, a driver's apparent authority to consent to a search of the car does not include the authority to permit a search of the personal belongings of other passengers. State v. Suazo, 133 NJ 315 (1993)]



1997

State v. Crumb, 307 NJ Super. 204 (App. Div. 1997)
[Apparent authority - parent and child]

New Jersey is among the overwhelming majority of courts holding that a parent has the right to consent to the search of the property of his or her son or daughter. Even in cases where the child has reached adulthood, courts have been reluctant to find that the son or daughter had exclusive possession of a room in the parent's home. This capacity to consent has alternatively been based on the parent's authority as head of the household or owner of the property, the exercise of parental responsibility over the child, or as a co-tenant or co-occupant.

Another factor considered in determining whether the child had exclusive possession of the room is whether the child paid rent for the room. An informal agreement that the child would pay rent when able to do so with no specified amount fixed has been held inadequate to give the child exclusive possession of the room. Cases which have upheld a parent's authority to consent to the search of the room of an adult son or daughter still living at home have turned on whether the adult offspring paid rent or utility bills and whether the parent had access to the room. Another consideration is whether the parent had ready access to the defendant-child's room to clean it.

2002

State v. Carty, 170 NJ 632 (2002)

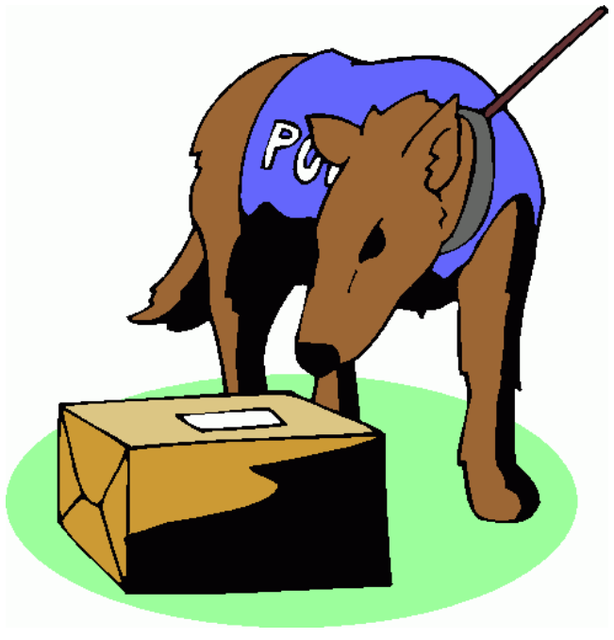
[Consent in automobile searches]

We agree with the Appellate Division that consent searches following a lawful stop of a motor vehicle should not be deemed valid under *Johnson* unless there is reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity. In other words, we are expanding the *Johnson* two-part constitutional standard and holding that unless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional.

A suspicionless consent search shall be deemed unconstitutional whether it preceded or followed completion of the lawful traffic stop. The requirement of reasonable and articulable suspicion is derived from our State Constitution and serves to validate the continued detention associated with the search. It also serves the prophylactic purpose of preventing the police from turning a routine traffic stop into a fishing expedition for criminal activity unrelated to the stop. Indeed, our holding is consistent with both the State Police Standard Operating Procedures and the Consent

[Applies only in automobile context - State v. Domicz, 188 NJ 285 (2006)]

[Applies to disabled vehicles - State v. Elders, 192 NJ 224 (2007)]



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