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THIRD-PARTY CONSENT TO SEARCH AND SEIZURE

THE NEED FOR A NEW EVALUATION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. United States Constitution, amendment IV.

There is no doubt that a person may, by his voluntary consent, waive his immunity to a search and seizure which, without such consent, would violate the fourth amendment.¹ The point of conflict, however, and the subject matter of this note is the extent to which a defendant may be convicted on the basis of evidence seized in a search which would be violative of the fourth amendment² but for the *consent of a third party*.

The Protection of the Fourth Amendment

The basic purpose of the fourth amendment is to protect the public against wrongful governmental infringement of personal security, personal liberty and private property.³ It must be noted, however, that not all searches and seizures are wrongful, but only those which are *unreasonable*. The fourth amendment itself does not define "unreasonable search and seizure," but the United States Supreme Court has held that a search, in order to be reasonable, must normally be conducted pursuant to a search warrant issued by a judge upon probable cause.⁴ Probable cause is that degree of certitude which provides a reasonable ground for belief of guilt.⁵ Exceptions to the rule requiring a search warrant before a lawful search may be conducted are searches and seizures which are

¹ Judd v. United States, 190 F.2d 649, 650-51 (D.C. Cir. 1951).

² The fourth amendment does not expressly provide that illegally seized evidence is inadmissible but the United States Supreme Court has interpreted it as implicitly forbidding the use of such evidence in the federal courts. See Weeks v. United States, 232 U.S. 383 (1914). Now, as a consequence of Mapp v. Ohio, 367 U.S. 643 (1961), the states are also prohibited from using evidence against a defendant which has been seized in violation of the fourth amendment.

³ Gouled v. United States, 255 U.S. 298, 303-04 (1921).

⁴ See Chapman v. United States, 365 U.S. 610, 613 (1961); Johnson v. United States, 333 U.S. 10, 13-14 (1948); Gouled v. United States, *supra* note 3, at 308. See also Judd v. United States, *supra* note 1, at 650.

⁵ RICHARDSON, EVIDENCE § 146, at 124-25 (Prince ed. 1964).

incidental to a valid arrest, or those consented to by one authorized to give consent.⁶

The general requirement that there be a search warrant for a valid search and seizure is much more than a mere procedural formality. A search warrant has, by its very nature, certain inherent safeguards which protect the individual. The warrant will not issue upon mere suspicion; it must be based upon probable cause. In addition, the determination as to whether or not probable cause exists is to be made by an impartial judicial officer rather than by the police or other law enforcement agents.⁷ A further safeguard is evidenced by the fact that search warrants may not permit a *general* investigatory search, but must state specifically the place of the search and the object sought. Finally, at least under the federal rules, a search warrant may not be issued to obtain *purely evidentiary* material, but may be issued only when the evidence sought is either contraband, or the fruits or instrumentalities of a crime.⁸

This note will place primary emphasis on cases of third-party consent. However, cognizance must always be taken of the fact that *both* effective third-party consent *and* searches and seizures incidental to a valid arrest are exceptions to the general rule requiring a search warrant. Therefore, since the substantial protection of a search warrant is not present, these exceptions deserve especially close scrutiny before their validity is upheld.

Third-Party Consent

The majority of courts have been liberal in finding that consent by a third party validates a search, thereby rendering evidence seized admissible over the objection of a non-consenting defendant.⁹ These decisions have usually been based upon the third party's *right of control* over the property where the evidence was seized, or his *actual control* of the property with the implied or apparent authority to consent to the search.

⁶ *People v. Loria*, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 466-67 (1961).

⁷ *Johnson v. United States*, *supra* note 4, at 14.

⁸ *RICHARDSON*, *op. cit. supra* note 5, at 121; see FED. R. CRIM. P. 41(b). *But see* N.Y. CODE CRIM. PROC. §792 which authorizes the search for and seizure of purely evidentiary matter. It has been suggested, however, that the New York rule is violative of the fourth amendment and, therefore, unconstitutional. *RICHARDSON*, *op. cit. supra* note 5, at 121.

⁹ See, *e.g.*, *Woodard v. United States*, 254 F.2d 312 (D.C. Cir. 1958); *United States v. Sferas*, 210 F.2d 69 (7th Cir. 1954); *Stein v. United States*, 166 F.2d 851 (9th Cir. 1948); *Reszutek v. United States*, 147 F.2d 142 (2d Cir. 1945); *Driskill v. United States*, 281 Fed. 146 (9th Cir. 1922); *United States v. Sergio*, 21 F. Supp. 553 (E.D.N.Y. 1937).

Under the theory of *right of control*, it has been held, *inter alia*, that a parent may give valid consent to a search for evidence to be used against a child who is living at home.¹⁰ The authority of the parent to consent is based upon the fact that the parent is the owner of the house and, as such, has the right to admit whomever he pleases, including police officers who desire to make a search. Thus, it is held that since the child has no legal property interest in the house, the parent may, by his consent, validate a search and seizure directed against the child and conducted without a search warrant.¹¹

It has also been held, under the *right of control* theory, that a partner¹² or joint tenant¹³ may give valid consent to a search for evidence to be used against another joint tenant or partner. The rationale in such cases is that, since both are entitled to possession and control, either can validly consent to a search in which the evidence seized may be used against the non-consenting party.

The doctrine of *actual control* and the implied or apparent authority recognized thereunder, although somewhat less widely accepted than the *right of control* doctrine, is utilized by courts to legitimize a search and seizure consented to by a third party whose legal interest in the property where the evidence is seized is inferior to the interest of the person against whom the search is directed and the evidence used. These cases typically involve the consent of a wife to a search of the husband's premises,¹⁴ or the consent of a bailee to the search of the bailed goods.¹⁵

The basis for decision in the cases upholding the authority of the wife to consent is that, in the husband's absence, the wife has complete actual control of the premises and, therefore, may consent to a search.¹⁶

Similarly, in the case of bailed property, it has been held that since the bailee has actual control of the goods and may himself inspect them, he has the implied authority to consent to a search by the police.¹⁷

¹⁰ See, e.g., *State v. Kinderman*, 136 N.W.2d 577 (Minn. 1965).

¹¹ *Ibid.*

¹² See, e.g., *United States v. Sferas*, *supra* note 9.

¹³ See, e.g., *Stein v. United States*, *supra* note 9; *Driskill v. United States*, *supra* note 9.

¹⁴ See, e.g., *United States v. Heine*, 149 F.2d 485 (2d Cir. 1945); *United States v. Sergio*, *supra* note 9; *Hook v. State*, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958). *But see* *United States v. Rykowski*, 267 Fed. 866 (S.D. Ohio 1920). The only time in which the issue of the wife's authority to consent was before the Supreme Court, the merits were never reached since in that case it was held that the wife's consent had been impliedly coerced and was therefore ineffective. *Amos v. United States*, 255 U.S. 313 (1921).

¹⁵ See *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962).

¹⁶ See *United States v. Heine*, *supra* note 14; *United States v. Sergio*, *supra* note 9; *Hook v. State*, *supra* note 14. *But see* *United States v. Rykowski*, *supra* note 14.

¹⁷ See *United States v. Eldridge*, *supra* note 15, wherein the consent to a

Some courts have occasionally extended the doctrine of actual control and implied authority much further. For example, it has been held that a baby-sitter,¹⁸ or even an eight year old child,¹⁹ has the implied authority of the owner of the premises to consent to a search.

Supreme Court Cases

In order to fully ascertain the validity of a search and seizure without a search warrant, pursuant to the consent of a third party, it is necessary to examine in some detail a number of recent United States Supreme Court cases.

In *Jones v. United States*,²⁰ the issue before the Court was whether the defendant, who was granted permission to use an acquaintance's apartment, had standing to object to the admission at trial of narcotics seized during a search of that apartment. Although this case did not involve third-party consent, it is of prime importance since it defined the "interest" which is necessary before a defendant has "standing" to object to the unconstitutionality of a search. The primary requirement for "standing" is that the defendant be the one "aggrieved" by the search, *i.e.*, the one against whom the search is directed.²¹

In *Jones*, however, since the defendant alleged neither ownership of the narcotics nor any interest in the apartment wherein they were seized greater than that of an "invitee or guest," the prosecutor challenged his standing. The Supreme Court acknowledged that to establish "standing" the lower courts have generally required that the defendant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched.²² The Court, however, overruled both standards. It held, first, that since the defendant's possession of the narcotics was necessary for conviction, he automatically had "standing" to object to their seizure.²³ Secondly, it held that the defendant had a *sufficient interest* in the premises where the narcotics were found to have such "standing."²⁴

The significance of the Court's first statement is that, now, whenever a defendant is being tried on the basis of his possession of some object which has been seized, he has "standing" to object to its admission as evidence against him without subjecting himself

search of an automobile by a gratuitous bailee was held to have validated the search. Thus, the evidence seized was admissible against the bailor.

¹⁸ *People v. Misquez*, 152 Cal. App. 2d 471, 313 P.2d 206 (1957).

¹⁹ *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964).

²⁰ 362 U.S. 257 (1960).

²¹ *Jones v. United States*, 362 U.S. 257, 261 (1960).

²² *Ibid.*

²³ *Id.* at 263-64.

²⁴ *Id.* at 265.

to possible conviction by alleging ownership of the article. Its further significance is that it is a recognition by the Court that in order to have "standing" it is not necessary that the defendant have an interest in the situs of the search and seizure. It suffices that the defendant have an *interest in the object* which is seized. This is an acknowledgement by the Court that the protection of the fourth amendment extends not only to "houses" but also to "papers" and "effects." Thus, although the defendant may have no interest in a particular house, he may have an interest in personal property contained therein; and such personal property is entitled to constitutional protection from unreasonable search and seizure.²⁵

The second part of the *Jones* holding, *i.e.*, that the defendant's status as an "invitee or guest" was sufficient to establish "standing," also has great significance since it recognizes that *anyone* with *any* interest in the premises wherein property is seized has a right to object to the search and seizure if it was directed against him. The Court held it to be immaterial that the defendant had no substantial property interest in the premises. In this regard it stated that it is:

unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee,' and 'guest' . . . ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.²⁶

The Court, after thus rejecting distinctions of property law as determinative of constitutional rights, went on to state that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him."²⁷ The Court thus indicated that the right to object is the *personal* right of the defendant against whom the search is directed, rather than just the *property* right of the person who is the owner or lessee of the premises wherein the search took place.

It may be argued that, in *Jones*, the Court was speaking of the *right to object* to a search and seizure and not of the *validity* of a search and seizure which has been consented to by a third party. The Court itself, however, has given at least some indication in two later cases that the rationale of *Jones* is equally applicable in cases of third-party consent.

²⁵ See *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955), wherein it was held that the defendant's daughter could not consent to the search of a *locked* cabinet belonging to the defendant but stored in the daughter's house.

²⁶ *Jones v. United States*, *supra* note 21, at 266.

²⁷ *Id.* at 267.

In *Chapman v. United States*,²⁸ a lessor had consented to a search of the leased premises. The police, in the course of their search, found an unregistered still and a quantity of mash. Despite the absence of a search warrant, the evidence was admitted at trial over the objection of the lessee, and it was utilized as the basis of his conviction for violation of the federal liquor laws.

The United States Supreme Court, in reversing, rejected the contention that the landlord, since he might be permitted to enter the premises, could, therefore, authorize the police to conduct a search. In the course of its opinion, the Court cited *Jones* with approval, reiterating that formal rules of property law should not be the basis of the determination of constitutional rights.²⁹ By not indicating that *Jones* involved a search and seizure to which no one had consented, whereas *Chapman* involved a search and seizure for which third-party consent had been obtained, the Court gave some strength to the inference that the rationale of *Jones* is applicable in cases of third-party consent.

The Supreme Court's attitude is further illustrated in *Stoner v. California*.³⁰ In that case, the police searched the defendant's hotel room, relying on the consent of the hotel desk clerk who admitted the police into the room. In the course of the search, evidence was seized which was later used as the basis of the defendant's conviction for robbery. The Court, in reversing the conviction, again cited *Jones* for the proposition that the constitutional right of the defendant to be free from unreasonable search and seizure does not depend upon his interest in the premises as determined by property law.³¹ In other words, the consent of the desk clerk did not validate a search and seizure merely because the defendant had only a small property interest in the hotel room.³²

The prosecutor had contended in *Stoner* that the hotel desk clerk had "apparent authority" to consent to the search. The Court rejected this contention and stated: "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'"³³ The Court admitted that one renting a hotel room gives permission to such persons as maids, janitors or repairmen to enter the room in the course of their employment, but pointed

²⁸ 365 U.S. 610 (1961).

²⁹ *Chapman v. United States*, 365 U.S. 610, 617 (1961).

³⁰ 376 U.S. 483 (1964).

³¹ *Stoner v. California*, 376 U.S. 483, 488 (1964).

³² It should be noted, however, that once an occupant of a hotel room checks out of the hotel he is deemed to have "abandoned" any personal property left in the room and, therefore, this property may be seized, provided the police have the consent of the hotel. *Abel v. United States*, 362 U.S. 217 (1960).

³³ *Supra* note 31.

out that the "conduct of the night clerk and the police in the present case was of an entirely different order."³⁴

Thus, the Court not only asserted that implied or apparent authority is not to be inferred, but also indicated that while a third party may be an agent for certain limited purposes, this does not automatically authorize him to consent to a search and seizure directed against his principal.³⁵

It would appear, in light of the Court's holding, that the authority of a third party to consent to a search and seizure may no longer be based on the law of agency unless *express* authority to consent has been given to the agent.³⁶

In *Stoner*, the Court gave additional weight to the manifestation in *Jones* that the protection of the fourth amendment is personal to the defendant against whom the search is directed. The Court noted that it was the defendant's "constitutional right which was at stake" and not the third party's.³⁷ Since it is the defendant's constitutional right which is involved, it would seem to follow that he should be the only one who can validly waive this right.

Recent Cases

There appears to be a trend, although ill-defined, toward a much narrower view of the validity of a search and seizure pursuant to third-party consent.³⁸ The cases which have not followed this trend have more often than not been the subject of vigorous dissenting opinions.³⁹

In *Reeves v. Warden, Maryland Penitentiary*,⁴⁰ the defendant's mother consented to a search of her son's room in her house. In the course of the search, the police found, in a bureau drawer, a sheet of paper which they seized. The paper was admitted at trial to prove that the defendant had been planning an alibi for the time of the crime. The defendant, partly on the basis of the paper, was convicted of rape. Upon writ of habeas corpus, the conviction was reversed. The court recognized that the defendant had such

³⁴ *Id.* at 489.

³⁵ *Ibid.*

³⁶ See *State v. Bernius*, 177 Ohio St. 155, 157-58, 203 N.E.2d 241, 243 (1964).

³⁷ *Supra* note 31, at 489.

³⁸ See *Reeves v. Warden, Maryland Penitentiary*, 346 F.2d 915 (4th Cir. 1965); *Hinchliff v. Clarke*, 230 F. Supp. 91 (N.D. Ohio 1963); *State v. Pina*, 94 Ariz. 243, 383 P.2d 167 (1963); *State v. Evans*, 45 Hawaii 622, 372 P.2d 365 (1962); *Henry v. State*, 154 So. 2d 289 (Miss. 1963); *State v. Bernius*, 177 Ohio St. 155, 203 N.E.2d 241 (1964).

³⁹ See *Maxwell v. Stephens*, 348 F.2d 325, 338 (8th Cir. 1965) (dissenting opinion); *United States v. Eldridge*, *supra* note 15, at 466 (dissenting opinion); *State v. Kinderman*, — Minn. —, —, 136 N.W.2d 577, 582 (1965) (dissenting opinion).

⁴⁰ 346 F.2d 915 (4th Cir. 1965).

an interest in his room and bureau that only he could give effective permission for a search without a warrant.⁴¹

The rationale of this case is extremely significant. It recognizes, at least with regard to his own room, that the defendant, although having no legal property interest in the premises, has a constitutional right to object to a search and seizure which no third party can reduce to a nullity by consent to the search. This is true even though the third party had the right to control the premises wherein the evidence was seized.

It should be noted that the court could have taken a different approach to arrive at the same conclusion, by holding that the defendant had an interest in his "papers" and "effects" which made his mother's consent to their search and seizure unauthorized.

This was the approach taken by the court in *State v. Evans*,⁴² wherein the defendant's wife had consented to a search. There, jewelry found in the defendant's cuff link box was seized and used as a basis for his conviction of robbery. The court, in reversing, did not decide the issue of whether a wife may consent to a search. Rather, the decision was based upon the fact that the jewelry seized was an "effect" of the husband within the protection of the fourth amendment.⁴³ Thus, the court recognized that a defendant's right to object to a search and seizure of his personal property is not rendered meaningless by the consent of a third party in control of the premises searched.

In *State v. Bernius*,⁴⁴ the defendant had gratuitously bailed his automobile to a third party who consented to a search of the vehicle. In the course of the search, evidence was seized which was later used against the defendant to aid in his conviction for possession of pornographic materials. In attempting to uphold the validity of the conviction, the state argued that the bailee had implied authority to consent to the search. The court, however, rejected this contention, stating that in light of the *Stoner* case, it was no longer free to rely upon its own law of agency which would have warranted the inference of implied authority. In the absence of express authority, the court held a third party could not validly consent to a search and seizure of the defendant's property.⁴⁵

Conclusion

In *Jones v. United States*,⁴⁶ the Supreme Court established that any defendant against whom a search is directed has a constitutional right to object to the admissibility of seized evidence

⁴¹ *Reeves v. Warden, Maryland Penitentiary*, *supra* note 38, at 925-26.

⁴² 45 Hawaii 622, 372 P.2d 365 (1962).

⁴³ *State v. Evans*, *supra* note 38, at 332-35, 372 P.2d at 372-73.

⁴⁴ 177 Ohio St. 155, 203 N.E.2d 241 (1964).

⁴⁵ *State v. Bernius*, *supra* note 36.

⁴⁶ 362 U.S. 257 (1960).

if he has an interest either in the object or in the premises wherein it was seized. Further, with regard to the premises, the Court pointed out that the requisite interest is not governed by formal rules of property law; any reasonable interest will suffice. In the later cases of *Chapman* and *Stoner*, the Court indicated the applicability of *Jones* to cases of third-party consent. In addition, in *Stoner*, the Supreme Court attacked the doctrine of implied and apparent authority, and indicated that the protection of the fourth amendment was *personal* to the defendant against whom the search was directed, apparently limiting effective third-party consent to those instances where *express* authority has been granted.

Neither *Jones*, *Chapman* nor *Stoner* constitute compelling precedent for holding that every case of unauthorized third-party consent involves an illegal search and seizure. And in the absence of binding precedent, no recent case has adopted, in its entirety, the rationale of *Jones* to cases of third-party consent. The courts, however, by an *ad hoc* approach, have indicated a trend favoring the adoption of this rationale.⁴⁷ In these recent cases, the consent of a third party has been held invalid although given by one with the right of control, or actual control with its concomitant apparent or implied authority to consent. In addition, the personal property right of the defendant in his "effects" has been recognized as being constitutionally protected.⁴⁸ Common to all these cases was the recognition that the defendant had a "sufficient interest" in either the object taken or the premises wherein it was seized to necessitate that the search and seizure, regardless of the consent of a third party, be conducted in accordance with the fourth amendment, *i.e.*, pursuant to a validly issued search warrant.

The primary protection of the fourth amendment is the requirement that a search warrant be issued for a valid search and seizure. This protection is completely frustrated by holding that, although the defendant has a constitutional right to object, the search and seizure, conducted without a search warrant, is nevertheless valid since it was consented to by a third party. The constitutional right to object is a mere nullity if the constitutionality of the search and seizure can be determined by the whim of a third party to consent or not to consent.

Hence, in order to give substance to the protection afforded by the fourth amendment, it would appear necessary to hold that in every case where a defendant has a constitutional right to object to a search and seizure which is otherwise violative of the fourth amendment, such search and seizure cannot be made constitutional by virtue of the consent of an unauthorized third party.⁴⁹

⁴⁷ *Supra* note 38.

⁴⁸ *State v. Evans*, *supra* note 38.

⁴⁹ Compare *Burge v. United States*, 333 F.2d 210 (9th Cir. 1964), with *Burge v. United States*, *on rehearing*, 342 F.2d 408 (9th Cir. 1965).