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One exception to the general rule that authorities must obtain a warrant before conducting a search is the consent exception. This article discusses that exception, the procedure for proving that the exception applies and various opinions examining the exception.

An Overview of the Consent Exception

In virtually identical language, both the Fourth Amendment to the U.S. Constitution and Article II, § 7 of the Colorado Constitution protect people from unreasonable searches and seizures. Judicial enforcement of this provision did not begin in earnest until this century.[1] Enforcement of the provision through the exclusionary rule is designed to deter misconduct by law enforcement officials,[2] although it also serves the purpose of maintaining the integrity of the judiciary.[3]

A search conducted without benefit of warrant is presumed unreasonable and in violation of the constitutional prohibition.[4] The prosecution can overcome this presumption by proving that valid consent was obtained prior to the search.[5] A consent to search surrenders the legitimate expectation of privacy protected by the Constitution and waives the warrant requirement.[6] If the person to be searched validly consents to the search, there is no police misconduct and there is no justification for excluding evidence obtained in that search.[7]

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The definition of a search does not include all police intrusions. Simply knocking on a person's door does not amount to a search, since the occupant retains the right not to answer.[8] Similarly, a proper investigative detention pat-down of a suspect does not require consent.[9]

Procedural and General Considerations

A defendant may raise a claim that evidence was improperly seized without valid consent by filing a motion to suppress. The defendant may always challenge his or her own purported consent but does not automatically have standing to challenge consent given by another. In *People v. Henry*,[10] the Colorado Supreme Court held that the defendant, who was a passenger in a car that had been lawfully stopped by the police, was not entitled to automatic standing to contest the search of the car conducted with the consent of the owner. The defendant's mere presence in the car did not give him a reasonable expectation of privacy conferring standing to contest the search.[11]

Once a claim is raised, the burden is on the prosecution to prove that the consent exception applies.[12] The determination of whether consent was given is based on a consideration of the totality of the circumstances.[13] These circumstances include the age, intelligence, education and knowledge of the purpose of the search of the person giving consent, as well as any promises, threats, overbearing conduct or misrepresentations by the authorities.[14]

The prosecution must prove the existence of consent by clear and convincing evidence.[15] Unless the trial court specifically bases its ruling on the Colorado Constitution, appellate courts presume that the ruling is based on the U.S. Constitution.[16]

Appellate courts are to accept the factual findings of the trial court as long as they are supported by the record, even when the reviewing court disagrees with the findings.[17] In *People v. Diaz*,[18] the Colorado Supreme Court affirmed a trial court order suppressing evidence seized from the defendant when he was arrested and searched in a bar without a warrant. The trial court resolved certain credibility issues in favor of the defendant, made detailed findings that the actions of the police were such as would convince an ordinary person that he or she was under arrest and found that the "request" of the police to search was more in the nature of an order. These findings were supported by the record and the trial court's credibility determinations. The trial court's conclusion that the prosecution failed to meet its burden of proving consent was therefore affirmed.

Trial courts should indulge every reasonable presumption against a waiver.[19] Thus, ambiguous or imprecise questions or answers may result in a finding that the prosecution has failed to prove consent. In *People v. Thomas*,[20] a police officer requested consent to search both the defendant and his car in one question. The trial court made a finding that this compound question resulted in an ambiguous answer. The Supreme Court considered itself bound by this finding because it was supported by the record,[21]

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and affirmed the trial court's suppression order even while strongly hinting that it might have reached a different conclusion had it been sitting as the finder of fact.

Consent must be voluntary. In *Schneckloth v. Bustamonte*,[22] the U.S. Supreme Court held that proof that consent was voluntary requires a showing that there has been "an intentional relinquishment or abandonment of a known right." That Court also has described the prosecution's burden as one of proving "that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."[23]

The Colorado Supreme Court has offered several similar descriptions of the requirement. In *People v. Reyes*,[24] the court held that proof of voluntariness requires proof ". . . that there was no duress or coercion, express or implied; and that the consent was unequivocal and specific and freely and intelligently given." Similarly, in *People v. Savage*,[25] the court held that a valid consent "must be the product of a free choice and must not be the result of duress, coercion, threats, or promises that are calculated to flaw the free and unconstrained nature of the decision."[26] In *People v. Thiret*,[27] voluntariness was described as meaning that the "consent was not the result of duress or coercion, express or implied, or any other form of undue influence exercised against the defendant."[28]

The Scope of Consent

The fact that consent is given does not authorize the police to search anywhere or for as long as they wish. Consent "may be confined in scope to specific items . . . or may be restricted to certain areas or location . . . or otherwise may be limited in purpose and time."[29] The scope of the consent may be limited by the language of the request or by the language of the consent. A number of cases have addressed the scope of a consent to a search.

The specific language of the request to search may limit the scope of the search. In *Thiret*,[30] the police arrived at the defendant's home without a warrant and asked if they could "look around." The defendant said yes, and the police then spent forty-five minutes searching the entire house, including piles of clothes and debris, boxes and drawers. The Colorado Supreme Court ruled that this search exceeded the scope of the consent and that the subsequent seizure of some photographs and film was improper. On the other hand, consent to "search" a home encompasses police actions such as photographing and measuring the premises.[31]

The person giving consent may specifically limit the scope of the consent. In *People v. Billington*,[32] the defendant in a bad check case consented to a search of his hotel room to find papers belonging to the victim and relating to the common business interest of himself and the victim. The Supreme Court held that the police must stay within the limitations of this consent or obtain a warrant for a more general search. However, the court went on to hold that this search was within the scope of the limited consent.

> "Proof that consent was voluntary requires a showing that there has been 'an intentional relinquishment or abandonment of a known right.'"

The U.S. Supreme Court has held that consent to search the interior of a car justified the search of any closed containers in the car that might reasonably contain the object of the search.[33] A police officer had stopped the car and asked to search for drugs. He found a kilo of cocaine inside a rolled up paper bag on the floor.

The most recent Colorado opinion on the scope of consent is *People v. Olivas*,[34] in which the Supreme Court reversed the suppression of marijuana found hidden behind the door panels of a car. The defendant was stopped because his windshield was cracked. Due to some suspicious information, the officer asked if the defendant would consent to a search of the car, and the defendant agreed. The officer found nothing in the car or in the trunk, but then noticed that the door panel on the driver's door was loose. Using his flashlight, the officer saw what appeared to be marijuana hidden in the door, pried the panel off and found marijuana. Analyzing the issue on federal grounds only, the court noted that consent may be specifically limited by the suspect, but held that consent does authorize a thorough and careful search. The court held that the search was within the scope of the consent and was reasonable.[35]

Consent is not limitless in terms of time, either. *People v. Trujillo*[36] held that "the question of the temporal scope of a consent to search is also a question of fact to be determined in light of all of the circumstances."[37] In *Trujillo*, the defendant consented to a search of his impounded car on August 9. The police found nothing, but searched the car again two days later after their suspicions were aroused by the repeated demands of the defendant's wife to return the car. The Court of Appeals affirmed the trial court's ruling that the second search fell within the temporal scope of the consent because the consent was not limited in time by its own terms and because the defendant should have foreseen that his car would remain impounded for some period of time.

Once consent is granted, it may not be withdrawn. In *People v. Heimel*,[38] the Colorado Supreme Court held that an air traveler who impliedly consented to a search by beginning the security screening process could not withdraw that consent by withdrawing from the checkpoint. Similarly, the court has held that a person who initially consented to a search of his car trunk could not change his mind and validly withdraw consent after the search began.[39]

Third-Party Consent

In certain situations, a person other than the defendant may give valid consent to search. Whether a third party may validly consent usually turns on the relationship of the third party to the property to be searched (for example, the owner/occupier may give consent) or the relationship of the third party to the person who is the target of the search.[40] Generally, the person with the principal right to occupancy is the only person who may give consent. However, there are a number of situations in which third parties may validly consent to a search. Appellate courts have addressed the issue in a number of opinions.

In the case of rental property, it is normally the tenant who has the sole right to give consent.[41] A landlord who found marijuana in a house she leased to the defendant on a month-to-month basis did not have authority to authorize the police to search the home.[42] However, a co-tenant has the authority to authorize a search of the common areas of the shared property,[43] and a co-tenant who shares

specific rooms with the suspect may authorize a search of those rooms.[44] In a situation where the landlord was the defendant's mother, occupied the same premises and controlled access to all parts of the premises, she had authority to consent to a search of the home, and the police could lawfully arrest the defendant after spotting him inside.[45]

The owner or occupier of property may cede the authority to consent to a search to a third person. The defendant in *People v. Rivers*,[46] gave his trailer key to the owner of the trailer park in which he lived and told him to use the key in case of emergency. The owner called the police after getting complaints about offensive odors emanating from the trailer. A police search yielded a dead body. The Colorado Supreme Court upheld the search, holding that the defendant had granted the power to consent to the third party.

The consent of one spouse to allow a search of the premises binds the other spouse.[47] The issue in *People v. Payne*[48] was whether the defendant's estranged wife had authority to consent to a search of the jointly owned marital home after she had moved out. After the defendant was arrested on a suspicion of sexually assaulting the wife, the wife entered the home and gave police permission to search. The Court of Appeals affirmed the defendant's conviction, noting that the defendant and the victim had a common interest in the home and that the victim went to the home to retrieve some of her personal property. The court held that she had the authority to consent.

Actual authority to consent to a search is not a prerequisite of third-party consent if the police were justified in an objectively reasonable belief that the party giving consent had authority. In *People v. McKinstrey*,[49] the Colorado Supreme Court reviewed a trial court order suppressing evidence found in the search of a mountain cabin. An officer searched the cabin after learning some suspicious information about the occupant and after a nearby resident named Drumm claimed part ownership of the cabin and consented to the search. The trial court found that Drumm did not possess authority to consent to a search because he did not have joint access to and control over the cabin for most purposes. The trial court based its suppression order on this finding.

The Supreme Court held that the factual finding was supported by the record but that the finding did not resolve the constitutional issue. The federal constitutional analysis is governed by *Illinois v. Rodriguez*,[50] which held that the "reasonableness" requirement of the Fourth Amendment applies to the analysis of consent searches and that it does not automatically bar all "consent" searches that are conducted without proper consent. If the officers conducting the search believed they had valid consent, and if that belief was objectively reasonable, the results of the search should not be suppressed. The officers should make inquiry regarding the authority of the person giving consent to do so.[51] Because the trial court in *McKinstrey* did not fully consider this question, the case was remanded for further findings. Colorado's Supreme Court explicitly declined to consider the issue under the Colorado Constitution.

The most recent Colorado Supreme Court decision on the issue of third-party consent is *People v. Hopkins*.[52] In *Hopkins*, three police officers investigating an illegal fireworks call were approached by the defendant and two other people.

When identification was requested, the defendant accompanied one officer to his apartment to get identification, and the other two people stayed with the other two officers. When these two people indicated that they did not have identification, one officer asked to look in the fanny pack one of them was carrying. The person consented, and the officer found crack cocaine, marijuana and identification belonging to the defendant inside. Both people then indicated that the fanny pack belonged to the defendant.

The trial court granted the defendant's motion to suppress, but the Supreme Court reversed. The test for third-party consent was described as whether the facts available to the officer at the time of the search justify a reasonably cautious person in the belief that the consenting party had authority over the property,[53] and the court held that such facts did exist. Neither the fact that the consenting party did not have actual consent, nor the failure of the officers to inquire into the ownership of the pack altered this conclusion.

Implied Consent

Normally, the waiver of a fundamental constitutional right requires express consent by the person holding the right. However, in certain situations, the Colorado Supreme Court has found that consent may be implied by the actions of the defendant. In *Heimel*,[54] discussed above, the court held that entering an airport and beginning the security screening process constituted a consent to a search.

In *People v. Renfrow*,[55] police officers were inspecting a car that was believed to have been involved in a recent burglary. The defendant approached them, gave information about the car, volunteered that he had the keys inside and invited them in. The house was dark, and the officers had to use their flashlights, revealing stolen property in plain view. The Colorado Supreme Court held that the defendant voluntarily consented for the police to enter, grafted the plain view exception onto the consent exception and upheld the admission of the results of the search.

An invitation to enter a residence, coupled with an agreement to speak with the officers, also was held to be a consent to a search in *People v. Clouse*.[56] Police officers investigating an auto theft found an outstanding warrant for the defendant. They knocked on the defendant's motel room door, stepped inside to pat him down and asked if they could speak with him. The defendant replied "sure" and invited the officers into the room. Inside, the officers noticed a weapon and cuffed and advised the defendant. A search of his room turned up evidence implicating the defendant in burglary, theft and forgery.

The *Clouse* court first noted that the police may constitutionally knock on a door for investigative purposes because the occupant retains the right to refuse to open the door.[57] The record supported the trial court's conclusion that the defendant then validly consented to the entry by the police officers. The search of the motel room was justified as a search incident to the arrest.[58]

Such implied consent has limits. In *People v. Lingo*,[59] the defendant and another person entered a prison facility for a visit. Both the paperwork and the facility's signs put visitors on notice that there would be a search. Just after they walked through the metal detector, a balloon with a white powdery substance was found on the floor. The defendant was arrested, questioned, taken to the sheriff's office and searched. The trial court found that there was no probable cause justifying the arrest. The prosecution argued that the search fell within the scope of the consent exception created by the consent form and warning sign. The Supreme Court rejected that argument, holding that the consent was limited to a search at the correctional facility and that the search at the sheriff's office exceeded the scope of that consent.

Tainted Consent

Improper police actions preceding a consent may taint that consent and render it invalid. In *People v. Cleburn*, the Colorado Supreme Court held that "when consent is given after an interrogation in violation of *Miranda*, the consent is likely to be constitutionally infirm, tainted by the unconstitutional interrogation."[60] Similarly, if consent is obtained after an unlawful entry, it is likely to be constitutionally infirm.[61] Consent obtained through deception by the police is generally tainted by that deception.[62]

As in other search and seizure situations, the taint may become so attenuated that it no longer affects the validity of the consent, and the trial court should still consider the totality of the circumstances, including the defendant's age, education, intelligence and state of mind, as well as the duration, location and other circumstances of the search in determining whether consent has been voluntarily given.[63]

While consent may be tainted by improper police conduct prior to the consent, it is not tainted by the simple fact that there is some sort of police-citizen encounter prior to the consent. The defendant in *People v. Johnson*[64] was standing in line to board a plane when he was approached by two police officers who asked for identification and some other information. They gave him back his identification and asked if he would consent to a search, which he did.

The trial court found that there was no probable cause or reasonable suspicion for the initial contact and that the subsequent consent was tainted by this illegal contact. The Supreme Court reversed, holding that the initial contact between the defendant and the police did not even rise to the level of an investigatory stop and that the subsequent consent to search given by the defendant was not tainted by the initial encounter. The consent issue should therefore be analyzed on its own merits, and the court, after reviewing the relevant factors, held the consent was voluntary.

The most recent review of a claim that police action tainted a consent to search came in *People v. Gillis*.[65] As the police were about to conduct a search of the defendant's home, they realized that the address was incorrectly listed on the warrant. They told the defendant that they would secure his house until a corrected warrant was obtained. The defendant then signed a consent to search form. The Supreme Court affirmed a ruling that this consent was voluntary, finding that the police were entitled to secure the home until the corrected warrant arrived and that there were no threats or coercion, that the defendant's state of mind was unimpaired, and that no promises were made in exchange for the consent.

Conclusion

It seems that a surprisingly high percentage of suspects in criminal cases cooperate with the police, either by making statements or authorizing searches that incriminate themselves. Knowledge of the contours of the consent exception to the warrant requirement is important to the effective practice of criminal law and proper administration of the criminal justice system.

NOTES

1. *See* LaFave and Israel, *Criminal Procedure, West*, § 3.1.
2. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Linkletter v. Walker*, 381 U.S. 618 (1965).
3. *Elkins v. United States*, 364 U.S. 206 (1960).
4. *People v. Reynolds*, 672 P.2d 529, 531 (Colo. 1983).
5. *People v. Thiret*, 685 P.2d 193, 200 (Colo. 1984); *Colorado v. Bannister*, 449 U.S. 1 (1980).
6. *Reynolds, supra*, note 4 at 532.
7. *People v. Savage*, 630 P.2d 1070 (Colo. 1981); *see Coolidge v. New Hampshire*, 403 U.S. 443 (1971).
8. *People v. Milton*, 826 P.2d 1282 (Colo. 1992); *People v. Baker*, 813 P.2d 331 (Colo. 1991).
9. *People v. Savage*, 698 P.2d 1330 (Colo. 1985).
10. 631 P.2d 1122 (Colo. 1981).
11. *Rakas v. Illinois*, 439 U.S. 128 (1978).
12. *People v. Valdez*, 480 P.2d 574 (Colo. 1971).
13. *People v. Cleburn*, 782 P.2d 784 (Colo. 1989).
14. *People v. Santisteven*, 693 P.2d 1008 (Colo. 1986).
15. *People v. Drake*, 785 P.2d 1257 (Colo. 1990).
16. *People v. Inman*, 765 P.2d 577 (Colo. 1988); *People v. McKinstrey*, 852 P.2d 467 (Colo. 1993).
17. *People v. Thomas*, 853 P.2d 1147 (Colo. 1993).
18. 793 P.2d 1181 (Colo. 1990).
19. *People v. Reyes*, 483 P.2d 1342 (Colo. 1971).
20. *Supra*, note 17.
21. *People v. Hampton*, 758 P.2d 1344 (Colo. 1988).
22. 412 U.S. 218 (1973).
23. *Bumper v. North Carolina*, 391 U.S. 543 (1968).
24. *Supra*, note 19.
25. *Supra*, note 9.
26. *Id.* at 1334.
27. *Supra*, note 5.
28. *Id.* at 201.
29. *People v. Torand*, 622 P.2d 562, 565 (Colo. 1981).
30. *Supra*, note 5.
31. *Reynolds, supra*, note 4.
32. 552 P.2d 500 (Colo. 1976).
33. *Florida v. Jimeno*, 111 S.Ct. 1801 (1991).
34. 859 P.2d 211 (Colo. 1993).
35. *See United States v. Torres*, 663 F.2d 1019 (10th Cir. 1981) (search behind a door panel); *United States v. Espinoza*, 782 F.2d 888 (10th Cir. 1986) (search behind an unsecured quarter panel); *United States v. Peña*, 920 F.2d 1509 (10th Cir. 1990) (same).
36. 576 P.2d 179 (Colo.App. 1977).
37. *Id.* at 181.
38. 812 P.2d 1177 (Colo. 1991).
39. *People v. Kennard*, 488 P.2d 563 (Colo. 1971).
40. *People v. Hinchman*, 574 P.2d 866 (Colo.App. 1977).
41. *Stoner v. California*, 376 U.S. 483 (1974).
42. *People v. Brewer*, 690 P.2d 860 (Colo. 1984); *see also People v. Boorem*, 519 P.2d 939 (Colo. 1974); *Condon v. People*, 489 P.2d 1297 (Colo. 1971).
43. *Supra*, note 7.
44. *Spencer v. People*, 429 P.2d 266 (Colo. 1967).
45. *People v. Lucero*, 720 P.2d 604 (Colo. App. 1985).
46. 727 P.2d 394 (Colo.App. 1986); *see also People v. Berow*, 688 P.2d 1123 (Colo. 1984) (tenants granted authority to security guard).
47. *Lanford v. People*, 489 P.2d 210 (1971); *People v. Derrera*, 570 P.2d 558 (Colo. 1977).
48. 839 P.2d 468 (Colo.App. 1992).
49. *Supra*, note 16.
50. 497 U.S. 188 (1990).
51. *See also United States v. Rosario*, 962 F.2d 733 (7th Cir. 1992).
52. *People v. Hopkins*, 870 P.2d 478 (Colo. 1994).
53. *Rodriguez, supra*, note 50; *McKinstrey, supra*, note 16.
54. *Supra*, note 38.
55. 473 P.2d 957 (Colo. 1970).
56. 859 P.2d 288 (Colo.App. 1992).
57. *Milton, supra*, note 8; *Baker, supra*, note 8.
58. *People v. Hufnagel*, 745 P.2d 242 (Colo. 1987); *People v. Boff*, 766 P.2d 646 (Colo. 1988).
59. 806 P.2d 949 (Colo. 1991).
60. *Supra*, note 13 at 787; *People v. Breidenbach*, 23 Colo.Law. 1989 (Aug. 1994) (S.Ct. No. 93SA309, *annc'd* 6/13/94).
61. *People v. Donald*, 637 P.2d 392, 394 (Colo. 1981).
62. *McCall v. People*, 623 P.2d 397 (Colo. 1981).
63. *Breidenbach, supra*, note 60.
64. 856 P.2d 836 (Colo. 1994).
65. 23 Colo.Law. 1564 (July 1994) (App. No. 93CA0438, *annc'd* 5/5/94).