Consent Searches

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Overview

Search authorized by consent is a clearly recognized exception to warrant requirement of 4/A.

- Requirements for S. based on consent to be valid
  - Voluntary
  - Within Scope of consent
  - Person granting consent must be authorized to do so.

- 3d Party Consent and Computer Searches
  - Battling Co-tenants
  - Password protected files
  - Password circumventing tools
Voluntary \textit{(totality of circumstances)}

1. Characteristics of suspect:
   
   • Education/intelligence
   
   • Knowledge of right to refuse
   
   • Age
   
   • Gender
   
   • Ability to understand English
2. Act of Government Agent

- Threats or Force

- Assertion of lawful Authority
  
  “I have a search warrant.”
Scope of Consent

Limited by terms of authorization

Described by exchange between one granting consent & law enforcement
CONSENT TO SEARCH

I, ____________________________________________, residing at ______________________________________________________________, having been informed of my right to refuse to give consent to a search, hereby authorize __________________________ and other officers he may designate to assist him, to conduct a complete search of my ____________________________________________, including any containers of any kind located at ______________________________________________________________.

The officers are authorized by me to seize and take custody of any letters, papers, materials or other property including computers, together with all of its components, related processing and storage devices, discs, scanners, keyboards, printers, display monitors, modems and any and all accessories, including any and all stored images and documents or other related items or material or property that they deem pertinent to their investigation. The officer(s) are authorized to search for and seize electronic data within any computer they may search, and to utilize all means to search all files, including deleted, encrypted, and password-protected files. They are also authorized to remove any property, equipment or other material for search or sorting elsewhere as they deem necessary.

I have read this form and / or have had it read to me and I understand its contents. This permission is given by me freely and voluntarily and without threats or promises of any kind. I also understand that my consent can be withdrawn at any time during the execution of the search.

Dated: ________________________________

Signature

__________________________________________

Witness Signature

__________________________________________

(Other Signature)
Standard: “Objectively Reasonable”

- What would a reasonable person have understood by exchange between suspect and law enforcement?
Computer science grad student gave i.e. consent to search computer

He agreed to let officers take computer to FBI office for exam

Rsble to assume he knew it would involve more than a cursory look

- Police asked to search man’s apt. – assault on his neighbor
- Man consented
- Police searched his computer files
- *Did police exceed the scope?*
Scope of Consent → Reasonableness Test:

Expressed object

Statements made by Officer

Statements by Suspect

Officer:  “I think there are drugs in your car – can I search it?”

Suspect:  “Sure – I have nothing to hide.”

OK to search paper bag
Limited by Terms of Authorization

- Expressed Object
- Limitations of person granting consent
- Modifications or withdrawal of consent during search
Defendant consented to search of computer for evidence of stalking
Limited consent to D: Drive, My Files directory, Creative Writing folder

Police opened and viewed contents of a folder labeled “Offshore,” believing it contained evidence of tax violations.

Consent by Third Parties

General rule:

A search conducted by one other than the subject of the search is valid if the consenting party has either _________ or _________ authority.
Actual Authority - origin

- Not due to property interest

- Mutual use of property by one having joint access or control for most purposes

- Assumption of risk

Actual Authority

People who might have actual authority to consent:

- Parents
- Spouses
- Employers (maybe; not always)
- Room-mates and co-tenants

* Why these people?
Not due to their relationship

Often have mutual use and control for most purposes;

Minor children generally subject to control of parents.
Apparent Authority

Officer may rely on consent of one who seems authorized to give consent

**Objective standard:**

Facts available to officer would warrant a person of reasonable caution in the belief that consenting party had authority over the object of the search
Caveat …

3d party’s authority doesn’t automatically extend to every discreet enclosed space capable of being searched.

Mother could consent to search of son’s room in house they shared but not to locked footlocker in the room.

U.S. v. Block, 590 F.2d 535 (4th Cir. 1978)
“...the rule has to be one of reason that assesses the ... circumstances indicating the presence or absence of a discreet expectation of privacy with respect to the particular object.”
Locks are critical in determining who is authorized to consent

“If one wants to ensure his possessions will be subject to consent search based only due to his own consent, he is free to place these items in an area over which others do not share access or control, be it a private room or a locked suitcase under a bed.”

- Randolph
Disagreement Between Parties

If a potential D. w/ a self interest in objecting is not & objects, co-tenant’s consent does not suffice for a reasonable search.

Georgia v Randolph, 547 U.S. 103 (2006)
Defendant **NOT** Physically Present

Do NOT search my computer!
Facts:

• Valid warrant to search H’s work computer, found child porn;

• Asked for his consent to search home computer; he refused;

• Husband arrested, taken to jail;

• Police went to his home and asked Wife for consent to search home computer; she gave consent

Valid?
Totality of Circumstances:

• Wife had joint access/control; authorized under *Matlock*

• told of right to refuse

• co-tenant was not present & objecting Unlike in *Randolph*,

• Meets 4/A rsblness requirement;
U.S. v. Henderson, 536 F.3d 776 (7th Cir. 2008)

- Objection loses its force when defendant is validly arrested and taken to jail.

- An objector does not have an absolute veto.

- Both presence and objection by tenant are required to render co-tenant’s consent unreasonable.

But...
Once co-tenant refuses to grant consent, refusal remains in effect - barring an *objective manifestation* that he changed his mind & no longer objects.

U.S. v. Murphy, 516 F.3d 1117  (9th Cir. 2008)
What if police removed co-tenant?
Defendant lawfully arrested & placed in squad car

Co-tenant asked for and gives consent to search

Is Co-tenant’s consent valid?
• Lawful arrest

• Reasonable to keep arrestee in back of car
  Defendant

• D. never refused to give consent (never asked)

United States v. Wilburn, 473 F.3d 742 (7th Cir. 2007)
• *Effect* of officer’s removal of Defendant more important than officer’s *intent* …

• *But for* act of police, defendant would have been present

• when he registered objection from back of squad car, he was deemed to be *present* & *objecting* under *Randolph*.

State v. Jackson, 931 A.2d 452 (Del. Super Ct. 2007)
Password-Protected Files & 3dp Consent

Police are *not* entitled to rely on 3rd party consent to search a *locked* area when the third party lacks a key.

A password is a digital lock.
Welcome

click on your user name to begin

Marc

Margaret

Shaun
• Conrad and Trulock shared a computer
• Police asked Conrad for consent to search computer
• She told police they each had separate, password protected files on the hard drive – did not know each other’s passwords
• Police looked at Trulock’s password protected files …

Valid Search?
Held:

- Although Conrad could consent to a general search of computer, her authority did not extend to Trulock’s password-protected files.
Why?

- Owner affirmatively intended to exclude others from his files
- No _________________  ___  ________
- One who doesn’t know passwords lacks _________________ and ______ : No authority to consent.

Trulock v. Freeh, 275 F.3d 391, 403 (4th Cir. 2001)
What is the Effect of a Lock?

1. Manifests owner’s E/P

2. Imposes practical barrier to warrantless searches.
Ambiguous facts re: 3d party’s authority = duty to investigate further


Objective Standard: would rsble person believe party granting consent had the requisite authority?
• Wife consents to search of home computer.

• Forensic software does not indicate presence of Husband’s passwords

• Court said o.k. based on apparent authority

  • Totality of Circumstances

  • Officer of reasonable caution warranted in thinking wife had authority

United Stated v. Buckner, 473 F.3d 551 (4th Cir. 2007)
This is o.k.?! 

Maybe; maybe not…

*Buckner, (in dicta)* - can’t rely on apparent authority while using technology to intentionally avoid discovery of passwords / encryption put in place by user.
• 91 yr old father gave consent to search son’s computer
• Only computer in house
• Computer in son’s bedroom
• Encase software did not reveal presence of passwords

United States v. Andrus, 493 F.3d 711 (10th Cir. 2007)
What would have resulted if police tried to enter Andrus, jr’s room and discovered the door was locked?
This practice “may well be subject to question” if it is shown that there is a “high incidence of password protection” among home computer users.

Andrus
Welcome

click on your user name to begin

Marc

Margaret

Shaun
Should passwords on computers receive less weight than physical locks b/c they are not apparent from a visual inspection of the outside of the computer?
How do police know if a door is locked?
Is using EnCase, etc. which bypasses digital locks the same as using an x-ray machine to look through a door w/out first trying the doorknob?
Gov’t can not to ignore the walls of a home by relying on new technology that uses thermal imaging to perceive activities behind those walls

Should 4/A allow govt to ignore computer passwords (locks) b/c govt has technology that can bypass them?
Encase

- Highly configurable by users
- Provides users w/ ability to check for digital locks manually and easily
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