Consent to Enter or Search by Deception

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Officers often use deception during the course of their investigations. Hoping to entice a confession from a suspect, an officer may legally, but falsely, tell a suspect that his fingerprints were found at a crime scene, that his criminal acts were recorded by a concealed video camera, or that a co-criminal has confessed and implicated him. An undercover officer, by design, is engaged in a pattern and practice of deception.

Officers also often use deception when asking for and receiving consent to enter or search. By giving a law enforcement officer valid consent to search, the person has waived 4th Amendment reasonable expectation of privacy in the article or place to be searched. To be valid, the consenter must have either actual or apparent authority over the item or area to be searched. In addition, the person providing consent can limit the scope of the consent or withdraw consent at any time.

To be valid, consent to enter or must also be voluntarily. In deciding this issue, the court will consider the "totality of the circumstances" surrounding the consent. The burden is on the government to prove, by the preponderance of the evidence, that the consent was voluntary. Certainly, consent obtained through coercion is not voluntary. But, what about consent by deception? To what extent may an officer use deception without violating the requirement that consent be voluntary?

Lawful Deception

The Delivery Man With a Warrant

Armed with a search warrant for possession of cocaine, Alaska State Troopers and U.S. Postal Inspectors went to the defendant's home to serve the search warrant. The officers knocked on the door. A voice from inside responded, "who is it?" One of the troopers then announced, "Federal Express." A female occupant of the home then answered the door, whereupon the officers announced their true identity and purpose. The officers executed the warrant, seized cocaine and arrested the defendant. The defendant moved for suppression of the evidence claiming that the officers executing the search warrant did not comply with 18 U.S.C. § 3109, the federal "knock-and-announce" statute, which requires officers to announce their authority and purpose and be refused admittance prior to opening a closed door to gain entry. (18 U.S.C. 3109) The court denied the motion and found the deception used to get somebody to open the door did not violate federal law. *United States v. Contreras-Ceballos*, 999 F.2d 432 (CA9 1993). See also, *United States v. Salter*, 815 F.2d 1150 (CA7 1987).

The Undercover Narcotics Buyer

Lying about whether you are law enforcement is OK.

On December 3, 1964, a defendant engaged in a telephone conversation with an undercover narcotics agent and invited the agent to his home for the purpose of selling him marijuana. Upon arrival, the undercover agent knocked on the defendant's door, identified himself as the potential purchaser and the defendant invited him inside. A sale of marijuana from the defendant to the agent took place. On December 17, 1964 the two parties completed a similar transaction. During both of these visits to the defendant's home, the agent did not see, hear or take anything that was not contemplated by the defendant. Agents subsequently arrested the defendant and a grand jury indicted him. The defendant filed a motion to suppress the marijuana. He argued that his admittance to the agent into his home was not voluntary, as the agent had engaged in deliberate deception by not revealing his true status as a federal agent. The U.S. Supreme Court denied the motion, stating, "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Lewis v. United States*, 385 U.S. 206 (1966).

Consent Once Removed

The "consent once removed" doctrine applies when an undercover law enforcement officer is invited into a house or other location where a reasonable expectation of privacy exists, establishes probable cause to make an arrest or conduct a warrantless search, and then summons additional officers for assistance. The doctrine holds that initial consensual entry covers the admission of additional officers and does not result in any greater government intrusion.

The United States Supreme Court recently had an opportunity to address the "consent once removed" doctrine. See *Pearson v. Callahan*, 129 S. Ct. 808 (2009). They declined and decided the case on qualified immunity grounds. However, the 6th, 7th, 9th and 10th circuits have approved of the doctrine. The 6th and 7th circuits have extended the doctrine to apply in situations where a police informant was invited in to the home. The 10th circuit has expressly refused to extend the doctrine to informants, limiting the scope of the doctrine to undercover police officers. See *United States v. Pollard*, 215 F.3rd 643, 648-649 (6th Cir.), cert denied 531 U.S. 999 (2000), *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir.), cert denied 484 U.S. 857 (1987), *United States v. Bramble*, 103 F.2d 1475 (9th Cir. 1996), *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986), *United States v. Yoon*, 398 F.3d 802, 806-808, (6th Cir.) cert. denied 546 U.S. 977 (2005), and *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007).

Unlawful Deception

The Non-existent Warrant

Lying about the existence of a warrant is not OK.

Four North Carolina police officers were investigating a rape. Two days after the alleged offense the officers responded to a residence the suspect shared with his grandmother. The grandmother met the officers at her door and one of them falsely announced that he had a search warrant. In

response, the grandmother opened the door and told the officers to "go ahead." During the subsequent search, the officers seized a rifle. The prosecutor introduced the rifle at trial after the court denied a motion to suppress. During argument on the motion, the state conceded it had relied on consent to justify the entry and search instead of a search warrant. On appeal, the United States Supreme Court ruled that consent based upon a false assertion that the officers possessed a search warrant cannot be voluntary and is thus invalid. *Bumper v. North Carolina,* 391 U.S. 543 (1968).

The 7th Circuit Court of Appeals faced a similar circumstance where an officer gained consent to enter a home by falsely stating she had an arrest warrant for the homeowner's son. In denying summary judgment on a 42 U.S.C. 1983 claim against the officer, the court stated that the consent in this case was obtained "by an outright and material lie, and was therefore ineffectual." *Hadley v. Williams,* 368 F.3d 747 (7th Cir. 2004).

The Deceitful Purpose

Telling the truth about being "government" but lying about what part of the government or lying about your true purpose is <u>not</u> OK.

Bosse was a licensed firearms dealer with a pending application to sell machine guns. An agent from the State of California arrived at Bosse's home to inspect his premises and the surrounding area as part of the application process. A federal ATF agent accompanied the state agent but failed to identify himself as such. The state agent merely told Bosse that the federal agent "is with me." Bosse gave the agents consent for the purpose of conducting the licensing inspection. In fact the ATF agent was present for the independent purpose of furthering a federal criminal investigation into Bosse's firearms activity.

The federal agent testified that he used the access to Bosse's home to prepare diagrams of the layout of the house in preparation for obtaining a search warrant. A court subsequently issued a search warrant and federal agents seized an illegal sawed-off shotgun, which resulted in Bosse's indictment. Bosse then argued that the shotgun was seized as a direct result of the ATF agent's illegal search of his residence.

While the 9th Circuit Court of Appeals remanded the case to the trial court for further findings, it did condemn the actions by the ATF agent. The court found that the misrepresentation of the ATF agent's purpose and position invalidated Bosse's consent. The court stated, "We think it is clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust." The 9th circuit reiterated that a known government agent who misrepresents his true purpose for entry cannot rely on consent to justify that entry. *United States v. Bosse*, 898 F.2d 113 (9th Cir. 1990).

In an earlier 9th Circuit case, the court disapproved of the entry of federal agents into a home that was accomplished with the assistance of local police officers. The local officers requested to enter to investigate a fictitious burglary. The officers used this ruse in order to gain access to the defendant in his own home for the purpose of placing him under arrest without first obtaining an arrest warrant. *United States v. Phillips,* 497 F.2d 1131 (9th Cir. 1974).

The 5th Circuit also found consent to be invalid when a suspect turned over tax records to an IRS revenue agent who represented that he was conducting a civil audit. The suspect's accountant asked the revenue agent if a "special agent" was involved in the matter. The revenue agent stated that no special agent was involved. In fact, the revenue agent was conducting the audit at the request of the Organized Crime and Racketeering Section of the Department of Justice. Because of the revenue agent's statements implying the lack of an existing criminal investigation, the defendant made some records available to the revenue agent who then microfilmed all of the records. On remand, the 5th Circuit stated, "It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by deceit, trickery or misrepresentation of the Internal Revenue agent." *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977).

On the other hand, the 8th Circuit found consent to be valid when officers consent to enter an apartment by telling the renter that they were looking for her boyfriend to discuss an "important matter" with him. In fact, the officers intended to arrest him for an earlier bank robbery but had not obtained an arrest warrant. The 8th Circuit ruled that there was no deceitful misrepresentation by the officers and that their stated purpose did not appear to have been said with the intent of tricking the girlfriend into giving consent to the officers. *United States v. Briley*, 726 F.2d 1301 (1984).

The Deceitful Objective

Lying about what you are searching for is <u>not</u> OK.

An individual may limit the scope of any consent given to law enforcement. For example, a person may give consent to officers to search his home, with the exception of a bedroom. A citizen may allow a search of his person, but not his briefcase. In addition, a person giving consent to a search of his home for the sole and express purpose of locating stolen pianos restricts the officers' search to only those areas large enough to conceal pianos.

Often times when asked for consent to search, a subject will ask what the officer is searching for. The officer needs to be honest and forthright in answering that question. If the officer asks for and receives consent to search a car for drugs, the U.S. Supreme Court has ruled that such consent can extend to containers in the vehicle that could contain the drugs. *Florida v. Jimeno*, 500 U.S. 248 (1991). But when officers receive consent to search for narcotics and then also search for and seize currency and exchange receipts, insurance policies, loan receipts, and certificates of title to real estate, the officers have misused the limited consent as a license to conduct a general exploratory search. Such unlawful action by government officers or agents raises the issue of the overall voluntariness of the actual consent. *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971).

Frank Connelly currently instructs legal subjects to the Federal Air Marshals, the Federal Flight Deck Officers, Bureau of Indian Affairs officers, tribal police officers, and United States Border Patrol agents. Frank retired from twenty-eight years of service as a municipal police officer in the Seattle, Washington area. He served in patrol, detectives and training units during my law enforcement career. Frank graduated, cum laude, from the Seattle University School of Law in 1987 and is an active member of the Washington State Bar.

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