

The State of Third Party Consent After *Georgia v. Randolph*¹

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Introduction

The Supreme Court seems to focus attention on co-occupant consent in 16 year increments. Starting with *U.S. v. Matlock*² in 1974, the Court ruled that a fellow occupant who shares common authority may consent to a premises search. In 1990, the Court further ruled in *Illinois v. Rodriguez*³ that a third party who lacks actual authority but who has “apparent authority” has capacity to give lawful consent. Most recently, in *Georgia v. Randolph* the Court settled a split among both federal and state courts by ruling that the objection of a co-occupant who is present prevails over the consent of another. Since *Randolph* was decided in 2006, the federal circuits have considered numerous challenges to law enforcement searches relying on third party consent. The term “present” in the *Randolph* holding has been the subject of the lower courts’ examination, along with two cases on third party capacity to consent.

Federal Circuit Court Application of *Randolph*

The Second Circuit

In *Moore v. Andreno*⁴ two deputies were sued for unlawfully entering a room where they discovered drugs. They relied on the consent of a live-in girlfriend who was moving out and called for assistance. Believing her boyfriend had hidden some of her belongings in a study that he had always forbidden her to enter, she used a bolt cutter to remove two locks and entered the room. After receiving an unidentified telephone call and fearing that her boyfriend was on his way back to the home to harm her, she called for help. Upon arrival, the deputies accompanied her into the study to retrieve her belongings and she discovered drugs in a drawer. They seized the drugs and the homeowner was indicted. The state court dismissed the indictment after suppressing the evidence and the homeowner sued.

The court ruled that a third party who has been told not to enter a room, who has been prevented from entry by padlocks, who has gained entry only by cutting the locks with bolt cutters, and who has made these facts known to the officers has neither actual nor apparent authority to grant consent. The court explained that a third party has authority to consent to a search of a home when that person has access to the area searched and has either (a) common authority over the area, (b) a substantial interest in the area, or (c) permission to gain access to the area.

In granting qualified immunity to the two deputies, the court stated, “with the recurrence of domestic violence in our society, we are loath to assume that a man may readily threaten his girlfriend, take her belongings, lock her out of part of his house, and then invoke the Fourth Amendment to shield his actions.”⁵ Furthermore, while the two deputies, “...misapplied the relevant constitutional calculus, they are police officers, not lawyers or mathematicians. And thus, because the law governing the authority of a third party to consent to the search of an area under the predominant control of another is unsettled,”⁶ the legal mistake they made in this case was a reasonable one.

The Sixth Circuit

In *U.S. v. Purcell*⁷ officers arrested a fugitive standing outside a hotel room and obtained consent from his girlfriend to search bags inside the room on the basis of “apparent authority” when she claimed the bags belonged to her. The officers found only male clothing inside the first duffel bag. The court ruled that discovery demonstrated the girlfriend lacked proper authority to consent. The court suppressed the discovery of a firearm found in another bag. The court ruled that the officers could have reestablished her apparent authority by asking her to verify her control over the other bags to be searched.

The Seventh Circuit

*U.S. v. Wilburn*⁸ upheld the discovery of a firearm during a consent search of a duffel bag in a closet given by a live in girlfriend who shared the residence for three months. The defendant had already been arrested for a traffic offense and was held in a patrol car outside in the parking lot when his girlfriend gave consent to search. The court cited *Randolph*, “...if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out (*italics added*)... So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant’s permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant’s contrary indication when he ex-presses it.”⁹

*U.S. v. Groves*¹⁰ is a case where police strategically planned to avoid the presence of a potentially objecting co-tenant. Officers were initially called to the neighborhood for shots fired. Upon arrival they spoke to the defendant, a convicted felon. He admitted to shooting off fireworks but denied having a firearm and repeatedly refused consent to search his apartment. A search warrant application was denied, and officers returned to the residence three weeks later when they determined the defendant would be away at work but his live in girlfriend would be home. After she signed a consent to search form, officers discovered the necessary evidence to charge the defendant with being a felon in possession of a firearm. Citing *Wilburn* and applying the holding from *Randolph*, the court ruled that the police played, “no active role” in removing the defendant from the premises. Since he was not, “objecting at the door” as required by *Randolph*, the search was valid.¹¹

*U.S. v. Henderson*¹² answers a slightly different question than the one raised in *Groves*: Does a refusal of consent by a “present and objecting” resident remain effective to bar the voluntary consent of another resident with authority after the objector is arrested and is therefore no longer “present and objecting?”¹³ The court noted that the two other circuits considering this question are split (see *Hudspeth* and *Murphy* below). In *Henderson*, the police were called to a home for a domestic assault. They met the wife outside where she told them her husband choked her and had a history of gun and drug arrests. Using a key provided by her teenage son, the officers entered the home, and the husband unequivocally ordered them out. Instead, they arrested him for domestic battery. The wife then signed a consent to search form and officers seized a number of weapons and drugs.

Agreeing with the 8th Circuit in *Hudspeth*, the court stated, “Both presence *and* objection by the tenant are required to render a consent search unreasonable as to him. Here, it is undisputed that [the husband] objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and [his wife] was free to authorize a search of the home.”¹⁴

The Eighth Circuit

In *U.S. v. Hudspeth*¹⁵ the police discovered child pornography on the defendant’s business computer during the execution of a search warrant. He refused consent to search his home computer for additional evidence and was arrested. Other officers went to his home and, after informing his wife why he had been arrested, she refused consent to search the home. The officers then asked if they could take the home computer. She asked what would happen if she refused and was told that an officer would remain behind to make sure no evidence was destroyed while another left to obtain a search warrant. She then consented and more evidence was discovered on the home computer.

The court applied “the narrow holding of *Randolph*, which repeatedly referenced the defendant’s physical presence and immediate objection [and] the absent, expressly objecting co-inhabitant has assumed the risk that another co-inhabitant might permit the common area to be searched.”¹⁶ Here again, simultaneous physical presence and objection must exist to overcome the consent of a cohabitant.

The Ninth Circuit

Contrary to *Hudspeth* and *Henderson*, the Ninth Circuit has ruled in *U.S. v. Murphy*¹⁷ that “when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant.”¹⁸ Despite a valid arrest and removal from the scene, followed by a voluntary consent two hours later by another co-tenant, “[o]nce a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects.”¹⁹ The court referred to one of the concerns addressed in *Randolph* that the police should not remove a “potentially objecting tenant from the entrance for the sake of avoiding a possible objection.”²⁰ Therefore, “when an objection

has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him."²¹

The Tenth Circuit

In *U.S. v. McKerrell*²² the court addressed the same concern expressed by the Ninth Circuit in *Murphy*. However, the "bare fact"²³ of an arrest and transport to the police station does not support a conclusion that police removed the arrestee to mute a potential objection to a search. When officers arrived at a home to arrest the defendant on outstanding felony drug charges he quickly retreated into the home and barricaded himself inside. His wife quickly came out of the house, leaving their young child inside. After a number of telephone conversations the defendant came outside and surrendered peacefully. He was arrested and transported to the police station. Officers then asked the wife for consent to search and she signed a written authorization. Affirming the search, the court found that merely barricading oneself in a home to avoid arrest on a warrant is not the functional equivalent of an express refusal of consent to search the home. In contrast with the Ninth Circuit, this court found that once a co-tenant is lawfully arrested and removed from the scene, the remaining co-tenant may give a valid consent to search.

Conclusion

It did not take long for the twin requirements of physical presence and express objection to surface in the appellate arena. So far, with the exception of the Ninth Circuit, the lower courts are applying *Randolph* narrowly, construing it to mean that one cohabitant may still provide lawful consent over the objection of another who is not physically present.

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¹ 547 U.S. 103 (2006)

² 415 U.S. 164 (1974).

³ 497 U.S. 177 (1990).

⁴ 505 F.3d 203 (2nd Cir. 2007).

⁵ *Id.* at 205.

⁶ *Id.*

⁷ 526 F.3d 953 (6th Cir. 2008).

⁸ 473 F.3d 742 (7th Cir. 2007).

⁹ *Randolph*, 126 S. Ct. At 1527-1528 (emphasis added by the *Wilburn* court).

¹⁰ 530 F.3d 506 (7th Cir. 2008).

¹¹ *Id.* at 512.

¹² 536 F.3d 776 (7th Cir. 2008).

¹³ *Id.* at 781.

¹⁴ *Id.* at 785. (emphasis original).

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- ¹⁵ 518 F.3d 954 (8th Cir. 2008).
¹⁶ *Id.* at 960-61.
¹⁷ 516 F.3d 1117 (9th Cir. 2008).
¹⁸ *Id.* at 1124.
¹⁹ *Id.* at 1125.
²⁰ *Randolph*, 547 U.S. at 121.
²¹ *Murphy*, 516 F.3d at 1125.
²² 491 F.3d 1221 (10th Cir. 2007).
²³ *Id.* at 1229.