Tulsa Law Review

Volume 3 | Issue 1

1966

Criminal Law: Search and Seizure--Right of Parent to Waive Child's IV Amendment Protections

Daniel T. Monte

the lessor;[11] the lessor cannot sue to recover any delay rental payments nor can he sue for breach of contract.[12] An "or" lease does not terminate automatically if there is no drilling as provided in the lease even if delay rentals are not paid;[13] rather the lessor has a cause of action against the lessee to recover the amount of the delay rental.[14]

Therefore, relative to the distinction between an "unless" lease and an "or" lease, there is a legal obligation to drill or pay *only* in the case of an "or" lease; there is no legal obligation to drill or pay in an "unless" lease such as was present in *Long* or *Murphy*. But relative to what is required to *perpetuate a lease* during the primary term, which was the underlying problem in *Long*, the lessee is obligated to either drill or *pay—not both*. If the lessee in *Long* had done neither, the lease would have automatically terminated since it was an "unless" lease but the lessee would have incurred no liability to the lessor; had it been an "or" lease and had the lessee done neither, the lessee would have been liable for damages.

While the language of the court that "the lessee is obligated to either commence the drilling of a well . . . or pay to the lessor a . . . delay rental" is inaccurate when applied to an "unless" lease, the context of the opinion makes it clear that what the court really means is that the lessee, if it intends to perpetuate its lease, must drill or pay.

Archie Robbins

CRIMINAL LAW: SEARCH AND SEIZURE—RIGHT OF PARENT TO WAIVE CHILD'S IV AMENDMENT PROTECTIONS

In the recent case of *State v. Kinderman*,[1] defendant, age twenty-two, was convicted of armed robbery of a sum greater than $100. After his arrest, police went to his home, where he lived with his father, and obtained permission from his father to search the premises for evidence in connection with the holdup. The police and the father went directly to the son's bedroom where they found in the closet the gun, sunglasses, and clothes used in the robbery. Defendant's motion to suppress this evidence, obtained by search and seizure without a warrant, was denied. In affirming the trial court, the Minnesota Supreme Court held that while defendant was protected from unreasonable searches and seizures under the United States Constitution, Amendment IV,[2] and the Minnesota Consti-

[11] Phillips Petroleum Co. v. Curtis, 182 F.2d 122 (10th Cir. 1950).
[12] 3 SUMMERS, OIL AND GAS § 452 (1958).
[13] Rich v. Doneghey, 71 Okla. 204, 177 P. 86, A.L.R. 352 (1918).
[14] 3 SUMMERS, OIL AND GAS § 440 (1958).

[1] 136 N.W.2d 577 (Minn. 1965).
[2] "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."

tution, Article 1, § 10,[3] his right of privacy in his father's home must be considered from the standpoint of the father's right to waive it as sole owner and one in possession. A vigorous dissent by the chief justice and two associate justices argued that the search was unreasonable because the father could not consent to a search without a warrant of the son's personal effects and that no reason was shown why the police did not obtain a warrant.

In determining the legality of search and seizure without a warrant but with the consent of a third party, the courts have applied a test of reasonableness.[4] This test of reasonableness is resolved by looking at the facts of each case.[5] The courts have been especially concerned with the relationship between the parties, the location of the evidence, and the degree of control over this location by the one consenting.

In parent-child situations, the courts are as divergent in their results as they are in their reasons. The early decisions looked merely at the consent of the homeowner and were not particularly concerned with where the evidence was found. Most illustrative of this view is *Gray v. Commonwealth.*[6] Although the evidence was found in the suspect's bedroom, the court held that the consent of the householder enabled the police to make the search.[7]

More recent decisions, while considering where the evidence is located, have induced more confusion into this area of the law than they have eliminated. In *Holzhey v. United States,*[8] police were given consent by the defendant's daughter and son-in-law, with whom the defendant lived, to search their home. The court held this consent did not extend to a locked cabinet containing the personal effects of the defendant, since the police were put on notice by the daughter's statement that the cabinet did not belong to her.[9]

In *Woodard v. United States,*[10] a lady let her grand-nephew and his friend occupy a room in her apartment. While in the normal process of cleaning their room, she discovered a pistol and some suspicious-looking

[3] The language of Article 1. Section 10 of the Minnesota Constitution is the same as that of the United States Constitution, Amendment IV, *supra* note 2.

[4] See, *e.g.,* United States v. Zimmerman, 326 F.2d 1 (7th Cir. 1963); United States v. Peisner, 311 F.2d 94 (4th Cir. 1962); Buettner v. State, 233 Md. 235, 196 A.2d 465 (1964).

[5] See, *e.g.,* Davis v. United States, 327 F.2d 301 (9th Cir. 1964); Fraker v. United States, 294 F.2d 859 (9th Cir. 1961); United States v. Law, 190 F. Supp. 100 (S.D. Cal. 1960).

[6] 198 Ky. 610, 249 S.W. 769 (1923).

[7] *Accord,* Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937) (evidence found in "front room" where defendant was sleeping); State v. Hagan, 47 Idaho 315, 274 P. 628 (1929) (evidence found in barn); Morris v. Commonwealth, 306 Ky. 349, 208 S.W. 2d 58 (1948) (evidence found in kitchen).

[8] 223 F.2d 823 (5th Cir. 1955).

[9] *Contra,* State v. Tuttle, 16 Utah 2d 288, 399 P.2d 580 (1965) (dictum). Mother's consent to search a cabinet in her son's bedroom was upheld. While the son normally lived at home, he was in the Air Force at the time of the search.

[10] 254 F.2d 312 (D.C. Cir.), *cert. denied,* 357 U.S. 930 (1958).

papers and called the police. The court held her consent valid.[11]

In *Maxwell v. Stephens*,[12] a mother's consent was held to be sufficient to authorize search of the closet in defendant's bedroom and seizure of his coat hanging therein. The defendant shared the bedroom with two brothers. It can be argued that by sharing the bedroom there was sufficient common usage by the family to bring the case within the general rule suggested by the court in *United States v. Roberts*.[13]

In Rees v. Peyton,[14] the court held that the parent's consent was adequate. The son lived in a distant city, occasionally stayed with his parents, and was considered a guest. The evidence was found in a locked suitcase, bearing the name, address, and telephone number of a third party, in a crawl-way behind a closet in the attic. The parents did not know the third party and had never seen the suitcase. The basis of the court's decision was that the defendant, being a guest, had no standing to object.[15] In light of the *Holzhey* case, the evidence should have been excluded as the police were put on notice that the suitcase belonged to a third party and no attempt was made to contact that party before opening it.

The most recent case on parental consent is *Reeves v. Warden, Maryland Penitentiary*.[16] Defendant lived with his mother, sister (who owned the house), and niece. The mother was alone when police came to search defendant's room and gave them permission. In summarizing the facts and holding that the mother's consent was ineffective, the court said:

> It was conceded by all that the room in which Reeves was sleeping at the time of his arrest was *his* room and that it was regularly and exclusively occupied by him. The district court found as a fact that the bureau in which the note

[11] *Accord*, People v. Galle, 153 Cal.App.2d 88, 314 P.2d 58 (Dist. Ct App. 1957).

The *Woodard* case is distinguishable from the *Holzhey* case since in the former it was customary for the lady to be in their room and they were considered guests. Whereas, in the latter, the evidence was found in a locked cabinet set aside for the exclusive use of the suspect.

[12] 229 F. Supp. 205 (E.D. Ark. 1964).

[13] 223 F. Supp. 49, 59 (E.D. Ark. 1963) (dictum), *cert. denied*, 380 U.S 980 (1965):

"If a general rule must be extracted . . . , it may be said with some degree of assurance that assuming a truly voluntary and understanding consent or authorization the same is sufficient to validate a search if given by a person who is in the sole possession or has sole control of the premises in question or who has an equal right with the defendant or suspect to the possession or control of the premises, *provided that the search is limited to the general premises and does not involve entry into portions of the premises obviously reserved to the exclusive use of the defendant or suspect . . . .*" (Emphasis added.)

Accord, United States *ex rel.* McKenna v. Meyers, 232 F. Supp. 65 (E.D. Pa 1964).

[14] 341 F.2d 859 (4th Cir. 1965).

[15] *But see*, Jones v. United States, 362 U.S. 257, 266 (1960) (defendant had standing to object although he was at most an invitee or guest): "Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."

[16] 346 F.2d 915 (4th Cir. 1965).

> was found "was set aside exclusively for petitioner's use, even though she (the mother) washed his clothes and placed them in one of the drawers."
>
> Even assuming, as the district court found, that the mother's actions amounted to a grant of permission to enter and search the premises, we think she was without authority to consent to the search of Reeves' room and the bureau in it by the officers and that the petitioner has standing to challenge that search and the seizures which resulted from it. *Jones v. United States,* 362 U.S. 257, 265-266, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960); *Holzhey v. United States,* 223 F.2d 823, 825-826 (5th Cir. 1955) . . . .[17]

In the *Kinderman* case the majority bottomed the validity of the search upon the father's control over the premises. The court asserted that this control enabled the father to waive his son's constitutional right of privacy and made the search reasonable. Insofar as those areas that the father, as householder and one in possession, has sole control of or use and enjoyment jointly with the son, the court was correct in relying upon *Roberts v. United States.*[18] But the court did not distinguish these areas from those occupied exclusively by the son or even consider whether the son's rights in his personal effects were superior to his father's rights therein. The necessity of this distinction was shown by the dissent when it looked to the *Roberts* case and commented, "[T]he court (in the *Roberts* case) held the search was reasonable because, in contrast to the instant case, '*the search did not extend to the personal effects of the appellant.*, 332 F.2d 897."[19] Nowhere in the case was it shown that the father normally went into the son's room so as to make the *Woodard* case applicable. Or that the father jointly used the room so as to come within the *Roberts* case. While it may also be argued that there was no showing that the defendant had that degree of exclusive use of his room which the defendant had in the *Reeves* case, it would be more reasonable to assume exclusiveness with a twenty-two year old defendant than to assume joint use between him and his father. Furthermore, in allowing search of the son's closet, the court must have believed that either the defendant's belongings therein were not his personal effects, or even if they were, the father could consent to the search of them. The former belief would be invalid since the articles were located in the closet of the son's bedroom. The latter belief would be equally invalid in light of the *Reeves* case and the *Roberts* case.

It appears that the majority was erronous in both its reasoning and its conclusion. The court refused to follow the weight of modern authority and look at where the evidence was found and the interests of the defendant therein.[20] Rather it chose the view of the early decisions and was

[17] *Id.* at 924-25. (Emphasis by court.) (Footnote omitted.)

[18] 332 F.2d 892 (5th Cir. 1964), *cert. denied,* 380 U.S. 980 (1965). See general rule *supra* note 13.

[19] State v. Kinderman, *supra* note 1, at 585-86 (dissent). (Emphasis by court.)

[20] See text accompanying notes 8-17 *supra.*