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Police Law Bulletin

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UNITED STATES SUPREME COURT

Consent to Search Home By Woman Who Lived There Was Valid When Consent Given After Her Male Partner, Who Objected, Was Arrested and Removed From the Premises - *Randolph* Does Not Apply When the Objecting Occupant is Absent When Another Occupant Consents

***Fernandez v. California*, 571 U.S. ____ (25 February 2014).**

Police officers observed a suspect in a violent robbery run into an apartment building, and heard screams coming from one of the apartments. They knocked on the apartment door, which was answered by Roxanne Rojas, who appeared to be battered and bleeding. When the officers asked her to step out of the apartment so that they could conduct a protective sweep, Fernandez came to the door and objected, stating, "You don't have any right to come in here. I know my rights." Suspecting that Fernandez had assaulted Rojas, the officers removed him from the apartment and then placed him under arrest. He was then identified as the perpetrator in the earlier robbery and taken to the police station for booking.

Approximately one hour after Fernandez' arrest, an officer returned to the apartment and informed Rojas that Fernandez had been arrested. The officer requested and received both oral and written consent from Rojas to search the premises. In the apartment, the police found gang paraphernalia, a butterfly knife, clothing worn by the robbery suspect, ammunition, and a sawed-off shotgun.

Fernandez was charged with robbery, infliction of corporal injury on a spouse, cohabitant, or child's parent, possession of a firearm by a felon, possession of a short-barreled shotgun, and felony possession of ammunition. Before trial, Fernandez moved to suppress the evidence found in the apartment, but the court denied the motion. Fernandez then pleaded no contest to the firearms and ammunition charges. On the remaining counts—for robbery and infliction of corporal injury—he went to trial and was found guilty by a jury. The court sentenced him to 14 years of imprisonment. The California Court of Appeal affirmed. It held that because Fernandez was not present when Rojas consented to the search, the exception to permissible warrantless consent searches of jointly occupied premises that arises when one of the occupants present objects to the search, did not apply. The California Supreme Court declined to review the case. The United States Supreme Court then granted certiorari.

Consent searches are permissible warrantless searches, and are clearly reasonable when the consent comes from the sole occupant of the premises. When multiple occupants are involved, the Supreme Court's cases firmly establish that police officers may search the jointly occupied premises if one of the occupants consents. In *Georgia* v. *Randolph*, 547 U. S. 103 (2006), the Supreme Court recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, the Court considered whether *Randolph* applies if the objecting occupant is absent when another occupant consents.

Fernandez contended that, although he was not present when Rojas consented, *Randolph* nevertheless controls. He advanced two arguments in support of this position. He first argued that his absence should not matter since it occurred only because the police had taken him away. The Supreme Court acknowledged that dictum in *Randolph* suggested that consent by one occupant might not be sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," 547 U. S., at 121. However, the Court noted that this statement is best understood to refer to situations in which the removal of the potential objector is not objectively reasonable; the statement should not be read to suggest that improper motive may invalidate an objectively justified removal. In the case at hand, Fernandez did not contest the fact that the police had reasonable grounds for his removal or the existence of probable cause for his arrest. Thus, the Court reasoned, he was in the same position as an occupant absent for any other reason.

Fernandez' second argument was that the objection he made while at the threshold of the premises remained effective until he changed his mind and withdrew it. The Court found this argument though inconsistent with *Randolph* in at least two important ways. First, it cannot be squared with the "widely shared social expectations" or "customary social usage" upon which *Randolph*'s holding was based. Explaining why consent by one occupant could not override an objection by a physically present occupant, the *Randolph* Court stated:

> "[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions." *Id.*, at 113.

The Court hypothesized that the reaction would likely be quite different though if the objecting tenant was not standing at the door. When the objecting occupant is standing at the threshold saying "stay out," a friend or visitor invited to enter by another occupant can expect at best an uncomfortable scene and at worst violence if he or she tries to brush past the objector. But when the objector is not on the scene (and especially when it is known that the objector will not return during the course of the visit), the friend or visitor is much more likely to accept the invitation to enter. Second, Fernandez' argument would create the very sort of practical complications that *Randolph* sought to avoid. The *Randolph* Court recognized that it was adopting a "formalistic" rule, but it did so in the interests of "simple clarity" and administrability. *Id.*, at 121, 122. The rule that Fernandez would have us adopt would produce a multitude of practical problems. For example, there is the question of duration. Fernandez argues that an objection, once made, should last until it is withdrawn by the objector, but such a rule would be unreasonable. Suppose that a husband and wife owned a house as joint tenants and that the husband, after objecting to a search of the house, was convicted and sentenced to a 15-year prison term. Under petitioner's proposed rule, the wife would be unable to consent to a search of the house 10 years after the date on which her husband objected. The Court refused to stretch *Randolph* to such strange lengths. Nor was the Court persuaded to hold that an objection lasts for a "reasonable" time questioning what interval of time would be reasonable in this context? A week? A month? A year? Ten years?

Fernandez claims that his expansive interpretation of *Randolph* would not hamper law enforcement because in most cases where officers have probable cause to arrest a physically present objector they also have probable cause to obtain a warrant to search the premises that the objector does not want them to enter. The Court found that this claim though misunderstands the constitutional status of consent searches, which are permissible irrespective of the availability of a warrant. Requiring officers to obtain a warrant when a warrantless search is justified may interfere with law enforcement strategies and impose an unmerited burden on the person willing to consent to an immediate search.
The Supreme Court noted that its opinion in *Randolph* took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present. Again and again, the opinion of the Court stressed this controlling factor. The Court's opinion could hardly have been clearer on this point - the Court's opinion does not apply where the objector is not present and objecting. Therefore, the Court refused to extend *Randolph* to the very different situation in this case, where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared. The judgment of the California Court of Appeals was affirmed.

Encounter With Police Was Consensual So That Consent Obtained During Encounter Was Valid

***State v. Williams*, No. COA09-388 (22 December 2009).**

An officer, on patrol in Winston-Salem, ran the tag on defendant's vehicle, suspecting that the tag was expired because it was dirty and worn. Before the response came back, defendant had pulled into a driveway. The officer pulled over to the curb on the side of the street opposite the driveway. He did not activate his blue lights or siren. When the officer approached defendant's vehicle, he recognized the defendant's passenger because he had previously arrested her for narcotics possession and prostitution. The officer asked the defendant about the status of the 30-day tag and defendant proceeded to tell him that it was expired. The officer then asked defendant for his license, and defendant handed him an expired registration and admitted that he did not have a license. The officer asked defendant to step out of the vehicle. The officer then told defendant that he recognized defendant's passenger and "knew what kind of activity she was involved in." The officer asked defendant if he had any outstanding warrants, or any drugs on him, to which defendant responded, "no." Defendant then consented to a search of his person, which revealed cocaine.

Defendant was indicted for felony possession of cocaine. Defendant filed a motion to suppress. The trial court granted the motion concluding that the consent was not valid because it occurred during a period of detention which was not supported by reasonable suspicion. The State appealed.

The Court of Appeals noted that the United States Supreme Court has held that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to leave, the encounter is consensual and no reasonable suspicion is required. Examples of circumstances that might indicate a seizure would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In

the present case, the officer never initiated a traffic stop; defendant did not pull into the driveway as a result of any show of authority from the officer; the officer parked his patrol car on the opposite side of the street from the driveway in which defendant parked and thus, did not block his vehicle from leaving the scene; the officer did not activate his blue lights or siren; and there is no evidence that the officer exerted any physical force or engaged in any show of authority during his encounter with the defendant. Thus, the Court concluded that the encounter between the officer and the defendant was entirely consensual. Because it was not a seizure, the encounter did not have to be supported by reasonable suspicion or probable cause.

Authority to Consent Based Upon Reasonable Expectation of Privacy, Not Whether Person Is "Legal Occupant"

***State v. Early*, No. COA08-68 (6 January 2009).**

The defendant, Damenon Early, and another man, Paras Samuel had an altercation on the street. The argument escalated and Samuel pulled a gun, but then put it away and began to walk off. Defendant Early then pulled his gun and pointed it towards Samuel. Samuel turned around and said, "If you're gone pull [that] gun out, you better use it." Defendant then shot Samuel. Samuel pulled his gun back out and shot defendant who then returned fire twice more. Defendant fled from, and Samuel died at, the scene.

The defendant lived with his mother and stepfather. The police immediately went to the residence where the defendant's stepfather allowed them to come in. Defendant was in the kitchen bleeding from his chest. When the police asked defendant where his gun was, the defendant's mother retrieved a gun from the living room closet and some spent shell casings from the porch. Later, the police obtained consent to search the home from the defendant's mother and stepfather. They obtained various items of evidence from the house. In the defendant's room, they found a gun box and some bullets.

Defendant was charged with first degree murder. Prior to trial, defendant made a motion to suppress the gun box and bullets. The trial court denied the motion, ruling that the defendant did not have a reasonable expectation of privacy in his room because he was not a "legal occupant" registered with the lessor, a public housing authority. Defendant was found guilty of voluntary manslaughter. Defendant appealed arguing, among other things, that the trial court erred in denying his motion to suppress.

The North Carolina Court of Appeals embarked on a lengthy and useful recap of the law of consent, noting that (1) normally, any co-occupant of a residence can consent to a search of the common areas of the residence, but (2) such consent does not extend to areas of the residence that are exclusively used by another occupant, and (3) the defendant was an occupant of the residence regardless of whether he was registered with the lessor. The court could not determine from the record whether the defendant's room was used exclusively by him, or whether his mother and stepfather also had access to it, and therefore could not determine whether the trial court's denial of the motion to suppress was in error, but found that any error was harmless in light of other evidence against the defendant.

Always Remember….

The Duty to Disclose

I. Statutory Discovery Obligations

Chapter 15A, Subchapter IX, Article 48 sets forth the statutory provisions for discovery in superior court.

A. G.S. 15A-903(a) requires the State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies and the prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant.

B. G.S. 15A-903(c) requires law enforcement and investigatory agencies to make available to the prosecutor's office a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this or related statutes.

C. G.S. 15-903(a)(1)(a) defines "file" to include the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of test and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

II. Brady Obligations

A. *Brady v. Maryland*, 373 U.S. 83 (1963).
Brady, and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. Their trials were separate, Brady being tried first. At his trial, Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial, Brady's counsel had requested the prosecution allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him, but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution, and did not come to Brady's attention until after he had been tried, convicted and sentenced, and after his conviction had been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied Brady due process of law, and it remanded the cases for a new trial on the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [Brady's] offense below murder in the first degree."

The United States Supreme Court agreed to review the matter. The Supreme Court affirmed the judgment of the Maryland Court of Appeals and held that: 1. *suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution*; and that 2. when the Court of Appeals restricted Brady's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the Fourteenth Amendment, since the suppressed evidence was admissible only on the issue of punishment.

Thus, *Brady* (and subsequent cases descending from it) place an affirmative duty on a prosecutor to disclose favorable, material information to the defense.

B. This duty has been extended to police agencies through case law, requiring law enforcement agencies to notify the prosecutor of any such information. *See Kyles v. Whitley*, 514 U.S. at 437.

C. "*Brady* material" or evidence the prosecutor is required to disclose includes any evidence favorable to the accused – evidence that goes towards negating a defendant's guilt or that would reduce a defendant's potential sentence (i.e. exculpatory evidence). *Giglio v. United States* expanded the *Brady* decision to require prosecutors to also provide information to the defense which could tend to impeach a witness, including evidence that might impact the credibility of a witness. 405 U.S. 150 (1972).

D. *Brady* is not a discovery rule but has been described as a rule of fairness. Thus, *Brady* requires the disclosure of certain favorable information, even if that information has not previously been recorded and has only been communicated orally to a member of the prosecution team (this includes law enforcement). It is not limited to the production of pre-existing documents.

E. It is the prosecutor who must decide if the information is exculpatory and whether it must be disclosed to the defense. Law enforcement should not attempt to assume this role but rather inform the prosecutor of the information. Any doubts should be resolved in favor of disclosure. Suppression may result regardless of whether the prosecutor intentionally or inadvertently withheld evidence.

F. The defense has no obligation to make specific *Brady* requests. Thus, the fact that the defense has not specifically requested the information does not relieve law enforcement of its obligations to provide the information to the prosecutor. Law enforcement has an affirmative duty to provide *Brady* material to the prosecution.