

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 vs. : NO. 013 CR 10  
 :  
 PAUL G. HERMAN, :  
 Defendant :

Criminal Law - Search and Seizure - Suppression - Spousal Consent - Voluntariness - Conclusiveness of Third Party Consent Where Defendant Physically Present and Opposed - Searches and Seizures by Private Parties - State Action - Third Party Acting as Agent or Instrumentality of the State

1. As a general rule, when police officers obtain the voluntary consent to search of a third party who has the authority to give consent, they are not required to obtain a search warrant based upon probable cause.
2. The constitutional sufficiency of a co-inhabitant's consent to enter and search rests on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right.
3. A spouse's consent to search a defendant's home in response to a police officer's statement that a search warrant will be obtained if consent is not given is neither coerced or involuntary, if at the time the officer had a good faith and legal basis to obtain a warrant.
4. A warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.
5. The proscriptions of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution apply only to governmental searches and seizures, not to searches and seizures conducted by private individuals.
6. For the conduct of a third party to be deemed state action subject to the exclusionary rule: (1) the third party must

be acting on behalf of the state at the time of the conduct in question, and (2) either the conduct of the state or a party acting on its behalf must be unlawful.

7. The critical factor for purposes of determining whether state action is involved is whether the private individual, in light of all the circumstances, must be regarded as having acted as an instrument or agent of the state.

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vs.	:	NO. 013 CR 10
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PAUL G. HERMAN,	:	
Defendant	:	
James M. Lavelle, Esquire		Counsel for Commonwealth
Assistant District Attorney		
Stephen P. Ellwood, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - January 18, 2012

The Defendant, Paul G. Herman, has been charged with two counts of possession of a firearm in violation of 18 Pa.C.S.A. §6105(a)(1),<sup>1</sup> one count of simple assault under 18 Pa.C.S.A. §2701(a)(1), and one count of harassment under 18 Pa.C.S.A. §2709(a)(1). Herein, Defendant seeks to suppress two guns obtained from his home and brought to the police station by his wife, as well as two statements made by Defendant following

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<sup>1</sup> Defendant is a convicted felon which status prohibits him from possessing a firearm in this Commonwealth. Defendant's conviction was for voluntary manslaughter.

the delivery of these weapons. For the reasons which follow, we deny Defendant's Motion to Suppress.

#### FACTUAL BACKGROUND

On January 3, 2010, at approximately 7:13 P.M., Officer John Donato of the Jim Thorpe Police Department was dispatched by the Carbon County Communications Center to 319 South Street in the Borough of Jim Thorpe to investigate a domestic disturbance call. The dispatch advised that weapons were present. The call was made by Defendant's wife, Jolaine Herman, who, together with Defendant's minor daughter and son, also resided at this location.

Upon his arrival, Officer Donato looked in the front window, observed Defendant's wife and daughter, and then knocked on the door. Defendant's daughter answered. Officer Donato stepped inside and asked to speak to Defendant. At this point, Defendant entered the room from an upstairs area and indicated he and his daughter had been arguing.

In order to better assess the situation, Officer Donato asked Defendant to step outside. Defendant was patted down and a pocket knife removed from his possession. After speaking with Defendant, Officer Donato asked Defendant to remain outside in the Officer's patrol car while he re-entered Defendant's home to speak further with Defendant's wife and

daughter. Inside the home, Officer Donato was told that Defendant had struck and kicked his daughter. Officer Donato also examined Defendant's daughter's upper chest and neck where he observed red marks consistent with the assault described. To further document their answers, Defendant's wife and daughter agreed to meet with the Officer at the police station and give a formal statement. In the meantime, Officer Donato went outside, placed Defendant under arrest, and transported him to the police station.

The police station is located a short distance from Defendant's home. At the police station, Defendant was placed in a holding cell, given *Miranda* warnings, and asked if he wanted to make a statement. Defendant declined to speak without an attorney. This occurred at approximately 8:20 P.M. (Commonwealth Exhibit 1).

Shortly after Defendant and Officer Donato arrived at the station, Defendant's wife and daughter also arrived and were taken to a conference room. Officer Donato again spoke with Defendant's wife and daughter about what had happened. During this time, Officer Donato told Defendant's wife that he had conducted a background check on Defendant and knew he was a convicted felon.<sup>2</sup> Officer Donato further asked if there were any

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<sup>2</sup> Prior to speaking with Defendant's wife at the station, and after Defendant had been arrested, Officer Donato made a request to obtain Defendant's prior

guns in the house. In response, Defendant's wife confirmed that Defendant was a convicted felon and that there were two long guns in the home. Upon learning of the presence of these guns, Officer Donato asked Defendant's wife if she would return to the home and bring these weapons to the police station. Officer Donato also told Defendant's wife that if necessary he would obtain a search warrant to have the guns located. Upon hearing this, Defendant's wife agreed to voluntarily bring the guns to the station.

Defendant's wife then left the police station. When she returned, she handed a 12 gauge shotgun (loaded) and a .22 caliber rifle (unloaded) to Officer Donato. Defendant's wife further agreed to provide, and did provide, a written statement about these weapons. (Commonwealth Exhibit 6). In this statement, Defendant's wife confirms that the guns she retrieved from the home were Defendant's and that the guns were located in their bedroom, on Defendant's side of the room. There is no time indicated as to when the statement was given.

When Defendant's wife returned to the station, Defendant saw his wife carrying the guns and asked to speak with her. This was not permitted. However, after his wife had left

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criminal record. The results of this request were faxed to Officer Donato at approximately 8:21 P.M. Although Officer Donato could not recall at the time of hearing whether he was aware of this fax or had examined its contents prior to meeting with Defendant's wife and daughter at the police station, it is clear from wife's testimony that Officer Donato was aware of her husband's criminal history when he spoke with her at the station.

the station, Defendant told Officer Donato that he now wanted to make a statement. At approximately 8:38 P.M., Defendant executed a form waiving his *Miranda* rights. (Commonwealth Exhibit 2). This was followed by two written statements from Defendant, one describing the circumstances of his possession of the guns and the second giving his version of the domestic dispute with his daughter. (Commonwealth Exhibits 3 and 4). Neither statement provides the time it was given. On the second statement, the time of the dispute between Defendant and his daughter is indicated to have occurred at 7:10 P.M.

In his Motion to Suppress, Defendant claims the police illegally coerced his wife to admit to the presence of weapons in their home and improperly pressured her to agree to bring the weapons to the police station by threatening to obtain a search warrant if she failed to do so - stating that if she didn't retrieve the guns, he would rip the home apart to have them located - when there was no basis to obtain a search warrant. Defendant also claims that the reason he gave the two written statements was because he saw his wife at the station with the guns.<sup>3</sup> Following hearing on Defendant's Motion, Defendant also

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<sup>3</sup> In his Motion to Suppress, Defendant further contends that at the time these statements were made, he was injured and in need of medical attention, which, he claims, was refused by the police and that, in consequence, the statements he gave were not knowingly, voluntarily and intelligently made. We find Defendant's description of his medical condition exaggerated and its effect on his decision-making incredulous.

While in the holding cell at the station, Defendant complained of a

argued that because he was present in the police station when his wife's consent to retrieve the guns from their home was obtained, the failure to also obtain his consent vitiated the effectiveness of any consent given by his wife.

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headache, possibly a concussion. This occurred after Defendant had given the two written statements. Officer Donato called to have an ambulance dispatched, and emergency medical personnel did in fact arrive and examine Defendant. Defendant, however, refused any medical treatment. (Commonwealth Exhibit 5).

DISCUSSION  
Voluntariness of Wife's Consent

As to the first issue, we reject the factual basis on which it is premised: that Officer Donato unlawfully induced Defendant's wife to turn over his weapons in violation of Defendant's rights. We accept as credible Officer Donato's testimony that after being alerted to the presence of weapons in the initial dispatch, he inquired of Defendant's wife if there were weapons. We also believe it entirely natural under the circumstances - a physical altercation between Defendant and the parties' daughter, witnessed by Defendant's wife, which resulted in Defendant's wife calling 911 for emergency assistance - for wife to confirm that there were weapons and that she wanted them removed from the home.

That Officer Donato mentioned the possibility of obtaining a search warrant (that he was aware of Defendant's prior record and would seek a warrant if consent was not provided) and that Defendant's wife wanted to avoid a search of her home for fear of what might be discovered since her teenaged son was also living in the home - facts to which wife testified - does not change our finding as to the voluntariness of wife's consent. The fact remains that given the information both known and available to Officer Donato at the time, there was a factual



basis for a search warrant<sup>4</sup> and any subjective compulsion wife may have felt to consent due to the potential for criminal liability of her son was neither known nor caused by Officer Donato.

#### Necessity of Defendant's Consent

As to the second issue, whether Defendant's consent was required to legitimize his wife's consent, Defendant relies on the United States Supreme Court's decision in Georgia v. Randolph, 547 U.S. 103 (2006). Before discussing this case, we note first that as a general rule "[w]hen police officers obtain the voluntary consent of a third party who has the authority to give consent, they are not required to obtain a search warrant based upon probable cause." Commonwealth v. Hughes, 836 A.2d 893, 900 (Pa. 2003). The constitutional sufficiency of a co-inhabitant's consent to enter and search "rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right . . . ." United States v. Matlock,

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<sup>4</sup> Having found that Officer Donato indicated his intent to obtain a search warrant if Defendant's wife refused to return to the parties' home and retrieve the firearms, this does not render the consent involuntary. See Commonwealth v. Woods, 368 A.2d 304, 306-307 (Pa.Super. 1976) (statement of intent to obtain a search warrant does not vitiate consent if the officer had a good faith and legal basis to obtain a warrant); cf. Bumper v. North Carolina, 391 U.S. 543 (1968) (holding that there can be no valid consent where access is given by police representing they have a search warrant when they have none).

415 U.S. 164, 171 n.7 (1974). Hence, Defendant's wife, as a resident of the home, had the requisite authority to consent to the search. See Commonwealth v. Garcia, 387 A.2d 46 (Pa. 1978) (holding that a mother, who had joint access or control over her son's bedroom, could validly consent to the search and seizure of items contained therein as son had no reasonable or legitimate expectation of privacy as against his mother's consent).

In Randolf, the police were called to a domestic dispute. On arrival, they found a husband and wife involved in a dispute over custody. Both parties accused the other of using illegal substances. Wife informed the police that they could find evidence of her husband's drug use if they searched the house. The police asked husband for permission to search but he refused. The police then asked wife. Wife consented, going so far as leading the police to an upstairs bedroom, which she identified as husband's, where evidence of drug use was in plain view. This evidence, together with other evidence discovered after execution of a search warrant obtained on the basis of what the police had observed, was seized. Husband moved to suppress the evidence.

In granting husband's motion, the Supreme Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present

resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." 547 U.S. at 120. The Court specifically noted it was drawing a fine line:

[I]f 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.

. . . 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 expresses it.

*Id.* at 121.

In drawing this line, the Court explicitly recognized that there is a distinction between a co-tenant who is physically present and objecting to the search and a co-tenant who has an interest in objecting to the search, but, because he may be a short distance away, is not invited to take part in the threshold colloquy, citing Matlock<sup>5</sup> and Illinois v. Rodriguez,

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<sup>5</sup> In Matlock, the defendant was in custody in a police car outside of the house in which he resided with his girlfriend and others when his girlfriend gave police her consent for a search of the bedroom she shared with the defendant.

497 U.S. 177 (1990).<sup>6</sup> Randolf, 547 U.S. at 121. In both of these cases, the Court upheld the reasonableness of the search to which consent was given, notwithstanding that the police were aware of the identity of the potential defendant and his nearby presence. As to the qualification in Randolf, that the police not "have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," Defendant's presence in the holding cell was not to prevent him from objecting to a search of the home, but rather occurred as a result of the assault on his daughter which was the basis of his subsequent arrest. Cf. Commonwealth v. Yancoskie, 915 A.2d 111, 115 (Pa.Super. 2006) (noting that obtaining defendant's wife's consent to search at a time when police knew defendant planned to be away and would not be home, did not amount to removal of defendant from entrance of his home under Randolph); *appeal denied*, 927 A.2d 625 (Pa. 2007).

Moreover, the factual distinctions between Randolph and the present case, and their legal implications, are even more fundamental. Here, the search of Defendant's home (assuming wife's return to the home, unaccompanied by police, and retrieval of guns which wife knew were present and openly visible in her own bedroom, can properly be characterized as a

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<sup>6</sup> In Rodriguez, the defendant was asleep in another room of the apartment when his girlfriend, whom the police believed to have authority, gave consent for a police search of the apartment.

search) was conducted by Defendant's wife, not by the police. This is significant since the proscriptions of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution apply only to governmental searches and seizures, not to searches and seizures conducted by private individuals. Commonwealth v. Harris, 817 A.2d 1033, 1047 (Pa. 2002).

Even if we were to accept Defendant's argument that "when [his wife retrieved the guns] and then handed them over to the police, she was acting as an 'instrument' of the officials, complying with a 'demand' made by them," and therefore, Defendant "was the victim of a search and seizure within the constitutional meaning of those terms," this would not change the outcome we have reached. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971), overruled on other grounds by Horton v. California, 496 U.S. 128 (1990). For the conduct of a third party to be deemed state action subject to the exclusionary rule: (1) the third party must be acting on behalf of the state at the time of the conduct in question, and (2) either the conduct of the State or a party acting on its behalf must be unlawful. Cf. Commonwealth v. Corley, 491 A.2d 829, 832 (Pa. 1985) (setting forth a two-part analysis in determining whether a private party's conduct in making an arrest is state action).

"[T]he fruits of an illegal search by an individual not acting for the state are not subject to exclusion by reasons of the Fourth Amendment. At the core of the reasoning underlying this refusal to extend application of the exclusionary rule to private searches is the concept of 'state action,' the understanding that the Fourth Amendment operates only in the context of the relationship between the citizen and the state." Corley, 491 A.2d at 831 (citations omitted); see also United States v. Jacobsen, 466 U.S. 109, 113 (1984) (The Fourth Amendment proscribes "only governmental action;" it is inapplicable to searches, even unreasonable ones, "effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official"). "The critical factor for purposes of determining whether state action is involved is whether the private individual, in light of all the circumstances, must be regarded as having acted as an 'instrument' or agent of the state." Commonwealth v. Price, 672 A.2d 280, 283 (Pa. 1996).

The acts of a third party do not become state action "merely because they are in turn relied upon and used by the state in furtherance of state objectives." Corley, 491 A.2d at 832. "The mere use by police and prosecutors of the results of an individual's actions does not serve to 'ratify' those actions as conduct of the state." *Id.* "Where, however, the

relationship between the person committing the wrongful acts and the State is such that those acts can be viewed as emanating from the authority of the State, the principles established in Corley dictate a finding of state action." Price, 672 A.2d at 284.

In this case, wife had every right as a co-inhabitant of the home with Defendant, her husband, to be in the home, and to seek and remove items located there. There is no illegality in her conduct. Cf. Commonwealth v. Pinkins, 525 A.2d 1189, 1193-94 (Pa. 1987) (upholding defendant's mother's right to search her home for a revolver owned by her, which was found in her son's bedroom and which had been used in a murder in which her son was involved). Nor, as previously discussed, did Officer Donato act unlawfully in seeking Defendant's wife's cooperation in retrieving the two guns.

That wife chose to cooperate with the police, with police knowledge, does not necessarily make her actions those of the police for purposes of the Fourth and Fourteenth Amendments, the question being one that can only be resolved "in light of all the circumstances of the case." Coolidge v. New Hampshire, 403 U.S. at 487.

As stated in Coolidge

In a situation like the one before us there no doubt always exist forces pushing the spouse to cooperate with the police. Among these are the

simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse. But there is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure or active cooperation with the police. The exclusionary rules were fashioned 'to prevent, not to repair,' and their target is official misconduct. They are 'to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it.' But it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. If, then, the exclusionary rule is properly applicable to the evidence taken from the [Herman] house on the night of [January 3, 2010], it must be upon the basis that some type of unconstitutional police conduct occurred.

*Id.* at 487-88.<sup>7</sup>

The facts of the present case strongly suggest that wife was acting primarily for her own self-interest and out of concern for the safety of her daughter. It was wife who called the police in the first instance and it was wife who decided to retrieve the guns herself, rather than have the police search

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<sup>7</sup> In Coolidge, the defendant was suspected of murder. While a polygraph was administered to him at the police station, police visited his home and interviewed his wife. During the course of this interview, defendant's wife provided the police with four guns belonging to her husband, and some clothes that she thought her husband might have been wearing on the evening of the murder. Specifically, in response to the police's question whether her husband owned any guns, wife replied, "Yes, I will get them in the bedroom." The police then accompanied wife to the bedroom where wife took four guns out of the closet and handed them to the police. At a suppression hearing, wife testified that she did so in an attempt to clear her husband of suspicion. While acknowledging that defendant's wife did not act wholly on her own initiative, the Court ultimately held that given the totality of the circumstances, she was not acting as an instrument or agent of the State and that the Fourth Amendment was not implicated. *Id.* at. 486-490.



for them, in order to protect her son. At the same time, unlike in Coolidge, here the police made an explicit request for wife to get Defendant's guns and bring them to the police station. While this distinction is indeed significant and supports a finding that wife was acting at the behest of the police when she retrieved Defendant's guns, absent some type of unconstitutional police conduct or illegality committed by wife - of which we have found none - Defendant's request to suppress his guns must fail. Cf. Commonwealth v. Borecky, 419 A.2d 753 (Pa.Super. 1980) (holding that where a police informant, with the knowledge and concurrence of the police, surreptitiously searches and takes marijuana from defendant's home, without defendant's knowledge or consent, the unauthorized and illegal activities of the informant are fairly imputed to the Commonwealth and require that the contraband seized, as well as all evidence seized pursuant to a subsequent warrant issued on the basis of such contraband, be suppressed).

#### CONCLUSION

In accordance with the foregoing, Officer Donato's actions did not violate Defendant's right to be free from unreasonable searches and seizures under the United States and Pennsylvania Constitutions. Officer Donato was under no obligation to obtain Defendant's consent. Furthermore,

Defendant's wife's retrieval of the guns was neither unlawful nor violated the protections afforded Defendant by the state and federal constitutions against unreasonable searches and seizures.

BY THE COURT:

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P.J.