

THIRD DEGREE COMMUNICATIONS, INC.

TRAINING BULLETIN: LEGAL UPDATE

Apparent Authority/Consent

By Charles Gillingham

You are dispatched to a residence on a call of loud noise. You go to the door, knock, and someone answers. You ask for entry, see a homicide victim in plain view and you begin to make arrests and seize other evidence. No problem right? Maybe, maybe not. You may be on the front page of the paper---and not in a good way. Every time you enter a location with consent you must evaluate whether the person who gave consent had the right to do so. **DO NOT TAKE SHORTCUTS.** Question, Question, Question, those from whom you seek consent. Then **DOCUMENT** your questions and the responses that you received.

WHAT DID YOU DO?

Courts acknowledge the simple fact that it may be difficult, if not sometimes impossible, in certain circumstances to determine whether an individual had the right to consent to a search of a location, car or some other thing like a computer. The cases look very closely at the steps officers take in determining whether the person giving consent had the right to do so.

The United States Supreme Court has even gone so far as to uphold a search where the person giving consent had no right to do so. In that case, the Court looked at what the officer said and did. The Court held that the officer made a reasonable, good faith effort, to determine who the person giving consent was, and whether that person had the ability to give consent. The Court held that the officer, by extensively questioning the individual, had facts that would lead a reasonable officer to conclude that s/he had consent to enter the residence.

COMMON AUTHORITY

In a shared residence, or a shared computer, it is important to determine whether the person giving consent has a right to access and control the area they are giving consent to search. The key question is whether someone other than the person giving consent had *exclusive* access and control to a certain location. For instance, a couple of years ago, I received a call from a Sheriff's Deputy who received consent to search a computer from the wife of a suspect. The astute deputy inquired of the wife whether there were password protected files or other areas she could not access. As a result of the inquiry, the deputy determined that the wife could not access all areas of the computer. That was

significant because had those areas been searched as a result of the wife's consent, all evidence of child pornography would have been suppressed. Instead, the deputy got a warrant and there was a successful prosecution.

Be clear that use of a location or thing is not required. In other words, the right to access and control is not the same as actually doing so. The person giving consent only has to possess the right to access and control a location, that they never did is of no import.

MINORS

As a general rule, minors cannot give consent to search a residence. What if you come upon a residence with a 16 or 17 year old babysitting? As with every rule, there are exceptions. There is one California case that held a 16 year-old in charge of a house had the authority to authorize a search of the residence. The facts in each instance are important.

QUESTION, QUESTION, QUESTION

California courts and the United States Supreme Court have made clear that unless officer are certain the person from whom they are requesting consent has that authority they need to ask her about it. The U.S. Supreme Court has stated that "even when the invitation is accompanied by an explicit assertion that the person lives there, the ...circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."

Save yourself the need to testify, save yourself the embarrassment of having evidence suppressed because you did not ask 30 seconds of questions.

Ask whether they live at the location?

Ask how they are associated with the location?

How do they know the owner, how long have they lived there?

Are there areas of the residence, car, computer, they are not allowed to go?

Are there areas they do not have the keys/password to?

Use your common sense, take a little time, and insure that your consent search will be upheld.

FOLLOW UP

In the last update I omitted something that caused confusion and an astute reader noted the ambiguity. In that case, a female passenger during a car stop got out when the car

came to a stop. The officer ordered her to stop and return. The U.S. Supreme Court in *California v. Brendlin*, 2007 W.L 1730143, held unequivocally that such an action is fine because the passenger is necessarily detained in every car stop. (See also TDC Legal Update October 2007.) What I did not make clear in the previous article was that a detention of a passenger in a car stop is fine, it is not sufficient for a pat search or prolonged detention. The bottom line is this, when you make a legal, valid car stop, you have wide latitude in determining officer safety—including detaining the passenger in the vehicle. Be clear, anything beyond the initial detention needs to be supported by other articulable facts. I regret not making more clear that point.

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