

Spring 1970

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REQUIREMENT OF AN EFFECTIVE CONSENT TO A WARRANTLESS SEARCH

In recent years the courts have tended to guard individual rights guaranteed by the Constitution more closely than ever before. Waiver of these rights is now carefully scrutinized to insure that an individual's rights have not been infringed. For example, in *Miranda v. Arizona*¹ the United States Supreme Court set down definite rules to guarantee that one's fifth amendment rights would remain inviolate. But while the question of fifth amendment rights appears to be settled, there are many questions concerning other rights stemming from the Constitution which remain unanswered.

One of these questions concerns the waiver of fourth amendment rights. Necessity often compels police to search property without warrants but with the "consent" of the owner. Very often incriminating evidence is found in such searches. But did the owner actually waive his fourth amendment rights? When is his consent sufficient? What are the requirements of a valid consent? This comment shall attempt to discover answers to these questions.

HISTORICAL BACKGROUND

The fourth amendment to the Federal Constitution declares, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"² State constitutions generally contain almost identical guarantees.³ Such constitutional provisions were designed to protect the people from abuses of police power.⁴ To guarantee these rights to the people, stringent requirements for search warrants were developed.⁵

The Supreme Court did not apply the provisions of the fourth

¹ 384 U.S. 436 (1966). For an explanation of the holdings in this case see note 33 *infra*.

² U.S. CONST. amend. IV.

³ See, e.g., ILL. CONST. art. 2, §6.

⁴ The supreme court in *Wolf v. Colorado*, 338 U.S. 25 (1949) stated: The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. *Id.* at 28.

⁵ *Stanford v. Texas*, 379 U.S. 476 (1965). This case carefully traces the history of the search warrant by starting with early English history and progressing to the use of the general warrants in the American colonies and the development of the fourth amendment. The requirements for a valid warrant are then analyzed in the light of this historical development.

amendment to the states until the leading case of *Mapp v. Ohio*⁶ was decided in 1961. This case held that the due process clause of the fourteenth amendment required the states to comply with fourth amendment provisions. This meant that the "exclusionary rule" as followed by the federal courts now applied to the states so that evidence seized as a result of an unreasonable search and seizure would not be admissible against the defendant.⁷

The *Mapp* case did not determine whether the federal standards of probable cause for the issuance of search warrants would apply to the states. This question was answered in 1963 by the Supreme Court in *Ker v. California*.⁸ In this case the Court imposed the federal standards on the states and crystallized the federal requirements of probable cause which had to be met before a search warrant may be issued. The Court did not disturb the earlier decisions which had outlined exceptions to the general rule requiring the use of search warrants. These exceptions were historically three in number: where the searches were incident to a lawful arrest with a warrant;⁹ where the circumstances indicated an emergency justifying a search by police officers,¹⁰ and where the constitutional protection has been waived by the consent of the person whose property is to be searched.¹¹ It is this third exception which will be explored. Matters on the authority to give a valid consent and standing to object to an invalid consent will not be dealt with here.¹²

As courts are in full agreement that the fourth amendment rights are personal rather than property rights, it is the person in possession of the property in question who is given the protection of the fourth amendment.¹³ Thus, even if the police officers act in good faith and reliance upon the belief that the person giving consent has the right to do so, the fact that the consenting person

⁶ 367 U.S. 643 (1961).

⁷ The "exclusionary rule" is a rule of evidence formulated by the Supreme Court in a long series of cases beginning with *Weeks v. United States*, 232 U.S. 383 (1914). Basically, the Court held that the fourth amendment barred the use of evidence obtained through an illegal search and seizure. The court continually adhered to and expanded this rule until it was finally applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁸ 374 U.S. 23 (1963).

⁹ *Agnello v. United States*, 269 U.S. 20 (1925); *Carroll v. United States*, 267 U.S. 132 (1924); *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁰ *Agnello v. United States*, 269 U.S. 20 (1925); *Carroll v. United States*, 267 U.S. 132 (1924); *Weeks v. United States*, 232 U.S. 383 (1914).

¹¹ *Cantrell v. United States*, 15 F.2d 953 (5th Cir. 1926), *cert. denied*, 273 U.S. 768 (1927).

¹² See, Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797 (1966); Comment, *Search and Seizure*, 59 NW. U.L. REV. 611, 620-23 (1964).

¹³ *Simmons v. United States*, 390 U.S. 377 (1968); *Calhoun v. United States*, 172 F.2d 457 (5th Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); *People v. Miller*, 40 Ill. 2d 154, 238 N.E.2d 407 (1968), *cert. denied*, 393 U.S. 961 (1968).

does not have possessory rights over the property will make his consent invalid.¹⁴ If two people have equal rights in the property, either may give a valid consent to the search of that property,¹⁵ and, likewise, co-tenants may bind the other by giving a valid consent.¹⁶ Similarly, a spouse can generally consent to a search of the house when the other is the defendant.¹⁷ Of course, one without sufficient possessory interests may never give a valid consent.¹⁸ The problem of possessing standing to complain of the possible violation of a constitutional right is similar to the problem of possessing sufficient interest to give a valid consent, and it is generally held that only a person possessing such an interest has standing to complain.¹⁹ Thus, a defendant cannot question the validity of a consent to a warrantless search if that search was on the property of another and there was no right of possession in the defendant at the time of the search.²⁰ However, some courts have recently begun to hold that when a defendant's constitutional rights are at stake they cannot be waived by a third party.²¹

CONSENT IN THE FEDERAL COURTS

The federal courts have traditionally placed a heavy burden on the prosecution to show that consent was given when a warrantless search has taken place. In the 1962 case of *United*

¹⁴ *People v. Miller*, 40 Ill. 2d 154, 238 N.E.2d 407 (1968), *cert. denied*, 393 U.S. 961 (1968).

¹⁵ *United States v. Sferas*, 210 F.2d 69 (7th Cir. 1954); *Stein v. United States*, 166 F.2d 851 (9th Cir. 1948), *cert. denied*, 334 U.S. 844 (1948); *People v. Shambley*, 4 Ill. 2d 38, 122 N.E.2d 172 (1954); *People v. Smith*, 108 Ill. App. 2d 172, 246 N.E.2d 689 (1969); *People v. Preston*, 88 Ill. App. 2d 107, 231 N.E.2d 704 (1967).

¹⁶ *People v. Smith*, 108 Ill. App. 2d 172, 246 N.E.2d 689 (1969); *State v. McCarty*, 199 Kan. 116, 427 P.2d 616 (1967), *vacated on other grounds*, 392 U.S. 308 (1968); *People v. Pelow*, 24 N.Y.2d 161, 247 N.E.2d 150 (1969).

¹⁷ *United States v. Sergio*, 21 F. Supp. 553 (D.C.N.Y. 1937); *People v. Perroni*, 14 Ill. 2d 581, 153 N.E.2d 578 (1958), *cert. denied*, 359 U.S. 980 (1959). *But see*, *Cofer v. United States*, 37 F.2d 677 (5th Cir. 1930).

¹⁸ *See, e.g.*, *People v. Weinstein*, 105 Ill. App. 2d 1, 245 N.E.2d 788 (1968) where a wife was prosecuted for the murder of her husband. The deceased's father was administrator of the estate, and the defendant wife was barred by an order of the probate court from entering the house. The court held that the father did not, as administrator, have possessory rights great enough to allow a warrantless search of the house.

¹⁹ *State v. Craddock*, 272 N.C. 160, 158 S.E.2d 25 (1967).

²⁰ *See* 33 U. CHI. L. REV. 797, *supra* note 12. While this article carefully outlines the law on this subject, the writer concludes with a recommendation that a valid consent must be obtained from all persons with rights in the property in question. It would appear that a requirement such as this would raise numerous collateral issues at the evidence hearing as many people may have rights in a given piece of property. In addition, it would make a warrantless search virtually impossible for the police as they would have to ascertain title, possession, leases, liens, and such on the property and then obtain permission from all the persons who had an interest in this property. Such a solution would certainly be most unworkable.

²¹ *People v. Miller*, 40 Ill. 2d 154, 238 N.E.2d 407 (1968), *cert. denied*, 393 U.S. 961 (1968); *Maxey v. State*, 244 N.E.2d 650 (Ind. 1969). At the present time there is little case law on this subject. The courts seldom ques-

States v. Page,²² the Court of Appeals for the Ninth Circuit carefully outlined the federal law on this topic. The court first stated that the question of the circumstances surrounding the consent to a warrantless search is a question of fact for the trial court.²³ The prosecution has a heavy burden of proof which can be sustained only by clear and positive proof that such consent was given.²⁴ In order for the consent to be effective, the government must prove that there was actual consent by the person with possessory rights in the property to be searched, and that there was no duress or coercion either express or implied against this person by the government authorities.²⁵ In addition, the government must prove that the consent was unequivocal and specific and that it was freely and *intelligently* given.²⁶ This definition has generally been followed by the federal courts with little change in the elements required for consent to be valid. The only major exception occurred in *United States v. Blalock*²⁷ in which the court went even further and stated that a warrantless search is *prima facie* unconstitutional, and to refute this the government must prove that there was an intentional abandonment of a known right which was freely and intelligently given with no coercion by the government authorities.²⁸ The court went on to say that a person cannot intelligently waive a right unless he is aware of that right.²⁹

The federal courts will look at all the facts concerning, and the circumstances surrounding, the alleged consent to see whether the elements of a valid consent are present. In *United States v. Smith*,³⁰ the court was faced with a situation in which there had been a lawful arrest of the defendant who was found with heroin in his possession. He then freely took the government officers to his apartment and showed them the hiding place of more heroin. The court felt that the voluntary acts of the defendant showed that his consent to the search was valid.

However, in later cases the federal courts began to place

tion a defendant's right to object to a warrantless search where the consent was given by another with rights in the property. In these cases the fact that the defendant's constitutional rights may have been infringed gives him standing to question the validity of the consent. Of course, the prosecution may still deny the defendant's standing and bring up the question in this manner. Apparently this is seldom done as this problem of standing is seldom in issue on appeal.

²² 302 F.2d 81 (9th Cir. 1962).

²³ *Id.* at 83.

²⁴ *Id.* at 83, 84.

²⁵ *Id.* at 83.

²⁶ *Id.* See also, FED. R. CRIM. P. 41(e).

²⁷ 255 F. Supp. 268 (E.D. Pa. 1966).

²⁸ *Id.* at 269.

²⁹ *Id.*

³⁰ 308 F.2d 657 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1962).

more and more emphasis on the element of "intelligent" waiver. The 1965 case of *Commonwealth v. Cavell*³¹ was similar to *Smith*. In *Cavell* the defendant was lawfully arrested for murder. He then told the authorities where he lived and rode with them ten miles to his home. He did not object in any way to the search in which incriminatory evidence was found and seized. The court held that the search and seizure were unconstitutional as there had been no affirmative, intelligent waiver of the defendant's fourth amendment rights.

In 1966 *Miranda v. Arizona*³² was decided by the Supreme Court. This case concerned the defendant's waiver of a right guaranteed by the Constitution, and the court concluded that the fifth amendment right against self-incrimination cannot be waived unless the defendant was fully apprised of his rights and completely warned of the consequences of such self-incrimination.³³ *Miranda*, it may be noted, was not concerned with fourth amendment rights but only with the rights found in the fifth amendment. At this time there was no mention of whether *Miranda* warnings would apply to the waiver of other constitutional rights, nor was there an indication as to whether other constitutional rights would be surrounded with similar safeguards.

The federal courts did begin to guard other constitutional rights more closely after the *Miranda* decision. The first case in which this problem arose was *United States v. Nikrasch*.³⁴ This case concerned a conviction for transporting a stolen car across state lines. The defendant was jailed after a lawful arrest, and while in custody, he gave the police permission to search his car if they desired. Incriminating evidence was found, and the court faced the question of whether or not the consent was valid. It concluded that one cannot intelligently waive his fourth amendment rights and give a valid consent to a warrantless search until he has been apprised of his rights.

Another 1966 case which dealt with the same problem was

³¹ 244 F. Supp. 560 (M. D. Pa. 1965), *aff'd*, 358 F.2d 132 (3rd Cir. 1966), *cert. denied*, 384 U.S. 1004 (1966).

³² 384 U.S. 436 (1966).

³³ Briefly stated, *Miranda* requires that before a person in custody can be subjected to interrogation he must be informed that he has a right to remain silent. He must also be warned that anything he says will be used against him and that he has a right to consult with an attorney and have an attorney present during the interrogation. He must also be advised that he may request that a lawyer be appointed for him. If the police obtain a confession after these warnings have been given and there is no attorney present to protect the defendant at that time, there still remains a strong presumption that the confession was obtained under coercion, and the prosecution must clearly show that the confession was not so obtained.

³⁴ 367 F.2d 740 (7th Cir. 1966).

*United States v. Blalock*³⁵ mentioned earlier. In addition to holding that a warrantless search is prima facie unconstitutional, the court stated that the defendant must be aware of his fourth amendment rights before he can intelligently waive them. The court noted that the *Miranda* warnings had been given to the defendant before the search by the authorities but went on to say that these warnings concern the fifth amendment rather than the fourth amendment rights. The observation was made that the *Miranda* warnings do not advise one that he has a right to refuse a warrantless search.³⁶

Not all federal courts have followed the *Blalock* decision. In 1967 the first circuit reasoned somewhat differently in *Gorman v. United States*.³⁷ After a lawful arrest the defendant was given the *Miranda* warnings and was specifically advised that he did not have to answer any questions. Subsequently, the defendant gave permission for the search of his luggage which contained incriminating evidence. While the court did acknowledge that other circuits were requiring specific fourth amendment warnings prior to an effective consent, this court felt that the *Miranda* warnings were sufficient to put one on notice of his rights. The court then observed that the defendant did reply to the question concerning his consent to the search even after he was informed that he did not have to answer any question. Such a reply was believed to be an effective waiver of his fourth amendment rights.³⁸ The court did not find that the defendant had been coerced even though he was under arrest at the time he consented to the search. "[B]owing to events, even if one is not happy about them, is not the same thing as being coerced."³⁹ This court expressly rejected the strict rules outlined in *Nikrasch* and *Blalock*.⁴⁰

The first circuit continued to find effective waiver without specific warnings in *Manni v. United States*⁴¹ where the court merely noted that the facts related occurred prior to the *Miranda* decision which was not to be applied retroactively.⁴² Because of

³⁵ 255 F. Supp. 268 (E. D. Pa. 1966). The defendant was apprehended and searched in the washroom of a hotel on the suspicion of bank robbery. He denied any knowledge of this robbery and consented to a search of his room to show that he had nothing to hide. It was during this search that part of the stolen money was found.

³⁶ *Id.* at 269.

³⁷ 380 F.2d 158 (1st Cir. 1967).

³⁸ *Id.* at 163, 164.

³⁹ *Id.* at 165.

⁴⁰ *Id.* at 164.

⁴¹ 391 F.2d 922 (1st Cir. 1968), *cert. denied*, 393 U.S. 873 (1968). This involved a conviction under the Federal Firearms Act where the defendant had allowed officers to search his room before having been given the benefit of sufficient warning.

⁴² *Johnson v. New Jersey*, 384 U.S. 719 (1966).

this, the court did not decide whether the *Miranda* decision would apply to searches and seizures.

The seventh circuit has drawn a compromise between these extremes. Rather than requiring specific fourth amendment warnings, this circuit will examine all the facts surrounding the alleged consent to see whether all the elements of an effective consent are present. Thus, in *United States v. Miller*⁴³ where federal agents had warned the defendant that he did not have to allow them to search his garage, the court felt that his consent was valid and effective as he was aware that he could exclude the federal officers if he so desired. The fifth circuit uses the same test, as evidenced by *Phelper v. Decker*⁴⁴ in which no specific fourth amendment warnings were given to the defendant although he was given the *Miranda* warnings at the time of his arrest. The court concluded there that when all the facts were looked at collectively, the conclusion was unmistakable that the defendant's consent was made voluntarily and knowingly.⁴⁵

The third circuit, however, has continued to guard the fourth amendment rights more closely than any other circuit as shown by two recent decisions from the district court of Delaware. In *United States v. Moderacki*⁴⁶ the defendant moved to suppress evidence found by postal inspectors who had asked him to empty his pockets prior to putting the defendant under arrest. At this time, he had been under questioning and had been given *Miranda* warnings very carefully. The inspectors had prepared these warnings on printed cards and had given the defendant one of these cards to read. After he had done so, the inspectors asked him to read the card aloud to them. They then discussed the warnings one additional time. Despite these precautions, the court held that the warnings were insufficient and that the government had failed to prove an intelligent waiver of his rights under the fourth amendment. Even though the defendant was advised of his fifth amendment rights, he could not consent to a warrantless search without being explicitly advised of his fourth amendment rights.⁴⁷ The court held that

⁴³ 395 F.2d 116 (7th Cir. 1968), *cert. denied*, 393 U.S. 846 (1968).

⁴⁴ 401 F.2d 232 (5th Cir. 1968).

⁴⁵ The facts in this case are somewhat unusual. The defendant was convicted of possessing obscene photographs. He was personally acquainted with the police officers involved and had on earlier occasions allowed them to see these pictures which were in his house. Apparently the defendant did not think that these photos were obscene. A few weeks after the authorities had seen the pictures, the defendant was arrested and taken to the police station where he was given the *Miranda* warnings. It seems as though he remained on friendly terms with the officers who then drove him to his home and allowed him to go in by himself and explain the circumstances of his arrest to his wife. When he was finished he allowed the officers in and let them search for the pictures.

⁴⁶ 280 F. Supp. 633 (D. Del. 1968).

⁴⁷ *Id.* at 636.

the key to voluntary waiver was "knowing" what was being waived and that this could not be proved by the prosecution unless actual rather than implied warnings were given.⁴⁸

However, the same court did find effective waiver in *United States v. Morton Provision Company*⁴⁹ in which the defendants had been in communication with their attorneys prior to the search and seizure and obviously knew that they did not have to consent to a warrantless search. The defendants contended, however, that they did not know the consequences of such a search or that the evidence discovered could be used against them. The court refused to sustain this contention in these circumstances as the defendants had ample legal advice.

In summary it can be seen that the federal courts are hesitant to find an effective waiver of a defendant's fourth amendment rights. There was a heavy burden of proof on the prosecution to show that all elements of an effective waiver have been met. Presently, there is some disagreement as to whether *Miranda* warnings are necessary and whether *Miranda* warnings are even sufficient to show an intelligent waiver of this constitutional right.

CONSENT IN THE SUPREME COURT

The Supreme Court has not directly answered the question of the requirements of an effective consent. An attempt to raise this point was made by the defendant in *Hoffa v. United States*,⁵⁰ but the court ruled against the defendant on other grounds.⁵¹ The question was again raised in *Katz v. United States*⁵² which is the case bringing wiretapping within the protection of the fourth amendment. The court merely stated that a search to which the defendant consents meets the fourth amendment requirements but declined to comment on the elements of a valid consent.

The Supreme Court again touched this issue in 1968 in *Bumper v. North Carolina*.⁵³ This case concerned a prosecution for rape in which the defendant's grandmother allowed authorities to make a search. She believed they had a valid warrant, but it was later found that the warrant was defective. The Supreme Court held that the prosecution has the burden of proving that the consent was freely and voluntarily given and that

⁴⁸ *Id.*

⁴⁹ 295 F. Supp. 385 (D. Del. 1968).

⁵⁰ 387 U.S. 231 (1967).

⁵¹ Hoffa had invited a government spy into his apartment and later complained that this was an illegal search and seizure as Hoffa didn't know this individual was a spy sent by the government. The court ruled that there was no government intrusion as the defendant himself had invited the spy into his room.

⁵² 389 U.S. 347 (1967).

⁵³ 391 U.S. 543 (1968).

there can be no effective consent where there has been any coercion.⁵⁴ Thus, any consent whatsoever after the authorities profess to have a warrant will not stand.⁵⁵ However, the court did not go into the "intelligent" element of effective consent.

CONSENT IN THE STATE COURTS

While the federal courts are not in complete agreement on what constitutes effective consent, there is uniformity in that all the courts require clear and convincing proof of an intelligent and voluntary waiver of one's rights. The state courts are even more divided on this issue and show little, if any, uniformity. The following recent decisions point up the widely divergent views which are taken.

The Supreme Court of Nebraska attacked the problem in 1966 shortly after the *Miranda* decision in *State v. Forney*.⁵⁶ The court stated that it refused to apply the *Miranda* decision to fourth amendment rights as this would shackle law enforcement. The court held that consent is effective if it is voluntarily and freely given but made no mention of the requirement that consent be knowingly or intelligently given. A three point syllabus was included in the court's decision: first, *Miranda* does not apply to the fourth amendment; second, the requirements of the fourth amendment are met by having the affirmative burden of proof on the prosecution; and third, consent can be shown by acts as well as words. This reasoning has been followed by the state of Kansas as evidenced by *State v. McCarty*.⁵⁷ Again the court held that *Miranda* controls the violation of fifth amendment rights only and must not be applied to unreasonable searches and seizures in violation of the fourth amendment. Likewise, Maryland has refused to apply *Miranda* to the fourth amendment nor has it surrounded this amendment with similar protections against its violation.⁵⁸

The Supreme Court of Louisiana has also decided against such safeguards. In 1967 the opinion in *State v. Andrus*⁵⁹ was written in which the court took notice of the conflicting views held across the nation in arriving at its decision. This court reasoned that the fourth amendment applies only to unreasonable searches and seizures. When the consent is freely and intelli-

⁵⁴ *Id.* at 548.

⁵⁵ *Id.* at 549.

⁵⁶ 181 Neb. 757, 150 N.W.2d 915 (1967). Here the defendant was being questioned in the police station prior to being arrested or informed of his *Miranda* rights. When asked if the police could search his car, the defendant led them outside and allowed them to do so. A gun was then found and seized as evidence. It was at this time that the defendant was arrested and given the *Miranda* warnings.

⁵⁷ 199 Kan. 116, 427 P.2d 616 (1967).

⁵⁸ *Lamot U. State*, 2 Md. App. 378, 234 A.2d 615 (1967).

⁵⁹ 250 La. 765, 199 So. 2d 867 (1967).

gently given, the search is no longer unreasonable even though the fourth amendment rights have not been explained to the defendant.⁶⁰ This court also refused to draw a distinction between the cases where the defendant is under arrest at the time the consent is given and the cases where there has been no arrest. While some courts felt that the fact of the arrest is *prima facie* evidence of coercion,⁶¹ this court held that there is no real difference in these instances which would require such results. Instead, when the trial court finds that the consent was given after an arrest, it should merely put the question of consent under more severe scrutiny.⁶²

Other courts have more carefully guarded the fourth amendment rights. For example, the Oregon courts have followed the federal courts by closely scrutinizing an alleged consent. This issue was decided by the Supreme Court of Oregon in *State v. Williams*⁶³ in 1967. This case concerned a burglary prosecution in which the defendant was originally arrested for vagrancy. He was given no warnings about his rights and was asked to empty his pockets. A key to a locker in the local bus station was found, and the defendant gave police permission to get his bags from this locker. The police found stolen items in the locker and charged the defendant with burglary. At this time the *Miranda* warnings were given. In a four to three decision, the court held "the request to search is a request that the defendant be a witness against himself. . . ." ⁶⁴ The court further held that the principles of *Miranda* as well as the principles of *Escobedo v. Illinois*⁶⁵ are applicable to interrogations aimed at obtaining consent to make a search when the defendant is in custody.⁶⁶

The Supreme Court of North Carolina felt the question of whether the defendant was in custody of the police at the time the consent was given was an important factor in determining whether or not there was an effective waiver of his right. In *State v. Craddock*,⁶⁷ where the defendant was not in police custody, the court held that, "[m]erely asking a defendant for consent to search the automobile is not prohibited by the *Miranda* decision."⁶⁸ However, the court did not pass directly on the effectiveness of such consent other than to say that *Miranda* was

⁶⁰ *Id.* at 782, 199 So. 2d at 873.

⁶¹ See, e.g., *United States v. Shrobschire*, 271 F. Supp. 521 (D.C. La. 1967).

⁶² *State v. Andrus*, 250 La. 765, 783-84, 199 So.2d 867, 873 (1967).

⁶³ 248 Ore. 85, 432 P.2d 679 (1967).

⁶⁴ *Id.* at 93, 432 P.2d 683.

⁶⁵ 378 U.S. 478 (1964).

⁶⁶ *State v. Williams*, 248 Ore. 85, 93, 432 P.2d 679, 683 (1967).

⁶⁷ 272 N.C. 160, 158 S.E.2d 25 (1967).

⁶⁸ *Id.* at 170, 158 S.E.2d at 32.

not applicable in all situations. The Rhode Island courts also appear to be following the more liberal federal court rulings and will find effective consent by looking at all the circumstances surrounding the consent even though explicit warnings have not been given.⁶⁹ The problem of consent was presented in 1968 in *State v. Leavitt*⁷⁰ where the defendant had been arrested and given the *Miranda* warnings. While in the police station he was asked if the police could search his car. He replied "Sure" and tossed the keys to the police. The court held that the consent was valid and confirmed his murder conviction.

While some courts have definitely stated their positions in regard to effective consent, others have been quite cautious in approaching this question and, in some instances, have refrained from committing themselves. Typical of these cases is the recent case of *Commonwealth v. Garreff*⁷¹ decided by the Supreme Judicial Court of Massachusetts. In this case the defendant's car had been stopped at night by the police, and he was asked to show the automobile registration but was unable to comply as he could not find it. The defendant then asked the police to enter the car and assist him by searching the glove compartment. In the process of this search burglary tools were found and the defendant was placed under arrest. The defendant appealed on the grounds that the failure to give any *Miranda* warnings negated any consent he may have given. In support of this contention, the defendant cited *California v. Stewart*, a companion case of *Miranda*.⁷² The circumstances were somewhat similar in the two cases, but in *Stewart* the defendant was already under arrest at the time of the search. However, the court did not feel that *Stewart* was controlling inasmuch as the reversal of that conviction was based not upon the illegal search but rather on incriminating statements made by Stewart after his arrest. The court also distinguished the present case from *Stewart* in that in the former the defendant was not under arrest and only a threshold inquiry was being conducted. Thus, the court disposed of the question by drawing distinctions between the two cases but did not give a clear holding on what constitutes effective consent.

CONSENT IN ILLINOIS COURTS

Illinois is another state which has not clearly stated a position on the question of effective consent. The first case to face

⁶⁹ *State v. Leavitt*, 237 A.2d 309 (R.I. 1968), *cert. denied*, 393 U.S. 881 (1968).

⁷⁰ *Id.*

⁷¹ 245 N.E.2d 442 (Mass. 1969).

⁷² 384 U.S. 436 (1966).

the question squarely since *Miranda* was *People v. Trent*⁷³ decided in 1967 by the appellate court. This case concerned a conviction for armed robbery in 1964. Defendants were stopped while driving their automobile on the charge of having obscured license plates. Initially one defendant was arrested for driving without a valid license and the other was charged with allowing an unauthorized person to use his automobile. There was conflicting testimony on whether the owner then consented to the search of the car. During this search evidence of a prior robbery was found, and the defendant was later convicted for this robbery. As the question of the circumstances surrounding the alleged consent was a question of fact, on appeal the findings of the trial court were not disturbed as they were not clearly erroneous.⁷⁴

The defendant next contended that his consent to the search was not valid since he had not been given the *Miranda* warnings. The court dismissed this contention on the grounds that *Miranda* concerned only the fifth amendment rights and not those of the fourth amendment. The court concluded that the rights protected are entirely different and *Miranda* should not be controlling in connection with fourth amendment problems.⁷⁵ However, the court then went on to dismiss the same contention on two different grounds. First, the court noted that this occurred prior to the *Miranda* decision which was not to be applied retroactively.⁷⁶ Secondly, the court observed that since this point had not been raised in the trial court it could not be raised on appeal.⁷⁷ As these two grounds completely decided the question in point, the earlier discussion by the court in which it held that *Miranda* does not apply to the fourth amendment was not necessary to the disposition of the case and can be classified as mere dictum.⁷⁸

The Supreme Court of Illinois was then presented with the problem of effective consent to a warrantless search in *People v. Ledferd*⁷⁹ which was decided in 1967 shortly after the *Trent* case. In this case the defendant was arrested for armed robbery and placed in a police car. According to police testimony, the defendant gave them permission to search his apartment and raised himself in his seat while handcuffed so that the police

⁷³ 85 Ill. App. 2d 157, 228 N.E.2d 535 (1967).

⁷⁴ *Id.* at 161, 228 N.E.2d at 537.

⁷⁵ *Id.* at 161-62, 228 N.E.2d at 537-38. Unfortunately, the court failed to give its reasoning in support of this conclusion.

⁷⁶ *Johnson v. New Jersey*, 384 U.S. 719 (1966).

⁷⁷ *People v. Trent*, 85 Ill. App. 2d 157, 162, 228 N.E.2d 535, 538 (1967).

⁷⁸ Because these arguments were not necessary to the disposition of the case, one can only surmise as to the court's reason for including them if other than to show the court's views and possible tendencies in deciding a subsequent case on this point.

⁷⁹ 38 Ill. 2d 607, 232 N.E.2d 684 (1967).

could remove the key from his pocket. The defendant denied such consent and maintained that even if it had been given it was invalid as he had not yet received the *Miranda* warnings. As to the first question, the court held that whether consent has been given is a question of fact for the trial court whose determination will not be overturned on appeal unless clearly erroneous.⁸⁰ Since this is a question of fact, the prosecution's evidence will be presumed to be an accurate account of the circumstances surrounding the consent, search, and seizure.

The remaining question concerned the validity of the consent as it was presented by the prosecution. The court acknowledged the apparent split between the nation's courts on this subject and stated,

This court is not prepared to hold that the People must show under circumstances such as were concerned here, not only the consent by the defendants to the search, but also that he was advised of rights secured by the fourth amendment.⁸¹

The supreme court again considered the consent problem in 1968 in *People v. Haskell*.⁸² This time the court took what would initially appear to be a completely different stand and became extremely hesitant to find a waiver of fourth amendment rights. This appeal concerned a conviction for murder. The defendant had been arrested in his home at about 2:30 A.M. and was taken to jail. There was conflicting testimony on whether the defendant gave police permission to return to his home which was still occupied by his nineteen year old wife to search for the murder weapon. In any event, the police did return to the house between 6:00 and 7:00 A.M. that morning and informed the wife that they had been sent by her husband to get his gun. She initially denied any knowledge of such a gun, but after some conversation with the police, she went upstairs and brought down her husband's gun.

There were three main issues raised on appeal. The first concerned the wife's standing to waive a right also held by her defendant husband as well as his standing to complain of a violation of her rights. The court held that a wife could give effective consent but that the husband can also raise this question as his rights would have been interfered with had the consent not been valid.⁸³ The second question was whether the wife had actually given permission to seize the evidence. Here the court followed its previous holding in *Ledferd* that this is a question of fact for the trial court and is not open to review

⁸⁰ *Id.* at 610, 232 N.E.2d at 686.

⁸¹ *Id.*

⁸² 41 Ill. 2d 25, 241 N.E.2d 430 (1968).

⁸³ *Id.* at 28, 241 N.E.2d at 432-33.

unless obviously in error.⁸⁴ Because of this, the court then accepted without question the testimony of the police officers as to the facts and circumstances surrounding the consent.

Last, the court had to decide whether the consent was effective assuming the truth of the prosecution's evidence concerning the consent. Here the court made what would apparently be a complete departure from its previous holding in *Ledferd*. The following quotation from the decision shows the heavy emphasis placed on the holdings of the federal courts and their tests for a valid consent to a warrantless search:

[C]onsent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. (*Amos v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed 654; *Judd v. United States*, 89 U.S. App. D.C. 64, 190 F.2d 649, 651.) The prosecution must show a consent that is "unequivocal and specific" (*Karwicky v. United States*, (4th cir.) 55 F.2d 225, 226), "freely and intelligently given". (*Kovach v. United States*, (6th cir.) 53 F.2d 639.) "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461.⁸⁵

Using this test, the court concluded that there was no effective waiver of the fourth amendment rights even though the facts were viewed in a light most favorable to the prosecution. The court felt that since the wife was not informed of the rights involved, she could not intelligently waive these rights.⁸⁶ It may be noted that much of the opinion deals with other facts surrounding the consent. The court noted the tender age of the wife, the fact that her husband had been taken from her by the police during the night, and the fact that she had again been aroused by the police in the early morning hours. All of these factors appeared to influence the court in reaching its decision that the wife did not freely and intelligently give consent to a warrantless search and seizure.⁸⁷ At the same time the court did acknowledge its earlier holdings in *Ledferd* and expressly stated that *Ledferd* was not being overruled. The court made it clear that warnings of one's fourth amendment rights do not have to be given in all circumstances but that the presence or

⁸⁴ *Id.* at 30, 241 N.E.2d at 433.

⁸⁵ *Id.* at 31, 241 N.E.2d at 433-34.

⁸⁶ *Id.* at 31-32, 241 N.E.2d at 434.

⁸⁷ The court also appeared impressed by the ballistics evidence which was used to link the defendant's gun with the murder weapon. It was observed that the ballistics expert found different markings when comparing test bullets with those found in the victim. Additionally, the brand of bullets found in the gun was not the same as those in the victim. The expert had failed to measure the diameter of the bullets and did not ascertain whether the gun had been recently fired. This expert even failed to make the basic test of matching lands and grooves on the bullets with those on the gun's barrel. It could well be that the court was influenced by such a lack of evidence when it decided the case on another point.

absence of these warnings is a "factor bearing on the understanding nature of the consent."⁸⁸

The last, and most recent, decision⁸⁹ by the Illinois Supreme Court concerning this area of consent was the 1969 case of *People v. Rhodes*.⁹⁰ This case concerned a murder conviction in which the police had arrested the defendant and obtained his permission to search his apartment prior to advising him of his constitutional rights. In this case the court took no notice of its holdings in *Haskell* which had earlier made it appear as though Illinois courts would follow the federal courts when fourth amendment questions arise. Indeed, the court merely cited *Ledferd* as the present Illinois law on this topic and reaffirmed its earlier holding that in Illinois a person does not have to be advised of his fourth amendment rights to effectively waive his right against a warrantless search.

At the present time a cursory examination would suggest that the Illinois law on the consent requirements is inconsistent. One decision refused to apply the many federal safeguards although this was apparently done in dicta. This was followed by a case which quoted at length from the federal cases and which made it appear as though Illinois would follow the federal reasoning in closely guarding one's fourth amendment rights. However, the latest decision disregarded the second one entirely. On the basis of the wording in the various opinions, one could conclude that there is ample authority for either side of the argument.

NEEDED: A BASIC REVIEW OF THE FOURTH AMENDMENT

A review of the cases outlined earlier suggests that few courts agree as to what constitutes an effective consent to a warrantless search. There is some uniformity and direction given by the United States Supreme Court in *Bumper v. North Carolina*⁹¹ in that consent, after one has been shown an invalid warrant, is never effective. Also, there can be no consent where there is coercion, and the prosecution has the burden of proving that the consent was freely and voluntarily given. But are the courts really at odds where the other elements of consent are concerned? Are some courts very strict while others are liberal in finding consent? Is there possibly a basic thread of consis-

⁸⁸ 41 Ill. 2d 25, 31, 241 N.E.2d 430, 434 (1968).

⁸⁹ *People v. Armstrong*, 41 Ill. 2d 390, 243 N.E.2d 825 (1969) is another case decided later in 1968 in which the consent problem arose. The court merely held that the circumstances surrounding the consent are to be decided by the trial court and did not expand on the requirements of an effective consent.

⁹⁰ 41 Ill. 2d 494, 244 N.E.2d 145 (1969).

⁹¹ 391 U.S. 543 (1968).

tency running through all of these cases which makes them reconcilable although the express wording of the opinions differs greatly? To answer these questions, one must first take a critical look at the rights involved.

When one first thinks of search and seizure in connection with the fourth amendment, it is easy to think of this amendment as *giving property rights*. Such a view tends to entirely distort the meaning of the fourth amendment which in fact has nothing to do with property rights.⁹² The fourth amendment gives personal rights to the citizens so that they may be free from unreasonable government intrusion. Likewise, there is nothing in the fourth amendment or anywhere else in the constitution that calls for an exclusionary rule of evidence.⁹³ The so-called "exclusionary rule" is one formed entirely by the courts in an effort to control the activities of the police.⁹⁴ This implies that the sole purpose of the exclusionary rule is to effectuate the fourth amendment provisions so that this amendment can now be enforced by the courts if it is not enforced by the police. There is, of course, an abundance of criticism over this rule, and much of it is well-founded.⁹⁵ However, all the reasoning in support of such a rule would fail if the police always remained within the fourth amendment bounds or there were other methods of minimizing the threat of illegal searches.

Another attempt to justify the exclusionary rule was made

⁹² *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁹³ *Wolf v. Colorado*, 338 U.S. 25 (1949); *Weeks v. United States*, 232 U.S. 383 (1914). In *Wolf* Mr. Justice Frankfurter speaking for the majority stated:

This ruling [the Exclusionary rule] was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.

Wolf v. Colorado, 338 U.S. 25, 28 (1949). Likewise, in a concurring opinion Mr. Justice Black stated:

But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.

Id. at 39-40.

⁹⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹⁵ See, e.g., *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). The majority opinion stated:

The rules of evidence are designed to enable courts to reach the truth. . . . Evidence obtained by an illegal search and seizure is ordinarily just as true and reliable as evidence lawfully obtained. . . .

If he is innocent or if there is ample evidence to convict him without the illegally obtained evidence, exclusion of the evidence gives him no remedy at all. Thus the only defendants who benefit by the exclusionary rule are those criminals who could not be convicted without the illegally obtained evidence.

Id. at 442-43, 282 P.2d at 910.

Justice Cardozo observed in *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), "The criminal is to go free because the constable has blundered."

by Mr. Justice Black in his concurring opinion in *Mapp v. Ohio*.⁹⁶ Justice Black stated:

[T]hat when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.⁹⁷

However, Mr. Justice Black goes on to disclose that this theory evolves from *Boyd v. United States*⁹⁸ in which the incriminating evidence was composed of private papers and books belonging to the defendant. In such instances, the two amendments do protect similar rights because this real evidence is also self-incriminating evidence coming from the words of the defendant. A broader comparison of the two amendments shows the great difference between them. While the fifth amendment right is also a personal right, it is different in that it is a right against self-incrimination and concerns actual confessions and incriminating statements made by the defendant. The *Miranda* decision formed strict requirements so that the police were no longer able to obtain confessions in violation of this right. It may be noted that much of the *Miranda* decision concerns the police tactics used to extricate confessions, and one can see that the court was concerned over the abuses of police power. These requirements gave the courts police powers over the police to ensure the protection of rights guaranteed by the constitution but not always enforced by the police.

However, the fourth amendment rights are not concerned with the nature of incriminating evidence found during a search. This right concerns only the right to personal security. While one is apt to give a confession or even a false confession under coercion or grilling, he is not apt to plant evidence during a search. The various articles seized in a search are real evidence, and it is a fact that they were at the place found when they were found. No amount of police brutality is going to produce evidence which is not there.⁹⁹ It is elementary that the fourth amendment does not address itself to evidentiary questions but rather the right to be free from unreasonable intrusions.

SUMMARY: IS THERE CONTINUITY?

The very word "unreasonable" could be the key word to this amendment as it suggests a test which is not only largely subjective but discretionary as well. As the amendment affords

⁹⁶ 367 U.S. 643 (1961).

⁹⁷ *Id.* at 662.

⁹⁸ 116 U.S. 616 (1886).

⁹⁹ Obviously it is possible for the police to plant evidence. This possibility is not under consideration here as the exclusionary rule does nothing to safeguard against such practices.

freedom from "unreasonable" searches and seizures only, the only real question before a trial judge is the reasonableness of the search. Is it really unreasonable to search property where the owner does not object? It would appear that a search which does not degrade or in any other way affect the dignity of the person whose property is being searched would not be unreasonable. A trial judge could apply a "reasonable man" standard in which the defendant would be replaced by a completely innocent, law-abiding reasonable man. If the search would in any way be obnoxious to such an individual, it would be unreasonable. But if, under the circumstances, no reasonable man could be offended in any way by the search, the search would be reasonable. The trial judge would also have to include some element of subjectivity in the test to protect the sensibilities of the actual defendant. Of course, if there is any evidence of coercion or misrepresentation by the police, the consent would not be valid.

A look at the facts surrounding the cases cited earlier suggests that the various courts may have used such a test, though possibly subconsciously, as this test was never expressly stated. Where the police activity has been blatantly offensive, the courts have been most reluctant to find a valid consent. On the other hand, where the police activity has been reasonable and unoffensive, the courts have generally found the consent valid. A review of the Illinois cases described above shows this exact trend in the Illinois courts and suggests that the holdings are entirely reconcilable if based on a standard of reasonableness as set forth in the fourth amendment. In fact, Illinois holdings have consistently required a close look at all circumstances surrounding an alleged consent. Such a requirement would be useless if, indeed, the elements of "intelligent, knowing" waiver were actually controlling.

In support of this hypothesis, it may be noted that the United States Supreme Court has generally denied the defendant's writ of certiorari on the grounds of an unconstitutional search following an invalid consent. Even when granted as in *Bumper v. North Carolina*, the court has not followed the holdings of some of the lower federal courts which have applied *Miranda* safeguards to the fourth amendment. It would seem probable that if the court did feel there was such a similarity between these rights, at least a mention of this would be made when a case such as *Bumper* was being decided by a court whose composition was largely the same as when *Miranda* was handed down.

The reasoning above does not explain the holdings of some of the federal courts which require *Miranda* warnings and some-

times additional warnings before there is an effective consent. Again it must be stated that there is no authority for the proposition that the fourth amendment was designed to aid a defendant in his efforts to keep evidence from the police. However, the court-designed exclusionary rule does just that as a side effect stemming from its main purpose of policing the police. If the fourth amendment is studied in conjunction with the requirements of the exclusionary rule, holdings requiring such warnings are justifiable, not for constitutional reasons, but as an extension of the courts' power over the police. Such will aid the courts in their efforts to insure police adherence to the fourth amendment standards. The recurring idea of "intelligent waiver" is without justification as there is nothing in the fourth amendment's requirement of reasonableness which could possibly suggest that a waiver must be intelligently made. Nor is there, as has been stated before, any rational basis for drawing a correlation between the fifth and fourth amendments which are so vastly different in their operations, purposes, and effects.

In short, it would appear that most of the cases involving the question of valid consent to a warrantless search are reconcilable if a strict constitutional interpretation is given to the fourth amendment. The confusion of inconsistent holdings arises not because the holdings and decisions are truly inconsistent but rather because the courts have failed to adequately analyze and examine the nature of the rights involved. Even though there is no rational basis for correlating fifth amendment rights with those of the fourth, some courts have found it convenient to do so, not on a strict constitutional basis, but rather as a means to extend the courts' control over the police.

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