Washington and Lee Law Review

Volume 28 | Issue 1 Article 12

Spring 3-1-1971

Family Consent To An Unlawful Search

the matter—the interests of the employer and the employee. Whose interests are more protected by the Constitution and the laws? Whose interests outweigh the other's? This is the heart of the conflict, and it is upon this that a court should focus its attention.

McCLANAHAN INGLES

FAMILY CONSENT TO AN UNLAWFUL SEARCH

The fourth amendment protects each citizen from unlawful searches and seizures which would deprive him of his right to personal security, personal liberty, and personal property.[1] Yet, an individual may waive the constitutional guarantees of the fourth amendment by "consenting" to an otherwise unlawful search and seizure. However, where the accused shares a residence with his family, and another family member consents to a police search which produces evidence to support a criminal prosecution against the accused, the other family member's "consent" deprives the accused of his constitutional protection.[2] The theory of vicarious "family consent" to an unlawful search and seizure of incriminating evidence was recently presented in the Virginia case of *Ritter v. Commonwealth*.[3]

Ritter was an eighteen-year-old high school student who lived at

---

[1]The Supreme Court of the United States has often discussed the fourth amendment which reads:

> The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND IV. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S 383 (1914); Boyd v. United States, 116 U.S. 616 (1886).

[2]Family consent to search and seizure has received many interpretations. Most cases have involved a husband and wife relationship. *See, e.g.*, United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937) (The wife of a tenant of a one-family dwelling house, in the attic of which her husband and another person were operating a still, was sufficiently in control of the house to consent to a search by officers who wished to search without a warrant.); *In re Lessard*, 62 Cal. 2d 50, 399 P.2d 39, 42 Cal. Rptr. 583 (1965) (Court found, in husband's absence, officers could reasonably conclude that wife could consent to search of the premises); State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1965) (Evidence gained through search without a warrant and based on wife's consent was held inadmissible.); People v. Perroni. 14 Ill. 2d 581. 153 N.E.2d 578 (1958) (Wife's consent rendered search and subsequent seizure lawful.); People v. Shambley, 4 Ill. 2d 38, 122 N.E.2d 172 (1954) (Husband and wife have equal rights to use and occupy premises and either may consent to a search and evidence thus disclosed can be used against either.)

[3]210 Va. 732, 173 S.E.2d 799 (1970).

home with his parents. The police secured a warrant to search for narcotics in Ritter's home. At 12:30 p.m., a police officer went to Ritter's residence where Ritter's mother, upon learning he had a search warrant, invited the officer inside. Acting pursuant to the authority of the warrant, the officer searched the premises for narcotics, finding none. Noting the delivery and deposit of a package in the Ritter mailbox, he questioned Mrs. Ritter as to any package her son may have received. Ritter's mother stated that he had received no package, but when asked by the officer, she advised that she had not collected the mail for that day. They both walked to the mailbox located not on the premises, but within the right-of-way of the public street. Here, Mrs. Ritter opened the mailbox,[4] removed a package addressed to her son and surrendered it to the officer at his request.[5] Later, at the high school, Ritter was advised of his constitutional rights, given the package, and asked to open it. The officer asked what it contained, and, after opening it, Ritter replied, "pot." Asked by the officer whether it was his, the boy stated, "It must be mine, it's got my name on it."[6] Ritter was then arrested, charged, indicted, and prosecuted for possession of marijuana.

The trial court held that the warrant did not authorize a search of Ritter's mailbox. However, the Supreme Court of Appeals of Virginia avoided the invalid warrant problem by finding that Mrs. Ritter, by reason of her possession and control of the premises, had consented to a warrantless search on behalf of Ritter when she voluntarily turned the unopened package over to the officer. By reason of her voluntary consent to the search and seizure, the lower court convicted Ritter of possession of a narcotic drug, holding that the package had been lawfully obtained and properly admitted into evidence. In affirming the trial court's judgment of guilty, the appellate court held the search and seizure valid by reason of the "consent" theory. This theory is expressed in cases holding either that a parent's or a wife's consent to a search of the premises renders seized evidence, incriminating a child or husband, legally admissible, and not in violation of their personal constitutional rights.[7] The appellate court, by establishing the validity of the evidence,

---

[4]173 S.E.2d at 807. The trial court found the mailbox did not fall within the scope of the warrant.

[5]For a discussion of coercion as it relates to consent, see text accompanying notes 39-54 *infra*.

[6]173 S.E.2d at 801.

[7]173 S.E.2d at 803-04. *See* People v. Galle, 153 Cal. App. 2d 88, 314 P.2d 58, 60 (Dist. Ct. App. 1957); Tomlinson v. State, 129 Fla. 658, 176 So. 543, 544 (1937); State v. Hagan, 47 Idaho 315, 274 P. 628, 629 (1929); Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58, 60 (1948); State v. Coolidge, 106 N.H. 186, 208 A.2d 322, 327 (1965).

found Ritter guilty of "constructive" possession[8] of a narcotic drug and affirmed the lower court's decision.[9]

Under the Bill of Rights of the United States Constitution, the fourth amendment guarantees that certain spheres of the individual's privacy will be insulated against police invasion. It insures that the right of citizens to be secure in their "homes" and "effects" shall not be violated unless a legal search warrant, specific in its nature, has been issued upon probable cause to authorize a search.[10] Thus, the fourth amendment is the foundation of the law of search and seizure,[11] and it is binding on the states under the Due Process Clause of the fourteenth amendment.[12]

Since the fourth amendment is for each individual's personal protection, he may personally waive his rights under this amendment just as he may freely and intelligently waive any constitutional right.[13]

---

[8]The court applied *People v. Pigrenet*, 26 Ill. 2d 224, 186 N.E.2d 306 (1962) which held knowledge was the essential ingredient in possession of narcotics and such knowledge may be shown by acts, declarations, or conduct of the accused from which the inference may be drawn that he knew of the existence of narcotics at the place they were found. 173 S.E.2d at 806. "Constructive" possession is defined in *People v. Fox*, 24 Ill. 2d 581, 182 N.E.2d 692, 694 (1962) to be an intent and capability to maintain control and dominion over a chattel, but without actual present personal dominion over it.

[9]173 S.E.2d at 807. Justice Gordon dissented on the grounds that the package was illegally seized and thus its contents were improperly admitted into evidence. He stated that since the trial court had found the warrant did not authorize a search of the mailbox and there was no cross-error assigned by the state, a search of the mailbox was invalid. He found that Mrs. Ritter had been coerced into surrendering the package and denied that she had voluntarily handed over the package, relying upon Bumper v. North Carolina, 391 U.S. 543 (1968) which held that coerced consent renders the evidence subsequently seized inadmissible in court. *See* text accompanying notes 72-75 *infra*.

[10]The fourth amendment constitutional safeguard against unlawful searches and seizures reads,

> The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

[11]B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 9 (1st Ed. 1969) [hereinafter cited as GEORGE].

[12]Mapp v. Ohio, 367 U.S. 643 (1961). The Due Process Clause of the fourteenth amendment reads,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV.

[13]GEORGE at 46.

Consent to a police search justifies both the search and the seizure of its products and is the "principal means by which a waiver of fourth amendment rights comes about."[14] Nonetheless, consent only becomes relevant when the investigating officers are without a search warrant or when the warrant upon which the yare acting is invalid.[15]

Consent to search is an exception to the warrant rule,[16] and the courts have imposed a strict interpretation of consent, since consent represents a waiver of a fundamental constitutional right.[17] As the immunity from unreasonable search and seizure is personal once the individual has consented, he loses his standing to object to the admission into evidence of a personal article subsequently seized.[18]

As a general rule, the fourth amendment grants a personal right which may be waived only by the accused with reference to whom the search is conducted. However, courts have likewise admitted into evidence material seized during a search to which an individual did not consent, but to which a third party[19] or a member of the individual's family did. This would seem to nullify partially the personal protection

---

[14]*Id.*

[15]*Gray v. Commonwealth,* 198 Ky. 610, 249 S.W. 769 (1923) held that the consent of a householder to the search of the house dispenses with the necessity for a search warrant.

[16]Channel v. United States, 285 F.2d 217 (9th Cir. 1960). The relevance of consent lies in the fact that where there is, in effect, no search warrant, the lawfulness of the search will depend on the consent of the occupant.

[17]The prosecution carries the burden of this restrictive interpretation of consent.

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). *See, e.g.,* Johnson v. United States, 333 U.S. 10 (1947); Amos v. United States, 255 U.S. 313 (1921); United States v. Marra, 40 F.2d 271 (W.D.N.Y. 1930).

[18]A defendant cannot claim that his constitutional rights were invaded when an entry and search of his premises was made with his consent and there is no evidence of force or coercion. Milyonico v. United States, 53 F.2d 937, 938 (7th Cir. 1931). *Accord,* United States v. Ziemer, 291 F.2d 100 (7th Cir.), *cert. denied,* 368 U.S. 877 (1961).

[19]Cases hold that X cannot object to the searching of Y's premises or property, if Y consents to the search even though property is found for the possession of which X is subsequently prosecuted. *See* Calhoun v. United States, 172 F.2d 457 (5th Cir.), *cert. denied,* 337 U.S. 938 (1949) (Master of house gave consent to search room sometimes used by appellant who did now own or rent); Cutting v. United States, 169 F.2d 951 (9th Cir. 1948) (Consent was given by the owners and appellant lived elsewhere.); Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769 (1923) (Mother's consent to search her son's room removed question of warrant sufficiency.); People v. Azukauckas, 241 Mich. 182, 216 N.W. 408 (1927) (Property owners' rights were adjudged to be superior to that of guest.); State v. Fowler, 172 N.C. 905, 90 S.E. 408 (1916) (Defendant lived with a sister who gave permission to officers to search and evidence admitted.).

of the fourth amendment. Therefore, it is necessary to examine the bases which justify the limitations of this constitutional guarantee.

The majority of vicarious consent cases[20] have held that, despite the fact that the accused did not personally consent to the search of the home in which he and his parents live, evidence against him is rendered admissible if his parent had validly[21] consented to a search of the premises. His mother or father can literally release incriminating evidence to the authorities who would, except for the parental permission, be violating his constitutional rights by searching without warrant or authority.

The doctrine of vicarious family consent to an unlawful search and to the seizure of the personal property of a child has never been ruled upon by the United States Supreme Court.[22] Yet, other authorities lean heavily toward upholding the validity of the search based upon the "possession and control" doctrine which allows vicarious consent where the consentor is in "possession and control" of the premises.[23] In other words, control of the premises by the consenting par-

[20]*See* Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965) (Mother with whom defendant was living voluntarily consented to policemen's taking of son's coat, which was deemed admissible evidentiary material.); People v. Galle, 153 Cal. App. 2d 88, 314 P.2d 58 (Dist. Ct. App. 1957) (Mother's voluntary consent rendered seizure of marijuana as evidence against her son as not unreasonable search.); Tomlinson v. State, 129 Fla. 658. 176 So. 543 (1937) (Search of defendant's dwelling house with father's consent was not unlawful.); State v. Hagan, 47 Idaho 315, 274 P. 628 (1929) (Mother's consent to the search of the barn held not to have violated any constitutional right of her son's privacy.); Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58, (1948) (Father who was head of household consented to search and an empty cartridge found was competent evidence in murder prosecution.); Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905) (There was no abuse of legal process where mother disregarded warrant and invited officers inside, whereupon they found a knife which was allowed in evidence in murder prosecution against son.); State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965) (Search without a warrant which was consented to and participated in by father was held not to be unreasonable.); Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966) (Father's consent held to be binding on son whose coat was admitted into evidence without his permission.); Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962), *cert. denied,* 372 U.S. 964 (1963) (Search consented to by defendant's parents rendered admissible evidence even though defendant did not consent.).

[21]To be valid, consent must be voluntary, freely given, and not coerced. Cline v. Commonwealth, 312 Ky. 646, 229 S.W.2d 435, 436 (1950). See text accompanying notes 39-54 *infra.*

[22]State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577, 580-81 (1965).

[23]*See* United State v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964) (If voluntary consent was given by defendant's mother to federal agents to enter and search house which she owned and in which defendant lived, consent was binding on defendant and precluded claim that evidence thus obtained was procured by unreasonable search and seizure.). *See also* Fredericksen v. United States, 266 F.2d 463 (D.C. Cir. 1959); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937); Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769 (1923); Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962), *cert. denied,* 372 U.S. 964 (1963).

ent has been held to sanction a waiver of the child's personal rights.[24]

In the judicial efforts to interpret the facts in light of the "possession and control" doctrine,[25] very little is said about the waiver of the child's constitutional guarantees. Control[26] of the premises by the parent as owner or occupier is the turning point, and courts rarely involve themselves in this imbroglio over rights. A few courts have met the issue directly and held that the voluntary consent of the parent is binding on the child and precludes his objection to evidence obtained in violation of his constitutional rights.[27] Such decisions have been based on cases holding that voluntary consent by one in control of the premises circumvents anyone's claim of unlawful search and seizure.[28] A 1965 Minnesota case, *State v. Kinderman*,[29] exemplifies a promulgation of the "possession and control" doctrine. Defendant was not at home when his father, who was in possesion and control of the premises, consented to a warrantless search of the home by police officers. The police seized a revolver from defendant's bedroom closet and clothing from the cellar. The court agreed that the child had a constitutional right against unlawful searches and seizures but asserted ". . . if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of chil-

---

[24]Voluntary consent by a parent is binding on the child. Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966). Control has been defined in various ways:

(1) "proprietary interest in the house" in *Maxwell v. Stephens*, 348 F.2d 325, 337 (8th Cir. 1965);

(2) son's possession right being in "subservience and submission to the power, authority, ownership, and possession of his mother" in *State v. Hagan*, 47 Idaho 315, 274 P. 628, 629 (1929);

(3) "Owner or in control" in *Gray v. Commonwealth*, 198 Ky. 610, 249 S.W. 769 (1923);

(4) "head of the household" in *State v. Williamson*, 78 N.M. 751, 438 P.2d 161, 164 (1968).

[25]"The rule most commonly employed to uphold third party consents to search is that one who has possession and control of the premises or an object may consent to its search and evidence uncovered by that search may be used against anyone." Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. (—).

[26]Control is free access to the dwelling and substantial freedom to do what one wishes within the dwelling. White, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260, 273 (1964-65).

[27]*See* State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965); Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719, 723 (1966); Commonwealth v. McKenna, 202 Pa. Super. 360, 195 A.2d 817 (1963).

[28]*See, e.g.*, United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962); Fredericksen v. United States, 266 F.2d 463 (D.C. Cir. 1959); Woodard v. United States, 254 F.2d 312 (D.C. Cir.), *cert. denied*, 357 U.S. 930 (1958); United States v. Sferas, 210 F.2d 69 (7th Cir. 1954); United States v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964); Commonwealth v. McKenna, 202 Pa. Super. 360, 195 A.2d 817 (1963).

[29]271 Minn. 405, 136 N.W.2d 577 (1965).

dren who live in his house."[30] Consequently, the child's protection was to be viewed ". . . in light of the father's right to waive it."[32] The officers were held to have conducted a lawful search.

A further extension of the dependence upon possession and control is indicated in a 1965 Eighth Circuit decision, *Maxwell v. Stephens*.[33] Where defendant's coat was seized by police under authority of his mother's consent to a search, the court declared that since the consent of the mother was voluntary and non-coerced, the coat was legally admitted into evidence.[34] Considering her voluntary consent in light of the fact that the mother held a possessory interest in the house, the court deemed that the coat came into the hands of the officers by means of a lawful search. That the coat was a personal effect of the defendant, not of his mother, was conceded by the court. However, the court determined that the consent was given by one who had a superior possessory interest in the premises within which the coat was located. Consequently "[i]t was an item which freely came into the hands of the authorities by one who had the right to make it available to them."[35] In other words, the mother's possessory interest in the premises coupled with the voluntariness of her consent outweighed the possessory interest of her son in either the coat or the premises.

Moreover, the issue of vicarious consent and waiver of another's rights has been avoided where circumstances show that the premises have been abandoned by the defendant.[36] A recent district court decision applied this abandonment test.[37] The defendant was not living with his parents at the time of the search which produced incriminating evidence and the court held that ". . . he then had no possessory interest in the premises either as a guest or invitee."[38] Consequently the products of the search were admissible as evidence against him, inasmuch as he had abandoned the premises which were the situs of the seized evidence. In summation, it is apparent that the rule employed

---

[30]136 N.W.2d at 580.

[31]*Id.*

[32]*Id.*

[33]348 F.2d 325 (8th Cir. 1965).

[34]*Id.* at 336-38.

[35]*Id.* at 338. The court stated that the mother ". . . had control of the premises, undiminished by any kind of less-than-fee interest . . ." possessed by the son. *Id.* at 337.

[36]*See, e.g.*, Abel v. United States, 362 U.S. 217 (1960); United States v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962), *cert. denied*, 372 U.S. 964 (1963).

[37]United States v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963).

[38]220 F. Supp. at 806. This statement would tend to support the argument that if the child had been living with his parents then the third party waiver of his constitutional rights might have been invalid.

to uphold third party consent by the family is the "possession and control" doctrine—the one who has possession and control of the premises may consent to its search and evidence uncovered by that search may be admitted.

Many courts have invalidated vicarious family consent on grounds of "coercion" and thus have avoided the family waiver problem[39] since where there is coercion, there cannot be consent.[40] However, coerced consent is not only found where there is a flagrant use of force by an investigating officer; but rather subtle coercion may be inferred by a close examination of the facts surrounding the search.[41] In discussing this "coercion" doctrine, the courts have distinguished legal consent from mere obedience of and respect for the law and the apparent authority of the police. Consider, as an example, where an investigating officer announces to the mother that he has a search warrant for the premises which are shared by the mother and her son and the mother replies, "Go ahead." Unbeknownst to either the officer or the mother, the warrant is invalid. The Supreme Court has held that consent cannot legalize an unauthorized search after the officer has asserted that he has a search warrant, because his assertion evokes the coercive nature of his apparent authority.

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.[42]

What was then said by the mother was but her respect for the police power and obedience to the law.[43] By showing acquiescence to the

---

[39]*See, e.g.*, Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940).

[40]Amos v. United States, 255 U.S. 313 (1921)

[41]Courts often state that both the search and the consent to a search must be analyzed independently on their own facts. *See* Davis v. United Staes, 327 F.2d 301, 306 (9th Cir. 1964); United States v. Ziemer, 291 F.2d 100, 103 (7th Cir.), *cert. denied*, 368 U.S. 877 (1961); Channel v. United States, 285 F.2d 217, 219-20 (9th Cir. 1960).

[42]Bumper v. North Carolina, 391 U.S. 543-550 (1968), where it was held.

> The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.

Id. at 548.

[43]The mother simply reacted to the presence of the officer in a law-abiding manner. A Kentucky decision considered her situation and reasoned:

> In her eyes the "law" was supreme and something not to be resisted or opposed—her apparent acquisescece in the search was most probably a mere outward manifestation of her recognition of the supremacy of the law . . . .

Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956, 961 (1940).

apparent authority of a police officer, the owner of the premises does not give valid consent.[44] According to *Stroud v. Commonwealth*,[45] "When an officer armed with a search warrant comes to a citizen's home and reads the warrant to him, or her, for the purpose of searching the premises, the citizen is compelled to submit to the search."[46] It has been held that this is a coercive consent, implied from the mere presence of the law officers.[47]

In the example, consent given by the mother is not a waiver of the unlawful character of the search.[48] In analyzing her predictment, an Indiana decision is helpful.[49] There the officer presented an invalid search warrant and the wife of the accused answered, "You are welcome to search here." Thereupon, an instrumental part of an illegal still was found and seized by the police. In the language of the court,

> She had no ready means to determine for herself whether the warrant was valid or invalid. She merely bowed in submission to the writ in the hands of one who represented himself to be an officer.[50]

Her coerced consent was not a waiver of the invalid warrant.

It is not necessary that the mother resist the officer's attempt to search or defy him in order to insure her son's constitutional rights.[51] This position is supported in *Dixon v. State*.[52]

> We are of the opinion that one, who is informed by the officers that they have a search warrant under which they propose to search his house, who says nothing further than, "All right; Go ahead," cannot be held to thereby waive irregularities in the search warrant, or to have given his consent to the search without warrant.[53]

Thus, there is clearly no consent to a search and seizure which will be considered binding on the son, where the mother is coerced to allow an officer to enter and search the premises. Where the prosecution claims

---

[44]Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). *See, e.g.*, Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954); Johnson v. United States, 333 U.S. 10, 13 (1948); Amos v. United States, 255 U.S. 313, 317 (1921); United States v. Marra, 40 F.2d 271 (W.D.N.Y. 1930).

[45]295 Ky. 694, 175 S.W.2d 368 (1943).

[46]175 S.W.2d at 369-70.

[47]Amos v. United States, 255 U.S. 313 (1921).

[48]*See* Wilkerson v. State, 37 Okla. Crim. 43, 256 P. 63 (Ct. Crim. App. 1927).

[49]Conner v. State, 201 Ind. 256, 167 N.E. 545 (1929).

[50]167 N.E. at 546.

[51]Stroud v. Commonwealth, 295 Ky. 694, 175 S.W.2d 368, 370 (1943).

[52]Dixon v. State, 108 Tex. Crim. 650, 2 S.W.2d 272 (Tex. Crim. App. 1928).

[53]2 S.W.2d at 273.

waiver by consent, the testimony must clearly show that the consent was really voluntarily given with a desire to invite a search, and not give merely in obedience to the inherently coercive sanctions of the law and thus to avoid resistance.[54] In other words, consent must be a volitional, coercion-free permission to enter and to make the kind of search that is made.

Statement made by some courts do not clearly indicate that mere vicarious consent to search can be regarded as an effectual waiver of one's fourth amendment rights.[55] The constitutional protection against unlawful search and seizure is viewed as superior to the possessory interest in the premises of the consentor. In discussing the individual's contitutional rights, courts have enunciated the belief that the fourth and fifth amendments should be given a liberal construction.[56] For example, a 1940 Kentucky case[57] involved a situation where the accused's mother willingly allowed the officer's search of her home and the seizure of a pair of pants from the premises. These pants, as evidence, would have heavily incriminated her son for rape. The court tacitly overruled the "possession and control" doctrine and stated that the accused's constitutional right ". . . is a personal right and is broad enough to cover the [defendant son] as a member of the family, residing with his father and mother, since it was his dwelling as well as theirs."[58] The son was thus impliedly held to have rights equal to those of his parent, the owner of the premises.

Moreover, in defining as personal the constitutional right against unreasonable searches and seizures, it has been maintained that such a right cannot be waived by anyone except the defendant himself.[59] Where evidence is seized through an unreasonable search, it is important to remember that it is the child's constitutional right that would be waived and not that of the consenting party. This theory finds support in *Stoner v. California*,[60] where a hotel clerk gave consent to police

---

[54]*See* State v. Bonolo, 39 Wyo. 299, 270 P. 1065 (1928).

[55]Amos v. United States, 255 U.S. 313, 317 (1921); Elmore v. Commonwealth, 283 Ky. 443, 138 S.W.2d 956, 960-61 (1940); Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101, 102 (1923).

[56]This belief was pointed out quite clearly in a 1921 Supreme Court decision.

> It has been repeatedly decided these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them. by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.

Gouled v. United States, 255 U.S. 298, 304 (1921).

[57]Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940).

[58]138 S.W.2d at 960.

[59]Stoner v. California, 376 U.S. 483, 489 (1964).

[60]376 U.S. 483 (1964).

officers to search without a warrant the hotel room rented to Stoner, who was absent from the room. The court found that it was Stoner's constitutional right which was at stake and not the rights of the night clerk and that only Stoner could waive it either through his own consent or the consent of his agent.[61] Since the constitutional protection against unreasonable searches and seizures is in the nature of a personal privilege, it can only be waived by the citizen whose rights are invaded or by someone who might be specifically authorized[62] to act for him in this matter. This personal privilege theory receives support from the 1969 Supreme Court decision in *Alderman v. United States,*[63] where it was held, "We adhere . . . to the general rule that the Fourth Amendment rights are personal rights, which like some other constitutional rights, may not be *vicariously* asserted."[64]

Some courts have likewise held that constitutional rights are personal, but have delved deeper into the consent issue by considering the personal property interests of the individual.[65] They have held the individual's interest in his own property is superior to his family's right to consent to a search of the premises. In other words, personal effects, seized without the owner's consent, are not proper evidentiary material,[66] as no one else can waive the owner's possessory rights.[67] Since the property in question does not belong to the consentor, he should not be able to arbitrarily surrender the owner's property to the police and thereby vicariously waive the owner's protection against unreasonable search under the fourth amendment.

This personal property emphasis is manifested by *Gouled v. United States*[68] where attention was focused upon the fifth amendment, which states in part that no person shall be compelled in any criminal case to be a witness against himself.[69] In *Gouled,* a government officer illegally

---

[61]*Id.* at 489. *See* United States v. Jeffers, 342 U.S. 48 (1951).

[62]People v. Lind, 370 Ill. 131, 18 N.E.2d 189, 191 (1938)

[63]394 U.S. 165 (1969). While a parent may be authorized to act as his child's agent, such agency will not be inferred from the parental relation. *See* Angus v. London, 206 P.2d 869 (Cal. Dist. Ct. App. 1949).

[64]394 U.S. at 174 (emphasis added).

[65]*See* Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965) (dissent); Gouled v. United States, 255 U.S. 298 (1921); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955).

[66]*See* Gouled v. United States, 255 U.S. 298 (1921); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955).

[67]*See* Maxwell v. Stephens, 348 F.2d at 339 (dissenting opinion). Where defendant's coat was seized through an unreasonable search sanctioned by the mother, the dissent said the child did not voluntarily place the possession of the coat in the hands of his mother.

[68]255 U.S. 298 (1921).

[69]U.S. CONST. AMEND. V.

seized the private papers of the defendant. The Supreme Court considered that the admission of such evidence would be a violation of the fifth amendment. Relying on *Boyd v. United States,*[70] it reasoned,

> In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.[71]

Having discussed consent and its ineffectiveness under coercion, it is now possible to look at *Ritter* where the mailbox was not within the purview of the search warrant[72] and should not have been, in effect, subject to a search and seizure of its contents. Yet, the majority opinion held there was no seizure but a voluntary surrender of the package by Mrs. Ritter. Since the consent was held to be voluntary, the package was not unreasonably seized. Had the consent been found to be coerced, the package would have been illegally seized and inadmissable. Although the majority of courts hold that parents can consent to a search and seizure of their child's belongings, their coerced consent is recognized as invalid. The *Ritter* case is replete with subtle coercion.

Mrs. Ritter did not once act on her own initiative. She allowed the officer to enter her house only after he announced that he had a search warrant. The officer not only first suggested a search of Ritter's mail, but also gained possession of Ritter's property only through the mother's compliance with his requests. Mrs. Ritter cannot be held to know that, with respect to the mailbox the warrant was no longer the legal basis of the officer's search. She did as she was asked. Her consent was mere obedience to the coercive force of the law, not legal consnt. Consent must be tested or examined for coercion. In accordance with *Bumper v. North Carolina,*[73] once Mrs. Ritter knew that the officer had a search warrant, she could not thereafter give legal consent. The situation was "instinct with coercion,"[74] as Mrs. Ritter was in the presence of law officers. Mrs. Ritter was coerced into allowing the package to be

---

[70]*Boyd v. United States,* 116 U.S. 616 (1886) held the seizure or compulsory production of a man's private papers to be used in evidence against himself, and, in a prosecution for a crime is within the prohibition of the fifth amendment.

[71]255 U.S. at 306.

[72]*Id.* at 807. "The trial court held that the warrant did not authorize a search of the Ritter's mailbox and the Commonwealth did not assign cross-error." *Id.*

[73]391 U.S. 543 (1968).

[74]*Id.* at 550.

seized by the police; thus the marijuana should not have been admitted into evidence.

Pursuing another approach, it seems inconsistent for the court to be able to rule, on the one hand, that Ritter had constructive possession[75] of the package while holding, on the other hand, that the package was an ". . . appropriate object to be voluntarily surrendered by the mother who was in lawful control thereof."[76] In other words, the court has said, in effect, that two people, in different places, simultaneously have possession of one article.

The *Ritter* rule may be challenged under a more modern and more significant approach. To argue that the mailbox was a constitutionally protected place is to miss the true significance of the fourth amendment. A property interest seems to be the focal point of the attack where courts have held a parent can consent to a search of his child's personal effects. Such emphasis on a constitutionally protected place runs contrary to the modern concept of the fourth amendment, which is the protection of personal rights in addition to property rights.[77] The Supreme Court in *Jones v. United States,*[78] a 1960 decision, warned against misconstruing constitutional guarantees and insisted that subtle distinctions of property law should not be determinative in considering constitutional rights. The Supreme Court in *Katz v. United States* went even further in 1967 and held that the fourth amendment protects people, not places.[79] To hold under the *Ritter* "possession and control" doctrine that a possessory interest in the premises gives one the right to waive another's constitutional protection is to ignore that the fourth amendment provides for a right which is personal. Just like the situation in the *Katz* case, it was not the place which was in issue, but Ritter's personal protection. Furthermore the Court in *Mancusi v. DeForte,*[80] a 1968 case, interpreted the *Katz* case and reiterated its holding,

> . . . capacity to claim the protection of [the fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.[81]

It is submitted that one's mailbox should be subject to an expectation

---

[75]Note 8 *supra.*

[76]173 S.E.2d at 804.

[77]D. REISIG, SEARCHES AND SEIZURES HANDBOOK 22 (1968).

[78]362 U.S. 257, 266 (1960).

[79]Katz v. United States, 389 U.S. 347 (1967) (Defendant protested the wiretapping of a public phone booth which he was using).

[80]392 U.S. 364 (1968).

[81]*Id.* at 368.