
No. 05-0146

IN THE

Supreme Court of the United States,

OCTOBER TERM, 2005

THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

EDMOND FITZGERALD,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR PETITIONER

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September 16, 2005

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QUESTION PRESENTED

Whether the consent of one who possesses common authority over premises or effects is valid under the Fourth Amendment of the United States Constitution as against the present, non-consenting person with whom that authority is shared.

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STATEMENT OF THE CASE

Edmond Fitzgerald, the Respondent in this case, shared an apartment with Paul Jaworski at 230 Market Street, located in Mifflinville, Pennsylvania. Commonwealth v. Fitzgerald, 875 A.2d 1058-59 (Pa. 2005). Fitzgerald's girlfriend, Jessica Applewood, called police the morning of July 6, 2001 following a dispute with Fitzgerald and told them she believed Fitzgerald had a large amount of illegal narcotics stored in his apartment. Id. at 1058. When pressed, Applewood admitted she had only overheard a few of Fitzgerald's phone conversations in which he said he had "the stuff" at his apartment. Id. at 1058-59. Not only did Applewood sound angry and agitated when she talked with police, she had not actually seen any drugs at Fitzgerald and Jaworski's apartment. Id. Officers Patton and Hutchinson decided against trying to obtain a warrant based upon Applewood's allegations. Id. at 1059. Instead, they decided to perform a routine stop at the Market Street apartment to ask for consent to conduct a search and verify that no drugs were on the premises. Id.

Upon arriving at Fitzgerald and Jaworski's apartment, the officers knocked and announced that they were police. Id. Fitzgerald came to the door first, and after Officers Patton and Hutchinson explained that they did not have a warrant but wanted to search the apartment for illegal narcotics, he immediately refused. Id. Jaworski then arrived at the front door and informed the officers that he also lived in the apartment. Id. The officers asked Jaworski for his permission to search the apartment and he consented. Id. Fitzgerald immediately resumed his objection to the search. Id.

After entering Fitzgerald and Jaworski's apartment, the officers began searching the kitchen and common room. Id. The officers found nothing in the common room but did find

— five packages of white powder they believed to be cocaine under the kitchen sink. Id. Officer Hutchinson then left the apartment to retrieve an evidence bag. Id. at 1060.

Looking around, Officer Patton saw the door to the east bedroom was open and asked Jaworski if the door was open often. Id. Jaworski told Officer Patton that it was usually open. Id. The door had no lock. Id. When Officer Patton moved into the east bedroom, Fitzgerald resumed his objection to the search by ordering the officer to "stay the hell out of my bedroom." Id. Officer Patton found a small pipe that he believed smelled like marijuana in the east bedroom and he returned to the common room to question Fitzgerald about it. Id.

Meanwhile, Officer Hutchinson returned to the apartment and examined the white powder, which field-tested positive as cocaine. Id. Officer Patton then returned to the east bedroom where he found several packages of what he believed to be marijuana. Id. After seizing the cocaine, pipe, and suspected marijuana, the officers arrested Fitzgerald. Id. Lab tests established that the officers had seized five kilograms of cocaine, ten kilograms of marijuana and a pipe used to smoke marijuana. Id.

Prior to trial, Fitzgerald sought to suppress the drugs and related paraphernalia as seized during an illegal search in contravention of the Fourth Amendment of the United States Constitution and Art. 1 § 8 of the Pennsylvania Constitution. Id. The Court of Common Pleas suppressed the drugs and paraphernalia after finding that a third party could not give consent over the objection of a present party. Id. An appeal to the Eastern Division of the Superior Court followed. Id. The Superior Court reversed the Court of Common Pleas, holding that United States v. Matlock, 415 U.S. 164 (1974), did not require suppression of the evidence. Id. at 1061. After appeal, the Supreme Court of Pennsylvania reversed the Superior Court in a 4-3

decision finding the evidence should be suppressed. Id. at 1071. Petitioner then filed a petition for certiorari, which this court granted.

SUMMARY OF THE ARGUMENT

The Supreme Court has not specifically addressed whether under the Fourth Amendment a cotenant may voluntarily consent to a police search of his apartment while another cotenant is present and objecting. This open question is a federal one, and is within the jurisdiction of the Supreme Court to answer. Applying existing lower court case law to the matter at hand and interpreting other relevant Supreme Court decisions strongly suggests that the third party consent should be upheld and the Supreme Court of Pennsylvania's decision be reversed.

First, Jaworski's voluntary consent acted as an exception to the Fourth Amendment mandated warrant and allowed the police to enter the apartment to conduct their search. Fitzgerald's bedroom was part of the shared premises and as such, the police had actual authority to search it.

Second, even if Jaworski did not have actual authority to consent to the search, an objectively reasonable person would have believed he did as a cotenant; therefore, the police acted on apparent authority, which also obviates the need for a warrant. This apparent authority applies to Fitzgerald's bedroom as well, because an objectively reasonable person would have believed that Jaworski had authority to consent to a search of any freely accessible room in the apartment.

Third, even if the court believes neither actual nor apparent authority existed to search Fitzgerald's bedroom, exigent circumstances forced the police to do so after discovering the cocaine. Finding drugs in the kitchen was probable cause to think more evidence could be found in Fitzgerald's bedroom. This discovery coupled with the real threat that possible evidence could be destroyed in the adjoining bathroom while the police waited on a warrant, proved the

officers acted within their power and the boundaries of the Fourth Amendment in proceeding with the search.

Finally, there is a strong public policy argument that a third party's consent to a search should not be abrogated. It is in the public interest to aid police in apprehending criminals and preventing crime as much as possible. Disallowing third party consent to search in the face of a cotenant's objections would greatly diminish the cooperation possible between citizens and police in protecting the country.

DISCUSSION

I. THIS CASE FALLS WITHIN THE JURISDICTION OF THE COURT.

The Supreme Court of the United States has jurisdiction to hear this case, because the Supreme Court of Pennsylvania used only the Fourth Amendment to the United States Constitution in making its ruling. The Supreme Court will not review a state-court decision based clearly on "both adequate and independent" state law. Illinois v. Rodriguez, 497 U.S. 177, 182 (1990) (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983)). However, when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," it must contain a "'plain statement' that [it] rests upon adequate and independent state grounds." Michigan, 463 U.S. at 1040, 1042. Otherwise, the Supreme Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Id. at 1041. Here, the state Supreme Court's opinion contains no "plain statement" that its decision rests on state law. In fact, while the opinion mentions the Pennsylvania Constitution in passing, the court reasons using only the federal standard. Even the cases cited by the opinion are federal cases and rely solely on the Fourth Amendment of the United States Constitution. The Supreme Court of Pennsylvania clearly based its decision on federal law, and thus the Supreme Court of the United States has proper jurisdiction over this case.

II. THE OFFICERS' ENTRY INTO THE APARTMENT WAS CONSTITUTIONALLY VALID.

The police did not need a warrant to search the apartment. Voluntary consent is one of the exceptions to the Fourth Amendment to the United States Constitution; its existence obviates the need for a warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). In the present

case, the police were able to gain permission from Jaworski to search the residence.

Commonwealth v. Fitzgerald, 875 A.2d 1059 (Pa. 2005).

According to United States v. Matlock, 415 U.S. 164, 171 (1974), a defendant or a third party with "common authority" over the premises may give valid consent, thus rendering a warrant unnecessary. The third party authority can be either actual or apparent. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). However, because Matlock does not squarely address the question currently before the Court, it is helpful to note that numerous circuit courts have interpreted Matlock to read that third party consent remains valid even when a present defendant specifically objects.¹

A. Jaworski had actual authority to consent to a search of the apartment.

Jaworski, as Fitzgerald's roommate, had actual authority to give voluntary consent to search their apartment. The Supreme Court in dealing with third party consent ruled that, "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." United States v. Matlock, 415 U.S. 164, 171 (1974). A defendant or a third party with "common authority" over the

¹ United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (finding that even though a joint occupant of an apartment was present and objected to the search, the police obtained consent from the other joint occupant); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992) ("Valid consent may be given by a defendant or a third party with 'common authority' over the premises. Third party consent remains valid even when the defendant specifically objects to it."); United States v. Morales, 861 F.2d 396, 400 n.9 (3d Cir. 1988) (finding third party consent remains valid even when the defendant is physically present and objects to it); United States v. Bethea, 598 F.2d 331, 335 (4th Cir. 1979) (by sharing common area defendant assumed the risk co-occupant might consent to search even when he, himself, was present); United States v. Baldwin, 644 F.2d 381, 383, 383 n.1 (5th Cir. Unit A 1981) (per curiam) (finding third party consent remains valid even when the defendant is physically present and objects to it); J.L. Foti Constr. Co. v. Donovan, 786 F.2d 714, 716-17 (6th Cir. 1986) (same); United States v. Morning, 64 F.3d 531, 535 (9th Cir. 1995) (same); United States v. McAlpine, 919 F.2d 1461, 1464 (10th Cir. 1990) (same); Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995) ("even when a present subject of the search objects" a third party with common authority can consent to the search).

premises may give valid consent rendering securing a warrant unnecessary. As a cotenant, Jaworski had “common authority” to allow the police to enter and search the apartment.

Due to his co-habitation with Jaworski, Fitzgerald had no reasonable expectation of privacy. The United States Court of Appeals for the Sixth Circuit explained the rationale behind the Matlock rule as such, “a joint occupant assumes the risk of his co-occupant exposing their common private areas to such a search. There is no reasonable expectation of privacy to be protected under such circumstances.” United States v. Sumlin, 567 F.2d 684, 688 (6th Cir. 1977). The additional fact of Fitzgerald's refusal to consent did not lessen the risk assumed that his co-occupant would consent. The Sixth Circuit held that “this additional fact does not increase a reasonable expectation of privacy.” Id. The Supreme Court agreed with Sumlin stating that in order for a search to be deemed invalid under the Fourth Amendment the individual must first manifest “a subjective expectation of privacy.” Kyllo v. United States, 533 U.S. 27, 33 (2001) (quoting California v. Ciraolo, 476 U.S. 207, 211 (1986)). By living with a roommate and not even having a lock on his usually open door, Fitzgerald assumed the risk Jaworski might voluntarily consent to allowing the police to search the apartment. Whether Fitzgerald was there or refused to give consent for a search does not change the fact he had already assumed the risk that Jaworski could validly consent. Once he shared his property with Jaworski, Fitzgerald could not have prevented him from giving valid consent unless Fitzgerald revoked his rights to the property.

B. The officers had apparent authority because an objectively reasonable person would have believed that Jaworski had authority to consent to a search of the apartment.

In Illinois v. Rodriguez, 497 U.S. 177, 188 (1990), the Supreme Court of the United States recognized that police officers could have apparent authority to conduct a search when they did not have actual authority. The Court found that “[a]s with other factual determinations

bearing upon search and seizure, determination of consent to enter must 'be judged against an objective standard.'" Id. at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)). The Court recognized that objective standard to be whether "the facts available to the officer at the moment...[would] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." Id. (internal quotation marks omitted). The Court remanded the case to the appellate court for a determination of whether the officers reasonably believed that the defendant's girlfriend had authority to consent to a search of defendant's home. Id.

In the present action, the Supreme Court of Pennsylvania found that the Commonwealth failed to prove the officers had apparent authority from Jaworski to search the house and to search the defendant's bedroom. Commonwealth v. Fitzgerald, 875 A.2d 1058, 1070 (Pa. 2005). The Pennsylvania court based its rationale on its belief the officers "made no attempt to inquire into the living situation between Fitzgerald and Jaworski, beyond Officer Hutchinson's question as to whether Fitzgerald's bedroom door normally remained open." Id. at 1071. Based upon a reading of this Court's precedent, the Commonwealth did show that the officers were reasonable in assuming Jaworski had the authority to consent to a search of the house as well as Fitzgerald's bedroom.

This Court stated in Rodriguez that "[e]ven when the invitation [to search] is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." Rodriguez, 497 U.S. at 188. In the present case, Jaworski did explicitly identify himself as Fitzgerald's roommate and state that he lived in the apartment. Commonwealth v. Fitzgerald, 875 A.2d 1058, 1059 (Pa. 2005). Furthermore, there were no suspicious circumstances surrounding Jaworski's admissions that would cause a reasonable

person to doubt their veracity and inquire further. Nothing in the record indicates that Fitzgerald who was present during the officers' questioning contested Jaworski consent. Id. at 1059.

Fitzgerald only objected to Jaworski's consent to have the house searched. Id. Such an eventuality was to be expected given Fitzgerald's earlier refusal to the search, and this fact does not cast any doubt upon the officers' reasonable belief that Jaworski had authority to consent to a search of the house. Rodriguez, at 183-84 ("There are various elements, of course, that can make a search of a person's house 'reasonable' – one of which is the consent of the person or his cotenant.")

III. THE OFFICERS' ENTRY INTO THE BEDROOM WAS CONSTITUTIONALLY VALID.

The Pennsylvania Supreme Court's assumption that "roommates...often set aside their own private space" is of no moment to the present case and ignores the Matlock Court's instructions. This Court stated that the test goes to mutual use and joint access. Matlock, 415 U.S. at 172 n.7. An officer's continuing search of a shared premise cannot be impeded by whatever thoughts, constructs, or arbitrary property lines are devised between roommates as the Pennsylvania Supreme Court suggests.

A. Jaworski had actual authority to consent to a search of Fitzgerald's bedroom.

In Frazier v. Cupp, 394 U.S. 731 (1969), "the Court was unwilling to engage in the 'metaphysical subtleties' raised by Frazier's claim that his cousin only had permission to use one compartment within the bag." Matlock, at 170-71. "[I]n allowing [the] use [of] the bag and in leaving it in his house, [he] must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." Frazier, 394 U.S. at 740. In Matlock, the Court noted, "any of the co-inhabitants has the right to permit the inspection in his own right and the others have assumed the risk that one of their number might permit the common area to be searched." Matlock, at 172

n.7. It is unreasonable for Fitzgerald to expect privacy in his bedroom when he has a cotenant, does not have a lock on the door, and usually leaves the door open. Kyllo v. United States, 533 U.S. 27, 33 (2001). The Court should apply its analyses in Frazier and Matlock to the instant case. The Supreme Court of Pennsylvania's insistence on metaphysical subtleties clearly ignores this Court's binding precedent and it should be overruled.

B. Officer Patton had apparent authority because an objectively reasonable person would have believed that Jaworski had authority to consent to a search of any freely accessible room in his apartment.

In U.S. v. Matlock, 415 U.S. 164 (1974), the Court determined "a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected" could give permission to search. Matlock, at 171. The Court cautioned that "[t]he authority which justifies the third-party consent *does not rest upon the law of property...but rests rather on mutual use of the property by persons generally having joint access or control for most purposes.*" Id. at 172 n.7 (emphasis added). The Pennsylvania Supreme Court ignored this warning.

Officer Patton's question to Jaworski about the east bedroom door went directly to the issue of mutual use through joint access. The test from Matlock is whether the third party "generally ha[s] joint access." Id. Based upon Jaworski's answer that the door was "usually" open, and the obvious absence of a lock on the door, Officer Patton was objectively reasonable in his belief that Jaworski had access to that room of the apartment. Apparent authority does not require that the officer's judgment is ultimately correct; it only requires that it be reasonable. Rodriguez, 497 U.S. at 183-84.

IV. IF NEITHER ACTUAL AUTHORITY NOR APPARENT AUTHORITY EXISTED TO SEARCH FITZGERALD'S BEDROOM, EXIGENT CIRCUMSTANCES COMPELLED THE POLICE TO CONTINUE THEIR SEARCH AFTER DISCOVERING COCAINE.

Matlock clearly stated, "it is reasonable to recognize that any of the co-inhabitants has the right to permit [an] inspection in his own right and that the others have assumed the risk that one of their number might permit the *common area* to be searched." U.S. v. Matlock, 415 U.S. 164, 172 n.7 (1974) (emphasis added). As an actual and apparent cotenant of the apartment, Jaworski could undeniably consent to a search of the common area. Id. However, after the officers discovered suspected cocaine underneath the kitchen sink, Commonwealth v. Fitzgerald, 875 A.2d 1059 (Pa. 2005), their footing in the apartment changed.

Exigent circumstances can obviate the need for a warrant. See Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298 (1967) ("Under the circumstances of this case," "neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid."); McDonald v. United States, 335 U.S. 451, 456 (1948) ("the exigencies of the situation made [a search without a warrant] imperative."). The United States Court of Appeals for the First Circuit has further found that something an officer discovers during a consented search can lead to exigent circumstances requiring a continued search. United States v. Donlin, 982 F.2d 31, 33-4 (1st Cir. 1992).

To claim exigent circumstances due to the possible destruction of evidence the United States Court of Appeals for the Ninth Circuit has held "the state must demonstrate probable cause to suspect that evidence was present." United States v. Impink, 728 F.2d 1228, 1231 (9th Cir. 1984). In Impink, the police did not know a methamphetamine laboratory was on the premises before they began searching. Id. at 1232. In contrast, in the case under review, a citizen notified the police that she suspected her boyfriend, Fitzgerald, was hiding a large

quantity of drugs at his residence. Commonwealth v. Fitzgerald, 875 A.2d 1058-59 (Pa. 2005). After getting consent to search the common areas from Fitzgerald's roommate, the police found a large quantity of suspected cocaine in the kitchen. Id. at 1059. This discovery served as probable cause to think there may be other drug related evidence elsewhere in the residence.²

In addition to the existing evidence, Fitzgerald's bedroom had an attached bathroom that could have allowed him to dispose of any additional evidence discretely and quickly by flushing it down the toilet. Therefore, the facts in the case in question meet the Ninth Circuit's Impink test of a "finding of probable cause coupled with exigent circumstances" that allows for a warrantless search. Impink, at 1232. (quoting United States v. Stanley, 545 F.2d 661, 664 (9th Cir. 1976)).

V. PUBLIC POLICY DICTATES THAT A THIRD PARTY'S CONSENT TO SEARCH SHOULD NOT BE ABROGATED

This Court has emphasized the importance of the consent to search. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court observed that "[i]n a situation where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." Schneckloth, 412 U.S. at 227. Officers Patton and Hutchinson were presented with just such an instance in this case. The officers decided that Applewood's allegations were not specific enough, but did merit further inquiry. Commonwealth v. Fitzgerald, 875 A.2d 1058-59 (Pa. 2005). They then proceeded to the apartment to verify that no drugs were on the premises and

² While the police likely could have arrested Fitzgerald at that moment, this Court has recently re-emphasized the wide deference police should be given in deciding when to exercise their arrest powers. Town of Castle Rock v. Gonzales, 545 U.S. ___, 125 S.Ct. 2796, 2805-2806 (2005); see also Chicago v. Morales, 527 U.S. 41, 47, n.2, 62, n.32 (1999). That Officer Patton chose to continue the search before arresting Fitzgerald was within his discretion as a police officer.

Jaworski, a third party with both actual and apparent authority to consent to a search, allowed them to search. Due to Jaworski's cooperation, police found five kilograms of cocaine, ten kilograms of marijuana, and related drug paraphernalia. Id. at 1060.

A third party's consent to search allows citizens to aid police in investigations. "It is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971). Cases like the one at bar are likely to result in the apprehension of criminals. When a citizen with equal authority to consent to a search is attempting to aid police in their investigation, that citizen's consent should not be barred by the unilateral denial of the cotenant. Such a policy would undermine the common good. Cooperation between citizens and police would be drastically diminished if the Court adopted such a rule.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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September 16, 2005