LAW ENFORCEMENT
NEWSLETTER
a publication of the New York Municipal Insurance Reciprocal

To Search, or Not To Search: That Is the Question

Michael P. McClaren, Partner
Webster Szanyi, LLP

To a lay person (i.e. a juror) it is hard to comprehend that someone would consent to a search; let alone voluntarily consent to a strip search. In reality, however, it is not surprising, nor is it uncommon, for a person in custody to consent to a strip search. The question, then, is whether the officer should agree to conduct the search if consent is given.

There is no question that a search conducted pursuant to consent is permissible under the Fourth Amendment. A well-established exception to the Fourth Amendment's requirement of a search warrant is consent for the search. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 222 (1973). A person, by consenting to a search, may waive the requirement for a warrant or probable cause for searches of their persons, automobiles and residences. United States v. Ansaldi, 372 F.3d 118, 129 (2d Cir. 2004).

However, just because it is legal, does not mean that in all circumstances where a person consents, a search should be conducted. Even a search by consent, with the consent in writing, carries risks. Each officer and each supervisor must weigh the risks of litigation against the likelihood of obtaining useful information by means of the search. Although the threat of litigation should not be a deterrent to good police work, it is a simple reality that more and more people are trying to use the Court system as a ticket to riches. In other words, a strip search just might be that person's lottery ticket.

A NYMIR subscriber recently experienced the unpleasantries of litigation over whether a strip search was consensual. The facts were as follows: A young black woman was driving her own vehicle at approximately 10 p.m. at night, when a police officer on patrol recognized the passenger (a black man) in the vehicle, who was also the driver's fiancé, as an individual wanted for questioning on a charge of assault with a deadly weapon. The officer initiated a felony stop. Upon arrival of back-up, the driver of the vehicle was ordered, at gunpoint, to exit the vehicle. She did so, was patted down by a female officer, handcuffed, and placed in the back of a patrol car. The passenger in the vehicle was secured, and taken from the scene. The handcuffs were then removed from the driver, who was visibly upset, and consent was requested to search the trunk and compartments of the vehicle. A written consent form was signed. The vehicle was searched, although no evidence of a crime was obtained.

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People v. Matthew Jones

Disorderly Conduct Case Dismissed - Case of Insufficient Details

Lisa Weber, NYMIR Claims Counsel

In the recent case of People v. Matthew Jones, the Court of Appeals vacated a conviction for disorderly conduct because the factual allegations in the accusatory instrument failed to establish a prima facie case.

The defendant had been charged, by information, with disorderly conduct. The information contained a statement by the arresting officer that he "observed defendant along with a number of other individuals standing around at the above location, to wit a public sidewalk, not moving and that as a result of defendant's behavior, numerous pedestrians in the area had to walk around defendants…deponent directed defendant to move and defendant refused and as deponent attempted to stop defendant, defendant did run."

As required by the Criminal Procedure Law, the factual portion of an information must contain a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges. An information is sufficient on its face when: it substantially conforms to the requirements prescribed in Section 100.15; and the allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.

Because nothing in the information indicated how the defendant had the intent to or recklessly created a risk of causing public inconvenience, annoyance or harm, the information was legally insufficient. Something more than a mere inconvenience of pedestrians would be required to support the charge.

Although the defendant had attempted to flee, the Court of Appeals also found the resisting arrest charge could not be supported since the arrest would not be considered "authorized" owing to the deficiencies of the information.

Disorderly conduct arrests need to be closely scrutinized to meet the standards above. Failing to meet these standards, often results in these cases being dismissed. Frequently when these cases are dismissed, false arrest or malicious prosecution claims are filed against the Law Enforcement Agency.

Tough Questions — Easy Answers? *Law Enforcement Newsletter Quiz*

1. Name the one sport in which neither the spectators nor the participants know the score or the leader until the contest ends.
2. Only three words in Standard English begin with the letters "dw" and they are all common words. Name two of them.
3. What famous North American landmark is constantly moving backward?
4. Name the only sport in which the ball is always in possession of the team on defense, and the offensive team can score without touching the ball?

Answers: 1. Boxing; 2. dwarf, dwell, and dwindle; 3. Niagara Falls (The rim is worn down about two and a half feet each year because of the millions of gallons of water that rush over it every minute.); 4. Baseball.

Because the registration for the vehicle had expired, the driver was told that she could not drive the vehicle from the scene. Instead, she was given a ride to the police station. The driver waited in the lobby of the police station while her fiancé was processed, and while her traffic tickets were prepared. She was not handcuffed, nor was she in custody. The officers processing the passenger of the vehicle found crack cocaine secreted in his buttocks. The driver was then asked into an interrogation room, where she was advised of the trouble that her fiancé was in. The driver, who had never previously been arrested, and had no prior criminal history, again became visibly upset. She stood up and immediately said, "I got nothing on me…I don't know nothing about any drugs, you can check me if you want." A supervising officer then asked the driver if she was consenting to a search of her person. She responded "yes".

The search was conducted by a female officer, in the privacy of the women's bathroom. There was never any physical contact between the officer and the driver. The search was conducted in quadrants. The driver was never completely naked. No drugs were found. Unfortunately, no written consent was obtained for that search, although Department policies mandated that the consent be in writing.

The driver was then asked if the officers could search her apartment for a weapon. The officers were aware that the fiancé lived there off-and-on. A written consent for the search of the apartment was secured. The driver actually participated in the search, telling the officers where her fiancé kept his things. The search was not fruitful.

One year later, out of the blue, the police department, and three officers were individually named in a lawsuit alleging violations of the driver's Fourth Amendment rights. The driver claimed that she was coerced into signing the written consents, and never consented to what she described as a cavity search. She claimed to have been "groped" and violated by the officer performing the strip search. She claimed that she signed the consent for the search of the vehicle only because the officers told her that if the search was pursuant to warrant or an inventory search, "no one knows what shape the car will be in when the search is over." She also claimed that while in the interrogation room, the officers threatened to throw her in jail, threatened to have her son taken from her, yelled at her, swore at her, and that she was otherwise berated and humiliated. She asserted that she was targeted for the searches because of her race, and that racially derogatory names were uttered at her.

Ultimately, several years later, the case was tried before a jury.

In determining whether a search is consensual, the Courts, and the juries, look to the totality of the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, knowledge of a right to refuse a search is not a prerequisite of a voluntary consent. Schneckloth, 412 U.S. at 227. The determination whether consent was voluntary or coerced is based on the totality of the circumstances. Schneckloth, 412 U.S. at 227; United States v. Kon Yu-Leung, 910 F.2d 33, 41 (2d Cir. 1990). In determining whether consent to search was free from coercion, a court should consider, inter alia, physical mistreatment, use of violence, threats, threats of violence, promises or inducements, deception or trickery, and the physical and mental condition and capacity of the defendant within the totality of the circumstances. United States v. Pena, 143 F.3d 1363, 1367 (10th Cir. 1998). Duress and coercion, however, are not established merely by the fact that: an arrest was effected; a representation is made that a

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Effective Training

Two men who broke into a commercial building in Antioch, CA to steal copper wire, found themselves in the middle of a police training exercise. While one officer taking part in the training hid in the 40,000 square foot building, another officer outside announced that a dog was about to be released and anyone inside should come out or risk being bitten. James Ayers and Frederick Gulliee assumed the warning was directed at them. Ayers surrendered and the officers and K-9 nabbed Guillee hiding inside.

Source: Contra Costa Times, September 20, 2007

warrant will be obtained if consent is withheld; or by the fact a defendant is handcuffed. United States v. Medina, 301 F. Supp. 2d 322 (S.D.N.Y. 2004) (citing Kon Yu-Leung, 910 F.2d 33, 41). Drawing firearms or using handcuffs do not establish coercion negating consent for a search. Ansaldi, 372 F.3d at 129.

The signing of a written consent form "weighs heavily toward finding [a] consent was valid." United States v. Taylor, 31 F.3d 459, 463 (7th Cir.1994).

The following factors are considered in ascertaining whether consent to search is voluntary: the person's age, mental and physical condition; the fact that the suspect never entertained the possibility that she would be arrested; the fact that the suspect was employed and managed the household bills and affairs; that officers never raised their voices. United States v. Jelks, 273 F. Supp. 2d 280, 290-91 (W.D.N.Y. 2003) (finding consent voluntary despite the fact that the woman had given birth four days earlier and whose child was asleep on the couch, was accompanied by three officers in her home at night, and had been erroneously informed that parole officers could search a parolee's home "any time" they wanted to do so); see also United States v. Juliano, 2000 W.L. 1206745, at *2-3 (S.D.N.Y. 2000) (finding consent voluntary where agents were courteous, did not engage in intimidation, did not raise their voices, and did not make any threats or attempts to induce cooperation); United States v. Bennett, 2005 WL 2709572 (W.D.N.Y. 2005) (finding consent voluntary based on written statement of consent and "totality of circumstances.").

Consent is voluntary despite the fact that it is preceded by an arrest or use of force by police where "calm" is restored. In United States v. Snype, 441 F.3d 119, 131-32 (2d Cir. 2006), the Court of Appeals held that consent to search a woman's apartment was voluntary despite the fact that her "home was forcibly entered by a heavily armed SWAT team that initially secured her and her boyfriend in handcuffs and raised the possibility of taking the couple into custody while placing [the woman's] young daughter in protective care" and after her boyfriend "was arrested and removed from the apartment." The Court found that "calm" had been restored because the SWAT team left and she was allowed to call her sister to assist with her daughter. Id. The consent to search was voluntary because the woman did not fear the consequences of refusing consent and knew that she was not required to give consent. Id.

Courts have held that handcuffing and the use of guns in effectuating an arrest does not render consent involuntary. See e.g., United States v. Ansaldi, 372 F.3d 118, 129 (2d Cir. 2004) (holding that the use of guns to effectuate arrest and handcuffing of defendant did not render his consent to search his home involuntary); United States v. Garcia, 56 F.3d 418, 423 (2d Cir. 1995) ("Nor does the presence of three law enforcement officers lend significant support to a claim of coercion. Consent to search has been found despite formal arrest . . . and such additional aggravating circumstances as handcuffing of a suspect, the presence of six law enforcement officers in his home, and their assurance that they would remain indefinitely and secure a search warrant if consent were withheld."); United States v. Rojas, 906 F. Supp. 120, 127 (E.D.N.Y. 1995) ("The presence of a gun does not necessarily render consent involuntary, United States v. Rothberg, 460 F.2d 223, 224 (2d Cir.1972), especially if it was unholstered "only as a precaution." United States v. Miley, 513 F.2d 1191, 1204 (2d Cir.1975).").

The jury in the case described above ultimately sided with the police officers and the Police Department. As often happens when a person lies, the driver (or Plaintiff) had a difficult time keeping her story straight during the course of depositions and trial testimony. The jurors clearly felt that she lacked credibility. The jury found that all three searches had been consensual, and that the cavity search never occurred. The difficulty is, however, that a skilled Plaintiff's lawyer can easily turn a case like the foregoing into a "he-said-she-said" battle. The unpredictability of juries then comes into play. The officers in that case lived with the uncertainties of litigation for years.

The lessons learned:

- Follow all Department policies to the letter;
- Consents, ideally, should be video-taped or audio-taped, and keep the tapes;
- All consents should be in writing;
- Have as many officers and supervisors as possible witness the consent;
- Evaluate the person giving consent (education, criminal history, sophistication, work history…)
- Document the consent in standard reports;
- Finally, don't let the threat of litigation dictate your actions, but keep it in mind. Litigation is not fun, and is expensive.