STRATEGIES in Brief

ÆQUITAS

Issue #22 | May 2014

"I Hear You Knockin' But You Can't Come In (At Least While I'm Here)"

Fernandez v. California: Third-Party Consent Search After Arrest of Objecting Suspect-Occupant

Teresa M. Garvey, JD[1]

The scenario plays out in a variety of investigations, including many domestic violence cases: police go to a suspect's residence in response to a 911 call, to make an arrest, or to seek consent to a search of the residence, but the suspect refuses to allow police to enter the home. Does that refusal prevent the police from later, in the absence of the objecting occupant, obtaining the consent of an adult co-occupant to enter and search the premises without a warrant? In its recent decision in *Fernandez v. California*[2], the United States Supreme Court answered that question in the negative—at least where the police have, in good faith, removed the objecting suspect by arresting him or her.

The Facts

In *Fernandez*, police responded to a report of an armed robbery in which the victim had been attacked by a group of men whose comments during the robbery indicated they were involved in gang activity. Officers went to an alley they knew to be frequented by members of a gang known as the "Drifters." A man approached the officers and told them "the guy" was in a nearby apartment building. Police saw a man run from the alley to that apartment building and then heard screams, and the sound of fighting coming from the building. When officers went to the apartment from which the screams had been coming, a woman named Roxanne Rojas answered the door, holding a baby. Rojas, who appeared be crying, had blood on her clothing and fresh injuries to her face and hand. She claimed that the only other person in the apartment was her four-year-old son, and told the officers she had been injured in a fight. When the officers asked Rojas to step outside so they could check the apartment for any threat to her or the children, defendant Walter Fernandez appeared at the door, clad only in his boxer shorts. Fernandez indignantly stated that he knew his rights and that the police had "no right" to come in. Reasonably believing that Fernandez had assaulted Rojas, the officers took him into custody. After the victim of the original robbery identified Fernandez as one of his attackers, police returned to the apartment and obtained Rojas's oral and written consent to search the apartment. Police found gang paraphernalia, clothing that matched the description of the robbery suspect, a butterfly knife, and ammunition, as well as a sawed-off shotgun whose location was revealed by the four-year-old child.

State Court Proceedings

Fernandez was charged with the domestic violence assault, robbery, and weapons offenses. After denial of his motion to suppress the evidence found in the apartment, Fernandez entered a plea of *nolo contendere* to the weapons offenses, going to trial only on the robbery and domestic violence assault. At trial, Fernandez was found guilty of both offenses, and his convictions were affirmed on appeal at the state level.[3] The California Court of Appeals held that *Georgia v. Randolph*,[4] which prohibits the police from conducting a third-party consent search over the objection of a present occupant, did not apply in this case, where the third-party consent was obtained after the objecting occupant had been arrested and removed from the premises.[5]

UNITED STATES SUPREME COURT

The Court's opinion, written by Justice Alito and joined by the Chief Justice and four others, briefly discussed its precedents involving consent searches. Observing that consent searches have long been considered legitimate tools of law enforcement for which no warrant is required in order to satisfy the Fourth Amendment's "reasonableness" standard, the Court traced the history of consent searches from *Schneckloth v. Bustamonte*[6] (holding that warrantless consent searches are reasonable under the Fourth Amendment) through *United States v. Matlock*[7] (holding that consent of a co-occupant is sufficient to permit a warrantless search) and *Illinois v. Rodriguez*[8] (holding that consent of one with apparent authority over the premises will justify a warrantless search, even if it is later discovered that the consenting person did not, in fact, possess such authority).[9]

However, in what the *Fernandez* Court termed a "narrow exception" to the rule allowing third-party consent to search,[10] *Georgia v. Randolph*[11] held that the consent of one resident to a police search could not trump the objection of a co-resident who objected to such a search, at least while the objector was present at the scene. In *Randolph*, the police went to a residence in response to a report of a non-violent domestic dispute. The estranged wife of the defendant (who still resided with him) informed the police that her husband had drugs in the house. When police asked the defendant for consent to search the home, he refused. When they turned to his wife for consent, however, she granted permission for the search, which resulted in the seizure of a small quantity of cocaine. Social norms, the Court observed, would likely discourage an ordinary social visitor from entering a home at the invitation of one resident if another were present and insisting that the visitor stay out. If an ordinary visitor would feel constrained from entering under such circumstances, the Court reasoned, it would likewise be unreasonable for police to enter and search a residence over the objection of a co-occupant who was present at the scene.[12]

The *Fernandez* Court noted that the *Randolph* opinion had repeatedly and explicitly emphasized the significance of the physical presence of the objecting resident as the basis for invalidating a warrantless search based on the consent of a co-occupant.[13] There was, however, a dictum in *Randolph* suggesting that the presence or absence of the objecting occupant would be dispositive only "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection…."[14] Rejecting Fernandez's argument that his objection should prevail because he was absent only due to his arrest, the *Fernandez* opinion clarified the *Randolph* dictum, explaining that the subjective motivations of the police in detaining or arresting a potentially objecting occupant would not be determinative so long as there was an objectively valid basis for the detention or arrest.[15] Thus, even if police subjectively hoped to obtain consent from a co-occupant once an objecting resident is arrested, so long as there is probable cause for the arrest, the fact that the police are responsible for removing the objector will be no bar to their seeking consent from another occupant.

The Court also rejected the defense argument that the defendant's objection to the search should stand unless and until he changes his mind. Even a rule that the objection would stand for a "reasonable" time was deemed to be unworkable in practice and inconsistent with the "social norms" that underlay the *Randolph* exception—a social visitor welcomed by one resident would probably be deterred by the presence of a co-occupant refusing the visitor's entry, but would nevertheless feel free to enter if that objecting individual were not present.[16]

Under the facts presented in *Fernandez*, the Court held, the consent of Rojas was therefore sufficient to justify the warrantless search of the apartment. To allow the objection of one resident to prevail, even after he had been arrested and removed from the scene, would be to disregard the right of the co-occupant to ask for police assistance in the form of a search.[17] As the Court observed, in this case the police search uncovered a sawed-off shotgun that was readily accessible to a four-year-old child. "Denying someone in Rojas' position the right to allow the police to enter *her* home would also show disrespect for her independence. Having beaten Rojas, petitioner would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power."[18]

Justices Scalia and Thomas, both of whom joined the majority opinion, filed concurring opinions in which they expressed their continuing disagreement with the *Randolph* decision, one from which both had dissented.[19]

Justice Ginsburg wrote a dissenting opinion that was joined by Justices Sotomayor and Kagan.[20] While the dissent acknowledged the seriousness of domestic violence, the dissenters believed that a victim is adequately protected by the ability of the police to enter for the purpose of protecting the victim and arresting the offender.[21] At that point, the dissent asserted, any further search, over the objection of the suspect, must be accomplished by use of a warrant.[22]

Commentary

The Court's opinion appropriately recognizes the agency of victims and other innocent co-occupants to consent to a search independently of the objection, no matter how vehemently expressed, of a suspect who has been arrested or is no longer at the scene. Despite the dissenters' nod to the seriousness of domestic violence, their position would place needless obstacles in the path of police officers responding to serious crimes, particularly those involving domestic violence. Protecting the victim is paramount, and the dissent properly recognizes the authority of the police to do so. However, the immediate protection of the victim is only the beginning of a process that requires much more for the ultimate safety of the victim and the appropriate consequences for the offender. Successful prosecutions require evidence.

Under the dissent's rule, an abuser could, by the mere act of registering an objection to any search, effectively prevent the police from asking the victim for consent to search the premises where the crime occurred. Although the dissent is correct in its assertion that a warrant often *could* be obtained, consent searches are far more expedient, allowing the police to begin processing the scene and collecting evidence at the earliest possible time. A prompt search enhances the likelihood that relevant observations (such as signs of a struggle) can be observed and documented, that important, often-fragile evidence (such as blood or semen) will be properly preserved, and that dangerous weapons (such as the sawed-off shotgun in *Fernandez*) will be safely recovered. Moreover, as the Court observed, obtaining a warrant will often impose a substantial burden on the victim, who may be forced to wait for the warrant to be issued and executed before going about his or her business, while a consent search would be quicker, more efficient, and less disruptive.[23] As the majority opinion notes, a victim or other innocent co-occupant may have at least as much interest in allowing the search as the objecting occupant has in preventing one.[24]

The Gang Connection and Witness Intimidation

Curiously, the dissenting opinion suggested that Rojas's consent might have been the product of police coercion, the dissenters apparently crediting her testimony at the suppression hearing that the police threatened to take her children from her[25] (although, as the majority opinion pointed out, the trial court found that Rojas had knowingly and voluntarily consented to the search).[26] Rojas's trial testimony on behalf of the defendant,[27] and her claim at the suppression hearing that she was pressured by the police when they returned to obtain her consent to search, will come as no surprise to any prosecutor, police officer, or advocate who deals with crimes of domestic violence, where recantation by victims is a fact of life. It appears that the dissenting justices did not consider the possibility that Rojas's trial testimony was itself the product of coercion—by the defendant. In addition to the usual dynamics accompanying many cases of domestic violence, however, this case presents additional considerations that were not discussed in any of the Supreme Court opinions, but can be readily inferred from the trial testimony as it was described in the opinion of the California Court of Appeals.

At trial, the prosecution presented the testimony of a gang expert who explained how gangs in general, and the Drifters in particular, function; how the gang and its members engage in criminal conduct—including witness intimidation—to advance their interests; and what facts led him to conclude Fernandez was a member of that gang.[28] The expert's opinion—that the robbery was a gang-related crime—was offered to support the jury's finding of that statutory sentencing factor.

Rojas, testifying on behalf of the defense at trial, claimed that she had been assaulted in the apartment by a female who wanted to fight her, and that Fernandez had merely yelled at her after he saw her injuries.[30] At the suppression hearing, she implied that her cooperation with the police had been coerced by threats to remove her children.[31]

According to the trial testimony of the officer-gang-expert, however, Rojas told him a few days after Fernandez's arrest that she "did not want to be a 'rat' and that defendant would be very upset if he knew she was talking to the police."[32] While issues concerning the gang expert's testimony and the enhanced penalty for gang-related offenses were not raised before the United States Supreme Court, and discussion of those issues was ultimately redacted from the published opinion of the California Court of Appeals, the testimony in this case presents a classic illustration of the effects of witness tampering in domestic violence cases, particularly where there is gang involvement. For more information on these issues, and strategies to combat them, *see* TERESA M. GARVEY, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, WITNESS INTIMIDATION: MEETING THE CHALLENGE (2013), *available at* http://www.aequitasresource.org/library.cfm; and AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON WITNESS INTIMIDATION (Mar. 2014), *available at* http://www.aequitasresource.org/library.cfm.

CONCLUSION

The *Fernandez* decision will facilitate prompt and efficient evidence collection in many crimes involving domestic violence while simultaneously empowering victims to consent to reasonable investigative requests that will facilitate holding their abusers accountable.

ENDNOTES

1 Teresa M. Garvey is an Attorney Advisor at AEquitas: The Prosecutors' Resource on Violence Against Women. The author gratefully acknowledges Assistant U.S. Attorney Christian Fisanick, Chief of the Criminal Division, U.S. Attorney's Office for the Middle District of Pennsylvania, for his assistance and his thoughtful review of this article.

2 Fernandez v. California, 134 S.Ct. 1126 (2014).

3 People v. Fernandez, 145 Cal.Rptr.3d 51 (Cal. Ct. App. 2012), *review denied* (Oct. 31, 2012), *aff'd* 134 S.Ct. 1126 (2014).

4 Georgia v. Randolph, 547 U.S. 103 (2006).

5 *Fernandez,* 145 Cal.Rptr.3d at 65-66.

6 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

7 United States v. Matlock, 415 U.S. 164 (1974).

8 Illinois v. Rodriguez, 497 U.S. 177 (1990).

9 *Fernandez,* 134 S.Ct. at 1132-33.

10 *Id.* at 1132.

11 Georgia v. Randolph, 547 U.S. 103 (2006).

12 *Id.* at 112-15.

13 *Fernandez,* 134 S.Ct. at 1133-34.

14 *Randolph,* 547 U.S. at 121.

15 *Fernandez*, 134 S.Ct. at 1134.

16 *Id.* at 1135-36.

17 *Id.* at 1137.

18 *Id.*

19 *Id.* at 1137-38 (Scalia, J., concurring); *id.* at 1138 (Thomas, J., concurring).

20 *Id.* at 1138-1144 (Ginsburg, J., dissenting).

21 *Id.* at 1143-44 (Ginsburg, J., dissenting).

22 *Id.* (Ginsburg, J., dissenting).

23 *Id.* at 1137.

24 *Id.*

25 *Id.* at 1139 ("About an hour later, however, and with no attempt to obtain a search warrant, the police returned to the apartment and *prevailed upon* Rojas to sign a consent form authorizing search of the premises") (emphasis added); 1143 n.5 (describing Rojas's testimony at the suppression hearing) (Ginsburg, J., dissenting).

26 *Id.* at 1130 n.2.

27 *See id.*; *Fernandez,* 145 Cal.Rptr.3d at 56-57).

28 *Fernandez,* 145 Cal.Rptr.3d at 54-56.

29 *Id.* at 55-56.

30 *Id.* at 56-57.

31 *See Fernandez*, 134 S.Ct. at 1143 n.5 (Ginsburg, J., dissenting).

32 *See Fernandez*, 145 Cal. Rptr.3d at 106-07.

This article was supported by Grant No. 2009-TA-AX-K024 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author and do not necessarily reflect the views of OVW.

1100 H Street NW, Suite 310 • Washington, DC 20005

P: 202-558-0040 • F: 202-393-1918