

NEW YORK COURT OF APPEALS ROUNDUP

IN A VERY PRODUCTIVE MONTH, COURT TACKLES SEARCH AND SEIZURE AND POLICE MISCONDUCT

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The New York Court of Appeals released 18 opinions in November, the most in a single month in more than four years. Eight of the opinions were 4-3 split decisions dealing with constitutional challenges, including government search and seizures, an individual's right to bear arms and alleged police misconduct. Chief Judge Rowan D. Wilson and Judges Jenny Rivera, Shirley Troutman and Caitlin Halligan comprised the majority opinion in most of the 4-3 split decisions, with Judges Anthony Cannataro, Michael Garcia and Madeline Singas in the minority.

One such opinion was *People v. Cuencas*, in which the Court of Appeals considered whether the police had a reasonable basis to believe that a third party provided consent to enter a premises where the police found and arrested the defendants without a warrant. In an opinion written by Chief Judge Wilson, the court held as a matter of law that the police did not have a reasonable belief that the third party had apparent authority over the premises and, accordingly, the warrantless entry into the premises violated the defendant's rights under the New York and federal constitutions.

In 2012, codefendants Tramel Cuencas and Irving Gavin allegedly abducted Thomas Dudley in front of Mr. Dudley's sisters and his cousin. The next morning, Mr. Dudley was found dead in a park. Three days after the abduction, Mr. Dudley's sister and cousin reported the kidnapping and provided police with photos of the defendants. The family members subsequently identified the defendants from a photo array.

The police did not apply for a warrant to arrest the defendants. Instead, two days later, the police went to a two-story, two-family duplex early in the morning where they believed the defendants could be found. The police did not receive a response when they knocked on the front door several times. After police knocked on a first-floor window, a man opened the front door. The man, Kwamel Jeter, was not known to the police.

The police asked Mr. Jeter if they could "come in and talk to you?" Mr. Jeter did not verbally respond, but opened the door wider which the police interpreted as consenting for them to enter the building. The police did not ask Mr. Jeter who he was, whether he lived in the building or what purpose he had there.

Once inside the building, the police could see two interior doors that separated the two apartments inside the duplex. Both doors had locks on them, but the doors were open. The police saw Mr. Cuencas through one of the open doors, proceeded through that door and arrested Mr. Cuencas in the living room and Mr. Gavin in the bedroom of what was later determined to be codefendant Mr. Gavin's apartment.

Mr. Cuencas waived his *Miranda* rights and agreed to speak with the police. During his interrogation, Mr. Cuencas confessed that both defendants abducted Mr. Dudley, but that they left him alive. According to Mr. Cuencas, an individual named Victor Cruz offered to pay him for the abduction. Police later executed a search warrant of the defendants' apartment and found the keys and title for a Jaguar in the name of Victor Cruz, and the car was located across the street from the apartment.

The defendants were indicted on charges including kidnapping, robbery and felony murder. According to the people, Mr. Cruz gave Mr. Gavin the Jaguar as payment for participating in the abduction and murder.

Defendant Cuencas moved to suppress the evidence, relating to the title of the Jaguar in the name of Victor Cruz and the cell phone containing photos of Mr. Cuencas with the Jaguar, because the police did not have a warrant or consent to enter his home to arrest him. The Supreme Court, Kings County, denied the suppression motion based on Mr. Jeter's testimony that his mother owned the entire building that he had a key to the defendants' apartment, and he could come and go as he pleased.

While this information was not known to the police at the time they arrested Mr. Cuencas, the trial court accepted the testimony and credited additional testimony from the officers as to their interpretation of Mr. Jeter's consent for them to enter the building. After trial, the jury convicted the defendants.

The Appellate Division, Second Department affirmed the conviction and the denial of the suppression motion. 192 A.D.3d 109 (2d Dep't 2020). A justice of the Appellate Division granted leave to appeal to the Court of Appeals.

The majority began its analysis by reiterating that warrantless searches and seizures inside a home are presumptively unreasonable under Article I, Section 12 of the New York Constitution and the Fourth Amendment of the United States Constitution. The police may not enter a private residence to arrest its occupant without an arrest warrant unless there are (i) exigent circumstances or (ii) voluntary consent. The question of whether someone voluntarily consented to a home's search is a question of fact. However, the minimum factual showing necessary to constitute consent is a question of law.

It is undisputed that the police did not have a warrant to arrest the defendants and that the defendants did not consent to the police entering their apartment to execute the arrests. The question before the court was whether Mr. Jeter provided third-party consent as an exception to the requirement for a warrant.

The U.S. Supreme Court has held that prosecutors may show that permission to search was obtained from a third party who possessed common authority over or sufficient relationship to the searched premises. Additionally, the Court of Appeals has held that evidence from a search should not be suppressed where the police rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate that the individual does have the authority to consent.

When applying those legal standards to this case, the majority held that the trial court erred by relying on facts not known to the police at the time they entered the premises, including Mr. Jeter's testimony that his mother owned the entire building, he had keys to the defendants' apartment and he could come and go as he pleased.

According to the majority, the trial court should have limited its analysis to what the police knew or should have known at the time they entered. In other words, when considering whether Mr. Jeter provided third-party consent to enter the defendants' apartment, the trial court could only consider that the police knocked on the duplex's exterior door and window for several minutes, Mr. Jeter was seen peering out of the window near the duplex's front door, the front door opened into a hallway that led to two separate doors for the two apartments inside the duplex, both apartment doors had locks on them and were open, and Mr. Jeter did not verbally respond when the police asked to "come in and talk to you."

The majority concluded that these facts are insufficient as a matter of law to establish that Mr. Jeter provided consent for the police to enter either or both of the apartments within the duplex.

The majority rejected the People's and the dissent's reliance on several cases in which the court found that the police reasonably assumed that a third party had some claim of authority over the property to be searched. In each of those cases, the third party either verbally communicated information to the police that would lead a reasonable person to conclude that the third party had authority, the third party gave

access to the police using a key to the property or the party challenging the evidence did not have a reasonable expectation of privacy in the premises to be searched.

In the instant case, the trial court found that Mr. Cuencas did have an expectation of privacy in the apartment, the police knew Mr. Jeter was not one of their suspects, both apartments in the building had separate doors with locks, Mr. Jeter did not say anything in response to the police's request to enter the building, and the police did not ask Mr. Jeter any questions about his authority over the building or the individual apartments. Even if the police knew that Mr. Jeter had been in the defendants' apartment shortly before answering the door to the building, the majority would require something more to establish a reasonable belief in Mr. Jeter's apparent authority over the defendants' apartment such as Mr. Jeter identifying himself as the building's landlord, displaying keys to the defendants' apartment, or unlocking and entering the apartment.

According to the majority, "[i]t would be a radical departure to say that so long as an unidentified person within a multi-family apartment building opens the building's exterior door at the request of the police, that person will be deemed to have had apparent authority to authorize a police search of the entire premises."

The majority concluded that Mr. Cuencas' rights under the New York and federal constitutions were violated because the facts known to the police at the time they interacted with Mr. Jeter did not reasonably establish that Mr. Jeter had apparent authority over the defendants' apartment. The Second Department's decision was reversed and the case remitted to the trial court to determine whether any evidence obtained as a result of the subsequent search of the defendants' apartment is sufficiently attenuated to his illegal arrest.

Judge Cannataro, joined by Judges Garcia and Singas, wrote a dissent arguing that while the scope of Mr. Jeter's consent is debatable, the record was sufficient to support the police's reasonable belief that Mr. Jeter had apparent authority over the defendants' apartment and gave his tacit consent for the police to enter the apartment.

The dissent accuses the majority of substituting its own view of the evidence as opposed to performing the court's more limited role of assessing whether there was sufficient evidence to support the lower court's findings. According to the dissent, it was not unreasonable as a matter of law for the police to believe that Mr. Jeter had the authority to consent because it appeared to them that Mr. Jeter had just left the apartment in order to open the front door to the building.

The dissent agrees that consent to enter the common area of a multi-family dwelling does not give police the authority to enter every apartment in the building; however, in this case, the dissent sees the question as narrower: whether Mr. Jeter consented to police entering both the building and the defendants' apartment when he opened the door to the building after appearing to leave from, and leaving the door open to, the defendants' apartment.

The dissent viewed this evidence from the suppression hearing as sufficient to support the trial court's determination that Mr. Jeter consented to the police entering the apartment.

Going forward, police officers should ascertain more information from third parties who they believe may have authority over a premises before they conduct a warrantless search of or arrest within the premises. At a minimum, they should inquire about the third party's identity, relationship to the premises and whether there are additional facts to suggest authority over the premises, such as keys to the apartment.

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