



THE FIRST CIRCUIT UPHOLDS A FEDERAL DISTRICT COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS, FINDING THAT THE DISTRICT COURT'S FACTUAL FINDINGS DO NOT SUPPORT THE DEFENDANTS' ARGUMENTS.



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Defendant Ángel Luis Pérez–Díaz (“Perez”) was convicted of possession of child pornography and sentenced to seventy-eight months of imprisonment. Before pleading guilty to that charge, Perez filed a motion to suppress. Therein, Perez argued that FBI agents violated his Fourth Amendment rights by trespassing on the curtilage of his home, by entering his apartment without his consent, and by illegally seizing his property before obtaining a search warrant. The District Court held two evidentiary hearings on Perez’s motion to suppress and, thereafter, made the following factual findings.

In November 2010, FBI agents conducted an undercover online session through which they downloaded child pornography. The I.P. address of the internet user from whom they downloaded the pornography led them to the former family home of Perez (the “Family Home”). On April 29, 2011, the FBI agents executed a search warrant on the Family Home. The FBI agents spoke to Perez’s wife and children at the Family Home and learned that Perez had recently moved out. Perez’s fourteen-year-old son told one of the FBI agents that he saw Perez looking at pornography on Perez’s computer before Perez moved out. Perez’s wife told the FBI agents where Perez presently lived, what kind of car he drove, and informed the agents that Perez worked as a police officer for the Puerto Rico Police Department. Upon obtaining Perez’s new address, the FBI agents traveled to his apartment where they determined the car outside the apartment belonged to Perez.

The parties disputed the facts surrounding the subsequent events. Based on the testimony of the FBI agents, the agents entered the apartment building property through the back gate which did not require force to open. Two of the four FBI agents, led by Special Agent Tomás Ortiz, initiated a “knock-and-talk” by knocking on the door to Perez’s apartment. A “knock-and-talk is an investigative procedure where “officers who have not yet secured a warrant go to investigate a suspected crime and determine whether the suspect will cooperate.” United States v. Paneto, 661 F.3d 709, 712 (1st Cir. 2011). Perez answered and talked with the agents through the door for two minutes and, then,

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allowed the agents to enter his home. Agent Ortiz asked Perez if he could ask him some questions; Perez responded in the affirmative and showed them into the kitchen.

In the kitchen, the agents asked Perez about his computer use. Perez stated that he had searched for pornography on his computer and that any accidentally viewed child pornography would be on the hard drive of a broken desktop computer. When asked if he ever accidentally downloaded child pornography, Perez stated, "Yes." Perez led the agents to the living room closet where he took out a ten-year-old hard drive and gave it to one of the agents, attempting to pass it off as the hard drive of the above-mentioned desktop computer. The agents noticed a laptop on the floor of the living room and asked Perez if he used that laptop at his prior residence (the Family Home where his wife and children still resided) and if he may have inadvertently downloaded or watched child pornography on it. Perez responded that he had used the laptop at his prior residence but that he had neither downloaded nor watched child pornography on it. One of the agents asked if Perez could turn on the laptop to show the agents that he did not have any peer-to-peer file sharing applications installed. At that point, Perez became evasive and stated that he did not want them to touch the laptop.

Accordingly, the agents immediately ended the interview and proceeded to secure the premises while Agent Ortiz went to obtain a search warrant for the apartment, which he received by 12:20 that afternoon. After they obtained the warrant, the agents searched the apartment and seized several electronic media items, including the desktop computer Perez discussed during the knock-and-talk and the laptop located on the living room floor. The desktop and the laptop yielded at least eighty images and over six hundred videos of child pornography.

Perez told a different story to the District Court. According to Perez's account, the agents forced open a padlock on the back gate in order to gain access to his front door; entered his apartment without his consent by pushing gently on his chest; forcefully sat him on an exercise bike and interrogated him; searched his apartment at will after he refused to cooperate; ordered him to move from the kitchen to the living room after they had completed the initial investigation; and continued to search his apartment even after he spoke to his attorney on the phone.

The District Court credited the agents' testimony over Perez's testimony, both initially and upon reconsideration, and so, the District Court denied Perez's motion to suppress. Perez, then, timely appealed to the United States Court of Appeals for the First Circuit.

The First Circuit began its consideration of Perez's appeal by finding that Perez had presented no argument that would come anywhere near to convincing it that the District Court had erred by crediting the agents' testimony over that given by Perez. After making that determination, the First Circuit's task on appeal became simple.

As for Perez's argument that the agents trespassed upon the curtilage of his home, the First Circuit explained that the curtilage of one's home encompasses "the area immediately surrounding and associated with the home." *Florida v. Jardines*, ___ U.S. ___ 133 S. Ct. 1409, 1414 (2013). The First Circuit further noted that curtilage is regarded as part of the home for purposes of the Fourth Amendment. *Id.* Because the District Court found the agents' version of the events to be true, the First Circuit held that the agents did not violate Perez's Fourth Amendment rights because there is an "implicit license" that permits a visitor to approach a home and to knock promptly. *Id.* Because the agents entered through a back gate that did not require them to forcefully open it, the First Circuit

affirmed the District Court's conclusion that the agents did not violate the curtilage of Perez's home by opening the back gate or by walking from the back gate to the front door to knock.

Furthermore, the First Circuit upheld the District Court's finding that Perez consented to the agents' search of his apartment. The First Circuit explained that a police officer may approach and knock on a citizen's front door and may request the opportunity to speak to the citizen in what is known as a knock-and-talk. *Kentucky v. King*, 563 U.S. 452, 469-70 (2011). The citizen does not have to answer or speak to the police officers, and if he does speak to the officers, he does not have to allow the officers into his home. *Id.* at 470.

Consensual searches are a recognized exception to the Fourth Amendment's warrant requirement. Whether the consent was given voluntarily is a question of fact that turns on the totality of the circumstances. Factors to be weighed in making this comprehensive assessment include, but are not limited to, "(i) the consenter's age, education, past experiences, and intelligence; (ii) whether law enforcement officials advised the consenter of his constitutional right to refuse consent; (iii) the length and conditions of the consenter's detention and/or questioning; and (iv) law enforcement officials' use of any inherently coercive tactics." *United States v. Vanvliet*, 542 F.3d 259, 264 n. 2 (1st Cir. 2008).

In this case, the First Circuit agreed that, under the totality of the circumstances, Perez had consented to the agents' search. The First Circuit gave particular weight to the fact that Perez was an experienced police officer. Therefore, Perez understood that, when the FBI shows upon on one's doorstep, the citizen has no obligation to speak with law enforcement or to let them into the residence. Nevertheless, Perez spoke with the FBI agents, and he let the FBI agents into his home. Accordingly, the First Circuit found that the agents had not violated Perez's Fourth Amendment rights because Perez had consented to speak with the agents and allowed them to search his home.

Finally, the First Circuit found that the agents had not unreasonably seized Perez's apartment for three hours in order to obtain a warrant. The First Circuit stated that the test for whether a temporary seizure is acceptable under the Fourth Amendment is based on reasonableness and looked at the four factors set out in *Illinois v. McArthur*: (1) the police had probable cause to believe the property "contained evidence of a crime or contraband," (2) "the police had good reason to fear" the contraband would be destroyed before the police returned to the location with a warrant, (3) "the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy," and (4) "the police imposed the restraint for a [sufficiently] limited period of time." 531 U.S. 326, 331-33.

In this case, the agents had probable cause to believe that Perez's apartment contained evidence that he had viewed child pornography. The agents also had reason to fear that Perez would destroy the evidence unless they secured the residence. Therefore, the First Circuit held that a three-hour seizure was not unreasonable, under the circumstances, given the fact that the agents worked diligently to obtain a search warrant. Accordingly, the First Circuit affirmed the District Court's denial of Perez's motion to suppress because the agents did not violate Perez's Fourth Amendment rights in securing the evidence against him. _____

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*