



May Officers Base Consent On A Bathrobe?



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In *United States v. Terry*, ___ F.3d ___, 2019 WL 625152 (7th Cir. Feb. 14, 2019), the United States Court of Appeals for the Seventh Circuit addressed the following issue: Is it reasonable for officers to assume that a woman who answers the door in a bathrobe has the authority to consent to a search of a male suspect's residence? The Seventh Circuit held that the answer to this question is: "no." As the Seventh Circuit explained, the officers could reasonably assume that the woman had spent the night at the apartment, but that's about as far as the bathrobe could take them. Therefore, without more, the Seventh Circuit determined that it was unreasonable for the officers to conclude that the female occupant and the suspect shared access to or control over the property and further decided that the United States District Court for the Northern District of Illinois erred in holding otherwise in denying a motion to dismiss. The relevant facts are as follows.

In February 2012, a team of agents from the Drug Enforcement Agency (DEA) executed an arrest warrant for Dimitris Terry related to his role in a conspiracy to possess and to distribute heroin. The agents did not want others to know that Terry had been arrested because they hoped to secure his cooperation in the broader investigation. Thus, the agents planned a quick and quiet arrest. The agents waited for Terry to return home from taking his son to school one morning, arrested him when he got out of his car, and took him to the DEA's Chicago field division for questioning.

A few agents remained behind at Terry's apartment. Two of the agents knocked on the door to Terry's apartment, and a woman answered wearing a bathrobe and looking sleepy. The agents identified themselves, explained that they had just arrested Terry, and asked to come inside. The agents did not ask the woman who she was, how she was related to Terry, or whether she lived at the apartment.

Without hesitation, the woman let the agents in, and they immediately presented her with a consent-to-search form. After she both read the form and had it read aloud to her, she signed it, and the search began. Only then, after the search was underway, did the agents ask the woman who she was. The woman identified herself as Ena Carson, the mother of Terry's son. Carson explained that her son lived at Terry's apartment, but she did not. Nevertheless, the agents continued the search for roughly the next hour. The agents recovered letters addressed to Terry showing proof of residence, four cell phones, and a suspected drug ledger.

Meanwhile, two DEA agents conducted a post-arrest interview of Terry back at the field office. Before asking any questions, the agents read Terry his Miranda rights, which were also spelled out on an advice-of-rights form. The agents signed the form, but Terry refused to do so. When asked if he understood his rights, Terry

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explained that “he was not going to sign the form or initial it; that, you know, this wasn’t his first go-around with law enforcement . . . but he was willing to talk.” The agents understood Terry’s statement to mean that he had prior experience with law enforcement, understood his rights, and was knowingly and voluntarily waiving them by agreeing to talk with the agents. So, the agents wrote “Verbal Only” on the advice-of-rights form, indicating that Terry “gave verbal consent that he understood the form.” Terry then answered the agents’ questions about the case and made incriminating statements about his role in the conspiracy to distribute heroin.

Thereafter, Terry was charged with possession, distribution, and conspiracy to possess and distribute heroin. Terry moved to suppress both the evidence recovered from the search of his apartment and his post-arrest statements to the agents. First, Terry argued that the search of his apartment was unlawful because Carson had neither actual nor apparent authority to consent to it because all that the agents knew at the time of consent was that she answered the door at Terry’s apartment wearing a bathrobe. Had the agents simply inquired (Terry argued), they would have discovered that Carson did not live at the apartment and lacked the authority to consent to the apartment’s search. Second, Terry claimed that he had not understood that he was waiving his Miranda rights when he answered the agents’ questions. Therefore, Terry argued that the waiver was invalid and that his post-arrest statements should be suppressed.

After an evidentiary hearing at which the agents and Terry testified, the District Court denied both motions to suppress. As to the first motion, the District Court determined that it was reasonable for the agents to assume that Carson lived at the residence and had authority to consent to the search because (1) she was permitted to be home when Terry was not; (2) her son resided at the apartment; (3) the bathrobe “indicated she was more than a mere temporary guest”; and (4) she consented to the search without hesitation.

On the second motion, the District Court found that Terry’s testimony—that he did not know that his statements could be used against him—“simply not credible” given his many encounters with law enforcement (he had been arrested at least seventeen times since he turned eighteen) as well as his level of education and success in business. The District Court thought that this was strong evidence that Terry understood his rights. And because he understood his rights, the District Court concluded that Terry’s answers to the agents’ questions provided “a clear and unequivocal waiver of his right to remain silent.”

After a bench trial, the District Court found Terry guilty and sentenced him to 168 months’ imprisonment. Terry timely appealed and asked the Seventh Circuit to vacate his conviction on the ground that the District Court erroneously denied his motions to suppress. The Seventh Circuit agreed with Terry on his first motion but disagreed with him on his second motion.

As for his first motion that was based upon Carson’s lack of authority to consent to the search on his behalf, the Seventh Circuit explained that, as a rule, the Fourth Amendment requires the Government to get a warrant before searching someone’s property. But the warrant requirement is subject to several carefully defined exceptions. One such exception exists if consent is given from a person with actual or apparent authority to give it. When a person allows a third party to exercise authority over his property, he assumes the risk that the third party might permit access to others, including government agents.

In this case, the Government did not argue that Carson had actual authority. Instead, the Government asserted that Carson had apparent authority, which exists when the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises, even if the person actually had no such authority. In other words, apparent authority exists if an officer might reasonably believe that a third party has authority over certain property if the third party appears to have joint access or control for most purposes.

The Seventh Circuit went on to explained that, in order to determine whether the officers' belief was reasonable, courts consider what the officers knew at the time that they sought consent and not facts that came to light after the search began. If the officers did not know enough to reasonably conclude that the third party had authority over the premises, they have a duty to inquire further before they can rely upon a third party's consent to a search.

Here, the Seventh Circuit noted that the DEA agents knew four facts when the search of Terry's apartment began. Terry left Carson alone in the apartment for about forty-five minutes; Carson was wearing a bathrobe; Carson appeared to be sleepy; and Carson consented to the search without hesitation. The agents did not know who she was, what her relationship to Terry was, why she was in the apartment, how long she had been in the apartment, or whether she lived there. At that point, the agents did not know that Carson was the mother of Terry's child, and as a result, the Seventh Circuit concluded that it was wrong for the District Court to rely on that fact in evaluating Carson's apparent authority.

Instead, the Seventh Circuit found that the facts that the agents had at the relevant time made it reasonable for them to conclude that Carson had spent the night at Terry's apartment. That might have been an indication that she lived with him, but there are multiple other possibilities. Carson could have been a one-time guest, a periodic guest, a friend or relative visiting for a couple of days—or she may have had some other relationship to Terry. And, the existence of so many other equally plausible possibilities should have prompted the agents to make further inquiries.

The agents made no further inquiry; rather, they thought that it was safe to assume that Carson had spent the night in the apartment, lived in the apartment, had joint access to or control over the apartment for most purposes, and had the authority to consent to the search. The Seventh Circuit opined that this kind of inferential pileup falls short of the reasonableness required by the Fourth Amendment because a bathrobe alone does not clothe someone with apparent authority over a residence, even at 10:00 in the morning. Accordingly, the Seventh Circuit held that the District Court erred in denying Terry's motion to suppress the evidence discovered in his apartment that came as the result of a warrantless search for which no exception—specifically the consent exception—applied.

As for his second motion that was based upon his claim that he did not knowingly and voluntarily waive his Miranda rights before making incriminating statements, the Seventh Circuit stated that a defendant's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused, in fact, knowingly and voluntarily waived his Miranda rights when making the statement. A knowing waiver requires a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Terry noted that he never explicitly waived his right to remain silent and points to his refusal to sign the advice-of-rights form as evidence that he did not knowingly waive his Miranda rights. However, the Seventh Circuit stated that Terry's argument was foreclosed by United States Supreme Court precedent. Specifically, the Supreme Court held in *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010), that a knowing waiver can be express or implied. *Id.* at 384.

As a result, the Seventh Circuit agreed with the District Court that Terry's education, sophistication, and familiarity with the criminal justice system provided sufficient evidence to support the District Court's finding that Terry understood his rights when the agents read them to him and that Terry's willingness to speak with the agents was a course of conduct indicating waiver, notwithstanding his refusal to sign the advice-of-rights form. Thus, the District Court correctly concluded that Terry knowingly waived his right to remain silent and properly denied his second motion to suppress.

In sum, the Seventh Circuit held that the evidence that the DEA discovered in Terry's apartment was the fruit of an unconstitutional search, and so, the District Court should have granted Terry's motion to suppress it. On the other hand, the District Court properly denied Terry's motion to suppress his post-arrest statements because the agents did not violate Terry's Constitutional rights in questioning him.