LEGAL UPDATE

City of Madison

Spring 2006 Lieutenant Victor Wahl

Consent Searches

***Georgia v. Randolph*, No. 04-1067 (2006); Decided March 22, 2006 by the United States Supreme Court.**

In *Randolph*, officers responded to a child custody dispute between two separated spouses. During the course of the investigation, the wife (Janet Randolph) advised the officers that her husband (Scott Randolph) was a cocaine user and likely had cocaine in the residence. Scott Randolph denied this, and claimed that it was Janet who was abusing drugs and alcohol.

After the officers resolved the child custody issue, Janet again renewed her complaint about Scott's drug use, and went on to state that there was evidence of drug use in the residence. One of the officers asked Scott for permission to search the house, and Scott expressly refused. The officer then asked Janet for consent, which she provided. Janet escorted the officer into the residence and into a bedroom where a portion of a drinking straw with cocaine residue on it was recovered.

Scott Randolph was subsequently charged with possession of cocaine. He challenged the arrest, arguing that the warrantless search of his residence—after he had expressly refused to provide consent—was improper. The case eventually reached the U.S. Supreme Court. The court, by a 5 to 3 vote, agreed with Scott Randolph, ruling that the search of his residence was unreasonable.

For many years the law has permitted searches based on so-called "third-party" consent. This doctrine, first articulated by the Supreme Court in *United States v. Matlock*, 415 U.S. 164 (1974), recognized that evidence obtained pursuant to the voluntary consent of someone with shared authority over the area searched is admissible (even if the evidence is used to prosecute another, nonconsenting party). This theory has most often been applied to searches of dwellings, but can also apply in other contexts (vehicles, etc.).

In *Matlock*, the third party—the party who was prosecuted—was not present at the time of the search. What has been unclear was the outcome when one party consented to a search and another (also with authority) who was present refused consent.

The *Randolph* case, for the most part, answered this question. The court concluded that in situations of this type— two parties with authority over an area the police are seeking to search are present; one provides consent and the other does not—a search is not permissible. The court stated:

> We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.

So, when an officer seeks consent to search an area, two (or more) people with authority over the area are present, and one expressly refuses consent to search, no search is allowed (even if one of the parties provides consent).

There are several questions raised by the *Randolph* decision:

What about domestic abuse? The Randolph case involved a domestic situation, and clearly many similar cases could involve domestic violence. The court made it clear that the decision applied only to entries or searches based purely on consent. If officers are justified in making an entry to protect the safety of someone or check the welfare of a individual, consent will not be an issue:

> [T]his case has no bearing on the capacity of the police to protect domestic victims…No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have a good reason to believe…a threat exists…the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes.

What about third parties that are not present? Does this case impact officers' ability to perform consent searches if a third party (with joint authority over the area searched but not present at the time of the search) later objects to the search? The *Randolph* court made it clear that a nonconsenting party must be present in order to prevent a search:

> [I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the (discussion) loses out…so 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.

So, officers can still perform consent searches as long as they establish the consenting party's authority over the area to be searched. Any other parties not present at the time of the search will not be able to object to the search after the fact.

Note that officers cannot intentionally remove the potential objecting party from the scene purely to avoid the possible objection.

Does this case apply to vehicles or other areas? It is not clear whether *Randolph* applies to consent searches of vehicles, storage lockers, or other non-dwellings. However, the case repeatedly uses the term "co-tenant" when discussing the parties involved, and much of the court's reasoning focuses on the high level of protection the Fourth Amendment provides to citizens in their homes.

What about parents/children? The *Randolph* case involved parties (spouses) with equal authority over the area that was searched. What about situations where one party clearly has a superior authority over the area to be searched than the other? The court strongly suggested that its reasoning would not apply to situations involving "some recognized hierarchy, like a household of parent and child or barracks involving military personnel of different grades." This suggests that in some cases officers may be able to rely on the consent to search provided by a parent, even if a child is present and attempting to refuse consent. Note that officers still need to establish the parent's actual authority over the area to be searched in these situations.

OMVWI

***Village of Cross Plains v. Haanstad*, 2006 WI 16 (2006); Decided February 14, 2006 by the Wisconsin Supreme Court.**

A recent case clarified the definition of operating a motor vehicle for purposes of enforcing the OMVWI statutes. Assistant City Attorney Jessica Long provided this summary of the case and its implications:

In a recent case, *Village of Cross Plains v. Kristin J. Haanstad*, 2006 WI 16, the Supreme Court held that to "operate" a motor vehicle for purposes of an OWI conviction, the defendant must make some affirmative act to manipulate or activate the controls of the vehicle. Sitting in a parked car with the engine running does not necessarily mean that the defendant "operated" the motor vehicle as required under the statute.

In this case, Kristin Haanstad was drinking at a bar with a friend, Timothy Satterthwaite. She handed Satterthwaite the keys to her car, and he drove them and another man to a nearby park. Satterthwaite left the car running and the lights on while he helped the friend into his own car. Haanstad then moved from the passenger seat to the driver's seat. Satterthwaite returned to the car and sat in the passenger seat to talk with Haanstad. At no time did Haanstad manipulate the controls of the vehicle: she did not touch the keys in the ignition; she did not turn on the engine; she did not activate the lights; she did not tap the gas pedal or brake.

An officer approached the car and although Haanstad denied driving, he subsequently arrested her for OWI. Haanstad was ultimately found not guilty because she did not "operate" a motor vehicle. The Court determined that the term "operate" as defined by Wis. Stat. Sec. 346.63(3)(b) requires "some affirmative act of control on the part of the defendant." Wis. Stat. Sec. 346.63(3)(b) defines "operate" as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." The Court found that merely sitting behind the steering wheel of a parked car with the engine running is insufficient. The Court did note that had Haanstad started the car but left it in park, she would have been "operating" a motor vehicle as defined by Wis. Stat. Sec. 346.63(3)(b). But since Satterthwaite started the car and left it running, there was no affirmative act on Haanstad's part to control the vehicle.

Based on this case, our office would recommend that when an officer approaches a parked vehicle with the engine running, and suspects the occupant of OWI, the officer should ask the suspect several questions: Where are you coming from? How did you arrive at this location? Why is the engine running? Who turned on the engine? Did you put the keys in the ignition? Did you turn the keys in the ignition? Who put the vehicle in park? If the lights (or heater, or radio) are on, who turned on the lights (or heater, or radio)? In light of the *Haanstad* decision, officers must now verify that the suspect did something to control the vehicle before making an arrest for OWI and document such in their reports.

New Statute

A new statute (947.011) applies to disrupting a funeral or memorial service. The statute states that:

- No person, with the intent to disrupt a funeral procession, may impede vehicles that he or she knows are part of the procession.
- No person may impede vehicles that are part of a funeral procession if the person's conduct violates s. 947.01.
- No person may do any of the following during a funeral or memorial service, during the 60 minutes immediately preceding the scheduled starting time of a funeral or memorial service if a starting time has been scheduled , or during the 60 minutes immediately following a funeral or memorial service:
  - Engage in conduct that is prohibited under s. 947.01 within 500 feet of any entrance to a facility being used for the service.
  - Block access to a facility used for the service

Violation of the statute is a Class A misdemeanor, though a repeat conviction can be a Class I felony.