JUDICIAL APPROACHES TO CONSENT SEARCHES: THE GEORGIA EXPERIENCE

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INTRODUCTION AND PRELIMINARY OBSERVATIONS

One of the most challenging aspects of teaching criminal procedure involves staying abreast of the changes in search and seizure law. It is indeed a volatile area, producing prolific litigation and frequent departures from what was once thought to be the expected standards. Witness the Supreme Court's abandonment, in *Illinois v. Gates* (1983), of the longstanding *Aguilar-Spinelli* test for establishing probable cause via an informant's tip. Then there was the Court's pronouncement, in *Horton v. California* (1990), that "inadvertent discovery" had never been a required element for plain view seizures despite the widespread view to the contrary following the decision in *Coolidge v. New Hampshire* (1971).

While most search and seizure law generates debate, perhaps the most controversial area involves consent searches. There are so many variables and so much uncertainty surrounding such searches that no particular "bright-line" rules have emerged. As is the case in other aspects of criminal procedure, much of what can be said about consent searches is generated by the United States Supreme Court. Most texts and casebooks focus on the decisions handed down by the Court, and this is probably as it should be. The Court, in interpreting the Constitution via a few well-chosen cases, establishes binding precedents for lower courts, law-enforcement officers, and other participants in the criminal

justice system. Thus, the High Court will enlighten us as to what ought to happen, constitutionally, in certain situations. Yet, there are reasons for looking a state appellate court cases as well.

One such reason focuses on the current Supreme Court's judicial philosophy about a variety of criminal procedure issues, including consent searches. This Court, more than any other in history, has embraced the totality-of-circumstances approach for use in its decision-making process. This case-by-case approach shuns rigid "bright-line" rules in favor of flexibility. Consequently, state courts have considerable latitude in determining the circumstances under which a particular consent search is valid or invalid. Of course, this freedom is, at least potentially, conducive to the creation of confusion and inconsistency.

In a related vein, it should be remembered that Supreme Court cases generally establish constitutional minimums. States can do more, and students need to be alerted to any such differences. In addition, it is also possible that state courts could depart from constitutional minimums. Students and educators need to be in a position to recognize and address such discrepancies.

Another reason for studying state cases relates to the nature of the most likely involvement of citizens in the criminal justice system. It is submitted that one of the most frequently encountered Fourth Amendment issues involves consent searches, because such searches require neither probable cause nor a warrant. In addition, most consent searches are conducted by state and local officials, rather than by federal agents. Consequently, most resulting court cases will be played out in state courts. With this in mind, it would seem important to examine how state courts are addressing issues in this very flexible area of the law. For these reasons, it is suggested that there is a legitimate need to look a state cases in establishing a solid knowledge base about what is and is not accurate relative to consent searches.

Of course, the bottom-line issue in any search and seizure is whether the evidence is admissible in a particular trial as proof of guilt. Concerning consent searches, admissibility is predicated upon the validity of the consent. Assuming that the consent is valid, neither probable cause nor a warrant are required to conduct the search. Although much can and has been said about validity in this context, there are three distinct issues important to this determination. The most frequently litigated issue in Georgia focuses on the voluntariness of the consent. A second issue relates to the legal authority or capacity to consent. This commonly emerges as an issue in cases involving third-party consent. A collateral issue concerns the permissible scope of a valid search. This paper will examine these issues by reviewing selective cases from the Georgia Court of Appeals and the Georgia Supreme Court. It is the third and final installment of a series of research projects. Previously, portions of the research were presented in papers at meetings of the Southern Criminal Justice Association in October, 1994, and Georgia Political Science Association in February, 1995.

Before turning to the cases, it might be helpful to make and remember the following observations: (1) consent searches involve intrusions into constitutionally protected expectations of privacy; (2) a valid consent search requires neither a warrant nor probable cause for justification; (3) the individual is free to refuse to allow officers to conduct a consent search; (4) the state carries the burden of proving that the consent on which the search is based is voluntary; and (5) the consenting individual controls the permissible scope of the search, both in terms of time and space.

DETERMINING THE VOLUNTARINESS OF CONSENT SEARCHES IN GEORGIA

Judicial Approaches to Consent Searches

Totality of Circumstances

In 1973, the U.S. Supreme Court held that, in order to be valid, a consent to search must be voluntary. That, according to the Court, meant that the consent had to be free of explicit or implicit coercion, free of threats, and free of force (*Schneckloth v. Bustamonte*). As indicated previously, the Court employs the totality-of-circumstances analysis in determining whether a particular consent was given voluntarily or was attributable to coercion, threats, or force. In this respect, the prosecution must prove that, under all operative circumstances, the defendant voluntarily consented.

It did not have to be this way. The Court could have adopted a rule-oriented approach, with *Miranda*-like warnings, to determine the validity of these searches. For example, the Court could have required that officers inform individuals of their right to refuse the search and warn them that, if consent was forthcoming and if incriminating evidence was found, such evidence could be used to prosecute. This of course did not happen. Even so, the Georgia courts could have opted for such an approach. After all, they have on occasion afforded more protection to individuals than the U.S. Supreme Court has mandated. For example, the U.S. Supreme Court has recognized the good faith exception to the exclusionary rule, whereby illegally seized evidence, though normally suppressed, is admissible if the officer acted in objective good faith compliance with constitutional requirements (*United States v. Leon*, 1984). On the other hand, the Georgia Supreme Court rejected the existence of such an exception in state prosecutions (*Gary v. State*, 1992).

However, relative to the appropriate measure to be used in evaluating the validity of consent searches, Georgia courts have followed the totality-of-circumstances approach so enthusiastically

endorsed by the U.S. Supreme Court. In *Mooney v. State* (1978), the Georgia Supreme court noted that voluntariness of any consent must be determined by the totality of the circumstances and that the state carries the burden of proving that such consent was given without coercion, threats, or force. According to that court, several factors are important in this analysis. These include the accused's age, education, intelligence, and knowledge of constitutional rights, the length of any detention and the nature of questioning, and the psychological impact of these factors on the accused (*Dean v. State*, 1982). In *Kosal v. State* (1992), the Georgia Court of Appeals reiterated this position. Both the Georgia Supreme Court and the Georgia Court of Appeals have consistently reinforced the notion that the state carries the burden of proving that the consent was freely given (*Mooney v. State*, 1978; *Williams v. State*, 1982; *Hicks v. State*, 1981).

Based on review of the above-cited cases regarding the voluntariness of consent, it appears that Georgia courts follow the totality-of-circumstances approach adopted by the Supreme Court, and they have identified several factors they consider important in this analysis. They also insist that the state carries the burden of proving voluntariness in consent situations. This paper will now attempt to ascertain how Georgia courts have weighed particular factors in their analyses of voluntariness.

Knowledge of Right to Refuse

An argument can be made that consent to search, obtained from one unaware of his right to refuse such consent, is never voluntary. In *Schneckloth*, the Supreme Court rejected this across-the-board position, noting instead that such lack of knowledge was but one factor in the equation. The Georgia Supreme Court followed suit in *Guest v. State* (1973) and

Woodruff v. State (1975), holding that it is not essential, in establishing the validity of a consent, that the defendant be told that he has a right to refuse. And, in 1982, the Georgia Court of Appeals held that police failure to advise the defendant of his right to refuse did not require a finding that the consent was coerced (*Suddeth v. State*).

Lack of knowledge or the right to refuse can also become an issue relative to other legally authorized searches. In *Riviera v. State* (1989), police had a warrant to search the defendant's apartment. His van, however, was not located within the curtilage of the apartment and could not, therefore, be searched pursuant to the warrant. The Georgia Court of Appeals concluded that the van could be searched because the defendant consented. This was true even though the defendant was unaware of his right to refuse and even though he was confronted by the compelling authority of a warrant which authorized a search of his apartment. Apparently, the court felt that the defendant should have known that, from a Fourth Amendment perspective, there is a difference between an apartment and a van located near, but outside the curtilage of, that apartment.

While lack of knowledge of the right to refuse is not dispositive of the issue, it can be an important factor in determining voluntariness. For example, in *State v. Norris* (1992), the police officer failed to inform the suspect of his right to refuse, and, in addition, the suspect entertained an affirmative belief that he had no such right. Thus, this case involved a situation where there was more than a simple lack of knowledge. Under these circumstances, the Georgia Court of Appeals concluded that the consent was not voluntarily given.

Lack of knowledge of the right to refuse, in combination with other factors, can invalidate a consent. For example, in *Rogers v. State* (1992), police officers illegally stopped the

defendant. He was never informed of his right to refuse. In response to the officers' request to search, the defendant replied that he "understood the reason" for the search. The court, weighing all of these factors under the totality-of-circumstances approach, concluded that this was not a voluntary consent.

Although lack of knowledge of the right to refuse does not, standing alone, establish a lack of voluntariness, it appears that possession of such knowledge is very persuasive in the other direction. In *Benavideo v. State* (1989), the defendant initially consented to the search of his bag. Later, he refused to allow the police officer to continue the search. This refusal, according to the Georgia Court of Appeals, indicated that the defendant was aware of his right to refuse and supported a finding that the original consent was voluntary.

Georgia courts have stated in general terms that lack of knowledge of the right to refuse is one factor, among the totality of circumstances, that will be considered in determining the voluntariness of consent for a search (*Dean v. State*, 1982). As noted above, lack of such knowledge has not invalidated consent in many cases. Based on the review of the cases, it does not appear that lack of knowledge is given any particular preference or enhanced evidentiary weight by Georgia courts in their determination of the voluntariness of consent searches. And this is true despite the frequently repeated assertion that the state bears the burden of proving that the consent was voluntarily given.

Nature of the Consent

Somewhat related to the issue of lack of knowledge is one involving the nature of the consent. The problems would be easily resolved if the evidence demonstrated a clearly worded request by the officer and an equally clearly worded voluntary consent by the

defendant, but this is rarely the case. It is more likely that the officer's "request" will be in the form of some conduct or language which would allow varying interpretations of the intended message. And defendants almost never respond with "I voluntarily consent to the search." In light of this ambiguity, and relative to this issue of voluntariness, it is necessary to look at what the officer does and says and at the response of the individual. In this inquiry, it is important to remember once again that the state bears the burden of showing voluntariness.

Despite the state's burden relative to these searches, it seems clear that anything close to an expressed request and an expressed permission will be deemed to be voluntary. For example, in *Murphy v. State* (1980), the defendant replied "all right" in response to the officer's statement to "let me search you." The court held that this was a voluntary consent. And in *Paramore v. State* (1925), the court held that the defendant had more or less "invited" a search of his person and that, consequently, the search was lawful.

In many cases, Georgia courts have certainly found voluntary consent in the absence of a clear expression to that effect. *Strickland v. State* (1970) involved the search of an automobile owned by the defendant's mother. At the defendant's request, the mother turned the keys over to the police. The Georgia Supreme Court concluded the that defendant had consented to the search. In *Crider v. State* (1966), the defendant was arrested and told by the arresting officer that his automobile would be searched. The defendant's response was "there the car is." The Court of Appeals concluded that this response, even though inexact and made under the throes of an arrest, amounted to voluntary permission to search the vehicle. In *Foshee v. State* (1986), the court ruled that there was voluntary consent when the defendant gave the keys to his apartment to a police officer, knowing at the time that the officer

would use the keys to search the apartment. In *Guerrero v. State* (1991), an officer legally stopped an automobile and asked if he could "look inside." The driver's affirmative response was interpreted by the Court of Appeals as voluntary consent to search the entire automobile. In all of these cases, it should be remembered that the person making the request to search was a police officer, and the person giving the consent was either arrested or otherwise detained. Thus, the "requests" were fortified by a show legal authority, and the corresponding "consents" were potentially influenced by the intimidation often associated with such authority.

Ridgeway v. State (1992) presented an interesting fact situation. After police officers made a valid stop of the defendant's automobile, he gave them permission to search the vehicle. They found nothing. A short time later, they conducted a second search without getting permission to do so. The Court of Appeals concluded that the voluntary consent for the first search covered the second search as well.

On the other hand, there have been some Georgia cases where ambiguous language and conduct were held not to reflect voluntary consent. In one such case, automobile keys were seized from the defendant's pockets. He then consented for police officers to use the keys to see if they "fit" a certain vehicle. The Georgia Court of Appeals held that this exchange authorized, at most, the officer to ascertain if the keys matched the car. It did not amount to a voluntary consent to search the entire vehicle, including the interior and trunk (*Love v. State*, 1978). In *Miranda v. State* (1988), a law enforcement officer stopped a defendant in an airport terminal. He requested permission to search her, her purse, and her bag. The defendant, who was apparently from South America and who communicated primarily in Spanish, indicated that she did not understand the question. The officer escorted her to a nearby room,

where he repeated his request to search. At that time, and without speaking a word, the defendant opened her bag and removed two garments. While the defendant stood with these items in her hand, the officer searched the bag and discovered incriminating evidence. The court concluded that, while this conduct may have demonstrated acquiescence to the search, it did not reflect voluntary consent to conduct the search. Another example of acquiescence rather than consent occurred in *State v. Westmoreland* (1992). In that case, the defendant asked the police officer if he had a warrant and the officer replied that he did not need one. Thereafter, the defendant allowed the search. The court concluded that consent extracted on the basis of an unfounded assertion of this sort was involuntary.

The difficulty associated with voluntariness is perhaps best and most frequently illustrated when there is a conflict between the testimony of the police officer and that of the defendant. Such was the case in *Jones v. State* (1987), where there was disagreement as to what was said and done. The court held that the police officer's testimony was sufficient to establish a voluntary consent. The court apparently concluded that the officer's testimony, despite being contradicted by that of the defendant, was believable enough to carry the state's burden of proving voluntariness.

The use of written consent forms might be one way to avoid much of this confusion. Such forms are often used in Georgia, although they are not required. This point was illustrated in *Jones v. State* (1980), where the Georgia Court of Appeals ruled that an oral consent was sufficient to establish voluntariness. But there can be questions and problems even if written forms are used. In *Hill v. State* (1987), the defendant executed a consent form. He later testified that he did not understand the impact of the form. The court disagreed and concluded that consent was voluntary.

Another troublesome aspect of the voluntariness issue relates to language deficiencies. An inability on the part of the officer and the suspect to communicate would seem to suggest that there could be little chance of a voluntary consent to search. However, the Georgia cases indicate that even in the face of communication difficulties, a valid consent can be forthcoming. In *Del Rio v. State* (1984), the defendant had a functional knowledge of English. Police officers told him that he had a right to refuse, and then gave him a card to read. The defendant never gave any affirmative response to the officers' request to search a bag. Instead, he opened his bag and the officers inspected the contents. To the court, this conduct evidenced an understanding of the situation and amounted to voluntary consent. In *Ramirez v. State* (1989), the court noted that, even if the defendant's English was poor, voluntariness could be demonstrated by other means, such as the use of a video. In *Vincente v. State* (1989), the court suggested that use of a consent form in Spanish would be one way to overcome the communication difficulties. But, as pointed out above, there can be problems even with written consent forms.

Based on these cases, it is submitted that there exists some uncertainty in the ability to predict just what kind of language or conduct amounts to a voluntary consent. No precise manner of communication is required, and to some degree, it might even be argued that complete understanding of the situation by the consenting party is not a prerequisite to a voluntary consent.

Arrest, Detention, and Police Presence

Recall that voluntariness in this context requires an absence of express or implicit coercion, duress, threats, or force. It is also useful to remember that acquiescence to authority does not equate to voluntary consent. In addressing this issue, the courts

look at a variety of circumstances, including overt police acts, subtle police statements, the vulnerable state of mind of the defendant, and the impact on the defendant's will (*Radowick v. State*, 1978). But what particular kinds of things amount to coercion, duress, or threats?

Arrest is normally associated with a coercive atmosphere, and one might argue that consent to search given by a person under arrest should never be considered to be voluntary. Georgia courts, however, have not embraced this argument. In *Barrow v. State* (1964), the court noted that consent, obtained from a suspect under arrest, was not, as a matter of law, involuntary. In other cases, Georgia courts have held that there was no inherent coercion involved where defendants consented to searches while they were under arrest. (*Mitchell v. State*, 1986; *Mann v. State*, 1990). The Georgia position is even broader than this. In *Crider v. State* (1966), the defendant was arrested and he subsequently gave the police permission to search the premises on which the arrest was made. The police conducted that search and seized evidence to be used in connection with a crime other than the one for which the defendant was originally arrested. The court held that the consent was voluntary. *Howard v. State* (1977) involved a defendant who was arrested and handcuffed when the consent was obtained. The court ruled that it was voluntarily given.

The above cases dealt with legal arrests, and they demonstrate that consents obtained during such arrests are usually determined to be voluntary. *Radowick v. State* (1978) involved an illegal arrest, as well as other coercive tactics by the police. For example, the defendant was told that his vehicle must be searched before he could be released. The consent in this case was determined to be involuntary.

Cases involving detention which falls short of a full custodial arrest have produced mixed results. In *Weeks v. State*

(1992), the defendant was legally detained at a sobriety checkpoint. The officer observed leaves, grass, and cigarette rolling papers. He ordered the defendant out of the car for a field sobriety test. During this confrontation, the officer obtained consent to search the vehicle. The court concluded that the officer created a situation in which the defendant would not feel free to refuse and that, consequently, the consent was involuntary. In another case, the court held that consent obtained during an illegal stop and detention was tainted and involuntary (*Tarwid v. State*, 1987). In a similar case, however, the defendant was wrongfully detained in the back of a patrol car. The court concluded that his consent for officers to search his car was valid because the evidence indicated that he had intended to give consent even if he had not been detained (*Bruce v. State*, 1989). Thus, even the illegality of the arrest or detention will not, in and of itself, invalidate a consent if the court feels that other factors suggest a contrary result.

Aside from arrests and detention, police presence may have implications for voluntariness of the consent. It seems reasonable to suggest that a sufficient show of force by police officers would likely lead to coercion and duress. This issue arose in *Shaw v. State* (1979), where the defendant moved to suppress certain evidence on the grounds that his consent to search an automobile was not voluntarily given. The defendant had been asked to drive his car to police headquarters, and the consent and subsequent search transpired on the street just outside the building. Consequently, the defendant was confronted by extraordinary police presence in the very shadow of police headquarters. Nevertheless, the Georgia Court Appeals ruled that this overpowering presence of police officers did not necessarily mean that the consent was coerced. In *State v. Rivers* (1977), the court also concluded that the overwhelming presence of officers did not prompt a consent. In determining that there was no evidence to

suggest either that the defendant was reluctant to give consent or that he was coerced into doing so, the court noted the absence of other aggravating factors, such as youth, lack of education, and low intelligence. In *Hall v. State* (1975), armed officers went into a residence in hot pursuit of a suspect. The defendant consented to a search during that encounter. The court ruled that the evidence did not show that the consent resulted from intimidation.

A liberal reading of the above cases almost suggests that the Georgia courts have shifted the burden of proof on this issue from the state to the individual. However, there have been other cases where police presence under certain circumstances has invalidated consent. For example, in *Lane v. State* (1978), the defendant and his companion were suddenly surprised by a half-dozen heavily armed law officers and searched at gunpoint. The court held that the "consent" obtained for this search resulted from coercion and was, therefore, involuntary. In a similar case, the defendant was surrounded by five police officers, informed that he was under arrest, and advised of his *Miranda* rights. During this chain of events, he allegedly consented to a search of his premises. The court held that he was indirectly forced to comply with the request and that he did not voluntarily consent to the search (*Powell v. State*, 1982).

Other Police Conduct

Police conduct other than that involving arrest, detention, and overpowering presence, may also generate concerns about coercion, threats, and duress. Remember the Supreme Court's admonition in *Schneckloth* that voluntariness meant freedom from such things, be they express or implicit. In *Brand v. State* (1973), the Georgia Court of Appeals issued a similar decision, holding that the state must demonstrate an absence of express or implied coercion or duress. But what amounts to coercion, threats, or

duress in the context of a consent search?

One fairly common situation involves the use of deceit by the police officer. True to the totality-of-circumstances tradition, there are Georgia cases on both sides of this issue. In some instances, the courts determined that the nature of the deceit necessitated a finding of involuntariness. One such case was *Beasley v. State* (1992), where the defendant, who was in custody, was asked to give a urine sample. He was led to believe that the sample would be used by the judge for the purpose of deciding whether to grant bail. He was not told that he was actually consenting to a search for evidence that the state would use against him in a charge of cocaine possession. The Georgia Court of Appeals ruled that this was not a voluntary consent. In another case, the defendant consented in response to the officer's false claim of authority to search. The Georgia Supreme Court concluded that this consent was not voluntarily given (*Code v. State*, 1975).

On the other hand, the courts have occasionally concluded that deceit involving the purported purpose of the search does not invalidate consent. For example, in *Smith v. State* (1981), the officer pretended to be concerned about recent burglaries in the vicinity when he requested, and obtained, the defendant's permission to search the trunk of his vehicle. In reality, he suspected the defendant of criminal activity and hoped to find incriminating evidence. The court upheld the state's position that the consent was voluntary. *Pupo v. State* (1988) involved similar circumstances. The officer misrepresented the purpose of his proposed search. He told the defendant that he was looking for weapons, when in fact he was searching for drugs. The court upheld the validity of the consent, concluding that the area to be searched was identical in either case. Under the *Pupo* rationale, neither the officer's deceit nor the defendant's reliance on that

deceit rendered the consent involuntary.

Another commonly litigated area under this topic involves the "threat" or promise or statement by the officer that, unless consent is forthcoming, a warrant will be obtained. In other words, the search will take place in any event. Getting a warrant takes time. On the other hand, consent will enable the officers to do it sooner so that the individual can be on her way. Does this amount to coercion, duress, or a threat? Again, there are cases on both sides of this issue in Georgia. The determinative factor in these case appears to be the existence or nonexistence of probable cause to obtain the warrant.

In *Flournoy v. State* (1974), police officers, acting on information received from an unidentified source, stopped the defendant's car and asked permission to search the trunk. The defendant refused that request. While one officer stayed with the defendant, the other one went to try to get a warrant. After about ten minutes, the defendant allowed the remaining officer to search. The court ruled that the officers did not have sufficient probable cause to support the issuance of a warrant and that, therefore, the consent was involuntary. On the other hand, if the officer has sufficient probable cause to support the issuance of a warrant, the courts have upheld the validity of the consent (*Miller v. State*, 1990; *Hicks v. State*, 1981; *Bailey v. State*, 1978).

Farley v. State (1990) seemed to involve an additional "threat." Officers told the defendant that, unless he consented to a search, they would get a warrant and execute it while his wife and family were at home. While there is no doubt that the officers could so execute a validity obtained warrant, it does seem that this amounts to some psychological arm-twisting. Nevertheless, the Georgia Court of Appeals concluded that the consent was voluntary.

LEGAL AUTHORITY TO CONSENT

Even a voluntary consent can be invalid if the person who consented was not legally authorized to do so. As indicated earlier in this paper, this situation arises almost always in conjunction with third-party consents. Obviously, there are numerous possibilities along these lines. This paper will now examine some of the more frequently litigated circumstances in this classification.

Common Authority

In 1974, the U.S. Supreme Court ruled that the validity of a third-party consent was linked to that person's "common authority" over the premises in question (*United States v. Matlock*). For example, a roommate's consent to search an apartment would be valid if the consenting roommate shared, more or less equally, the searched area with the absent roommate. Thus, the absent roommate could not successfully contend that the search of "his" apartment was nonconsensual and, thereby, unconstitutional. Georgia courts have generally followed this line of reasoning, consistently ruling that third party consents are valid if the consenting party possesses either common authority over, or "other significant relationship" to, the premises (*Rucker v. State*, 1982; *Gossett v. State*, 1991).

This kind of case comes up quite often when the actors are family relations. For example, in *Jenkins v. State* (1978), the defendant was a minor who lived at his mother's home. The mother supplied police officers with an article of the defendant's clothing. The court ruled that the mother shared the premises with the defendant, and that, therefore, her consent to search was valid. In *Fears v. State* (1979), the defendant left a bag at his sister's house. The sister called the police and consented to their search of

the bag. Since the sister controlled the bag, her consent to search was valid. *Leach v. State* (1977) involved a husband who gave his wife a gun, but with no instructions as to what she should do with it. Later, she consented to a search of the premises and the gun was found. The court ruled that the defendant was in no position to object to the search, because the wife had common authority over the premises and, under the circumstances, over the gun.

Valenzuela v. State (1981) was an interesting case of a brother who was visiting his sister. While the sister was away, the brother agreed to allow officers to "look around" the apartment. The officers discovered evidence which incriminated the brother. He moved to suppress the evidence on the grounds that he had no legal authority to consent. The court disagreed and upheld the validity of the consent.

Another "common authority" situation involves roommates. In *Hall v. State* (1977), a paramour consented to a search of the one bedroom apartment he shared with the defendant. The court concluded that the consent was valid. Similarly, in a situation where the defendant sometimes stayed in an apartment with a friend, the friend could validly consent to a search of the apartment (*Battle v. State*, 1985). In another case, a former roommate was without authority to consent under circumstances showing that he had moved out of the apartment a week prior to the search, that he left no major items in the apartment, and that he had no access to the apartment (*Browing v. State*, 1985).

In *Chapman v. United States* (1961) and *Stoner v. California* (1964), respectively, the U.S. Supreme Court ruled that, as a general rule, landlords and hotel clerks do not have legal authority to consent to searches of premises occupied by tenants and guests. Again, Georgia courts are pretty much in accord with these positions. For example, in *State v. Oliver* (1987), the court ruled that a landlord could not consent to a search of the tenant's

quarters, especially since the lease contained no provisions for mutual use and no expressed authority for the landlord to enter the premises in the tenant's absence. In *Browning*, the court ruled that a landlord was without authority to consent to the search, even though the tenant was in jail and had not paid his rent. It seemed important to the court in this case that there was no evidence, either that the tenant intended to abandon the premises, or that the landlord had initiated proceedings to evict the tenant for non-payment of rent. On the other hand, the landlord could validly consent to a search once the rental period had ended, even if the defendant's personal property remained on the premises (*Witt v. State*, 1981).

Smith v. State (1988) involved a search of a motel room, authorized by the manager. That search produced evidence incriminating to the guest. While acknowledging that a manager or clerk cannot normally consent to such a search, the court employed the totality-of-circumstances approach in concluding that this particular search was valid. Specifically, the court noted that the defendant had been arrested prior to the search, and that he had neither paid for his room since his arrest nor made arrangements for anyone else to do so. Under these circumstances, the court concluded that the defendant had abandoned the room and, therefore, the manager's consent was valid. And, in another motel case, the court concluded that one who shared a room with the defendant had common authority over that room and could, consequently, validly consent to a search of the room (*Gilden v. State*, 1987).

An unusual situation arose in *Shue v. State* (1973). There, a caretaker of a residence where the defendant lived consented to a search of the premises, and even turned over contraband to the police. The court ruled that the consent was valid.

Age of the Consenting Party

In our system, tender years can invalidate a variety of things that might otherwise have some legal significance. For example, contracts cannot be enforced against minors. Children under a certain age are conclusively presumed to be incapable of committing crimes. And, there is an age of consent for sexual relations. It is logical then that age, or the lack thereof, would have some impact on the validity of a consent search. While the U.S. Supreme Court has never spoken directly to this issue, there are a few Georgia cases on point.

In *Atkins v. State* (1985), the court concluded that a minor's consent to the search of a home was not invalid *per se*, but was to be determined on a case-by-case basis using the totality-of-circumstances approach. Of importance to the court in this determination were such factors as the minor's age, his address, and his right of access to the premises in question.

Rajappa v. State (1991) involved a situation where a fifteen-year-old girl gave consent to search an apartment. She told police that she was in charge of the apartment while her mother was out of town. It should be noted that other adults were on the premises at the time, and they passively acquiesced in the search. The court ruled that the officer reasonably assumed that the girl had sufficient control over the premises to consent to the search.

Perhaps the most notorious case along these lines was *Davis v. State* (1992). That case involved a ten-year-old "latch key" child who was allowed to stay at home alone for one and one-half hours each afternoon. He had his parents permission to call emergency assistance if he needed help. On one of those afternoons, the child viewed a public service announcement on television. The announcement warned about the dangers of drug abuse, and suggested that people who, either for themselves or for

others, needed help with drug problems should call a specified telephone number. The child, wishing to help his family, called the number and told the authorities that his parents had drugs in the house. Police officers responded and obtained the child's permission to search the house. During the search, they discovered and seized the drugs. The parents, who were charged with drug offenses, moved unsuccessfully to suppress on the grounds that the child had no legal authority to consent to the search. On appeal, the Georgia Court of Appeals concluded that the child did indeed have legal authority to consent to the search. The court noted that the boy was bright, articulate, educated, and independent, and that he had his parents' permission to call emergency services. Under the totality of these circumstances, the court felt that the boy could validly consent, despite his young age. The Georgia Supreme Court disagreed and reversed, holding that the boy did not have authority to consent to a search because this was not the kind of "emergency" envisioned in the parents' instructions. It might also be reasonably speculated that this court's decision was driven, at least in part, by the public relations problems associated with using a child and a public service offer of help in order to convict the parents of drug violations.

Apparent Authority

Generally speaking, if one does not have the legal authority or legal capacity to consent to a search, the consent would be invalid and the search illegal. If the courts were operating under a rigid, rule-oriented approach to such searches, this would always be the case. However, as this paper amply illustrates, such an approach has been abandoned in favor of a flexible totality-of-circumstances analysis on a variety of criminal justice questions. Recently, this innovation has been used in cases where the

consenting party did not have legal authority to consent, but where it appeared to the police officer that the party did have such authority. The U.S. Supreme Court first sanctioned this notion of "apparent authority" in *Illinois v. Rodriguez* (1992). In that case, the Court concluded that, if it reasonably appeared to an officer acting in good faith that the consenting party had legal authority to consent, the consent would be valid and the search legal even if there was in fact no legal authority to consent. Again, the reasonableness of this "apparent authority" was evaluated under the totality of the operative circumstances.

Of course, Georgia courts could have rejected this analysis, just as they ultimately did the good faith exception to the exclusionary rule. This did not happen. In fact, the Georgia Court of Appeals recognized this notion before *Rodriguez* was decided. For example, in the 1991 case of *Gossett v. State*, the court concluded that it was reasonable for the arresting officer to assume that the owner of a leased vehicle had given the driver permission to use the vehicle. Thus, the driver's consent to search the vehicle was valid. The court reaffirmed this notion the next year in *State v. Stewart*, holding that a search based on consent was legal if the officers reasonably believed that the consent was valid. In that case, the consenting party had leased the premises on behalf of a third party. The consenting party informed the officers that he had no key or other means of access to the premises and that he had never been inside the premises or seen its contents. Under those circumstances, the court concluded that it was unreasonable for the officers to assume that the party had legal authority to consent.

PERMISSIBLE SCOPE OF CONSENT SEARCHES

Assuming that the consent is voluntary and that the consenting party was legally authorized to permit the search, there

is still the question of the legal parameters of the search. This is important because a consent is not an open-ended license to search endlessly and extensively. The consenting party can limit the search in terms of time and space, and can terminate it entirely. This is logical, given the fact that the consent need not be given at all. While litigation on this issue has not been nearly as pervasive as that concerning voluntariness, there have been a few Georgia cases worthy of comment.

In *Springsteen v. State* (1992), the Georgia Court of Appeals noted that the permissible scope of a consent search must be measured by all operative circumstances, rather than only by what the defendant said in response to the request. The type, duration, and the physical zone of intrusion is limited by the permission granted, and only that which can reasonably be understood from the consent may be undertaken. The court made particular case, the defendant shrugged his shoulders and said "o.k." in response to a request to search an automobile. The court held that a pat-down and removal of a soft package from a pocket fit within the permissible scope of the search. However, police went beyond that scope when they removed the defendant's clothing and searched body cavities. The court added that, in a situation where the search exceeds the permissible scope, the defendant is not obligated to halt the search. Rather, the burden is on the state to justify the more intensive intrusion.

Despite the individual protections underscored in *Springsteen*, other cases have not been so generous to defendants. In *Garcia v. State* (1993) for example, police asked the defendant's permission to "go through his car." He agreed, and the police ultimately found cocaine behind the radio panel in the car. The court ruled that, since only minor force was used to remove the panel, the search did not exceed the reasonably expected

parameters of the search. A similar situation arose in *Clemow v. State* (1990), where the police officer asked the defendant if he could search his car "real quick." The defendant agreed and the officer found evidence inside the door panel of the vehicle. The court held that this search did not exceed the scope of the consent. However, in *Amato v. State* (1989), the court ruled that the defendant's consent for the officer to look in the passenger compartment of his car did not authorize removal of a vent cover.

In *Arena v. State* (1990), the officer had consent to search an automobile. He found a coffee can on the floor, noticed coffee grounds scattered about, and observed that the can was full. He searched the can and found drugs. The court rule that the contents of the can were within the contemplated scope of the consent search.

Woods v. State (1988) seemed really to stretch the scope of a consent search. There, the defendant consented to a search of his house. The court ruled that this consent implicitly authorized the police to search the *curtilage*, where garbage cans containing the incriminating evidence were located.

There have been a few noteworthy cases relative to the permissible *duration* of a consent search. In *Ferguson v. Caldwell* (1975), police conducted a consent search. A short time later, they returned and searched a second time, without obtaining a second consent. The court ruled that the consent for the second search was within the contemplation of the original consent. The court reached a similar conclusion in *Bell v. State* (1982), where the second search again occurred shortly after the first. Of course, these cases raise questions of voluntariness relative to the subsequent searches. Apparently, the courts experienced no problems in concluding that these "continuing consents" were voluntary and valid.

Finally, it appears that cases such as *Ferguson* and *Bell*

seriously challenge the proposition that the burden of proof in consent searches falls entirely on the state. As part of the rationale for these particular decisions, the courts noted that there was no evidence that the defendant limited or withdrew the original consent. Similarly in *Garcia v. State*, the court ruled that, once a voluntary consent was legally obtained, it continued until it was either revoked or withdrawn. The point is that, even though the defendant need not consent at all, and even though the states carries the burden of proof as to the validity of the consent, the defendant seems to have the burden of clearly communicating a desire to terminate the consent or to limit its scope. Indeed, it appears that evidence supporting the defendant's desire to limit or terminate the search must be more forceful than evidence to support the voluntary nature of the consent in the first place.

CONCLUDING OBSERVATIONS

Georgia courts, following the example of the United States Supreme Court, utilize the totality-of-circumstances approach in evaluating the voluntariness of consent in search and seizure cases. The courts insist that such consent be free of express or implicit coercion, threats, or duress. Furthermore, the courts place the burden of proving voluntariness on the shoulders of the state. These are all clearly stated principles embraced by Georgia courts. In practice, however, the connection between these principles and the outcomes in the individual cases seems quite attenuated.

It is probably safe to assume that most reasonable people would feel intimidated and threatened if arrested or detained by the police. A similar assumption might be made about one who is confronted by overwhelming numbers of police officers. Under these conditions, it might also be assumed that a reasonable person

might feel obliged to "consent" to a search. But the totality-of-circumstances approach is not receptive to such assumptions, as reasonable and as inviting as they may be. Consequently, Georgia courts in many cases concluded that a consent under such circumstances was voluntary. In other cases, usually involving illegal arrest or detention or drawn weapons, the courts ruled that consent was involuntary.

If the burden of proving voluntariness is truly on the state, it would seem prudent to require the state to inform the defendant of his right to refuse. Georgia courts clearly do not require this of police officers. In addition, the courts do not demand a clearly articulated request or a precise form of consent. A variety of words and/or conduct will suffice for both requests and consents. In this respect, it could be argued that the results of some of the cases suggest that it is incumbent on the defendant to make it perfectly clear that he does not consent. In other words, it seems that the burden often falls on the defendant to show involuntariness, rather than on the state to show voluntariness.

Deceit on the part of police officers, especially as it relates to the purported purpose of the search and as long as it is not too outrageous, will not invalidate a consent. Apparently, such deceit does not rise to the level of coercion or duress.

"Threats" to obtain a warrant unless consent to search is given may or may not invalidate a consent. If the officer has sufficient probable cause to support the issuance of a warrant, the consent is considered voluntary. If not, this is the kind of proscribed threat that would taint the consent and render it involuntary.

The totality-of-circumstances approach has generally favored law enforcement officers relative to the issue of the legal authority to consent. Thus, parties who share common authority over premises, such as roommates, family members, and friends,

can validly consent to searches of those premises. Children, in some situations, can validly consent to searches. The age of the particular child and the nature and degree of the child's control over the premises seem to be important in this evaluation. Consent searches are also legal if it reasonably appears to the officer that there is authority to consent, even if the consenting party has no actual authority to do so.

Consenting parties, according to the Georgia decisions, can limit the searches in terms of time and space. In addition, the state carries the overall burden of proof relative to the issue of whether a particular search is within the permissible scope of the consent. However, it appears that police, once they obtain consent, have considerable leeway in terms of time and space. In order to limit, revoke, or withdraw consent, defendants must clearly articulate such intentions. Some of the cases suggest that the burden on the defendant in such situations is more formidable than that on the police to demonstrate voluntariness in the first place. In other words, once consent to search is given, the burden of proof seems to shift to the defendant regarding limitations in scope and termination of consent.

In closing, it might be noted that the totality-of-circumstances approach has given Georgia courts considerable flexibility in dealing with consent searches. But it has also fostered, on occasion, confusion and ambiguity. The most troubling aspect of this legacy, it is submitted, might be that, in some instances at least, there seem to have been inconsistent results among similar cases. Certainly, there seem to be inconsistencies between the judicial principles enunciated above, and their applications to particular fact situations.

TABLE OF CASES

Crider v. State, 114 Ga. App. 523 (1966).

Davis v. State, 202 Ga. App. 629, *rev'd*, 262 Ga. 278 (1992).

Dean v. State, 250 Ga. 77 (1982).

Del Rio v. State, 171 Ga. App. 381 (1984).

Farley v. State, 195 Ga. App. 721 (1990).

Fears v. State, 152 Ga. App. 817 (1979).

Ferguson v. Caldwell, 233 Ga. App. 887 (1975).

Flournoy v. State, 194 Ga. App. 338 (1990).

Foshee v. State, 256 Ga. 555 (1986).

Garcia v. State, 207 Ga. App. 653 (1993).

Gary v. State, 262 Ga. 573 (1992).

Gilden v. State, 184 Ga. App. 105 (1987).

Gossett v. State, 199 Ga. App. 105 (1987).

Guerrero v. State, 198 Ga. App. 397 (1991).

Guest v. State, 230 Ga. 569 (1973).

Hall v. State, 135 Ga. App. 690 (1975).

Hall v. State, 239 Ga. 832 (1977).

Hicks v. State, 157 Ga. App. 79 (1981).

Horton v. California, 498 U.S. 128 (1990).

Howard v. State, 144 Ga. App. 208 (1977).

Illinois v. Gates, 462 U.S. 213 (1983).

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

Jenkins v. State, 146 Ga. App. 458 (1978).

Jones v. State, 154 Ga. App. 21 (1980).

Jones v. State, 184 Ga. App. 328 (1987).

Kosal v. State, 204 Ga. App. 708 (1992).

Leach v. State, 143 Ga. App. 598 (1977).

Lee v. State, 162 Ga. App. 259 (1982).

Love v. State, 144 Ga. App. 728 (1978).

Mann v. State, 196 Ga. App. 730 (1990).

Miller v. State, 194 Ga. App. 338 (1990).

Miranda v. State, 189 Ga. App. 218 (1988).

Mitchell v. State, 178 Ga. App. 244 (1986).

Mooney v. State, 243 Ga. 373 (1978).

Murphy v. State, 155 Ga. App. 128 (1980).

Paramore v. State, 161 Ga. 166 (1925).

Powell v. State, 205 Ga. App. 218 (1992).

Pupo v. State, 187 Ga. App. 765 (1988).

Radowick v. State, 145 Ga. App. 231 (1978).

Rajappa v. State, 200 Ga. App. 372 (1991).

Ramirez v. State, 192 Ga. App. 255 (1989).

Ridgeway v. State, 205 Ga. App. 218 (1992).

Riviera v. State, 190 Ga. App. 823 (1989).

Rogers v. State, 206 Ga. App. 654 (1992).

Rucker v. State, 250 Ga. 371 (1982).

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

Shaw v. State, 149 Ga. App. 853 (1979).

Shue v. State, 129 Ga. App. 757 (1973).

Smith v. State, 160 Ga. App. 690 (1981).

Smith v. State, 186 Ga. App. 303, *appeal after remand*, 192 Ga. App. 181 (1988).

Spinelli v. United States, 393 U.S. 410 (1969).

Springsteen v. State, 206 Ga. App. 150 (1992).

State v. Norris, 203 Ga. App. 574 (1992).

State v. Oliver, 183 Ga. App. 92 (1987).

State v. Rivers, 142 Ga. App. 96 (1977).

State v. Stewart, 203 Ga. App. 829 (1992).

State v. Westmoreland, 204 Ga. App. 312 (1992).

Stoner v. California, 376 U.S. 483 (1964).

Strickland v. State, 226 Ga. 750 (1970).

Suddeth v. State, 162 Ga. App. 460 (1982).

Tarwid v. State, 184 Ga. App. 853 (1987).

United States v. Leon, 468 U.S. 897 (1984).

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

Valenzuela v. State, 157 Ga. App. 247, *cert. denied*, 454 U.S. 963 (1981).

Vincente v. State, 193 Ga. App. 57 (1989).

Weeks v. State, 206 Ga. App. (1992).

Williams v. State, 251 Ga. 749 (1982).

Witt v. State, 157 Ga. App. 564 (1981).

Woodruff v. State, 233 Ga. 840 (1975).

Woods v. State, 258 Ga. App. 540 (1988).