

Tuesday, December 5, 2006

**Police consent searches are not consensual.**

Repeatedly, police officers claim that criminal defendants consented to a search, even when the suspect was not advised of the right to refuse the search, and even when it twists the English language to say that consent can result from an armed police officer firmly saying "Please open your trunk" (They probably do not say "Pretty please, would you be willing to consent to open your trunk?"). Because coercion accompanies such searches, they are not consensual, and should be prohibited. Until such searches are prohibited, bravo to the Austin, Texas (of all places) police chief Stan Knee for requiring officers to obtain written consent in addition to verbal permission for searches, and requiring officers to document the reason for their suspicion. Here is one of our own examples of a non-consensual search; happily, the prosecutor ultimately dismissed this marijuana possession case: Our client is checking on a friend's house by invitation while the friend is away. While he is outside, a police officer starts questioning our client, who is black, after allegedly receiving a report from a "concerned citizen" (or was that a bigoted citizen?) about a few suspicious black males in the block. The officer pats down our client allegedly for his safety; I have discussed here that officer safety is not a sufficient reason, by itself, to permit a frisk. Even though the officer feels no possible weapon on our client, he claims to "ask" our client to empty his pockets, being suspicious that the bag he feels in the pocket might contain contraband. Our client empties his pockets, but leaves the bag in the pocket, claims the police officer. The officer says he "asks" our client to remove the bag again, which our client does; some marijuana is in the bag. This is neither a lawful nor consensual search. Whether or not the officer's initial encounter with our client was lawful, and whether or not the weapons patdown was lawful, once the cop found no weapons, it was time to end the encounter. The cop's second "request" for our client to empty his pockets clearly was not consensual where he had refused to empty the bag from his pocket after the officer's first "request" to do so, particularly in the context of the cop's display of authority (arriving with the typical imposing police car with its enhanced bright lights, telling our client to keep his hands out of his pockets, asking for identification, frisking him for weapons, and "asking" him to empty his pockets). I explain to the prosecutor that this marijuana possession prosecution is based on unlawfully seized evidence, and show the prosecutor a letter from the homeowner who invited our client to keep an eye on his house, who takes exception to the arrest, and who is on call as a defense witness. I talk to the police officer, and challenges him about this unlawful search. We return to court after the lunch break, and the prosecutor dismisses the case. I do not know the specific reason for the dismissal, but it was the right thing for the prosecutor to do. This arrest took place in one of the most liberal towns in Maryland when it comes to race relations and social justice. I lived there briefly, and live and work in the county where this case was prosecuted. The county's government leadership is very sensitive about racism. As to social justice, a government cannot automatically conclude that the police and prosecutors will automatically do justice merely by government leaders feeling the will to do justice and merely by concluding a good police chief is in place. If this police behavior can happen where it happened, it can happen anywhere. We need to always keep our guards up about the activities of police and prosecutors. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00