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Excerpt From the Decision

Judge Lorin Duckman held that an inspection of the bedroom — which turned up the gun — was unnecessary. "[W]hat difference did it make where he slept or whether or not he slept? . . . The issue, if any existed relating to his parole supervision, was why he was not at work, a discussion which did not have to take place in the very private confines of his bedroom," Judge Lorin wrote. The judge also held that the man's act of leading officers to the bedroom could not be considered a valid consent because he did not know he had a choice to refuse to allow them to enter his private quarters. The parole officers' presence "created a chilling atmosphere in which defendant must have felt that he had to submit to their request," the judge held.

Gun Found in House Of Parolee Excluded

Judge Finds No Rational Reason for Search

BY CERISSE ANDERSON

A GUN FOUND on a closet shelf in a parolee's bedroom cannot be used as evidence at the man's trial on gun possession charges because the parole officers who found the weapon did not have a rational reason to search the room, a Brooklyn judge

has ruled. The parolee's consent to the search had been implicitly coerced, he said.

The decision will be published tomorrow.

Ruling in *People v. Barry Plato*, filed last week in Criminal Court, Kings County, Jury Part 3, Judge Lorin Duckman granted Barry Plato's motion to suppress the gun.

Mr. Plato was charged with criminal possession of a dangerous weapon in the fourth degree, a Class A misdemeanor, on Oct. 12, 1995, when two parole officers saw a gun on a closet shelf in the bedroom of his mother's apartment in the Bedford-Stuyvesant section of Brooklyn. Mr. Plato had been living there since his release from prison four months earlier.

While not finding any impropriety in the parole officers' random stop at Mr. Plato's residence at approximately 9:30 a.m., Judge Duckman said the officers did not have a legitimate reason to inspect his bedroom upon finding him at home instead of at work.

The judge further rejected the prosecution's argument that Mr. Plato had consented to all searches months earlier by signing a waiver permitting the "search and inspection of my person, residence and property" as a condition of his release on parole.

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Gun Found in House Excluded

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Prosecutors also had contended that Mr. Plato had expressly consented to the search by leading the officers to the room at their request.

Unnecessary Search

The warrantless search of Mr. Plato's home was not rationally related to the duties of the parole officers, i.e. to supervise adherence to the conditions of probation, the judge said.

Mr. Plato previously had been complying with all the requirements of parole. When he answered the door that morning, he told the officers that he was not at work, where he was expected to be, because he had overslept. The officers said they went to look at the bedroom to confirm that he had actually slept there and then saw the weapon through an open closet door.

Judge Duckman said an inspection of the bedroom was unnecessary.

"[W]hat difference did it make where he slept or whether or not he slept? . . . The issue, if any existed relating to his parole supervision, was why he was not at work, a discussion which did not have to take place in the very private confines of his bedroom," he wrote.

The prosecution could not rely on the blanket waiver signed by Mr. Plato at the time of his release to authorize entry into his bedroom, the judge said. He noted that had Mr. Plato not signed the authorization to search, he would not have been released from prison.

The waiver was not a consent to all searches, and there was still a requirement to show the search was rationally related to the parole officer's duty to detect and prevent parole violations, he said.

No Choice

Mr. Plato's act of leading the officers to the bedroom also could not be considered a valid consent to a search, the judge said, because he did not know he had a choice to refuse to allow them to enter his private quarters.

The former inmate knew that if he violated any of the instructions of the parole officers, he could be returned to prison, the judge said.

"Parole Officer Cuevas' mere presence in his apartment along with another parole officer created a chilling atmosphere in which defendant must have felt that he had to submit to their request. The coercion was implicit; there was no consent," he said.

2/7/96 NYLW

CRIMINAL COURT

PART JURY 3

Judge Duckman

PEOPLE v. BARRY PLATO—Defendant has been charged in a prosecutor's information with the crime of criminal possession of a dangerous weapon in the fourth degree (Penal Law §265.01(1)).

It is alleged that on October 12, 1995, during a random home visit by defendant's parole officer, a gun was observed in plain view on a shelf in a closet in a room where defendant was believed to sleep.

Defendant moves to suppress the gun on the ground that the search of the bedroom was not expressly consented to by him either by his conduct on October 12, 1995 or as a result of his having agreed to permit searches of his residence as a condition of his release to parole supervision.

Hearing

At a hearing held on January 19, 1996, Parole Officer Cuevas testified for the people. A copy of the New York State Division of Parole Policy and Procedures Manual covering "Definition of Supervision Contacts" (hereinafter referred to as the Manual) was filed by the people after the completion of the hearing.

The defendant's mother, Phyllis Plato, testified for the defendant.

Two pictures of folding doors attached to defendant's bedroom closet (one showing them open and the other showing them closed) were introduced by the defendant.

The court took judicial notice of 9 NYCRR 8003 offered by the defendant under CPLR 4511(a).

By stipulation, the Certificate of Release to Parole Supervision (hereinafter referred to as the Certificate of Release) was also put before the court.

Despite one seeming contradiction concerning whether or not the closet had doors, for purposes of the hearing, the testimony of both witnesses was credible and believable.

Finding of Facts

Parole Officer Cuevas is assigned to the after shock patrol. She has had defendant under supervision since his release to parole supervision in June, 1995.

Her duties include interviewing parolees at her office, making visits to the parolee's home and place of employment, assisting parolees to enroll in rehabilitative programs, instituting delinquency proceedings and executing warrants.

Part of the duties of a parole officer is the home visit:

"Regular visits to the parolees residence, including personal interviews with the parolee and members of his/her family, are an essential part of the casework process. It is very important that the parole officer, in the course of these regular home visits, gain an adequate knowledge of the members of the family, their attitudes towards each other, their attitudes towards the parolee and parole, as well as increasing his/her knowledge regarding the parole and his problems." See Manual Item 9203.00, *supra* (Emphasis added).

During intensive supervision (the first nine months following a parolee's release), visits of a parolee's employer are also required. See, Manual.

As an apparent condition of release, defendant signed a Certificate of Release in which he agreed:

"I will permit my Parole officer to visit me at my residence and/or place of employment and I will permit the search and inspection of my person, residence and property."

Defendant in addition to agreeing to "fully comply with the instructions of the parole officer" was also required under certain "special conditions" to do certain things:

"I will seek, obtain and maintain and/or participate in educational, vocational, training and therapeutic program. I will participate in substance abuse programs.

I will submit to epodic (sic) substance abuse testing. . . . I will observe any specific curfew as established by my parole officer." See, Certificate of Release, *supra*.

Prior to the defendant's release on parole, Parole Officer Cuevas met with Ms Plato during a community prep visit at her residence at 375 Lexington. She familiarized herself with the residence, including the room where Ms Plato advised her defendant would be sleeping.

Once defendant was placed on parole, she visited the residence several times, usually between the hours of 5:00 a.m. and 6:30 a.m. On one occasion, defendant was not present. This resulted in a curfew negative; no violation was filed.

Since being placed on parole, defendant had complied fully with the terms of his parole. He had reported every week as scheduled for face to face meetings; during random urine tests no evidence of drugs or alcohol were found; he had graduated from the Fellowship Center, where he was receiving follow-up counselling; he regularly attended network community meetings at St Luke's church; and his employment as a satisfactory employee of A & W Furniture had been confirmed through his boss.

On October 12, 1995, Parole Officer Cuevas, accompanied by Parole Officer Gemmati, visited 375 Lexington to serve a parole violation on a person living on the third floor. After finding the person was not there, she decided to make a random stop at defendant's apartment.

She knocked on the door to defendant's mother's apartment at approximately 9:25

a.m. Defendant, dressed in sweatpants, socks and a shirt answered the door. Parole Officer Cuevas asked to be let in and was admitted to the apartment. A person was asleep on a couch in the living room.

Parole Officer Cuevas asked defendant why he was home. Defendant explained that he was up late and had overslept.

Parole Officer Cuevas then asked to see defendant's bedroom. Defendant complied, leading the two officers down the hallway to his room.

Parole Officer Gemmati followed defendant into the room. He looked around and then motioned to Parole Officer Cuevas who remained at the door. Parole Officer Cuevas looked in the direction indicated and observed a gun lying on a towel on a shelf in an open closet. She retrieved the gun and defendant was placed under arrest.

Defendant's mother testified that the closet had doors.

Contentions

The people rely on the plain view doctrine to justify the seizure of the gun. They contend that the parole officers lawfully entered the room to verify whether or not the defendant had actually been sleeping, an act rationally and substantially related to their duties. Since they were not expecting to see any illegal objects or substances, the seizure of the weapon which was in plain view was inadvertent.

Additionally, they argue that the defendant expressly consented to the entry of the parole officers into the apartment, as well as his bedroom, both by his conduct on the morning of October 12, 1995 and by his having signed a "Certificate of Release" in which he agreed to allow parole officers to enter and search his residence.

The defendant contends that the presence of the parole officers in his bedroom was not rationally and substantially related to their supervisory duties.

Additionally, he argues that neither the signing of the Certificate of Release, nor his apparent lack of resistance to the officer's command to enter the apartment allowing them to go to his bedroom on the morning of October 12, 1995 should be viewed as evidence of his having given consent.

Law Plain View

Under the plain view doctrine, the police can make a warrantless seizure of contraband, evidence or instrumentalities of a crime when these items are in open view and the officer makes his view from a lawful vantage point. *People v. Jackson*, 41 NY2d 146 (1976). Thus, an officer who has obtained consent to be in an area where he would not otherwise lawfully be permitted to be may seize an item in plain view. *People v. Scott*, 116 AD2d 756 (2d Dept 1986).

Rational and Substantial Relationship to Duty to Detect and Prevent Parole Violations

A warrantless search of a parolee's home by a parole officer is proper only if the search is rationally and substantially related to the duties of the parole officer. *People v. Huntley*, 43 NY2d 175, 182-3 (1977); see also, *Kamins, NY Search and Seizure, Probationers, Parolees and Prisoners*, p. 278-280 (1995); *La Fave, Search and Seizure, Searches Directed at Parolees and Probationers*, B4, §10.10(d) (Third Edition 1996).

"The test of what is reasonable as a prerequisite for a search of the person or property, of a probationer or a parolee is whether the search is consistent with the duty to supervise adherence to the conditions of probation or parole and the duty to influence the offender to refrain from unlawful conduct" (*Prieser, Practice Commentary, McKinney's Con Laws*, Book 11A, CPL 410.50, p 149). *People v. Jackson*, 46 NY2d 171 (1978)."

The defendant had been in compliance with all of the terms of his release. His employment record had been verified through his employer and all reports were of satisfactory performance. He had made all required office visits, passed clean urine, graduated from a treatment program and continued in counseling.

The parole officer admits that she was only making a home visit. She was in the building to serve a delinquency on another parolee who was not at home. Defendant was not the subject of any delinquencies, despite having had at least one curfew negative for not being around during an earlier visit by the parole officer.

Nowhere in the Manual does it suggest that an entry of the defendant's private living quarters should be done during such visits. Rather, the purpose of the visits is stated to be to determine if the defendant is at home, increasing knowledge of the parolee and their problems.

In the absence of a specific pattern of absences or some other indication that the defendant's work-related tardiness was caused by something other than an accurate timepiece, merely being late for one day of work would not warrant an inspection of defendant's bedroom to see if he had a problem.

Though the people suggest that the reason for the entry into the bedroom was to confirm that the defendant had actually slept in the bedroom there is no support for this theory in the testimony of the parole officer. She testifies that she asked defendant to show her where he was sleeping. In fact, nowhere does she state, despite having been in the room, what the condition of the bedroom was.

How entering the bedroom would have confirmed that he did or did not spend the night in the bed in the room has not been made clear. No inquiry was made about why he overslept or even whether he could report to work late. Defendant was appropriately dressed for a person who was at home, asleep — sweats, socks and a T-shirt; no telltale signs or smells of alcohol or drug use were detected.

Moreover, what difference did it make where he slept or whether or not he slept. What would a made or unmade bed have indicated about where the defendant slept? And, why did it matter?

The issue, if any existed relating to his parole supervision, was why he was not at work, a discussion which did not have to take place in the private confines of his bedroom. The trip to the bedroom was unnecessary. See *People v. Candelaria*, 63 AD2d 85, 90 (1st Dept 1978).

In short, the parole officer had no reason to believe defendant was in violation of any term of his parole or that going to the bedroom would promote defendant's rehabilitation. Therefore, there was no rational and substantial reason relating to the parole officers duties to be in defendant's bedroom.

Waiver

The reliance on the waiver signed by the defendant at the time of his conditional release is misplaced.

"Waiver is the voluntary and intentional relinquishment of a known right; knowledge and intent are essential elements" and [at] the very least the record should reflect an advised and knowing waiver entered into freely and voluntarily. *People v. Cox*, 71 AD2d 798." See, *People v. Suttell*, 109 AD2d 249, 252 (4th Dept 1985).

He was advised prior to signing the Certificate of Release that "parole or conditional release would not be granted to any individual unless he states . . . that he has read and understood the conditions of release." See, 9 NYCRR § 8003.1(c). Had he not signed, he would have stayed in prison. How free and voluntary is such an act?

Further, it could hardly be said that a person incarcerated in a prison where random searches are an everyday fact of life would fully appreciate that once released, he possessed a right, albeit a diminished one, to resist the search of himself and his residence!

In any event, "[T]he authorization is not an unrestricted consent to any and all searches and does not obviate a showing by the parole officer that the search was rationally related to his duty to detect and prevent parole violations." *People v. Mackie*, 77 AD2d 778-9 (4th Dept 1980).

"Because parole is a matter of legislative grace and not of constitutional right does not mean that unconstitutional conditions may be attached when it is granted." See, *People v. Huntley*, supra at 183.

Again, in the absence of a reason rationally and substantially related to his parole supervision, the waiver will not provide authorization for the entry into defendant's bedroom.

Consent

A search of a home is presumptively unreasonable. *Payton v. New York*, 445 US 573, 588 (1980), reversing *People v. Payton*, 45 NY2d 300 (1978). A person may consent to the warrantless search of their home. *People v. Gonzalez*, 39 NY2d 122 (1976).

The people have a "heavy" burden to show consent, one which must be met by "clear and positive evidence." *People v. Zimmerman*, 101 AD2d 294, 296 (2d Dept 1984). "Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle." *People v. Gonzalez*, supra at 122, 128.

If defendant consented here, he did it by act and not word when he led the parole officers to his bedroom. How any acts by him, under the circumstances in which they occurred could be considered to be the product of a free and unconstrained choice strains credulity.

Defendant, having signed what was essentially an unenforceable waiver of his rights to resist a search of his residence, did not know he had a choice to refuse to allow the parole officers to enter his private quarters. Cf. *People v. Auxilly*, 173 AD2d 627 (2d Dept 1991).

He was aware that if he violated any of the instructions given by the parole officer or failed to abide by the special conditions of his parole, he could be violated. See, 9 NYCRR § 8003.1(b). He signed the Certificate of Release acknowledging that his "violation of [the] conditions may result in the revocation of [his] release."

While Parole Officer Cuevas says that defendant could have refused her entry to the room without fear of being violated, her interpretation of the predicate for the filing of parole violations is not expressed in the statute. Defendant cannot be presumed to understand the subtle differences between the right of a leaseholder to refuse the officers entry and the same refusal expressed by a resident/parolee.

Parole Officer Cuevas' mere presence in his apartment along with another parole officer created a chilling atmosphere in which defendant must have felt that he had to submit to their request. The coercion was implicit; there was no consent.

Conclusion

Since the parole officers did not have a right to be in the bedroom, what they saw from the position they were in and subsequently seized must be suppressed.

Accordingly, defendant's motion to suppress the gun is granted.

All other contentions have been considered and rejected.

This constitutes the Opinion, Decision and Order of the Court.