



FAIRFIELD POLICE DEPARTMENT TRAINING BULLETIN

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Seizing Weapons at Domestic Violence Incidents

ISSUE

Is there any authority to search for and seize a gun at the scene of a domestic violence incident, pursuant to Penal Code Section 18250 (Formerly 12028.5), when one party to the incident consents but the other objects?

BRIEF ANSWER

No, not without further justification. When one party consents and the other objects, consent is not grounds to search. However, as discussed below, the community caretaker exception, officer safety, and of course plain view will justify a search in more limited circumstances.

DISCUSSION

I. WHEN ONE PARTY WITH STANDING CONSENTS TO A SEARCH AND THE OTHER OBJECTS, A SEARCH IS NOT VALID BASED SOLELY ON CONSENT

A defendant with equal authority over the area to be searched who is present and objects to a search negates the validity of a third party's consent. (*Georgia v. Randolph* (2006) 547 U.S. 103; *People v. Ledesna*, supra, at p. 704, fn. 16.) In that case, police were called to a home for a domestic dispute. Defendant's wife told the police officers that defendant was a cocaine user and that there was evidence of such in the house. When asked for permission to search the house, defendant unequivocally refused. His wife however, readily gave consent to search and led an officer to defendant's bedroom where a section of a drinking straw with a powdery residue was found. The Supreme Court has made it clear that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." This case is still controlling authority, and is not affected by the provisions of Penal Code Section 18250. **However, consent is just one way to justify the search for a gun.** (Emphasis added)

II. A SEARCH FOR A GUN IS JUSTIFIED WHEN A SITUATION MEETS THE REQUIREMENTS OF THE EMERGENCY DOCTRINE

"The emergency doctrine provides that if a police officer, while investigating within the scope necessary to respond to an emergency, discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would be found." *United States v. Cervantes* (2000), 219 F.3d 882, 888. The emergency doctrine requires that:

- "(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
- (2) The search must not be primarily motivated by intent to arrest and seize evidence.
- (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. *Id* (quoting *People v. Mitchell* (1976), 39 N.Y.2d 173.)

In *United States v. Oropeza* (2004) 90 Fed. Appx. 253, the 9th circuit reviewed the denial of a motion to suppress where officers were called out to a domestic disturbance involving the threatened use of a shotgun. Defendant's wife told the officer that defendant had threatened her with a shotgun shortly before the officer arrived and that defendant could be released on bond in as little as four hours. Defendant had told the officer that there was a gun in the closet, linking the area searched with the emergency at hand. The officer gave un rebutted testimony at the suppression hearing that he seized the gun out of concern for the wife's safety, not because he wished to seize evidence or affect an arrest. *The 9th circuit ruled that the emergency doctrine had been met.* (Emphasis added)

First, the officer reasonably believed there was an emergency at hand requiring the seizure of the shotgun. Defendant's wife had been threatened with the shotgun in question, and could be released on bail in as little as four hours. It was reasonable for officers to believe that temporary seizure of the shotgun was necessary to protect defendant's wife and children.

Second, un rebutted testimony was given at the suppression hearing that seizure of the gun was motivated by concern for defendant's wife's safety, not by the desire to seize evidence or affect an arrest.

Third, the location of the gun was known. The area searched was linked to the emergency at hand. Overriding public safety concerns that exists for victims of domestic violence were prevalent in the court's analysis, and the fact that defendant's wife called police and invited officers inside.

In conclusion, in a domestic violence context a search for a weapon will be justified without consent, so long as there is (1) an emergency requiring seizure of the gun (2) seizure is motivated solely by concerns for safety (3) a reasonable basis exists which links the location searched to the emergency.

CONCLUSION

In a domestic disturbance, where one party consents to a search for a weapon, and another party does not, consent will not justify a search. If there are (1) reasonable grounds to believe an emergency with immediate need for assistance is occurring, such as domestic violence with the threatened use of a gun, (2) the search is not primarily based on intent to arrest or seize evidence, and (3) there is a reasonable basis to link the emergency to the area searched, a search for a gun is justified. Additionally, plain view of a gun will justify a search in the domestic violence context, due to exigency.

Note: The *Oropeza* case, cited above, involved the threatened use of the gun which was ultimately seized. This case does not necessarily address all cases where guns are in the home but are not used in the DV case being investigated. Also, officers should consider seeking consent to search for a weapon outside the presence of the defendant whenever possible.