Washington University Law Review

Volume 1969 | Issue 4

January 1969

# The Tenant's Consent to an Administrative Search, People v. Rosenthal, 299 N. Y.S.2d 960 (1969)

## THE TENANT'S CONSENT TO AN ADMINISTRATIVE SEARCH

*People v. Rosenthal, 59 Misc. 2d 565, 299 N.Y.S.2d 960 (1969)*

A city health inspector entered the defendant-absentee landlord's apartment building without a search warrant and made a routine inspection of the building.[1] The inspector found violations of the Minimum Housing Standards Ordinance in the ceiling of the bathroom of a tenant who had consented to inspection of his apartment. The defendant, indicted for violating the ordinance, moved to suppress the evidence of the inspection on the grounds that the inspection was an unreasonable search prohibited by the fourth amendment. *Held*: defendant's motion granted. An absentee landlord has standing to challenge use of the evidence gained by an administrative search of his apartment building, and a warrantless search is not validated by the consent of a tenant.[2]

Before determining whether the tenant's consent validated the warrantless search, the court first had to consider whether the absentee landlord had standing to object to the introduction of the evidence secured by the search. Because the search was conducted against him and the evidence was being offered against him, and because the defendant, as landlord, had a personal property interest in the structure of the apartment building, the court held that the defendant-landlord did have standing to object.[3]

To determine the validity of the tenant's consent to the search of his apartment, the court attempted to analyze the property interests of the tenant and the defendant-landlord in the leased premises. The court noted that the ceiling of the tenant's bathroom "will presumably survive the present tenancy . . . . [It] will remain the personal province and responsibility of the defendant-landlord."[4] In this rather awkward

1. People v. Rosenthal, 59 Misc.2d 565, 299 N.Y.S.2d 960 (City Ct. of Poughkeepsie 1969). There is no indication in the case that the inspection was made pursuant to a complaint, so it is assumed that the inspection was merely routine.

2. *Id.*

3. The evidence of the inspection was the physical condition of the ceiling of the tenant's bathroom. It is not clear whether the court granted standing to the defendant because it felt that his property interest was superior to that of the tenant's or because the property interest gave the defendant a sufficient connection to the premises searched to object to the use of the evidence of the search against him. For a complete discussion of the standing rules to object to the use of evidence gained by unconstitutional searches and seizures, *see* Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488.

4. People v. Rosenthal, 59 Misc. 2d 565, ____, 299 N.Y.S.2d 960, 964 (City Ct. of Poughkeepsie 1969).

fashion, the court was apparently attempting to describe the defendant-landlord's reversionary interest in the tenant's apartment. The court did not describe the tenant's interest in the leased premises. The court simply concluded that the tenant "cannot give a binding consent to a search of the property personal to her landlord."[5]

The fourth amendment[6] is designed to protect the individual from the arbitrary exercise of governmental power.[7] Searches and seizures are not valid under the fourth amendment unless made pursuant to a warrant issued by an authorized judicial officer based on a showing of probable cause.[8] There are, however, certain exceptions to the warrant requirement. Thus, searches which are otherwise reasonable may be made without a warrant as incident to: a valid arrest, an emergency situation, or consent.[9] Third party consent searches should be distinguished from searches conducted incident to the consent of one who ultimately becomes the defendant.[10] The issue in third party consent searches is whether an otherwise unconstitutional search is made reasonable by the consent of a third party. To decide this issue courts have usually analyzed the nature of the third party's property interest in the premises searched. The general rule is that consent may be validly given by one having a right to possession and control of the premises searched.[11]

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5 *Id.* The inspector in the *Rosenthal* case had also noted violations of the Minimum Housing Standards Ordinance in the walls of the common hallways of the apartment building. The defendant was indicted for these violations as well as those found in the tenant's apartment. The court found that the search of the common hallways was also invalid, stating that "if a portion of the structure within the leased premises [the ceiling of the tenant's bathroom] can be attacked by an absentee-landlord, it follows, *a fortiori* that common hallways must be treated in a similar manner." *Id.* at ____, 299 N.Y.S.2d at 964. The legality of the search of the tenant's apartment depended upon the validity of the tenant's consent. The tenant did not consent to a search of the common hallways. Apparently the inspector merely walked into the apartment building and noted the violations in the common hallways either on the way to or from the tenant's apartment. It does not follow from the invalidity of the consent search of the tenant's apartment that the warrantless and consentless search of the common hallways was also invalid. *See* note 22, *infra.*

6 U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

7 1 J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 5 (1961).

8 *Id.* at 225.

9 *Id.* at 225-26.

10 *See* Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12, 14 [hereinafter cited as *Third Party Consent*]. Consent to search should also be distinguished from consent to enter. *Id.* at 18-19.

11 *Third Party Consent* at 21. It has been held that a landlord may not consent to a search

Though only describing the property interest of the defendant-landlord, the *Rosenthal* court did recognize his interest was not possessory.[12] The court, then, implicitly recognized the existence of some property interest in the tenant. If, in fact, both the tenant and the landlord have property interests in leased premises, it appears appropriate that a court weigh these interests in considering the validity of a tenant's consent to an administrative search of his apartment.

Except where a lease provides otherwise, landlord-tenant law provides that the tenant acquires possession of the leased premises, and all the rights which accompany ownership of a possessory interest, such as the power to exclude. The landlord generally has no right to enter or to control use of the leased premises.[13] Thus, the *Rosenthal* holding cannot be supported on the basis of real property law.

It should be noted, however, that there are tests other than the property test[14] which *Rosenthal* might have employed to determine the validity of the tenant's consent to an administrative search of his apartment. Several courts have analyzed the validity of warrantless searches on the basis of the right of privacy.[15] The right of privacy test can be more accurately broken down into two separate tests: the property-privacy test and the personal privacy test.

*State v. Schaffel*[16] demonstrates the property-privacy test. In that

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of his tenant's premises when the landlord's sole right to possession and control depends upon his status as landlord, *e.g.*, his right to view the premises for waste. *Id.* Difficult problems may arise, however, when the landlord reserves increasing amounts of control over the leased premises through covenants in the lease.

12. 1 AMERICAN LAW OF PROPERTY § 3.38 (A. Casner ed. 1952). *See generally* Mintz, *Search of Premises by Consent*, 73 DICK. L. REV. 44 (1968).

13. 1 AMERICAN LAW OF PROPERTY § 3.38 (A. Casner ed. 1952).

14. California courts have developed a hybrid property test to determine the validity of third party consent searches. Generally stated, California courts look to the relationship of the consenter to the premises searched not only to determine whether the consenter in fact had possession and control, but also to determine whether the official conducting the search reasonably believed that the consenter had possession and control. If the requisite relationship of the consenter to the premises does not in fact exist, California courts may nevertheless uphold the validity of the consent if they find that the official reasonably believed that the consenter had possession and control. *See Third Party Consent* 32-34. It appears that the California rule would validate more third party consents to administrative searches of apartments than would the traditional property test, inasmuch as California courts would uphold searches made pursuant to the consent of one who is not the tenant but reasonably appears to be in possession and control of the apartment at the time of the consent. *Id.* at 34.

15. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

16. 4 Conn. Cir. 234, 229 A.2d 552 (App. Div. 1966), *petition for certification for appeal denied*, 228 A.2d 560 (Conn. 1967).

case, several of the defendant-landlord's tenants consented to a warrantless administrative search of their apartments in which violations of the New Haven Minimum Housing Standards Ordinance were found. In rejecting the defendant-landlord's attack upon the use of the evidence of the search, the court noted that it was a well-accepted principle that the fourth amendment was designed to protect the right of privacy against official invasion. The court stated, moreover, that the right of possession and control of the premises searched forms the basis of the right of privacy. The court found that, unless a lease provides otherwise, a tenant acquires exclusive possession and control of leased premises. The lease in *Schaffel* permitted the defendant-landlord to enter the leased premises to inspect and to see that the covenants on the part of the tenant are being kept and performed. The court found that these terms of the lease gave the defendant-landlord the right to enter for specific purposes only, but that this limited right of entry was far from control inasmuch as the tenant retained the general power to exclude.[17] Because the tenants retained possession and control of their leased premises, the court concluded that the tenants, not the landlord, had the right of privacy in the premises searched. Therefore, the tenants could validly consent to an invasion of the privacy.[18]

*Schaffel* makes clear that the right of privacy depends upon or evolves from property interests in the premises searched.[19] Thus, this property-privacy test of the validity of a tenant's consent to an administrative search of his apartment appears to be substantially the same as the property test. And because the holding in *Rosenthal* cannot be supported on the basis of the property test, it cannot be supported by use of the property-privacy test.

17. *Id* at 247, 229 A.2d at 561.

18 *Id* at 250-51, 229 A.2d at 561-63. The inspectors in the *Schaffel* case had initially entered the apartment building in response to the complaint of a tenant. Either before or after inspecting the complaining tenant's apartment, the inspectors noted violations of the Minimum Housing Standards Ordinance in the common hallways. The court allowed the evidence of the violations in the common hallways to be introduced on the grounds that the complaining tenant's consent extended to a search of the common hallways. The court noted that a tenant has exclusive possession and control not only of the leased premises, but also, of parts of the structure which form an integral part of the tenement, *e.g.*, common hallways. *Id.* at 236-37, 229 A.2d at 561. *But see* People v. Corrao, 201 Cal. App. 2d 848, 20 Cal. Rptr. 492 (1962) (landlord retains control over the common areas of leased premises).

19. State v. Schaffel, 4 Conn. Cir. 234, 229 A.2d 552 (App. Div. 1966), *petition for certification for appeal denied*, 228 A.2d 560 (Conn. 1967).

In *Katz v. United States*,[20] the Supreme Court held that the right of privacy protected by the fourth amendment does not depend upon property interests in the premises searched. In that case, the government attempted to introduce evidence of the defendant's telephone conversations, overheard by Federal Bureau of Investigation agents who had attached an electronic device to the outside of the public telephone booth from which the defendant had placed his calls.[21] In rejecting the government's contention that no right of privacy of the defendant was invaded by attaching the electronic device to the outside of the public telephone booth because the defendant had no property interest in a public telephone booth, the Court stated that:

> [t]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[22]

Although the *Katz* decision did not concern a third party consent search, the personal privacy test recognized by *Katz* emerges as a possible alternative to determine the validity of a tenant's consent to an administrative search of his apartment.[23] Even assuming that the personal privacy test is an appropriate test in third party consent searches, it appears that use of this test in *Rosenthal* would have validated the tenant's consent. The personal privacy protected by *Katz* is a transitory right that the individual carries with him wherever he goes to assure that whatever he seeks to keep private remains free from unauthorized invasion. In *Rosenthal,* with no evidence of any property interest reserved under the lease, the defendant-landlord's presence on the premises when the search was conducted would be critical under *Katz.* The landlord was not present, however, and the tenant who was present chose not to keep anything secret. Thus, the *Rosenthal* decision cannot be supported either under the test which it employed or under the possible alternative tests which it might have used.

20. 389 U.S. 347 (1967).

21. *Id.* at 348.

22. *Id.* at 351.

23. *See* Alderman v. United States, 89 S. Ct. 961, 968 (1969) (personal privacy and property-privacy tests used in the alternative to test the constitutionality of warrantless search).