



DPS TRAINING BULLETIN



LEGAL BULLETIN NO. 336

**PROTECTIVE SEARCH OF RESIDENCE REQUIRES
A BELIEF THAT AREA TO BE SWEEP HARBORS AN
INDIVIDUAL POSING A DANGER TO THOSE ON ARREST SCENE**

Reference: Donald Brand Alaska Court of Appeals
v. Opinion No. 2211
State of Alaska _____ P.3d _____
April 3, 2009

FACTS:

Police responded to a residence to investigate a threat of suicide involving a female. When the officer assigned to the case arrived at the home, paramedics were already on the scene and were treating the subject, identified as Gretchen SMITH, in the rear of the ambulance. After speaking with the officer, SMITH became agitated and ran back into the home. The officer attempted to pursue SMITH into the house but was confronted by BRAND at the front door who told the officer to leave his property. During the encounter with BRAND, SMITH twice emerged from the house; at one point SMITH threatened the officer with a large bulldog, and at another she brandished a knife. The officer felt BRAND was causing a distraction and told him to put his hands behind his back so the officer could handcuff him. BRAND refused and the officer tased him. The officer was then able to handcuff him. While this was going on, two other officers arrived at the scene. Donald BRAND was secured in the ambulance to be transported to the hospital because of injuries associated with the tasing incident. Donald's brother, James, was also outside the house; SMITH was still inside. A short time thereafter, SMITH came outside and was secured by the investigating officer. The officer had informed the two other officers that she had smelled marijuana. The second officer then said a "protective sweep" of the house should be conducted.

There was no one else in the residence but the officers did secure the bulldog. An officer went to the second level where he discovered a marijuana growing operation of more than forty plants.

By this time, a fourth officer had arrived at the scene. That officer confronted BRAND, who was handcuffed and in the back of the ambulance, and asked for his consent to search the residence. BRAND initially refused. When the officer informed BRAND that he would get a search warrant, BRAND gave his consent to search.

BRAND was charged and convicted of two counts of fourth-degree misconduct involving a controlled substance; he was sentenced to four years in prison.

BRAND argues that the police had no right to make a warrantless "protective sweep" of his residence and that his consent was tainted.

ISSUE: Was the protective search illegal and the subsequent consent to search tainted?

HELD: Yes - Police may not enter a home for a protective sweep unless they have a reasonable belief that there is an individual inside who could put them in danger. Unless the government can show that the consent is sufficiently insulated from the prior misconduct (the illegal entry into the house), the defendant's consent is considered to be tainted.

REASONING:

1. All of the officers involved testified that they did not have any reason to believe that there was anyone in the home. They further testified that both SMITH and BRAND were secured outside the residence prior to the entry to conduct the sweep. (emphasis added.)
2. Under Alaska law, to satisfy the protective search doctrine, the State must prove that: (a) the officers must have a reasonable cause to believe that their safety is in danger before engaging in such a search, and (b) the search must be narrowly limited to areas where they could find a dangerous person.
3. There was insufficient testimony at the evidentiary hearing to suggest that the officers had reason to believe that there were others inside the home.
4. When the police obtain the defendant's consent after conducting an illegal search or arrest, the unlawful police action presumptively taints the defendant's unrelated consent to search. To overcome this presumption, the government must demonstrate a break in the "casual connection" between the prior illegality and the defendant's consent.
5. In this case, the officer obtained BRAND's consent to search the residence after the officer had already conducted a protective sweep. If the protective sweep was illegal, then the State would have to show "a break in the casual connection" sufficient to insulate the consent the officer obtained. However, the State has not presented any argument that BRAND's consent was not tainted.

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NOTE: *Effective March, 2009 the Cover Page, Acknowledgments, Foreword, Table of Contents, Text, and Case Law Citations Index of the Alaska Legal Briefs Manual have been revised. Updates may be reviewed and printed from the Alaska Police Standards Council website:*

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