



DPS TRAINING BULLETIN

LEGAL BULLETIN NO. 187
October 8, 1994

WARRANTLESS SEARCH OF THIRD-PARTY
CUSTODIAN'S BEDROOM

Reference: John W. Milton
v.
State of Alaska

Alaska Court of Appeals
Opinion No. 1368
P.2d
September 2, 1994

FACTS:

John Milton agreed to act as a third-party custodian for Jesus Gutierrez, who was to be released on a \$1,000 bond. Gutierrez had been arrested for violating his probation on a charge of selling cocaine. As a condition of his release, the Court stated that Gutierrez was to remain subject to the "terms and conditions of probation." As a condition of probation, Gutierrez was required, upon request of a probation officer, to submit to a search of his residence for presence of contraband. Milton agreed Gutierrez could reside at Milton's home.

The probation officer supervising Gutierrez had received information that Gutierrez was using and possibly selling cocaine. The probation officer, accompanied by two State Troopers and another probation officer, informed Gutierrez that his place of residence would be searched immediately because they had "reason to believe that Gutierrez was either using or distributing drugs." As stated above, Gutierrez was living in Milton's home with Milton acting as his third-party custodian.

The officers entered Milton's bedroom and discovered letters and bills on a night stand, some of which were addressed to Milton and at least one addressed to Gutierrez. There was also some white powder residue on the stand, but not enough for testing.

One of the officers entered Milton's walk-in closet and noticed a black nylon suitcase sitting on the floor. The suitcase was searched. Upon removing items of clothing and rain gear, a clear plastic bag was found. It contained approximately two ounces of a substance which field-tested positive for cocaine. Milton was arrested and a later search of his person produced additional cocaine. The search of Gutierrez's bedroom also revealed the presence of cocaine.

Even though several searches and seizures were made in this case, this Legal Bulletin will address the search of Milton's private bedroom, walk-in closet and suitcase as it pertains to his "reasonable expectations of privacy" as a third-party custodian.

ISSUE:

Just because probation officers and State Troopers had the authority to search Gutierrez and his living area without a warrant, did that authorize them to expand the search to Milton's private bedroom?

HELD:

Maybe yes and maybe no; in this case, probably no. The Court of Appeals has remanded this case back to Superior Court with orders to "follow the law governing searches conducted on the premises of third-party custodians."

REASONING:

1. When the probationer is sharing living quarters with another person who is not subject to similar conditions, it seems clear that the probation officer and others working under his direction may search all parts of the premises the probationer has common authority to use.

2. The searching officer "must have reasonable suspicion, that the item to be searched is owned, controlled or possessed by a probationer, in order for the item to fall within the permissible bounds of a probation search."

3. As a factual matter, Milton never explicitly waived his right to privacy, nor did he ever explicitly consent to searches of his home by Gutierrez's probation officer. (emphasis added)

4. A person who agrees to house a probationer retains a limited expectation of privacy in his person, possessions and residence.

5. This expectation of privacy is limited because the probation officer is entitled to search the probationer, the probationer's possessions and the probationer's residence.

6. In the case of a shared residence, the probation officer's search may extend to all areas of the residence over which the probationer has control, even if that control is not exclusive.

NOTES:

By agreeing to house Gutierrez, Milton gave up his right to object to a search of the "common areas" of his residence. What is unknown in this case is if Milton allowed Gutierrez "common access" to Milton's private bedroom. The mere fact that the bedroom was accessible to Gutierrez is not decisive when determining the scope of the authorized search.

It would appear that the State's Attorney will have to address the scope of any search of a third-part custodian's residence when conditions of release are ordered. The custodian must consent to such a search and be aware of the consequences.

In this case, the officer could have asked Milton for his consent to search the suitcase. If consent had been refused, perhaps lawfully obtained evidence seized at the residence could have been used as probable cause to obtain a search warrant for the entire residence.

NOTE TO SUBSCRIBERS TO THE ALASKA LEGAL BRIEFS MANUAL:

Add this case to Sections N, "Warrantless Searches Conducted by Probation Officers or Private Persons," and Section B, "Consent," of your Contents and Text. File Legal Bulletin No. 187 numerically under Section R of the manual.