"THE FEDERAL CORNER"

The Defendant Gets Tricked and the Officers Get Treated

Buck Files

No client is more self-righteously indignant than the one who learns that he has been tricked into giving a confession by officers using a variation of the very old "we-found-your-fingerprints-at-the-scene" ploy. Unfortunately for the client, the courts have approved the use of such trickery; e.g.,

> This Circuit has held that trickery or deceit is only prohibited to the extent that it deprives the defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. *Soffar v. Cockrell*, 300 F.3d 588, 596 (5th Cir.2002)(en banc)…
> *United States v. Bell*, 367 F.3d 452 (5th Cir. 2004).

I was reminded of *Soffar* when I came across an analytical – even amusing – opinion that discussed a ruse employed by two members the South Florida Organized Fraud Task Force to circumvent the Fourth Amendment's general requirement that officers obtain a warrant before searching someone's home. *United States v. Spivey*, 861 F.3d 1207 (11th Cir. 2017) [The Panel: Circuit Judges William Pryor, Martin and Boggs (Circuit Judge of the Sixth Circuit, sitting by designation.) (Opinion by Pryor; Martin dissented and filed an opinion.)]

Judge Pryor's opinion reads, in part, as follows:

[The Facts]

> Caleb Hunt twice burgled the Lauderhill, Florida, home of Chenequa Austin and Eric Spivey. Spivey reported the first burglary to the police. The second time, Hunt tripped a newly installed security system. Austin spoke with the police about the second burglary when officers responded to the audible alarm. When the police caught Hunt, he informed them that the residence was the site of substantial credit-card fraud. Indeed, Hunt told the police that the home "had so much high-end merchandise in it that he [burgled] it twice."
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> Two members of the South Florida Organized Fraud Task Force then became involved. Special Agent Jason Lanfersiek works for the United States Secret Service investigating financial crimes, including credit-card fraud. Detective Alex Iwaskewycz works for the Lauderhill Police Department. The Task Force decided to have Lanfersiek and Iwaskewycz investigate Austin and Spivey's suspected fraud.
>
> The district court found that Lanfersiek and Iwaskewycz went to the residence 'on the pretext of following up on two burglaries, which was a legitimate reason for being there, but not the main or real reason.'Iwaskewycz displayed a gun and a

badge. Lanfersiek wore a police jacket. Austin saw the agents approaching and went inside to warn Spivey and tell him to hide the card reader/writer in the oven. When the agents told Austin they were there to follow up on the burglary, Austin invited them in. The officers told Austin that Lanfersiek was a crime-scene technician for the police department, and Lanfersiek maintained the façade by pretending to brush for latent fingerprints. Austin led Lanfersiek and then Iwaskewycz through the house to the master bedroom, following the burglar's path. Spivey showed Iwaskewycz home-surveillance video of the burglary. A detective assigned to the burglary investigation later used that video evidence to help prosecute Hunt. Inside the home, both officers observed evidence of fraud, including a card-embossing machine, stacks of credit cards and gift cards, and large quantities of expensive merchandise such as designer shoes and iPads. Austin and Spivey separately told the officers that the embossing machine had been left in the apartment before they moved in. Iwaskewycz arrested Austin on an unrelated active warrant and removed her from the scene.

The officers then ended their ruse and told Spivey that they investigated credit-card fraud. Nevertheless, Spivey remained cooperative. After being advised of his rights, he signed two forms giving his consent to the officers to conduct a full search of the home and a search of his computer and cell phone. In that search, officers recovered high-end merchandise, drugs that field-tested positive as MDMA, a loaded handgun, an embossing machine, a card reader/writer (found inside the oven), and at least seventy-five counterfeit cards.

[In the District Court]

After a federal grand jury returned an indictment against them, Austin and Spivey moved to suppress all evidence procured as a result of the officers' 'entry into Austin's residence ... by fraud ... which vitiated any consent.' The district court denied the motion to suppress and rejected a 'bright line rule that any deception or ruse vitiates the voluntariness of a consent [ ] to search.'

* * *

Both Austin and Spivey conditionally pleaded guilty. Austin pleaded guilty to conspiracy to commit access-device fraud and possess device making-equipment, 18 U.S.C. § 1029(b)(2), and aggravated identity theft, *id.* § 1028A(a)(1). Spivey pleaded guilty to conspiracy to commit access device fraud and possess device-making equipment, *id.* § 1029(b)(2), aggravated identity theft, *id.* § 1028A(a)(1), and being a felon in possession of a firearm, *id.* § 922(g)(1). Both pleas reserved the right to appeal the denial of the motion to suppress. The district court sentenced Austin to thirty-six months in prison and three years of supervised release and Spivey to seventy months in prison and three years of supervised release.

[The Fourth Amendment]

The Fourth Amendment provides that '[t]he 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.'U.S. Const. Amend. IV. A search is reasonable and does not require a warrant if law enforcement obtains voluntary consent. The parties agree that Austin consented to the search, so the sole question on appeal is whether her consent was voluntary.

[Voluntariness]

'A consensual search is constitutional if it is voluntary; if it is the product of an "essentially free and unconstrained choice."' Voluntariness is 'not susceptible to neat talismanic definitions; rather, the inquiry must be conducted on a case-by-case analysis' that is based on 'the totality of the circumstances.'Relevant factors include the 'voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found.'

[Deceit as a Factor]

Deceit can also be relevant to voluntariness. Because we require 'that the consent was not a function of acquiescence to a claim of lawful authority,'… deception invalidates consent when police claim authority they lack. For example, when an officer falsely professes to have a warrant, the consent to search is invalid because the officer 'announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion.'And when an officer lies about the existence of exigent circumstances, he also suggests that the occupant has no right to resist and may face immediate danger if he tries. Deception is also likely problematic for consent if police make false promises.

[An Example of a Mispresentation]

In the tax context, we have ruled that when a taxpayer asked whether a 'special agent' was involved in the investigation and the Internal Revenue Service answered 'no,' consent was involuntary because it was induced by an official misrepresentation that suggested the investigation was only civil, not criminal.

[Permissible Deception]

The Fourth Amendment allows some police deception so long the suspect's 'will was [not] overborne.'Not all deception prevents an individual from making an 'essentially free and unconstrained choice.'For example, undercover operations do not invalidate consent. When an undercover agent asks to enter a home to buy drugs, the consent is voluntary despite the agent's misrepresentations about his

identity and motivation. 'If dissimulation so successful that the suspect does not know that he is talking to an agent is compatible with voluntariness, how could there be a rule that misdirection by a known agent always spoils consent?'

* * *

That 'fraud, deceit or trickery in obtaining access to incriminating evidence *can* make an otherwise lawful search unreasonable,'…does not mean that it *must.* Particularly because physical coercion by police is only one factor to be considered in the totality of the circumstances, …we should approach psychological coercion the same way. The district court correctly stated the law when it explained that deception does not always invalidate consent.

[The Defendant's Argument]

Austin and Spivey argue that the officers' deception was egregious because the purpose of the ruse was to mislead them into believing that the officers were there to '*assist* them,' not to '*bust* them.' They argue that a 'ruse' about whether Austin was the target of the investigation is worse than misrepresentations about whether an investigation is civil or criminal. We disagree.

[The Court's Response]

We cannot say that it was clear error for the district court to find that, although the burglary investigation was 'not the main or real reason' for the search, it was 'a legitimate reason for being there.'Iwaskewycz testified that it was a 'dual-purpose investigation.' And the district court found that 'the videotape was eventually used in the burglary investigations.' Austin argues that the stated purpose 'was nothing more than a "pretext"' because one agent had the 'exclusive purpose' and the other had the 'primary purpose''to investigate the report of a credit-card plant,' but even this argument concedes that at least one of the officers had a dual purpose. What matters is the existence of a legitimate reason to be there, not the priority that the officers gave that reason.

[The Subjective Intent of the Officers]

The subjective motivation of the officers is irrelevant. Consent is about what the suspect knows and does, not what the police intend. 'Coercion is determined from the perspective of the suspect.'Whether officers 'deliberately lied''does not matter' because the 'only relevant state of mind' for voluntariness 'is that of [the suspect] himself.'And officers are entitled to be silent about their motivations. The officers' subjective purpose in undertaking their investigation does not affect the voluntariness of Austin's consent.

[Pretext]

Pretext does not invalidate a search that is objectively reasonable.

* * *

As long as the officers are engaging in 'objectively justifiable behavior under the Fourth Amendment,' their subjective intentions will not undermine their authority to stop or search, or in this appeal, to ask for consent to search. Responding to a burglary report is objectively justifiable behavior, and we must ask only whether the officers prevented Austin from making a free and unconstrained choice.

[The Ruse]

Stripped of its subjective purposes, the officers' 'ruse' was a relatively minor deception that created little, if any, coercion. The officers admittedly misrepresented Agent Lanfersiek's identity, but there is no evidence that his exact position within the hierarchy of criminal law enforcement was material to Austin's consent.

* * *

Austin likewise knew that Agent Lanfersiek was involved in criminal investigations and was going to search her home. Austin understood that she faced a risk that Lanfersiek would notice evidence of the credit-card fraud when she consented to his presence in her home. His identity is material only to the subjective purpose of the investigation.

[The District Court Was Correct]

After it considered the totality of the circumstances, the district court correctly determined that Austin's consent was voluntary. The factors other than deceit all point in favor of voluntariness. Austin was not handcuffed or under arrest when she gave her consent.She invited the officers inside the home and volunteered video footage of the burglary. The encounter was polite and cooperative, and the officers used no signs of force, physical coercion, or threats. The officers did not inform Austin that she had the right to refuse consent, but they were not required to do so. And a warning is even less relevant in this context because it is easier to refuse consent when the police are offering to help than when they initiate an adversarial relationship. The district court found that the consent was 'intelligently given.' And 'significantly,'… Austin believed that no incriminating evidence would be found—or at least, nothing she and Spivey had not prepared to explain away.

[The Ruse Did Not Prevent a Voluntary Decision]

The 'ruse' did not prevent Austin from making a voluntary decision. Austin and Spivey informed the police of the burglaries and invited their interaction. The officers did not invent a false report of a burglary, nor claim any authority that they lacked. Agent Iwaskewycz testified that he and Lanfersiek never promised Austin that '[w]e're just here to investigate a burglary; anything else we see,

we're gonna ignore.' Austin knew that she was interacting with criminal investigators who had the authority to act upon evidence of illegal behavior. There is no evidence that Austin felt that she was required to help with the burglary investigation or that she needed to consent to avoid her inevitable prosecution. From Austin's perspective, her ability to consent to the search of an area where she knew there was evidence of illegal activity was not dependent on whether the officers provided no explanation or a partial explanation of their intentions. '[M]otivated solely by the desire' to retrieve her stolen property, Austin consented to the officers' entry and search 'at h[er] own peril.'

And perhaps most significant of all, Austin and Spivey engaged in intentional, strategic behavior, which strongly suggests voluntariness. Although Austin and Spivey were victims of one crime and suspects of another, the district court reasoned, '[t]hieves usually don't report that the property that they stole has been stolen.' The district court found that Austin and Spivey enlisted the officers' assistance to recover their property. Austin 'wanted to cooperate' because 'expensive shoes had been stolen,' and Spivey was 'willing to risk exposure to credit[-]card prosecution to get his property back.' Before allowing the officers into their home, they hid the most damning piece of evidence in the oven. And Austin and Spivey gave a rehearsed story to explain the device that remained visible. This prior planning proves that Austin and Spivey understood that asking for the officers' assistance came with the risk that their own crimes would be discovered. Austin's behavior does not evoke fear or good-faith reliance, but instead suggests that she sought to gain the benefit of police assistance without suffering potential costs. The more Austin behaved strategically, the more her behavior looked like a voluntary, rational gamble, and less like an unwitting, trusting beguilement. Although the plan to involve police to recover their stolen goods may not have been the best one, voluntariness does not require that criminals have perfect knowledge of every fact that might change their strategic calculus. Nor does it require that 'consent [be] in the[ir] best interest.'

[The Government Has Shown a Voluntary Waiver]

When we view the evidence in the light most favorable to the judgment, Austin's consent was not 'granted only in submission to a claim of lawful authority.'We agree with the district court that under the totality of the circumstances, 'the government has shown by clear and positive testimony that the consents were voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.'

[Conclusion]

Because the initial search was supported by Austin's voluntary consent, it did not violate the Fourth Amendment. And because the initial search was constitutional, we do not reach any question about Spivey's later consent and the fruit of the poisonous tree. We affirm the denial of the motion to suppress.

* * *

We affirm the judgments of conviction and the sentences of Austin and Spivey.

[My Thoughts]

- This case bears watching. Judge Martin filed a strong dissent that I did not have the space to discuss. There is always the possibility that this case could have *en banc* review.
- *Spivey* is a case that you might keep handy for the self-righteous client who confessed. It is a nice map that illustrates the boundaries of acceptable trickery and deceit.
- And, Austin and Spivey are now in first place for this year's Dumb and Dumber Award for reporting (twice) that someone had stolen the property that they had obtained by fraud!