FLORIDA CASE LAW UPDATE 18-03

Case: **Duke v. State, 43 FLW D2148d (Fla. 1st DCA)**

Date: **September 14, 2018**

Subject: **Police did not conduct an unlawful search of USB computer drives, where the content of the drives had already been viewed by a citizen without any prompting by the police, and the citizen had the apparent authority to grant consent for the officers to also view the content of the drives.**

FACTS: Duke reported that his car had been burglarized, resulting in the theft of cash, laptops, and other items, including several USB computer storage drives. However, the subsequent police report documenting the burglary did not include the USB drives in the list of property stolen. A few days later, an individual named Hampton was arrested on unrelated charges. After his arrest, he consented to a search of his home, and led officers to several USB drives he had hidden. He told the officers that the drives contained videos which appeared to depict illegal activity. Hampton, known to the police as a drug dealer, advised that he had received the drives from another person in exchange for drugs. The officers did not know that the drives were stolen. The officers placed one drive, which was not password protected, into a police computer, and viewed a video which appeared to show a sexual battery in progress. The officers did not view any other files, but instead turned everything over to a sex crimes detective, who questioned Hampton further. Hampton then provided written consent to search all of the USB drives. Law enforcement subsequently identified the man in the viewed video as Duke, and a warrant was issued for his arrest. When the warrant was executed, Duke, a convicted felon, was charged with possession of a firearm found in his vehicle. Duke filed a Motion to Suppress, arguing that the arrest warrant which led to the discovery of the firearm was only issued because of the unlawful search of his stolen USB drives. He argued that the viewing by law enforcement constituted an unlawful search under the Fourth Amendment because: he never abandoned the drives; he retained an expectation of privacy in the contents; he never consented to a search or authorized Hampton to do so; the officers should have known the drives were stolen; and Hampton had no authority to consent to the search. The trial court denied the Motion, finding that (1) it was Hampton, not the officers, who violated Duke's expectation of privacy in the drives, if any; and (2) that Duke had no expectation of privacy in the drives because they were not password protected. Duke was convicted of the firearms offense (related charges of sexual battery, kidnapping, and domestic battery were apparently dropped.) This appeal followed.

RULING: The First District Court of Appeal upheld the trial court, holding that (1) under the circumstances no Fourth Amendment search occurred, and (2) even if a search by the police had occurred, it was lawful because it was based on the consent of the person in possession of the drives who the officers reasonable believed had the apparent authority to grant consent.

DISCUSSION: The court begins its analysis by noting that under U. S. Supreme Court precedent, a Fourth Amendment search only occurs when a person's reasonable expectation of privacy is infringed by an agent of the government. The Fourth Amendment is "wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." Thus, "where a warrantless search by law enforcement is prompted by a prior search by a private party, the warrantless search does not violate the Fourth Amendment so long as it does not exceed the scope of the private party's search." *U. S. v. Jacobsen*, 466 U.S. 109 (1984). The court noted that in this case, the facts led to the reasonable conclusion that the one video viewed by the officers on scene was the same video already viewed by and described to them by Hampton, thereby establishing that their search did not exceed the scope of his. As such, under the *Jacobsen* definition, no Fourth Amendment search ever occurred. However, even it if had, the consent granted by Hampton would have been valid. According to the court, it is well-established law that valid consent is an exception to the search warrant requirement. *State v. Purifoy*, 740 So.2d 29 (Fla. 1st DCA 1999.) The fact that Hampton did not have *actual* authority from Duke, the owner of the drives, to give consent to search them is immaterial, as law enforcement may rely on the consent of a

person with *apparent* authority, so long as that reliance is reasonable under the circumstances. See *State v. Young*, 974 So.2d 601 (Fla. 1st DCA 2008), citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The court found the consent granted by Hampton in this case to be reasonable because the police did not know that the drives were stolen, or that Hampton was not in legal possession of them. The drives were hidden in his home, and he stated that he had bartered drugs for them, an activity which they knew he had a history of engaging in. Under these circumstances, it was reasonable for the officers to assume that the person who had traded the USB drives to Hampton was their actual owner, thereby making Hampton the current lawful owner. The fact that this did not turn out to be true does not affect the reasonableness of the officers' beliefs at that time. Similarly, under the same rationale, it was also reasonable for the detective to rely on Hampton's written consent when viewing the remaining files on the drives. Conviction affirmed.

COMMENTS: Note that the citizen-search exception only applies when the person who conducted the search does so without the knowledge, encouragement, or direction of law enforcement. The police cannot circumvent the Fourth Amendment by directing a citizen to do something, at law enforcement's behest, that they cannot do themselves.

ADDITIONAL NOTE: Since the appellate court based its decision on its holding that no Fourth Amendment search occurred, it did not discuss the trial court's other holding that Duke did not retain an expectation of privacy in the drives because he did not password protect them. It is my opinion that affirmance on that ground would have been more problematic.

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