

1966

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### Recommended Citation

William H. Ledbetter Jr., *Consent to a Search and Seizure by a Member of the Suspect's Family: A Survey of the Problems*, 2 U. Rich. L. Rev. 234 (1966).

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Consent to a Search and Seizure  
by a Member of the Suspect's Family

*A Survey of the Problems*

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Constitutional provisions, statutes and common law rules of criminal procedure, designed to protect an individual's privacy and security, require that most searches and seizures in the Anglo-American system of jurisprudence be conducted pursuant to a warrant. The Fourth Amendment of the Constitution of the United States, now applicable to the states, *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), explicitly limits searches and seizures and outlaws the broad, general warrants and writs of assistance of the eighteenth century.

This is not to say, however, that a properly-drawn search warrant is necessary in *every* case before officers can conduct a search.

Since the requirement of a valid warrant is for the individual's own protection, he can waive this requirement by an effective consent. White, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260 (1964). But, can someone else waive this requirement for him? This question provides the nucleus of this article, with emphasis on the cases in which a member of the suspect's family agrees to the search and seizure.

The courts have spun a web of protection around this concept of consensual waiver of the Fourth Amendment (and state constitutional) guarantees, closely scrutinizing each case in an effort to see that no one loses his fundamental rights without an intentional relinquish-

ment thereof. Especially is this true when someone other than the suspect himself has agreed to the search and seizure.

The courts, understandably, have been reluctant to allow another member of the family to waive a person's constitutional rights. The rationale behind this reluctance, however, is too often muddled by a confusion of two separate and distinct problems:

(1) *The problem of freely-given consent—i.e.*, whether the alleged permission was freely and voluntarily given so as to constitute consent.

(2) *The problem of capacity to consent—i.e.*, whether a member of the suspect's family can, in *any* case, make a waiver by consenting to a search and seizure.

This article deals with these two problems under separate headings in an effort to avoid the confusion in which the courts find themselves when they fail to make such a distinction.

## I. CONSENT—WAS IT FREELY GIVEN?

### A. General Consideration

It must be assumed at the outset, as a basis for this article, that the officers seeking to search the premises do not have a valid search warrant. Obviously, if the officers have a proper warrant, they do not have to obtain prior consent from anyone before they conduct a reasonable search and seizure. What constitutes a valid search warrant, and what can be seized pursuant to such a warrant, are problems beyond the scope of this article. It must further be assumed that the officers seeking to search the premises are not doing so incident to a valid arrest. If a valid arrest has been made, a reasonable search of the area can be made without a search warrant, without approval of the suspect or anyone else. KAUFER, *Constitutional Law* 936 (2d ed. 1960). Thus, it

must be supposed for this discussion of consent that the only way in which the search and seizure can be upheld is for the suspect to have effectively consented to it.

Although the federal courts have been conspicuous in their failure to explore this problem in detail, the Court of Appeals for the District of Columbia has laid down some general guidelines in *Judd v. United States*, 190 F. 2d 649 (D. C. Cir. 1951):

Such a waiver of consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. . . . The Government must show a consent that is unequivocal and specific . . . , freely and intelligently given. (190 F. 2d at 651).

The states are now required to measure up to these federal standards in applying the Fourth Amendment.

It has been suggested previously that the courts, both federal and state, are even more reluctant to find freely-given consent when members of the suspect's family attempt to waive the suspect's rights than when the suspect himself permits the search. This is particularly true where the wife has supposedly consented to a search of the premises. In fact, as is noted below, some courts have gone so far as to close the door on any searches conducted pursuant to permission given by the wife simply because, as these courts say, the very presence of officers intimidates the wife.

### B. The Cases

The first case in this field handed down the United States Supreme Court, and the one on which many courts have since relied, is *Amos v. United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1920). In *Amos*,

revenue officers went to the home of the defendant, were allowed to enter by the wife, and subsequently found incriminating evidence. The Court, in reversing the conviction, concluded that "it is perfectly clear" that "implied coercion" was, in fact, present. No authorities were cited on this point, and the whole matter was disposed of in summary fashion. Thus was born the phrase "implied coercion" which apparently means that the presence and demeanor of the law enforcement officers frightened and coerced the wife.

A raft of state court cases can be found citing, often without comment, *Amos* and its "implied coercion" doctrine, but no case has expanded the doctrine to the limits reached in *Byrd v. State*, 161 Tenn. 306, 30 S. W. 2d 273 (1930). The facts were similar to those in *Amos*, also involving an alleged violation of the revenue laws, but apparently the officers were more polite to Byrd's wife, who permitted them to enter. Despite the suaveness of the men in blue, the Tennessee court was not convinced; it struck down the conviction for these reasons:

While the sheriff apparently approached [the wife] more courteously [than did the officers in the *Amos* case], the essential elements of implied coercion appear to have been equally present. The phraseology differed, but the situation presented to the wife was substantially the same. . . . Duress is not less controlling because accomplished by polite means. Confronted at her door by three officers of the law seeking admission, we cannot avoid the conclusion that the record fails to show, as it should, that this ignorant woman [*quaere*: what does this mean?] acted freely and voluntarily. (30 S. W. 2d at 273).

The Kentucky court has also expanded the *Amos* rule. In *Duncan v. Commonwealth*, 198 Ky. 841, 250 S. W. 101

(1923), the facts again being similar to those in *Amos*, the court relied exclusively on *Amos* and held that "the wife, by reason of the coercive situation implied from the presence of the officers of the law," could not under the circumstances waive her husband's rights and effectively consent to the search for illicit liquor.

Many courts have not been persuaded by these decisions; they recognize the decisions for what they are: efforts to formulate a policy whereby wives cannot under any circumstances waive the suspect's constitutional guarantees. The majority of the courts which have seen fit to formulate such a policy have done so candidly, without using this idea of implied coercion as a front.

The better view concerning this idea of consensual waiver is stated by Varon, in his work on searches and seizures:

The mere fact that a police officer puts in an appearance . . . does not necessarily constitute coercion. It is the manner and method in which the police officer makes his wishes known, that would have a bearing upon the determination as to whether or not coercion was employed. I VARON, *Searches, Seizures, and Immunities* 446 (1961).

An oft-quoted decision which follows this view is *People v. Galle*, 153 Cal. App. 2d 88, 314 P. 2d 58 (1957). In that case, officers went to the defendant's house on a tip that the defendant possessed narcotics. Pursuant to the officer's request for admission, the mother of the defendant said, "Go right ahead." Marijuana was found in the defendant's coat. In upholding the conviction, the court acknowledged that while there is some reason for the argument that every request or demand by an officer for permission to search is to some extent coercive, "considered alone, it does not render the consent involuntary as having been obtained by coercion."

The only reported case in Virginia involving this matter of consent is the recent case of *Rees v. Commonwealth*, in which the defendant was convicted of murder. F.B.I. agents were given permission by the defendant's parents to search the home of the parents, and subsequently the agents found a gun which was introduced into evidence as the murder weapon. The defendant objected to the introduction of this evidence (1) on the ground that his parents could not waive his constitutional rights and allow the search (discussed *infra*), and (2) on the ground that, even if the parents could permit such a search, they were coerced in this case and thus the consent was ineffectual. The court concluded that the parents of the defendant had freely, voluntarily, and intelligently consented to the search and the subsequent seizure of the evidence. The court said that there was no coercion, actual or implied, and no trickery or fraud was involved. The conviction was upheld. *Rees v. Commonwealth*, 203 Va. 850, 127 S. E. 2d 406 (1962); cert. denied, *Rees v. Virginia*, 372 U. S. 964, 83 S. Ct. 1088, 10 L. Ed. 2d 128 (1963). In denying a writ of habeas corpus, the federal courts agreed with the Virginia court on this issue, as well as on the other issues raised. *Rees v. Peyton*, 225 F. Supp. 507 (E. D. Va. 1964); affirmed in 341 F. 2d 859 (4th Cir. 1965).

It seems to be the better view, and is that adopted by those courts which have given the problem due consideration, that unless there is actually some sort of coercion, such as brute force; subtle intimidations, *Elmore v. Commonwealth*, 282 Ky. 443, 138 S. W. 2d 956 (1940); threats, *Manning v. Commonwealth*, 328 S. W. 2d 421 (Ky. 1959); or trickery, *Gouled v. United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921), the court should find that the permission was freely and voluntarily given. The doctrine of implied coercion should not, it is submitted, be distorted in an effort to develop,

via the backdoor, a rule that wives, parents, and children can *never* consent to a search of the premises.

## II. CAN MEMBERS OF SUSPECT'S FAMILY GIVE EFFECTIVE CONSENT?

### Preface

Now the consideration shifts to the second problem: even if the permission was freely and intelligently given under the rules laid down in the first section of this article, can such permission *ever* be valid against a suspect when given by a member of his family?

This section is subdivided into discussions of consent of the parents, children, and spouses, respectively. Parents give the courts few perplexing moments because the parents of the suspect usually have a definite possessory and/or proprietary interest in the property which provides a logical basis for a valid consent; thus, a thread of rationale runs through the cases involving consent of parents. There are so few cases concerning consent of children that no general rule or rationale can be enunciated; therefore, a statement of the holdings of a handful of these cases is all that will be attempted. The discussion of consent of the spouse is reserved until last, because herein lie the enigmas and the irreconcilable views.

#### A. Consent of Parents

Few cases can be found which refute the general notion that parents of the suspect can validly consent to a search of the premises and a seizure of evidence. This notion is based on the fact that the parents invariably have a possessory or proprietary interest in the property; *i.e.*, they either own the property or have definite control and custody of the premises at the time of the search. Accepting the postulate that a possessory or proprietary interest may serve as a valid basis for consenting to a

search, some sort of rationale can be observed in most of the cases concerned with whether the parents can ever consent to a search of the premises.

When the suspect does not even live at the home of his parents, the courts are agreed that the parents can permit a search of the premises. This was the circumstance in *Rees*, the Virginia case in which the defendant had grown up in the parents' home but had moved away and was only visiting the home on occasions. The father signed a written permission to search, and the mother verbally assented. When the gun, suspected of being the murder weapon, was found in the house, the father allowed the F.B.I. agents to take the weapon. The Supreme Court of Appeals adopted the ably-written opinion of the trial judge, in which it was concluded that the parents of a defendant can effectively consent to a search of the household over which they have control.

A similar situation confronted a federal court in Pennsylvania in the case of *United States ex rel. Puntari v. Maroney*, 220 F. Supp. 801 (W. D. Pa. 1963). In denying a writ of habeas corpus the court said that "an accused cannot object to a search of another's premises if the latter consents." The parents owned the home; the defendant lived elsewhere and was only visiting the parents at the time that he committed the crime. The defendant's conviction of robbery had been upheld in *Commonwealth v. Puntari*, 198 Pa. Super. 70, 181 A. 2d 719 (1962), and an appeal from this decision had been dismissed in *Puntari v. Pennsylvania*, 372 U. S. 708, 83 S. Ct. 1021, 10 L. Ed. 2d 127 (1962).

A more difficult question is raised where the defendant lives with his parents on the premises searched, but the courts have generally found that here, too, the parent's consent is valid because of the possessory or proprietary interest of the parents. A recent well-reasoned case enunciating this rule is *Maxwell v. Stephens*,

229 F. Supp. 205 (E. D. Ark. 1964). The defendant had been convicted of rape and sentenced to death, and this had been affirmed in *Maxwell v. State*, 236 Ark. 694, 370 S. W. 2d 113 (1963). He then sought a writ of habeas corpus. The defendant shared a room with two brothers in the home of his parents. After he had been arrested, officers went to the home and were given permission to enter by the mother of the defendant. The father was at work. After concluding that the mother had given her permission freely and intelligently, the District Court held that such consent was a valid waiver of the defendant's constitutional right to a search warrant. The court pointed out that "the mother . . . had sole control, power and, at the time, the superior right to exclude others from not only her home but also from the very room which petitioner shared with his brothers." The denial of the writ was affirmed in 348 F. 2d 325 (8th Cir. 1965).

In *McCray v. State*, 236 Md. 9, 202 A. 2d 320 (1964), the defendant's father, who owned the home, invited the officers into the home, and into the room in which the defendant slept. Later, however, the father and mother refused to sign an authorization for the search. But the court still concluded that there had been a valid waiver of the defendant's rights to a search warrant, because the father had initially invited the officers into the house and had agreed to a search of the room which defendant occupied. See also: *Gray v. Commonwealth*, 198 Ky. 610, 249 S. W. 769 (1923) and *Tomlinson v. State*, 129 Fla. 658, 176 So. 543 (1937).

Distinguishable are the cases in which the parent is only a visitor in the suspect's home, or in which the suspect pays rent for the exclusive possession and occupation of a room in the parent's home. In these cases, the courts generally hold that the parent's consent is not an effective waiver of the suspect's constitutional guarantee against search and seizure without a warrant, be-

cause the parent had no interest in the property searched. See Annot., 31 A. L. R. 2d 1078 (1953).

### B. Consent of Children

Since there are few cases involving consent of children of the suspect, there can be found no general rule or rationale, and it is almost impossible to say how the courts will deal with the problems involved. It is difficult to see how a young child could "freely and intelligently" consent to a search of the premises under any circumstances. Therefore, the court probably would strike down such permission on the grounds that the child was simply incapable of understanding the significance of his act. If the child were older and more responsible, a more difficult problem would face the court, but it seems likely that most courts would refuse to recognize such invitation to the premises as an effective consent.

In *United States v. Linderman*, 32 F. Supp. 123 (E.D.N.Y. 1940), the court said that the child's invitation to the officers to enter the house did not "rise to the dignity of a consent"; rather, the court termed it a "submission." (But the evidence was held to be correctly admitted in this case because the search was conducted by state officers—*Mapp v. Ohio* had not yet been decided.) The child's age was not disclosed in the opinion.

In *People v. Jennings*, 142 Cal. App. 2d 160, 298 P. 2d 56 (1956), officers questioned two teen-age daughters of the defendant for two hours during the middle of the night. Then, the oldest daughter accompanied the officers on a search of the basement, where incriminating evidence was discovered. The court held that there was no evidence that the girls had consented to the search and that, even if they had been asked to consent, it

would be idle to suppose that they would have objected.

A recent case which has been cited as authority for the proposition that a child can waive the suspect's constitutional guarantees is *Davis v. United States*, 327 F. 2d 301 (9th Cir. 1964). But the case does not stand for that proposition. In *Davis*, officers went to the suspect's house to talk to him about his alleged possession of marijuana. The officers had no intention of searching the premises or of arresting the suspect when they entered the house with the permission of an eight-year-old daughter of the suspect. But once in the living room, the officers saw marijuana and arrested the suspect. The court upheld the conviction of the child's father, and held that the child had not consented to a search and seizure but had only invited the officers into the house to talk with her father. "When the one who opens the door says, 'Come in,'" the court said, "neither the time, nor the officers' intent, nor the total circumstances, nor the Fourth Amendment demands that they remain outside." (327 F. 2d at 305).

### C. Consent of Spouse

The largest number of cases concerning third-party consent involves wives who, in the absence of their husbands, permit officers to enter and search the premises. Since most courts are reluctant to permit such a waiver, they are especially prone in their zeal to reverse convictions in these cases to confuse the problem involving freely-given consent with the separate and distinct problem of the spouse's capacity, under any circumstances, to give effective consent. Several cases illustrate the way in which some courts have misinterpreted and misapplied *Amos*, the Supreme Court decision which held that the wife did not give an effective consent to a search of the premises because of the "implied coercion" of the officers. As stated above, the Court express-

ly said that it was not deciding in *Amos* whether a wife could effectively consent to such a search in other circumstances. But ten years after *Amos*, in *Cofer v. United States*, 37 F. 2d 677 (5th Cir. 1930), a federal court held that the wife could not bind the husband with her consent to a search of his premises. The court relied on *Amos* to support this broad statement, although *Amos* clearly does not stand for that proposition. But there was an additional factor in *Cofer* which justified a reversal of the conviction: the officers had used an invalid search warrant when they approached the wife with a request to search the house. Certainly the wife's acquiescence to a search which she thought was pursuant to a search warrant was not an effective consent. The court did not need to over-extend the doctrine of *Amos* to reach this result.

Similarly, in *Simmons v. State*, 94 Okla. Cr. 18, 229 P. 2d 615 (1951), the court used *Amos* to support its view that neither husband nor wife can waive the other's Fourth Amendment guarantee.

A 1938 Illinois case provides the final illustration of the confusion of the problem of freely-given consent with the problem involving the spouse's capacity to consent. In *People v. Lind*, 370 Ill. 131, 18 N. E. 2d 189 (1938), the court began its opinion apparently intending to discuss whether or not the wife had given her consent freely and intelligently. But before concluding that the case was "tinged with official coercion" and thus following *Amos*, the court rambled for several paragraphs, discussing the views supported by many decisions that a wife can *never* consent to a search of her husband's property. To accept, literally, all that the court said in *Lind*, one would readily conclude that Illinois prohibits any consensual waiver by the wife, no matter how freely given. A recent Illinois case shows that many of the broad declarations of *Lind* had nothing to do with the

true holding in that case. In *People v. Harvey*, 48 Ill. App. 2d 261, 199 N. E. 2d 236 (1964), the wife gave a written authorization to the officers to search the premises. The court held, without any reference to *Lind*, that this was definitely a case of freely-given consent, and thus served as an effective waiver of the husband's Fourth Amendment rights. The court said that where two persons have equal rights to the use or occupancy of the premises, either can consent to a search thereof.

There is a brighter side however. Many of the courts distinguish the problem of freely-given consent from that of the spouse's ability to waive the suspect's rights to a search warrant, and dispose of the two problems separately. In a recent case of first impression which involved Virginia law enforcement officers, the North Carolina court treated the problem ably. In *State v. Hall*, 264 N. C. 559, 142 S. E. 2d 177 (1965), officers of North Carolina and Virginia searched the defendant's home in Norfolk after identifying themselves to the defendant's wife and gaining her permission to search the premises. The husband had been incarcerated in the Norfolk jail. Incriminating evidence was found which led to the defendant's conviction of larceny in North Carolina. The court first disposed of the question of voluntary consent. The court said that it was not convinced that the wife was at liberty to object to the search. This was because of the number of policemen which confronted the wife and the fact that she knew that her husband was already in the local jail. The court made reference to *Amos*, which was relevant to the issue being discussed. Then, the court moved on to discuss another question. If she had voluntarily consented, could the wife effectively waive her husband's rights to a search warrant? The court answered this question in the negative, adopting the view that the wife can never consent to a search of the husband's dwelling.

The majority of well-reasoned cases, like *Hall*, reach the same conclusion as the poorly-analyzed opinions, and hold that the wife cannot under any circumstances waive her husband's constitutional rights (unless, of course, he has given her express authority to do so). 47 Am. Jur. *Search and Seizure* §72 (1943).

The Arizona court followed the majority without reservation in *State v. Pina*, 94 Ariz. 243, 383 P. 2d 167 (1963), when it stated, "A third person cannot waive another's basic constitutional rights against unlawful search and seizure unless specifically authorized." This emphatic statement seems to preclude the argument, used in some cases, that the wife may have been given "implied authority" to supervise the premises, and thus to consent to a search, when the husband is away from the house. In an oft-cited Indiana case, the court held that the wife could not consent to the search and seizure of the automobile which was used exclusively by the husband, although the certificate of ownership was in the wife's name. *Dalton v. State*, 230 Ind. 626, 105 N. E. 2d 509, 31 A. L. R. 2d 1071 (1952). The court said that the husband had not given the wife authority, express or implied, to consent to a search of the property over which he had control.

Varon contends that the courts adhering to the majority view base their decisions upon the idea that the husband is head of the household, and cannot be said to have given the wife implied authority to consent to a search thereof. I VARON, *Searches, Seizures, and Immunities* 433 (1961).

Thus, the cases representing the majority view that the wife cannot consent to a search of the premises, are in keeping with the current trend toward expanding the individual's guarantees under the Bill of Rights. As long as the courts do not confound the two problems

discussed in this article, as did some in the illustrations noted above, this view rests on persuasive logic.

But the minority view, too, is supported by sound principles. The California court has best explained this view. In *People v. Carter*, 48 Cal. 2d 737, 312 P. 2d 665 (1957), the court held that the wife could effectively consent to a search of the premises if such consent were voluntarily given. Justice Traynor said:

The problem calls for a determination of whether the wife's relation to her husband and his property is such that there is no invasion of his privacy if she consents.

When the husband is absent from the home, it is the wife who controls the premises, the ordinary household property, the family automobile, and with her husband's tacit consent determines who shall and who shall not enter the house on business or pleasure and what property they may take away. When the usual amicable relations exist between the husband and wife, and the property seized is of a kind over which the wife normally exercises as much control as the husband, it is reasonable to conclude that she is in a position to consent to a search and seizure in their home. (312 P. 2d at 670).

One authority who disagrees with this line of reasoning and would prefer the result reached in *Pina* and *Dalton*, nevertheless acknowledges the good logic behind the position taken by the minority:

It is the factor of joint ownership and control over the premises subject to the search that binds the husband in those jurisdictions validating the wife's consent *i.e.*, the wife is consenting not as an agent but as an occupant entitled to equal control of the premises. Belefonte, *The Effect of the Wife's Con-*

*sent to a Search and Seizure of the Husband's Property*, 69 DICK L. REV. 69, 74 (1964).

The Hawaii court, in *State v. Evans*, 45 Hawaii 622, 372 P. 2d 365 (1962), apparently accepted the minority view that the wife can consent to a search of premises, but held that under the circumstances of that case, the wife did not have "joint ownership and control over the premises subject to the search." The officers found stolen jewelry in the husband's cuff link box. Since the minority view is based on the idea of joint ownership and control, *Evans* reached a sound result in standing for the proposition that exclusively-private parts of the home, such as cuff link boxes, desk drawers, etc., are out of reach of the other spouse and thus immune from a search conducted with the consent of the other spouse.

It is submitted that those courts which have relied on *Amos* to support their declarations that the spouse can never consent to a search have confused the problems unnecessarily to bolster their efforts to invalidate all consensual waivers attempted by the wife of the suspect. These courts may not have reached the wrong results, but they have used faulty reasoning, failed to recognize the problem, and evidenced a less-than-intensive study of this area of the law.

As for those courts which have separated the two problems as this article has attempted to do, there are still two clearly defined views on whether the wife should be allowed to give consent, but at least the courts have a clear understanding of the perplexities involved, and base their holdings on logical reasoning and careful thought.

### III. SUMMARY AND CONCLUSION

The purpose of this article is to survey the problems

involved when a member of the suspect's family consents to a search of the premises without the suspect's express authorization. There are two looming problems, and, at the risk of tedium, they are restated:

(1) The problem of freely-given consent.

(2) The problem of capacity of a particular person to consent for another.

I. The first problem dealt with the question of what constitutes consent, and with the standards which the courts have laid down to safeguard the idea of consensual waiver as it applies to situations when one other than the suspect is making the waiver. In analyzing any case in this field of the law, if the analyst finds that the permission was not given voluntarily and intelligently, under the rules discussed in §I of this article, there is no need to proceed with the inquiry as the search and seizure is invalid.

II. The second section discussed each member of the family who may attempt to consent to a search of the premises and that person's capacity to make an effective waiver of the suspect's right to a warrant, assuming throughout the discussion that the standards discussed under Problem No. 1 had been met so that the attempted consent was given freely.

A. Parents do not give much trouble to the courts because they usually have a definite possessory or proprietary interest in the premises. This provides a logical, and legally-acceptable, basis for consent.

B. Children have thus far caused relatively little confusion because of the paucity of cases on the point. It is apparent that a small child could not measure up to the standards required under the first problem. Although older and more responsible children could "freely and intelligently" permit a search, it is doubtful that the courts would permit the consent to be effectual because of policy reasons.

C. As for wives . . .

(1) The majority of courts says that the wife cannot consent to a search of the premises, based on the notion that the husband is head of the household and has given her no implied authority to permit such searches and seizures. However, many of these courts, in their zeal to reach this result, misapply cases, make unnecessarily broad declarations, and/or fail to research the issues efficiently, thereby confusing the two problems dealt with in this article.

(2) The minority says that she can consent, and bases its decisions on the proposition that joint occupancy permits either occupant to consent to a search.

