

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2008

5 (Argued: October 17, 2008 Decided: November 13, 2008)

6
7 Docket No. 08-1269-cr

8 -----X
9 UNITED STATES OF AMERICA,

10
11 Appellee,

12
13 - v. -

14
15 ALBERT LOPEZ,

16
17 Defendant-Appellant.

18 -----X
19 Before: McLAUGHLIN, LEVAL, and POOLER, Circuit Judges.

20 Appeal from a judgment of the United States District Court
21 for the District of Connecticut (Underhill, J.), convicting
22 defendant, after a guilty plea, of possession of a firearm by a
23 convicted felon.

24 AFFIRMED.

25 JAMES R. SMART, Assistant United
26 States Attorney, for Nora R.
27 Dannehy, United States Attorney for
28 the District of Connecticut,
29 Bridgeport, Connecticut (Sandra S.
30 Glover, on the brief), for
31 Appellee.

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33 CHARLES F. WILLSON, Nevins & Nevins
34 LLP, East Hartford, Connecticut,
35 for Defendant-Appellant.

1 McLAUGHLIN, Circuit Judge:

2 Albert Lopez appeals from a judgment of conviction entered
3 on March 5, 2008. He had pled guilty in the United States
4 District Court for the District of Connecticut (Underhill, J.) to
5 one count of possession of a firearm by a convicted felon. He
6 was sentenced principally to 47 months' imprisonment.

7 On appeal, Lopez contests the denial of his pretrial motion
8 to suppress a firearm seized during a search by United States
9 marshals. His live-in girlfriend had consented to the search.
10 He contends that her consent was ineffective as to him because he
11 was present in the house and the marshals did not request his
12 consent.

13 We agree with the district court that the marshals had no
14 obligation to get Lopez's consent. Accordingly, we affirm.

15 **BACKGROUND**

16 In July 2006, Albert Lopez, a convicted felon, violated the
17 terms of his supervised release by failing a drug test.

18 In October 2006, U.S. marshals arrested Lopez on the first
19 floor of his house pursuant to an arrest warrant. Having
20 handcuffed Lopez, who was wearing only shorts, one of the
21 marshals then escorted Lopez's girlfriend to their second-floor

1 bedroom to get clothes for Lopez. Lopez did not object to this
2 procedure.

3 In the bedroom, the marshal saw narcotics and drug
4 paraphernalia on the night stand. He got consent from Lopez's
5 girlfriend to search the bedroom, and he summoned another marshal
6 upstairs to witness the consent and to assist with the search.
7 The marshals never asked Lopez, who remained downstairs during
8 the search, for consent to search the bedroom. A loaded .357
9 handgun was found under a pillow on the bed.

10 In March 2007, Lopez was indicted for possession of a
11 firearm by a convicted felon in violation of 18 U.S.C. §§
12 922(g)(1) and 924(a)(2) and for possession of a firearm by an
13 unlawful user of a controlled substance in violation of 18 U.S.C.
14 §§ 922(g)(3) and 924(a)(2).

15 Lopez moved to suppress the gun, arguing that,
16 notwithstanding the consent of the girlfriend, the search of the
17 bedroom was unreasonable because he did not consent to it. After
18 a hearing, the district court denied the motion to suppress,
19 finding that the consent of Lopez's girlfriend was sufficient to
20 justify the search in light of Lopez's failure to object.

21 Reserving the right to appeal the denial of his motion to
22 suppress, Lopez pled guilty to possession of a firearm by a
23 convicted felon.

1 23. In so holding, the Supreme Court carefully distinguished and
2 preserved its earlier holdings in United States v. Matlock, 415
3 U.S. 164 (1974), and Rodriguez, two prior cases where the Court
4 upheld searches conducted with the consent of the defendant's co-
5 occupant. See Randolph, 547 U.S. at 121-22.

6 In Matlock, the defendant was arrested in his front yard and
7 was moved to a nearby squad car while police officers obtained
8 consent to search his residence from a woman with whom he lived.
9 415 U.S. at 166. In Rodriguez, the defendant was asleep inside
10 the residence, and the officers obtained consent from his
11 girlfriend, whom the police reasonably believed also lived at the
12 premises. 497 U.S. at 180. In both cases, law enforcement
13 officers did not give the defendants an opportunity to object to
14 the searches.

15 To reconcile its holding in Randolph with Matlock and
16 Rodriguez, the Supreme Court "dr[ew] a fine line," reasoning as
17 follows. If one co-occupant of a premises consents to search
18 while the other objects, the search would be unreasonable as to
19 the co-occupant who objected. On the other hand, having obtained
20 the consent of one co-occupant, the officers are under no
21 obligation to inquire of the other occupant whether he consents,

from a third party." Id. at 481. It is certainly questionable
whether that proposition is valid after Randolph.

1 even when the other occupant is present at the premises when the
2 consent is given. Randolph, 547 U.S. at 121-22. This rule is
3 subject to a limitation: the police must not have removed the
4 occupant for the purpose of avoiding a possible objection. Id.
5 at 122.

6 Randolph also added in dictum that law enforcement officers
7 need not "take affirmative steps to find a potentially objecting
8 co-tenant before acting on the permission they had already
9 received" from another tenant. Id. According to the Court,
10 requiring police to seek consent from potential objectors would
11 "needlessly limit the capacity of police to respond to ostensibly
12 legitimate opportunities in the field" and turn every co-tenant
13 case "into a test about the adequacy of the police's efforts to
14 consult with a potential objector." Id.

15 Applying these standards, we find that the search of Lopez's
16 bedroom was reasonable. Lopez concedes that his live-in
17 girlfriend voluntarily consented to the search of their bedroom
18 and that Lopez did not object to the search. In addition, there
19 is no indication that the marshals removed Lopez for the purpose
20 of avoiding his potential objection. See id. at 121. To the
21 contrary, the evidence shows that, after being arrested, Lopez
22 remained inside the house during the entire search. Nor is there
23 any contention that the officers separated Lopez from his

1 girlfriend in order to conceal from him that they would ask her
2 for consent.

3 The fact that the marshals did not ask Lopez for his consent
4 does not render the search unreasonable. Randolph indicates that
5 law enforcement officers are under no affirmative obligation to
6 request consent from a potentially objecting co-occupant before
7 acting on permission they received from another occupant. Id. at
8 122. As the Supreme Court noted, a contrary rule would prove
9 needlessly time-consuming and impractical. See id.

10 Lopez maintains that the rule we now adopt does not apply
11 here because the marshals were not required to "find" Lopez to
12 obtain his consent. Rather, the marshals could have asked him
13 for permission merely by calling down the stairs or contacting
14 their colleagues downstairs by radio. We reject this argument.
15 The Supreme Court upheld the searches in Matlock and Rodriguez
16 notwithstanding that the potentially objecting co-occupants were
17 readily accessible to law enforcement officers. The Matlock
18 defendant was in a squad car near the residence, 415 U.S. at 166,
19 and the Rodriguez defendant was asleep in another room, 497 U.S.
20 at 180. Randolph specifically confirmed that these cases remain
21 sound law. See Randolph, 547 U.S. at 121. Thus, the ease with
22 which law enforcement officers might seek the defendant's
23 permission to search when a co-occupant has already consented is

1 simply irrelevant. Accordingly, Lopez's contention that he was
2 far more accessible to the law enforcement officers than were the
3 Matlock and Rodriguez defendants is unavailing.

4 In short, we hold that the marshals had no duty to ask Lopez
5 whether he consented to the search, no matter how easy or
6 convenient it might have been to do so. Rather, the onus was on
7 Lopez to object to the search. Because he did not object, his
8 girlfriend's consent was valid, and the search was reasonable.

9 The district court did not err in denying Lopez's motion to
10 suppress.

11 **CONCLUSION**

12 For the foregoing reasons, we AFFIRM the judgment of the
13 district court.