[J-263-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 53 W.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court of Pennsylvania entered on
	:	December 8, 1997 at No. 61PGH97,
v.	:	affirming the Judgment of Sentence
	:	entered on December 30, 1996 in the
	:	Court of Common Pleas of Beaver
JOSEPH M. CLECKLEY, JR.,	:	County, Criminal Division, at No. 552 of
	:	1996.
Appellant	:	
	:	
	:	SUBMITTED: December 8, 1998

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: AUGUST 23, 1999**

I respectfully dissent from the majority opinion since I believe that when police seek consent to perform an otherwise unconstitutional search, they should be required under Article I, Section 8 of the Pennsylvania Constitution to expressly advise the subject of the search that he or she has the right to refuse to give consent and that any refusal will be respected.

As Appellant argues, a consent to search is, in reality, a waiver of one's rights under Article I, Section 8.[1] Consequently, for such a waiver to be valid, the Commonwealth should be required to demonstrate an "intentional relinquishment or abandonment of a

[1] Article I, Section 8 "relates to freedom from unreasonable searches and seizures," and "is meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries." Commonwealth v. Edmunds, 586 A.2d 887, 896-97 (Pa. 1991).

known right or privilege," as it must for waivers of other constitutional rights. See, e.g., Commonwealth v. Garrett, 266 A.2d 82, 83 (Pa. 1970); Commonwealth v. Norman, 285 A.2d 523, 526 (Pa. 1971); Commonwealth v. Vega, 719 A.2d 227, 230 (Pa. 1998). As this Court has stated,

> Regarding any rights guaranteed by either the United States Constitution or the Pennsylvania Constitution, for a waiver of those rights to be valid, the Commonwealth must prove by a preponderance of the evidence that the alleged waiver was intelligently made. Before finding a valid waiver, we must be convinced that an accused knows the nature of the constitutional rights involved.

Commonwealth v. Coleman, 383 A.2d 1268, 1271 (Pa. 1978) (citations omitted).

The majority finds, however, that this analysis is inapplicable to one's waiver of his right under Article I, Section 8 to be free from unreasonable searches and seizures. Relying on Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the majority concludes that a person's consent to search, so long as it is given "voluntarily," is valid under our state constitution even when the subject of the search is unaware that he has every right to refuse to consent to an otherwise illegal search. Schneckloth, however, was based on the Fourth Amendment. Given this Court's consistent determination that Article I, Section 8 affords broader privacy rights than those provided by the Fourth Amendment, I wholeheartedly disagree with the majority that our state constitution sanctions a person's relinquishment of the right to refuse consent when he has no knowledge of such a right's existence. In my view, both our state constitution and common sense require that a person be aware of his rights before any waiver to those rights is constitutionally validated. See Commonwealth v. Gibson, 638 A.2d 203, 207 (Pa. 1994) ("the subject of the search must be made aware of his rights against a warrantless search for a waiver to be intelligent").[2]

[2] Although I agree with the majority that the facts of Gibson are distinguishable from those presented by the instant case, I disagree with its conclusion that Appellant is precluded from relying on Gibson to support his argument because he takes the above-quoted language "out of context." (continued…)

By holding that Appellant's consent in the instant case was valid merely because "there is no evidence that the officer exerted any pressure upon Appellant to submit to the search or exerted any force," the majority, I fear, ignores the practical impact that a police officer's request for consent to search has on the average citizen. As stated by the New Jersey Supreme Court in State v. Johnson,

> …where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent. Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. One cannot be held to have waived a right if he was unaware of its existence.

Johnson, 346 A.2d 66, 68 (N.J. 1975) (emphasis added); see also Schneckloth, 412 U.S. at 288 (J. Marshall, dissenting) ("under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law"). If a person believes he has no choice but to consent upon an officer's request, then that person's consent cannot be said to have been given voluntarily, much less knowingly and intelligently. The safeguard advocated by Appellant -- a simple statement by the police that the subject of the search has the lawful right to withhold consent to search -- would serve to protect not only those who are unaware of their rights, but also those who, although perhaps aware of their rights, become too intimidated to refuse what can readily be perceived as an official demand.

(…continued)
Gibson clearly cites this proposition as a generally accepted principle of law. And while Gibson does cite a pre-Schneckloth case in support of its proposition that the subject must be informed of his rights against a warrantless search before any waiver to those rights will be deemed valid, Gibson was decided over twenty years *after* Schneckloth and retains precedential value in this Commonwealth.

Unlike the majority, I can see no prejudice that would be born to the Commonwealth if police were required to ensure that the person to be searched was informed of his right to withhold consent. If the Commonwealth fears that informing persons of their rights before asking them to waive those rights would hamper its ability to search for and obtain evidence, it must be remembered that police always retain the ability to seek a search warrant in their efforts to obtain evidence. There is, however,

> . . . little reason to believe, as the Schneckloth Court apparently did, that the requirement of informed consent would reduce the number of consent searches obtained by the police. It has not occurred with the Fifth Amendment waiver even in the wake of Miranda, and there is no reason to expect it will occur in the face of the requirement to inform of the right to refuse a consent to search. Many cases hinge on confessions, despite the Miranda warning requirement. Although somewhat different considerations are often present in a confession situation, such as the prior arrest of the defendant, and thus more than mere suspicion exists at that point, there is little cause to believe that warnings of the right to refuse to consent to search will, in any great degree, cause a vast reduction in the number of consent searches.

Appellant's Brief at 28 (quoting McGlaughlin, David, "Consent Searches and Knowledge of the Right to Refuse," 12 Search and Seizure Law Report 1:93, 99 (January 1985)).

Since I believe Pennsylvania citizens are entitled under Article I, Section 8 to be informed of their constitutional rights before any waiver to those rights will be deemed valid, including their right to refuse consent to an otherwise unconstitutional search, I must respectfully dissent.