

**[J-93-2002]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 15 MAP 2002
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered June 22, 2001 at No. 1913
	:	MDA 2000 which Affirmed the Judgment
v.	:	of Sentence of Centre County Court of
	:	Common Pleas, Criminal Division entered
	:	May 16, 2000 at No. 1999-1397
	:	
JAMES L. GILLESPIE,	:	
	:	
Appellant	:	ARGUED: May 16, 2002

**CONCURRING AND DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**Decided: April 25, 2003**

I join the majority opinion's analysis and disposition on the issue involving the definition of a firearm under Section 6105(i) of the Crimes Code, 18 Pa.C.S. §6105(i). Concerning the assessment of the factors bearing upon the voluntariness of Appellant's consent to search, however, I do not believe that the majority affords sufficient weight to the coercive circumstances.

In this regard, I depart from the view that the presence of police and legitimate police activity, specifically, securing the premises and placing Appellant in custody, do not implicate a coercive dynamic. Indeed, the Court has acknowledged that there is an element of coercion that exists in non-custodial interactions between law enforcement

officers and citizens. See Commonwealth v. Strickler, 563 Pa. 47, 73, 757 A.2d 884, 898 (2000) (citing Commonwealth v. Jones, 474 Pa. 364, 371-72, 378 A.2d 835, 839 (1977)). Such element is enhanced when coupled with custody. See id.; see also Commonwealth v. Smith, 470 Pa. 220, 228, 368 A.2d 272, 277 (1977) (recognizing that "[c]ustody, while not determinative in itself, places a heavy burden in showing consent was voluntarily given" and noting that "custody when coupled with other coercive factors[,] will normally necessitate the conclusion that the consent is not effective"). Of additional significance, in this case, the police stated that they were going to obtain the search warrant and ordered everyone to leave the residence. While these circumstances do not necessarily render Appellant's consent involuntary,<sup>1</sup> in my view, when coupled with custody, they should be accorded significance within the totality assessment.

At the same time, as the majority notes, there exist certain non-coercive circumstances, such as, the fact that the interaction with police occurred in Appellant's home, that he was aware of his right to refuse consent and, indeed, initially exercised such right. In addition, I would also distinguish the detention of Appellant in this case from those instances where the consent to search follows custody occurring in connection with a traffic stop, see, e.g., Commonwealth v. Freeman, 563 Pa. 82, 757 A.2d 903 (2000), or in the context of narcotics interdiction at an airport, see, e.g., Commonwealth v. Mack, 568 Pa. 329, 796 A.2d 967 (2002) (plurality opinion). Here, the detention would not have occurred but for Appellant's belligerent behavior. Nevertheless, on this record, I cannot conclude that the consent resulted from an essentially free and unconstrained choice, as opposed to duress or coercion, express or implied, see Strickler, 563 Pa. at 79, 757 A.2d at 901; rather, Appellant's response to the threat to obtain a warrant, which he uttered while pinned

---

<sup>1</sup> See generally 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, §8.2(c), at 651-54 nn.74-88 (collecting cases and explaining that a threat to obtain a search warrant is not per se coercive).

against a couch with his arms handcuffed behind his back, more closely resembles acquiescence or submission.

Mr. Chief Justice Cappy joins this concurring and dissenting opinion.