PRIVATE SEARCHES AND A FRUSTRATED EXPECTATION OF PRIVACY

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On October 20, 2016, the Court of Appeals of Georgia decided *DeGeorgis v. State*[i], in which the court examined the issue of whether a police officer violated the Fourth Amendment when he searched a computer without a warrant. The relevant facts of *DeGeorgis*, taken directly from the case, are as follows:

> [I]n August 2012, DeGeorgis's estranged wife brought a computer tower to the Holly Springs Police Department and expressed concern that she had discovered child pornography on its hard drive. Upon speaking to a police lieutenant, DeGeorgis's wife explained that she had recently moved out of her and DeGeorgis's marital home, but returned when she knew that DeGeorgis was absent in order to retrieve computer equipment used by DeGeorgis which she knew to contain sexually explicit pictures of herself. While later viewing images on the hard drive of one of the computer towers, she discovered what she believed to be child pornography and brought the tower to the police station. She requested that the lieutenant look at the computer's contents to confirm whether it contained unlawful material.
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> The lieutenant agreed to do so and after viewing some of the images, he also came to suspect that the computer contained child pornography. He thereafter took possession of the computer tower at issue, as well as a second computer tower and two external hard drives that DeGeorgis's wife had also retrieved from the residence. The lieutenant obtained search warrants for each piece of equipment and requested that a forensic study of their contents be conducted.
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> At the same time that the lieutenant was in the process of obtaining the search warrants and releasing the towers and drives for forensic analysis, DeGeorgis filed a police report at the same police station in reference to the missing items. The lieutenant arranged to meet an unsuspecting DeGeorgis at his home the following day. Upon arrival, the lieutenant presented DeGeorgis with a search warrant for the residence, and he and a

second officer proceeded to conduct the search while two additional officers remained outside for security.

The search focused primarily on an area of the garage that DeGeorgis had converted into a "man cave," and in which he spent the vast majority of his time. The area contained a myriad of locked boxes, drawers, and compartments. When asked, DeGeorgis informed the lieutenant that one of the locked cabinets contained a metal key box holding color-coded keys to each of the remaining locked containers, and he provided the lieutenant with a key to the cabinet. In one locked drawer, the lieutenant found numerous ziplock baggies containing womens' undergarments, each individually labeled with a female's name and a date. After being questioned about the items, DeGeorgis admitted that they were "in his possession." The remaining locked containers contained a pornography collection so extensive that, once seized, it took law enforcement officers working in shifts almost two months to sift through its contents and to separate out the 28 printed images depicting child pornography that were ultimately tendered at trial.

A forensic study of the computer towers and of one of the external hard drives also revealed an immense collection of "bizarre" pornography, including 127 electronic images flagged by the forensic examiner as depicting naked pictures of underage minors.

DeGeorgis was charged with and convicted of two counts of sexual exploitation of children in violation of OCGA § 16-12-100 (b) (8).[ii]

DeGeorgis filed a motion to suppress the evidence obtained as a result of the initial warrantless search of his computer. The trial court denied the motion and the case went to trial. He was convicted, and he filed a motion for a new trial, which the trial court denied. He then appealed to the Court of Appeals of Georgia.

On appeal, DeGeorgis first argued that the trial court erred in denying his motion to suppress for the initial warrantless search of his computer. Specifically, he argued that since he and his wife were separated and she reentered the marital residence without his permission to take and view the computers, her consent to the lieutenant to search the computer tower was invalid and a violation of the Fourth Amendment. Additionally, he argued that since initial warrantless search led to the search warrant and that search warrant led to the discovery of other evidence, the evidence obtained from the search warrant should be suppressed as “fruit of the poisonous tree.”

The court of appeals first looked at the legal principles that control the issue of whether that first warrantless search which based on DeGeorgis’ estranged wife’s consent, was a violation of DeGeorgis’ Fourth Amendment rights.

The court stated

> **It is well established, however, "that no illegal search and seizure occurs when a private citizen independently discovers contraband or other evidence of illegal conduct and then brings it to the attention of law enforcement**." *Johnson v. State*, 231 Ga. App. 823, 825 (3) (499 SE2d 145) (1998); see *U. S. v. Jacobsen*, 466 U. S. 109, 113 (I) (104 SCt 1652, 80 LEd2d 85 (1984). **Indeed, "[t]he protection afforded by the**

> **Fourth Amendment proscribes only governmental action and 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 of a government official**." (Citation, punctuation, and footnote omitted.) *Hitchcock v*. *State*, 291 Ga. App. 455, 457 (2) (662 SE2d 155) (2008); see *Jacobsen*, 466 U. S. at 113 (1). **In this context, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.**" *Jacobsen*, 466 U. S. at 117 (I); see *Hobbs v*. *State*, 272 Ga. App. 148, 150 (1) (611 SE2d 775) (2005) ("**No Fourth Amendment violation exists when an individual's privacy is initially invoked by a private act, and any additional invasion of [a defendant's] privacy . . . is measured by the degree to which [the authorities] may have exceeded the scope of the private search.**")[iii]. [emphasis added]

Thus, simply put, the Fourth Amendment is not violated when a private citizen conducts a search (even an unreasonable search), as long as the search was not done at the request of law enforcement. Further, once a private citizen conducts a search and frustrates a person's reasonable expectation of privacy, the police do not violate the Fourth Amendment in examining the item searched *to the same extent the private citizen searched the item* because the reasonable expectation of privacy as already been "frustrated" by the private citizen.

The court then examined the facts of DeGeorgis' case in light of the above legal principles. The court noted it is not disputed that the DeGeorgis' estranged wife, searched the computer on her own volition (not at the request of law enforcement). This led her to see what she believed was child pornography and to bring the computer to the Holly Springs Police Department. Then, it is undisputed that she guided the lieutenant as he looked at the computer to view the images that she had already seen that she suspected were child pornography. Therefore, the lieutenant's initial warrantless search of the computer was not a violation of DeGeorgis' rights under the Fourth Amendment, because his expectation of privacy was already frustrated and the lieutenant did not exceed the scope of that frustration of privacy. Further, seeing those images provided the lieutenant probable cause to obtain the search warrant for that computer, the other computers, and the entire residence.

DeGeorgis' second issue on appeal was that his statement that he possessed the women's undergarments should have been suppressed because he did not believe he was free to go at the time he made that admission because the officers had taken his car keys and his cell phone at the time he made that admission.

The state argued that DeGeorgis' cell phone was seized as evidence under the search warrant and the officers did not seize his keys. Rather, they asked for his keys to help them open locked file cabinets that were within the scope of the search warrant.

The court of appeals stated

> Regardless, even assuming DeGeorgis's car key was inadvertently taken by the lieutenant, the record fully supports the trial court's ruling that DeGeorgis's admission to possessing the undergarments was voluntary. Although DeGeorgis was asked to remain outside the home for officer safety during the search, he was not placed under arrest, was not confined in any way, and was never told that he could not leave. Indeed, the officers

> testified that had DeGeorgis attempted to leave during the search, he would have been permitted to do so. It follows that DeGeorgis failed to prove that his statement was involuntary.[iv]

As such, the court of appeals affirmed the denial of the motion to suppress and the denial of the request for a new trial.

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[i] A16A0927 (Ga. App. Decided October 20, 2016)
[ii] Id.
[iii] Id.
[iv] Id.