



EIGHTH CIRCUIT UPHOLDS CONSENT GIVEN BY ARRESTED PERSON

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On October 12, 2017, the Eighth Circuit Court of Appeals decided the *United States v. Cobo-Cobo*, which serves as an excellent review regarding the law pertaining to consent to enter private premises. The relevant facts of *Cobo-Cobo*, taken directly from the case, are as follows:

Special Agents Michael Fischels and Andrew Lund with the Department of Homeland Security were helping a local police department investigate a stabbing incident when one Elias Mendoza-Marcos piqued their interest. According to Fischels, they followed Mendoza-Marcos to a laundromat and, once he got out of his car, Fischels told him that they were investigating a stabbing and began questioning him. Though it became apparent that Mendoza-Marcos was not involved in the stabbing, the agents began to suspect that Mendoza-Marcos might be in the country illegally when he could not furnish a government-issued form of identification. Mendoza-Marcos told the agents that he lived in an apartment in the building containing the laundromat and acknowledged that other people lived with him. He also admitted that he was from Guatemala and that he had no documentation authorizing him to live in the United States.

The agents then arrested Mendoza-Marcos and asked him if he wanted to retrieve any items from his apartment to take with him to the immigration office. He said he did, and, according to both agents, consented to their entering the apartment with him. On their approach to the apartment, one of Mendoza-Marcos's roommates spoke with him through a window on the second floor. According to Lund, the roommate then opened the apartment door and did not object when the agents entered with Mendoza-Marcos. The agents asked Mendoza-Marcos and the roommate to round up others who were in the apartment, and, when they said that Cobo-Cobo was asleep in a bedroom, the agents requested that they wake him and gather everyone in the living room to speak with the agents. Like Mendoza-Marcos, the other occupants could not provide government-issued identifications, and, after questioning confirmed that they too were in the country illegally, the agents arrested them. It is important for present purposes that, as a result of this

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incident, the government obtained Cobo-Cobo's employment identification card from a business called Carlson Building Maintenance and placed it in Cobo-Cobo's "alien file"—a government file that, according to one witness, contains papers and documents pertaining to a person's immigration status.

The identification card resurfaced a little more than four years later after a deportation officer reviewed Cobo-Cobo's alien file. The officer contacted Carlson to request a copy of Cobo-Cobo's I-9 Employment Eligibility Verification Form, and Carlson obliged. Federal law requires employers to verify the identity of their employees by checking certain documents to ensure they are eligible to work in the United States, which the employer, in an I-9 form, must attest to having done. See *Split Rail Fence Co., Inc. v. United States*, 852 F.3d 1228, 1232 (10th Cir. 2017). While reviewing Cobo-Cobo's I-9 form, the deportation officer discovered that Cobo-Cobo had provided Carlson with a social security number that did not belong to him, leading to the indictment here.ⁱⁱ

Cobo-Cobo filed a motion to suppress the evidence, and the district court denied the motion. He then pleaded guilty with the right to appeal the denial of his motion to suppress.

One appeal, Cobo-Cobo first argued that Mendoza-Marcos never gave the agents consent to enter his apartment. The court of appeals will not reverse a factual finding of a trial court unless there is clear error in the findings. The court noted that, while Mendoza-Marcos now claims that he did not give the agents consent, district court relied on several facts that tended to make the agent's contention that he did give consent more likely. First, it is unlikely that the agents would have let Mendoza-Marcos enter his apartment to retrieve items without asking if they could accompany him. Second, while Mendoza-Marcos claimed that the agents did not identify themselves, ask him where he lived, or ask if he lived alone, that is not likely because he had allowed the agents to arrest him and accompany him into the apartment. Third, the conversation with the roommate who was in the window did not fit with Mendoza-Marcos' testimony. Thus, the district court based its findings on evidence, and the court of appeals cannot reverse that decision.

Second, Cobo-Cobo argued that Mendoza-Marcos did not give voluntary consent to enter the apartment because he was under arrest, was not told he could refuse consent, had not been provided Miranda warnings, and had no prior experience with law enforcement. Regarding this argument, the court of appeals first stated

None of the facts that Cobo-Cobo emphasizes automatically renders consent involuntary. Officers need not provide *Miranda* warnings before requesting consent to perform a search, *United States v. Saenz*, 474 F.3d 1132, 1137 (8th Cir. 2007), or inform arrestees of their right to refuse consent. *United States v. Ortega-Montalvo*, 850 F.3d 429, 435 (8th Cir. 2017).ⁱⁱⁱ [emphasis added]

The court noted that the factors asserted by Cobo-Cobo can impact the voluntariness of the consent, but their absence does not automatically render consent involuntary. In this case, the court found that Mendoza-Marcos was at least average intelligence, not intoxicated or without his faculties, and was not confronted by agents displaying weapons. Further, the agents did not raise their voices, handcuff him, or make promises prior to seeking consent. Thus, the court held that there were no factors on which to conclude that the district court committed clear error regarding this issue.

The third issue Cobo-Cobo argued was that the agents did not have reasonable suspicion to seize him and require him to go sit in the living room. The court first stated

The agents could seize Cobo-Cobo if they had a reasonable, articulable suspicion that criminal activity was afoot; reasonable suspicion is more than a mere hunch but less than probable cause or a preponderance of the evidence. *United States v. Roberts*, 787 F.3d 1204, 1209 (8th Cir. 2015). We consider all the relevant circumstances, keeping in mind that officers may draw on their experience and training to make inferences from the information they have. *Id.*^{iv} [emphasis added]

Cobo-Cobo argued that his heritage was the only factor that the agents relied upon to seize and detain him. The court observed that the Supreme Court, in

Brignoni-Ponce expressly recognizes that heritage may be a "relevant factor," among others, in forming a reasonable suspicion. See *id.*; see also *United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994).

However, while that was one factor, the agents also considered other facts such as it is common for unrelated, illegal-alien males to live together, one illegal-alien was already arrested there, none of the men spoke English, and the landlord at that location was known to rent to illegal-alien. The court also noted that generally, proximity alone to others that are violating the law does not provide reasonable suspicion in and of itself; however, there was more than mere proximity in this case. Cobo-Cobo lived at that apartment and was not merely a guest or in a public location such as a bar. Therefore, since there were other factors on which to rely, the court held that the agents had sufficient reasonable suspicion to detain him.

Thus, because the entry into the apartment was legal, and his detention was legal, the evidence discovered was also admissible. Therefore, the court affirmed the denial of the motion to suppress.

ⁱ No. 16-4097 (8th Cir. Decided October 12, 2017)

ⁱⁱ *Id.* at 2-4

ⁱⁱⁱ *Id.* at 4

^{iv} *Id.* at 5