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Davis v. State: Too Young To Consent?

I. INTRODUCTION

In *Davis v. State*,¹ the Supreme Court of Georgia held that a ten-year-old child could not give valid consent to a search of his parents' home.² In determining the validity of a minor's consent, the supreme court considered those factors that the court of appeals deemed relevant in *Atkins v. State*.³ Applying the *Atkins* factors, the supreme court held that ten-year-old Darrin Davis ("Darrin") "lacked that degree of mental discretion necessary for a minor to give valid consent to the search of his, and his parents', home."⁴ According to Justice Sears-Collins, "[m]ost ten-year-old children are incapable of understanding and waiving their own rights, much less those of their parents."⁵

This Casenote begins with the facts and procedural history of *Davis v. State*. It then discusses the background cases leading up to the third-party-minor consent exception to the warrant requirement. This Casenote concludes with an analysis of the decision and a brief summary.

II. FACTS AND PROCEDURAL HISTORY

On January 28, 1991, ten-year-old Darrin Davis was at home alone. He routinely arrived home from school at 3:00 p.m. His mother required him to call to let her know he was home. Darrin was not allowed to invite friends over or play outside while he was home alone, approximately one and one-half hours each school day, and he had instructions to call 911 in the case of an emergency.⁶

On the day of the search, Darrin arrived home safely and called his mother. While using the phone in his parents' bedroom, he found what he thought were drugs. Darrin called 911 and told Deputy Greg Kirby in the Douglas County Sheriff's Department that his parents had drugs in the

1. 262 Ga. 578, 422 S.E.2d 546 (1992).

2. *Id.* at 581, 422 S.E.2d at 549.

3. 173 Ga. App. 9, 11, 325 S.E.2d 388, 390 (1984), *aff'd*, 254 Ga. 641, 642, 331 S.E.2d 597, 598 (1985).

4. 262 Ga. at 582, 422 S.E.2d at 550.

5. *Id.* at 581, 422 S.E.2d at 550.

6. *Id.* at 579, 422 S.E.2d at 548.

house and he "would like to get them some help."⁷ Deputy Kirby dispatched Deputy Cheryl Smith to the Davis home. Deputy Kirby called Darrin back before Deputy Smith arrived and told him to wait outside so Deputy Smith would recognize the house. Darrin followed the instruction and walked to the driveway when Deputy Smith arrived. Deputy Smith followed Darrin into the house and into appellant's bedroom, where Darrin pointed out a mirror with white powder and a razor blade on it. Then he opened a nightstand drawer and retrieved a bag of marijuana and some rolling paper. Deputy Smith noticed a "marijuana joint" in an ash-tray. The deputy seized the drugs, took them to her car, and waited inside with Darrin and another officer for his parents to return home.⁸

When Darrin's mother arrived, she consented to a search of her purse, which contained additional drugs. The officers arrested her and she refused to consent to a search of the house. When appellant, Freddie Ray Davis, returned home, the officers arrested him. He also refused to consent to a search of the premises.⁹

Appellant Davis was on ten years probation for drug possession under the First Offender Act at the time of his arrest.¹⁰ The sheriff's deputies arrested and charged appellant Davis with violating the Georgia Controlled Substance Act.¹¹ The trial court denied Davis' motion to suppress the evidence seized in the search.¹² The trial court found that "Darrin appeared bright, articulate and educated" and that his daily routine demonstrated that he had enough authority over the house to consent to a search.¹³

Davis filed an application for discretionary appeal.¹⁴ The court of appeals granted the appeal and found that the denial of the motion to suppress was proper, holding that Darrin had authority to give valid consent to the warrantless search.¹⁵

The Supreme Court of Georgia granted a writ of certiorari to determine whether the consent to search given by ten-year-old Darrin was valid.¹⁶ The State made three other contentions. First, the State argued that no consent was necessary because what occurred was not a search. Second, the State contended that exigent circumstances made the warrantless search necessary. Third, the State argued that even if the search was un-

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 578, 422 S.E.2d at 548. O.C.G.A. §§ 42-8-60 to -65 (1992).

11. 262 Ga. at 578, 422 S.E.2d at 547. O.C.G.A. § 16-13-30 (1992).

12. 202 Ga. App. 629, 631, 414 S.E.2d 902, 903 (1992).

13. *Id.*

14. 262 Ga. at 578, 422 S.E.2d at 548.

15. *Id.*

16. *Id.* at 579, 422 S.E.2d at 548.

lawful, the trial court justifiably denied the motion to suppress based upon the "independent source" or the "inevitable discovery" exceptions to the exclusionary rule.¹⁷

III. BACKGROUND

The United States Supreme Court established in *Katz v. United States*¹⁸ "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."¹⁹ One such exception is when police obtain consent from one who possesses common authority over the premises to search in the absence of the non-consenting target of the search.²⁰

Common authority that gives a third party authority to consent to a search

rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.²¹

In *Atkins v. State*,²² the Supreme Court of Georgia affirmatively decided the question whether a minor could give consent to a warrantless search.²³ In *Atkins* the seventeen-year-old brother of appellant gave oral and written consent to a warrantless search of his mother's premises where he and appellant lived.²⁴ The trial court denied appellant's motion to suppress the evidence seized during the search.²⁵ The supreme court refused to accept appellant's contention that a minor, as a matter of law, could not give valid consent to a warrantless search.²⁶ Instead, the court held that validity of consent should be determined on a case-by-case basis, and approved the consideration of factors identified by the court of appeals to be used in making such determinations.²⁷

17. *Id.* at 582-83, 422 S.E.2d at 550-51.

18. 389 U.S. 347 (1967).

19. *Id.* at 357.

20. *United States v. Matlock*, 415 U.S. 164, 170 (1974).

21. *Id.* at 171-72 n.7.

22. 254 Ga. 641, 331 S.E.2d 597 (1985).

23. *Id.* at 641, 331 S.E.2d at 597.

24. *Id.*, 331 S.E.2d at 598.

25. *Id.*

26. *Id.*

27. *Id.* at 641-42, 331 S.E.2d at 598.

The factors to be examined in measuring the extent of a minor's authority over the premises include:

[W]hether the minor lived on the premises; whether the minor had a right of access to the premises and the right to invite others thereto; whether the minor was of an age at which he or she could be expected to exercise at least minimal discretion; and whether officers acted reasonably in believing that the minor had sufficient control over the premises to give a valid consent to search.²⁸

Basically, the court established a totality of the circumstances test to determine if the minor can give valid consent.

IV. THE OPINION

A. *The Consent Issue*

The Supreme Court of Georgia first considered whether the consent given by ten-year-old Darrin to search his stepfather's house was valid. The court examined the factors laid out in *Atkins* to determine the validity of a minor's consent.²⁹ The court also emphasized the importance of examining "a child's mental maturity and his ability to understand the circumstances in which he is placed, and the consequences of his actions."³⁰ These last factors proved to be key in the court's determination that Darrin did not have the authority to consent to a search of his parents' home.

The court found it most compelling that Darrin was only ten years old.³¹ Although the court recognized that Darrin was a bright child, it found that he did not have "the minimal discretion required to validly consent to a search, much less waive important constitutional rights."³² The younger the child, the less likely he will have the minimal discretion.³³ The court emphasized that Darrin did not completely understand the consequences of his consent.³⁴ Darrin apparently believed he would achieve family harmony by calling the police, not disharmony and disruption. This showed his immaturity and naivety.³⁵

28. *Atkins*, 173 Ga. App. 9, 11, 325 S.E.2d 388, 390 (1984). The court compiled this list of factors after examining cases in other jurisdictions. *Id. See, e.g.,* *Harmon v. State*, 641 S.W.2d 21 (Ark. 1982); *Doyle v. State*, 633 P.2d 306 (Alaska 1981); *State v. Folkens*, 281 N.W.2d 1 (Iowa 1979); *Murphy v. State*, 355 So. 2d 1153 (Ala. App. 1978).

29. *Davis v. State* 262 Ga. 578, 580, 422 S.E.2d 546, 549 (1992).

30. *Id.* at 581, 422 S.E.2d at 549.

31. *Id.*, 422 S.E.2d at 550.

32. *Id.*

33. *Id.*

34. *Id.* at 582, 422 S.E.2d at 550.

35. *Id.* at 581, 422 S.E.2d at 550.

While the other factors in the *Atkins* test were substantially met, the court gave greater weight to the child's age and maturity and ruled that he could not validly consent to the search.³⁶

The court further emphasized the reasonableness one has in expecting privacy in one's bedroom.³⁷ "From there, one may exclude the whole world, including one's children, and especially the government."³⁸

B. Was This a Search?

Alternatively, the State contended that no consent was necessary because there was not a "search" at Darrin's home.³⁹ The State reasoned that Darrin had authority to call for assistance if he needed help, and to invite the officer into the house. According to the State, once the officer was in the house, Darrin leading her into his parents' bedroom and pointing out what he had discovered on his own was not a search.⁴⁰

The court disagreed with this argument by pointing out that Darrin had power to invite the police into the house only to the extent required by the emergency.⁴¹ When the officer saw Darrin in the driveway and realized that he was not in danger, "it became incumbent upon the officer not to exceed the scope of the child's limited right of invitation."⁴² The officer exceeding the scope of Darrin's right of invitation was a search that required valid consent or a warrant.⁴³

C. Exigent Circumstances Issue

The State also argued that the authorities did not need consent because exigent circumstances necessitated the warrantless search.⁴⁴ First, the State contended that drugs in the house with the child created exigent circumstances.⁴⁵ But, the "presence of contraband without more does not give rise to exigent circumstances."⁴⁶ Additionally, the court pointed to the deputy's testimony that there was no danger.⁴⁷ The deputy did not believe that the entry was justified by "the need to protect or

36. *Id.* at 582, 422 S.E.2d at 549-50.

37. *Id.* at 581 n.3, 422 S.E.2d at 549 n.3.

38. *Id.*

39. *Id.* at 582, 422 S.E.2d at 550.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (quoting *United States v. Torres*, 705 F.2d 1287, 1297 (11th Cir. 1983)).

47. *Id.*

preserve life or avoid serious injury."⁴⁸ The mere presence of drugs in the house with the child did not excuse the warrantless search.⁴⁹

The State also contended that the potential destruction of evidence constituted exigent circumstances.⁵⁰ The court found that, because the child was home alone, there was no threat of the drugs being destroyed if the officers took time to get a warrant. Therefore, there were no exigent circumstances excusing the warrantless search.⁵¹ But, the court suggested that had the parents been home during the search, the prospective loss of evidence may have given the officer exigent circumstances for a warrantless search.⁵²

D. "Inevitable Discovery" and "Independent Source" Exception Issue

Finally, the State argued even if this was an unlawful search, the trial court properly denied motion to suppress under the "inevitable discovery" and "independent source" exceptions to the exclusionary rule.⁵³ For these exceptions to apply, the government authorities must obtain the evidence by means other than an illegal search.⁵⁴ The court found that because the State did not show a warrant would have been sought as routine procedure by the police after a phone call of this nature from a child, the evidence would not have been ultimately discovered lawfully.⁵⁵ Additionally, the State did not show that Darrin provided enough facts "to enable [a] magistrate to make an independent determination as to whether probable cause exists for the issuance of a search warrant."⁵⁶

V. ANALYSIS

Davis effectively put a limit on the age at which a minor may consent to a search of his parents' home. While the court applied a fact-specific analysis, it found it inconceivable that a ten-year-old would have the minimal discretion required to consent to a search.⁵⁷ "Most ten-year-old children are incapable of understanding and waiving their own rights, much less those of their parents."⁵⁸

48. *Id.* at 583, 422 S.E.2d at 550 (quoting *Mincey v. Arizona*, 437 U.S. 385 (1978)).

49. *Id.*

50. *Id.*, 422 S.E.2d at 550-51.

51. *Id.*, 422 S.E.2d at 551.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 584, 422 S.E.2d at 551.

56. *Id.* (quoting *McMahon v. State*, 125 Ga. App. 491, 492, 188 S.E.2d 183, 184 (1972)).

57. *Id.* at 581, 422 S.E.2d at 550.

58. *Id.*

Age ten is when the court has drawn the line, but consent given by minors older than ten will still be analyzed on a case-by-case basis. The court in *Davis* tells police that they should take precautions and consult a judge or magistrate when they have doubts about a child's age.

VI. CONCLUSION

Darrin Davis should be commended for his attempt to help his parents. No child should have to grow up in an environment where his parents are using drugs. But, the Fourth Amendment gives even appellant Davis a right to be free from unreasonable searches and seizures.⁵⁹ Allowing a child who is immature and naive to give consent to search his parents' home is unreasonable.

It should not be said that parents have assumed the risk of their young child consenting to a search of the family home. This goes beyond the nature of the relationship between a parent and a child, especially when the child is not mature enough to understand the consequences of his consent. Once the child reaches a maturity level where he understands these consequences, the parents' expectation of privacy diminishes. Then, the rest of the factors of *Atkins* need to be examined to determine whether the minor's consent was valid.⁶⁰

This decision should not dissuade children from calling authorities when they find drugs. But, it ought to warn police officers to be more cautious. Children should not be used as pawns by the police to circumvent basic constitutional rights.

JUDSON ROBERT JAHN

59. U.S. CONST. amend. IV.

60. See *supra* note 28 and accompanying text.

