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CONSENT SEARCHES IN MONTANA: BASIC ELEMENTS OF THE TEST FOR VOLUNTARINESS

Richard L. Parish

I. INTRODUCTION

The standard information-gathering device contemplated by the United States Constitution for the use of law enforcement officers is the search warrant.¹ There has never been any doubt, however, that an officer may conduct a warrantless search if he has obtained the free and voluntary consent of the person to be searched.² Consequently, consent searches, which are statutorily authorized in Montana,³ are an important investigatory tool. With more frequent use, however, consent searches have become increasingly controversial.

There are a number of advantages, particularly from a law enforcement perspective, in allowing the liberal use of the consent search. A suspicious officer may conduct a search without probable cause solely on the basis of consent. The innocent subject may be quickly exonerated, while the guilty one may be apprehended without the delay necessary in the procurement of a search warrant.

There are difficult problems inherent in the consent search process. While one certainly may waive his right to privacy, he who consents to a full-scale search may not understand the ramifications of such consent until it is too late. Indeed, a polite but firm "request" by two or three uniformed police officers may carry the implication that there is no choice but to comply. An officer may also misinterpret an off-hand remark as an unqualified permission to search, contrary to the intention of the "consenter."⁴ Whatever

1. U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. This comment will not address the questions involved in consents to search by third parties.

3. REVISED CODES OF MONTANA (1947), § 95-701.

4. For a rather extreme case, see *Fankloner v. Robinson*, 391 F. Supp. 542 (W.D. Va. 1975). In this case an officer arrived at the defendant's apartment, saw the defendant through an open door, and asked for an interview with him. From the defendant's reply of "Sure," the officer saw fit to come in and search. The court expressed distaste with this procedure:

The constitutional protections of the Fourth Amendment cannot so easily disappear with the intoning of the word "consent" unless it appears that an express consent was in fact voluntarily given. The fabric of constitutional liberties is woven of a thread strong enough to withstand any attempted *fait accompli* by a presumptuous policeman, perceiving an open door as an implied invitation to enter.

Id. at 546.

the nature of the misunderstanding, the parties often become embroiled in after-the-fact controversies ranging from the officer's tone of voice to the accused's subjective state of mind.

This comment will briefly discuss the recent development of the law relating to the determination of whether a consent to search was voluntarily and effectively given. Particular emphasis will be given to recent decisions by the Montana Supreme Court indicating some of the common and crucial factors in such a decision.

II. UNITED STATES SUPREME COURT DECISIONS

The 1968 decision of *Bumper v. North Carolina*⁵ laid the groundwork for modern judicial appraisal of consent searches. In *Bumper*, the State attempted to justify a search of defendant's home based on the consent of his grandmother, with whom he lived. Officers had arrived at their house and informed the grandmother that they had a search warrant to search the house, to which she replied, "Go ahead."⁶ No warrant was produced at the hearing on a motion to suppress. The Supreme Court, with Justice Stewart writing for the majority, held that such circumstances constituted "colorably lawful coercion,"⁷ and the consent was therefore invalid. The Court emphasized the burden of proof in a consent situation:

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.⁸

Aside from stating that the burden of proof was not met by the State, the Court did not elaborate on the nature of the burden.

Clarification was forthcoming in the landmark case of *Schneckloth v. Bustamonte*.⁹ This case involved consent to search an automobile which the police initially stopped because of a burned out headlight. The officer became suspicious of the six occupants when only one of them (not the driver) could produce any identification. One of the occupants explained that the car belonged to his brother, and he gave the officer permission to search the car. At this time, no arrests had been made, and the confrontation was described as "congenial."¹⁰ Stolen checks found in the automobile

5. 391 U.S. 543 (1968).

6. *Id.* at 546.

7. *Id.* at 550.

8. *Id.* at 548-49.

9. 412 U.S. 218 (1973).

10. *Id.* at 220.

were used to convict one of the other occupants. On appeal the Ninth Circuit held that the State had not met its burden of proving that the occupants had given consent with knowledge that it could be freely and effectively withheld.¹¹ In so holding, the federal court relied on previous Ninth Circuit decisions, reasoning that a consent to search is a waiver of fourth and fourteenth amendment rights, and that such a waiver must be knowingly and intelligently given.¹² The Supreme Court, again in an opinion by Justice Stewart, disapproved this rationale and used the test adopted by the California Supreme Court:

[T]he question whether a consent to search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.¹³

The reasoning of *Schneckloth* has been vigorously criticized,¹⁴ but its impact is unquestionable. Post-*Schneckloth* cases in state and federal courts routinely pay homage to the "totality of the circumstances" test in discussing questions of voluntariness in consent search situations.

One arguably coercive factor, common to many consent situations, was missing in *Schneckloth*. At the time of giving consent, the defendant was not in custody. The Court in *Schneckloth* emphasized that fact, and specifically reserved the question of voluntariness of consent by a defendant in custody.¹⁵ This led some commen-

11. *Bustamonte v. Schneckloth*, 448 F.2d 699, 700 (9th Cir. 1971), *rev'd.*, 412 U.S. 218 (1973).

12. *Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968); *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965).

13. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The California cases from which the Supreme Court took the test are *People v. Tremayne*, 20 Cal. App.3d 1006, 98 Cal. Rptr. 193, 198 (1971); *People v. Roberts*, 246 Cal. App.2d 715, 55 Cal. Rptr. 62, 70 (1966).

14. One commentator wrote:

Bustamonte is a strained, self contradictory opinion which not only represents a drastic departure from the Court's own previous cases, but also undermines a substantial body of prior federal case law which reflected a sustained and sometimes creative effort to develop a coherent consent-search doctrine.

Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 212 (1974).

Justice Marshall, dissenting in *Schneckloth*, reasoned as follows: "[T]he holding today confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few." *Schneckloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting).

15. Our decision today is a narrow one. We hold only that *when the subject of the search is not in custody* and the State attempts to justify a search on the

tators to believe that following a *Miranda* type of reasoning, proof of knowledge by the defendant of his right to refuse consent (such as the giving of a warning to that effect) might be required in custodial situations.¹⁶ This idea was foreclosed almost as an afterthought by Justice White in *United States v. Watson*.¹⁷ In *Watson*, defendant was arrested by a postal inspector and charged with possession of stolen credit cards, on the basis of information from a reliable informant. The inspector then searched Watson, and asked for permission to search his car, to which Watson replied, "Go ahead."¹⁸ The inspector warned Watson that the fruits of the search could be used against him, but Watson reaffirmed his consent. Stolen credit cards were found and Watson was convicted, but the Ninth Circuit found the arrest to be invalid and the resulting consent to be involuntary under the "totality of the circumstances" test.¹⁹ The Supreme Court devoted most of its opinion to a discussion of the arrest, which it held to be valid.²⁰ Turning to the issue of voluntariness of the consent, the Court noted the following factors: (1) there was no evidence of any coercion by the inspector; (2) the consent, though given while in custody, was given on a public street rather than in the confines of a police station; (3) defendant was given *Miranda* warnings and warned that any evidence found would be used against him; (4) defendant had prior experience with the law and presumably knew his rights.²¹ Referring to these facts,

basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of the right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (emphasis added).

16. See, e.g., Note, *Search and Seizure—Knowledge of Fourth Amendment Rights Not a Prerequisite to a Valid Consent Search—Schneckloth v. Bustamonte*, 93 S.Ct. 2041 (1973), 8 U. RICH. L. REV. 359, 365 (1974).

17. 96 S.Ct. 820 (1976).

18. *Id.* at 823.

19. *United States v. Watson*, 504 F.2d 849, 853 (9th Cir. 1974), *rev'd*, 96 S.Ct. 820 (1976).

20. *United States v. Watson*, 96 S.Ct. 820, 828 (1976).

21. *Id.* at 828. Justice Marshall, in an opinion joined by Justice Brennan, again dissented:

I adhere to the views expressed in my dissent in *Schneckloth* . . . and therefore believe that the government must always show that a person who consented to a search did so knowing that he had the right to refuse. But even short of this position, there are valid reasons for application of such a rule to consents procured from suspects held in custody. It was, apparently, the force of those reasons that prompted the Court in *Schneckloth* to reserve the question. Most significantly, we have previously accorded constitutional recognition to the distinction between custodial and noncustodial police contacts. *Miranda v. Arizona* Indeed, *Schneckloth* directly relied on *Miranda's* articulation of that distinction to reach

the Court held: "In these circumstances, to hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth* and would distort the voluntariness standard that we reaffirmed in that case."²²

The policy of the Supreme Court is clear after *Watson*. All of the facts will be considered in the voluntariness determination. While custody and lack of knowledge of the right to refuse consent should still weigh heavily,²³ these factors will not prove the consent involuntary as a matter of law.

III. CONSENT SEARCHES IN MONTANA

Because subtle differences in factual situations are crucial in each case, the value of precedent in this area is questionable. An examination of the Montana Supreme Court's application of the voluntariness standard, however, may indicate its attitude toward some fairly common, but troublesome circumstances.

A. *Equivocal Consent*

A person who is asked by the police for permission to search, and who is in possession of something incriminating, is faced with a dilemma. On one hand, he wants to avoid discovery of the hidden article. Assuming he realizes that he can effectively refuse consent, he obviously has a motivation to refuse. On the other hand, he wants to avoid the suspicion of the police, and a refusal might cause them to focus their investigation upon him. This could make ultimate discovery inevitable. A possible solution to this dilemma is to give

its conclusion . . . Thus, while custodial interrogation is inherently coercive, and any consent thereby obtained necessarily suspect, *Miranda* (and *Schneckloth*) expressly rejects the notion that there is anything inherently coercive about general noncustodial interrogation . . . For this reason it is entirely appropriate to place a substantially greater burden on the Government to validate a consent obtained from a suspect following custodial interrogation, however brief. Indeed, it is difficult, if not impossible, to square a contrary conclusion with *Miranda*.

Id. at 844 (Marshall, J., dissenting).

22. *Id.* at 828.

23. *But see The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 220 (1973):

The virtual impossibility of obtaining reliable evidence of what was going on in a subject's mind at the time his consent was sought—a major factor in the Court's decision that the state should not be required to prove knowledge—will force the courts to decide cases on the basis of objective factors. The only psychological factors that courts will consider will therefore be those, such as the subject's age, education, intelligence, and mental stability, which may be ascertained by external evidence. Thus the net result of *Bustamonte* may be that in practice a lack of knowledge of the right to refuse will rarely if ever be a significant factor in a decision about the voluntariness of consent (footnotes omitted).

all appearances of cooperation while at the same time fabricating a reason why search is impossible.

This type of equivocation was present in *Application of Tomich*,²⁴ a federal habeas corpus proceeding in the district of Montana. In *Tomich*, officers arrested the defendant for driving without a valid driver's license. Upon being asked for permission to search the trunk of the car, defendant verbally agreed but stated that he did not have the key. In fact, the key was safely tucked away in his shoe. The officers escorted the defendant to a garage, had a key made, and opened the trunk, discovering narcotics. The court, noting that "consent is not to be lightly inferred,"²⁵ held that the State had not met its burden of proving voluntariness: "If he truly consented to the search, he would have delivered up the key to the officers and saved them all the trouble they went to to get into the trunk of the car."²⁶

An almost identical situation occurred in *Cipres v. United States*,²⁷ in which police officers asked to search defendant's bags at an airport in California. She gave her consent, stating that she had nothing to hide but that she left the keys to the bags in New York. The officers found the bags to be unlocked, opened them, and found marijuana inside. Citing *Tomich*, the Ninth Circuit Court stated that on its face these facts rendered the consent ineffectual.²⁸ "The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did."²⁹

The Montana Supreme Court first discussed the implications of *Cipres* and *Tomich* in 1965 in the case of *State v. Peters*.³⁰ Peters, who was suspected of possession of stolen livestock, allowed the authorities to search his property and even helped them find the calves in question—calves which he claimed he had purchased from an Indian. The defense asserted that this disclaimer showed that the consent was equivocally given and therefore invalid under *Cipres* and *Tomich*. The court distinguished those cases as follows:

The *Cipres* and *Tomich* cases both involved possession of contraband property.

. . . .

24. 221 F. Supp. 500 (D. Mont. 1963), *aff'd sub nom.* *Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964).

25. *Id.* at 502.

26. *Id.* at 503.

27. 343 F.2d 95 (9th Cir. 1965).

28. *Id.* at 98.

29. *Id.*

30. 146 Mont. 188, 405 P.2d 642 (1975).

Possession of the calves was not illegal in itself, and appellant was confident that he had persuasive evidence of ownership and that the inspection would not reveal his crime.³¹

This is clearly a fair basis for distinction. Peters did not in any way try to prevent the authorities from searching for or from finding the calves; he merely asserted that his possession of the calves was lawful. The court went on, however, to voice a mild disapproval of *Tomich*: "While we may not agree with that court's interpretation, in this respect, yet in this case, appellant's consent to search was uncoerced, unconditional, and unequivocal."³²

State v. LaFlamme,³³ decided in 1976, represents the latest word in this line of cases. In this case, the police asked LaFlamme for his .44 magnum pistol for the purpose of a ballistics examination. LaFlamme agreed, and proceeded to search for the gun in his room. When he was unable to find the weapon, an officer suggested that he check his truck before reporting it stolen. LaFlamme made a cursory examination of the truck and reported that the gun was not there. An officer who had watched him suggested that he look behind the seat of the truck, to which LaFlamme responded, "I don't think so." The officer then reached into the truck, tipped the seat forward, and found the "lost" weapon. The Montana Supreme Court upheld the district court's suppression of the evidence as being seized without a valid consent, noting that the officers did not seek nor obtain explicit permission to search the truck.³⁴ The court again referred to *Cipres* and *Tomich*, stating:

In both of these cases the Ninth Circuit found that the search was not a valid unequivocal consent to a search. While this Court is not in full agreement with that interpretation it is clear that *in the absence of a positive verbal assent to the search*, equivocal conduct alone is insufficient as a basis for an inference of consent to search, which is a waiver of a constitutional right (emphasis added).³⁵

This language indicates the basis of the court's disapproval of *Cipres* and *Tomich*. In both, the subject of the search gave a positive verbal assent accompanied by deception designed to lead the police to believe that the actual search would be impossible or too burdensome to perform. The Montana Supreme Court implies that positive verbal assent, regardless of any subsequent deception, constitutes a clear and unequivocal consent to search. The court in *LaFlamme*

31. *Id.* at 204-05, 405 P.2d at 651.
 32. *Id.* at 205, 405 P.2d at 651.
 33. ___ Mont. ___, 551 P.2d 1011 (1976).
 34. *Id.* at ___, 551 P.2d at 1012.
 35. *Id.* at ___, 551 P.2d at 1013.

distinguished *Peters* on a similar basis: "In *Peters* defendant gave his verbal assent to the search and actively assisted the authorities in the search. Here, defendant never gave his verbal assent to the search and did all the searching himself."³⁶

It is clear that two elements are necessary in order to have an effective consent to search. First, there must be some form of clear and unambiguous assent. In *LaFlamme*, this element was clearly lacking. In *Cipres*, *Tomich*, and *Peters* this element was present in its most common form, verbal assent. The second element is that the assent must be voluntary. The holdings in *Cipres* and *Tomich* indicate that because of the deceptive conduct, the consent was not voluntary.³⁷ In *Peters* every indication was that the consent was voluntary. The Montana Supreme Court, in *dicta* disapproving of *Cipres* and *Tomich*, appears to believe that the Ninth Circuit found the consent to be faulty because it was not clear and unambiguous, when actually it was faulty because it was not voluntary. This confusion may have resulted in the unjust disapproval of valuable precedent for Montana. *Cipres* and *Tomich* can be reconciled with Montana case law if the deceptive conduct present in those cases is treated as bearing on the voluntariness issue instead of the "clear and unambiguous assent" issue.

B. Coerced Consent

"Where there is coercion there cannot be consent."³⁸ This statement is true regardless of how clearly and unequivocally a defendant consents to a search. Recent decisions in the Montana Supreme Court indicate how it will treat several common and arguably coercive factors in the procurement of consent.

The court in *State v. Pound*,³⁹ decided just prior to *Schneckloth*, found enough coercion in the procurement of a consent to search as to preclude a finding of voluntariness. Defendant, a Canadian citizen, was arrested, handcuffed, and given a *Miranda*

36. *Id.*

37. Admittedly, *Tomich* was unclear as to the basis for its holding: "In this case, the record compels the finding that petitioner did not freely give his unequivocal and specific consent to the search without a warrant." Application of *Tomich*, 221 F. Supp. 500, 503 (D. Mont. 1963). *Cipres*, however, was more definite in its finding that the deceptive conduct went to the voluntariness issue:

A number of circumstances suggest that her assent may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: . . . it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual.

Cipres v. United States, 343 F.2d 95, 98 (9th Cir. 1964) (footnote omitted).

38. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

39. 162 Mont. 10, 508 P.2d 118 (1972).

warning. The sheriff, suspecting him of possessing stolen property, claimed that he asked Pound for permission to search his car, to which Pound allegedly agreed. Although Pound denied giving permission, the court held that even accepting the sheriff's story, Pound's consent was coerced:

Pound was a Canadian citizen born in England, presumably not knowledgeable of rights granted under our system of law. He had not been informed of his right to refuse a warrantless search. He had been held under arrest for several hours, handcuffed, and taken to the vehicle in the custody of three law officers and four other men who were antagonistic to his interests.⁴⁰

This case might have been decided otherwise had it arisen after *Schneckloth*, because it relies heavily on the fact that defendant did not know of his right to refuse consent. It does point out other important coercive factors, however. The susceptibility of the defendant to coercion, and the environment in which the consent is given (such as custody, handcuffs, and the prolonged confrontation with several uniformed officers) are significant factors in a determination of whether a consent was voluntary.

In 1975, the Montana Supreme Court decided *State ex rel. Kotwicki v. District Court*.⁴¹ In *Kotwicki*, the defendant was arrested for a traffic violation and taken to the police station. He was permitted to phone a friend in an effort to post bond, but that effort was unsuccessful. The officers then informed the defendant that he would have to spend the night in jail. While searching the defendant prior to placing him in a cell block, the deputy sheriff found a bag of marijuana in the defendant's shoe. After advising the defendant of his right to refuse consent, the officers asked him for permission to search his car. At one time he told them, "You might as well look in it, it's full of marijuana," but subsequently revoked his consent. The next morning he relented and signed a form giving the officers consent to search the vehicle. Defense counsel argued that the consent was involuntary because: (1) he had refused to consent the night of the arrest; (2) he consented only after spending the night in jail; and (3) he consented after being told that a search warrant would be obtained and the automobile would be searched regardless of his consent. Applying the *Schneckloth* "totality of the circumstances" test, the court held that the defendant had voluntarily consented. It emphasized that he knew of his right to refuse, he had previously admitted that his car was "full of marijuana," and his

40. *Id.* at 16, 508 P.2d at 121.

41. 166 Mont. 335, 532 P.2d 694 (1975).

prior experience with the law (having previously been arrested for possession of dangerous drugs) should have given him a full understanding of his rights.⁴²

Kotwicki must be contrasted with the very recent case of *State v. Brough*.⁴³ Like *Kotwicki*, *Brough* was arrested for a traffic violation, and placed in jail. After initially refusing consent to a search of his automobile and then spending a night in jail, he eventually consented to the search. This time the court found the consent to be involuntary because of the following circumstances: (1) although the officers were authorized to receive bond, they did not allow the defendant to post it; (2) the defendant had repeatedly refused to consent the night before; (3) he was held incommunicado in jail and was not allowed to phone his father; (4) his father, upon hearing of the arrest and arriving at the jail, was not allowed to see him, and was not informed of the charge against him or the amount of his bond; (5) defendant was told that he would remain in jail until the car was searched, with or without his consent; and (6) he was told that if he did not consent, a search warrant would be obtained, and that his consent would save time and paperwork.⁴⁴ In discussing *Kotwicki*, the court simply stated: "[T]he facts of that case lack the coercive tenor of the policy procedure here."⁴⁵

Because no single factor appeared determinative in these two cases, they well illustrate the application of the "totality of the circumstances" test. They are particularly interesting because of the number of common factors present in both of them. In both, the defendants were in custody but were aware of their right to refuse consent. Also, the police in both cases repeatedly, but unsuccessfully requested consent to search, and referred to the inevitability of the search regardless of whether the defendant consented.⁴⁶ The basis for distinction seemed to be the general tenor of the police conduct. The police in *Brough* seemed to indicate that they intended to keep the defendant in custody until either he consented to the search, or they were able to obtain a search warrant. In contrast, the police in *Kotwicki*, although persuasive and firm, made it very clear that the only condition precedent to his release was his payment of the bond, and they gave him every opportunity

42. *Id.* at 344-45, 532 P.2d at 699.

43. ___ Mont. ___, 556 P.2d at 1239 (1976).

44. *Id.* at ___, 556 P.2d at 1240-41.

45. *Id.* at ___, 556 P.2d at 1241.

46. The time-honored tactic of informing the suspect that a search warrant will be obtained and a search made regardless of whether he consents has often been challenged as making the consent involuntary. While courts consider this to be a strong factor in determining whether the consent is voluntary, they generally do not consider it to be determinative by itself. See, e.g., *State v. Yoss*, 146 Mont. 508, 514, 409 P.2d 452, 455 (1965).

to attempt to obtain the money. Thus the inferences drawn from the conduct of the police can be critical factors in the "totality of the circumstances." Subtle distinctions in this context may make the difference between a voluntary consent and an involuntary one.

Finally, the scope of supreme court review of the voluntariness determination should not go unnoticed. In *Kotwicki*, *Brough*, *LaFlamme*, and *Peters* the Montana Supreme Court upheld the trial court's decision of whether to suppress the evidence. This might reflect an unstated, and probably reasonable policy of great deference to the trial court in such a fact-oriented decision.

IV. CONCLUSION

A prosecutor relying on consent to justify a search has a burden of "proving by clear positive evidence that the individual freely and intelligently gave his unequivocal and specific consent to search, uncontaminated by any duress or coercion, actual or implied."⁴⁷ This is a test that is easy to state but manifestly difficult to apply. Montana precedent seems to be in line with the United States Supreme Court policy of balancing the factors, with no involuntary *per se* notions. In every case, there must be an unambiguous assent to the officer's request to search. This assent must be voluntary. The following factors should be analyzed to determine whether the consent was voluntary:

- (1) Did the defendant know of his right to refuse consent?
- (2) Was the defendant in custody at the time?
- (3) Did the defendant have prior experience with the law which would cause him to be more aware of his rights and less intimidated by the police procedure?
- (4) Was the defendant promised anything if he consented?
- (5) Did the officers make coercive statements, such as references to the inevitability of the search?
- (6) Was the defendant advised of the consequences of his consent?
- (7) Was the consent accompanied by actions or statements attempting to show the officer that a search would be impossible or too burdensome to perform?
- (8) Was the defendant susceptible to any coercive factors?

The answers to these questions may decide a large number of cases in which the voluntariness of a consent to search is in question. This brief listing, however, is not meant to be all-inclusive. The range of possible factors in the "totality of the circumstances" is

47. *State v. Brough*, ___ Mont. ___, 556 P.2d 1239, 1241 (1976).

limited only by the range of the imagination of police and their suspects.