

A necktie salesman was charged with the murder of a woman who had been strangled and whose body was found in the woods near his home. The salesman suffers from a neurological problem that makes it impossible for him to remember an occurrence for longer than 48 hours.

After the salesman was charged, the police visited him and asked if they might search his home. The salesman consented. During their search, the police found a diary written by the salesman. An entry dated the same day as the woman's disappearance read, "Indescribable excitement. Why did no one ever tell me that killing gave such pleasure to the master?"

The salesman was charged with murder. His attorney has moved to exclude the diary from evidence on the ground that its admission would violate the salesman's privilege against self-incrimination. His counsel has also argued that the salesman could not give informed consent to the search because more than 48 hours had passed since the making of the entry and hence he could not remember the existence of the incriminating entry at the time he gave his consent. There is no evidence that the police officers who secured the salesman's consent to the search were aware of his memory impairment.

Should the court admit the diary into evidence?

- A. No, because the salesman was not competent to consent to a search.
- B. No, because use of the diary as evidence would violate the salesman's privilege against self-incrimination.
- C. Yes, because the salesman's consent was not obtained by intentional police misconduct and the salesman was not compelled to make the diary entry.
- D. Yes, pursuant to the good-faith exception to the exclusionary rule.

Explanation:

The salesman argues that the warrantless search of his home violated the **Fourth Amendment** because he could not give informed consent to the search. However, **consent** need only be given **freely and voluntarily** (ie, **without police coercion**)—informed consent is not required. Therefore, police do not need to inform a suspect of his/her right to refuse consent or the incriminating evidence they hope to obtain.

Here, due to his neurological condition, the salesman could not remember the incriminating diary entry when he consented to the police search. But since his consent was not obtained by intentional police misconduct or other coercive measures, it was given *voluntarily*. Therefore, the police had valid consent to search the salesman's home, and the diary discovered during the search should not be excluded on Fourth Amendment grounds.

The salesman also argues that admitting the diary would violate his **Fifth Amendment privilege against self-incrimination**. This privilege protects persons from being **compelled to produce or create self-incriminating evidence**—ie, evidence that could be used (or lead to other evidence that might be used) against him/her in a criminal prosecution. But this protection does not apply to documents obtained during a constitutional search since the government did not compel the person to produce or create them.

Here, the diary entry is incriminating because it implicates the salesman in the woman's murder. But admitting this evidence would not violate his privilege against self-incrimination since (1) it was discovered during a lawful search of his home (no compelled production) and (2) the salesman was not compelled to create the diary entry (**Choice B**). Therefore, the court should deny the salesman's motion and admit the diary into evidence.

(Choice A) Incompetency (eg, neurological or mental illness) alone does not invalidate a person's consent. Instead, it is one factor used to determine if consent was voluntary. But the salesman's competency is not an issue here since there is no evidence that the police knew about his neurological condition (or took advantage of it to coerce his consent).

(Choice D) The good-faith exception to the exclusionary rule allows the admission of *illegally* seized evidence if police reasonably believed that they were acting lawfully (eg, relying on a warrant later deemed invalid). But this exception does not apply here since the officers *legally* searched the salesman's home and seized the diary.

Educational objective:

Police may conduct a warrantless search if the person consented to the search voluntarily—ie, without police coercion—even if the consent was not informed. Additionally, the privilege against self-incrimination only applies to the compelled production or creation of evidence—not evidence discovered during a constitutional search.

References

U.S. Const. amend. IV (prohibition against unreasonable searches and seizures).

Schneckloth v. Bustamonte, 412 U.S. 218, 225–28 (1973) (explaining that consent must be voluntary and not the result of police coercion).

U.S. Const. amend. V (privilege against self-incrimination).

United States v. Hubbell, 530 U.S. 27, 35–36 (2000) (explaining that contents of documents that a defendant was not compelled to create are not privileged).

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Admissibility of diary at trial

