

The following is a statutory analysis memo I wrote for the Legal Analysis Research and Writing class I took as part of my first year curriculum. The fact pattern is as follows:

Robert Earl Cowan has been charged with trespassing in violation of California Penal Code section 602(m) [formerly section 602(l), which was identically worded] and with possession of cocaine in violation of Health and Safety Code section 11350.

The police report indicates that on July 16, 2006, at approximately 7:30 p.m., Sergeant Hudson of the Santa Clara Police Department responded to a call from a resident of an apartment complex at 1614 Smith Street in Santa Clara to investigate possible drug dealers conducting illegal business on the property. As he pulled up, he heard a number of whistles and shouts of “Stella”, which he recognized as signals by lookouts that the drug task force was coming.

As he approached the Smith Street building, Sergeant Hudson saw a young man in a white shirt and red pants vaulting the fence at the rear of the Smith Street property onto the property at 1619 Oak Street, which is directly behind the Smith Street complex. Oak Street runs parallel to Smith Street. The Oak Street property consists of a small house with a fenced yard on a compact urban lot. It is situated between small houses and fenced lots on either side. Sergeant Hudson immediately dispatched Officers Perry and Grimes to the 1619 Oak Street property to cut off the suspect’s escape route, and followed close behind.

About five minutes later, the officers called out to Sgt. Hudson that they had detained a young man wearing a white shirt and red pants in the backyard of the 1619 Oak Street property. Sgt. Hudson entered the backyard through the unlocked gate and detained the person, who identified himself as Robert Earl Cowan. The owner of the property was inside the house. He was surprised when policed knocked, and denied ever having seen Robert Cowan before. Sergeant Hudson then arrested Mr. Cowan for trespassing on the 1619 Oak Street property in violation of Penal Code section 602(m).

After arresting Mr. Cowan, Sgt. Hudson searched him and found a plastic bag containing a small quantity of a chunky white substance in his pocket. Laboratory tests performed later showed the substance to be two grams of cocaine base.

You work in the office of the Santa Clara County Public Defender. Your supervisor, Geraldo Munoz, is considering bringing a motion to suppress the cocaine and exclude it from evidence pursuant to Penal Code section 1538.5 on the grounds that Sgt. Hudson did not have probable cause to arrest Cowan. Munoz has asked you to write a short memorandum analyzing whether Cowan has violated Penal Code section 602(m). He tells you to use *People v. Wilkinson*, 248 Cal. App. 2d Supp. 906, 56 Cal. Rptr. 261 (1967), in which the court analyzed the applicable statute, then numbered as section 602(l). Relying on this judicial interpretation of the statute, write an analysis of whether the arrest was valid.

MEMORANDUM
Confidential

To: Gerald Munoz, Supervising Attorney
From: Andy Chen
Re: People v. Cowan – viability of Trespass Charge (California Penal Code section 602(m))
Date: October 28, 2005

Question Presented

Did defendant Robert Earl Cowan trespass onto the premises of 1619 Oak Street within the meaning of California Penal Code section 602(m) when he vaulted over a fence onto said property without the consent of the owner only to remain there for five minutes before being apprehended by police?

Brief Answer

Robert Earl Cowan is unlikely to have trespassed onto the premises of 1619 Oak Street within the meaning of Penal Code section 602(m). Although he entered without consent, his five minute occupation of the property was not of the continuous and non-transient nature required by the judicial interpretation of the statute.

Statement of Facts

At 7:30 pm on July 16, 2006, Santa Clara police responded to 1614 Smith Street to investigate a call that illegal drugs were being dealt on the property. As the responding sergeant approached, he saw a young man in a white shirt and red pants vault over the rear fence separating 1614 Smith Street from the property immediately behind it, 1619 Oak Street. Additional officers were dispatched to that address and five minutes later detained a young man wearing a white shirt and red pants in the backyard. The sergeant entered the backyard of 1619 Oak Street from 1614 Smith Street through an unlocked gate in the fence.

The property owner of 1619 Oak Street was surprised by the police activity and indicated that he had not previously seen the young man. The young man voluntarily identified himself as

Robert Earl Cowan. He was subsequently arrested for trespassing onto the 1619 Oak Street property in violation of California Penal Code section 602(m). A subsequent search revealed that Cowan had a small amount of a chunky white substance in a plastic bag in his pocket. Tests later revealed the substance to be two grams of cocaine base.

Discussion

California Penal Code section 602(m) states that every person who willfully enters and occupies “real property or structures of any kind without the consent of the owner, the owner’s agent, or the person in lawful possession” is guilty of misdemeanor trespass. A California court held in *People v. Wilkinson*, 248 Cal. App. 2d Supp. 906, 56 Cal. Rptr. 261 (1967), that section 602(m) requires that a defendant (A) enter onto a property without the consent of the owner, and (B) occupy said property in a “non-transient and continuous” fashion without the owner’s consent before being found guilty of criminal trespass.

1. Entry Without Consent

Cowan will likely have to concede that he entered the Oak Street property because the sergeant saw him vault the fence. Cowan could, however, argue that his entry was with the property owner’s implied consent. Consent may be “implied as well as express.” *Wilkinson*, 248 Cal. App. 2d Supp. at 908. Cowan will argue that unlike in *Wilkinson*, where the property was entirely fenced, the owner in the instant case implied consent to entry by having an unlocked gate in the fence surrounding his property. The D.A. will argue that the unlocked gate is irrelevant because the court in *Wilkinson* also held that a defendant may trespass within the meaning of 602(m) by entering “unfenced and unposted land.” *Id.* The D.A. will also argue that the reason Cowan vaulted over the fence initially was because he was unaware the unlocked gate even existed. Lastly, the D.A. will argue that Cowan did not have either express or implied

consent to enter given that the owner was surprised that the police had apprehended someone on his property and that he had never seen Cowan before. Thus, a court is likely to hold that Cowan did enter on to the 1619 Oak Street property without the consent of the property owner.

2. Occupation Without Consent

Cowan will argue that even if he entered onto 1619 Oak Street without consent, his subsequent occupation was not of the type required in *Wilkinson*. The court there found that section 602(m) requires a non-transient, continuous type of possession” because only then would the legislative intent of preventing squatter occupancy of land be fulfilled. *Id.* at 911, 56 Cal. Rptr. at 264. In *Wilkinson*, the court found that the appellants only intended to use the ranch land for “one night’s sleeping out encampment” because they were packing up to leave prior their 9:30 AM arrest. Similarly, Cowan only intended to remain at 1619 Oak Street for no longer than necessary to evade pursuit. He had, for instance, no provisions or equipment indicative of a prolonged stay. Furthermore, Cowan can argue that like the appellants in *Wilkinson*, he made no modifications to the Oak Street property indicating that he “intended to remain permanently, or until ousted.” *Id.*

Lastly, Cowan will argue that given the common, ordinary, lay use of “occupy”, his five-minute presence solely in the backyard is inconsistent with occupation of the entire Oak Street property. *Id.* at 264, 56 Cal. Rptr. at 911. The D.A. will counter, however, that the only reason Cowan remained in the backyard was to evade the responding officers. Similarly, Cowan was on the property for just five minutes only because that was how long it took the officers to find him. As a result of Cowan’s goal of evading capture, a court is likely to hold that he did not occupy 1619 Oak Street in the non-transient and continuous fashion required by section 602(m).

3. Consent

Consent is also an issue with regard to Cowan's presence on the Oak Street property. Section 602(m) requires that both the entry and occupation of a property be done without the owner's consent. *Wilkinson*, 248 Cal. App. 2d Supp. 906, 910, 56 Cal. Rptr. 261, 263 (citing *People v. Brown*, 236 Cal. App. 3d Supp. 915, 920, 47 Cal. Rptr. 662 (1965)). The D.A. will argue that had the property owner actually given consent to Cowan's presence, he would not have been surprised when the police subsequently knocked. In addition, because the owner had never seen Cowan before, it is unreasonable to think that he would have given consent to occupy. Cowan is unlikely to have any viable arguments in his defense. Thus, if a court concludes that Cowan did indeed occupy the Oak Street property, it is likely to subsequently hold that it was without the owner's consent.

Conclusion

Defendant Robert Earl Cowan is unlikely to be found guilty of misdemeanor trespass because while he did enter onto and occupy the premises of 1619 Oak Street without the owner's consent, the occupation was not of the continuous and non-transient type required in order to fulfill the legislative intent of Penal Code section 602(m).