AUTHOR: Earl McGowen

DATE: September 9, 2008

FILE: Slater Memo

RE: Dwelling

**DISCUSSION**

[C]Mr. Taylor’s “detached” garage is not a dwelling under Colorado’s “Make-My-Day” statute because the court does not consider detached structures in the incidental-uses and non-common-area rule.

[R]If a garage is part of an “entire building,” considered a dwelling, the uses of that garage are incidental to the uses of the dwelling, and it is not a common area, the garage is a dwelling. People v. JIMENEZ; People v. CUSHINBERRY

[E]In JIMENEZ, the Supreme Court of Colorado considered an attached garage a dwelling and found the defendant, who stole a bike from the garage, to be correctly charged with a burglary of a dwelling. The court held that the garage was a dwelling because the garage was part of the “entire building” and the uses of the garage were incidental to the uses of the residence, even though it was not “usually used by a person for habitation.” Also, in CUSHINBERRY, the Colorado Court of Appeals found that a stairwell of an apartment building did not constitute a dwelling even though it was part of a whole residential building. Similar to our client, the defendant tried to have the stairwell considered a dwelling for the purposes of the “Make-My-Day” statute. The court held that the stairwell was not a dwelling because it was a common area that other tenants and guests use.

[A]Mr. Taylor frequently slept on a cot in his detached garage. This clearly falls into the incidental uses of the main residence. However, the JIMENEZ court focused on the incidental uses within an “entire building.” Also, unlike the stair-well in CUSHINBERRY, Mr. Taylor’s private garage is not a common area. This may help Mr. Taylor with a claim of self-defense since one does not normally expect other people in a private area. However, the court will not push the line of dwelling beyond the attachment element for the higher protections of the “Make-My-Day” statute. That unnecessarily bent line would encompass other private areas that have incidental uses like rental storage units, cars, or office spaces. Also, temporary usage of the garage with the cot is not enough of a habitation use because that same cot could be used in structures like a car or office space. Moreover, a reasonable person does not normally consider a garage a sleeping area. Finally, detached structures, which have enough habitation uses, incidental or not, like a vacation home, are considered dwellings in their own right.

[C]Because the court does not consider detached structures in the incidental-uses and non-common-area rule, Mr. Taylor’s “detached” garage is not a dwelling under Colorado’s “Make-My-Day” statute.

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