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Persons Who May Object To Unlawful Searches Seizures:

1980 Supreme Court Cases on "Standing" Limit Application of the Exclusionary Rule

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INTRODUCTION

During the 1980 term, the Supreme Court decided three cases that further limit the application of the exclusionary rule for unconstitutional searches and seizures. These cases do not affect the substantive rights of individuals once the Fourth Amendment is held applicable.

BACKGROUND

Before 1960, in order to have evidence suppressed as the fruit of an unlawful search or seizure, a defendant often had to take the witness stand and testify under oath that he had a possessory interest in either the item seized or the place searched. If he did not so testify (or present other evidence), the court could deny his motion to suppress without reaching the issue as to the lawfulness of the search and seizure because the defendant had not demonstrated that he had "standing" to object to the search and seizure.

In 1960, the United States Supreme Court decided the case of Jones v. United States, 362 U.S. 257. The search in question was conducted pursuant to a warrant and resulted in the seizure of narcotics. The defendant was present in the apartment when it was searched. At a suppression hearing conducted in the district court pursuant to Federal Rule 41(e), the defendant testified that he lived elsewhere but a friend had given him permission to use the apartment and a key. He stated that he kept a suit and a shirt in the

apartment and slept there "maybe a night." The district court denied his motion to suppress, finding that Jones was not a "person aggrieved" within the meaning of Rule 41(e).[1] He had not claimed possession of the narcotics seized and had no possessory interest in the premises searched greater than that of an invitee or guest.

The Supreme Court reversed. It perceived two evils in the lower court's rationale as it related to prosecutions for possessory offenses. These are cases in which an essential element of the charge against the defendant is that he possessed the very item that he now seeks to have suppressed. The first of these evils was that in order to establish standing, the defendant was required to testify to facts that, once proved, would tend to convict him. The Court borrowed the following language from Judge Learned Hand:

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.[2]

The Court considered the risk that the defendant's testimony at the suppression hearing would disadvantage him at trial too great a price to pay for invoking constitutional protections.

Justice Frankfurter, writing for the Court, addressed a second evil--the "vice of prosecutorial contradiction." The government should not be permitted to take the position at the suppression hearing that items were not the defendant's possessions when seized and then later convict him of possessing these same items. The Court held that the possession on which the defendant was to be tried and convicted was sufficient to confer standing and render him an aggrieved person under Rule 41(e). Thus defendants charged with possessory offenses had "automatic standing" to object to the introduction of the items they allegedly possessed. As to persons charged with other offenses, the law remained unchanged.

As an alternative basis of decision, the Court held that Jones's testimony made out a sufficient interest in the premises searched to establish standing as an aggrieved party. Constitutional jurisprudence should not turn on "arcane" concepts of tort or property law like the distinction between invitees, licensees, and guests. Rather,

1. Standing under Rule 41(e) and the general constitutional concept of standing under the Fourth Amendment are identical. Alderman v. United States, 394 U.S. 165, 173 n.6 (1969).

2. Connolly v. Medalie, 58 F.2d 629, 630 (2nd Cir. 1932).

anyone legitimately upon the premises where a search occurs may challenge its legality.

In 1968, the Supreme Court foreshadowed the death of the Jones automatic-standing rule. In Simmons v. United States, 390 U.S. 377, the Court held that a defendant may take the witness stand at a suppression hearing and later, by timely objection, prevent the use of his testimony during the prosecution case-in-chief. [The possibility of impeachment use of his testimony was expressly left open. Cf. Harris v. New York, 401 U.S. 222 (1971).] As discussed later, the 1980 Supreme Court reasoned that this holding takes the defendant off of the horns of Learned Hand's dilemma.

Ten years later, the Court took the opportunity presented by Rakas v. Illinois, 439 U.S. 128 (1978), to re-examine the alternate basis of the Jones decision--the standing of anyone "legitimately upon the premises." Kentucky officers had stopped and searched, without a warrant, an automobile believed to be an armed-robbery getaway car. A sawed-off rifle was found under the passenger seat and shells were found in the glove box. The defendants, who were convicted of armed robbery, were passengers in the car. They did not own the car or claim possession or ownership of the items seized. They were not charged with any possessory offense and therefore did not automatically have standing. The Court assumed that they were "legitimately upon the premises" of the automobile.

The Supreme Court began its analysis by discarding the term "standing."[3] Since Fourth Amendment rights are personal rights that cannot be raised vicariously, the issue is always whether the challenged search or seizure violated the Fourth Amendment rights of the particular criminal defendant who seeks to exclude the evidence. Thus the question of standing--whether government action has invaded some interest of the particular defendant that the Fourth Amendment was intended to protect--is always subsumed within the substantive inquiry.

The Court next discarded "legitimately upon the premises" in favor of "having a legitimate expectation of privacy" as defining the class of persons entitled to have the fruits of an illegal search or seizure suppressed. Jones merely recognized that a person might have a legitimate expectation of privacy in a place other than his own home. The defendants here had not demonstrated that they had an expectation of privacy in the glove box or under the seat of the car in which they were passengers.

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3. Although officially disapproved, the term still appears in the Court's writing occasionally. E.g., United States v. Payner, ___ U.S. ___, 100 S. Ct. 2439, 2444 (1980) (". . . respondent lacks standing . . .").

THE 1980 TERM

In 1980 the Court overruled the automatic-standing rule of Jones. The search in United States v. Salvucci, ___ U.S. ___, 100 S. Ct. 2547, was conducted by Massachusetts police at the home of Salvucci's co-defendant's mother. Salvucci was charged with possession of the twelve checks, stolen from the United States mail, that were seized during the search. The district court held that the defendant had automatic standing under Jones and granted a pretrial suppression motion. The Supreme Court reversed. Simmons v. United States, supra, had effectively dealt with the first evil underlying the reasoning in Jones--the self-incrimination dilemma. A defendant is adequately protected by his ability to prevent the use of his suppression-hearing testimony during the prosecution case-in-chief. The second evil--the vice of prosecutorial contradiction--had also been eroded by recent case law. Rakas v. Illinois, supra, had made clear that a defendant might possess seized goods and yet not have had his Fourth Amendment interest invaded.[4]

Having disposed of both evils, the Court declared that the automatic-standing rule of Jones had outlived its usefulness. It is important to note, however, that Jones has not been overruled on its facts, and the implication in Rakas, supra, was clearly that it would be decided the same way under the expectation-of-privacy analysis.

In a second case, the Court went a step further in limiting the application of the exclusionary rule in cases in which standing is claimed on the basis of possession of seized goods. The case was Rawlings v. Kentucky, ___ U.S. ___, 100 S. Ct. 2556 (1980). The search was conducted by police officers armed with a search warrant. They had originally gone to the home in question to serve an arrest warrant. Unable to find the person named in the warrant, they smelled marijuana smoke and saw seeds while on the premises. Four occupants of the house were detained while the officers obtained the search warrant. Believing that the warrant for the premises authorized them to search occupants also, the officers found controlled substances in the purse of one Vanessa Cox. The defendant, Rawlings, immediately claimed the drugs. Police then searched him, found $4,500 and a knife, and then formally arrested him.

As to the controlled substances found in Cox's purse, not only did the defendant have no automatic standing in view of Salvucci but also no interest of his that the Fourth Anendment was designed to protect had been invaded. This was so even though he had testified at the suppression hearing that the contraband belonged to him. The court held that, while ownership is a factor to consider, property law

4. This proposition was made a great deal more clear in Rawlings v. Kentucky, ___ U.S. ___, 100 S. Ct. 2556 (1980), an opinion filed the same day; it is discussed later in this memorandum.

concepts, again "arcane," are not controlling. Only those who have a legitimate expectation of privacy in the place searched are "aggrieved" by the search. Rawlings had no such interest in Cox's purse.

This decision further removed the vice of prosecutorial contradiction that had offended the Jones Court. It is no longer a contradiction to convict a defendant of possession of contraband while denying him "standing" to object to the search that resulted in its seizure. He can own and possess an item seized as evidence and yet have no expectation of privacy in the place searched.

In Rawlings, the defendant's conviction was affirmed. The Court noted that the defendant has the burden of proving not only that the search was illegal but also that it invaded some interest of his that the Fourth Amendment protects. In addition, the Court disposed of defendant's contention that he was illegally detained while officers obtained a search warrant and that his admission of ownership of the drugs was the fruit of that detention. Assuming that the detention was illegal, Justice Reinquist noted such factors as the congenial atmosphere during the detention, Miranda warnings given just before the admission, the apparent spontaneity of the admission, and the fact that the police were not guilty of any flagrant violations. He concluded that the admission was voluntary and not the fruit of the detention. The money and the knife found on the defendant were admissible as incident to a lawful arrest. The fact that the search of the defendant preceded formal arrest by a few seconds was not important, since there was probable cause for arrest once the defendant admitted ownership of the drugs.

In a third case, the 1980 Supreme Court apparently makes clear that the standing limitation on the exclusionary rule will be strictly applied no matter how offensive the governmental conduct.[5] In the case of United States v. Payner, ___ U.S., ___, 100 S. Ct. 2439, the defendant was prosecuted for falsifying tax returns--specifically, for stating that he had no foreign bank accounts when in fact he had a secret account with the Castle Bank and Trust Company of the Bahamas. The government's case rested largely on a loan agreement showing that defendant had pledged his funds in the Castle Bank as security for a loan. Both the Supreme Court and the district court assumed that this document was in some way the fruit of the flagrantly unconstitutional search of a Castle Bank officer's briefcase while he was in Miami. The district court found as a fact that the Internal Revenue Service counseled its agents that the standing limitation of the Fourth Amendment permits them to conduct a

5. This case can be explained to some extent by other factors. For example, the relationship between the search and the evidence suppressed by the district court was rather tenuous. Also, the Supreme Court apparently did not agree with the district court concerning the manner in which IRS agents were instructed with regard to the Fourth Amendment.

purposeful unconstitutional search and seizure of one individual to obtain evidence against a third party. The district court invoked its supervisory powers to suppress evidence gathered as a result of "knowing and purposeful bad faith hostility" to another individual's constitutional rights, despite the defendant's own lack of standing.

The Supreme Court reversed. The standing limitation strikes the proper balance between Fourth Amendment values and the need of the judicial fact-finding process for probative evidence. That balance does not change simply because one chooses to analyze under the rubric "supervisory powers." Therefore, the federal courts may not invoke supervisory powers to suppress evidence upon motion of a defendant who is without standing.

SUMMARY OF HOLDINGS

(1) A defendant charged with a possessory crime does not automatically have standing to suppress, as the fruit of an unlawful search, the evidence he is charged with possessing.

(2) The fact that a defendant has established his ownership or possession of an article of evidence that was the fruit of an unlawful search will not necessarily entitle him to suppression.

(3) The defendant's motion to suppress the fruit of an unlawful search or seizure must be overruled unless the government has invaded some interest of his that the Fourth Amendment was intended to protect. In the case of a search, the defendant's Fourth Amendment interests are not invaded unless he has a legitimate expectation of privacy in the place searched.

(4) To suppress the fruit of a search, the defendant has the burden of showing: (a) that a search was unlawful, and (b) that he had a legitimate expectation of privacy in the place searched.

(5) The standing limitation on the exclusion of evidence applies even when the government's conduct is flagrantly unconstitutional.

IMPLICATIONS FOR NORTH CAROLINA

The new limitations on the application of the exclusionary rule will bind the North Carolina courts. Hearings on motions to suppress are governed by Article 53 of Chapter 15A of the North Carolina General Statutes.[6] Section 15A-972 permits only "a defendant who is aggrieved" to file a

6. Article I, Section 20, of the North Carolina Constitution also provides

motion to suppress. The official commentary indicates that the word "aggrieved" was borrowed from Rule 41(e) of the Federal Rules of Criminal Procedure to give North Carolina the benefit of federal case law on standing to object. Section 15A-974(1) provides that evidence must be suppressed if "[i]ts exclusion is required by the Constitution of the United States . . . ." In explaining that this subdivision requires suppression of evidence only when such exclusion is constitutionally mandated, the commentary points out that "[t]here are indications that the Burger Court will moderate some of the exclusionary rules, and this section is designed not to freeze North Carolina's statutory law into patterns set solely by current case law." Since Article 53 was enacted, the North Carolina Supreme Court has consistently followed the United States Supreme Court's decisions on standing. See, e.g., State v. Jones, 299 N.C. 298, 306, 261 S.E.2d 860 (1980); and State v. Taylor, 298 N.C. 405, 415, 259 S.E.2d 502 (1979).

SUPPRESSION - HEARING PROCEDURES

The 1980 cases apparently settle the troublesome issue as to who has the burden of proof in a search and seizure case. It was already well established that the defendant has the burden of proof as to standing. Alderman v. United States, 394 U.S. 165 (1969); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980). Also, the majority of courts that considered the question had placed the burden of proving that the search was unlawful on the defendant, though this question was far from settled.[7] Rawlings has now apparently placed this burden squarely on the defendant. Finally, the Supreme Court has held that a search without a warrant was presumed to be unlawful, and the government has the burden of proving that the search came within an exception to the warrant requirement. Coolidge v. New Hampshire, 403 U.S.

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search and seizure protection. Apparently there are no cases holding that this provision requires a broader test of standing than that required by the United States Constitution. The Supreme Court of North Carolina does, in fact, follow the case law of the United States Supreme Court on standing. E.g., State v. Jones, 299 N.C. 298, 306, 261 S.E.2d 860 (1980).

7. The clear majority of courts had placed the burden on the defendant. E.g., United States v. Cella, 568 F.2d 1266 (9th Cir. 1977) (burden on defendant to go forward and demonstrate taint); United States v. Grera, 409 F.2d 117 (3d Cir. 1969) (burden on defendant to present prima facie case); United States v. Lyon, 397 F.2d 505 (7th Cir. 1968) (defendant has burden of establishing unlawfulness); United States v. Melendey, 355 F.2d 914 (7th Cir. 1966) (initial burden on defendant). In a few cases the burden has been placed on the government. E.g. United States v. Ocks, 461 F. Supp 1 (S.D.N.Y. 1978). The New York courts have placed the burden of persuasion on the defendant, but require the prosecution to go forward with the evidence (a rule not necessarily inconsistent with Rawlings). People v. Di Stefano, 38 N.Y.2d 640, 652, 345 N.E.2d 548, 555, 382 N.Y.S.2d 5, 12 (1976); People v. Turney, 417 N.Y.S.2d 840 (Sup. Ct. 1979). The North Carolina Supreme Court had placed the burden on the State but held that it was proper to place the burden of going forward on the defendant. State v. Crews, 286 N.C. 41 (1974). The almost uniform practice among superior court judges in North Carolina has been to put the burden (at least of going forward) on the State.

443, 455 (1971). The procedure to be followed, therefore, will vary somewhat depending on whether a search was conducted with a warrant.

Since suppression motions in North Carolina are normally heard before trial,[8] the defendant will not be able to rely on evidence already presented by the State to help him carry his burden. He will first have to show that he has standing--that he is "aggrieved" by the search or seizure--and then show that the search was unlawful.

Warrantless searches. A defendant makes a prima facie showing that a search was unlawful simply by showing that it was conducted without a warrant. Once he has demonstrated standing and the lack of a warrant, the burden shifts. The State must then prove facts that bring the search within an exception to the warrant requirement. If it cannot do so, the motion to suppress is allowed.

Searches with a warrant. In all other cases, the defendant has the burden of persuading the court that the search was unlawful. If he cannot do so, his motion is overruled.[9]

During the trial of the main issue, the State would, of course, not be permitted to use the defendant's suppression-hearing testimony as part of its case-in-chief but probably could use it for impeachment purposes. Cf. Harris v. New York, 401 U.S. 222 (1971). In a footnote in Salvucci, the Court cites a number of state courts that have permitted such impeachment.[10] A second footnote states: "This Court has held that the 'protective shield of Simmons is not to be converted into a license for false representations . . . .' United States v. Kahan, 415 U.S. 239 . . . (1974)."[11] Also, during the 1980 term the Court held that evidence that had been suppressed on Fourth Amendment grounds may be used for impeachment purposes, even as to a matter raised for the first time on cross-examination, but only if the defendant has opened the door in some general way during testimony on direct examination. United States v. Havens, ___ U.S. ___, 100 S. Ct. 1912.

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8. Motions to suppress must be made before trial unless the defendant is deprived of the statutory notice and opportunity afforded by G.S. 15A-975.

9. In some complex situations in which the defendant has established his standing and the unlawfulness of the search, there may still be an issue as to whether the particular evidence in question is "tainted" by the search. If the prosecution contends that the evidence is not tainted because of an independent source, then it has the "ultimate" burden of persuading the court. Alderman v. United States, 394 U.S. 165 (1969).

10. 100 S. Ct. at 2554, n.8.

11. Id., n.9.

UNLAWFUL SEIZURES

A distinction should be made between unlawful searches and unlawful seizures. In Rawlings, the Court held that possession or ownership of an item seized as the result of an unlawful search does not establish standing to object to the search. A different issue is presented by an attack on the seizure of items without regard to the existence or lawfulness of any accompanying search. Government agents, for example, may not constitutionally seize items that they have no reasonable basis to believe are contraband, evidence, or the implements or proceeds of a crime. See Stanford v. Texas, 379 U.S. 476 (1965). The Court does make a passing reference in Salvucci to this distinction between unlawful searches and unlawful seizures.[12] Thus ownership or possession of an item improperly seized would probably establish standing. Such a holding would give meaning to the Fourth Amendment protection of one's security in his "effects."

LEGITIMATE EXPECTATION OF PRIVACY

The cases that have been discussed shed some light on the question: Where does a person have a legitimate expectation of privacy? All of these cases deal with one person's claim of privacy in another person's "place." Jones and Salvucci dealt with others' dwellings; Rakas with an automobile; and Payner and Rawlings with valises. In the absence of a showing, no privacy right is recognized. The Court, in determining whether a sufficient showing had been made to establish privacy rights in these cases, mentioned the following facators: (1) the relationship between the defendant and the person to whom the place belonged, (2) whether the defendant had been given permission to use the place, and, if so, the scope of that permission; (3) the history and nature of whatever use the defendant had made of the place; (4) what degree of dominion or control the defendant had of the place; and (5) what actual expectation the defendant had with respect to the place. In Rawlings there was conflicting evidence as to the defendant's permission to use his female companion's purse. He had not previously used her purse, nor did he have dominion and control of it, and he testified he did not expect the police to stay out of it. The Court held that he lacked standing. In Jones, on the other hand, the defendant had been given not only permission to use his friend's apartment but also a key. He had used the apartment on prior occasions, had slept there, and kept clothing there. At the time of the search, he had dominion and control of the apartment (as the Court

12. "Legal possession of the seized goods may be sufficient in some circumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal . . . . We need not explore this issue since respondents did not challenge the constitutionality of the seizure of the evidence." Id., n.6.

later observed in Rakas). Therefore he had a privacy right recognized by the Fourth Amendment.

CONCLUSION

During its 1980 term, the United States Supreme Court filed three opinions concerning the standing of criminal defendants to move for suppression of evidence as the fruit of an unlawful search. These decisions limit substantially the application of the exclusionary rule and apply the limitation strictly, even in the face of flagrant government misconduct. Prosecutors in North Carolina and elsewhere will be advantaged in several important ways by these opinions. First, the complaints of certain criminal defendants about unlawful searches will no longer be heard--namely, defendants who have a possessory interest in the item seized but no right of privacy in the place searched. Second, no defendant will automatically have standing to object; instead, every defendant will have the burden of proving that his right of privacy was violated by the search. Third, prosecutors will often obtain the tactical advantage of "staking out" the defendant's testimony before trial and will probably have the option of impeaching the defendant if his trial testimony differs. However, while these decisions cut substantial inroads into the criminal defendant's arsenal of technical defenses, no corresponding cuts have been made into the substantive protection afforded individuals once the Fourth Amendment is held to apply.