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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from York County
John C. Hayes, III, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

Kenneth Darrell Morris, II.....Petitioner.

REPLY BRIEF

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TABLE OF CASES

Though the argument was never made below, Respondent now argues that Petitioner lacks standing to bring a Fourth Amendment challenge to his seizure and the search of the rented vehicle that he was driving. Respondent makes this argument because Petitioner was not an authorized driver of the rented vehicle pull over by Officer Vinesett. It is true that the renter and only authorized driver of the vehicle was the passenger, Brandon Nichols.

As with so many issues involving the Fourth Amendment, a split of authority exists on the question of whether or not an unauthorized driver of a rented vehicle has a legitimate expectation of privacy in the area searched. Respondent wants this Court to adopt the rule followed by the Fourth Circuit. The rule in the Fourth Circuit (as well as in several other circuits including the First, Third, Fifth and Tenth) is that "an unauthorized driver of the rented car, ha[s] no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights." United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994).

Respondent's argument mirrors the Fourth Circuit's rule and would have this Court hold that "[a]n unauthorized driver of a rented car has 'no legitimate privacy interest in the car' and, therefore, a search of the car 'cannot have violated his Fourth Amendment rights.' This conclusion is not altered where the authorized lessee allows the unauthorized driver to drive the rented vehicle . . . ." United States v. Luster, 324 Fed. App'x 224, 225 (4th Cir. 2009) (internal citations omitted) (emphasis added). Petitioner respectfully maintains that the approach urged by Respondent is too arcane, as evidenced by the following authorities.

I. As the permissive driver of the rented vehicle, Petitioner has standing to bring a Fourth Amendment challenge. The passenger, who rented the vehicle, gave Petitioner permission to drive it.

"[Federal circuit] courts have developed at least three different approaches to determining when an unauthorized driver of a rental car has standing to challenge a search."

United States v. Thomas, 447 F.3d 1191, 1196 (9th Cir. 2006). "The first approach is seen in the Fourth, Fifth, and Tenth Circuits." Id. at 1196. "These courts have all adopted a bright-line test: An individual not listed on the rental agreement lacks standing to object to a search. Their cases reason that because an unauthorized driver lacks a property or possessory interest in the car, the driver does not have an expectation of privacy in it." Id. at 1196-97. Case law handed down more recently has observed that this bright-line test is simply too rigid. See, e.g. State v. Cutler, 144 Idaho 272, 275,159 P.3d 909, 912 (Idaho App. 2007) ("Given the increasingly common utilization of rental vehicles for a myriad of purposes and our view that a bright line rule fails to address the ensuing complexities, we are convinced the Sixth Circuit Court's totality of the circumstances approach best addresses the issue.").

The second approach, which Petitioner submits is a better more reasoned approach, has been adopted by the Eighth and Ninth Circuits and is a modified bright-line approach. This approach generally disallows standing "unless the unauthorized driver can show he or she had the permission of the authorized driver." Thomas, 447 F.3d at 1197. This second approach grants standing to an unauthorized driver but only "after a showing of 'consensual possession' of the rental car". Id. at 1997 (citing United States v. Muhammad, 58 F.3d 353, 355 (8th Cir. 1995) (per curiam)).

Finally, the third approach has been adopted by the Sixth Circuit and "examines the totality of the circumstances in determining whether a non-authorized driver had a reasonable expectation of privacy." Id. (citing United States v. Smith, 263 F.3d 571 (6th Cir. 2001). The Sixth Circuit recognized "a broad presumption against granting unauthorized drivers standing to challenge a search. However, the [Sixth Circuit] stated that the 'rigid [bright-line] test is inappropriate, given that we must determine whether [the defendant] had a legitimate expectation of privacy which was reasonable in light of all the surrounding circumstances.'"

Id. (quoting Smith, 263 F.3d at 586). The Sixth Circuit's test "consider[s] a range of factors, including: (1) whether the defendant had a driver's license; (2) the relationship between the unauthorized driver and the lessee; (3) the driver's ability to present rental documents; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company . . ." Id. at 1198 (quoting Smith, 263 F.3d at 586).

After considering the three approaches followed by the circuits, the Ninth Circuit "reject[ed] the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search." Id. at 1198. The Ninth Circuit refused to "base constitutional standing entirely on a rental agreement to which the unauthorized driver was not a party." Id. at 1198-99. See also Rakas v. Illinois, 439, U.S. 128, 143, 99 S.Ct. 421, ___ (1978) "'Arcane distinctions developed in property and tort law . . . ought not . . . control' the reasonableness of an expectation of privacy.") (internal citations omitted).

The Ninth Circuit concluded "an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter." Id. at 1199.

Apply the above persuasive authorities to the case now before the Court, Petitioner must admit that he would lack standing if the Court were to adopt the bright line lest adopted in the Fourth Circuit and others. He simply was not listed as a permissive driver and was behind the wheel of the vehicle when it was stopped. However, Petitioner urges this Court to adopt a non-arcane, reasonable rule that does not base the applicability and ability to invoke sacred constitutional rights on a mere contract to rent a car.

Under the approach adopted by the Eighth and Ninth Circuits, Petitioner believes that he possesses standing to bring a Fourth Amendment challenge. The facts of this case, as presented below, are than Petitioner was driving a rented vehicle from Atlanta to North

Carolina while accompanied by a passenger who had rented the vehicle. The fact that Petitioner and the renter (i.e. authorized driver) were travelling together in the rented vehicle should be a sufficient fact in and of itself to establish standing under the modified bright line approach, and Petitioner respectfully maintains that he has standing to bring his Fourth Amendment challenge.

Further, if this Court inclined to adopt the Sixth Circuit's totality of the circumstances approach, Petitioner asserts that he still has standing to bring a Fourth Amendment challenge. Again, the facts of this case as presented below are that Petitioner was driving a rented vehicle from Atlanta to North Carolina while accompanied by a passenger who had rented the vehicle. Petitioner presented his driver's license and the passenger gave Officer Vinesett a copy of the rental agreement. Further Officer Vinesett established that Petitioner and the passenger were travelling together back from a road trip to Atlanta. (All of the above fact were established when the video recording of the traffic stop played in open court during the suppression hearing.) These factors taken together should be more than sufficient to establish that Petitioner had a reasonable expectation of privacy in the rented vehicle he was driving under the totality of the circumstances. As he was driving with the consent of the authorized driver, his passenger, Petitioner respectfully maintains that he has standing.

II. This Court has already impliedly rejected Respondent's argument. The driver in State v. Tindall was an unauthorized driver of a rented vehicle. He was merely paid $1,500 to drive a vehicle he did not rent.

In recent years, this Court decided the case of State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010). In that case, Tindall was pulled over in Oconee County for speeding in a rented vehicle; he was also charged with following too closely and failing to maintain his lane. Id. at 204. The officer searched the vehicle and found a large quantity of illegal drugs. Following the search, "Tindall was placed in custody and given Miranda warnings, after

which he gave a statement to the officer admitting that he was being paid $1,500 to drive the Jeep from Atlanta to Durham. Id. at 204-05.

This Court focused on the information available to the officer when he extended the scope and duration of the traffic stop and reversed Tindall's conviction. The Court observed:

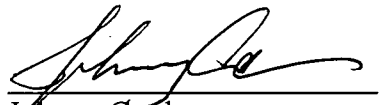
> [a]t that point, the officer had ascertained the following information: (1) Tindall was driving to Durham to meet his brother; (2) Tindall was driving a rental car **rented the previous day by another individual** which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous.

Id. at 206 (emphasis supplied). The Court concluded "[w]e find these facts did not provide the officer with a 'reasonable suspicion' that a serious crime was afoot. Id.

Though not an issue addressed by this Court in Tindall, the fact that Tindall was an unauthorized driver (and sole occupant) of a rented vehicle was not fatal to his Fourth Amendment challenge. Further unlike the facts present in Tindall, Petitioner was present in the car with the renter of the vehicle and not merely a paid courier as was Tindall.

CONCLUSION

For the above-stated reasons, Petitioner respectfully maintains that Respondent's argument that he lacks standing to bring a Fourth Amendment challenge is (1) based on Fourth Circuit case law that has been rejected by well-reasoned opinions from the Sixth, Eighth and Ninth Circuits and (2) inconsistent with South Carolina precedent as expressed in State v. Tindall. As such, Petitioner maintains he has standing to bring his challenge.



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May 12, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability, this Brief of the Petitioner complies with Rule 211(b), SCACR, and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Date Identifiers and Other Sensitive Information in Appellate Court Filings."

Dated: May 12, 2014

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PROOF OF SERVICE

I, Victoria Hucks Bailey, hereby certify that I have served the within Reply Brief of Petitioner and Petitioner's Motion to File Reply Brief Out Of Time upon Mark R. Farthing, Esq., by depositing two copies of the same in the United States Mail, with sufficient first class postage attached, addressed to:.

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I further certify that all parties required by the South Carolina Rules of Appellate Procedure have been served.

Victoria Hucks Bailey

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May 12th, 2014