

“THE FEDERAL CORNER”

What Will the Supremes Do With a Fourth Amendment Issue That Would Benefit Some of the Drivers of Rental Vehicles?

Buck Files

For those of us who live and practice law in cities near interstate highways, it is common for us to represent clients who have been stopped by law enforcement officers while they were driving rental cars and transporting drugs. In each of these cases, we consider filing a motion to suppress the evidence that was discovered and seized by the officers. Often, there is an issue as to whether our clients have standing to challenge the search of their vehicles and the seizure of the drugs.

On September 28, 2017, the Supreme Court granted certiorari in *Byrd v. United States*, 2017 WL 2119343 (U.S.). On February 10, 2017, the United States Court of Appeals for the Third Circuit affirmed Byrd’s judgment and conviction for the offenses of possessing heroin with the intent to distribute in violation of 21 U.S.C. § 841(a)(1), and possessing body armor as a prohibited person in violation of 18 U.S.C. § 931(a)(1). *United States v. Byrd*, 679 F.App’x 146 (3d Cir. 2017) [Panel: Circuit Judges Fisher, Krause and Melloy. Opinion by Melloy.] Interestingly, a footnote to the opinion stated, “This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.”

[An Overview of the Opinion]

Terrence Byrd entered a conditional guilty plea to charges of possessing heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and possessing body armor as a prohibited person in violation of 18 U.S.C. § 931(a)(1). He reserved the right to appeal several suppression rulings. He now appeals, arguing: ... the District Court erred by holding Byrd lacked standing to challenge the vehicle search. We affirm the judgment of the District Court.

[The Facts]

Byrd was driving a rental car on a four-lane divided highway near Harrisburg, Pennsylvania. A state police officer parked in the median recognized Byrd’s car as a rental and noticed the driver’s seat was reclined to an unusual degree such that the driver was not clearly visible. The officer followed Byrd and eventually pulled Byrd over. The officer claimed he observed Byrd violate a state law requiring drivers to limit use of the left-hand lane to passing maneuvers.

When the officer approached Byrd’s stopped car and asked for Byrd’s license and the rental agreement, Byrd appeared nervous and conspicuously avoided opening a center console even though Byrd had difficulty locating the requested documents. Eventually, Byrd produced an interim New York driver’s license that

did not include a photo. Byrd also produced the rental agreement. The rental agreement did not list Byrd as the renter or as a permissive driver.

The officers then asked Byrd for permission to search the vehicle, but stated they did not need his consent because he was not listed on the rental agreement. The officers assert that Byrd gave his consent. They subsequently found heroin and body armor in the trunk of the car and arrested Byrd. (emphasis added)

[In the District Court]

In the District Court, Byrd moved to suppress the evidence resulting from the stop and the search,... *The District Court determined that Byrd, as the sole occupant of a rented car, had no expectation of privacy because he was not listed on the rental agreement. (emphasis added)*

[The Circuit Split]

...Byrd argues he did not consent to the vehicle search. *A circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement. See [United States v. Kennedy](#), 638 F.3d 159, 165–67 (3d Cir. 2011) (collecting cases). The Third Circuit has spoken as to this issue, however, and determined such a person has no expectation of privacy and therefore no standing to challenge a search of the vehicle. See *id.* at 167–68 (‘We therefore hold that society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company.’). As such, we need not address Byrd’s arguments concerning his lack of consent for the search. (emphasis added)*

We will affirm the judgment of the District Court.

In his opinion in *Byrd*, Judge Melloy only notes that there is a Circuit split on the expectation of privacy issues, citing *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011) [Panel: Circuit Judges Fuentes, Jordan and Aldisert. Opinion by Fuentes, Circuit Judge.]

Judge Fuentes recognizes that in the 4th, 5th, 6th and 10th circuits, “...*the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy.*” In the 8th and 9th circuits, “...*an unauthorized driver of a rental has standing where the renter gives him permission to use the vehicle.*” (emphasis added)

Judge Fuentes’ opinion reads, in part, as follows:

[An Overview of the Opinion]

Acting on an arrest warrant, police arrested Shamone Kennedy and impounded a nearby rental car that Kennedy's girlfriend had lent him a few days earlier. Following an inventory search, police found two guns and 200 grams of cocaine inside the car. Kennedy moved to suppress the evidence found in the car, contending he had a legitimate expectation of privacy in its contents. The District Court denied the motion. *Because we find that the driver of a rental car whose name is not listed on the rental agreement generally lacks a legitimate expectation of privacy in the car, we conclude that Kennedy's suppression motion was properly denied.* (emphasis added)

[The Fourth Amendment]

Fourth Amendment standing 'requires that the individual challenging the search have a reasonable expectation of privacy in the property searched ... and that he manifest a subjective expectation of privacy in the property searched[.]' [United States v. Baker](#), 221 F.3d at 441... (emphasis added)

('Our Fourth Amendment analysis ... inquire[s] whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable.') (internal quotation and citation omitted); [Carter](#), 525 U.S. at 101, 119 S.Ct. 469 (1998) (emphasis added)

[The Court Joins with Four Other Circuits]

...we concur with the majority of circuits that have considered this factual scenario and conclude that, as a general rule, the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy. (emphasis added)

[The Court's Reasoning]

...an individual who borrows a rental car without the permission or knowledge of the owner not only acts in contravention of the owner's property rights, but also deceives the owner of the vehicle while increasing the risk that the property will be harmed or lost. Although property law is not controlling, neither is it irrelevant. See [Rakas](#), 439 U.S. at 143 n. 12, 99 S.Ct. 421 ('Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that

are recognized and permitted by society.’). An authorized driver on the rental agreement has lawful possession of the vehicle and, within the scope of the rental agreement, may legitimately exclude others from using it. *See, e.g., United States v. Walker*, 237 F.3d 845, 849 (7th Cir.2001) (*‘A person listed as an approved driver on a rental agreement has an objective expectation of privacy in the vehicle due to his possessory and property interest in the vehicle.’*). In contrast, an unauthorized driver has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude. *The lack of such an interest supports the position that it is objectively unreasonable for an unauthorized driver to expect privacy in the vehicle.* (emphasis added)

For the foregoing reasons, we affirm the judgment of the District Court.

The only Fifth Circuit case cited by Judge Fuentes in his opinion is *United States v. Seeley*, 331 F.3d 471, 2003 WL 21142908 (5th Cir. 2003) (Per Curiam) The opinion is just over a page in length and reads, in part, as follows:

[The Facts]

Seeley was convicted at a bench trial for importing marijuana into the United States and for possessing marijuana with the intent to distribute. After being convicted, he gave notice of appeal.

[Seeley’s Argument on Appeal]

Seeley contends that the district court erred in denying his motion to suppress. Because he did not object to the magistrate judge’s report recommending that the motion be denied, this court reviews for plain error.

Seeley has not established that there was plain error in the holding that he lacked standing to challenge the search of the rental car, as he (the sole occupant of the car) was not the renter or an authorized driver.

...Seeley had nothing to do with the rental, never presented his driver’s license (or name) to Alamo (the rental company) and was merely given the keys by his friend just after the friend rented the car from Alamo, the friend not intending to use the car but simply, at Seeley’s request, renting it for Seeley because Seeley did not have an appropriate credit card, and the rental agreement provides ‘no additional renters are authorized to drive the vehicle.’

Consequently, the judgment of the district court is affirmed.

[NOTE: This is no mention of expectation of privacy in the opinion.]

[My Thoughts]

- I wish I had kept a list of the cases in which the Judges of the Courts of Appeal have ordered that they are not to be published or have stated that the opinion does not constitute binding precedent – and then watched them wind up at the Supreme Court. *Byrd* is one of those cases.
- How can any defense lawyer be optimistic that the Justices of the Supreme Court will grant relief to Byrd when that would permit other defendants similarly situated to have standing to raise Fourth Amendment issues?