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Criminal Procedure - The Automatic Standing Rule in Possession Cases is Overruled

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NOTES

CRIMINAL PROCEDURE—THE AUTOMATIC STANDING RULE IN POSSESSION CASES IS OVERRULED. *United States v. Salvucci*, 448 U.S. 83 (1980).

On the basis of an affidavit of a Massachusetts state police trooper a search warrant was issued for the apartment of Jean Zackular. The affidavit stated that a reliable, unnamed informant had told the trooper of conversations between the informant and Joseph Zackular. According to the affidavit Zackular had told the informant that a check writing machine used to print checks on stolen check forms was located at the apartment of Jean Zackular. During the search of the apartment, stolen checks were found. As a result of the discovery of the checks, John Salvucci and Joseph Zackular were charged with unlawful possession of stolen checks.

The defendants moved to suppress the checks on the ground that the affidavit supporting the search warrant was inadequate to demonstrate probable cause. The government contended that the defendants lacked standing to challenge the constitutionality of the search because they did not have a possessory interest in the place searched. The federal district court for the state of Massachusetts held that the affidavit was deficient because it was based on double hearsay and failed to specify the dates on which information included in the affidavit had been obtained. The court ordered the suppression of the checks. The government sought reconsideration of the district court's ruling. The district court reaffirmed its order and the government appealed.

The Court of Appeals for the First Circuit affirmed, holding that the defendants had standing under the automatic standing rule of *Jones v. United States*.[1] The court ruled that the defendants were not required to establish a legitimate expectation of privacy in the premises searched or the property seized. The court questioned the vitality of the *Jones* rule, but refused to overrule it.[2] Certiorari was

1. Jones v. United States, 362 U.S. 257 (1960).
2. United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979).

granted by the United States Supreme Court.[3] The Court held that the automatic standing rule was no longer valid and expressly overruled *Jones. United States v. Salvucci*, 448 U.S. 83 (1980).

Unreasonable searches and seizures are prohibited by the fourth amendment.[4] To give effect to this prohibition the Supreme Court has established an exclusionary rule which prevents the use of evidence obtained in violation of the fourth amendment.[5] The protection against unreasonable searches and seizures is viewed as a personal right. A defendant may challenge the legality of a search only if he can establish that he was actually the victim of an invasion of privacy, and he may not vicariously assert the violation of another's rights.[6]

In finding standing to object to a search, courts have traditionally required that the defendant have either a possessory interest in the place searched or an ownership interest in the thing seized.[7] In the *Jones* decision, the Court broadened the circumstances under which standing could be found. The Court was there faced with a defendant who was charged with illegal possession of narcotics, but who had been denied standing to challenge the seizure of the very narcotics he was alleged to have possessed. The Court held that a defendant has automatic standing to object to the search for, and the seizure of, contraband when he is charged with a crime of which possession of the contraband is a key element.

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3. United States v. Salvucci, 444 U.S. 989 (1979).

4. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

5. Weeks v. United States, 232 U.S. 383 (1914). *See also* Mapp v. Ohio, 367 U.S. 643 (1961).

6. Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969). To prevent the vicarious assertion of constitutional rights courts require that the person asserting such rights have "standing." Standing refers to the status of having such sufficient property or possessory interest in the place searched or the thing seized as to be entitled to challenge the search and seizure.

7. United States v. Jeffers, 342 U.S. 48 (1951); Lovette v. United States, 230 F.2d 263 (5th Cir. 1956); Shurman v. United States, 219 F.2d 282 (5th Cir. 1955); Washington v. United States, 202 F.2d 214 (D.C. Cir. 1953); Scoggins v. United States, 202 F.2d 211 (D.C. Cir. 1953); Gorland v. United States, 197 F.2d 685 (D.C. Cir. 1952); United States v. Pisano, 193 F.2d 361 (7th Cir. 1951); Grainger v. United States, 158 F.2d 236 (4th Cir. 1946); In re Nassetta, 125 F.2d 924 (2d Cir. 1942); McMillan v. United States, 26 F.2d 58 (8th Cir. 1928); Graham v. United States, 15 F.2d 740 (8th Cir. 1926); Goldberg v. United States, 297 F. 98 (5th Cir. 1924); MacDaniel v. United States, 294 F. 269 (6th Cir. 1924).

The Court's opinion stated two reasons for establishing an automatic standing rule. First, to establish standing in possession cases a defendant would have to give testimony at the suppression hearing which, if used at trial, would tend to convict him. At the time of *Jones* some lower courts allowed the use of such testimony at trial.[8] A defendant was faced with the dilemma of choosing between his fourth amendment right to object to an illegal search and seizure and his fifth amendment right not to incriminate himself. Automatic standing removed him from this dilemma by relieving him of the need to give incriminating testimony.

The second reason given for the automatic standing rule was that the government should not be allowed to take the contradictory positions of asserting that the defendant possessed the contraband for purposes of violation of the criminal statute, but not for purposes of claiming his fourth amendment protection. The automatic standing rule forced the government to take the position that the defendant possessed the contraband for all purposes.

The expansive protection given to defendants in possession cases by the decision in *Jones* has steadily declined. The first case to place a limitation upon the automatic standing rule was *Brown v. United States*,[9] in which the Supreme Court restricted the application of the automatic standing rule to situations in which possession *at the time* of the search and seizure was an element of the crime. Prior to the decision in *Brown* the automatic standing rule had been applied in all possession cases regardless of when the possession was alleged to have occurred. In *Brown* the defendants were charged with possession of stolen property. The charge, however, related to the possession of the stolen goods up to the time of their delivery to the place that was eventually searched; therefore, the Court was able to rule that the automatic standing rule did not apply. The automatic standing rule and standing as a whole was dealt a severe blow in *Rakas v. Illinois*,[10] in which standing as a separate inquiry was abandoned. Prior to *Rakas* courts used a two step inquiry. The first inquiry was whether the defendant had standing to object to the search. The second was whether the search had in fact violated the defendant's constitutional rights. After *Rakas* there is a single inquiry concerning whether there was a violation of a "legitimate ex-

8. Fowler v. United States, 239 F.2d 93 (10th Cir. 1956); Kaiser v. United States, 60 F.2d 410 (8th Cir. 1932); Heller v. United States, 57 F.2d 627 (7th Cir. 1932).

9. 411 U.S. 223 (1973).

10. 439 U.S. 128 (1978).

pectation of privacy in the invaded place."[11] That is, did the police invade a place that the defendant would reasonably believe was safe from intrusion by others so that property placed there would not be disturbed?

Brown and *Rakas* thus set the stage for the Supreme Court to abandon the automatic standing rule of *Jones*. In *Salvucci* the Court did so.[12] Justice Rehnquist, writing for the Court, stated that the bases for the automatic standing rule no longer exist. First, the dilemma of a defendant having to choose between claiming his protection under the fourth amendment and retaining his privilege against self-incrimination under the fifth amendment had been removed by *Simmons v. United States*.[13] It was held there that testimony given by a defendant to establish standing to object to illegally seized evidence may not be used against him at his trial on the question of guilt or innocence. Second, the decision in *Rakas* settled the objection concerning the government taking contradictory positions regarding the defendant's possession of contraband by holding that a legitimate expectation of privacy had to be shown in order to challenge the legality of a search. Legal possession of an object seized during an illegal search does not guarantee a sufficient fourth amendment interest to allow the owner to protest the search.[14] In other words, possession of an object does not necessarily mean that there is a legitimate expectation of privacy concerning it.

Justice Rehnquist further stated that the automatic standing rule was no longer useful in the determination of fourth amendment rights. He emphasized that under the rule evidence was being lost which would prove a defendant's guilt. Also, defendants were being allowed to raise fourth amendment objections when in fact their constitutional rights had not been violated.

The Supreme Court's analysis was weak in finding that the bases for the automatic standing rule no longer exist. *Simmons* did not relieve a defendant from having to choose between his fourth and fifth amendment rights. True, testimony given by a defendant at a suppression hearing cannot be used at trial as evidence of guilt or innocence. However, such testimony could probably be used at trial

11. *Id.* at 140. *See also* Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring).

12. United States v. Salvucci, 448 U.S. 83, 85 (1980).

13. 390 U.S. 377 (1968).

14. Rawlings v. Kentucky, 448 U.S. 98 (1980).

for impeachment purposes.[15] A number of courts have so held.[16] A defendant would almost surely have to admit a possessory interest in the contraband in order to challenge a search and seizure. This testimony would be admissible against him at trial should he testify that he did not possess the contraband. He would therefore be placed in the position of having to choose between objecting to an unconstitutional search and testifying in his own behalf. The defendant should not be placed in such a position.

Justice Rehnquist was correct in stating that the objection to the government taking contrary positions was removed if, as stated in *Rawlings v. Kentucky*,[17] possession does not give rise to fourth amendment rights. However, possession of the object seized has long been a valid basis for raising fourth amendment objections.[18] The fourth amendment protects "effects, against unreasonable searches and seizures."[19] Limiting this protection to instances where there is a "legitimate" expectation of privacy is too narrow a reading of the fourth amendment. It raises the possibility that the fourth amendment's protection will be available only when the accused can show that he could, and did in fact, exclude others from access to the seized object. Availability of the object to others, even accomplices, may be ruled sufficient to deny the existence of a legitimate expectation of privacy. The burden of proving such an interest is too excessive.

The Court's emphasis on the prosecutorial cost of the automatic standing rule, the loss of probative evidence, ignores the true purpose of the exclusionary rule. The primary purpose of the exclusionary rule is to deter illegal searches.[20] Certainly, the application of the exclusionary rule in conjunction with the automatic standing rule resulted in the release of defendants who were in truth guilty of the crime with which they had been charged. However, that is the price to be paid if illegal searches and seizures are to be prevented. As a result of *Salvucci*, the police may be encouraged to violate one

15. United States v. Salvucci, 448 U.S. 83, 93 (1980); *see* Jenkens v. Anderson, 447 U.S. 231 (1980); United States v. Havens, 446 U.S. 620 (1980); Oregon v. Hass, 420 U.S. 714 (1975); United States v. Kahan, 415 U.S. 239 (1974); Harris v. New York, 401 U.S. 222 (1971). *But see* New Jersey v. Portash, 440 U.S. 450 (1979).

16. People v. Douglas, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974); Gray v. State, 43 Md. App. 238, 403 A.2d 853 (1979).

17. 448 U.S. 98 (1980).

18. *See* cases cited note 7 *supra*. *See also* Cantrell v. United States, 15 F.2d 953 (5th Cir. 1926).

19. U.S. CONST. amend. IV.

20. Elkins v. United States, 364 U.S. 206 (1960).

person's rights in the hope of finding evidence that could be used against another. Most police officers will not intentionally violate the rights of others. However, there are some who will. The fourth amendment and the exclusionary rule are directed at them. The Supreme Court should be supporting the Constitution and insuring the protections it offers rather than sacrificing individual rights for a few additional criminal convictions.

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