IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,033

THE STATE OF FLORIDA,

Petitioner,

vs.

TROY SINGLETON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,033

THE STATE OF FLORIDA,

Petitioner,

vs.

TROY SINGLETON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

INTRODUCTION

This brief will refer to the parties as the "defendant" and the "state," and will designate the record and transcripts by the same symbols used in the state's brief.

STATEMENT OF THE CASE AND FACTS

The defendant disagrees with the following assertions contained in the petitioner's Statement of the Case and Facts:

1) "Respondent admitted that on the night in question he did not have permission to drive the car (T1. 9) and, in fact, he took the car without asking, even though Pinder was available. (T1. 10)." (Petitioner's Brief at 5).

2) "Sandra Pinder testified that on January 30, 1990, Respondent did not have permission to drive her car (T1. 20). She also stated that, without her permission, he had taken a set of keys to the car." (Petitioner's Brief at 5).

3) "Pinder . . . consented to allow Rolewicz to search the passenger compartment and the trunk of her car." (Petitioner's Brief at 3).[1]

The defendant adds the following facts:

The motion to suppress alleged that the police had effected a nonconsensual search of a car belonging to the defendant's girlfriend, and that the defendant had a possessory and privacy interest in the vehicle which gave him standing to challenge the

---

[1]The defendant also disagrees with the state's assertion that, after Detective Malinowski advised him of his rights, the defendant "waived them." (Petitioner's Brief at 4). That assertion implies a knowing and voluntary waiver, which is not what the record indicates. According to Detective Malinowski, after being read his rights and indicating that he understood them, the defendant asked what would happen if he did not sign the waiver form, and if he talked to the officers without an attorney. (T2. 120-21, 159). Malinowski told him that "nothing" would happen. (T2. 121, 159). Without signing the form or asking for a lawyer, the defendant then told Malinowski that he was shot when he began to enter Zapatero's room, and that he left in his girlfriend's car. (T2. 122).

search. (R1. 22-23).

The hearing on the motion to suppress was limited to the question of the defendant's standing to challenge the search. (T1. 3-32). The defense presented the testimony of the defendant and of Sandra Pinder in support of the defendant's claim of fourth amendment standing. The state presented the testimony of the investigating detective, Steven Malinowski.

The defendant testified that the car belonged to his girlfriend, Sandra Pinder. (T1. 5). He and Pinder lived together. (T1. 11). He often used her car, helped her to make payments on it "a few times," and had his own set of keys. (T1. 6, 10). Only he and Pinder used the car. (T1. 10). Sometimes, when he and Pinder quarreled, she would tell him not to use the car, but "other than that, I usually have permission to use the car. I don't have to ask her to use the car." (T1. 10). He did not have "exact permission" to use the car on the day in question, because he had not seen Pinder in a couple of days, although she was at home when he took it, and she knew that he had it. (T1. 9-10).

After the defendant's testimony, the state called Detective Steven Malinowski to the stand. Over defense counsel's objection that the testimony was hearsay, Malinowski testified that after the defendant had been arrested, Pinder told him that the defendant had stolen the car and had no right to use the vehicle. (T1. 13-15). According to Malinowski, Pinder also said that "she had been trying to get the vehicle back from him for a couple of weeks; that she would get it back, he would take, she would get it back, he would

go and take it again. He had his own set of keys to the vehicle, which she could not get back." (T1. 15). Pinder had not reported the car as stolen, but she told the officers that she would press charges if that was necessary to get it back. (T1. 17). According to Malinowski, Pinder's statements were made under oath. (T1. 17-18).

After Malinowski's testimony, the defense called Sandra Pinder. Pinder testified that the defendant was her boyfriend. (T1. 19). They had a child. (T1. 24). The defendant had a key to the car and used it with her knowledge and permission. (T1. 19).

On cross-examination, Pinder stated that, at various times, she had withdrawn her consent to the defendant's use of the car. (T1. 20). Shortly after his release from prison, the defendant was arrested for "carrying a pipe." (T1. 22). He was in possession of the car at the time, and the car was seized by the police. (T1. 22). Because Detective Armstrong told her that the only way to get the car back was if she pressed charges, she told him that the defendant did not have permission to use the car. (T1. 23). Pinder did not want to press charges, "[s]o then Armstrong said he would work out a deal with Troy to get my car back, and they did." (T1. 23). Pinder recovered her car on January 24, 1990. (T1. 21-22). There was "junk" in the trunk: clothes, bottles, cables, etc. (T1. 21).

Pinder further testified that the defendant took the car again several days after she had recovered it from the police. (T1. 20, 22, 24). He did not ask for her permission, but she knew he had

the car, and he did not really steal it. (T1. 20, 22, 24). Pinder explained that she had not seen the defendant "in a few days. But like, he just came home, he changed, we talked for a while, and he left. Troy, he is my boyfriend. We live together. He never really asked you know. He just took it." (T1. 24). She did not ask him to give it back, because she was tired of arguing with him about the car. (T1. 20).

Early the next morning, a boy woke her up and told her that the defendant had been shot. (T1. 25). Pinder drove the defendant to the hospital. (T1. 25).

After the defendant was arrested, Pinder told Detective Malinowski that the defendant did not have permission to drive the car that morning. (T1. 20). She gave Detective Yannacone the following written statement:

> I've been going with Troy seven years. He is my boyfriend. He has used all of my cars, except for the first one. I bought my Plymouth Acclaim in June while he was in prison. For three weeks he did not really bother with the car, but after that he took the car, and I would have to fight him to get it back. I believe it was the 24th of January when I got my car back from Troy. When I looked through the car, there was junk in the trunk. Clothes, bottles, cables, et cetera. There was none of the property in it that the police found the day of the arrest. No video camera, no watches, rings. There was no Visa, traveler's checks in the ashtray. There wa no money in the ashtray or front seat. No American Express gold card on the floor, driver front side, and I did not see a Minolta camera at that time. As far as I know, Troy is the only person that drives my car.

(T1. 21-22).

The trial court denied the motion to suppress, stating, "The

Court holds that the defendant, having taken the car without the permission or consent of the owner, does not have standing to argue the suppression of what was found in the car." (T. 32). The written order denying the motion states:

> ORDERED AND ADJUDGED that said Motion be, and the same is hereby denied. Defendant did not have the permission or consent of the owner or the subject vehicle and was not driving said vehicle at the time of said search and therefore lacks the requisite legal standing to challenge the search thereof. U.S. v. Peters, 791 F.2d 1270.

(R1. 28).

There was no inquiry at the hearing regarding the circumstances of the search. However, at trial, limited testimony regarding those circumstances was presented.

Officer Peteck testified that he saw officers Rolewicz and Gaertner going through Pinder's car. (T2. 81). They had pulled a video camera out of the car, and were viewing the film in the camera. (T2. 81). Peteck was not involved in the search, and did not know if the officers had approval for it. (T2. 81). However, based on what he was told about the contents of the film, he was later able to ascertain that the camera belonged to Mr. Cupolo. (T2 83).

Officer Timothy Rolewicz testified that, after observing blood on the driver's side of the car when it was parked at the hospital, he asked Pinder for permission to look at the car and then examined its interior. (T2. 70). Over defense counsel's objection, Rolewicz testified that Pinder gave him permission to search the trunk of the car. (T2. 70-71). According to Rolewicz, another officer--

who did not testify--opened the trunk and found a video camera and a 35mm camera. (T2. 71).

The court did not permit defense counsel to cross-examine Rolewicz regarding the circumstances of the search, and sustained the state's objection to counsel's attempt to inquire as to whether Rolewicz had specifically asked Pinder for permission to look into the trunk. (T2. 73-74). This portion of the transcript reads as follows:

> Q [DEFENSE COUNSEL] Going to the hospital, you asked Ms. Pinder if you could look in the car?
>
> A [OFFICER ROLEWICZ] Yes.
>
> Q You never specifically asked her whether you could look in the trunk, correct, or do you recall?
>
> MS. STONES [PROSECUTOR]: Your Honor, I object. May we approach the bench?
>
> (The following bench conference was held out of the hearing of the jury)
>
> MS. STONES [PROSECUTOR]: Your Honor, I'm going to object to this line of questioning. The concept of defendant's Fourth Amendment right is a matter of law. It is not a matter for jury determination, and that's clear from the case law.
>
> THE COURT: All right. What is the purpose of this line of questioning, Counsel?
>
> MR. SMITH [DEFENSE COUNSEL]: Judge, I want to get clear on the record the circumstances of the search, and I believe it can be --
>
> MS. STONES [PROSECUTOR]: It is clear on the case law. That is not even for the jury to consider.
>
> THE COURT: It's not proper. I will

sustain the objection.

(T2. 73-74).

Later in the trial, when the state introduced a photograph of the video camera found in Pinder's car, defense counsel objected and renewed the motion to suppress. (T2. 138-39). The court again denied the motion, explaining that the defendant lacked standing because "he did not have permission of the owner to use the vehicle on the day in question" and "had not been driving the car at the time immediately preceding the search." (T2. 139-40).[2] Moreover, the court said, there had been testimony during the trial that Pinder had consented to the search, although, the court acknowledged, that issue had not been addressed at the hearing on the motion to suppress. (T2. 140-41).

[2]The court noted that the second reason for denying the motion--that the defendant had not been driving the car--had not been stated orally at the hearing, but had been added to the written order upon further reflection. (T2. 139).

POINT ON APPEAL

WHETHER THE DISTRICT COURT OF APPEAL'S DECISION WHICH REVERSED AND REMANDED FOR FURTHER PROCEEDINGS, COMMENCING WITH A HEARING ON THE DEFENDANT'S MOTION TO SUPPRESS, SHOULD BE AFFIRMED, WHERE THE TRIAL COURT'S FINDING THAT THE DEFENDANT LACKED STANDING TO CHALLENGE THE SEARCH WAS NEITHER SUPPORTED BY THE EVIDENCE NOR THE RESULT OF A PROPER HEARING. (Restated).

SUMMARY OF ARGUMENT

The defendant moved to suppress evidence seized by the police during a warrantless search of the trunk of a car owned by his girlfriend, Sandra Pinder. After a hearing which was limited to the question of standing, and in which the trial court narrowly focused on the defendant's proprietary interest in the car, the court denied the motion to suppress, finding that the defendant lacked standing to challenge the search because he did not have the "permission or consent of the owner" to use the car, and had not been driving the car at the time of the search. The Third District Court of Appeal reversed and remanded for further proceedings, commencing with a hearing on the motion to suppress. That decision should be affirmed because the trial court's finding of lack of standing is not supported by the record and was the result of a hearing which was improperly limited to the question of standing without inquiry into the fourth amendment issues involved.

The testimony presented at the hearing established that, although the defendant was not the owner, he did have a reasonable expectation of privacy in Pinder's car and was therefore entitled to challenge the warrantless search. He and Pinder lived together. He was her boyfriend. Their relationship had lasted seven years. They were expecting a child. The defendant used the car regularly, and had his own set of keys. Only he and Pinder used the car. He would use the car without asking for permission, because, unless they were quarrelling, it was not necessary to ask. His use of the car was with Pinder's knowledge and consent. Under these

circumstances, the defendant had a strong and reasonable expectation of privacy, which did not depend on his physical presence in the car or on his asking for permission for its use.

The state argues, nevertheless, that the defendant "stole" the car, and that the Third District Court of Appeal's decision should be quashed based on the proposition that the driver of a stolen vehicle never has standing to challenge a search of the vehicle when there is no question of an illegal stop. The state's argument is based on a factual error: This case does not involve a stolen vehicle, as the trial court itself recognized. Nor did the Third District Court of Appeal hold that Nelson v. State, 578 So.2d 694 (Fla. 1991) stands for the proposition that the driver of a stolen vehicle has standing to challenge a search of the vehicle. Accordingly, there is no basis in the facts of this case for announcing the broad proposition of law urged by the state.

Moreover, the state's insistence throughout this case that the automobile was "stolen" despite the testimony in the record which demonstrates that it was not, illustrates why fourth amendment analysis should not proceed based on such loose, emotionally-charged labelling. Such analysis by labelling can all too easily become a shortcut leading to the wrong answer. The appropriate standard remains whether, under the totality of the circumstances, the defendant had a subjective expectation of privacy which society is prepared to recognize as reasonable. In this case, that standard was not applied. Because the defendant in this case did not receive the hearing to which he was entitled,

and because the trial court's finding of lack of standing is not supported by the record, the Third District Court of Appeal's decision to reverse and remand for such a hearing must be affirmed.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION WHICH REVERSED AND REMANDED FOR FURTHER PROCEEDINGS, COMMENCING WITH A HEARING ON THE DEFENDANT'S MOTION TO SUPPRESS, SHOULD BE AFFIRMED, WHERE THE TRIAL COURT'S FINDING THAT THE DEFENDANT LACKED STANDING TO CHALLENGE THE SEARCH WAS NEITHER SUPPORTED BY THE EVIDENCE NOR THE RESULT OF A PROPER HEARING. (Restated).

The Third District Court of Appeal ordered the trial court to conduct a hearing on the defendant's motion to suppress. (R. 48). The states seeks to quash that decision, on the ground that the defendant stole the vehicle searched by the police, and therefore did not have standing to challenge the search. (Brief of Petitioner at 11, 17). The state urges this Court to hold that the driver of a stolen vehicle can never have fourth amendment standing to challenge a search of the vehicle when there is no question of an illegal stop. The state's argument is based on a factual error, and the broad proposition of law upon which it seeks reversal is inapposite to the facts of this case.

The District Court Of Appeal Properly Reversed And Remanded For A Hearing

As the trial court recognized, this case does not involve a stolen vehicle. (T1. 29). The vehicle belonged to the defendant's girlfriend, and he did not "steal" it. (T1. 20, 24, 29). The question which should have been determined by the trial court was whether, under the totality of the circumstances, the defendant had a legitimate expectation of privacy in his girlfriend's car, so as to give him standing to challenge an illegal search. Instead of addressing that question, the trial court focused on the question

of standing based on property ownership. After a hearing which was limited to the question of standing, and in which no evidence was presented regarding the circumstances of the search, the trial court denied the motion to suppress, finding that the defendant lacked standing to challenge the search because he did not have the "permission or consent of the owner" to use the car, and had not been driving it at the time of the search. (R1. 28; T1. 32). This was reversible error because (1) the court did not conduct a proper inquiry, and (2) the result of that inadequate inquiry--that the defendant lacked fourth amendment standing--was not supported by the evidence. Accordingly, the Third District Court of Appeal's decision to reverse and remand for a hearing was correct and should be affirmed.

A defendant may challenge the legality of a search and seizure if, under the totality of the circumstances, he had a reasonable expectation of privacy in the area searched, or the property seized. State v. Suco, 521 So.2d 1100, 1102 (Fla. 1988); Rakas v. Illinois, 439 U.S. 128, 139 (1978).

A reasonable expectation of privacy is an expectation which is actually (subjectively) held by the defendant, and which society is prepared to recognize as reasonable. Smith v. Maryland, 442 U.S. 735, 740 (1979); Rakas, 439 U.S. at 143 n. 12.

The privacy expected need not be absolute. An area shared with others may yet be private, if access is restricted to a known few. See Mancusi v. DeForte, 392 U.S. 364, 369-70 (1968) (office shared by union officials and which only personal or business

guests of those officials would be expected to enter).

Neither ownership nor a legally-enforceable possessory interest is necessary to confer fourth amendment standing. It is "the totality of the circumstances in any given case" which must be examined to determine whether a search infringed a reasonable expectation of privacy. State v. Suco at 1102; Rakas, 439 U.S. at 143; Andrews v. State, 536 So.2d 1108, 1111 (Fla. 4th DCA 1988), review denied, 544 So.2d 200 (Fla. 1989). Because fourth-amendment rights are not limited to property owners, it is reversible error to determine the question of standing based on property ownership alone, without considering the totality of the circumstances bearing on the defendant's expectation of privacy in the premises searched. Andrews at 1111. As this Court held in Dean v. State, 478 So.2d 38, 41-42 (Fla. 1985), the question of standing is not to be separately resolved apart from the substantive fourth amendment issues involved. The inquiry is "whether the defendant's rights were violated by the allegedly illegal search and seizure." Dean at 40.

Here, there was no inquiry at the hearing regarding the circumstances of the search, and the trial court narrowly focused the inquiry upon the defendant's immediate possessory interest in the car at the time of the search, rather than upon the substantive fourth amendment issue of whether that search infringed upon his reasonable expectation of privacy. The court acknowledged that the owner of the car had "acquiesced" in the defendant's use of it (T1. 29), but then noted that the issue was "whether he had a possessory

interest in the car" (T1. 29), and concluded that he did not, because at the time in question the defendant took the car "without permission or consent of the owner" (T1. 32). On this basis, the court held that the defendant did not have standing to challenge the search. (T1. 32). This narrow focus of the inquiry upon the sole question of whether the defendant had asked to use the car on this particular occasion, without considering any other circumstances, either as to the search, or as to the relationship between the owner of the car and the defendant, would itself require reversal and remand for an appropriate inquiry. See Dean; Andrews.

However, the record also demonstrates that the court's finding that the defendant lacked permission or consent to use the car was contrary to the evidence adduced at the hearing, and further demonstrates that the defendant did in fact have a reasonable expectation of privacy in the car.

In the context of automobile searches, courts have recognized the standing of non-owners who share the use of the vehicle with the owner on a regular basis, particularly when they live in the same household with the owner. See Pollard v. State, 270 Ind. 599, 388 N.E. 2d 496, 503 (1979) (defendant's expectation of privacy in his wife's car was as legitimate as that of his wife, despite the fact that he did not establish that his use of the car was within his wife's permission); Dean v. State, 406 So.2d 1162, 1164 (Fla. 2d DCA 1981) (defendant had legitimate expectation of privacy in trunk of father's car, because he had the use of the car with his

father's permission, drove it most of the time, and there was no evidence that he had allowed anyone else to use the trunk), petition for review denied, 413 So.2d 877 (Fla. 1982); United States v. Burke, 506 F.2d 1165, 1170-71 (9th Cir. 1974) (reasonable expectation of privacy as a result of repeated use of brother's van); In re J.R.M., 487 S.W.2d 502, 509 (Mo. 1972) (sixteen-year-old son had standing to object to search of father's car where son lived at home where the car was kept, regularly used the car as if it were his own, had his own keys, and was included in the family insurance policy); State v. Campbell, 699 S.W.2d 25, 27 (Mo. App. 1985) (son had standing to object to search of mother's car, where, although he did not have his own keys and there was no insurance policy, he lived at home with his mother where the car was kept, had practically unlimited use of it, was responsible for its general maintenance, and had installed radio equipment in the car).

Here, the owner of the car, Sandra Pinder, and the defendant, both testified in support of the defendant's claim that he had "a possessory and privacy interest in the vehicle giving him standing to contest the search." (R1. 23). Their testimony established that they lived together, that they were the only ones who used the car, and that it was kept at their home. (T1. 10-11, 22, 24). Accordingly, it was entirely reasonable for the defendant to expect that access to the car would be limited to himself and to Pinder. See Dean, 406 So.2d at 1164; Burke at 1170-71; J.R.M. at 509; Campbell at 27. Cf. Mancusi, 392 U.S. at 369-70.

Not only was access to the car restricted to himself and to

Pinder, he regularly shared in its use. He used the car on a regular and recurring basis, had his own keys, and generally used the car as his own without any need to ask for permission, except during those times when he was quarrelling with the owner. (T1. 6, 10, 19, 20, 22, 24). He not only lived with the owner, she was his girlfriend of seven years standing, and was expecting his child. (T1. 20, 21, 24). Under these circumstances, the expectation of privacy is strongly reasonable, and becomes equivalent to that of the owner herself. See Pollard, 388 N.E.2d at 503 (defendant's expectation of privacy in his wife's car was as legitimate as that of his wife, even without establishing that his use of the car was within his wife's permission); J.R.M. at 509 (sixteen-year-old who lived at home where father's car was kept, had his own keys, and regularly used car as his own); Campbell at 27 (son who did not have keys to mother's car, but lived at home where car was kept, had practically unlimited use of it, was responsible for its general maintenance, and had installed radio equipment in it); Burke at 1170-71 (repeated use of brother's van).[3]

It is true that the defendant took the car without specifically asking for permission. However, both Pinder's and the defendant's testimony established that neither of them expected him to ask for permission each time he used the car. As a result of their longstanding relationship, he regularly used the car without

---

[3]The fact that they were not actually married should not affect the determination of whether the defendant's expectation of privacy was one which society is prepared to recognize as reasonable. Cf. Moore v. East Cleveland, 431 U.S. 494 (1977).

asking for permission, and she would not insist that he do so. (T1. 10, 22, 24). One does not "steal" the family car each time one uses it without asking the family member in whose name the car is registered for permission. As Pinder explained it: "Troy, he is my boyfriend. We live together. He never really asked, you know. He just took it." (T1. 24).

Moreover, Pinder expressly testified that the defendant used the car with her knowledge and consent. (T1. 19). Although she could withdraw her consent if she chose to do so, and had done so in the past, she did not do so on this occasion, because she had "decided not to argue." (T1. 20). Her testimony confirmed that of the defendant, who testified that he had her permission to use the car, unless they were quarrelling. (T1. 10). Under these circumstances, far from showing a lack of standing, the defendant's use of the car without specifically asking for permission in fact demonstrates his reasonable expectation of privacy in the vehicle. This habitual use of the car as if it was his own was often "inconsiderate" (T1. 12-13), but it was with Pinder's knowledge, and with her consent (T1. 19). As J.R.M., Campbell, and Burke illustrate, and as Pollard makes explicit, such regular use of a car with the knowledge of the owner, raises a presumption that the use is permissive, and establishes a fourth amendment privacy interest as reasonable as that of a co-owner. See Pollard, 388 N.E. 2d at 503; Burke at 1170-71; J.R.M. at 509; Campbell at 27. See also State v. Suco (lessor who was in the habit of letting himself into his lessee's house with his own key, and making himself at

home without announcing his presence, had reasonable expectation of privacy in lessee's house). Compare United States v. Peters, 791 F.2d 1270 (7th Cir. 1986) (no standing where defendant had sold car but still used it occasionally, where use was not on a regular basis and was only with owner's permission, and defendant knew several others used the car and thus did not think his effects in the car would remain untouched).

The only testimony lending support to the trial court's ruling, or to the state's contention that the car was "stolen," was hearsay which could not be used as substantive evidence. Officer Malinowski testified (over defense counsel's objection that the testimony was hearsay) that after the defendant had been arrested, and the car impounded, Pinder told the police that the defendant had stolen the car and was using it without her permission. (T1. 13-17). This hearsay testimony could not be used to establish that the car was in fact being used without Pinder's permission or consent, much less that it had been stolen. See State v. Smith, 573 So.2d 306, 313-314 (Fla. 1990) (prior inconsistent statement made during police investigative questioning cannot be used as substantive evidence to prove the truth of the matter asserted). Moreover, a stolen vehicle report made for the first time after learning of the driver's arrest, is hearsay of a particularly unreliable sort. Such a report is not sufficient to rebut a claim that the car was used with the owner's permission. United States

v. Garcia, 897 F.2d 1413, 1417-18 (7th Cir. 1990).[4]

Finally, the fact that the defendant was not driving the car at the time of the search did not diminish his legitimate expectation of privacy, because that expectation did not depend on his presence in the car, but on his regular use of it, his relationship with the owner, and the fact that only he and Pinder used it. Such permissive use on a regular and recurring basis, gives rise to a legitimate expectation of privacy which does not depend on being in actual possession of the car at the time of the search. See J.R.M. at 509. See also United States v. Rose, 731 F.2d 1337, 1343 (8th Cir. 1984) (defendant who had sister's permission to use her car, had keys to ignition and trunk, and drove car as much as two to three times a week, had standing although at time of search he was a passenger and the car was being driven by another with his permission); United States v. Dotson, 817 F.2d 1127, 1134-35 (5th Cir. 1987) (defendant did not give up reasonable expectation of privacy in car loaned to friend for a short period, where, although car was legally owned by defendant's sister, defendant was owner

---

[4]In Garcia, the court further held that where the defendant claimed to have borrowed the car he was driving from a person who reported it stolen only after the defendant was arrested, "it remains for the government to prove by the preponderance of the evidence that the vehicle was stolen." Id.

The reason for these holdings is well illustrated by Pinder's explanation of what had happened on a prior occasion when her car had been impounded. Pinder testified that on that occasion she told the police that the defendant did not have permission to drive her car, because a detective told her that the only way to get the car back was to press charges. (T1. 23). See Garcia at 1418.

for all practical purposes).[5]

Because the trial court failed to conduct a proper inquiry, and because the finding of a lack of standing is not supported by the record, the trial court's ruling denying the motion to suppress was erroneous, and the Third District Court of Appeal properly reversed and remanded for a proper hearing.[6]

It Would Be Inappropriate To Hold That The Driver Of A Stolen Car Never Has Standing To Challenge A Search Of The Car.

The state requests this Court to hold that the driver of a stolen car never has standing to challenge a search of the car, when there is no question of an illegal stop. Such a holding is not necessary in this case, because, as set forth above, no stolen

---

[5]Moreover, this second stated basis for the denial of standing--that the defendant was not driving the car at the time of the search--was improperly added to the trial court's order after the hearing. At the hearing, the court relied exclusively on its finding that the defendant did not have the permission or consent of the owner to use the car. (T1. 32). As the court explained at trial, the additional reason that the defendant was not driving the car occurred to the court after the hearing, and was then added to the order. (T2. 139).

[6]Because the inquiry was limited to the question of standing, there could be no other basis for denying the motion. Nevertheless, when the motion was renewed during the trial in case 90-274, the trial court mentioned an additional reason for denying the motion, namely, that the state had elicited testimony from Officer Rolewicz that Pinder gave him permission to search the trunk. (T2. 70-71, 139-40). However, the court precluded defense counsel from cross-examining the officer on this point. Indeed, at the state's insistence, the defense was not permitted to cross-examine on any of the circumstances of the search. (T2. 73-74). The state had the burden of showing that the consent had been voluntary and that its scope included the trunk of the car. See Norman v. State, 379 So.2d 643 (Fla. 1980). To allow it to carry that burden based on testimony which the defense was precluded from subjecting to cross-examination would be an obvious violation of due process.

automobile is involved. Moreover, there is already in existence an adequate standard by which to determine the fourth amendment standing of the driver of a stolen automobile. The existence or lack of standing will depend on whether, under the totality of the circumstances present in the particular case, that person had a subjective expectation of privacy which society is prepared to recognize as reasonable. It may well be that in most cases involving stolen vehicles, the defendant involved will not have such an expectation. However, that is no reason to foreclose the possibility that, under some circumstances, society may nevertheless be prepared to recognize that the driver of such a vehicle has a legitimate expectation of privacy which is violated by unreasonable government intrusion.[7]

The state's insistence--contrary to the trial court's own statement (T1.29), and contrary to the competent testimony adduced at the hearing--that the automobile was "stolen," illustrates what the practical result will be of recognizing that label as a conclusive shortcut to decision. Mr. Singleton could never have been convicted of auto theft based on the testimony before the trial court. And yet, because he did not ask his girlfriend, "Honey, can I use the car tonight," he is being labelled a car

---

[7]For instance, it is not inconceivable that, where the vehicle is in the possession of someone who is neither the owner, nor the person who stole the car, the driver may well have a subjective expectation of privacy which society is prepared to recognize as reasonable, just as, in other contexts, it is prepared to protect good faith purchasers for value. See W.R. LaFave, Search and Seizure § 11.3(e), p. 329 (2d Ed. 1987).

thief for fourth amendment purposes. As the Third District Court of Appeal's decision recognizes, such easy labelling cannot substitute for an adequate inquiry into the totality of the circumstances bearing on the right to be free from unreasonable searches and seizures.

Finally, contrary to the state's assertion (Petitioner's Brief at 11), the Third District Court of appeal did not hold that Nelson v. State, 578 So.2d 694 (Fla. 1991) stood for the proposition that the driver of a stolen vehicle had standing to challenge the search of the vehicle. It is true that the Third District Court's opinion refers to the "holding" of Nelson. And it is also true that the particular facts of Nelson are not those of this case, and therefore its specific holding would not apply. However, Nelson also held that the fourth amendment protections apply to criminals as well as to others, and, thus, is consistent with the proposition that even a criminal is entitled to an adequate inquiry on the fourth amendment issue raised in his motion to suppress. The Third District Court of Appeal recognized that the defendant in this case did not receive the hearing to which he was entitled. Its decision to reverse and remand for such a hearing should be affirmed.

CONCLUSION

Based on the foregoing, the respondent requests this Court to affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Post Office Box 012241, Miami, Florida 33101 this 21st day of November, 1991.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender