ORIGINAL

In the

Supreme Court of the United States

DAVID RAWLINGS,

PETITIONER,

V.

KENTUCKY,

RESPONDENT.

No. 79-5146

Washington, D. C.
March 26, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

DAVID RAWLINGS, Petitioner,	:	
v.	:	No. 79-5146
KENTUCKY, Respondent.	:	

Washington, D. C.,

Wednesday, March 26, 1980

The above-entitled matter came on for oral argument at 1:28 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

J. VINCENT APRILE II, ESQ., Assistant Deputy Public Advocate, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40701; on behalf of the Petitioner

VICTOR FOX, ESQ., Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 79-5146, Rawlings v. Kentucky.

Mr. Aprile, you may proceed.

ORAL ARGUMENT OF J. VINCENT APRILE II, ESQ.,

ON BEHALF OF THE PETITIONER

MR. APRILE: Mr. Chief Justice, and may it please the Court:

The case before you today presents four issues. The primary issue is the first issue, and it deals with whether the petitioner, David Rawlings, has standing, that is, is he entitled to raise a violation of the Fourth and Fourteenth Amendments generated by the illegal search of the purse of Vanessa Cox and the seizure from that purse of property, including contraband drugs, on the basis that the property, one, belonged to Mr. Rawlings, and, two, on the basis that he was charged with an offense that was the possession of those very contraband drugs.

The second issue in this case deals with the question of whether the searches and seizures, all of them, not only of Vanessa Cox's purse but also of Mr. Rawlings, and the other incriminating evidence were the fruits of an unconstitutional detention and arrest of both petitioner and Vanessa Cox in violation of the

Fourth and Fourteenth Amendments of the federal Constitution.

The third issue and the fourth issue in the case are derivative issues that depend upon this Court finding the first issue in favor of the petitioner. But I would point out to the Court that the third issue, that the search of Vanessa Cox's purse was unconstitutional, has been conceded in this Court by the respondent. So the question is whether or not we are entitled to assert the illegalities in that situation.

I would immediately turn to that first issue and tell you that we are proceeding on three different theories. We are proceeding first on the theory of automatic standing, because under any restrictive construction that you give to the doctrine of automatic standing, David Rawlings clearly qualifies. The theory of the prosecution's case, the indictment, everything points to the fact that David Rawlings is charged with possession of these contraband drugs while they are in the purse of Vanessa Cox, and when they were searched, October 18, 1976 is the date of the crime and the date of the purse.

So there is no question as to whether or not we were entitled to automatic standing. The question is --

QUESTION: Does it make any difference how they

got into the young lady's purse?

MR. APRILE: Your Honor, under the first analysis that we propose for automatic standing, we would suggest no, it does not matter how they got there, except in a situation -- no, I would say under automatic standing it would not matter.

QUESTION: Well, what if it turned out that the search of the purse was perfectly legal?

MR. APRILE: I'm sorry, the question that was addressed to me, Your Honor, was how they got into the purse, not how it was taken out.

QUESTION: I see.

QUESTION: Was it important how they --

QUESTION: I thought his question meant whether getting into the purse was legal or not.

MR. APRILE: Well --

QUESTION: Of course, it makes a difference whether it was legal, getting into the purse was legal or not.

MR. APRILE: With regard to automatic standing?

QUESTION: Yes.

MR. APRILE: I would suggest with regard to automatic standing that would not deal with --

QUESTION: All right, you might have standing, the only thing is you would lose.

MR. APRILE: On the question of the merits of it, yes.

QUESTION: You would lose.

MR. APRILE: Yes, Your Honor, I agree with you. That would be determinative of the merits of the issue.

QUESTION: All right.

MR. APRILE: Addressing the question of automatic standing in this situation, I would like to refer to three major concepts that are involved here, and I think -- excuse me, there would be two, and the first one would be subdivided into three concepts.

The first question is the dilemma of self-incrimination, and we have argued in our brief and we take the position that Simmons has not eradicated completely for the defendant the dilemma of self-incrimination that occurs when he must take the stand in a suppression hearing and testify to either ownership or possession of the premises searched where the possessory offense crime was committed, that is where the possession of the contraband material occurred, or where he must take the stand and admit either ownership or possession of the contraband goods themselves which are the very gravamen of the offense with which he is charged.

We say that this exists for three reasons. The first one is the danger of impeachment. And as this

Court well knows, it does not require a situation where a defendant takes the stand in a suppression hearing and says one thing and then takes the stand at trial and says another thing that is an outright lie. All in most jurisdictions required for impeachment is an inconsistent statement. So if this defendant wants to assert, for example, possessory ownership, possessory interest or ownership interest in the contraband, he may come in and say, in this particular situation I owned the suitcase in which this was found, and in that situation when he asserts that in a possessory offense, he may then want to take the stand and say but I didn't have the slightest idea how the drugs got in there. Once he would say I don't have the slightest idea how the drugs got in there, then the prosecutor could say we want to introduce the inconsistency that that was his suitcase, and in that situation a marginal --

QUESTION: That wouldn't be an inconsistency.

MR. APRILE: Well, Your Honor, I can only say to you that I have seen numerous cases on appeal in which that type of ruling has been made by the trial court and affirmed on appeal that that is enough of an inconsistency to allow the question of credibility to be raised. The real issue --

QUESTION: There are bound to be --

MR. APRILE: The real issue, Your Honor, is will it deter a defendant and his defense attorney from going ahead and challenging the propriety of a Fourth Amendment violation. That was the rationale behind Jones. You reaffirmed that in McGautha v. California when you said the reason why we say this is a dilemma of self-incrimination here is because the danger is it will deter people from bringing marginal Fourth Amendment claims. That is an incredibly good reason for --

QUESTION: How much do you think is left of McGautha after our subsequent --

MR. APRILE: I don't think that McGautha -- I don't think the question in McGautha was reached, perhaps in dicta, but it was a discussion which is relied upon by the petitioner in the previous case to show what you meant by Simmons, and that is all I am using it for. I am not trying to say that the underpinnings of McGautha with regard to death penalty is still good law. I am just talking about your discussion of the tension and the reasons in Simmons behind the prophylactic rule that you enunciated.

QUESTION: It seems to me that all your reasoning is that the defendant should be encouraged to do everything he can to prevent the prosecution from establishing the truth or falsity of the charges it brings

against him if there is some constitutional implication in the thing, and that no weight should be attached whatever to the usefulness of the trial as a process for finding out whether or not the charges are true.

MR. APRILE: I think there are two important considerations, when I respond to that, Your Honor. I think the first one very basically is I cannot accept Chief Justice Burger's position that every motion to suppress is a motion to exclude the truth. That simply has not been the result of practical experience. Sometimes it excludes the truth, sometimes it excludes falsity done by the polic, such as motion to exclude or suppress on the basis of an involuntary confession. You have even said in cases such as Mincey v. Arizona that the very question of the validity of the truthfulness of that confession is at issue and you would not allow impeachment under similar circumstances to Harris v. New York.

So we can't just start off with a presumption that every motion to suppress is an attempt to destroy the truth-finding process. In some instances it may very well be, but I think the second and most important response that we have here goes to the concept of what was talked about earlier, and that is this vice of prosecutorial self-contradiction. And I would just simply jump ahead to that to say that what is the

government attempting to say.

QUESTION: Before you leave your first point, which as I understand it is that your example is that if something is found in a suitcase and he is charged with possession of that item, he can't later on get on the stand and testify sort of tangentially about it.

MR. APRILE: Yes, sir.

QUESTION: Wouldn't that argument apply equally if he were charged with murder and there were a gun in the suitcase?

MR. APRILE: Exactly, Your Honor.

QUESTION: That is really not particularly related to the automatic standing.

MR. APRILE: No, Your Honor. I agree with your analysis and I certainly don't mean to deamn it in any way. I agree with it. My response, however, is that Jones was not predicated on the fact that these problems would not occur in other kinds of situations. It was predicated on the knowledge that where the crime is a possessory offense, the danger is the greatest. And we all know as a practical reality that I'm not up here just saying something for the purposes of appellate argument. In each of the examples that I would give, that is, impeachment, substantive use of prior inconsistent statements, in prosecutorial fishing expedition,

the danger is always the greatest when the defendant is testifying at the suppression hearing about something that directly relates to his involvement with the possession itself, the very nature of the charge.

The example you give is very true. What about a murder situation when the defendant comes in and he testifies, yes, the shirt that you found is mine. Okay. And consequently this evidentiary item gives me standing to contest the search, say, of the third person, the premises where the shirt was left.

What else will be generated by the fact that he has acknowledged that this innocuous piece of evidentiary material is his? It is not going to open up all kinds of opportunities for prosecutorial fishing expedition, and it is probably not going to generate much in the way of impeachment or the substantive use of prior inconsistent statements in a jurisdiction like Kentucky.

So I suggest the danger is the greatest in possessory offenses, and that is what was recognized by Justice Frankfurter in the majority opinion in Jones v. United States, and that is very significant.

QUESTION: The trial judge always has the right and duty, doesn't he, to exclude evidence that isn't probitive or isn't relevant to the issues?

MR. APRILE: I think that is an interesting

question you ask me, Your Honor, because I would point to two things. It is interesting with regard to the prosecutorial fishing expedition. Counsel for the respondent in this case took the position that that scertainly is just a legitimate function of the adversarial nature of the prosecution's function. They said that it is good for a prosecutor in a suppression hearing to take the tactic of trying to find out everything you can when the defendant testifies.

QUESTION: I am talking about a trial, which is where a -- assuming the suppression motion doesn't end up with a finding of guilt or the imposition of a sentence. I am saying at a trial the judge has a right and duty to exclude non-probative, non-relevant evidence.

MR. APRILE: Non-probative and non-relevant, but the point is in prosecutorial fishing expedition example that we just mentioned, what would happen is that the suppression hearing would generate all kinds of leads, all kinds of information. The case at bar is a perfect example.

QUESTION: It might lead to the truth.

MR. APRILE: But the point is the defendant was only taking the stand for the purposes of establishing standing. He takes the stand for that purpose. The prosecutor and the judge allows him, as occurred in the

case at bar, to go way far afield asking whom did you try to sell these drugs to, in a case of trying to prove trafficking.

QUESTION: Well, if he is not guilty he has got nothing to hide, presumably.

QUESTION: But what you are doing is you are placing an incredible burden on his right to assert standing. He comes in to assert standing and he is required to truly incriminate himself. That is exactly what you are saying. That is exactly what Simmons was supposed to stop. Duncan v. State, the Maryland Supreme Court said about the prosecutorial fishing expedition, this is exactly the vice that Jones was intended to prevent.

QUESTION: Do you suggest this is a fishing expedition?

MR. APRILE: I would suggest that when we peruse the suppression hearing number two in the case at bar, there was nothing more than a prosecutorial fishing expedition.

QUESTION: Well, you made the suppression motion.

MR. APRILE: Your Honor, I did not make the suppression motion.

QUESTION: Well, the government certainly doesn't make suppression motions.

MR. APRILE: But the point is, even under Simmons he was allowed to go into that suppression hearing to be protected when he made his statements to allege standing, that they would not be in turn used against him. Here in a prosecutorial fishing expedition situation, it becomes derivative evidence which the defendant would be hard-pressed to ever prove came directly from the testimony that he gave during the course of the suppression hearing.

QUESTION: I am baffled at your constant repetition of prosecutorial fishing expedition that arises out of a motion made by the defendant, not by the prosecution.

MR. APRILE: No, Your Honor, it does not arise out of the motion to suppress, it arises out of not allowing automatic standing and forcing the defendant to take the stand, not to establish the merits of the Fourth Amendment claim but to establish whether or not he has the right to even raise the merits, and that is what the automatic standing rule was generated to prevent, and that is what Simmons does not answer and that is why I suggest to you that the dilemma of self-incrimination continues to persist despite Simmons for the defendant and the defense attorney who is counseling him, and those are the three reasons.

QUESTION: Do you mean it persists because if

he takes the stand he might be in difficulty, is that your point?

MR. APRILE: Your Honor, as in this case, the prosecution in this case wanted to establish not only possession but possession for the purposes of sale, trafficking. They've got this man on the stand who is now testifying that those were his drugs, so he can show an actual --

QUESTION: Where is he testifying? Where is he testifying? At pretrial or trial?

MR. APRILE: He is testifying at a suppression hearing pretrial, that's right.

QUESTION: And that can't be used against him?

MR. APRILE: Well, that is the point. Maybe that can't be introduced against him, but all of a sudden, now that he is on the stand, the prosecutor has a wide open vista to ask him did you ever try to sell these drugs to anybody. That is not relevant to the question of standing. What that is relevant to is establishing why did you possess the drugs. He possessed them for purposes of sale.

QUESTION: Well, if he doesn't like that he doesn't have to make a motion to suppress.

MR. APRILE: That's true, Your Honor, but at the same time the motion to suppress concept is to stop the

government from violating constitutional rights. And as McGautha indicated, as Simmons indicated, we are going to give this kind of protection because we don't want defendants to be deterred from raising marginal Fourth Amendment claims because we don't want the police to engage in unconstitutional activities, and that is what a motion to suppress is all about. It is not just vindicating rights of the defendant, it is vindicating the rights of society against incorrect police procedures that violate the Constitution of the United States.

QUESTION: Do you mean that is the chief motivation of the defendant?

MR. APRILE: I don't know, sir, I don't propose to say that. It certainly wouldn't be my chief motivation as a defense attorney, but I realize that it is a legitimate motivation and it is one of my motivations as a defense attorney.

QUESTION: What the courts have said is the court's reason for doing it, which are wholly independent and separate from the defendant's purposes --

MR. APRILE: I acknowledge that, Your Honor. In some situations, as this Court has indicated, you feel that it is unfortunate and unfair that a guilty person goes free because the constable blundered. I understand that. But the point is what we are talking about is what

was the motivating policy reason behind automatic standing, and this is exactly what it was, to allow people to raise marginal Fourth Amendment claims without being afraid that the testimony they provide in the suppression hearing to establish standing would come back to haunt them as a form of self-incrimination, and that is my response.

QUESTION: It seems to me that part of your argument really is that the cross-examination by the prosecutor going into the motives was really improper examination and I wonder if your argument has the same force if one presumes the trial judge wouldn't allow that kind of cross-examination.

MR. APRILE: That is what I was trying to get to a moment ago, Your Honor, and I guess i lost track of it. I apologize. But this respondent argues that it is perfectly permissible. The Solicitor General in the previous case argues that no self-respecting trial judge, no self-respecting prosecutor would ever do these things and that they would stop it if it occurred, and I just submit to you that there certainly is not unanimity on the side of the prosecutors in their approach to this, nor in the trial judge. In this case, it is a perfect example. I don't want to be side-tracked so long on this issue, but I would say this case is a perfect

example. Every one of these questions were objected to. In every instance, the judge said overruled, this is not a trial in front of the jury, give the information to the prosecutor.

QUESTION: Now, stopping right on that question, if they asked him a question that was outside the scope of the suppression hearing --

MR. APRILE: Yes, sir.

QUESTION: -- and the judge forced him to answer, haven't you got a compelled incrimination claim as to that particular answer?

MR. APRILE: I would like to think that you do, Your Honor, and I would like to think that Simmons would stand for that.

QUESTION: Why wouldn't you have?

MR. APRILE: Well, the problem that I see is the very difficulty begins to demonstrate when they turn up a witness as a result of this and they say, well, we had this witness before, we say well, you got this witness as a result -- it becomes a very difficult problem. That is the only reality, and automatic standing would prevent that real proof problem.

If I could for a moment just briefly skip ahead to the concept of prosecutorial self-incrimination, and I want to point out in the Salvucci brief that the

petitioner, the Solicitor General's office in Salvucci, they say that self-incrimination -- I'm sorry, the vice of prosecutorial self-contradiction doesn't really exist because of instances like constructive possession and aiding and abetting are examples where we get a terrible result.

And I would point out, first of all, as I said in my reply brief in this case, that aiding and abetting is not under your past construction of where automatic standing would apply, aiding and abetting somebody else who commits a possessory offense would not entitle someone to automatic standing.

Another example they give construction possession, the very definition of constructive possession is such a nexus between the thing seized and the defendant, such dominion and control that the defendant would almost have actual standing. So I would say in that situation there is really no harm generated by applying automatic standing, and the examples given by the Solicitor General certainly do not show a bad result generated by the use of automatic standing in those two examples.

I would next, if it is permissible with the Court, move to the other two theories that we advance in this case which are different from the preceding case. The second one is this particular --

QUESTION: You had four theories in your brief.

MR. APRILE: Four theories, Your Honor, perhaps I did. What I am referring to is the first theory was automatic standing. The second one is the ownership or possessory interest in the thing seized, that is, generates automatic standing. And I would like to say to the Court, I hope I have not in my brief seemed to say that I don't agree with your position in Rakas. It is not that. I tried to say the reason I was using the terms "automatic standing" and "actual standing" is, even though you did away with those in Rakas, the appellate courts of this country as well as the trial courts are still fumbling around, as I am, with the concept of what is left over.

I know in Rakas you said the inquiry would be the same under your new test, reasonable expectation of privacy, as it was under the old concepts of actual standing, so I tried to integrate the two vocabularies and I hope I haven't indicated that I don't follow the reasoning of Rakas.

In this particular regard, I would say what do we have in this situation? This defendant, when he was denied automatic standing took the stand and admitted ownership of the drugs. He outright said these are my drugs. We say that, as Jones pointed out when it went back historically and said what is a basis for

establishing standing, actual standing has always been a possessory or ownership interest in the premises searched or the items seized. In this case, the defendant's interest in the property that he put in her purse gave him the right to complain about that violation, and this is also, of course --

QUESTION: Well, if they had had a warrant to search her purse, the fact that -- say they had a warrant to search her purse for stolen checks.

MR. APRILE: Yes, sir.

QUESTION: And they searched her purse and found some drugs that happened to belong to your client. Now, your client couldn't object to the procedure.

MR. APRILE: No, sir, no more than he could object had she consented.

QUESTION: Then his interest in the property seized isn't enough.

MR. APRILE: I disagree, Your Honor. I would say this, that he shares --

QUESTION: Not if they were legally in the purse, it isn't enough.

MR. APRILE: That's right, because his privacy right and his interest in the property seized when he turns it over to somebody else is minimized by her ability to control the use of it. But that does not do away with

either his total expectation of privacy nor the fact that an interest is generated by the property seized.

In this particular case -- as I said, in the case of a consent --

QUESTION: You are saying that his property was seized as a result of an illegal search of a purse in which he had a joint interest or in which he had a privacy interest.

MR. APRILE: He had a privacy interest generated by the fact that he was storing something within it with her permission.

QUESTION: Did she consent to his placing this in the purse?

MR. APRILE: Yes, sir. There were only two people --

QUESTION: Isn't there some dispute about that?

MR. APRILE: Yes, sir, but may I point this out, Mr. Justice Blackmun, that in the suppression hearing Vanessa Cox did not testify. The first suppression hearing was only Officer Railey, and then when we were denied automatic standing then the petitioner testified and his testimony is quite clear. He said I asked her if I could put these items in her purse and she said yes.

There is one place during the course of this trial, under redirect examination by the prosecutor, a

leading question, he says did you object when he put the property in there. I think it is page 59 of the transcript. And at that point she says yes, but if you look at her other testimony, which I have detailed in the reply brief, she actually says at the time he said may I put these items in your purse, she said nothing with regard to that, she doesn't go into anything like that, she said he put the items in my purse, it was later when I glanced in the purse that I then objected.

QUESTION: Well, a finder of fact has a right to disbelieve the testimony of anyone.

MR. APRILE: He didn't. That's exactly right, Your Honor, but no court that has looked at this case has done it on the basis that Vanessa Cox did not give him permission to put the things in the purse, so there has been no question like that.

QUESTION: Well, have they said that she did give him permission?

MR. APRILE: Yes, it has been accepted through the --

QUESTION: I mean have they said specifically that she did give him permission?

MR. APRILE: They have said that the items were placed in her purse with her knowledge, yes.

QUESTION: Well, that is not the same thing as

permission.

MR. APRILE: No finder of fact has ever based a decision to deny the motion to suppress in this case on the basis that there was not permission given.

QUESTION: Well, why did anybody ever have to get to automatic standing then in this case if you are claiming that you have a privacy interest in the purse, that the seizure of your property was the product of an illegal search of what is in effect your property, why the big hassle about automatic search?

MR. APRILE: Well, because when it started, Your Honor, the very first thing that the trial defense attorney did was say this is a possessory offense alleged to have occurred and the possession at the time of the illegal search and seizure gives us automatic standing. That was rejected and then, rather than give up the claim, he went ahead and testified as to his ownership of the drugs, generating both --

QUESTION: Well, was this claim ever made to anybody, this particular theory?

MR. APRILE: Yes, sir, it has been presented all the way through the case.

QUESTION: And has been rejected at every level?

MR. APRILE: Yes, sir.

QUESTION: On what basis, that you didn't have

an interest in the purse or what?

MR. APRILE: On the basis that he was vicariously asserting somebody else's rights, that's exactly right, that even though he was saying that these were his drugs and he admitted ownership, the Supreme Court of Kentucky says --

QUESTION: That wouldn't be enough. You have to say that you had a privacy interest in the purse.

MR. APRILE: He testified that when he placed them --

QUESTION: And did the courts reject a claim that he had a privacy interest in the purse?

MR. APRILE: In the purse itself?

QUESTION: Yes.

MR. APRILE: Your Honor, I don't believe I ever said that.

QUESTION: Well, you have to have that claim and doesn't --

MR. APRILE: What happens is the possessory interest in the thing that is contained in the repository generates the privacy interest. It is just --

QUESTION: Not so. Not so. I don't think you've got any -- if she had consented, by the way, to search of the purse, you know --

MR. APRILE: Exactly, Your Honor.

QUESTION: -- that your interest in the property wouldn't have done you any good.

MR. APRILE: Exactly right, nor would interest in the purse have done any good.

QUESTION: All right, I agree with you, or if there had been a warrant to search the purse, it wouldn't have done you any good at all.

MR. APRILE: If it was a legitimate warrant, that's exactly right.

QUESTION: Yes, a legitimate warrant.

MR. APRILE: I agree, Your Honor.

QUESTION: So you've got a claim of some privacy interest in the purse.

MR. APRILE: No, sir, I don't agree with this, and I think that your cases --

QUESTION: Then you never did then. I take it then you are telling me you never did claim a privacy interest in the purse, anywhere in these proceedings.

MR. APRILE: No, I am saying that we claimed a privacy interest in the items that were placed in the purse and therefore the protection of the purse, that is exactly right. We did claim that all the way through, and that has been rejected.

QUESTION: But that doesn't make for automatic standing, as Justice White said to you before. So which

which is it?

MR. APRILE: Well, Your Honor, we are entitled to automatic standing unless you find that automatic standing no longer exists and that was rejected, and then we were forced to take the stand and admit ownership, and that is where we have an actual standing, and a reasonable expectation --

QUESTION: Did you ever present to the lower courts your third argument that you present in your brief, that the search of the purse was --

MR. APRILE: Violated reasonable expectation?

QUESTION: -- no, was the fruit of an illegal search of the house?

MR. APRILE: Oh, yes, sir. In fact, if you look in the brief --

QUESTION: Here is a warrant that -- the search of the purse took place after the warrant issued?

MR. APRILE: That's right.

QUESTION: So they had a warrant to search the house.

MR. APRILE: You bar --

QUESTION: And you say the warrant to search the house didn't authorize anybody to search a person in the house.

MR. APRILE: Exactly right.

QUESTION: So that any guest in the house could object to overstepping the search warrant and the search warrant was overstpped by searching the person, namely a purse and hence your property was seized and is a fuit of an illegal search.

MR. APRILE: Yes, sir. In fact --

QUESTION: Is that presented anywhere?

MR. APRILE: It is presented all the way through the proceedings, Your Honor. Page 8 of the statement of facts in the brief points out that in summarizing the issues before the intermediate appellate court, they said that the appellant also contends that the search warrant for the premises did not authorize the search of all persons on the premises. So it is all the way through. All of these issues are properly before this Court. We have raised them and each court has ruled upon them, and this has been no attempt to supplement it at this level, our position.

I would just like to ask this Court to consider with me the very reality of the expectation of privacy that we would have. Consider if you were walking with your spouse and you were carrying, for example, a diary and it was getting cumbersome and you said to your wife will you put this in your purse for me, and she says yes, I will put it in the purse. Are we to believe that

society no longer would recognize your own personal expectation of privacy, even though she is carrying that?

If you give to me some of your papers to carry in my briefcase because you don't have a briefcase while we are walking down the street, and it is easier for one of us to carry it, have you lost your right of privacy? Clearly, there is an expectation of privacy there.

In the reply brief I have cited for you Prof. Goffman in "Relations in Public," talking about what people expect with regard to privacy rights, and one of the key things is joint tenure. Joint tenure can be generated in a purse, it can be generated in a briefcase. And I think your cases such as Arkansas v. Sanders and Chadwick v. United States recognize that when we talk about repository of effects, it doesn't mean that because I place my effects in someone else's repository that I will necessarily lose all expectation of privacy.

If I do it with consent, if I do it with their permission, then of course I realize I do it with the limitation that they may consent, and then I lose my privacy rights. But you said in Mancusi v. DeForte that that didn't matter when it doesn't happen in the case, and this woman did not consent.

QUESTION: You haven't told us the entire conversation. I finally found what I was trying to recall.

She said, "David, I do not want to carry this in my purse."

MR. APRILE: Yes, sir. That did not occur until -- I said that -- until after she glanced in the purse, and David said, according to her testimony, "Just give ma second and I will take it out." There was a knock on the door, the police were there and David could not get back.

Now, this is a crucial point. If she really wanted him to remove the information, remove the drugs from her purse, she had 45 minutes while she sat there with the police and all she had to do at any time was to say, "David, here are the drugs," but she didn't do that. She waited until the police said open up your purse, she dumped them out and all of a sudden the drugs are revealed and now she says, "David, you'd better take what is yours." If she really wanted him not to have an expectation of privacy, then she had 45 minutes while she was right there with the police officers where she could have said, "David, remember three minutes before they got here? Take the drugs." She didn't do that-

Anybody who tries to say, such as the respondent has in this case, that she did not agree, consent, acquiesce all through that 45-minute period of detention, of keeping those drugs in her purse, is simply not dealing with the real facts of this case.

QUESTION: Mr. Aprile, let me ask you one question. You referred to Arkansas v. Sanders and Chadwick. How finely can you slice that -- I use the word "onion" not with any disrespect, although I did dissent, but that concept. Suppose it is not a footlocker, it is not a suitcase, but it is a small paper bag, does the same ruling still apply?

MR. APRILE: I noticed in Criminal Law Reporter just recently, I can't remember, I think it was the California court that just recently said you had no expectation in a fast food cup, expectation of privacy in a fast food cup. I would go along with that.

QUESTION: That is heartening to know.

(Laughter)

MR. APRILE: I think, Your Honor, that in Arkansas v. Sanders, the very strong reference to the fact that it didn't matter, that this was a briefcase that was unlocked, you know, I think that really fits quite well with the purse.

I think if you will notice in the Goffman material that I cited to you in the reply brief from "Relations in Public," they talk about perhaps even the pockets on your raincoat, you could share that with someone and they would have an expectation or privacy with you. Society is ready to recognize that sort of

thing and I thought that is what we were talking about in Rakas, was it subjectively reasonable and was it an interest that society was ready to recognize.

I suspect that somewhere between the purse that is closed up and not open to view and the paper cup from the fast food company, we can slice the onion in a way that we will know, but that of course is your job and not mine.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Fox.

ORAL ARGUMENT OF VICTOR FOX, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FOX: Mr. Chief Justice, and may it please the Court:

Automatic standing in possession cases is no longer necessary for the protection of substantive Fourth Amendment rights. As we have heard this afternoon, the basis for automatic standing which came out in Jones was simply the problem of self-incrimination, i.e., the clash between one asserting his Fourth Amendment rights at perhaps the expense of the Fifth Amendment; and the second aspect, which we contend basically was thrown in as an afterthought, and that is the so-called vice of prosecutorial self-contradiction.

We submit simply that Simmons has solved the

problem at least of that portion of Jones which says self-incrimination. An individual may go in at a motion to suppress and assert his Fourth Amendment substantive rights without fear of this being used against him as evidence of his guilt at trial.

The fact that it may come back a little later as perhaps impeachment purposes, we would submit is not sufficient to expand the exclusionary rule to exclude this. The purpose of the exclusionary rule, of course, is to deter unlawful police conduct. In a Fifth Amendment context, in the Harris case, this Court has said we are unwilling to extend the exclusionary rule to the point where it would give the defendant the right to commit perjury. We are submitting that this is just as applicable to the Fourth Amendment right as it is within the Fifth Amendment. This we submit is sufficient as to the impeachment purposes.

The petitioner in this case has pointed out a case in Kentucky called Jett, and I would like to read the rule in Jett for the purpose of substantive use. And it says, "Out of court statements made by any person who appears as a witness, which statement is relevant and material to issues, may be received as substantive evidence through another witness and need not be limited to impeachment purposes.

We submit that this is simply the very situation which Simmons attempted or does in fact, we submit, cure. First of all, we would say that testimony at a suppression hearing is not necessarily an out of court statement. It is part of the same proceedings. Second, it would require that the person making the statement, i.e., the accused, first testify as a witness before Jett would come into play.

Finally, the key here, that which is substantive, material, relevant to the issues, i.e., substantive use of evidence of guilt, is that which is prohibited in Simmons. That leaves only the impeachment aspect of it, a contradictory statement which we submit again, as previously pointed out, is permissible.

Finally, the basis for the -- the only basis I should say left for Jones for the automatic concept, rather than the substantive Fourth Amendment rights, is the vice of prosecutorial self-contradiction. This is the only aspect, as the dissent in a footnote in Rakas points out, this is the only thing that is really left of Jones.

We have here people who are accused of a possessory crime being treated substantially different than any other accused. For example, I would like to point out in the same factual situation as in this case, we add one

additional element, a third person has a revolver in Mrs. Cox's purse. As a result of that revolver being found in her purse, he is charged with murder. Now, the respondent -- petitioner would have us believe that Mr. Rawlings is entitled to automatic standing, i.e., assertion of Mrs. Cox's Fourth Amendment rights, because of his possessionary crime where the individual who is charged with murder cannot assert vicarious Fourth Amendment right or vicariously assert it.

We are creating or have created by this one remaining aspect of Jones a special class of defendant out here. The vice of prosecutorial self-contradiction by merely going in upon the defendant's motion to suppress and the government saying what reasonable right of privacy, expectation of privacy did you have in that which was seized or that which was searched, and having that individual give factors to show some reason why he had a reasonable expectation of privacy, and then to come back at trial and under the concept of possession under a penal code assert that there was possession sufficient for conviction. There is nothing contradictory about that.

Assuming that there is no longer the need --

QUESTION: Except for Simmons, there would be a problem for the defendant.

MR. FOX: There would be a problem for the self-incrimination aspect, yes, Your Honor, as with any other defendant.

QUESTION: So absent Simmons, what do you think about Jones?

MR. FOX: What do I think about Jones? I think Simmons articulated somewhat more clear what Jones attempted to do and that is resolve the problem between the Fourth and Fifth Amendments.

QUESTION: Do you think under Simmons that not only any evidence at the hearing but any fruits of that evidence would be excludable?

MR. FOX: Are you referring to the fishing expedition aspect of it?

QUESTION: Well, suppose -- I take it under Simmons if the defendant took the stand at the suppression hearing and said I had possession of these drugs, that that would be excludable at his trial.

MR. FOX: Yes, Your Honor.

QUESTION: Suppose he said some other things that gave the prosecution some hints and they tracked down some other evidence as a result of what they heard at the suppression hearing from the defendant, do you think under Simmons that all those things are excludable, too?

MR. FOX: No, Your Honor, I do not believe that they are all excludable. The point is that, first of all, Simmons excludes those items --

QUESTION: Well, isn't there something to what your friend on the other side says about the dangers of overruling that part of Jones?

MR. FOX: If these other statements, other items go to the issue of guilt or innocence or go to guilt, as Simmons refers, I believe they would be prohibited by Simmons. But if it goes beyond that, if it is immaterial, then the exclusion which comes from evidence which is not material to or irrelevant to the issues is not admissible.

QUESTION: What if at the suppression hearing the question that your friend hypothesized, that is, did you have these drugs for the purpose of selling them, and an immediate objection, the objection is overruled by the hearing judge and he is ordered to answer, now would that be held as self-incrimination?

MR. FOX: Well, Your Honor, under Kentucky law the charge of trafficking does include not only possession but the sale, and so forth, and it would be no more so than that is the purpose of Simmons, to prevent the assertion of the Fourth Amendment right at the expense of the Fifth Amendment, the self-incrimination. At a suppression hearing, it is not a determination of guilt or innocence,

and whether this can be used at a later point in time on that issue --

QUESTION: Is the question that I postulated to you relevant to the suppression hearing, that is, did you have these drugs for the purpose of selling them, did you intend to sell them, had you sold some of them, is that relevant?

MR. FOX: It is really not relevant or material.

QUESTION: It shouldn't be allowed, should it?

MR. FOX: No, Your Honor.

QUESTION: But if he is compelled under an order of the court to answer, he is being compelled to incriminate himself, isn't he, unless that evidence is excluded at the trial.

MR. FOX: He has not been compelled to incriminate himself because that evidence is not admissible at trial because it goes to --

QUESTION: I said unless, unless you exclude it at trial, that is the only protection he has got against self-incrimination.

MR. FOX: That's correct, Your Honor.

QUESTION: So you concede that?

MR. FOX: I will concede that without the Simmons protection anything he says at the suppression hearing can be used that goes to the issue of guilt.

QUESTION: Actually, prior to Jones all of the trend in the lower courts has been exactly the opposite to Jones, had it not, that the defendant had simply to fish or cut bait on the question?

MR. FOX: Yes, Your Honor, that was basically it. He had to flip a coin and if it came down Fourth Amendment he went after his Fourth Amendment rights, if it came down Fifth Amendment he didn't. That may be a rather cut and dried view of it, but that was basically what he was faced with at that point in time.

QUESTION: And Learned Hand had written one of those opinions.

MR. FOX: I am unaware, sir, of that.

QUESTION: Mr. Attorney General, isn't it true, lawyer to lawyer, that when you lose your suppression hearing on a drug case, you go to jail?

MR. FOX: I'm sorry, Mr. Justice, I didn't --

QUESTION: From all practical standpoint, in a dope case, a narcotics case, when you lose your motion for suppression of the evidence, isn't that the end of the road for the defense?

MR. FOX: I would say that if the evidence is overwhelming and goes to his guilt, yes, Your Honor, that would be. I would say that any time you lose a motion to suppress, whether it be in a narcotics case or any other

case --

QUESTION: You don't think that narcotics is in a category all by itself?

MR. FOX: No, Your Honor, I don't believe so.

QUESTION: Well, how many cases are you aware of where dope is admitted in evidence where the man was acquitted?

MR. FOX: My personal experience is I am unaware of any, Your Honor, because we only get those where he is convicted on appeal.

QUESTION: Perhaps the moral of that story is that you should keep out of the narcotics business.

MR. FOX: Very well, Your Honor.

We submit that simply Simmons has resolved these issues and that under the prosecutorial concept of self-contradiction no longer being a valid basis for retention of the automatic standing, we then look at the issues as they come to expectation of privacy, and in Rakas this Court has, of course, rejected the standing concept for the reasonable expectation.

Factors which you must take into consideration or that are taken into consideration in reaching whether anindividual had a reasonable expectation of privacy, first of all the nature of the premises.

QUESTION: Mr. Fox, let me ask you something.

Suppose the officers had shown up at the house here with a search warrant and were going to search the house for a stolen piano and they decided that, well, now that they had found everybody here they will just search them. I suppose -- let's suppose they searched in a drawer for a stolen piano and found some drugs and it just turned out that the drugs belonged to this particular defendant. He wouldn't need any automatic standing to question that, would he? Rakas didn't say that that part of Jones is reversed, that a guest in the house has got some interest in privacy in the house.

MR. FOX: He would have to demonstrate some reasonable expectation --

QUESTION: Sure. Sure, but couldn't he? "I'm a guest in the house."

MR. FOX: I would hope that he would be capable from his viewpoint.

QUESTION: Sure, he gets on the stand and says, "I was a guest in the house."

MR. FOX: He goes through, you know, why he was there, what his interest was --

QUESTION: And they seized my drugs, wouldn't you say that is excludable? Wouldn't you say that he would win?

MR. FOX: The ultimate issue of whether or not

the evidence must be suppressed I won't make a judgment on. Whether he has the right to assert his Fourth -- if he proves that it was his Fourth Amendment, then under the facts that they were in there with a search warrant for a piano and they go through a jewel box --

QUESTION: Yes.

MR. FOX: -- there is no question.

QUESTION: That he gets it excluded.

MR. FOX: As a result of it not being a search of --

QUESTION: No, it is a violation of his Fourth Amendment rights.

MR. FOX: It is a warrantless search under --

QUESTION: All right, it is a warrantless search of a house in which he has a privacy interest.

MR. FOX: He has an expectation of privacy.

QUESTION: Exactly. Now, tell me why in this case isn't that situation present when the officers show up with a search warrant and the search warrant doesn't authorize searching anybody in the house, but they do search somebody in the house?

MR. FOX: They first arrived on the scene to serve an arrest warrant. Then because --

QUESTION: They didn't search the lady then?

MR. FOX: They didn't search her then. They

returned with what they thought was a valid search warrant.

QUESTION: They waited until they had a search warrant.

MR. FOX: Then they searched her and they thought at that time they had a valid search warrant to search her.

QUESTION: Well, that isn't so, is it?

MR. FOX: It turned out that the warrant was not, but it still did not change the --

QUESTION: Why not? The warrant just didn't authorize searching people.

MR. FOX: That's right, but they thought they were obtaining a warrant for the people and that is evident from the evidence, the testimony of the officers. At any rate, we are admitting that the search of her purse was without a valid warrant. Now the question is what is his reasonable expectation of privacy in her purse.

QUESTION: No, I am asking you whether he had a reasonable expectation on the premises.

MR. FOX: As a casual visitor?

QUESTION: Yes. He was a guest there as far as I know.

MR. FOX: He walked in, he was a transient, he had never been there before, there was no evidence to that effect.

QUESTION: Let's assume he was. Assume that he

was exactly like the person in my example with the piano.

MR. FOX: I misunderstood Your Honor. I thought that the individual had his drugs in a dresser of his within that house.

QUESTION: Well, he didn't have his drugs in a dresser drawer, he had his drugs in the lady's purse.

MR. FOX: Which was just another transient. For him to come in and demonstrate some expectation of privacy in that premise, the mere fact he was there is insufficient. That is only one factor.

QUESTION: All right. I would agree with you that if he didn't have an expectation of privacy in the premises, then my piano example is irrelevant. But if he did have an expectation of privacy in the premises, then it seems to me that my example is very relevant, and your answer is very damaging.

MR. FOX: Your example is relevant only in the fact that his mere presence is and of itself the sole determining factor. His presence is merely a factor among others to be considered before you reach the ultimate issue of whether he had a Fourth Amendment expectation of privacy. His presence there is but one factor.

QUESTION: What do you think is the consequence of this young lady's answer to him, "David, I do not want to carry this" -- referring to the drugs -- "I do not

want to carry this in my purse." Does that have any effect on his claim that he had an expectation of privacy?

MR. FOX: It would indicate that first of all it would have no effect upon his expectation of privacy in her purse, applying the factors, and assuming that he had no reasonable expectation of privacy in her purse under the Fourth Amendment substantive right process, does the fact that he placed his drugs in her purse create an expectation of privacy. His placing of those drugs in her purse without her active consent -- and at this point we do disagree with the petitioner on that point -- it would be no more different than his breaking into a home and hiding the drugs -- and I believe I heard an example this morning of an individual going into a home in the earlier Salvucci case and placing the drugs in the basement and the police illegally searching the basement. His expectation of privacy is diminished by the placing of the drugs in her purse without her consent.

Mr. Aprile pointed out that the spouse -- and here again, going back with the reasonable expectation of privacy concept to those areas, each case must be considered upon its facts, and this is why we are saying it is no longer necessary and no longer in fact should the automatic standing remain.

I would have far more expectation of privacy in

my wife's purse than I would in my brother's briefcase. It is a recognition granted by society that as a part of a unit, a marital unit I would have some degree. At the same time, I would not have the same amount of reasonable expectation of privacy in her purse than she has.

Here the individual was not a spouse, was a casual acquaintance of approximately a week's time. He had never put anything in this purse before. His reasonable expectation of privacy is rather diminished and really not one which society would be prepared to recognize, which brings us to the final point, his expectation of privacy in contraband.

This Court in Brown has said that there was no protected interest in stolen property. Stolen property is just nothing but another form of contraband. We would simply submit that society is not prepared to recognize as reasonable an expectation of privacy in contraband.

QUESTION: What did the search warrant cover, by the way?

MR. FOX: The search warrant covered the premises.

QUESTION: For what? What did it list, marijuana, they wanted to search for marijuana?

MR. FOX: I do not recall. The search warrant is not a part of the record.

QUESTION: It isn't?

MR. FOX: No, Your Honor, it is not.

QUESTION: Well, why did they ever go get a warrant? I thought it was because they smelled marijuana or drugs or something.

MR. FOX: They went in and in searching for the individual named in the arrest warrant --

QUESTION: Do you mean the search warrant isn't a part of the printed record or isn't a part of the record that was here?

MR. FOX: It was never a part of the record at all, Your Honor.

QUESTION: Well, can you get it from a lower court?

MR. FOX: I happen to have a Xerox copy in my office, but I don't recall --

QUESTION: I suppose if you have a warrant for -- if you have a warrant that authorizes you to search a premises for marijuana, you can look almost anywhere on the premises for marijuana. I think you could look behind doors, you could look in jewel boxes, and you probably, if you just saw a purse sitting in the corner somewhere, you could search the purse.

MR. FOX: I believe we would have problems under Ybarra.

QUESTION: Why? Let's assume that -- you could

certainly search boxes that you found.

MR. FOX: If the purse was sitting over by itself --

QUESTION: Yes.

MR. FOX: -- I agree with Your Honor in that case.

QUESTION: Well, the court below in this case said that although warrants do not ordinarily authorize the search of persons in a room, the search of this purse wasn't the search of a person. It was just like searching any other containers on the premises for marijuana. Now, I take it you don't agree with that, although that is what your court said.

MR. FOX: Our trial court in its opinion also -- and I will make this point -- we have basically since I believe the Court of Appeals intermediate said that the search of her purse was a warrantless search and must be justified under some other exclusion or some exception to it. The courts have agreed --

QUESTION: So you've abandoned that part of the trial court's --

MR. FOX: Basically, Your Honor, we have. That order also in there states that there was a finding that he had no expectation of privacy in her purse. That point is in there, in response to an earlier question of Your

Honor.

QUESTION: If we agree with you on your automatic standing theory, we have to reach in order to affirm, we still have to reach any other Fourth Amendment issue that is fairly before us.

MR. FOX: We have to -- assuming that the automatic standing no longer exists, we then must look at the facts of this case, surrounding this case within that concept. First of all, did he have a reasonable expectation --

QUESTION: Well, we have to answer the questions that he raises in his petition for certiorari.

MR. FOX: That is correct, that is that he had an expectation of privacy in her purse, which we deny, and that his expectation of privacy in the drugs was insufficient to constitute a protected interest.

QUESTION: Mr. Fox, on the question of whether he had an expectation of privacy in her purse, how do we answer that? Do we answer that based on the relationship between the parties or on our judgment as to whether he actually expected that nobody would look inside the purse? What is the test?

MR. FOX: Well, there are some factors that we must look at, and I would -- basically these are the nature of the premises or the activity involved, the personal interest in that point, the steps taken by the individual

to protect that privacy, and whether society really characterizes that as something which is to be protected. These are all factors. A possessory interest is really a factor as well. It is not the sole purpose, but we apply all of these factors and we look at the situation involving the purse, and that is first of all he has no possessory interest in the purse, he didn't buy the purse, he didn't give it to her, it wasn't his that she was carrying for him.

What steps did he take to protect the privacy of the purse? He didn't attempt to hide it, he didn't say don't let anybody see this. Society's characterization, which I gave earlier, of my spouse's purse as opposed to my expectation of privacy in someone else's spouse's purse or someone else's purse, this characterization, society I don't think would characterize that he really had some interest in her purse, some expectation of privacy in her purse.

QUESTION: Suppose he handed this to her and put it in her pocket or her dress, would he expect any privacy then?

MR. FOX: Her expectation of privacy --

QUESTION: I'm going to be fair with you. My next question is what is the difference between that and the pocket book.

MR. FOX: Basically I will answer your second question. I don't see too much difference. Now, the purpose is what is his expectation of privacy in her dress. She has a tremendous expectation of privacy in both her purse and that which society is willing to recognize.

QUESTION: I see.

MR. FOX: It only goes to what society and what his expectation is in that, and I believe there are many, many cases in which the search of the purse and so forth is sufficient.

Now, if he had under the same factual situation had been in the habit of carrying stuff in her pockets or putting stuff in her pockets or with her consent and she had not said I don't want it in there, then I don't think it makes any difference whether it is her purse or her pockets.

QUESTION: Suppose as an alternative she had been charged with possession of the drugs.

MR. FOX: We wouldn't be here, Your Honor.

QUESTION: Then she would be able to assert the Fourth Amendment right to --

MR. FOX: By all means. By all means, and I don't believe we would be here if she had asserted her Fourth Amendment right to privacy.

If there are no further questions, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:26 o'clock p.m., the case in the above-entitled matter was submitted.)

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