1-1-1981

The Death Knell of Automatic Standing-Another Blow to Fourth Amendment Privacy

Darlene Stosik

The Death Knell of Automatic Standing—Another Blow to Fourth Amendment Privacy

In two recent decisions,[1] the Burger Court struck another blow at the fourth amendment's protection against unreasonable governmental searches and seizures by further restricting a criminal defendant's right to invoke the exclusionary rule. In *United States v. Salvucci*,[2] the Court overruled the "automatic" standing theory of *Jones v. United States*[3] and declared that if a defendant charged with a crime of possession contests the validity of a search and seizure, he must first show that he had a legitimate expectation of privacy in the area searched. The inquiry is not whether the defendant had "standing," but whether the state "in fact" violated the defendant's fourth amendment rights.[4] In *Rawlings v. Kentucky*,[5] the Supreme Court further narrowed the scope of fourth amendment protection by holding that a possessory interest in a seized item does not necessarily evidence a legitimate expectation of privacy.[6] Possession of the seized goods, once a hallmark of standing doctrine, is now only another factor to consider in establishing a legitimate privacy interest.[7]

A brief review of the development and demise of automatic standing will highlight the import of the *Salvucci* and *Rawlings* decisions. Although the automatic standing rule of *Jones v. United States*[8] was never as broad as its name suggests,[9] it was the alter-

---

1. Rawlings v. Kentucky, 100 S. Ct. 2556 (1980); United States v. Salvucci, 100 S. Ct. 2547 (1980).

2. 100 S. Ct. 2547.

3. 362 U.S. 257 (1960). Construing FED. R. CRIM. P. 41(e), the *Jones* Court held that the charge of criminal possession "automatically" gave the defendant standing to challenge the legality of the search. In addition, the Court held that anyone legitimately on the searched premises may challenge the search's legality when the state uses the fruits of the search against him.

4. 100 S. Ct. 2547, 2551 n.4. The Court reaffirmed its conclusion in Rakas v. Illinois, 439 U.S. 128 (1978), that "standing" is no longer the relevant inquiry "in determining whether a defendant is entitled to claim the protections of the exclusionary rule." 100 S. Ct. at 2551 n.4. In *Rakas*, the Court asserted that the traditional standing requirements are "more properly subsumed under substantive Fourth Amendment doctrine." 439 U.S. at 139.

5. 100 S. Ct. 2556.

6. The Court found adequate support in the record for the state court's conclusion that the defendant failed to demonstrate a reasonable expectation of privacy in his companion's purse and therefore could not challenge the validity of the search, even though he claimed ownership of the seized drugs.

7. *See, e.g.*, Jones v. United States, 362 U.S. at 261.

8. 362 U.S. at 257.

native to a strict property-related theory of standing.[10] Before *Jones*, a criminal defendant charged with possession of contraband faced a Hobson's choice. To establish standing to contest the legality of a search and seizure, he had to show a possessory interest either in the premises searched or in the goods seized.[11] If he did not own the premises and alleged ownership of the goods, he admitted his guilt. Although the prosecution could not lose, it was in a contradictory position: it could allege that the defendant possessed the contraband for conviction purposes, but that he did not have a sufficient possessory interest for standing purposes.

The defendant's self-incrimination dilemma and the prosecution's self-contradiction dilemma prompted the automatic standing rule. No longer would a defendant charged with a crime of possession have to allege a property interest in the seized items (thus incriminating himself) to establish standing.[12] Rather, the possessory charge automatically clothed the defendant with standing to contest the constitutionality of the search and seizure. Under the *Jones* decision, automatic standing existed simultaneously with a second standing theory announced in that case, that a defendant legitimately on the searched premises has standing to contest the legality of a search, and with traditional property concepts, as an alternative route to standing.

Then in *Katz v. United States*,[13] a substantive fourth amendment decision, the Supreme Court redefined the nature of the interests protected by the fourth amendment in terms of privacy. Declaring that the fourth amendment protects people, not just places, against unreasonable searches and seizures,[14] the Court held that fourth amendment protection extends beyond property lines to areas in which one reasonably expects freedom from governmental intrusion. The defendant in *Katz* did not have to show a physical trespass or a property right in the invaded place to establish a fourth amendment violation. The bugging of the phone

---

9. For example, the Court narrowed automatic standing in Brown v. United States, 411 U.S. 223, 229 (1973), to apply only when possession of the seized evidence at the time of the contested search and seizure is an essential element of the offense charged.

10. *See* Olmstead v. United States, 277 U.S. 438 (1927) (expression of the view that property interests are the focus of fourth amendment protection). *But see* Katz v. United States, 389 U.S. 347, 353 (1967).

11. *See* United States v. Jeffers, 342 U.S. 48 (1951) (search and seizure violated the fourth amendment rights of defendant who had a possessory interest in both the premises searched and the property seized).

12. 362 U.S. at 264.

13. 389 U.S. 347 (1967).

14. *Id.* at 351.

booth used by Katz "violated the privacy upon which he justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[15]

The Court's decision in *Mancusi v. DeForte*[16] further reflects the shift from property interests to privacy interests as the focus of fourth amendment protection. In *Mancusi*, the Court applied the principles of *Katz* to the issue of DeForte's standing to challenge the government's seizure of records from a union office which DeForte shared with other officials. Like the defendant in *Jones*, DeForte did not have exclusive use of or access to the place searched, nor did he have a personal property interest in the seized records. Yet DeForte had standing, reasoned the Court, because he had a reasonable expectation that the union office and records would be free from governmental intrusion.[17] Although standing no longer turned on the defendant's possessory interests alone, property rights in the seized goods could still confer standing. Therefore, the *Jones* automatic standing rule remained necessary to prevent the reoccurrence of the dilemmas that spawned *Jones*.[18]

Then, in *Simmons v. United States*,[19] the Court called into question the viability of the self-incrimination dilemma as a rationale for automatic standing. In *Simmons*, the Court held that testimony given by a defendant to establish standing cannot be used against him at trial on the question of his guilt or innocence.[20] The Court later recognized, in *Brown v. United States*,[21] that after *Simmons* "[t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution."[22] But the *Brown* Court expressly reserved the question whether *Simmons* eliminated the need for the

15. *Id.* at 353.

16. 392 U.S. 364 (1968).

17. *Id.* at 370.

18. *But see* Gutterman, *A Person Aggrieved: Standing to Suppress Illegally Seized Evidence in Transition*, 23 EMORY L.J. 111, 126 (1974). Professor Gutterman argued forcefully that possession of contraband should not by itself confer standing.

19. 390 U.S. 377 (1968).

20. *Id.* at 394.

21. 411 U.S. 223 (1973).

22. *Id.* at 228. In *Brown*, the government used stolen merchandise to convict defendants charged with transporting and conspiring to transport stolen goods. The government had seized the merchandise from the store of a co-conspirator while the defendants were in police custody in another state. Because the indictment applied only to a period before the search, the defendants could have claimed possession of the seized goods without admitting their guilt of the offenses charged. Therefore, since these facts presented neither the prosecutorial self-contradiction dilemma nor the defendant's self-incrimination dilemma, the Court found the automatic standing rule inapplicable. *Id.* at 229.

automatic standing rule for a case in which possession at the time of the contested search and seizure "is an essential element of the offense . . . charged."[23] Although *Simmons* seemingly eliminated the defendant's self-incrimination dilemma, it did not resolve the prosecutorial dilemma. Thus, the *Jones* automatic standing rule was still viable in the context of crimes of possession.

Then, in the landmark decision of *Rakas v. Illinois*,[24] the Court established the defendant's legitimate expectation of privacy as the threshold inquiry in fourth amendment challenges to searches and seizures.[25] In *Rakas*, the police searched a getaway car in which the defendants, who were charged with and later convicted of robbery, were passengers. The police found a shotgun under the passenger seat and bullets in the glove compartment of the car. The defendants did not claim ownership of either the car or the seized goods. The Court held that the search had not violated the defendants' fourth amendment rights, because they did not have a legitimate expectation of privacy in the searched car. Although the passengers were legitimately present, unlike the owner they did not have the right to contest the state's intrusion. The Court overruled the "legitimate presence" theory of *Jones* and confined the automatic standing portion of the *Jones* holding to its facts.[26] Although the Court focused on the defendants' expectation of privacy as the only appropriate criterion for determining standing,[27] the references to property concepts in the opinion[28] led some commentators[29] and the dissenting Justices[30] to conclude that the Court was actually returning to old property-related concepts of standing. The thrust of *Rakas*, however, was to begin defining the boundaries of legitimate expectations of privacy, subsuming property concepts within those boundaries. Justice Rehnquist, writing for the plurality, noted that the right to exclude others from a searched area was a prime indicator of legitimacy.[31] Justice Powell, in his concurring opinion, pointed to the precautions taken by a

23. *Id.* at 228 (quoting Simmons v. United States, 390 U.S. at 390).

24. 439 U.S. 128 (1978).

25. *See* note 4 *supra*. In later decisions, several members of the Court criticized this reading of *Rakas*. *See, e.g.*, notes 57-58 and accompanying text *infra*.

26. 439 U.S. at 142-43, 147. Justices Powell and Burger concurred in "the distinction between one's expectation of privacy in an automobile and one's expectation when in other locations." 439 U.S. at 153-54 & n.2.

27. *Id.* at 143.

28. *Id.* at 143 n.12, 148.

29. 13 CREIGHTON L. REV. 653 (1979); 46 BROOKLYN L. REV. 123 (1979).

30. 439 U.S. at 156 (White, J., joined by Marshall, Brennan, & Stevens, JJ., dissenting).

31. *Id.* at 143 n.12.

defendant to maintain his privacy in a searched area, the nature of a defendant's use of the area, and a defendant's rights in the seized property as significant factors in the inquiry into whether a defendant has a legitimate privacy interest in the searched area.[32] Despite the Court's emphasis on privacy, the Court did not explicitly dismiss possession as an alternative route to standing.[33] Automatic standing was still good law.

The facts of *Rakas*, however, had not given the Court the opportunity to rule on the vitality of automatic standing after *Simmons*.[34] *United States v. Salvucci*[35] presented those facts. In that case, the government charged the defendants, Zackular and Salvucci, with twelve counts of unlawful possession of checks stolen from the United States mail. The police seized the stolen checks during a search of Zackular's mother's apartment. Neither defendant was present during the search. At the hearing on their motion to supress, the defendants asserted that they had automatic standing under *Jones* to challenge the validity of the search warrant. The district court granted their motion and the Court of Appeals for the First Circuit affirmed, noting that despite uncertainty about the status of *Jones*, the Supreme Court had not yet overturned that decision.[36] The Supreme Court granted certiorari,[37] overruled the automatic standing rule, and reversed and remanded to allow the defendants an opportunity to demonstrate a legitimate expectation of privacy in the searched apartment.[38]

Justice Rehnquist, writing for the majority, reasoned that the decisions in *Simmons* and *Rakas* had eliminated the need for the automatic standing rule to protect a defendant's fourth and fifth amendment rights. The Court explained that since *Rakas* established the reasonableness of the defendant's expectation of privacy as the threshold inquiry in fourth amendment challenges to searches and seizures, it was no longer inconsistent for the prosecutor to allege that a defendant accused of a crime of possession did not have standing.[39] In addition, even if the defendant alleged a

---

32. *Id.* at 150 (Powell, J., concurring).

33. In fact, the Court suggested that if defendants had asserted ownership or possession of the seized goods, they might have had standing. *Id.* at 130 n.1, 148.

34. *Id.* at 135 n.4. The crime charged in *Rakas* was robbery, not illegal possession.

35. 100 S. Ct. 2547 (1980).

36. *Id.* at 2550.

37. The Court granted certiorari to resolve the split among the circuits on the status of the automatic standing rule of *Jones*. *Id.* at 2250 n.2.

38. *Id.* at 2555.

39. *Id.* at 2552. Even after *Rakas*, the prosecutorial self-contradiction persists in crimes

possessory interest in the item seized to show his expectation of privacy, under *Simmons* that testimony could not be used to establish his guilt at trial.[40] Although the *Rakas* and *Simmons* decisions removed the two dilemmas underpinning the automatic standing rule, they did not address the inequities that stem from the government's use of a defendant's testimony at a suppression hearing to impeach the defendant at trial. The *Salvucci* Court specifically declined to speak on the issue, although it did cite a number of lower court decisions that have held such testimony admissible, perhaps signalling the position the Court will take when and if the issue comes before it.[41] In an emphatic dissent, Justice Marshall stressed that the potential admissibility of a defendant's testimony for impeachment purposes remains a significant deterrent to the defendant's exercise of his fourth and fifth amendment rights.[42] To the extent that the government may use the defendant's testimony against him, even though not on the question of his guilt, the self-incrimination dilemma underlying the automatic standing rule persists.[43]

With automatic standing overruled, criminal defendants charged with possessory offenses must now bring forward evidence that they have a legitimate expectation of privacy in the area searched. How does a defendant persuade a court that his personal expectation of privacy is indeed "legitimate"? The Court's decision in *Rawlings v. Kentucky*[44] established that the defendant's possession of the item seized is *not* determinative. Rather, the answer implicitly turns on the three factors enunciated by Justices Rehnquist and Powell in *Rakas*.[45] Just before the police search in *Rawlings*, the defendant stuffed a bag containing LSD and other controlled substances into a companion's purse, while visiting at the

---

of constructive possession. Since to prove constructive possession the prosecution must prove the ability to exclude others, the government cannot consistently charge the defendant with constructive possession and simultaneously claim his fourth amendment rights were not violated because he did not have a reasonable expectation of privacy in the area searched.

40. *Id.*

41. *Id.* at 2554 & n.8.

42. *Id.* at 2555-56 (Marshall, J., joined by Brennan, J., dissenting).

43. The *Salvucci* dissenters also noted that the government can use the defendant's suppression hearing testimony to develop its case and trial strategy. 100 S. Ct. at 2555.

44. 100 S. Ct. 2556 (1980).

45. Those three factors are: the defendant's right to exclude others from the searched area, 439 U.S. at 144 n.12; the defendant's use of the searched area, *id.* at 153 (Powell, J., concurring); the precautions taken by the defendant to maintain his privacy, *id.* at 152 (Powell, J., concurring).

house of a mutual friend. He later asserted standing to contest the legality of the search and seizure on the ground that he had a legitimate expectation of privacy in her purse. He did not, however, show that he had a right to exclude others from her purse, or that he had used her purse as a vehicle for his possessions before the search.[46] The state courts and the Supreme Court were not persuaded that Rawlings' precipitous behavior was consistent with an inference that he took normal precautions to maintain his privacy.[47] In fact, the defendant actually admitted that he had no subjective expectation that the purse would remain free from governmental intrusion.[48] The Court found that these facts justified the state court's conclusion that Rawlings did not have a reasonable expectation of privacy in his companion's purse.[49]

The dissenting Justices contended that the Court erroneously narrowed the scope of fourth amendment protection to a privacy interest in the area searched by rejecting the defendant's claim of protection for his possessory interest in the property seized.[50] The fourth amendment, they noted, expressly protects against governmental interference with one's "effects" as well as one's privacy.[51] The dissent concluded that the state's seizure of the defendant's property invaded the defendant's right to be secure in his effects and gave the defendant the right to challenge the reasonableness of that invasion.[52]

The majority's conclusion in *Rawlings* that the defendant was entitled to claim fourth amendment protection only if he had a legitimate expectation of privacy in his companion's purse can be explained in part by the Court's distinction between the nature of the fourth amendment's protection of searches from its protection of seizures.[53] The Court implied that a defendant's possessory interest in the item seized gives him standing only to contest the legality of the seizure, not the search.[54] If the defendant can show

---

46. 100 S. Ct. at 2561. There was conflicting evidence in the record about whether Rawlings' companion gave him permission to put the bag of drugs in her purse. *Id.* at 2560 & n.1.

47. *Id.*

48. *Id.* at 2561 & n.3.

49. *Id.* at 2562.

50. 100 S. Ct. at 2567-68.

51. *Id.* at 2568.

52. *Id.*

53. 100 S. Ct. at 2552. In *Salvucci*, the Court noted: "The person in legal possession of a good seized during an illegal search and seizure has not necessarily been subject to a Fourth Amendment deprivation." *Id.*

54. *Id.* at 2552 n.6. "Legal possession of the seized good may be sufficient in some cir-

that the search was illegal as to him by demonstrating that he had a legitimate privacy interest in the area searched, he can then claim that the seized evidence is the fruit of an illegal search and that he is entitled to the benefit of the exclusionary rule. Otherwise, a possessory interest in the item seized may give the defendant standing to challenge the seizure only on much narrower grounds—*i.e.*, that the goods are not contraband, the product of criminal activity, or evidence of a crime.[55]

The *Rawlings* dissent explicitly rejected this view: "If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable."[56] Objecting to the majority's use of *Rakas* to justify limiting the scope of fourth amendment protection, the dissent declared that *Rakas* held only that being legitimately on the searched premises does not necessarily entitle a defendant to such protection,[57] and not that the fourth amendment protects only a defendant's privacy interest in the premises.[58]

In *Rakas*, the dissenting Justices criticized the plurality opinion for defining privacy interests in terms of property concepts, thereby erroneously narrowing the scope of fourth amendment protection.[59] In *Rawlings* and *Salvucci*, the Court further narrowed that protection by eliminating a possessory interest in the item seized as determinative of a protected privacy interest.[60] The Court did indeed turn "the development of the law of search and seizure on its head."[61] By defining the fourth amendment's protection

---

cumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal." *Id.* The Court did not address the issue further, however, because the defendants did not contest the validity of the seizure. *Id.*

55. *See* United States v. Lisk, 522 F.2d 228, 230-31 (7th Cir. 1975), *cited in Salvucci*, 100 S. Ct. at 2552 n.6. In the court's denial of defendants' petition for rehearing, Judge Stevens criticized the proposition that a defendant's interest in the seized property gives him standing to challenge both the search and the subsequent seizure. 522 F.2d at 232-33.

56. 100 S. Ct. at 2568.

57. *Id.* at 2566.

58. *Id.*

59. 439 U.S. at 156-57 (White, J., joined by Brennan, Marshall, & Stevens, JJ., dissenting) ("The Court today holds that the Fourth Amendment protects property, not people . . . .").

60. In *Rawlings*, Justice Marshall's dissent criticized the Court for inconsistently claiming that property rights do not by themselves trigger fourth amendment protection, and then simultaneously defining the scope of the protected interest in terms of a property or possessory interest. 100 S. Ct. at 2569.

61. 100 S. Ct. at 2568 (Marshall, J., dissenting). The Court has also turned "the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person." United States v.

solely in terms of legitimate privacy interests in the area searched, and simultaneously excluding the privacy interests that arise from certain property rights, the Court dismissed the intellectual history of the fourth amendment[62] and opened the door to uncertain judicial construction.

It is not clear what cumulative effect these decisions will have. Through construction of the word "legitimate," courts can narrow the fourth amendment's protection even further so that an individual will never be deemed to have a legitimate expectation of privacy if engaged in illegal activity, even in his own home.[63] Or, under the property-related standards of *Rakas*,[64] courts may narrowly construe a "legitimate privacy interest" to require a possessory or property interest in the area searched. What is clear is that the Court's discontent with the exclusionary rule has firmed its determination to restrict access to the benefits of that rule by continuing to limit the invasions forbidden by the fourth amendment.

DARLENE STOSIK

Payner, 100 S. Ct. 2439, 2447-48 (1980) (Marshall, J., dissenting). In *Payner*, the Court held that the federal courts' supervisory power "does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court." *Id.* at 2446. *See* Baskes v. United States, *petition for cert. filed*, 49 U.S.L.W. 3578 (U.S. Dec. 22, 1980) (No. 80-1066) (seeking reconsideration of United States v. Payner).

62. The *Rawlings* dissent noted that *Katz* did not exclude property interests from fourth amendment protection; rather, it recognized "that privacy interests are protected even if they do not arise from property rights." 100 S. Ct. at 2568.

63. *See Rakas*, 439 U.S. at 144 n.12. "[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items." *Id.*

64. *See* note 45 *supra*.