



If You Rent a Car, Don't Move the Seat Back

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The Supreme Court recently announced its decision in *Byrd v. United States*. There, Pennsylvania police had pulled Byrd over “because he was driving with his hands at the ‘10 and 2’ position on the steering wheel, sitting far back from the steering wheel, and driving a rental car.” The case turned, however, not on whether police had reasonable suspicion for the stop, but on whether Byrd had standing to challenge the subsequent search if he was not listed on the rental agreement. Resolving a split among the lower federal appellate courts over a per se rule, the Court held that “the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.” Thus, based solely on the rental agreement, Byrd could not be denied standing to challenge the search of the rental car that resulted in the discovery of a flak jacket and 49 bricks of heroin. The Court returned the case to the U.S. Court of Appeals for the Third Circuit (Third Circuit) for a determination of whether Byrd lacked standing for other reasons or alternatively whether the officers had probable cause for the search.

Background

The [case](#) began when Byrd’s girlfriend rented a Ford Fusion and handed the keys over to Byrd in the car rental agency’s parking lot. Byrd was not listed on the rental agreement that required assurances that the driver had a valid license and had not been convicted of various traffic offenses within three years. The police later stopped Byrd for a possible traffic violation while he was traveling alone in the rental car. They asked Byrd for permission to search the car, but told him they did not need his consent because he was not listed on the rental agreement. The officers then searched the car and discovered and seized the flak jacket and heroin.

Byrd was turned over to federal authorities and charged with possession of [heroin](#) with intent to distribute and possession of [body armor](#) after having been convicted of a violent felony. The District Court for the Middle District of Pennsylvania [denied](#) Byrd’s motion to suppress evidence of the seizure on the ground that Byrd, as the unlisted driver of the rental car, had no reasonable expectation of privacy covering the car’s content and consequently had no standing to challenge the search. The Third Circuit [affirmed](#) the district court ruling for the same reason, but acknowledged the conflict among the lower federal appellate courts.

Supreme Court’s Opinion

The Supreme Court unanimously [held](#) that the driver of a rental car does not lose his legitimate expectation of privacy as to the car’s contents simply because he is not listed on the rental agreement.

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Beyond this rejection of an automatic rule, Justice Kennedy's opinion for the Court made three other noteworthy points. First, "the test most often associated with legitimate expectations of privacy ... supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.'" Until *Katz v. United States*, the question of whether an individual enjoyed Fourth Amendment rights with respect to a particular place was a matter of property law. In *Katz*, the Court held that an individual had a Fourth Amendment-protected expectation of privacy as to conversations in the telephone booth in which he had no property interest. For some years thereafter, the Court's Fourth Amendment cases spoke almost exclusively of expectations of privacy. Nevertheless, Justice Kennedy explained, property law may provide the grounds upon which a legitimate expectation of privacy may be based. An individual who "lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude" others from possession or control. Byrd's possession of the rental car was lawful on its face because the rental agreement did not make it unlawful; instead it made him liable for any damages.

Second, Fourth Amendment standing should not be confused with Article III standing. The Third Circuit held that Byrd, as an unlisted driver of a rental car, lacked standing to challenge a search of the car. Article III of the Constitution authorizes federal courts to try disputes, "cases or controversies." If an individual has no substantial personal interest in the resolution of a dispute, he has no standing, and federal courts have no jurisdiction to resolve the dispute on his behalf. Fourth Amendment standing, in contrast, is not jurisdictional. Fourth Amendment standing, an expectation of privacy in the place to be searched, is interwoven with the question of whether the government violated the Fourth Amendment when it searched the place. An individual's challenge cannot succeed unless he can show both that he had a legitimate expectation of privacy and that the government impermissibly intruded upon it. Moreover, a court may find that he failed to carry one burden without considering the other. As Justice Kennedy pointed out, on "remand, then, the Court of Appeals is not required to assess Byrd's reasonable expectation of privacy in the rental car before, in its discretion, first addressing whether there was probable cause for the search..."

Third, there may be circumstances under which an unlisted rental car driver can have no legitimate expectation of privacy. For example, the Supreme Court indicated that a car thief would have no legitimate expectation of privacy with respect to a car he had stolen. The Court returned the case to the Third Circuit for a determination of whether "one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event." The probable-cause assessment would give the Third Circuit a chance to consider what combination of innocent circumstances, like driving a rental car with the seat pushed back, may constitute reasonable suspicion for a police highway stop.

Justice Thomas, joined by Justice Gorsuch, concurred because he felt the opinion for the Court correctly applied the Court's earlier case law. He noted, however, that he had serious doubts of the validity of the Court's expectation of privacy decisions and would welcome an opportunity to reconsider them. Justice Alito concurred in order to identify some of the numerous circumstances that might undermine an unlisted rental car driver's legitimate expectation of privacy.

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