# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

No: 16-1419

United States of America

Appellee

v.

Rashawn Long

Appellant

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:13-cr-00405-BCW-1)

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## ORDER

The petition for panel rehearing filed by appellant's counsel is denied.

Appellant's pro se petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 18, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Doc. #11

# United States Court of Appeals
## For the Eighth Circuit

No. 16-1419

United States of America

*Plaintiff - Appellee*

v.

Rashawn Long

*Defendant - Appellant*

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: June 13, 2018
Filed: October 12, 2018

Before LOKEN and MELLOY, Circuit Judges.[1]

MELLOY, Circuit Judge.

Rashawn Long was convicted by a jury of one count of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and one

[1]Judge Murphy had been assigned to the panel that originally heard this matter and issued an opinion dated August 31, 2017. Judge Murphy passed away on May 16, 2018 and did not participate in this panel rehearing.

"Appendix E"

count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Long was sentenced to 360 months' imprisonment. He appeals, arguing the district court[2] erred by failing to suppress evidence discovered during an inventory search. He also argues the district court erred in calculating his criminal history. We affirm Long's convictions and sentence.

I.

On October 26, 2013, Long parked his car in the backyard of Valerie McCoy's house. Long did not know McCoy. He approached McCoy's door, knocked, received no answer, and left on foot, leaving the car parked in her backyard without permission. McCoy was home at the time and had observed Long park his car. Out of fear due to the unusual situation, and because she did not recognize Long, she did not answer the door. Instead, she locked herself in her bedroom and called the Kansas City, Missouri police.

When officers arrived at the scene of the apparent trespassing and vehicle abandonment, McCoy explained that a black male parked the car in her yard, knocked on the door, and left when she did not answer. The officers found a 2013 silver Avenger parked in McCoy's backyard, ran the license plate number, and learned it was a rental car. After an unsuccessful attempt to contact the rental company, the officers called a tow truck to remove the car from McCoy's property.

After officers had already ordered the tow truck, Long ran towards them from another property. He gave the officers his name, told the officers the name of the person who had rented the car, and explained that he had parked the car in McCoy's

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[2]The Honorable Brian C. Wimes, United States District Judge for the Western District of Missouri, adopting the Report and Recommendation of the Honorable John T. Maughmer, United States Magistrate Judge for the Western District of Missouri.

named in a car rental agreement has a Fourth Amendment expectation of privacy when driving a rental car with consent received directly from the named renter. As to that issue, the Eighth Circuit had already determined that such a driver with first-person consent enjoyed a protectable expectation of privacy. United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998). We held, however, that Long's claim to a privacy expectation was too far removed because he had merely obtained second-hand permission from such a consent driver; the renter of the vehicle had not given permission directly to Long. We also affirmed as to the sentencing issues Long raised on appeal.

Subsequently, the Supreme Court took up the issue posed in the circuit split and resolved the issue consistently with our circuit's law: there is no per se rule that the driver of a rental vehicle, who has received consent directly from the listed renter, lacks a protected expectation of privacy in that vehicle. United States v. Byrd, 138 S. Ct. 1518, 1527–28 (2018). In its opinion, however, the Court raised additional questions concerning the scope of privacy expectations in the context of rental vehicles. See id. at 1531. We read Byrd as indicating, at a minimum, that privacy expectations in rental vehicles are not subject to easily articulated bright-line rules. Because Byrd arguably calls into question the standing determination upon which we based our initial opinion in this case, we now vacate our prior opinion and affirm for the reasons stated herein.

II.

On appeal, Long asserts the district court erred in denying his motion to suppress. Long also contends that the Missouri offense of armed criminal action is not a crime of violence and, thus, the district court erred in assessing a criminal history point for that conviction. Alternatively, Long argues his sentence is substantively unreasonable.

A.

We assume without deciding that Long has standing to challenge the search of the rental vehicle. In reviewing a challenged search, "[t]his Court reviews the facts supporting a district court's denial of a motion to suppress for clear error and reviews its legal conclusions de novo." United States v. Cotton, 782 F.3d 392, 395 (8th Cir. 2015). "This court will affirm the district court's denial of a motion to suppress evidence unless it is unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, based on the entire record, it is clear a mistake was made." United States v. Hogan, 539 F.3d 916, 921 (8th Cir. 2008) (quoting United States v. Annis, 446 F.3d 852, 855 (8th Cir. 2006)).

Long argues that the district court should have suppressed the evidence discovered during the search of his vehicle because the inventory search prior to towing his vehicle was unconstitutional. We disagree. While we acknowledge Long's concerns that officer comments serve as evidence suggesting pretext, "[t]he presence of an investigative motive does not invalidate an otherwise valid inventory search." United States v. Garner, 181 F.3d 988, 991 (8th Cir. 1999).

Here, the search was a reasonable inventory search of the vehicle—a vehicle Long used to trespass on the private property of stranger and which he concealed without permission in that person's backyard before seemingly abandoning the vehicle. In response to the homeowner's understandable call for help in this suspicious situation, and before Long returned to the scene, the officers determined it was necessary and appropriate to tow the car. In fact, the officers had already called the tow vehicle before Long came running back to the scene. (Policy to tow not inventory abandon or illegal..)

As of that point in time, an inventory search was fully justified. Nothing that occurred after Long's return lessened the need or the propriety of towing the vehicle and performing an inventory search. Long's behavior and explanations, including his

2011) (holding that an officer's "minor deviation from . . . policy was not sufficient to render [an inventory] search unlawful"). no deviation if record shows deviant intent from start.

B.

Long also argues the district court erred in assessing an additional criminal-history point because his prior conviction for armed criminal action is not a "crime of violence." We review a district court's determination that a prior conviction is a crime of violence under the Guidelines de novo. United States v. Maid, 772 F.3d 1118, 1120 (8th Cir. 2014).

Pursuant to U.S.S.G. § 4A1.1(e), a sentencing court "[a]dd[s] [one criminal-history] point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under [§ 4A1.1] (a), (b), or (c)." At sentencing on March 25, 2016, the Guidelines provided that a "crime of violence" was any crime punishable by more than one year in prison that:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a). The "or otherwise" clause is referred to as the residual clause.

On January 8, 2016, the sentencing commission announced that it had unanimously voted to eliminate the residual clause of the Guidelines. That amendment, however, did not become effective until August 1, 2016. U.S.S.G. app. C, amend. 798. And the Supreme Court recently held that the residual clause in U.S.S.G. § 4B1.2(a)(2) is not unconstitutionally vague. Beckles v. United States, 137

because it relied too heavily on his history and characteristics and because it greatly differs from sentences other defendants received for similar conduct.

"A district court abuses its discretion when it (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment." Id. (internal quotation marks and citation omitted). If a district court deviates from the advisory Guidelines range, it must "give serious consideration to the extent of any departure from the Guidelines and must explain [its] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." Id. at 462 (alteration in original) (quoting Gall v. United States, 552 U.S. 38, 46 (2007)). The district court has discretion to rely more heavily on some sentencing factors than others, United States v. Townsend, 617 F.3d 991, 994 (8th Cir. 2010) (per curiam), and a defendant challenging the district court's sentence "must show more than the fact that the district court disagreed with his view of what weight ought to be accorded certain sentencing factors." Id. at 995.

In this case, the district court gave "substantial insight into the reasons for its determination." Feemster, 572 F.3d at 463 (internal quotation marks and citation omitted). The district court addressed Long's criminal history, observing that Long had a drug conviction at 18 and pled guilty to second-degree murder at 20. The district court made clear that it was considering the totality of the circumstances, including Long's history and characteristics. Addressing Long, the district court stated, "You have shown through your conduct that you're not able to conform to society as we know it in terms of you being out [of jail]. And the problem here is people will get hurt if you are on the street." Finally, the district court acknowledged that it was imposing a significant upward variance, explaining, "I think this sentence is appropriate, and arguably the Court could have ran as high as 40 years. I didn't,

but I think this is a sentence that is not greater than necessary, but this is a sentence that is certainly going to protect the public from you."

The district court adequately explained the sentence it imposed on Long. The court clearly addressed the § 3553(a) factors and, although the court focused most on Long's history and characteristics, there was no abuse of discretion. Long has not shown "more than the fact that the district court disagreed with his view of what weight ought to be accorded certain sentencing factors." Townsend, 617 F.3d at 995.

III.

Based on the foregoing discussion, we affirm Long's convictions and sentence.[5]

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[5] Long raised a number of other arguments in supplemental pro se briefing on appeal. Finding those arguments to be without merit, we summarily affirm under Eighth Circuit Rule 47B. Additionally, we deny Long's Motion to File a Supplemental Reply Brief and Motion for Production of Video and for In Camera Inspection.

Additional material from this filing is available in the Clerk's Office.