ORIGINAL

In the

Supreme Court of the United States

FRANK L. RAKAS and LONNIE L. KING, Petitioners,	)	
v.	)	No. 77-5781
PEOPLE OF THE STATE OF ILLINOIS, Respondents.	)	

Washington, D. C.
October 3, 1978

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Washington, D.C.

Tuesday, October 3, 1978

The above-entitled matter came on for argument at 1:52 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:

G. JOSEPH WELLER, Assistant Defender, 628 Columbus Street, Suite 308, Ottawa, Illinois 61350; for the Petitioners.

DONALD B. MACKAY, Assistant Attorney General, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Rakas and King against Illinois.

Mr. Weller, I think you may proceed when you are ready.

ORAL ARGUMENT OF G. JOSEPH WELLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WELLER: Thank you, Mr. Chief Justice, and may it please the Court:

Your Honors, the basic issue in this case is whether passengers who were legitimately present in an automobile when it was stopped by police have standing to challenge the constitutionality of a warrantless search of that automobile.

We advance two grounds for such standing. One is the "legitimately present on the premises" rule, and the other is the "directed-at" theory for standing.

The facts in this case can be briefly stated. The two petitioners in this case, Frank Rakas and Lonnie King, were convicted of armed robbery in an Illinois court. And the most significant evidence against them was a sawed-off rifle which was identified by one of the victims of the robbery as being the same weapon which was used by the masked robbers. Two robbers in the robbery in question made their getaway from the site of the robbery in a blue Plymouth Roadrunner which was taken from one of the robbery victims. About ten or

fifteen minutes later--

Q Were they found in possession of that car?

MR. WELLER: The car was subsequently abandoned. However, prior to that time, the police officer, who was about four miles north of the robbery site, noticed not a blue Roadrunner but a purple Roadrunner, with a different license number. He followed this vehicle to a lounge, saw the petitioners and two female companions exit and go into the lounge. And then he returned to his original site near the highway to look for the real getaway car since he knew it was a different license number.

About that time he heard a radio call noting that the getaway car had been found abandoned. So, he considered the possibility that the robbers changed cars. He went back into the lounge, called the sheriff's dispatcher for a description of the suspects, was not given a description. Instead he gave his description of the petitioners whom he had seen, and he was told that one of the petitioners--who, I believe, would be Mr. King--matched the description of one of the robbers.

As a matter of fact, however, we learned from the trial that the robbers in this case wore ski masks and they wore clothing different from what the petitioners were wearing at the time of their arrest.

In any event, this police officer waited until the

petitioners left the lounge. He followed their car down the highway toward the robbery site. And it was near the site in which a number of police vehicles stopped the car in which the petitioners were riding and the search in question was conducted.

Q Mr. Weller, in your opinion, was there ever an arrest?

MR. WELLER: In my opinion there was not an arrest before the search.

Q Not before the search. I want to be sure about that. You so concede?

MR. WELLER: No arrest before the search. There was also no consent for the search.

In any event, during the motion-to-suppress hearing, both petitioners agreed that they did not own the car in question. The car was owned by one of the female companions who happened to be the former wife of petitioner King.

The trial court decided that since neither petitioner owned the car, they did not have standing to contest the search. And their motion to suppress then was merely disposed of on that grounds.

The trial court nor the appellate court discussed the "legitimately on the premises" rule which we rely upon here.

Q That language that you paraphrased at least from

our opinion is related to dwelling houses, is it not?

MR. WELLER: That is exactly correct, and I believe the issue in this case, contrary to what the respondents' brief would suggest, is whether this rule does apply to automobiles.

Q Many cases have made sharp distinctions between searches of automobiles and homes, have they not?

MR. WELLER: I acknowledge that, Your Honor. However, the major distinction which has been made between automobiles and homes is the mobility of an automobile. And, as a result of that, it has generally been held that police have a greater right to conduct warrantless searches of automobiles.

Q Does it not also rest on the expectation of greater privacy in the home, in an enclosed home, than in an automobile?

MR. WELLER: Recent cases have dwelled upon the point that there is a lesser expectation of privacy in an automobile. However, there is ample authority also for the proposition that that notwithstanding, there is a substantial right of privacy in an automobile.

Q If standing is a prudential rule, does it not make some sense to say that if automobiles are subject to less rigorous substantive requirements as to search and seizures, they are also subject to stricter standing requirements?

MR. WELLER: I do not think so unless you can say there is absolutely no expectation of privacy in an automobile

because obviously we know the owner would have standing--

Q If you reduce both to zero, I mean, you would never get an automobile case. If we are simply talking about diminished expectations of privacy as compared to a house, then would it not make sense to say there are stricter rules of standing too because we do not consider the interests in privacy as great in an automobile as we do in a house?

MR. WELLER: Of course it is diminished. But, as I was saying, the owner of an automobile still has standing. Of course the owner of a house would have standing. Are we to say that there is a difference between the guests but not the owners? Is not the differential between owners and guests the same in both?

Q As the Chief Justice just commented, we have differentiated between houses and automobiles for purposes of substantive Fourth Amendment inquiries. Does it not make sense to differentiate between them for standing purposes too?

MR. WELLER: No, I do not believe so because as long as the right to privacy exists and someone can be the victim of a Fourth Amendment violation, be it in an automobile or a house, he should have standing to raise that issue.

Q Are you arguing in jure in fact that if at your trial evidence is introduced against you which has been obtained in violation of the Fourth Amendment, you can object to it even though you did not own it, you were not on the

premises when it was taken? Are you arguing simply to do away with standing?

MR. WELLER: Absolutely not. I think that would be--

Q Then what does it mean to say that you are the victime of an unlawful search?

MR. WELLER: The victim is one who actually suffers an invasion of the privacy which he had, his reasonable expectation of privacy. I believe that a passenger in an automobile does have that reasonable expectation of privacy.

Q Supposing that the police go to A's house and search without a warrant and find a letter that has your fingerprints on it, and you were not in the house at the time the search occurred, and the letter did not belong to you; nonetheless, it tends to incriminate you. Do you think you should have standing to object to the introduction of that at your trial?

MR. WELLER: Not under the "legitimately on the premises" rule, which I have advanced. You have to be present under Jones v. United States to have that reasonable expectation of privacy, to have that necessary interest in the premises searched.

Q You have not been a victim of the search then?

MR. WELLER: I would have to concede that if you are not present, you would not be a victim of the search. But if you are present, you have that expectation. You have an

interest in the premises searched. And I see no reason to differentiate between automobiles and houses.

Q Would you indicate at what point precisely this right of privacy you speak of was invaded. Was it invaded when they told him to get out of the car?

MR. WELLER: I think it was invaded when the car was stopped.

Q When they stopped the car?

MR. WELLER: I believe it was invaded at several points, including when the car was stopped.

Q Where is the first point where the privacy was invaded?

MR. WELLER: When the car was stopped, Your Honor.

Q And then the next time?

MR. WELLER: When the car was searched.

Q How about when they told him to get out of the car?

MR. WELLER: That is correct, that would be another time.

Q Have not our cases indicated a broad right when a car is stopped to search the car, search the people?

MR. WELLER: I do not believe it is quite broad enough to allow a search of a car without probable cause.

Q As I understand it, the validity of this search has never been determined by the lower court.

MR. WELLER: That is exactly correct.

Q And even if we decide in your favor, all you ask us to do is to remand it to the state court to determine the validity of the search.

MR. WELLER: That is correct.

Q So, that is not before us now at all.

MR. WELLER: No, it is not.

I believe that the respondent in this case has presented an argument which simply does not exist in this case. The first case that we rely on here is Jones v. United States, which presented two tests or grounds for standing. One is the automatic standing rule, which would be limited to possessory type offenses, which this was not. And the second alternative holding is the "legitimately on the premises" rule, which we rely on. That in Mancusi v. DeForte was stated to have general application.

Q Although in fact it was a possessory offense in Jones, was it not?

MR. WELLER: That is true, but--

Q The dilemma perceived in the Jones opinion--Mr. Justice Frankfurter's opinion for the Court in Jones--was eliminated in Mr. Justice Harlan's opinion for the Court in Simons, is that not correct? I may not have the identification of the members of the Court exactly correctly; that is my recollection. But, in any event, the Simons decision

eliminated the dilemma perceived by the opinion in Jones; is that not correct?

MR. WELLER: That is correct.

Q And that had only to do with possessory offenses.

MR. WELLER: For the purpose of arguing, I would say it eliminated, although I think since I have not briefed that point whether it actually eliminated--

Q But with respect to possessory offenses, Simons made clear that a person did not have to in fact admit possession in order to try to exclude the evidence; is that correct?

MR. WELLER: That is correct.

Q And that was the dilemma perceived in Jones.

MR. WELLER: That was the dilemma which was faced with the automatic standing, which I do not rely upon here.

Q I understand.

MR. WELLER: I might add that Mr. Justice Harlan also wrote the Mancusi v. DeForte--

Q Yes, he did.

MR. WELLER: --which did not involve the possessory offense. And in his opinion he clearly notes that there is a distinction between the two tests.

It would appear to me that the standing is based upon what the Fourth Amendment protects, which is the right of

privacy, not necessarily property. Therefore, if one has that expectation of privacy, he would have standing.

Q But if you have an expectation of privacy, your Fourth Amendment interests are implicated, are they not? I mean, is that not almost saying that there is no standing rule separate from a substitutive violation of the Fourth Amendment?

MR. WELLER: Certainly if there is a violation of the Fourth Amendment, one would have to have standing.

Q What is the point of a standing rule? The standing rule assumes that some people may have a Fourth Amendment claim that they could make if they only had standing.

MR. WELLER: I agree with that. If one is the victim of a Fourth Amendment violation, he should have standing.

Q Then you are arguing for his injury in fact or doing away with standing.

MR. WELLER: No, because if you are not a victim of the illegal police conduct, if it was somebody else who was the victim, you would not have standing or I would not have standing. But if you are the actual victim, then you should have standing. My contention here is that my clients were the actual victims of the police action. There was a Fourth Amendment violation. They were the victims. Therefore, they have standing.

Q And how again do you define the term "victim"?

MR. WELLER: A victim is one who had a reasonable

expectation of privacy at the time of the contested police conduct. In this particular case they had that expectation because they were legitimately present in the car.

Q If they had been found in the stolen car, you would not be in here, would you?

MR. WELLER: I would hate to have to make that argument; however, it has been made successfully in a few courts.

Q What if they were ten feet away from the car?

MR. WELLER: It seems to me that if they were that close, they might have standing. I think there is a case that I am aware of where one did leave the car momentarily and was held not to have standing.

Q Suppose he had never been in the car but he was just ten feet away from it. Would he be, quote, "legitimately on the premises," close quote, as you use the term?

MR. WELLER: That is a difficult question, and it does not apply here. My feeling is, if he had never been on the premises, perhaps not. But that is not the case we have here.

Q In other words, if you have never been on the premises, you do not have to decide whether you are legitimately on the premises.

MR. WELLER: I think that makes good sense, Justice Stevens.

We also have another issue in this case which concerns what is known as the directed-at theory. Under this theory, one who has the search intentionally directed at him would have standing. The theoretical basis for the theory is that the purpose of the exclusionary rule is to deter unlawful police conduct. And the best deterrence would be giving standing to one to whom the search was personally directed at.

Q Would not an even better deterrent be to simply do away with standing and say that anyone who has evidence offered against him at his trial that was seized in violation of the Fourth Amendment ought to be able to object to it?

MR. WELLER: That would be a better deterrent. However, I think that case law would suggest that some sort of limitation is in order.

Q You will argue that next time.

MR. WELLER: Perhaps, Your Honor.

If there are no further questions, I would like to reserve my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Mackay.

ORAL ARGUMENT OF DONALD B. MACKAY, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

To grant standing to the petitioners here we feel

would constitute a radical departure from the well reasoned and readily enforceable rule of standing which is currently based on the right-to-privacy concept. The dictates of public policy, we submit, Your Honors, strongly support the continued application of the reasonable expectation of privacy standards. To expand standing, as petitioners would suggest, under a directed-at theory would simply be to say to anyone charged with a crime that he may mount a challenge to a search which could not have conceivably affected his personal interest and privacy. This approach, Your Honors, we believe would abandon the traditional rationale behind the Fourth Amendment cases--that is, the primacy of the protection of privacy--and would replace it with a cumbersome standard of expediency.

Q What about the guests in the house and the search of the house; does a guest have standing?

MR. MACKAY: Your Honor, in order to answer that question, I think we have to look to what reasonable expectation of privacy the guest had.

Q You say there is no general rule about that?

MR. MACKAY: It is our position, Mr. Justice White, that Simmons or Simons--

Q You are right, it is Simmons, double "m."

MR. MACKAY: Is it Simmons?

Q Yes.

MR. MACAY: That Simmons although it--excuse me. I am getting confused. That Jones, although it purports to have language to the effect that one legitimately on the premises automatically has standing by virtue of that alone is only dicta in Jones and--

Q What if it is not? What if we thought that was the general rule?

MR. MACKAY: Then I would submit, Mr. Justice White, that this Court should seriously consider abandoning.

Q Because it might govern the case of the automobile guest?

MR. MACKAY: Not only that but because--

Q But it would?

MR. MACKAY: Yes.

Q So, if I had a guest in the house and if he had standing to object to a search; but then we left and I was taking him home and there was a search in my car, he would have as much standing to object to the search of the car as to the house?

MR. MACKAY: We do not concede that, Your Honor.

Q Is it necessary to make such a general rule? It depends on what the search was of in the house. If it was a search of the guest's suitcase or pajamas or hip pocket, it is one thing. If it was a search of the owners of the house's wine cellar, it is something else, is it not?

MR. MACKAY: Yes, Your Honor.

Q You do not have to talk about expectations of privacy.

Q Well, you do not have to answer my question, but my question was directed at that. Do you agree that the dictum in Jones indicated that the guest may have standing?

MR. MACKAY: That is correct. I agree that that is what the dictum in Jones says. I disagree that that--

Q And to the extent that is the law, would it be as applicable to an automobile as to a house?

MR. MACKAY: Yes, it would, Your Honor.

Q Is not the real test of standing as to whose Fourth Amendment right was violated?

MR. MACKAY: Yes, Your Honor.

Q And a person has a Fourth Amendment right against unreasonable searches and seizures in his person, papers and effects. And forgetting about person for a moment because it is not involved here--that is an arrest situation--they are his papers or his effects if he has ownership of them, title to them, or if he has possession of them. Is that correct?

MR. MACKAY: That is correct.

Q If he is a stranger to either title or possession, his Fourth Amendment rights can hardly be violated, can they?

MR. MACKAY: That is correct. This Court has held

that Fourth Amendment rights are private and may not be vicariously asserted. To get back to something which I think is suggested by Mr. Justice White's question--

Q Or by Jones.

MR. MACKAY: Or by Jones. It is the--

Q And if Mr. Justice Stewart's presentation represents the law, the dictum is obviously wrong.

MR. MACKAY: That is our position, Your Honor.

But we see a distinction, Your Honors, between the reasonable expectation of privacy that one enjoys in his home or in a residence and a reasonable expectation of privacy that a passenger in an automobile should enjoy. And it is our position, Your Honors, that the petitioners here lack a sufficient expectation of privacy to object to the search and seizure as being an invasion of their privacy.

Q What if the passenger had been the title owner of the automobile? He had been riding in the back seat as a passenger, but the fact is he owned the automobile.

MR. MACKAY: Then under our argument, Mr. Justice Stewart, that individual would have standing because his privacy--

Q His ownership.

MR. MACKAY: --in that vehicle is being violated.

Q His privacy was no more violated in the one case than in the other.

MR. MACKAY: I suggest that as the owner of the vehicle, he has a paramount expectation of privacy in the contents of that vehicle.

Q He has a right not to have his automobile victimized by an unreasonable search and seizure.

MR. MACKAY: Yes.

Q John Smith does not have a right that that other fellow's automobile not be subjected to an unreasonable search and seizure; is that not it?

MR. MACKAY: Yes, Your Honor.

Q It has nothing to do with privacy. The privacy interest is the same in both cases.

MR. MACKAY: We take the position that it is not, Your Honor, that a passenger in an automobile has a diminished expectation of privacy. The paramount--

Q Is that consistent with your answer to Mr. Justice White's question that the "legitimately on the premises" rule for houses carries over automatically to automobiles? I thought you said it did?

MR. MACKAY: Mr. Justice Rehnquist, that is exactly what I responded to Mr. Justice White. We are here attempting to draw a distinction between what the reasonable expectation of privacy is. I take issue with the dicta in Jones that one legitimately on the premises by virtue of that fact alone should be found to have standing. And I would suggest that

this Court reads that to be the law of Jones, that this Court should then overrule that to the extent that it is inconsistent with our position.

Q Or not apply it to costs.

MR. MACKAY: Yes, Your Honor, Mr. Justice Marshall.

Q Mr. Mackay, I have to confess I am somewhat puzzled. Do you think the standing turns on property concepts or expectation of privacy concepts?

MR. MACKAY: I believe it turns on expectation of privacy.

Q So then you would not differentiate if you had four people riding in a car at 11:00 o'clock at night out in the country somewhere. You would say they all have precisely the same expectation of privacy regardless of who owned the car?

MR. MACKAY: No, because it is our position, Mr. Justice Stevens, that the owner of the car, assuming he is present in your hypothetical--

Q Let us take it both ways. Would you suggest that he has an expectation if he is not present but the four people present have no expectation?

MR. MACKAY: I would suggest, Your Honor, that the owner of the vehicle has a paramount right of expectation of privacy to the contents of that vehicle.

Q Regardless of whether he is present?

MR. MACKAY: Yes.

Q And the persons present never have an expectation of privacy?

MR. MACKAY: The operator of the car, perhaps on the theory of agency--that he is the agent of the driver--may be placed into the shoes of the owner, as being a surrogate owner, to assert the right of privacy.

Q That is a problem. What about the leased cars and the rented cars?

Q How about a passenger in a taxicab? He would never have an expectation of privacy. Open season on taxicabs.

MR. MACKAY: No, Your Honor, I--

Q How about a leased limosuine?

MR. MACKAY: As to the--

Q What about a leased jet?

MR. MACKAY: As to leased modes of transportation, Mr. Justice Marshall, the only way I think I can answer your question is to respond that the lessee here is the surrogate owner who has a primacy, a primary protection of the interests of privacy in that vehicle or airplane.

Q That is a better answer than I have for it. I do not have any.

MR. MACKAY: I am sorry?

Q I do not have any answer for it. That is why I have the difficulty with your argument. If you had just

straightened me out, I would have it.

MR. MACKAY: I am sorry.

Your Honors, returning again to the degree of expectation of privacy that one may reasonably expect as a passenger in an automobile, we should take into consideration that the primary purpose of an automobile, as this Court has recognized, is transportation. An automobile seldom serves as one's residence or as the repository for one's personal effects or papers.

Q We have on some occasions observed that an automobile is also an instrument of criminal conduct--

MR. MACKAY: Yes, Your Honor.

Q --which homes may or may not be but considerably less so.

MR. MACKAY: And I believe, Mr. Chief Justice, that your comment gives more force to our argument that the rights of passengers in an automobile to privacy are significantly diminished.

Q Is it your submission that nobody but the record owner of an automobile has standing to complain of a search or seizure of an automobile?

MR. MACKAY: Essentially yes, Mr. Justice Stewart, with the qualification that someone acting as the owner's agent in possessing or driving the automobile would--

Q Somebody driving it with the owner's permission

and who is the only person in the automobile and therefore clearly has sole possession of it.

MR. MACKAY: Right.

Q What if a passenger in his motion to suppress says, "I was the possessor. I was a passenger but I was in possession of the automobile because I had borrowed it from somebody or I had leased it from somebody or I had stolen it from somebody"?

MR. MACKAY: Mr. Justice White, that is what we are dealing with here. The petitioners never alleged that they were entitled to possession of the car.

Q But in any of those circumstances you would think he had standing?

MR. MACKAY: Yes.

Q Anybody who is in fact in possession of the automobile?

MR. MACKAY: Yes. And, for instance, in this case if the petitioners were to have demonstrated to the cop that they were in joint possession, if you want to indulge in such a concept, I would have no quarrel.

Q You might have a quarrel, but at least you would have a harder case.

MR. MACKAY: I would have no quarrel with granting them standing at least to challenge the legality of the search.

Q Or if he had alleged he was in possession of the

gun.

MR. MACKAY: I beg your pardon?

Q Or if he had alleged that he was in possession of the gun.

MR. MACKAY: That is correct.

Q Only if he is indicted for possession of the gun. It would not make any difference whether it is bank robbery.

MR. MACKAY: In that case, Mr. Justice Stevens, you are then talking about a possessory offense, and we bring into play the remaining language in Jones which has not been dealt with in Simmons.

Q It seems to me, if I understand your argument correctly, you are saying with respect to non-possessory offenses that standing turns on property concepts.

MR. MACKAY: Correct.

Q You are kind of asking the Court to go back to a precast--

MR. MACKAY: No, not really on property concepts, Mr. Justice Stevens.

Q Ownership, possession, agent of owner, and all that, but the privacy does not have anything to do with it, as I understand your argument. You use the word "privacy" to say it is present when you are an owner, but there is no privacy present when you are a non-owner or a non-agent. So, in the

final analysis, you are making a property type analysis but using the word "privacy" to describe it, which is a precast analysis.

MR. MACKAY: I will concede that with this clarification. I know of no practical way to determine the underlying legal fashionable question as to what reasonable expectation of privacy anyone has in a particular location, under particular circumstances, without at some point reverting to property concepts in order to make that distinction.

Q You do not think a judge could come to the conclusion that when four or five people are riding along in a car, the car is stopped, and everybody is ordered out of the car and everybody is searched, that they could all feel that there has been some infringement of their constitutional rights; you do not think that a judge could make that kind of determination?

MR. MACKAY: Your Honor, I am not saying that. If the individuals have personally been searched, their individual right to remain free from unreasonable searches has been violated, but when the automobile is searched--

Q If just the vehicle is searched, they do not have any right?

MR. MACKAY: That is correct.

Being legitimately on the premises, we submit, without more is insufficient to confer standing on these petitioners.

This concept presupposes that one who is, quote, "legitimately on the premises" has a reasonable expectation of privacy in the premises and in its contents anywhere on the premises simply by virtue of the fact that he or she is there. It is our belief, Your Honors that this Court, when it decided Jones v. United States in 1960 did not intend to create such a rule, notwithstanding the very clear English language contained in Jones to the effect that the Court was considering two separate grounds for standing.

I think we must remember that Jones, first of all, was attempting to define an aggrieved person under Rule 41 of the Federal Rules of Criminal Procedure. It dealt with a possessory offense where it felt that the vice of prosecutorial self-contradiction and the potential for self-incrimination required the Court as a matter of public policy to grant standing to the petitioner in that case. The Court in Jones that the same possession which would grant standing was the very same possession which would convict.

I might also point out that Jones, which was decided in 1960, was decided prior to this Court's decision in Mapp v. Ohio, which came the following year. And I just doubt, Your Honors, whether this Court in 1960, when it announced Jones, intended to formulate a rule of standing.

Q What do you say about Brown v. United States, 411 U.S.? Here is the footnote: "Presence of the defendant

at the search and seizure was held in June to be a sufficient source of standing in itself." And then it proceeds to say--of course in Brown the defendant was not on the premises at the time.

MR. MACKAY: Your Honor, the only way I can answer that is to refer the Court to the dissent of Justice Black in Mancusi v. DeForte, where he labels the--

Q Of course this is a court opinion.

MR. MACKAY: I understand that.

Q Purporting to say what one of the court holdings is and announcing what the existing rule of law is. Perhaps it did not approve it, but it certainly indicated it was a rule.

MR. MACKAY: Your Honor, it is our position that if this Court finds that is the rule, then Jones should be modified by the opinion in this case to strike being legitimately on the premises as an independent ground for standing because because the factors which were present in Jones to give rise to that are no longer in existence. We now under Simmons no longer have the potential for self-incrimination. We still have left--

Q Brown followed Simmons.

MR. MACKAY: That is right. And, as a matter of fact, the language in Brown would suggest that the continued vitality of Jones in light of Simmons is questionable--

Q Yes, but only on the automatic standing thing with regard to possession.

MR. MACKAY: The way I read Brown, Your Honor, is that it reserves for future consideration the application of Jones type standing only to possessory offenses. We are dealing here with a non-possessory offense. I think what the Court is suggesting in Brown is that the Jones type standing is no longer required in a non-possessory offense.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Mackay.

Do you have anything further, Mr. Weller?

REBUTTAL ARGUMENT OF G. JOSEPH WELLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WELLER: Thank you, Mr. Chief Justice, and may it please the Court:

Very frankly, I find this case remarkably simple. It seems to me that all we are talking about is that property concepts no longer apply to standing. Therefore, the "legitimately on the premises" rule is even more valid today than it was before.

Q That leaves us then to decide whether premises and automobiles are to be equated, does it not?

MR. WELLER: That is right, Your Honor. And I am willing to concede that there is a diminished expectation of privacy in an automobile. However, I think it is abundantly

clear, both logically and in the Court's opinion, that the interior of an automobile is indeed a protected area.

Q What if the officers could see the gun or whatever? Is that a violation of privacy for them to look at it?

MR. WELLER: I think we should make a distinction between what would be a legal seizure or search because of course you have the plain-view doctrine which would make the police officer's conduct legal. But perhaps we should still grant standing of the person who is present in the automobile to contest whether or not that gun was in fact in plain view.

One other comment. Let me make an example at this point. A number of examples were suggested.

Q Let me ask you a little question since you are so hip on Jones. Does that apply to a hitchhiker?

MR. WELLER: I think that a hitchhiker would have standing. However, we are not hitchhikers in this case. We are clearly not hitchhikers. And also I wonder if--

Q But it would apply to a hitchhiker?

MR. WELLER: The "legitimately on the premises" rule would apply to hitchhikers.

Q And robbers?

MR. WELLER: It would not apply to someone who--

Q Someone steals a car and they are driving it.

MR. WELLER: It would not apply to a theft.

Q He is in fact in possession and, let us say, he is in sole, in exclusive, possession.

Q That is not legitimately on the premises.

MR. WELLER: He is not legitimately on the premises is my answer.

Q But a hitchhiker would be.

MR. WELLER: A hitchhiker would be legitimately on the premises. However, I wonder if--

Q A hitchhiker has a right of privacy in somebody else's car which he is temporarily in.

MR. WELLER: I think that is true, but I wonder if that is really a serious problem.

Q Does that not stretch something?

MR. WELLER: Can that situation come up very often? You would assume that this person we are talking about--

Q I have seen a whole lot of hitchhikers getting in cars.

MR. WELLER: Yes, but can they be incriminated by something found in that car unless they have some association with it? So, maybe you are talking about a very isolated circumstance.

Q You mean hitchhikers are isolated?

MR. WELLER: No, so far as--

Q I have seen as many as ten of them in a group.

MR. WELLER: So far as raising this issue is concerned,

Of course there are many hitchhikers, but I think it would be rare that a hitchhiker would be incriminated by something found in the car. And I also would hasten to add that really we are not hitchhikers in this case.

Q Do you need this for your case?

MR. WELLER: Pardon me, Your Honor?

Q Do you need that Jones statement for your case?

MR. WELLER: "Legitimately on the premises"?

Q Yes, sir.

MR. WELLER: It was certainly helpful, and I do not wish to discard it.

Q You would have to go to the directed-at theory if you forget about Jones, would you not?

MR. WELLER: If we concede that there is no expectation of privacy, you would have to go to the directed-at theory. I might add on that point also that in the dissent by Mr. Justice Black in the Mancusi case he suggested that perhaps it would be proper to combine "legitimately on the premises" and "directed-at." If that would be a test, I think it would be an extension of what the present test is. But if that is a test, we still meet that in this case.

Q Except Mancusi was a building, not a car.

MR. WELLER: It was an office.

Q Does the presence or absence of probable cause

make any difference in this type situation?

MR. WELLER: Not as far as standing is concerned.

Q That is what I am asking.

Q That is the issue on the merits, and that has not been yet decided in this case.

MR. WELLER: That is correct, Your Honor.

Q Right. But let us assume for the moment there was probable cause to stop this automobile. Would you still be making the same issue with respect to standing to conduct the sort of pat-down search that was approved in Robinson?

MR. WELLER: If they have probable cause to stop the vehicle?

Q Yes. Would that have been permissible? Or would the individual who was patted down after the vehicle had been stopped with probable cause have standing to object?

MR. WELLER: I would think so because he first of all would have to have standing to challenge his being patted down. That is his person. I think he also has standing to contest the stop. That is not saying that if there is probable cause, he will lose; he may lose.

Q But if he concedes there is probable cause, then he is not going to object to it.

MR. WELLER: He has conceded the issue. It is not a standing question. It is just not an issue.

Q Right.

Q The other side of the coin is that if you assume there is no probable cause, it still does not do your client any good if he has not standing. The search can be grossly illegal, and he still has nothing to complain about.

MR. WELLER: That is true. I was just, what would happen in the case of a husband and wife, one of whom is the registered owner of the car; are we going to say that both would not have standing? That to me to suggest a rather absurd result. I do not think that--

Q Let us not get involved in how close the husband and wife are.

MR. WELLER: I have nothing further.

Q May I ask you the question that was asked your adversary; what about the driver of a stolen car?

MR. WELLER: I have no problem with that. I do not think that a driver of a stolen car has standing.

Q So, you think that if I steal a car and I am driving down the road and a policeman stops the car without probable cause and searches it, that I cannot object to it.

MR. WELLER: I would hate to argue that, Your Honor, and I do not think that would be the case. It is "legitimately on the premises" again--not legitimately on the premises. That is a simple enough rule. I think it should probably be retained.

Q Very strategic. Very strategic.

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

[The case was submitted at 2:36 o'clock p.m.]

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