UNITED STATES V. COHEN: ELEVENTH CIRCUIT PROTECTS DEFENDANT'S ABILITY TO BRING A FOURTH AMENDMENT CLAIM WHILE AFFIRMING OUTCOME BASED ON THE MERITS

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In *United States v. Cohen*, the United States Court of Appeals for the Eleventh Circuit addressed whether a defendant had Fourth Amendment standing to challenge the search of his vehicle and whether an inventory search was lawful pursuant to the impoundment procedures and policies of the Tampa Police Department.[1] Devon Cohen filed a motion to suppress evidence obtained during the inventory search, arguing that the police had no grounds for impounding the vehicle because he had not parked illegally.[2] The United States District Court for the Middle District of Florida denied Cohen's motion, stating that Cohen lacked standing to contest the search of the vehicle and, even if he did have standing, that the search was lawful under the procedures of the department.[3] On appeal, the Eleventh Circuit held that, while Cohen did have standing to bring his Fourth Amendment claim, the search was valid on the merits because the impoundment was consistent with the department's procedures and policies.[4]

Cohen was flagged down by the Tampa Police after he ran a stop sign.[5] In response, Cohen "pulled into the parking lot for Oakhurst Apartments . . . [and] exited his vehicle."[6] The officers requested Cohen return to his vehicle and remain there, but Cohen repeatedly refused; thus, the officers "placed [him] under arrest for resisting arrest without violence."[7] Upon further investigation, the officers "discovered that Cohen's license was suspended" and that the car Cohen was driving had been rented from Enterprise Rent-A-Car.[8] The renter was

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[1] 38 F.4th 1364, 1368 (11th Cir. 2022).

[2] *Id.* at 1367.

[3] *Id.* at 1368.

[4] *Id.* at 1370–71.

[5] *Id.* at 1366.

[6] *Id.*

[7] *Cohen*, 38 F.4th at 1366.

[8] *Id.*

Sheila Brewer, the mother of Cohen's girlfriend and the one who had given Cohen permission to drive the vehicle.[9] The officers then called for the rented vehicle to be towed to Enterprise even though the apartment complex where Cohen had parked did not enforce towing until 10:00 p.m.[10] Before giving the vehicle to the towing company, the "officers conducted an inventory search of the vehicle" which led to the discovery of "a firearm in the car's center console."[11] Cohen subsequently admitted that he was aware of the firearm's presence in the car.[12] "[T]he towing company [then] returned the car to Enterprise" once the inventory search was completed.[13]

The United States Attorney's Office sought to bring a "federal indictment against Cohen for being a felon in possession of a firearm."[14] A federal grand jury charged Cohen with the offense.[15] "Cohen filed a motion to suppress evidence" prior to trial, but the district court denied this motion.[16] One of Cohen's key contentions was that "the police had no legal basis to impound the car because it was legally parked in an apartment parking lot."[17] Moreover, the police did not contact Brewer in order to arrange for the car to be picked up before it was towed, "nor did they contact Cohen's cousin who lived at the apartment where the car was parked."[18] Further, Cohen argued that since the car was returned to Enterprise, "it was not in police custody and there was no [reason] to conduct an inventory search."[19] The district court rejected Cohen's argument and found Cohen guilty, sentencing him to sixty months in prison "followed by three years of supervised release."[20]

Cohen appealed to the Eleventh Circuit.[21] Upon reviewing the district court's decision, the Eleventh Circuit applied "a mixed standard of review to the district court's ruling on a motion to suppress,

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[9] *Id*. at 1366–67.

[10] *Id.* at 1367.

[11] *Id.*

[12] *Id.*

[13] *Cohen*, 38 F.4th at 1367.

[14] *Id*. ("The state initially charged Cohen with the offenses of resisting an officer without violence and driving with a suspended license. It then dismissed those charges when the United States Attorney's Office sought a federal indictment against Cohen for being a felon in possession of a firearm.").

[15] *Id.*

[16] *Id*.

[17] *Id.*

[18] *Id*.

[19] *Cohen*, 38 F.4th at 1367.

[20] *Id.* at 1367–68.

[21] *Id*. at 1368.

reviewing its factual finding for clear error and reviewing de novo its application of the law to those facts."[22]

First, the court examined whether the district court erred in finding that Cohen lacked Fourth Amendment standing to challenge the constitutionality of the inventory search conducted of the vehicle.[23] In determining whether a person has Fourth Amendment standing to challenge a search, the court noted that "a person must have a reasonable expectation of privacy in the place searched."[24] Citing United States Supreme Court precedent, the Eleventh Circuit acknowledged 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 . . . reasonable expectation of privacy."[25] The court rejected the government's argument that the "combination of being unlicensed and being unauthorized to drive the rental car" will bar Cohen from bringing a Fourth Amendment claim.[26] Rather, the court noted that Cohen being unlisted "on the rental agreement does not defeat his reasonable expectation of privacy, so long as he was otherwise in lawful possession and control of the vehicle."[27] Having been granted permission to drive the rental vehicle by Brewer, Cohen was "in sole possession of the rental car and could have excluded third parties, such as carjackers."[28] The court did not determine whether Brewer made a wise decision in permitting Cohen to drive without verifying his license because "nothing in the record indicate[d] that Cohen obtained the vehicle by misleading Brewer."[29]

Further, being unlicensed did not negate Cohen's expectation of a right to privacy.[30] Based on the Second Circuit's reasoning in *United States v. Lyle*,[31] the district court concluded that an unlicensed driver did not have a reasonable expectation of privacy because being unlicensed means one is not lawfully in control of his vehicle.[32] On appeal, however, the Eleventh Circuit agreed with the reasoning of the Eighth

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[22] *Id.* (citing *United States v. Ramirez*, 476 F.3d 1231, 1235 (11th Cir. 2007)).

[23] *Id*.

[24] *Id.* (citing Minnesota v. Carter, 525 U.S. 83, 88 (1998)).

[25] *Cohen*, 38 F.4th at 1368 (citing Byrd v. United States, 138 S. Ct. 1518, 1531 (2018)).

[26] *Id.* at 1369.

[27] *Id.* at 1368 (citing *Byrd*, 138 S. Ct. at 1531).

[28] *Id.* at 1369 (citing *Byrd,* 138 S. Ct. at 1528–29).

[29] *Id.*

[30] *Id.*

[31] 919 F.3d 716 (2d Cir. 2019).

[32] *Cohen*, 38 F.4th at 1367 ("Noting that the Eleventh Circuit had yet to rule on whether a defendant has Fourth Amendment standing under these facts, the [district] court considered the opposing holding of two circuits that had: the Second Circuit . . . and the Eighth Circuit . . . .").

Circuit in *United States v. Bettis*[33] that the "proper question is whether the defendant's illegal conduct has the same effect as a defendant's wrongful presence."[34] According to the Eleventh Circuit, by denying an unlicensed driver standing to file a Fourth Amendment claim, a multitude of offenders would lose standing in court even though their offenses were not "comparable with the sort of wrongful presence that the Supreme Court has said may eviscerate standing."[35] Wrongful presence—which would strip an individual's Fourth Amendment claim—requires interfering with another's "valid property interest."[36] There is no wrongful presence for those who merely commit common traffic offenses; thus, Cohen's conduct did not satisfy this definition.[37] Since Cohen's unlicensed driving did not interfere with the rights of Brewer as an authorized car renter, he had Fourth Amendment standing to challenge the Tampa Police Department's search of his vehicle.[38]

Next, the Eleventh Circuit addressed whether the search was lawful on the merits.[39] A warrant is generally required for the police to conduct a search under the Fourth Amendment; however, there are exceptions to this rule.[40] If officers are authorized to impound a vehicle and follow department procedures controlling the inventory searches, they are not required to obtain a warrant to search the vehicle.[41] An officer's decision to impound a car must be in "good faith, based upon standard criteria, and not solely based upon suspicion of evidence of criminal activity."[42] Cohen argued that the impoundment of his vehicle did not follow "the [d]epartment's two impoundment procedures" because only police impoundments or rotation impoundments were mentioned in the policy.[43]

The Eleventh Circuit rejected Cohen's argument because, although the policy "provide[d] that a vehicle will 'generally' be rotation impounded or police impounded," it did not specify that officers were forbidden from performing other types of impoundments.[44] The court

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[33] 946 F.3d 1024 (8th Cir. 2020).
[34] *Cohen*, 38 F.4th at 1370 (citing *Bettis*, 946 F.3d at 1029).
[35] *Id.* (citing *Lyle*, 919 F.3d at 729).
[36] *Id.*
[37] *Id.* (quoting *Bettis*, 946 F.3d at 1029).
[38] *Id.*
[39] *Id.*
[40] *Cohen*, 38 F.4th at 1371.
[41] *Id.* (citing United States v. Isaac, 987 F.3d 980, 988 (11th Cir. 2021)).
[42] *Id.* (quoting *Isaac*, 987 F.3d at 988–89).
[43] *Id.* at 1370.
[44] *Id.* at 1371.

pointed to the "Vehicle Impound Policy," which noted that the disposal of a car depended "on the nature of the law enforcement interest in the vehicle and the circumstances of each individual situation."[45] Further, the court noted that the officers acted in accordance with their department policies because officers should "tak[e] reasonable precautions to protect vehicles and the contents thereof from damage or theft when the vehicle owner is unable to do so for any reason."[46] As a result, the district court's denial of Cohen's motion to suppress was not erroneous since the Tampa Police Department did not violate any of these policies.[47]

In *Cohen*, the Eleventh Circuit addressed for the first time whether a defendant would have Fourth Amendment standing to challenge a search when he is unlicensed but had permission to use the vehicle.[48] The court held that such individuals have standing to challenge searches under the Fourth Amendment, even if they commit traffic law infractions.[49] Even though the defendant's motion to suppress evidence was denied in *Cohen*, the Eleventh Circuit still allowed the defendant to have standing to bring the claim.[50] By allowing claims to be brought under this set of facts, the Eleventh Circuit ensured an unlicensed driver's Fourth Amendment right to challenge a search is upheld and based solely on the merits of the claim.

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[45] *Id.*

[46] *Cohen*, 38 F.4th at 1371 (alteration in original).

[47] *Id.*

[48] *See id.* at 1367.

[49] *See id.* at 1370.

[50] *Id.* at 1367, 69.