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Lisa Belrose
Touro Law Center

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Cover Page Footnote

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**DO AUTOMOBILE PASSENGERS HAVE A LEGITIMATE
EXPECTATION OF PRIVACY? AN ANALYSIS OF
REASONABLE EXPECTATION UNDER THE FOURTH
AMENDMENT**

**SUPREME COURT OF NEW YORK
APPELLATE TERM, SECOND DEPARTMENT**

People v. Howard¹
(decided May 9, 2011)

The defendant, Dustin Howard, was arrested when the police observed a revolver in the car, in which he was a passenger.² Howard was ultimately convicted of attempted criminal possession in the fourth degree.³ The defendant sought to challenge the search of the vehicle and seizure of the gun on Fourth Amendment grounds that “the officer’s directive that the vehicle be moved, transform[ed] what might otherwise be a mere investigatory approach to a stationary vehicle into a full-blown vehicle stop.”⁴ The criminal court denied the defendant’s motion to suppress the evidence, and the appellate term affirmed, holding that defendant failed to meet his burden of proving that he had a legitimate expectation of privacy in the searched vehicle.⁵

¹ 928 N.Y.S.2d 156 (App. Term 2d Dep’t 2011).

² *Id.* at 158.

³ *Id.*

⁴ *Id.* The Fourth Amendment to the United States Constitution reads in pertinent part that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV. Similarly, New York’s Constitution reads in pertinent part that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .” N.Y. Const. art. I, § 12.

⁵ *Howard*, 928 N.Y.S.2d at 158. The court also relied on the fact that the car was not in a lawful location at the time of the initial approach by police, and the vehicle was not stopped by police. *Id.*

Defendant was a passenger in an illegally parked car that was obstructing traffic on a one-way street.⁶ As the police approached the vehicle, an officer asked the vehicle operator to move the car.⁷ The operator, who was outside of the vehicle, responded by asking the defendant, who was the rear-seated passenger, to move the car out of the way.⁸ After the defendant drove the car to a legal space, the officers asked for identification and permission to search the car.⁹ Simultaneously, another officer saw a gun on the floor of the car where defendant was originally seated.¹⁰ At that point, the police officers arrested the defendant, the other passenger in the vehicle, and the original operator of the vehicle.¹¹

After he was “convicted of attempted criminal possession of a weapon in the fourth degree,”¹² the defendant challenged his conviction alleging that the order to move the car amounted to a Fourth Amendment seizure of his person and, therefore, conferred standing on him to challenge the seizure and resulting search of the vehicle.¹³ The defendant based his claim that he was subject to a Fourth Amendment¹⁴ stop, as the driver, or alternatively, as the passenger in the car.¹⁵ The defendant also alleged rights under a New York statutory presumption of possession, which would automatically provide him with standing to challenge the stop and search of the car.¹⁶

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Howard*, 928 N.Y.S.2d at 158. The request to search the car was denied. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Howard*, 928 N.Y.S.2d at 159.

¹⁴ U.S. CONST. amend. IV. The constructive possession statute in New York is N.Y. PENAL LAW §265.15 [3] (McKinney 2011). Although defendant attempted to claim this presumption it was not the basis of the prosecution’s complaint against him (attempted constructive possession, N.Y. PENAL LAW §10.00[8] (McKinney 2011)) and was quickly set aside by the court as irrelevant in his case. *Howard*, 928 N.Y.S.2d at 159.

¹⁵ *Id.*

¹⁶ *Id.* N.Y. PENAL LAW §265.15 [3] is a constructive possession statute that states:

The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, large capacity ammunition feeding device, defaced firearm, defaced rifle or shotgun, defaced large capacity ammunition feeding device, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, dagger, dirk, stiletto, billy, blackjack, plastic knuckles,

The court began its analysis in *Howard*, with the fact that the initial police observation and approach of the car was legal and proper because the police were conducting a mere investigatory approach.¹⁷ The issue came down to whether the police order to move the vehicle amounted to a stop and seizure under the Fourth Amendment.¹⁸ The court began with the basic premise that a passenger may challenge the constitutionality of a police stop and the search of a vehicle.¹⁹ However, the court also noted that “a mere passenger in a vehicle already stopped has no reasonable expectation of privacy in the vehicle’s interior.”²⁰

The United States Supreme Court enunciated the current rule of passenger standing to challenge a Fourth Amendment violation as a factor-driven test in *Rakas v. Illinois*.²¹ The Court in *Rakas* was specifically concerned with the ability of a car passenger to challenge a search of a vehicle in which a rifle and shells were seized.²² The Court held that the passengers did not have standing to challenge the search because they did not claim property or possessory rights to the car or in the items seized.²³ The Court’s ruling effectively established the rule that a mere passenger in a car has no standing to challenge a search of the vehicle’s interior without some legitimate ex-

metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his or her trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his or her possession a valid license to have and carry concealed the same.

¹⁷ *Howard*, 928 N.Y.S.2d at 158-59; see *Texas v. Brown*, 460 U.S. 730, 740 (1983) (holding police shining flashlight into Brown’s stopped vehicle did not trigger Fourth Amendment protections); *People v. Valerio*, 710 N.Y.S.2d 497, 498 (App. Div. 4th Dep’t 2000) (holding police possessed objective and proper reason to approach car because it was illegally double parked).

¹⁸ *Howard*, 928 N.Y.S.2d at 159.

¹⁹ *Id.* (citing *Brendlin v. California*, 551 U.S. 249, 255-56 (2007)).

²⁰ *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978)).

²¹ 439 U.S. 128 (1978).

²² *Id.* at 129.

²³ *Id.* at 148.

pectation of privacy therein.²⁴

The Court in *Rakas* stated that to have standing there are “two inquiries: first, whether the proponent of a particular legal right has alleged ‘injury in fact,’ and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.”²⁵ The Court stated that to determine whether the Fourth Amendment protects an individual it is necessary to determine “whether the disputed search and seizure has infringed an interest of the defendant which the *Fourth Amendment* was designed to protect.”²⁶ The determinative factor is whether the individual has “a legitimate expectation of privacy in the invaded place.”²⁷

The Court then explained that the expectation is not only a subjective expectation, but also one that is objectively reasonable, based upon society’s willingness to recognize that expectation as reasonable.²⁸ Factors to be considered in this analysis, according to the

²⁴ *Id.* at 130-31. With this decision, the Supreme Court overruled its previous decision in *Jones v. United States*, 362 U.S. 257 (1960), overruled by *Rakas v. Illinois*, 439 U.S. 128 (1978). The defendant in *Rakas* argued that *Jones* applied to him because the search was directed or aimed at him or, in the alternative, that he was “‘legitimately on [the] premises’ at the time of the search.” *Rakas*, 439 U.S. at 132 (citing *Jones*, 362 U.S. 257). The test that had been established in *Jones* was that to establish standing a person must have some possessory interest in the property searched, or the target (person aggrieved) by the search to establish standing. *Jones*, 362 U.S. at 264. The Court in *Rakas*, merely adopted this rule as one of the many factors to establish whether there is standing. *Rakas*, 439 U.S. at 143 n.12.

²⁵ *Rakas*, 439 U.S. at 133, 139; see also *Alderman v. United States*, 394 U.S. 165, 174 (1969) (citations omitted) (holding “we adhere to . . . the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”); *United States v. Payner*, 447 U.S. 727, 731 (1980) (citations omitted) (reaffirming Fourth Amendment rights are individual in nature).

²⁶ *Rakas*, 439 U.S. at 140.

²⁷ *Id.* at 143.

²⁸ *Id.* at 143 n.12. This standard was enunciated by the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the FBI listened to the defendant’s private telephone conversation in a public phone booth with an electronic listening device. *Id.* at 348. The Court distinguished between what a person knowingly shows to the public, which is not protected by the Fourth Amendment, and what a person seeks to keep private. *Id.* at 351 (citations omitted). This analysis considers actions that an individual takes to preserve their privacy that may trigger Fourth Amendment protections. *Id.* at 352. The Court concluded in *Katz* that, given the circumstances, there was a subjective expectation of privacy of the individual in the telephone booth, because the individual takes steps to protect the telephone conversation, which includes walking into a phone booth, shutting the door behind them, paying the fee to place the call, uttering words into the receiver, with the expectation that it will not be broadcast to the world. *Id.*

Court, included property rights, whether the person is the owner, whether the person may exclude others, and control over the property, which the Court also noted that, all of which, may not be enough if there is no particular expectation in a specific location.²⁹

Passenger standing in the vehicle context was extended by the United States Supreme Court in *Brendlin v. California*.³⁰ The Court held that a passenger may challenge the constitutionality of a traffic stop because they are seized within the meaning of the Fourth Amendment.³¹ The Court reasoned that passengers are seized because they are halted when the police perform a traffic stop, and that any reasonable person would not feel free to leave without the permission of the police.³² The Court concluded that because a passenger has standing to challenge the legality of the stop, if the police conduct is unreasonable or exceeds the permissible scope of police action, then the passenger may object to those constitutional violations and have any evidence found in the car suppressed.³³ To determine this, the Court will examine the legality of the initial stop, the length of time elapsed, and if an occupant has been removed from the vehicle.³⁴

In *Brendlin*, the defendant challenged the seizure of his person and the search of the car because there was no reasonable suspicion for the police to stop the vehicle.³⁵ The police had observed the car with an expired registration.³⁶ However, when the officers called into dispatch, they learned that a new registration was requested and that it was legal to drive the car as is.³⁷ The police then proceeded to pull over the vehicle, despite the fact there was no reasonable suspicion with regards to the car.³⁸ After approaching the car, the police officer recognized Brendlin, the front-seat passenger, as a parole vi-

²⁹ *Rakas*, 439 U.S. at 143 n.12.

³⁰ 551 U.S. 249 (2007).

³¹ *Id.* at 251.

³² *Id.* at 255, 257.

³³ *Id.* at 259 (citation omitted).

³⁴ *Id.*

³⁵ *Brendlin*, 551 U.S. at 253.

³⁶ *Id.* at 252.

³⁷ *Id.*

³⁸ *Id.*

olator and arrested him.³⁹ A subsequent search of the car resulted in incriminating evidence of illegal drugs.⁴⁰ Applying the reasonable person test, the Court determined that any reasonable passenger, under the circumstances, would have felt that they were under police control and were not free to leave the situation at their will.⁴¹ The Court concluded that *Brendlin* was seized when the car was pulled over and remanded the case to the state supreme court.⁴²

Vehicles are treated differently under the law than real property in the context of standing to challenge a Fourth Amendment search.⁴³ In *Minnesota v. Olson*,⁴⁴ the Court held that an overnight guest may have a legitimate expectation of privacy depending on the circumstances.⁴⁵ The Court held that *Olson's* Fourth Amendment rights had been violated when the police arrested him.⁴⁶

In *Olson*, the police executed a warrantless arrest against *Olson* in a duplex he was staying in as an overnight guest.⁴⁷ Subsequently, *Olson* made an incriminating statement at the police station, while under arrest, that he moved to suppress as tainted by the illegal arrest.⁴⁸ The Court held that *Olson* had an expectation of privacy

³⁹ *Id.*

⁴⁰ *Brendlin*, 551 U.S. at 252.

⁴¹ *Id.* at 257.

⁴² *Id.* at 263.

⁴³ See *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974) (citations omitted) holding that:

“The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one’s person or of a building.” One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view. “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one’s right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.

⁴⁴ 495 U.S. 91 (1990).

⁴⁵ *Id.* at 98.

⁴⁶ *Id.* at 93.

⁴⁷ *Id.* at 94.

⁴⁸ *Id.* at 94-95.

similar to that of an owner of the dwelling, and that it was one society would deem reasonable.⁴⁹ The Court decided that a reasonable expectation of privacy is not limited to the absence of the true owner of real property.⁵⁰ According to the Court, a guest does not need complete dominion and control over the place to be searched to have his or her Fourth Amendment rights violated.⁵¹

In its analysis, the Court in *Olson*, evaluated the reasonableness of the defendant's expectation of privacy as an overnight guest against the objective standard society deems acceptable.⁵² The Court stated that a host's overnight guest is a longstanding social custom, and that at one point or another, every individual will be a host, or a guest, and that no matter which way one looks at it, society does recognize a legitimate expectation of privacy in another's home in those circumstances.⁵³ The Court reasoned that the guest is there because of the advantages of keeping personal effects and possessions in the host's home and there is an expectation that the home is private enough not to be interfered with, even when one is sleeping.⁵⁴ Further, the Court reasoned that a host shares privacy with a guest, and is likely to honor that sphere of the guest even though there is no legal interest in the property, because a guest will have some control over the premises when the host is not present or asleep.⁵⁵

In *Minnesota v. Carter*,⁵⁶ the Court applied the standing factors from *Olson*, and held that the rights of the defendants were not violated because there was no reasonable expectation of privacy in the premises.⁵⁷ The defendants did not live in the apartment, and the only reason for being present at the apartment was for the illegal commercial activity of packaging cocaine.⁵⁸ The Court reasoned that

⁴⁹ *Olson*, 495 U.S. at 100.

⁵⁰ *Id.* at 98-100.

⁵¹ *Id.* at 98.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Olson*, 495 U.S. at 99.

⁵⁵ *Id.*

⁵⁶ 525 U.S. 83 (1998).

⁵⁷ *Id.* at 85. The Court also noted that the defendants were present in the apartment for only a couple hours, and had never had any previous ties to the apartment. *Id.* at 86. A police officer observed the illegal activity through a crack in the window blinds from outside the apartment, and defendants claim this was an unreasonable search. *Id.* at 85-86.

⁵⁸ *Id.* at 86.

the apartment was used for commercial reasons, it was not their home, and nothing indicated that the defendants had a significant connection to the apartment.⁵⁹ Therefore, the Court stated that the defendants were merely permitted to be present in the apartment, which did not give rise to a legitimate expectation of privacy.⁶⁰

New York precedent has largely relied upon and followed *Rakas v. Illinois* in order to determine standing to challenge a Fourth Amendment search.⁶¹ The New York Supreme Court, Appellate Division, Second Department, has stated that “[a] passenger in an automobile has standing to challenge the admissibility of any evidence seized as a result of an alleged illegal stop.”⁶² This rule has been applied in a variety of vehicle stops under New York law.

For example, in *People v. Madera*,⁶³ the court held that the defendant, who was a passenger in an illegal stop, had standing to challenge and move to suppress evidence as a result.⁶⁴ The court reasoned that the police did not have a legitimate reason to stop the vehicle, because it was driven in accordance with the law, with the permission of a family member of the owner, and none of the individuals in the car were engaged in suspicious activity at the time the car was pulled over.⁶⁵

The standing rule of a passenger to challenge the legality of a stop has also been extended in New York beyond *Rakas*. For example, in *People v. Millan*,⁶⁶ the court held that a taxicab passenger had standing “to contest the legality of the stop of the cab and to seek suppression of the weapon as the product of that allegedly unlawful

⁵⁹ *Carter*, 525 U.S. at 90-91.

⁶⁰ *Id.* at 91. Also, note the Court evaluated precedents set forth in *Jones*, 362 U.S. at 265, and *Rakas*, 439 U.S. at 135, and concluded that “[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.” *Carter*, 525 U.S. at 89-90.

⁶¹ 439 U.S. 128 (1978).

⁶² *People v. Dawson*, 496 N.Y.S.2d 273, 274 (App. Div. 2d Dep’t 1985).

⁶³ 509 N.Y.S.2d 36 (App. Div. 2d Dep’t 1986).

⁶⁴ *Id.* at 37.

⁶⁵ *Id.*

⁶⁶ 508 N.E.2d 903 (N.Y. 1987). In contrast, the court in *People v. Ocampo*, 492 N.Y.S.2d 695, 698 (Sup. Ct. 1985), held that a passenger does not possess standing to challenge an unreasonable search and seizure if there is no possessory interest in the items seized or the places searched.

police conduct.”⁶⁷

Fourth Amendment standing and the individuality of this right are highlighted even further in New York precedent when it comes to the vehicle operator’s ability to challenge a stop and/or a resulting seizure.⁶⁸ In *People v. May*,⁶⁹ the court held that the driver of a stolen car had standing to challenge the illegal stop of the car and subsequent search, because he was stopped based on the officer’s suspicion of May’s conduct.⁷⁰

In *May*, the police observed a car parked on the side of a road in the early morning hours.⁷¹ When the police pulled up behind the car the defendant began driving away, which prompted the police to use a loudspeaker to order the car to pull over; and the defendant complied.⁷² When the officers called in the tags on the car, they were advised it was a stolen vehicle, and a subsequent search revealed drugs and a tampered steering column that was rewired.⁷³ The court reasoned that, given the circumstances, the police did not have a legal basis for the stop at the point they ordered the car to pull over, and that the defendant was stopped personally, which conferred the right to challenge the search and seizure.⁷⁴

Further, in *People v. Voner*,⁷⁵ the court held that even the driver of a car who disclaimed ownership of the vehicle has standing to challenge an illegal stop by the police.⁷⁶ In *Voner*, the police were acting on a tip from a confidential informant that later turned out not

⁶⁷ *Millan*, 508 N.E.2d at 904. Although the prosecution had charged the defendant with the statutory presumption of possession N.Y. PENAL LAW § 265.15[3] (McKinney 2011), the court nevertheless reaffirmed that passengers nonetheless have standing to challenge an illegal seizure and any resulting search as fruits of the illegal stop. *Id.*

⁶⁸ See *People v. May*, 609 N.E.2d 113, 114 (N.Y. 1992) (holding car thief possessed standing based on officer’s individualized suspicion of driver); *People v. Voner*, 904 N.Y.S.2d 225, 227 (App. Div. 2d Dep’t 2010) (holding disclaimer of ownership did not negate driver’s Fourth Amendment standing); *People v. Cacioppo*, 479 N.Y.S.2d 264, 265 (App. Div. 2d Dep’t 1984) (holding occasional use of another’s vehicle insufficient to establish standing).

⁶⁹ 609 N.E.2d 113 (N.Y. 1992).

⁷⁰ *Id.* at 114.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *May*, 609 N.E.2d at 114-15.

⁷⁵ 904 N.Y.S.2d 225 (App. Div. 2d Dep’t 2010).

⁷⁶ *Id.* at 227.

to give rise to probable cause under the *Aguillar-Spinelli* test.⁷⁷ The government argued that the defendant did not have standing to challenge the search, because he had no legitimate expectation of privacy, because he denied ownership of the seized vehicle.⁷⁸ The court stated that standing to challenge a search of a vehicle was separate from the right to contest the validity of a seizure and the defendant had the right to seek suppression on those grounds.⁷⁹

In *People v. Cacioppo*,⁸⁰ the court held that the occasional use of a vehicle did not give rise to a legitimate expectation of privacy.⁸¹ In *Cacioppo*, the defendant had an agreement with the vehicle owner, that in exchange for \$100 per month, the defendant would have occasional use of the car.⁸² The facts in the case revealed that the owner exercised dominion and control over the car because it was registered in his name only, and he kept the keys to the car.⁸³ Further evidence showed that the owner, the owner's spouse, and the defendant used the vehicle, and the doors were kept unlocked.⁸⁴

Based on these facts, the court in *Cacciopo* determined that the defendant did not have a legitimate expectation of privacy because he was not the owner, the doors were not locked at the time of the search, and he did not have his own set of keys to the vehicle.⁸⁵ The court also noted that the defendant failed to allege that he exercised dominion and control over the vehicle by attempting to exclude others.⁸⁶

Although, New York precedent is broader in some aspects of

⁷⁷ *Id.* at 226, 228. The *Aguillar-Spinelli* test was a two-part test that established criteria for police to rely on informant information that required the police to confirm an informant's reliability and veracity. *Aguillar v. Texas*, 84 S. Ct. 1509, 1513-14 (1964), *overruled by* *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983). In *Gates*, the United States Supreme Court adopted a "totality of the circumstances" test instead. *Gates*, 103 S. Ct. at 2332.

⁷⁸ *Voner*, 904 N.Y.S.2d at 227.

⁷⁹ *Id.*

⁸⁰ 479 N.Y.S.2d 264 (App. Div. 2d Dep't 1984).

⁸¹ *Id.* at 265-66.

⁸² *Id.* at 265. The owner of the vehicle corroborated the defendant's interest and legal claims in the vehicle and testified that he also allowed the defendant to store drugs in the car for an additional \$25 per week. *Id.*

⁸³ *Id.*

⁸⁴ *Cacioppo*, 479 N.Y.S.2d at 265.

⁸⁵ *Id.* at 266.

⁸⁶ *Id.* Which the court also stated would help his argument that he possessed standing. *Id.* Rather, the court noted that there was free access to the vehicle. *Id.*

standing, it also places limits on passenger standing in an already stationary vehicle. The court in *Howard* stated that the police:

did not so interfere with defendant's freedom of movement as to convert what otherwise was an indisputably lawful approach to a stationary vehicle based on a Vehicle and Traffic Law violation into a vehicle stop. The vehicle "was stationary prior to, and for a reason independent of, the action of the police," and because its illegal placement attenuated defendant's privacy interests, it cannot be said that the order to move the vehicle implicated the Fourth Amendment concerns associated with such stops.⁸⁷

The legal implication of this language is that in an already stopped vehicle that aroused suspicion by the illegal placement, gives rise to lowered expectation of privacy therein.

The New York Court of Appeals established the above legal principle in *People v. Ocasio*.⁸⁸ In *Ocasio*, the police approached a vehicle that was stopped at a traffic light in which Ocasio was a passenger.⁸⁹ The police tapped on the window of the car, and asked for identification.⁹⁰ Ocasio provided a wallet to the officer that was not his own.⁹¹ This aroused police suspicion, and led Ocasio to consent to a search by the police for weapons.⁹² A subsequent inventory search of the vehicle led police to discover a weapon and stolen cash from the true owner of the wallet that the defendant handed to police.⁹³

The court in *Ocasio* distinguished the rule of law between the

⁸⁷ *Howard*, 928 N.Y.S.2d at 159 (citations omitted); *see also* *People v. Ocasio*, 652 N.E.2d 907, 908 (N.Y. 1995) (holding that standard to determine whether seizure occurred was "whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom."); *People v. Thomas*, 792 N.Y.S. 2d 472, 476 (App. Div. 1st Dep't 1995) (holding parking in front of and blocking defendant's car by police did not escalate intrusion upon defendant because his vehicle was already stopped).

⁸⁸ 652 N.E.2d 907 (N.Y. 1995).

⁸⁹ *Id.* at 908.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Ocasio*, 652 N.E.2d at 908.

stop of a moving vehicle as opposed to that of a stationary one.⁹⁴ For a parked car, the police only need an objective credible basis to approach a car.⁹⁵ Then to determine whether a seizure has occurred it is a reasonable person standard, whether a person would feel free to walk away from police.⁹⁶ The court in *Ocasio*, found that the police requests were nonthreatening requests for basic information, which resulted in a continued consensual encounter with the defendant, which did not trigger Fourth Amendment protections.⁹⁷

The courts in New York have also examined the ability of an overnight guest to challenge a police search of a dwelling or home, similar to the federal precedent on this topic. In *People v. Rodriguez*,⁹⁸ the New York Court of Appeals held that the defendant had no legitimate expectation of privacy in an apartment that police searched and found illegal drugs.⁹⁹ The defendant's ties to the apartment were rather tenuous; he went to the apartment to buy drugs, was sleeping on a sofa bed when the police arrived, and he may have stayed there several times before.¹⁰⁰ The court stated that in order to have a legitimate expectation of privacy in the place searched, the expectation must be "reasonable in light of all the surrounding circumstances."¹⁰¹

The court in *Rodriguez* considered several factors to determine the reasonableness of the expectation of privacy including: "whether the individual took precautions to maintain privacy, the manner in which the individual used the premises and whether the individual had the right to exclude others from the premises"¹⁰² The court stated that a mere possessory interest is no longer sufficient by itself, and must be considered in conjunction with the time spent by

⁹⁴ *Id.* (citing *People v. May*, 609 N.E.2d 113, 115 (N.Y. 1992); *People v. Harrison*, 443 N.E.2d 447, 450-51 (N.Y. 1982)).

⁹⁵ *Id.* (citing *Harrison*, 443 N.E.2d at 450). A moving vehicle requires the police to have a minimum of reasonable suspicion to justify a police stop and seizure. *Id.*

⁹⁶ *Id.*

⁹⁷ *Ocasio*, 652 N.E.2d at 909 (citing *People v. Hollman*, 590 N.E.2d 204, 206 (N.Y. 1992)).

⁹⁸ 505 N.E.2d 586 (N.Y. 1987).

⁹⁹ *Id.* at 587.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 588. According to the court, reasonable is also based on what society is willing to recognize as a privacy interest. *Id.* (citing *Rakas*, 439 U.S. at 153).

¹⁰² *Rodriguez*, 505 N.E.2d at 588.

the individual in a particular place, the purpose for the individual's stay in the place that is searched, and included considerations of the degree of connection to the apartment, such as clothing, expenses or other household chores.¹⁰³ The court, applying these factors, deemed the defendant a transient, with no sense of an objective or subjective expectation of privacy in the apartment that was searched.¹⁰⁴

Also, in *People v. Stanley*,¹⁰⁵ the defendant was convicted of possession of a controlled substance, despite his contention that he had a legitimate expectation of privacy in the apartment that was searched.¹⁰⁶ The defendant had forced the lawful tenant out of the apartment, did not have a lease, and did not pay rent.¹⁰⁷ The court determined that there was no legally recognizable expectation of privacy in the apartment, because "any subjective expectation of privacy [the defendant] manifested in the apartment was not objectively reasonable."¹⁰⁸

The New York Appellate Term's decision in *People v. Howard*, appears to be in line with what is now well-settled Fourth Amendment law established under Federal and New York State precedents.¹⁰⁹ Pursuant to the Federal and New York State Constitutions, individuals are protected against unreasonable searches and seizures in their persons, places, and effects.¹¹⁰ The federal and New York courts have interpreted this language to protect more than just tangible items and to include things such as private conversations.¹¹¹ Furthermore, the protections against unreasonable searches and seizures have gone far beyond property rights to establish standing to challenge such a search.¹¹² Rather, a property interest is no longer

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 589.

¹⁰⁵ 856 N.Y.S.2d 221 (App. Div. 2d Dep't 2008).

¹⁰⁶ *Id.* at 222.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 222-23.

¹⁰⁹ Federal and New York precedent are almost identical because the respective constitutions, U.S. CONST. amend. IV., and N.Y. CONST. art. I, § 12.

¹¹⁰ U.S. CONST. amend. IV.; N.Y. CONST. art. I, § 12.

¹¹¹ See *Katz*, 389 U.S. at 348 (applying Fourth Amendment protections to individual in public telephone booth); N.Y. CONST. art I, § 12 also states that "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated . . .").

¹¹² See generally *Jones*, 362 U.S. at 264-65 (holding person aggrieved by search may have

dispositive in this area of law and is now just one of many factors in the test announced by the Supreme Court in *Rakas*.¹¹³

Specifically, in the context of stopped vehicles, there are two ways to establish standing.¹¹⁴ One way to establish standing, is to challenge the legality of a traffic stop by the police, which according to *Brendlin*, a passenger may contest.¹¹⁵ The second way to establish standing is to demonstrate a legitimate expectation of privacy in the location that is searched, which according to *Rakas*, must be one that society is prepared to accept as legitimate.¹¹⁶

In *Howard*, the defendant did not try to claim a privacy interest in the car to establish a legitimate expectation of privacy.¹¹⁷ Rather, Howard attempted to claim that, as the driver of the car or as the passenger, the police stop was not legitimate and, therefore, it was illegal.¹¹⁸ However, Howard failed to take into consideration the surrounding circumstances of the initial police observation and approach of the vehicle.¹¹⁹ The police's observation that the car was illegally parked prompted the police to request that the car be moved, which subsequently led to the plain-view observation of the gun.¹²⁰ Given the circumstances, the police did not seize the car and, therefore, did not confer standing upon Howard to challenge the alleged stop and search of the car.¹²¹

Further, the United States Supreme Court has found that a vehicle is merely a tool to travel, within plain view of outside eyes looking inward, and, therefore, it is harder to find an objective expect-

standing or person may assert some possessory interest in property); *Rakas*, 439 U.S. at 143 n.12 (holding traditional concepts of property do apply; however, in the alternative, a legitimate expectation of privacy may also be based on what society is willing to recognize as legitimate or objectively reasonable); *Katz*, 389 U.S. at 348 (holding Fourth Amendment protected an individual's private telephone conversation in public telephone booth); *Rodriguez*, 505 N.E.2d at 586, 587 (applying Fourth Amendment analysis to another's home in context of overnight guest).

¹¹³ *Rakas*, 439 U.S. at 142-43 (citations omitted).

¹¹⁴ *Brendlin*, 551 U.S. at 259 (citation omitted); *Rakas*, 439 U.S. at 143 n.12 (citations omitted).

¹¹⁵ *Brendlin*, 551 U.S. at 259 (citation omitted).

¹¹⁶ *Rakas*, 439 U.S. at 143 n.12 (citations omitted).

¹¹⁷ *Howard*, 928 N.Y.S.2d at 159.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

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tation of privacy in such places that society is willing to recognize.¹²² This line of reasoning appears to make sense given the circumstances of ordinary travel or commute. However, individual expectations may vary greatly. It would appear that in cases such as *Howard*, that either the individual has to be acting, for lack of a better word, unwise, or that they possess a subjective expectation of privacy in a vehicle from outside eyes. No matter which conclusion one comes to, there is one thing that is clear - individuals must take steps to protect their privacy in vehicles, just like they would to protect their privacy in a dwelling. Otherwise, an individual is deemed to have waived his or her expectation of privacy, which is half the battle of challenging a search or seizure, and no legally recognizable right exists in terms of standing.

*Lisa Belrose**

¹²² *Cardwell*, 417 U.S. at 590-91 (citations omitted).

* Juris Doctor Candidate, May 2013, Touro College, Jacob D. Fuchsberg Law Center. I would like to thank Professor Patricia Rooney for taking the time to advise and assist me this term. I very much enjoyed working with you and appreciate all your efforts. Special thanks to my family and friends for their love and support.