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IN THE
COURT OF APPEALS OF INDIANA

Marcus M. Wilson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 24, 2021

Court of Appeals Case No. 21A-CR-366

Appeal from the Vanderburgh Circuit Court

The Honorable Kelli E. Fink, Magistrate

Trial Court Cause No. 82C01-1909-F2-6176

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Marcus Wilson (Wilson), pursues this interlocutory appeal following the trial court's denial of his motion to suppress.

[2] We affirm.

ISSUE

[3] Wilson presents at least three issues on appeal, one of which we find to be dispositive and restate as: Whether Wilson met his burden of proof to show that he had a protectable privacy interest in the rental car he drove at the time of the traffic stop.

FACTS AND PROCEDURAL HISTORY

[4] On September 5, 2019, the Evansville/Vanderburgh County Joint Drug Task Force was surveilling a house in the 1200 block of Marshall Street in Evansville to follow up on a tip they had received regarding narcotics activity there. Lieutenant Monty Guenin (Lieutenant Guenin) followed a black Tahoe, subsequently learned to be driven by Wilson, after it stopped at the house on Marshall Street. Lieutenant Guenin observed Wilson commit two traffic infractions by speeding and changing lanes without signaling. Lieutenant Guenin relayed this information to Detective Robert Schmitt (Detective Schmitt), who initiated a traffic stop.

[5] Detective Schmitt requested identification from Wilson and from the female passenger in the Tahoe. Wilson provided Detective Schmitt with a driver's

license bearing the name Latroy Stovall (Stovall) and an address in Russellville, Kentucky. Wilson also provided Detective Schmitt with a Hertz rental agreement for the Tahoe. Detective Schmitt asked Wilson for permission to search the Tahoe, but Wilson did not consent. Detective Schmitt observed that Wilson was agitated, nervous, sweating, and argumentative as he conversed with him. During the traffic stop, Detective Schmitt and other officers who arrived to assist smelled an intermittent odor of marijuana but could not discern its source. A K-9 officer that sniffed the vehicle did not alert to the presence of narcotics. However, an assisting officer observed what he suspected was the remnant of a marijuana cigarette in plain view in the ashtray of the Tahoe's console.

[6] Upon inspecting the driver's license that Wilson had provided, Detective Schmitt suspicioned that Wilson had provided false identification because his physical appearance did not match Stovall's photograph, height, and weight. However, Wilson was adamant that he was Stovall. Wilson told Detective Schmitt that he was from Owensboro, Kentucky, and that he had been arrested there. Detective Schmitt contacted the Owensboro authorities, who reported that they had no record of Stovall. Detective Schmitt next contacted the Russellville Sheriff's Department, who indicated that they were familiar with Stovall and asked Detective Schmitt to send them a digital image of the person being investigated at the traffic stop. After receiving the image, the Russellville Sheriff's Department confirmed that Wilson was not Stovall. Detective Schmitt arrested Wilson for false informing.

[7] Wilson's passenger was not an authorized driver of the Tahoe, so pursuant to his normal practice and as a courtesy to the rental car company so that it could avoid incurring an impound fee, Detective Schmitt contacted Hertz to determine if the company would retrieve the Tahoe. While conversing with the Hertz representative, Detective Schmitt was granted consent by Hertz to search the Tahoe prior to it being returned to the company. On the floorboard of the Tahoe, the officers performing the search found a purse containing what was later alleged to be cocaine, heroin, MDMA, and marijuana. After removing these items, the Tahoe was turned over to Hertz. While Wilson was in custody, he told an officer that his driver's license was "suspended" and that his cousin "Troy" had rented the Tahoe. (Exh. 1, file 05D2158C20190905154209001i100 at 2:35 and 4:44).

[8] On September 9, 2019, the State filed an Information, charging Wilson with Level 2 felony dealing in cocaine; Level 2 felony dealing in a narcotic drug; Class A misdemeanor possession of a controlled substance; and Class B misdemeanor possession of marijuana. On January 20, 2020, Wilson filed a motion to suppress seeking to exclude Wilson's statements to officers during the traffic stop and any evidence obtained through the search of the Tahoe. Wilson argued that the search, procured without a warrant or his consent, violated his federal and state rights to be free from unreasonable search and seizure. In support of his motion, Wilson attached a copy of *Byrd v. United States*, 138 S.Ct. 1518 (2018).

[9] On October 15, 2020, the trial court held a hearing on Wilson's suppression motion. Detective Schmitt testified that the marijuana odor that he and other officers perceived at the traffic stop did not provide probable cause to search the Tahoe because it could not be traced to the vehicle. When asked whose name was on the rental agreement, Detective Schmitt stated, "I do not recall; I believe it was Mr. Stovall." (Transcript p. 35). On cross-examination, Detective Schmitt confirmed that there was no indication prior to the search that the Tahoe had been stolen or that Wilson did not have permission to drive the Tahoe. Wilson's counsel argued, based on *Byrd*, that Wilson had a reasonable expectation of privacy in the rented Tahoe because there had been no evidence presented that Stovall had not given Wilson permission to drive the Tahoe or that Wilson had obtained the Tahoe by fraud or deceit.

[10] On January 8, 2021, without entering findings of fact or conclusions thereon, the trial court denied the portion of Wilson's motion seeking to suppress the evidence recovered from the rental car, but it suppressed any statements made by Wilson during the traffic stop prior to receiving his *Miranda* advisements. Wilson pursued an interlocutory appeal. On February 22, 2021, the trial court certified the matter for interlocutory appeal. On April 1, 2021, this Court accepted jurisdiction.

[11] Wilson now appeals. Additional facts will be presented as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[12] Wilson appeals following the trial court's denial of his motion to suppress. We review a trial court's decision to deny a motion to suppress with deference. *Marshall v. State*, 117 N.E.3d 1254, 1258 (Ind. 2019). We construe any conflicting evidence in the light most favorable to the ruling, but we also consider any substantial and uncontested evidence favorable to the defendant. *Id.* When the trial court's decision denying a defendant's motion to suppress concerns the constitutionality of a search and seizure, then it presents a legal question that we review *de novo*. *Id.* Where a trial court rules on a motion to suppress without entering findings, the general judgment standard controls, and we will uphold the trial court's ruling under any theory supported by the evidence. *State v. Estep*, 753 N.E.2d 22, 25 n.6 (Ind. Ct. App. 2001); *see also Godby v. State*, 736 N.E2d 252, 258 (Ind. 2000) ("[A] general judgment will control as to the issues upon which there are no findings.")

II. *Protectable Privacy Interest*

[13] Fourth Amendment rights are personal, and they may not be asserted vicariously. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). In order to challenge the constitutionality of a search and seizure under the Fourth Amendment, a defendant must demonstrate that he had a legitimate expectation of privacy in the premises searched. *Peterson v. State*, 674 N.E.2d 528, 532 (Ind. 1996). The Supreme Court has observed that, although this concept is routinely referred to as standing, it is truly a matter of substantive Fourth Amendment doctrine that

"should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." *Byrd*, 138 S.Ct. at 1530. Where the challenge is to the premises searched and not to any property[1] seized, establishing standing under Article 1, Section 11, of the Indiana Constitution is essentially the same as under the Fourth Amendment, and federal precedent is "equally applicable under the Indiana Constitution." *Campos v. State*, 885 N.E.2d 590, 598 (Ind. 2008). The defendant bears the burden of proof to establish that he has a legitimate expectation of privacy in the premises searched. *Harris v. State*, 156 N.E.3d 728, 732 (Ind. Ct. App. 2020). There is no presumption that the driver of a car who is not the owner has standing to challenge the constitutionality of the search of the car; rather, a defendant must present some evidence of permission to possess the vehicle in order to establish standing. *See Campos*, 885 N.E.2d at 599 (disapproving of *Hester v. State*, 551 N.E.2d 1187, 1189 (Ind. Ct. App. 1990), wherein this court found standing existed based on a lack of evidence that the driver did not have the owner's permission).

A. *Waiver*

[14] Before we proceed to our substantive analysis, we address whether the issue of standing is properly before us. As part of his appellate argument that the State required his consent to search the Tahoe, Wilson argues that "[u]nder *Byrd* [,]

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[1] Wilson does not develop any separate argument based on Article 1, Section 11, that he had a privacy interest in the purse found in the Tahoe.

Wilson had a reasonable expectation of privacy in the vehicle he was driving[,]" and "[b]ecause this car was not owned by Wilson, the first inquiry must be whether Wilson has standing to challenge the search." (Appellant's Br. pp. 9, 11). Wilson develops his argument, based on *Byrd*, that he indeed had standing under the Fourth Amendment to challenge the search. In response, the State argues that Wilson does not have standing, also pursuant to *Byrd*, because he did not show that he was in lawful possession of the Tahoe at the time of the traffic stop because he obtained the Tahoe through fraud and did not have permission from a lawful renter to drive it. In his reply, Wilson contends that the State waived its standing arguments because it did not challenge his standing below. Relying on *State v. Friedel*, 714 N.E.2d 1231 (Ind. Ct. App. 1999), and *Everroad v. State*, 590 N.E.2d 567 (Ind. 1992), Wilson contends that, where the State failed to make any challenge to standing before the trial court, it may not raise the issue for the first time on appeal. Therefore, Wilson requests that we do not address the issue of whether he has standing.

[15] As a general matter, we agree with Wilson that issues not presented below are waived for purposes of appeal. *See, e.g., Leonard v. State*, 80 N.E.3d 878, 884 n.4 (Ind. 2017) (declining to address an issue that was waived, as it was raised for the first time on appeal). However, Wilson had the burden of proof at the suppression hearing to establish that he had the requisite privacy interest. *Harris*, 156 N.E.3d at 732. Wilson argued the issue of whether he had a protectable privacy interest during the suppression proceedings, and he has placed the issue squarely before this court in his appellate brief. Therefore, his

reliance on *Friedel* and *Everroad* is misplaced. *Friedel* was a state-initiated appeal following the grant of a motion to suppress, and there is no indication in the opinion that Friedel actively argued the issue of standing before the trial court ruled in her favor. *Friedel*, 714 N.E.2d at 1235-36. In *Everroad*, the State and the defendants agreed that standing had not been an issue at the trial court level. *Everroad*, 590 N.E.2d at 569. Wilson also overlooks our standard of review of a general judgment which permits us to affirm the trial court's suppression decision on any theory supported by the record. *See Estep*, 753 N.E.2d at 25 n.6; *Godby*, 736 N.E2d at 258. Therefore, we will address whether Wilson had standing to challenge the search of the Tahoe.

B. *Byrd*

[16] In *Byrd*, our Supreme Court addressed whether the driver of a rental car has a Fourth Amendment protectable privacy interest in the rental car if he is not an authorized driver under the rental agreement. *Byrd*, 138 S.Ct. at 1523-24. Byrd and Latasha Reed (Reed) went to a rental car facility together. *Id.* at 1524. Byrd stayed outside while Reed went inside the rental facility and rented a car. *Id.* Reed did not list Byrd as an authorized driver under the rental agreement. *Id.* Reed then exited the rental facility, handed the keys of the rental car to Byrd, and allowed Byrd to drive away in the rental car alone. *Id.* Byrd was subsequently stopped by a state trooper for possible traffic infractions. *Id.* Byrd provided the trooper with an interim driver's license and the rental agreement which showed he was not an authorized driver, and he informed the trooper that a friend had rented the car. *Id.* at 1524-25. The trooper and other assisting

officers asked for, but did not obtain, Byrd's consent to search the rental car. *Id.* at 1525. The officers searched the car anyway based on their belief that Byrd's consent was not required because he was not an authorized driver. *Id.* The search netted forty-nine bricks of heroin and illegal body armor. *Id.* Following suppression proceedings, both the District Court and Court of Appeals ruled that Byrd, as the sole occupant of the car and an unauthorized driver, had no Fourth Amendment protectable privacy interest in the rental car and, therefore, could not challenge its search. *Id.*

[17] The Supreme Court held that the sole occupant and unauthorized driver of a rental car may have a reasonable expectation of privacy in the car, even if he is in breach of the rental agreement by driving it. *Id.* at 1529. Having reached that conclusion, the Court found that "[t]he central inquiry at this point turns on the concept of lawful possession[.]" *Id.* The Court acknowledged that a defendant's "'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." *Id.* (quoting *Rakas*, 439 U.S. at 141 n.9). Although the Government argued that Byrd's possession of the rental car was unlawful because he had used Reed as a strawman to deceive the rental car company in order to commit a crime, the Court declined to address the issue because it had not been raised below. *Id.* at 1529-30. The Court remanded for further factual development and consideration of the issue and for consideration of whether probable cause existed to justify the search under the automobile exception. *Id.* at 1530.

[18] Wilson argues that, in light of *Byrd*, even if he was an unauthorized driver under the rental agreement, he still had standing to contest the search of the rental car. However, *Byrd* merely stands for the proposition that a defendant's status as the unauthorized driver of a rental car does not defeat his claim to standing. Such a defendant must still show that he was "someone in otherwise lawful possession and control" of the rental car to establish his standing under *Byrd*. *Id.* at 1524. Although there are no Indiana state or Seventh Circuit cases applying *Byrd* to facts similar to those before us, our supreme court has already established that "'[w]here the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle.'" *Campos*, 885 N.E.2d at 599 (quoting *United States v. Rubio-Rivera*, 917 F.2d 1271, 1275 (10th Cir. 1990)). Post-*Byrd*, disagreement has arisen among federal courts regarding whether failure to have a valid driver's license defeats a claim to standing for purposes of *Byrd* analysis. *Compare* *United States v. Bettis*, 946 F.3d 1024, 1029 (8th Cir. 2020) (holding that lack of a valid driver's license did not defeat the standing of the driver of a rental car who was not an authorized driver under the rental agreement) *with* *United States v. Lyle*, 919 F.3d 716, 730 (2nd Cir. 2019) (concluding that an unauthorized driver operating the vehicle without a valid driver's license does not lawfully possess or control the vehicle). However, in a pre-*Byrd* decision, the Seventh Circuit concluded that a defendant who cannot show that he has permission of the owner of a vehicle to drive it and who does not have a valid driver's license does not have a reasonable or legitimate expectation of privacy

sufficient to challenge a search. *United States v. Figueroa-Espana*, 511 F.3d 696, 704 (7th Cir. 2007).

[19] Detective Schmitt testified that he "believe[d]" that Stovall's name was on the rental agreement, which supports a reasonable inference that Stovall rented the car, not Wilson. (Tr. p. 35). While Wilson appended a copy of *Byrd* to his motion to suppress and argued that he had standing pursuant to that decision, he did not present any evidence at the suppression hearing that he was an authorized driver on the rental car agreement or that he had Stovall's permission to use it. Wilson's contention that he "appears to be the consensual bailee of a lessee of an automobile" does not enjoy support in the record. (Appellant's Reply Br. p. 5). In what we assume was an attempt to show that he had lawful possession of the Tahoe, Wilson elicited testimony at the suppression hearing that there was nothing indicating he did not have permission to use the Tahoe and that the Tahoe had not been reported as stolen. However, this is precisely the type of evidence that our supreme court has held was insufficient to establish standing. *See Campos*, 885 N.E.2d at 599. Contrary to his assertion on appeal, Wilson's statement after the search that Troy had rented the Tahoe does not support a reasonable inference that Troy had lent the vehicle to Wilson. In addition, although after the search Wilson informed an officer that his license was suspended, we need not address the issue of whether the status of Wilson's driver's license impacted his claim to standing, as we have already concluded that he did not show that he had Stovall's permission to use the Tahoe. In sum, because Wilson did not meet his

burden to show that he lawfully possessed the Tahoe when it was searched, the trial court properly denied his motion to suppress.

CONCLUSION

[20] Based on the foregoing, we conclude that Wilson lacked the requisite privacy interest in the Tahoe and, therefore, lacked standing to challenge the search of the vehicle.

[21] Affirmed.

[22] Najam, J. and Brown, J. concur