In the

United States Court of Appeals

For the Seventh Circuit

No. 21-3169

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL THOMAS,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Evansville Division.
No. 3:17-cr-00031-RLY-MPB — **Richard L. Young**, *Judge*.

ARGUED FEBRUARY 9, 2023 — DECIDED APRIL 19, 2023

Before EASTERBROOK, HAMILTON, and LEE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Federal officials suspected that Michael Thomas was supplying large quantities of illegal drugs in Indiana. Thomas was wanted by state officials too, and warrants had been issued for his arrest. In order to lie low (and continue trafficking drugs), Thomas obtained several fake identification documents, including one issued by North Carolina under the name "Frieson Dewayne Alredius". Using

this fictitious identity, Thomas leased a condominium in Atlanta, Georgia.

Federal officials tracked Thomas to Atlanta and arrested him outside the condo building. Thomas's landlord told the officers that she had rented the unit to someone she knew as "Alredius Frieson". With the landlord's consent, officers searched the condo, finding drugs, drug paraphernalia, and six cell phones. After obtaining warrants to search the phones, the officers discovered evidence that Thomas was trafficking methamphetamine. A grand jury indicted Thomas for conspiracy to distribute methamphetamine. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846.

Thomas moved to suppress the evidence obtained from the search of the condo, contending that his landlord could not consent to a search of the property he had leased. The United States conceded that the lease gave Thomas a subjective expectation of privacy in the condo. But it argued that this is not an expectation that society is prepared to accept as reasonable, because Thomas had obtained the lease by deceiving the landlord about his identity, which is a crime in Georgia. Ga. Code §§ 16-9-4(b)(1), 16-9-121(a)(4). The district court agreed and denied Thomas's motion. Thomas later pleaded guilty but reserved the right to appeal the suppression order. The court sentenced Thomas to 180 months' imprisonment.

At the time of the search, Thomas was the condo's leaseholder. A tenant lawfully may exclude others, including the police, even when the landlord consents to a search. *Chapman v. United States*, 365 U.S. 610 (1961). And using an alias to sign a lease, as Thomas did, does not by itself deprive a tenant of a legitimate expectation of privacy. The United States concedes, and we have previously recognized, that a person may have

innocent reasons to use an alias. *United States v. Pitts*, 322 F.3d 449, 457–58 (7th Cir. 2003). See also *United States v. Watson*, 950 F.2d 505, 507 (8th Cir. 1991) (legitimate expectation of privacy in house purchased under fictitious name); *United States v. Villarreal*, 963 F.2d 770, 774–75 (5th Cir. 1992) (same for packages addressed to fictitious names); *United States v. Newbern*, 731 F.2d 744, 748 (11th Cir. 1984) (same for hotel room registered under fictitious name).

Thomas's use of an alias was not for an innocent purpose. It was to help him evade arrest. Whether or not Thomas showed his fake identity card to the landlord, as the United States asserts—Thomas protests that there is no evidence of this in the record, but he failed to contest the issue in the district court—he gave her a bogus name in order to avoid arrest on multiple warrants.

Thomas's deception does not necessarily mean that he lacked a legitimate expectation of privacy, however. The warrantless search of his condo violated the Fourth Amendment if he had a subjective expectation that his landlord could not invite the police to search his residence and society is prepared to recognize that expectation as reasonable. *Katz v. United States*, 389 U.S. 347 (1967). That Thomas had a subjective expectation of privacy is not in dispute. The question, then, is whether deceiving one's landlord to obtain a lease alters society's understanding that a landlord may not consent to a search on the tenant's behalf.

An executed lease, on its own, does not immunize a deceptive lessee from consequences. On the contrary, Thomas's landlord retained an ownership interest in the property and was entitled to protect her interest from a fugitive such as Thomas. But *how* she was entitled to protect this interest bears

on the reasonableness of Thomas's expectation of privacy. The landlord could have sought to terminate Thomas's lease because of his deception. See Ga. Code §13-5-5 ("[f]raud renders contracts voidable at the election of the injured party"). There is a difference, however, between bringing eviction proceedings against a fraudulent (or felonious) tenant and inviting the police to search his residence. *Chapman* holds that the right to do the former does not imply a right to do the latter. 365 U.S. at 617.

The Fourth Amendment does not turn on the intricacies of state law. But that law nonetheless can indicate whether society recognizes as reasonable the expectations of tenants such as Thomas. For example, had the landlord been entitled to remove Thomas from the premises without notice or judicial process, then perhaps she just as easily could have consented to a search of the property. But the United States did not cite any authority suggesting that Georgia permits self-help evictions. And our own research suggests that Thomas's landlord would have had to initiate a dispossessory proceeding in state court. See Ga. Code §§ 44-7-2, 44-7-50.

A tenant in Georgia who deceives or even defrauds a landlord is entitled to retain possession of the residence until (1) the landlord has provided notice to the tenant and filed an affidavit in state court, (2) the court has issued a dispossessory warrant, (3) the tenant has had the opportunity to file an answer, and (if an answer is filed) (4) the court has held a hearing. If the landlord fails to comply with these steps, then the tenant can pursue a tort claim for wrongful eviction. See, e.g., *Hart v. Walker*, 347 Ga. App. 582 (Ga. App. 2018). Other actions intended to remove the tenant from the property, such as cutting off electricity or water, trigger fines. Ga. Code §44-7-14.1.

Even if Thomas's landlord had initiated a dispossessory proceeding, Thomas was entitled to all the rights of any other leaseholder, including the right to exclude strangers such as police officers, until the proceeding concluded in the landlord's favor. It does not matter that Thomas knew that he had deceived his landlord in obtaining the lease. Georgia has codified his expectation that his tenancy could not be revoked without notice and an opportunity for judicial process, which means that his expectation of privacy in the interim is one that society recognizes as reasonable.

To be sure, some people may consent to a search even when they cannot evict a tenant. See *Fernandez v. California*, 571 U.S. 292 (2014) (co-occupants may consent to a search under some circumstances). But *Chapman* holds that a landlord is not among them. *Georgia v. Randolph*, 547 U.S. 103, 110–12 (2006). Thomas's landlord could not summarily terminate his protections without violating the Georgia Code, nor could she consent to a warrantless search of his condo.

The United States makes much of the fact that Thomas's deception in obtaining the condo was a crime in Georgia, comparing him to a "burglar plying his trade in a summer cabin during the off season" who consequently lacks a legitimate expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). This amounts to a contention that any violation of the law in the causal chain of an interest in property eliminates the need for a warrant. But the rule that a person lacks a legitimate expectation of privacy in stolen property does not extend so far. At oral argument we asked the United States about a person who uses illegal drug proceeds to purchase or rent a residence. Doing so likely constitutes money laundering. Does the person have a legitimate expectation of privacy

in the residence? The answer must be yes; the deed or lease is valid, even if acquiring the property was itself a criminal act. Similarly, someone who signs a lease while intending not to pay rent—an intent that makes the transaction criminal fraud—is entitled to bar the door to unwelcome visitors until the lease is terminated through the legal process.

The United States responded that the proper question is whether there is any version of events in which the person could have acquired the residence *without* violating the law (in the money-laundering hypothetical, by choosing to use untainted funds to pay for the property). It contends that Thomas could not have obtained the condo without deception because the landlord would have run a background check, discovered that he was a fugitive, and rejected his application. Nothing in the record supports these assertions. And they strain credulity: "Frieson Alredius" was a fiction created just two months before Thomas signed the lease. Had the landlord conducted a background or credit check, it would have come back empty. It is evident that she did not check at all.

More to the point, this argument is incompatible with the way courts must evaluate searches. The validity of a search depends on what law enforcement knew when they conducted the search. See *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *Phillips v. Allen*, 668 F.3d 912, 915 (7th Cir. 2012). Under the approach proposed by the United States, by contrast, a search may be deemed valid or invalid depending on facts discovered later, in the course of prosecution. At the time of the search, law enforcement knew that Thomas was a fugitive but did not know whether he had shown a fake identity card to the landlord, whether the landlord ran background checks, and so on. What the agents knew at the time of the search was

not enough to defeat Thomas's expectation of privacy in the condo.

Byrd v. United States, 138 S. Ct. 1518 (2018), supports our conclusion. *Byrd* holds that a person in lawful possession and control of a rental car has a legitimate expectation of privacy in the car, even if that person is not an authorized driver under the rental agreement. Terrence Byrd's right to exclude others—such as a carjacker—from the rental car implied a right to exclude the police, just as Thomas's right to exclude a burglar from the rented condo does. *Id.* at 1528–29. And the Justices emphasized that a breach of a rental agreement, even a serious one, does not automatically deprive the breaching party of a legitimate expectation of privacy. Contracts "concern risk allocation between private parties" and breaching them may result in all sorts of negative financial and legal consequences. *Id.* at 1529. Here, one of those consequences may have been Thomas's eviction from the condo. But "that risk allocation has little to do with whether one would have a reasonable expectation of privacy". *Ibid.* And this case concerns a home, which is "first among equals" in the eyes of the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

Byrd left open the question whether a person who not only lacks authorization to drive a vehicle but also commits a criminal offense by doing so (such as driving without a license) has a legitimate expectation of privacy in the vehicle. There appears to be a conflict among the circuits on that question. Compare *United States v. Lyle*, 919 F.3d 716 (2d Cir. 2019), with *United States v. Bettis*, 946 F.3d 1024 (8th Cir. 2020), and *United States v. Cohen*, 38 F.4th 1364 (11th Cir. 2022). But that question differs from the one in this case, and so we do not discuss it further.

One final observation. Actual authority to consent is not always necessary to justify a warrantless search. Police may search with the consent of a third party if they reasonably believe that the person consenting has the authority to do so—that is, if the person has apparent authority. *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *United States v. Klotz*, 943 F.2d 707 (7th Cir. 1991). But the United States has not advanced any argument that Thomas's landlord had apparent authority to consent to a search. And apparent authority, too, rests on the facts known to law enforcement at the time of the search, not those discovered later. *Rodriguez*, 497 U.S. at 188. This does not affect our conclusion that Thomas's motion should have been granted.

The district court's decision denying the motion to suppress is reversed, and the case is remanded for proceedings consistent with this opinion.