

Short Circuit 322: Neighbors

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SPEAKERS

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A Anthony Sanders 00:25

"Neighbors, everybody needs good neighbors. Just a friendly wave each morning helps to make a better day. Neighbors need to get to know each other. Next door is only a footstep away." Well, those words of wisdom are from the Ozzy soap from the 1980s that some of you may remember, maybe you don't, was not abided by by certain neighbors in Manhattan recently. And that led to a federal lawsuit and also claims of sovereign immunity. We're going to talk about that in a little bit. But before that, something about a car and the Fourth Amendment and a search, which is always good fodder here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on April 17, 2024. And I have with me my good friend and former IJ clerk colleague and now lawyer colleague, Rob Frommer. Rob, welcome back to Short Circuit.

R Rob Frommer 01:35

Oh, well, thank you for having me back, Anthony. I'm super excited to be here.

A Anthony Sanders 01:39

Of course, of course. Well, what is more exciting than Short Circuit and the Fourth Amendment and searches of someone's girlfriend's car? So Rob, tell these people about this little escapade from the 6th Circuit.

R Rob Frommer 01:55

Okay, so I'm trying to paint a picture for everybody. This is January 2020. COVID is not yet here, but it's cold out. And Gregory Rogers was sitting in his girlfriend's car when he found himself face to face with Grand Rapids, Michigan, police. You see, the police had been responding to,

well, an unrelated domestic assault. And the witnesses there said, oh, the suspect went south. Now, unfortunately for Rogers, also to the south, he was sitting in a Chevy Cruze, which was parked safely on the side of the road. So an officer walks over, approaches Rogers, and he's just sitting in the car. He's alone in the passenger seat of the car. The officer says, do you have a license? And Roger says, no, I don't have my license on me. And he claimed that the car belonged to his girlfriend, who let him borrow it. And, in fact, his girlfriend a couple days later had reached out to the police to confirm that, to say that Rogers was allowed to use her car when she was at things like work or school. But then the police went and ran Rogers' name in a database, and they learned he had an outstanding felony warrant for carrying a concealed weapon. Okay, so officers come back. Now remember, Rogers was just sitting in a car, not doing anything, minding himself. So the officers come back, they arrest Rogers, and they find on him as part of their arrest both, unsurprisingly, car keys for the Cruze, as well as \$785 in cash he happened to have on him. Now remember, I said that the car had been parked safely. It was on a residential street, you know, parked just like every other car. But after they arrested Rogers, the police decided to impound the Chevy Cruze. So they take the car. They take it back to the station. They conduct what's known as an inventory search, which is meant to protect police from accusations of theft or loss. And when they're doing this inventory search, well, they find a bunch of stuff that looks pretty incriminating: two digital scales, some plastic baggies, a gun, and a big bag of marijuana. And, as a result of that, they ended up charging Rogers with a whole mess of drug crimes. In fact, the escapade (no pun intended, no car pun intended anyway with Rogers and the Cruze continued three months later in April 2020. Rogers has another run in with the police, again in the exact same Chevy Cruze. That time, police arrested Rogers with a loaded pistol, along with some pot and more drastic bags. So it's pretty clear he's drug dealing. The April event is not so important here, but I just wanted to talk about it. So now, Rogers is facing charges for both the January and the April offense. And he's in U.S. district court, so he says, I want to move to suppress this evidence. You know, they didn't have a right to search the Chevy Cruze. I had a reasonable expectation of privacy in the Chevy Cruze, and that means they couldn't just take the car and toss it. And therefore, what they did violated the Fourth Amendment. You have to toss out the evidence, and since that's the basis of the charges, let me go. But the district court disagrees. The district court says that Rogers doesn't have what's known as standing. In other words, he doesn't have any right even to complain about the police's conduct with regards to the Cruze. And the district court says that he didn't have a reasonable expectation of privacy since he wasn't the car's owner, and he wasn't driving it. And he somehow had failed to show that he had permission to occupy it, which seems odd given what I told you previously about the girlfriend. And then Rogers gets convicted on six counts. So now, this case goes up to the 6th Circuit, the appeals court for Michigan. And he appeals it, but two judges on the appeals court agree with the district court and say you had no standing to challenge anything the officers did to the Chevy Cruze because you didn't show, these are their words, that you had "complete dominion and control of it." Now, this is odd because the Supreme Court just recently, about five years ago in a case called *Bird*, had said that people who rented a rental car had Fourth Amendment rights in the rental car. Even people who weren't even on the rental agreement, who were just driving along, they had Fourth Amendment rights in the vehicle. So you're wondering like, well, if they can, why doesn't he? But the majority says, well, you're in the passenger seat. You're not in the driver's seat, so it doesn't show that you have control of the vehicle. And, of course, I said it was a 2-1 decision, and the dissent was having none of this. It noted that 6th Circuit precedent makes very clear that if you borrow a vehicle and you store personal items in it, you have a reasonable expectation of privacy. And the record was clear that Rogers frequently borrowed the car, and you know, whether the stuff he stored in there was legal or not, that's up for question, but he definitely stored things in there. And so therefore, the dissent's like, well, under 6th Circuit precedent, you guys are wrong. He should have standing challenges. And the majority says, oh,

no, no, no. So even given that 6th Circuit precedent that says if you borrow a car and put stuff in it, you have a reasonable expectation of privacy, the majority says, oh, well, even if that's true, he lost any expectation of privacy through his actions. And they point to this older case, *Tolbert*, which held ... Let me explain the situation. In that situation there was like a ... This woman was being a drug courier, and she had a piece of luggage that was going along with her. And when she realized that the fuzz was on her, she tried to get away and she repeatedly disclaimed any ownership or control of the bag whatsoever. And what the 6th Circuit said in that *Tolbert* case was like, look, when you expressly disclaim any ownership or control of an item, you lose Fourth Amendment standing. You don't have any Fourth Amendment standing to challenge what the police do to it. And they said that's what Rogers did here when the police showed up. And it went back to that original January meeting, and they said, well, he told us twice that the car wasn't his and he wasn't in the driver's seat. And you know what, he didn't even have his driver's license on him. So they're saying that makes this just like that *Tolbert* case where the woman disclaimed ownership of the bag. He's disclaiming any kind of control or dominion over the vehicle. Now, you might expect this, but the dissent thought that was all hogwash. It first pointed out that, you know, again, under circuit precedent, if you store stuff in a vehicle and you borrow the vehicle, you have a reasonable expectation of privacy. And the fact that Rogers just honestly communicated that to the police to say, hey, this is my girlfriend's car. She lets me borrow it, and I hold stuff in it. That just simply saying the truth can't vitiate the expectation of privacy you have in the vehicle. The same thing about the fact he wasn't driving. Like, what does that matter? Like, what is that that he wasn't driving at that point? Nothing about the fact he wasn't driving at that point had any bearing about whether he had a right, an expectation of privacy in the vehicle. And then lastly, the dissent's like the fact that he didn't have his license on him, that doesn't make a lick of sense. Because after all, one, in Michigan, there's no requirement that you have to hold your license in your pocket or have it on your person whenever you just even go sit in your car, and two, the court said even if that were the case, again, how does that vitiate any expectation of privacy he has? Now, I'll point out that the majority, because of that standing decision saying Rogers didn't have standing, they never had to get to whether the search of the Cruze was good or not, but the dissent did. And the dissent said that search was bad and for a simple reason. The whole justification for police being able to tow vehicles that are on the public roadways is if they're a danger to others or blocking traffic. You know, a broken down vehicle in the middle of the road, that's a problem. But this car wasn't broken down. It was parked safely, orderly on the side of the road. And the police said, well, this was a high crime area, so if we'd left it there, who knows what might have happened to the vehicle.

A

Anthony Sanders 11:59

The same with all the other cars on the street too, I would think.

R

Rob Frommer 12:03

And that's exactly what the dissent said. Like that argument proves too much because under that rationale, you should take every single vehicle out of a bad neighborhood and like move it. And that obviously is not what the community caretaking doctrine allows officers to do, thankfully, because I'd like my car to be where I left it when I come back. And so the dissent said, look, Rogers had standing. You guys are manipulating this to say he didn't because you

don't want to get to the underlying question of what they did with the car. And what they did with the car very clearly violated the Fourth Amendment. So we'll see what happens with this one, but it was a very contentious opinion.

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Anthony Sanders 12:45

It seems like really the only thing here that the majority can hang its hat on, and they do their best to kind of make it, you know, make everything really muddy, it seems, is how he wasn't quite straight with the police about what he was doing when they first got there. So he says, well, I'm not even driving. I, you know, my girlfriend, she's coming back soon. She's the one who's going to drive the car, was his implication. And because of that, he doesn't have a reasonable expectation of privacy like he would if he was actually driving the car, which he actually was. He just wasn't up-front about that, probably because he doesn't have a license. And that contradiction somehow allows the police to do all this other stuff.

R

Rob Frommer 13:31

Yeah, I mean, the fact if he gets to borrow the vehicle, he says it's my girlfriend's vehicle, she lets me borrow it, you know. Whether the girlfriend's like ... Yeah, and you're right. He did tell them, oh, she's going to be back in just a minute. So he was lying about that, but again, like what does that matter? Like how does that change anything? I mean, if this is, in fact, his girlfriend's vehicle, and if he, in fact, has permission to borrow it, I mean, to be honest, I can lie to cops. I can tell a cop a lie, and that doesn't ... Yeah, and I mean, unless the lie actually increased the suspicion that this isn't his vehicle or something's like afoot, like it's legally immaterial.

A

Anthony Sanders 14:15

Right. What they're really saying is, so say I borrow someone's car, but I don't borrow someone's car, someone's car is running, they're not there, I'm sitting in the passenger seat. They're really saying I have absolutely no Fourth Amendment interest, which is crazy because if the car is pulled over, there's all this case law that's saying, and they actually recognize it, that I as a passenger do have some measure of Fourth Amendment rights to my person when they pull me over. So that really falls apart upon inspection.

R

Rob Frommer 14:54

It does. I have to be honest, I'm definitely more in line with the dissent here. Fourth Amendment standing is supposed to be sort of a minimal bar. And, to be honest, it often ... It's not supposed to interfere with the merits of whether ... Because ultimately, at the end of the day, what we care about is what the police did and whether it's constitutionally reasonable or not, and so standing should be a minimal threshold to get to that merits question. Instead, they let it sort of block any review whatsoever.

Anthony Sanders 15:31

A

Maybe we could take just a minute here, Rob, to talk a bit more about Fourth Amendment standing because, you know, to a lot of people, even lawyers who don't do this stuff all the time, it sounds like normal standing, right? Normal standing, which we talk about on Short Circuit quite a lot, is when you sue, you need to have basically an injury, a bone in the fight, to sue about. But Fourth Amendment standing, they use the word standing, that's not really what it means. It means that you have some recognized right under the Fourth Amendment that you can raise, which always seems weird to me that it's raised in this context, which is the exclusionary rule because the exclusionary rule is about trying to prevent the police from doing bad behavior. And so who cares whose Fourth Amendment interest it is? The police still violated someone's Fourth Amendment right, so why isn't the exclusionary rule in play?

Rob Frommer 16:30

R

Well, that's the whole reason they go through this. The idea under the Fourth Amendment, at least under this standing idea, is like you have Fourth Amendment rights in your stuff, in your persons, houses, papers, and effects. But you don't have a Fourth Amendment interest, right, Fourth Amendment rights in your bodies. And so oftentimes, you'll see one plaintiff or one criminal defendant complain about the search of let's say somebody else's house, you know, where something incriminating is found, and what the courts will say there is, look, you don't have any standing to challenge that search because it wasn't your house. And that's essentially what they're doing here. They don't want to get down the line and to have actually unpack whether what the police did here was reasonable or not. So you can short circuit everything, no pun intended, by simply saying that, hey, this wasn't Rogers' car, and he didn't have enough dominion and control for constitutional purposes. That doesn't make a whole lot of sense. To me, it seems like that's sort of a policy that's sort of ends-oriented, you know what I mean in the sense like they have a particular outcome they want to reach and then they work backwards in their reasoning to get there. I think a much simpler position for something like this is just to look at basic property law principles, which is this is the girlfriend's vehicle, obviously, you know, my car, I can lend it out to people. And as I see fit, because it's my property, I can dispose of it or share it as I want. And when those people, I lend it to them, and they can use it, they're standing in my shoes. You know, they have, except for me, a, you know, who's the actual owner, they stand to the rest of the world as the owner of the vehicle. They can assert all the rights because I, as a matter of property law, have allowed, have given those to them. That's part of the bundle that I've given. And I think when you analyze it that way, rather than these nebulous expectations of privacy, this becomes a lot easier case. Now, it comes out different than the way the 6th Circuit one's majority wanted to, but I think that's a far superior approach than asking the squishy, malleable questions.

Anthony Sanders 19:11

A

So the 6th Circuit, you could describe sometimes as squishy and malleable, they often split on different issues. Do you think this has en banc appeal to it?

Rob Frommer 19:23

R

If this came out ... Let's see, today's April 7. This came out when we could go short circuit listeners on April 10. So we'll see. I think this would be an excellent candidate for en banc

review. You have a very spirited dissent that articulates principles, it points directly at circuit precedent that says the majority is misinterpreting, misapplying it, and I would take the shot if I were the attorneys for the appellant here.

A

Anthony Sanders 19:58

Well. We shall see. And we will ... So stay tuned on that both on Short Circuit and in our newsletter, which you can find at shortcircuit.org or ij.org. So thank you, Rob. We are now going to move from the 6th Circuit to the 2nd Circuit, namely the heart of the 2nd Circuit, Manhattan, and the part of Manhattan that's kind of close to the United Nations. And that brings us to this case, which is *Harvey v. Permanent Mission of the Republic of Sierra Leone to the United Nations*. And it has that title because the defendant is the Permanent Mission of Sierra Leone to the United Nations. So some of you probably know, but maybe not all of you do, Sierra Leone is a small country in West Africa. It is a sovereign country, and so, therefore, as a member of the United Nations, it has a diplomatic mission to the U.N. So it also, I'm sure, has diplomatic relations with the United States and the embassy there and has embassies elsewhere in the world. But this is about, essentially, its U.N. embassy, which all kinds of countries have. And the thing about an embassy, as people probably know, is it's kind of like a little part of your country in another country, right? That's the whole deal with embassies and diplomatic immunity for diplomats. You can't arrest a diplomat. You can't charge them with a crime. You can only kick them out of the country. So this is kind of a different aspect of that whole idea of it's not diplomatic immunity, but it's sovereign immunity. And it's suing another state, so a foreign state, in the courts of the United States. So Congress has passed a statute to deal with this kind of thing. It's called the Foreign Sovereign Immunities Act. And there are exceptions to it, so it's not like if a different country comes here, its people do whatever they want and you can't sue about it at all. There are certain exceptions to that. And this is, I think, a prime example of where those exceptions come to bear. And so it's not surprising that, in the end, there is no sovereign immunity in this case. So let's get to the facts. So the facts will ring true with a lot of homeowners who are listening and indeed anyone who has had neighbors, as we've talked about at the beginning of the show. So the plaintiffs are this poor couple, Janet and Joseph Harvey. They live on 49th Street in Manhattan, not far from the U.N. And they are in row house, so they share a wall (I'm sure it's, you know, probably a high-value neighborhood with the Permanent Mission of Sierra Leone to the United Nations. You know, you gotta have your embassy somewhere. Not everyone has just a vast mansion like some countries do in some parts of the world. And so they have this row house, the Permanent Mission does, and they needed to do some renovations. And so these renovations were pretty extensive. And it sounds like probably what happened is they didn't hire really the right contractors, so they had a general, they had subs. And if you've ever seen the Fawlty Towers episode, *The Builders*, where he has this guy, O'Reilly, Basil Fawlty does ... I don't know if you remember that one, Rob. It's kind of like that. Nothing ever really gets done. He keeps saying he needs more time. It sounds like that's what happened here. And so the Harveys get sick of this. They alleged, now this is all off their complaint, so we don't know what's actually true, but they allege that there's mold that's crept into their house from the other side. I guess they were building, the Mission was building higher, adding floors, and they didn't do anything to the Harveys' chimney. So it's more likely that it would catch fire. They left stuff like building supplies on their roof that was maybe causing damage. They had gone to the city over and over again to complain. Now, we're not big fans of New York City fining people, we've had lawsuits about that, but we have no idea if this was on the up and up or not. But, I mean, it sounds pretty normal and understandable. And the city actually had, in various departments, fined the Mission thousands of dollars for basically not picking up the stuff when they had damaged their neighbor's property. After a

couple of years of this, they've had enough, and so in 2021, they sued. Now, they have to sue in federal court, even though these are really just state law claims of negligence and other various claims you would expect. Like there was a trespass claim, and they sue for damages and also to stop this ongoing construction. Well, the Mission claims sovereign immunity. They say you can't sue us for that; we have full sovereign immunity. But the Harveys say there are exceptions to sovereign immunity, and they're actually right in the statute. And so that makes it ... This isn't some judge-made thing. This is actually sovereign immunity granted by statute, and then there are these exceptions that are given. So one of the exceptions is if there is something of a commercial activity, so the commercial activity exception to sovereign immunity ... That is basically the idea if this is something that is about the nation's activities as a sovereign state, so I think maybe, they don't give any examples in the case, but I think an example would be if you're the ambassador and you make a statement and someone thinks they've defamed them and they sue. It's about, you know, a matter of diplomatic relations or international relations and you sue for defamation, that's going to be covered by sovereign immunity. But if it's just something that anyone could do and you happen to just be a sovereign nation doing that, then it doesn't apply. And so that's what the commercial activity exception grants is that you can sue. So it says, "A foreign state shall not be immune from the jurisdiction of courts of the United States ... upon a commercial activity carried on in the United States by the foreign state." So the question is, well, what's a commercial activity? Well, then they get to that. There's another exception, which is tortious activity. So, essentially, if you, the sovereign state, commit a tort, so you know, negligence, intentional infliction of emotional distress (these are things that we all learn in the first year law school, for lawyers listening), that is also an exception. And, interestingly, they're in the statute; they are distinct. So you can't have tortious claims for what is a commercial activity. So if you win on a commercial activity, if you get that exception, you can't, by definition, get the other. So the court, long story short, the court says that this applies under the one exception, commercial activity, and not the other. And, essentially, what they say is, look, this is about a property owner hiring a contractor that doesn't work out. And under New York law, as you might expect, the property owner is responsible, at least to some extent, for the actions of its contractor. And you guys have done, under the complaint, a lot of bad things to your neighbor's property. And, therefore, you should have to pay because that's just a run-of-the-mill commercial activity. It doesn't have to be ... So by commercial activity, it's not like it has to be a profit-making enterprise, like they started a business. It just has to be, you know, you're paying a contractor to come over and fix stuff, and he's causing all this damage. And so there is no sovereign immunity. The same was true in the district court, but you will be interested to hear this, listeners. Like with qualified immunity, the Mission got to appeal, even though it lost in district court. So this complaint was filed, the motion then came that even on what is said in the complaint, relief can't be granted because of their sovereign immunity. The court said no, this is commercial activity. We're going forward with the case; you get to appeal anyway. And so now that this has been dealt with, I don't think this case is going any higher. They will remand and then actually get to the heart of the case, just like when a police officer, you know, is sued and loses the first round of qualified immunity and, nevertheless, gets to appeal. And then, whenever it is later, finally the case goes back down if qualified immunity is denied, and the case can go forward. So the Harveys will finally now get their day in court, but it has taken quite a long time. I think this building began in 2019, so I don't know, you know, how their house is today. But it sounds like it hasn't been a fun time living there.

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Rob Frommer 29:47

For five years ... Can you imagine? This is not a pleasant neighbor. This cannot be good for your

day-to-day life. Like can you imagine every time you walk out the door looking over at the embassy, and they're looking at you. And you both know, like, oh, we hate each other, and we've had all these problems. But what's nuts to me is that, you know, the Mission attempted to, right, try to say that the commercial activity exception didn't apply. And I don't want to get this wrong, and so I apologize if I do, but I think at some point, the Mission says, well, our activity is being a mission. And so, of course, that's sovereign, and therefore, you can't touch us. And I think the court says, wait, the whole purpose of like why you're here is to be that, but the question is what you were doing. And you're not being a mission, you're just doing renovations, same as you do, I do, you know, everyone does. And I think that was the key part. And I think you've got that sort of key distinction that when you're acting as a sovereign, you're immune. But when you're acting just like an ordinary person doing things everybody else can do, then you have to face the music.

A

Anthony Sanders 31:11

And I think it's really interesting to think about that the court could have gone a different way with that. I mean, it was following case law, but just on the text of the statute, or just thinking about the doctrine of sovereign immunity in the abstract, you could have a court that said, well, we need to protect sovereigns, and we're going to read this very broadly. And so, you know, obviously, in order to have an embassy, you have to have property. And yeah, you have to rebuild that property sometimes. And so, there, it would be like ... The exception could get very, very small in order to protect this sovereign interest because if you think about the flip side, you know, there are ... Like I came up with the example of making a statement that's defamatory in trying to carry out your diplomatic mission, but you know, there's not that many torts that you could commit or, I don't know, contracts where you just don't pay the guy, if this was a contract case where the exception wouldn't apply. So the exception here is pretty broad, which is good. I think it does justice to have that. But there are a lot of other contexts with immunity, like the ones we deal with at IJ a lot. So qualified immunity, prosecutorial immunity, absolute immunity, where it's all about how broadly do we read it, and either way, you could kind of see it making sense but not making sense. But you could see a justification for it. But then, whether you see it broadly or narrowly is going to determine everything, and I would flag, I don't know a heck of a lot about the issue, but the upcoming presidential immunity, you know, for criminal liability case at the Supreme Court. That, I mean, I think everyone agrees that, you know, former President Trump is not going to win that appeal, but whatever law comes out of that for the future, a lot will turn on how broadly ... how the president is different than other people, just like here, it was how a embassy is different than other properties.

R

Rob Frommer 33:35

Well, I think one thing that's interesting here, going to what you were just saying, is that unlike, you know, things like qualified immunity and some of the immunity doctrines we deal with that involve government officials, those are ... The foreign, the FSIA or whatever they call this thing, the Foreign Sovereign Immunities Act is an actual piece of legislation that has actual words that have exceptions that are written out in real words that judges can look at and read the text of. Qualified immunity isn't in a statute. It was invented out of whole cloth by the court, and as such, there's nothing to really look at other than prior decisions. But there's no objective measure of when qualified immunity should apply or shouldn't, other than those broad terms. And I think this gets back to, you know, way back into our old law school days, like standards versus rules. I think here, this set of rules makes it a lot more objective to figure out when

immunity should apply or not in the foreign sovereign context than what we have in the domestic context where it can really, like you said, shrink or balloon based on, maybe not the merits of the case, but more about like the particulars of the judge or the person who happens to be before them.

A

Anthony Sanders 35:03

And presidential criminal immunity also is not in any statute. It doesn't mean it doesn't exist, but it is much more in the qualified immunity bucket than what we've been talking about here. Well, Rob, thank you. Always enjoy talking to you. Appreciate you coming back on the show.

R

Rob Frommer 35:22

Oh, it's my pleasure.

A

Anthony Sanders 35:23

And if you want to learn more about what Rob does at IJ, you can check out our Project on the Fourth Amendment, of which he is a leader and has many cases brewing in that regard. And for the rest of you, thank you for joining us. And in the meantime, until next time, I hope that all of you get engaged.