

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20060069-CA	
v.)		
)	F I L E D	
Anthony Angelo Lucero,)	(February 8, 2007)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2007 UT App 36</td></tr></table>	2007 UT App 36
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Second District, Ogden Department, 051903321
The Honorable Parley R. Baldwin

Attorneys: Dee W. Smith and Randall W. Richards, Ogden, for
Appellant
Mark L. Shurtleff and Christine F. Soltis, Salt Lake
City, for Appellee

Before Judges Greenwood, Davis, and Thorne.

DAVIS, Judge:

Defendant Anthony Angelo Lucero appeals his conviction of possession of a controlled substance in a jail or prison, a second-degree felony. See Utah Code Ann. § 58-37-8(2)(e) (Supp. 2006). When police officers searched the car in which Lucero was a passenger, they found drugs on the backseat floor where he had been sitting. This led to Lucero's arrest and the eventual discovery of more drugs during the search of his person conducted at the jail. Lucero argues plain error and ineffective assistance of counsel, both stemming from failure to suppress all evidence resulting from the car search.

Motions to suppress are generally granted whenever a police officer violates a defendant's Fourth Amendment right to be free from unreasonable searches and seizures. See State v. Deherrera, 965 P.2d 501, 505 (Utah Ct. App. 1998) ("Absent an exception to the exclusionary rule, [we must] exclude 'all evidence obtained by searches and seizures in violation of the Constitution.'" (quoting Mapp v. Ohio, 367 U.S. 643, 655 (1961))); accord United States v. Calandra, 414 U.S. 338, 347 (1974). A defendant may

not, however, seek to exclude evidence obtained through violations of the Fourth Amendment rights of third parties.

Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) (quotations and citations omitted). Thus, the ultimate inquiry "is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." Id. at 140.

Here, Lucero argues that the car search, which led to his arrest and also to the eventual discovery of drugs in jail, was unconstitutional. But Lucero's Fourth Amendment rights were not violated by the car search. The car's driver was the owner of the car, and Lucero was simply a passenger, with no possessory interest in the car. And Lucero has not made any attempt to show that he had a legitimate expectation of privacy in the area searched, i.e., the floor of the backseat. Further, at no point did Lucero assert ownership in the drugs discovered during the car search, nor does he make such a claim on appeal. Under these circumstances, Lucero may contest neither the alleged improper detention of the driver nor the ensuing search of the car. Thus, the exclusionary rule does not require suppression of the drugs discovered in the car search, or the drugs found upon arrival at the jail.

Lucero argues that his own Fourth Amendment rights were violated when he was asked to get out of the car and was questioned regarding drug usage, and that this violation warrants exclusion of the fruits of the car search. He asserts that "[i]f this court finds that the Defendant's constitutional rights were violated, the result would be the suppression of the evidence." We acknowledge that "although a defendant may lack the requisite possessory or ownership interest in a vehicle to directly challenge a search of that vehicle, the defendant may nonetheless contest the lawfulness of his own detention and seek to suppress

evidence found in the vehicle as the fruit of the illegal detention." United States v. Nava-Ramirez, 210 F.3d 1128, 1131 (10th Cir. 2000). However, "[t]o successfully suppress evidence as the fruit of an unlawful detention, a defendant must first establish that the detention did violate his Fourth Amendment rights. The defendant then bears the burden of demonstrating a factual nexus between the illegality and the challenged evidence." Id. (quotations and citations omitted).

Even assuming that the detention of Lucero was unconstitutional, we disagree that the necessary factual nexus has been shown here. There was no evidence presented that would suggest that the search here--regardless of whether it was constitutional--resulted from Lucero's detention, i.e., that the driver allowed the search only because one of her passengers was being detained outside the car. Instead, evidence was presented that after the driver told the officers that they were free to check the car, Lucero yelled at the driver, telling her that she need not--and should not--permit the search. The driver nonetheless responded, "I don't care they can search it. I don't have anything in there." Therefore, Lucero has not met his burden of demonstrating a factual nexus between his detention and the discovery of the drugs.

Lucero has not demonstrated any possessory interest or expectation of privacy in the area searched or the drugs discovered in the car. Nor has he shown a factual nexus between his alleged unconstitutional detention and the drug discoveries. We therefore determine that the court's failure to exclude the drugs was not plain error, and that counsel's failure to seek suppression of the drugs was not ineffective assistance, see State v. Malmrose, 649 P.2d 56, 59 (Utah 1982) ("Effective representation does not require counsel to object when doing so would be futile."). Accordingly, we affirm.

James Z. Davis, Judge

WE CONCUR:

Pamela T. Greenwood,
Associate Presiding Judge

William A. Thorne, Judge