IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8537
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MIGUEL ANGEL MALDONADO
and RICARDO FLORES-VENEGAS,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas

(MO-92-CR-39-1)

(August 4, 1993)

Before JOLLY, WIENER and E. M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendants-Appellants Miguel Angel Maldonado and Ricardo Flores-Venegas (Flores) were convicted by a jury of conspiracy to

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

possess with intent to distribute and possession with intent to distribute more than 100 kilograms of marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. On appeal each appellant challenges his conviction, Maldonado on constitutional grounds (Fourth Amendment search and seizure and Sixth Amendment effectiveness of counsel), and Flores on the sufficiency of the evidence. Finding no reversible error, we affirm.

I

FACTS

On May 4, 1992, Officer Glenn of the Midland (Tx) Police Department received information from the FBI that a new blue van with no license plates would be traveling west toward El Paso, would be occupied by a black male, and would be carrying a load of marihuana. Officer Glenn had his narcotics detection dog with him, and, after picking up Detective Honeycutt, proceeded east on Highway I-20. Officer Glenn spotted the van, turned around, and began following it. After the van turned into a rest area, Officer Glenn stopped it, ascertained that the van was owned by Jonathan Moore, the black male occupying the van, and received consent from Moore for the dog to sniff the van and for the officers to search it. Officer Glenn located a brick of marihuana in a blue duffle bag and a large wooden crate filled with 46 or 47 bundles of marihuana with a total weight of 307 pounds. The marihuana was unloaded, and the crate was replaced after the cooperating Moore made contact with his supplier in El Paso.

Moore, who pleaded guilty to lesser charges prior to trial,

and testified for the government, stated that (1) on April 28, 1992, he was working for a John Wernake in El Paso; (2) co-defendant Herrera[1] with five other people, including Moore, helped load marihuana into two crates; (3) one crate was destined for Chicago and the other for Los Angeles; (4) the crates were loaded into a truck belonging to Maldonado; (5) Moore drove the truck containing the crates to a residence at 2561 Catnip in El Paso where a trucking company picked them up; and (6) the next day Moore and Maldonado flew to Chicago together using tickets purchased by Maldonado. (Maldonado's ticket was found in the blue van after Moore was stopped.)

According to Moore, the pair checked into a hotel after arriving in Chicago. The hotel charges were paid for by Maldonado. The next day they went to a house located at 2621 Albany in Cicero, Illinois, where Maldonado received some money. The owner of the house loaned them a vehicle. Moore and Maldonado went looking for a U-Haul or a van, eventually purchasing a van. Maldonado paid for it, but title was placed in Moore's name. They then returned to the house on Albany, returned the borrowed vehicle, and left to buy a car, which Maldonado paid for and drove away.

The plan was to pick up the crate of marihuana and deliver it, with Moore in the van following Maldonado in the car, but they got separated. Moore never found Maldonado, so he picked up the crate and tried to deliver it, but he took it to the wrong address.

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[1] Eduardo Herrera's appeal was dismissed on March 26, 1993, pursuant to Herrera's motion to withdraw appeal.

Moore then decided to return to El Paso with the crate. As a result of placing some phone calls, Moore was instructed to meet Maldonado in Dallas. Moore tried to comply but did not find Maldonado there, so Moore decided to return to El Paso. He was on his way to El Paso when stopped by Officer Glenn.

Moore agreed to cooperate with the police and the FBI by making phone calls to his contacts and allowing the phone calls to be recorded. Three of the four recorded phone conversations were with Maldonado.

Arrangements were made with the Lexington Inn in Midland to use the hotel for a controlled delivery of the crate. On May 5, at approximately 12:00 or 12:30 a.m., Flores arrived at the Lexington Inn. He looked into the van on the parking lot. The desk clerk at the Lexington had been told to be on the lookout for two men who would be asking for Moore's room number. The clerk later identified Flores as one of the men who came in asking for Moore's room number. The clerk told the men that Moore was staying at the hotel but that he could not reveal the room number. The clerk also told the men that Moore had gone to one of the nightclubs in the area. Officer Glenn observed Flores walking to a nightclub across the street from the Lexington.

Alonzo Roel testified that he traveled to Midland from El Paso with Flores to pick up the marihuana from Moore. Roel stated that Flores bought a van and put it in Roel's name; that they went to the Lexington Inn and asked for Moore; and that while at the hotel, Flores (who had only known Moore's first name) made a phone call to

El Paso to find out Moore's last name so that they could inquire about his room number.

After Flores was arrested on May 6, he made an initial statement to the FBI, denying any knowledge of the marihuana and stating that he had gone to Midland with Roel to visit Roel's aunt. The next day, however, Flores was interviewed again, and he admitted that initially he had lied. In this subsequent interview Flores stated that he had gone to Midland to pick up the marihuana which Moore had in his van. Flores also related that he had transported marihuana to Chicago six weeks earlier.

II

ANALYSIS

A. Maldonado - Standing to Challenge Search and Seizure

Maldonado argues that Officer Glenn's stop and search of the blue van occupied by Moore violated his (Maldonado's) constitutional rights under the Fourth, Sixth, and Fourteenth Amendments, so that both the evidence seized from the van and Moore's testimony should have been suppressed. He argues that he has standing to challenge the search on authority of United States v. Padilla, 960 F.2d 854 (9th Cir. 1992), reversed, 113 S.Ct. 1936 (1993). He argues that Padilla gives him standing by virtue of his control over and supervision of the contraband contained in the van. He also contends that he had a privacy interest in the van because he paid for it, even though the van was registered in Moore's name and was not occupied by Maldonado.

In the district court Maldonado failed to file a motion to

suppress the evidence seized in the stop and search of the van. In order to preserve a claim of erroneous admission of evidence for appellate review, a defendant must timely object or move to strike the evidence, stating the specific grounds of the objection. Fed. R. Evid. 103(a)(1); United States v. Martinez, 962 F.2d 1161, 1165-66 (5th Cir. 1992). As Maldonado did not object to the admission of the evidence obtained as a result of the search of the van, our review is limited to the plain error standard of Fed. R. Crim. P. 52(b). Id. at 1166 n.10. Pursuant to Rule 52(b), we may correct an error that is plain and affects a party's substantial rights. United States v. Olano, _____ U.S. _____, 113 S.Ct. 1770, 1776-77, 123 L.Ed.2d 508 (1993). An error is plain when it is clear or obvious. Id. at 1777. To show that a substantial right is affected, the defendant must show prejudice. Id. at 1778. Courts of Appeals should correct plain errors that seriously affect the "fairness, integrity or public reputation of judicial proceedings." Id. at 1779 (internal quotation and citation omitted).

Fourth Amendment rights are personal; they may not be asserted vicariously. A defendant may not challenge the introduction of evidence secured by an illegal search of a third person's property. Rakas v. Illinois, 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Maldonado must show that the search or seizure violated his own constitutional rights. United States v. Boruff, 909 F.2d 111, 115 (5th Cir. 1990), cert. denied, 111 S.Ct. 1620

(1991). But first Maldonado is required to establish his standing[2] to challenge the search and seizure of the van under the Fourth Amendment. United States v. Pierce, 959 F.2d 1297, 1303 (5th Cir.), cert. denied, 113 S.Ct. 621 (1992). The concept of standing requires a determination whether the challenged search and seizure violated the Fourth Amendment rights of Maldonado, i.e., whether the search and seizure infringed an interest of Maldonado's which the Fourth Amendment was designed to protect. Rakas, 439 U.S. at 140. Maldonado must show "a legitimate expectation of privacy" in the property searched and seized. Id. at 143.

In Boruff, a case with virtually identical facts, we held that the defendant did not have standing to challenge the search. Boruff purchased a truck to use in smuggling marihuana. Boruff was accompanied by a co-conspirator, Taylor, to make the purchase. Boruff paid for the truck, partly in cash and partly with cashier's checks in Taylor's name, and placed the title to the truck in Taylor's name. All documents relating to the truck, including registration and insurance, were placed in Taylor's name. Taylor drove the truck in the smuggling operation, while Boruff drove a far rented in his girlfriend's name. The truck driven by Taylor contained the marihuana; Boruff followed in the car. The truck was stopped and the marihuana was seized. Boruff was not present when the truck was stopped and searched.

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[2] In Rakas, 439 U.S. at 133, the Supreme Court specifically stated that the issue is more properly considered one of substantive Fourth Amendment law rather than "standing"; however, this Court has continued to discuss this issue in terms of the concept of standing.

Boruff challenged the search of the truck. He argued that he was the equitable owner of the truck and exercised joint control over it during the smuggling operation, essentially the same arguments that Maldonado makes.

We held that Boruff did not have standing to challenge the search of the truck, concluding that he failed to establish that he had a legitimate expectation of privacy in the truck. We stated that "[d]espite his asserted ownership interest, Boruff did everything he could do to disassociate himself from the truck in the event it was stopped by law enforcement officials." Id. at 116. We further noted that "[a]n individual cannot reasonably expect to maintain privacy in a vehicle when he or she has rendered all of the normal incidents of ownership, including title and possession, to another...." Id. at 116-17.

Those facts are indistinguishable from the facts now before us. Maldonado purchased the van but placed title in Moore's name. The shipping crates containing the marihuana were consigned to Moore. Moore drove the van containing the marihuana while Maldonado traveled in another car. Maldonado was not present when the van was stopped and searched. When we apply our earlier reasoning from Boruff, we find that Maldonado does not have standing to challenge the stop and search of the van. Clearly the admission of the challenged evidence was not plain error (if it was error at all). We note in passing that Maldonado's reliance on Padilla to give him standing fails because the theory used by the Ninth Circuit to confer standing on the defendants was disapproved

by the Supreme Court in United States v. Padilla, ____ U.S. ____, 113 S.Ct. 1936, 1937-39, 123 L.Ed.2d 635 (1993).

B. Maldonado - Ineffective Assistance

Maldonado argues that he was denied effective assistance of counsel because his attorney did not file a motion to suppress the evidence obtained from the illegal search and seizure of the van, did not consult sufficiently with him to prepare adequately and investigate all available defenses; failed adequately to investigate the facts and research the applicable law; failed to advise him of his legal rights; and coerced him to waive his rights outside open court. Maldonado also contends that his attorney was ineffective due to a conflict of interest, i.e., being under investigation by the government; and that he (Maldonado) waived his right to object to the conflict involuntarily and unknowingly.

Maldonado did not raise this issue in the district court. Our general rule is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal unless it has been first raised in the district court. United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991). Finding the record to be inadequate to resolve Maldonado's claims, we decline to address them on the merits, albeit we do so without prejudice to his right to raise this issue in a proceeding under 28 U.S.C. § 2255. Id. There is one ground of ineffective assistance asserted by Maldonado that nonetheless may be addressed at this time. As he lacked standing to challenge the search and seizure of the van, he cannot show prejudice based on his attorneys' failure to file a motion to suppress. Pierce,

959 F.2d at 1303.

C. Flores - Sufficiency of the Evidence

Flores argues that the evidence was insufficient to support his convictions; specifically that it was insufficient to establish that he had knowledge of the marihuana in the blue van belonging to Moore, that he was a willing participant in the conspiracy; or that he knowingly possessed the marihuana with intent to distribute it. He contends that FBI Agent Henrie's testimony about Flores' confession was not corroborated, and suggests that the confession was not made voluntarily because he was young and afraid.

Flores made the required motions for acquittal. Therefore the standard of review is "whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Garza, 990 F.2d 171, 173-74 (5th Cir. 1993) (internal quotation and citation omitted).

Flores was convicted under 21 U.S.C. §§ 841(a)(1) and 846. Section 846 requires the government to prove: 1) the existence of an agreement between two or more persons to violate federal narcotics laws; 2) that the defendant knew of the agreement; and 3) that he voluntarily participated in the agreement. United States v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991). Section 841(a)(1) requires the government to prove that the defendant had: 1) knowledge, 2) possession, and 3) intent to distribute the marihuana. Garza, 990 F.2d at 174.

When Moore agreed to cooperate with the government, he called Maldonado for assistance and told him that his van had broken down

and that he (Moore) was at the Lexington Inn. Flores arrived at the Lexington Inn and inquired as to Moore's whereabouts. Flores was observed inspecting the blue van. Roel testified that he and Flores went to Midland to pick up the marihuana from Moore. Agent Henrie testified that Flores confessed that he had gone to Midland to pick up the marihuana. This evidence is sufficient for a reasonable jury to find beyond a reasonable doubt that a conspiracy to possess with intent to distribute marihuana existed between Maldonado, Moore, and Flores; and that Flores knew of the conspiracy and voluntarily participated in it. This same evidence is sufficient to support his conviction for the substantive offense of possession with intent to distribute marihuana. Although Flores may not have physically possessed the marihuana, he is deemed to have possessed it through the possession of Moore, his co-conspirator. Gallo, 927 F.2d at 822.

At trial, Flores did not object to the admission of his confession through the testimony of Agent Henrie, and his brief to us does not raise the issue of the voluntariness of his confession except as it relates to the sufficiency of the evidence. Flores' attorney cross-examined Agent Henrie about the circumstances surrounding the confession, and Flores testified about the giving of the confession, denying Henrie's version. This is an issue of credibility, and the jury was free to believe Henrie's version of Flores' confession, i.e., that Henrie was told by Flores that he went to Midland to pick up the marihuana. We cannot supplant the jury's credibility choice under the instant circumstances. Garza,

990 F.2d at 174.

AFFIRMED.