COMMONWEALTH v. AMAURY GAUTREAUX

Supreme Judicial Court of Massachusetts
941 N.E.2d 616 (2011)

CORDY, J.:

The defendant, Amaury Gautreaux, was born in the Dominican Republic in 1980 and moved to the United States when he was fourteen years of age. His primary language is Spanish and he has never become fluent in English. He is not a United States citizen. On August 27, 2003, he pleaded guilty in the Lawrence District Court to criminal charges arising out of three arrests. Pursuant to a plea bargain struck with the Commonwealth, the defendant received an eleven-month sentence to a house of correction suspended for eighteen months, during which period he was placed on probation. Approximately five years later, on May 26, 2008, the defendant was once again arrested, and on July 8, 2008, he received an order of deportation from the United States Department of Homeland Security. In February, 2009, he moved . . . . to vacate his guilty plea and for a new trial.

In his motion, the defendant claimed that he was never notified of his right as a foreign national to have his consulate informed of his arrests in violation of art. 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (art. 36 or Vienna Convention). The defendant also claimed that although he was in need of an interpreter, none was provided at his plea hearing . . . .

The motion was denied by the same judge who accepted the defendant's guilty pleas. In denying the motion, the judge first concluded that, with respect to the Vienna Convention, there was no relevant case law in Massachusetts regarding its enforceability or remedies for its violation. . . .The defendant appealed, and we transferred the case to this court on our own motion to determine (1) whether art. 36 creates individually enforceable rights, and, if so, what remedy is appropriate for a violation of those rights; and . . . .We conclude that the notifications required by art. 36 must be provided to foreign nationals on their arrest; and, if not provided, a challenge to the soundness of any conviction resulting therefrom may be made in a motion for a new trial. The standard to be applied in such circumstances is the substantial risk of a miscarriage of justice standard, one that the defendant has not met in this case. We also affirm the judge's ruling that the defendant has failed to establish that there was no interpreter at the plea hearing. . . .

The Vienna Convention, negotiated in 1963, governs the establishment of consular relations between nation States (States) and defines the functions of a consulate. . . . The Vienna Convention was ratified by the United States in 1969. . . Once ratified, the Vienna Convention became the "supreme Law of the Land" and binding on the States of the United States. . . . The United States also signed the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement

of Disputes, . . ., which established that the International Court of Justice (ICJ) would have jurisdiction over disputes regarding compliance by the signatory States with the provisions of the Vienna Convention, and made its decisions binding on the parties before it.

Article 36 sets out the procedure to be followed when a foreign national is arrested or detained. It provides in pertinent part that a foreign national shall be notified "without delay" of "his rights," including his right to have authorities of the detaining State notify his consulate of his detention. Art. 36 (1)(b). Once requested to do so, such authorities shall inform the detainee's consulate of his detention "without delay." Id. Thereafter, consular officers shall be free to communicate with and have access to the detainee and to arrange for his legal representation. Art. 36 (1)(c). The Vienna Convention further provides that the rights and obligations it contains "shall be exercised in conformity with the laws and regulations of the receiving State," and that these laws and regulations must "enable full effect" to be given to the intended purposes of art. 36. Art. 36 (2). In order to enable the full effect to be given to art. 36, we conclude that the notifications it requires must be incorporated into the protocols of the State and local law enforcement agencies of Massachusetts. . . .

. . . . [T]he Commonwealth provided the court with a procedural directive issued by the Department of State Police, issued on April 23, 2009, which outlines the process to be followed by the State police when a foreign national is taken into custody. The Commonwealth also informed the court that consular notification training is provided to both State and municipal police officers. The sufficiency of these efforts to satisfy the requirements of art. 36 is not before us in this case.

The Vienna Convention is silent as to remedy for the failure in individual cases to adhere to the provisions of art. 36, where the detainee is subsequently convicted of a crime. See *Sanchez-Llamas v. Oregon,* 548 U.S. 331, 343 (2006) . . . . We have never determined whether the consular notification requirement of the Vienna Convention confers individual rights on foreign nationals that are judicially enforceable. The only Massachusetts case to address in any significant manner the consequences of a violation of art. 36 is *Commonwealth v. Diemer,* 785 N.E.2d 1237 (2003). In *Diemer*, a German national sought to suppress statements he made on grounds of a violation of art. 36. The Appeals Court provided a thorough review of the existing split among jurisdictions on the question whether art. 36 creates individual rights that can be enforced by persons (rather than only by signatory States) but found it unnecessary to decide the question because it concluded (as other courts had) that even if art. 36 created individual rights, the suppression of evidence would not be an available remedy. . . This view was subsequently affirmed by the United States Supreme Court in *Sanchez-Llamas v. Oregon,* . . . . The Appeals Court further concluded that in any event, the defendant had not demonstrated that he was prejudiced by a violation of the treaty. . . .

In *Breard v. Greene,* 523 U.S. 371, 376 (1998), the United States Supreme Court stated that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest," but has since avoided the question. Circuit Courts of the United States Appeals that have decided the question have answered inconsistently. Other Federal District and State courts have weighed in, also with varied results.

Consequently, while it remains far from clear whether art. 36 confers rights on individuals judicially enforceable by them under American law, it is unquestioned that an enforceable right exists for signatory States. The International Court of Justice (ICJ) has heard three cases where signatory States have challenged the application (or lack of application) by the United States of art. 36. See *Case Concerning Avena & Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31, 2004) (*Avena*); *LaGrand* Case (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27, 2001) (*LaGrand*); *Case Concerning the Vienna Convention on Consular Relations* (*Para. v. U.S.*), 1998 I.C.J. 248 (April 9, 1998). The ICJ issued decisions in both *LaGrand* and *Avena*, binding on the United States.

In *LaGrand*, the ICJ concluded that art. 36 of the Vienna Convention not only confers rights on signatory States, but also grants "individual rights" to the States' nationals that "may be invoked in this Court by the national State of the detained person." . . . .More specifically, it ruled:

> "[I]f the United States . . . should fail in its obligation of consular notification to the detriment of [foreign] nationals, . . . it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the [Vienna] Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States."

Subsequently, in the *Avena* case, the ICJ found that the United States had violated its obligations under art. 36 with regard to a large number of Mexican nationals arrested and subsequently convicted of crimes in Texas. As reparation, the United States was required to provide, "by means of its own choosing, review and reconsideration of the convictions and sentences of the [foreign] nationals" that takes into account the violation of rights set forth in art. 36. . . . The ICJ did not limit its holding to the case at hand; indeed, it took care to "re-emphasize a point of importance" that "the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States." . . .

Although a decision of the ICJ is not binding on this court, it is entitled to respectful consideration. . . . The ICJ is the judicial organ designated to resolve

disputes regarding implementation of the Vienna Convention, and as signatory to the Optional Protocol, the United States agreed to be bound by its decisions. We acknowledge and accept the conclusion of the ICJ regarding the obligation that art. 36 creates when clear violations of its notice protocols have been established, that is, to provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation.

Under our procedural rules, a postconviction review may be obtained at any time by filing a motion for a new trial pursuant to rule 30 (b). . . In such a posttrial proceeding, it is incumbent on the foreign national to demonstrate that the failure to comply with art. 36 of the Vienna Convention gave rise to a substantial risk of a miscarriage of justice. . . To demonstrate a substantial risk of a miscarriage of justice in this context, a defendant must show that it is likely that if he had been notified of the rights provided in Article 36 of the Vienna Convention, the result of the criminal proceeding would have been different. At a minimum, this means that the defendant must establish that his consulate would have assisted him in a way that likely would have favorably affected the outcome of his case.

In support of his claim, the defendant asserts that had he "known of his right to consular notification and assistance he would have sought that assistance and presumably, at least, have been advised of the necessity of taking great care in seeking to understand his attorney, the proceedings against him and ways in which he might accomplish this (i.e. his right to an interpreter, etc.)." He has, however, produced no evidence of the practices and protocols of the Dominican Republic Consulate (consulate), or of the advice and assistance it would have provided on notification of the detention of one of its citizens. An assumption with respect to such matters is not evidence, and is woefully insufficient to demonstrate that the outcome of the defendant's case -- his pleading guilty to a significantly reduced set of charges with no sentence of incarceration -- likely would have been different, had he been informed of his right to have his consulate so notified.

Even if we assume that the consulate would have (on such notice) provided the defendant some assistance in defending his case, the principal type of assistance envisioned by the Vienna Convention was afforded to him by virtue of the laws of the Commonwealth and the United States applicable to all persons charged with crimes. Consular officials, it is postulated, will likely have better knowledge of the detaining country's legal system and can therefore help the citizen navigate the law principally through assisting the detainee in retaining counsel. Foreign nationals arrested and detained in the United States are provided with the same constitutional protections as United States citizens, including, in the defendant's circumstances, the right to the prompt appointment of an attorney to represent him throughout the proceedings. . . That was done in this case. Indeed, the defendant met with his counsel on several occasions, and with his assistance negotiated a most favorable plea agreement. . . . Order denying defendant's motion for a new trial affirmed.