UNITED STATES OF AMERICA v. JIMENEZ-NAVA

United States Court of Appeals for the Fifth Circuit
243 F.3d 192 (2001)

EDITH H. JONES, CIRCUIT JUDGE:

Alejandro Jimenez-Nava ("Jimenez-Nava") appeals from his conviction for possession of counterfeit immigration-related documents in violation of 18 U.S.C. § 1546(a). He entered a conditional plea of guilty, reserving the right to appeal the district court's denial of his pretrial motion to suppress. He now argues that the Vienna Convention on Consular Relations ("Vienna Convention"), . . . bestows on foreign nationals individual rights, that his rights were violated, and that exclusion of his incriminating statements to immigration agents is the appropriate remedy. We disagree and affirm his conviction. . . .

On March 7, 1999, Immigration and Naturalization Service ("INS") agents, suspecting that Jimenez-Nava was involved in making fraudulent immigration documents, went to his apartment and introduced themselves. After one agent asked Jimenez-Nava, in Spanish, about his immigration status, Jimenez-Nava admitted that he was an illegal alien from Mexico. The agent ascertained that Jimenez-Nava had no immigration documents, placed him under arrest and read him his *Miranda* rights in Spanish. Jimenez-Nava did not invoke *Miranda* rights and consented to a search of his apartment.

During the search, Jimenez-Nava was given his *Miranda* warnings a second time and advised that he could tell the agents to stop at any time. Jimenez-Nava allegedly told the agents that he would show them where the fraudulent documents were made. At the end of the search, Jimenez-Nava signed a consent-to-search form and was transported to INS to be processed. Jimenez-Nava later stated at the suppression hearing that he had not wanted to sign this form.

At INS, Jimenez-Nava was processed by a different agent who spent twenty to twenty-five minutes with him. Jimenez-Nava was given a standard INS notice of rights form written in Spanish that advised him of his right to legal representation and right to communicate with a consular officer of his country. Jimenez-Nava's initials appear on this notice of rights, next to a box that he checked, admitting that he was in the United States illegally and that he waived his right to a hearing before a judge. His signature also appears on a standard INS processing form.

Subsequently, one of the agents who arrested Jimenez-Nava returned to the INS and asked Jimenez-Nava to take him to a document lab. Jimenez-Nava showed them to an apartment and orally agreed to a search of it. Jimenez-Nava now denies that he

gave consent.

After this search, the agents returned with Jimenez-Nava to the INS office, continued to question him, and once again gave him his *Miranda* rights. An agent then wrote Jimenez-Nava's statement: he was from Hidalgo, Mexico and admitted he was not a United States citizen; he discussed how he entered this country and his plans to work for a man named Miguel Hernandez by selling false immigration and social security cards. At some point, Jimenez-Nava refused to answer further questions and ended the interview.

Jimenez-Nava testified at the suppression hearing that he was shown the form informing him that he could speak to a consular officer after he was asked questions about Hernandez and the selling of fraudulent documents. During cross-examination, Jimenez-Nava testified that after each of three *Miranda* warnings, he declined to request a lawyer. He admitted that he knew, from the form, that he could have access to a Mexican consular official, but he did not want one. However, he also testified that he did not know the function of consular officers and that he did not want to speak to the consular officer because the agents were treating him like an immigrant and he was not concerned about being deported. He stated that he would have wanted to contact a consular official had he known that he had a right to speak to one about the document fraud investigation.

The suppression hearing was convened because, after his indictment, Jimenez-Nava contended that he was prejudiced by a violation of his treaty rights under the Vienna Convention. He requested suppression of his statements to the INS agents and the evidence taken from the search at the second apartment. The district court denied relief, ruling both that the treaty does not require suppression and that Jimenez-Nava consented to the apartment search. Jimenez-Nava entered a conditional guilty plea. He was sentenced to a twenty-four month term of imprisonment and three years' supervised release. Jimenez-Nava has timely appealed the court's application of the Vienna Convention. . . .

The Vienna Convention is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. *See United States v. Lombera-Camorlinga,* 206 F.3d 882, 884 (9th Cir. 2000). Mexico is a signatory nation. The treaty governs "the establishment of consular relations, [and] defines a consulate's functions in a receiving nation." *United States v. Alvarado-Torres,* 45 F. Supp. 2d 986, 988 (S.D. Cal. 1999). Jimenez-Nava asserts that Article 36 of the treaty bestows a private, judicially-enforceable right on foreign nationals to consult with consular officials. He argues that because this right was violated, his post-arrest statements and tangible evidence should have been suppressed. These are issues of first impression for this circuit. . .

Ratified treaties become the law of the land on an equal footing with federal statutes. U.S. Const. art. VI, cl. 2. They are to be construed initially according to their

terms. . . . Treaty construction is a particularly sensitive business because international agreements should be consistently interpreted among the signatories. "Treaties are contracts between or among independent nations." . . . As such, they do not generally create rights that are enforceable in the courts. *United States v. Li,* 206 F.3d 56, 60 (1st Cir. 2000); . . . .

Principally because of the references to "rights" in Article 36, the circuit courts have so far declined to decide whether the Vienna Convention intended to enact individually enforceable rights of consultation. . . . A strong argument has been made that such diffidence is unnecessary and that the Vienna Convention is not ambiguous as to whether it creates private rights. In *Li*, Judges Selya and Boudin stated:

> Nothing in [the] text explicitly provides for judicial enforcement of . . . consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a 'right' of access, but these references are easily explainable. The contract States are granting each other rights, and telling future detainees that they have a 'right' to communicate with their consul is a means of implementing the treaty obligations as between States. Any other way of phrasing the promise as to what will be said to detainees would be artificial and awkward.

Li, 206 F.3d at 60, 66. (Selya, J. & Boudin, J., concurring). In any event, as these judges pointed out, even if the treaty is ambiguous, the presumption against implying private rights comes into play. Finally, as both the majority and concurring judges in *Li* recognized, the U.S. State Department has consistently taken the position that the Vienna Convention does not establish rights of individuals, but only state-to-state rights and obligations. The State Department's view of treaty interpretation is entitled to substantial deference. . . .

Jimenez-Nava's arguments in support of individually enforceable rights ultimately emphasize the treaty's ambiguity. First, by dwelling on the plain language concerning "rights" in Article 36, Jimenez-Nava must discount the equally plain language in the Preamble that the treaty's purpose "is not to benefit individuals". Appellant would confine the limitation to consular officials, but that interpretive route hardly assists him, since consular officials are the specific beneficiaries of many of the treaty provisions. If the treaty cannot benefit them by creating individually enforceable rights, how can it intend to confer enforceable rights on all foreign nationals detained in the receiving state? . . .

In his final thrust, Jimenez-Nava points out that the State Department's manual on the treatment of foreign nationals advises arresting officers to inform detainees of their right to consular communication pursuant to the treaty. U.S. Dept. Of State, Foreign Affairs Manual § 411 (1994). Further, a "Memorandum of

Understanding on Consular Protection of Mexican and United States Nationals" was entered into between this country and Mexico to adopt procedures and views concerning communication between consuls and foreign nationals. . . . Such documents do no more than express this country's laudable determination to abide by the treaty. But the implementation of the treaty by the Federal government is wholly different from the implication that it may be enforced in court by individual detainees.

The sum of Jimenez-Nava's arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained foreign national and his consular office. Thus, the presumption against such rights ought to be conclusive. If this conclusion suffers from any defect, however, it is beyond dispute -- among the federal circuit courts -- that analogizing the proffered right to consult with *Miranda* rights is utterly unfounded. . . .

Jimenez-Nava argues that his right of consular communication and notification is a "fundamental right," analogous to the Fifth and Sixth Amendment, which merits protection through use of the exclusionary rule. He contends that the terms of the Vienna Convention require courts to elect a remedy to "enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended." Vienna Convention, Art. 36(2). "Full effect," he argues, requires exclusion in criminal prosecutions of statements given without appropriate information about consultation rights.

All of our sister circuits have held that suppression of evidence is not a remedy for an Article 36 violation. . . . "The exclusionary rule was 'not fashioned to vindicate a broad, general right to be free of agency action not 'authorized' by law, but rather to protect specific, constitutionally protected rights.'". . . We agree that "there is no indication that the drafters of the Vienna Convention had these 'uniquely American rights in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted." . . . Absent an express provision in the treaty, the exclusionary rule is an inappropriate sanction. . . .

Jimenez-Nava argues that suppressing his statements constitutes the only effective method of enforcing the treaty. Article 36 does not articulate a specific remedy. The treaty states that the rights of consultation "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Vienna Convention, Art. 36(2). The treaty leaves implementation to the discretion of each signatory state so long as its "purposes" to ensure free communication and access are given full effect. "Yet, the treaty does not link the required consular notification in any way to the commencement of police interrogation. Nor does the treaty, as *Miranda* does, require law enforcement officials to cease interrogation once the arrestee invokes

his right." . . . Suppressing evidence in a criminal trial does not further the treaty's purposes.

Finally, most countries do not have a suppression remedy. . . . No other signatories to the Vienna Convention have suppressed statements under similar circumstances and two have rejected this remedy. . . . If suppression becomes the remedy in the United States, the treaty would have an inconsistent meaning among the signatory nations. Thus, refusing to resort to the exclusionary rule promotes "harmony in the interpretation of an international agreement." . . .

For the foregoing reasons, the district court did not err by denying Jimenez-Nava's motion to suppress.

AFFIRMED.