

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000251-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 00-CR-00119

JOSE ANTONIO ORAZCO SANCHEZ
A/K/A SALVADOR ORISCO SANCHEZ

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, BAKER, AND JOHNSON, JUDGES.

BARBER, JUDGE: The Commonwealth filed an interlocutory appeal from the pretrial suppression of evidence by the trial court. This evidence includes statements given by Appellee Jose Antonio Sanchez to the police, which the Commonwealth alleges were "lies." Sanchez, who is primarily a Spanish speaker, asserts that at the time his statements were made, he did not have a

properly trained interpreter and had not been given an adequate Miranda warning.

Prior to trial, defense counsel requested appointment of an interpreter for Sanchez. Upon motion by the Commonwealth, the trial court appointed several different interpreters who were used during pre-trial proceedings. One of these trained and qualified interpreters reviewed Sanchez' Miranda warning, and the initial custodial interview with Sanchez to determine the accuracy of the translation provided.

Following review of the custodial interrogation by the court-appointed interpreter, Sanchez stated that his initial statements to the police were made prior to his having been given and having understood his Miranda warnings. At the suppression hearing, the local sheriff who had questioned Sanchez testified that he believed Sanchez understood English, because Sanchez was able to answer some questions asked exclusively in English. The sheriff had no independent knowledge of Sanchez' ability to understand or communicate in English. The sheriff and other officers involved in the interrogation noted that Sanchez did not receive a translation of every question made, and that some of the time Sanchez listened to a question posed in English and responded in English without benefit of a translation. The custodial interpreter admitted during the suppression hearing that she injected her

own opinions into the translation and that she informed the officers that what Sanchez was saying did not always make sense to her.

The court-appointed translator reviewed the interpreter's actions during the interview with the police, and found that the volunteer custodial interpreter used by the police did not conform to the necessary standards. The Commonwealth argued that this did not matter, as the Supreme Court of Kentucky has not yet imposed standards upon translation. The court-appointed interpreter noticed at least forty-eight (48) instances where the interpreter used by the police and sheriff "either omitted information, added information, changed what was said or distorted the interrogation to some extent." The court-appointed interpreter noted that the custodial interpreter did not accurately impart the meaning of questions or answers given during the interrogation. The court-appointed interpreter also noted that "there are significant amounts" of information omitted in the translation. Review of the audiotapes in court also showed that there was a significant amount of distortion and vibration making it difficult for the interpreter to understand what was being said by the parties.

The Commonwealth makes much of the fact that the court-appointed interpreter did not ascertain whether each and every

question and answer was translated word for word, but rather focused on inaccuracies and areas of difficulty. The Commonwealth also complains that the court-appointed interpreter could not specify an absolute percentage of questions and answers translated accurately. Because there were numerous improper translations, lack of adequate interpretation and failure to provide either the defendant or the interrogating officers with the accurate meaning of what was said, the Commonwealth's objections are irrelevant. Sanchez was clearly not provided with a reasonably competent interpreter.

In its order suppressing Sanchez' statement, the trial court noted that Sanchez may not adequately have been provided his Miranda rights; Sanchez may not have fully understood his rights; the interpreter was not properly trained; Sanchez was not actually told that he had the right to have an attorney appointed for him free of charge; and that the trial court was not comfortable with whether Sanchez was aware that he had a right to have his attorney present during questioning, or whether he knew he could stop the questioning at any time and request an attorney.

The Commonwealth claims that the trial court's rulings were not supported by substantial evidence, and that the court's legal conclusions were wrong. Despite evidence to the contrary in the record, the Commonwealth asserts that Sanchez could

communicate fairly well in English. Based on this assertion, the Commonwealth argues that the partial interpretation provided to Sanchez was sufficient.

The law is clear in holding that the Commonwealth has the burden of proving that the defendant understood his Miranda rights and freely and deliberately waived those rights. See: Mills v. Commonwealth, Ky., 996 S.W.2d 473, 482 (1999). The transcript of the translation of the Miranda rights as actually told to Sanchez by his interpreter reveals that crucial portions of the Miranda rights were not fully explained. The trial court also noted in her ruling that "although the officers obtained a written waiver of rights signed by the Defendant, which was executed on December 3, 2000, prior to the tape recorded interview, this waiver of rights was provided to the Defendant in English and it is not clear whether the Defendant is capable of reading and understanding the English language."

The English translation of the Miranda rights actually given to Sanchez shows its insufficiency clearly:

You have the right uh, to remain in silence, uh

Anything that you say can be (counted/told) against you and uh, against you also in the procedures.

You have the right to consult an attorney, uh, before to make any conversation or any um, uhh . . . court that's going to involve it uh, or to question eh, any question.

You also have ummm . . . right to have your lawyer

whenever you want or to ask questions or when they are going to ask you questions.

Uh, number four says, uh, you can ask the court to assign you an attorney and you have the right to uh, to have one.

And number five says, um, you can stop asking questions in any (age in time/epoch) or um, refuse uh to respond to any type of question or uh, to ask for an appointment with your attorney before answering.

The custodial interpreter was asked by Sanchez to repeat #2, and she stated "all that you say can be used against you, and um, any other procedure in court." This version of a Miranda warning was insufficient to properly apprise Sanchez of his rights.

The United States Supreme Court has recently reaffirmed the need for Miranda warnings. The Supreme Court stated:

[W]e laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "Miranda rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Dickerson v. United States, 530 U.S. 428, 479, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Failure to fully and completely inform a defendant of his rights requires suppression of statements made prior to a full and complete warning. Wells v.

Commonwealth, Ky., 892 S.W.2d 299, 302 (1995); United States v. Tillman, 963 F.2d 137, 140 (6th Cir. 1992). The fact that even the custodial interpreter noted that she did not understand what Sanchez was saying indicates that there were difficulties in the translation. For this reason, it would have been improper for the trial court to deny the motion for suppression.

Other jurisdictions have faced a similar problem. The Wisconsin Supreme Court held that the government bears the burden of proving that a foreign language Miranda warning was legally sufficient. Failure to meet the burden of proof requires suppression of any statement made. State v. Santiago, 556 N.W.2d 687 (Wisc. 1996). See also: People v. Mejia-Mendoza, 965 P.2d 777 (Colo. 2000).

Sanchez' second issue on appeal, that of whether the Commonwealth denied Sanchez his rights under Article 36 of the Vienna Convention of Consular Relations, need not be addressed, as we affirm the suppression of the statement due to failure to provide Sanchez with a full and complete Miranda warning prior to questioning.

For the foregoing reasons, the Order of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Albert B. Chandler, III
Attorney General of Kentucky
Frankfort, Kentucky

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Robert V. Bullock
Thomas D. Bullock
Lexington, Kentucky