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A Taste of Arizona in the 10th Circuit

The recent 10th Circuit Court of Appeals case of *US v. Silva-Arzeta* brings both further illumination and concerns to the recent Arizona immigration enforcement bill. There are many in New Mexico clamoring for Arizona style immigration enforcement in our state. This case will provide little comfort to those already concerned about this prospect and the forfeiture of individual rights that it would bring.

In a nutshell, the defendant was stopped by officers while in his car leaving his apartment on suspicion of drug trafficking. The officers questioned the defendant in English. They searched his vehicle finding meth and $1038 in cash. The officers alleged that the defendant then consented to the search of his apartment. Really! That's what they alleged. They stopped him in his car, he is drug trafficker, and he consented to the search of his apartment. Drug dealers everywhere would be appalled by his lack of professionalism. All this was done in English.

After he was arrested, the defendant was finally provided a Spanish speaking interpreter for further questioning at the station. The interrogation at the station was conducted entirely in Spanish. The officers that obtained the consent to the search, searched the defendant's car and apartment and placed him under arrest stated that the defendant's English was fine. It is not clear why the station interrogation was in Spanish given the defendant's mastery of the English language. Perhaps it was because he did not speak English as testified to by his employer who stated that the defendant spoke little English and that he had to use a bilingual employee to assist him in communicating with the defendant on the job.

The defendant was acquitted of all charges in the first trial. The state was able to obtain a retrial and the defendant was then convicted on all counts. The defendant appealed arguing that all evidence seized in the case was seized in violation of the 4th Amendment prohibitions against unlawful search and seizure. The defendant argued that the consent to the search was not and could not be consensual due to his inability to adequately understand English. The 10th Circuit affirmed the conviction.

The court recognized that any warrantless search is presumed unreasonable. One exception of course is a consensual search. The Court stated that "Whether voluntary consent was given is a question of fact, determined by the totality of the circumstances and reviewed for clear error." In short, the question is left to the jury who judgment

should not be second guessed. The most obvious question being which jury should we rely on? The first jury that acquitted him on all counts, or the second jury that convicted him?

The court recognized established case-law that "invalidated searches based on consents ... given by Hispanics who did not comprehend what they were doing." Despite the case-law, the court affirmed the conviction stating "Mr. Silva-Arzeta could converse in English sufficiently well to consent to the search." Naturally, no guidance was provided for the definition of "sufficiently well" effectively leaving it up the judgment of law enforcement.

Keep in mind this is what happened here. The defendant's English speaking ability was entirely evaluated by the arresting officers. The testimony of the defendant's employer was ignored as was the defendant's own testimony. And none of the conversations with the defendant were recorded. Not at the scene, and not at the station during the Spanish language interrogation. None of the officers saw fit to record these conversations despite the ease with which it can be done with the officers' standard issue belt-tapes.

These issues are even more problematic when the court states: "Mr. Silva-Arzeta's concerns, however, are the bread and butter of litigation. Much of the controversy at trials could be minimized, if not eliminated, if all acts were videotaped and all conversations recorded." The court further recognized approvingly the defendant's citation of Justice Department guidelines that suggest this practice. However, the court dismissed these as mere suggestions of best practice that do not give rise to constitutional concerns.

In short, a Spanish speaker has no right to protection against unlawful search and seizure. The defendant could be held to have consented based purely upon the self-serving testimony of the arresting officers as in this case where there was no mention of other corroborating witnesses to the defendant's ability to understand and speak English. Finally, officers are not required to record any of the encounter, unless they so choose despite the obvious evidentiary value of a recording.

The folks of New Mexico might want to keep an eye on the immigration enforcement debate in the upcoming elections. It's not just drug dealers that will suffer if New Mexico heads down this path of Arizona. It is not just drug dealers that benefit from the 4th Amendment protections against unlawful search & seizure. Use your imagination, I am out of space, and out of time.

Main Office:
400 Gold Ave. SW
Suite 500
Albuquerque, NM 87102
(505) 242-5958

http://www.albuquerquecriminallawyerblog.com/