

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

VICTOR ALFONSO DUENAS-FLORES,)
)
 Petitioner,) NOT FOR PUBLICATION
)
 v.) No. C-2005-1
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 28 2007

MICHAEL S. RICHIE
CLERK

OPINION GRANTING CERTIORARI

A. JOHNSON, Judge.

Petitioner, Victor Duenas-Flores, is a Mexican national. On August 9, 2003, a vehicle he was driving crossed the centerline of a highway and struck another vehicle head-on. The driver of the second vehicle died. A blood test revealed Duenas-Flores had a blood alcohol content of 0.21. As a result of the fatal collision, Duenas-Flores was charged with the crime of first-degree manslaughter in violation of 21 O.S. 2001, § 711.

On August 12, 2004, Duenas-Flores entered a blind plea of guilty to the charge in Blaine County District Court Case No. CF-2003-52, before the Honorable Ronald Franklin, District Judge. Judge Franklin sentenced Duenas-Flores to forty-five years imprisonment. Duenas-Flores timely moved to withdraw his plea and the district court denied that motion.

Following denial of his motion to withdraw his plea, Duenas-Flores petitioned this Court for certiorari claiming: (1) that his plea was rendered involuntary by the State's failure to advise him of his rights to contact Mexican

consular officials as required by Article 36 of the Vienna Convention on Consular Relations (VCCR);¹ and (2) his forty-five year sentence was excessive. Finding an inadequate record on the VCCR claim, this Court remanded the case to the district court for an evidentiary hearing.

The district court conducted the hearing on February 8 and 16, 2006. In its findings of fact and conclusions of law, the district court determined that Duenas-Flores had not been notified without delay of his right to contact Mexican consular officials as required by the VCCR. The district court held, however, that Duenas-Flores could not show prejudice from that violation because the claim was foreclosed as a non-jurisdictional claim through the act of entering the plea.

After this Court received the record of the evidentiary hearing and the district court's findings of fact and conclusions of law from that proceeding, Duenas-Flores and the State were directed to file supplemental briefs.

¹ The Vienna Convention on Consular Relations is a federal treaty that is binding on the courts of this State under the Supremacy Clause of the United States Constitution. *See Sanchez-Llamas v. Oregon*, ___ U.S. ___, 126 S.Ct. 2669, 2680, 165 L.Ed.2d 557 (2006) ("it is well established that a self-executing treaty [such as the VCCR] binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants"). In relevant part, Article 36 of the treaty states:

If he [the detained or arrested person] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. **The said authorities shall inform the person concerned without delay of his rights** under this sub-paragraph . . .

Article 36, 21 U.S.T. 77, 1969 WL 97928 (U.S. Treaty), T.I.A.S. No. 6820 (emphasis added).

Supplemental briefing was complete with filing of the State's brief on August 28, 2006.

The crux of Duenas-Flores's claim is that he was advised by his attorney that in order to mount a defense to the charge of first-degree manslaughter he needed an expert witness to challenge the blood alcohol test results that would form the key piece of evidence against him at trial. Duenas-Flores claims he was pressured to enter a guilty plea after the district court denied his application for state funds for an expert because neither he nor his family had the funds necessary to hire such an expert. Duenas-Flores contends that had he been notified of his right to contact Mexican consular officials, he would have done so and the Mexican government would have assisted him in retaining the services of an expert.

In *Torres v. State*, 2005 OK CR 17, ¶ 4, 120 P.3d 1184, 1186, a capital postconviction proceeding, we held that prejudice is "**presumed**" to flow from the State's failure to notify a defendant of his VCCR rights if the defendant: (1) did not know he could have contacted his consulate; (2) would have done so if he had known; and (3) the consulate would have taken specific actions to assist in his criminal case. Logically, in the context of a guilty plea proceeding where we review the claim only to the extent necessary to determine whether the plea was entered knowingly and voluntarily, to obtain relief for a VCCR violation, the prejudice resulting from that violation must implicate the knowing or voluntary nature of the plea.

The record of the proceeding below amply supports the district court's factual conclusion that that Duenas-Flores was not advised by the State of his consular access rights "without delay" as required by Article 36 of the VCCR. We therefore defer to that finding and accept it. We disagree, however, with the district court's legal conclusion that Duenas-Flores is not entitled to relief because his claim, a non-jurisdictional claim, was foreclosed through entry of the plea.

In this instance, despite having found that Duenas-Flores was not advised of his consular access rights as required by the VCCR, the district court disposed of Duenas-Flores's claim through use of a rule of procedural default rather than conducting an inquiry into whether the VCCR violation and resulting prejudice implicated the knowing and voluntary nature of the plea. This was error.

Here, the record shows, and there is no dispute, that Duenas-Flores was not advised without delay of his right to contact the Mexican consulate as required by Article 36 of the VCCR. Furthermore, the record shows that Duenas-Flores would have done so if he had been so advised. Additionally, through the statement and affidavit of Mexican consular official Fernando Gonzalez the record also shows that the Mexican government's Kansas City consulate likely would have assisted Duenas-Flores in obtaining the services of an expert witness had it been informed that Duenas-Flores had been detained and was facing homicide charges.

Under these circumstances, we find that Duenas-Flores has met his burden under *Torres*. He has thereby made a showing sufficient for us to conclude that had he been properly advised of his Article 36 rights under the VCCR, he would have opted to proceed to trial rather than plead guilty. As a remedy for the State's failure to comply with Article 36 of the VCCR, therefore, we find that Duenas-Flores is entitled to withdraw his plea.

Because we grant relief on and vacate the judgment and sentence on the VCCR issue, we do not reach Duenas-Flores's claim that his forty-five year sentence is excessive.

DECISION

The Petition for the Writ of *Certiorari* is **GRANTED**. The Judgment and Sentence is **VACATED**. The case is **REMANDED** with directions that Duenas-Flores be permitted to withdraw his guilty plea and that the district court conduct further proceedings consistent with this opinion.

Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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OPINION BY: A. JOHNSON, J.

LUMPKIN, P.J.: Dissent

C. JOHNSON, V.P.J.: Concur

CHAPEL, P.J.: Concur

LEWIS, J.: Concur

LUMPKIN, PRESIDING JUDGE: DISSENT

I must respectfully dissent to the Court's action in this case. The Court's decision seems to turn on the subjective "without delay" wording in Article 36 of the VCCR rather than the objective actions that actually took place in this case.

When the District Court denied Petitioner's request for an expert, it advised Petitioner and his attorney they should contact the Mexican Consulate to seek assistance. The evidentiary hearing in this case reveals Petitioner's attorney did contact the Mexican Consulate in Kansas City but never received a return phone call from them. This is definitive proof that at the time when it mattered, the Consulate would not and did not provide assistance. To accept the assertion after the fact that the Consulate would have provided assistance is just disregarding the truth of what actually happened.¹ I surmise that in every case of this type the Mexican Consulate would, after the fact, say it would have provided assistance if contacted. However, the facts of this case are that when contacted prior to the plea, the Mexican Consulate would not even return a phone call.

Even under the *Torres*² extremely generous rule, to which I previously dissented, no relief is warranted.

¹ The evidentiary hearing reveals via a letter and affidavit from the Mexican Consulate that the only assistance it would have provided at the time would have been a phone call to Petitioner or his attorney. They would not have provided an expert witness.

² 2005 OK CR 17, 120 P.3d 1184.

I would deny Certiorari.