



Police Law Bulletin



Durham Police Department

Police Attorneys' Office

Arnetta J. Herring, Senior Police Attorney

Toni M. Smith, Police Attorney

In this issue:

Violation of Detained Foreign National's Right to Have Consular Officials Notified Did Not Require Suppression of Statements – Pgs. 1-2

Double Jeopardy Did Not Bar Convictions for Both Malicious Conduct by a Prisoner and Habitual Misdemeanor Assault Based On Same Conduct – Pg. 2

Evidence Supported Convictions for Burglary and Felonious Breaking or Entering Because Defendant Could Not Have Reasonably Believed That Thirteen-Year-Old Victim Had Authority to Consent to Defendant's Entry Into Victim's Parent's Home For Purpose of Engaging in Sex With Her;

Sufficient Evidence of Constructive "Breaking" for Burglary When Thirteen-Year-Old Victim of Statutory Rape and Sex Offenses Opened Bedroom Window Pursuant to Defendant's Instructions – Pgs. 3-4



United States Supreme Court



A Violation of a Detained Foreign National's Right to Have Officials of His Country's Consulate Notified of His Detention Does Not Require the Suppression of Statements the Detainee Makes to Police

Sanchez-Llamas v. Oregon, No. 04-10566 (28 June 2006).

Moises Sanchez-Llamas is a Mexican national (a person from Mexico who is not a United States citizen). In 1999, he was arrested after an exchange of gunfire with police. Officers did not inform him that he could ask to have the Mexican Consulate notified of his detention. During interrogation, he made incriminating statements regarding the shootout.

Before his trial for attempted murder and other offenses, Sanchez-Llamas moved to suppress his incriminating statements on the grounds that authorities had failed to comply with Article 36 of the Vienna Convention regarding consular notification and access. The trial court denied the motion and Sanchez-Llamas was convicted and sentenced to twenty years in prison. The Oregon Court of Appeals and State Supreme Court both affirmed the trial court's denial of his motion to suppress.

In 1997, Mario Bustillo, a Honduran national, was identified by several witnesses as having beaten a man to death with a baseball bat as the man stood outside a restaurant smoking a cigarette in Springfield, Virginia. Bustillo was arrested and charged with murder. Authorities never informed him that he could request to have the Honduran Consulate notified of his detention.

Bustillo was convicted of first degree murder and sentenced to thirty years in prison. His conviction was affirmed on appeal. Bustillo then filed a writ of habeas corpus in state court and argued, for the first time, that authorities had violated his right to consular notification under Article 36 of the Vienna Convention. The state habeas court determined that Bustillo was barred from arguing the issue because he had failed to raise the claim at trial or on appeal. Bustillo appealed to the Virginia State Supreme Court who also refused to entertain his claim.

The United States Supreme Court agreed to consolidate the two cases and consider the defendants' arguments as they relate to the Vienna Convention issue.

The Court held that ordering suppression of the defendants' statements was not an appropriate remedy for violation of the detainees' rights to consular notification under Article 36 of the Vienna Convention. The Court determined that it has no authority to create a remedy for violation of the treaty applicable in state court proceedings. This is due to the fact that federal courts have no authority over state judicial proceedings and may only intervene to correct constitutional wrongs. The Court went on to reason that even if it had the authority to impose a remedy for violation of the treaty upon the States, it did not believe the exclusionary rule was the proper recourse. The exclusionary rule has primarily been used to deter constitutional violations. Article 36 of the Vienna Convention though has, at best, only a remote connection to the interests protected by the Fourth and Fifth Amendments i.e. the gathering of evidence. In addition, the Court felt that the reasons for suppressing evidence when there are Fourth and Fifth Amendment violations are absent in the consular notification context. Coerced confessions are excluded because they are disapproved of by the Court and because they tend to be unreliable. The fruits of an unreasonable search are excluded on the theory that, without a strong deterrent, law enforcement might too readily disregard the constraints of the Fourth Amendment. However, the failure to inform a defendant of his consular notification rights is unlikely, with any frequency, to produce unreliable confessions. And, unlike in the search and seizure context, where the need to obtain valuable evidence might tempt law enforcement to transgress Fourth Amendment limitations, police win little, if any, practical advantage from violating Article 36. The Court also noted that the interests Article 36 advances are effectively protected by other constitutional and statutory requirements - many of which are enforced by the exclusionary rule. Finally, suppression is not the only means of vindicating Article 36 rights. A defendant can raise a violation of his rights to consular notification as part of a broader challenge to the voluntariness of his statements to police. In addition, political and diplomatic avenues have historically been used as the primary means of enforcing international treaties.

*Note – North Carolina courts, as well as most federal circuit courts, have denied defendants' motions to suppress incriminating statements based upon alleged violations of the Vienna Convention. However, note that the Supreme Court suggested in the above case that defendants might raise a failure by the police to notify them of their consular rights as part of a claim that incriminating statements made by them were not voluntarily given and, therefore, a violation of the 14th Amendment. Officers are encouraged to familiarize themselves with and apply consular notification and access rights of foreign nationals. These obligations are explained in detail at http://travel.state.gov/consul_notify.html A summary of these materials can also be found on the officers' supplemental website under the Department Information section, Legal Updates subsection.

North Carolina Court of Appeals

Double Jeopardy Did Not Bar Convictions for Both Malicious Conduct by a Prisoner and Habitual Misdemeanor Assault Based On Same Conduct

State v. Artis, ___ N.C. App. ___, 622 S.E.2d 204 (6 December 2005).

The defendant, while an inmate in a county detention center, threw his urine at a detention officer. The defendant was convicted of malicious conduct by a prisoner and habitual misdemeanor assault; both offenses were based on the defendant's throwing of the urine. The court ruled that double jeopardy did

not bar convictions for both malicious conduct by a prisoner and habitual misdemeanor assault based on the same conduct.

Evidence Supported Convictions for Burglary and Felonious Breaking or Entering Because Defendant Could Not Have Reasonably Believed That Thirteen-Year-Old Victim Had Authority to Consent to Defendant's Entry Into Victim's Parent's Home For Purpose of Engaging in Sex With Her;

Sufficient Evidence of Constructive "Breaking" for Burglary When Thirteen-Year-Old Victim of Statutory Rape and Sex Offenses Opened Bedroom Window Pursuant to Defendant's Instructions

State v. Brown, ___ N.C. App. ___, ___ S.E.2d ___ (21 February 2006).

Defendant began an Internet correspondence with the victim, D.N.K. D.N.K.'s online username, at the time, was "I'm sexy girl." Defendant initiated the correspondence by sending D.N.K. a message saying, "A sexy girl can make men do unbelievable things." When defendant informed D.N.K. that he was 45 years old, she told him that he was too old to have a relationship with her, but that they could still be friends. Later, she told him that she was 13 years old. The two continued to correspond over the Internet for about a month. Defendant told D.N.K. that he wanted to have sex with her. He encouraged her to sneak out of her parent's house to meet him and D.N.K. refused, but the two then made plans for the defendant to come to D.N.K.'s house. As previously arranged, defendant signaled D.N.K. with a red penlight through the basement window of her house. When she saw the light, D.N.K. opened the basement door for the defendant and defendant entered the home. D.N.K. invited defendant to her bedroom. Defendant instructed D.N.K. to go upstairs, close her bedroom door, turn off the lights and opened the window. After D.N.K. did so, defendant climbed through the bedroom window. The defendant hid in D.N.K.'s closet until he felt certain that her parents were asleep. The two then engaged in oral sex and sexual intercourse. Two nights later similar events reoccurred; and again approximately a week afterwards. The day following the last incident, D.N.K.'s parents learned about the relationship and called the police.

Following a jury trial, defendant was convicted of first degree burglary, two counts of felonious breaking or entering, indecent liberties with a child, statutory sexual offense against a 13, 14 or 15 year old, and three counts of statutory rape of a 13, 14 or 15 year old.

Defendant appealed and argued, among other points, that the State failed to present sufficient evidence to prove either burglary or breaking or entering because D.N.K., a resident of the house, consented to his entry. The Court noted that it is correct that a person entering a residence with the good faith belief that he has the consent of the owner occupant or that person's authorized agent cannot be charged with breaking or entering. However, our courts have recognized that a child who has a room in his or her parent's house does not have unlimited authority to allow entry to visitors. Courts considering consent to entry given by a son or daughter have focused on the purpose of the entry and whether the child had authority to consent to entry for that purpose. In the case at hand, there was sufficient evidence for a jury to find that the defendant could not have reasonably believed that D.N.K. had authority to allow him entry to further his purpose of committing statutory rape. Defendant's covert actions such as arriving late at night, wearing camouflage, signaling D.N.K. with a penlight, taking precautions to turn off lights, and hiding in D.N.K.'s closet all suggest that he did not believe D.N.K. had full authority to allow him to be in her parent's house.

Defendant also argued that he did not “break” into D.N.K.’s parent’s house because he entered through the open basement door and then re-entered through D.N.K.’s open bedroom window. Therefore, he contended, the trial court should have dismissed the burglary charge because burglary requires both breaking and entering. The Court noted that a “constructive” breaking occurs when an opening is made, not by the defendant, but by some other person acting at the direction, express or implied, of the defendant, or who is acting in concert with the defendant. In the present case, it was reasonable for a jury to conclude that a constructive breaking occurred. D.N.K., a minor, opened the basement door to defendant as they had prearranged, and then, following his instructions, opened her bedroom window for him. The window and door were only ajar because defendant induced D.N.K. to open them and, as discussed above, defendant’s behavior showed that he knew D.N.K. lacked authority to consent to his entry.