[Cite as *State v. Alhajjeh*, 2010-Ohio-3179.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93077

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARWAN ALHAJJEH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512675

BEFORE: Dyke, P.J., Jones, J., and Cooney, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, P.J.:

{¶ 1} On July 3, 2008, defendant was indicted for murder, felonious assault, and tampering with evidence, in connection with the death of his father-in-law, Karim Khaled Salman, an employer at a convenience store in Cleveland. Defendant pled not guilty at his July 9, 2008 arraignment, and moved to suppress the written and oral statements that he made to police. Following an evidentiary hearing, the trial court denied the motion and, on February 17, 2009, defendant withdrew the not guilty plea and entered a plea of no contest to the charges. The trial court found defendant guilty of all three charges and sentenced him to a total of twenty years to life imprisonment.

{¶ 2} Defendant now appeals and assigns seven errors for our review.

{¶ 3} Defendant's first assignment of error states:

{¶ 4} "The Cleveland Police violated Article 36 of the Vienna Convention when it failed to inform appellant of his right to contact the Jordanian Consulate upon his detention and/or arrest on June 4 and June 19 and thus his statement must be considered involuntarily given."

{¶ 5} "The trial court erred in denying the appellant's motion to suppress that was obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the federal Constitution."

{¶ 6} In 1969, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention or Convention), Apr. 24, 1963, (1970) 21 U.S.T. 77, T.I.A.S. No. 6820, and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol

or Protocol), Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820. *Medellín v. Texas* (2008), 552 U.S. 491, 516, 128 S.Ct. 1346, 170 L.Ed.2d 190. Article 36 of the Convention provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his righ[t]" to request assistance from the consul of his own state. Id.

{¶ 7} The Optional Protocol provides a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convention, Art. I, 21 U.S.T., at 326. Under the Protocol, such disputes "shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] *** by any party to the dispute being a Party to the present Protocol." Id.

{¶ 8} Article 36(1)(b) of the Vienna Convention on Consular Relations provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his rights under this sub-paragraph." Article 36(2) specifies: "The rights referred to in paragraph 1 *** shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso *** that the said laws *** must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

{¶ 9} In *Sanchez-Llamas v. Oregon* (2006), 548 U.S. 331, 126 S.Ct. 2669, 165 L.Ed.2d 557, the court noted that the Vienna Convention does not prescribe specific remedies for violations of Article 36, but rather, expressly states that the implementation of Article 36 is to "be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U.S.T., at 101. The court additionally noted that the treaty did not create a judicial remedy applicable in state court, and that it is inconsistent with the Court's judicial function if the court were to require suppression as the remedy for Article 36 violations. The Court recognized, however, that a defendant can raise a claim that his rights under Article 36 of the Vienna Convention were violated as part of a broader challenge to the voluntariness of his statements to police. Id.

{¶ 10} Accord *State v. Linnik,* Madison App. No. CA2004-06-015, 2006-Ohio-880, the court stated:

{¶ 11} "Rights under a treaty, like rights under a federal statute, are not the equivalent of constitutional rights. *Murphy v. Netherland* (C.A.4, 1997), 116 F.3d 97, 100; see, also, *State v. Issa,* 98 Ohio St.3d at 75, 2001-Ohio-1290, 781 N.E.2d 88, J. Cook, concurring. A state does not violate a constitutional right merely by violating a federal statute. Similarly, a state does not violate a constitutional right merely by violating a treaty. *Murphy* at 100."

{¶ 12} The *Linnik* court therefore concluded that the exclusion of incriminating statements is not the appropriate remedy for an alleged violation of the consular notification right under the Vienna Convention. Similarly, in *State v.*

Lopez, Greene App. No. 99-CA-120, 2003-Ohio-3974, the court held that rights under an international treaty, like rights under a federal statute, are not the equivalent of constitutional rights. Id., citing *Boos v. Berry* (1988), 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333. They may also be waived. Id.

{¶ 13} Finally, it is clear that whatever individual rights the treaty may confer are waivable. *State v. Issa*, 93 Ohio St.3d 49, 54-56, 2001-Ohio-1290, 752 N.E.2d 904; *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637.

{¶ 14} Applying the foregoing, we hold that the trial court properly denied the motion to exclude defendant's statements, based solely upon the alleged violation of his rights under Article 36 of the Vienna Convention. In any event, the record indicates that defendant, a citizen of both Sweden and Jordan, was advised of his right to have both consulates notified, but stated that he did not want such notification to occur. (Tr. 226) The first assignment of error is therefore without merit.

{¶ 15} Defendant's second assignment of error states:

{¶ 16} "The Cuyahoga County Court of Common Pleas violated Article 36 of the Vienna Convention when it failed to inform the appellant at his arraignment or at any other time of his right to contact the Jordanian or Swedish consulate."

{¶ 17} Crim.R. 5(A) and Crim.R. 10 require that, at the arraignment, the court shall inform the defendant of: (1) the nature of the charges against him; (2) his right to counsel, and the right to a reasonable continuance to secure counsel;

(3) his rights pursuant to Crim.R. 44 to have counsel assigned without cost if he is unable to employ counsel; (4) his right to refrain from making statements and that any statement made might be used against him; (5) his right to bail if the offense is bailable; and (6) his right to a preliminary hearing in a felony case, when his initial appearance is not pursuant to indictment; and (7) his right to a jury trial, and the necessity to demand one in petty offense cases.

{¶ 18} The rules do not refer to rights set forth in the Vienna Convention. Further, as noted previously, the rights under the Vienna Convention are not the equivalent of constitutional rights. *State v. Lopez*. Accordingly, we conclude that the rights under the Vienna Convention need not be explained at the time of arraignment. In any event, as we noted supra, the record indicates that the defendant, a citizen of both Sweden and Jordan, was advised of his right to have both consulates notified, but stated that he did not want such notification to occur. (Tr. 226).

{¶ 19} The second assignment of error is therefore without merit.

{¶ 20} Defendant's third assignment of error states:

{¶ 21} "The trial court erred in failing to journalize its findings in denying the motion to suppress the June 19 statement in violation of Ohio law."

{¶ 22} Crim.R. 12(F) states:

{¶ 23} "(F) Ruling on motion.

{¶ 24} "The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means."

{¶ 25} "* * *

{¶ 26} "Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

{¶ 27} In *City of Strongsville v. Carr,* Cuyahoga App. No. 89666, 2008-Ohio-907, this court found a trial court's statements on the record sufficient to meet the requirements of Crim.R. 12(F). Accord *State v. Blazer* (June 4, 1992), Ross App. No. 1806 (does not require a trial court to reduce its essential findings to writing); *State v. Raines* (Nov. 16, 1988), Ross App. No. 1426, (court may satisfy the Crim.R. 12(E) requirement by stating findings on the record that are sufficiently detailed and precise to provide a sufficient basis for appellate review).

{¶ 28} In this matter, the trial court explained that the defendant had a valid driver's license, ran a convenience store for four years, and spoke English to the officers in response to their inquiries. The court also stated:

{¶ 29} "At 15:06 and 30 seconds, first thing, 'I read you your rights, do you know what your rights are as a citizen of the United States?' Then he is spoken to in Arabic by Agent Mack.

{¶ 30} "So that to me was the key thing here. Finding that the detective did advise him, the defendant, of his rights in the break room under Miranda, given proper and complete advisement. That [was] when he came into the room in a well-run continuous sequence of interrogation, because it was the same people, same location, very close in time, just moved from probably 30 or 40 feet away to

a different room, they reaffirmed, 'Do you understand your rights,' he said 'yeah.' Then on the tape in Arabic, the translation, when they asked, 'do you want to go over your rights,' he says, 'The ones we talked about before.' That was the translation in Arabic.

{¶ 31} "So the Court finds Mr. Alhajjeh was given his rights under Miranda and then at some point voluntarily waived them. There is no coercion, if you look at the DVD, he wasn't deprived of breaks. He was alert. No one pressured him in any way. There is no evidence that he was threatened in any way. It was indicated it might be helpful to him if he cooperated.

{¶ 32} "The Court has considered information provided about his education level, those types of things, but he was able to run a store. I don't know how successfully, but he was able to operate a store for at least four years. He was able to speak to the officers. At one point later on in the DVD, they asked about his address, he answered in English. It was apparent to the court, from the DVD as well as the testimony itself, that Mr. Alhajjeh, as many people do, lives in two different worlds. One Arabic-speaking world, one English-speaking world. They cross over. I find that he did understand what his rights were, that he voluntarily waived them, gave a statement to the Cleveland police and was ultimately implicated in this matter by virtue of the June 19 statement.

{¶ 33} "The Court also notes that there is no evidence controverting Detective Chojnowski, and that he has 30 years as a Cleveland police officer. He's a training officer. So when he asserted, testified that he gave these

warnings, that also seems to be backed up by his career experience." (Tr. 314-316)

{¶ 34} We find the foregoing sufficient to meet the requirements of Crim.R. 12(F) because the court stated its findings on the record.

{¶ 35} The third assignment of error is without merit.

{¶ 36} The fourth and fifth assignments of error are interrelated and state:

{¶ 37} "The trial court erred in failing to consider the violation of the Vienna Convention in determining the voluntariness of defendant's statement."

{¶ 38} The fifth assignment of error states:

{¶ 39} "The trial court erred in denying appellant's motion to suppress that was obtained in violation of the Fifth, Sixth and Fourteenth Amendments of the federal Constitution."

{¶ 40} A review of the denial of a motion to suppress involves mixed questions of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. With respect to the trial court's conclusions of law, however, our standard of review is de novo and we must decide whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 41} In *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694, the Supreme Court of the United States held that the "prosecution may not use statements * * * stemming from a custodial interrogation unless it demonstrates the use of procedural safeguards effective to secure the privilege

against self-incrimination." The Court further held, with regard to the procedural safeguards, that the following warnings are required prior to custodial interrogation:

{¶ 42} "[The suspect] must be warned prior to any questioning that he 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." Id.

{¶ 43} A suspect may waive his *Miranda* rights, however, provided his waiver is knowing, intelligent, and voluntary. *Edwards v. Arizona* (1981), 451 U.S. 477, 483, 101 S.Ct. 1880, 68 L.Ed.2d 378. The state is required to prove, by a preponderance of the evidence, that the defendant waived his right to remain silent. *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473. The issue of waiver is determined from a totality of the circumstances in each case, including the defendant's background, experience, and conduct. *Edwards v. Arizona*. In *State v. Green,* 90 Ohio St.3d 352, 366, 2000-Ohio-182, 738 N.E.2d 1208, the Ohio Supreme Court held that in determining whether a defendant understood and voluntarily waived his or her *Miranda* rights, a trial court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. Id.,

applying *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus, overruled on other grounds, *Edwards v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155.

{¶ 44} In this matter, the record indicates that defendant worked at the convenience store for four years. He was able to speak with customers, answer the telephone, run the lottery machine, and fill orders, all using the English language.

{¶ 45} The record further reflects that during the police inquiries at the convenience store, during the portion of the investigation that occurred immediately after the homicide, the defendant responded to Det. Chojnowski's questions in English. Later, when defendant was asked to come to the police station for further questioning, Det. Chojnowski arranged for an F.B.I. agent, who was fluent in Arabic, to be present to explain defendant's rights to him. At this time, defendant's rights were explained to him in both English and Arabic. Defendant signed his name to a waiver of rights form printed in the English language and spoke in English to the detective during this interview. Defendant answered the detectives' questions, posed in English, about his birth date, age, race, and address.

{¶ 46} The record further reflects that defendant was arrested on June 19, 2008. According to Det. Chojnowski, defendant was given his *Miranda* rights in English at the convenience store. The F.B.I. agent was again present at the police station. According to Det. Chojnowski, the agent had a slip of paper on

which the rights were written in Arabic, and defendant was notified of his rights in English and Arabic. Defendant then made a written statement, following questioning via an interpreter. This questioning was taped. Det. Chojnowski acknowledged, however, that the taped interview does not reflect defendant being read his rights in Arabic. Instead, the detective said, "I read you your rights. Do you remember them?" He then prompted the F.B.I. agent to give defendant his rights in Arabic, and the agent then spoke to defendant in that language.

{¶ 47} The state also presented the testimony of Khaled Salman, son of the decedent. This witness testified that, in the past four or five years, he has had discussions with defendant in English and Arabic. Defendant and his friend ran the convenience store and spoke to customers, and has a working knowledge of the English language.

{¶ 48} The F.B.I. agent[1] testified that he speaks Arabic and read defendant his rights in Arabic, pursuant to form FD 395.1, on June 4, 2008. Defendant then agreed to be interviewed. This witness further stated that, on June 19, 2008, he again advised defendant of his rights in Arabic, asked defendant if he understood, and if he wished to continue speaking with the officers. The witness stated that defendant preferred to speak with them in Arabic, however.

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[1] The record indicates that the Department of Homeland Security sent a letter to the trial court requesting that the identity of this witness not be disclosed.

{¶ 49} Defendant presented the testimony of translator Bassel Abdallah. This witness testified that defendant was not able to converse with him in English. According to this witness, defendant could understand some English but did not understand all of the detective's questions. He stated that defendant studied English for a few years as a child in Jordan, and has a driver's license but used an interpreter for the driving test. As to the advisement of defendant's rights, this witness stated that defendant was not informed that an attorney could be provided for him if he could not afford one. He acknowledged, however, that the full rights were given before defendant prepared the written statement, and also stated on the tape that his rights were previously explained to him and he did not want them to go over the rights again. Abdallah additionally testified that defendant was informed of his right to have the officers contact both the Swedish and Jordanian consulates, but defendant indicated that he did not want them to do so.

{¶ 50} From the record, we find that the trial court's evaluation of evidence and the credibility of the witnesses, and its decision denying the motion to suppress to be supported by the record. Under the totality of the circumstances, defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights when he made his statements. There was no indication that a language barrier impeded his understanding of the nature of his circumstances or the rights that he chose to forego. Accord *State v. Linnik*.

{¶ 51} As to the claim that defendant's rights under the Vienna Convention

were violated, and this rendered his statements involuntary, we note that these rights are waivable. *State v. Issa*; *State v. Ahmed*. Here, the record further reflects that on June 19, 2008, the date of the arrest, defendant stated that he did not want such notification to occur. (Tr. 226)

{¶ 52} The fourth and fifth assignments of error are therefore without merit.

{¶ 53} Defendant's sixth and seventh assignments of error are interrelated and state:

{¶ 54} "The trial court violated Ohio and federal law and committed plain error when it imposed consecutive sentences."

{¶ 55} "Counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when he failed to object to consecutive sentences."

{¶ 56} Defendant argues that the United States Supreme Court's decision in *Oregon v. Ice* (2009), ____ U.S. ____, 129 S.Ct. 711, 172 L.Ed.2d 517, implicitly overrules *State v. Foster,* 120 Ohio St.3d 23, 2008-Ohio-4912, 845 N.E.2d 470, in which the Ohio Supreme Court held that trial courts have full discretion to impose any sentence within the statutory range and need not give reasons for imposing maximum, consecutive, or more than minimum sentences. Id. at paragraph seven of the syllabus. He argues that in light of *Ice,* the trial court was required to state its reasons for imposing consecutive sentences.

{¶ 57} The Ohio Supreme Court acknowledged this decision in *State v. Elmore,* 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582, but declined

to address fully all ramifications of *Oregon v. Ice,* since neither party sought the opportunity to brief this issue before oral argument. The court followed its *Foster* decision, and reiterated that trial courts "'are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.'" *State v. Elmore* at 482, quoting *Foster*. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. See *State v. Pinkney,* Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon,* Cuyahoga App. No. 92048, 2009-Ohio-4564; *State v. Moore,* Cuyahoga App. No. 92654, 2010-Ohio-770; *State v. Buitrago,* Cuyahoga App. No. 93380, 2010-Ohio-1984.

{¶ 58} Pursuant to *Foster,* the trial court has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently. *State v. Elmore*; *State v. Bates,* 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328.

{¶ 59} In accordance with all of the foregoing, the sixth assignment of error is without merit.

{¶ 60} With regard to the claim of ineffective assistance of counsel, a defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373. Because we have not found prejudicial error in connection with the trial court's failure to state its reasons for imposing

consecutive sentences, the claim of ineffective assistance of counsel fails. *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237.

{¶ 61} The seventh assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR