

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2009-P-1670

ESSEX, SS.

COMMONWEALTH,
Appellee

V.

AMAURY GAUTREAUX,
Appellant

ON APPEAL FROM A JUDGMENT
OF THE LAWRENCE DISTRICT COURT

BRIEF AND SUPPLEMENTAL RECORD APPENSIX
FOR THE COMMONWEALTH

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ISSUES PRESENTED

- I. The plea judge properly rejected the defendant's claim that his guilty plea should be vacated because he was not informed of his notification right under the Vienna Convention, where the treaty does not provide for vacatur of an otherwise valid guilty plea as a remedy for a violation; this Court has held, in analogous circumstances, that the treaty does not provide for suppression as a remedy for a violation; and even if vacatur is an available remedy, it would not be appropriate here because the defendant did not show he was prejudiced.

- II. The plea judge acted within his discretion in rejecting the defendant's claim that he was not provided an interpreter if he needed one, where: one docket sheet had a notation that an interpreter was required, and according to the clerk's office an interpreter is appointed if the docket reflects one is needed; interpreters are available in the courthouse; the judge had a "practice" of providing interpreters in appropriate cases; and he would not have accepted

a plea unless he was confident that the defendant understood the proceedings.

STATEMENT OF THE CASE¹

This is the defendant's appeal from the denial of his motion to vacate his guilty plea in which he claimed that he was entitled to vacatur because the police did not inform him of his "rights" under the Vienna Convention "to have his consulate informed of his arrest"² (S.R. 17), and that his plea was not knowing and intelligent because he needed, but did not have, an interpreter.

¹ Record references are: record appendix (R. __); supplemental record appendix (S.R. __); motion to vacate hearing transcript (Tr. __); defendant's brief (D.Br. __). Some papers in the record appendix were cut off in photocopying, so the Commonwealth has reproduced it in its entirety in the supplemental record appendix. This brief cites both appendices.

² As described more fully at pp. 17-21, under Article 36 of the treaty, an arrestee must be informed that, on his request, arresting authorities will inform his consulate of his arrest. Commonwealth v. Diemer, 57 Mass. App. Ct. 677, 681 (2003), cert. denied, 540 U.S. 1150 (2004), quoting United States v. Emuegbunam, 268 F.3d 377, 388 (6th Cir. 2001). In his motion and brief, the defendant equates this obligation on the police with individually-enforceable "rights," see S.R. 17; D.Br. at 6, even though this Court, in Diemer, adopted the "most popular" "approach" among jurisdictions, and expressly declined to answer whether the treaty granted "rights," "leapfrogging" instead to "consideration of the remedy, or lack thereof, for a violation." 57 Mass. App. Ct. at 685-687.

On January 29, 2003, a complaint issued in Lawrence District Court, charging the defendant, Amaury Gautreaux, with possession of a class A substance with intent to distribute and a school zone violation (No. 0319CR498) (R. 1; S.R. 1). He filed a motion to suppress which, following an evidentiary hearing, was allowed in part and denied in part (Ostrach, J.) (R. 6; S.R. 2, 15).

On June 2, 2003, while the first complaint was pending, another complaint issued in Lawrence District Court, charging the defendant with assault and battery (No. 0318CR3702) (R. 2; S.R. 4). And on July 23, 2003, a third complaint issued in Lawrence District Court, charging him with violating a 209A order, assault and battery, and threatening to commit a crime (No. 0318CR4983) (R. 3; S.R. 7).

On August 27, 2003, he pled guilty to all of these charges, except: the charge of possession with intent to distribute heroin (No. 0319CR498) was reduced to simple possession; the threats charge (No. 0318CR4983) was filed with his consent; and the school zone charge (No. 0319CR498) was dismissed (Brennan, J.) (R. 1, 2, 3; S.R. 1, 4, 7). He received an

eleven-month suspended sentence and eighteen months probation (R. 1, 2, 3; S.R. 1, 4, 7).³

On or about February 6, 2009,⁴ he filed a motion to vacate his guilty plea on No. 0319CR498,⁵ raising two claims: at time of his arrest and subsequent plea hearing in 2003, he was not given notice of his right under Article 36 to have his consulate notified of his arrest and detention; and he did not understand the alien warnings because he did not have an interpreter at the plea hearing (R. 12-13; S.R. 17-18, 25). Along with his motion, he filed a supporting memorandum, his own affidavit, and affidavits from his plea counsel and his appellate counsel (R. 7-13; S.R. 17-24).

³ On page 2 of his brief, the defendant states that he was sentenced to 60 days for the 209A violation, but this does not appear on the docket. See R. 3; S.R. 7.

⁴ The motion is dated February 6, 2009, but was not docketed (R. 12; S.R. 17-18).

⁵ The motion and accompanying affidavits reference only No. 0318CR498; the supporting memorandum references Nos. 0318CR498 and 0318CR3702 (R. 7-13; S.R. 17-18, 19, 20-24). On or about August 10, 2009, the defendant moved to amend the notice of appeal to include Nos. 0318CR3702 and 0318CR4983 on the ground that all three cases were the subject of the underlying motion (R. 15; S.R. 27). The motion to amend was allowed on August 26, 2009 (R. 15, S.R. 17).

On March 24, 2009, the plea judge held a non-evidentiary hearing⁶ and denied the motion orally and in a margin endorsement (R. 12; S.R. 17; Tr. 19-20).

On March 27, 2009, the defendant filed a timely notice of appeal (R. 14; S.R. 26).⁷ The case was docketed in this Court on September 8, 2009.⁸

STATEMENT OF FACTS⁹

I. The Defendant's Guilty Plea

On August 27, 2003, the defendant pled guilty to: a lesser charge of simple possession of a class A substance; the related school zone count was dismissed (No. 0319CR498) (R. 1; S.R. 1); domestic assault and battery (No. 0318CR370) (R. 2; S.R. 4); and violation of a 209A order and assault and battery; the threats

⁶ The defendant did not request an evidentiary hearing in his motion or at the hearing (R. 12-13; S.R. 17-18; Tr. 1-21).

⁷ The notice of appeal was amended on August 26, 2009 to include Nos. 0318CR3702 and 03184983. See n. 5 of this brief.

⁸ On page 5 of his brief, the defendant states, without citation, that he was notified to appear for removal proceedings on July 8, 2008 as a result of his "convictions"; he received an order of deportation on February 4, 2009; and he has since been deported. The Commonwealth disputes only that the notice was for his heroin possession conviction only.

⁹ The recitation of facts relates only to the defendant's new trial motion. The facts of the underlying plea are neither available nor relevant to the appellate issue.

count was filed (No. 0318CR498) (R. 3; S.R. 7). He received an eleven month suspended sentence, with eighteen months probation (R. 1, 2, 3; S.R. 1, 4, 7). Thereafter, and likely in accordance with the applicable retention rule, the recording of the proceeding was destroyed (Tr. 1/5). See Special Rule of the District Courts of Massachusetts 211 (A) (4) (1988) (requiring preservation of recordings of guilty plea hearings for two and one half years).

Even so, six court documents exist that reflect what occurred on the date of the plea: 1) the three docket sheets (R. 1, 2, 3; S.R. 1, 4, 7); and 2) the three "TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS" forms -- i.e., the standardized form required to be utilized when a defendant tenders a plea ("Rule 4(c) form") (S.R. 9-10, 11-12, 13-14).¹⁰ See District/Municipal Courts Rules of Criminal Procedure 4(c) (A "tender of plea . . . shall be set forth on the form promulgated therefore by the Chief Justice of the District Court").

On No. 0318CR498, the box marked "Interpreter Required (language)" is checked and the handwritten

¹⁰ These forms show that the plea terms on Nos. 0318CR498 and 0318CR4983 were agreed upon and on No. 0318CR3702 were disparate (S.R. 9-14).

word, "Spanish," appears inside (R. 1; S.R. 1). This box on the other two (later) dockets, Nos. 0318CR3702 and 0318CR4983, is not checked and nothing is written inside the box (R. 2, 3; S.R. 4, 7). On all three dockets, the "DISPOSITION METHOD & JUDGE" box is marked "8/27/03 Brennan," the "DISPOSITION METHOD" is check-marked next to: "Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 §29D warning," and the phrase "278 §29D warning" is circled (R. 1, 2, 3; S.R. 1, 4, 7).

According to the Rule 4(c) forms for Nos. 0318CR498 and 0318CR4983,¹¹ the judge accepted the plea as follows:

"The Court ACCEPTS the tendered Plea or Admission on defendant's terms set forth in Section I, and will impose sentence in accordance with said terms, subject to submission of defendant's written WAIVER (see Section IV on reverse of this form), a completion of the required oral COLLOQUY, a determination that there is a FACTUAL BASIS for the Plea or Admission, and notice of ALIEN RIGHTS"

(S.R. 9, 13); (capitalization as in original). The cognate section ("Section II") on the Rule 4(c) form for No. 0318CR3702 is not check-marked (S.R. 11).

¹¹ Only the Rule 4(c) form for No. 0318CR3702 was attached to the new trial motion, even though the other Rule 4(c) forms are in the clerk's papers; all forms are at S.R. 9-14.

Rather, there is a checkmark in "SECTION III" that the plea was rejected as follows:

"The Court REJECTS the defendant's dispositional terms set forth above and, in accordance with Mass. R. Crim. P. 12(c)(6), has set forth to the defendant the dispositional terms it would find acceptable, to wit:"

with the following notation directly underneath:

"Ct will Impose Comm's recom Brennan J 8/27/03"
(S.R. 11) (capitalization as in original). The Rule 4(c) forms are dated and are signed by Judge Brennan (S.R. 9, 11, 13), and, because the plea was rejected on No. 0318CR3702, the defendant's plea counsel also signed that form (S.R. 11).

The defendant signed the reverse side of each form, acknowledging his understanding of the immigration warnings listed in the statute:

"I understand that if I am not a citizen of the United States, conviction of this offense may have the consequences of deportation, exclusion from admission to the United States or denial of naturalization, pursuant to the laws of the United States"

(S.R. 10, 12, 14). His plea counsel signed a certificate, as well:

"As required by G.L. c. 218, § 26A, I certify that as legal counsel to the defendant in this case, I have explained to the defendant the above-stated provisions of law regarding the defendant's waiver of jury

trial and other rights so as to enable the defendant to tender his or her plea of guilty or admission knowingly, intelligently and voluntarily"

(S.R. 10, 12, 14). Both signatures are dated (except on No. 0318CR4983, where the defendant's signature is undated¹²) (S.R. 10, 12, 14).

Finally, Judge Brennan certified that he "addressed the defendant directly in open court," as follows:

"I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States"

(S.R. 10, 12, 14). The signature is dated (S.R. 10, 12, 14).

II. The Defendant's New Trial Motion, Memorandum,¹³ Supporting Affidavits, and Additional Exhibits

A. New Trial Motion and Accompanying Memorandum

On or about February 6, 2009, the defendant filed a Rule 30(b) motion, an accompanying memorandum,

¹² The omission of the date is of no consequence on appeal.

¹³ The defendant's brief repeats the argument made in his memorandum. So, in the interests of brevity, only the first page of the memorandum is reproduced in the supplemental record appendix (S.R. 19).

exhibits, and affidavits from plea counsel, appellate counsel, and himself (R. 7-13; S.R. 17-24). The motion was triggered by immigration consequences, namely removal proceedings arising from the conviction for heroin possession (No. 0318CR498) (R. 7-9, 12-13; S.R. 17-18, 20-22).

In his motion and accompanying memorandum, he claimed that as a foreign national he was entitled to "notice of his right to have his consulate informed of his arrest," pursuant to Article 36(1)(c) of the Vienna Convention, and he was never so notified (R. 12-13; S.R. 17-18, 19). He also claimed that at the time of his plea he required the services of an interpreter, but none was present, thereby invalidating his plea (R. 12-13; S.R. 17-18, 19).

B. Supporting Affidavits

The defendant's affidavit, states the following: he was born in the Dominican Republic and lived in the United States since 1994; he attended Lawrence public schools for four years, but the schools were bilingual and he communicated with his teachers "primarily in Spanish"; during freshman year, he took, and passed, a first level English language course, but never went any further; he never became "fluent" in English; he

was arrested on January 28, 2003, June 1, 2003, and July 22, 2003, and never received notice of his right to have his consulate notified of his arrests; his bilingual cellmate "helped" him communicate with his plea counsel; he was under the impression that he would not be subject to deportation if he pled guilty and his plea counsel said he would obtain a sentence of "less than one year to avoid any immigration consequences"; the plea judge read him his alien rights from the green sheet but he "did not understand what the judge was saying" and no interpreter was present; during the plea, he "could see that the judge was reading from the green sheet that [he] had signed and answered yes at the appropriate times"; he became aware of his right to consulate notice when he was arrested on May 26, 2008, and "overhear[d] one officer ask another officer if anyone had faxed notice to [his] consulate"; and he was detained for deportation "on or about July 10, 2008" (R. 7-9; S.R. 20-22).

Plea counsel's affidavit states the following: he represented the defendant "between January 29, 2003 and August 27, 2003"; he recalls that the defendant "spoke some broke English, but preferred and communicated best in his native language Spanish"; he

represented the defendant at a suppression hearing which was partially allowed on the basis that the defendant had not received his Miranda warnings in Spanish but he does not remember if an interpreter was present at that hearing; he does not remember whether there was an interpreter at the plea hearing; and "to [his] knowledge the defendant did not receive notice of his right to consular notice pursuant to Article 36(1)(c) of the Vienna Convention of Consular Notice" (R. 11; S.R. 23).

Appellate counsel's affidavit states the following: Lawrence police department informed her they had no record of notifying the defendant of his rights under the Vienna Convention; the defendant's plea counsel informed her that he had no knowledge of the defendant being advised of his rights under the Vienna Convention; and, as for the clerk's office's regular practice in appointing interpreters, that office informed her that if the docket sheet reflects that an interpreter is needed or if a defendant asks for one, then one is appointed, there is always an interpreter in two of the courtrooms and they are sent to other courtrooms as needed, but she was not able to

confirm this with the interpreter's office because her message was not returned (R. 10; S.R. 24).

C. Additional Exhibits

Also accompanying the defendant's motion was the motion to suppress and supporting affidavit on No. 0318CR498 (R. 6, 7; S.R. 15, 16); and dockets for his arrests in two unrelated cases in 2006 and 2008 (Nos. 0619CR002756 and 0818CR003528) (R. 4, 5; S.R. 30, 31).¹⁴

In his motion to suppress, he claimed that he was interrogated without having first been advised of his "so-called Miranda rights" (R. 6; S.R. 15). In his supporting affidavit, he said that he was questioned before his Miranda rights were administered and that he did not answer any questions voluntarily, but he never claimed that he had problems understanding English (R. 6, 7; S.R. 15, 16). After an evidentiary hearing, at which he was represented by his plea

¹⁴ The defendant also filed the following papers with his motion: the incident report, on No. 0318CR498; a finding of indigency form on No. 0318CR3702; a finding of indigency form and a motion to revise and revoke with supporting affidavit (from plea counsel) on No. 0318CR4983; and the defendant's Board of Probation Record. These papers have not been reproduced in either the record appendix or the supplemental record appendix, as they are not relevant to the motion or the appellate issue.

counsel, Judge Ostrach denied the motion with respect to the evidence found, but allowed it with respect to the defendant's post-arrest statements, in relevant part as follows:

". . . I cannot find beyond reasonable doubt Δ received Miranda warnings before his post-arrest interrogation. Det. Burokas' testimony he read the rights in Spanish is contradicted by Det. Dube' [sic] recollection Burokas did not speak Spanish that night. Accordingly all post-arrest statements are suppressed. Denied in all other respects"

(S.R. 15).

The docket from the defendant's 2006 arrest reflects that a Spanish interpreter was required (No. 0618CR002756); the docket from the 2008 arrest does not (No. 0818CR003528) (R. 4, 5; S.R. 30, 31).

III. The Hearing on the New Trial Motion

At the hearing, the defendant argued that he was entitled to a new trial because the police did not advise him of his "rights" under the Vienna Convention and because there was no evidence that an interpreter was present at the plea hearing (Tr. 3-5). The defense counsel argued that the notation on the docket sheet on No. 0318CR498 about a Spanish interpreter showed only that an interpreter was required, but not that one was provided, particularly since there was no

such notation on the other two dockets (Tr. 5-6). She argued that the defendant would not have pled guilty had he understood the immigration consequences (Tr. 6).

Conversely, the prosecutor argued that a violation of the Vienna Convention did not confer a right to a new trial (Tr. 11). She noted that in Commonwealth v. Diemer, 57 Mass. App. Ct. 677 (2003), cert denied, 540 U.S. 1150 (2004), this Court declined to take a position as to whether the treaty established an enforceable right, but held that even if it did, suppression would not be the appropriate remedy (Tr. 11). She also argued that there was no reason to believe that the defendant did not have an interpreter at the time of his plea had he needed one (Tr. 9-10). She asked the judge to "take notice of [his] customary practice" with regard to providing an interpreter in appropriate cases (Tr. 10).

Judge Brennan denied the motion with respect to both of the defendant's claims (Tr. 19-20). He denied the Article 36 claim because no Massachusetts case required vacatur of a guilty plea for a violation of the Vienna Convention (Tr. 19-20). And he denied the interpreter claim based on his "practice" of assuring

an interpreter was present if a defendant needed one (Tr. 6, 7, 19-20). He added that he would not have accepted the plea had he not been confident that the defendant understood the proceedings (Tr. 6, 7, 19-20), and that, in any event, it would have been "incumbent" on the defendant's plea counsel, who had represented him on the motion to suppress, to alert the court of any need for an interpreter (Tr. 15-16, 19-20). In other words, the judge ruled that if the defendant had needed an interpreter, he had one.

ARGUMENT

- I. THE PLEA JUDGE PROPERLY RULED THAT VACATING THE DEFENDANT'S PLEA WAS NOT AN APPROPRIATE REMEDY FOR A VIOLATION OF THE VIENNA CONVENTION: THE TREATY DOES NOT PROVIDE THIS REMEDY; IN AN ANALOGOUS SITUATION, THIS COURT HAS HELD THAT SUPPRESSION IS NOT A REMEDY; AND, IN ANY EVENT, THE DEFENDANT DID NOT SHOW THAT HE WAS PREJUDICED BY THE ALLEGED VIOLATION

A motion to vacate a guilty plea pursuant to Mass. R. Crim. P. 30(b) is considered as a motion for new trial. Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 48 (1997). Appellate courts review the decision on the motion "only to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Perkins, 450 Mass. 834,

845 (2008), quoting from Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

Here, the motion judge concluded, sub silentio, that the Vienna Convention was violated, but properly ruled that vacating the defendant's guilty plea was not an appropriate remedy for the violation (Tr. 19-20). The Vienna Convention is a multilateral treaty that "'governs the establishment of consular relations between nations and defines the functions of a consulate.'" Commonwealth v. Diemer, 57 Mass. App. Ct. 677, 681 (2003), cert. denied, 540 U.S. 1150 (2004), quoting United States v. Emuegbunam, 268 F.3d 377, 388 (6th Cir. 2001). Article 36 of the treaty provides that arresting authorities must inform a foreign national that, on his request, they will inform his consulate of his arrest. Id. However, "[t]he treaty is silent as to the remedy if this notification is not provided and the detainee is subsequently charged and convicted of a crime." Id. at 682. "Two issues arise in such a scenario. First, does the treaty confer an individual right that a detainee may pursue? If so, what is the remedy for a violation of that right?" Id.

In Diemer, this Court addressed these two issues in the context of a suppression motion. Id. at 685. Adopting the "most popular" "approach" in other jurisdictions, the Court held that it need not decide whether the convention created individually enforceable rights, because even if it did, suppression of evidence was not a proper remedy for the violation. Id. at 685-687. The Court applied the following analysis: first, no express language in the treaty contemplated suppression; second, at the time, no other signatories of the convention "permitted" suppression as a remedy, and two signatories had expressly rejected it as a remedy; and third, "even if suppression were an appropriate remedy . . . it would not be appropriate," absent a showing of prejudice arising from the violation. Id.

Our appellate courts have not addressed how Article 36 applies to a motion to vacate a guilty plea, but the discussion in Diemer provides an apt analogy. As is the case of a suppression motion, no provision in the treaty authorizes, or even contemplates, vacatur of an otherwise lawful guilty plea. See Vienna Convention on Consular Relations and Optional Protocol on Disputes, 21 U.S.T. 77 (1969).

Second, it does not appear that other signatories have provided vacatur as a remedy for a violation, and the defendant has not identified any such signatories. See D.Br. at 6-13. Third, even if vacatur was an appropriate remedy, the defendant would have to show that he was prejudiced by the violation. Cf. Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 497-499 (1985) (defendant not entitled to a new trial where he did not show that he would not have pled guilty had he been informed of his intra-trial rights).

State court cases from across the country apply this same analysis to vacatur of a guilty plea. See, e.g., Joseph v. State, 2009 WL 817849, *9 (Minn. App. 2009) (defendant was not entitled to withdraw guilty plea where he could not show that he was prejudiced by violation of the Vienna Convention); State v. Liu, 2008 WL 5340195, *9 (Ohio App. 9th Dist., 2008) (vacatur of a guilty plea is not the proper remedy for a violation of the Vienna Convention); People v. Aybar, 2006 WL 2918218, *1-*2 (N.Y. Sup. 2006) (unreported disposition) (violation of Vienna Convention is not a basis to vacate a guilty plea, and even if it was, the defendant would have to show that he was prejudiced by the violation).

Even if this Court were to conclude that a new trial is an appropriate remedy, the defendant was not entitled to it because he did demonstrate that he was prejudiced by the violation. See Nolan, supra, at 497-499. He acknowledges that he was advised of his rights, including immigration warnings (R. 7-9; S.R. 20-22), and the docket sheets and Rule 4(c) forms bear this out (R. 1, 2, 3; S.R. 1, 4, 7, 9-14). As discussed in Argument II below, if he needed an interpreter, one was provided. See pp. 21-24 of this brief. His plea counsel, who represented him for months, including at a suppression hearing, negotiated an extremely favorable disposition -- one charge was reduced, one was dismissed, and one was filed, and the sentence was suspended (R. 1, 2, 3; S.R. 1, 4, 7).

In short, the defendant's plea was valid; any violation of the Vienna Convention provides no basis for a granting him a new trial.

II. THE DEFENDANT'S CLAIM THAT HIS PLEA WAS NOT VOLUNTARY AND INTELLIGENT BECAUSE HE DID NOT HAVE AN INTERPRETER WAS PROPERLY REJECTED WHERE ONE DOCKET NOTED THAT AN INTERPRETER WAS REQUIRED, THE JUDGE HAD A "PRACTICE" OF PROVIDING AN INTERPRETER IN APPROPRIATE CASES, AND IN ANY EVENT, THE JUDGE WOULD NOT HAVE ACCEPTED THE GUILTY PLEAS HAD HE NOT BEEN CONFIDENT THAT THE DEFENDANT UNDERSTOOD THE PROCEEDINGS.

The decision to appoint an interpreter rests with the trial judge. Mass. R. Crim. P. 41; G.L. c. 262, § 32. Here, the defendant claims his ability to understand and communicate in English required an interpreter, but that none was appointed (R. 7-9, 12; S.R. 17-18, 20-22). Thus, he claims, his plea was not knowing and voluntary. (R. 7-9, 12; S.R. 17-18, 20-22). The judge properly rejected this claim: by the notation on one docket, the court was, at a minimum, aware of the need for a Spanish interpreter, the judge had a "practice" of appointing one in appropriate cases, and he would not have accepted the guilty pleas had there been any concern about the defendant's ability to enter a plea knowingly and intelligently. See R. 1; S.R. 1; Tr. 6, 7, 19-20.

In the first place, the docket for No. 0318CR498 shows that a Spanish interpreter was appointed, or at the very least, that the court knew of the defendant's need for a Spanish interpreter (R. 1; S.R. 1). The

defendant pled guilty to three different complaints in the same proceeding, so it is inconsequential that the docket sheets for two of those cases do not bear the notation about an interpreter. See R. 1, 2, 3; S.R. 1, 4, 7. And apart from the docket sheets, the court would have been aware of any need for an interpreter because there was a suppression hearing at which the defendant testified. See R. 6; S.R. 15.

Furthermore, the judge was aware of his obligation to conduct a probing inquiry during a plea colloquy - he used the "green sheet" to inform the defendant of his immigration warnings, for example, and the defendant does not allege any omission or deficiency in the proceedings (R. 7-9; S.R. 20-22). To this end, the judge had a "practice" of appointing an interpreter in appropriate cases. (Tr. 6, 7, 19-20). Such interpreters were readily available in the courthouse and were moved from session to session as the need arose, according to the clerk (R. 10; S.R. 24; Tr. 5-6).

Had an interpreter been necessary, but not provided, the defense counsel also would certainly

have brought this to the court's attention.¹⁵ As far as can be gleaned from his affidavit, he did not, either because there were no difficulties with the defendant's ability to understand English or, more likely, there was an interpreter. Indeed, he attested only that the defendant spoke "broken English," and preferred to communicate in Spanish, but he did not claim any difficulty in communicating with the defendant in English and did not endorse the defendant's claim that his cellmate "helped" them communicate (R. 11; S.R. 23). And, in any event, the judge would not have accepted the plea unless the defendant understood the proceedings (R. 7-8, 11; S.R. 20-22, 23; Tr. 6, 7, 19-20). On this record, the defendant has not established any abuse of discretion in the Court's conclusion that the plea proceeding comported with constitutional and statutory requirements.

¹⁵ As the judge explained, he expected the defense counsel to bring any language issues to his attention (Tr. 15, 19-20).

CONCLUSION

For the foregoing reasons, the denial of the defendant's Rule 30(b) motion should be affirmed.

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978-745-6610 (ext. 5024)

March, 2010

Essex, ss.

COMMONWEALTH OF MASSACHUSETTS
LAWRENCE DISTRICT COURT
Docket # 0318CR498

COMMONWEALTH

v.

AMAURY GEAUTREUX

**AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE
OBTAINED FROM WARRANTLESS SEARCH**

I, Amaury Geautreaux, state the following is true to the best of my knowledge, information and belief:

1. I am the defendant in this action.
2. On January 28, 2003 the vehicle I was in was searched by the Lawrence Police.
4. I did not voluntarily consent to the search of the vehicle of my person.
5. I was not shown a search warrant.
6. I was questioned before any of my so-called Miranda Rights were read or explained to me.
7. I did not voluntarily answer questions.

Signed under the pains and penalties of perjury this 3rd day of March, 2003.

Amaury Geautreaux, Defendant

Certification of Service

I hereby certify that a copy of this pleading and corresponding affidavit was served upon the Office of the District Attorney at Lawrence District Court in-hand on this date.

March 3, 2003

John Carlson

COMMONWEALTH OF MASSACHUSETTS

Essex, ss

Docket# 0318CR498

COMMONWEALTH

v.

AMAURY GAUTREAUX

3/24/09
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 ② Don't do Regent
 PM

DEFENDANT'S MOTION TO VACATE HIS PLEA AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Now comes the defendant in the above-entitled matter and respectfully moves, pursuant to Mass. R. Crim. P. 30 (b), that the court vacate his guilty plea and that he be granted a new trial because his plea on August 27, 2003 was not made voluntarily or intelligently.

In support of this motion the defendant states the following:

1. On January 29, 2003 a complaint issued out of the Lawrence District Court charging the defendant with possession of a class A substance with intent to distribute and violation of the school zone statute.
2. Upon his arrest the defendant, as a foreign national and pursuant to Article 36 (1)(c) of the Vienna Convention on Consular Relations (VCCR), was entitled to notice of his right to have his consulate informed of his arrest.
3. The defendant was not given notice of these rights.
4. In addition to the failure of notice, at the time of his arrest and subsequent plea hearing the defendant required the services of an interpreter. Although the docket sheet reflects this requirement there was no interpreter present at his plea hearing and thus the defendant was not aware of the deportation consequences he is now facing.
5. Prior to the plea hearing on August 27, 2003 counsel met with the defendant and instructed him to sign the "green sheet," which he did. The defendant was unable to read the green sheet as it was written in English.

6. At the plea hearing the judge read from the green sheet and, according to the docket sheet, gave the colloquy required by ALM GL c. 278 §29D. Although the colloquy was given, it was presented in English and no interpreter was present.
7. On May 26, 2008 the defendant was detained for deportation and received an order of deportation on February 4, 2009. The defendant has 30 days to appeal this order.

Respectfully submitted,

Amaury Gautreau

By his attorney

Sarah G. J. Clymer

BBO# 633163

P.O. Box 623

West Falmouth, MA 02574

(508)540-7561

Dated: February 6, 2009

COMMONWEALTH OF MASSACHUSETTS

Lawrence, ss

Docket No.0318CR498 and
0318CR3702

COMMONWEALTH

v.

AMUARY GAUTREUX

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO
VACATE HIS GUILTY PLEA

PRIOR PROCEEDINGS

On January 29, 2003 a complaint issued out of the Lawrence District Court charging the defendant with Possession of a class A substance with intent to distribute and violation of the school zone statute. The docket sheet on these charges indicates the need for an interpreter.

(R.1)¹

On June 2, 2003 a complaint issued out of the Lawrence District Court charging the defendant with domestic assault and battery. The court issued a 209A restraining order against the defendant. The docket sheet on these charges does not indicate the need for an interpreter. (R.2)

¹The defendant's record appendix is produced post and is cited as (R).

COMMONWEALTH OF MASSACHUSETTS

Essex, ss

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v.

AMAURY GAUTREAUX

AFFIDAVIT OF AMAURY GAUTREAUX

I, Amaury Gautreaux, do hereby depose and say that:

1. I am the defendant in the above-entitled matter.
2. I was born in the Dominican Republic on 12/5/1980.
3. I came to live in the United States on January 14, 1994. I came to live with my mother, two siblings and grandmother, who were already living in the United States.
4. I was raised in a Spanish speaking-household. Neither of my parents or siblings spoke English when I was growing up. Neither of my parents speaks English today.
5. I attended grade 8 through 11 in the Lawrence Public School System. The schools were bilingual and I communicated with my teachers and classmates primarily in Spanish.
6. In my freshman year I was enrolled in an ES1 (English/ Spanish class). I passed ES1, but did not take ES2 and did not become fluent in English.
7. I dropped out of school in the 11th grade.
8. In 2001 I married and ultimately had three children. We maintained a Spanish-speaking household.
9. I was arrested on 1/28/03. I did not receive notice of my right to have my consulate notified of my arrest and to communicate and seek the consulate's assistance; I did not know that I had this right.

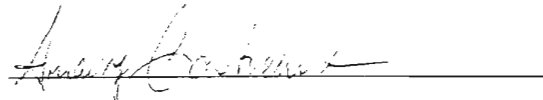
10. I was arrested on 6/1/03. I did not receive notice of my right to have my consulate notified of my arrest and to communicate and seek the consulate's assistance; I did not know that I had this right.
11. I was arrested again on 7/22/03. I did not receive notice of my right to have my consulate notified of my arrest and to communicate and seek the consulate's assistance; I did not know that I had this right.
12. After my arrests in 2003 I met with my court appointed counsel on only three separate occasions. The first being at my suppression hearing on April 7, 2003, at the Jail on or about August. 24, 2003 and again at the plea hearing on August, 27, 2003.
13. On or about August 24th my counsel came to the jail where I was being held for the violation of a 209A order. The "meeting" last approx. 5 minutes. To the best of recollection and the best of my ability to understand him at the time, he said something about a "speedy trial" or that he could get me a deal if I plead guilty to the domestic abuse charge. He informed me that we would be going into court on August 27th.
14. I handed my attorney my green card and told him the best that I could that I could not be sentenced to more than one year or I would be deported. I had learned this information from my inmates. My counsel told me he was going to get me less than one year to avoid any immigration consequences.
15. On August 27, 2003, my counsel came to the jail and met with me at the cell I was in. He discussed "bundling" my three cases and pleading guilty in return for an 11 month suspended sentence w/ 18 months probation, a reduction of intent to simple possession. My inmate, who was bilingual, helped me to communicate with my counsel.
16. At that meeting I signed a piece of paper given to me by my lawyer agreeing to plead guilty. I did not read the form as it was written in English. I signed the form on the advice of counsel.
17. In the courtroom, the Judge read from the green sheet that I had signed with my attorney, I answered yes to his questions on the advise of counsel and in conformity with the green sheet that I had just signed.
18. The court did not appoint an interpreter for me and I did not understand what the judge was saying. I could see that the judge was reading from the green sheet that I had signed and answered yes at the appropriate times.
19. My motivation for pleading guilty was my understanding that my pleas would not subject me to deportation. Had I known that deportation was a possible consequence I would have mounted a defense and gone to trial.

20. I was arrested on 5/1/06. I did not receive notice of my right to have my consulate notified of my arrest and to communicate and seek the consulate's assistance; I did not know that I had this right.

21. On May 26, 2008 I was arrested. I was not directly notified of any rights with regard to consulate notice, but I did overhear one officer ask another officer if anyone had faxed notice to the consulate, had been faxed. I was not provided a copy of that transmission. My charges pursuant to that arrest were dismissed.

19. On or about July 10th 2008 I was detained for deportation.

SIGNED UNDER THE PAINS AND PENALTY OF PERJURY THIS 3 DAY
OF February, 2009.



Amaury Gautreaux

COMMONWEALTH OF MASSAHUSETTS

Essex, ss

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COMMONWEALTH

V.

AMAURY GAUTREAUX

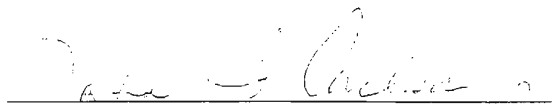
AFFIDAVIT OF JOHN F. CARLSON

I, John F. Carlson, do hereby state as follows:

1. I am an attorney duly licensed to practice law in the Commonwealth of Massachusetts, with an office located in Andover, Massachusetts.
2. Between January 29, 2003 and August 27, 2003 I represented Amaury Gautreaux, the defendant in the above-entitled case.
3. It is my recollection that the defendant spoke some broken English, but preferred and communicated best in his native language, Spanish.
4. On May 7, 2003 I represented the defendant at a suppression hearing regarding statements that he made to the arresting officer. This motion was allowed in part due to the fact that the judge could not find beyond a reasonable doubt that the defendant had been read his Miranda warnings in Spanish. I do not recall if an interpreter was present at that hearing.
6. I do not recall if an interpreter was present at the plea hearing on August 27, 2003.
7. To my knowledge the defendant did not receive notice of his right to consular notice pursuant to Article 36(1)(c) of the Vienna Convention of Consular Notice.

SIGNED UNDER THE PAINS AND PENALTY OF PERJURY THIS 21st

DAY OF January, 2009.



JOHN F. CARLSON

COMMONWEALTH OF MASSACHUSETTS

Essex, ss

Docket# 0318CR498

COMMONWEALTH

V.


AMAURY GAUTREAU

AFFIDAVIT OF SARAH G. J. CLYMER

I, Sarah G. J. Clymer, do hereby state as follows:

1. I am an attorney duly licensed to practice law in the State of Massachusetts, with an office located in West Falmouth, Massachusetts. I represent Amaury Gautreaux in the above referenced matter.
2. I contacted the Lawrence police department and learned from Officer Gene Scanlon, keeper of the records, that they have no record of notifying Mr. Gautreaux of his rights under the VCCR.
3. I have spoken with Mr. Gautreaux's defense counsel, John Carlson, and he also claims no knowledge of Mr. Gautreaux having received notice.
4. On February 2, 2009, I spoke with the criminal clerks office regarding the regular practice of the court in appointing interpreters. I was told that if the docket sheet reflects that an interpreter is needed then one is appointed and if a defendant asks for one then one is appointed. Reportedly there is always an interpreter in courtrooms 1 and 4, and if one were needed in another courtroom then they would be sent there. My attempt to confirm this practice with the interpreters' office was unsuccessful, as my message was not returned.

SIGNED UNDER THE PAINS AND PENALTY OF PERJURY THIS 6th
DAY OF FEBRUARY 2009



SARAH G. J. CLYMER

COMMONWEALTH OF MASSAHUSETTS

Essex, ss

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COMMONWEALTH

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AFFIDAVIT OF SERVICE

I, Sarah G. J. Clymer, counsel of record for the above-named defendant/appellant, say as follows:

On February 6, 2009, I mailed two (2) copies of the Defendant's Motion to Vacate and Record Appendix by first class mail, postage pre-paid to the District Attorney's Office, 2 Appleton Street, Lower Level, Lawrence, MA 02840.

Signed under the pains and penalties of perjury this 6th day of February 2009.



Sarah G. J. Clymer