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RENDERED: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000488-MR

DATE 12-21-06 E.J.A.Grauman D.C.

ALFREDO RIVERA-REYES — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JUDITH MCDONALD-BURKMAN, JUDGE
NO. 03-CR-003347

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Jose Alfredo Rivera-Reyes, entered a conditional plea of guilty to one count of first degree rape.[1] As a condition to his plea, Appellant reserved the right to appeal the Jefferson Circuit Court's denial of his motion to suppress statements made to officers subsequent to his arrest and issuance of Miranda warnings. Appellant was given a sentence of twenty years imprisonment. Appellant now appeals to this Court as a matter of right pursuant to Ky. Const. § 110(2)(b), alleging the trial court committed reversible error in denying his motion to suppress statements made to police after he signed a Spanish version of the Miranda rights waiver form, arguing that (1) the Spanish version of the Miranda

[1] Appellant was indicted on two counts of first degree rape; however, in return for his conditional guilty plea, the Commonwealth agreed to dismiss the remaining count.

rights waiver form was constitutionally defective and Officer Simpson was not shown to be a competent Spanish translator, warranting suppression of his statements and (2) the failure of the police to contact the Mexican Consulate pursuant to Article 36 of the Vienna Convention requires suppression of his statements. Having reviewed the record and for the reasons set forth herein, we affirm the ruling of the trial court.

II. FACTS

On October 7, 2003, Appellant was arrested and charged with two counts of rape in the first degree of his 10 year old step-daughter. Following Appellant's arrest, Officer Keith Simpson of the Louisville Police Department responded to a radio request for a police officer that could speak Spanish "somewhat" to assist in questioning Appellant. Officer Simpson arrived shortly thereafter at the Crimes Against Children Unit (CACU) at the police department, and, with three other officers, he questioned Appellant Reyes concerning the charges. Appellant made incriminating statements to the police during questioning, but only after he had signed a Spanish version of the Miranda rights waiver form and after indicating to the Officer Simpson in Spanish that he understood his rights.

On September 2, 2004, Appellant filed a motion to suppress his statements to police, arguing that his waiver of Miranda rights was not knowing, voluntary and intelligent because the Spanish version of the Miranda warnings did not contain a statement informing him that he could cease questioning at any time by refusing to answer questions or by requesting an attorney. On March 7, 2005, pursuant to Appellant's request, the Jefferson Circuit Court conducted a suppression hearing.

Testimony elicited at the suppression hearing revealed that Officer Simpson had limited experience in reading constitutional rights to suspects in Spanish. Officer Simpson testified that Appellant Reyes was cooperative during the questioning and seemed to understand Officer Simpson's Spanish. The three officers that accompanied Officer Simpson during the questioning of Appellant also testified that Appellant appeared to understand his rights and that he was responsive when Officer Simpson spoke to him in Spanish. Appellant signed the Spanish version of the Miranda rights waiver form and placed his initials beside each of the four Miranda warnings, indicating that he understood each of the four enumerated rights contained in the form.

In denying Appellant's motion to suppress, the trial court found that:

> [t]he only difference between the [English and Spanish] rights forms at issue is with respect to paragraph 5 of the English version, which is absent from the Spanish version. This paragraph on the English form states, "You may stop the questioning or making of any statements at any time by refusing to answer further or by requesting to consult with an attorney prior to continuing with questioning or the making of any statements."

The trial court ultimately concluded that the Spanish version satisfies Miranda, finding that the absence of paragraph 5 from the Spanish version did not render Appellant's statements involuntary. Further, the trial court found that the omitted language did not contain any additional rights, and thus, the court found Appellant's waiver was made voluntarily, knowingly and intelligently.

During the suppression hearing, Appellant also argued that a violation of Article 36 of the Vienna Convention, as is alleged to have occurred here, requires, as a remedy, that any statements made to the police must be suppressed. The trial court was not persuaded and ruled as follows:

> The court is very familiar with the Gomez[2] case . . . . And that is pretty factually direct, as far as the facts here and the facts there. . . . That treaty, if you will, does not confer more specific individual rights or additional individual rights on anyone. . . . [S]uppression of the statements is not appropriate in a situation like this. What the remedy would be – I don't know – but it's not suppression. What prejudice [Appellant] suffered, the court can't figure either at this point. . . .[3]

On March 22, 2005, Appellant appeared before the Jefferson Circuit Court and pled guilty to one count of rape in the first degree. In return, the Commonwealth agreed to dismiss the remaining count of rape in the first degree and recommended a twenty year prison sentence, the statutory minimum. Appellant's guilty plea was conditioned on the right to appeal the pre-trial order denying his motion to suppress his statements. Judgment was entered against Appellant on May 4, 2005, sentencing him to twenty years in prison. He now appeals the trial court's denial of his motion to suppress.

III. ANALYSIS

A. Standard of Review

The provisions of RCr 9.78 establish the standard for appellate review of the trial court's decision on a motion to suppress statements. Fletcher v. Commonwealth, 182 S.W.3d 556, 558 (Ky.App. 2005). "If supported by substantial evidence the factual findings of the trial court shall be conclusive." RCr 9.78. See also Davis v. Commonwealth, 795 S.W.2d 942 (Ky. 1990).

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[2] Gomez v. Commonwealth, 152 S.W.2d 238 (Ky.App. 2004).

[3] The trial court also noted that the United States Supreme Court would be considering this issue in an upcoming case. That case, Medellin v. Dretke, 544 U.S. 660, 125 S.Ct. 2088, 161 L.Ed.2d 982 (2005), was decided on May 23, 2005. In Medellin, the United States Supreme Court held that the state prisoner was required to demonstrate, inter alia, that alleged treaty violation could establish a denial of a constitutional right. The Court dismissed petitioner's writ of habeas corpus as being improvidently granted.

"When the findings of fact are supported by substantial evidence . . . the question necessarily becomes, 'whether the rule of law as applied to the established facts is or is not violated.'" Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998) (quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911(1996)). "The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000) (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)). However, it should be noted that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Ornelas v. United States, 517 U.S. at 699, 116 S.Ct. at 1663.

B. Trial Court properly denied Appellant's motion to suppress.

1. Denial of motion to suppress was based on substantial evidence.

Appellant makes two arguments on appeal. First, Appellant argues that the trial court's denial of his motion to suppress was erroneous because he did not understand his rights and thus, could not knowingly, voluntarily and intelligently waive his rights. In support of this argument, Appellant contends that the Spanish version of the Miranda rights waiver form is constitutionally deficient because it contains only four enumerated rights, as opposed to the English version of the same form, which includes a fifth enumerated provision informing the individual that they can cease questioning at any time by saying so or by requesting the assistance of an attorney. Appellant also contends that Officer

Simpson's lack of proficiency in speaking and translating Spanish further implicates an invalid waiver of Appellant's rights under Miranda.

Initially, this Court must decide if the Jefferson Circuit Court's denial of Appellant's motion to suppress was based on substantial evidence. We believe it is.

In this case, Appellant, a Spanish-speaking Mexican national, was given a Spanish version of the Miranda rights waiver form. Appellant clearly indicated to the officers that he did not speak English, which is supported by testimony from the officers that Officer Simpson responded to a call for an officer that spoke Spanish. Appellant's contention that he did not validly waive his rights under Miranda is without merit, as the record clearly shows that Appellant placed his initials beside each of the four enumerated provisions on the waiver form and signed his name at the bottom.

Furthermore, despite Officer Simpson's lackluster ability as a Spanish translator, the other officers that were present during the questioning testified that Appellant responded appropriately to Officer Simpson's questions. Moreover, the officers also testified that Appellant appeared to understand his rights.

Appellant's contention that the absence of a fifth element on the Spanish version of the Miranda rights waiver form requires suppression of his statements is equally without merit. The trial court determined that the fifth element, a statement found on the English version only and informs the individual that they may cease questioning at any time by indicating his intentions to the officers or by requesting an attorney, did not contain any additional rights. The trial court also found the Spanish version of the form conformed to the requirements of

Miranda. Further, no evidence was offered to suggest that Appellant's statements were given involuntarily as several officers testified that no threats or promises were made to get Appellant to speak to the police.

Appellant's second argument is that a violation of Article 36 of the Vienna Convention requires suppression of his statements as a remedy. It is undisputed that the police never contacted anyone from the Mexican Consulate and never informed Appellant of his rights under Article 36 of the Vienna Convention. The trial court, however, correctly found that the multinational treaty does not confer individual rights such that suppression of statements is required when a violation of its provisions has occurred. Furthermore, the trial court correctly determined that Appellant suffered no prejudice, at least none for which suppression of his statements to the police is necessary or required.

Thus, we find that the trial court's denial of the motion to suppress was supported by substantial evidence.

2. Trial Court properly denied Appellant's motion to suppress as a matter of law.

Finding the trial court's denial of Appellant's motion to suppress was based on substantial evidence, we must now determine *de novo* whether the denial of the motion to suppress was correct as a matter of law. We find no error in the trial court's application of the law and thus affirm Appellant's conviction and sentence.

a. Spanish version of Miranda rights waiver form.

Appellant's primary contention is that the Spanish version of the Miranda rights waiver form is constitutionally defective as it contains only four enumerated

rights compared to the English version of the form, which contains five enumerated rights. The trial court resolved any apparent discrepancies and possible violations of Miranda's requirements in finding that the information described in the fifth paragraph on the English version of the rights waiver form did not set forth any additional rights not already disclosed on the Spanish version of the form. The trial court also determined that the absence of the fifth paragraph on the Spanish version of the rights waiver form had no effect on the validity of Appellant's waiver, and thus ruled against Appellant's motion to suppress.

Although this case presents an issue that is a matter of first impression for this Court, this is not a novel argument, as this issue has been addressed in a number of cases in other jurisdictions. Most notably, in State v. Foust, 823 N.E.2d 836 (Ohio 2004), the appellant argued that the Miranda warnings given to him were inadequate because of the failure of the police to inform him that he could ask for an attorney at any time, including after questioning began, and that if he asked for an attorney once the questioning began, all questioning would stop. The Ohio Supreme Court disagreed and held that "[p]olice do not have to provide additional warnings to a suspect beyond what Miranda requires." Id. at 854. The court also found that "[t]he Supreme Court has never insisted that Miranda warnings be given in the exact form described in that decision." Id. at 853.

The Sixth Circuit Court of Appeals also addressed this issue in United States v. Davis, 459 F.2d 167 (6th Cir. 1972). In that case, the appellant argued that he was not clearly apprised of his right to terminate questioning at any time

and request counsel at any time and thus there was no intelligent waiver of his Miranda rights. The court disagreed and found that the recitation of rights wherein the officers stated that appellant had the right to remain silent and that he could invoke this right or request an attorney at any time were sufficient. Id. at 169. The court opined that "[w]hile we could devise a more explicit statement declaring a suspect's right to rescind a waiver of rights and end questioning at any time, we conclude that the challenged statement provides an adequate and understanding apprisal of rights." Id.

Moreover, the United States Supreme Court has adequately addressed the issue. In California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981), *quoted in* Duckworth v. Eagan, 492 U.S. 195, 202-03, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), the United States Supreme Court opined that it "has never indicated that the 'rigidity' of Miranda extends to the precise formulation of the warnings given a criminal defendant." See e.g., United States v. Lamia, 429 F.2d 373, 375-76 (2d Cir. 1970), *cert. denied*, 400 U.S. 907, 91 S.Ct. 150, 27 L.Ed.2d 146 (1970). "Miranda itself indicated that no talismanic incantation was required to satisfy its strictures." Id. Further, the Court noted:

> Other courts considering the precise question presented by this case . . . have not required a verbatim recital of the words of the Miranda opinion but rather have examined the warnings given to determine if the reference to the right to appointed counsel was linked with some future point in time *after* the police interrogation.

Prysock, 453 U.S. at 360, 101 S.Ct. at 2810 (emphasis added). Where the reference to the right to an attorney was linked to some point in time after police interrogation, rather than before such interrogation, the Court would find the defendant was not adequately advised of his rights under Miranda. Id.

The seminal case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), provides the warnings required and the waiver necessary for statements made by criminal defendants to be admissible at his trial. There, the Supreme Court held that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444, 86 S.Ct. at 1612. "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.*" Id. at 444-45, 86 S.Ct. at 1612 (emphasis added).

Thus, it is clear from the language of Miranda that the court meant to provide procedural safeguards. To effectuate that end, they set forth the four basic tenets comprising the Fifth Amendment right against self-incrimination, with instructions for law enforcement that questioning must cease when the suspect exercises his rights.

Reyes' "right" to stop questioning, on the other hand, merely describes a manner in which he could have exercised the Fifth Amendment privilege that he had been adequately informed was his. It need not be included in the warnings explicitly, as has been held in a number of cases. See e.g., United States v. Lares-Valdez, 939 F.2d 688 (9th Cir. 1991) (holding that suspect need not be advised of the right to have questioning stopped at any time, of the option to answer some questions but not others, or that some questions may call for

incriminating responses); United States v. Caldwell, 954 F.2d 496, 501-504 (8th Cir. 1992) (holding that suspect need not be explicitly advised of his right to counsel before and during questioning); United States v. DiGiacomo, 579 F.2d 1211, 1214 (10th Cir. 1978) (holding there is no express requirement under Miranda to advise suspects of the right to terminate questioning).

So we agree with the trial court that the Spanish version of the Miranda form did not contain the fifth element found on the English form. Although regrettable, this omission did not deprive Appellant of the full benefit of his Constitutional rights.

b. Effect of Officer Simpson's lack of proficiency in Spanish.

Appellant further argues that his statements must be suppressed because Officer Simpson's lack of proficiency as a Spanish translator rendered Appellant's confession involuntary. While it is true that any statement made, elicited, or offered to law enforcement personnel in the absence of a qualified interpreter must be suppressed, the suspect still has the right to make a voluntary confession. KRS 30A.400(2). This voluntary confession can be made after the suspect is apprised of his rights and waives them by signing the Spanish version of the Miranda rights waiver form, as occurred here.

Appellant cites several cases for the proposition that a non-English speaking defendant can only validly waive his rights when a "qualified" interpreter is available to explain the Miranda rights to the individual. Appellant cites United States v. Castorena-Jaime, 117 F.Supp.2d 1161 (D. Kansas 2000), in support of his argument that an interpreter must be available when a non-English speaking suspect is interrogated. In that case, the federal district court opined that

"[l]anguage barriers are a factor to consider, because they may impair a suspect's ability to act knowingly and intelligently." Id. at 1171 (citing United States v. Heredia-Fernandez, 756 F.2d 1412, 1415 (9th Cir. 1984)). While language barriers are certainly factors to be considered, we note that in that case, the officer merely read, in English, the Miranda warnings, without ever apprising the suspect of his rights in Spanish. Further, that case did not involve a written Spanish version of the Miranda warnings.

Appellant also cites People v. Mejia-Mendoza, 965 P.2d 777 (Colo. 1998), in arguing that his statements were not the product of a knowing, intelligent, and voluntary waiver of his Miranda rights due to the inability of the translator to properly convey the warnings of Miranda. In that case, however, the translator merely read, in Spanish, a Miranda warning card, which was printed in English, to which the defendant never responded. This case is clearly distinguishable from the one at bar, as here, again, we find that Appellant was adequately apprised of his rights in Spanish and voluntarily, knowingly, and intelligently waived them. Appellant never indicated to the attendant officers that his waiver was anything but valid.

Finally, Appellant cites People v. Aguilar-Ramos, 86 P.3d 397 (Colo. 2004), wherein the Supreme Court of Colorado held, in affirming the trial court, that the appellant was not adequately advised of his Miranda rights by police before his custodial interrogation. In that case, the trial court suppressed statements given by the defendant, a Spanish-speaking Mexican national, because it found he did not validly waive his Miranda rights, despite the fact that

he was given a Spanish version of the Miranda rights waiver form, which he subsequently signed.

What distinguishes Aguilar-Ramos from the case at bar, however, is the fact that the defendant in Aguilar-Ramos was confused by the officer's reading of the Spanish form as was evident when he attempted to ask the officer how he could write on the form that he wanted an attorney. Id. at 398-99. The Colorado Supreme Court looked at the totality of the circumstances and determined from the evidence that Aguilar-Ramos clearly indicated he wanted an attorney but never got one, and thus his waiver was invalid. Id. at 401-02. Here, on the other hand, it is undisputed that Appellant never requested an attorney and indicated to the officers present that he understood his rights.

Although Appellant presents compelling arguments for finding his waiver invalid due to Officer Simpson's lack of proficiency in Spanish, as a matter of law, Appellant voluntarily, knowingly and intelligently waived his rights clearly set forth on the Spanish version of the Miranda rights waiver form. The record surely supports this conclusion.

c. Effect of alleged violation of Vienna Convention.

In Appellant's final assignment of error, he alleges that the failure of the Louisville police to inform him of his right to contact the Mexican Consulate requires the suppression of his statements pursuant to Article 36 of the Vienna Convention. The Commonwealth disagrees, arguing that the Vienna Convention does not, by its own terms, provide for the suppression of statements as a remedy for a violation of the treaty and that Appellant did not argue before the trial court that he was prejudiced in any way by the violation. Despite Appellant's

persuasive arguments, we find the trial court's denial of Appellant's motion to suppress was correct and affirm Appellant's conviction and sentence on this issue.

Article 36(1)(b) of the Vienna Convention on Consular Relations requires signatory countries, such as the United States, to advise "without delay" a foreign national who is arrested of his right to contact his consulate. Vienna Convention on Consular Relations art. 36(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"). The treaty also provides that:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Vienna Convention art. 36(2).

In Gomez v. Commonwealth, 152 S.W.3d 238, 242 (Ky.App. 2004), the Kentucky Court of Appeals, adopting the holding of the Court of Appeals of Wisconsin, held:

> "While we acknowledge this split in opinion [among the federal court's], in light of the well-established principles of international law that guide judicial construction of a treaty, we are convinced that the Vienna Convention does not confer standing on an individual foreign national to assert a violation of the treaty in a domestic criminal case."

(Quoting State v. Navarro, 659 N.W.2d 487, 491 (Wisc. Ct. App. 2003).

Appellant acknowledges the Kentucky Court of Appeals' decision in Gomez, supra, but urges this Court to reconsider the holding in that case due to developments in the law since Gomez was decided. We find the argument inapposite, as the United States Supreme Court has recently ruled that "even assuming the Convention creates judicially enforceable rights . . . suppression is

not an appropriate remedy for a violation of Article 36, and . . . a State may apply its regular rules of procedural default to Article 36 claims." Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2674 (2006).

Although the Sixth Circuit has found that the treaty does not confer individual rights, see United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001) (holding that "the Vienna Convention does not create a right for a detained foreign national to consult with the diplomatic representatives of his nation that the federal courts can enforce" and noting that "the Preamble to the Convention expressly disclaims the creation of any individual rights[.]"), the United States Supreme Court declined to resolve whether the Convention grants such individual rights. Rather, the Court held:

> [t]he Convention does not prescribe specific remedies for violations of Article 36. Rather, it expressly leaves the implementation of Article 36 to domestic law: Rights under Article 36 are to "be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U.S.T., at 101. As far as the text of the Convention is concerned, the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.

Id. at 2678.

The Supreme Court reasoned that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own." Id. at 2680. Further, the Court opined that "[t]he failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions. . . . [Thus,] [s]uppression would be a vastly disproportionate remedy for an Article 36 violation." Id. at 2681. Moreover, the Court found that because foreign nationals detained on suspicion of a crime enjoy the same protections of Due Process as

anyone else in this country, "Article 36 adds little to these 'legal options,' and [thus it is] unnecessary to apply the exclusionary rule where other constitutional and statutory protections-many of them already enforced by the exclusionary rule-safeguard the same interests [Appellant] claims are advanced by Article 36." Id. at 2682.

Thus, in finding that the Vienna Convention does not require suppression of evidence as a remedy for a violation of its articles and in refusing to implement its supervisory authority over state judicial proceedings, the United States Supreme Court meant for the states to implement their own procedural rules in resolving the issue of whether or not certain evidence should be suppressed. Accordingly, we hold that suppression is not an available remedy under the Convention, and because suppression was not otherwise warranted under the circumstances of this case, the trial court's denial of Appellant's motion to suppress was correct.

Finally, Appellant argues that, as a result of the Supreme Court's decision in Sanchez-Llamas, supra, a violation of Article 36 of the Convention must be considered as part of the totality of the circumstances in resolving the admissibility of Appellant's statement to the police. We are not persuaded by these arguments and find again that Appellant's statements were given voluntarily, knowingly, and intelligently. Furthermore, we do not consider a request to speak with an attorney, as provided in RCr 2.14(1), to be equivocal to a foreign national's request to speak with his or her consulate under the Convention. Moreover, the portion of Sanchez-Llamas upon which Appellant relies in making this argument requires the alleged Article 36 violation to be

brought to the attention of the trial court so that the "court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance." Sanchez-Llamas, 126 S.Ct. at 2682. Here, Appellant failed to allege that he was prejudiced in any way by the officers' failure to inform him that he could ask to have the Mexican Consulate notified of his detention, and thus the trial court could not consider the "totality of the circumstances" in order to properly determine whether he voluntarily, knowingly and intelligently gave statements to the police.

Accordingly, we affirm that much of the trial court's ruling finding that suppression of the statements was not an available remedy in this instance. A clear reading of Article 36 and all other applicable parts of the treaty do not compel the result Appellant requests. There is simply no way of reading the treaty as providing a remedy for suppression of statements taken in the course of criminal interrogations in which the defendant has validly waived his rights under Miranda.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the Jefferson Circuit Court.

Lambert, C.J.; Graves, Roach, Scott and Wintersheimer, JJ., concur. McAnulty, J., dissents by separate opinion, with Minton, J., joining that dissent.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE McANULTY

Respectfully, I dissent from that part of the Majority's Opinion which affirms the trial court's denial of Rivera-Reyes's motion to suppress any and all statements made by him. Although I can locate no express finding in the trial court's order that Rivera-Reyes voluntarily waived his rights, to the extent that this finding may be implied, I conclude that it was not based on substantial evidence. Thus, it was clearly erroneous, and I would reverse and remand.

A waiver is coerced -- not voluntary -- when not made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. (See Mills v. Commonwealth, 996 S.W.2d 473, 482 (Ky. 1999) (citing Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) for its holding that there are two distinct dimensions to a voluntary waiver: (1) uncoerced choice and (2) the requisite level of comprehension). "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of

comprehension may a court properly conclude that the Miranda rights have been waived." Moran, 475 U.S. at 421 (quoting Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979)).

In my opinion, the circumstances in this case compel a finding of an invalid waiver because they show that at all times Rivera-Reyes and the law enforcement officers were speaking two different languages. Rivera-Reyes spoke Spanish, not English. Once the detectives learned that he did not speak English, they requested an officer who spoke Spanish "somewhat" -- not a Spanish interpreter. They relied on the officer who spoke Spanish "somewhat" to present Rivera-Reyes with a rights form -- not a waiver of rights form. The officer who spoke Spanish "somewhat" could not translate the provisions of the form that he presented to Rivera-Reyes to sign. The rights form did not inform Rivera-Reyes that he may stop the questioning or making of any statements at any time by refusing to answer further or by requesting to consult with an attorney -- a provision which is included on the English form. As noted above, the rights form contained no waiver provision as the English form does. Roughly translated, the Spanish form simply states: You understand your rights. Understanding your rights, do you still wish to speak with me? While the English form states:

WAIVER OF RIGHTS

> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

No, the English form does not contain any additional rights, but I believe it does contain that which is necessary to impress upon a person being interrogated those rights that he or she is waiving and assure the continuous opportunity to exercise those

rights at a later stage. The additional language on the English form demonstrates that the waiver is made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Standing alone -- which under these facts it must -- the Spanish form does not.

Minton, J., joins this dissent.