

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

AYER DISTRICT COURT
DOCKET NO. 1848CR001006

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| _____ |) |
| COMMONWEALTH OF |) |
| MASSACHUSETTS, |) |
| |) |
| vs. |) |
| |) |
| JEFFERSON GANDRA, |) |
| Defendant |) |
| _____ |) |

**DEFENDANT’S MOTION TO DISMISS FOR FAILURE
TO PROVIDE RIGHTS UNDER M.G.L. c. 263, §5A**

Now comes the defendant, Jefferson Gandra, a resident of Brazil, and hereby moves this Honorable Court to dismiss Count I “OUIL” of the indictment against him, on the grounds that he was never properly accorded his rights under M.G.L. c. 263, §5A, which would have allowed him to take an exculpatory blood test.

SUMMARY OF CASE

Essentially, the defendant was in custody at the State Police Barracks in Concord and was handed a “Rights Form” delineated in Spanish. Being Brazilian, he speaks Portuguese and, thus, does not understand Spanish. Simultaneously, the Trooper “contacted a language interpreter over the phone” and then placed Gandra in touch with the language interpreter. Because the Trooper does not speak Portuguese, she was apparently unaware that Mr. Gandra did not understand virtually anything said to him by the unknown interpreter as Mr. Gandra has sworn in his Affidavit. Instead of explaining rights, the “language interpreter” urged him to plead “Guilty.” (See Affidavit of Defendant attached hereto as **Exhibit 1**).

Because Mr. Gandra did not understand the interpreter’s belligerence towards him and did not understand what he was being told by the “language interpreter,” Mr. Gandra did not sign the “Statutory Rights and Consent Form,” which was, again, handed to him in Spanish.

According to the Government’s own discovery in the form of a letter from Trooper Devlin to the D.A. “April,” the Government admits that it did not keep a transcript of the phone call between the “language interpreter” and Mr. Gandra at

the barracks. (See **Exhibit 2**). Trooper Devlin also refers to a non-existent report from Trooper Delgado, which has never been produced in discovery over the past five months. It should not come in under the aegis of “Oh, I forgot” and now be belatedly accepted. As a matter of law, it does not exist because it was never produced pursuant to the Defendant’s Discovery motions filed as far back as 9/24/2018. (See **Exhibit 3** annexed hereto).

Very simply, if the Defendant’s rights to obtain an exculpatory blood test under M.G.L. c. 263, §5A were not properly conveyed to Mr. Gandra, in a language which he understood or provided by an interpreter whom he could understand, then Mr. Gandra’s rights have been egregiously breached warranting dismissal.

I. STATEMENT OF FACTS

We begin on an unhappy note. Though Mr. Gandra attempted to defend himself in the courts of the Commonwealth, he was accosted and “apprehended” by two plain clothes “ICE” agents in this very same courthouse, outside the doors of this very same courtroom, on 11/1/2018. Mr. Gandra was then expeditiously processed by ICE in the ICE jails located in Plymouth and Billerica and eventually deported just before Thanksgiving of 2018. Therefore, he cannot be with us today.

The Government’s case is extremely tenuous, because it arises out of a motor vehicle encounter (not an actual motor vehicle stop) with the State Police per Trooper Devlin on the warm evening of 8/18/2018 on Route 495 Northbound near Exit 32 in the town of Westford. Trooper Devlin did not actually observe any erratic operation of the motor vehicle by Mr. Gandra and, instead, was relying upon a “911” call from an unidentified civilian operator, who claims that Gandra was operating “erratically.” In response to Defendant’s discovery motions, and in response to Judge Guzman’s order from the bench at the last hearing on the day before Thanksgiving, the Government was finally able to produce a tape of that civilian call. In that tape, there is no evidence that the civilian “caller” had any law enforcement background nor any experience in the detection of “drunk drivers.” One’s peculiar sensitivities might cause one to lodge calls against virtually any driver on Route 495 that night, who may have been looking at their phone.

When Trooper Devlin arrived to find Mr. Gandra’s Ford Fusion stopped at the side of the road, she also found Trooper Clark already there. So, she coordinated her efforts with Trooper Clark in accosting the defendant. Dissatisfied with this level of representation at the roadside, Trooper Delgado, a Spanish speaking officer appeared to complete the trio of troopers, who were now addressing Jefferson Gandra at the scene. The Spanish speaking Delgado does not speak

Portuguese and Gandra's Affidavit confirms that he did not understand Trooper Delgado at the roadside. Yet, field sobriety tests ensued anyways, regardless of Gandra's understanding. Trooper Delgado initiated the field sobriety tests by deploying the Horizontal Gaze Nystagmus test, which is the subject of Defendant's Motion to Suppress Results of Horizontal Gaze Nystagmus test already been filed on 9/24/2018. Without extensive medical testimony by the Government, which they have eschewed in discovery, the Horizontal Gaze Nystagmus test is excluded from evidence under Commonwealth v. Sands.

Supposedly, Mr. Gandra failed this Horizontal Gaze Nystagmus test and two other field sobriety tests which he did not understand. Thus, he was taken into custody and driven to the Concord Barracks by Trooper Devlin, who does not speak either Spanish or Portuguese. At the Barracks, the problems continued, when the State Police were forced to reply exclusively upon the unidentified "language interpreter on the phone" because there were no Troopers present who spoke Portuguese. Curiously, while Gandra was speaking to the "Portuguese interpreter" on the phone, he was handed a "Rights Form" in Spanish, as if Spanish and Portuguese are apparently equivalent languages, which they are not.

Not understanding the unidentified "Portuguese interpreter" and being intimidated by the interpreter's consistent mantra to "admit your guilt," Mr. Gandra summarily ended the telephone conversation by refusing to sign any Rights Form. (See Exhibit 1. Had the Government properly performed in this case, they would have had a Portuguese State Trooper present or a Portuguese interpreter present in person to ensure Gandra's understanding of critical rights. The Government provides no basis for not abiding by either of these options, except for convenience. For example, there is no evidence submitted by the Government to explain why they did not have a Portuguese interpreter present to speak with Mr. Gandra regarding these important charges. This Honorable Court should draw a negative inference therefrom with respect to the Government's care for Mr. Gandra's rights.

II. THE LAW

The warnings under M.G.L. c. 362, §5A are no different than Miranda Warnings in terms of the Government's burden to ensure that the defendant understands the warnings provided to him, such as the right to have a blood test which would have been exculpatory in this matter. Special care must be taken by the police to ensure that the defendant understands and comprehends the Miranda Warnings and has executed a valid waiver. See Commonwealth v. Colon-Cruz, 408 Mass. 533, 539, 562 N.E.2d 797, 803 (1990). In this case, the Government cannot competently prove that these seminal warnings were properly given

because the Government admits that it never kept a transcript of the phone call, nor the name of the interpreter. (See Exhibit 2, at Clauses 5 and 6).

If the Government cannot even identify the name of the interpreter, then how can the Government demonstrate that the Miranda Warnings and the M.G.L. c. 263, §5A warning were properly discharged? Without the transcript of the “interpretation call” or even the name of the interpreter, the Government cannot hope to prove that it advised the defendant of his rights in a language which he could comprehend. Commonwealth v. Lopes, 455 Mass. 147, 166 (2009). It also deprived the defendant of any opportunity to challenge the competency of the interpretation.

It is against this backdrop that the Government’s conduct in this case must be skeptically viewed. The Government cannot prove that the blood test rights were given to Mr. Gandra in a proper manner by the unidentified “interpreter.” Though that phone call was made on a phone line controlled by the Government at the Concord State Police Barracks, the Government apparently has no “transcript” of the call according to its own discovery (See Exhibit 2, Clause 6).

III. CONCLUSION

Under these egregious circumstances, the case against Mr. Gandra must be dismissed, with prejudice. Portuguese speaking immigrants, such as Jefferson Gandra, have the right to take a blood test under M.G.L. c. 263, §5A and those rights were never properly conveyed to Mr. Gandra.

The Government’s case is exceedingly weak because it involves an untrained and basically unknown “911 caller” making allegations of erratic operation against Mr. Gandra, but apparently failing to supply her own name. The phalanx of three Troopers who appeared at the scene did not observe any erratic operation by Mr. Gandra, who was already pulled over on the side of the road that evening in August 2018 on Route 495 Northbound. At least one of the three field sobriety tests (Horizontal Gaze Nystagmus) which the Government initiated must be dismissed pursuant to Commonwealth v. Sands, as a matter of law. Thus, the Government is left with two field sobriety tests, which were administered roadside by a Spanish speaking officer to a Portuguese defendant, who does not understand Spanish. Moreover, the defendant was then brought to the Barracks by an English speaking officer, who put him on the line with an unknown interpreter, who belligerently berated Mr. Gandra, forcing him to eventually hang up and refuse to sign the “rights forms” including the seminal blood test form. Complicating matters further, the Government never kept a transcript of that “interpreter call” or even the name of the interpreter, thereby, preventing the defendant from

challenging the propriety of the interpreter's sterling "work" at any potential hearing.

Gandra attempted to defend himself in this court and appeared for every court hearing with counsel, before he was "apprehended" by two ICE agents inside the four walls of this courthouse and then transported to ICE jail, from which he was deported. While Mr. Gandra resides in Brazil, he hopes to come to the United States someday. Thus, it is vitally important that he have a clean record in order to do so.

WHEREFORE, Jefferson Gandra respectfully requests this Honorable Court to allow his Motion to Dismiss with prejudice and refers to his Affidavit in further support hereof.

Respectfully Submitted,
The Defendant,
JEFFERSON GANDRA
By His Attorney,

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