U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: SEDENO-TRUJILLO, LUIS NARCISO

A088-190-240/241/244/229

Date of this notice: 9/22/2010

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Wendtland, Linda S.

Files: A088 190 240 - Hartford, CT
A088 190 241
A088 190 244
A088 190 229

Date: SEP 22 2010

In re: LUIS NARCISO SEDENO-TRUJILLO
CIRILO SEDENO TRUJILLO
APOLINAR FLORES ROMERO
AMILCAR SOTO VELASQUES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Michael Wishnie, Esquire

ON BEHALF OF DHS: Leigh Mapplebeck
Senior Attorney

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled (all respondents)

APPLICATION: Termination

The respondents appeal from an Immigration Judge's April 3, 2009, decision denying their separate motions to suppress the evidence of alienage offered against them and to terminate proceedings. Because the respondents' cases were treated as a group below–i.e., they provided testimony of record in one another's cases and have filed largely identical briefs raising identical claims–we have consolidated these records for purposes of adjudicating the instant appeal. *See* Ch. 4.10, Board of Immigration Appeals Practice Manual ("the Board may consolidate [ ] appeals where the cases are sufficiently interrelated"); Tr. at 5, 199, 139, 143.[1] We have considered the respondents' briefs in support of their appeals, the opposition of the Department of Homeland

[1] Reference to the transcript refers to joint proceedings held with all of the above-captioned respondents present. The same transcript (covering, *inter alia,* hearings on November 24, 2008, December 8, 2008, January 22, 2009, and April 3, 2009) has been filed in the record of proceedings for each of the above-captioned respondents.

Security ("the DHS"), the respondents' reply briefs to the DHS's opposition, and the numerous and lengthy exhibits offered in support of the appeals. We find that remand is required to clarify the record and produce fact-finding on key issues that are central to this appeal.[2]

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence); 8 C.F.R. § 1003.1(d)(3). The Board reviews *de novo* questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

This appeal requires us to address the standards governing motions to suppress evidence in removal proceedings. In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), the Supreme Court held that, while the Fourth Amendment exclusionary rule is generally inapplicable to deportation proceedings, this rule may be applied if there are egregious Fourth Amendment violations that transgress Fifth Amendment notions of fundamental fairness, undermining the probative value of the evidence. *See also Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (respondent made *prima facie* showing that admissions were given involuntarily and the government presented no contrary evidence; proceedings terminated); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). But we note that, in view of the civil nature of deportation (and removal) proceedings, the "identity of an alien (as distinguished from alienage) is not suppressible . . . even if it is conceded that an illegal arrest, search, or interrogation occurred." *Matter of Sandoval, supra,* at 79.

I. Background

Insofar as is relevant here, the background of this case is as follows.[3] The respondent and several other roommates were asleep in their apartment at 199 Atwater Street in New Haven, Connecticut,

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[2] Our consolidation of these cases for appeal is for purposes of producing an administrative decision that is complete and accurate. Our decision to consolidate for purposes of appeal does not affect the Immigration Judge's ability to sever these cases on remand if he finds that to do so is in the best interests of justice.

[3] The respondents make a host of contentions that, at bottom, are not relevant to the main question presented here, i.e., whether the Forms I-213–containing evidence related to the respondents' alienage–should have been admitted into evidence in these removal proceedings. To the extent necessary to address arguments raised on appeal, we will identify and discuss these contentions in this order, but we note that although we have reviewed the many pages of supporting documents filed by the respondents, we find much of the material (including background evidence regarding a plan to provide identity cards to undocumented aliens in New Haven, Connecticut) to be immaterial to the central question presented to us. We also note that to the extent that the information was not presented below, and was not shown to be previously unavailable or undiscoverable, it will not be considered by the Board in the context of this appeal. *See Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984).

in the early morning of June 6, 2007, when agents of the DHS's Immigration and Customs Enforcement ("ICE") branch, along with officers from other law enforcement agencies, knocked and rang the doorbell at the outside door to their apartment.[4] *See* Declarations of Respondents in Support of Motions to Suppress Evidence (filed separately in each of the above-captioned respondents' records of proceedings); *see also* pp. 5-6 *infra*. What happened in response to the officers knocking at the door is in dispute regarding whether the officers entered 199 Atwater Street pursuant to the consent of a resident. The DHS contends generally that a resident of the apartment gave the agents consent to enter. The DHS also contends that its officers entered the apartment, encountered the respondents and other residents, asked for identification, and detained the respondents for further questions based on reasonable suspicion that the respondents were present in the United States without permission.

Below, the respondents sought suppression of the Forms I-213 filed in each case, in which the ICE concluded, in general, that the respondent who was the subject of each I-213 did not have permission to be present in the United States.[5] On appeal, the respondents contend the Forms I-213 contain evidence gathered by means of an egregious illegal and non-consensual search and a seizure based on race. *See* Respondents' Briefs at 13-14; 17-55. The respondents also argue that the proceedings below violated their Fifth Amendment rights to due process and fundamental fairness, their First and Tenth Amendment rights, and the DHS's own regulations and policies. *Id.* at 14, 55-64. Because we find that the record must be remanded for further proceedings before we can exercise appellate review of the Fourth Amendment issues, we do not now address the arguments raised by the respondents as to the First, Fifth, and Tenth Amendments or the respondents' regulatory-based arguments.

II. Legal Framework on Fourth Amendment Search Issue

As previously noted, the exclusionary rule of the Fourth Amendment is generally not considered applicable in removal proceedings. *INS v. Lopez-Mendoza, supra*; *Matter of Sandoval, supra*. Even if the Fourth Amendment's protection against unreasonable searches and seizures was violated during the operation at 199 Atwater Street, suppression of evidence that resulted from the operation will only be necessary (if at all) when the constitutional violations are "egregious." *INS v. Lopez-Mendoza, supra*; *Almedia-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006); *Melnitsenko v. Mukasey*, 517 F.3d 42, 46 (2d Cir. 2008). The guiding principle is whether the consideration of the evidence trangresses Fifth Amendment notions of fundamental fairness. *Matter of Sandoval, supra*. As the Second Circuit has recognized, evidence should be suppressed

[4] As noted, the above-captioned respondents all appeared together at several hearings (*see supra* note 2) with another roommate, Teresa Varo-Gonzalez, whose case was ultimately separated so that she could pursue an asylum application (Tr. at 140). At this point, the Board is not aware of any other aliens with pending appeals who were placed into proceedings as a result of the operation at 199 Atwater Street.

[5] The contents of each Form 213 will be discussed in more detail *infra*.

only when the record establishes that "an egregious violation that was fundamentally unfair had occurred or that the violation . . . undermined the reliability of the evidence in dispute." *Almeida-Amaral, supra,* at 235.

In the criminal context where, unlike in removal proceedings, the exclusionary rule of the Fourth Amendment is fully applicable, a search conducted without a warrant issued upon probable cause is "per se unreasonable." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). An exception to this general rule is when a person with authority has given voluntary consent to the search. *Schneckloth v. Bustamonte*, *supra,* at 223. That exception applies equally in removal proceedings where we are required to assess whether a search violated the Fourth Amendment and whether that violation was "egregious," thereby justifying the exclusion of evidence. *Cf. Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016 (9th Cir. 2008).

In removal proceedings, an alien seeking the exclusion of evidence based on the Fourth Amendment bears the burden of establishing a *prima facie* case that evidence should be suppressed. *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971). The request to exclude evidence should be made via a motion to suppress that is supported by an affidavit or other objective evidence that explains why suppression is appropriate. *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). The affidavit must contain specific, detailed statements based on the personal knowledge of the affiant. *Matter of Tang*, *supra*; *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). Only when an alien has come forward with adequate evidence in support of suppression will the burden shift to the DHS to justify the manner in which it obtained the evidence. *Matter of Barcenas*, *supra,* at 611.

Below, the respondents filed Motions to Suppress that argued that no consent was given at the point of entry to the apartment. In support of the Motion, the respondents submitted sworn affidavits in which each of the above-captioned respondents stated that he was told by a Ms. Sammy Salazar, the person who is alleged (in one Form I-213) to have opened the exterior door to 199 Atwater Street, that she never gave consent to enter the apartment. The respondents also requested that the Immigration Judge issue a subpoena to the ICE agents who first entered the apartment, for the purpose of allowing testimony on the disputed point of consent. The Immigration Judge found that the respondents had not met their threshold burden of submitting evidence that could point to an egregious violation of the Fourth Amendment (Tr. at 139). Because of this finding, the Immigration Judge declined to subpoena testimony from any of the government agents involved in the operation at 199 Atwater Street on June 6, 2007 (Tr. at 145). Specifically, the Immigration Judge found that the search of 199 Atwater Street, although done without a warrant, was not shown to be egregious because no direct evidence of non-consent was produced (I.J. at 27).

A. Facts Bearing on Consent

1. Form I-213

The Form I-213 filed in each case is at the center of the Fourth Amendment issues in these cases. These documents detail, from the perspective of the ICE agents, what happened when the agents arrived at 199 Atwater Street. What is at issue on appeal is whether the documents can be admitted into evidence for purpose of showing the alienage of the above-captioned respondents, given the arguments that Fourth and Fifth Amendment rights were violated by an egregious search and seizure

of the home. Because we are dealing with an early-morning entry into a private home, we are aware of the unique and serious considerations at play in such an analysis, even in the context of a civil removal proceeding. *Cf. Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016 (9th Cir. 2008).

At the outset, we note that the four Forms I-213 filed in the four respondents' cases are inconsistent with one another on the key issue of access and consent. That is, in only one of the above-captioned respondents' cases (i.e., Luis Sedeno-Trujillo, A088 190 240) is Ms. Salazar identified as giving consent to the ICE officers to enter. *See* Form I-213 filed May 8, 2008, in Record of Proceedings ("ROP") A088 190 240 (unmarked as an exhibit). In the case of Luis Sedeno Trujillo's brother, Cirilo Sedeno-Trujillo (A088 190 241), the person alleged to have given consent is Edelberto Sedeno. *See* Form I-213 filed May 8, 2008, in ROP A088 190 241 (unmarked as an exhibit). There is no evidence in any of the four consolidated records of the above-captioned aliens that Edelberto Sedeno lived at 199 Atwater Street or was present on June 6, 2007. *See* Tr. at 12. In the Form I-213 filed in the case of Apolinar Flores-Romero (A088 190 244), nothing is said about consent; rather the document only indicates that Flores was "encountered" during an ICE attempt to locate a known fugitive, who goes by the A# 029 914 533.[6] *See* Form I-213 filed May 8, 2008, in ROP A088 190 244 (unmarked as an exhibit). Finally, the Form I-213 in the case of Amilcar Soto-Velasques also says nothing about consent to enter, stating that he was "apprehended at 199 Atwater Street while a warrant of deportation at this address was executed." *See* Form I-213 filed May 8, 2008, in ROP A088 190 229 (unmarked as an exhibit).

The inconsistencies among the I-213 documents alone strongly suggest that the record requires further evidence on the issue of consent. Ms. Salazar, alleged to have given consent to enter, was not present to testify. Each of the four captioned respondents filed an affidavit stating, in almost identical language, that Ms. Salazar (alleged in one Form I-213 to have allowed the ICE officers into the home) did not, in fact, consent to the officers' entry and search. *See* Respondents' Supplemental Declarations, filed at Exh. B to Respondents' Reply to Government Brief Opposing the Suppression of Evidence.[7]

2. Testimony and Affidavits

Each of the above-captioned respondents testified about what happened early in the morning on June 6, 2007. Luis Sedeno-Trujillo (A088 190 240) testified that he was asleep in the same room as his brother on June 6, 2007 (Tr. at 89). He stated that the door bell rang and there was knocking

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[6] The alleged "known . . . fugitive" is identified by a different A number in Cirilo Sedeno-Trujillo's file, i.e., 074 862 572. *See* Form I-213 filed May 8, 2008, in ROP A088 190 241 (unmarked as an exhibit).

[7] The Supplemental Declarations are written in English and have been signed by each respondent. They include a certification of Regina Bateson that she is "fluent in both Spanish and English" and that she "translated the above Declaration . . . into Spanish." It is unclear if that translation was oral or in writing. The respondents each have indicated that they do not speak English. *See* Respondents' Declarations, filed at Exh. B to Motion to Suppress in each individual record of proceedings.

on the back door of the apartment and that he was half awakened by these sounds. (Tr. at 90). There are two doors to open to allow someone in the apartment (Tr. at 98). He heard steps in the apartment and then someone entered his room (Tr. at 91-92). The person who entered told him to get up and asked him for identification (Tr. at 92). The respondent understood the instructions (Tr. at 93-94). He did not give the officers anything in response to their request and said nothing (Tr. at 94-95).

Luis Sedeno-Trujillo's brother Cirilo Sedeno-Trujillo (A088 190 241), testified consistently with his brother that he was sleeping in his room when he heard the doorbell ring and that his cousin Sammy Salazar opened the door (Tr. at 70-71). Two doors had to be opened before the ICE officers could gain entry to the apartment (Tr. at 71). He was in bed when officers entered his room (Tr. at 72). He was asked for identification, but he did not provide anything in response (Tr. at 73).

Amilcar Soto-Velasques (A088 190 229) was sleeping at 199 Atwater Street on the morning of June 6, 2007, but did not live there (Tr. at 47). He was visiting his girlfriend Teresa Varo Gonzalez (Tr. at 47). He awoke from the noise of the doorbell (Tr. at 50). He testified that two doors of the apartment must be entered to gain entry to where the bedrooms are (Tr. at 50). He did not hear the encounter at the door (Tr. at 51-52). The officers knocked on the door to his girlfriend's bedroom and she opened the door (Tr. at 52-53). The officers directed him and his girlfriend to the living room (Tr. at 54). Both he and his girlfriend provided identification in response to the officers' request (Tr. at 55-56).

Apolinar Flores-Romero (A088 190 244) was sleeping in the living room at 199 Atwater Street on the morning of June 6, 2007 (Tr. at 20). He awoke to the ringing of the doorbell (Tr. at 21). Flores testified that Salazar went to the door and opened it but did not say anything (Tr. at 23). Mr. Flores was equivocal on whether the agents and Ms. Salazar spoke after entering the apartment (Tr. at 23, 43-44). He stated that the agents said nothing to anyone after entering (Tr. at 23), but later asked him for identification (*Id.*). He first stated that the officers asked no questions except for requesting identification, but later indicated that he did not remember whether they asked any questions (Tr. at 25). He was advised that his affidavit indicated that the officers shouted at the residents (Tr. at 27-28). He provided identification in response to the officers' request (Tr. at 24-25, 45).

B. Remand for Additional Proceedings on the Issue of Consent

Given all of the above, the record is not clear as to what exactly occurred when the ICE officers approached 199 Atwater Street. While we are mindful that the respondents bear the burden of producing a *prima facie* case in support of suppression, we find that the inconsistency of the core documents raises factual issues, the resolution of which requires further proceedings. *Matter of Barcenas, supra.* The Immigration Judge's factual conclusion that Sammy Salazar gave consent to the officers appears derived from (1) the lack of the respondents' direct knowledge about the interaction at the door, and (2) the finding that Mr. Flores' testimony about the officers' interaction with Ms. Salazar lacked credibility (I.J. at 25-26). But these findings raise questions, such, e.g., as whether the alleged consent of Ms. Salazar was express or implied by her actions. The Immigration Judge's conclusion, we find, does not reflect whether he gave full consideration to the record, particularly the serious inconsistencies in the I-213s. While we find no clear error in the adverse credibility determination, this proves simply that Mr. Flores had little credible evidence to lend to the resolution of the question of consent. We note that there is other evidence of record that

would undermine the conclusion that Ms. Salazar gave consent to the officers, and other potential avenues to secure additional evidence on this point.

We do not intend to convey here our acceptance of the various statements of the respondents or to credit the alleged out of court statements of Ms. Salazar. We share the concerns of the Immigration Judge about the respondents' lack of first-hand knowledge of Ms. Salazar's consent or lack thereof, and note that although hearsay is generally admissible in immigration proceedings, the weight it is accorded is subject to an assessment of its reliability. *See* I.J. at 25 (citing *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984)). *See also Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996).[8]

But more generally, given the inconsistencies in the documentary record, there was an avenue available to secure first-hand testimony about the encounter at the door between the officers and Ms. Salazar, if she is, indeed, the person who answered the door. That avenue is production of the testimony of the officers who approached the door, and then the Immigration Judge's on- the-record assessment and weighing of this testimony. Were the Form I-213 documents that are of record in each of these four cases consistent as to what occurred at 199 Atwater Street, we might share the Immigration Judge's opinion that there is no need to gather additional evidence on the issue of consent. But here, given the various inconsistencies on the issue of consent and the issue of why the officers were at the apartment in the first place (since different "fugitives" have been used to justify the search), we find that significant concerns have been raised about the encounter between agents and the residents of 199 Atwater Street.

Furthermore, we find that the I-213s do not sufficiently reveal the exact nature of the evidence used to support conclusions of alienage. That is, some respondents deny providing identification at the home. Given this fact, the Form I-213 should reflect how the officers gained basic information about each respondent in order to conclude that the person was an alien unlawfully present. Did the key information come from the questioning during the initial search, i.e., in response to their inquiries for identification (Tr. at 55-56, 73, 92)? Did the respondents each admit alienage, and if so, at what point? If the respondents admitted only their identity at 199 Atwater Street, and alienage was discovered through other investigatory techniques, the remedy of suppression may be unavailable to the respondents. *See Matter of Sandoval, supra,* at 79 ("the 'body' or identity of an alien . . . is not suppressible as the 'fruit of the poisonous tree'" even if an illegal arrest or search occurred). As we have stated, "[o]nce an alien's identity is learned, the [DHS] can entirely avoid triggering the exclusionary rule . . . where documents lawfully in the [DHS's] possession evidence unlawful presence." *Id.*

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[8] Reliability of hearsay evidence is based on "the sum of the circumstances surrounding the making of the statement that render the declarant worthy of belief." *See Bierenbaum v. Graham*, 607 F.3d 36, 50 (2d Cir. 2010) (*citing Nucci v. Proper*, 95 N.Y.2d 597, 603 (2001)). In considering the circumstances, a trier of fact takes into account, *inter alia*, the spontaneity of the statement, whether it was repeated, the mental state and motive of the declarant, and the degree to which the statement was against the interests of the declarant. *Id.* Moreover, other factors such as the specificity of the information, the circumstances under which it was disclosed, and the degree to which it is corroborated by other evidence, also can be relevant. *Sira v. Morton*, 380 F.3d 57, 78-79 (2d Cir. 2004).

These open questions also contribute to our decision to remand this case for full consideration of the various statements about consent, for supplementation of the record with testimony from one or more of the various agents involved in the operation at 199 Atwater Street on June 6, 2007,[9] and for the Immigration Judge to assess what information was actually gathered at the apartment, and whether suppression is an appropriate remedy in light of the answer to all of the above questions.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained. The record will be remanded for further proceedings consistent with this order.

FOR THE BOARD

[9] We note that the Form I-213 filed in, e.g., the case of Luis Sedeno-Trujillo, indicates that ICE officers were assisted by officers from other law enforcement agencies.