

THE STATE OF NEW HAMPSHIRE

Cheshire-Hillsborough County

Jaffrey-Peterborough District Court  
Nashua District Court

State of New Hampshire

v.

Frederico Barros-Batistele - #05-CR-1474,1475  
Wellington Brustolin Da Silva - #05-CR-1479,1480  
Luiz De Amorim - #05-CR-1481,1482  
Mauro Sergio Farias – 05-CR-1476  
Bernarda Gallego - #05-CR-1477,1478  
Jorge Mora Ramirez - #05-CR-0736,0737  
Sergio Robles-Ruiz - #05-CR-1483,1484  
Marcos Vinicius S. Sousa - #05-CR-1486

ORDER ON MOTIONS TO DISMISS AND OBJECTIONS

The defendants in these cases are charged with violation-level criminal trespass by the New Ipswich (Ramirez) and Hudson (Robles-Ruiz, De Amorim, Farias, Da Silva, Gallego, Barros-Batistele and Sousa) Police Departments. All were apparently engaged initially by officers for other reasons, but were then charged with criminal trespass when the officers suspected the defendants were in violation of federal immigration laws.

New Hampshire RSA 635:2 provides that a person is guilty of criminal trespass as a violation “if, knowing that he is not licensed or privileged to do so, he enters or remains in any place.” The police departments’ theory of their charges, which they acknowledge is novel, is that the defendants knew they were not properly documented to be in this country, because they had taken no steps to lawfully enter or remain here, and thus also knew they were not licensed or privileged to remain in the town of New Ipswich or Hudson. The novelty of the charges is that until now, in New Hampshire at least, the “place” referred to in the statute has been a specific parcel or structure of privately-owned real property, rather than any public or private place within the respective town.

Motions to dismiss the criminal trespass complaints have been filed on behalf of defendants Ramirez, Robles-Ruiz, Sousa and Gallego (the “Motions”), claiming that these state law charges violate the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, in that the comprehensive system of federal laws regulating “naturalization” adopted by Congress pursuant to U.S. Constitution, Art. I, §8, preempts any state action attempting to regulate

immigration. They say the underlying basis of this fundamental principle of constitutional law is that if each state could establish its own system of offenses and penalties for immigration violations, it would undermine Congress' power to carry out a uniform national policy in that area.

The police departments' objections to the Motions (the "Objections") acknowledge that federal authority to regulate immigration is exclusive, but argue that the criminal trespass complaints do not constitute regulation of immigration. They reason that because the statute as applied does not establish new conditions for removal of immigrants or for determination of immigration status, these charges are not inconsistent with federal law, but are merely tools to enable local law enforcement to positively identify persons with no record of existence in the available databases. Furthermore, they say these charges are not intended either to facilitate deportation of the defendants or to hassle them with fine payments, but are aimed solely at fulfilling each department's undisputed duty to protect the security of its citizenry.

Fortunately, the resolution of these issues does not require this court to understand much about substantive immigration law. It does, however, involve consideration of the cases where state laws have been charged with violating the Supremacy Clause.

Both the Motions and the Objections acknowledge that the United States Supreme Court's decision in De Canas v. Bica, 424 U.S. 351 (1976) sets forth the criteria for determining whether a state law (or its application in these cases) is an unconstitutional entry into an area preempted by federal law. Those criteria, which have been acknowledged and applied by the New Hampshire Supreme Court in Appeal of Conservation Law Foundation, 147 N.H. 89 (2001), are (1) whether federal law explicitly preempts state regulation in a particular area; (2) whether absent specific preemption, state law infringes on an area where Congress intended federal law to have exclusive jurisdiction, that is, to "occupy the field"; or (3) whether state law actually conflicts with the provisions of federal law.

The decision in De Canas is particularly instructive, not only because the subject matter was also immigration law, but also because it demonstrates how the criteria the Supreme Court established are to be applied to specific circumstances. The issue was whether a California statute was preempted by federal immigration law, where the state law prohibited employers from knowingly hiring illegal aliens if such employment would adversely affect local resident workers. Significantly, the Court stated that although "[p]ower to regulate immigration is unquestionably exclusively a federal power," Id. at 354, it was unable to find "any specific indication in either the wording or the legislative history of the [Immigration and Nationality Act ("INA")] that Congress intended to preclude even harmonious state regulation touching on aliens in general...." Id. at

358. Thus, having resolved the first of its criteria for federal preemption in the negative, the Court moved on to the second.

In determining whether the California law entered an area where federal immigration law was intended by Congress to be exclusive, the Court declared that “[t]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.” Id. at 359. It then found that because Congress had passed other laws giving the states authority over alien employment issues, “the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens, and therefore barring state legislation....” Id. at 362.

Finally, on the last of its criteria, the Supreme Court felt it needed further information from the lower court in order to tell whether the California statute “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA.” Id. at 363. Specifically, input was sought on construction of the state statute, from which the Court might determine whether the law “can be enforced without impairing the federal superintendence of the field covered by the INA.” Id. at 363.

Turning to our cases, and considering how De Canas resolved its first criterion, we can safely conclude that there is no explicit prohibition in federal law against all state laws in any way touching on aliens. Thus, the mere fact that RSA 635:2 has been applied to these defendants is not in itself unconstitutional.

Resolution of the second De Canas criterion is not as straightforward, in that it requires a determination as to whether use of our criminal trespass statute in the manner charged enters an area where Congress intended federal law to “occupy the field.” The field is the regulation of immigration, which, in addition to the other statements from De Canas cited above, “is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” Id. at 355.

The State argues that charging the defendants with criminal trespass is not an effort to deport them for illegally remaining in New Ipswich or Hudson, or to determine whether they may subsequently remain in this country, but is merely intended to identify them as being in violation of federal immigration law, in the interest of protecting the local citizenry from persons essentially of unknown quantity. It further states that these proceedings are not in conflict with federal law, because only the federal standards for determining immigration status are to be applied by the court, not a different set of state guidelines.

The difficulty with this analysis is that the State asks the court not only to use the federal standards to determine the defendants’ immigration status, but then, based on that status, to find them guilty of an additional offense and to

impose additional penalties beyond those the defendants would face under federal immigration law. The provisions of the INA, 8 U.S.C. §1101 et seq., set forth quite a number of offenses, sanctions and penalties for violation of its requirements ranging from civil deportation, to criminal fines and/or imprisonment for such offenses as unauthorized entry into the United States (under §1325), failure to register (under §1306), and reentry by a previously deported alien (under §1326). All in all, this array of offenses, sanctions and penalties constitutes a scheme of federal regulation “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” which is how our Supreme Court explained the second De Canas test of federal law “occupying the field.” Appeal of Conservation Law Foundation, supra, at 91.

Moreover, the present cases are entirely different than that dealt with in De Canas, where the regulation of employers who hired illegal aliens was found to be “a merely peripheral concern of the federal regulation.” De Canas, supra, at 361. These prosecutions go directly to the subject matter of the sanctions and penalties for immigration violations set forth in the INA, and attempt to add state sanctions in the same area, a result which has never been permitted in any case where federal regulation has been found to “occupy the field.” See Hines v. Davidowitz, 312 U.S. 52, 63 (1941), which seems to be the seminal case for this principle, and which is cited in many other decisions where federal law permeates “the specific field which the States were attempting to regulate....” De Canas, supra, at 362.

There is no need to dwell on the third De Canas criterion for federal preemption, because the current charges clearly conflict with the comprehensive menu of federal immigration offenses, sanctions and penalties by attempting to add a new one to them.

Based on the foregoing, the criminal trespass charges against the defendants are unconstitutional attempts to regulate in the area of enforcement of immigration violations, an area where Congress must be deemed to have regulated with such civil sanctions and criminal penalties as it feels are sufficient.

Before concluding, it should be noted that the federal system of enforcing immigration violations does not preclude all efforts by local law enforcement to participate and assist in that work. As the defendants point out, 8 U.S.C. §1357(g) provides a process for state officers to become authorized to perform “immigration officer functions” as, in effect, deputies of the federal government. The functions permitted by this status include “investigation, apprehension and detention of aliens,” which are primarily the goals the New Ipswich Objection (in paragraph 3) sought to accomplish with its charge, because “an admittedly overburdened ICE Department...does not have the resources to take custody of the defendant directly.” The point, though, is that this role for local law enforcement exists within the federal plan for enforcing immigration violations,

which is further indication that Congress intended to preclude any local efforts which are unauthorized or based on other than federal law.

Finally, this analysis has purposely avoided any determination whether it is proper as a matter of statutory construction for RSA 635:2 to be applied as the police departments have sought to do. The reason is that there is no reliable basis on which this court could undertake that inquiry, as there are no New Hampshire cases dealing with the issue, or legislative history revealing the intent of our lawmakers who passed the statute. The import of the analysis the court has conducted, however, is that even if the police departments have applied the statute in a manner not otherwise unlawful, its application in that manner violates the Supremacy Clause of the United States Constitution, and is thus barred by federal preemption.

Consequently, the Motions are granted, and the criminal trespass complaints against all defendants are dismissed, including those against defendants who did not file such motions. As to the complaints for other charges, the parties are requested to contact the court in order to schedule trial dates, at which time the court will also consider the pending motions to suppress and objections, which require testimony before rulings can be made.

SO ORDERED.

Date: August 12, 2005

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L. Phillips Runyon III  
Presiding/Acting Justice