

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ANTONIO OCAMPO * Docket 2:10-CV-4309-R
*
versus * New Orleans, Louisiana
*
MARLIN N. GUSMAN, et al * November 15, 2010
* * * * *

TEMPORARY RESTRAINING ORDER HEARING
BEFORE THE HONORABLE SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

Appearances:

For the Plaintiff: New Orleans Workers' Center
for Racial Justice
BY: JENNIFER J. ROSENBAUM, ESQ.
803 Baronne Street
New Orleans, Louisiana 70113

For the Defendants: Usry Weeks & Matthews
BY: FREEMAN R. MATTHEWS, ESQ.
TIMOTHY R. RICHARDSON, ESQ.
1615 Poydras Street, Suite 1250
New Orleans, Louisiana 70112

Official Court Reporter: Toni Doyle Tusa, CCR, FCRR
500 Poydras Street, B-406
New Orleans, Louisiana 70130
(504) 589-7778

Proceedings recorded by mechanical stenography; transcript
produced by computer.

1 **MS. ROSENBAUM:** We do have an interpreter who is
2 interpreting for Mr. Ocampo, so that may be part of the --

3 **THE COURT:** Has she been sworn in? Swear her in.
4 (WHEREUPON the interpreter, Nicky Thanos, was duly
5 sworn.)

6 **MR. RICHARDSON:** Tim Richardson on behalf of the
7 sheriff. Judge, from what we could gather from today -- and,
8 again, Judge, we received this file this morning, but this is
9 what looks like has happened.

10 Originally, the prisoner was arrested for an
11 attempted first-degree murder and two aggravated batteries by
12 cutting. Those were the original charges. What happened from
13 that point is it started to go through the district attorney's
14 office.

15 At that point, we have some documentation that
16 INS actually placed a hold on the inmate. Well, it went
17 through until about August of 2010. In August, the charges
18 were reduced to a simple battery. That happens in August, and
19 we have some documentation that we actually checked with the
20 clerk's office they were still showing an attempted
21 first-degree murder as of that point in time.

22 Now, pursuant to the office policies of the
23 sheriff, as soon as there is any indication that the inmate is
24 to be released or that the charges have been reduced or so
25 forth, INS will be notified. The way that that works, Judge,

1 is the district attorney's office has the information which
2 goes to the clerk's office. The clerk's office goes to the
3 sheriff's office and notifies the sheriff's office that, at
4 this point in time, the inmate can be released.

5 **THE COURT:** Let's back up. You're not disputing that
6 the inmate was entitled to be released in August?

7 **MR. RICHARDSON:** It looks like that's the case from
8 the district attorney's standpoint. The only issue at that
9 point, Judge -- I would agree with you with the caveat there
10 was still a hold from INS.

11 **THE COURT:** That hold was for 48 hours.

12 **MR. RICHARDSON:** Well, Judge, pursuant to INS -- and
13 it's 8 C.F.R § 287. Pursuant to the C.F.R., INS takes the
14 position they have 48 hours after being notified.

15 **THE COURT:** I looked for that. I don't have any law
16 on that. Do you have some law on that?

17 **MR. RICHARDSON:** I have the actual --

18 **THE COURT:** It says: "Temporary detention at
19 department request. Upon a determination by the department to
20 issue a detainer for an alien not otherwise detained by a
21 criminal justice agency, such agency shall maintain custody of
22 the alien for a period not to exceed 48 hours, excluding
23 Saturdays, Sundays, and holidays, in order to permit assumption
24 of custody by the department."

25 **MR. RICHARDSON:** Correct, Your Honor. That's

1 Subsection (d). That's correct.

2 **THE COURT:** So where does it say that that is more
3 than 48 hours and that it's 95 days?

4 **MR. RICHARDSON:** No, I understand that, Judge. I
5 think the issue is that upon notice that the inmate's charges
6 have been dissolved. I guess the problem here is the clerk's
7 office -- and we did go to the clerk's office today, Judge, to
8 try to find the actual record to see when the sheriff's office
9 was notified that there was actually a dismissal or a reduction
10 of the charge.

11 The clerk's office can't find the file, but the
12 sheriff's office indicates -- we can present testimony of
13 this -- that the sheriff's office did not receive any
14 notification from the criminal clerk's office until Friday.
15 The only reason we received it on Friday is because the sheriff
16 actually had someone go down there Friday to obtain some
17 documents. Even after the sentencing -- according to the
18 documents from the clerk's office, even after the charge had
19 been reduced, the clerk's office was still showing the
20 attempted first-degree murder charge.

21 **THE COURT:** The fact of the matter is that the man
22 was entitled to be released in August. There was a 48-hour
23 detainer that elapsed. Unless there's some legal authority
24 that says that that can be extended for months at a time
25 pending some sort of notice, that makes no sense to me. We

1 Looked for law that said that the 48 hours can be extended
2 until you give notice and we couldn't find any.

3 **MR. RICHARDSON:** I understand your concern,
4 Your Honor. I agree with you that as soon as there's notice,
5 things need to happen. I think the problem in this case is
6 that the criminal clerk's office didn't give notice to the
7 sheriff's office so that the sheriff's office could be on
8 notice when this individual had to be released. I think that's
9 the problem, Judge.

10 Of course, INS -- and they are not here, so I
11 can't really speak too much for INS other than they wanted to
12 say, "Look, we didn't get notice until Friday, Sheriff, so we
13 still want our 48 hours."

14 Judge, our position is whatever Your Honor wants
15 to do is okay. We are just kind of in a weird position between
16 INS and the inmate. We will do whatever we need to do, Judge.
17 We just want to make it clear it's not that the sheriff was
18 intentionally holding this individual; it's that the sheriff
19 never did get notice from the clerk's office.

20 As soon as we got Your Honor's order last
21 Friday, the sheriff actually sent someone to the clerk's
22 office, couldn't find the record, but went to the screening
23 area and found that the diminished charge was in August. At
24 that point, we obtained that document.

25 We are here today to say, Judge, whatever you

1 need us to do is fine, but we just didn't have the notice
2 before. I don't want anyone to misconstrue that the sheriff
3 some kind of way had notice in August of a reduced charge and
4 time served on a charge and just held this individual based on
5 an INS hold. It's just that the clerk didn't give us the
6 information. That's really all I wanted to say about that,
7 Judge.

8 **THE COURT:** Well, it's clear to me that if I release
9 this prisoner that INS can go get a warrant and arrest him
10 tomorrow.

11 **MR. RICHARDSON:** Yes, Your Honor, absolutely.

12 **THE COURT:** That warrant, if they get one from the
13 attorney general, it's not even reviewable by the judiciary.
14 There's no question about that. I'm here on a habeas that
15 challenges your authority to continue to hold this man and
16 that's what I have to rule on.

17 **MR. RICHARDSON:** Absolutely.

18 **THE COURT:** So far I have not heard anything that
19 justifies the continued detention by your office based on the
20 law that I have seen and the facts that I understand.

21 **MR. RICHARDSON:** That's correct, Judge. I think
22 what's just important is until Friday, there was nothing that
23 we had received -- in other words, the sheriff, as you know,
24 Judge, pursuant to Louisiana law, which has the sheriff's
25 authority, is just the keeper of the jail. So the sheriff

1 doesn't make the decision as to who to release and when to
2 release. We have to act on a court order. The problem, of
3 course, Judge, is we never did receive the order from the court
4 until the sheriff himself undertook it personally to go pick it
5 up.

6 **THE COURT:** I'm not blaming the sheriff. He just
7 happens to have custody of the prisoner and he is the one who
8 has to release him if I order him released.

9 **MR. RICHARDSON:** Yes, Your Honor.

10 **THE COURT:** I'm not saying that the sheriff is
11 intentionally detaining a prisoner who was entitled to be
12 released in blatant disregard of his rights. I'm not saying
13 that. I'm saying that if the prisoner was entitled to be
14 released in August, to hold him past the due date of the
15 detainer would violate his due process right because he was at
16 that point entitled to be released. That's all I'm saying.

17 **MR. RICHARDSON:** Sure, Judge. In terms of the INS
18 position, if their position is that they have 48 hours from the
19 point in time that they received notice versus 48 hours from
20 when the sentence is reduced, I really don't know that, Judge.
21 It's really part of the INS, and we really don't want to get
22 involved with that portion of the argument.

23 **THE COURT:** INS could have appeared and intervened
24 and argued that to me and given me some law, but they haven't
25 done it, and I haven't found any.

1 **MR. RICHARDSON:** That's all we have, Judge. With
2 that, I think I can conclude if that satisfies Your Honor.

3 **THE COURT:** It does satisfy me. I appreciate you
4 acting on such quick notice. I know this thing was served this
5 morning, so I appreciate it.

6 **MR. RICHARDSON:** Yes, Your Honor. Thank you and the
7 Court for your time.

8 What do you want to say?

9 **MS. ROSENBAUM:** Thank you, Your Honor. I do just
10 want to put on the record that the 48 hours comes from the
11 constitutional requirements under the Fifth Amendment that
12 that's how long someone can be held before there's a charge
13 entered. It's not something that was devised solely for the
14 Department of Homeland Security detainer process. It's the
15 fundamental time in which we have decided as a nation you can
16 be held without a charge. The remedy for being held unlawfully
17 without a charge is release. That's what we are asking for
18 here.

19 I do think that the sheriff does have some
20 responsibility in his interpretation of the detainer statute,
21 and its concerning to hear that that interpretation is 48 hours
22 from whenever the notification happens as opposed to 48 hours
23 from when the person becomes due for release, which is clearly
24 what the regulations say and what the detainer says on its
25 face.

1 **THE COURT:** I think I have heard enough to make a
2 determination.

3 Based on the evidence in the record provided by
4 the petitioner, which the respondent does not dispute as to the
5 date on which the prisoner was entitled to release and the date
6 on which the detainer had been imposed and on which it would
7 have expired, the Court finds as a fact as follows:

8 It has jurisdiction under 28 U.S.C. § 2241.

9 The defendant was arrested on February 20, 2010.
10 At some point after his arrest, the Department of Homeland
11 Security issued an immigration detainer notice that the
12 Orleans Parish Prison advise the department prior to Ocampo's
13 release. Ocampo plead guilty to two counts of simple battery
14 and was sentenced to two concurrent five-month sentences and
15 given credit for time served.

16 Ocampo contends -- and it is not disputed on the
17 record -- that Ocampo's sentence was completed on August 12,
18 2010. Pursuant to 8 C.F.R. § 287.7(d), the sheriff's office
19 was permitted to detain Ocampo until August 16, 2010, when the
20 immigration detainer expired. Ocampo remains in the custody of
21 the sheriff in his capacity as keeper of the Orleans Parish
22 Prison.

23 The sheriff has explained on the record that the
24 detention was because he did not have notice from the clerk's
25 office that the prisoner was entitled to release. Be that as

1 it may, the Court finds that the prisoner has been held beyond
2 any point in time in which the sheriff is entitled to hold him
3 and he is entitled to be released. There's been no other basis
4 offered that the Court can determine the legal basis for
5 retaining custody of Ocampo by the sheriff's office.

6 The Court cites *Ochoa v. Bass*, 181 P.3d 727
7 (Ok. 2008): "Once the 48-hour period granted to ICE by
8 8 C.F.R. § 287.7(d) (2007) for assumption of custody had lapsed
9 without ICE taking any action on its detainers, the state no
10 longer had authority to hold petitioners."

11 Accordingly, it is ordered that Ocampo's
12 petition is granted and that he be immediately released from
13 the custody of the sheriff. If there's nothing further, the
14 Court is adjourned. Thank you.

15 THE DEPUTY CLERK: All rise, please.

16 (OFF THE RECORD)

17 THE COURT: I need to change the writ to say that
18 since the hearing has been held, the Court has determined that
19 the prisoner is entitled to be released immediately. I'm
20 amending this writ to provide that the marshal shall not return
21 the prisoner to the sheriff's office but that since the sheriff
22 is here, the prisoner is here, and the prisoner is entitled to
23 be immediately released, he shall be immediately released from
24 the custody of the sheriff.

25 THE SHERIFF: Can we get his clothes brought here?

1 **THE COURT:** Sure. Sixth floor.

2 **THE SHERIFF:** We will have his clothes bought here in
3 the next 15 minutes.

4 **THE COURT:** Thank you, Sheriff.

5 (WHEREUPON the Court was in recess.)

6 * * *

7 **CERTIFICATE**

8 I, Toni Doyle Tusa, CCR, FCRR, Official Court
9 Reporter for the United States District Court, Eastern District
10 of Louisiana, do hereby certify that the foregoing is a true
11 and correct transcript, to the best of my ability and
12 understanding, from the record of the proceedings in the
13 above-entitled and numbered matter.

14

15

16

17

s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter

18

19

20

21

22

23

24

25