

IN THE SUPREME COURT OF THE STATE OF NEVADA

ISAAC ASUSTA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53053

**FILED**

**MAY 26 2011**

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of first-degree murder with the use of a deadly weapon and second-degree murder with the use of a deadly weapon. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

Appellant Isaac Asusta shot and killed Frankie Coca and Melody Hawkins Carrasco in Ely, Nevada, in January 2005. A criminal complaint was filed against Asusta charging him with two counts of murder with a deadly weapon. Thereafter, Asusta illegally entered Mexico, where he hid for a year-and-a-half. In July 2005, Richard W. Sears, the White Pine County District Attorney, wrote a letter to Molly Warlow, Director of the Office of International Affairs (OIA), permitting Warlow to provide the Mexican government with assurances that a life sentence would not be sought or imposed should Asusta be extradited to the United States. The record is void of any information indicating communication between the OIA and the Mexican authorities.

In August 2006, Mexican authorities obtained information from the United States Marshals Service regarding Asusta's possible location in Guadalajara, Mexico. Once Asusta was taken into custody, Mexican authorities determined that Asusta was in Mexico illegally and

expelled him from the country. Subsequently, Asusta was returned to Nevada to face the murder charges.

The prosecutor subsequently filed a notice of intent to seek the death penalty against Asusta. In response, Asusta filed a motion to strike the death penalty and to further limit his potential sentence to a term of years on the ground that Sears made express written guarantees to the Mexican government that a life sentence would not be sought or imposed against him. The district court denied Asusta's motion.

Ultimately, Asusta entered a plea agreement whereby he agreed to plead guilty to murder in the first degree with the use of a deadly weapon and murder in the second degree with the use of a deadly weapon pursuant to NRS 200.030 and NRS 193.165. In exchange, the district attorney agreed to withdraw efforts to seek the death penalty. Asusta received four consecutive life sentences and was ordered to pay restitution.<sup>1</sup>

On appeal, Asusta argues that: (1) he has standing to challenge a violation of the United States—Mexico Extradition Treaty, (2) the terms of that treaty should be abided by, (3) the district attorney should be bound by his promise to not seek a life sentence, and (4) he was coerced into entering a guilty plea.<sup>2</sup> We disagree, and we therefore affirm the judgment of conviction.

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<sup>1</sup>The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

<sup>2</sup>Asusta also argues that the doctrine of specialty applies. The doctrine of specialty “provides that an extradited defendant may not be prosecuted ‘for any offense other than that for which the surrendering country agreed to extradite.’” Rodriguez Benitez v. Garcia, 495 F.3d 640, *continued on next page . . .*

The question of whether an international treaty applies to a specific criminal defendant “is based on factual conclusions but requires distinctively legal analysis to determine whether the [criminal defendant has standing to enforce the treaty and whether the treaty has been invoked], and therefore, we will review such a determination as a mixed question of fact and law.” See Ybarra v. State, 127 Nev. \_\_\_, \_\_\_, 247 P.3d 269, 276 (2011). “Accordingly, we will give deference to the district court’s factual findings so long as those findings are supported by substantial evidence and are not clearly erroneous, but we will review the legal consequences of those factual findings de novo.” Id.

#### Standing

Asusta contends that criminal defendants have standing to challenge a violation of an international treaty such as the United States’ extradition treaty with Mexico.

We conclude that Asusta’s argument is without merit as “[i]t is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.” Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990). “Indeed, even where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that ‘any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.’” United

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*. . . continued*

643 (9th Cir. 2007) (quoting U.S. v. Andonian, 29 F.3d 1432, 1434-35 (9th Cir. 1994)). We conclude that Asusta’s argument lacks merit, as he was not extradited by Mexico to the United States.

States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2nd Cir. 1975) (second alteration in original) (quoting Restatement (Second) of the Foreign Relations Law of the United States § 115 cmt. e (1965)); see also United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981). Moreover, “[t]reaties are ‘designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress.’” Matta-Ballesteros, 896 F.2d at 259 (quoting U.S. v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988)). In addition, this court has concluded that the only remedies to redress a violation of treaty are “diplomatic or political or exist between states under international law.” Garcia v. State, 117 Nev. 124, 128-29, 17 P.3d 994, 997 (2001).

As the record provides no basis for any inference that Mexico protested or objected to Asusta’s departure from its country—to the contrary, it was the Mexican authorities who expelled Asusta from their country—we conclude that Asusta does not have standing to challenge any violation of the extradition treaty between the two countries.

#### Invocation of the extradition treaty

The process of extradition between the United States and Mexico is outlined in the extradition treaty between the two countries. See Extradition Treaty between the United States of America and the United Mexican States, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059. The treaty provides that “the request for extradition shall be made through the diplomatic channel.” Id. at 5066. The request for extradition must contain a description of the offense for which extradition is requested and must be accompanied by:

- a) A statement of the facts of the case;
- b) The text of the legal provisions describing the essential elements of the offense;
- c) The text of the legal provisions describing the punishment for the offense;
- d) The text of the legal provisions relating to the time limit on the prosecution or the execution of the punishment of the offense;
- e) The facts and personal information of the person sought which will permit his identification and, where possible, information concerning his location.

Id. Moreover, when the request for extradition relates to a person who has not yet been convicted, it must be accompanied by a certified copy of the warrant of arrest issued by a judge and evidence that would justify the apprehension and commitment for trial. Id. at 5066-67. In this appeal, a careful review of the extradition treaty is relevant in determining whether the treaty was invoked.

Assuming, arguendo, that Asusta did have standing to challenge violations of the extradition treaty, we conclude that the terms of the treaty were not invoked. Although Asusta admits that the record does not reflect that there were formal extradition proceedings, he argues that the district attorney enlisted the aid of the federal government to extradite him from Mexico and that the district attorney made a formal extradition demand. In addition, Asusta argues that it was the federal authorities who divulged information on his whereabouts and turned it over to the Mexican authorities, and it was the federal authorities, in

conjunction with the Mexican authorities, who removed Asusta from Mexico to the United States.

“The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier” by extradition or deportation. Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893) (internal quotations omitted). “[E]xtradition and deportation, although each has the effect of removing a person from the country, are different things, and have different purposes.” Id. at 709 (emphases omitted).

“‘Deportation’ is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.” Id. Deportation is also defined as “[t]he act or an instance of removing a person to another country” and “the expulsion or transfer of an alien from a country.” Black’s Law Dictionary 504 (9th ed. 2009).

On the other hand “[e]xtradition’ is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished.” Fong Yue Ting, 149 U.S. at 709. “Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused . . . of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands his surrender.” Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967) (emphasis omitted) (quoting Terlinden v. Ames, 184 U.S. 270, 289 (1902)). Extradition has also been defined as “[t]he official surrender of an alleged criminal by one state or

nation to another having jurisdiction over the crime charged.” Black’s Law Dictionary 665 (9th ed. 2009). International extradition occurs “in response to a demand made by the executive of one nation on the executive of another nation.” Id.

Accordingly, “[a]nother country’s unilateral expulsion of a fugitive as an undesirable alien is not an extradition.” 31A Am. Jur. 2d Extradition §12 (2002). Additionally, where “no demand for extradition is made by the United States and the defendant is deported by the authorities of the other country which is party to the treaty, no ‘extradition’ has occurred and failure to comply with the extradition treaty does not bar prosecution.” United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980). Therefore, “a demand in some form by the one country upon the other is required, in order to distinguish extradition from the unilateral act of one country, for its own purposes, deporting or otherwise unilaterally removing unwelcome aliens.” Stevenson, 381 F.2d at 144; see Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000) (stating that “[a] statute or extradition treaty is a prerequisite to extradition.”)

As the record is void of any evidence that Asusta was formally extradited by Mexico to the United States, we conclude that Asusta’s argument lacks merit. The Mexican authorities took custody of Asusta and returned him to the United States without any formal extradition proceedings. Asusta was deported by Mexico because he was in the country illegally and was ordered expelled by the Mexican authorities. We conclude that a formal demand for extradition was never made by the United States government. Under the treaty, a formal request by the diplomatic channels is necessary to initiate extradition proceedings. See Extradition Treaty between the United States of America and the United

Mexican States, U.S.-Mex., May 4, 1978, 31 U.S.T. 5066. Further, the record reflects that Asusta was deported, not extradited. Thus, we conclude that Asusta's argument lacks merit.

Asusta further argues that the district attorney should be held to his promise not to seek imposition of a life sentence. Here, the district attorney promised the OIA that the State would not seek a life sentence if Asusta was extradited from Mexico. However, Asusta was never extradited by the Mexican authorities, so the condition precedent of extradition never transpired. In addition, the district attorney's assurance not to seek a life sentence was not an offer to bargain a plea with Asusta. Thus, we conclude that this argument also lacks merit.

#### Guilty plea

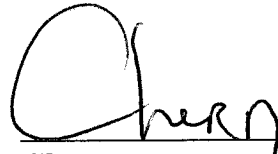
Asusta argues that he was coerced into entering a guilty plea because the prosecutor improperly threatened him with a death penalty sentence. Because the record does not indicate that Asusta challenged the validity of his guilty plea in the district court, his claim is not appropriate for review on direct appeal from the judgment of conviction and, therefore, we need not address it. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), superseded by statute as stated in Hart v. State, 116 Nev. 558, 562 n.3, 1 P.3d 969, 971 n.3 (2000). To the extent that Asusta argues that this court should "return" him to the district court to determine if he wants to withdraw his plea, such action by this court is unnecessary because Asusta is free to challenge the validity of his guilty plea in the district court by filing a post-conviction motion to withdraw the plea

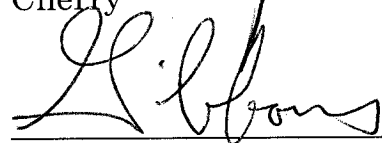



pursuant to NRS 176.165 or a post-conviction petition for a writ of habeas corpus pursuant to NRS Chapter 34.<sup>3</sup>

Based on the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Steve L. Dobrescu, District Judge  
State Public Defender/Ely  
State Public Defender/Carson City  
Attorney General/Carson City  
Kelly C. Brown, White Pine County District Attorney  
White Pine County Clerk

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<sup>3</sup>We express no opinion as to the merits of any attempt to withdraw the plea.