Immigration, enforcement of federal law

Number: INFORMAL

Date: August 31, 2010

The Honorable Scott Plakon
Representative, District 37
Florida House of Representatives
1855 West State Road 434, Suite 242
Longwood, Florida 32750

Dear Representative Plakon:

You have requested this office's assistance regarding Florida's authority to enforce federal criminal immigration laws. You refer to the many issues surrounding Arizona's SB 1070, enacted as the "Support Our Law Enforcement and Safe Neighborhoods Act,"[1] which contains various provisions concerning illegal aliens. As you are aware, a United States district court judge in *United States v. Arizona*,[2] while not preliminarily enjoining the act in its entirety, has enjoined several provisions of the act.[3]

While discussed more fully below, in sum it appears that state and local law enforcement have the authority to inquire into the immigration status of an individual lawfully detained pursuant to Florida law, provided that the questioning does not prolong the lawful detention. In addition, the state may grant state and local law enforcement officers the authority to enforce criminal violations of the federal immigration laws.

The federal courts have recognized that state and local law enforcement are not precluded from enforcing federal law where state enforcement activities do not impair federal regulatory interests.[4] Federal regulation of a particular field, therefore, should not be presumed to preempt state enforcement activity "in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[5]

While the regulation of immigration is an exclusive federal power, the courts have recognized that this power does not preempt every state activity affecting aliens.[6] While the supremacy of federal power in the field of immigration is established by the Constitution and has been recognized by the Supreme Court,[7] it is also well settled that, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration" that is "per se preempted by this constitutional power, whether latent or exercised."[8]

The United States Supreme Court in *DeCanas v. Bica*,[9] cautioning that preemption is not based on the mere fact that state and federal laws address the same general subject matter. More specifically, the courts have acknowledged the general authority of state and local law enforcement officers to enforce the criminal provisions of the federal immigration laws.

For example, the court in *United States v. Vasquez-Alvarez*,[10] stated that state law

enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws and that federal law as currently written does nothing "to displace . . . state or local authority to arrest individuals violating federal immigration laws." Provided that there is no state or local law prohibiting the enforcement of criminal immigration laws, the Tenth Circuit has held that state and local police officers had implicit authority within their respective jurisdictions to investigate and make arrests for violations of federal law, including immigration laws.[11]

The decision of the Ninth Circuit Court of Appeals in *Gonzales v. City of Peoria*,[12] however, while recognizing that nothing in federal law precludes local law enforcement from enforcing the criminal provisions of the Immigration and Naturalization Act, suggests that state law must affirmatively grant local authorities to arrest for criminal violations of the immigration laws. This office has found no state or federal court decision in Florida addressing the issue of whether Florida law permits state and local law enforcement to arrest for criminal violations of the federal immigration laws.[13]

State and local law enforcement officers appear to have the authority to inquire into the immigration status of a person detained under Florida law. Section 901.151(2), Florida Statutes, provides:

"Whenever any law enforcement officer of this state encounters any person under circumstances which reasonable indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which let the officer to believe that the person had committed, was committing, or was about to commit a criminal offense."

In addition, 8 U.S.C. s. 1373(a) provides:

"Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

The United States Supreme Court in *Muehler v. Mena*,[14] rejected the argument that local law enforcement officers, who had detained the defendant while executing a search warrant, were required to have an independent reasonable suspicion in order to question the defendant concerning her immigration status. Recognizing that it had repeatedly held that mere police questioning does not constitute a seizure,[15] the Court stated that there was no additional seizure within the meaning of the Fourth Amendment. Therefore, the officers did not need to have a reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.[16]

Most recently, in *Arizona v. Johnson*,[17] the Court reaffirmed its holding in *Muehler, supra,* when considering an officer’s authority to inquire into matters unrelated to the justification for a traffic stop. The Court again held that such inquiries "do not convert the encounter into

something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[18]

Florida law enforcement officers would therefore appear to have the authority to inquire about the immigration status of individuals lawfully detained pursuant to Florida law, provided that the questioning does not prolong the lawful detention. In fact, this office is aware that state and local law enforcement officers currently make such inquiries. They are not, however, required to do so.

Thus, it appears that state and local law enforcement have the authority to inquire into the immigration status of an individual lawfully detained pursuant to Florida law, provided that the questioning does not prolong the lawful detention. In addition, the state may grant state and local law enforcement officers the authority to enforce criminal violations of the federal immigration laws.

Sincerely,

Bill McCollum
Attorney General

BM/t

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[1] Chapter 2010-113, Ariz. Sess. Laws, The legislation was subsequently amended by HB 2162, enacted as Ch. 2010-211, Ariz. Sess. Laws.

[2] Case No. CV 10-1413-PHX-SRB, 210 WL 2926157 (D.C. Ariz. July 28, 2010).

[3] The court enjoined several provisions of the Arizona law, holding that the United States was likely to succeed:

"(1) provision requiring that all persons who are arrested have their immigration status verified prior to release;
(2) provision requiring officers to make reasonable attempt to determine individual's immigration status during any lawful stop where reasonable suspicion existed;
(3) provision making it a misdemeanor for a person unlawfully present in United States to apply for work;
(4) provision stating that officer could make warrantless arrest if officer had probable cause to believe that person had committed public offense making person removable."

[4] *See, e.g., Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). *And see Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds, Hodgers-Durdin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

[5] *De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 142, 83 S.Ct. at 1217); *Gonzales v. City of Peoria,*

supra at 474.

[6] *De Canas*, 424 U.S. at 354-55, 96 S.Ct. at 935-36; *Gonzales v. City of Peoria, supra* at 474; and *United States v. Arizona, supra*.

[7] *See* Art. I, s. 8, cl. 4, U.S. Const.; *De Canas v. Bica*, *supra*; and *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941).

[8] *De Canas*, 424 U.S. at 355.

[9] 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976). The court stated that federal law preempts any state statute or policy that constitutes a regulation of immigration, "which 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. Even if the state law or policy does not regulate immigration, it may be preempted if Congress intended to "occupy the field," *i.e.*, if it was "the clear and manifest purpose of Congress" to effect a "complete ouster of state power" that would "preclude even harmonious state regulation touching on aliens in general." *Id.* at 357-358. Finally, a state law or policy is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 363.

[10] 176 F.3d 1294, 1296, 1299 n. 4, 1300 (10th Cir.1999). *Accord United States v. Santana-Garcia,* 264 F.3d 1188 (10th Cir. 2001). *And see United States v. Salinas-Calderon*, 728 F.2d 1298, 1301-02 & n.3 (10th Cir.1984), noting that state law enforcement officers possess general investigatory authority to inquire into possible immigration violations.

[11] *United States v. Vasquez-Alvarez, supra; United States v. Santana-Garcia*, *supra* at 1194.

[12] 722 F.2d 468, 475 (9th Cir. 1983), *overruled on other grounds, Hodgers-Durdin v. de la Vina* , 199 F.3d 1037 (9th Cir. 1999). *And see United States v. Santana-Garcia*, *supra* at 1194, stating the *Gonzalez* court suggested that state law must affirmatively grant local authorities the power to arrest for federal criminal immigration law violation). *See also United States v. Sapp,* 272 F. Supp.2d 897 (N.D. Cal. 2003) (state and local officials may make arrests for violations of federal criminal law where permitted to do so by state law, citing *Gonzales*); *Flores v. Walla Walla Police,* No. CV-06-166-MWL, 2006 WL 2850010 (E.D. Wash. 2006).

[13] *But see United States v. Bowdach*, 561 F.2d 1160 (5th Cir. Fla. 1977), in which the court stated that 18 U.S.C. s. 3041 indicates that state law enforcement officers have the power to arrest citizens for crimes against the United States, especially when the state officers have knowledge of the fact that the person being arrested is wanted by the federal authorities and that a federal arrest warrant has been issued for that person's arrest.

[14] 544 U.S. 93, 125 S.Ct. 1465 (2005).

[15] *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual); *INS v. Delgado*, 466 U.S. 210, 212, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984).

[16] However, the Court noted that a lawful seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." 544 U.S. at 101, 125 S.Ct. at 1471.

[17] --- U.S. ---, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009).

[18] 129 S.Ct. at 788. *Cf. United States v. Mejia-Chicas*, 287 Fed. Appx. 830 (11th Cir. 2008), concluding that a Florida patrol officer had reasonable suspicion to support extending the duration of traffic stop of the defendant's van as the officer, before stopping the van for speeding, had received information from Immigration and Customs Enforcement agents that the occupants of van were suspected of carrying illegal aliens or cash proceeds from such trafficking, neither defendant nor her passenger could produce proof of ownership of van or insurance, and while standing outside van, the officer detected urine-like odor and observed food wrappers and clothing strewn about van, which led him to believe that van had been traveling for a long time or that someone lived in it.