The Commonwealth of Massachusetts
Committee for Public Counsel Services
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Practice Advisory on *Commonwealth v. Bautista*:
Does a defendant forfeit his bail if he is transferred into Immigration custody?

Introduction

In *Commonwealth v. Bautista*, SJC-10730, 2011 Mass. LEXIS 164 (Apr. 11, 2011), the Supreme Judicial Court ruled that a defendant who, upon posting bail, was transferred into immigration custody and was thereafter unable to appear in criminal court, forfeited his bail. Although the case is distinguishable due to its unusual facts and lack of evidence, it underscores the need for practitioners to be aware that a client could lose his bail due to immigration custody.

Facts

Juan M. Bautista, a citizen of the Dominican Republic, was in state custody after indictment for various drug-related crimes. Shortly after his arrest, Immigration and Customs Enforcement (ICE) issued a Notice to Appear against him. A Notice to Appear (NTA) is an immigration charging document that, when filed in Immigration Court, initiates removal proceedings against a noncitizen. Mr. Bautista acknowledged service of the NTA and, above his signature, two boxes on the NTA were checked off. One box requested a hearing in Immigration Court; the other box waived his right to a hearing in Immigration Court.

Several months later, Mr. Bautista's surety posted bail and Mr. Bautista was transferred directly to ICE custody.[1] Mr. Bautista's attorney made assertions that subsequently, he was transferred to an ICE detention facility in Texas and may have been deported.

Shortly after Mr. Bautista was transferred to ICE custody, his surety moved for return of the bail. The motion was denied, and the SJC upheld that denial.

The Supreme Judicial Court's reasoning

The defendant's surety argued that G.L. c. 276, §70 applied to this case, which states that if a defendant is unable to appear in court due to the actions of the U.S. government (among other entities), he is exonerated from the requirement to appear in court and does not forfeit his bail. The SJC held that, in order for §70 to apply, the surety must prove (1) that the actions of the U.S. government prevented the defendant from

[1] The transfer of a noncitizen from state to immigration custody is authorized by an ICE detainer lodged with the DOC facility. In this case, there was no evidence presented that a detainer was lodged; however, without a detainer, ICE would have had no custodial authority over Mr. Bautista and DOC would not have transferred him to ICE.

appearing in court; and (2) it is not the surety's fault that the defendant did not appear. *Bautista*, 2011 Mass. LEXIS at *15.

The SJC then held that the surety was unable to prove the first requirement, because there was insufficient evidence that governmental action *beyond the defendant's control* prevented him from appearing for his criminal hearing. *Id*. at *19. This finding was made primarily due to the scant record of evidence. There was no evidence of an ICE detainer or that the defendant was even placed in removal proceedings. The SJC suggested that ICE may have arrested the defendant strictly because he had waived his right to an immigration hearing by checking the waiver box on the NTA, and that such waiver was a voluntary action on the part of the defendant. *Id*. at *19-20.

As to the second requirement of §70, the SJC noted that not every surety who posts bail for a noncitizen assumes the risk of nonappearance due to deportation. *Id*. at 22. However, it also held that a surety may be at fault in a situation in which he/she was aware of the existence of an ICE detainer when posting bail. *Id*. at 22, FN 15.

Because the surety was unable to prove the first requirement of §70, the SJC denied the return of bail to the surety.

Practice Tips

This case was, in large part, based on the scant evidence in the record. There was no evidence of an ICE detainer, notice of hearing in Immigration Court, or the defendant's transfer to an ICE detention facility out of state. *Id*. at *20. There was also no explanation as to why both boxes on the NTA were checked when they contradict each other. Due to this lack of evidence, the SJC assumed that this defendant had voluntarily accepted deportation and had essentially signed himself over to ICE custody. *Id*. On the contrary, the majority of our clients do not go into ICE custody voluntarily, do not waive their right to a hearing, and are primarily taken into ICE custody for the purpose of appearing in Immigration Court, rather than voluntary deportation. These clients also do not have control over an ICE decision to transfer them to a detention facility in another state, which is a routine ICE practice. Attorneys should be sure to make the record clear of these facts.

Attorneys should also point out to the court that the mere fact that an ICE detainer has been issued against a defendant does not necessarily put the surety on notice that ICE detention will occur or that such detention will prevent the defendant from appearing in state court. ICE lodges some detainers for the purpose of investigating whether a defendant is deportable, and if it concludes that the defendant is not deportable, then it must remove the detainer. Moreover, even if a defendant is transferred into ICE custody, he may be eligible for release on bond by either ICE or the Immigration Court, particularly if he does not have a serious criminal record. In that situation, the defendant would continue to be available to appear for his criminal hearings.

Finally, attorneys should know that for defendants held in ICE custody in New England, there is a procedure for them to appear for their criminal hearings. They have to ask the state court judge to issue a habe to "ICE-ERO, Field Office Director, 10 New England Executive Park, Burlington, MA 01803." The habe should then be faxed to Mark Gentile, Chief of Detention, at 781-359-7629. ICE will bring the defendant to Suffolk County House of Correction at South Bay, and the state is then responsible for transportation to the proper court. If the habe is not honored, attorneys can call ICE at 781-359-7500. Given this procedure, sureties could reasonably believe that even a defendant who is mandatorily detained in ICE custody will appear for his criminal court hearings.

Bautista is more difficult to distinguish in cases in which the defendant has already been ordered deported and there is an ICE detainer. In those situations, the defendant is no longer entitled to a hearing in Immigration Court, and is also not eligible to be released from ICE custody while he is waiting to be deported. Thus, while the transfer to ICE custody itself may not be voluntary, it is more difficult to say that the surety was not on notice of the likelihood of the defendant's deportation and subsequent failure to appear in criminal court. In those situations, defense counsel should advise clients that they are likely to lose their bail if they are transferred into ICE custody.

Conclusion

The question of whether bail will be returned to a surety centers on whether a defendant's failure to appear in criminal court is voluntary. Therefore, defense counsel must make the record clear that, given a client's particular situation, the ICE custody was not voluntary, nor was the surety on notice that the defendant would be unable to appear in court, even if a detainer was lodged. If the record is clear in this regard, *Bautista* should be easily distinguished.

April 21, 2011