

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	Criminal No. 97-66-P-H
)	
GREGG M. PAQUETTE,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

The defendant is charged in a 19-count indictment with conspiracy in violation of 18 U.S.C. § 371, eight counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 2, four counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2, making and subscribing to a false income tax return in violation of 26 U.S.C. § 7206(1) and five counts of money laundering in violation of 18 U.S.C. § 1957. Prior to the institution of criminal proceedings, an agent of the Internal Revenue Service (“IRS”) and three representatives of the local police department came to the defendant’s office to question him. The defendant now moves to suppress the evidence obtained during that interrogation and the defendant’s visit to the police department’s headquarters the following day. An evidentiary hearing was held on January 27, 1998. I recommend that the following findings of fact be adopted and that the suppression motion be denied.

I. Proposed Findings of Fact

On April 29, 1997 at approximately 2:51 p.m., Special Agent Michael Ballback of the IRS criminal investigation division, joined by Detective Ronald Avery of the Kittery, Maine police department, arrived unannounced at the defendant’s place of business in Kittery. Their purpose was to ask the defendant questions concerning an investigation that Ballback was conducting with the

assistance of the Kittery Police Department. Ballback and Avery entered the building through its rear entrance, adjacent to the parking lot, and introduced themselves to the defendant. The defendant then invited the two investigators down the hall and into his office. Once there, the defendant sat behind his desk and invited the two investigators to sit in chairs facing the desk.

Ballback began by telling the defendant that he was the target of a grand jury investigation. The IRS agent then read from a pre-printed statement, supplied to Ballback by the IRS and bearing the title "STATEMENT OF RIGHTS (NON-CUSTODY)." In material part, this statement contained these admonitions:

I would like to ask you some questions. However, first I advise you that under the 5th Amendment to the Constitution of the U.S. I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of any attorney before responding.¹

The back of the card carried by Ballback contained a different statement designed to be read in the event of a custodial interrogation. Ballback opted not to read this statement because he did not intend to arrest the defendant and did not otherwise consider the interrogation to be custodial in nature.

The defendant indicated to Ballback that he wished to answer the investigators' questions. By prior arrangement, Ballback posed the questions to the defendant and Avery served as note-taker, occasionally asking follow-up questions. The discussion initially focused on the defendant's tax returns. At approximately 4:00 p.m., about an hour into the interview, Chief Edward F. Strong and

¹ A copy of the card from which Ballback read appears in the record as Government Exhibit 1.

Detective Sergeant Steven Hamel of the Kittery Police Department arrived at the defendant's office and joined the interview. The investigators had previously agreed that Strong would go to the defendant's office after Ballback had had a chance to ask the defendant questions about his tax records that the investigators considered preliminary. Strong and the defendant were previously acquainted because the defendant had worked in the same real estate office as Strong's wife. Strong therefore believed his presence in the interview would make it more likely that the defendant would be cooperative.

The defendant invited Strong and Hamel into the office. Strong sat in a chair; Hamel remained standing. Ballback continued to conduct the interview, with Avery taking notes. Strong asked a few follow-up questions. Hamel did not participate in the questioning. The focus of the discussion shifted to the conspiracy that has since been alleged in the indictment. There was mention of the possible charges the defendant could face. The conversation was in no sense confrontational or hostile with the exception of two occasions when Strong raised his voice and indicated his disbelief of the explanations the defendant was supplying. Following the second occasion, Strong stood up and left the interview. This was at approximately 5:15 p.m.

At some point thereafter, the defendant inquired of the investigators concerning how much longer they planned to take with the interview, stating that he would have to leave shortly for an appointment. Shortly after 6:00 p.m., Ballback, Avery and Hamel concluded the interview, leaving with certain files that had been turned over to them by the defendant following Strong's departure. The defendant also indicated that he might have additional relevant files at home. Ballback suggested that the defendant drop off any additional documents at the Kittery Police Department. At the conclusion of the discussion, the defendant stated an intention to contact an attorney.

Ballback responded that he might want to do so.

Other than this reference at the end of the interview, at no point during the discussion did the defendant give any indication that he wished to consult an attorney. He showed no hesitation in answering the investigators' questions, indicated no reluctance to participate in the interview and at no point expressed a desire to have the investigators leave or to leave the room himself. The defendant took two outside phone calls during the course of the interview. Although the defendant's office was not a large room, and was therefore somewhat crowded with the defendant and four investigators present, the defendant remained behind his desk during the interrogation and the exit pathway from the room was open to the defendant throughout the interview.

The day after the interview at his office, the defendant appeared without making a prior appointment at the Kittery Police Department at approximately 11:00 a.m. and asked to speak with Strong. Summoned by the dispatcher, Strong greeted the defendant in the lobby. The two then walked outside to the parking lot, where they spoke for approximately 15 or 20 minutes and the defendant gave Strong two folders containing additional documents. At the end of the conversation the defendant indicated he had made an appointment to see an attorney. Strong stated that he thought it was good advice for the defendant to take such a step.

II. Discussion

Notwithstanding the grounds asserted in the defendant's written suppression motion (Docket No. 4), the defendant indicated at the hearing that he seeks suppression of the evidence obtained by the investigators on the sole ground that the interview was not preceded by the full array of warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). According to the defendant, *Miranda*

warnings were required because the interrogation was custodial in nature. The government demurs to this assertion.

The determination of whether the defendant was in custody, a mixed question of fact and law, requires the court to decide whether there was “a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *United States v. Fernandez-Ventura*, 1998 WL 257 at *3 (1st Cir. Jan. 6, 1998) (quoting *Thompson v. Keohane*, 116 S.Ct. 457, 465 (1995)). “The test is not applied mathematically, but in view of the totality of the circumstances.” *Fernandez-Ventura*, 1998 WL 257 at *3. The custody determination is an objective one, focusing on “how a reasonable [person] would have understood his situation.” *United States v. Ventura*, 85 F.3d 708, 711 (1st Cir. 1996) (citations omitted). The subjective intent of the interrogators is not relevant. *Id.* Rather,

[r]elevant circumstances include whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation.

Id. (citations and internal quotation marks omitted).

Certain factors arguably favor the view that the interrogation was custodial: the presence of four investigators, when only one conducted the bulk of the inquiry,² the fact that Hamel was standing rather than sitting,³ and Strong’s two brief outbursts indicating skepticism about the defendants’ explanation. On the other hand, the character of the interrogation was otherwise entirely

² The record suggests that Chief Strong’s presence was a calculated effort to increase the likelihood of receiving inculpatory information, either because he would make the defendant feel more at ease or possibly because he would make the defendant feel intimidated. Because the investigators’ subjective intentions are not relevant, this issue is of no significance.

³ The defendant contends that Hamel positioned himself in such a way that the defendant’s path of egress was blocked. I do not propose such a finding.

civil, the questioning took place in familiar surroundings and, in fact, in a room selected by the defendant.⁴ Although the interview was of a fairly long duration — more than three hours — nothing in the record suggests any physical restraint and, indeed, the interview concluded soon after the defendant made mention of a need to wrap up the discussion. *Cf. United States v. Morgan*, 911 F.Supp. 1340, 1350 (D.Kan. 1995) (finding custodial interrogation where tenor grew more hostile over course of ten-hour meeting with authorities). The fact that the defendant was free to receive outside telephone calls and did receive such calls during the interview also suggests the non-custodial nature of the proceedings. *See United States v. Venerable*, 807 F.2d 745, 747 (8th Cir. 1986). Finally, it is of some incidental significance that the defendant took up Ballback’s suggestion to return to the Kittery Police Department the next day to furnish yet more documents to the authorities. In sum, while this unannounced visit from four investigators was undoubtedly a stressful occasion for the defendant, the totality of the circumstances leads inescapably to the conclusion that the interrogation was non-custodial.

III. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

⁴ The defendant made much at hearing about the size of the room. There was differing testimony as to its dimensions, but the record supports a determination that the defendant’s office was just big enough to accommodate him and his four visitors. It is of considerable significance in this regard that the defendant was able to remain behind his desk during the interrogation, thus separating him from his visitors and attenuating the possibility that the cramped nature of the surroundings made the atmosphere coercive.

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 29th day of January, 1998.

*David M. Cohen
United States Magistrate Judge*