

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
v.	)	<b>Criminal No. 97-70-P-H</b>
	)	
<b>MARK E. HUDDLESTON,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

The defendant is charged with attempting to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He seeks the suppression of (1) certain tape recordings in which a cooperating individual placed a series of telephone calls in the presence of and at the instigation of the authorities and (2) statements he made to the authorities following his arrest.<sup>1</sup> The defendant contends these recordings are not admissible at trial because the government cannot demonstrate their authenticity, because certain material parts of them are inaudible, and because the confidential informant did not consent to have his phone conversations recorded. His position concerning the post-arrest statements is that they were made in violation of his Fifth Amendment rights because they occurred after too much time had elapsed following his receipt of *Miranda*<sup>2</sup> warnings upon arrest. An evidentiary hearing was held on January 23, 1998. I recommend that the

---

<sup>1</sup> As to the defendant's post-arrest statements, the suppression motion appears as item number 1 in the defendant's Notice of Omnibus Motions (Docket No. 6). With the exception of item number 2, all of the other matters raised in the omnibus filing have been previously resolved. *See id.* at 2 (endorsement). Item 2 seeks a hearing to determine the audibility and authenticity of certain recorded telephone conversations. In light of the claims respecting those tapes, I treat this item simply as an expansion of the scope of the suppression motion.

<sup>2</sup> The reference is to *Miranda v. Arizona*, 384 U.S. 436 (1966).

following findings of fact be adopted and that the motion to suppress be denied.

### **I. Proposed Findings of Fact**

This prosecution stems from a series of telephone conversations recorded by agents of the Drug Enforcement Administration (“DEA”) on November 5 and 6, 1997. Cooperating individual Miguel Rodriguez-Gonzales initiated these phone conversations, which involved the defendant and his female companion, identified in the hearing record only as “Sue.”

The first three calls were placed to the defendant’s home telephone number on November 5, 1997 from the Portland office of the DEA under the supervision of Jay Stoothoff, a DEA investigator. Stoothoff used a conventional telephone answering machine to record the conversations. This machine generated an electronic voice-stamp, purporting to give the date and time of the call, at the conclusion of each discrete recording it made. There is a significant discrepancy between the times recorded by the answering machine after each of these conversations and the times these phone calls actually took place according to Stoothoff’s testimony at hearing. I credit Stoothoff’s explanation that the answering machine was registering an incorrect time in each instance, in all likelihood because a prior power failure had caused the machine to lose the correct time. I therefore find credible Stoothoff’s testimony that the first call was placed at approximately 4:53 p.m.,<sup>3</sup> the second within two minutes thereafter, and the third approximately two hours later.<sup>4</sup>

---

<sup>3</sup> This call reached only a recording, generated by the phone company, advising the caller to dial “1” before placing a call outside the local calling area.

<sup>4</sup> The tape of these three conversations, admitted as Government Exhibit 1, was played at the hearing. In an effort to rebut Stoothoff’s testimony concerning the times of the calls, the defendant notes that the tape includes the notation “2 a.m.,” generated by the answering machine and audible immediately prior to the final call. After the final call, the machine recorded the notation  
(continued...)

Although Stoothoff did not personally ask Rodriguez-Gonzales if he consented to the recording of these phone conversations, Stoothoff was present when Rodriguez-Gonzales stated to other agents that he wished to cooperate. Before placing the first call, Stoothoff did ask Rodriguez-Gonzales if he consented to the making of the calls and if he was “ready to go,” to which Rodriguez-Gonzales in some fashion indicated his assent. At no time during the making of the November 5 recorded telephone calls did Rodriguez-Gonzales indicate to Stoothoff in any way that he was unwilling to cooperate with the DEA by making the calls and allowing them to be recorded.

Yuri Shafir, a special agent with the DEA, supervised the making of two calls by Rodriguez-Gonzales on November 6, 1997 to the defendant’s home number.<sup>5</sup> These calls were placed from the offices of the U.S. Marshal in Portland and were recorded by Shafir using the Marshal Service’s equipment. In each instance, Shafir personally dialed the phone number of the defendant’s home and then had Rodriguez Gonzales conduct the actual conversation. In each instance, Shafir paused before dialing to record his own notation of the date, time and number called. These audio notations by Shafir were played at the hearing. Their sound quality is very low owing to a loud hum on the tape; Shafir’s voice, although difficult to hear, is audible with two significant exceptions. As to the first conversation, only the last three digits of the phone number as noted by Shafir are audible. However, these digits — 181 — are indeed the last three digits of the defendant’s home phone

---

<sup>4</sup>(...continued)

“4:21 a.m.” It is obvious from the brevity of the final call that it did not last for two hours and 21 minutes. From a careful review of the tape it is apparent that the machine made the “2 a.m.” notation immediately after Stoothoff used the machine to record his recitation of the time of the second call, after which the machine was disengaged, no additional voices being recorded on the tape until the final call beginning some two hours later.

<sup>5</sup> The tapes of these two conversations were admitted as Government Exhibits 2 and 3.

number as reflected by Shafir's audio notation preceding the third call and by Shafir's testimony at hearing. Likewise, Shafir's audio notation as to the time of the first call is inaudible other than the letters "p.m." However, the audio notation on the second tape is audible as "6:51 p.m." and I credit Shafir's hearing testimony that the first Shafir call was within an hour before the second.

Both Stoothoff and Shafir testified at hearing that they recognized as the defendant's the male voice on the other end of the recorded phone conversations. In addition, Detective Steven Hamel of the Kittery Police Department, who has known the defendant for 17 years, heard excerpts of these tapes played during the hearing and testified that he recognized the male voice as the defendant's. I credit all of this testimony that the male with whom Rodriguez-Gonzales spoke on each occasion was, in fact, the defendant.

With the assistance of state and local authorities, agents of the DEA arrested the defendant on November 6, 1997 at the northbound rest stop adjacent to Exit 3 of the Maine Turnpike. Stoothoff advised the defendant of his constitutional rights as required by *Miranda*, and the defendant affirmatively indicated that he understood them. Noticing Detective Hamel of the Kittery Police Department at the scene of the arrest, he indicated a desire to speak with the detective. The defendant also consented to a search of his residence, on condition that he be present at the search, whereupon an agent of the Maine Drug Enforcement Agency drove the defendant and Hamel to the defendant's home in Eliot, some 30 minutes away by car. The defendant spoke to the two agents throughout the trip, and made several statements that bear directly on the pending criminal charge. The defendant was so talkative, in fact, that Hamel had a difficult time taking notes on everything that was being said. Although Hamel asked some questions during the conversation, most of what the defendant said he stated at his own initiative. At no time during the trip did the defendant

indicate he did not wish to speak to the authorities, wanted to consult an attorney or otherwise desired to invoke his *Miranda* rights.

During the arrest itself, agents pulled the defendant from his car and placed him on the ground. The defendant is a large man and, accordingly, it was necessary for the arresting agents to use two pair of handcuffs to secure him. For the same reason, the agents seated the defendant in the front seat of the car in which they transported him from the arrest scene to his home for the consensual search. At no time during the arrest and subsequent trip to Eliot was the defendant incoherent, nor did he complain of any physical ailments. Although there were suggestions at the hearing that the defendant's physical state may have had a bearing on the voluntariness of his statements to the authorities, nothing in the hearing record supports a finding that the plaintiff was injured or otherwise in a condition that would affect his ability to understand and to waive his constitutional rights.

## **II. Discussion**

At the hearing, the defendant indicated that his objection to the admissibility of the tapes in question is grounded in *United States v. Font-Ramirez*, 944 F.2d 42 (1st Cir. 1991). In that case, the First Circuit noted that the “preferable method” for challenging a tape recording on authenticity and/or intelligibility grounds is by pretrial suppression motion. *Id.* at 47. The court also noted that, “[a]fter the government lays a foundation for the admission of a tape, the party challenging the recording bears the burden of showing that it is inaccurate.” *Id.* Further, “[t]he trial court has broad discretion in ruling on the admissibility of tape recordings, even where portions of tapes are unintelligible.” *Id.*

In this instance, the government has laid a proper foundation for the admission of the tapes in question. Stroothoff and Shafir made the appropriate representations concerning the tapes' chain of custody. As to their authenticity, the Federal Rules of Evidence recite, "[b]y way of illustration only, and not by way of limitation," that evidence of telephone conversations may be authenticated "by evidence that a call was made to the number assigned at the time by the telephone company to a particular person . . . if . . . circumstances . . . show the person answering to be the one called." Fed. R. Evid. 901(b) and (b)(6). In this instance, there is no dispute that the number called was, in fact, the one assigned to the defendant. Further, the record more than amply establishes that the persons with whom the confidential informant spoke were either the defendant or his companion Sue. See, e.g., *United States v. Rodriguez*, 63 F.3d 1159, 1167 (1st Cir. 1995) (noting that non-participant in phone conversation can authenticate tape and sustaining admission of recorded conversation where circumstances corroborated by other witnesses). Moreover, the unintelligibility question relates only to those portions of the tapes in which the agents purport to record details concerning the date, time and number called. Given that other evidence is sufficient to fix these circumstances, there is absolutely no basis for determining that "the inaudible parts are so substantial as to make the rest more misleading than helpful."<sup>6</sup> *Font-Ramirez*, 944 F.2d at 47 (citation omitted).

The consent issue, as raised by the defendant, relates to 25 U.S.C. § 2511(2)(c). This subsection sets forth an exception to the criminal statute enjoining the interception of phone conversations. Pursuant to subsection (2)(c), it is not unlawful "for a person acting under color of

---

<sup>6</sup> I thus agree with the government's assertion at the hearing that fixing the time of the phone calls is not necessary for the recordings to be authenticated under Rule 901. Moreover, as already noted, the investigators' credible testimony concerning the times of the calls only bolsters the evidence of their authenticity.

law to intercept a wire . . . communication where . . . one of the parties to the communication has given prior consent to such interception.” 25 U.S.C. § 2511(2)(c). In *Font-Ramirez*, the First Circuit rejected a similar challenge to taped conversations because there was “no question that [the informant] agreed to carry the tape recorder and to record the conversation.” *Font Ramirez*, 944 F.2d at 47. Similarly, there is no question here that Ramirez-Gonzales indicated through his statements and conduct that he assented to the government’s plan to record conversations between him and the defendant. Thus, although the record lacks evidence that Ramirez-Gonzales made an affirmative statement that he was giving such consent, there is more than enough evidence from which the court may infer that the informant had agreed to permit the recording of the conversations in question.

Concerning the statements made by the defendant subsequent to his arrest, the government bears a “heavy burden” of showing that with regard to these statements the defendant voluntarily, knowingly and intelligently waived the rights secured to him to remain silent and to consult with an attorney. *United States v. Melanson*, 691 F.2d 579, 588 (1st Cir. 1981). The government has met its heavy burden in this instance. The record in this case supports no other inference than that he made extensive and inculpatory statements in a steady stream that immediately followed the receipt of *Miranda* warnings. Concerning the defendant’s physical state, the most defendant-favorable inference the record will support is that he was in some minor discomfort given the circumstances of his arrest and subsequent transport to Eliot, but that his discomfort did not affect his ability to understand and to waive his constitutional rights. Accordingly, his waiver of *Miranda* rights was voluntary, knowing and intelligent.

### **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, 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 26thth day of January, 1998.*

---

*David M. Cohen  
United States Magistrate Judge*