

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**UNITED STATES OF AMERICA** )  
 )  
**v.** ) **Criminal No. 00-71-P-H**  
 )  
**BILLY ROY,** )  
 )  
**Defendant** )

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

Billy Roy, charged with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), seeks to suppress statements he made during two interviews with a detective sergeant of the Lincoln County Sheriff’s Department. Indictment (Docket No. 1); Motion to Suppress Statements (“Motion”) (Docket No. 7) at 1. An evidentiary hearing was held before me on November 17, 2000. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

**I. Proposed Findings of Fact**

On May 15, 2000 at approximately 1:15 p.m., Detective Sergeant Rand Maker of the Lincoln County Sheriff’s Department, having obtained a warrant to do so, arrived at the defendant’s residence in Dresden, Maine along with two other detective sergeants and a deputy sheriff to search for child pornography. The deputy was the only uniformed officer; the others were in plain clothes but wore jackets identifying them as agents of the Lincoln County Sheriff’s Department. After a delay of four to six minutes, during which the officers were pounding on the two doors to the house and shouting, the defendant, who had been sleeping, opened one of the doors. He had been sleeping in his underwear

and put on a pair of shorts before answering the door. Due to the delay in responding to their knocks, the officers were concerned about the possibility that someone in the house might have been destroying the evidence that they were seeking.

The defendant recognized Maker, who was in charge of the search, from a previous contact. Maker informed him that the officers would be executing a search warrant, looking particularly for child pornography, and provided the defendant with a copy of the warrant. Maker testified that the defendant looked like he had been sleeping. The defendant stepped back, and the officers entered the house. At no time did the officers draw their guns, place handcuffs on the defendant, or inform him that he was under arrest. After quickly determining that there was no one in the house other than the defendant, the officers fanned out, with Maker and another detective going to the second floor and the other two officers remaining on the first floor. The officers knew where the two computers in the house were located before they entered the house.

The defendant went into the living room and sat on the couch. He testified that he was told by Maker to sit down and not to move around the house. Maker denied telling the defendant to sit on the couch. The defendant also testified that Maker's tone of voice indicated that Maker was angry and upset, and that he was never alone while any of the officers were in the house. For about three-quarters of the time that any of the officers were in the house, the defendant testified, Maker was with him. For the remaining time, the uniformed deputy was with him while the deputy collected video tapes in the living room. Maker testified that he did not assign any of the officers to watch the defendant while Maker was upstairs because the defendant was cooperative and did not pose a risk to the officers. The defendant testified that, about twenty minutes after the officers arrived, he became chilly, asked an officer, whom he believes to have been Maker, if he could go to his bedroom and get a shirt, and was denied permission to do so. Maker denied hearing or refusing such a request. The

defendant also testified that, during the search, he mentioned that he knew where more tapes were located upstairs and that Maker then accompanied him upstairs, where the defendant saw detective sergeant Murphy dismantling the computer in the defendant's bedroom, and, after the tapes were located, the defendant was escorted back downstairs to the living room, still without a shirt. Maker testified that he did not recall the defendant making this statement or being accompanied upstairs to help find anything. The defendant testified that an unidentified officer told him that "if [he] told them where [the material subject to the search warrant] was, it would be easier" and that "it would look better" if he helped them find the material.

The officers had driven to the defendant's residence in two vehicles, which were parked in the driveway in a manner that blocked egress of the defendant's pickup truck. However, the defendant also owned a motorcycle which he could have used to leave during the search.

After completing his search upstairs and inventorying the contents of three or four bags of video tapes and CD-ROMs, Maker went into the living room with Murphy. Maker testified that he began his interview with the defendant in a standing position, but conducted most of the interview while sitting, either next to the defendant on the couch or in an adjacent chair, and that Murphy also sat in a nearby chair. The defendant testified that the officers remained standing throughout the interview, which was conducted after the third detective and the deputy had left. The defendant asked whether the search was related to a civil proceeding involving the Department of Human Services; Maker replied that it was not. The defendant asked who had provided the information that resulted in the search warrant; Maker declined to identify the person.

Maker told the defendant that the officers were looking for images of minor children in sexually explicit or sexually suggestive positions. The defendant told Maker that he did visit pornographic web sites and that his computer might contain images of adult pornography. He told

Maker that images of children in sexually explicit or sexually suggestive positions sometimes appeared on this computer and that, when such an image began to download onto his viewing screen, he would close the image before fully viewing it. He admitted that he had saved some images involving children on the computer's hard drive.

The officers were at the defendant's house for a total of one and one-half hours. Maker testified that the interview took 20 to 30 minutes. As Maker and Murphy were leaving, the defendant informed them that he thought he could only break the law if he sent pornographic images from his computer via e-mail and that obtaining such images from the internet was not a crime.

On June 26, 2000 Maker and Murphy returned to the defendant's residence at about 2:25 p.m. Maker was carrying his laptop computer, on which he had loaded 26 images that had been retrieved from the defendant's computer. He told the defendant, who again was alone, that he did not have to talk with Maker and Murphy and that Maker wanted to ask him some questions about the material that had been found on the defendant's computer. The defendant, who testified that Maker's tone of voice on this occasion was "a lot more sociable," invited the officers into the house. No weapons were drawn by the officers during this visit, no handcuffs were used and the defendant was not told that he was under arrest. The defendant and Maker sat side-by-side on the couch; Murphy occupied a nearby chair.

Maker began by showing the defendant some images of adults that had been taken from his computer. During the interview, which lasted about one hour and twenty minutes, the defendant got up to answer the telephone on the second floor but did not ask to end the interview, for a lawyer, or to leave. With the exception of two images of his wife's daughter, the defendant admitted that he would have been the only person using the internet through his computer on the dates and times the files containing the images were created or modified. He admitted that he looked for images of young-

looking females on the internet and estimated the ages of the subjects in the images at between 7 and 18 years old. Maker and Murphy did not arrest the defendant. Maker left his card with the defendant, requesting that the defendant ask his wife to call Maker.

The defendant, a former corrections officer at the Cumberland County jail, was familiar with the *Miranda* warnings. He was aware at all relevant times that he had the right not to answer any of Maker's questions and the right to ask for a lawyer. He testified that he was "scared" during the first interview and, on both occasions when Maker visited his house, he did not think that he had done anything wrong. Maker told him that someone other than Maker and Murphy would make the decision whether to charge the defendant with a crime.

## II. Discussion

The defendant contends that he was in custody on both occasions when he spoke with Maker and that, since no *Miranda* warnings were given, his statements must be suppressed. Motion at 3. A police officer must give the *Miranda* warnings "only when there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."

*Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). Determination of custody depends on the objective circumstances of the interrogation, not on the subjective views of either the interrogating officers or the person being questioned. *Id.* at 323.

In making this determination, we engage in a fact-specific inquiry, evaluating all of the circumstances surrounding the incident. Although no single element dictates the outcome of this analysis, factors that we consider in deciding whether a defendant was in custody at the time of questioning 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.”

*United States v. Jones*, 187 F.3d 210, 218 (1st Cir. 1999) (quoting *United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987)). When the questioning occurs at a place other than a police station, “*Miranda* is *not* triggered simply because a person detained by the police has reasonable cause to believe that he is not free to leave.” *United States v. Streifel*, 781 F.2d 953, 961 (1st Cir. 1986) (emphasis in original). The appropriate question is whether, given the factual circumstances, a reasonable person in the defendant’s position would have felt that he was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

Here, the questioning at issue took place in the defendant’s residence, clearly a familiar place. The officers did not draw their weapons on either occasion, did not handcuff the defendant, and did not engage in physical or verbal threats or intimidation. While there were four law enforcement officers present during the search that occupied the first portion of the May 15 visit to the defendant’s home, only two remained by the time the defendant was questioned, and only one, Maker, actively questioned the defendant. There were only two officers present at all times during the second visit on June 26, and again Maker alone conducted the questioning. See *United States v. Quinn*, 815 F.2d 153, 157 (1st Cir. 1987) (five officers present during questioning; no custodial interrogation found). These factors militate against the defendant’s position with respect to both interviews.

The remaining factors are somewhat different for the two interviews. While Maker was inside the defendant’s home for a total of one and one-half hours during the first visit, his testimony that his questioning of the defendant occupied only 20 to 30 minutes of that time is unrebutted. Detention of the resident of premises for which a search warrant has been issued during the execution of that warrant, and while no questioning of the resident takes place, is not custody for purposes of analysis of the need

for *Miranda* warnings. *Michigan v. Summers*, 452 U.S. 692, 701-04 (1981); *United States v. Saadeh*, 61 F.3d 510, 520 (7th Cir. 1995). If, as the defendant testified, he was told to sit in the living room and not told that he need not answer Maker's questions, those factors do not render the subsequent questioning custodial. *See United States v. Rith*, 164 F.3d 1323, 1332 (10th Cir. 1999) (defendant told to sit at kitchen table while officers conducted search and not told that he need not answer officer's questions). Similarly, if, as the defendant testified, he was accompanied by Maker when he volunteered to go upstairs and show Maker where some video tapes were located, that fact does not make the subsequent questioning custodial. *United States v. Fike*, 82 F.3d 1315, 1325 (5th Cir. 1996) (defendant, asked by authorities to wait outside residence during search, was escorted by officers on two occasions during the search when he entered the house), overruled on other grounds *United States v. Brown*, 161 F.3d 256, 259 n.8 (5th Cir. 1998). Counsel for the defendant suggested that the urgency with which the four officers initially entered the residence, due to their concern someone other than the defendant might be inside or that destruction of evidence might be in progress, rendered the later interrogation custodial, presumably because an objective person witnessing such an entry would not have felt free to refuse to answer questions or to leave, but I find persuasive the holding of the Fifth Circuit in *Fike* that the facts that officers pointed a gun at a defendant "during the first few minutes of the search" and entered his residence with "violence" did not render his statements inadmissible. *Id.*

The defendant testified that Maker's tone of voice was angry and hostile, while Maker testified that the questioning was conducted in a conversational, relaxed tone. Neither testified that any questions asked by Maker during this initial interview used false information, were presented in an attempt to trick the defendant, or stated or implied that anything the defendant said was not worthy of belief or inconsistent with other information that the officers already possessed. *See United States v.*

*Lanni*, 951 F.2d 440, 442-43 (1st Cir. 1991). While I find Maker's testimony on this point more credible than that of the defendant, the defendant's characterization of Maker's tone, taken alone or in concert with the other evidence presented by the defendant, is in any event insufficient to render the interview custodial. The fact that the defendant could not have driven his truck out of the narrow driveway unless the officers moved their vehicles, given the availability of his motorcycle, and the alleged fact, denied by Maker, that Maker refused to allow the defendant to go to his bedroom to obtain a shirt on that May afternoon, also do not make the interrogation custodial. See *Quinn*, 815 F.2d at 154-56 (discussing blocking of defendant's car). Neither suggests that a reasonable person in the defendant's position would not have believed that he could terminate the interview or leave the house. Finally, the defendant's suggestion that suppression of his statements from this first interview may be based on the fact that "the focus of the interview was on the defendant alone," as his counsel argued at the close of the hearing, is an argument that has been specifically rejected in this context by the Supreme Court. *Beckwith v. United States*, 425 U.S. 341, 347 (1976).

At the second interview, when the two officers involved did not have a search warrant, began by informing the defendant that he did not have to speak with them, and were invited into the house by the defendant, there was no suggestion of urgency in the officers' entry, there is no evidence that their vehicle blocked the defendant's vehicle, the unrebutted testimony is that the defendant was allowed to leave the living room where the interview was being conducted without the escort of either officer, and the defendant himself testified that he was not told where to sit and that Maker's tone was "very pleasant." This interview was considerably longer than the first, consuming approximately one hour and twenty minutes, but all of the other circumstances that distinguish it from the first interview make it even less likely that a reasonable person in the defendant's position would have felt that he could not terminate the interview or leave. Counsel for the defendant argued at the hearing that Maker's

questions during the second interview were “clearly designed to elicit an incriminating response,” but that approach to the questioning, if counsel’s characterization is correct, does not make the interrogation custodial. Counsel’s characterization goes to the question whether interrogation occurred, a question that is not reached if the defendant was not in custody. *United States v. Li*, 206 F.3d 78, 83 (1st Cir. 2000). Contrary to counsel’s final argument, the fact that Maker told the defendant at the outset of the second interview that the defendant did not have to answer his questions makes it more likely, not less, that the interview did not constitute custodial interrogation. The defendant offers nothing further to distinguish the first and second interviews.

### **III. Conclusion**

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

Date this 20th day of November, 2000.

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David M. Cohen  
United States Magistrate Judge