

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	
v.)	Criminal No. 92-19-P-H
)	
DONALD R. LOTHROP,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

On February 13, 1992 the defendant was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The defendant has filed motions to suppress all evidence gained as a result of a search of his apartment on or about December 4, 1991 and all statements made by him to law enforcement officers at the Androscoggin County Jail on or about December 5-7, 1991. An evidentiary hearing was held before me on April 27, 1992.¹ The last of the supplemental legal memoranda was filed on May 7, 1992. I recommend that the following findings of fact be adopted and that the motions to suppress be denied.

I. Proposed Findings of Fact

Pursuant to a December 4, 1991 affidavit and request of Maine State Trooper Douglas Parlin (Gov't Exh. 1), a judge of the Maine District Court issued a search warrant authorizing the search of the

¹ At the hearing the defendant's counsel indicated that the only item the defendant seeks to have suppressed as a consequence of the search of his residence is the seized firearm. The government represented that it will not seek to admit at trial statements made by the defendant to law enforcement officers on December 4 and 10, 1991, that no such statements were made on December 7, 1991 and that, therefore, only statements made on December 5 and 6, 1991 are in issue.

defendant's apartment at 264 Blake Street, Lewiston, as well as the basement and a five-car garage, for several specifically described items including a .22 caliber handgun revolver with a blue finish and a brown holster (Gov't Exh. 2). The search was executed by Troopers Parlin and Holcomb and Lewiston police officers. Among the items seized was a .22 caliber high standard revolver which was found in a drawer of a dresser located in the defendant's bedroom. The defendant, who was present during the search, denied any knowledge of the gun and claimed that he was set up. He was thereupon arrested for a probation violation relating to the presence of the firearm in his apartment and was transported to the Lewiston Police Department.

During the booking process the defendant initiated a conversation with Trooper Parlin in which he asked the trooper what was going to happen to him. The defendant, who has a lengthy criminal record which includes multiple burglaries and thefts (Gov't Exh. 6), then volunteered the statement that he knew of a large stolen property ring in the area involving substantial players and was willing to cooperate with the police concerning this and other criminal activities.² Parlin responded to the defendant's expressed concern about what was in store for him by indicating that he would contact federal authorities to inform them of the discovery and seizure of the firearm from the defendant's apartment. He also told the defendant that he would return the next day to interview him. In response to the defendant's stated willingness to cooperate, Trooper Parlin explained that he thought a judge might look favorably on such cooperation and that it was the right thing to do. The defendant does not dispute Trooper Parlin's testimony that he never promised the defendant anything as an

² The defendant testified that he had decided to cooperate with the authorities even before the search warrant was issued and that, even though he changed his mind at one point, by the time he had arrived at the police station on December 4, 1991 he had again decided to cooperate. His decision apparently resulted from discussions he had had with his girlfriend Sandy and was motivated as well by a concern for his son whom he believed had been the victim of sexual molestation by an unidentified individual.

incentive for his cooperation and that he never suggested to the defendant that he would not go to jail or what sentence he might receive. This entire conversation took approximately 15 to 20 minutes.

On December 5, 1992 Trooper Parlin interviewed the defendant at the Androscoggin County Jail beginning at approximately 1:30 p.m. With Parlin was Trooper Holcomb. The defendant had neither breakfast nor lunch before the interview because he was not feeling well, although there is no indication either Parlin or Holcomb was aware of this. The interview took place in a secure room, not a cell, measuring approximately 8 feet by 8 feet and containing two desks and several chairs. At the outset Parlin read the defendant his *Miranda* rights from a form (Gov't Exh. 3) and asked him if he understood each of his rights. The defendant acknowledged that he did and signed the form indicating that he wished to answer questions.³ *Id.* At no time did the defendant inform Parlin or Holcomb that he did not want to talk to them. The defendant was at all times free of handcuffs and otherwise unrestrained.

During the interview Trooper Parlin asked the defendant to explain where the gun that was seized from his apartment came from. The defendant then made the inculpatory statement that it had been used in a burglary and was given to him by a friend for safekeeping. The defendant agreed to meet again the next day with Trooper Parlin and a federal Bureau of Alcohol, Tobacco and Firearms ("ATF") agent. The entire interview took 45 minutes.

On December 6, 1991 Trooper Parlin and ATF Special Agent Dennis Flavin met with the defendant at the jail at approximately 5:30 p.m. This interview took place in a somewhat larger room measuring approximately 8 feet by 12 feet and containing several chairs but no desks. Again, the defendant was unrestrained. Agent Flavin advised the defendant of his *Miranda* rights and the

³ Trooper Parlin testified that he circled the word "yes" next to each question and wrote the words "I do" to reflect the defendant's actual response.

defendant orally waived his rights and agreed to answer questions.⁴ He had access to food and drink. Indeed, during the interview his dinner was brought to him and he ate while being questioned. Among other things, Flavin asked the defendant if he possessed the firearm seized from his apartment, to which he responded that he did and that he knew it was stolen. The interview lasted a total of 20 to 30 minutes.

⁴ The defendant acknowledged during his testimony that he has had several encounters with the law and is very familiar with his *Miranda* rights.

Although the defendant testified that he had been experiencing chest pains for two or three days prior to the search,⁵ that he was about to leave his apartment for the hospital when the authorities arrived to conduct the search, that his request to leave in order to have the pains checked out was denied, that Trooper Parlin dismissed his complaints in a cavalier manner and that the pains continued to plague him during the entire period at issue here, Trooper Parlin and Agent Flavin both denied that the defendant ever mentioned chest pains in their presence. The defendant also testified that he slept poorly or not at all during this period and was tired at the time of his initial discussion with Trooper Parlin on December 4 and the two interviews on December 5 and 6. Parlin and Flavin both testified that the defendant appeared relaxed and evidenced no signs of anxiousness or psychological or emotional discomfort during the interviews.

In addition to noting the defendant's failure to articulate in what respect these circumstances affected his ability effectively to waive his *Miranda* rights, I do not credit his testimony to the extent it contradicts or is contradicted by the testimony of Trooper Parlin or Agent Flavin, which I do credit. The defendant was not at all convincing in his contradictory account of the facts, often appeared shifty and, on the issue of whether or not he wanted to cooperate with the authorities, told a story which I do not believe and which leads me to conclude that in many other respects his testimony was not truthful. Parlin and Flavin, by contrast, appeared to me to be fully credible.

II. Legal Discussion

⁵ The defendant testified that he originally believed he had pulled a muscle and was given pain medication at the jail on the evening of December 4, 1991 to relieve his symptoms. He further testified that when he was taken to a hospital some ten days later for x-rays and an electrocardiogram the results were negative.

A. Search Warrant

The defendant asserts that all evidence concerning the gun found in his dresser drawer should be suppressed because the search warrant issued and executed on December 4, 1991 is facially deficient. Specifically, he argues that the warrant is flawed because the supporting affidavit fails to specify a time frame within which the gun was seen or a location where it was seen. Defendant's Supplemental Memorandum of Law ("Defendant's Memorandum") at 6.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that "the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid." *Massachusetts v. Sheppard*, 468 U.S. 981, 988-89 (1984) (citing *Leon* at 922-23).

First, it is not at all apparent that the warrant is invalid. From all that appears, Trooper Parlin's supporting affidavit establishes probable cause to believe that the defendant had in his possession within his residence a .22 caliber handgun. *See* Gov't Exh. 1. Second, even assuming the absence of probable cause, it is clear that the executing officers' reliance on the warrant was objectively reasonable. The warrant, issued by a Maine District Court judge, refers to and incorporates by reference the affidavit of Trooper Parlin, contains a finding of probable cause and describes in detail the place to be searched and the objects of the search. *See* Gov't Exh. 2.

The defendant's facial deficiency argument is grounded on the claim that the supporting affidavit fails to include critical information. However, the exception to the *Leon* holding on which the defendant relies requires a showing that the warrant itself either fails "to particularize the place to be

searched or the things to be seized," thus rendering it "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923. As noted above, the warrant is specific as to both. The defendant's facial deficiency claim is meritless.

B. Incriminating Statements

The defendant next argues that his confessions should be suppressed as involuntary. Defendant's Memorandum at 8-9. In doing so, he effectively concedes -- as on this record he must -- that he was duly apprised of his *Miranda* rights and waived them. Indeed, he correctly observes, citing *Colorado v. Connelly*, 479 U.S. 157 (1986), that statements made following a *Miranda* waiver "will not be deemed involuntary unless the police have engaged in some type of coercive or overreaching conduct." Defendant's Memorandum at 8.

The defendant has presented no evidence of any coercive or overreaching conduct on the part of any of the interviewing officers. Although he argues that at the time he confessed he had been suffering from chest pains for several days, I have found that he advised neither Trooper Parlin nor ATF Agent Flavin of his complaints, and there is no indication in the record that they were otherwise made aware of them. In any event, there is no record indication that the officers took advantage of the defendant's medical condition, such as it was.⁶ Likewise, the defendant's expressed concerns about his son did not lead to any inappropriate responses by the authorities. Unlike the situation in *Lynum v. Illinois*, 372 U.S. 528 (1963), the officers here threatened no adverse consequences relating to the defendant's son if he failed to cooperate. The defendant's final argument, that he offered to confess only on the condition that he not serve any jail time, fails on the basis of my findings that he had decided to cooperate with the authorities unconditionally before he even arrived at the police station

and had never so conditioned his stated willingness to answer questions, and that Trooper Parlin never promised him anything as an incentive for his cooperation and never suggested to him that he would not go to jail or what sentence he might receive.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motions 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 at Portland, Maine this 15th day of May, 1992.

David M. Cohen
United States Magistrate Judge

⁶ See *supra* note 5.