

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,

v.

TIMOTHY LEE VEILLEUX,

Defendant

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Criminal No. 90-00010 P

RECOMMENDED DECISION ON MOTION TO SUPPRESS

On February 13, 1990 the Grand Jury charged the defendant in a two-count Indictment with (i) conspiracy to possess and distribute in excess of 500 grams of substances containing cocaine, in violation of 21 U.S.C. ' ' 841(a)(1), 841(b)(1)(B) and 846, and (ii) possession, aiding and abetting the possession, distribution and aiding and abetting the distribution, of approximately 10 ounces of a substance containing cocaine, in violation of 21 U.S.C. ' ' 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. ' 2. The defendant has filed a motion to suppress certain statements made by him on January 22, 1990. An evidentiary hearing was held before me on June 7, 1990. The last of the supplemental legal memoranda was filed on July 31, 1990. I recommend that the following findings of fact be adopted and that the motion to suppress be **DENIED**.

I. Proposed Findings of Fact

The defendant was arrested in a bank parking lot near his home in Lewiston, Maine at approximately 4:20 p.m. on January 22, 1990 pursuant to a warrant issued by this court. T. 41. Michael Cunniff, a special agent with the United States Drug Enforcement Administration ("DEA"), effected the arrest assisted by Sergeant Michael Kelly of the Lewiston Police Department. T. 40-41. Agent Cunniff was aware at the time of the arrest that the defendant was then represented by Julian Sweet, an attorney who practices in Lewiston. T. 24, 42. Within minutes of the arrest the defendant made certain spontaneous remarks -- including the comments that he knew why he had been arrested that day, that the authorities were looking for his father and that he would not testify against his father -- which prompted Cunniff to advise him that he should talk to his attorney, receive discovery, review the evidence in the case and then discuss with his attorney what he should do. T. 42-43. This advice was repeated twice as the defendant continued to make spontaneous statements.¹ T. 43, 50, 67.

¹ The defendant made similar spontaneous comments concerning his father enroute from the bank to his residence and again on the driveway at his residence. T. 50.

Agent Cunniff transported the defendant from the parking lot to his residence so that the defendant could speak to his wife and explain what was happening, as he had requested to do, and because it was a convenient place to meet up with the other members of the arrest team.² T. 44. Sergeant Kelly drove the defendant's car to his residence so it could be left there. *Id.* When the defendant exited Agent Cunniff's car, which had been parked near a set of garages located close to the house, the defendant, in the presence of Cunniff, DEA Special Agent Henry John O'Donoghue, Kelly and Bureau of Intergovernmental Drug Enforcement ("BIDE") Agent Ken Pike, spontaneously gestured toward the garage and said, "It was Peter Drown who brought those wing nuts here." T. 3, 31, 45. He then asked Agent Cunniff if Drown had told him that. T. 35, 61. In response, Cunniff again told the defendant he should be careful because anything he said could be used against him. T. 36, 46. Cunniff then talked with Agent O'Donoghue and asked him to advise the defendant of his constitutional rights. *Id.* Cunniff did not himself advise the defendant of his rights because he did not intend to, and in fact did not, ask the defendant any questions. T. 55-56.

² The other members of the arrest team had proceeded directly to the defendant's residence, which was the subject of a federal forfeiture action and was being seized by the U.S. Marshal Service at the same time as the arrest occurred, in order, among other reasons, to provide security for the deputy marshal if necessary. T. 44, 48-49.

Subsequently, Agent O'Donoghue, BIDE Agent Thomas Albrecht and Sergeant Kelly transported the defendant to the Lewiston Police Department for processing. T. 4, 60. Enroute O'Donoghue read the defendant the *Miranda* warnings from a printed DEA card. T. 4-5; Gov't Exh. M1. He then asked the defendant if he understood his rights and the defendant replied that he did. T. 7; Gov't Exhs. M1-M2. The defendant was next asked if he was willing to answer some questions and he responded affirmatively. *Id.*; T. 39. O'Donoghue then asked the defendant some questions which he answered. T. 7-8; Gov't Exh. M2. The interrogation took between 5 and 10 minutes. T. 9. The defendant was coherent, appeared to understand the *Miranda* warnings and the questions, and did not appear to be under the influence of any drug or alcohol or to be suffering from any physical or mental problem affecting his ability to answer O'Donoghue's questions. *Id.* None of the officers present threatened or coerced the defendant. T. 9-10. The defendant did not appear to be disoriented or frightened during the conversation. T. 24. Like Agent Cunniff, Agent O'Donoghue had also learned prior to the defendant's arrest that he was at the time represented by Attorney Julian Sweet.³ T. 14, 24, 39. The defendant's attorney arrived at the police station a short time after the agents and the defendant did and while the defendant was being processed, and indicated that his client no longer wished to speak with the authorities. T. 8-9, 29. Questioning then ceased. T. 9.

II. Legal Discussion

³ In fact, the defendant had appeared with other counsel at the U.S. Attorney's office in December, 1989 for the purpose of making a proffer. T. 10-11, 12-13. He was then interviewed by Agent O'Donoghue, among others. *See* Gov't Exh. M4.

The defendant asserts that he is entitled to have all of his post-arrest incriminating statements suppressed because he was effectively denied his constitutional right to the assistance of counsel. He also argues that, by referring at the time of his arrest to a conference he had just completed with his attorney, he effectively invoked his right to counsel thereby tainting any statements made by him outside the presence of his attorney. The government argues that the defendant confuses his Fifth Amendment right to counsel, which applies during custodial interrogation or its functional equivalent, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980), with his Sixth Amendment right to counsel, which attaches automatically at the first critical stage of the proceeding, *United States v. Wade*, 388 U.S. 218, 226-27 (1967). It suggests that only the defendant's Fifth Amendment right to counsel is implicated here since all incriminating statements were made before the defendant's presentment in court.

All of the incriminating statements at issue were made after a criminal complaint had been filed against the defendant and a warrant for his arrest was issued by the court. These events mark the initiation of judicial proceedings and the point in time when the defendant's Sixth Amendment right to counsel attached. *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977). Thus, at the time of and following his arrest the defendant enjoyed a Sixth Amendment right to counsel. As reflected in my proposed findings of fact, I have concluded that the incriminating statements made by the defendant before he was read the *Miranda* warnings were spontaneous. The Sixth Amendment does not protect a defendant against such statements where, as here, they did not result from government interrogation or its functional equivalent. As spontaneous utterances they are clearly admissible at trial.⁴ See *Miranda v. Arizona*, 384 U.S. at 478.

⁴ The defendant's counsel suggests that the utilization of the arrest warrant procedure to accomplish the defendant's arrest may itself have been calculated to confuse and frighten him into making

incriminating remarks outside the presence of his counsel. Defendant's Supplemental Memorandum of Law in Support of His Motion to Suppress at 5. The record is devoid of any support for this supposition.

The defendant was entitled to the assistance of counsel under both the Fifth and Sixth Amendments when he was later interrogated. I conclude, however, that any incriminating statements made by him during the interrogation followed "an intentional relinquishment or abandonment [by him] of [this] known right or privilege." *Brewer v. Williams*, 430 U.S. at 404 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The interrogation was preceded by a recitation of the *Miranda* warnings apprising the defendant, *inter alia*, of his rights to remain silent, to talk with his attorney before any interrogation took place and to have his attorney present during questioning. After being asked whether he understood these rights and responding that he did, he affirmatively indicated that he was willing to answer questions. *Cf. Brewer v. Williams*, 430 U.S. at 404-05. The circumstances surrounding the recitation of the *Miranda* warnings and rights and the defendant's waiver were neither threatening nor coercive. The defendant was oriented and coherent. He was in no respect mentally, emotionally or physically disabled. He was not frightened. Having had an opportunity to observe the defendant at his initial appearance and to make a judgment about his intelligence and maturity, I find him to be of above-average intelligence and maturity. Assessing the totality of the circumstances, I am satisfied that, in agreeing to answer questions, the defendant gave a knowing, voluntary and intelligent waiver of his Fifth Amendment right against self-incrimination and of his Fifth and Sixth Amendment right to counsel.⁵

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

⁵ The defendant asserts that his earlier reference to his lawyer constituted an invocation of his right to counsel. The nature and timing of the reference belies this claim. The defendant simply mentioned to Agent Cunniff at the time of his arrest that he had just come from his lawyer's office. *See* T. 42. The record is devoid of any indication that, after waiving his right to counsel in response to the *Miranda* warnings given him by Agent Donoghue, defendant subsequently communicated a desire to consult with his counsel prior to the time the interrogation was terminated at the specific request of his

NOTICE

A party may file objections to those specified portions of a magistrate'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 7th day of August, 1990.

*David M. Cohen
United States Magistrate*

counsel when he appeared at the police station.