

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
)	
<i>v.</i>)	Criminal No. 94-59-P-H
)	
ANTHONY J. VAN HORN,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

The defendant is charged in a single-count indictment with being a six-time convicted felon in possession of a firearm, in violation of 18 U.S.C. ' 922(g)(1) and 924(e). He seeks the suppression of statements he made to the police following his arrest on June 28, 1994. An evidentiary hearing was held on December 21, 1994. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

At approximately 11:30 a.m. on June 27, 1994, Ronald A. Hubbard was hitch-hiking in Portland when he was picked up by the defendant. The two were previously acquainted; Hubbard had just been released from the Cumberland County Jail. The defendant asked Hubbard if he was interested in making a few dollars. When Hubbard responded affirmatively, the two went to the Gorham home of the defendant's parents. While there, there Hubbard and the defendant consumed two beers and four shots of whiskey and smoked some marijuana. The defendant produced two silver bars and said he wanted to sell them. The two then drove to two pawn shops, one in South

Portland and the other in Portland, in an effort to sell the bars. During these travels, the defendant, knowing of Hubbard's interest in guns, asked Hubbard if he could acquire a firearm for the defendant that he could use in a robbery. Hubbard responded affirmatively and told the defendant to call him on the following day.

The pair continued their travels together, next stopping at Rickey's Tavern in Portland. They arrived shortly before 2:00 p.m. and, while there, the defendant consumed alcohol which included a shot of whiskey and another beer or two. Hubbard told the police that the owner of the bar was concerned that the defendant was too intoxicated to drive, and gave the defendant a free hamburger in an effort to sober him up. The two eventually left Rickey's and went from there to another bar, this one in Westbrook, at approximately 4:00 p.m. The record does not disclose whether the defendant consumed any alcohol during this stop.¹

The pair next proceeded to the Gorham home of Hubbard's girlfriend, Janice Kullman, where Hubbard and the defendant then parted company. As soon as the defendant left, Kullman told Hubbard that the police had been looking for him and the defendant. Hubbard then walked to a nearby convenience store, contacted the police, met with them and told them about his activities and conversations with the defendant that day, including those relating to the defendant's stated interest in acquiring a gun. Hubbard agreed to cooperate with the police. It was decided that Hubbard would call the defendant and arrange to meet him in a local schoolyard to furnish the defendant with a weapon of the kind he wanted.

¹ Hubbard has recently told Special Agent John Paquette of the Bureau of Alcohol, Tobacco and Firearms that the defendant had consumed between two and four drinks at the home of the defendant's parents, and between seven and ten beers during the course of the afternoon.

When Hubbard left Kullman's apartment to contact the police, Kullman herself contacted the police to report that the defendant had just left her home and to warn that he had been drinking. Officer Christopher Sanborn of the Gorham police was dispatched in his cruiser to Kullman's residence, where he observed the defendant pulling away in his pickup truck. The officer followed the defendant for approximately a mile and half, did not observe any erratic driving or anything else that would have given him probable cause to stop the defendant, and therefore ceased trailing the defendant's vehicle.

The defendant picked up his girlfriend, Kerry Guidi, between 6 and 8 o'clock that evening at her sister's home in North Parsonsfield, where she and the defendant smoked a joint. They then drove to his parents' home in Gorham, where they spent the evening watching television. According to Guidi, neither she nor the defendant consumed any further intoxicants over the course of the evening.

The police records reveal that Hubbard placed his phone call to the defendant at 18 minutes past midnight on June 28th. A transcript of the call shows that Hubbard told the defendant that he had acquired a weapon for him but had to "get rid of it tonight." The two arranged to meet at 12:45 at the Village School in Gorham. The defendant appears to have been coherent during this conversation, despite being woken up by the phone call. For example, he quizzed Hubbard about why it was necessary for them to meet at a school rather than at Hubbard's home.

The defendant drove to the school parking lot with Guidi in the passenger seat of his truck. Once there, he left his truck, approached Hubbard and took possession from him of a gun, which he tucked into his pants. The police observed the transaction from an outpost in the nearby woods.

When the defendant got back into his truck and attempted to drive away, he was stopped and arrested.

Five police officers who participated in the arrest testified at the suppression hearing: Officer Sanborn, Detective Drown, Officer Robert Gaudette and Officer Robert Henckel, all of the Gorham Police Department, and Detective Sergeant James Langella of the Cumberland County Sheriff's Department. Each testified that he was familiar with the symptoms of intoxication, but observed no such symptoms in the defendant either at the time or the arrest or during subsequent contact with him on the night in question. In particular, none of them detected any odor of alcohol on the defendant's breath. Although it is clear that the defendant had consumed significant amounts of alcohol during the afternoon of the previous day, and had smoked some marijuana as well, as of the time he received the tape-recorded phone call from Hubbard the defendant was not intoxicated or otherwise impaired.

After the defendant was processed at the Gorham police station, the defendant met with Detective Langella and Officer Sanborn in an interview room beginning at 12:55 a.m. Detective Langella advised the defendant of his *Miranda* rights and the defendant affirmatively indicated that he understood those rights, waived them and was willing to talk with the officers.² The defendant, who holds a high school equivalency diploma, has five previous felony convictions. Clearly, he was familiar with police investigatory techniques and generally able, as a result of his education, to understand what the police were telling him. Although under arrest, the defendant was not handcuffed or otherwise under any physical restraint as he sat in the interview room. Detective

² After *Miranda* warnings were given, Detective Drown took Officer Sanborn's place in the interview room.

Langella advised the defendant that the police would be offering him nothing in exchange for his cooperation.

During the interview the defendant at first denied having purchased a gun from Hubbard. Detective Langella advised the defendant that he was lying, that Langella had him, that not only was he caught with "his hand in the cookie jar" but "with a cookie in his hand" and that his girlfriend was "being talked to now." Government Exh. 2 at 5. Detective Langella told the defendant that ten police officers had witnessed the transaction, that it had been videotaped, that the police had a tape recording of his phone conversation with Hubbard and that he could be prosecuted in either state or federal court.

During their discussions with the defendant, the authorities were also conducting an interview in another room with Guidi, whom they knew to be pregnant. Detective Langella also told the defendant that Guidi was also speaking with the police, and at one point left the room where the defendant was being held for about ten minutes to speak with Guidi. Detective Langella advised the defendant that if Guidi was not telling the truth, she could be charged with unsworn falsification. According to Detective Langella's suppression hearing testimony, "I told him that, basically, so he would stop lying and tell me the truth." At the time Detective Langella made this statement to the defendant, the detective was aware that the police had already indicated to Guidi that she was not under arrest and would not be prosecuted in connection with the incident.

Approximately an hour into the interview, the defendant admitted that he had received a gun in the parking lot "for someone else," and that, as the police converged on him as he was attempting to drive away, he threw the gun out the passenger-side window of his truck. The interview ended at approximately 2:00 a.m.

II. Legal Discussion

A defendant may waive the rights of which he is advised via *Miranda* warnings "provided the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)). The inquiry has two "dimensions." *Moran*, 475 U.S. at 421 (citations omitted).

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). The government bears the burden of proving by a preponderance of the evidence that the defendant's waiver of his *Miranda* rights was voluntary. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

Here, the defendant makes two distinct arguments in support of his contention that his confession was not a voluntary one and should therefore be suppressed. First, he asserts that he was under the influence of alcohol and marijuana at the time of the police interview, and that his waiver was thus not made with a full awareness of the nature of the right being abandoned and the consequences of the abandonment. However, as I noted above, I find that the government has proven by a preponderance of the evidence that, despite the defendant's use of these substances

during the day prior to his arrest, he was not under the influence of either alcohol or marijuana by the time he was taken to the Gorham police station.

Secondly, the defendant contends that the totality of the circumstances surrounding the interview suggests that his confession was coerced. The defendant cites the lateness of the hour, the length of the interrogation, the persistence of the officers, his intoxication, the officers' failure to determine whether he was under the influence of any intoxicating substances, and what the defendant characterizes as the police's disingenuous assertion that if he did not confess the authorities would be prosecuting his pregnant girlfriend, who was being questioned elsewhere in the police station.

Regarding the latter assertion, the evidence demonstrates that Detective Langella used the threat of prosecuting Guidi as a means of encouraging the defendant to confess, even though the detective was fully aware that the police had no intention of pressing any charges against her. Detective Langella testified that he was also aware of Guidi's pregnancy. By itself, the fact that the defendant was unaware the police did not intend to prosecute Guidi, or, indeed, that he had no information about her statements to police, is of no relevance to the present inquiry. "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Moran*, 475 U.S. at 422. The Constitution does not "require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* Nor does the Constitution protect the defendant from the use of a confession that could somehow be construed as involuntary because it sprang simply from a concern for his girlfriend or her pregnancy. "The voluntariness of a waiver of [the Fifth Amendment] privilege has always

depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170 (confession resulting from psychotic delusion admissible).

Detective Langella, however, may have taken the process a step further by affirmatively misleading the defendant into thinking his girlfriend faced prosecution. According to the defendant, this was an effort to play on his concern for the fate of the pregnant Guidi as a means to coerce a confession. However, there was never any suggestion to the defendant that any deals would be struck as a result of his cooperation, and in that light I regard Langella's statement about Guidi as nothing more than a reminder to the defendant, in light of the inconsistency between his statement and Guidi's, that a person who knowingly makes a false statement to the police can be prosecuted for unsworn falsehood. This admonition to the defendant came in the context of what was presented to him as a mounting tide of evidence contradicting his story: Hubbard's cooperation with the police, the tape-recorded conversation between Hubbard and the defendant, the investigating officers' observations of the transaction in the parking lot, and Guidi's statement implicating the defendant. In this context, even if Detective Langella was in some sense attempting to manipulate the defendant's sense of concern for Guidi, it was obvious to the defendant that the police regarded him and not Guidi as the liar. Therefore, the threat of prosecuting Guidi was not, in context, coercive.

Nor does the totality of the circumstances generated by this threat, in combination with the other factors cited by the defendant, render his confession involuntary. The hour was late, but nothing in the record suggests that the defendant was anything other than alert. The interview, which lasted approximately an hour, was not unreasonably or even notably long. As noted previously, the defendant was not intoxicated. In short, he remained able to exercise, had he chosen to do so, his right not to talk to the police. *Cf. Mincey v. Arizona*, 437 U.S. 385, 398, 401-02 (1978) (seriously

wounded defendant interrogated at hospital, weakened by pain and shock, isolated from relatives, friends and his attorney, and "barely conscious"; waiver involuntary); *Townsend v. Sain*, 372 U.S. 293, 303, 307-08 (1963) (defendant of extremely low intelligence injected with "truth serum" prior to questioning; police slapped and threatened defendant; involuntary waiver); *United States v. Kiendra*, 663 F.2d 349, 351 (1st Cir. 1981) (defendant had only ninth-grade education, had spent 30 days in solitary confinement and had lost four pounds as a result of hunger strike; voluntary waiver). The government has demonstrated by a preponderance of the evidence that the defendant's waiver of his *Miranda* rights was knowing, intelligent and voluntary.

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 at Portland, Maine this 23rd day of December, 1994.

*David M. Cohen
United States Magistrate Judge*