

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 04-50-P-S
)	
FRANK MASTERA,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Frank Mastera, charged with being a felon knowingly in possession of a firearm and ammunition and with knowing or having cause to believe that the firearm was stolen, in violation of 18 U.S.C. §§ 922(g)(1), 922(j), 924(a)(1) and 924(a)(2), seeks to suppress any statements he made to a law enforcement officer on August 28, 2003. Indictment (Docket No. 4); Motion to Suppress, etc. (Docket No. 16) at [1]-[4]. An evidentiary hearing was held before me on August 4, 2004. The government called one witness and introduced one exhibit, which was admitted without objection. The defendant called one witness, himself, and offered one exhibit, which was admitted without objection. Counsel argued orally at the close of the hearing. Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On August 26, 2003 Detective Christopher Young of the Rockland (Maine) Police Department, who had been assigned to investigate the reported theft of a gun from the residence of Scott Stewart, spoke with Stewart. As a result of that conversation, Young went to the home of the defendant, Frank Mastera,

whom he knew as a result of an earlier investigation, and told him that he was investigating the theft. He told the defendant that witnesses had seen the defendant drinking beer on the porch of Stewart's house when Stewart was not there. The defendant told Young that he had been drinking beer on Stewart's porch but had no knowledge of any missing gun. He said that he would not have taken the gun because he was a convicted felon. He told Young that a man named Ron who worked at Electrotech had been with him on Stewart's porch.

Young then went to Electrotech and interviewed Ron Chrzas who said that he had been with the defendant at Stewart's house for only a short time and had left when the defendant began to go into the house because Chrzas did not feel comfortable about that. He told Young that Young should speak with Sharon Phillippe because she had seen the defendant with a firearm.

Sharon Phillippe told Young that the defendant had arrived on his bicycle while she was visiting her friend Amy Whitney and that he brought a gun into Whitney's house. Whitney told Young the same thing; her uncle Boris Whitney told Young to speak to Peggy Guilford because she had also seen the defendant with a gun. Guilford told Young that the defendant had arrived at her house with a .308 caliber rifle, which was the same type of weapon that had been reported stolen by Stewart.

On August 28, 2003 Young went to the defendant's residence to talk to him again about the theft, but the defendant was not at home. At around noon, Young, who was wearing plain clothes and driving an unmarked car, saw the defendant riding his bicycle near the intersection of Route 1 and Pleasant Street. The defendant rode into the parking lot of Pen Bay Glass when he saw Young, and Young pulled into the parking lot after him. Young got out of his car and told the defendant that they needed to talk more about the gun. Young intended at this time to attempt to obtain a confession from the defendant. The defendant again denied any involvement in the theft. Young then told the defendant what he had learned from the

people he had interviewed and that he knew that the defendant had stolen the gun. He told the defendant that it was important to know where the gun was and that he needed the defendant's help to retrieve it. The defendant then admitted taking the gun, telling Young that he had done so because Stewart threatened him with the gun when the defendant informed Stewart that a female friend of the defendant's to whom Stewart had loaned \$100 had not followed through on her promise to give the defendant the money to repay Stewart.

Young then asked the defendant to come with him to the police department so that he could get a written statement from him. He may have said "You need to come to the station to see if we can get this worked out." Young told the defendant that he did not have to come to the police station if he did not want to. The defendant asked if he was being arrested and Young told him that he was not. While Young intended to seek charges against the defendant, he did not intend to arrest the defendant at this time. Young knew that the defendant would be arrested at some time in the future if the district attorney decided to prosecute him. If the defendant had refused to go to the police station with him, Young would not have arrested him at that time. The defendant asked that he be allowed to return his bicycle to his nearby residence. Young followed the defendant approximately 200 yards to the defendant's residence, where the defendant got into Young's car.

At the police station, no more than 30 minutes after the initial meeting in the parking lot, Young interviewed the defendant after reading him his *Miranda* rights.¹ The defendant said, and confirmed in his testimony at the hearing, that he understood these rights. This interview was videotaped, and a copy of the

¹ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

videotape is Government Exhibit 1. Young told the defendant that the door to his office was closed for privacy and that the defendant was not under arrest and was free to leave at any time.

During the interview, the defendant told Young that he had sold Stewart's gun to David Deabler, whom he told that he had purchased the gun at a yard sale. The defendant told Young that he had provided Deabler with a false bill of sale that the defendant had created. He also told Young that he had been convicted of a felony in Massachusetts and had served a year in jail there. Young told the defendant that he was going to be charged with a crime. The defendant wrote and signed a statement and gave it to Young.

Young then drove the defendant back to his residence and went to interview Deabler where he worked. Not arresting the defendant at the time was a gesture in response to his cooperation. Young then learned from Deabler that the defendant had already called Deabler and told him that the defendant had admitted to Young that the gun was stolen. Young was able to retrieve the gun. Young was annoyed because he believed that the defendant was interfering with his further investigation of the theft of the gun and the possible crime of receiving stolen property, so he went to the defendant's residence and arrested him on a charge of burglary.

The defendant's testimony differed from that of Young in several respects. The defendant testified that after Young pulled into the parking lot on August 28, 2003 the defendant went up to the driver's window of Young's car and spoke to Young, who never got out of the car. He testified that the first thing Young said to him was "I know you did it; you took the gun." When the defendant responded "I don't know what you're talking about," Young said words to the effect of "Don't mess around with me. I know you took it." According to the defendant, Young then told that defendant that he would arrest him if he did not come to the police station with him and that the defendant would go to jail unless he wrote out a statement for Young. The defendant testified that he did not confess to the theft during the conversation in

the parking lot and that he felt that he had to go with Young because he did not want to go to jail. He testified that he “knew,” despite understanding the *Miranda* warning that Young read to him at the police station, that he would have been arrested if he tried to get up and leave Young’s office. He testified that he answered Young’s questions at the police station and wrote out a statement (Defendant’s Exhibit 1) because he did not want to go to jail. Young testified in rebuttal that he would never remain seated in his car while talking to a suspect and did not do so in this case; that he did not use the word “jail” in his conversation with the defendant in the parking lot; and that he did not ask the defendant to come to the police station until after he had confessed to taking the gun.

To the extent that the defendant’s testimony conflicts with that of Young on any material factual issue, I find Young’s testimony to be credible.

II. Discussion

The defendant seeks suppression of his statements made in the parking lot conversation (which he denies making), his statements during the videotaped interview and his written statement. He contends that a *Miranda* warning was required under the circumstances before Young asked him any questions in the parking lot and that his later statements must be suppressed under *Missouri v. Seibert*, 124 S.Ct. 2601 (2004). In *Seibert*, the Supreme Court held that a confession obtained after a *Miranda* warning had been given, but only after the defendant had confessed without benefit of the warning under circumstances where the warning was required, was not admissible against the defendant. 124 S.Ct. at 2606, 2613. In that case, the defendant had already been arrested when she made her initial confession, *id.* at 2606, so there was no question whether she was in custody at the time she was first questioned. In the instant case, if there was no legal requirement that a *Miranda* warning be given before the defendant’s first admission in the parking lot, the *Seibert* argument fails.

Miranda applies only to custodial interrogations. *United States v. Jones*, 187 F.3d 210, 217 (1st Cir. 1999). “The decisive issue in the custody inquiry is ‘whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’” *Id.* at 217-28, quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994).

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.

Id. at 218 (citation and internal punctuation omitted). Here, the defendant was questioned in neutral surroundings, the parking lot; only one officer was present; no physical restraint was placed upon him — if the plaintiff’s version is credited, Young could not have placed any physical restraint on him because he remained seated in his vehicle — the duration of the interrogation was short — according to the plaintiff, there was no interrogation at the parking lot — and the character of the interrogation was not threatening. No *Miranda* warning was required at the parking lot, because the defendant was not in custody at that time.

The defendant also contends that any statements he made in the parking lot were involuntary due to a promise by Young not to prosecute him if he answered the questions, citing *United States v. Rogers*, 906 F.2d 189 (5th Cir. 1990). In that case, officers went to the defendant’s residence, not intending to arrest him, and asked him about the location of guns that had been stolen by another individual. *Id.* at 190. The defendant asked whether he would be charged if he cooperated and the officers told him “no.” *Id.* The defendant retrieved the guns and turned them over to the sheriff’s office, where he signed a *Miranda* waiver and gave a statement that was used to obtain an indictment against him. *Id.* The Fifth Circuit held that the

confession was not voluntary under the circumstances. *Id.* at 191. *Rogers* is readily distinguishable from the instant case because, even by the terms of the defendant's own testimony, Young did not promise that the defendant would not be prosecuted if he admitted taking the gun. According to the defendant, Young said that he would arrest the defendant and that the defendant would go to jail if he did not go to the police station with Young and write out a statement. The defendant was familiar with the criminal justice system. A reasonable person in his position would not have interpreted these statements as a promise that the defendant would not be prosecuted for theft or burglary if he admitted taking the gun. And in any event, I find more credible Young's testimony that he did not ask the defendant to accompany him to the police station until after the defendant had admitted taking the gun and that the conversation about whether the defendant was under arrest or would be arrested did not take place until after the defendant had admitted taking the gun. Accordingly, the admission cannot have been rendered involuntary by Young's statements concerning the possible arrest of the defendant.

Counsel for the defendant also argued at the hearing that the oral and written statements given at the police station were involuntary independent of the *Seibert* analysis because the videotape shows that the defendant was questioning what his rights were even after Young read the *Miranda* warnings, proving that he did not in fact understand the warnings. This argument is undercut by the defendant's testimony that he understood his rights as Young read them to him. He testified that he "knew" that he would nonetheless have been arrested if he tried to leave Young's office because of what Young had said to him in the parking lot. I have determined that Young's version of what was said in the parking lot is more credible. Nothing in those statements was contrary to the content of the *Miranda* warning that was given or would have caused a reasonable person in the defendant's position to conclude that Young was reading the warnings only for show. In addition, none of the defendant's questions during the videotaped interview demonstrate any

misunderstanding of the rights of which he had been informed. After the oral interview was concluded and the defendant began to write his statement, he asked Young for assistance in phrasing his written statement and about whether he should include certain information in that statement. He observed that he would probably need a lawyer, and Young informed him that a court-appointed attorney would probably be available, to which the defendant responded that it would be “better if I hired one.” None of this demonstrates any lack of understanding of his rights on the part of the defendant, nor does it provide any reason to conclude that either his oral or his written statement was involuntary. These are the only questions posed by the defendant during the videotaped interview to which counsel for the defendant drew the court’s attention during the hearing. From all that appears in the videotape, the defendant’s statements were voluntary, knowing and intelligent. *Colorado v. Spring*, 479 U.S. 564, 573-75 (1987).

III. Conclusion

For the foregoing reasons, I recommend that the 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 6th day of August 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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