

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
v.) Crim. No. 01-04-B-S
)
DAVID C. FAULKINGHAM,)
)
 Defendant)

RECOMMENDED DECISION

This matter is before the Court on the defendant’s Motion to Suppress. An evidentiary hearing was held before me on May 11, 2001. I now recommend that the Court adopt the proposed findings of fact and **GRANT-IN-PART** and **DENY-IN-PART** the pending motion.

Proposed Findings of Fact

Shortly before August 1, 2000, Agent Mark Leonard of the Maine Drug Enforcement Agency (“MDEA”) received information from a known confidential informant that David Faulkingham was a drug user/dealer in the Hancock County, Maine area. Agent Leonard was also informed that Faulkingham lived in Tremont, Maine and that he drove a tan Lincoln Town Car. Neither Agent Leonard nor the other agent involved in this case, Robert Hutchings, had heard of or met David Faulkingham prior to receiving this information. Nevertheless, they determined that it would be worthwhile to investigate the situation and on August 1 decided to travel from Bangor to Tremont to see what was what.

Prior to going to the Tremont area, they stopped at the Hancock County Jail in Ellsworth, Maine, and spoke with Deputy Sheriff Stephen MacFarland. The agents were provided with a jail photograph from approximately 1996 that showed Faulkingham’s appearance at that time.

They learned that Faulkingham had lost considerable weight since the date of the photograph. Agent Leonard also did some background investigation and learned that Faulkingham's right to operate a motor vehicle was under suspension. He verified the continuing suspension with the Department of Motor Vehicles while on route to Tremont.

At approximately 3:00 p.m., the agents arrived in the vicinity of the Tremont residence that had been identified to them as Faulkingham's. They drove by the residence and saw a small black vehicle sitting in the driveway with a passenger in it. The driver was not immediately visible nor was the tan Lincoln. The agents drove on and turned around to make another pass by the house. As they did so, they observed two individuals approximately three to four hundred yards from the residence standing in a woods road. The agents parked their vehicle in another woods road closer to the residence where they were able to maintain visual contact with the residence but could not be seen by others. By this time, the Lincoln was in the driveway parked beside the black car.

The black car left the driveway shortly thereafter and the agents followed it for a short way down the road. As the car approached the second woods road where the two individuals had been standing, the black car stopped dead in the middle of the road. The two individuals ran into the road and jumped into the black car. The agents followed the car for a short way and then turned around and returned to their surveillance point. The Lincoln was still in the driveway. At this point in time, Agent Hutchings had a suspicion that illegal drug activity might have just occurred.

At about 3:15 p.m. the Lincoln left the driveway. The agents were able to ascertain that the driver appeared to be a male and that there were two passengers in the vehicle. They could make no further identification at that point. They followed the vehicle for approximately two

miles until it started to travel onto the Flat Iron Road. The Flat Iron Road merges with the route they were traveling on, and as the Lincoln entered the intersection the driver slowed and made a type of u-turn so that his car was now facing back in the direction from which it had just come. As the agents' car was directly behind the Lincoln at that point, the vehicles passed driver's side window to driver's side window at an extremely slow speed. In fact, the defendant's vehicle was not moving. Agent Hutchings immediately recognized that the operator of the vehicle matched the photograph of Faulkingham that the agents had clipped onto their sun visor when they left the Hancock County Jail.

Hutchings immediately pulled his vehicle to the side of the road, jumped from his vehicle, and identified himself verbally and by showing his badge to the operator. Hutchings asked Faulkingham to identify himself and when he confirmed that he was David Faulkingham, Hutchings placed him under arrest for operating after suspension. During the patdown search Hutchings found heroin, hashish, and a syringe on Faulkingham's person. Hutchings placed Faulkingham in handcuffs and put him in the back seat of the agents' car.

In the meantime, Agent Leonard was dealing with the two passengers. He obtained identification from them and checked to see if either was wanted for any law enforcement purposes. Finding no reason to hold either of them, he fairly quickly told them they could leave the area, which they did on foot. Leonard then proceeded to search the motor vehicle as part of this traffic stop but did not find anything of further interest for purposes of this case.

While Leonard was dealing with the passengers and the motor vehicle, Hutchings put the evidence seized from Faulkingham's person into his trunk and then returned to the passenger compartment of the vehicle, ostensibly to "complete some paperwork." Included among that paperwork is a form which is used to advise suspects in custody of their rights under the Miranda

rule. Hutchings understood that he had a suspect in custody that he intended to interrogate, but he never read the Miranda warning.

Once Hutchings took a seat in the vehicle and explained to Faulkingham that he was planning to review some paperwork with him, Faulkingham announced to him that he was a heroin addict and that within the next two hours he was going to go into withdrawal. At that point, however, Faulkingham appeared normal and spoke without difficulty. After learning of Faulkingham's concerns regarding his addiction, the agents informed him that he could either cooperate with them and provide information concerning his supplier or he would be taken to the Hancock County Jail for processing. Faulkingham then informed them that if he were going to cooperate, time was of the essence because one of the fellows who had just departed was a roommate of his supplier. Once the supplier learned that Faulkingham had been apprehended by the police, obtaining evidence against him would become more difficult. Faulkingham suggested to the agents that his supplier was a major drug dealer and that his apartment currently contained a huge quantity of heroin that Faulkingham had seen the previous day. The agents were lead to believe that this operation could be a "huge bust." They maintain that in the excitement of the moment they simply didn't have time to comply with Miranda. Faulkingham asked them what sort of deal they could give him and the agents responded that they could not make any deals or promises, but they confirmed that his cooperation would make it easier for him.

At about this point in time Shannon Faulkingham, the defendant's wife, arrived at the scene in her pick up truck. On her way to the post office she observed her husband's vehicle pulled over to the side of the road. When she learned what was happening she became upset and started to cry, revealing to the agents that she had just gotten her husband through a drug rehabilitation program and that she thought he had overcome the problem. Faulkingham talked

with his wife and asked her to call Kevin Barron, his attorney, and make arrangements for his bail. The agents agreed that Faulkingham asked his wife to call someone and that he was concerned about bail money because they had seized cash from his person. However, they deny that they specifically heard Faulkingham say that he wanted to call his attorney. In fact, they agree that he mentioned to them that he had retained an attorney, but did not express a desire to speak with the attorney. The agents also agree that in spite of this passing reference to a retained attorney, neither agent proceeded to provide the Miranda warning.

After his wife left the area, Faulkingham reiterated his concern that if he were going to cooperate it was imperative that they move quickly, indicating that he should place the call to Mark Power, his supplier, by 3:30 p.m. or it was likely that Power would take steps to destroy or conceal the drugs in his apartment because he would have learned of Faulkingham's arrest. When Faulkingham made this suggestion Hutchings looked at his watch and observed that it was 3:28 p.m. Faulkingham also expressed to the agents his concern about being seen in the intersection by passing motorists and offered that the best place to make the call would be from his own residence due to Power's routine use of caller ID to screen his calls. The agents called their supervisor and obtained permission to proceed with Faulkingham, but they balked at going to his house as contrary to standard police procedures. Therefore Faulkingham suggested a secluded marina as a secondary location. Hutchings drove Faulkingham there in the police vehicle and Leonard followed driving the Lincoln. Faulkingham's handcuffs were removed and he was given access to a telephone.

During this time period the agents opined that Faulkingham was driving the investigation and that they had basically put him in charge. His plan was to convince his supplier, Mark Power, to come over to his residence and perhaps bring the drugs with him. Although

Faulkingham made repeated attempts to call Power from the marina location, he was not able to make contact. Faulkingham insisted that they should return to his residence in order for him to be able to make the call from his own phone. Finally, at about 4:30 p.m., the three men returned to Faulkingham's residence.

Once inside the residence, Faulkingham was able to make two recorded phone calls to Power's apartment. On one occasion he spoke to a roommate named Dave who assured him that the "stuff" was safe. Eventually Faulkingham talked directly to Power and convinced him to come over to the house. When Power came over to the residence at approximately 5:00 p.m. he was confronted by the agents and he too agreed to cooperate, becoming the Government's primary witness in this case against Faulkingham, who Power contends was the actual supplier of the drugs. Once Hutchings and Leonard became involved with Power that evening they had little additional contact with Faulkingham. However, from the scant evidence they did present it is clear that Faulkingham became ill at his residence, apparently spending time in the bathroom vomiting. The supervisor, Arno, arrived at the scene and apparently tended to Faulkingham, eventually taking him to a local hospital for treatment for his withdrawal symptoms. Hutchings and Leonard both acknowledged that they knew that heroin addicts who go into withdrawal can become extremely ill and miserable. They also acknowledge that from the moment they placed Faulkingham in custody they never advised him of his rights and they made clear to him that if he did not cooperate with them he would go immediately to jail where the jail authorities would have to deal with his withdrawal symptoms in accordance with jail policy. The alternative they presented to him was that if he cooperated he would not be arrested that evening. Furthermore, immediately upon his indication that he might cooperate by making phone calls, the agents

removed his handcuffs and allowed him to “call the shots.” Ultimately, they neither arrested Faulkingham nor gave him a summons that night.

Discussion

The defendant raises three separate issues in this motion to suppress. He argues, first, that the stop of his motor vehicle was an unreasonable seizure under the Fourth Amendment; second, that his statements must be suppressed because they were elicited as the result of a custodial interrogation without the Miranda warnings being administered; and third, that all derivative evidence, including physical evidence seized from the Power residence and Mark Power’s testimony, should be suppressed as well. I will discuss each of these issues in turn.

1. The Fourth Amendment

According to Faulkingham, the agents’ initial stop of his motor vehicle was not based upon reasonable suspicion of criminal activity. The United States Supreme Court has held that a police officer may stop an individual reasonably suspected of criminal activity, perform a pat-down frisk for weapons, and question the person briefly. Terry v. Ohio, 392 U.S. 1, 22-24 (1968). I am satisfied that in the present case the agents identified Faulkingham as the operator of the motor vehicle prior to exiting their vehicle and effecting a seizure of the defendant’s person. Once they were able to identify Faulkingham as the operator of the vehicle, they had more than a reasonable suspicion; they had probable cause to believe that criminal activity was occurring. The agents had double checked that very afternoon and learned that Faulkingham did not have a right to operate a motor vehicle in the State of Maine. Pursuant to either 29-A M.R.S.A. § 2412-A or 29-A M.R.S.A. § 1251, operating after suspension or without a motor vehicle license is a misdemeanor offense subject to arrest. Because I am satisfied that the agents properly identified Faulkingham prior to the seizure, the fact that their motivation for being in

the area had to do with potential drug-related conduct is irrelevant. The Supreme Court has said that the actual police motives for a stop are irrelevant as long as the police have either reasonable suspicion or probable cause for a stop. Whren v. United States, 517 U.S. 806, 813 (1996).

Once Faulkingham was lawfully arrested, the agents were authorized to conduct a warrantless search of Faulkingham incident to the arrest, including the passenger compartment of his vehicle. New York v. Belton, 453 U.S. 454, 460 (1981). No Fourth Amendment violation occurred either as a result of the arrest of the defendant or the search of his person or vehicle.

2. Miranda and Unwarned Statements

For purposes of this motion the government concedes that the defendant was not advised of his Miranda warnings at any time following his arrest on August 1, 2000. The government also concedes that the agents' solicitation of cooperation from the defendant and the ensuing conversation was the "functional equivalent" of questioning. Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). That the defendant was in custody pursuant to a valid arrest is axiomatic. The government therefore concedes that under well established precedent none of the defendant's statements made after arrest are admissible in the government's case in chief. Miranda v. Arizona, 384 U.S. 436 (1966); Dickerson v. U.S., 530 U.S. 428 (2000). Accordingly, the motion to suppress those statements must be granted.

3. Miranda and Derivative Evidence

The government's concession regarding the suppression of the defendant's statements does not end the inquiry. As the matter stands, Faulkingham is indicted as one of three co-conspirators. The other defendants, including Mark Power, have become cooperating individuals and have provided evidence that Faulkingham is actually the major supplier. Thus, some of the statements suppressed pursuant to Miranda, although inculpatory at the time they were made, are

actually now somewhat favorable to the defendant and consistent with his position that Power was the major supplier. By the same token, the statements are simply no longer crucial to a successful prosecution of Faulkingham.

The defendant argues, and the government concedes, that there is no independent source for the government's remaining evidence in this case other than the statements made by the defendant. However, the government contends that under established Supreme Court precedent the exclusionary rule does not apply to the "fruits" of a Miranda violation. See Michigan v. Tucker, 417 U.S. 433, 451-52 (1974) (holding that the Miranda exclusionary rule does not apply to the statement of a witness whose identity the defendant revealed in the absence of Miranda warnings). The defendant responds to that assertion with three arguments: (1) that the recent case of Dickerson v. United States has overruled or weakened Tucker so as to make it inapplicable to the "egregious" violation demonstrated by the facts of this case; (2) while conceding at oral argument that no Sixth Amendment right to counsel is at issue in this case, see Texas v. Cobb, 121 S. Ct. 1335, 1343 (2001) (holding that the right to counsel attaches only to formally charged offenses), that pursuant to Edwards v. Arizona, 451 U.S. 477 (1981), he invoked his Fifth Amendment right to counsel by asking his wife to call an attorney and because the police never obtained a waiver of that right, all statements and derivative evidence must be suppressed; and (3) that his statements were not voluntary, but rather were the product of police coercion and heroin withdrawal, and should not be allowed for any purpose, including as the source for the derivative evidence. The government conceded at oral argument that if the statements were not voluntary, the suppression of the derivative evidence would necessarily follow. See Mincey v. Arizona, 437 U.S. 385, 398 (1978).

A. *Miranda, Dickerson, and the Fruit of the Poisonous Tree*

When law enforcement officers fail to provide Miranda warnings to a suspect prior to subjecting him to custodial interrogation, any unwarned statements they obtain are conclusively presumed to be the product of coercion and may not be introduced against the suspect in a subsequent criminal proceeding. Miranda, 384 U.S. at 479 (1966). In Dickerson, the Supreme Court reaffirmed this rule and unequivocally held that pre-interrogation Miranda warnings, or their equivalent, are a constitutional entitlement grounded in the Fifth Amendment and not merely a “prophylactic standard” or rule of procedure as some post-Miranda decisions had intimated. 530 U.S. at 441 (2000). In upholding Miranda, the Dickerson Court rejected the argument, and a federal law to the effect, that a judicial finding that unwarned statements were made voluntarily, based on a totality of the circumstances surrounding the interrogation, could override the Miranda presumption of coercion and permit the unwarned statements to be offered in evidence. Id. at 442-43.

At issue in this case is whether the holding in Dickerson that the Miranda warning is a constitutional requirement and not merely a “prophylactic standard” compromises Supreme Court precedents—particularly Tucker—holding that the Miranda exclusionary rule does not extend to the “fruit of the poisonous tree” or “derivative” evidence, but only to introduction of the unwarned statements themselves. The defendant contends that it does; that because it must now be said that the failure to provide him with Miranda warnings violated his Fifth Amendment rights, his statements cannot be used for any purpose, including to identify and contact independent witnesses against him, as would be the case if the statements were, in fact, coerced, or had been obtained as a result of a Fourth Amendment violation, or had amounted to compelled testimony. See Mincey, 437 U.S. at 398 (“[A]ny criminal trial use against a defendant of his

involuntary statement is a denial of due process of law); Wong Sun v. United States, 371 U.S. 471 (1963) (applying Fourth Amendment “fruit of the poisonous tree” doctrine); Kastigar v. United States, 406 U.S. 441, 460-461 (1972) (concerning testimonial immunity). In response, the government argues that Tucker is still good law and that the Miranda exclusionary rule does not extend to derivative evidence. According to the government, the “fruit of the poisonous tree” doctrine can only be applied if the defendant’s statements were, in fact, involuntary. I conclude that the holding of Dickerson does not compromise the holding of Tucker and that the Miranda exclusionary rule has not, in the wake of Dickerson, sprouted a “fruit of the poisonous tree” scion.

In Miranda v. Arizona, the Supreme Court held that “the prosecution may not use¹ statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” 384 U.S. at 444. In Michigan v. Tucker, the Supreme Court refused to extend the Miranda exclusionary rule to exclude the testimony of a witness whose identity had been obtained as a result of unwarned statements made by the defendant in the course of custodial interrogation. 417 U.S. at 451-52. The Court’s primary rationale was that “the police conduct at issue . . . did not abridge respondent’s constitutional privilege against

¹ The Court has since made clear that the only “use” to which unwarned statements or confessions cannot be put is as evidence in a criminal proceeding. See, e.g., Berkemer v. McCarty, 468 U.S. 420, 429 (1984) (describing central holding of Miranda as requiring only that “if the police take a suspect into custody and then ask him questions without informing him of [his] rights . . . , his responses cannot be introduced in[] evidence to establish his guilt”); Estelle v. Smith, 451 U.S. 454, 464-65 (1981) (reversing imposition of death penalty because physician’s testimony at sentencing hearing concerning his opinion as to the defendant’s likelihood of recidivism related “the substance” of the defendant’s statements to the jury); Harris v. New York, 401 U.S. 222, 224 (1971) (“Some comments in the Miranda opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court’s holding and cannot be regarded as controlling.”). This clarification was necessary due to statements in Miranda such as, “[U]nless and until such warnings . . . are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him,” Miranda, 384 U.S. at 479, as opposed to the Court’s introductory statement, “[W]e deal with the *admissibility of statements* obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself,” *id.* at 439 (emphasis added).

compulsory self-incrimination, but departed only from the prophylactic standards . . . laid down by this Court in Miranda to safeguard that privilege.” Id. at 445-46. The Court also reasoned that Miranda’s purpose of deterring police misconduct would not be served by excluding the testimony of the independent witness and that there was no basis for presuming that the witness’s testimony would be unreliable. Id. at 448-49.

In Oregon v. Elstad, the Supreme Court once again rejected the notion that the Miranda exclusionary rule should incorporate the “fruit of the poisonous tree” doctrine described in Wong Sun, 470 U.S. 298, 305-306 (1985). In Elstad, the Court held that an unwarned confession did not prevent the introduction in evidence of a subsequent, post-Miranda warning confession, rejecting an argument that the latter confession was the “fruit” of the psychological pressure created by the prior, unwarned confession. Id. at 300. The Court concluded that the presumption of coercion applied to the initial, unwarned confession could not be extended to the subsequent confession because the causal connection between the two confessions was “speculative and attenuated at best.” Id. at 313-314. Although the Court in this way denied that the later confession was the “fruit” of the prior confession, the Court also observed that in so far as the Miranda exclusionary rule is keyed to a *presumption* of coercion, rather than a *finding* of coercion in fact, there is no valid reason to extend the presumption beyond the unwarned statements to other reliable evidence. Id. at 306-307 & n.1, 314.²

The Dickerson Court clearly anticipated the argument presented in the instant motion and cautioned courts not to rush to embrace it. “Our decision in [Elstad]—refusing to apply the traditional “fruits” doctrine developed in Fourth Amendment cases—does not prove that Miranda is a nonconstitutional decision, but simply recognizes the fact that unreasonable

² See also id. at 307-308 (“Where an unwarned statement is preserved for use in situations that fall outside the sweep of the Miranda presumption, ‘the primary criterion of admissibility [remains] the ‘old’ due process voluntariness test.’”) (citation omitted).

searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.” Dickerson, 530 U.S. at 441. Granted, this statement does not provide a satisfying explanation for what the difference is, as the Dickerson dissent observes, Id. at 455 (Scalia, J., dissenting), but it makes plain that the defendant’s argument is not only unsupported by precedent, but also contrary to Tucker and Elstad, which the Dickerson majority explicitly, albeit in *dicta*, declined to reconsider. Because Tucker and Elstad remain good law, I recommend that the Court not graft the “fruit of the poisonous tree” onto the Miranda exclusionary rule.

B. Invocation of the Right to Counsel

A secondary argument advanced in favor of suppressing derivative evidence under Fifth Amendment principles relates to the invocation of the right to counsel. In Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), the Supreme Court held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by a mere showing that the accused responded to further police-initiated custodial interrogation even if he has been advised of his rights. The Court observed that an accused having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Faulkingham asserts that his instruction to his wife to call his attorney was an invocation of his right to counsel and the agents were therefore on notice that he should not be subjected to further interrogation. This argument fails in two respects. First, Faulkingham’s ambiguous statements to his wife do not amount to an invocation of his right to counsel. Second, even if Faulkingham’s statement is viewed as an invocation of his right to counsel, there is no case law that I can find that would support Faulkingham’s theory that derivative evidence should be

suppressed. Edwards and its progeny relate to the valid relinquishment of a known right or, put another way, they are cases about the validity of purported waivers of the right to counsel under the Fifth Amendment. In those cases where the government fails to establish a valid waiver after the right to counsel has been invoked, defendant's statements must be suppressed.

In order for the rule of Edwards to apply, the suspect must unambiguously request counsel. Faulkingham did not articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances of Hutchings and Leonard would have understood the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect.³ See Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986) (“[A]s both Miranda and subsequent decisions construing Miranda make clear beyond refute, the interrogation must cease until an attorney is present *only* if the individual states that he wants an attorney”) (citation and internal quotation marks omitted). In the present case, Faulkingham told the agents in conversation that he had a retained attorney. The agents did not hear him instruct his wife to call the attorney. Merely mentioning that he had an attorney was not a clear invocation of his right to have an attorney present in these circumstances.

C. Voluntariness

The remaining question, of course, is whether or not the defendant's statements identifying Mark Power were voluntarily made. If so, then the government may use Mark Power's testimony in criminal proceedings against the defendant. If not, then not.

³ Of course, in this case the agents should not have been questioning Faulkingham in any event because he had not been properly advised of his Miranda rights. However, if he had been so advised, the mere mention of the existence of a retained attorney would not have been an invocation of his right to counsel, although the agents might have had an obligation to inquire further about the issue. In any event, the remedy would have been suppression of the statements made after the right to counsel had been invoked.

The burden is on the government to prove that the defendant's statements were voluntary by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972). The government must show that, based on the totality of the circumstances, the investigating agents neither "broke" nor overbore the defendant's will, Chambers v. Florida, 309 U.S. 227, 240 (1940), and that his statements were "the product of a rational intellect and a free will," Blackburn v. Alabama, 361 U.S. 199, 208 (1960). See also Lynumn v. Illinois, 372 U.S. 528, 534 (1963). As this language suggests, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'." Colorado v. Connelly, 479 U.S. 157, 167 (1986). Coercive police activity may include either the creation of a susceptible psychological state in the person interrogated, Townsend v. Sain, 372 U.S. 293, 307-308 (1963) (concerning alleged administration of "truth serum" to quell heroin addict's withdrawal symptoms), or the exploitation of an existing psychological condition, Blackburn, 361 U.S. at 207-208 ("[A] most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane.")

The First Circuit has noted that because a suspect is in a weakened condition because of his heroin withdrawal symptoms, it does not necessarily follow that his post-arrest statements are involuntary. United States v. Palmer, 203 F.3d 55, 61-62 (1st Cir. 2000) ("In the context of the voluntariness of a confession, a defendant's mental state by itself and apart from its relation to official coercion never disposes of the inquiry into constitutional voluntariness."). In the context of the present case, Faulkingham's heroin addiction may have been a motivating factor in his choice to cooperate with officials, but heroin withdrawal symptoms did not overwhelm him or prevent him from making an independent and rational choice. In fact, at the time the defendant made the incriminating statements, he most certainly was not suffering from heroin withdrawal.

He plainly indicated to the agents that he anticipated that in a couple of hours he would begin to experience those symptoms. He made a conscious choice to cooperate with the agents in the hope that by doing so he would avoid incarceration and receive medical treatment. His decision to cooperate was the rational act of a fully competent individual seeking to maximize his own comfort and minimize his criminal exposure.

The police conduct in this case was certainly not exemplary in that they failed to inform the defendant of his Miranda rights. However, aside from that failing there is no evidence that their behavior was unduly coercive. In fact, they gave Faulkingham a great deal of freedom, not only removing physical restraints such as handcuffs, but also allowing him to dictate the course of events. The agents did not unreasonably exploit the fact of Faulkingham's addiction. It is uncontested that they informed the defendant that they could not make any deals or promises, other than that they would not take him to jail that night. Although they acknowledged that they were aware of unpleasantness associated with heroin withdrawal symptoms, there is no evidence that the agents exploited any weakened mental state experienced by the defendant. While dealing with Hutchings and Leonard, Faulkingham was in full control of his faculties. Based upon the totality of the circumstances, I am satisfied that the statements made by Faulkingham and his decision to cooperate with the authorities were voluntary acts under applicable federal precedent.

Conclusion

Based upon the foregoing, I recommend that the Court adopt the proposed findings of fact and **DENY** the motion as it relates to the stop of the motor vehicle and the search of the defendant's person incident to the arrest. I further recommend that the court **GRANT** the motion as it relates to the statements made by the defendant and that the government be barred from

using those statements as part of its case in chief. I also recommend that the court **DENY** the motion as it relates to derivative evidence whether in the nature of physical evidence or testimonial evidence from Mark Power or any other individual.

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 of 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.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated May 29, 2001

CJACNS

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 01-CR-4-ALL

USA v. FAULKINGHAM, et al

Filed: 01/12/01

Dkt# in other court: None

Case Assigned to: Judge GEORGE Z. SINGAL

DAVID C FAULKINGHAM (1) KEVIN BARRON, ESQ.

defendant [COR LD NTC ret]

14 HIGH STREET

ELLSWORTH, ME 04605

207-667-8700

Pending Counts: Disposition

21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE (Conspiracy to Possess with Intent to Distribute 100 Grams or More of Heroin in violation of 21:841(a)(1), 846 and 18:2) (1s)

21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE
(Possession with Intent to Distribute Heroin and Aiding and Abetting the Commission

of that Crime in violation of 21:841(a)(1) and 18:2)

(2s)

Offense Level (opening): 4

Terminated Counts: Disposition

21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE

(Conspiracy to Possess with Intent to Distribute 100 Grams or More of Heroin in violation of 21:841(a)(1) and 846 and 18:2)

(1)

Offense Level (disposition): 4

Complaints:

NONE

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defendant

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Pending Counts: Disposition

21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE

(Conspiracy to Possess with Intent to Distribute 100 Grams or More of Heroin in violation of 21:841(a)(1), 846 and 18:2)

(1s)

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(2s)

Offense Level (opening): 4