

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 1-55-B-S
)
TRAVIS SMITH,)
)
Defendant)

RECOMMENDED DECISION

Travis L. Smith has filed a motion to suppress statements he made to police interrogators on May 23, 2001, alleging that the statements were obtained in violation of the Miranda rule and were otherwise involuntary. I now recommend that the court adopt my proposed findings of fact and **DENY** the motion to suppress.

Proposed Findings of Fact

Richard Rolfe, a special agent with the Maine Drug Enforcement Agency (“MDEA”), who worked for nine years at the Baileyville police department before assignment to the MDEA, conducted an investigation in May 2001 relating to trafficking in dilaudid, a powerful narcotic. On May 23 the investigation centered on a number of individuals and the surveillance of Dawn Fitch’s residence in Princeton, Maine. Rolfe contacted agent Brent McSweyn of the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) because he believed that Travis Smith would be present at the residence on the date in question and he suspected that Smith would be armed with firearms. Smith’s criminal history made him a prohibited person under federal law, thus engendering ATF’s interest in the case.

After several hours of surveillance, the officers apprehended Fitch, Smith, and a third individual named Francis. A search of the vehicle and Fitch's purse resulted in the seizure of a number of firearms. The officers in attendance interrogated the three individuals. That interrogation took place at Fitch's kitchen table where these individuals were brought one at a time to meet with the officers. They were not taken to a police station because according to Rolfe there were no private interview rooms available at any police station within reasonable proximity to the scene.

Smith was brought into the kitchen from the police cruiser where he had been detained while others were interviewed. The officers present included Rolfe, McSweyn, and two Washington County deputy sheriffs, Frank Gardner and Chris Gardner. Frank Gardner had a tape recorder with him and apparently turned the recorder on to tape the interview. However, for some inexplicable reason, he did not do so until after Rolfe read Miranda to Smith.

The three officers present, Rolfe, McSweyn, and Frank Gardner,¹ all testified that Rolfe read Miranda from a card and that Smith indicated affirmatively that he understood his rights and would waive them. Field notes of each officer prepared during the interview corroborate the testimony. The written field notes were admitted, on re-direct examination, over objection by the defense. The notes were offered pursuant to Federal Rule of Evidence 801(d)(1)(B) as a prior consistent statement by each officer. As I found that the notes, when offered by the United States on re-direct examination, were properly admissible pursuant to that rule, they, by definition, were not excludable as hearsay.

¹ Chris Gardner did not testify at the suppression hearing. According to the testimony he left the room while Rolfe read Miranda. Then he returned. In response to my questions at the beginning of the hearing the Assistant United States Attorney prosecuting the case identified Chris Gardner's voice as one of the individuals on the taped interview. The evidence presented under oath at the hearing was that Chris Gardner left and then came back into the room and took extensive notes.

There was no other evidence presented on the issue of whether or not Miranda was read and, based on the evidence I heard, I must conclude that Smith was read his rights and waived them.

I also find that Smith was not influenced by narcotic substances to such an extent as to render his statements involuntary. I listened to the entire tape and Smith's responses are cogent, his diction is relatively clear, and he does not sound at all as though he is experiencing any distress. My observations of the taped conversation are confirmed by the testimony of all three officers. None of them observed any signs of narcotic withdrawal while speaking with Smith. During the conversation Smith does not refer to any narcotic withdrawal difficulties and his only reference to a substance was a request regarding cigarettes. Agent McSweyn not only spoke with Smith during the interview, but also had the opportunity to speak with him a few additional minutes on the front porch of the residence and he observed no signs that Smith was under the influence when he walked out to the porch and stood there speaking with him. I am completely satisfied that narcotic substances did not render Smith's statements involuntary.

Discussion

In order for Smith's statements to the police to be admissible, the United States must establish by a preponderance of the evidence that Smith "voluntarily, knowingly and intelligently" waived his right to remain silent and to speak with counsel. Lego v. Twomey, 404 U.S. 477, 484-86 (1972) (establishing preponderance standard); Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."). The voluntariness of a waiver depends on the totality of the circumstances. Arizona v.

Fulminante, 499 U.S. 279, 286 (1991). The United States must demonstrate that Smith's will was not overborne and that his decision to speak was freely and voluntarily made. Bryant v. Vose, 785 F.2d 364, 367-68 (1st Cir. 1986). Relevant considerations include "both the characteristics of the accused and the details of the interrogation." Schneekloth v. Bustamonte, 412 U.S. 218, 226 (1973) (discussing voluntariness standard in the context of a consent to search).

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 if 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, the only evidence presented was that Smith was a long-term abuser of narcotics. There was no evidence of withdrawal symptoms or any other physiological process during the May 23, 2001, interview. Additionally, aside from Miranda concerns, there is no allegation of any coercive police conduct in this case. Smith’s statements were voluntary and his waiver, assuming compliance with Miranda, was made knowingly, intelligently, and voluntarily.

Smith’s counsel makes the allegation that the Government did not prove by a preponderance of the evidence that the officers read Miranda, but there is no testimonial evidence to support the assertion. The only evidence is the tape itself and the obvious failure to record Miranda. However, even if the officers had not each produced a “prior consistent statement” in the form of his field notes, they all three testified under oath that Rolfe read Miranda from a card and Smith affirmatively waived his rights. In the face of the overwhelming weight of evidence presented at the hearing, I find as a fact that Miranda was read to Smith.

I note that there is no legal requirement that Miranda warnings be taped. Moore v. Ballone, 488 F.Supp. 798, 804 (E.D. Va. 1980). However, as the Moore court noted, “the Supreme Court in Miranda placed the burden of proving compliance with its procedural safeguards on the prosecution because only the state has available to it ‘corroborated evidence of warnings given during incommunicado interrogation.’” 488 F.Supp. at 804 (quoting Miranda, 384 U.S. at 475). **“In anticipation of the burden prosecutors bear with regard to a defendant's inculpatory statements, police generally record the reading of the Miranda warnings along with any confession**

that may follow, or secure a signed statement from a defendant that he has been advised of his rights. Although the absence of such a recording or writing is not fatal to the prosecution's case, it does make the burden of proving compliance with Miranda heavier.” Id. (emphasis added). Most commonly there is some logical reason provided as to why the warnings were not taped, such as lack of equipment or logistical problems. Obviously no such excuse is offered in this case because the tape recorder was there and working, just not turned on for the initial portion of the interview. Fortunately for the Government, United States v. Smith is distinguishable from Moore because in this case there are two additional officers that corroborate the testimony of the interrogator. However, the officers’ failure to comply with police procedures that have been recognized and honored for over twenty years is nevertheless disturbing.²

Conclusion

Based upon the foregoing I recommend that the court adopt my proposed findings of fact and **DENY** the motion to suppress.

² Unfortunately, MDEA agents have developed a pattern of failing to provide this court with any reasonable justification for their egregious failure to comply with elementary police procedures. I consider this case to be the third in a trilogy, beginning with United States v. Sargent, 2001 WL 501030 (D. Me. 2001), modified by 150 F.Supp.2d 157, where the officers were “too rushed” to include the necessary paragraph in a state court warrant that would have obtained judicial authorization for a “no-knock” execution of a search warrant. Sargent was followed by United States v. Faulkingham, 2001 WL 58667 (D. Me. 2001), aff’d with modification, 156 F.Supp.2d 60, where MDEA agents “forgot” to administer Miranda because they were too caught up in the excitement of the ongoing investigation. Now I am told that the officer did not bother to tape the Miranda warning because if Smith had invoked his rights that would have been the end of the conversation, so why take the trouble to tape that portion of the interview.

I recognize that the facts of the other two cases were not part of the evidentiary presentation during this motion, and my recommended decision is based only upon the evidence I heard brought forth at this hearing. I am simply expressing the concern I have voiced on the record at the conclusion of all three of these unrelated suppression hearings. I fear repeated warnings have fallen on deaf ears.

U. S. Attorneys:

DANIEL J. PERRY, ESQ.

[COR LD NTC]

U.S. ATTORNEY'S OFFICE, P.O. BOX 2460

BANGOR, ME 04402-2460

945-0344