

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :           CRIMINAL ACTION  
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  :  
WAYNE WHITTAKER                            :           NO. 01-107

MEMORANDUM

Dalzell, J.

June 5, 2001

Defendant Wayne Whittaker seeks to suppress statements he allegedly made in an interview with two FBI agents on the morning of May 10, 2000 at the FBI's Philadelphia office. In particular, Whittaker moves to suppress statements he allegedly made to the agents that day regarding two telephone conversations said to be with an individual purportedly involving "giving up" Whittaker's 1998 Jeep Cherokee as part of an insurance fraud scheme in violation of 18 U.S.C. § 1341.

It is undisputed that Whittaker was not in custody at any time during the interview, and no charges were pending against him at the time of the meeting, and thus the exclusive focus of our inquiry on his motion goes to the voluntariness of the alleged statements.<sup>1</sup> At the May 24, 2001 evidentiary hearing, we heard the testimony of all three participants in the interview, i.e., Whittaker and FBI Special Agents Jennifer Usleber and James McIntosh, and where there was conflict in the

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<sup>1</sup>As Whittaker was indisputably not in custody, Miranda warnings were not constitutionally mandated, e.g., Oregon v. Elstad, 470 U.S. 298, 304-05, 105 S.Ct. 1285, 1290-91 (1985). As no charges had been filed against Whittaker at the time of the interview, his right to counsel under the Sixth Amendment had not attached, Texas v. Cobb, 121 S.Ct. 1335, 1340 (2001).

three accounts we credit Whittaker's testimony as to what occurred.

By way of background, Whittaker is now forty-three years old, is a high school graduate, and currently is a department manager of a branch of Bed, Bath & Beyond<sup>2</sup>. Whittaker had no prior contact of any kind with the criminal justice system and was in that respect a complete naïf at the time of the interview.

After speaking on the telephone with Special Agent Usleber (who had left her card at Whittaker's brother's house), Whittaker arranged to visit the FBI's office on the 8th floor of 600 Arch Street in Philadelphia on May 10, 2000. Whittaker on May 10 left the home of Rose Quinn, a friend, in Swedesboro, New Jersey, where he was then living, in the expectation that he was going to talk to the FBI in his capacity as a victim of the theft of his 1998 Jeep Cherokee in June of 1999. Since Whittaker regarded himself as a victim, he declined the suggestion of Ms. Quinn and her brother, William, who both mentioned to him that he might contact a lawyer before talking to the FBI or take counsel with him to the meeting. N.T. 145. Thus, Whittaker was unaccompanied when he went into the FBI's reception area on May 10, 2000.

Shortly after his arrival at 600 Arch Street, Special Agent Usleber escorted him to a small interview room, about ten

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<sup>2</sup>Whittaker had, for about three years before the May 10, 2000 interview, owned a food sales business.

feet square, where he was seated with his back to the single door, which was closed and the shade of whose window was pulled down. When he went into the interview room, Whittaker also met Special Agent McIntosh, a thirty-year veteran of the FBI who stands six feet seven inches tall and at the time weighed 240 pounds.<sup>3</sup> Special Agent Usleber conducted the interview, and did most of the talking on the FBI's behalf, although from time to time Special Agent McIntosh offered some words.

After about fifteen minutes, during which everyone agrees that the agents were "polite" and "courteous", Special Agent Usleber for the first time said to Whittaker that, "You are part of the investigation", whereupon Whittaker (understandably) became nervous and said, "Do you feel that I need to get an attorney?". N.T. 149. Special Agent Usleber answered that she could not advise him about that subject, "But if you don't cooperate, worse things could happen to you". She then mentioned the possibility of five years' incarceration.

Again, Whittaker said, "Do you think I need an attorney?", to which Usleber reiterated that she could not advise him about that subject but "worse things could happen", N.T. 151, at which point Whittaker became very upset because he was afraid he was going to be arrested. Although Whittaker admitted that he knew he could leave the conference room at any time, he credibly testified he was "scared after her comment of saying 'worse

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<sup>3</sup>Special Agent McIntosh is now slightly heavier.

things could happen to you'" and felt he would be disadvantaged if he tried to leave. Whittaker by this point did not want to talk with the agents without seeing a lawyer first, but nevertheless did not leave the room and continued the interview.

Although Special Agent Usleber two days later transcribed the notes she had taken during the interview, Whittaker never saw either version (Exs. D-3 and D-4) until after he was indicted. Indeed, the less sanitized handwritten version only came to light at the hearing, the Government having failed to disclose its existence to Whittaker's counsel until after the hearing commenced on May 24. The interview lasted about forty-five minutes, and Whittaker admitted that he never asked to end the interview, even though he reported that, "My stomach [was] bother[ing] me", N.T. 172-73, and he wanted to talk with a lawyer.

Although on the foregoing facts this presents a close case, Whittaker's statements on May 10, 2000 were voluntary under well-established Supreme Court jurisprudence collected in Oregon v. Elstad, supra and described in Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973). Looking, as we must, at "the totality of all the surrounding circumstances", Bustamonte, id.,<sup>4</sup> we note that:

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<sup>4</sup>In Bustamonte, the Supreme Court identified a number of characteristics for a court to consider in evoking this "totality", including the youth of the accused, the accused's lack of education, the accused's low intelligence, the failure to advise the accused of his Constitutional rights, the repeated and  
(continued...)

- Whittaker was a middle-aged man and a high school graduate, with significant business experience at the time of the interview;
- Close friends of his had advised him that he should first consult with counsel before seeing the FBI, but he elected not to do so;
- The questioning, though conducted in close quarters and in the presence of an intimidating figure in the person of Special Agent McIntosh, was not prolonged, having lasted less than an hour;
- No weapons were visible on either agent, who were, for the most part, "polite" and "courteous" to Whittaker;
- Whittaker knew that he was free to leave the interrogation room at any time.

Given these realities, and notwithstanding Whittaker's naiveté when it comes to the criminal justice system as well as the presence of the looming figure of Special Agent McIntosh, we cannot say that the statements made on May 10, 2000 were involuntary and thus they barely pass due process muster. It is,

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<sup>4</sup>(...continued)

prolonged nature of the questioning, and the use of physical punishment. Bustamonte, 412 U.S. at 226, 93 S.Ct. at 2047. Other pertinent factors include the length and location of the interrogation, the defendant's physical condition, and the defendant's mental health, United States v. Swint, 15 F.3d 286, 289 (3d Cir. 1994)(quoting Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745, 1754 (1993)).

to be sure, true that what happened here was not as purely voluntary as it would be, say, for a citizen who, sitting on a bench in Rittenhouse Square one day, suffers a pang of conscience and walks down to 600 Arch Street to make a clean breast of things to the FBI. But this difference is without legal consequence. As Judge Becker observed for our Court of Appeals in Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986):

Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all. . . . Thus, it can almost always be said that the interrogation caused the confession.

Moreover, it is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. . . . For example, the interrogator may play on the suspect's sympathies or explain that honesty might be the best policy for a criminal who hopes for leniency from the state. . . . These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.

Id. at 604-05 (citations omitted).

Whittaker balanced those "competing considerations" and continued to speak with the two FBI agents. Thus, the Government has carried its burden of showing Whittaker's voluntariness. We shall therefore deny the motion to suppress.

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ORDER

AND NOW, this 5th day of June, 2001, upon consideration of defendant's motion to suppress his statement (docket no. 17), and the Government's response thereto, and after an evidentiary hearing on May 24, 2001, and the receipt of further memoranda from the parties, it is hereby ORDERED that the motion is DENIED.

BY THE COURT:

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Stewart Dalzell, J.