

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

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|---------------------------------|---|------------------------|
| UNITED STATES OF AMERICA | : | CRIMINAL ACTION |
| | : | |
| vs. | : | |
| | : | |
| ANDRE HENRY | : | NO. 06-33-01 |
| | : | |

ORDER & MEMORANDUM

ORDER

AND NOW, this 2nd day of February, 2007, upon consideration of defendant Andre Henry's *pro se* Motion for the Suppression of Audio Surveillance and Testimony (Document No. 350, filed January 30, 2007), the Government's Response to Defendant Andre Henry's Motion for Suppression of Audio Surveillance and Testimony (Document No. 362, filed January 31, 2007), and defendant Andre Henry's *pro se* Supplemental Memorandum of Law for Motion to Dismiss Audio Surveillance (Document No. ____, filed February ____, 2007), **IT IS ORDERED** that defendant Andre Henry's *pro se* Motion for the Suppression of Audio Surveillance and Testimony is **DENIED**.

MEMORANDUM

I. INTRODUCTION

Defendant, Andre Henry, is charged in a 28-count Superseding Indictment in connection with eight robberies of fast food restaurants, the purchase and possession of firearms and assault weapons, possession of body armor, two armed bank robberies, a conspiracy to commit a third armed bank robbery, a car jacking that involved shots fired at a police officer, and solicitation to commit murder of a federal grand jury witness. Currently before the Court is defendant Andre Henry's *pro se* Motion for the Suppression of Audio Surveillance and Testimony. Liberally

construing defendant's *pro se* motion, defendant argues: (1) that defendant's conversations with the government's cooperating witness are protected by the attorney-client privilege; (2) that defendant had a Sixth Amendment right to counsel during his taped conversations with the government's cooperating witness; and (3) that defendant's Fifth Amendment rights were violated because Miranda warnings were not read to him prior to his taped conversations with the government's cooperating witness. For the reasons that follow, the Court concludes: (1) that the attorney-client privilege does not apply to defendant's conversations with the government's cooperating witness; (2) that the Sixth Amendment right to counsel had not yet attached at the time of defendant's taped conversations with the government's cooperating witness; and (3) that defendant's Fifth Amendment rights were not violated because it was not necessary for Miranda warnings to be read to defendant prior to his taped conversations with the government's cooperating witness.

II. BACKGROUND

Defendant's motion pertains to taped conversations between defendant and Kreg Williams that occurred on or about April 29, 2004, December 8, 2004, and January 27, 2005, while defendant was incarcerated for multiple parole violations at the State Correctional Institute at Somerset ("SCI Somerset"). (Def. Mot. at 1.) Williams was a fellow inmate at SCI Somerset and an informant in the federal investigation of defendant. (Id. at 1-2.) Defendant argues that he had "hired" Williams "as the defendants [*sic*] counsel seeking assistance about parole violates lodged against the defendant." (Id.) Defendant refers to Williams as a "Jailhouse Lawyer," a "paralegal," and "counsel." Williams is not a licensed attorney, nor is there any evidence that Williams held himself out to be a licensed attorney. (See Jan. 29, 2007 Hearing Transcript at

34.) On January 24, 2006, at the conclusion of the federal investigation of defendant, defendant was charged in a 28-count federal indictment.

III. DISCUSSION

A. Attorney-Client Privilege

Defendant argues that his taped conversations with Williams are protected by the attorney-client privilege because defendant “hired” Williams as a “jailhouse lawyer.”

The attorney-client privilege does not extend to communications between a defendant and a “jailhouse lawyer” who is not in fact a licensed attorney. The court in Moorhead v. Lane, 125 F.R.D. 680, 686 -687 (C.D.Ill. 1989) explicitly rejected the argument “that the attorney/client privilege should be extended to communications made to a ‘jailhouse attorney.’” As the Moorehead court explained, “a professional relationship must exist as a prerequisite to an assertion of the privilege.” Id. (citing Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 319 (7th Cir.1963), cert. denied 375 U.S. 929 (1963)); see also Velasquez v. Borg, 1994 WL 327328, *1 (9th Cir. June 8, 1994) (“Because [petitioner] does not contend that he thought [the “jailhouse lawyer”] was authorized to practice law, he has not proven a violation of the attorney-client privilege”); McCoy v. Southwest Airlines Co., Inc., 211 F.R.D. 381, *387 (C.D. Cal. 2002) (noting that communications with “jailhouse lawyers” are not privileged.)

In this case, Williams is not a licensed attorney, nor is there any evidence that Williams held himself out to be a licensed attorney. Thus, the Court rejects defendant’s argument for suppression based on attorney-client privilege.

B. Sixth Amendment Right to Counsel

Liberally construing defendant’s *pro se* motion, defendant argues that he had a Sixth

Amendment right to counsel during his taped conversations with Williams. In advancing this argument, defendant points out that some of the actions underlying his parole violations, for which counsel had been appointed, were the same as those underlying his federal indictment. (See Def. Mot. at 5.) Defendant's argument is rejected.

“[T]he Sixth Amendment right to counsel is not triggered until some action is taken constituting the initiation of criminal proceedings against the defendant.” United States v. Ammar, 714 F.2d 238, 260 (3d Cir. 1983). “[I]t is clear from the Supreme Court's statements that the Sixth Amendment right to counsel, as enunciated in Massiah and Henry, does not extend to the pre-indictment period..” Id. at 261 (referring to Massiah v. United States, 377 U.S. 201, 206 (1964) and United States v. Henry, 447 U.S. 264, 273 (1980)).

The taped conversations at issue in defendant's motions all took place prior to defendant's January 24, 2006 federal indictment while defendant was incarcerated for state parole violations. Even though defendant faced charges in state court, because defendant had yet to be charged in a federal indictment, defendant's right to counsel had not yet attached with respect to the federal charges. Thus, the Court rejects defendant's argument for suppression based on the Sixth Amendment right to counsel.

C. Fifth Amendment Right to Counsel

Liberal construing defendant's *pro se* motion, defendant argues that his Fifth Amendment rights were violated because Miranda warnings were not read to him prior to his taped conversations with the government's cooperating witness.

“[T]he Fifth Amendment privilege against self-incrimination prohibits admitting

statements given by a suspect during ‘custodial interrogation’ without a prior warning.” Illinois v. Perkins, 496 U.S. 292 (1990) (citing Miranda v. Arizona, 384 U.S. 436 (1966)). In Perkins, however, the Supreme Court held that an undercover law enforcement officer posing as fellow inmate is not required to give Miranda warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response. Id. at 295-296.

In this case, a fellow inmate who was a cooperating witness had conversations with defendant that elicited incriminating responses. As in Perkins, the cooperating witness was not required to give Miranda warning to defendant before engaging in these conversations. Thus, the Court rejects defendant’s argument that his Fifth Amendment rights were violated because Miranda warnings were not read to him.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the taped conversations at issue in defendant’s suppression motion do not violate the attorney client privilege, the Sixth Amendment right to counsel, or the Fifth Amendment right to counsel. Thus, defendant’s motion to suppress these statements is denied.

BY THE COURT:

/s/ JAN E. DUBOIS, J.

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