

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
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HOWARD GUNTER : NO. 12-394-4

MEMORANDUM

Bartle, J.

March 15, 2013

Before the court is the motion of defendant Howard Gunter for suppression of evidence obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). The issue presented is whether Gunter was in custody or otherwise deprived of his freedom of action in any significant way at the time he made a series of admissions. If so, the statements must be suppressed since it is conceded that no Miranda warnings were given. Gunter also contends that his statements were involuntary and must be suppressed pursuant to the Due Process Clause of the Fifth Amendment.

The government has indicted this defendant as well as three additional defendants, Jay Stout, Joel Stout, and Flying Tigers, Inc. ("FTI"), on multiple charges of conspiracy to defraud the United States, fraud involving aircraft parts, mail fraud, wire fraud, and destruction, alteration, or falsification of records in a federal investigation, pursuant to 18 U.S.C. §§ 38(a)(1), 371, 1341, 1343, and 1519. FTI was in the business of providing aircraft maintenance and repair services and annual

inspections of aircraft for its customers. Jay Stout was the president of FTI while his son, Joel Stout as well as Howard Gunter, were aircraft mechanics and inspectors employed by FTI.

The court held an evidentiary hearing on the motion to suppress and makes the following findings. In or about October 2007 the Department of Transportation ("DOT") initiated an investigation of FTI and its airplane inspection practices. In November 2009, prior to any indictment, Agents Robert Brautigam and Brian Gallagher of the Office of the Inspector General of the DOT visited Gunter's home to arrange an interview with him regarding his employment at FTI. Since Gunter was not present when the agents arrived at his home, they left their business card with Gunter's wife and asked that Gunter call them. Within a few days Gunter contacted Agent Brautigam by phone. Agent Brautigam told Gunter that he needed to speak with him about FTI and inspections that Gunter performed on its behalf. Agent Brautigam suggested several places where they could meet, including Gunter's home and the Federal Aviation Administration field office in New Cumberland, Pennsylvania, where Gunter had previously worked. New Cumberland is approximately a forty-five minute drive from New Bloomfield, where Gunter lives. Gunter told Agent Brautigam that he preferred to meet at the FAA office. Agent Brautigam asked Gunter to bring with him to the meeting any records he had of annual inspections he had performed for FTI.

On November 25, 2009, Gunter met Agents Brautigam and Gallagher at the FAA office in New Cumberland. Gunter drove

himself to the meeting. Prior to the formal interview, Gunter saw and spoke to some of his former colleagues and briefly sat with the agents in the office of Jim Pool, another former colleague. The agents then showed Gunter into a conference room where they proceeded with the interview. The agents did not read Gunter his rights pursuant to Miranda. The interview began at about 9:30 or 10:00 a.m. and took between two and two and a half hours. One bathroom break occurred.

The agents told Gunter at the outset that they wanted to talk about FTI. Gunter gave the agents the two airplane inspection records he brought with him, and the agents made copies of them. Agent Brautigam asked Gunter to look at the records and answer questions about his activities at FTI. After hearing from Gunter, the agents confronted him with inconsistencies in the documents and several times accused him of lying.

After approximately two hours of interrogating Gunter, the agents gave him a target letter signed by an Assistant United States Attorney in this District and dated November 19, 2009. It informed Gunter that he was the subject of a grand jury investigation and should engage a lawyer or contact the Federal Defenders Association to obtain free representation. After the agents gave Gunter the target letter, they informed him that he was not under arrest, was free to go, and should consult an attorney. Gunter, however, said he wanted to keep talking to the agents and tell the truth. The interview continued for

approximately another thirty minutes. Ultimately Gunter left the FAA office by himself. He was not arrested at that time. Indeed, Gunter was not arrested until after the indictment was issued in the summer of 2012.

In his motion to suppress, Gunter argues that the admission of his statements against him at trial would violate his rights under Miranda, 384 U.S. 436, and the Due Process Clause of the Fifth Amendment. As noted above, Gunter contends that he was the subject of a custodial interrogation without having his Miranda rights read to him.

Miranda, 384 U.S. 436, provides that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effectual to secure the privilege against self-incrimination. Id. at 444. The procedural safeguard required by Miranda consists of advising a suspect of the following: the suspect has the right to remain silent; anything the suspect does say can and will be used against him or her; the suspect has the right to have an attorney present before and during the questioning; and the suspect has the right, if he or she cannot afford the services of an attorney, to have one appointed, at public expense and without cost to the suspect, to represent him or her before and during the questioning. Id.

The Court defines custodial interrogation as "questioning initiated by law enforcement officers after a person

has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. To determine whether a defendant was in custody, a court assesses the circumstances from the perspective of a reasonable person in the defendant's position. Berkemer v. McCarty, 468 U.S. 420, 422 (1984). "For a person to be in custody when he has not been arrested, something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." United States v. Willaman, 437 F.3d 354, 359 (3d Cir. 2006).

Factors we may consider in determining whether a defendant was in custody for purposes of Miranda include "(1) whether the officers told the suspect he was under arrest or free to leave; (2) the location or physical surroundings of the interrogation; (3) the length of the interrogation; (4) whether the officers used coercive tactics such as hostile tones of voice, the display of weapons, or physical restraint of the suspect's movement; and (5) whether the suspect voluntarily submitted to questioning." Id. at 360-61. An agent's suspicions of the defendant's guilt play no role in determining whether the defendant was in custody. Rather, whether the defendant was in custody is a matter for the court to determine after considering the objective circumstances of the interrogation. Stansbury v. California, 511 U.S. 318, 323 (1994).

The prosecution has the burden of proving by a preponderance of the evidence that Gunter was not in custody when he made the admissions at issue here since it has conceded that he was never advised of his Miranda rights. See Lego v. Twomey, 404 U.S. 477, 488 (1972). After reviewing the totality of the circumstances surrounding Gunter's interview with Agents Brautigam and Gallagher, we conclude that the government has met its burden.

Gunter was not in custody or otherwise deprived of his freedom of action in any significant way during the interview by DOT agents Brautigam and Gallagher on November 25, 2009. He voluntarily agreed to meet with the agents. His wife gave him the agents' contact information, and he called them on the phone on his own initiative. Gunter also chose the place of the interview among several options he was given by Agent Brautigam, including his own home. Gunter drove himself to the interview and even brought some inspection records with him. The location of the interview was familiar to Gunter and there were at least several people there with whom he was still acquainted from his days as an FAA employee.

The interview took place in the morning and lasted no more than two and a half hours. The length of the interview here does not weigh in favor of finding that Gunter was in custody. Moreover, at no time did the agents display any weapons. They were dressed in plain clothes. While Agent Brautigam concedes that toward the end of the interview he and Agent Gallagher

confronted Gunter with inconsistencies between his story and the inspection records, there is no evidence that the tone of the interview was hostile or threatening at any point. The agents told Gunter they did not believe his account and eventually provided him with a target letter from the Department of Justice.¹ While the agents' subjective belief regarding Gunter's truthfulness or guilt may bear on the tone of the interview, it is in and of itself irrelevant to determining whether he was in custody. See Stansbury, 511 U.S. at 323.

There is likewise no evidence that Gunter's freedom of movement was ever restrained in any way. Indeed, Gunter left the interview unescorted in his own vehicle. Upon giving Gunter the target letter, the agents informed him that he was free to go, that he was not under arrest, and that he could seek the counsel of an attorney. There is simply nothing in the record that demonstrates a reasonable person in Gunter's position would not have taken the agents at their word.

We next turn to Gunter's argument that his confession was coerced and thus involuntary. A defendant in a criminal case is deprived of due process rights under the Fifth Amendment "if his conviction is founded, in whole or in part, upon an

1. Gunter additionally argues that a factor weighing in favor of finding that he was in custody is that the agents disregarded Department of Justice policy when they failed initially to provide Gunter with a copy of the letter. While we make no judgment as to whether the agents violated department policy, it has no bearing on whether Gunter was in custody at the time of the interview.

involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." Lego, 404 U.S. at 483.

A confession is involuntary if it is obtained through either psychological or physical coercion. Rogers v. Richmond, 365 U.S. 534, 540 (1961). When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Id. at 489. To determine whether a statement is voluntary, the court must consider "the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." Lam v. Kelchner, 304 F.3d 256, 264 (3d Cir. 2002). "The question in each case is whether the defendant's will was overborne when he confessed." Miller v. Fenton, 796 F.2d 598, 604 (3d Cir. 1986). Certain "psychological tactics in eliciting a statement from a suspect" are generally allowed. For example, the interrogator may ... explain that honesty might be the best policy for a criminal who hopes for leniency from the state." Id. at 605.

We find that Gunter's statements to the agents were not involuntary and, therefore, that their admission at trial would not violate his due process rights. There is certainly no evidence of physical coercion by the agents against Gunter. Nor was Gunter deprived of food, water, sleep, or bathroom breaks.

The interview was held in the morning, and length of the interview was not so prolonged as to constitute physical coercion, nor is there any evidence that Gunter asked for a break and was not granted one. There is nothing in the record that demonstrates Gunter's age and medical condition caused him to make involuntary statements or that the agents were overbearing while interviewing him.

The motion of defendant Howard Gunter to suppress his statements made during the November 25, 2009 interview with DOT agents Brautigam and Gallagher will be denied.

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ORDER

AND NOW, this 15th day of March, 2013, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant Howard Gunter to suppress statements (Doc. #74) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
J.