

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

United States of America : CRIMINAL ACTION
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Pedro Falu : NO. 98-401

M E M O R A N D U M

Padova, J.

December __, 1998

On September 3, 1998, Defendant Pedro Falu pled not guilty to the one-count Indictment for violation of 18 U.S.C. § 922(g)(1), felon in possession of a firearm. Before the Court is Defendant's Motion to Suppress Statements. Based on the evidence presented at the suppression hearing held on December 8, 1998 and for the reasons set forth below, the Court will grant Defendant's Motion and will suppress all statements made by the Defendant to Drug Enforcement Authority ("DEA") Special Agent Carl Giardinelli and DEA Special Agent Michael Laravia.

I. FACTS

On December 8, 1998, an evidentiary hearing was held on Defendant's Motion to Suppress Statements. At that hearing, DEA Special Agents Giardinelli and Laravia, as well as the Defendant, testified. In addition, the Court received into evidence the following exhibits: Laravia's Report of Investigation, titled

"Conversation with Pedro Falu on 7-21-98" (DEA Form 6); Giardinelli's Report of Investigation, titled "Interview of Pedro Falu and Maria Rivas-Perez on July 21, 1998" (DEA Form 6); a blank DEA Form 13, "Statement of Rights and Waiver"; Excerpts from the DEA manual; Giardinelli's rough notes from his July 21, 1998 interview of the Defendant. The following rendition of the facts is based on this evidence.

On July 21, 1998 at approximately 1:23 a.m. a search warrant was executed at 3901 Roosevelt Boulevard, Apartment 5-B, Philadelphia, PA. During the execution of that warrant, \$223,000 in U.S. currency and two semi-automatic weapons were seized. Defendant Falu was arrested at the scene. He was in the apartment with his girlfriend, Maria Rivas-Perez. At the time of the execution of the search warrant, Falu and his girlfriend were in the living room about to have sex, and Falu was naked.

After the residence had been secured by a SWAT team, Giardinelli entered the apartment. He was assisting with the investigation and in this limited role, was assigned to get personal information from Falu. According to Giardinelli, before he asked Falu any questions, he read Falu his Miranda¹ rights from a card that he keeps in his wallet. He then asked Falu if he understood his rights and Falu answered "yes." He then asked Falu if he was willing to answer some questions, and Falu

¹Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

answered "yes." As part of the questioning, Giardinelli asked Falu to state his address and then asked him to state his parents' address. When Falu gave the same address for both, Giardinelli said to Falu, "You still live with your parents! What do you do for privacy when you're with your girlfriend?" Falu replied, "No man, I stay here and other places."²

According to Falu, Giardinelli never advised him of his rights before questioning him. Because of the number of agents that burst into the apartment with their weapons drawn and Falu's compromising situation involving his girlfriend, Falu was "shook" and "nervous" at the time of his arrest and interview with Giardinelli. He also had smoked "pot" that night.

Giardinelli did not have a DEA 13 form with him and never got Falu to sign a DEA 13 waiver of rights form waiving his right to remain silent or to have counsel present.³ In the notes that Giardinelli made of his interview with Falu, Giardinelli did not indicate that he had advised Falu of his rights and that Falu had waived those rights. Similarly, in the DEA 6 that Giardinelli

²During his direct and cross examination, Giardinelli testified that Falu replied, "No man, I live here and I live there." After repeated questioning and after being shown the DEA 6 that he had written, in which he reported that Falu had replied, "No man, I stay here and other places," Giardinelli changed his testimony to comport with the DEA 6.

³According to Giardinelli, he did not have Falu sign a DEA 13 because he was not interviewing Falu but was just obtaining personal history information from him.

prepared concerning his interview with Falu, Giardinelli did not indicate that he had advised Falu of his rights and that Falu had waived those rights.

The DEA Manual sets forth guidelines for interviewing defendants. Section 6641.31 provides in relevant part as follows:

A. Prior to interviewing the defendant, he must be advised of his constitutional rights as follows (using DEA Form 13a or 13b):

-Before we ask you any questions, you must understand:

-You have the right to remain silent.

-Anything you say can be used against you in court.

-You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during the questioning.

-If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish.

-Do you understand?

-Are you willing to answer some questions?

NOTE: A "Miranda interrogation has been defined as "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the subject." (Rhode Island vs. Innis, 100 S. Ct. 1682 (1980)). Therefore, unless made spontaneously and without solicitation by the agent, any self-incriminating statements made by the defendant without first being advised of these rights will probably be deemed inadmissible.

* * *

D. If the defendant elects to waive his rights, then a full, witnessed interview will be conducted, culminating in a signed statement. . . .

NOTE: Where a defendant is reinterviewed, he should be advised of his rights at the start of each such interview.

(DEA Manual at 331-32.)

Giardinelli acknowledged that at the time he questioned

Falu, he knew that the investigation involved possession charges and that the fact of where Falu lived was critical to the investigation. Giardinelli also acknowledged that a signed statement should be secured when interviewing someone.

According to Special Agent Laravia, at about 10:30 or 11:00 a.m. on July 21, 1998, he processed and fingerprinted Falu. He spent about 20 to 30 minutes with Falu. According to Laravia, as soon as Falu came in the room to be fingerprinted, he came over to Laravia and said "I don't like that guy. He'll get me killed on the streets." Falu was referring to Agent Nitti. Falu also told Laravia that he could get the authorities a lot more money if he was not incarcerated and that the money that had been seized was "chump change." Laravia was under the general impression that Falu wanted to cooperate with the authorities. During his testimony, Falu denied making any comments to Laravia.

Although Laravia was unable to remember other details of his conversation with Falu, he did remember that at some point he changed the topic of conversation by asking Falu if he had considered going for a weapon at the time of his arrest. According to Laravia, Falu responded that he had; Laravia then told Falu that he could have gotten shot, and Falu responded that that was why he did not go for a gun. According to Laravia, he had asked Falu about the weapons because Laravia had remembered a comment made by one of the SWAT team members that, before Falu

was handcuffed, it seemed as though Falu had considered going for one of the handguns found in the apartment. During his testimony, Falu also denied having had a conversation with Laravia about going for a weapon.

Laravia testified that he had been at the scene when Falu had been arrested and the weapons and money had been seized. According to Laravia, when he asked Falu the question about weapons, he was referring to the weapons found at the scene. Laravia also testified that although he knew that Falu's arrest had involved the seizure of weapons, he thought Falu had been arrested on a charge related to the money that had been seized.

Laravia admitted that he never advised Falu of his Miranda rights. He stated that he does not give Miranda warnings if he is just fingerprinting someone. At the time he asked Falu about reaching for a gun, he did not know if Falu had been given his Miranda warnings by any other agent. Although Laravia acknowledged that the DEA Manual contained the directive that a defendant must be given fresh Miranda warnings before a Defendant is re-interviewed, Laravia stated that he did not give Falu such warnings because he did not believe that he was interviewing Falu.

II. LEGAL STANDARD

With respect to Falu's statement to Giardinelli, the

Government concedes that it has the burden of proving by a preponderance of the evidence (1) that Giardinelli gave Miranda warnings to Falu, (2) that Falu waived his right to remain silent and his right to counsel, and (3) that Falu's waiver was made voluntarily, knowingly, and intelligently. Colorado v. Connelly, 479 U.S. 157, 168, 107 S. Ct. 515, 522 (1986); Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 1140-41 (1986); United States v. Dixon, Civ.A.No. 98-28, 1998 WL 408820, at *3 (E.D. Pa. July 16, 1998). To determine whether a waiver was made voluntarily, knowingly, and intelligently, the Court must consider "the totality of the circumstances." United States v. Velasquez, 885 F.2d 1076, 1086 (3d Cir. 1989). The facts of each particular case must be examined, including the background, experience and conduct of the suspect. Id.

With respect to Falu's statement to Laravia, the Court's inquiry must focus initially on the definition of "custodial interrogation." The Supreme Court defined the term as follows:

[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against

coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90 (1980). The Supreme Court has further refined the definition of the "functional equivalent" prong of the Miranda test. "[C]ustodial interrogation for purposes of Miranda includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to have ... the force of a question on the accused, and therefore be reasonably likely to elicit an incriminating response." Pennsylvania v. Muniz, 496 U.S. 582, 601, 110 S. Ct. 2638, 2650 (1990)(citation and quotation omitted).

III. DISCUSSION

A. Falu's Statement to Giardinelli

The Government's case against Falu is based on the theory that Falu constructively possessed the weapons that were seized during the execution of the search warrant at 3901 Roosevelt Boulevard, Apt. 5-B. In support of its case against Falu, the Government seeks to introduce the inculpatory statement made by Falu that he "stayed here [i.e., 3901 Roosevelt Boulevard, Apt. 5-B] and other places." The Government contends that

Giardinelli gave Falu his Miranda warnings and that Falu waived his right to remain silent and to have counsel present during questioning. Falu denies that Giardinelli advised him of his rights and that he waived his rights.

The Court finds that the evidence as to whether Giardinelli gave Falu his Miranda warnings does not tip the scales in favor of the Government, as it must in order for the Government to meet its burden of proof on this issue. In reaching this decision, the Court does not mean to suggest that it disbelieves Giardinelli's testimony. Rather, the Court finds itself in a state of equipoise with respect to weighing the evidence. In this regard, the testimony of Giardinelli and Falu conflicts on the critical issue of whether Giardinelli gave Miranda warnings to Falu. Moreover, there is a complete absence of documentary evidence to corroborate Giardinelli's testimony that he gave Miranda warnings to Falu. The Court finds that it is particularly significant that Giardinelli did not include any reference to Miranda warnings in his notes of his questioning of Falu. Giardinelli is a Special Agent of the DEA and has served as a Special Agent for three years. As such, he is well aware of the importance of Miranda warnings and of the directives contained in the DEA manual to secure a written waiver of rights prior to interviewing a defendant.

Under these circumstances, the Court finds that the

Government has not proved by a preponderance of the evidence that Falu was advised of his rights before Giardinelli questioned him.⁴ Therefore, the Government cannot use at trial the inculpatory statement by Falu to Giardinelli.

B. Falu's Statements to Laravia

The Government advances several arguments in an attempt to defeat the Defendant's Motion to suppress statements by Falu to Laravia. The Court will address each of these arguments in turn.

First, the Government argues that Falu's statements to Laravia were made as part of routine booking procedures and, therefore, Laravia was not required to re-advise Falu of his rights. In this regard, the Supreme Court in Pennsylvania v. Muniz held that "questions regarding [the defendant's] name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation . . . merely because the questions were not intended to elicit information for investigatory purposes." Pennsylvania v. Muniz, 496 U.S. at 601,

⁴In light of the Court's ruling, it is not necessary for the Court to reach the issues of whether Falu waived his rights and whether the waiver was made voluntarily, knowingly, and intelligently. The Court notes, however, that for the same reasons as set forth above, the Government also failed to prove by a preponderance of the evidence that Falu waived his rights. In addition, the record developed at the December 8 hearing is devoid of any evidence that Falu knowingly and intelligently waived his rights. Falu testified that he had been smoking "pot" the night of his arrest. The Government did not elicit testimony as to Falu's capacity to waive his rights.

110 S. Ct. at 2650.

As the Government acknowledges and as the Supreme Court has held, the recognition of a "booking exception" to Miranda does not mean that any question asked during the booking process falls within that exception; without obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions. Id., 496 U.S. at 602 n.14. In other words, "fresh Miranda warnings must be given if an officer seeks to resume interrogation during the booking procedure." (Government's Opp. at 5 n.1.) Here, Laravia admittedly did not give Falu new Miranda warnings.

The question Laravia asked Falu stands in stark contrast to the routine booking questions set forth in Pennsylvania v. Muniz. Laravia's question was not aimed at obtaining information necessary to complete the booking or pretrial process. Instead, Laravia posed a direct question to Falu concerning weapons found at the scene. The booking exception clearly does not apply in this case. The Court rejects the Government's attempt to characterize Laravia's question as "solicitation of pedigree or booking information." (Government's Opp. at 5.)

The Government next argues that Laravia's questioning of Falu does not constitute custodial interrogation, thereby triggering fresh Miranda warnings, because the nature of the

exchange between Falu and Laravia indicates that Falu did not perceive Laravia's questions as ones designed to elicit incriminatory admissions. The Government relies on Innis in arguing that "the spontaneous, conversational tenor of the exchange between Falu and Special Agent Laravia was set by Falu from its beginning, when Falu freely and without solicitation expressed, among other things, his dislike of the other agents to Laravia, stating that he could 'work with' Laravia. Such an exchange, interspersed with questions from Special Agent Laravia, was not interrogation, and Falu's consistent willingness to talk to authorities demonstrates that he did not perceive it as such." (Government's Opp. at 6.)

The problem with this argument is that the Government ignores the fact that Laravia posed a direct question to Falu concerning his charged crime -- that is, whether Falu, a convicted felon, had constructive possession of the weapons found in the apartment. The Government intends to use Falu's response to Laravia's question as an inculpatory statement evidencing Falu's dominion and control over the weapons seized in the apartment. Such direct questioning about Falu's charged crime custodial interrogation and therefore requires Miranda warnings. The Court's finding comports with the Supreme Court's holding in Innis that the Miranda safeguards apply to express questioning, such as Laravia's questioning of Falu. Rhode Island v. Innis,

446 U.S. at 300-301, 100 S. Ct. at 1689-90.

The Government completely sidesteps this issue and instead argues that the relevant inquiry is whether Laravia's question was the functional equivalent of express questioning about Falu's crimes. Even if the Court were to ignore the simple truth that Laravia asked Falu a direct question about his charged crime and to analyze Laravia's interchange with Falu as the "functional equivalent" of express questioning, Falu's statements to Laravia about the weapons must still be suppressed. The Court finds that Laravia employed a practice that he should have known was "reasonably likely to evoke an incriminating response from [Falu]" and thus amounts to interrogation. Id.

Finally, the Government argues that even if it is assumed that Falu invoked his rights and Laravia's questions constituted interrogation, such interrogation was permissible because Falu "evinced a willingness and a desire for a generalized discussion about the investigation." (Government Opp. at 7, quoting United States v. Velasquez, 885 F.2d 1076, 1086 (3d Cir. 1989).) In Velasquez, the United States Court of Appeals for the Third Circuit ("Third Circuit") discussed the two-part test set forth in Oregon v. Bradshaw, 462 U.S. 1039, 1046, 103 S. Ct. 2830 (1983) to determine whether a defendant, who has been given his Miranda warnings and has invoked his rights to remain silent and to have counsel present, may nevertheless be questioned. In

order to use inculpatory statements made by a defendant under these circumstances, the Government must prove by a preponderance of the evidence both that the defendant "initiate[d] himself further communication, exchanges, or conversations with the police" and that subsequent events indicate that the defendant waived his Fifth Amendment rights. Bradshaw, 462 U.S. at 1044, 103 S. Ct. at 2834 (quoting Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885 (1981)). The Government concedes that in this case Laravia never advised Falu of his rights and hence Falu never waived his rights. The Government argues that although the facts of this case differ from the Bradshaw-Velasquez line of cases, these cases are instructive nevertheless because they further refine the contours of custodial interrogation.

The Court finds the Government's argument unpersuasive and the Bradshaw-Velasquez line of cases inapposite. The Government concedes that fresh Miranda warnings were required if Laravia resumed the interrogation of Falu during the booking procedure. Laravia admitted that he did not give Falu his Miranda warnings. Moreover, Laravia asked Falu an express, direct question about Falu's charged crime, thereby resuming the interrogation of Falu. It goes without saying that Falu could not knowingly and intelligently waive rights when he was never advised of his rights. For these reasons, the question of waiver is not

reached.⁵

Under the facts of this case, the Court finds that before questioning Falu about the weapons in the apartment, Laravia was required to give Falu his Miranda warnings. He did not. Therefore, the Government cannot use at trial Falu's inculpatory statements to Laravia.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Defendant's Motion and will suppress Falu's statements to Giardinelli and Laravia.

⁵In addition to finding that the Government's argument is analytically faulty, the Court notes that the facts of Velasquez and Bradshaw differ significantly from the facts present in this case. First, Laravia's question about the weapons was not prompted by anything that Falu had said. Although Laravia testified that Falu had made a comment about another agent and the money that had been seized, Laravia's pointed question about the weapons came completely out of the blue. It was prompted solely by Laravia's memory of a comment made to him at the scene by a member of the SWAT team. Second, Laravia's question was a direct question that went to the heart of the Government's case against Falu for constructive possession of weapons. Third, the Government did not meet its burden of proving by a preponderance of the evidence that Falu initiated a conversation with Laravia. Laravia contends that Falu did so. Falu denied that he said anything to Laravia. There is no contemporaneous documentation to corroborate Laravia's testimony that Falu initiated a conversation with him. As with the Court's finding concerning Giardinelli's testimony, it is not that the Court disbelieves Laravia. Rather, based on the evidence presented at the suppression hearing, the Court finds itself in a state of equipoise. As such, the Court finds that the Government failed to prove by a preponderance of the evidence that Falu initiated a conversation with Laravia that evinced a desire to discuss the investigation.

An appropriate Order follows.

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O R D E R

AND NOW, this 16th day of December, 1998, upon consideration of Defendant's Motion to Suppress Statements (Doc. No. 22), and the Government's Response thereto (Doc. No. 23), and based on the testimony and documentary evidence presented at the evidentiary hearing on December 8, 1998, **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED**. All statements made by the Defendant to DEA Special Agent Carl Giardinelli and to DEA Special Agent Michael Laravia are **SUPPRESSED**.

BY THE COURT:

John R. Padova, J.