



The Government claims that between November 28, 2001 and December 1, 2001 the defendants here, and others who remain unknown, held victim Yi Kai Li, and sought to have his son, Feng Li, pay a ransom for his release. On December 1, 2001, at 3:45 a.m., the FBI arrested the defendants on the boardwalk in Atlantic City.

On April 15, 2002, the Court held a hearing concerning the parties' motions. During that hearing, FBI Agent Kendrew Wong testified that he asked Zheng several questions before Zheng was given her Miranda warnings. Specifically, he asked her name, date of birth, citizenship, whether she knew the other defendants, and when Zheng stated that she lived at the defendants' apartment, Agent Wong asked her how long she lived there. To this last question, Zheng stated that she had lived at the apartment for 3 days. Agent Wong also asked Zheng for "permission" to search the apartment before Zheng was given her Miranda warnings, and Zheng gave permission to search the apartment. Although Zheng speaks a chinese dialect called Foochow, Agent Wong spoke to Zheng in Mandarin chinese because that is the official language of China and he testified that "basically across [China] everyone speak[s] Mandarin."

As mentioned above, three motions are now before the Court. Now, in light of the parties' motions, the responses thereto, the parties' oral arguments concerning those motions,

and the evidence before the Court, the Court turns to a discussion of each motion.

## II. DISCUSSION

### A. DEFENDANT ZHENG'S MOTION TO SUPPRESS

#### 1. **Zheng's responses to FBI questions on the Boardwalk and Zheng's Consent to Search Her Apartment**

Zheng first claims that her responses to FBI questions on the boardwalk should be suppressed because the FBI failed to give her Miranda warnings before questioning her. To this contention, the Government has indicated that it will not seek to introduce Zheng's responses that: 1) she knew the other defendants; and 2) that she resided in the apartment for 3 days.<sup>1</sup>

Zheng further claims that the evidence seized from the apartment should be suppressed because she was not Mirandized before she gave her consent; thus, she contends that the evidence in the apartment is "fruit of the poisonous tree." She also claims that her consent to search the apartment was not otherwise voluntary. However, the Government argues that her consent was voluntary, and the FBI's failure to Mirandize her does not

---

<sup>1</sup>Thus, the Government may only seek to introduce Zheng's statements concerning her name, date of birth, and citizenship. Zheng does not object to the introduction of these statements as they fall within the "routine booking" exception to Miranda as explained in Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990).

invalidate Zheng's consent.<sup>2</sup>

The Government must prove that the search of the apartment was made pursuant to a voluntary consent. United States v. Matlock, 415 U.S. 164, 177 (1974); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). The Supreme Court has instructed that a determination of whether a consent was voluntary must be based on the totality of the circumstances. Schneekloth v. Bustamonte, 412 U.S. 218, 227 (1973). When considering the totality of circumstances, the following factors may be relevant: "the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." United States v. Velasquez, 885 F.2d 1076, 1082 (3d Cir. 1989).

The Third Circuit has held that "the fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before Miranda warnings are issued." United States v. DeSumma, 272 F.3d 176, 178 (3d Cir. 2001); see also United States v. Sangineto-Miranda, 859 F.2d 1501, 1515 (6th Cir. 1988)("where

---

<sup>2</sup>During the April 15, 2002 hearing, Zheng withdrew her Motion to the extent she alleged that her answers to questions after she requested an attorney should be suppressed. Thus, that portion of Zheng's Motion is no longer before the Court.

police simply fail to administer Miranda warnings, the admissibility of nontestimonial physical evidence derived from the uncounseled statements should turn on whether the statements were voluntary within the meaning of the Fifth Amendment"); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1048 (9th Cir. 1990)(finding that "tainted fruits" doctrine does not apply to physical evidence obtained through Miranda violation). Likewise, courts that have considered the issue, commonly find that a consent search is not invalid simply because a suspect is not told her Miranda rights. U.S. v. Rodriguez-Garcia, 983 F.2d 1563, 1567 (10th Cir. 1993); United States v. Moreno, 897 F.2d 26, 33 (2nd Cir. 1990); United States v. Glenna, 878 F.2d 967, 971 (7th Cir. 1989); United States v. Gentry, 839 F.2d 1065, 1069 (5th Cir. 1988); United States v. Ritter, 752 F.2d 435, 438 (9th Cir. 1985). Upon a review of these cases, the Court agrees with them, and as indicated above, the relevant question is whether Zheng's consent was voluntary. Schneckloth, 412 U.S. at 248-49; Ritter, 752 F.2d at 439.

Here, the Court is satisfied that Zheng's consent was voluntary. Before asking for her consent, Agent Wong waited 15-20 minutes after the initial arrest. At that time, the evidence indicates that the scene on the boardwalk was calm, and under control. Additionally, before asking for her consent, Agent Wong removed Zheng's handcuffs. He then asked for "permission" to

search her apartment, and told Zheng that she had a right to refuse permission. Agent Wong testified that he used the word "permission" instead of "consent" because "permission" shows more respect in chinese than "consent", and also has less of a legal attachment to it. Further, the evidence demonstrates that Zheng understood Agent Wong's questions and directions, even though they were in Mandarin and not Foochow, because each time Agent Wong asked Zheng a question, or directed her, Zheng responded appropriately and without assistance. Lastly, Zheng signed a consent form hours after Agent Wong received "permission" to search the apartment, a fact that reaffirms the voluntariness of Zheng's consent. Thus, under these circumstances, the Court finds that Zheng's consent was voluntary and therefore valid.

**B. DEFENDANT ZHENG'S MOTION IN LIMINE TO ADMIT EVIDENCE AND DEFENDANT KONG ZHEN CHEN'S MOTION TO SUPPRESS**

Zheng seeks the admission of a recorded telephone call from defendant Chen to an unknown male where Chen allegedly incriminates himself, and exculpates Zheng. That statement is memorialized in a transcript of the telephone call: ". . . .Whoever had gone with (me)<sup>3</sup> would have been arrested. You know? . . . (UI)<sup>4</sup> once arrested, would be accused of conspiracy, something like that. Actually, this, has nothing to do with

---

<sup>3</sup>Translator's note.

<sup>4</sup>Translator's note meaning inaudible conversation.

[defendant Zheng]. . ."

Zheng argues that the preceding statement is admissible: 1) under Federal Rule of Evidence 804(b)(3) as a statement against interest because the statement is self-incriminating, and corroborating circumstances indicate the statement is trustworthy; or 2) under Federal Rule of Evidence 807, the "catchall" hearsay exception. Chen moves to suppress this same statement in her Motion In Limine. Chen argues that the recording: 1) does not satisfy Federal Rule of Evidence 804(b)(3) as it is not self-incriminating; and 2) is not otherwise admissible under Rule 807 because it is not evidence of a material fact, and is too prejudicial. The Government argues that Chen's statement is inadmissible under Rule 804(b)(3) because: 1) the statement is not necessarily against his interest; and 2) corroborating circumstances do not indicate the statement is trustworthy. The Government also argues the statement is inadmissible under Rule 807 because it is not trustworthy.

Under Federal Rule of Evidence 804(b)(3), the "statement against interest" exception to the hearsay rule, a hearsay statement is admissible if it was:

at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement

unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Accordingly, the first issue the Court must confront is whether Chen's statement sufficiently against his interest so as to be deemed reliable. United States v. Moses, 148 F.3d 277, 280 (3d Cir. 1998). This determination must be made "by viewing [the statement] in context" and "in light of all the surrounding circumstances." Id. (citing Williamson v. United States, 512 U.S. 594, 603-604 (1994)).

When viewed in context, the Court cannot conclude that Chen's statement was against his interest when made. In the quoted language above, Chen does not admit anything, but rather speculates that whoever was with him when he was arrested would also have been arrested. Thus, the Court does not find that the statement is sufficiently self inculpatory to satisfy Rule 804(b)(3).

Likewise, the Court does not find that the statement is admissible under Rule 807. That Rule states in relevant part that:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these

rules and the interests of justice will best be served by admission of the statement into evidence.

Here, the Court does not find that Chen's statement has the requisite "circumstantial guarantees of trustworthiness." First, as the statement was not against Chen's interest, the Court cannot conclude that "a reasonable person in [Chen's] position would not have made the statement unless believing it to be true." Williamson, 512 U.S. 604. Zheng has failed to otherwise persuade the Court that the statement is trustworthy, and the Court finds that, as hearsay, the statement suffers from an inherent lack of trustworthiness. Further, to make the telephone call, Chen used a prison telephone to talk to somebody who may have been involved in the alleged crime, after having been informed that law enforcement officials would monitor his calls. In doing so, he may have been trying to avoid the conspiracy charge<sup>5</sup>, or he simply may have chosen not to offer a true version of the facts.

Finally, the statement says "this has nothing to do with Zheng" and the referent for the word "this" is unclear. While it could indicate the crimes charged in the indictment, it could also indicate, for example, that the debt involved in this case belonged to Chen and not Zheng. Consequently, because the

---

<sup>5</sup>This possibility is bolstered because in the statement at issue, Chen indicates that he is aware that a conspiracy charge is a possibility.

statement does not clearly indicate that Zheng was not involved in the crimes charged in the indictment, the Court cannot conclude that the statement is relevant as evidence of a material fact.

An appropriate Order follows.

---

Clarence C. Newcomer, S.J.