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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
MICHAEL BANKOFF	:	NO. 07-185

MEMORANDUM

Baylson, J. **March 7, 2008**

Defendant Michael Bankoff ("Defendant") allegedly threatened employees of the Social Security Administration ("SSA") and is charged with three counts of threatening a public official in violation of 18 U.S.C. § 115(a)(1)(B). On February 7, 2008, the Court held a hearing on various pretrial motions. Among these, the Court had evidentiary hearings on the government's Motion to Admit Electronic Recordings (Doc. No. 18) and the Defendant's Motion to Suppress Statements (Doc. No. 57).

I. Government's Motion to Admit Electronic Recordings

A. Background

The government seeks to introduce as evidence three recordings of voicemail messages that the Defendant allegedly left for the SSA employees. The government has also indicated that at trial, it intends to move to introduce transcripts of the recordings. The voicemail recordings at isssue do not contain the threats charged in the indictment, but contain messages allegedly left on the victims' answering machines the same day that the Defendant made the charged threats. The government contends that the three voicemails are as follows: 1) a recording of a February 26,

2007 voicemail message that Defendant left for Mr. Dan Sphabmixy, an SSA employee and victim of the threats; 2) a recording of a different February 26, 2007 voicemail message that Defendant left for Mr. Sphabmixy; and 3) a recording of March 9, 2007 voicemail message that Defendant left for Ms. Susan Tonik, another SSA employee and victim of the threats. At the February 7, 2007 hearing on pre-trial motions, the three voicemail messages were all contained on a CD introduced as Government Exhibit 1.

At the hearing, the government called two witnesses in support of its motion to admit the recordings. The first was Ms. Tonik, who testified that she was a Supervisor with the SSA and had received various verbal threats by voice mail messages from the Defendant. Ms. Tonik testified that she had personally met the Defendant and when the recorded voice mail messages were played in open Court, she identified the voice on the messages as belonging to the Defendant.

The government's second witness was Special Agent Jessie Kunkle ("Agent Kunkle"), the case agent on the Defendant's case, who testified that he interviewed Ms. Tonik and made digital recordings from Ms. Tonik's and Mr. Sphabmixy's respective telephones. Agent Kunkle testified to the careful steps that he took to place the recorded voice mail messages of Ms. Tonik and Mr. Sphabmixy onto the CD (Gov't Exh. 1) which the government intends to introduce at trial. However, Agent Kunkle testified that inadvertently the recording of one voice mail message was lost due to a procedure that he had taken.

The government could not call Mr. Sphabmixy as a witness because he was in Florida the day of the hearing. However, the government submitted an affidavit from Mr. Sphabmixy (Doc. No. 61, Exh. 1) in which Mr. Sphabmixy attests that he is familiar with the Defendant's voice

and that the February 26, 2007 voicemail messages left on his machine were from the Defendant. Mr. Sphabmixy also states, in his affidavit, that he knows how to use the voicemail system at his office, saved the messages of February 26, 2007 as he regularly does, and provided the messages to the Federal Protective Service for copying. Furthermore, in the affidavit, Mr. Sphabmixy states that he listened to the recordings which constitute exhibits in this matter and he identified the speaker on the recordings as the Defendant. The Court will consider this affidavit for background purposes only, but not for the truth of the matter asserted, so as to prevent hearsay evidence.

After the hearing, the parties filed supplemental briefs regarding the admissibility of the voicemail recordings. (See Docs. No. 72 and 78.) The Defendant argues that the recordings should not be admitted because they are of poor quality and calls them unintelligible. The Defendant also argues that the government did not meet its burden, under United States v. Starks, 515 F.2d 112 (3d Cir. 1975) or Federal Rule of Evidence 901, to illustrate proper authentication of the recordings.[1]

B. Legal Discussion

Despite strong briefing and detailed cross examination by defense counsel, the Court finds that the government has satisfied its burden under the Third Circuit case law for admission of the electronic recordings.

As noted above, the Defendant asserts that the recordings should not be admitted primarily because the government failed to reliably identify the speaker on the tape and failed to

[1] Defendant also contends that the recordings are not admissible as "intrinsic" evidence and would be unfairly prejudicial. Defendant does not develop this argument and the Court therefore does not address it.

properly authenticate the process used to record the messages. In making these assertions, the Defendant relies on United States v. Starks and Federal Rule of Evidence 901, arguing that the government does not meet its burden pursuant to either standard. In Starks, the Third Circuit held "that the burden is on the government to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings." Starks, 515 F.2d at 121. The Court then listed standards of authentication that a party seeking to introduce sound recordings must meet.[2]

Shortly after the Third Circuit issued the Starks opinion, the Federal Rules of Evidence went into effect. Federal Rule of Evidence 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims," and the government argues that this lesser standard supercedes the standard set forth in Starks. Some District Court opinions have addressed the apparent conflict between Starks and F.R.E. 901(a). See, e.g., United States v. Flood, 2007 WL 1314612 (W.D. Pa., May 4, 2007); United States v. Tubbs, 1990 WL 27365 (E.D. Pa., Mar. 12, 1990).

In the absence of Third Circuit guidance on this apparent conflict, the Court applies the higher Starks standard and finds that the government has met this higher standard with regard to

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[2] Id. ("[B]efore a sound recording is admitted into evidence, a foundation must be established by showing the following facts: (1) That the recording device was capable of taking the conversation now offered in evidence. (2) That the operator of the device was competent to operate the device. (3) That the recording is authentic and correct. (4) That changes, additions or deletions have not been made in the recording. (5) That the recording had been preserved in a manner that is shown to the court. (6) That the speakers are identified. (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.") (Citing United States v. McKeever, 169 F.Supp. 426, 430 (S.D.N.Y. 1958).

the identity of the speaker on the recordings. During the February 7, 2008 hearing, Ms. Tonik testified that she saved the voicemail message left on her machine on March 9, 2007. She testified that she was familiar with the Defendant's voice, due to in-person meetings and prior phone calls, and that it was the Defendant who left the March 9, 2007 voicemail.

Ms. Tonik also testified that she had previously listened to Government Exhibit 1 and that the exhibit contained a recording of the March 9, 2007 voicemail message left on her machine. The government then played the CD (Gov't Exh. 1) at the hearing and, as noted above, Ms. Tonik identified the speaker on the recording as the Defendant.

In addition, Agent Kunkle's testimony addressed the identity of the speaker on Government Exhibit 1. Agent Kunkle stated he was familiar with the Defendant's voice because of prior conversations with the Defendant in person and on the phone. After the government played the recordings (Gov't Exh. 1) in Court, Agent Kunkle identified the speaker on the recordings as the Defendant.

Thus, two witnesses listened to the recordings in court and testified that the voice they heard was the voice of the Defendant. The Court, having heard the recordings and the testimony, and without giving any substantive weight to Mr. Sphabmixy's affidavit, finds that the government has met its burden to produce clear and convincing evidence that the speaker on Government Exhibit 1 can be identified as the Defendant.

The Court further finds that the government has met its burden with regard to authenticating the recordings. At the February 7, 2008 hearing, Ms. Tonik testified that her voicemail system was not complicated, that she never had problems with it, and that she saved the message contained on Government Exhibit 1 pursuant to her usual practice of saving voice

mails. Agent Kunkle then testified in detail as to the process he used to record the voicemail message from Ms. Tonik's and Mr. Sphabmixy's voicemail machines. Agent Kunkle stated that he taped the voicemail messages at issue when Ms. Tonik and Mr. Sphabmixy played them out loud from their respective voicemail systems. According to the testimony, Agent Kunkle and one of his colleagues, Agent Ryan, then transferred the recordings to a computer where they were stored in digital format. Agent Kunkle made CD copies of the digital recording, and Government Exhibit 1 is one of the CD copies. Agent Kunkle also testified that to the best of his knowledge, the recordings played in Court were accurate copies of the voicemail messages that he heard and recorded from Ms. Tonik's and Mr. Sphabmixy's voicemail systems.

Although Agent Kunkle had occasional difficulty describing the process by which he transferred the recordings, specifically the process by which he transferred them to the computer, the Court credits his testimony. Defendants argue that Agent Ryan "took the lead" in transferring the recordings and that the government should have called Agent Ryan to testify. However, although Agent Ryan appears to have participated in one stage of the transfer process, the Court finds that Agent Kunkle was primarily responsible for the recording and transferring of the voicemail recordings and is satisfied with Agent Kunkle's testimony.

"The district court has considerable discretion in determining how to make the ruling on authentication and also in adjudicating the competing concerns and assuring that all the evidence submitted to the jury is authentic." United States v. Whitted, 2006 WL 3327671 (E.D. Pa. Nov. 13, 2006). The court finds that the recordings in Government Exhibit 1 may be introduced in evidence and submitted to the jury and will grant the government's motion to admit the recordings.

II. Defendant's Motion to Suppress Statements

A. Background

The Defendant seeks to suppress statements attributed to him subsequent to his arrest based on violations of Miranda v. Arizona, 384 U.S. 436 (1966). According to the Defendant, agents continued to question him after he had invoked his Miranda rights. The Defendant also argues that when the government obtained his written waiver of Miranda rights, it did not ensure that the waiver was made voluntarily, as it is required to do.

The government objects to the suppression and states that it intends to use two statements attributed to the Defendant for its rebuttal case, if they become relevant through cross-examination or through positions taken and/or evidence introduced by the Defendant. The government contends that the statements are admissible because the Defendant voluntarily made them, without any questions being asked, and consequently there was no interrogation to trigger Miranda. The government argues in the alternative, that even if there had been a Miranda violation (and it does not concede that there was), the statements are admissible if the Defendant opens the door, and that is the only situation in which the government would seek to introduce them.

At the February 7, 2008 hearing, to support the argument as to invalid waiver of Miranda rights, the Defendant relied on the testimony of Dr. John O'Brien, a well known and highly trained psychiatrist. Dr. O'Brien gave his opinion that because of the Defendant's psychiatric make-up, the Defendant was unable to understand and voluntarily waive his Miranda rights, and that the statements which he gave to the agent should not be considered voluntary statements.

The government in turn relied on Agent Kunkle, who testified that after he gave the

Defendant his Miranda warnings, the Defendant declined to make a statement and then without any interrogation by the agent or any other law enforcement officer, volunteered several statements. However, the Defendant contends that on cross examination, the reliability and credibility of Agent Kunkle's testimony was undermined.

B. Legal Discussion

Although the Court finds that Dr. O'Brien is a well recognized expert in psychiatry, the Court cannot accept his conclusions and credits the testimony of Agent Kunkle. The circumstances related by Agent Kunkle show that the Defendant voluntarily made the statements at issue without being interrogated. Alternatively, there is no reason in law, Miranda or otherwise, why the Defendant's statements should be suppressed. Defendant may present to the jury issues relating to voluntariness and other conditions under which he contends the statements were made.

In Miranda v. Arizona, supra, the Supreme Court held that an individual in custody who is subjected to questioning must be warned that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires." Miranda, 384 U.S. at 479. For Miranda to apply, a defendant must be in custody and there must be interrogation. Id. at 439. Importantly, "volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Id. at 478.

The Supreme Court has clarified the meaning of "interrogation" in Miranda. Interrogation refers to "any words or actions on the part of the police (other than those normally

attendant to an arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

In the present case, it is undisputed that the Defendant first invoked his rights pursuant to Miranda and subsequently signed a waiver of those rights. As noted above, the Defendant argues that the waiver was not voluntary and is thus invalid. Dr. O'Brien's testimony was intended to support the claim that the waiver was invalid because the Defendant's mental state renders the Defendant incapable of making a voluntary waiver. According to Defendant, Agent Kunkle should have known that Defendant was incapable of voluntarily waiving his rights and should not have questioned him.

The Court finds that Defendant's invocation of his Miranda rights and subsequent signing of a waiver are of little relevance because the statements at issue did not result from interrogation. At the February 7, 2008 hearing, Agent Kunkle testified that he did not interrogate the Defendant. Agent Kunkle also testified in detail about the evening the Defendant was arrested and how the agents processed the Defendant, including the interaction between the Defendant and the agents. According to Agent Kunkle, the Defendant repeatedly stated that he had been running from the police his entire life. Agent Kunkle testified that the Defendant did not make these statements in response to any questioning.

Agent Kunkle also testified that the Defendant stated he planned to use his mental history as the reason for making the threats. Agent Kunkle affirmed that Defendant did not make this statement in response to any questioning. Agent Kunkle explained that of these two statements, he included the first, about running from the police, on his report but neglected to include the second.

The Defendant contends that because Agent Kunkle responded when the Defendant made a statement, the Defendant was being interrogated. The Court disagrees. As noted above, for purposes of the Miranda analysis, interrogation exists when an agent's words or actions are reasonably likely to elicit an incriminating response from a defendant. Innis, 446 U.S. at 301. Here, Agent Kunkle responded to conversation initiated by the Defendant. The Court has seen no evidence that Agent Kunkle's words or actions were likely to elicit the statements the Defendant allegedly made, and conversation does not presumptively constitute interrogation, especially when initiated by the Defendant.

The Defendant seeks to discredit Agent Kunkle's testimony by claiming that it is inconsistent. For example, the Defendant argues that at the hearing, Agent Kunkle spoke of statements the Defendant made which he did not include in his report. The Court does not find that such a discrepancy indicates inconsistent testimony.

The Court credits Agent Kunkle's testimony and finds that the Defendant did not make the statements at issue as the result of interrogation. Miranda is therefore inapplicable. Furthermore, as noted above, the government does not seek to introduce the statements unless they become relevant through cross-examination or through positions taken and/or evidence introduced by the Defendant. The Defendant does not address this stated intention on the part of the government.

Statements made in violation of Miranda can be admissible if a defendant chooses to testify. "[O]nce it is determined that the defendant has freely taken the stand, Harris permits impeachment by probative evidence since it lends 'valuable aid to the jury in assessing (a defendant's) credibility.' The scope of impeachment is not confined to collateral matters but

embraces all matters reasonably related to the subject of his direct testimony." Angellino v. State of New Jersey, 493 F.2d 714, 722 (3d Cir. 1974) (quoting Harris v. New York, 401 U.S. 222, 225 (1971)). The statements attributed to Defendant would be admissible if the Defendant takes the stand and addresses a topic related to the statements, and the government states that it will only introduce them if the Defendant takes this course of action. Even if Agent Kunkle had interrogated the Defendant, the statements at issue would have been admissible for the purposes the government seeks. The Defendant has not shown why the statements should be suppressed.

III. Conclusion

For the reasons stated above, the Court will grant the government's Motion to Admit Recordings and deny the Defendant's Motion to Suppress. An appropriate order follows.

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ORDER

AND NOW, this 7th day of March, 2008, it is hereby ORDERED that the government's Motion to Admit Electronic Recordings (Doc. No. 18) is GRANTED and Defendant's Motion to Suppress Statements (Doc. No. 57) is DENIED.

The Defendant's Motion to Dismiss the Indictment (Doc. No. 58) is DENIED and a memorandum will be filed subsequently.

A further pretrial conference is scheduled for Monday, March 17, 2008, at 2:30 pm for any other pretrial issues and for Defendant's request to represent himself at trial.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.