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

UNITED STATES OF AMERICA	)	
	)	Criminal Action
	)	No. 07-CR-689-04
vs.	)	
	)	
JAMES LENEGAN,	)	
also known as “Boo”,	)	
	)	
Defendant	)	

O R D E R

NOW, this 22nd day of August, 2008, upon consideration of the Motion to Suppress filed May 9, 2008 by defendant James Lenegan; upon consideration of the Government’s Response in Opposition to Defendant’s Motion to Suppress Statements, which response was filed May 15, 2008; upon consideration of defendant’s objections to the publication to the court of Government Exhibit 3 and admission into evidence of Government Exhibit 4; after hearing held June 10, 2008; and for the reasons articulated in the accompanying Memorandum,

IT IS ORDERED that defendant’s objection to the publication to the court at the suppression hearing of Government Exhibit 3 is overruled.

IT IS FURTHER ORDERED that defendant’s objection to the admission into evidence at the suppression hearing of Government Exhibit 4 is sustained.

IT IS FURTHER ORDERED that defendant’s Motion to Suppress his statements is denied.

IT IS FURTHER ORDERED that statements allegedly made to law enforcement officials by defendant at a proffer session on May 6, 2005 may be used for purposes of impeaching defendant at his criminal trial.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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* * *

APPEARANCES:

DANIEL A. VÉLEZ, ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

MARC I. RICKLES, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on defendant James Lenegan’s Motion to Suppress, which motion was filed May 9, 2008. The Government’s Response in Opposition to Defendant’s Motion to Suppress Statements was filed May 15, 2008. On June 10, 2008, I conducted a hearing on defendant’s motion, and took the motion and two evidentiary objections under advisement. For the reasons that follow, I overrule defendant’s objection to the publication to the court at the suppression hearing of Government Exhibit 3;

sustain defendant's objection to the entry into evidence at the suppression hearing of Government Exhibit 4; and deny defendant's Motion to Suppress his statements made at a proffer session.

PROCEDURAL HISTORY

On November 7, 2007, a grand jury charged defendant James Lenegan with six counts of a forty-one count Indictment. Defendant is one of eleven co-defendants in this case. The Indictment stems from a series of pharmacy burglaries and attempted burglaries which occurred in and around Philadelphia, Pennsylvania, including in New Jersey and Delaware.

Specifically, defendant Lenegan is charged with one count of conspiracy to burglarize pharmacies, in violation of 18 U.S.C. § 2118(d) (Count One); two counts of pharmacy burglary and aiding and abetting thereof, in violation of 18 U.S.C. § 2118(b) (counts Twenty-Three and Twenty-Five); and two counts of possession with intent to distribute controlled substances and aiding and abetting thereof, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Counts Twenty-Four and Twenty-Six).

The Indictment also charged defendant Lenegan with one count of conspiracy to commit arson, in violation of 18 U.S.C. § 371 (Count Twenty-Seven). However, by Order dated August 5, 2008, I granted an unopposed motion of the government to dismiss that count.

On May 9, 2008, defendant filed a Motion to Suppress, seeking to suppress statements he made in the course of a proffer

session conducted on May 6, 2005. The government filed its response on May 15, 2008. On June 10, 2008, I conducted a hearing on defendant's motion and took the motion, along with two evidentiary objections, under advisement. Hence this Memorandum.

EVIDENTIARY OBJECTIONS

Two defense objections made at the June 10, 2008 hearing were taken under advisement. Defendant objected to publication to the court at the suppression hearing of Government Exhibit 3 ("G-3"), a report prepared by Special Agent Derek Valgora of the Bureau of Alcohol, Tobacco, Firearms and Explosives of the United States Department of Justice ("ATF"). The exhibit, which contains the statement made by defendant at his May 6, 2005 proffer session, was admitted into evidence at the June 10, 2008 hearing in the absence of objection.[1]

Defendant contends that the contents of his statement, as contained within Agent Valgora's report, are not relevant to a determination of whether the statement was made voluntarily. Although defendant did not object to the admission of the document into evidence, he argues that the contents of the exhibit should not be published to the court, as factfinder, for purposes of deciding the motion to suppress because the exhibit

[1] Although defense counsel initially objected to the admission of Government Exhibit 3 into evidence, the objection was withdrawn. See Transcript of Hearing on Pre-Trial Motions - Day 2 - Before the Honorable James Knoll Gardner, United States District Judge, June 10, 2008 ("N.T."), at page 92.

is not relevant to the court's determination of voluntariness.

Defendant initially objected to the admission of Exhibit G-3 on relevance grounds, but withdrew his objection. See Footnote 1. In doing so, counsel for defendant expressly stated that the exhibit is relevant to the suppression hearing.[2] I therefore conclude that defendant has conceded the relevance of Exhibit G-3.

Defendant does not cite any other applicable rule or authority in support of his objection to publication of Exhibit G-3. For example, defendant does not argue that the probative value of Government Exhibit 3 is outweighed by any danger of unfair prejudice or confusion, or delay. See Fed.R.Evid. 403.

In addition, I find Exhibit G-3 to be relevant for the following reasons.[3] Exhibit G-3 contains information about the circumstances of defendant's proffer session.[4] Specifically, the report indicates who was present at the session; where the session took place; and the timing and circumstances of how the interview ended. As discussed below in the Discussion section, this information is relevant to a determination, based on the

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[2] N.T. 92.

[3] "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

[4] Exhibit G-3 indicates that the proffer session occurred on May 7, 2005. However, based on testimony at the hearing, I conclude that the report which constitutes Exhibit G-3 is a summary of the May 6, 2005 proffer session. N.T. 89-91.

totality of the circumstances, of whether defendant's statements were made voluntarily. See United States v. Swint, 15 F.3d 286, 289 (3d Cir. 1994).

Because, as defendant concedes, Exhibit G-3 is relevant, and because defendant cites no other applicable rule in support of his objection to publication of the exhibit to the court, the objection is overruled.

Second, I address defendant's objection to the use and admission into evidence at the suppression hearing of Government Exhibit 4 ("G-4"), an ATF report prepared by Agent Joseph Mangoni regarding the proffer session on May 6, 2005. Defendant argues that Exhibit G-4 was not produced until the day of the hearing and that government counsel had agreed not to use the document against defendant Lenegan in any way. As a result, defendant objects to the document's receipt into evidence. For the following reasons, I sustain defendant's objection.

In his opening statement at the suppression hearing, Assistant United States Attorney Daniel A. Vélez conceded that Exhibit G-4 is a "late turnover and clearly suppressible."[5] Attorney Vélez stated that Agent Mangoni's report would not be used against defendant Lenegan "to the extent that there is any information [in that report] that differs from the prior information he has received".[6] Attorney Vélez reiterated this

[5] N.T. 4.

[6] N.T. 4.

position in response to defendant's objection, which was made after Attorney Vélez showed the document to Agent Mangoni on direct examination.

Agent Mangoni testified that G-4 represents the only report he generated as a result of the proffer session on May 6, 2005. Moreover, a limited review of G-4 for the sole purpose of comparing its contents to the contents of G-3, a report authored by Agent Valgora as a result of the same proffer session, reveals that G-4 contains information which is not contained within G-3. The government has not established that all of the contents of G-4 were previously provided to defendant Lenegan in other documents. Therefore, I sustain defendant's objection to the admission of G-4 into evidence.

FACTS

Based on the evidence presented by the parties at the hearing before me on June 10, 2008, I find the pertinent facts to be as follows.

Defendant James Lenegan is forty years old and did not graduate from high school. He appears to be in good health. Prior to the filing of the Indictment in this case, defendant was arrested on other matters at least five times.

In May 2005, defendant was in state custody at a Bucks County, Pennsylvania facility. He was represented in that state criminal matter by Allan J. Sagot, Esquire. In early May 2005,

in the course of investigating a series of pharmacy burglaries, Assistant United States Attorney Joseph T. Labrum III contacted Attorney Sagot and advised him of the government's interest in conducting a proffer session with defendant. Moreover, federal prosecutors faxed a copy of the government's standard proffer letter dated May 4, 2005 to Attorney Sagot.[7] Neither defendant nor his attorney signed the proffer letter and the contents of the letter were not read to defendant.

On May 6, 2005, federal agents and Attorney Labrum met with defendant Lenegan for a proffer session in a conference room at the Bucks County District Attorney's Office in Doylestown, Pennsylvania. Although prosecutors expected Attorney Sagot to be in attendance, he was not present. Attorney Labrum called Attorney Sagot and spoke to him by telephone. Attorney Sagot indicated that the proffer session should continue in his absence, under the terms of the standard proffer letter. At Attorney Sagot's request, Attorney Labrum then gave the telephone to defendant Lenegan, who spoke to Attorney Sagot.[8]

After the telephone call, Attorney Labrum explained to

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[7] Government Exhibit 1.

[8] Defendant testified that he does not remember speaking with Attorney Sagot by telephone on May 6, 2005. N.T. 63. However, I credit the

(Footnote 8 continued):

(Continuation of footnote 8):

testimony of Attorney Labrum and Detective Kenneth Golczewski, both of whom testified that defendant did speak with Attorney Sagot before proceeding with the proffer session. N.T. 20-23, 40, 55.

defendant the general nature of a proffer session. The terms of the proffer letter were not read to defendant verbatim. However, Attorney Labrum explained that any statements made in the course of the proffer session would not be used against defendant directly, but could be used as impeachment evidence on cross examination.[9]

Defendant was then questioned by federal agents Derek Valgora and Joseph Mangoni. Detective Kenneth Golczewski and agent Brian Gallagher were also present. The agents were dressed in casual clothing and did not display their weapons during the proffer session, which lasted approximately an hour. When defendant indicated that he wanted to end the session in order to eat his lunch, the session concluded.[10]

CONTENTIONS

Defendant's Contentions

Defendant contends that although he was aware of the existence of a proffer letter, he did not understand the legal and practical consequences of a proffer before engaging in the proffer session on May 6, 2005. Specifically, defendant avers that because his attorney was not present to advise him, defendant believed the statements he made in the course of the proffer session could not be used against him at all.

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[9] N.T. 21-22.

[10] N.T. 23, 31, 40-41, 51, 56-57; Exhibit G-3.

Defendant further contends that because no Miranda[11] warnings were given before the proffer session, any statements he made were presumptively involuntary and that no knowing, voluntary and intelligent waiver was effected. Therefore, defendant argues that the statements he made in the course of the proffer session should be suppressed at trial for all purposes, including impeachment.

Government's Contentions

The government contends that because the interview of defendant was conducted as a proffer session, prosecutors will not seek to introduce defendant's statements in its case-in-chief. However, the government asserts that because the consequences of a proffer session were explained to defendant, including the fact that any statements made by him could be used to impeach him, defendant's statements were voluntary and should not be suppressed for purposes of cross-examination.

The government argues that a proffer session is, by its very nature, voluntary because it is an opportunity for the defendant to convince the government that he has information which would assist the government in an investigation or prosecution. Moreover, the government avers that statements made by defendant Lenegan during the proffer session on May 6, 2005 were voluntary in light of the totality of the circumstances,

[11] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

regardless of whether Miranda warnings were given. Therefore, the government contends that the statements can be used for purposes of cross-examination if defendant testifies inconsistently at trial.

For the following reasons, I agree with the government and deny defendant's motion to suppress his statements.

DISCUSSION

Only voluntary confessions may be admitted into evidence at a criminal trial. The government has the burden of proving, by a preponderance of the evidence, that a confession was voluntarily given. United States v. Swint, 15 F.3d 286, 288-289 (3d Cir. 1994). A confession is voluntary when it is the product of an "essentially free and unconstrained choice by its maker" and is "the product of a rational intellect and a free will", and "the [defendant's] will was not 'overborne'." Swint, 15 F.3d at 289 (quoting United States ex rel. Hayward v. Johnson, 508 F.2d 322, 326 (3d Cir. 1975).

Courts look to the totality of the circumstances to determine whether a confession was voluntary. Swint, 15 F.3d at 289. Although the potential circumstances include the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition and mental health, a particularly crucial element is police coercion. Id. (internal citations omitted). Another element may be the failure of police to advise the defendant of his rights to remain silent

and to have his counsel present during custodial interrogation. Id.

Unless there is "'police conduct causally related to the confession,' a confession is considered voluntary. Thus, a court will not hold that a confession was involuntary unless it finds that it was the product of 'police overreaching.'" Swint, 15 F.3d at 289 (citing Colorado v. Connelly, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473, 482 (1986)).

In this case, the parties agree that defendant was not given Miranda warnings before the proffer session. Miranda warnings protect a custodial suspect's Fifth Amendment right not to incriminate himself without "freely deciding to forego those rights." Oregon v. Elstad, 470 U.S. 298, 305, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222, 229 (1985).

Whether a suspect is in custody depends on whether, under the totality of the circumstances, a reasonable person in his position would feel free to leave. See Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383, 394 (1995). In this case, defendant was in state custody at the time of the proffer session. Given his incarceration, a reasonable person in defendant's position would not have felt free to leave.

Defendant contends that the lack of Miranda warnings renders his statements presumptively involuntary. Nevertheless, statements made in violation of Miranda can be used for

impeachment purposes despite their inadmissibility in the prosecution's case-in-chief so long as they are voluntary. Oregon v. Hass, 420 U.S. 714, 723, 95 S.Ct. 1215, 1221, 43 L.Ed.2d 570, 578 (1975); Harris v. New York, 401 U.S. 222, 226, 91 S.Ct. 643, 646, 28 L.Ed.2d 1, 5 (1971).

For the following reasons, based on the totality of the circumstances, I conclude that the government has met its burden of showing, by a preponderance of the evidence, that defendant's statements were voluntary and therefore can be used for impeachment regardless of whether Miranda warnings were given.

Defendant is forty years old and in apparently good physical and mental health.[12] Defendant does not aver that, at the time of the proffer session on May 6, 2005, he suffered from any physical or mental condition that rendered him incapable of making a voluntary statement. However, he testified that on May 6, 2005, he mistakenly believed he was being taken to the Bucks County courthouse for the purpose of an appeal hearing and did not know it was for a proffer session.[13]

Although the proffer session took place at the Bucks County District Attorney's Office in the Bucks County courthouse, the session was held in a conference room with officers in plain

[12] At the hearing on his motion to suppress, defendant testified that although he did not understand some issues that were presented in the course of the hearing, he generally understood the "whole picture" of the pretrial motions proceedings. N.T. 68-69.

[13] N.T. 61.

clothes. The session lasted only about an hour until the defendant indicated he wanted to end the session and eat his lunch, which he was permitted to do. Therefore, I conclude that the location and length of the session, combined with the fact that the session was terminated at defendant's request, do not suggest that the statements were made involuntarily.

Although defendant did not complete high school, he is familiar with the criminal justice system.[14] Prior to this Indictment, defendant was arrested at least five times and testified that he went to trial twice, and pled guilty three times. Defendant does not explain on what basis he believed he was being taken to the courthouse for an "appeal hearing". Nevertheless, upon his arrival at the Bucks County District Attorney's Office, it would have been clear to defendant that the proffer session in the conference room was not a hearing. Therefore, I conclude that defendant's education level, maturity, and experience weigh in favor of a determination that defendant participated in the proffer session voluntarily.

Moreover, I conclude that statements defendant made during the proffer session were not the product of "police overreaching" and there was no police coercion. See Swint, 15 F.3d at 289. Because the purpose of a proffer session is to

[14] See Clewis v. State of Texas, 386 U.S. 707, 712, 87 S.Ct. 1338, 1341, 18 L.Ed.2d 423, 428 (1967), which held a statement was involuntary where defendant had a fifth-grade education and no prior involvement with the legal system.

permit the defendant to offer information that will be helpful to the government in investigation or prosecution, it is, by its nature, a voluntary interview. The federal agents present were dressed in street clothes and did not display their weapons during the session.

To the extent defendant initially may have been confused about the nature of the meeting, such confusion was not the result of police coercion at the session. See Swint, 15 F.3d at 290 (concluding that the government's misleading and coercive conduct caused defendant's confusion about a proffer session, "depriving him of the ability to make a free and unconstrained choice about whether to make a statement to the federal agents").

On the contrary, government agents sought to ensure that defendant Lenegan was not without the benefit of counsel. When he learned that Attorney Sagot was not present at the proffer session, Assistant United States Attorney Labrum actively attempted to contact him and arranged for defendant to speak with Attorney Sagot by telephone. The proffer session continued only after defendant had spoken with his attorney. Therefore, I conclude that, largely because of Attorney Labrum's efforts, defendant was not without the benefit of counsel before proceeding with the proffer.

Moreover, Attorney Labrum explained the nature of a proffer session to defendant, including that any statements made could be used as impeachment evidence, but not in the

government's case-in-chief. Thereafter, the session continued and defendant made statements. Based on the totality of the circumstances, I conclude that those statements are the result of defendant's voluntary participation in the proffer session, and not the result of police coercion.

Finally, I address defendant's argument that the agents' failure to give Miranda warnings is relevant to a determination of whether his statements were made voluntarily. Defendant's motion to suppress and accompanying memorandum of law argue that defendant was "denied the benefit of counsel during the custodial interrogation" and, as a result, mistakenly believed that his statements could not be used against him at all. (Defendant's motion at paragraph 8.) As discussed above, however, I find that defendant was not without the benefit of counsel because he spoke to his attorney by telephone before proceeding with the proffer session. Moreover, the nature of the

proffer session was explained to defendant before proceeding with the proffer.

In this case, defendant was in state custody at the time of the proffer session and would not have felt free to leave the session. See Thompson, 516 U.S. at 112, 116 S.Ct. at 465, 133 L.Ed.2d at 394. Nevertheless, even if Miranda warnings should have been given, defendant's statements are admissible on cross-examination. Statements made in violation of Miranda can

be used for impeachment purposes despite their inadmissibility in the prosecution's case-in-chief so long as they are voluntary. Oregon v. Hass, 420 U.S. 714, 723, 95 S.Ct. 1215, 1221, 43 L.Ed.2d 570, 578 (1975); Harris v. New York, 401 U.S. 222, 226, 91 S.Ct. 643, 646, 28 L.Ed.2d 1, 5 (1971).

Here, the government agrees that statements made by the defendant will be used only for the purpose of impeachment should the defendant testify inconsistently at trial and not in the government's case-in-chief. Because, as discussed above, I find that defendant voluntarily participated in the proffer session after speaking with his attorney by telephone, I conclude that the statements may be used for impeachment regardless of whether Miranda warnings were, or should have been, given.

CONCLUSION

For all the foregoing reasons, I overrule defendant's objection to the publication to the court of Government Exhibit 3 and sustain defendant's objection to the entry into evidence of Government Exhibit 4. Moreover, I conclude that statements made by defendant at the proffer session on May 6, 2005 were voluntary and may be used as impeachment evidence. Accordingly, defendant's Motion to Suppress is denied.