UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA **PLAINTIFF**

v.

STEVEN D. GREEN **DEFENDANT**

UNITED STATES' POST-HEARING REPLY ON
DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

Comes the United States, by counsel, in reply to defendant's post-hearing brief on the motion to suppress statements. Contrary to the arguments of counsel, Green was not subject to interrogation: rather, he initiated all conversation and freely volunteered statements during post-arrest transport. Furthermore, defendant's argument that his initial appearance was unnecessarily delayed is entirely without merit given the fact that defendant was presented to a federal magistrate the next business day following his arrest.

I. Agent Kelley's Conversation with Green Did Not Violate *Miranda* Because Green Was Not Interrogated and All Conversation Was Initiated by Green Himself.

First, as the defendant stated in his brief, there is no dispute that during Green's post-arrest transport, he was in custody and asserted his right to counsel. It is equally important to note that Green does not dispute that his statements to Agent Kelley during transport were

voluntary and not the result of police coercion.[1] Therefore, the question at issue is whether Agent Kelley interrogated Green.

For purposes of *Miranda*, "the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Thus, "interrogation, as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id*. at 300.

The defendant argues that Green was interrogated during transport and points to three questions that Agent Kelley asked, or might have asked, during Green's trips to Asheville and Charlotte. First, Agent Kelley testified that in response to some of the defendant's questions or statements, he might have asked Green as some point, "What do you mean?" Tr. at 45. Agent Kelley stated, however, that such a question, if even asked, was not related to anything of substance. *Id*. Indeed, on cross, Agent Kelley testified that he was not sure he had even asked Green "what do you mean" and could not recall a time when he actually asked him the question. Tr. at 61-62. Furthermore, there is no evidence of what Green said in response, whether Green answered at all, let alone whether his response was incriminating.

Second, the defense directs the Court to Agent Kelley's testimony that upon picking up Green at the jail for his second transport, he asked Green "how his stay was at the jail." Tr. at 50. The defense concedes that this was not a question designed to elicit an incriminating response (*see* Def's Resp. Br. at 14 ("[w]hile that question in and of itself was not about the case…)). Indeed, "polite conversation is not the functional equivalent of interrogation." *United States v.*

1 Nor does Green dispute that his statements to Agent Lando prior to transport and prior to his invocation of rights were voluntary and not coerced.

Tail, 459 F.3d 854, 858 (8th Cir. 2006). Nonetheless, the defense suggests that it was a "direct question to reopen the conversational relationship Kelley had established with Green [on] June 30th." *Id*. This theory, however, is at odds with the rest of Kelley's testimony.

Agent Kelley testified that the reason he asked this question was because "we get some complaints that it's too cold there" and "we weren't sure if he had been fed that night." Tr. at 50. Agent Kelley testified that after asking about the jail, for the next approximately 20 minutes, there was no talking and "everything was quiet." *Id*. Thus, there is no evidence that Kelley's question was designed to reopen any sort of "conversational relationship," nor did Agent Kelley's question appear to have that effect based on the ensuing 20 minutes of silence.[2]

Third, the defendant directs the Court to Agent Kelley's testimony regarding the death of Green's Lieutenant. Kelley stated that Green volunteered that "[a]ll of my buddies were getting killed over there. My lieutenant got his face blown off." Tr. at 83. On cross, Kelley agreed that in response he "might" have asked Green "how did that happen" because "that's a very tragic thing." Tr. at 84. More than anything, though, this was a polite response to Green's comment and there was no reason to believe that an answer to that question would be incriminating nor was it incriminating.

These questions, if actually asked, were not designed to elicit an incriminating response nor can it be shown that they actually produced incriminating statements from Green. *United States v. Fleck*, 413 F.3d 883, 893 (8th Cir. 2005) (statements during transport not a product of interrogation; agent asking how defendant liked jailhouse food not designed to elicit incriminating response; rather defendant's initiation of questions led to the incriminating

2 Note, the term "conversational relationship" does not exist in the body of federal case law. Rather, the term was put forth in defendant's response brief. See Def. Resp. Br. at 14.

statements). Nor did Agent Kelley engage in the functional equivalent of interrogation. These questions did not relate, even tangentially, to the charged criminal conduct involving rape and murder, nor is there anything in the record to suggest that Agent Kelley's responses to Green's statements were designed either to appeal to his conscience or to otherwise elicit a response. *See Innis*, 446 U.S. at 302-303. Nor did Agent Kelley's pleasantries create a general atmosphere of "subtle compulsion," which itself does not even equate to the functional equivalent of interrogation under *Innis* (*id*.). Moreover, there is no evidence that the defendant was particularly susceptible to these questions. *See United States v. Avery*, 717 F.2d 1020, 1024 (6th Cir. 1983).

Furthermore, there can be no "subtle compulsion" when the defendant speaks first. It is uncontroverted that the agents respected Green's invocation of rights – there was up to 15 minutes of complete silence during the first transport (Tr. at 40) and up to 20 minutes of silence at the beginning of the second (Tr. at 50). Defendant cites to no case law that required Agent Kelley to sit quietly once Green sought to engage him in active conversation.

Green's statements arose from a conversation that he initiated again and again. The fact that Green wanted to discuss his time in Iraq, the Agent's perception of Green, and jurisdictional/evidentiary matters related to his case certainly does not turn Kelley's participation in the conversation into a Constitutional violation. Rather, as the United States pointed out in its initial brief, and the defense noticeably ignored in its response, Green's continued initiation of conversation evidenced his desire for a generalized discussion about the case with the authorities and effectively waived his prior invocation of rights. *See Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (holding that after the right to counsel has been asserted by an accused, further

interrogation of the defendant should not take place "unless the accused himself initiates further communication, exchanges, or conversations with the police"); *Wyrick v. Fields*, 459 U.S. 42 (1982); *United States v. Ware*, 338 F.3d 476, 481 (6th Cir. 2003) (defendant who invokes right to counsel may initiate discussion of the crime by unprompted statements that "evince a willingness and a desire for a generalized discussion about the investigation") (citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983)). Green obviously knew his rights – he invoked them before even being informed of them (Tr. at 39) – and after sitting in silence he decided without prodding, subtle compulsion, or any outside influence to initiate conversation to engage in conversation with Agent Kelley.

II. A Two-Hour Drive to Charlotte Does Not Constitute "Unnecessary Delay" Under Rule 5(a).

Green contends that the United States caused a two-hour "unnecessary delay" under Federal Rule of Criminal Procedure 5(a) in taking Green for his initial appearance to a magistrate judge in Charlotte as opposed to presenting him in Asheville. He claims his rights were abrogated by the United States' alleged desire that "Green would talk more to the FBI again if he spent two more hours with Agent Kelley without an attorney present." Def. Br. at 18. Therefore, he seeks suppression of his July 3rd statements to Agent Kelley during the drive to Charlotte.[3]

3 Defendant also attempts to tie a Sixth Amendment claim to this issue, arguing that in transporting Green from Asheville to Charlotte, the United States intentionally delayed attachment of the right to counsel by two hours. Although there is some precedent for such a claim, *see, e.g., United States v. Dobbs*, 711 F.2d 84, 85 n.1 (8th Cir. 1983); *Flittie v. Solem*, 775 F.2d 933, 943 (8th Cir. 1985), *United States v. Vaccaro*, 445 F.Supp.2d 82, 86-87 (D. Mass. 2006), no court has seriously considered extending the right to pre-adversarial stages in the absence of evidence that the government deliberately delayed initiation of adversarial proceedings for the purpose of avoiding attachment of the right. There isn't a scintilla of evidence in the record before the Court that the United States engaged in deliberate delay in Green's case, and the defense offers no such evidence. Rather, Green sets forth a conspiracy theory based on rank speculation, and wholly unsupported by the record, premised upon Special Agent Kelley's lack of knowledge regarding the reason for the defendant's initial appearance in Charlotte.

The advisory notes to Rule 5 state: "What constitutes 'unnecessary delay', i.e., reasonable time within which the prisoner should be brought before a committing magistrate, must be determined in the light of all the facts and circumstances of the case." Fed. R. Crim. P. 5, Advisory Committee's Note (1944). As Agent Kelley testified, Green was arrested on a Friday evening around 8:00 p.m. Tr. at 49. The next business day, Monday, July 3, 2006, Green was taken from Asheville to the federal courthouse in Charlotte where he was presented to a United States Magistrate Judge. Agent Kelley stated that he did not know whether the lone magistrate in Asheville was or was not available, being that it was the July 4th weekend. Tr. at 101. On the other hand, Agent Kelley testified that initial appearances are subject to coordination and scheduling between the clerk's office, an AUSA, and the magistrate. Tr. at 100-01. There is simply no evidence that Green's transport to Charlotte was part of some plan hatched by the United States to keep Green talking.

There is nothing in the Federal Rules or Local Rules of this Court or those of the Western District of North Carolina that requires a defendant to be taken to a certain division within the district for his initial appearance. Rule 5 only required that Green have his initial appearance within the Western District of North Carolina. *See* Fed. R. Crim. P. 5(c)(2)(A). As this Court knows, and as is the practice in this district, defendants are sometimes presented to a magistrate judge in a division other than the one in which arrest occurred based on factors such as court staffing, the availability of sufficient personnel from the United States Marshals Service, the United States Attorney's Office, and, most importantly, the availability of a United States Magistrate Judge. In the Western District of Kentucky, this could mean driving a defendant as much as four hours if it became necessary to transport a defendant from Paducah to Louisville, in

the event the magistrate judges in Paducah and Owensboro were unavailable. Having Green's initial appearance in Charlotte, where most of the district judges and magistrate judges for the Western District of North Carolina are located, was certainly both rational and reasonable especially given the circumstances of Green's arrest at the onset of a four day 4th of July holiday weekend.

III. Section 3501 Does Not Mandate Suppression Because Green's Statements Were Voluntary and Not in Response to Interrogation.

Green argues that 18 U.S.C. § 3501(c) requires suppression of Green's statements to Agent Kelley because they were provided outside the six-hour period outlined in the statute. But the defendant's reliance on subsection 3501(c) is misplaced. First, Green argues that section 3501(c) is a rule of exclusion, that is, any statement provided outside of the six-hour period is inadmissible. Def. Br. at 19-20. Rather, subsection 3501(c) is a rule of evidence inclusion. In other words, it limits judicial discretion in finding confessions involuntary. And courts reject the argument that the provision implies that all delays outside that range automatically render a defendant's confession inadmissible. *See United States v. Ostrander*, 411 F.3d 684, 695-96 (6th Cir. 2005) ("the rule in this circuit and in most others is that unnecessary delay, standing alone, is not sufficient to justify the suppression of an otherwise voluntary confession under 18 U.S.C. § 3501").

Second, and most importantly, is that the requirements and time limits of section 3501 do not apply to statements given voluntarily and in the absence of interrogation. "Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone. . . ." 18 U.S.C. § 3501(d). As outlined in Section I, Green was not interrogated, and there is no dispute that his statements were

voluntary and provided without coercion. *See* Gov't Resp. to Mot. to Supp., Doc. No. 158, at 7-11.

IV. Conclusion

When the defendant invoked his right to counsel shortly after apprehension, the arresting FBI agents did not attempt to question him. During transport, and after sitting in silence for approximately 15 minutes, Green initiated conversation regarding the nature of his case and his time in Iraq. Any question that was asked of Green during that time, or ever after, was not asked for the purpose of eliciting an incriminating response nor can it be shown that an incriminating response was provided based on such a question. The evidence demonstrates that Green clearly wanted to converse with Agent Kelley during his transport to Asheville and Charlotte. In initiating conversation again and again, Green proved his intent to voluntarily reopen the lines of communication. Agent Kelley's participation in Green's conversation was not interrogation under *Miranda* and did not violate Green's constitutional rights.

Furthermore, the two hour drive from Asheville to Charlotte, where Green's initial appearance was held, does not constitute "unnecessary delay" for purposes of Rule 5(a). There is no evidence that the United States sought delay for purposes of postponing attachment of the Sixth Amendment. If anything, the evidence supports a conclusion that due to scheduling concerns between lawyers, clerks, and judges in a small court division on a July 4th weekend, an initial appearance in Charlotte was more appropriate, practical, and certainly reasonable. Regardless, Green was presented to a magistrate the next business day after his arrest.

WHEREFORE, the United States respectfully requests that defendant's motion to suppress be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 17, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren C. Wolff, counsel for defendant, Steven D. Green.

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