

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,            )  
  )  
                  Plaintiff,                )  
  )  
                  v.                         ) Crim. No. 03-62-SLR  
  )  
JOHN TIGGETT,                         )  
  )  
                  Defendant.             )

**MEMORANDUM ORDER**

**I. INTRODUCTION**

Defendant moves to suppress all evidence and statements obtained as a result of his arrest on or about July 18, 2002. (D.I. 10) An evidentiary hearing was held on September 29, 2003. (D.I. 14) Post-hearing briefing is complete. (D.I. 16, 17) The court has jurisdiction pursuant to 18 U.S.C. § 3231.

**II. FINDINGS OF FACT**

Pursuant to Federal Rules of Criminal Procedure 12(e), the following constitutes the court's essential findings of fact.

1. Special Agent Michael Fleener ("Fleener") has been an investigator for the United States Customs Service ("Customs")<sup>1</sup> for approximately two and a half years. (D.I. 14 at 4) Prior to that, he was police officer for six and a half years and a military police officer for six years. (Id.)

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<sup>1</sup>Although it appears the name of this agency has changed, see infra note 2, for simplicity, the court will refer to the agency as "Customs."

2. On the evening of May 25, 2003, Fleener was called to assist Agent Kevin McGetrick ("McGetrick")<sup>2</sup> at the Philadelphia International Airport ("Airport"). (Id. at 5, 34) McGetrick had been investigating a drug smuggling organization that sends couriers from Delaware and New Jersey to Jamaica to pick up drugs. The couriers then return to Delaware and New Jersey to distribute the narcotics. (Id. at 63) Because a target of that investigation had arrived at the Airport on a flight from Jamaica, Fleener was needed to assist with any suspicious activity. (Id.)

3. Shortly after entering the International Terminal (the "Terminal"), Fleener received information from a Customs Inspector that the target had not cleared Customs. Inspectors had discovered about a kilo of cocaine inside the target's luggage. (Id. at 65) The cocaine was concealed inside three cans of coffee.

4. Shortly before 11:30 p.m., Fleener arrived at a Customs

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<sup>2</sup>McGetrick is a Special Agent with the Bureau of Immigration and Customs Enforcement ("ICE"), formerly known as Customs. (Id. at 62) Part of McGetrick's ICE agent duties is the investigation of international drug smuggling into Delaware. (Id. at 63)

holding cell<sup>3</sup> to interview the target, defendant herein.<sup>4</sup>  
(Id. at 10) Fleener found the cell door open and defendant alone, with his wrist handcuffed to the bed. (Id. at 8, 35) Fleener identified himself and displayed his credentials. He told defendant that inspectors had found something in his luggage that should not have been brought into the country. (Id. at 8, 37) Although defendant was agitated, he did not appear to have any psychological or physical problems. (Id. at 12-13)

5. Before proceeding, Fleener handed defendant a copy of Customs' standard Miranda form. (Id. at 9, 37) Customs Inspector Pat Coggins entered the cell and stood behind Fleener while the form was reviewed. (Id. at 10) Fleener also had a copy and read the warnings aloud to defendant. (Id. at 9) Fleener did not read the "Waiver"<sup>5</sup> section. (Id. at 40; Gov. Ex. 1)

6. Defendant told Fleener that he understood his rights.

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<sup>3</sup>The cell is located inside the Terminal off the main inspection area. (Id. at 8) This area includes a 12 by 12 foot room used for administrative purposes and is adjacent to a smaller, 5 by 10 foot room which is used as a holding cell. (Id.)

<sup>4</sup>At the evidentiary hearing, Fleener positively identified defendant as that individual. (Id. at 7)

<sup>5</sup>The text of this section reads: "I am willing to discuss subjects presented and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." (D.I. 16, Ex. A)

(Id. at 10) Fleener asked whether he was willing to talk. Defendant refused. He said he was not willing to answer any questions and did not want to say anything. (Id. at 11, 39)

7. Fleener asked defendant to sign his copy of the form to confirm that he understood his rights as read. (Id. at 11) Fleener told defendant that signing the form did not mean that he had agreed to answer any questions. (Id. at 11) Instead, the signing represented only that defendant understood his rights as read to him by Fleener.

8. Defendant signed the form on the line indicated by Fleener. (Id. at 11) Fleener left the cell and went to the administrative room to wait for Agent McGetrick. (Id. at 13)

9. When McGetrick arrived, Fleener advised him that defendant had invoked his Miranda rights and refused to answer any questions. (Id. at 14) McGetrick decided to verify this information himself and went to the holding cell. (Id. at 41) McGetrick advised that he was a special agent conducting an international narcotics investigation and one of the subjects of that investigation was him, defendant. (Id. at 71) McGetrick said that agents had discovered about a kilo of cocaine, concealed inside of coffee cans, hidden in defendant's luggage. (Id. at 65, 71) McGetrick thought defendant was only a courier and might want to help the situation by providing information. (Id. at 71) Defendant for a second time stated that he did not

wish to speak with authorities. After this brief conversation, McGetrick left the holding cell.

11. While discussing the case with agents, McGetrick learned that a suspicious looking rum bottle was also found in defendant's luggage. A closer examination and opening of the rum bottle revealed additional cocaine. (Id. at 72)

12. Armed with this information, McGetrick went to defendant's cell a second time. McGetrick told him about the rum bottle and indicated that defendant's problems were increasing, especially if this newly discovered cocaine turned out to be crack cocaine. (Id. at 42, 72) By McGetrick's estimation, about a kilo and one half of cocaine had been found in defendant's luggage.

13. Defendant denied ownership of the drugs and refused to speak further with McGetrick. (Id. at 72) Consequently, McGetrick left the holding cell and went to speak with Fleener.

14. McGetrick and Fleener reviewed the Miranda form. McGetrick said that Fleener and Coggins had to sign the form as witnesses to defendant's invocation of Miranda rights. (Id. at 15, 43, 69) McGetrick said the form was "awkward" and had caused problems in other cases. To make an adequate record of defendant's refusal to waive his rights, McGetrick urged them to sign. (Id. at 69) Fleener and Coggins complied and signed the form at 11:40 p.m. (Id. at 15, 17; Gov. Ex. 1)

15. Shortly after signing the form and while Fleener was standing outside the administrative room, defendant started commenting about his situation. (Id. at 19, 47) Defendant said that the police had the wrong guy and that they did not know what they were doing. Defendant made statements about his luggage and certain items found inside. (Id. at 20) Defendant also said he was willing to become a paid informant for the government. Fleener advised that such an arrangement could not be considered at this early stage in the investigation. (Id. at 21)

16. About an hour later, Fleener and McGetrick transported defendant to the United States Customs House ("Customs House") in downtown Philadelphia for processing. McGetrick drove the vehicle while Fleener sat in the backseat next to defendant. (Id. at 75) The three engaged in a continuous and fluid conversation on various topics, including the inequities in sentencing between crack cocaine and cocaine, and the smuggling of narcotics. Defendant said he was willing to trade his information for freedom or money. (Id. 22-23, 48, 54, 75) Since they were en route to the Customs House, McGetrick replied that they could talk at the Customs House after defendant signed the waiver portion of the form. (Id.) Defendant declined.

17. At the Customs House, defendant was fingerprinted, photographed and his personal history was taken. (Id. at 21-22,

75) After about an hour at the Customs House, McGetrick drove Fleener and defendant to Philadelphia City Jail. (Id. at 22, 51)

18. During the ride, another conversation arose between the three occupants. Defendant questioned the strength of the case against him. McGetrick explained that the case was strong since the drugs were found in his luggage and probable cause to search was not needed to open and inspect a suitcase at the Airport. Defendant was curious about McGetrick's involvement in the case. Defendant questioned the information McGetrick had on the smuggling organization. Because McGetrick did not want to compromise the investigation, his responses were purposely incomplete. He did, however, provide various hints to allow defendant to glean that authorities knew a lot about the smuggling ring. (Id. at 77)

19. When they arrived at City Jail, it was almost 3:00 a.m. Fleener exited the vehicle to make arrangements with the guards. McGetrick was left alone in the car with defendant. Defendant again asked him what he knew about the investigation. The exchange proceeded as follows:

McGetrick: Well, I will tell you what. Obviously, I don't want to tell you what I know if you are not going to cooperate, I said, because, you know, that wouldn't do me any good, I said. But I will give you a hint. I said, I will give you a big hint. I said, I work in Delaware. I'm assigned to Delaware. I said, What does that tell you? And he says, It tells me you know something. I said, Well, what do you want to do?

He said, I want to talk.  
I said, If you want to talk, you've got to sign the  
waiver.

(Id. at 78-79)

20. Before he could walk very far, McGetrick called out for Fleener to return to the vehicle because defendant had decided to waive his rights. (Id. at 24, 55, 79) McGetrick took out the Miranda form and inquired whether defendant remembered what agent Fleener had discussed earlier. (Id. at 79) Defendant said he was familiar with the form. McGetrick read the waiver section to him. (Id. at 80)

21. Defendant hesitated. He asked to read the form. (Id. at 80) Defendant read the form aloud and when he reached the right to an attorney section, he stopped and asked for an attorney. (Id.)

22. McGetrick said they were pressed for time and if defendant wanted to talk then he had to decide immediately because the prison guards were waiting. Defendant decided to sign and at 3:02 a.m. on May 26, 2003,<sup>6</sup> he waived his rights and began answering questions. (Id. at 80-81; Gov. Ex. 1) McGetrick signed the form and added notations to clarify the signing dates on the form.<sup>7</sup> Fleener witnessed the signing. (Id. at 81)

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<sup>6</sup>He signed the same form as used earlier.

<sup>7</sup>A distinction between the Miranda section (i.e., receiving his rights) and the waiver section (i.e., waiving the rights).

### **III. DISCUSSION**

Defendant argues that the statements were made after he had invoked his right to remain silent and should be suppressed.

(D.I. 16) Defendant contends that Fleener and McGetrick disregarded his request to refrain from questioning and, instead, made repeated attempts to convince him to change his mind. Further, Fleener's insistence that defendant sign the form even though he had refused to waive his rights was another attempt to obtain a waiver. Defendant argues that because there is no language on the form detailing the reason for signing, Fleener's conduct was contrary to procedure and not supported by the record.

Plaintiff concedes that defendant did invoke his Miranda rights and wished to remain silent. (D.I. 17) Defendant's subsequent conduct, however, vitiated this invocation. Specifically, plaintiff asserts that when defendant initiated conversations about the case with agents, he was demonstrating a willingness to talk and thereby revoking his initial refusal. Plaintiff contends that considering the totality of the circumstances, the waiver was knowing, voluntary and intelligent.

### **IV. CONCLUSIONS OF LAW**

The Fifth Amendment of the United States Constitution guarantees that in a criminal proceeding no person will be forced to be a witness against himself. To this end, the United States

Supreme Court created the Miranda warnings for law enforcement to follow prior to custodial interrogation of a suspect. Miranda v. Arizona, 384 U.S. 436 (1966). Specifically, before any questioning, the suspect must be informed that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. at 445. These "warnings are constitutionally required to combat the compelling pressures inherent in custodial police interrogation and to permit a full opportunity to exercise the privilege against self-incrimination" guaranteed by the Fifth Amendment. Dickerson v. United States, 530 U.S. 428, 440 (2000). Statements obtained in violation of Miranda precepts, even though the statements may be voluntary, are inadmissible to prove guilt at trial. See Michigan v. Mosely, 423 U.S. 96, 100 (1975); Miranda at 458-59.

Once a suspect invokes those rights, the interrogation must cease. McGraw v. Holland, 257 F.3d 513, 518 (6th Cir. 2001). "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda at 473-74. The circumstances under which questioning can resume varies.

The totality of the circumstances surrounding the questioning must be examined to determine the sufficiency of Miranda warnings and any waiver of rights. See United States v.

Velasquez, 885 F.2d 1076, 1086 (3d Cir. 1989); North Carolina v. Butler, 441 U.S. 369 (1979). The government carries the burden of demonstrating by a preponderance of evidence that a defendant has waived his Miranda rights. Colorado v. Connelly, 479 U.S. 157, 168-69 (1986). United States v. Durham, 741 F. Supp. 498, 504 (D. Del. 1990).

In Michigan v. Mosely, 423 U.S. 96 (1975), the United States Supreme Court concluded that if a custodial suspect only invokes his right to remain silent and not the right to counsel, then re-interrogation by law enforcement may be permissible under specific circumstances. The test is whether the defendant's right to stop questioning was "scrupulously honored." Id. at 104.

In creating a fact specific test, the Court examined the circumstances surrounding Mosely's speaking with law enforcement. Defendant Mosley was arrested after the police received a tip implicating him in a series of robberies. After he was read his rights and signed a form accordingly, a detective started questioning him. Mosely said he did not want to answer any questions about the robberies. Consequently, the detective promptly stopped the questioning and Mosley was removed to a holding cell. About two hours later a different detective visited Mosely's cell and provided a full and complete reading of Miranda warning before the interrogation. In response to the

detective's questioning about an unrelated homicide, Mosely provided incriminating information.

The Court concluded that officers had scrupulously honored Mosely's wishes and found that

[t]his is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

Id. at 105-106.

The record at bar reflects that defendant invoked his right to remain silent during his meeting with Fleener in the holding cell and, again, in his conversations with McGetrick. Despite his invocation of rights, however, the uncontradicted record reflects that defendant repeatedly initiated and engaged in conversations about the contraband found, strength of the case and scope of the investigation. Defendant's conduct, without explanation by him, suggests an abandonment of his invocation to remain silent. The agents' conduct, conversely, was merely responsive to defendant's inquiries and concerns. Moreover, the court notes that the events of the late evening of May 25 and early morning of May 26, 2003 were fluid and informal. There is nothing of record to suggest a formal interrogation or method.

Having found that the agents scrupulously honored defendant's right to remain silent, the issue becomes whether defendant's request for counsel, made immediately before he signed the waiver form, was honored.

When a defendant invokes his right to have counsel present during custodial interrogation, additional questioning cannot occur unless: 1) he initiates the conversation; and 2) he knowingly and intelligently waives his right to have counsel present. See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). The government bears a heavy burden of demonstrating that the defendant knowingly and intelligently waived his rights if the interrogation proceeds without the benefits of counsel. See Smith v. Illinois, 469 U.S. 91, 98 (1984); Miranda v. Arizona, 384 U.S. 436, 475.

The court finds defendant's request for counsel was knowingly and intelligently waived when he signed the waiver form. In so doing, the court credits the agents' testimony that the waiver section was read aloud to defendant and then given to him to read silently to himself. There was nothing presented to suggest a difficulty in comprehension or impairment of any kind. After defendant requested counsel, McGetrick response was neither coercive nor deceptive. Simply, at that late hour and after three hours of intermittent conversation about the case, defendant had to make a decision on how to proceed.

**V. CONCLUSION**

At Wilmington this 29th day of January, 2004 for the reasons stated,

IT IS ORDERED that:

1. Defendant's motion to suppress statements is denied.

(D.I. 10)

2. The court shall conduct and initiate a telephonic status conference on **Monday, February 9, 2004 at 4:00 pm.**

Sue L. Robinson  
United States District Judge