

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 02-142-JJF
	:	
CALVIN PRUDEN,	:	
	:	
Defendant.	:	

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MEMORANDUM OPINION

June 10, 2003  
Wilmington, Delaware.

**FARNAN, District Judge.**

Presently before the Court is Defendant Calvin Pruden's ("Defendant") Motion to Suppress Evidence (D.I. 11). For the reasons set forth below, the motion will be denied.

**I. Nature and Stage of the Proceedings**

Defendant has been charged with: 1) knowingly making a false statement intended and likely to deceive a federally-licensed dealer with respect to a fact material to the lawfulness of the sale of a firearm in violation of 18 U.S.C. §§ 922 (a) (6) and 2; and 2) being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) (1) and 924(a) (2). Defendant moves pursuant to Federal Rule of Criminal Procedure 12(b) (3) and the Fifth Amendment of the United States Constitution to suppress all statements made to the police on January 14th and January 15, 2003.<sup>1</sup>

The Court held a hearing on the motion (D.I. 11) on April 11, 2003, and ordered the parties to submit letters outlining their respective positions. This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law regarding the

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<sup>1</sup>The Defendant's initial motion to suppress also included a request to suppress all out of court and in court identifications made of the Defendant by Government witnesses in relation to his arrest on January 14, 2003. (D.I. 11). However, at the Suppression Hearing on April 11, 2003, Defense Counsel withdrew its motion to suppress the identifications. (Tr at 2-3). As a result, the Court will address Defendant's remaining motion to suppress statements.

instant Motion. (D.I. 11).

### FINDINGS OF FACT

1. On January 14, 2003, the Defendant arrived at the State Probation Office in Wilmington, Delaware for his monthly appointment with his Probation Officer, Faith Leiss. (Tr. at 5, 22).

2. After Defendant arrived at the Probation Office, Ms. Leiss informed him that Special Agents Jason Kusheba and Veronica Hnat of the Bureau of Alcohol, Tobacco, Firearms and Explosives wanted to speak with him privately. (Tr. at 23).

3. Thereafter, Special Agents Kusheba and Hnat escorted the Defendant to an unoccupied office across the hall, where they explained to him that he was being placed under arrest for the straw purchase of a firearm and for being a felon in possession of a firearm. (Tr. at 5-6).

4. After advising the Defendant that he was under arrest for the firearms offenses, Agent Kusheba asked the Defendant if he would be willing to answer any questions and he responded in the affirmative. (Tr. at 6). Agent Kusheba then read the Defendant his Miranda warnings, utilizing a statement of rights card. <sup>2</sup>

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<sup>2</sup> Specifically, Agent Kusheba informed the Defendant of the following:

You have the right to remain silent. Anything you say can and will be used against you in a court or other proceedings. You have the right to talk to

5. After Agent Kusheba advised the Defendant of his Miranda rights, he inquired as to whether the Defendant understood his rights as they had been explained to him. (Tr. at 9, 34). Agent Kusheba testified that the Defendant responded that he understood, and Agent Kusheba again asked him if he was willing to answer questions, to which the Defendant responded "yes." (Tr. at 9).

6. The Agents then asked the Defendant questions about the purchase of firearms and the Defendant proceeded to make incriminating statements. (Tr. at 9). Specifically, Agent Kusheba testified that the Defendant indicated that he had accompanied two separate women to Miller's Gun Store on two separate occasions for the purpose of helping them select a gun, that while he was in the store he handled firearms, that one of the two women purchased the gun charged in the indictment, and that he selected the gun that was purchased. (Tr. at 13-14).

7. The interview on January 14, 2003 lasted approximately

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a lawyer for advice and to have him with you during questioning. If you cannot afford a lawyer and want one, a lawyer will be appointed for you by the Court. If you decide to answer questions now without a lawyer present, you'll still have the right to stop questioning at any time. You also have the right to stop the questioning at any time until you talk to a lawyer. However, you may waive your right to the advice of an attorney and your right to remain silent. You may answer questions or make a statement without consulting an attorney if you so desire.

(Tr. at 8; Government Ex. at 1).

twenty to thirty minutes and Agent Kusheba summarized the Defendant's January 14, 2003 statements in his January 17, 2003 Report of the Interview. See Government Ex. 2.

8. After Agents Kusheba and Hnat concluded their questioning of the Defendant on January 14, 2003, Wilmington Police Detectives, Looney and Jordan began their own interrogation of the Defendant. (Tr. at 25, 35). These officers questioned the Defendant for approximately forty-five minutes about an unrelated narcotics investigation. (Tr. at 35).

9. The following day, on January 15, 2003, Agent Kusheba and Special Agent Fyock picked up the Defendant from Gander Hill Prison for the purpose of taking him to the U.S. Marshal's Office in the federal court building in Wilmington for processing and for his initial appearance before the United States Magistrate Judge. (Tr. at 15-16).

10. The car ride from Gander Hill Prison took approximately ten minutes. (Tr. at 21). During this car ride, Agent Kusheba drove the car, Agent Fyock sat in the front passenger seat and the Defendant, who was handcuffed, sat in the rear passenger seat. (Tr. at 15). During this car ride, Agent Kusheba explained to the Defendant where they were going and the applicable procedures. (Tr. at 15). Specifically, Agent Kusheba explained that when they got to the Marshal's area in the federal courthouse, he would be fingerprinted and photographed by both

himself and the Marshals and that the Marshals would ask him for biographical information. (Tr. at 15-16). Further, Agent Kusheba informed the Defendant that he would be appearing before a Magistrate Judge for his initial appearance, at which time the Magistrate Judge would explain to him the charges that were being brought against him as well the federal judicial process. (Tr. at 16).

11. Agent Kusheba also testified that he informed the Defendant that he related his January 14, 2003 statements to the prosecutor, and based on the information that was provided, the Government was going to make a motion to detain the Defendant pending a Detention Hearing. (Tr. at 16-17). In addition, Agent Kusheba testified that he informed the Defendant that if he wanted to add to his previous statement, that he should do so at that time, before his initial appearance. (Tr. at 16-17). Before proceeding with any other questions, Agent Kusheba testified that he asked the Defendant if he remembered Agent Kusheba reading him his Miranda rights the day before at the Probation Office, and he answered "yes". (Tr. at 18). Agent Kusheba also testified that he then asked whether the Defendant was willing to provide additional information, to which the Defendant responded in the affirmative. (Tr. at 18).<sup>3</sup> The Defendant then made additional

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<sup>3</sup> There is some discrepancy in the record as to whether Agent Kusheba asked the Defendant whether he understood, or knew what his rights were during the ten minute car ride. On his

incriminating statements. (Tr. at 20-21). Specifically, Agent Kusheba testified that the Defendant indicated that: 1) he went to Miller's Gun Store with a woman previously identified as "Steph" to help her select a gun; 2) a friend of his, Willie Andrews, also known as, "Cheddar", asked him for assistance in obtaining a gun; 3) Defendant asked the woman previously identified as "Tiff" to go to Miller's Gun Shop to buy a gun for Mr. Andrews; and 4) Defendant went to Miller's Gun Shop with "Tiff" and selected and handled the gun charged in the indictment. (Tr. at 20-21).

12. The Defendant's statement was summarized in Agent Kusheba's second January 17, 2003 Report of Interview. See Government Ex. 3.

13. Agent Kusheba did not have the Defendant execute a written waiver form in connection with either the January 14th or January 15, 2003 interviews. (Tr. at 26, 38). Further, the Defendant did not read or sign a written transcription of his statements from either the January 14th or January 15, 2003 interviews. (Tr. at 27, 35).

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direct examination, Agent Kusheba stated that he asked the Defendant whether he remembered Agent Kusheba reading him his rights the day before and if he was willing to answer any more questions. (Tr. at 17). Agent Keshuba indicated that at that point he did not ask him whether he understood his rights. (Tr. at 17). However, during Agent Kusheba's cross-examination he indicated that he asked the Defendant if he remembered being read his rights, whether he knew what his rights were and if he were willing to give any additional information. (Tr. at 38).

## CONCLUSIONS OF LAW

1. The Fifth Amendment to the United States Constitution (the "Fifth Amendment") provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V.

2. The Supreme Court, in Miranda v. Arizona, 384 U.S. 436, 444-45 (1966), held that:

the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned 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. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Miranda, 384 U.S. at 444-45.

3. It is well-settled that a defendant can waive his Miranda rights if the waiver is made knowingly, intelligently and voluntarily. See United States v. Palmer, 203 F.3d 55, 60 (3d Cir. 2000). It is the Government's burden, in accord with Miranda and its progeny, to prove that a waiver of rights was



both voluntary and knowing and intelligent. First, the statements must be given voluntarily in the sense that it was the product of a free and deliberate choice rather than the result of intimidation, coercion or deception. Second, the waiver must be knowing and intelligent in the sense that it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. See United States v. Durham, 741 F. Supp. 498, 502 (D. Del. 1990).

4. The Constitution does not require that a suspect know and understand every possible consequence of the waiver of his Miranda rights. Colorado v. Spring, 479 U.S. 564, 574 (1987). Rather, a defendant must be informed of the "pertinent consequence" that the Government will use the information provided by him in order to secure a conviction. Durham, 741 F. Supp. at 502 (citing Miranda, 384 U.S. at 469).

5. To assess the validity of a waiver, it is necessary to look at the totality of the circumstances. Arizona v. Fulminante, 499 U.S. 279, 285, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991). In conducting an analysis of the totality of the circumstances, courts should look to factors such as "the tactics used by the police, the details of the interrogation, and any characteristics of the accused that might cause his will easily to be overborne." Palmer, 203 F.3d at 60 (quoting United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987)). Further, a

court should look to the particular facts of a given case, including the defendant's background experience and conduct. United States v. Velasquez, 885 F.2d 1076, 1086 (3d Cir. 1989).

6. An express written statement of a waiver, is strong proof as to the validity of a waiver, however, it is not necessary or sufficient to establish waiver. See North Carolina v. Butler, 441, U.S. 369, 373 (1979). In fact, waiver may be made orally or implied from the Defendant's conduct. Id.

7. The Government must prove the waiver of a Defendant's Miranda rights by a preponderance of the evidence. See Colorado v. Connelly, 479 U.S. 157, 168, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986).

#### **JANUARY 14, 2003 STATEMENT**

8. With regard to the January 14, 2003, statement of the Defendant, made at the Probation Office, the Court concludes that the Government has met its burden of demonstrating compliance with Miranda and its progeny. The Court concludes, and no party contests, that the Defendant was in custody from the time that the Special Agents informed him that he was under arrest at the commencement of the interview. The evidence demonstrates that Agents Kusheba and Hnat escorted the Defendant down the hall in the Probation office to an unoccupied office, informed him that he was under arrest, described the nature of the charges against him, and asked if he would be willing to answer any questions, to

which he responded affirmatively. (Tr. at 5-6). Additionally, the evidence and Agent Kusheba's report of the January 14, 2003 interview, indicates that Agent Kusheba, prior to any further questioning, read the Defendant his Miranda rights from a statement of rights card. (Tr. at 6-7, 34; Government Ex.1). Moreover, Agent Kusheba testified that when he asked the Defendant if he understood his rights as they were explained and if he was willing to answer questions, he responded "yes" to both inquiries. (Tr. at 9, 34). Therefore, the Court concludes that the Defendant knowingly and intelligently waived his Miranda rights.

9. Additionally, the Court concludes that the Defendant's oral waiver of his rights was voluntary. Based on the record before it, the Court finds no evidence of police coercion, deception or intimidation. For example, the fact that the Defendant was a Probationer, present at the Probation Office for his monthly interview, does not alone establish that there was a coercive atmosphere in the January 14, 2003 interrogation. Further, the following undisputed facts support a finding of voluntariness: the interview only lasted twenty to thirty minutes; the Defendant was not handcuffed; the Agents sat across from the Defendant and did not physically intimidate him. Based on these facts and the Court's evaluation of the witnesses' credibility, the Court concludes that the Defendant knowingly and

voluntarily waived his Miranda rights at the January 14, 2003 interview. Accordingly, the January 14, 2003 statement will not be suppressed.

#### **JANUARY 15, 2003 STATEMENT**

10. As to the statement on January 15, 2003, the Court concludes that, although this statement involves a closer question than the January 14, 2003 statement, the Government has met its burden of demonstrating compliance with Miranda and its progeny. However, a different analysis is needed in the context of this statement because there was a delay between the time that the Miranda warnings were given and when the statement was taken. The passage of time between the issuance of Miranda warnings and an interrogation does not automatically render ensuing statements inadmissible. United States v. Vasquez, 889 F. Supp. 171, 175 (M.D. Pa. 1995).

11. Specifically, where there is such a delay, the totality of the circumstances, in conjunction with several factors have been deemed relevant such as:

(1) the time lapse between the last Miranda warnings and the [subject's] statement; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last Miranda warnings were given and the place where the [subject's] statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the [subject's] statement; and (5) whether the statement elicited during the complained-of interrogation differed significantly from other statements which had been preceded by Miranda warnings.

Vasquez, 889 F. Supp. at 177.

12. The issue then is whether the lapse of time rendered the earlier Miranda warnings ineffective in regard to Defendant's statement on January 15, 2003. The Court concludes that after considering and weighing the totality of the circumstances, in conjunction with the above factors, the lapse of time did not require new Miranda warnings.

13. Specifically, the Court finds that several factors weigh in favor of the conclusion that new Miranda warnings were not required on January 15, 2003. The Court finds significant that Agent Kusheba read the Defendant his Miranda warnings on January 14, 2003, and also conducted the second interrogation regarding the same subject matter on January 15, 2003. Further, the Court finds the fact that Agent Kusheba asked the Defendant if he remembered being read his rights the day before and the undisputed affirmative responses to these questions by the Defendant persuasive. Moreover, the January 15, 2003 statement was not significantly different from the first statement, except, in the January 15, 2003 statement, the Defendant elaborated on one of the previously described females, who he visited the gun shop with, and provided the name of the person who asked him for assistance in purchasing the firearm charged in the indictment.<sup>4</sup>

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<sup>4</sup> The Court finds support for its conclusion in several similar cases. See, e.g., Guam v. Dela Pena, 72 F.3d 767, 769-770 (9th Cir. 1995) (holding that a fifteen hour delay between

14. Lastly, with regard to the voluntariness of the January 15, 2003 waiver, the Court concludes that the waiver was not the product of intimidation, coercion or deception. Although the Defendant was handcuffed during the car ride and Agent Kusheba informed him that the Government was going to make a motion to detain him and advised him that if he had anything to add, he should do so at that time, or it "would be too late"; the Court does not find that these facts resulted in a coercive atmosphere so as to render the statement involuntary. Rather, the Defendant, a probationer who had experience with the criminal justice system, acknowledged that he had been read his rights the day before, and knowingly and voluntarily agreed to answer additional questions during the time he was being transported to

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Miranda warnings and questioning did not require rewarning where the officers reminded suspect of earlier warnings); United States v. Vasquez, 889 F. Supp. 171, 176-178 (M.D. Pa. 1995) (holding that a three and a half hour delay between Miranda warnings and questioning did not invalidate a previous waiver where a different officer conducted the interrogation); United States v. Smith, 679 F. Supp. 410, 413 (D. Del. 1988) (finding that a two and a half hour delay between Miranda warnings and questioning did not mandate a suppression of statement where the statement was taken by a different officer but nothing happened in the interim to invalidate the previous waiver). Additionally, this situation can be readily distinguished from cases which have found that previous waivers were invalidated, where in this situation, the statement was taken by the same officer, the Defendant was reminded of his earlier warnings and the charges against the Defendant were not escalating. See, e.g., United States v. Marc, C.A. No. 96-76-SLR, 1997 U.S. Dist. Lexis 3305 at \*29-30 (March 18, 1997 D. Del.) (holding that a ten hour delay invalidated a previous waiver when given by a different officer, in a changed location and where the charges against the defendant were escalating).

the court house.

15. In the circumstances presented, the Court concludes that the Defendant made a voluntary, knowing and intelligent waiver of his right to remain silent, and the period of delay between the time that he was read his Miranda rights and the time of the interrogation on January 15, 2003 does not render the Defendant's statement on January 15, 2003 inadmissible. Accordingly, the Defendant's Motion to Suppress Statements (D.I. 11) is denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,           :  
  :  
                  Plaintiff,            :  
  :  
                  v.                     :  
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CALVIN PRUDEN,                       :  
  :  
  :  
                  Defendant.           :  
  :

Criminal Action No. 02-142-JJF

**ORDER**

At Wilmington this 10th day of June, 2003, for the reasons set forth in the Memorandum Opinion issued this date;

NOW THEREFORE IT IS HEREBY ORDERED that Defendant's Motion To Suppress Statements (D.I. 11) is **DENIED.**

                  JOSEPH J. FARNAN, JR.                    
UNITED STATES DISTRICT JUDGE