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UNITED STATES of America
v.
Thomas A. SHAY and Alfred W. TRENKLER.
Crim. A. No. 92-10396-Z.
United States District Court, D. Massachusetts.
June 29, 1993.

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Nancy Gertner, Dwyer, Collora & Gertner, Boston, MA, Jefferson W. Boone, Allston, MA, Terry Philip Segal, Boston, MA, for defendants.
Paul V. Kelly, U.S. Attorney's Office, Boston, MA, for U.S.

MEMORANDUM OF DECISION

ZOBEL, District Judge.

*1 Defendant Thomas A. Shay ("Shay") stands indicted on three counts arising from the detonation of an explosive device planted in an automobile in Roslindale, Massachusetts (the "Roslindale bombing"), which resulted in the death of one police officer and injury to another. During the course of the investigation, agents of the Boston Police Department, the United States Bureau of Alcohol, Tobacco and Firearms ("ATF"), and the United States Attorney's Office questioned Shay, eliciting certain responses. The ATF agents also obtained an identification of Shay by Dwayne Armbrister, an employee of the Radio Shack store where bomb components were allegedly purchased. Shay now moves to suppress the statements and the identification.

I. FACTS

I find the following facts with respect to the investigation as it is relevant to the statements and identification.

A. October 29, 1991

On October 28, 1991, a bomb exploded in a car parked at the Roslindale home of Shay's father. Upon hearing of the explosion, Shay hitchhiked to the house. Boston police officers at the site refused to permit Shay to cross the police line and instructed him to go to the West Roxbury police station if he wished to speak to his father. Shay walked to the station.

That evening, Officer William Bridgeforth was on patrol in uniform in a marked police cruiser. Between midnight and 1:00 a.m. on October 29, Officer Bridgeforth was called to Roslindale to transport Shay from the West Roxbury station to the Boston Police Homicide Unit ("Homicide") in South Boston for "questioning." [FN1] During the thirty minute ride Shay conversed with Bridgeforth; he was seated in the back seat. Based upon his observations that evening, Bridgeforth concluded that Shay was "acting in a confused state of mind" and might be "slow," "retarded," or under the influence of drugs or alcohol.

The October 29 interview was conducted by Detectives Miller Thomas and Peter O'Malley in the second floor conference room. The room measures approximately fifteen by thirty feet and contains a large table which seats six to eight people. The room has doors and windows. During the meeting, which lasted 30 to 40 minutes, no physical restraint was used. The officers did not tell Shay that he was free to leave, nor did he ask whether he could leave. Indeed, Shay testified that he felt free to leave at all times that evening. Although Shay initially appeared "agitated" and expressed concern for his father, his moods

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Shay testified that he recognized certain individuals and vehicles to be plainclothes detectives and unmarked police cruisers, respectively.

At Homicide, Shay was separated from his friend and led to the same conference room used on October 29. The interview commenced at 10:00 p.m. and lasted approximately two hours. Four to five officers were present, including Detectives Thomas, O'Malley and Fogarty, Captain McNelly and ATF Agent Bowen. At least one detective was wearing a visible weapon.

*3 Thirty minutes into the interview, the detectives told Shay that his father was coming to the station to speak to him. The detectives made the statement knowing that it was false and believing that Shay would want to see his father. Shay responded, however, by stating that he did not wish to speak to his father; he was afraid that his father would hit him. Shay also asked whether he could leave. The officers responded that he was free to go. After talking to the officers for approximately eight more minutes, Shay again asked whether he could leave. The detectives responded in the affirmative. Shay then picked up his bag and left the room. He testified that he was "testing" the police by attempting to leave although he "knew" that he would be arrested. As he approached the station house door Detective Thomas arrested him.

Shay was brought back to the conference room and read his Miranda warnings from a printed card. Detective Thomas asked him whether he understood each right and he indicated that he did. Shay did not invoke his rights to silence or counsel; he did, however, ask and receive permission to make a phone call. He called a member of the press. After talking to the detectives for approximately twenty more minutes, he was transported to the identification section where he was photographed and fingerprinted. Ten to fifteen minutes after his return to Homicide he indicated for the first time that he wanted to speak to an attorney. No further statements were taken that evening.

C. June 4, 1991

Attorney William McPhee began to represent Shay on November 1, 1991. Six months later, AUSA Kelly contacted McPhee to organize the taking of a handwriting exemplar for June 4, 1992. McPhee informed AUSA Kelly that he would not be available until noon on June 4 because of a prior court appointment. Shay was, however, brought to the federal courthouse at approximately 10:00 that morning. Agent Jeff Kerr testified that the government believed the appointment had been set for 10:00 a.m. After waiting over two hours, AUSA Kelly called McPhee's office; Agent Kerr testified that they were told McPhee was delayed in court. McPhee returned the call at approximately 1:30 p.m. and confirmed that he would be detained for the rest of the day.

McPhee also asked to speak with his client, who remained in the federal lockup. Rather than transfer the call upstairs, AUSA Kelly asked Agent Kerr to bring Shay to his office. For security reasons, AUSA Kelly and Agents Kerr and D'Ambrosio stood outside of Kelly's open office door while Shay spoke to McPhee, who advised Shay to provide the exemplar but admonished him not to discuss the case. After several minutes Shay asked Kelly to come and speak to McPhee; they spoke for thirty seconds. Upon hanging up, AUSA Kelly turned to Shay and asked him what he had discussed with McPhee. Shay responded that it was all right for him to talk with the government.

The agents attempted to proceed with the exemplar; Shay, however, insisted

that they discuss the case first. The discussion lasted for approximately four and one-half hours. During that afternoon Shay did not ask to leave; on the contrary, he objected to the agents' repeated attempts to terminate the session. After the meeting, AUSA Kelly wrote to McPhee and indicated that Shay had spoken freely on June 4. The letter also indicated that Shay had expressed an interest in returning for a "proffer session of sorts" on June 10 or June 11. McPhee did not respond to the letter.

D. June 11, 1992

*4 Between June 4 and June 11 Agent Kerr accepted three to five collect telephone calls from Shay. During one of the calls Shay informed Kerr that he had fired McPhee. Shay also called AUSA Kelly, who accepted the call, and informed him that he had fired his attorney. Although Agent Kerr's contemporaneous report indicates that McPhee confirmed on June 11 that he was no longer Shay's lawyer, McPhee's testimony and later correspondence tends to show that the issue was not resolved before June 12. Shay was, in any event, transported to AUSA Kelly's office on June 11. At the outset of the discussion, the agents informed Shay of his rights and he executed a written waiver. Although Shay spoke freely, at times he acted "foolish" and did not appear to "appreciate the seriousness of the interview."

E. Armbrister Identification

In late 1991 the ATF undertook to search hardware stores and hobby shops in an effort to identify purchasers of components consistent with those used in the Roslindale bomb. The search revealed a Radio Shack receipt indicating that someone named "Sahy" had purchased such components, including a toggle switch, on October 18, 1991. The receipt indicated that the sales clerk for the transaction was "DRA," identified to be Dwayne Armbrister.

ATF agents arranged to interview Armbrister on February 20, 1992. Armbrister had recently returned to Boston from Florida, having spent several weeks with his family after the death of his grandfather. When ATF Agent Leahy appeared for the interview, Armbrister was "disinterested" and "nonresponsive." When Leahy showed Armbrister a blurry photo array, including a photo of Shay, Armbrister recognized no one. Agent Leahy then showed Armbrister a single photo of Shay; based upon the single photo, Armbrister identified Shay as having been a customer in the store. He stated that he recognized Shay because it was rare to have a customer taller than himself; Armbrister is six foot two. He was unable, however, to connect the customer in the photo and the October 18 receipt.

Between late February and early April, ATF agents visited Armbrister several times. When Agent Leahy revisited the store on February 24 Armbrister recalled nothing new. On March 10, however, he told Agent Sandra Lacourse that he recalled the October 18 purchaser was a tall white man. Armbrister testified that Lacourse showed him a single photo of Shay at that meeting. Lacourse testified, by contrast, that she showed him a photo array without Shay's photograph. The photos evoked no memory of the October 18 purchase or purchaser.

Armbrister testified that after reflecting upon the photograph and the sales receipt for several weeks he began to recall the details of the transaction. On April 8, 1992, Armbrister appeared at the office of AUSA Kelly to discuss his grand jury testimony of the following day. He recounted to AUSA Kelly and Agent Kerr what he now remembered of the October 18 transaction: that the

customer was tall and slender with short dark hair, no facial hair, crazy, deep set eyes, and a scar or cut above his mouth. Upon hearing that the customer had a scar, Kerr retrieved an enlarged photograph of Shay showing an imperfection on the right side of Shay's upper lip. [FN2]

*5 Armbrister now recalls that the customer was in the store for approximately fifteen minutes on October 18; two to three minutes were spent at the register during which he stood approximately two feet away. He recalls, in addition, that the customer: (1) entered the store at approximately 2:15 p.m. when there were few customers in the store; (2) had a small list of items and proceeded to retrieve things from the shelves without assistance; and (3) was annoyed with the paperwork required for the purchase and was reluctant to provide information. Armbrister admitted that customers frequently refuse to provide information for the receipt.

Armbrister testified that when the customer approached the register, he asked the customer how tall he was. After the customer left the store Armbrister turned to Alan Kingsbury, [FN3] a coworker, and stated that the customer was a "jerk." Armbrister generally waited upon thirty customers per day in October. He worked on commission, and this was a small sale.

II. LEGAL ANALYSIS

A. Suppression of Statements

1. October 29, 1991 and October 31, 1991.

It is well settled that when an individual is subjected to "custodial interrogation" by a state agent he must be advised of certain rights and waive those rights before any statements arising from the interrogation may be used against him. See Berkemer v. McCarty, 468 U.S. 420 (1984); Miranda v. Arizona, 384 U.S. 436 (1966). An interview is "custodial" if undertaken under circumstances in which a reasonable person in the defendant's position would have believed himself to be deprived of his freedom in a significant manner by the police. Miranda, 384 U.S. at 444. "Interrogation" occurs when the police use words or actions that they should know are "reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). Unwarned statements resulting from custodial interrogation are presumptively involuntary. Miranda, 384 U.S. at 444.

Statements taken in a non-custodial setting and statements taken after a defendant has been properly advised of his rights may also be suppressed as involuntary. When it seeks to admit a statement of the defendant, the government bears the burden of proving by a preponderance of the evidence that under the "totality of the circumstances" the statements were voluntary; that the free will of the defendant was not overborne by government coercion. Haynes v. Washington, 373 U.S. 503, 513-14 (1963). Among the circumstances to consider are the length and location of the interrogation; the maturity, education, physical condition and mental health of the defendant; and the conduct of the interrogators. Withrow v. Williams, 113 S.Ct. 1745, 1754 (1993). The mental condition of the suspect is particularly significant where the police use "subtle forms of psychological persuasion" in order to induce a confession. Colorado v. Connelly, 479 U.S. 157, 164 (1986).

*6 There is no dispute that Shay was "interrogated" on October 29 and October 31, 1991. The officers admitted that they intended to elicit statements from Shay. Shay cannot show, however, that the interrogations were "custodial" at any point prior to the actual arrest on October 31. On both

distinction hinges on the necessity of an "invalid purpose." In Beltran, Guzman and Smith the police used a stop or arrest in order to search for evidence of other criminal activity. The evidence in this case shows that the police arrested Shay on the Milton warrant because they wanted to question him about the Roslindale bombing; the evidence does not show that the police arrested Shay in order to search his person or property.

The distinction is substantial because: (1) an individual may not object to a search based upon a valid search warrant; (2) several exceptions to the Fourth Amendment's warrant requirement do not require consent; and (3) even for a consent search, the suspect has no right to be advised that he has a right to object. See Florida v. Bostick, 111 S.Ct. 2382 (1991). Subsequent to an arrest, however, the suspect must be advised of his rights to remain silent and to procure counsel; he must waive those rights before the police may proceed with the interrogation. Miranda, 384 U.S. at 444. The police can plan to use a minor offense as a pretext to obtain a warrant in order to search for evidence of a more serious offense; they cannot "plan" a defendant's knowing and voluntary waiver.

Because the risk of police overreaching is minimized in the case of an arrest, this case is akin to United States v. Causey, 834 F.2d 1179, 1184 (5th Cir.1987), in which the court held that "so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." In light of Shay's demonstrated willingness to speak with the police on earlier occasions, I conclude that Shay's waiver of his rights subsequent to the arrest on October 31 was no more than the predictable result of his own desire to talk to the police. The evidence of police overreaching on October 31 is simply insufficient to warrant suppression of the statements.

The statements made on October 29 and October 31, before and after the arrest, are admissible. The motion of the defendant to suppress those statements is accordingly denied.

2. June 4, 1992 and June 11, 1992.

Shay moves to suppress the statements made on June 4 and June 11 on the ground that they were taken in violation of his right to counsel under the Fifth and Sixth Amendments. Once a suspect invokes his right to counsel, any interrogation must cease and the police may not initiate further questioning without the presence of defense counsel. Edwards v. Arizona, 451 U.S. 477, 482 (1981). This is a prophylactic rule, designed to prevent those in custody from being "badgered" into waiving their rights. Id. As with statements made during custodial interrogation without the benefit of Miranda warnings, a violation of the Edwards rule creates an irrebuttable presumption that any statements made were the product of official coercion. Minnick v. Mississippi, 498 U.S. 146, ----, 111 S.Ct. 486, 491 (1990). If, however, the accused initiates conversation with the police by evincing "a willingness to and a desire for a generalized discussion about the investigation," Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983), then subsequent statements are admissible if the police can show a knowing and intelligent waiver of the right to counsel. Id. at 1044-45.

*8 It is undisputed that Shay's prior invocation of his right to counsel was in effect on the morning of June 4, 1992. It is also undisputed that the government was aware that Shay was represented by Attorney McPhee on that

date. There is no evidence that either Shay or McPhee requested that Shay be brought to Kelly's office; there is no evidence that the exemplars could not have been taken elsewhere; there is no evidence that Shay initiated conversation about the case prior to Kelly's improper question. [FN6] Under these circumstances, the government's unilateral decision to bring Shay to AUSA Kelly's office to speak with McPhee and AUSA Kelly's subsequent request that Shay tell him what he discussed with his attorney constituted an "initiation" on the part of the government. The June 4 statements must be suppressed. The statements made on June 11 must also be suppressed. It is undisputed that the June 11 session, "a proffer session of sorts," was conceived during the June 4 meeting, at which Shay apparently "expressed an interest in visiting with [the government] sometime [the same] week." Although the record is unclear as to whether the government or the defendant raised the issue of June 4, the fact that the June 11 meeting was "initiated" in the course of an improper interrogation renders it suspect.

The government urges this Court to conclude nevertheless that Shay's telephone calls to AUSA Kelly and Agent Kerr, informing them that he fired McPhee, constituted a waiver of his Fifth and Sixth Amendment rights prior to June 11. McPhee's status is not, however, dispositive. Under Edwards, an invocation of the right to counsel is inviolate until the accused initiates conversation. Whether or not Shay had fired McPhee, he was entitled to secure new counsel before the government initiated further discussions about the case. I conclude that the government has failed to meet its burden of proving that the June 11 session was initiated by Shay.

Shay's motion to suppress the June 4 and June 11 statements is allowed.

B. Suppression of Identification

Shay also moves to suppress the in- and out-of-court identifications made by Dwayne Armbrister. As recently restated by the First Circuit, the first issue is whether the identification procedure was "impermissibly suggestive." United States v. de Jesus-Rios, Nos. 91-1860, 91-1933, slip op. (1st Cir. Apr. 7, 1993). The de Jesus-Rios court held that a "show-up" procedure, whereby the police bring a potential witness to the station to view a suspect singly rather than in a line-up, is impermissibly suggestive. There is no distinction between a "show-up" and the showing of a single photograph in this case. See Hudson v. Blackburn, 601 F.2d 785, 789 (5th Cir.1979), cert. denied, 444 U.S. 1086 (1980).

A suggestive identification may be admissible, however, if under the totality of the circumstances it is shown to be reliable. Factors to be considered include: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the prior description; (4) the level of certainty demonstrated; and (5) the length of time between the crime and confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Allen v. Massachusetts, 926 F.2d 74, 81 (1st Cir.1991).

*9 According to Armbrister's testimony, the suspect was in the store for approximately fifteen minutes. Armbrister did not assist him with his purchases. The suspect spent two to three minutes at the register, however, standing at a distance from Armbrister of approximately two feet.

The testimony as to Armbrister's degree of attention is mixed. Although Armbrister, who worked on commission, generally paid little attention to small

sales, he paid more attention to the October 18 purchase because business was slow at the time. Armbrister testified that the October 18 purchaser's resistance to providing the personal information that Radio Shack requires for a receipt made the transaction stick in his mind; he also stated, however, that such behavior was common among their clientele. Armbrister's contradictory testimony on this point is suspect in light of the testimony of Alan Kingsbury, who also recalls the sale and who swears that the purchasers were two Middle Eastern men. The detailed nature of Armbrister's ultimate recollection suggests that he paid closer attention on October 18 than even he realized at any point prior to the resurgence of his memory on April 8.

Prior to the identification based upon the single photo Armbrister had provided no description of the suspect whatsoever. He did not recall the October 18 transaction. Even after seeing the single photo it took two months of repeated viewings and discussions with federal agents to "revive" his memory. His indeed was an "evolution in thinking," as styled by the government; because the photograph was shown to Armbrister at such an early stage, there is no truly independent memory to lend credence to his testimony and reliability to his identification. [FN7]

Before April 8, 1992, Armbrister could make no connection between the man identified and the October 18 transaction. He has testified, however, that he is now certain that his restored recollection is accurate.

The original length of time between the event and confrontation was approximately four months. At that point Armbrister was unable to recall the October 18 transaction; his recollection was restored two months later, after having viewed more photos and discussing the case with federal agents and others. [FN8] Although the fact that Armbrister was grieving in February might account for the lapse of memory had Armbrister been left alone between February and April, the record in this case establishes that Armbrister's memory was "jogged" by more than the passage of time.

The foregoing factors, taken together, demonstrate that Armbrister's identifications of Shay as the October 18 purchaser are wholly unreliable. The behavior of the agents in this case goes well beyond the facts of de Jesus-Rios; not only was the viewing of the single photo suggestive, but the agents' behavior following that showing was in itself so suggestive as to make it impossible for this Court to identify any part of Armbrister's testimony as the product of his independent memory.

*10 Shay's motion to suppress the identification of Dwayne Armbrister is allowed.

In sum, the motion to suppress statements (# s 85, 130) is allowed in part and denied in part. The motion to suppress the identification of Dwayne Armbrister (# 88) is allowed.

FN1. Before the grand jury Officer Bridgeforth stated that he was bringing Shay to Homicide to be "interrogated." I find that he was not using the word as a term of art. I credit his testimony that Homicide wanted to question the defendant.

FN2. Armbrister's testimony is inconsistent on the question of whether the ATF agents had shown him a large or small photo of Shay; the inconsistency is immaterial because both photos (exhibits 4 and 11) show the same

imperfection.

FN3. Kingsbury, who also recalled the October 18 sale, testified that the purchasers of the electronic components and toggle switch were two Middle Eastern men, one tall and one short. Kingsbury also testified that he helped the customers locate the items reflected upon the receipt.

FN4. It is undisputed that Shay asked whether he could leave and was told that he could. He then conversed with the officers for approximately eight minutes more and repeated the question. Again, he was answered in the affirmative. At that point he rose to go. On these facts, I conclude that there is no basis for the defendant's assertion that by asking whether he could leave he was, in reality, invoking his right to remain silent. Given that he continued to talk with the police after asking the question the first time, it would defy logic to conclude that he intended any more than to confirm whether he was, in fact, free to go. The police could not have understood the question as "an attempt to claim the privilege." Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir.) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)), cert. denied, 493 U.S. 969 (1989).

FN5. To the contrary, on October 31 Shay immediately asked to leave when informed that his father was coming to see him.

FN6. I do not find that the government planned to use the handwriting exemplar as a pretext for interrogating Shay without counsel on June 4; I do find, however, that Kelly's question cannot under any circumstances be interpreted as a statement "relating to routine incidents of the custodial relationship." Bradshaw, 462 U.S. at 1039.

FN7. The "scar" testimony is not persuasive. The large and small versions of the photograph shown to Armbrister do show a mark upon his upper right lip; the mark is not, however, appreciably clearer on the larger photograph than on the smaller version. Thus, to the extent that the photos "clearly" demonstrate the existence of a scar or mark, both versions are suggestive. Because Armbrister viewed either the larger or smaller photo before he "remembered" the scar, the government has not established that the testimony was the product of his independent memory.

FN8. I credit Armbrister's testimony that he had not read about the case in the newspapers. His testimony that he never discussed the case with coworkers, however, is not credible.

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