

NONPRECEDENTIAL

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,)
)
Plaintiff)
)
v.)
)
CRAIG M. HENDRICKS,)
RUSSELL ROBINSON, aka "Don,")
ELROY DOWE,)
DANIEL FLEMING,)
RANNEY LARONDE, aka "Ronnie,")
ANDY ANTOINE,)
RUDOLPH CLARKE,)
RAFAEL CINTRON,)
JACQUELYN CARR,)
)
Defendants)

CRIM. NO. 2004-05 F/R

MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court on the motion of Defendant Craig M. Hendricks to suppress all statements that Defendant Hendricks made on April 5, 2003, while he was in the custody of DEA, FBI, HIDTA, or the Virgin Islands Police Department. The Government opposes this motion. The Court held hearings on the matter on March 26, 2004, and March 30, 2004. For the reasons expressed herein, Defendant's motion will be granted.

I. Background

Defendant Hendricks has been indicted for drug, conspiracy, and money laundering charges. (Defendant's Motion at ¶ 1.) Pursuant to these charges, Defendant was arrested on April 5, 2003, and held in the custody of law enforcement. (Defendant's Motion at ¶ 2; Government's Opposition at pg. 1.) While in custody on April 5, 2003, Defendant Hendricks was interviewed for a period of approximately four hours. (Defendant's Motion at ¶ 2; Government's Opposition at pg. 3.) This interview was videotaped. (Defendant's Motion at ¶ 3; Government's Opposition at pg. 3.) Defense Counsel has been given an opportunity to review a copy of said videotape. (Defendant's Motion at ¶ 3.)

Defendant concedes that the Government produced a copy of a written, signed, and initialed Miranda waiver form. (Defendant's Motion at ¶ 5.) Defendant has attached said waiver to its Memorandum as Exhibit 1. At the hearing, Agent Tokarz was asked about Defendant Hendricks' response to the question "Do you want to make a statement without a lawyer?" on the Advise of Rights and Waiver Form. Agent Tokarz testified that he believed Defendant Hendricks had checked "YES." However, Defendant Hendricks actually checked "NO." (Defendant's Memorandum, Exhibit 1.)

Defendant points out that the videotape contains no evidence of Defendant Hendricks being read his Miranda rights. (Defendant's Motion at ¶ 4 -5; Defendant's Memorandum at pgs. 1 - 2.) Defendant suggests that this was done purposefully to avoid scrutiny of the advising of rights and now challenges the government to show that this process was not misleading or insufficient. (Defendant's Memorandum at pg. 2.) The Government contends that Defendant

was advised of his rights at 1:30pm on April 5, 2003, but that because Defense Counsel requested to have another attorney review the matter and then wanted to have discussions with Defendant, the interrogation did not commence until approximately 9:00pm. (Government's Opposition at pg. 4.) The Government claims that Defense Counsel was telephonically present when Defendant Hendricks was advised of his Miranda rights. (Government's Opposition at pg. 5.) Joe Mingolla's presence via telephone is indicated on the waiver form. (Defendant's Memorandum at Exhibit 1).

II. Analysis

A. Legal Standard

Under the guiding case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), if an attorney is not present while the defendant is being interrogated, then "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id. at 475 (citing Escobedo v. State of Illinois, 378 U.S. 478, 490, n. 14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977). Keeping this principle in mind, the relevant inquiry is whether in confessing, the defendant's will was overtaken. See Miller v. Fenton, 796 F.2d 598, 604 (3d Cir.1986) (citing Schneckloth v. Bustamonte, supra, 412 U.S. at 225-26, 93 S.Ct. at 2046-47; Procurier v. Atchley, supra, 400 U.S. at 453, 91 S.Ct. at 489; Haynes v. Washington, supra, 373 U.S. at 513, 83 S.Ct. at 1342 (1963); Lynumn v. Illinois, 372 U.S. 528, 534, 83 S.Ct. 917, 920, 9 L.Ed.2d 922 (1963); Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961); Leyra v. Denno, supra, 347 U.S. at 558, 74 S.Ct. at 717 (1954); Watts v. Indiana, supra,

338 U.S. at 53, 69 S.Ct. at 1349). The Court must employ a totality of the circumstances approach in determining whether a defendant's confession was voluntary. See id. at 604 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973); Procunier v. Atchley, 400 U.S. 446, 453, 91 S.Ct. 485, 489, 27 L.Ed.2d 524 (1971); Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 1424, 22 L.Ed.2d 684 (1969); Boulden v. Holman, 394 U.S. 478, 480, 89 S.Ct. 1138, 1139, 22 L.Ed.2d 433 (1969); Blackburn v. Alabama, supra, 361 U.S. at 206, 80 S.Ct. at 279; Fikes v. Alabama, supra, 352 U.S. at 197, 77 S.Ct. at 284). Such factors should include:

the youth of the accused; his lack of education or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

Id. at 604 (citing Schneckloth v. Bustamonte, supra, 412 U.S. at 226, 93 S.Ct. at 2047 (1973) (citations omitted)).

B. Waiver of Miranda Rights

The Government has the burden of proof to show that Defendant Hendricks knowingly and voluntarily waived his Miranda rights. See, e.g., Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602 (1966). At the first hearing for this matter, the Government requested a continuance for the reason that, based on the unexpected testimony given by Defendant Hendricks at the hearing, the Government believed it might need to call an additional witness. The Government specifically acknowledged that it may need Attorney Joe Mingolla to testify on its behalf. However, the Government produced no testimony from Attorney Mingolla at the second hearing.

Following the second hearing on this matter and after the Court received closing statements from both parties, it was still unclear whether Defendant Hendricks had waived his right to have counsel present *during* his interview with law enforcement. Accordingly, the Court issued an Order requesting additional briefing from both parties as to whether or not Defendant Hendricks' right to have counsel present during his interview was violated after Defendant Hendricks asserted that he did not want to make a statement without a lawyer. (Order entered by Chief Judge Finch on March 26, 2004.) In United States' Supplemental Opposition to Defendant Hendricks' Motion to Suppress Statements, the Government claims that Defendant Hendricks signed the waiver form after Agent Tokarz wrote "Attorney Joe Mingolla present via telephone" on it and that therefore Defendant's invocation of his right to counsel was ambiguous. However, the concern is not whether Defendant Hendricks consented to having his attorney present via telephone for the purpose of signing the waiver form. The pertinent issue is whether Defendant Hendricks waived his right to have an attorney present during the actual interrogation. At the hearing, it was established that neither Attorney Mingolla nor any other attorney was present, in person or telephonically, during Defendant Hendricks' interview with law enforcement on April 5, 2003.

The Government has provided no evidence that Defendant Hendricks waived his right to make a statement without a lawyer. The Government has not even provided any evidence that Defendant Hendricks was re-advised of his Miranda rights after Defendant Hendricks stated that he did not want to make a statement without a lawyer. This would have been necessary, though not sufficient, for Defendant Hendricks to waive his Miranda rights after he first invoked those

rights. See U.S. v. Tyler, 164 F.3d 150, 155 (3d Cir. 1998). The fact that Defendant Hendricks signed a form entitled “Advise of Rights and Waiver Form” does not mean that he waived his Miranda rights, especially when Defendant specifically noted on the form that he did not want to make a statement without a lawyer. By signing and initialing the form, Defendant Hendricks was merely acknowledging that he understood his rights, that he did *not* want to make a statement without a lawyer, that he had not been induced to make a statement by promises or threats, and that he was not under the influence of drugs or alcohol at the time.

It is irrelevant that Defendant Hendricks’ attorney was present on the telephone when Defendant signed this form. Similarly, it does not matter that Defendant Hendricks was given an opportunity to speak with his attorney and also another attorney *before* the interrogation began. The critical point is that an interrogation should not have been initiated until Defendant Hendricks unequivocally waived his Miranda rights. The Government has failed to show that this ever occurred.

III. Conclusion

Based on the totality of the circumstances and considering the aforementioned factors, the Court concludes that the Government has presented no evidence that Defendant Hendricks waived his right to have a lawyer present while he was interrogated in custody. To the contrary, the Court finds that Defendant Hendricks unambiguously invoked his right to counsel by checking “NO” to the question “Do you want to make a statement without a lawyer?” on the Advise of Rights and Waiver Form that he signed. (Defendant’s Memorandum, Exhibit 1.)

Therefore, the statements that Defendant Hendricks made to law enforcement officials on April 5, 2003, while he was in custody, must be suppressed.

Accordingly, Defendant Hendricks' Motion for Suppression of Defendant's Statements will be granted. An appropriate Order is attached.

ENTER:

Dated: April 26, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Hon. George W. Cannon
Patricia M. Sulzbach, Esq.
Eric Chancellor, Esq.
Andrew Capdeville, Esq.
Stephen Bruschi, Esq.
Leonard B. Francis, Esq.
Anna Paiewonsky, Esq.
Kevin Weatherbee, Esq.
Clive Rivers, Esq.
Treston E. Moore, Esq.
Jomo Meade, Esq.

NOT FOR PUBLICATION

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) JACQUELYN CARR,)
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) Defendants)
)
 _____)

CRIM. NO. 2004-05F/R

ORDER

THIS MATTER is before the Court on Defendant Craig M. Hendricks' Motion for Suppression of Defendant's Statements, docket item # 323. In accordance with the attached Memorandum Opinion, it is hereby

ORDERED that Defendant's motion is **GRANTED**.

ENTER:

Dated: April 26, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By:

Deputy Clerk

cc: Hon. George W. Cannon
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