

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

01-CR-32-C-2

JAMES H. FLEMING,

Defendant.

REPORT

Defendant James H. Fleming has filed a motion to suppress statements he made to two Madison police detectives on November 24, 1998. Fleming claims that: 1) The government violated F. R. Cr. P. 5 and 18 U.S.C. § 3501 because the detectives were working at the behest of the FBI and obtained his confession without promptly presenting him to a federal judge for an initial appearance; 2) The government violated his Sixth Amendment right to counsel because the detectives failed to tell him that he had been charged with a bank robbery before questioning him about it; and 3) His confession was involuntary. For the reasons stated below, I am recommending that this court deny Fleming's motion in its entirety.

On July 11, 2001, I held an evidentiary hearing on Fleming's motion. Having considered the exhibits, having seen and heard the witnesses and having determined their credibility based on the totality of circumstances, I find the following facts:

Facts

On April 29, 1997, someone used a firearm to rob a Clark Oil station in Madison, Wisconsin. On April 30, 1997, Madison Police Department Detective Leon Dandurand arrested James Fleming on a parole violation warrant, then obtained from the robbery victim an identification of Fleming as the robber. Detective Dandurand attempted to interview Fleming. After reading Fleming his constitutional rights and obtaining Fleming's acknowledgment that he understood his rights and was willing to talk, Detective Dandurand advised Fleming about the Clark Oil robbery and indicated that Fleming fit the suspect's description. Fleming provided an alibi but declined to name his witnesses. The interview ended quickly. Apparently, Fleming was released from his parole hold shortly thereafter.

On August 20, 1997, someone used a firearm to rob the Great Midwest Bank in Dane County, Wisconsin. MPD and the FBI investigated the case cooperatively. On August 21, 1997, MPD Detective Vic Heitzkey and FBI Special Agent Steve Paulson jointly met with an informant to obtain information about the robbery. Later that same day, MPD obtained a search warrant for an apartment on Northport Drive. Agent Paulson assisted in its execution and was present during the detectives' interview of a resident.

On August 21, 1997, Special Agent Paulson met with First Assistant United States Attorney Grant Johnson to discuss the Great Midwest bank robbery. Agent Paulson advised Johnson that there were two suspects (Fleming and Robert Sutton), both of whom also were suspects in recent armed robberies of an Applebee's Restaurant and a Kohl's grocery store

in Madison, Wisconsin. Agent Paulson explained that MPD was participating in the investigation and had expressed interest in having the state prosecute all related armed robbery charges if possible. Johnson responded that if there were additional related state charges, it would be appropriate to defer to the state and let it prosecute the defendants on all charges, including the bank robbery.

On August 25, 1997, Agent Paulson contacted the Milwaukee FBI field office to request assistance locating Fleming. On August 26, 1997, Detectives Heitzkey and Dandurand drove with Agent Paulson to Milwaukee where a Milwaukee police detective working with the FBI's fugitive task force guided them during their unsuccessful search.

On August 28, 1997, the Circuit Court for Dane County, Wisconsin issued a criminal complaint and arrest warrant for James H. Fleming, charging him with the armed bank robbery of Great Midwest. The criminal complaint filed in Dane County Circuit Court charged both Fleming and co-defendant Robert D. Sutton with armed bank robbery.

The state located Sutton but not Fleming, so it tried Sutton alone. On April 29, 1998 a jury acquitted Sutton at trial of the armed bank robbery charge. The Madison police detectives knew of this instantly; the FBI learned of it soon thereafter.

On September 25, 1998, someone at the Milwaukee County Criminal Justice Facility called Agent Paulson to advise that Fleming had been arrested in Milwaukee on September 17, 1998 on local charges. This person was calling the Madison FBI because the computer showed a probation hold on Fleming as well as a warrant from Dane County for bank

robbery. Apparently Paulson shared this information with the Madison detectives who followed up to obtain additional information about Fleming's status.

Although the Madison police detectives did not know this, Agent Steven Marshall had replaced Agent Paulson as the FBI's investigator on the Great Midwest bank robbery in September 1998. The detectives continued to use Agent Paulson as their contact.

On November 17, 1998, Detective Dandurand told Agent Paulson that Fleming had a probation revocation hearing set in Milwaukee for late November. Fleming's Milwaukee probation agent had told Detective Dandurand that if Fleming were revoked he faced a maximum 15 year sentence. Detective Dandurand told Agent Paulson that once Fleming had completed his probation and revocation hearings as well as any other hearings regarding charges pending against him in Milwaukee, Fleming would be sent to Madison to face Dane County's bank robbery charge. Detective Dandurand promised to keep Agent Paulson informed of the status of Fleming's prosecution.

On November 24, 1998, at approximately 2:00 p.m., Detective Ralph Spano of the Milwaukee Police Department telephoned Detective Dandurand to advise him that he had just completed an interview of James Fleming regarding a Milwaukee bank robbery. Fleming also had told Detective Spano that he had committed some robberies in Madison, including the Great Midwest Savings Bank. Fleming told Detective Spano that he was willing to talk to Madison detectives about the case.

Detectives Dandurand and Heitzkey immediately drove to Milwaukee where they met Detective Spano and his partner at the Milwaukee Criminal Investigation Bureau at

approximately 4:15 p.m. that same afternoon. The Madison detectives did not advise Agents Paulson or Marshall of this development before they drove to Milwaukee. Agents Paulson and Marshall learned of Fleming's interview afterward.

The Milwaukee detectives debriefed the Madison detectives on Fleming. Fleming had been talking freely all day and was awaiting the arrival of the Madison detectives, having just finished a meal from McDonald's provided by the Milwaukee detectives. The Milwaukee detectives took the Madison detectives to Fleming in an interview room where greetings were exchanged; Fleming, Dandurand and Heitzkey all knew each other from previous professional contacts.

By the time the Madison detectives met with Fleming at approximately 5:00 p.m. on November 24, 1998, Fleming had spent the entire day in the Milwaukee Criminal Investigation Bureau building, having been brought there from the House of Corrections very early that same morning. In his discussions with the Milwaukee detectives earlier that day, Fleming had incriminated himself in a number of Milwaukee area robberies. During the course of his interrogation by the Milwaukee detectives, Fleming had been provided with cigarettes and food as requested. Fleming estimates that he had smoked about 20 cigarettes during the day. The room in which he was interviewed by both sets of detectives was approximately 8 feet by 10 feet. Fleming had one hand handcuffed to either a piece of furniture or a wall bar, but otherwise was not restrained.

Detective Dandurand began by explaining that they wanted to ask Fleming about the Great Midwest robbery, the warrant for which was in place and for which Fleming would be

returned to Dane County for trial. Detective Dandurand then read Fleming his *Miranda* rights off of a printed wallet card. Detective Dandurand asked Fleming whether he had ever heard those rights before. Fleming acknowledged that he had heard his rights and was willing to talk to the detectives about the Great Midwest robbery.

The interview lasted from approximately 5:00 p.m. to 6:00 p.m. The officers provided cigarettes and soft drinks to Fleming at his request; Fleming estimates that he smoked approximately 13 during the hour. Fleming was cooperative, cogent and voluble through the entire interview, providing great detail and humorous anecdotes about the Great Midwest robbery and other matters. His narratives and his answers to questions were appropriate to the circumstances.

Fleming did not exhibit any signs of being high on any drug, nor any signs of experiencing withdrawal from any drug. That is, he did not appear nervous or agitated, his eyes were normal, he did not slur his words, and he was able to interact appropriately with the detectives. Fleming did not complain of feeling high, in withdrawal, or otherwise out of sorts, nor did he describe any symptoms that would have alerted the officers that he was not feeling well. Detective Dandurand has had past experience in narcotics enforcement, including three or four years in the police department's narcotics section, as well as training at the local state and federal level on the use and abuse of drugs and their effect on a person's system. Detective Dandurand holds a master's degree in social work with his primary focus on substance abuse and mental illness, and he worked for one year as an intern for the Dane

County Mental Health Agency while in graduate school. In other words, Detective Dandurand has had a lot of contact with substance abusers in a number of contexts. He has interacted with a lot of people who were intoxicated, high or going through withdrawal. Detective Dandurand saw no signs that Fleming was high or withdrawing from drugs during their interaction on November 24, 1998.

After questioning Fleming about the Great Midwest robbery, Detective Dandurand advised him that they were aware of at least a dozen other robberies in which they believed Fleming had a hand. Fleming agreed to provide information “off the record.” More specifically, Fleming was willing to point the detectives in the right direction, but would not admit to anything specifically until he had had a chance to think things over. The detectives accepted Fleming’s conditions. Detective Dandurand asked Fleming questions about specific armed robberies, and Fleming not only provided this information but volunteered information about other robberies. Although Detective Dandurand took notes, he did not include any of this “off the record” information in his typed report.

As the interrogation wound down, Fleming stated that he thought he would be charged in federal court in Milwaukee with robbery and he asked whether the Great Midwest charge could be made federal so that the matter could be disposed of in a consolidated proceeding. Detective Dandurand responded that the Madison charge was in state court and that it would be up to the state and federal prosecutors to arrange anything else. Detective Dandurand confessed that he had no idea how something like that would work; at that

point, the Great Midwest charge was in state court and Detective Dandurand had no power to change that.

Detective Dandurand prepared a written report of the on-the-record portion of Fleming's interview on November 30, 1998. On December 1, 1998, Detective Spano of Milwaukee telefaxed to Agent Paulson in Madison a copy of an offense report with Fleming's statement. It is not clear whether Detective Spano provided his own report, Detective Dandurand's report, or both.

The Madison police detectives were not acting as agents or at the behest of the FBI at any point during their investigation. As far as they were concerned, they were conducting their own investigation into violations of state law which would be prosecuted in the Dane County Circuit Court. Although Detectives Dandurand and Heitzkey worked with Agent Paulson and were aware of his interest in the case, they were not aware that the federal government had any independent interest in prosecuting Fleming on any pending charges.

Analysis

I. Collusion to Evade the Prompt Presentment Rule

Fleming's first claim is that the MPD detectives colluded with the FBI to obtain Fleming's confession in violation of F.R. Cr. P. 5(a)'s prompt presentment requirement. In *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), the Supreme Court ruled that the federal government was required to present

arrested defendants to a judicial officer without unnecessary delay; failure to do so would result in the suppression of post-arrest confessions. Congress limited the reach of the *McNabb-Mallory* rule by enacting 18 U.S.C. § 3501(c) which establishes that the confession of a defendant in custody would not be deemed inadmissible solely because the defendant's initial appearance was delayed, so long as the confession was made within six hours immediately following his arrest or detention and so long as the court determined that the confession was otherwise voluntary.

Time spent in state custody does not count against § 3501(c)'s six hour limit unless the defendant clearly establishes a "working arrangement" between state and federal agents "designingly utilized" to circumvent the federal prompt presentment requirement. *See United States v. Carter*, 910 F.2d 1525, 1528 (7th Cir. 1990); *United States v. Gaines*, 555 F.2d 618, 622, 625 (7th Cir. 1977). As Fleming admits, his burden of persuasion on this point is heavy. *See Brief in Support*, dkt. 65, at 12 n.4.

Here, the evidence shows that the FBI and MPD worked together closely to investigate the Great Midwest robbery. It appears, however, that the United States Attorney's Office decided early in the investigation that if the state could prosecute Fleming on additional charges of armed robbery, the federal government would acquiesce to the state adding Great Midwest to its package. Regardless of this, there is no evidence that MPD intended to relinquish to the federal government the prosecution of Fleming for bank robbery.

All indications are that Detectives Dandurand and Heitzkey viewed Fleming as their target, not the FBI's: the Dane County District Attorney filed a criminal complaint charging Fleming with armed robbery of Great Midwest but the United States Attorney did not. Although the FBI had known since September 25, 1998 that Fleming was in state custody in Milwaukee, it had made no attempt to interview him, to bring federal charges against him, or to bring him into federal custody. This bespeaks Agent Paulson's assumption that Fleming was MPD's target. When Detectives Dandurand and Heitzkey learned on November 24, 1998 from Milwaukee detectives that Fleming was sitting in an interview room waiting to talk to them about Great Midwest, they jumped in their car and drove straight to Milwaukee without even alerting Agents Paulson or Marshall, let alone seeking their assistance or input. The FBI didn't even know about Fleming's custodial interview until after it occurred. In sum, there was no working arrangement between the FBI and MPD on November 24, 1998 designed to obtain Fleming's interview in violation of the federal prompt presentment rule. This is not a basis to grant Fleming's motion to suppress.

II. Failure To Inform Fleming of the Pending Charge

Fleming's second claim is that the detectives failed to inform him that he had been charged with the robbery of the Great Midwest Bank before questioning him about it. Although it is not clear whether Fleming even *has* a Sixth Amendment right to be so notified, *cf. Patterson v. Illinois*, 487 U.S. 285, 295 n. 8 (1988) (Court expresses no opinion on the

issue), the legal analysis is foreshortened by my findings of fact: at the beginning of the November 24 1998 interview, Detective Dandurand told Fleming that Dane County's warrant for the Great Midwest robbery was in place against him and that he would be brought back to Madison for trial. This notification, along with the recitation of *Miranda* warnings amply protected Fleming's Sixth Amendment rights. Fleming is not entitled to suppression on this claim.

III. Voluntariness

Finally, Fleming contends that his confession was involuntary because drugs were interfering with his ability to make rational decisions at the time he spoke with the Madison detectives. At the evidentiary hearing, Fleming testified that he had been smoking crack most of the night before he was interviewed by the Milwaukee and Madison detectives. Apparently, detention in the house of corrections was no barrier to obtaining or consuming controlled substances. It is not clear from Fleming's turbid testimony whether he is claiming that he was still high on crack, was withdrawing from crack, or both. Fleming also throws into the mix the nicotine buzz he achieved from chain-smoking the detectives' cigarettes all day. If Fleming's admissions are true, then the combination of crack and nicotine could have left him frothy-headed on November 24, 1998.

I cannot determine whether Fleming actually binged on crack at the jail as he claims, but I *have* determined two other material facts: Fleming was not high or in withdrawal when

he spoke to the detectives, and the detectives did not engage in any coercive activity that could have overborne Fleming's will, whether he was at full strength or running on fumes. These findings dispose of Fleming's claim.

A confession is voluntary if the totality of the circumstances demonstrates that it was the product of rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics calculated to overcome the defendant's free will. *Watson v. DeTella*, 122 F.3d 450, 453 (7th Cir. 1997). Among the factors relevant to this inquiry are the nature and duration of the questioning used, whether the defendant was prevented from eating or sleeping and whether the defendant was under the influence of drugs or alcohol. *Id.* Also relevant are the defendant's personal characteristics, such as age, intelligence, education, mental state, experience in the criminal justice system, and whether the person has been provided with advice of his rights. *Id.*; *United States v. Brooks*, 125 F.3d 484, 492 (7th Cir. 1997).

Absent some showing of some type of official coercion, however, a defendant's personal characteristics alone are insufficient to render a confession involuntary. *Id.*, quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Thus, although drug intoxication is a relevant circumstance in the voluntariness equation, it cannot by itself establish coercion; it merely has the potential to make the suspect more susceptible to coercive interrogation techniques. See *United States v. Montgomery*, 14 F.3d 1189, 1195 (7th Cir. 1994). So, if the detectives had reason to know that Fleming was high, then this court could find that an

otherwise legally inconsequential level of coercive behavior was unacceptable under the circumstances. *Id.*

The credible evidence establishes that Fleming exhibited no symptoms of being high or in withdrawal. Fleming suggests that his garrulousness and ebullience themselves were symptoms and signs of his crack and nicotine jag, but there is no real evidence that this is so. True, back in April 1997 Fleming had refused to discuss the Clark Oil robbery with Detective Dandurand in any detail, but the circumstances were sufficiently different that I cannot say which variables accounted for Fleming's decision to come clean during his interrogation 19 months later. The evidence does not establish that Fleming's loquacity on November 24, 1998 was induced by crack, nicotine, caffeine, or something else.¹ To the contrary, Fleming was consciously controlling his fate in a rational manner: he floated the notion of consolidating his current and looming state and federal charges in one package deal, and he agreed to provide specified information off the record. Fleming's handling of these issues demonstrated his ability at the time to make discerning choices based on his assessment of his interests.

Ultimately, though, Fleming's state of mind is irrelevant because the detectives did not coerce Fleming's confession. The evidence establishes that this was a professionally

¹ I suppose it is irrelevant to a voluntariness analysis whether a suspect is under the influence of licit, as opposed to illicit drugs; a cigarette, junk food or Mountain Dew high probably could alter thought processes sufficiently to support a Fifth Amendment claim. But if cops get the word that providing cheeseburgers, soda pop and cigarettes during an interrogation could lead to suppression motions, then they're going to switch to rice cakes and skim milk in a smoke-free setting, which would put a whole new spin on future coerced confession claims.

handled, cordial interrogation. Even if Fleming was affected by whatever noxious substances he had ingested, he did not show it and the detectives did not take advantage of it. They had no clue that Fleming might not have been himself, so they never had a genuine opportunity to take advantage of him if they had been inclined to do so. The evidence shows that they were not inclined to take advantage of Fleming. They asked him questions, he provided answers, and no constitutional violations took place. This is not a basis to grant Fleming's suppression motion.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant James Fleming's motion to suppress his statements.

Entered this 29th day of August, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge