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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

01-CR-67-S-2

CHRISTOPHER MULLEN,

Defendant.

REPORT

Before the court for report and recommendation is defendant Christopher Mullen's motion to suppress his January 24, 2001 statements to drug task force agents. Mullen contends that the agents improperly induced his confession by a false promise of immunity. For the reasons stated below I am recommending that this court deny Mullen's motion.

On August 30, 2001, I held an evidentiary hearing on Mullen's motion. Having heard and seen the witnesses testify and having judged their credibility under the totality of the circumstances, I find the following facts:

Facts

Russell Cragin is a sergeant in the Dunn County Sheriff's Department with 18 years of law enforcement experience. Michael Olson is an investigator in the Menomonie Police

Department with 20 years of law enforcement experience. Both officers are members of the West Central Drug Enforcement Task Force and have participated in thousands of drug investigations in northern Wisconsin.

In January 2001, a confidential informant advised Sergeant Cragin that Joseph Bryan and others were selling cocaine in Dunn County. At the direction of the agents, the informant bought drugs from Bryan, which led to a search warrant for Bryan's residence, followed by Bryan's arrest on January 22, 2001. Bryan provided a statement that led the agents to interview other suspects on January 23, 2001. Everyone interviewed named defendant Christopher Mullen as the courier who picked up cocaine in Texas and brought it back to Wisconsin. Acting on this information, Sergeant Cragin called Mullen's residence and left a message asking him to drop by the sheriff's department for an interview. On January 24, 2001, Mullen returned the call and agreed to come in.

At approximately 7:30 p.m. on January 24, 2001, Mullen voluntarily appeared at the Dunn County Sheriff's Department to speak with Sergeant Cragin and Investigator Olson. The three men met in a large conference room and sat at a conference table. The door remained open throughout the hour-long interview. At the outset, Sergeant Cragin told Mullen that he was not under arrest, he would not be arrested, and he was free to leave at any time. Mullen appeared to understand these things and responded that he had expected to be contacted by the police. Sergeant Cragin did not advise Mullen of his *Miranda* rights.

Mullen was 21 years old and had attended college at UW-Stout. His criminal history was limited to a couple of citations for underage drinking and operating an automobile after revocation. Mullen was nervous but appeared in control of his faculties. The entire interview was low key and conversational with no raised voices, no physical contact, no displays of force and no other indicia of intimidation or coercion.

After assuring Mullen that he was not under arrest, Sergeant Cragin told him that task force agents had spoken with three admitted participants in the Wisconsin/Texas cocaine trafficking ring and all three had fingered Mullen as their courier. Sergeant Cragin advised Mullen that he faced prosecution in this matter and that the U.S. Attorney in Madison had agreed to press federal charges. Sergeant Cragin then made what has been dubbed the "bus statement": Sergeant Cragin told Mullen that there was a bus going to federal court in Madison and Mullen would be on it. Sergeant Cragin, Investigator Olson and the cooperators would be at the front of the bus; everyone else would be in the back. Those in the back would be wearing handcuffs and they wouldn't be coming back. Sergeant Cragin told Mullen he would have to decide whether he was going to Madison in the front with the cooperators or in the back with the non-cooperators.

There was no actual bus going to federal court in Madison; the point Sergeant Cragin was trying to make was that Mullen had to choose whether to align himself with the agents by cooperating and providing a statement. Although he never said this, Sergeant Cragin intended to aid all his cooperators by advising the U. S. Attorney's Office in Madison of

their cooperation. Sergeant Cragin did not intend to seek immunity for any cooperator and he did not intend for Mullen to interpret the bus statement as an offer of transactional immunity.

But the message sent was not the message received. Mullen, a college lad who was in way over his head, heard what he wanted to hear. He interpreted Sergeant Cragin's statement literally, believing that there was an actual law enforcement bus with a physical partition in the middle that divided the agents and their uncharged witnesses from the charged criminal defendants in the back. Mullen inferred that his status as either an uncharged witness or a charged defendant depended on whether he cooperated. In other words, Mullen interpreted Sergeant Cragin's bus statement to be an offer of immunity in exchange for cooperation. Despite the fact that Sergeant Cragin actually hadn't explicitly said any of this, Mullen did not ask the sergeant to explain what *he* meant by his bus statement. Based on his incorrect interpretation of the bus statement, Mullen provided a complete confession.

When Mullen was done answering questions, Sergeant Cragin asked Mullen to provide a handwritten statement recapitulating his oral statements. Mullen refused, stating that he probably should talk to someone before he did this. Sergeant Cragin then offered his own handwritten notes to Mullen to review and sign; Mullen declined.

The interview over, Mullen went home. As had been his intention, Sergeant Cragin timely advised the U.S. Attorney's Office of Mullen's cooperation. The U.S. Attorney sent

Mullen a target letter, to which he apparently did not respond; the instant indictment resulted and Mullen, to his surprise and chagrin, now faces federal drug trafficking charges.

Analysis

> *". . . and he shall separate them one from another, as a shepherd divideth his sheep from the goats; and he shall set the sheep on his right hand but the goats on the left."*
>
> Matt. 25:32

Does the failure to recognize and appreciate the abstractness of a metaphor entitle a literal-minded listener to prevail on a claim that he was intentionally misled by it? Mullen asks this court to suppress his January 24, 2001 statement on the ground that it was improperly induced by a false promise of immunity, namely Sergeant Cragin's bus statement. Whether we analyze this claim under constitutional or contract principles, Mullen cannot prevail.[1]

Let's start with constitutional principles, the only argument Mullen actually raises in his brief. A statement is voluntary if the totality of 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. *United States v. Kontny*, 238 F.3d 815, 818 (7th Cir. 2001). A false promise of non-

[1] Mullen does not seek specific performance of the inferred promise, perhaps recognizing that law enforcement agents cannot bind the sovereign in this fashion. *See United States v. Fuzer*, 18 F.3d 517, 520-21 (7th Cir. 1994).

prosecution in exchange for cooperation conceivably could render a statement involuntary because a rational person might well rely on it to his detriment. *Id; see also United States v. Rutledge*, 900 F.2d 1127, 1129-30 (7th Cir. 1990). As the court stated in *Rutledge*,

> If the officers, fully intending to use anything [the defendant] said against him, had said to him "Tell us all you know about the drug trade, and we promise you that nothing you tell us will be used against you," then he would have a strong argument that any ensuing confession had been extracted by fraud and was involuntary. . . .
>
> At the other extreme, if the officers had merely promised [the defendant] to inform the prosecutors of his cooperation, or had stated that, other things being equal, cooperation is helpful to an accused, or had reminded him that while cooperation might help him the government would not hesitate to use anything he said against him, there could be no serious argument that he had been coerced to confess.

United States v. Rutledge, 900 F.2d at 1130.

Here, Sergeant Cragin promised Mullen nothing. Whether one labels the bus statement a figure of speech, a metaphor, or even interprets it literally, it offered Mullen no tangible succor. Like many metaphors, the bus statement is abstract enough to support conflicting interpretations of it. But because Sergeant Cragin honestly did not intend for Mullen to interpret the statement as an offer of pocket immunity, he did not affirmatively mislead Mullen. Absent a showing that Sergeant Cragin *affirmatively* misled him, Mullen cannot possibly prevail. *See United States v. Kontny*, 238 F.3d at 819.

But this analysis probably overstates the legal significance of the bus statement: regardless what Sergeant Cragin *meant* to offer, he actually offered Mullen nothing except a bus ride to Madison. "The issue was not misrepresented because it was not represented at

all." *Pharr v. Gudmanson*, 951 F.2d 117, 120 (7th Cir. 1991). Investigator Olson, who is as close to a neutral observer as we've got, testified at the evidentiary hearing that he didn't know what the bus statement meant. This is the most objectively reasonable interpretation of all.

The Seventh Circuit has indicated that a defendant's mistaken belief that he is providing testimony under a grant of immunity can bind the government if that belief is reasonable, *see United States v. Cahill*, 920 F.2d 421, 427 (7th Cir. 1990). However, the court's subsequent pronouncements in cases such as *Kontny*, *supra*, almost certainly trump *Cahill's* dicta. In the absence of police misconduct, a suspect's mistaken belief that he has been immunized cannot be honored, no matter how reasonable that belief might be.

But even if the court's observation in *Cahill* is still viable, it does not help Mullen. No objective listener reasonably could have inferred an actual promise of immunity from the bus statement because it was just too hopelessly vague. Indeed, as the government notes, Mullen himself doubted the value and enforceability of Sergeant Cragin's "promise" at the time he heard it; why else would he refuse to provide a written statement until he obtained outside advice? If he honestly believed he was now a sheep rather than a goat, he had nothing to fear from putting pen to paper.

Focusing on the police misconduct requirement, Mullen asks this court to infer Sergeant Cragin's intent to mislead him from the very fact that he used a metaphor instead of making a concrete offer. Having seen and heard the witnesses and having considered the

reasonableness of Mullen's argument under the totality of the circumstances, I draw no such inference. Although Sergeant Cragin created unnecessary and unfortunate confusion, I have found as a fact that he did not *intend* to mislead Mullen. Further, although it would be easier for all concerned if agents eschewed vague metaphors during interrogations, there is no legal impediment to an agent drawing out a careless interviewee by making inscrutable pronouncements like Sergeant Cragin's bus statement. As the court noted in *Rutledge*,

> The policeman is not a fiduciary of the suspect. The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible."

900 F.2d at 1129.

Mullen extracted concrete meaning from the bus statement at his own peril. A defendant who mistakenly misinterprets the actual offer made by the police has no one to blame but himself. *United States v. Long*, 852 F.2d 975, 978 (7th Cir. 1988). "Hindsight realization that a deal was not as good as originally hoped for is not sufficient reason to suppress such evidence." *Id; see also United States v. Danser*, 110 F.Supp. 2d 792, 805 (S.D. Ind.1999)("to the extent [the defendant] mistakenly (but unreasonably) believed that Det. Swain was 'promising' him immunity or even leniency, this does not render his inculpatory statements involuntary").

Although Mullen was a nervous first-timer during his interrogation, it is not as if he had been stripped of his ability to make rational decisions. He was not under arrest and he knew it: he voluntarily came to the sheriff's department, was told that he was not under

arrest, was told that he could leave whenever he wanted, was interviewed with the exit door ajar, and he left for home when the interview concluded. He was 21 years old and had about two years of college under his belt. He was sober, sane and lucid. In other words, he was old enough and smart enough to protect his own interests, and nothing that the agents said or did prevented him from looking out for number one. For instance, Mullen was wary enough of the agents to decline their offer to provide a written statement or to sign off on Sergeant Cragin's notes until he "talked to somebody." Mullen's problem is not that his will was overborne or that the agents misled him; his problem is that his unexpressed hope that he could somehow make this all just go away made him careless.

Mullen has realized in hindsight that there are things he could have done differently on January 24 to protect himself. Most pertinent to his suppression motion, Mullen should have asked Sergeant Cragin what in the world the bus statement *really* meant. His failure to do so cannot be laid at the agents' feet. Accordingly, his decision to confess was legally voluntary.

Although Mullen hasn't argued contract principles, they work no better for him. Certainly the government is required to keep promises of leniency that it actually makes, but the starting point is the existence of an actual promise by the prosecutor. *See United States v. Eliason*, 3 F.3d 1149, 1152-53 (7th Cir. 1993); *cf. United States v. $87,118.00 in United States Currency*, 95 F.3d 511, 516-17 (7th Cir. 1996)(where written proffer agreement between criminal defendant and U.S. Attorney's Office did not address possibility of

subsequent civil forfeiture proceeding, the written agreement was not ambiguous and government could seek forfeiture). As the court noted in *Mays v. Trump Indiana, Inc.*, 255 F.3d 351 (7th Cir. 2001),

> [A] meeting of the minds on all essential terms must exist in order to form a binding contract. . . . Without an express statement of intent, the focus is on whether the contract is too indefinite to enforce. Thus, the existence or nonexistence of a contract turns on whether material terms are missing. And here, material terms are absent in spades.

Id. at 357-58. The same is true here: there was no meeting of the minds, no express statement of the parties' intent, and no statement of material terms. Therefore, there was no contract. Mullen is not entitled to suppression on this basis.

RECOMMENDATION

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

Entered this 19th day of September, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge