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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

02-CR-133-S-01

FREDERICK KEVIN GIPSON,

Defendant.

REPORT

Before the court for report and recommendation is defendant Frederick Kevin Gipson's motion to suppress statements he made to drug agents while a resident at Dane County's Work Release Center. Gipson contends that the agents did not read him his *Miranda* rights and that they coerced him into making incriminating statements. For the reasons stated below, I am recommending that this court deny Gipson's motion.

On December 19, 2002, this court held an evidentiary hearing. Having considered the testimony, Gipson's affidavit and the exhibits, I find the following facts:

Facts

Acting on a tip, on October 1, 2002 at about 9:25 p.m., agents from the DEA and Wisconsin's DNE visited Apartment No. 9 at 32 Heritage Circle, Madison, Wisconsin to

look for drugs. They found Marcie A. Maier and Harrunah R. Samori in possession of a kilogram of cocaine. Maier and Samori both told officers that the cocaine belonged to Frederick Gipson, who had bought it from Samori the previous day for $20,000.

Gipson was serving a state work release sentence and was housed at the county's work release facility on Rimrock Road. Wishing to interview Gipson, Agents Michelle Smith, Craig Grywalsky and Jerry Becka drove to the center that same evening. They arrived at approximately 10:50 p.m. At the agents' request, the deputies brought Gipson to a conference room off of the lobby. The room was approximately 8 x 14 feet, furnished with tables and chairs, high windows to the exterior, and lower windows facing into the lobby. When Gipson arrived, he was wearing jail blues. He did not appear tired and his demeanor was calm and pleasant. The agents left the door to the lobby open and they did not handcuff, shackle or otherwise make physical contact with Gipson. The agents were in street clothes, and only Grywalsky was armed, although his weapon was not visible.

Agent Becka did the talking, identifying the three agents to Gipson and advising him that he was going to be facing a charge of possessing a kilogram of cocaine. Agent Becka outlined the information they had obtained from Maier and Samori and told Gipson that the agents wanted to hear his side of the story. Agent Becka told Gipson that the agents wanted the truth, and that if Gipson cooperated with them, they would pass this along to the federal prosecutor. Neither Agent Becka nor the other agents made any other promises or threats against Gipson.

At that point, Agent Smith read Gipson his *Miranda* rights off of her wallet card. She read the front verbatim and asked Gipson if he understood his rights. Gipson said "Yes." Agent Smith then read the waiver portion verbatim from the back of the card and asked Gipson if he was willing to answer questions. Gipson said "Yes."

Gipson confessed to buying the cocaine and provided a narrative that tracked Samori and Maier's version of events. About 13 minutes into the interview, Gipson decided to stop talking and told the agents, "It's best if I talk to my attorney." The agents honored Gipson's wish and stopped the interview. The agents formally arrested Gipson at that time and took him to the Dane County Jail for booking.

The agents did advise the prosecutor of Gipson's statement, but Gipson received no consideration in return.

Gipson was 24 or 25 years old at the time of this interrogation. His criminal record reports about ten arrests in Chicago and Wisconsin between 1994 and 2002, along with drug felony convictions in 1996 and 1999.

Analysis

Given the facts found above, Gipson cannot prevail on his motion to suppress. The analysis "boils down to a question of credibility," *United States v. Huerta*, 239 F.3d 865, 871 (7th Cir. 2001) and Agent Smith's testimony at the evidentiary hearing has trumped Gipson's unpersuasive affidavit. Because the agents read Gipson his *Miranda* rights and

because there was no coercive police activity, Gipson is not entitled to suppression of his confession.

A statement is voluntary if the totality of circumstances shows that it was the product of rational intellect and free will rather than physical abuse, psychological intimidation or deceptive interrogation tactics that overcame the suspect's free will. *United States v. Huerta*, 239 F.3d 865, 871 (7th Cir. 2001). Coercive police activity is a predicate to finding a confession involuntary. *Id; see also Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Other relevant factors include the suspect's age, education, emotional or mental state, the length and nature of the interrogation, whether he was advised of his constitutional rights, the use of physical punishment or deprivation of physical needs; and the suspect's fatigue or illness. *Huerta*, 239 F.3d at 871.

The facts that I have found establish that the agents conducted a brief, low-key interview with a seasoned veteran of the criminal justice system. The agents read Gipson his rights and he initially waived them, then invoked his right to an attorney, which the agents honored. Absolutely nothing eyebrow-raising occurred during this encounter that would merit suppression of Gipson's statement.

That pretty much ends the analysis, but I will address some of Gipson's specific points. First, most of his arguments attempting to impeach Agent Smith's testimony (*see* reply Brief, dkt. 51 at 1) amount to nothing more than quibbling. His complaint that Agent Smith seemed to have a selective memory has more foundation, but it is of no moment. As

can be deduced from the facts found above, I have found that Agent Smith accurately remembered the material points.

For instance, although it is not clear that this really was a custodial situation in which Gipson was entitled to a *Miranda* advisal, *see United States v. McKinley*, 84 F.3d 904, 908 n.4 (7th Cir. 1996), I have credited Agent Smith's testimony that she read Gipson his rights of a wallet card, obtained his acknowledgment, then obtained his waiver. *Cf. United States v. Smith*, 218 F.3d 777, 781 (7th Cir. 2000)(agents need not commemorate a *Miranda* waiver in writing). That's the end of the *Miranda* issue.

Closer to the line is Agent Smith's testimony regarding the agents' discussion of carrots and sticks with Gipson. Agent Smith testified that, contrary to Gipson's claim, the agents never threatened him with a life sentence if he did not cooperate, and I have found that no such threat was made. As a legal matter, however, telling a suspect the potential sentence he faces if convicted–indeed, even *overstating* that sentence–is not, by itself, coercive. *United States v. Navarro*, 90 F.3d 1245, 1256 (7th Cir. 1996). Gipson, with two prior drug convictions, could face life imprisonment in this case the government were to file a § 851 notice. Therefore, it would not have been improper for the agents accurately to apprise Gipson of the potential consequences he faced, so long as they avoided coercive rhetorical flourishes.

Agent Smith's testimony about the discussion of benefits with Gipson is more puzzling. In her written report, Agent Smith stated that "The [agents] explained to Gipson

the benefits of cooperating with law enforcement." *See* Gov. Exh. 2 at 1. As with penalties, an accurate review with Gipson of the consequences of cooperation would not have been coercive. Thus, if the agents had told Gipson that cooperation was the key to avoiding a life sentence, this would not, without more, have been coercive because under § 5K1.1 of the USSG, it would have been an accurate statement. But at the evidentiary hearing Agent Smith testified that the agents merely had told Gipson that they would advise the prosecutor if he gave them a truthful statement. This hardly sounds like a benefit when so phrased, but it is a common interrogation tactic, perhaps because it raises a suspect's hopes without actually committing to anything, and because courts allow it. *See, e.g., United States v. Dillon*, 150 F.3d 754, 758 (7th Cir. 1998); *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990). Courts allow such tactics because the Constitution does not provide a criminal suspect any right to the "reassuring comforts of his own living room" during interrogation, *see* dkt. 51 at 1. Narcotics investigations, like politics, ain't beanbag, and interrogating agents are not a suspect's fiduciaries, they are his adversaries. *See United States v. Kontny*, 238 F.3e 815, 817 (7th Cir. 2001).

Perhaps Agent Smith's bland recollection of the cost/benefits discussion is not 100% complete, but this is irrelevant. I have found that Gipson's written version of events, crafted with lawyerly care and spared the scrutiny of direct or cross-examination, is not believable. As the facts found above indicate, none of the three agents said or did anything, singly or

collectively during the interview to interfere with Gipson's constitutional rights or to coerce him into making an involuntary statement.

RECOMMENDATION

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

Entered this 10th day of March, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge