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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW R. SCHUSTER,

Defendant.

REPORT AND RECOMMENDATION

04-CR-175-C

REPORT

This is a Section 1030 prosecution in which the government alleges that defendant Matthew Schuster unlawfully accessed and damaged protected computers to retaliate against his former employer.

Before the court for report and recommendation is Schuster's motion to suppress statements he made to the police on October 6, 2003, when they questioned him at his home during execution of a state search warrant. Schuster contended in his pre-hearing motion that this was an un-*Mirandized* custodial interview. Following the motion hearing, Schuster added a claim that the police refused to honor his requests for an attorney in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). For the reasons stated below I am recommending that this court deny Schuster's motion in all respects.

On January 21, 2005, this court held an evidentiary hearing. Having heard and seen the witnesses testify and having considered the exhibits, I find the following facts:

Facts

In the fall of 2003, police in Wausau were investigating allegations that Matthew Schuster was interfering with computers at his former place of employment. On October 6, 2003, at approximately 6:00 p.m., Detective Lieutenant Gregory Hagenbucher, Detective Jeff Strobach and uniformed Officer Matthew Barnes, traveled to Schuster's residence to execute a state search warrant. Officer Barnes waited in his patrol car while Lt. Hagenbucher and Det. Strobach knocked on the front door.

Schuster answered. The detectives identified themselves, told Schuster they were there to talk about a case they were investigating and said that they would like to come in. Schuster responded that the officers were going to have to wait a few minutes and that he would come back in a bit to let them in. Lt. Hagenbucher replied that they were not going to wait a few minutes, pushed the front door open the rest of the way and advised Schuster that he and Strobach were going to come in right now. The detectives let themselves into the hallway.

Schuster protested that the detectives could not come into his home without a warrant; Hagenbucher responded that they had one. Schuster replied that he wished to read it; Hagenbucher handed him a copy. Schuster announced that he did not want the officers doing anything until he had read the warrant.[1]

Lt. Hagenbucher radioed Officer Barnes and directed him to join the group. Lt. Hagenbucher explained to Schuster that Officer Barnes was going to sweep the house for

[1] Schuster claims that during this initial interaction he asked if he should have an attorney and that the detectives responded that he did not need an attorney because he was not under arrest. I am not finding these claims as facts, but because I discuss them below I have included them in the chronology.

officer safety to make sure no one else was home. As the police recall it, Officer Barnes found Schuster's young daughter in a back room; in a post-hearing affidavit, Schuster's mother-in-law avers that she dropped off Schuster's daughter later.

Schuster read the warrant, stated that he understood what this was about and that he could explain things. Lt. Hagenbucher advised Schuster that he was not under arrest and did not have to answer questions. Schuster replied that he still wanted to explain things. Schuster, Hagenbucher and Strobach moved to the dining portion of the small living area, sat down at a small table and engaged in a question and answer session for about 15 minutes. At one point Det. Strobach took over the questioning while Lt. Hagenbucher went into Schuster's computer room, where he discovered that Schuster's computer currently was electronically connected to the victim computer in a fashion that the government claims was unlawful. Lt. Hagenbucher confronted Schuster, who claimed he had no idea he was connected in this fashion and had not done it on purpose.[2]

Lt. Hagenbucher told Schuster the officers were going to execute the search warrant. He told Schuster that he would like him to sit on the living room couch and remain there for officer safety. Schuster went to the couch and Officer Barnes stayed in the room with him. Officer Barnes kept Schuster in sight at all times during the search. Barnes did not physically touch, restrain or menace Schuster. Officer Barnes granted Schuster's request to take

[2] Schuster claims that at some point during this interview he asked the officers "When do I get a lawyer?" He claims that they told him that it didn't work that way, he didn't get a lawyer. I am not finding these claims as facts, but because I discuss them below I have included them in the chronology.

a glass of water to his daughter in her bedroom. Schuster complained to Officer Barnes that he shouldn't have to remain on the couch. Officer Barnes responded that because Schuster was not under arrest, he was free to leave the premises if he wished; if, however, Schuster wished to remain in the house, then he must remain in the living room near the couch to ensure officer safety.

During all this, Det. Strobach and Lt. Hagenbucher were in the computer room disconnecting and seizing Schuster's five networked computers. Afterwards the detectives asked Schuster to walk them through his house, basement and garage. The detectives found a stand-alone computer in the kitchen that was not tied to the network. Schuster explained that this was his wife's computer and that she kept her homework on it. The detectives confirmed that this was so and decided not to seize this computer.

Analysis

I. Custody

Schuster claims that this October 6 police encounter was a custodial interview; therefore, the detectives' failure to provide him with *Miranda* warnings requires suppression of his statements to them. Because Schuster was not in custody during his interaction with the police, he is not entitled to suppression on this basis.

The test of Fifth Amendment custody is objective, not subjective. A suspect is in custody for *Miranda* purposes only if a reasonable person in his situation would believe himself unable to leave without the permission of the police. *United States v. Cranley*, 350 F.3d 617, 620 (7th Cir. 2003). Such a belief would be reasonable if, under the totality of circumstances, the suspect

were subject to a restraint on freedom of movement of the degree associated with a formal arrest. *United States v. Wyatt*, 179 F.3d 532, 535 (7th Cir. 1999); *see also A.M. v. Butler*, 360 F.3d 787, 795-96 (7th Cir. 2004)(the only relevant question is how a reasonable person in the suspect's position would have understood his situation; the subjective views of the suspect and the agents are irrelevant).

Schuster was not in custody at any time during the search. Although there was a testy confrontation when the detectives first arrived, the police promptly advised Schuster that he was not under arrest. Later, when Schuster complained about being relegated to the couch, Officer Barnes explained to him that he was free to leave the residence if he wished, but that he could not wander about the residence while the detectives conducted their search. I have rejected Schuster's assertions that he was bullied, manhandled and threatened with arrest throughout the evening. I find the police account of the evening's encounter more logical and persuasive.

This credibility determination segues to the parties' disagreement over the significance of Schuster's daughter. There was conflicting testimony about whether Schuster's young daughter was present when the police arrived or whether her grandmother dropped her off later. After the evidentiary hearing, the grandmother submitted a lukewarm affidavit indicating that she dropped off her granddaughter after the police had arrived. Schuster latches onto this as proof that the officers' testimony is less credible than his. The government concedes nothing.

The correct answer to this particular factual dispute does not help determine whether Schuster or the police are telling the truth about their interaction with each other. The presence or absence of Schuster's daughter at the beginning of the search is a collateral fact that has no

independent significance except perhaps as a peripheral memory test for the police. For instance, if there was artwork on the walls of Schuster's home, maybe the police now could recall it, maybe not, but any memory failure on this point would not make them unreliable witnesses on the more salient occurrences, namely their physical and verbal interaction with Schuster. Officer Barnes clearly recalls performing a protective sweep of the residence, he "believes" Schuster's daughter was there when he arrived, and he knows she was there later because he allowed Schuster to bring her water. These recollections neither support nor impeach Barnes's pellucid recollection that he advised Schuster that he was free to leave the residence rather than squirm on the couch. The detectives' awareness of and interaction with Schuster's daughter was even less significant and hence even less relevant to the court's determination of their credibility. The detectives' primary goal that evening was to execute their search warrant, their secondary goal was to interview Schuster, and everything else would have been of tertiary significance.

Therefore, even if the police were to be mistaken in their current recollection that Schuster's daughter was present when they first arrived, this does not mean that they are mistaken in their recollection that they did not rough up Schuster and that he did not ask for a lawyer. To the same effect, their alleged changing of their testimony during the evidentiary hearing is no more damning than Schuster's refinement of his recollection of how and when he asked about obtaining an attorney.

Of greater importance to the court is the logic and credibility of each witness's testimony regarding his interaction with everyone else at the residence that night. I have found the officers' version more credible. None of the four suppression hearing witnesses (including Schuster) has

total recall or an eidetic memory and each of them brought his subjective perspective and agenda with him to court. Having sorted through all of this and having viewed the demeanor of the each witness, I have found the facts noted above. Schuster's account of Brownshirt tactics is over the top. Perhaps his alarming testimony is based on his actual current recollection of the way things went down that night, or perhaps he has embellished his story in the interests of promoting his position; in any event, he was unpersuasive.

As Schuster concedes, his claim of custody hinges on which version of events the court accepts. I have accepted the police version. Schuster was not in custody. He was not entitled to be advised of his *Miranda* rights before questioning.

II. Request for an Attorney

Schuster also claims that his statements must be suppressed because he asked for an attorney but the police refused to honor his requests. There are four potential problems with this claim but I will only address the first two, each of which is dispositive.

First, Schuster waived his *Edwards* claim by not raising it until post-hearing briefing. Schuster's pre-hearing motion to suppress at most alleges that the detectives subjected Schuster to a *de facto* custodial interrogation without *Mirandizing* him. If Schuster wanted to raise an *Edwards* claim to this court, then he was obliged to do so within the motion deadline as required by F.R. Crim. Pro. 12(c), and to do so clearly as required by the November 15, 2004 scheduling order. *See* dkt. 6, at 1. Even *at* the evidentiary hearing, Schuster confirmed in response to court's specific inquiry that his only claim was that he had been subjected to custodial

interrogation without *Miranda* warnings. *See* tr., dkt. 26, at 16. When Schuster took the stand and announced for the first time that he had broached the topic of counsel with the police only to be rebuffed, both the government and the court were surprised. *Id.* at 63, 66 and 77-78.

To prevent sandbagging, Rule 12(e) deems forfeit untimely suppression claims absent good cause. Schuster has not provided good cause. Instead, he argues that the *Edwards* issue rises or falls on the *Miranda* issue, so his late claim doesn't change anything. Schuster is correct–he cannot prevail on this claim if he was not in custody–but Rule 12(e) doesn't include a no harm/no foul exception. In any event, the government *has* cried foul. *See* Gov. Response, dkt. 40, at 1 n.1. The government is correct. Schuster did not raise this claim in his motion, the accompanying documents, or to the court at the start of the evidentiary hearing. The government had no idea it would have to prepare to meet such a claim. Schuster's cross-examination of the government's witnesses touched on this issue so lightly as to maintain its invisibility. *See* tr. at 31 and 47. Then the *Edwards* claim sprang full-grown and armored from Schuster during his direct testimony, *Id*. at 51, whence it doubled, *id*. at 58, transmogrified, *id.* at 61-62, and became a 2½ page argument in Schuster's post-hearing brief, dkt. 14 at 5-7. This is not a situation where the underlying facts were unknown to Schuster prior to the hearing; to the contrary, his surprise testimony was based on events in which he personally had participated. There is no acceptable explanation for Schuster's failure timely to present this claim. Accordingly, it is waived.

This disposes of the matter, but there is a second unequivocal basis to deny this portion of Schuster's suppression motion: the facts don't support it. As Schuster acknowledges, in the

absence of a *Miranda* claim, there can be no *Edwards* claim. That's because the Fifth Amendment right to counsel safeguarded by *Miranda* cannot be invoked when a suspect is not in custody. *United States v. Wyatt*, 179 F.3d at 537. *See also McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991)("We have never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'"); *United States v. Vega-Figueroa*, 234 F.3d 744, 749 (1st Cir. 2000)("in order for *Miranda* rights to be invoked there must be (1) custody and (2) interrogation"); *Burket v. Angelone,* 208 F.3d 172, 197 (4th Cir.), *cert. denied*, 530 U.S. 1283 (2000)(police did not need to cease interrogating suspect who said "I think I need a lawyer" because suspect was not in custody). Because Schuster's encounter with the police was not custodial, any request for counsel that he might have made would not have required the investigators to stop asking him questions.

These two grounds each are independently sufficient to dispose of the *Edwards* claim without reaching the question whether Schuster actually asked about a lawyer or the question whether such statements would constitute a clear and unequivocal request for an attorney. I doubt Schuster's testimony on this point. I also doubt that the statements he claims to have made would qualify as unambiguous requests for counsel. *See Davis v. United States* 512 U.S. 452, 462 (1994); *United States v. McKinley*, 84 F.3d 904, 909 n.5 (7th Cir. 1996)(collecting examples of ineffective statements). It also may be that the detectives' purported responses to Schuster's alleged inquiries were legally accurate. But there is no reason for the court to provide third and fourth reasons to deny this phase of Schuster's 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's motion to suppress his statements.

Entered this 8th day of April, 2005.

BY THE COURT:

/s/

_____
STEPHEN L. CROCKER
Magistrate Judge

April 8, 2005

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Re: United States v. Matthew R. Schuster
Case No. 04-CR-175-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before April 22, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by April 22, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge