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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEN K. GILBERTSON,

Defendant.

REPORT AND RECOMMENDATION

04-CR-206-S

REPORT

This is an odometer tampering prosecution that originated with an administrative investigation by the State of Wisconsin. Before the court are defendant Allen K. Gilbertson's motion to dismiss the indictment and his motion to suppress statements and derivative evidence. For the reasons stated below, I am recommending that the court deny the motion to dismiss, deny the motion to suppress documents, but grant Gilbertson's motion to suppress his statements.

Gilbertson claims that he is entitled to dismissal of federal charges and suppression of his statements to state investigators because they promised him that they would not refer him to the United States Attorney for prosecution. Gilbertson also claims that his statements must be suppressed because he was subjected to custodial interrogation without the benefit of *Miranda* warnings,[1] the investigators ignored his request for an attorney, and

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

his statements are involuntary because they were induced by a materially false promise by the investigators. The government disputes all of Gilbertson's factual propositions and opposes both motions.

Gilbertson's dismissal motion is meritless and should be denied. Gilbertson's claim that his self-inculpatory statements were involuntary has merit. He made these statements to DMV investigators in reasonable reliance on a promise that they would not refer him for federal prosecution if he cooperated. Gilbertson cooperated, but here he is. The court should not suppress any documentary evidence because state investigators inevitably and independently would have obtained these documents.

On February 11, 2005, this court held an evidentiary hearing on Gilbertson's motions. Having heard and seen the witnesses testify, having made credibility determinations, and having reviewed the exhibits, I find the following facts:

Facts

Defendant Allen K. Gilbertson is a used car salesman. In June 2001 he held a salesman's license and worked for Griesbach Auto Sales in Wausau, Wisconsin. Prior to working for Griesbach, Gilbertson had owned and run a dealership named D&A Auto Sales. Gilbertson had closed that business on May 15, 2001.

Some time in early June 2001, someone at Griesbach's called Gilbertson and asked him to come down to talk to a Wisconsin Department of Transportation Division of Motor

Vehicles investigator about a 1989 Ford Probe with an odometer problem. Gilbertson did so and met with Thomas Krummel, an administrative field investigator with WDOT's DMV's Dealer Section. Gilbertson and Krummel knew each other from previous business dealings. Also present were several police officers called by Krummel to tow the Ford. Krummel told Gilbertson that there was a mileage discrepancy on the car; Gilbertson responded that he believed there had been a "repair" on that vehicle. Unmolified, Krummel lectured Gilbertson on the statutory and regulatory requirements attendant to such a "repair," then had the Ford towed.

Thereafter, Krummel reported this incident to Kevin Konopacki, the DMV's odometer fraud specialist. He suggested that they set up a meeting with Gilbertson to explore the matter further. The next time Krummel met with Gilbertson to look at some records he advised Gilbertson that DMV would like to hold a meeting with him about the Ford. Feeling that he had little choice, Gilbertson scheduled a June 20, 2001 meeting at Krummel's office in the DMV service center near Rib Mountain.

Gilbertson arrived for his appointment and was ushered to a medium-sized windowless conference room furnished with one long table surrounded by chairs. Gilbertson was familiar with this room from previous business meetings with Krummel. Krummel and Konopacki both were present for the meeting. Gilbertson had never met Konopacki before and was surprised he was there.

Konopacki ran the meeting. After some give and take, Gilbertson conceded that he had changed out the odometer on the Ford Probe to make it more attractive for resale. Konopacki responded that in his experience, where there's one changed odometer, there usually are more. Gilbertson conceded he might have "repaired" the speedometers in about twenty-five other vehicles before reselling them.[2]

Konopacki warned Gilbertson that Konopacki was going to investigate his story and if Gilbertson was not being forthright then he would be in trouble because odometer tampering is treated seriously in Wisconsin. Konopacki also warned that he could present this case to the United States Attorney's Office, which could seek even harsher federal penalties. Therefore, this meeting was the time for Gilbertson to come clean. Konopacki gave examples of dealers who had been subjected to federal prosecution, implying that this was something Gilbertson wanted to avoid. Konopacki told Gilbertson that it would look good to the Marathon County district attorney if Gilbertson took responsibility for his actions by contacting all the people with changed odometers and made them whole. In response, Gilbertson provided additional information about the other twenty-five cars.

Konopacki and Krummel left the room to confer. When they returned, Konopacki offered Gilbertson a deal: if Gilbertson cooperated completely by providing a written statement, by identifying all the cars he had sold with the odometer problems and by settling

[2] Because odometers usually are integrated into the speedometer, replacing a speedometer also replaces the odometer.

with those customers, then Konopacki would forward his investigative report to the local district attorney's office for review and not to the United States Attorney. Konopacki advised Gilbertson that he would be better off with a state referral. Konopacki did not promise Gilbertson that he would not face any criminal prosecution whatsoever.

Gilbertson accepted the offer and agreed to cooperate further. Gilbertson provided a short hand-written statement that afternoon in which he confessed to odometer tampering.[3] Konopacki told Gilbertson he would have to surrender his salesman license or else the state would seek revocation. Konopacki directed Gilbertson to turn over all his records to Krummel so that Krummel could identify the vehicles requiring investigation.

The meeting lasted about two hours. Although there were some pointed exchanges, the tone of the meeting remained non-threatening. Neither Krummel nor Konopacki had arrest powers, neither was armed or carrying handcuffs, neither threatened to arrest Gilbertson, and neither laid hands on him during the meeting. Gilbertson never asked to leave the meeting early, but if he had, Konopacki and Krummel would have had no authority to stop him.

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[3] This is Gilbertson's statement (all *sic*):

> I basically told Gilby Auto to turn replace speedo head on 89 Ford Probe . . . . I told him to turn it back to low 70's for increased value at sale. I owe Gene Gilbertson $70 for the repair. I new this was wrong behavior but for financial reason I got trapped into this situation. I had done this in the past to other vehicles under D&A Auto Sales. Approximately 25 vehicles. The majority of vehicles were done by Gene Gilbertson.
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> Gov't. Exh. 1.

At some point during the meeting Gilbertson asked whether he should talk to an attorney. He did not ask or demand to have an attorney present during the meeting. Konopacki did not threaten to cancel the deal and go straight to the feds if Gilbertson sought advice of counsel. Neither did he end the meeting in response to Gilbertson's question.

When the meeting ended Gilbertson left the conference room and drove away in his own vehicle.

Over the summer Gilbertson continued to cooperate with Krummel and Konopacki, turning over his records of car sales and answering their questions about the vehicles. Even if Gilbertson had ceased cooperation and declined to provide his records, Konopacki and Krummel still would have obtained the information necessary to determine whether Gilbertson had tampered with odometers on other vehicles. They would have accomplished this reviewing all of the Title Transaction Reports associated with Gilbertson. This is a report that car dealers are required to submit to the DOT and which the department kept in its database. From these reports, Konopacki could have shagged out all of the necessary collateral information to discover odometer tampering, such as when Gilbertson had obtained each vehicle, its mileage at that time, and the mileage at which he had sold it.

On August 14, 2001, Gilbertson and the DMV entered into a written stipulation in which Gilbertson admitted to tampering with the odometers on at least twenty-six motor vehicles, Gilbertson agreed to work with the division to identify the other vehicles, and consented to the revocation of his salesperson license effective September 1, 2001.

Through their review of Gilbertson's records, Krummel and Konopacki found that Gilbertson actually had sold closer to seventy cars with odometer problems as opposed to the twenty-five he had estimated at their meeting. Konopacki contacted Gilbertson to ask about this. Gilbertson admitted that these cars fit the pattern of odometer tampering and agreed to reimburse all of these customers as well.

When Gilbertson reimbursed customers who had bought cars from him with changed odometers, Gilbertson presented them with a "settlement agreement" form prepared by the Department of Transportation and provided to Gilbertson by Konopacki. Each settlement agreement was a fill-in-the-blank form that began with this statement:

> In consideration of payment for the resolution of the dispute between the parties listed below. Both parties agreement not to pursue any future civil or criminal actions against each other.

Gov. Ex. 2.

The Department of Transportation uses these forms at the administrative level to commemorate the resolution of disputes between dealers and customers. The form provides the customer, the dealer and the DMV with a record of the resolution. Gilbertson followed through by settling with every owner of a car with an odometer problem. It appears that every customer signed a settlement agreement with Gilbertson. DOT is not aware of any customer of Gilbertson's who was upset with the resolution of his or her case.

In March 2002, Krummel and Konopacki learned that Gilbertson had purchased back a 1991 Chrysler from his targeted group of vehicles, then had resold it without disclosing the

original mileage discrepancy. When confronted with this, Gilbertson reimbursed the new purchaser.

Despite the sometimes fitful course of the investigation and remediation, Konopacki concluded that Gilbertson had done everything asked of him. Therefore, once Gilbertson appeared to have made whole all of his customers, Konopacki referred Gilbertson's case to the District Attorney's Office in Marathon County for review. Konopacki did not bring Gilbertson's case to the attention of the United States Attorney's Office.

However, at some subsequent point the district attorney closed her investigation and referred Gilbertson to the United States Attorney for review and prosecution. Her reasons are not in this court's record. The closest we come is this exchange between Gilbertson's attorney and Konopacki at the February 11, 2005 evidentiary hearing:

> Q: You were not a party to any of the conversations between Mr. Gilbertson and myself and [District Attorney] Falstad?
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> A: That's correct.
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> Q: And you were never a party to any of the settlement agreements or offers that were made?
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> A: That's correct.
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> Q: So you have no knowledge whatsoever as to whether or not Mr. Gilbertson was cooperating [with the district attorney]?
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> A: Just statements from Jill Falstad that she was getting frustrated with him because he wasn't doing what the state was asking.
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> Q: Do you consider cooperating to mean that you have to do what a district attorney or prosecutor tells you to do?

A: I'm just telling you what she told me.

* * *

Q: And Ms. Falstad was basing that upon Mr. Gilbertson not settling the case?

A: I remember her saying she was frustrated with him . . ..

Transcript, dkt. 13, at 53-54.

Analysis

I. Motion To Dismiss the Indictment

Gilbertson has moved to dismiss the indictment in this case on the ground that

> the court is without jurisdiction in that there was an agreement made by the government with the defendant with a specific promise of immunity from federal prosecution.

Dkt. 17 at 1.

This claim is a nonstarter: state agents cannot bind federal prosecutors without the latter's knowledge and consent. *United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir. 1994). Even if everything Gilbertson alleges were accurate, Konopacki could not bind the United States Attorney to a nonprosecution agreement. Because no federal agents were parties to the agreement, Gilbertson cannot appeal to any notion of equitable immunity, which may not even exist in this circuit. *Id*. at 521.

II. Motion To Suppress Evidence

A. *Miranda* violation

(1) Custody

Gilbertson claims that he was subjected to a custodial interview on June 20, 2001; therefore, the investigators' failure to provide *Miranda* warnings requires suppression of his statements. Because Gilbertson was not in custody during the meeting, so 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, 619 (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).

Gilbertson attempts to recast his two-hour meeting with Konopacki and Krummel as a custodial interrogation, mainly because he claims to have assumed that Konopacki was some sort of police officer. This assumption was not objectively reasonable, but even if it were, this would not change the outcome. There were no indicia of custody attendant to Gilbertson's interaction with Konopacki and Krummel on June 20, 2001. Gilbertson

attended a scheduled meeting in an agency conference room in which he previously had attended work-related meetings with Krummel. He met for two hours with two DMV non-criminal investigators. Neither Krummel nor Konopacki had arrest authority and neither man said or did anything that would have led an objectively reasonable person to conclude that he was not free to leave. True, there were pointed threats of prosecution and the offer of a cooperation agreement, but merely broaching the topic of future criminal proceedings would not cause a reasonable person to conclude that by hearing these words he now was in custody.

Any "compulsion" to stay was resulted from Gilbertson's subjective cost/benefit analysis of his predicament and his options. Gilbertson chose to stick around and work things out. He was not in custody during the meeting. This is not a basis to suppress evidence.

(2) Request for an Attorney

Gilbertson claims that his statements must be suppressed because he asked for an attorney during the meeting but the investigators refused to honor his request. There are at least two problems with this argument. First, 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. Because Gilbertson's meeting with Konopacki and Krummel was

not custodial, any request for counsel that he might have made would not have required the investigators to stop the conversation.

Second, Gilbertson did not unequivocally and unambiguously demand an attorney during the meeting. Gilbertson's recollection on this point (Tr. at 95-96) is inaccurate. Gilbertson simply asked whether he should get an attorney. This was a logical question under the circumstances, but it was not sufficient to invoke any right to counsel that Gilbertson might have had in mind. *Davis v. United States* 512 U.S. 452, 462 (1994)("Maybe I should talk to a lawyer" was not a request for counsel that would require cessation of interview); *see also United States v. McKinley*, 84 F.3d 904, 909 n.5 (7th Cir. 1996)(collecting examples of ineffective statements). Considered in context, Gilbertson was asking whether he needed an attorney to navigate the looming regulatory and criminal shoals. But even if Gilbertson actually was wondering whether he should have an attorney present on June 20, the investigators did not violate his Sixth Amendment right by continuing the meeting. This is not a basis for suppression.

B. Voluntariness

Gilbertson's voluntariness claim has more traction. Statements are voluntary if the totality of circumstances shows that they were 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).

As a starting point, the collective circumstances of the June 20, 2001 meeting did come close to overbearing Gilbertson's free will and ability to make rational decisions. *See, e.g., United States v. Gillaum*, 355 F.3d 982, 990 (7th Cir. 2004). Absent the cooperation agreement, this would have been an unremarkable encounter between Gilbertson and the investigators. However, most of Gilbertson's statements on June 20 were involuntary because Gilbertson was induced to make them by a promise that the state did not keep.

Although the government may buy information with honest promises of consideration, it may not make a false promise of lenience because this would impede the suspect in making an informed choice as to whether he is better off confessing or clamming up. *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir. 1995); *see also United States v. Kontny*, 238 F.3d 815, 818 (7th Cir. 2001)(a false promise of nonprosecution in exchange for cooperation might induce reliance by a rational person). Even in the absence of an actual promise of immunity, a suspect's reasonable belief that he is speaking under a grant of immunity renders his statement involuntary. *United States v. Cichon* 48 F.3d 269, 272 (7th Cir. 1995). That being so, a nonprosecution agreement is a contract like any other, so that a material breach by the defendant would excuse performance by the state. *Wilson v. Washington*, 138 F.3d 647, 652-53 (7th Cir. 1998).

Where state actors are involved in a dispute over an agreement, reference to the state court's treatment of similar disputes could be helpful to determining the outcome. *Cf. id.* at 652 (federal court cites to Illinois case law to determine scope of a state prosecutor's immunity agreement with petitioner/defendant). In Wisconsin, courts impute the actions of law enforcement agents to the district attorney's office in many contexts, including the execution of plea agreements. *See State v. Matson*, 268 Wis.2d 725, 739-40, 674 N.W.2d 51, 58. (Ct. App. 2003). Although the breach in *Matson* flowed in the other direction (the agent broke the prosecutor's promise), the court's general concerns about fairness and agency apply to Gilbertson's situation. Therefore, Konopacki's promise not to refer Gilbertson to the United States Attorney should be binding on the District Attorney for Marathon County even though she did not make it.

Konopacki acknowledges that on June 20, 2001 he promised that he would not refer Gilbertson to the United States Attorney if Gilbertson cooperated with him. Gilbertson latched onto this promise and agreed to cooperate with Konopacki as a result. (Gilbertson would like to pretend that he believed he had received a complete immunity bath from Konopacki but that never happened. Gilbertson's post hoc overreaching, however, doesn't negate the promise Konopacki actually made). Konopacki concedes that despite some subsequent missteps Gilbertson ultimately did everything that Konopacki demanded of him. Therefore, Konopacki referred this case to the district attorney, as he promised.

The government argues that this is the end of the story because Konopacki kept his word. The government is incorrect.

First, "the State may not accomplish by indirect means what it promised not to do directly." *State v. Matson*,268 Wis. 2d at 739, 674 N.W.2d at 58. Investigators and prosecutors work as a team and often are bound by each other's words and deeds. This isn't always true, but if it isn't true *here*, then an agent's promise to a suspect may as well be written on the wind or in running water.[4] Although there is no indication that Konopacki planned to sandbag Gilbertson, Gilbertson got sandbagged and that's not cricket. *Id.,* 268 Wis. 2d at 745, 674 N.W.2d at 60-61 (Dyckman, J., dissenting) (concluding that defendant sandbagged the state on appeal). A promise of the sort that Konopacki made to Gilbertson should be enforceable under principles of agency and fairness.

That said, Gilbertson is not entitled to specific performance of his deal because two sovereigns are involved. As previously noted, the federal government cannot be bound by Konopacki's promise. But because Konopacki's promise was binding on the district attorney, and because the district attorney broke the promise, the federal government may not use against Gilbertson statements that he made in reliance on that broken promise.

Second, even if the district attorney were not bound by Konopacki's agreement with Gilbertson, the outcome would not change: suppression still is required. Because Gilbertson's decision to cooperate hinged on his reasonable belief that he would not be

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[4] *See* Catullus, Poem 70.

prosecuted federally, the state's subsequent referral vitiated the voluntariness of Gilbertson's decision and statements. *See United States v. Cichon* 48 F.3d at 272. Gilbertson's ability to exercise his free will and to make rational decisions was undermined when the D.A.'s referral to the U.S. attorney established that Gilbertson's decision to cooperate had been premised on false information supplied by the state.

If the government were to have established that Gilbertson materially breached his agreement after Konopacki referred him to the district attorney, then the outcome would be different. But apparently there was no material breach, only prosecutorial frustration with Gilbertson's perceived intransigence during plea negotiations. This is not enough to justify the federal referral. The government points to Gilbertson's weaseling during his active cooperation, *see* Response, dkt. 20, at 13-14, but Konopacki did not deem these acts a material breach at the time. Eventually Gilbertson *did* do everything Konopacki directed, and Konopacki did refer him to the district attorney. The government's post-hoc recharacterization of this process is unavailing.

Therefore, the statements that Gilbertson made to Konopacki and Krummel subsequent to Konopacki's offer to forego referral to the United States Attorney are involuntary and may not be used by the government for any purpose during the government's case in chief, on cross-examination, or in rebuttal. Neither may the government use any evidence directly derived from these statements. Gilbertson is entitled to be returned as close to the pre-promise status quo as possible.

As the government notes, Konopacki did not make his offer until after Gilbertson had admitted to "repairing" the speedometers in about 25 cars besides the Ford Probe. Therefore, this admission, and anything else Gilbertson said prior to that is not involuntary and is admissible. However, Gilbertson's written statement is out because he penned it after accepting Konopacki's deal.

As the government further notes, there is no basis to suppress any documentary evidence that the state subsequently generated (or generates), because the state has an independent source from which to obtain those documents and it inevitably would have obtained them. *See United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004)(government may use evidence obtained illegally if it would have obtained it legally in any event). Konopacki had ready access to DMV files that contained all of the documents he would have needed to build the instant case against Gilbertson even if Gilbertson had never said a word. Gilbertson has bemoaned the *Javertian* tenacity with which Konopacki has hounded him; he cannot now claim that Konopacki would not have pursued him with equal vigor in the absence of his cooperation. Indeed, any such resistence undoubtedly would have galvanized Konopacki to redouble his investigative efforts against Gilbertson.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above I recommend that this court:

1) Deny defendant's motion to dismiss the indictment

2) Deny defendant's his motion to suppress physical evidence; and

3) Grant in part and deny in part defendant's motion to suppress his statements, in the manner stated above.

Entered this 17th day of March, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge