

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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

04-CR-055-C

DAVID A. CARLISLE,

Defendant.

REPORT

Defendant David Carlisle is a postal worker accused of pilfering money from the Capitol Station Post Office. Before the court for report and recommendation is Carlisle's multi-faceted motion to suppress evidence obtained by postal inspectors during an after work interrogation and set of searches at the post office. *See* dkt. 7. On these facts, it is a close call and the court could go either way. For the reasons stated below I am recommending that this court find a *Miranda* violation and suppress Carlisle's statements, but that the court deny the motion to suppress evidence seized from Carlisle's wallet.

On March 18, 2004, this court held an evidentiary hearing on Carlisle's motion. Having considered all of the exhibits and affidavits, the testimony and demeanor of the witnesses who appeared, the absence of other witnesses, and the parties' arguments about the process this court should use to find facts, I find the following facts:

Facts

David Carlisle became an employee of the United States Postal Service in 1978. In August 2003, Carlisle was assigned as a sales and services associate at the Capitol Station in downtown Madison. His duties, such as selling stamps to the public, required him to work with and account for postal service cash.

Postal inspectors suspected that Carlisle was mishandling stamps and pilfering money, so in August, 2003, four postal inspectors (Jean Rosandich, Jeff Girardot, Steve Werlein and Lori Groen) targeted Carlisle for investigation. They conducted covert surveillance of Carlisle at work on August 14, 2003 and saw Carlisle remove \$22 from his cash draw and put it in his pocket. On August 18, 2003, they continued their covert surveillance and added to the mix seven controlled purchases of eleven books of stamps; they observed what they perceived to be mishandling of stamps and cash, including Carlisle removing a \$100 bill from his cash drawer and placing in his pocket. The inspectors decided that at the end of Carlisle's shift, they would confront and question him in hopes of obtaining a confession.

Carlisle punched out at about 5:15 PM that evening and left the building. His wife was waiting for him in their SUV in the post office parking lot. Before Carlisle reached his vehicle, Inspector Werlein approached, identified himself and asked Carlisle to return to the post office to answer some questions. Carlisle agreed. He was allowed to clock in.

Upon re-entering the building to be interviewed, Carlisle told the inspectors that his wife was waiting for him in the parking lot and he would like to go tell her he would be

delayed. The agents told Carlisle that they would take care of it, and Inspector Groen went out to inform Mrs. Carlisle. Mrs. Carlisle decided to wait in her car.

It was a long wait: Carlisle remained with the postal inspectors for four hours, until 9:30 PM. His interaction with them included questioning, a water break, one locker search, two searches of his wallet, a cash drawer audit, some use of office computers, a surreptitious phone call by Carlisle to his wife, his wife's subsequent call to 911, a Madison police inquiry, and several phone calls to and from postal union officials. The postal inspectors never provided *Miranda* warnings¹ to Carlisle that evening because as far as they were concerned, he was not under arrest. At no time during the evening did the postal inspectors lay hands on Carlisle, raise their voices, threaten Carlisle, or display weapons. Although it now appears that Carlisle was anxious and angry for most of the evening, he hid this from the inspectors, interacting with them cordially and cooperatively.

From the descriptions in the record, the Capitol Station Post Office seems to have a front lobby open to the public, behind which is a big room constituting the main work area. Within that area is at least one small office used by the station's supervisor, Ann McCredie. The office is about 8' X 10', with two desks, three chairs, file cabinets and a door. Apparently, there are windows overlooking the parking lot in which Mrs. Carlisle waited.

Agent Werlein escorted Carlisle into McCredie's office where Inspector Rosandich was waiting to assist with the interview. The agents identified themselves, told Carlisle he

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

was free to leave, they did not plan to arrest him and he would be going home at the end of the evening. Inspector Werlein sat at one desk, Carlisle sat next to him nearest to the door, and Inspector Rosandich sat in front of Carlisle a little to his left. The inspectors closed the office door for privacy because one regular postal employee still was on duty in the big room.

About an hour into the interview, at 6:28 PM, Inspector Werlein asked Carlisle to disclose the contents of his wallet. Carlisle agreed. He did not hand over his wallet but opened it, pulled out some money, then emptied his pockets of change, displaying a total of \$82 in bills and \$2.63 in coins, which the inspectors recorded.

At about 6:55 PM Carlisle asked for a drink of water. Everyone took about a three minute break. It is not clear if the inspectors let Carlisle walk out to the water fountain in the big room or if they simply brought a cup of water to him in McCredie's office.

The inspectors also wanted to check Carlisle's transactions at work that day, so at 7:15 PM, they asked Carlisle to print at least one report from his computer. During this process Carlisle said he needed his eyeglasses, which were in his car in the parking lot in which his wife sat waiting. Carlisle asked to go out to the parking lot to get them. The inspectors told Carlisle that they would get his glasses for him. Inspector Groen went back out and told Mrs. Carlisle why she was there, retrieved the glasses from the glove box, then took them inside to Carlisle. (In hindsight, Inspector Rosandich deems it "odd" that Carlisle asked to leave so he could retrieve his glasses when he seemed to be getting along just fine without them).

At 7:37 PM, Carlisle consented to a search of his postal locker. Inspectors Werlein and Groen conducted the search with assistance from Carlisle. This took until about 7:50 PM, at which time the inspectors resumed their interview. Within five minutes, at about 7:55 PM, Carlisle stated that he wished to contact a union steward, which was his right under his contract.² Inspector Groen called the main post office and was told that no steward was available.

While Inspector Groen was trying to contact a steward, the inspectors stopped questioning Carlisle and conducted an audit of his “cash accountability” and cash drawers. It is not clear how long these audits took; the results were within tolerance.

Meanwhile, down at the main post office, the postal employee who had taken Inspector Groen’s call contacted union vice president Karen DeLoof at her home in Portage to advise her that a postal employee at Capitol Station had requested a steward but none was available. At about 8:10 PM, DeLoof called the Capitol station and asked to speak to the employee being questioned. Inspector Rosandich answered the phone and declined to put Carlisle on the phone. DeLoof asked the inspectors to suspend their questioning until

² See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (union employees may request union representation at investigatory reviews that might result in disciplinary action). Pursuant to *Weingarten*, once Carlisle asked for a union steward, the inspectors had at three options: provide a steward; suspend the interview until a steward could be provided; or continue the interview without a steward if Carlisle agreed to proceed without one. Inspector Rosandich posited a fourth option: if inspectors attempt to contact a steward but no steward is available, then the inspectors may continue questioning their suspect in the steward’s absence.

DeLoof was back at work two days hence. Inspector Rosandich declined. Surprised, DeLoof began making phone calls to other union officials and stewards to see what they could do.

Some time near 8:30 PM the inspectors again asked to look inside Carlisle's wallet.³ Carlisle asked again if he could call a union steward. The inspectors gave Carlisle access to a telephone. Carlisle surreptitiously called his wife at her cell phone while she continued to wait in her car just outside. According to Carlisle's affidavit—he did not testify at the suppression hearing—he told his wife that he needed help. She asked if he wanted her to call 911 and he said that he did. Carlisle's affidavit further claims that when he tried to tell his wife that he was being "set up," the phone dead. Concerned and confused, Carlisle's wife called 911 and narrated her perception of events, which was oblique from lack of perspective.

A squad car responded to the post office parking lot. Mrs. Carlisle told the police officers that her husband had been acting strangely, that other people kept coming to her car to ask for things, and that she did not understand what was happening. She did not allege that her husband had asked for help; in fact she wasn't sure what she wanted the police to do. She pointed to a window in the post office and said that she could see her husband inside. The officers approached the post office to seek entry, where they encountered Inspector Girardot moving equipment. He identified himself and explained that postal inspectors were talking with Carlisle. The police told Inspector Girardot that Carlisle's wife

³ It is difficult from the evidence presented to pinpoint when this request was made, either on the clock or in relation to other acts and phone calls that took place between 8:00 and 9:00 PM.

was concerned and they asked if there was anything they could tell her. Inspector Girardot told them to explain to Mrs. Carlisle that her husband would be there a while longer, so she could go home and Carlisle would call her when he was done. This satisfied the officers, who conveyed the message to Mrs. Carlisle then left without taking further action. Mrs. Carlisle decided to wait. Inspector Girardot found this encounter puzzling, but because he did not know that Carlisle had asked his wife to call to 911, he did not broach the topic with Carlisle.

Simultaneously inside the post office, at about 8:45 PM, DeLoof called back to Capitol Station. Carlisle answered the phone personally but he did not identify himself. Not realizing to whom she was speaking, DeLoof identified herself as the union vice president and stated that she could not come in to act as a steward at that time because she was home with her two little boys. Carlisle shot back, "I don't care about your boys. I need a steward!" DeLoof asked him what was going on. Carlisle said that he had been at work since 6:00 AM, his wife had been waiting in the parking lot for three hours, he wanted a steward, he already had answered some questions, and he wanted to get out of there. DeLoof told Carlisle that if he wanted a steward and none was available, then the interview was over.

DeLoof asked to speak to one of the inspectors. Inspector Werlein took the phone and told DeLoof that Carlisle had answered some questions, but that he would not show them the contents of his wallet a second time. DeLoof responded that Carlisle did not have

to do so. Inspector Werlein replied that the inspectors had probable cause; DeLoof asked Werlein to disclose his probable cause; Werlein declined to do so and ended the conversation.

At 9:03 PM, Inspectors Werlein and Girardot prevailed upon Carlisle to continue answering questions without a union representative present. The interview continued at a table in the big room. Agent Girardot also convinced Carlisle to show them the contents of his wallet a second time. It is not clear how he did so, but Agent Girardot did *not* threaten to strip search Carlisle if he failed to cooperate. This time, Carlisle divulged a \$100 bill and five \$20 bills that he had been keeping in a separate compartment of his wallet. Carlisle explained that he had only wanted to talk to a steward about the money in his wallet because he thought it looked bad.

At about 9:11 PM, DeLoof again called Capitol Station. DeLoof asked to speak to Carlisle again; Inspector Werlein declined, stating that the inspectors almost were done with the interview, that Carlisle had waived his right to see a steward, and that he did not need to talk to a steward right now.

After the agents finished their questions, Carlisle asked if he could go. The inspectors said no, that he needed to wait because his supervisor was coming to explain his job situation to him, and that Carlisle would be free to leave after he talked to her.

Summoned by the inspectors, supervisor McCredie showed up a little later, met with Carlisle, explained his work status and took his keys. Carlisle left the building at approximately 9:30 PM

Analysis

Carlisle seeks to suppress both the statements he made to postal inspectors on March 18 and the physical evidence they seized from his wallet that evening. He claims that he was under arrest without probable cause; that he was subjected to a custodial interrogation without being advised of his *Miranda* rights; that his statements were involuntary; and that the inspectors illegally searched his wallet without a warrant and without probable cause. I deal with each claim in turn.

I. Probable Cause To Arrest

Although Carlisle claimed in his motion that there was no probable cause to arrest him, he did not brief this issue. This waives Carlisle's probable cause argument. *See United States v. Collins* 361 F.3d 343, 349 (7th Cir. 2004).

Actually, to be fair to Carlisle, at the close of his first brief he asserts that because he announced his probable cause claim in his motion and because the government then did not put any evidence into the record to refute this claim (since the government is claiming that there was no arrest), the point is proved. *See* Dkt. 15 at 14. This smells like a civil litigation game of "gotcha," and it's going nowhere in this criminal prosecution. Carlisle never made a prima facie showing of lack of probable cause to arrest. The government's failure to note this when it agreed to present testimony on other issues does not prove Carlisle's probable cause claim. To the contrary, the very documents submitted by Carlisle in support of his

other claims make a prima facie showing that the inspectors *did* have probable cause to arrest him on March 18, 2003.

The inspectors developed probable cause to arrest Carlisle based on their first-hand observations of how he handled stamps and cash on August 14 and 18, 2003. Probable cause exists when the facts known to the authorities are sufficient to warrant a prudent person in believing that the suspect has committed or is committing a crime. Probable cause requires only a substantial chance of criminal activity, not an actual showing of such activity. Although mere suspicion is not enough, probable cause need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false. The determination whether probable cause exists in a given situation involves examining the totality of circumstances in a commonsense manner. *United States v. Schaafsma*, 318 F.3d 718, 722 (7th Cir. 2003).

On both August 14 and 18 the inspectors saw Carlisle slip money from his postal drawer into his pocket; on August 18, 2003, they also saw him handle multiple controlled stamp sales irregularly. Embezzlement and willful mishandling of stamps are federal crimes. Carlisle has offered his post-hoc explanations for what happened, including his unsupported frame-job theory, but this cannot negate the probable cause known to the agents on August 18, 2003.

Because the main issues in this case revolve around *Miranda* and voluntariness, and because fifth amendment custody is different from fourth amendment custody, *see United*

States v. Smith, 3 F.3d 1088, 1096-97 (7th Cir. 1993), I'm not sure why the parties even raised this issue, but to the extent it matters, the inspectors did have probable cause to arrest Carlisle, even though they never actually arrested him.

II. Miranda Violation

Carlisle's primary argument in support of suppression is that regardless whether the inspectors formally arrested him, he was in their custody for fifth amendment purposes, and therefore was entitled to *Miranda* warnings prior to interrogation. The government disagrees, claiming that Carlisle was free to go at all times and therefore not subjected to custodial interrogation.

Miranda warnings only are required prior to a custodial interview. See *United States v. Cranley*, 350 F.3d 617, 619 (7th Cir. 2003). 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. *Id.* 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). Among the factors to consider are whether the encounter occurred in a public place, whether the suspect consented to speak with the agents, whether the agents informed the suspect he was not under arrest and was free to leave, whether the agents moved the suspect to a different area,

whether there was a threatening presence of several agents and a display of weapons or physical force, whether the agents deprived the defendant of documents needed to leave, and whether the agents used a tone of voice such that their requests likely would be obeyed. *Id*; see also *A.M. v. Butler*, 360 F.3d 787, 795-96 (7th Cir. 2004)(the only relevant question is whether a reasonable person in the suspect's position would have understood his situation; the subjective views of the suspect and the agents are irrelevant).

Here, the factors cut in both directions. On the one hand, there were objective indicia of custody, coupled with Carlisle's fervid (but undisclosed) belief that he was being held hostage; on the other hand, there were objective indicia of freedom of movement, coupled with the fact that Carlisle never specifically asked to leave.

Weighing in the government's favor, the inspectors did tell Carlisle near the outset that he was free to leave and that he would be going home at the end of the night. But then they treated him as if he was not free to leave until they had completed their agenda. First, they deflected Carlisle's request to go back outside to tell his wife he would be late by sending Inspector Groen as the messenger. Maybe this was merely an attempt to be efficient and helpful, but it would plant the seed that the inspectors were keeping a leash on Carlisle. Then two inspectors interviewed Carlisle in a small, closed office. When Carlisle asked for water, it is not clear whether they let him out of the small office or instead brought the water into him. If the latter, then the message would be reinforced that the inspectors were in control and Carlisle was not free to move about without their permission.

This message would have been driven home when Carlisle said that he needed his glasses from his car and the inspectors told him that they would get them for him. This is the third instance in which the inspectors—no doubt politely—declined to allow Carlisle to stray from their sight. The inspectors’ custodial mindset is revealed by Inspector Rosandich’s testimony at the suppression hearing that Carlisle’s request for his glasses seemed odd because Carlisle hadn’t needed his eyeglasses earlier. Implying what? That Carlisle was using his eyeglasses as a ruse to step outside and then flee? If Carlisle genuinely was “free to go,” then he didn’t have to offer any reason at all, let alone one the inspectors found believable, to go to his car, jump in and drive away. Even objectively reasonable people—a category into which Carlisle does not fall—would infer from such a response that they really were not free to go until the inspectors said so, notwithstanding the inspectors’ rote statement to the contrary at the outset. Indeed, the “free to go” advisal, coupled with the “going home at the end of the evening advisal” reasonably could be interpreted conjunctively to mean that the suspect would be free to go at the end of the evening after the interview was done. Temporary custody is still custody.

Carlisle is too subjectively paranoid to be considered an objectively reasonable man, but his covert telephone call to his wife does shed at least a bit of light on the question. It’s impossible to recreate the physical and psychological atmosphere at the empty post office at night, with four inspectors alone with their suspect, putting him through his paces as the he appears to acquiesce quietly to all demands. Perhaps it is too easy after the fact to insist

that an objectively reasonable suspect in this situation simply would announce that he was leaving. Maybe the subtle coercion of the situation, intended or not, would impress upon the suspect that whatever the inspectors might have said about “free to go,” they didn’t really mean it. Obviously, Carlisle felt sufficiently preyed upon to sneak a call to his wife imploring her to “get help.” Such a stunt is melodramatic and perhaps a tad irrational, but it does reveal that Carlisle subjectively felt so thoroughly ensnared and helpless that he resorted to detective novel tactics to escape the grasp of his tormentors.

On the other hand, Carlisle’s ploy also establishes that the inspectors did give him relatively unrestrained access to a telephone, and that Carlisle was free enough to call his wife covertly to leave an incomprehensible plea for assistance. Even so, access to a telephone is not the same as being free to leave: just because prisoners at the Dane County Jail have access to a telephone doesn’t mean they can go home.

Which segues back to a pivotal question: why didn’t Carlisle just tell the inspectors that he wanted to go home? If they had refused to release him, then at least his custodial status would have been pellucid. By failing to test the truth of the inspectors’ “free to go” announcement (which Carlisle claims never was made), Carlisle has made it more difficult for a factfinder in retrospect to conclude that he actually was in custody.

Let's add to the mix the inspectors' telephonic interaction with DeLoof.⁴ Whatever the procedural niceties of *Weingarten*, the fact that the inspectors continued the interview in the absence of a union steward could lead a reasonable person to conclude that he wasn't going anywhere until the inspectors were done asking questions. But this is a minor factor because the content of conversations to which Carlisle was not privy cannot be used as a basis to find custody. There is no proof that Carlisle ever told the inspectors that he would not answer any more questions until his steward appeared. Additionally, the inspectors always put the interrogation on hold while a request to obtain a steward was pending, detouring to some other activity that didn't involve Q&A.

Note, however, that the pauses always were filled with activities in the post office in the company of 2-4 inspectors. Apparently, there were no pauses during which the inspectors told Carlisle he could step outside and get a breath of fresh air. Would a reasonable person infer from this that he couldn't escape the inspectors or their questions until they were done?

Then, at the end, after the inspectors had asked all of their questions, looked into Carlisle's wallet twice, searched his locker, checked his cash drawer and run reports on his computer, Carlisle asked if he could go. The inspectors said no. Carlisle had to wait for McCredie to show up, take his keys, and suspend him. The inspectors testified that if

⁴ Ironically, Carlisle told DeLoof that he was tired and he wanted to go home, but he never said this to the inspectors.

Carlisle had tried to leave at that point, they would not have arrested him. Fine, but that's not the point: Carlisle asked to leave and they told him he couldn't. At that juncture, it wasn't Carlisle's burden to prove that the inspectors were bluffing.

Carlisle claims that things were even worse than this, but I have accorded slight weight to his affidavit. First, although the affidavit is admissible in a suppression hearing, Carlisle declined to subject his assertions to cross-examination or a demeanor check by taking the stand. Second, Carlisle has undermined his own credibility with arguably irrational words and deeds. I already mentioned the weird phone call to his wife, but there's also his implication that during the call the inspectors cut the line when he told his wife he was being "set up." Also, according to McCredie, Carlisle told her that the whole investigation was just another attempt by his supervisor (McCredie) to get him. Carlisle's insistence that he is the true victim despite the evidence showing that he did in fact mishandle stamps and money makes me skeptical of the claims in his affidavit.⁵

That said, this appears to be a wobbler. Based on the totality of the circumstances, I am recommending that the court find that Carlisle was in custody and therefore was entitled to *Miranda* warnings. If the court feels otherwise, there are facts in the record that would support the opposite finding. But the 4/1 ratio of inspectors-to-suspects, the length, timing and location of the interview, the subtle words and acts that kept Carlisle constantly

⁵ This is not finding that Carlisle intentionally made untrue or incorrect assertions, or that he is guilty of any crime.

in the presence of the inspectors, all sent the message that Carlisle was not free to go until the inspectors released him. The *gestalt* of the situation would have led an objectively reasonable person to believe that he was in custody during this interaction with the inspectors.

If the court accepts this finding, then Carlisle's statements to the agents must be suppressed from the government's case in chief. The next question, whether the statements were involuntary, determines whether the statements are inadmissible for any purpose at all. See *United States v. Cichon*, 48 F.3d 269, 274-75 (7th Cir. 1995).

III. Voluntariness of Carlisle's Statements

Carlisle claims that his statements to the inspectors were not voluntary, and therefore are not admissible. 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). Factors important to the determination include the suspect's age, education, intelligence and mental state; the length of his detention; the 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 use of drugs. *Huerta*, 239 F.3d at 871. *See also United States v. Gillaum*, 355 F.3d 982, 990 (7th Cir. 2004).

Although Carlisle perceived that he was being unjustly accused and pressured by the agents, the record does not support his subjective perceptions. As just noted, it is a close call whether Carlisle even was in custody that night. Despite the length, timing and location of the interview, and although the inspectors may have employed subtle techniques to establish their dominance over Carlisle, nothing that any inspector said or did, singly or collectively, comes close to the threshold of fifth amendment coercion. The only claim that raises an eyebrow is Carlisle's assertion in his affidavit that an inspector threatened to strip search him if he did not consent to the second wallet search. Inspector Girardot flatly denied this, and I have concluded that no such threat was made.⁶

Apart from this, Carlisle was old enough, smart enough, and aware enough to look out for his own interests. Indeed, he demonstrated his free will by asking more than once for a union steward. The fact that no stewards were available was not the inspectors' fault and it did not prohibit them from attempting to continue the interview. The fact that Carlisle asked to contact a steward more than once establishes that he remained aware of his right and continued to attempt to exercise it. This refutes any implication that the inspectors wore down his resistance over the course of the evening.

⁶ Inspector Werlein was conspicuously absent from the suppression hearing. Does Inspector Girardot's denial include Werlein? It's hard to tell, but Carlisle didn't pursue this during cross-examination, so I surmise Carlisle remembers Girardot to be the inspector who threatened him.

Carlisle also demonstrated sneaky defiance by calling his wife at around 8:30 to seek for help. Normally, such a call might be an indication that a suspect's will is being overborne, but not here. As previously noted, Carlisle never tried the obvious stuff, like announcing that he was done talking, or asking to leave. He was pleasant and cooperative at all times. He must have his reasons for proceeding in this fashion, but his tactical decisions do not establish coercion by the inspectors.

In short, there was no official coercion, and Carlisle's will was not overborne. His statements were not involuntary.

IV. The Wallet Searches

Finally, Carlisle seeks to suppress photocopies of the U.S. currency found in his wallet on the grounds that they represent the fruit of an illegal arrest, an involuntary statement or a statement obtained in violation of *Miranda*. None of these grounds justifies suppression.

First, Carlisle mentions in passing that this search was illegal because there was no probable cause to arrest him. Ironically, there *was* probable cause to arrest Carlisle and if the inspectors actually had arrested him, then they legally could have search the contents of his wallet without first obtaining his permission. See *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993).

Second, it is a non sequitur for Carlisle to argue that the wallet search derived from his statements to the inspectors. On March 18, 2003, the inspectors *saw* Carlisle pocket the

money that they suspected they would find in his wallet. This was a logical and untainted basis for the request to search. The inspectors did not learn of this evidence or its location from anything that Carlisle said to them.

Third, even if they had, as Carlisle acknowledges, this court takes the position that physical evidence discovered as the result of a *Miranda* violation need not be suppressed absent egregious conduct of the sort that is not present here. *See* March 16, 2004 order in *United States v. Gilmore*, 030-CR-30-C, dkt. 33 at 13-14.

Fourth, even if this court concludes that Carlisle was entitled to *Miranda* warnings before being questioned (which I am recommending), a request for consent to search is not covered by *Miranda* because it is not considered “interrogation.” *See United States v. Scheets*, 188 F.3d 829, 841 (7th Cir. 1999).

Finally, Carlisle’s best argument would be one under the fourth that he doesn’t make directly: that the inspectors coerced his consent to empty his wallet. I agree with Carlisle that the record could be better as to what prompted Carlisle to consent to the second wallet search, but Carlisle did not take the stand, and the only live witness to testify on this point denied that he threatened to strip search Carlisle. Accordingly, I have found that no such threat was made.

In sum, there is no basis to suppress the evidence obtained as a result of the inspectors’ search of Carlisle’s wallet. This portion of Carlisle’s motion should be denied.

RECOMMENDATION

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

- 1) Grant defendant's motion to suppress his statements on the ground of a *Miranda* violation;
- 2) Deny his motion to suppress his statements on the ground of involuntariness; and
- 3) Deny his motion to suppress the evidence seized from his wallet.

Entered this 7th day of May, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge