

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH N. RUSSO,

Defendant.

REPORT AND
RECOMMENDATION

05-CR-141-S

REPORT

The grand jury has charged defendant Joseph Russo, a convicted felon, with unlawfully possessing three firearms. Russo has moved to suppress all of his statements and the physical evidence seized from his home. Russo claims that upon being arrested by police in Hurley following his sale of marijuana to an informant, the police questioned him despite his repeated requests for an attorney. Russo claims that the officers then coerced his statements and coerced his consent to search his residence by threatening to arrest his friend and his girlfriend. Russo alleges that the police repeated this conduct in a followup interview, and that for two days he was denied the opportunity to telephone an attorney.

The government opposes Russo's omnibus suppression motion, asserting that at all times the police honored Russo's rights. The government is correct and I am recommending that this court deny Russo's motion.

On January 3, 2006, this court held an evidentiary hearing on Russo's motion. Having heard and seen the witnesses testify, having considered all the exhibits, including the affidavits, and having made credibility determinations, I find the following facts.

FACTS

In the spring of 2004, police in Hurley, Wisconsin were using a confidential informant to buy marijuana from Joseph Russo. The police surveilled Russo's house during drug buys, but not otherwise. They knew that Russo had a girlfriend, but the informant reported that she was not involved in Russo's drug sales. The police also knew that a man named Peterson stopped by Russo's house regularly, but the police had no reason to suspect that Peterson was involved in Russo's drug sales.

On May 30, 2004 at about 11:45 a.m., the confidential informant made his third dope buy from Russo. Officers waited for Russo to leave his home, executed a pretextual traffic stop, then arrested him. Officer Don Packmayer arrived on the scene and advised Russo that he was being arrested for selling drugs. Packmayer asked for and received from Russo permission to drive Russo's car to the police station. A car search revealed additional marijuana in the car.

At the Iron County Jail, Officer Packmayer caught up to Russo in the booking room. From there he escorted Russo to a small room in which police kept their Intoxilizer machine. (This room is marked with a blue "X" on Government Exhibit 3, a map of the jail).

Officer Packmayer asked if Russo was willing to talk; Russo replied that he was. Officer Packmayer read Russo his *Miranda* rights off of a form;¹ Russo initialed the five advisal paragraphs, then signed the waiver section at about 12:40 p.m. After Officer Packmayer asked a few questions, Sergeant Chris Colassaco arrived to take over. Officer Packmayer advised Sergeant Colassaco that Russo wished to talk and had been *Mirandized*. Officer Packmayer returned back to the booking area to search Russo's wallet for the buy money from that morning. At no time had Officer Packmayer made any promises to Russo, or made any threats against Russo, his girlfriend (Arlene Schwab-Wyche) or his friend Jeff Peterson. Russo did not tell Officer Packmayer that he wanted an attorney.

Alone with Russo, Sergeant Colassaco explained the charges to him. At that point, the police had no indication that Russo might have guns at his house. Russo reaffirmed his willingness to cooperate. Russo explained that he had two prior convictions and wanted to help himself. He did not ask for an attorney. Sergeant Colassaco offered to report Russo's cooperation to the district attorney without promising that the DA would take any specific action in return. This was enough for Russo, who promptly named his drug source, including his home address in Ironwood, Michigan (directly across the border from Hurley), the color of the house, and a description of the cars the police might find parked there. Sergeant Colassaco made no other promises to induce Russo to cooperate. Sergeant Colassaco made no threats against Russo directly or against Schwab-Wyche or Peterson in

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

order to coerce Russo into cooperating. Russo never asked for an attorney during the interrogation; perforce, Sergeant Colassaco never dishonored a request for counsel.

About an hour into the interrogation Sergeant Colassaco asked Russo if he was willing to consent to a search of his own home. Russo voluntarily agreed and signed a written consent form permitting the police to search his residence. Sergeant Colassaco asked Russo what they would find there; Russo responded that he still had a small amount of marijuana and a postal scale for weighing. Sergeant Colassaco asked if they would find any guns; Russo responded that there were some long guns in the house but they did not belong to him. This was the first time the topic of firearms was raised.

Although the timing is not entirely clear in the court's record, it appears that Sergeant Colassaco ended the interview and had Russo taken to cell block A within the jail. Sergeant Colassaco ordered that the telephone in A Block be disconnected that afternoon to prevent Russo from warning his drug supplier that he was burned. The police went to Russo's house in Hurley to conduct the consent search. It seems that both Peterson and Schwab-Wysche were at Russo's house during the search but there is no indication that the police interacted with them in any fashion.

Meanwhile the police in Ironwood were putting together a search warrant application for the house of Russo's drug supplier. Those police contacted Sergeant Colassaco to report that some of Russo's information did not check out. As a result, at about 3:00 p.m. Sergeant Colassaco and his lieutenant returned to A Block to ask Russo if he would accompany them

to Ironwood to point out the house he had described. Russo agreed. The police took Russo to Ironwood then returned him to A Block, keeping the telephone switched off.

The jail's cell block check sheets indicate that on May 30, 2004, only one inmate was housed in A Block (which had only two individual cells and a common room). The same is true for May 31 and July 1: only one inmate is listed as being housed in A Block.

Jail telephone records indicate that someone in a jail cell block telephoned Jeff Peterson on May 31, 2004 at 1:48 p.m. and held a ten-minute conversation.² Soon thereafter, at 2:25 p.m., someone from a jail cell block called Jeff Peterson's telephone number and a five-minute conversation ensued. Because all jail telephone calls must be made collect, Whoever answered Peterson's telephone would have to have accepted the toll charges for these conversations to have occurred.

On May 31, 2004 at 1:39 p.m. and 1:47 p.m., someone in a jail cell block attempted to call Nancy and Tim Schwab, the parents of Russo's girlfriend. Jail phone records indicate the call was blocked at the receiving party's end. On May 31, 2004 at 1:39 p.m. someone in a jail cell block attempted to call Attorney Rudy Perhalla, who Russo later claimed in state court was his retained attorney. This call was blocked from Perhalla's end.

On May 31, 2004 at about 7:20 p.m., Sergeant Colassaco and his lieutenant returned to the jail to interview Russo. They had him brought to the jail library. Russo immediately told Sergeant Colassaco that he attempted to contact an attorney but could not get hold of

² For reasons that are not entirely clear, although the records indicate that the calls originated in A Block, they could have originated in A Block, J Block or the jail's Huber Center.

him. Instead of terminating the interview, Sergeant Colassaco read Russo his *Miranda* rights, asked him to sign the waiver form, then asked him: “Do you want an attorney here tonight when you talk to us?” Russo responded that he did not. Russo then gave a statement that dealt mainly with drug trafficking. Russo also mentioned the guns found at the house and asked permission to write a statement about them, so Sergeant Colassaco let him. Sergeant Colassaco did not threaten Russo, Peterson, or Schwab-Wyche in any fashion that evening. Indeed, neither Peterson nor Schwab-Wyche even were mentioned on May 31.

At about 10:45 a.m. the next morning (June 1, 2004), Russo made his initial appearance in county court. He did not have an attorney present. The prosecutor outlined the nature of the case and Russo’s criminal history, then requested a high cash bond. The court determined that Russo was not indigent and asked him whether he intended to hire an attorney. Russo responded that he had Rudy Perhalla on retainer. The court set a bond hearing for the next day then asked Russo if he could alert Perhalla. Russo responded, “They won’t let me call out on my phone, and there is no way for me to contact.” *See* Gov. Exh. 7 at 66-67. The court replied that the jail sergeant would provide Russo the opportunity to meet with Perhalla prior to the bond hearing.

Later that afternoon (still June 1), someone in a jail cell block attempted to call the Schwabs again; again the call was blocked from the Schwabs’ end. At 12:58 p.m. someone in a jail cell block attempted to call Attorney Perhalla; again the call was blocked from Perhalla’s end.

ANALYSIS

Russo seeks to suppress all of the evidence against him based on his claim that all of his statements on May 30-31, 2004 resulted from *Miranda* violations and coercion, and that the guns recovered during the search of his home were derived from his coerced statements and his coerced consent to search.³

The parties agree on the law applicable to Russo's claims: the police must stop questioning a suspect if he asserts his *Miranda* right to counsel, *United States v. Lee*, 413 F.3d 622, 625 (7th Cir. 2005), and police may not coerce a suspect into providing an involuntary confession, *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). 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. at 167. 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 was in custody, 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,

³ Because Russo alleges that the firearms were discovered as a result of coercion, not just a *Miranda* violation, *United States v. Patane*, 542 U.S. 630 (2004) does not apply to this case.

990 (7th Cir. 2004). Courts consider the same factors used to determine the voluntariness of a *Miranda* waiver, see *Ruvalcaba v. Chandler*, 416 F.3d 555, 651 (7th Cir. 2005), and to determine the voluntariness of a consent to search, see *United States v. Grap*, 403 F.3d 439, 443 (7th Cir. 2005).⁴

On the facts found above, Russo cannot win: he did not invoke his right to an attorney, the police did not coerce him into confessing or consenting to a search, and they did not hold him *incommunicado* in violation of his right to an attorney.

In finding these facts I have accepted the officers' version of events and I have rejected the version provided by Russo and his witness, Theodore McCallister.⁵ Although there are some factual loose ends that cannot be tied off neatly, I conclude that the officers got it basically right while Russo and McCallister did not. This conclusion is based on my consideration of the testimony and demeanor of each witness, the reasonableness of their versions of events, the corroborating and impeaching documents and other exhibits, as well as the totality of circumstances presented.

⁴ The voluntariness determination in this case hinges on the dispute whether the police engaged in palpably improper conduct, so many of the usual factors are irrelevant to the analysis. For what it's worth, Russo was a construction worker in his early 40's at the time, with a 1995 felony drug conviction, a 1997 battery conviction and a handful of disorderly conduct arrests.

⁵ Because I have not credited McCallister's version of events, I did not even mention him in the fact section. McCallister, a six-time felon, was incarcerated in the Iron County Jail at the time Russo was detained there. For a while, McCallister was celled in "T Block" which opens into the jail's booking area. While in T Block on May 30, 2004, McCallister claimed to have overheard the police interrogation of Russo. McCallister also alleged that he was moved to A Block while McCallister was there, during which time the telephone remained turned off for several days.

Starting with McCallister, I agree with Russo that it is unusual for a criminal defendant to discover a third-party witness who is willing to testify about alleged police misconduct that he witnessed while incarcerated. Thus, Russo started the evidentiary hearing with a stronger hand than most defendants seeking to suppress evidence.

However, the longer McCallister testified, the more ephemeral this advantage became: McCallister's version of events contradicted several provable material facts in the instant case. No one expects any witness to remember accurately and precisely every detail of an occurrence like that at issue here, and some memory loss during the intervening 18 months is natural and expected. But a witness who confidently offers incorrect testimony on fundamental and significant points shreds his own credibility. So it was here: according to McCallister, at least two or three officers simultaneously interviewed Russo in the booking room for over an hour, questioning him throughout that time about guns and drugs without first advising him of his *Miranda* rights.

But the interview actually took place in another section of the jail where McCallister could not have heard or seen it, one officer at a time, with *Miranda* rights being provided at the front end, and the topic of guns not broached until an hour into the interrogation when Sergeant Colassaco was discussing the consent search of Russo's home. (Although not as clear cut a blunder on the facts presented, McCallister also got it wrong regarding the telephones). Having carefully considered McCallister's testimony, I have found it incredible and I have rejected it.

Russo raises a valid question: what motive did McCallister have to lie? I can only speculate as to why McCallister would place himself in this position. The bottom line is that McCallister could not have heard—and did not hear—the conversation that he claims to have heard on May 30, 2004, and there is circumstantial evidence, notwithstanding McCallister’s claim to the contrary, that Russo had access to a working jail telephone not later than May 31, 2004.

This leaves the conflicting narratives provided by Russo in his affidavit and the officers in their hearing testimony. A defendant’s affidavit is admissible at a pretrial evidentiary hearing and it could be more persuasive than the live testimony of police officers if their version of events is sufficiently impeached by cross-examination and conflicting evidence. But that is not the case here. Having heard and seen the officers testify, I have no reason to doubt their veracity. Overall, their version of events is more logical than Russo’s.

Although threatening innocent friends and loved ones is a logical, time-tested (and vicious) coercion technique if coercion is the officers’ game, I have no reason to doubt the police denials on this point. It would not be very logical for the police to threaten to arrest Peterson or Schwab-Wyche whom they did not suspect of complicity in Russo’s drug trafficking and against whom they had no evidence. If the police played this card and Russo called their bluff, then what? Nothing in the record suggests that Russo’s cooperation was so important to the police that they would break the rules to obtain it. Similarly, the police

had no strong reason to refuse Russo an attorney if he asked for one. Indeed, when Sergeant Colassaco re-interviewed Russo the next night (May 31), he recorded Russo's report of a failed attempt to contact an attorney.

Having caught Russo red-handed in three marijuana sales to a confidential informant, the officers did not need to coerce Russo into naming his source because Russo's personal legal troubles were motivation enough. As the prosecutor stated at the June 1, 2004 initial appearance, Russo knew he was in a world of hurt as a recidivist who faced potential federal prosecution and a breathtaking sentence if convicted. Russo's self-preservation instinct would provide more than enough motivation for Russo voluntarily to snitch out his source. But such a decision creates a dilemma for the snitcher, because while he needs to curry favor with the police, he also wants to avoid trouble with the people he fingers. One logical solution to this dilemma is to claim police coercion: "I didn't want to tell them, but they made me." Such an approach has the collateral potential later to convince a court that the claimed coercion actually occurred and the evidence against the snitching defendant must be suppressed.

Although this would be a logical approach, Russo's thought process and motivation remain unknown because he exercised his right not to testify in support of his motion. But weighed against Russo's accusations is the logical and believable testimony from the two officers. I am not suggesting that police never coerce suspects, *see, e.g., Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993)(discussing credible allegations that Chicago police

tortured confessions out of suspected cop killers). I am concluding that no coercion occurred in this case.

In addition to the officers' credible testimony, the jail telephone records, muddled though they may be, more strongly support the government's position than Russo's. Although at the evidentiary hearing it initially appeared from the phone records and jail map that the government was on the verge of proving that Russo and McCallister had concocted a bald lie, cross-examination by Russo's attorney weakened the impact of the telephone records. Even so, the question remains: on May 31, 2004, the date the officers claimed they restored phone service to A Block, who else but Russo would have called his girlfriend's parents' telephone and Peterson's telephone?

Also, someone attempted to call Attorney Perhalla. It cannot be determined whether this was Russo, but the jail telephone records do show that collect calls from the jail to Perhalla's line were blocked from Perhalla's end. It may well have been that Attorney Perhalla had not yet authorized Russo to call him from the jail. This is one logical explanation for Russo's complaint to Sergeant Colassaco during the May 31 library interview and Russo's complaint to the court at his June 1, 2004 arraignment. Granted, this is not the only possible explanation, so this thread is left dangling, at least slightly. But there is no support for Russo's contention that he was completely blocked from using the telephones until his initial appearance, or that after May 30, 2004 he was denied access to an attorney. Any failure to communicate with Perhalla appears to have been Perhalla's fault, not the officers'.

Finally, Russo's report on May 31 to Sergeant Colassaco that he could not get hold of his attorney is not grounds to suppress evidence resulting from the interview that followed. As the government correctly observes, a defendant who wishes to invoke his right to counsel in response to custodial interrogation must do so clearly. *See, e.g., United States v. Lee*, 413 F.3d 622, 625 (7th Cir. 2005). Russo did not do so, and Sergeant Colassaco was not obliged to seek clarification of his ambiguous statement. *Id.* But, as is the better practice, he did so anyway, reading Russo his *Miranda* rights for good measure. Russo confirmed that he did not want Perhalla or any other attorney present for the interrogation. So, the interrogation went forward without one. This did not violate Russo's constitutional rights.

In sum, the government has met its burden of establishing that Russo voluntarily provided all of his post-arrest statements to the police, and the police did not coerce him in any fashion or deny him access to an attorney. There is no basis to grant his motion to suppress.

RECOMMENDATION

Pursuant to 28 U.S. C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny in all parts defendant Joseph N. Russo's motion to suppress statements and other evidence.

Entered this 19th day of January, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

January 19, 2006

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Re: ___ United States v. Joseph N. Russo
Case No. 05-CR-141-S

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 January 23, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by January 23, 2006, 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 John C. Shabaz, District Judge