

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DE'ALLO GORDON,

Defendant.

REPORT AND
RECOMMENDATION

06-CR-103-S

REPORT

The grand jury has charged defendant De'Allo Gordon with two counts of distributing five grams or more of crack cocaine. Before the court is Gordon's motion to suppress his post-arrest statement on the ground that it was involuntary. *See* dkt. 20. For the reasons stated below, I am recommending that the court deny this motion.

On July 27, 2006, this court held an evidentiary hearing. Having heard and seen the witness testify, having considered Gordon's sworn affidavit, I find the following facts:

FACTS

At dawn on May 11, 2006, the FBI and local law enforcement agencies gathered their forces in Beloit, intending to arrest 15 to 20 newly-indicted defendants charged with a variety of drug trafficking crimes. Defendant De'Allo Gordon was one of their targets. At about 6:00 a.m. an armed and armored FBI entry team approached Gordon's home. One team member was FBI Special Agent Joshua Ben Mayers, a 15-year veteran of the FBI with a law degree, prior experience as a detective investigator in the City of New York, and

specialized training in interrogation techniques. It would be Agent Mayer's job to attempt to interview Gordon after his arrest.

The entry team knocked and announced; after waiting briefly for a response that never came, the entry team rammed down the entry door and threw a "diversionary device" (sometimes called a "flash-bang" device) into Gordon's living room. The device erupted in a blinding flash of light and a deafening bang as agents charged through the entryway's "fatal funnel." Agents quickly took Gordon into custody. It is not clear whether the agents initially found Gordon in bed with his girlfriend or in the living room; the first time Agent Mayers saw Gordon was on the living room floor in handcuffs. Agent Mayers identified himself to Gordon, told him not to say anything to anyone, and advised that they would meet again soon for an interview. Agent Mayers advised Gordon that the agents searching his house would not harm his family or damage his property.

Within about fifteen minutes, police drove the handcuffed Gordon to the Beloit National Guard Armory, which agents had converted into a holding area/interrogation center for the morning's roundup. Rock County Sheriff's Deputies were in charge of security at the armory and were the only agents in the building allowed to carry firearms. Agents had partitioned the main floor of the armory into small cubicles in which each arrested defendant was held individually until summoned to a private interview room at which agents attempted to obtain confessions. Although the record is unclear, Gordon probably was shackled in leg irons while at the armory.

At approximately 8:00 a.m., Agent Mayers and Beloit Police Inspector John McMahon directed deputies to bring Gordon to a private room for an interview. The book-lined room was approximately 8' x 12' and furnished with a rectangular conference table and three or four chairs. Both agents identified themselves to Gordon and showed him their credentials. The agents removed Gordon's handcuffs. Agent Mayers started by advising Gordon not to say anything until Mayers had finished his initial statement.

Agent Mayers reminded Gordon that they had met at Gordon's house about two hours earlier. Agent Mayers reported that he had just left that house, Gordon's family appeared to be fine and the search was ongoing. The agents obtained background information from Gordon and determined that he understood what was happening and was capable of communicating effectively with them that morning. Agent Mayers then advised Gordon that they had significant evidence of his direct involvement in crack transactions, that the agents had arrested many other defendants that morning who they believed were co-conspirators of Gordon's, and that some of these people already were cooperating with the government by implicating Gordon and others. This interview would be Gordon's opportunity to help himself.

To make his point, Agent Mayers used the oft-employed "bus analogy": Agent Mayers told Gordon that he had a bus in front of him right now and its door was open; Gordon could get on that bus by cooperating and telling the truth, which would assure that the agents would make his cooperation known to the U.S. Attorney, who would make the decision whether to reward Gordon. On the other hand, if Gordon chose not to cooperate

that morning, or chose not to tell the truth during the interview, then that bus door would close, the bus would drive down the street and someone else in the armory would be given the opportunity to get on the bus, cooperate, and possibly be rewarded by the U.S. Attorney. When employing this analogy, Agent Mayers did not make any promises that Gordon's cooperation actually would result in consideration; he advised that this was a decision for the U.S. Attorney to make. Neither did Agent Mayers advise Gordon that if he asked for an attorney, the bus was going to leave without him. At no point did the agents threaten that Gordon would never have the chance to be with his children again if he did not cooperate.

At that juncture, around 8:18 a.m., Agent Mayers pulled out a preprinted FBI Miranda form and read it verbatim to Gordon. Gordon responded that he wished to sign the form. Agent Mayers demurred, telling Gordon that first Gordon had to read the form to himself and make sure that he understood it. So, Gordon read the form silently. Agent Mayers asked if he had read it and whether he understood it. Gordon responded affirmatively to both questions. Agent Mayers then allowed Gordon to sign the Miranda waiver on the form, which both agents signed as witnesses.

The actual interview proceeded uneventfully from about 8:30 a.m. to 11:40 a.m., tapering to a conclusion when the agents ran out of questions. The agents spoke with Gordon conversationally without raising their voices. They never threatened Gordon or his family. Gordon was not restrained by handcuffs, although he might have been wearing leg shackles. Gordon never asked for an attorney during the interview and the agents never

attempted to dissuade him from obtaining one. Gordon neither voiced nor exhibited any signs of distress that would have suggested he felt overwhelmed by his situation. Twice during the interview Gordon asked to use the restroom, and both requests were honored, with deputy sheriffs escorting Gordon to and from the facilities. The agents offered Gordon a choice of beverages; he chose soda and drank some. At about 9:30 a.m. the agents cued an audiovisual CD purporting to show Gordon selling drugs to an informant. Around 11:30 a.m. Gordon asked if he could telephone his fiancée at their home. Inspector McMahon lent Gordon his cell phone. After talking to his fiancée, Gordon became emotional. The interview ended shortly thereafter and Gordon was transported to jail.

According to the May 24, 2006 pretrial services report, Gordon is 31 years old and lives with his fiancée, with whom he has three children under the age of 5. (Defendant has other young children from other relationships). Gordon has a high school education and works in construction. He is in good physical and mental health. Since 1994, Gordon has been arrested about 16 times, on charges of battery, bail jumping, disorderly conduct, OAR, trespass simple possession of marijuana. Gordon has far fewer convictions than arrests.

ANALYSIS

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 necessary

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 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, 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).

Although the government may buy information with an honest promise of consideration, it may not make a false promise of lenience because this would prevent the suspect from making an informed choice whether to confess or clam 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)(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).

The determination of Gordon's suppression motion pivots on which version of the facts the court accepts. Gordon submitted an affidavit alleging a torrent of physical, verbal and emotional abuse by the agents that caused him meekly and unwillingly to submit to interrogation without voicing his wish for an attorney. The government hotly disputes these contentions; its dudgeon was such that it announced at the suppression hearing its intent

to seek an obstruction enhancement at any sentencing because of Gordon's mendacity. Unfazed, Gordon declined to withdraw his affidavit and upped the ante in his post-hearing briefs by accusing Agent Mayers of covering up the coercion by failing to record the interview and testifying falsely at the hearing.

On the contested material facts (*see* ¶¶ 10-12 & 15-16 of Gordon's affidavit, dkt. 21), I have found Agent Mayers' testimony more accurate than Gordon's affidavit. That said, it's at least *possible* that Gordon's actually recalls some of the events as having occurred as he claims. Usually, however, genuine mis-recollection occurs in novices to the criminal justice system, not veterans like Gordon who are more familiar with the way things work.¹ Further, and more importantly, Gordon never expressed or demonstrated the emotional turmoil he now is claiming to have experienced that morning. Even if Gordon had manifested the paralyzing distress he claimed to be experiencing, in the absence of coercive agent conduct, this would not be a basis to grant suppression.

True, if the agents were to have had reason to suspect that Gordon was emotionally and mentally fragile, then this court could find that an otherwise legally inconsequential level of coercive behavior was unacceptable under the circumstances. *See, e.g., United States v. Montgomery*, 14 F.3d 1189, 1195 (7th Cir. 1994). But the agents noted nothing (even

¹ For instance, the last time this court visited the "bus analogy" regarding cooperation was in *United States v. Mullen*, 01-CR-67-S-2. Mullen was a naive middle class college student who got caught the first time he muled drugs. Mullen claimed that he had taken literally Investigator Russ Cragin's exhortation to get on the cooperator's bus to federal court. Disappointed by the absence of an actual bus waiting for the good guys outside the sheriff's department, Mullen moved to suppress his confession. *See* Rep. & Rec., dkt. 46. Apparently, law enforcement agents across Wisconsin are overestimating their suspects' capacity to grasp even mildly abstract concepts.

Gordon does not claim that he externalized his distress) and they did not engage in an quantum of coercive conduct that could have rendered Gordon incapable of exercising his free will when deciding how he wished to proceed that morning.

In short, aligning the applicable legal template with the facts found above establishes that Gordon's confession was not involuntary. The agents did not make the threats that Gordon attributes to them. Gordon's claim of debilitating distress and despair is unsupported by the record. To the contrary, the evidence demonstrates that this was a routine interview in which the agents followed the rules and Gordon voluntarily chose to cooperate. The fact that it occurred as part of a large-scale operation involving other suspects is irrelevant to the voluntariness determination.

I agree with Gordon that it would assist the truth-finding process if law enforcement agents routinely videotaped custodial interrogations. I am aware of no substantive downside to this, and ministerial issues such as obtaining enough equipment to record all the interviews in Beloit that morning could be resolved with proper planning. That said, I reject Gordon's intentionally inflammatory syllogism that since a videotape would have accurately recorded what happened during his interview, the agents' failure to videotape his interview establishes that Agent Mayers lied about what happened.

The upshot of all this is that there is no basis to find that Gordon's confession was involuntary. This court should deny his motion to suppress evidence.

RECOMMENDATION

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

Entered this 11th day of August, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

August 11, 2006

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Re: ___ United States v. DeAllo Gordon
Case No. 06-CR-103-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 August 21, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 21, 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