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

UNITED STATES OF AMERICA,

Plaintiff,

v.

KRISTEN SMITH,

Defendant.

OPINION & ORDER

14-cr-24-jdp

The defendant, Kristen Smith, was detained and questioned about the kidnapping of the infant K.P. She has now been charged with that kidnapping. Smith has moved to suppress statements she made to law enforcement agents while in custody on February 6 and 7, 2014. Dkt. 25, supplemented by Dkt. 30.

After an evidentiary hearing on Smith's motion, the magistrate judge issued a thorough Report and Recommendation that Smith's motion be granted in part. Dkt. 50. The magistrate recommends that the court find that Smith invoked her right to counsel under *Miranda* at about 1:30 a.m. on February 7, 2014, at the conclusion of the first day of interviews. Because Smith did not initiate her next contact with the agents, which began about 9:30 a.m. the next morning, the questioning that followed violated Smith's rights even though she signed a *Miranda* form at that time. The magistrate found no other valid bases on which to suppress Smith's statements. Most notably, the magistrate found that all Smith's statements were voluntary, even if the second day of questioning was improper under *Miranda*. Accordingly, the excluded statements would be admissible in the government's rebuttal case, should Smith testify.

Both Smith and the government have lodged objections to the magistrate's Report and Recommendation. Pursuant to 28 U.S.C. § 636(b)(1), I am required to review de novo the objected-to portions of the Report and Recommendation, including any specified proposed

findings to which a party objects. My review has been comprehensive: in addition to the Report and Recommendation, I have reviewed the parties' submissions in support of and opposition to Smith's motion to suppress, the transcript of the evidentiary hearing (including the video recordings of Smith's interrogation offered at the hearing), and the parties' objections to the Report and Recommendation. In one respect, I am modifying the magistrate's findings of fact. I am otherwise adopting the report and I am accepting the magistrate's recommendation to grant Smith's motion to suppress in part.

SMITH'S OBJECTIONS

Smith objects generally to those parts of the Report and Recommendation that do not go her way: "The Defense objects to the findings of the Court that Ms. Smith knowingly and intelligently waived her Fifth Amendment Right to counsel and that her statements were not a production of coercion." Dkt. 63, at 3. Although Smith characterizes her objections as being to the magistrates "findings," she does not identify any particular finding of fact that she disputes. I understand Smith to be making three identifiable objections.

First, Smith objects to the magistrate's determination that she did not invoke her right to counsel at the end of the first interview session with Special Agent McMillan. The exchange at issue occurred at about 2:15 p.m. on February 6, when McMillan was seeking Smith's consent to search her phone and car. Smith contends that she unambiguously asked for an attorney by stating "I don't want to talk to you; I want an attorney." She did utter these words, but she now takes them out of context. What she said was:

> . . . if I was being difficult then why wouldn't I be like, "I don't want to talk to you; I want an attorney."

As the magistrate found, Smith made this statement to demonstrate that she was being cooperative, despite her failure to give him the correct passcode for her phone. I have reviewed

the recording of this exchange and it is simply not open to any other interpretation. No reasonable officer (or anyone for that matter) would understand Smith to be asking for an attorney at this point.

Second, Smith objects to the magistrate's finding that Smith's hearing testimony that she had indeed invoked her right to an attorney during the exchange about the phone was not credible. Smith purports to offer two reasons that her hearing testimony was credible. The first reason is that Smith told Special Agent Riessen, the polygraph examiner, that "they" were forcing her to take the polygraph examination. It is not clear why this statement buttresses Smith's credibility in any way. Based on my review of the portions of Smith's interrogation offered at the hearing, Smith's statement to Riessen is another example of her lack of credibility.

The second reason Smith gives to support her own credibility is that McMillan's testimony should be discredited because it is "contradictory." According to Smith, McMillan first testified that "he had no conversations with Ms. Smith while she was out in the hallway, but then on rebuttal he did recall having a conversation with her." Dkt. 63, at 4. Smith contends that this makes McMillan's testimony "clearly contradictory." On cross examination by Smith's counsel, McMillan indicated that he *did not recall* having a conversation with Smith in the hallway just before the polygraph examination. However, this cross examination was not particularly pointed, and McMillan did indeed testify that he had several conversations with Smith about her submission to the polygraph examination. On rebuttal, he testified that one of the conversations had occurred out in the hallway. The fact that McMillan remembered that one of the conversations took place in the hallway does not establish a clear contradiction that would undermine McMillan's credibility and bolster Smith's.

Ultimately, the video of Smith's exchange with McMillan over access to her phone speaks for itself, because of what Smith says and her body language and demeanor. Her hearing

testimony contradicts the video; McMillan's does not. The magistrate's fact-finding on this point is correct. Smith did not invoke her right to counsel during the exchange about the phone.

Smith's third objection is to the magistrate's determination that her statements were voluntary rather than coerced. The only reason Smith gives to support this objection is that she told Riessen that she was being forced to take the polygraph examination, but Riessen did nothing to investigate her allegation. Smith argues that "[t]aken to the extreme, this could mean that if a suspect were being questioned by two officers, one could threaten and coerce a suspect and as long as the second officer is not involved then the statements would be considered voluntary." Dkt. 63, at 4. But this is not the extreme case, because Smith's objection points to no evidence that McMillan "threatened and coerced" her. Smith has pointed to nothing in the record that would establish that her statements were the result of physical abuse, psychological intimidation, or deception. *See United States v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012). After reviewing all the evidence presented at the hearing on Smith's motion to suppress, I find it telling that she had the will to invoke her right to counsel at what was presumably her moment of greatest vulnerability—after thirteen hours of on-and-off interrogation. I adopt the magistrate's findings and ultimate conclusion that Smith's statements were voluntary.

GOVERNMENT'S OBJECTIONS

The government does not object to any of the facts found by the magistrate. However, the government objects to the magistrate's determination, based on those facts, that the defendant unequivocally asserted her right to an attorney at the end of the first day of questioning, at about 1:30 a.m. on February 7. The exchange at issue occurred when McMillan sought Smith's consent to access and search her Yahoo! account. The DVD recording of this brief exchange was introduced by the government as Exhibit 6. Dkt. 38. It is discussed in the Report and Recommendation at pages 11-12 and 17-18.

The government, relying chiefly on *Davis v. United States*, 512 U.S. 452, 459 (1994), contends that Smith's statements are too ambiguous and equivocal to constitute an invocation of her right to counsel. The government's first argument is that the magistrate found that Smith's statements on the recording are substantially inaudible, and that McMillan could not hear and did not understand Smith's statements at the time. According to the government, because a reasonable officer in McMillan's position would not understand Smith to have clearly requested an attorney, the court must find that she did not. The government's second argument is that if Smith invoked her right to counsel, it was a limited request to consult an attorney before signing consent-to-search documents, not a general request for all purposes.

Before addressing the government's arguments, I will modify aspects of the magistrate's fact-finding concerning the exchange at issue. The magistrate found that at critical parts of the exchange, Smith was speaking so softly and unclearly that no one can discern exactly what she said. Further, the magistrate found that McMillan genuinely could not hear what Smith said at the time. Dkt. 50, at 17. I modify these findings in two respects: (1) Smith's statements on the recording are clearer than the magistrate discerned; and (2) the recording and McMillan's hearing testimony show that McMillan understood Smith to be asking for an attorney.

I have reviewed the recording of the exchange (like the magistrate, with the benefit of multiple replays). At the critical point in the exchange, McMillan asked for consent to access her Yahoo! account; Smith shook her head to indicate "no." I find that this is what was said after that (with parenthetical notations of Smith's demeanor):

McMillan: You're not willing to sign this?

Smith: (still shaking her head "no," and speaking very quietly and looking down) I want everything to go to an attorney.

McMillan: I'm sorry?

Smith: (very quietly, looking down) Everything is going to an attorney.

McMillan: Okay, I don't understand what you are saying.

Smith: (Lifting her head and speaking more clearly) Everything else I want an attorney to advise me.

McMillan: Okay, you want an attorney to advise you on *what*?

Smith: [inaudible, but something like "if you want me to"] . . . sign anything else at all.

McMillan: Okay, like the consent?

Smith: Yeah.

McMillan: Okay.

I find that McMillan did not hear and understand Smith's first two statements that she "want[ed] everything to go to an attorney." But I find that he did hear and understand her statement "Everything else I want an attorney to advise me." Smith's statement here is articulated relatively plainly, at least more plainly than some of the statements that are inaudible on the recordings but that McMillan appears to hear and understand without trouble. Most important, McMillan responds to Smith in a way that indicates that he heard and understood what she said.

The finding that McMillan heard this statement is confirmed by his hearing testimony. After reviewing the recording at the hearing, McMillan explained what had happened:

Question: Can you explain to the court what that was?

Answer: That was me attempting to gain consent to search Ms. Smith's Yahoo account and she said that she wanted an attorney to advise her. And so I clarified that by saying, "what do you want an attorney to advise you about?"

And she said, "Before I sign anything."

And I said, "Before you sign anything like what, like this consent?"

And she said, "Yes."

Dkt. 41, 46:24-47:8.

I turn now to the government's first argument, that Smith's statement is too ambiguous and equivocal to constitute an invocation of her right to counsel. The government is correct that under *Davis*, an interrogating officer is not required to cease questioning "if a suspect makes a statement that *might* be a request for an attorney." 512 U.S. at 461 (emphasis in original). The suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id*. at 459. An "ambiguous or equivocal reference to an attorney" is not an invocation of the right to counsel. *Id*. The statement at issue in *Davis* was "Maybe I should talk to a lawyer," which the Court held was not a request for counsel.

Smith's statement "Everything else I want an attorney to advise me" is not an ambiguous or equivocal reference to an attorney. And McMillan did not think it was. Although McMillan may have been uncertain about the *scope* of her request for counsel, his response demonstrated that he understood immediately that she wanted an attorney: "Okay, you want an attorney to advise you on *what*?" McMillan confirmed his understanding at the hearing when he testified that "she said that she wanted an attorney to advise her." Although the inquiry is an objective one, judged from the perspective of the hypothetical reasonable officer, the government can hardly dispute that Smith made her request with sufficient clarity when McMillan himself recognized her statement to be a request for an attorney.

The government also relies on *United States v. Clark*, 746 F. Supp. 2d 176, 186 (D. Me. 2010), for the principle that a suspect's statement uttered so softly as to be inaudible is too ambiguous and equivocal to constitute a sufficiently clear invocation of the right to counsel. But *Clark* does not cover the facts here. The statement in *Clark* was "I guess this is where I have to

stop and ask for a lawyer, I guess." But the words "ask for a lawyer, I guess" were spoken too softly to be heard. The detective acknowledged, but only after reviewing the recording, that the defendant had used the word "lawyer." The *Clark* court held that the defendant's statement was not an unambiguous and unequivocal invocation of the right to counsel, partly because the statement was inaudible and partly because the statement itself was ambiguous. The critical distinction with the facts here is that McMillan understood Smith to be asking for a lawyer *at the time she did so*. Although I have modified the magistrate's finding that McMillan did not hear Smith's statement, I adopt his ultimate conclusion that Smith unambiguously and unequivocally invoked her right to counsel.

The government's second argument is that if Smith asked for counsel, she limited her request to legal counsel in signing consent-to-search documents. The government is correct that under *Connecticut v. Barrett*, 479 U.S. 523 (1987), and *United States v. Martin*, 664 F.3d 684 (7th Cir. 2011), a suspect may limit his request for counsel to certain purposes. In *Barrett*, the suspect said that he would not give the police any written statements without an attorney but that he had no problem talking with them. 479 U.S. at 525. The Court held that the suspect had clearly invoked his right to counsel, but that the police could talk to him because he had requested counsel only for advice on written statements. But for purposes of Smith's case, the critical principle in *Barrett* concerns the effect of ambiguity: an invocation of the right to counsel that is ambiguous as to its scope is entitled to a broad rather than a narrow interpretation. *Id*. at 529; *see also Martin*, 664 F.3d at 688. The suspect in *Barrett* unambiguously limited his request; he "made clear his intentions, and they were honored by police." 479 U.S. at 529.

In this case, Smith clearly invoked her right to counsel, but the invocation was arguably ambiguous as to its scope. Because she said "*Everything else* I want an attorney to advise me," it might imply that there was at least something for which she did not request the advice of an

attorney. Because she had already willingly spoken to the officers and agents, one reasonable interpretation of her statement is that she wanted advice on everything else from that point forward. That would seem to be the most natural interpretation in light of her first two statements that "I want everything to go to an attorney," but McMillan did not hear those clearly.

McMillan's interpretation, based on a couple of short follow-up questions, was that she made a "very narrow request to consult an attorney before she signed *any documents*." Dkt. 41, 47:9-12 (emphasis added). McMillan's follow-up questions to Smith did not completely clarify the scope of her request. McMillan did not ask whether she was willing to continue talking without the aid of counsel, and his questions essentially got Smith to confirm one example of something about which she wanted legal counsel—the consent to search her Yahoo! account.

The government argues that what happened the next morning—when the agents got Smith to sign a written *Miranda* waiver—confirms Smith's intent to limit her invocation of her right to counsel to advice on signing documents. But the events of the following morning do not help the government's position. Although McMillan understood that Smith had invoked her right to counsel "before she signed anything," the first thing the agents did the next morning was to get her to sign a document without the benefit of counsel. This is certainly not a case like *Barrett*, in which the suspect made clear her intentions, and they were honored by the police.

The government argues that had Smith intended to invoke her right to counsel the night before, she surely would have asserted that fact during the long exchange about the *Miranda* waiver the next morning. In a footnote, the government acknowledges that under *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam), the police may not cast doubt on the clarity of a request for counsel by looking to the suspect's subsequent responses to continued questioning. Dkt. 62, at 10 n.5. *Smith v. Illinois* concerns an alleged ambiguity as to whether the suspect has

invoked her right to counsel, not ambiguity as to the scope of the request. 469 U.S. at 93-94. Nevertheless, the government's argument that Smith's responses the next day should illuminate her request for counsel the night before seems highly questionable under *Smith v. Illinois*. If Smith's statements the next day could be used to demonstrate that her earlier request for counsel was actually narrower than it might appear, then agents could press on with questions, badgering the suspect to erode the scope of the request for counsel. This practice would exceed the agent's legitimate interest in promptly clarifying an ambiguous request (permitted under *Barrett*) and run afoul of the "rigid prophylactic rule" that once counsel has been requested, questioning must cease until counsel has been provided. *Id*. at 94-95 (*citing Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

As the magistrate found, McMillan's erroneous interpretation of Smith's statement was an understandable one. But this is where the tie goes to the defendant, not the prosecution. A suspect may invoke her right to counsel after an initial waiver if she does so unambiguously. But once she does so, ambiguity as to the scope of that waiver must be construed in her favor. Smith did not clearly limit her request for counsel to advice concerning the signing of consent-to-search documents, and the more natural interpretation of her statements is that she wanted an attorney from that point on. Accordingly, I conclude that her request for counsel was not limited to assistance in evaluating documents.

CONCLUSION

Based on my review of the materials related to Smith's suppression motion, and as indicated above, I modify the magistrate's findings concerning the exchange between Smith and Special Agent McMillan in the early morning hours of February 7th. In all other respects, I adopt the findings in the report and I adopt entirely the recommendation that the defendant's motion to suppress be granted in part and denied in part.

ORDER

It is ordered that:

1) Defendant Kristen Smith's motion to suppress custodial statements she made after 1:30 a.m. on February 7, 2014, on the basis of a *Miranda* violation, is GRANTED;

(2) Smith's motion to suppress any other statements on her claim of a *Miranda* violation is DENIED; and

(3) Smith's motion to suppress her statement and consents to search on her claim of coercion is, in all respects, DENIED.

Entered this 11th day of July, 2014.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge