IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO: 01-11,975 01-11,976
VS	:	02-10,763
DONALD JOHN BROW II	:	

OPINION AND ORDER

Before the Court is Defendant's Omnibus Pre-Trial Motion filed February 11, 2002 and Defendant's Supplemental Motion to Suppress filed April 9, 2002. Hearings on the Motions were held March 5, 2002, March 28, 2002, and June 4, 2002. At the time of the hearings, many of the issues raised in the omnibus motion had been resolved, or were agreed to be handled at a later date. The resolution of these issues is outlined in the Order following this Opinion. The main issue remaining before the Court at this time is Defendant's Motion to Suppress.

The Court finds the following facts relevant to the suppression motion: Trooper Jeffrey A. Wharren (Wharren) is employed by the Pennsylvania State Police at the Centre County, Rockview Station. On November 2, 2001, PSP-Rockview began the investigation of a burglary and robbery that occurred early that morning. In that incident, an individual had entered a residence and forced the two elderly occupants into a bedroom at gunpoint. The individual fled the residence in the couple's mini van. The van was found abandoned later that day on Elk Creek Road. On November 3, 2001, the owner of a camp located a short distance from Elk Creek Road alerted

Pennsylvania State Police that when he went to check the camp, he observed some things that were out of place.[1] (N.T. 3/28/02, p. 7)

Wharren was among the troopers who responded to the cabin. When they were unable to unlock the cabin door with the keys from the owner, they kicked the door open. Moments later they heard a voice yell out "don't come in or I'll kill myself." (Id., p. 10) The Defendant hid in a separate area of the cabin. Wharren and two other troopers took turns talking to the Defendant, trying to bring him out of hiding, and bring a peaceful resolution to the situation. Although Wharren knew about the homicide in Lycoming County in which they believed the Defendant was connected, they did not indicate to the Defendant that they knew at that time. (Id., 16)

The Defendant eventually surrendered in the cabin, and was taken into custody at 6:40 p.m.. The Defendant was handcuffed, and he was read his *Miranda* rights at that time. (Id., p. 20) The Defendant was then transported to the Rockview Station. Once in the cruiser for transport, Wharren again read the Defendant his rights from a State Police card that contains the warning and waiver. The Defendant acknowledged that he understood everything that was explained to him. (Id., p. 23) While en route to the Station, the Defendant admitted to Wharren that he broke into the Centre County residence with a firearm, stole the vehicle, and subsequently abandoned the vehicle on Elk Creek Road. The Defendant also admitted breaking into the Weaver cabin. (Id., p. 26)

The Defendant also indicated that he was hungry, and tired. Wharren arranged to have food, coffee, and the Defendant's brand of cigarettes delivered to the Station. Wharren testified that he wanted to make the Defendant feel as comfortable as

[1] Mr. Weaver, the camp owner, noticed that items had been placed in the windows to obstruct the view inside the cabin. Mr. Weaver believed that doors had been taken off the kitchen cabinets and placed in front of the windows.

possible. (Id., p. 27) They arrived at Rockview Station at approximately 7:50 p.m.. The Defendant was taken into a conference room, and his handcuffs were removed. (Id., p. 29) The Defendant was given a written *Miranda* warning and waiver at that time. Wharren read it to the Defendant, and allowed the Defendant to read it himself. The Defendant signed the waiver in the presence of Corporal Bramhall and Trooper Ellis, who signed as witnesses to the waiver.

Wharren was joined by Trooper Scott A. Henry (Henry) of the Lycoming County, Montoursville Barracks. Henry was investigating the Lycoming County homicide that had occurred on November 1, 2001. Their investigation revealed that the perpetrator had fled the scene in the victim's 1985 GMC truck. Henry had been alerted by the Rockview Station that the truck had been found approximately one mile from the Centre County robbery and burglary on November 2, 2001.

The Defendant initially agreed to provide a written statement of the events that had occurred. Henry testified that it appeared, after an hour had passed, that the Defendant was having some difficulty finishing the statement.[2] Henry asked the Defendant if he would find it easier to verbally answer some questions. The Defendant agreed. A taped interview of the Defendant began at approximately 9:05 p.m.. In the beginning of the interview, the Defendant was again given *Miranda* warnings. (Id., p. 36) Wharren testified that the Defendant was coherent and was responsive to questions of him throughout the interview.[3] (Id., p. 38) Henry testified that the tone of the interview was conversational.

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[2] Henry testified that from what he read of the statement, it seemed legible, it just seemed to be taking him a great amount of time to complete it.

[3] On cross-examination Wharren and Henry acknowledged that the Defendant had made some comments about not having his medication, about hearing voices, and at the time of the shooting, seeing flashes. Henry testified that the Defendant had stated that he did not feel well prior to the shooting, and stated something to the effect that he was "wandering around like a zombie."

The first tape concluded at approximately 11:44 p.m. [4]. A second taped interview began at 12:18 p.m. and concluded at 12:39 a.m..[5], Wharren noted that they were cognizant of the six-hour rule, and concluded the interview one minute prior to the lapse of six hours from the time of the Defendant's arrest. At the conclusion of the interview, the Defendant was transported with Trooper Henry back to Lycoming County where he was arraigned at approximately 4:40 a.m.. (Id, p. 76) After his arraignment, the Defendant was advised of his *Miranda* rights again. Henry then took the Defendant to the location where he stated that he hid the revolver in the woods, near the cabin where he was apprehended. The revolver was recovered at that time.

Defendant first asserts that his statements should be suppressed as they were not obtained within six hours of his arrest, and he was not arraigned within six hours of his arrest, in violation of 42 Pa.C.S.A. § 518. The Court disagrees. In *Commonwealth v. Davenport,* 471 Pa. 278, 286-87, 370 A.2d 301, 306 (1977), the Pennsylvania Supreme Court established that any post-arrest, pre-arraignment statements of an accused who is not arraigned within six hours of arrest are inadmissible at trial.

The *Davenport* rule was later modified by the Court in *Commonwealth v. Duncan,* 514 Pa. 395, 525 A.2d 1177, (1987) (citations omitted), where the Court held that statements which are obtained within six hours after arrest are admissible even when arraignment does not occur within six hours after arrest. *Id.* at 406, 525 A.2d at 1182-83. The Court provided the following rational for carving out this modification:

> Our adoption of the more rigid standard of *Davenport* was an attempt to assure more certain and even-handed application of the prompt arraignment requirement, and provide greater

[4] During the course of the first tape, several breaks were taken. Henry and Wharren testified that they were called out of the room to be updated on information that was becoming available, and the Defendant was permitted to eat and to use the restroom. The breaks were of various lengths, of anywhere from 8 to 42 minutes. The Defendant was not re-warned of his rights following these breaks in the interview.
[5] At the beginning of the second tape, the Defendant was again informed of his rights and was asked if he wanted to continue answering questions. The Defendant had agreed. (Id., pp. 39-40)

> guidance to trial courts and law enforcement authorities.... [I]mplicit in our holding was a determination that a delay of six hours between arrest and arraignment is an acceptable period of time to accommodate conflicting interests without creating such a coercive effect so as to violate the rights of an accused. Therefore, the focus should be upon *when* the statement was obtained.... If the statement is obtained within the six- hour period, absent coercion or other illegality, it is not obtained in violation of the rights of an accused and should be admissible. In keeping with the underlying objectives of the rule, only statements obtained after the six-hour period has run should be suppressed on the basis of *Davenport*.
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> *Id. at* 405-06, 525 A.2d at 1182-83.

The *Davenport*-*Duncan* rule was further refined in *Commonwealth v. Odrick*, 410 Pa.Super. 245, 251-53, 599 A.2d 974, 977 (1991), in which the Superior Court held that "absent facts pointing to an unnecessary delay due to police misconduct, voluntary statements given by a defendant and initiated within six hours after arrest may not be suppressed just because the process of obtaining the statement runs over six hours."

In the instant case, the Defendant was arrested at 6:40 p.m.. The interview of the Defendant concluded at 12:39 a.m.. The Court is satisfied that the time of the interview did not exceed the six hour limit as defined by the courts in *Davenport* and *Duncan*. Even if the evidence had shown that the interview had exceeded the six hour limit, the Court would find that there was no evidence of unnecessary delay due to police misconduct. The Court therefore rejects Defendant's contention that the statements should be suppressed on this basis.

Defendant next asserts that his initial statements were given without the benefit of *Miranda* warnings. The Court does not agree. The first statements of the Defendant after being taken into custody were made in the police cruiser while en route to Rockview Station. At that time, the Defendant had been given *Miranda* warnings on two

occasions; immediately following his arrest, and upon being placed in the cruiser for transport. The Court therefore finds no evidence of statements made prior to being advised of his *Miranda* warnings.

Defendant asserts that his statements made after *Miranda* warnings were given should be suppressed, as the Defendant did not knowingly and voluntarily waive his rights. For a waiver of *Miranda* rights to be valid, it must be knowing, voluntary, and intelligent. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In other words, the waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Colorado v. Spring,* 479 U.S. 564, 572, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) (quoting *Fare v. Michael C.,* 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

The test for determining the voluntariness of a confession and the validity of a waiver looks to the totality of the circumstances surrounding the giving of the confession. *Commonwealth v. Jones,* 546 Pa. 161, 683 A.2d 1181, 1189 (1996). Some of the factors to be considered include: the duration and means of interrogation; the defendant's physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and any other factors which may serve to drain one's powers of resistance to suggestion and coercion. *Id.*

In this case, the evidence presented was that Wharren and Henry attempted to make the Defendant feel as comfortable as possible. Once in the interview room, the Defendant's handcuffs were removed. The Defendant was provided with food, coffee and cigarettes. The Defendant was permitted to use the restroom when needed. Additionally, Trooper Henry testified that the tone of the entire interview was even and

conversational. Although the actual taped portion of the interview was almost three hours, during that time, the Defendant was permitted to eat and drink, and use the restroom. A significant break was also taken to allow Wharren and Henry to gather additional information.

Although there was testimony that the Defendant alluded to mental health issues at various times that evening, there was no indication that the Defendant did not understand what was occurring at that time. The Defendant was read his rights on at least four occasions, and on one occasion, he was able to read the warnings. After each occasion, he indicated that he understood what was being said, and that he wished to proceed with questioning. The Court would find, under the totality of the circumstances of this case, that Defendant's waiver of his rights was knowing and voluntary.

Defendant last asserts, in his Supplemental Motion, that his statements in the interview should be suppressed, since he was not re-warned of his *Miranda* rights following the breaks or interruptions in the interview. "[N]ot every renewal of the interrogation process requires the repetition of *Miranda* warnings." *Commonwealth v. Proctor,* 526 Pa. 246, 255, 585 A.2d 454, 459 (1991). In making this determination, the Court should consider " 'the length of time between the warning and the challenged interrogation, whether the interrogation was conducted at the same place where the warnings were given, whether the officer who gave the warnings also conducted the questioning and whether statements obtained are materially different from other statements that may have been made at the time of the warnings.' " *Id., quoting Commonwealth v. Bennett,* 445 Pa. 8, 15, 282 A.2d 276, 280 (1971).

The evidence presented at the hearing established that the first taped interview began at 9:05 p.m.. The tape was turned off a total of five times between the

commencement and the conclusion of the tape at 11:44 p.m.. Trooper Henry testified that they took various breaks, of anywhere from 8 to 42 minutes, to allow the Defendant to eat and use the restroom, and for Wharren and himself to receive updates and additional information to focus the interview questions. The Court finds, under the totality of the circumstances, that the *Miranda* warnings given at the beginning of the taped session at 7:50 p.m. had not become stale during the duration of this interview. The Defendant was in the same room during the entire interview, and was interviewed by the same two individuals. Additionally, one of the individuals interviewing the Defendant was the one who administered the warnings. The circumstances as a whole support the conclusion that Defendant was as aware of his *Miranda* rights after each break as he was at the time they were explained to him. Defendant's Motion to Suppress on this basis is therefore Denied.

ORDER

AND NOW, this ____day of June, 2002, based on the foregoing Opinion, it is ORDERED and DIRECTED as follows:

I. The Defendant's Motion to Suppress statements made after his arrest, and before his arraignment is DENIED.

II. The Defendant's Motion for Change of Venue is DEFERRED at this time. Defense Counsel shall notify the Court if he intends to pursue this at a later date.

III. The Defendant's Motion to Exclude Photographs is DEFERRED until the time of trial. The Commonwealth shall provide copies of the photographs (similar size and manner of presentation) that they intend to introduce at trial to the Defense counsel for review on the date of jury selection for this case.

IV. The Defendant's Motion for Discovery is DEFERRED at this time, as Counsel has indicated that the items requested have been provided. This may, however, be revisited if a concern is raised regarding future discovery.

V. The Defendant's Motion for Individual Voir Dire is GRANTED.

VII. The Defendant's Motion to Supplement the Omnibus Motion is GRANTED upon a further showing that as a result of receiving additional discovery they have been made aware of the grounds for the supplemental motion.

By The Court,

_____
Nancy L. Butts, Judge

cc: William Miele, Esquire, Public Defender's Office
DA, CA
Honorable Nancy L. Butts
Judges
Law Clerk, Gary Weber, Esquire