IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 01-11,465
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	:
vs.	: CRIMINAL DIVISION
	: Pre-Trial Motion
BRIAN YASIPOUR, SR.,	:
Defendant	:

OPINION AND ORDER

Before the Court is a motion to suppress evidence, contained in Defendant's Omnibus Pre-Trial Motion filed April 9, 2002. Defendant has been charged with homicide in connection with the killing of his five-year daughter on August 24, 2001. In the Motion to Suppress, Defendant seeks to suppress documents obtained pursuant to certain search warrants, any statements made at or about the time of his arrest on August 24, 2001, and any statements made at two (2) post-arrest visits by the police to the Lycoming County Prison. A hearing on the motion was held June 11, June 14, June 17, and September 3, 2002. Defendant filed a brief on September 30, 2002 and the Commonwealth filed a brief on November 6, 2002.

The search warrants in question were issued August 28, 2001 to Community Services Group, Tressler Counseling Center, and Lycoming Clinton MH/MR Joinder Board, seeking "all records, case files, notes, evaluations, and psychological reports" concerning Defendant, his wife, and the child. Defendant seeks to suppress any documents obtained pursuant to these search warrants, contending the warrants are invalid as a direct violation of Rule 201 of the Pennsylvania Rules of Criminal Procedure.

Rule 201 provides as follows:

> Rule 201. Purpose of Warrant
> A search warrant may be issued to search for and to seize:
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> (1) contraband, the fruits of a crime, or things otherwise criminally possessed; or

(2) property that is or has been used as the means of committing a criminal offense; or

(3) property that constitutes evidence of the commission of a criminal offense.

Pa.R.Crim. P. Rule 201. Defendant contends the requested documents fit into none of these categories and the Court is inclined to agree. The Commonwealth argues they were seeking evidence regarding Defendant's state of mind and cite Commonwealth v Bagley, 596 A.2d 811 (Pa. Super. 1991). While evidence regarding Defendant's state of mind may be relevant in this matter, the Commonwealth has failed to justify the use of a search warrant to obtain such evidence. Indeed, in Commonwealth v Bagley, certain documentation was suppressed because the Court found the police did not have probable cause to believe the sought after documents were in any way connected to the murder in that case. The Court finds the same to be true in the instant case. The Commonwealth here has not shown the search warrants are supported by probable cause to believe that the sought after records, case files, notes, evaluations and psychological reports concerning Defendant, his wife and his child, are in any way connected to the child's murder. The Court sees the warrants as nothing more than three fishing poles cast by the Commonwealth into a murky pond. Without the requisite probable cause, the warrants are indeed invalid and all evidence obtained thereby will be suppressed. Recognizing that some of these documents may be obtainable through proper channels, the Court will not preclude the Commonwealth from introducing into evidence any documents which are actually obtained through those proper channels. Those documents which the Commonwealth now possesses, however, which have been obtained through execution of the search warrants, will not be allowed into evidence at trial.

With respect to any statements made by Defendant at or about the time of his arrest, Defendant seeks suppression on the grounds that he was in custody and was subjected to interrogation, that he was not given Miranda warnings prior to such interrogation, that he asked for an attorney and therefore questioning should have ceased at that point, and that once he was given Miranda warnings he did not waive his rights but interrogation was continued by the police. The Commonwealth contends Defendant was not in custody while still in his home,

admitting that once Defendant was handcuffed and escorted to City Hall he indeed was in custody, but that he was not at any time subjected to interrogation. The Commonwealth does not address the issues of whether Defendant invoked his right to counsel or waived his Miranda rights, contending simply that he was not subjected to interrogation.

The Court finds Defendant was indeed in custody from the moment police officers entered his home on August 24, 2001. According to the testimony, once notified of the stabbing death of Defendant's daughter, four officers nearly simultaneously arrived at Defendant's residence at approximately 7:30 p.m. At least three of the officers went into the home and Defendant was asked what had happened. The officers checked the residence and roped it off outside to preserve the scene. An officer stayed with Defendant while other officers went upstairs to confirm the child's death and it is clear that Defendant was not free to leave. The Court therefore has no difficulty in concluding that Defendant would have reasonably believed he was not free to leave and thus was in custody.

The Court also believes that at some point prior to receiving Miranda warnings, Defendant was subjected to custodial interrogation. According to the testimony, in response to questioning by the officers about what had happened, Defendant stated he had come home a short while before and found his daughter dead upstairs. A paramedic arrived in the meantime and an officer took him upstairs to confirm the child's death. While the officer and the paramedic were upstairs, Defendant was asked by another officer where his wife was. Defendant indicated that they were separated and that she was living elsewhere. Defendant was asked if he had let her know about the child's death and Defendant indicated that he had not. Once the child's death was confirmed by the paramedic, the officers asked Defendant to come to City Hall to give a statement. Defendant said that he would do that but indicated that he wanted to have an attorney before he would give a statement.[1] Defendant was then handcuffed

1 The testimony regarding Defendant's request for an attorney was somewhat conflicting. Officer Fred Miller testified that Defendant asked if they thought he should have an attorney but that the officers did not respond to Defendant's question. Sergeant Greg Foresman testified that Defendant asked if they thought he needed an attorney and he told him he couldn't make that decision for him, that it was up to him. Sergeant Foresman stated that Defendant then said he'd like to talk to them but wasn't sure if he needed an attorney, to which he responded, "that's fine". As noted, Officer Miller did not hear this exchange, even though he was standing right next to Defendant and Sergeant Foresman. The paramedic, Carl Finnerty, testified that as he was walking through the room after coming downstairs, he heard Defendant stating, to no one in particular, that he wanted a lawyer before he would make any other statements. Based

and taken to City Hall. It appears no conversation occurred in the car and once at City Hall Defendant was taken to the processing room and secured to a bench. Defendant asked the officers if he was going to jail but was told that he was at City Hall. Agent Sorage of the Williamsport Police was then called and advised of the homicide. Agent Sorage went to City Hall, spoke with Sergeant Foresman, who was one of the officers who had responded to the scene, and then went in to talk to Defendant. Agent Sorage told Defendant he was sorry about his daughter and asked Defendant if he needed anything. Defendant indicated that he did not. Agent Sorage asked Defendant where his wife was and how they could contact her and Defendant told him. Agent Sorage asked Defendant his daughter's name and Defendant told him. Defendant then asked Agent Sorage if the child was still in the house and Agent Sorage told Defendant that she was. Defendant asked Agent Sorage how long she would be there and Agent Sorage told Defendant that she would be there for some time since they needed to obtain a search warrant. Defendant then said to Agent Sorage he had waited for three hours to call the police and had cleaned everything up. At this point Defendant was moved to Captain McKenna's office and the handcuffs and shackles were removed. Defendant told Agent Sorage he was hungry and Agent Sorage told him he would get him something to eat but he wanted to talk to him about what had happened. Defendant told Agent Sorage he did not want to talk about it then. Agent Sorage told Defendant that was fine, that they would talk about it later, that there was plenty of time. He then sent for something to eat and while making those arrangements, Captain Bowers stayed in the room with Defendant. Captain Bowers introduced himself to Defendant and Defendant began talking about prior jobs, a hearing with Judge Butts that day, his wife, the fact that his child would be forced into prostitution if his wife took her to Iran but that she did not have to worry about it anymore and she was better off now. While making arrangements for the food, Agent Sorage talked to the District Attorney's office, informed them that Defendant was talkative, that he had not waived his rights, and that he did not know if he wanted to have an attorney. According to Captain Bowers, at one point Agent Sorage came back into the room and Defendant asked him if the child was still at the house.

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on all of this testimony, the Court finds Defendant did ask for an attorney, and did indicate that he wanted an attorney before he would talk with the police.

Agent Sorage told Defendant she was, that they were still in the process of getting a search warrant, and Defendant said that everything they needed was on the bed. Agent Sorage left and returned. At that time, Agent Sorage told Defendant he wanted to talk to him and Defendant said he didn't know if he ever wanted to talk about what happened. Agent Sorage told Defendant it seemed he loved his daughter and if the knife were outside another child could be harmed. Defendant then said "do you think I could leave it where someone could get hurt." Agent Sorage answered Defendant "no, I don't think so" and Defendant responded that he kept her as long as he could, then he went to BiLo and got two flowers, one for her and one for her mother. Defendant said something about the trash at BiLo and an officer was then sent to BiLo to secure the trashcan. At this point, approximately 9:30 p.m., the food arrived and Agent Sorage sat with Defendant while he ate. After he ate, Agent Sorage read Defendant the Miranda warnings. When he asked Defendant if he understood them and if he wished to waive them Defendant said that he did understand but he didn't know if he wanted to talk without an attorney, that he did not know what to do. Agent Sorage then told him that he didn't have to talk to him, that he could think about it, that he could pick and choose which questions to answer. Agent Sorage mentioned the areas of questioning he would cover if Defendant would agree to talk to him. Agent Sorage then asked Defendant if he could go through the home and Defendant said yes. Agent Sorage went to the home and then returned. Defendant asked Agent Sorage if the child was still there and Agent Sorage told him yes. Defendant asked Agent Sorage when he was going to jail and was told that a complaint had to be filled out and that they had to go to a District Justice. Defendant then said he wanted a lethal injection or he wanted to go to jail. Defendant was then taken to the bathroom and provided with another soda and then taken back to the Captain's office. Another detective came into the room and left shortly thereafter. In the meantime, Agent Sorage returned to the room and Defendant asked him if the child was removed from the home yet. Agent Sorage told him he had to gather all of the evidence first and Defendant said, "everything you need is right there." Agent Sorage told him he needed to photograph him and take his clothing. Defendant then asked whether if he wanted an attorney, he could call one. Agent Sorage told him yes, if he wanted one, they would call one and if he didn't know any they would have one appointed for him. At approximately 12:30

a.m. Defendant was taken back to the processing room to obtain his clothing and take photographs. According to Agent Sorage's testimony, while in the processing room Defendant noticed a cut on the back of his left hand and said he didn't know how he got the cut. Agent Sorage said to him that he knew how Defendant got that cut and when Defendant inquired how, Agent Sorage said "you got that cut when you killed Susan (Defendant's daughter)" and Defendant paused, hung his head and said "yes, I killed her". It was also indicated in the testimony that at some point Captain Bowers had asked Defendant if he wanted to pray with him but Defendant said no.

"Interrogation" is defined as "questioning initiated by law enforcement officials" and also "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Commonwealth v DeJesus, 787 A.2d 394 (Pa. 2001), quoting Miranda v Arizona, 384 U.S. 436, 444 (1966) and Rhode Island v Innis, 446 U.S. 291, 300-01 (1980). The Court agrees with the Commonwealth that Defendant was not subjected to interrogation when officers asked him at his home what happened, and when Agent Sorage asked him at City Hall where his wife was, how they could contact her and his daughter's name. It also appears that Defendant's statement immediately following those questions at City Hall, that he waited for three hours to call the police and had cleaned everything up, was not made in response to any custodial interrogation. These statements and responses, therefore, will not be suppressed. At the point Defendant was moved to Captain McKenna's office, however, the Court cannot help but conclude that the Williamsport Police Department purposefully ignored the requirements of Miranda, engaging in a calculated course of conduct designed to obtain incriminating statements from Defendant, thereby subjecting Defendant to custodial interrogation. Because Defendant was not provided with his Miranda warnings prior to such interrogation, and in fact had invoked his right to counsel, which request was ignored by police, this Court is left with no choice but to suppress all statements made by Defendant thereafter.

In determining whether the police conduct here amounts to interrogation, the Court finds it helpful to reference cases which discuss the validity of a waiver of one's Miranda rights. In Michigan v Mosley, 423 U.S. 96 (1975), the United States Supreme Court indicated that the

admissibility of statements obtained after a person in custody has decided to remain silent depends on whether that person's right to cut off questioning was scrupulously honored. While finding in that particular case that the police did honor the suspect's right to cut off questioning, the Court distinguished their situation from one where the police engaged in "repeated efforts to wear down his resistance and make him change his mind." Id. at 105. In Commonwealth v DeJesus, supra, our state Supreme Court referenced Miranda's goal of insuring that any statement an individual makes is the product of his unfettered choice, in observing that, to be valid, any waiver of Miranda rights must be "the product of a free and deliberate choice rather than intimidation, coercion or deception." 787 A.2d at 402. The courts thus focus on the source of the statement, and if a statement is found to be the product of certain conduct, it is only logical to conclude that that conduct was reasonably likely to elicit that statement, thus constituting interrogation. Therefore, the factors to be considered in determining whether a statement was the "product of intimidation, coercion or deception", found in cases addressing the waiver issue, should also indicate whether the statement was made in response to interrogation.

In determining the validity of a waiver, the Court is to consider 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, and any other factors which may serve to drain one's power of resistance to suggestion and coercion. DeJesus, supra, at 402. In the instant case, after indicating he wanted an attorney but no attorney having been summoned, Defendant was taken to and held at City Hall for approximately two hours, during which time he was told twice by Agent Sorage that he wanted to talk to him about his daughter's murder. Both times Defendant indicated he did not want to talk to police. Defendant was also questioned about the murder weapon, in a manner which implied he had committed the crime but which also attempted to play upon his sympathies, after the same officer had expressed to him his condolences for his daughter's death. Then, for three more hours, the police continued to hold Defendant at City Hall after having informed him of the Miranda warnings and Defendant having responded that he did not know if he wanted to talk without an attorney. Rather than processing Defendant quickly and saving any questioning until Defendant obtained

counsel and then seeking a waiver of his rights, the police instead told Defendant they wanted to question him anyway, and he could "pick and choose" which questions to answer. The police also offered to pray with Defendant. After Defendant inquired for the fifth time about the possibility of consulting an attorney, asking whether he could call an attorney if he wanted to, the police said yes but did not follow up on Defendant's inquiry. Instead, when Defendant remarked about a cut on his hand, the officer told him he thought the cut occurred during the stabbing of Defendant's daughter, a statement which the officer could not possibly have believed would not elicit an incriminating response (which indeed it did). Only after Defendant made the ultimate incriminating statement, "I killed her", [2] did the police terminate their detention and transport Defendant to the jail.

In addition to the police conduct in this matter, there was also direct evidence of their attitude. At the suppression hearing, the officers involved indicated to this Court that they were seeking to have Defendant waive his rights. Agent Sorage admitted on cross-examination that it was fair to say that he kept Defendant at City Hall, rather than taking him to the County Prison, to give him an opportunity to keep talking. Agent Sorage indicated further that he did not read Defendant his Miranda rights early on because Defendant kept indicating that he did not know if he wished to talk and Agent Sorage was afraid that reading him his Miranda rights might persuade him to not talk to the police. Captain Bowers indicated that he offered to pray with Defendant in order to establish a rapport which might lead to Defendant waiving his rights and making a statement.

Considering all of these circumstances, the Court concludes Defendant's statements were indeed the product of intimidation and coercion, and the Court thus has no difficulty in concluding Defendant was subjected to interrogation. In fact, the Court believes the instant situation is exactly what the Mosley Court was chastising when they referred to "repeated efforts to wear down [a suspect's] resistance and make him change his mind." 423 U.S. at 105.

The Commonwealth argues nevertheless that the police' hopes and intentions regarding obtaining incriminating statements are not the focus in determining whether a suspect is

2 The Court does not expressly find that the alleged statement "I killed her" was indeed made, only that the police testified to such a statement, and notes with interest that Captain Bower's notes do not contain any indication that such a statement was made, although they do document that Defendant ate cheeseburgers during the evening.

subjected to interrogation. The Court agrees that in Commonwealth v DeJesus, supra, the Supreme Court did say that the test of whether the police should know their words or actions are reasonably likely to elicit an incriminating response focuses primarily upon the perceptions of the suspect, rather than the intent of the police. The Court goes on to say, however, that this focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. In other words, the Supreme Court is not indicating that police intent is not relevant, merely that a defendant is not required to directly prove the police intended to elicit incriminating responses. In the instant matter, Defendant does not need to prove that as the police themselves admit it.

The Commonwealth does agree that Agent Sorage's questions of Defendant about the knife do constitute interrogation, but argue that such questions were permissible without Miranda warnings and in spite of any assertion of the right to counsel, under the Public Safety Exception. In Commonwealth v Bowers, 583 A.2d 1165 (Pa. Super. 1990), the Court held that the requirements of Miranda were excused where the police need to ask a question to ensure the public safety and not to elicit an incriminating response. In so holding, the Court relied upon the United States Supreme Court decision of New York v Quarles, 467 U.S. 649 (1984). The Court in Quarles created the "public safety" exception to address "a kaleidoscopic situation", where "spontaneity rather than adherence to a policy manual is necessarily the order of the day". Id. at 655-56. In Quarles, the police were in the process of apprehending a suspect in a supermarket, and found the suspect to be wearing a holster without a gun. The Court found the police had every reason to believe the suspect had just discarded the gun in the supermarket and the question regarding the gun's whereabouts was therefore properly asked prior to providing Miranda warnings. In Bowers, similarly, the police were summoned to the scene of a shooting where the suspect's two granddaughters and their friend were present in the immediate area, the suspect was located in an abandoned house next door and police were not able to locate the gun immediately. They asked defendant where the gun was without providing prior Miranda warnings, in order to protect the safety of those around them. In the instant case, the Court finds no "kaleidoscopic situation" or immediate necessity to ascertain the whereabouts of a

knife. Further, there was no showing that the police had "every reason to believe" that a knife had been discarded in a location where it might affect public safety. As the Court indicated in Quarles, supra, the public safety exception is a narrow exception to the requirement for Miranda warnings, and the Court finds it does not apply in this instance.

With respect to the police visits to Defendant at the County jail on September 4, 2001 and December 11, 2001, Defendant contends his Sixth Amendment Right to Counsel was violated as on both occasions he was represented by counsel but the visits by the police, which Defendant contends constituted interrogation, were conducted without counsel's presence. The Commonwealth contends no interrogation occurred and therefore Defendant had no right to counsel.

On September 4, 2001, the police visited the prison to give Defendant copies of the receipts and/or inventories from search warrants, which were executed at his residence. According to the testimony, they took Defendant into a separate, private room, and told him they had some papers for him and would not ask him questions, and that he was not to make any statements. Defendant asked the officers about his money and personal property and they told him that was not taken. Defendant asked if they had given a copy of his daughter's picture to the newspaper and they indicated they had not. Defendant told them he wanted his Court documents and they told him he would get copies later. Defendant said he wanted the papers so "they know all the facts" before "he gets the electric chair." Defendant then said he wanted to see a doctor, that he had "something wrong in his head" that "no one in their right mind would have done this." The officers then read him the receipt inventories. Defendant then said he gets social security disability because of mental problems and diabetes. Defendant asked Agent Sorage if he went to the funeral and Agent Sorage told him that he had stopped by. Defendant asked Agent Sorage if a lot of people were at the funeral and told Agent Sorage that he had been "mad that day" and had been "mad for 11 years." According to the testimony, Agent Sorage was taking notes during this discussion and Defendant saw him doing so. Defendant said "I hope you're not going to use this against me." On December 11, 2001, the officers went to the prison to obtain hair and blood samples for which they had obtained a search warrant. They asked to have Defendant brought to intake, took him into the nurse's office and asked him

if he would consent to having the samples taken. Defendant did consent and they did take the samples. Defendant talked about his personal property, and money, but nothing about the case, and no questions were asked.

The Court believes the police conduct during these visits did not constitute interrogation. At the beginning of the visit on September 4, 2001, Defendant was informed that he was not being questioned and that he was not to make any statements. He was read the receipt inventories but otherwise the police initiated no other conversation, through words or actions. It appears Defendant's statements were offered gratuitously and not in response to anything said or done by the police. The same thing can be said regarding the visit on December 11, 2001, as it appears the only conversation initiated by the police was an inquiry whether Defendant would consent to having hair and blood samples taken. Further neither visit was extended, nor does either appear to have been characterized by any coercive circumstances. Finding no interrogation, the Court agrees with the Commonwealth that Defendant's Sixth Amendment right to counsel was not violated. Defendant's request to suppress any statements made during these two visits will therefore be denied.

The Court wishes to take the opportunity to express its frustration with the Williamsport Police Department. There appears to have been absolutely no reason why Defendant could not have been read his Miranda rights as he was being handcuffed and escorted out of his home at the time of his arrest, and even if not then, as he was being taken into the Captain's office for questioning. The Court cannot think of a single reason why this was not done, except, as was offered, the police explanation that they were attempting to have Defendant waive those rights, without even having been informed of them. This is absolutely unacceptable. While the police may not like the Miranda decision and may find that it hinders their investigations, they, like the Court, are nevertheless bound by that decision. The Court would hope that in such an important matter as that presented in the instant case, the police would attempt to make at least a good faith effort to comply with the law. The exclusionary rule applied herein could have been prevented by adherence to proper procedure. The Court does not take this matter lightly and finds it very difficult to enter the Order which follows.

ORDER

AND NOW, this 22nd day of November, 2002, for the foregoing reasons, Defendant's Motion to Suppress is hereby granted in part and denied in part. Any statements made by Defendant at or about the time of his arrest on August 24 and 25, 2001, after Defendant entered Captain McKenna's office are hereby suppressed. None of these statements shall be admitted into evidence at trial. Finally, any documentation obtained as a result of the search warrants issued on August 28, 2001 shall not be admitted into evidence at trial. The Commonwealth is not precluded, however, from reobtaining the information through proper channels and any information so obtained, shall be subject to further review.

By the Court,

Dudley N. Anderson, Judge

cc: DA
PD
Kevin Way, Court Adminstrator
Gary Weber, Esq.
Hon. Dudley N. Anderson