

**IN THE COURT OF COMMON PLEAS FOR  
LYCOMING COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

<b>COMMONWEALTH</b>	:	
	:	
	:	
v.	:	<b>No.: 02-10,922</b>
	:	
<b>HEATH GRAY</b>	:	
	:	

**OPINION AND ORDER**

Before the Court is Defendant's Omnibus Pre-Trial Motion. A hearing was held on April 9, 2003 on two of the issues raised in the motion, namely Count 13, Defendant's motion to suppress evidence because of a violation of his Miranda rights, and Count 12, Defendants' Request for Deposition of Katherine Boell, who is alleged to be a material witness in this case.

Defendant first contends that a second statement that he gave to Agents Stephen Sorage and William Weber of the Williamsport Bureau of Police should be suppressed because the Agents failed to advise him of his Miranda warnings under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when they questioned for a second time about the offenses with which he is charged in the above-captioned information. Factually, there is no dispute about the questioning involved in this case. Defendant was arrested by the Williamsport Bureau of Police on May 1, 2002 and taken to City Hall. He was initially interviewed by Agents Sorage and Weber in a room near the Watch Commander of the Bureau of Police. The interview began at approximately 9:30 or 9:35 a.m. with the agents reading to the Defendant and obtaining his signature on a written outline of his Miranda rights.

At 9:39 a.m. a tape recorder was turned on and it was acknowledged on the tape that the Defendant had been advised of and understood his Miranda rights. This interview was concluded at 10:35 a.m. The contested interview began approximately one hour and fifteen minutes to one hour and twenty minutes later and was conducted by the same agents in the same room as the prior interview. Additionally, the co-Defendant, Keith Young, was present during the second interview. During the interim, the Defendant was processed for these offenses. Fire investigators asked the Defendant some questions during the processing and, after his return to a holding cell, Agent Sorage asked him a few questions about the incident. Those statements are not at issue here. The second, contested, interview was also audiotaped. This time the tape was begun some ten to fifteen minutes prior to the Defendant entering the room. It is undisputed, however, that the Defendant was informed at the time that he entered the room that the tape recorder was on. It is also undisputed that the Defendant was not given any Miranda warnings at any time during the second audiotaped interview.

Defendant now argues that the second audiotaped interview should be suppressed. In support of this, he relies upon the case of Commonwealth v. Upchurch, 513 A.2d 995, (Pa.Super. 1986). Upchurch provides a framework of criteria which should be considered when determining whether a subsequent statement, given without the benefit of Miranda warnings, should be suppressed.

These criteria are

- (1) the time lapse between the last *Miranda* warnings and the appellant's statement;
- (2) interruptions in the continuity of the interrogation;
- (3) whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the appellant's statement was made;
- (4)

whether the same officer who gave the warnings also conducted the interrogation resulting in the appellant's statement; and (5) whether the statement elicited during the complained-of interrogation differed significantly from other statements which had been preceded by *Miranda* warnings. *Id.*, citing [Commonwealth v. Ferguson, 444 Pa. 478, 282 A.2d 378 \(1971\)](#).

Defendant claims that since, under the facts of his case, there are significant differences between the first and second recorded statements, the Upchurch decision mandates that Defendant should have been provided with his Miranda warnings and, absent that, the second statement must be suppressed. This Court disagrees.

The Court finds that the Defendant has failed to meet the criteria set forth in the Upchurch decision. The time between the moment that Defendant was first given his Miranda warnings, at approximately 9:30 a.m., and the time of the contested statements, which began at approximately 11:55 a.m., is less than two and one half hours. There were few interruptions in the continuity of the questioning, especially given the fact that the same officers questioned the Defendant in the same room on both occasions. Finally, this Court finds that the differences in the statements were minimal. Defendant relies heavily on the fact that in the second statement he admitted to having pointed out a particular item, indicating that his co-defendant should light it on fire and that there was no mention made of this in the first statement. The Court believes that this is simply additional information provided to correct an omission from the original statement, not a materially different statement from the first one given. The testimony at the hearing clearly indicated that the Defendant was not asked during the initial interview whether he pointed out items for his co-Defendant to set on fire. Even if the addition of this

information is not simply the correction of an omission from the original statement, this Court finds that the totality of the circumstances in this case do not warrant the suppression of the second statement. There is no “prophylactic rule that a suspect must be rewarned of his constitutional rights every time a custodial interrogation is renewed.” Commonwealth v. Scott, 752 A.2d 871, 561 Pa. 617 (2000), citing Commonwealth v. Bennett, 282 A.2d 276, 445 Pa. 8 (1971). Additionally, the Court finds that in this case there was a clear continuity of interrogation. Id. Therefore, the motion to suppress the second audiotaped interview is denied.

Defendant next requests in his Motion that this Court order Katherine Boell to submit to a deposition prior to trial in this case. He concedes, however, that there is currently no provision in the law of Pennsylvania permitting such an order, and it is unclear that the Court possesses the authority to require Ms. Boell to submit to a deposition in this case. Defendant further concedes that his purpose in requesting a deposition is so that he can force Ms. Boell to speak with him concerning her proposed testimony against him. Defendant claims, without any offer of proof, that Ms. Boell has been instructed by the Williamsport Bureau of Police to not speak with him or his attorneys about the case. This Court declines to make a finding, in the absence of any offering of proof, that Ms. Boell received any instructions at all from the police and therefore declines to order Ms. Boell to submit to a deposition.

#### **ORDER**

Accordingly, it is ORDERED and DIRECTED that Defendant’s Motion for Deposition of Eyewitness Katherine V. Boell, contained in Count 12 of his Omnibus

Pre-Trial Motion and Defendant's Motion to Suppress Statement Pursuant to  
Pennsylvania Rule of Criminal Procedure 581, contained in Count 13 of his Omnibus  
Pre-Trial Motion filed on July 31 are DENIED.

By the Court,

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Nancy L. Butts, Judge J.

xc: DA  
Kyle Rude, Esquire  
Matthew Zeigler, Esquire  
Gary Weber, Esquire