IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1512-2016**
	:	
vs.	:	
	:	
	:	**Opinion and Order re Defendant's**
JONATHAN BAIR,	:	**Omnibus Pretrial Motion**
Defendant	:	

OPINION AND ORDER

By Information filed on September 8, 2016, Defendant was charged with five different burglaries and numerous related offenses. Between June 26, 2016 and July 19, 2016, Defendant is alleged to have illegally entered different residences and at least one business and to have stolen various items of value such as jewelry, cash and controlled substances.

Defendant waived his arraignment on September 12, 2016 and originally was scheduled to plead guilty. Unable to reach a plea agreement, the case was first placed on the trial list for Call of the List on April 18, 2017. At Defendant's request, however, the trial was continued four times to the January 9, 2018 Call of the List.

The case was apparently not reached but Defendant filed a motion to sever on March 20, 2018. Following a hearing and argument on May 9, 2018, by Opinion and Order dated May 16, 2018, the motion was denied. The case was previously continued by Defendant to the Call of the List on May 22, 2018. At Defendant's request, the case was continued two more times to the September 25, 2018 Call of the List. Apparently, the case was again not reached. It was then scheduled for the November term of court but continued by Order of Court dated November 2, 2018 to the "next trial term."

On January 10, 2019, with prior authorization by the court, Defendant filed an Omnibus Pretrial Motion which included a motion to dismiss and/or release on nominal bail, a motion to suppress physical evidence, another motion to suppress physical evidence, and a motion to suppress statements.

Following a hearing and argument on March 11, 2019 and by Opinion and Order dated May 7, 2019, the court denied Defendant's motion to dismiss. By separate Order, however, previously dated March 11, 2019, the court granted Defendant's motion for nominal bail.

The hearings on Defendant's suppression motions were held on May 7, 2019 and June 4, 2019. Because of the outstanding decision on said motions, the case was continued from jury selection and trial on June 18, 2019 to Call of the List on August 13, 2019.

Defendant's first motion to suppress seeks to suppress all of the evidence from Defendant's cellular phones and any derivative evidence.

The lead investigator in connection with the burglaries was Trooper Daniel Switzer of the Pennsylvania State Police. The defendant was arrested on July 19, 2016. While much of the conversation with Defendant was audio/video recorded, portions were not recorded, such as when Defendant was offering information about possibly cooperating or the parties were "outside while smoking."

Among other things, Defendant told Trooper Switzer that Defendant lived with an individual named Amanda Knudson. Trooper Switzer subsequently interviewed Ms. Knudson on July 20, 2016 at the PSP barracks. During the interview, Ms. Knudson provided

Trooper Switzer with her cell phone number of 570-560-9831. Ms. Knudson also showed her phone to Trooper Switzer. It was a black Samsung.

On July 25, 2016, a search warrant was authorized for one black Samsung cellular phone and one black Alcatel cellular phone, which were seized from Defendant when he was arrested on July 19, 2016. (Commonwealth's Exhibit 2). On October 3, 2017, another search warrant was authorized for the electronic data stored on said phones.

At the hearing in this matter, the Commonwealth indicated that it would not be using at trial any of the information obtained from the Alcatel phone. Accordingly, Defendant's motion to suppress said information will be deemed moot.

As to the Samsung phone, Defendant argues that it was actually searched prior to the search warrants being authorized. Defendant argues that, because the search was conducted without a warrant or consent, the evidence obtained must be suppressed.

Defendant's claim, however, is without any factual basis whatsoever. Indeed, it is based only on speculation and conjecture and without any basis in the record. Accordingly, it will be denied.

Defendant's second motion to suppress seeks to suppress all videotapes from Nik's Goldworks for the relevant dates and times of transactions with Defendant.

Trooper Switzer was made aware through his investigation that there were videotapes from Nik's Goldworks that may be relevant to his investigation involving Defendant. The owner, Mr. Lenios, apparently told investigators that there "was surveillance in the store."

Trooper Switzer requested the surveillance tapes several times from Mr.

Lenios. Despite his requests, they were never produced. Trooper Switzer advised Defendant that Trooper Switzer was attempting to get the surveillance tapes but without success. Apparently, Mr. Lenios stopped "cooperating."

While Defendant contends that there was an "extensive security system" in the store and that Mr. Lenios apparently admitted that surveillance tapes existed, they have never been provided to the Pennsylvania State Police, the Commonwealth or Defendant who even attempted to obtain the tapes through a subpoena.

As neither party has been able to locate or obtain the surveillance tapes, there is nothing to suppress. Accordingly, Defendant's motion will be denied.

Defendant's motion to suppress statements seeks to suppress all statements that the defendant gave to the Pennsylvania State Police on July 19, 2016 and August 1, 2016.

Trooper Switzer interviewed Defendant twice. The first interview occurred at the PSP barracks in Montoursville on July 19, 2016. The audio/video recording of the interview was introduced and admitted as Commonwealth's Exhibit 4.

Prior to the questions being asked by Trooper Switzer and Trooper Doane who soon entered the room following Trooper Switzer, Defendant was read his Miranda rights. While acknowledging that he understood his rights, he did not agree to answer questions.

When specifically asked if he wanted to answer some questions, he stated "probably not." He told the troopers only that he was willing to "listen." As the troopers explained to Defendant that he was implicated in at least one burglary as well as receiving

stolen property and theft by deception and that was why the troopers wanted to talk with him, Defendant stated: “then apparently I’m going to need an attorney probably.”

Soon thereafter he was asked: “so, you don’t wish to talk right now?” To which he answered: “correct.” The troopers indicated that the interview was concluded but then engaged Defendant in further conversation, essentially warning Defendant that if he was not willing to talk and they “don’t get any more information” that everything that they were looking into was going to get pinned on Defendant and that “there’s a lot.” In response, Defendant continued talking with the troopers, answering many questions over a long period of time and, of course, implicating himself.

In explaining why the troopers continued the interrogation of Defendant after he indicated that he wanted an attorney and did not wish to talk, Trooper Switzer indicated that they wanted Defendant to know about the investigation and to give Defendant an opportunity so that it was not all “pinned on him.”

Defendant submits that all of his statements made to the troopers after he invoked his right to remain silent and seek counsel must be suppressed as they were obtained in violation of his constitutional rights.

If an individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. *Commonwealth v. Frein,* 206 A.3d 1049, 1064 (Pa. 2019)(citing *Miranda v. Arizona,* 384 U.S. 436, 473-74 (1966)). Further, if an individual states that he wants an attorney, the interrogation must cease until an attorney is present. *Id.* (citing *Miranda,* 84 U.S. at 474). Any statements after a person invokes these privileges cannot be considered other than the product of compulsion,

subtle or otherwise. *Id.*(citing *Miranda, id.*).

An accused's right to cut off questioning must be scrupulously honored. *Id.* (citing *Michigan v. Mosley,* 423 U.S. 96, 104 (1975)). Further, once an accused has invoked his right not to talk or for counsel, a valid waiver of those rights cannot be established by showing only that he responded to further police initiated custodial interrogation. *Edwards v. Arizona,* 451 U.S. 477, 484 (1981).

"The invocation of a Miranda right must be clear as police officers should not be required to make difficult judgment calls about whether the suspect wants a lawyer…with the threat of suppression if they guess wrong." *Commonwealth v. Lukach,* 195 A.3d 176, 190 (Pa. 2018)(citing *Davis v. United States,* 512 U.S. 452, 461 (1994)).

The Commonwealth argues that Defendant's assertion of his right to remain silent was not clear and unambiguous as required by law. The Commonwealth argues that Defendant's assertions were qualified in light of the Defendant's statements that he "probably" did not want to answer the questions, he would "listen" and he apparently was "going to need an attorney probably."

In deciding if an invocation of one's Miranda rights is ambiguous, the courts must make an objective inquiry. *Lukach,* 195 A.3d at 185 (citing *Davis*, 512 U.S. at 459); see also *Berghuis v. Thompkins,* 560 U.S. 370, 381 (2010) (the standard for determining when a suspect has invoked his right to remain silent is the same as that which applies to an invocation of his right to counsel). If a suspect makes a reference that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking his rights, cessation of questioning is not required.

Id.(citing *Davis, id.).*

In this case, there was no doubt that the defendant no longer wanted to talk and that the troopers understood his statements as an invocation of his right to remain silent. See *Lukach,* 195 A.3d at 189-90.

In this case, the defendant asserted in unambiguous terms his right to remain silent. After Defendant's initial statements relied upon by the Commonwealth, the troopers asked Defendant, "So you don't wish to talk right now?" Defendant replied, "Correct." The troopers then said, "Okay. Alright. That will conclude the interview then." The troopers clearly understood Defendant's statements as aninvocation of his rights as they advised him that the interview would be concluded. *Lukach*, 195 A.3d at 190 (appellee's statement "I don't know just, I'm done talking. I don't have nothing to talk about" was not equivocal where Chief Wojciechowsky clearly understood appellee's statement as an invocation of his right to remain silent when he replied "You don't have to say anything, I told you that you could stop."). Unfortunately, the troopers did not conclude the interview. Instead, the troopers engaged Defendant in further conversation, essentially warning Defendant that if he was not willing to talk and they "don't get any more information" that everything that they were looking into was going to get pinned on Defendant and that "there's a lot."

Custodial interrogation is not limited to express questioning; it also includes any words or actions by the police that they should have known were reasonably likely to elicit an incriminating response. *Commonwealth v. Hughes*, 639 A.2d 763, 771 (Pa. 1994). Therefore, the troopers' further conversation with Defendant constituted interrogation. Furthermore and contrary to what is argued by the Commonwealth, Defendant did not

subsequently initiate the conversation. There was no break in questioning once the troopers decided to conclude the interview based on Defendant's unambiguous assertion of his rights. The troopers simply continued the interrogation, even increasing pressure on Defendant to talk by suggesting that if he did not talk all of the burglaries would be "pinned on him."

Accordingly, all of Defendant's statements made after the troopers indicated that the interview would be concluded will be suppressed.

Trooper Switzer again visited and interviewed Defendant on August 1, 2016. This visit occurred at the Lycoming County Prison. The interview was not video recorded but audio recorded. The audio recording was marked and introduced as Commonwealth's Exhibit 5. Defendant argues that the statements made during his interview were also obtained in violation of Defendant's constitutional rights under both the United States and Pennsylvania constitutions.

Prior to the questioning of Defendant regarding the charges, Trooper Switzer advised Defendant of his Miranda rights. Defendant indicated that he understood his rights and was willing to talk with Trooper Switzer without an attorney. Defendant agreed that he was talking with the trooper voluntarily and without any coercion or promises. Defendant also acknowledged that he understood that he could stop talking at any time.

Defendant proceeded to answer the questions posed by Trooper Switzer. During the questioning, Trooper Switzer asked Defendant if he wanted to tell the trooper what was in Defendant's bag on a certain date and where he got it from. Defendant directed the trooper to turn off the recording device. In response, the trooper turned off the recording. Nothing further was recorded.

Trooper Switzer did, however, continue to interview Defendant for somewhere between an hour and an hour and a half. This interview was memorialized in Trooper Switzer's police report. Trooper Switzer denied that at any time during the interview did Defendant request an attorney or exercise his right to stop talking.

Prior to going to the prison to speak with Defendant, while Trooper Switzer believed that Defendant was represented by the Public Defender's office, he did not contact the office to advise the office that he was going to speak with Defendant or to obtain consent to do so. During the second interview, Defendant never mentioned his attorney nor did Trooper Switzer reference his attorney. While Trooper Switzer did not recall Defendant saying he was represented by the Public Defender, Trooper Switzer understood that the Public Defendant "would be representing the defendant."

When Defendant first met with the troopers 13 days earlier on July 19, 2016, and he was first advised that he had the right to an attorney and asked if he wanted to answer questions, he stated "probably not." After Trooper Doane came in to the room, Trooper Switzer gave Defendant a Miranda waiver form and told Defendant that "in case" he was willing to talk, he would "need" to sign it. Defendant emphatically stated that he was "not waiving shit." When he was told by Trooper Switzer that he was "just waiving" his "right to have an attorney" right now, "while we were talking to you", Defendant stated more emphatically, "well, I don't know about that." He then threw the pen down and said "I'm not signing that shit."

As well, when he was being interviewed by the troopers on July 19, 2016, Defendant indicated that he would only listen. When told by the troopers why they wanted to

talk with him, he specifically stated “then, apparently, I’m going to need an attorney, probably.” The trooper then responded “okay that’s fine” to which Defendant responded “so, I mean that’s the situation, so.” The trooper then asked “so you don’t wish to talk right now”, and Defendant replied “correct.” The trooper then clearly stated that the interview was concluded.

This continuous conversation demonstrated that the trooper understood the defendant’s statements as an invocation of both his right to remain silent and for an attorney to be present. This is evidenced in large part by the trooper’s first response that “that’s fine”, his next response that Defendant did not “wish to talk right now” and his final response and decision to conclude the interview.

Further, the defendant’s statements and conduct when taken in their totality and context, and when viewed objectively, demonstrate and unambiguous invocation of his right to counsel and not to speak. His invocation of his rights while initially prefaced or qualified became unequivocal and certain. In examining the tone, demeanor, emphasis, body language and actions of the defendant, his assertions were far from ambiguous. See for example, *Lukach,* 195 A.3d at 189; *Commonwealth v. Champney*, 161 A.3d 265 (Pa. Super. 2017).

Determining that the defendant unequivocally asserted his right to have an attorney represent him when he spoke with the troopers on July 19, 2016, the issue concerns whether Trooper Switzer’s interview with Defendant on August 1, 2016 without affording counsel to him, violates his federal and state constitutional rights. Added to this equation is the fact that Trooper Switzer was likely aware that the defendant was being represented by

the Public Defender's office at the time.

The Commonwealth argues that even if the defendant had invoked his Fifth Amendment protection on July 19, 2016, there was a sufficient break in custody so that the police were permitted to approach him again despite that earlier invocation. The Commonwealth contends that ordinary incarceration is not the same as Miranda custody and that there was no bar to further interrogation because of such.

In *Champney,* the court reiterated the holding in *Edwards v. Arizona,* 451 U.S. 477 (1981) that when an accused has invoked his right to have counsel present during a custodial interrogation, police may not conduct further interrogations until counsel has been made available to him, unless the accused himself initiated the further communications, exchanges or conversations with the police. *Champney,*161 A.3d at 277, *Edwards,* 451 U.S. at 484-85.

The purpose of the Rule is to present police from taking advantage of the mounting coercive pressures of prolonged police custody by repeatedly attempting to question a suspect who previously requested counsel until the suspect is badgered into submission. *Champney,* 161 A.3d at 277 (citing *Maryland v. Shatzer,* 559 U.S. 98, 105 (2010)).

In this case, the court finds that the *Edwards* presumption applies. Defendant was abruptly arrested on July 19, 2016. Only 13 days later, he was interviewed. During that 13 days, he would not have had an ample opportunity to adjust to the ordinary restrictions of prison life. There was no evidence whatsoever that he was familiar with prison life, that he had an opportunity to receive visitors or communicate with anyone let alone an attorney.

Moreover, Trooper Switzer would have had the ability to free Defendant from his incarceration. Defendant was being incarcerated or detained solely as a result of these charges. Certainly there was a risk that the defendant, after spending 13 days in jail would feel pressured to speak with the hope that after doing so he might be allowed to leave and go home. Defendant could have rationally expected that by answering questions or giving a statement that he might secure his freedom. He was not incarcerated on a different sentence or pending different charges.

Even assuming for the sake of argument that there was a break in "Miranda custody", the break was not of a sufficient duration. The United States Supreme Court has held that the break in Miranda custody must be 14 days or more. *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010). Trooper Switzer first interrogated Defendant on July 19, 2016. Defendant invoked his Miranda rights. The second interrogation occurred at the prison on August 1, 2016. Although Defendant may have waived his Miranda rights during the second interrogation, it is of no moment because there were only 13 days between the first interrogation and the second interrogation.

Accordingly, Defendant's motion to suppress the statements he made to Trooper Switzer on August 1, 2016 will be granted.

ORDER

AND NOW, this ____ day of August 2019 following a hearing, argument and the submission of briefs, the court DENIES Defendant's motion to suppress the evidence

from the seized cellular Samsung phone. The motion to suppress with respect to the Alcatel phone is MOOT. The court DENIES Defendant's motion to suppress the videotapes from Nik's Goldworks. The court GRANTS Defendant's motion to suppress the statements from the July 19, 2016 and August 1, 2016 interrogations.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Michael Rudinski, Esquire
Gary Weber, Lycoming Reporter
Work file