

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1509-2018
	:	
vs.	:	
	:	Omnibus Pretrial Motion – Motions to Suppress
EDWARD HECK,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the court on the motions to suppress contained in an Omnibus Pre-trial Motion filed on behalf of Defendant, Edward Heck.¹

By way of background, Defendant is charged with homicide, criminal conspiracy to commit homicide and related offenses arising out of the murder of Sonja Heck, Defendant's wife, on August 16, 2018. More specifically, it is currently alleged that Defendant met Kenneth Smith online and he and Mr. Smith conspired to kill Defendant's wife. Defendant drove to the Nanty-Glo area, picked up Mr. Smith, and drove Mr. Smith to Defendant's home in Williamsport. In furtherance of the conspiracy, Mr. Smith killed Defendant's wife while she was sleeping and, the next morning, Defendant and Mr. Smith fled from Williamsport.

Defendant allegedly sent text messages to his step-daughter, Emily Rowe, stating things such as "I'm sorry", "I didn't do it" and advising her not to go into the residence. She initially thought the messages were intended for someone else.

When Mrs. Heck failed to appear for work, her employer contacted Ms.

¹ The court held proceedings on the following dates: May 30, 2019; May 31, 2019; September 11, 2019; September 12, 2019; December 4, 2019; January 28, 2020; January 30, 2020; May 14, 2020; June 18, 2020; and

Rowe, who went to the residence and found her mother's body. Ms. Rowe call 911. Police arrived and began to process the scene. Among other things, the police discovered an incriminating note allegedly written by Defendant on the kitchen table. Ms. Rowe told the police that she suspected Defendant of cheating on her mother. She also told the police about the text messages she had received from Defendant.

On August 17, 2018, the police filed a criminal complaint against Defendant and obtained a warrant for his arrest. Through GPS tracking of Defendant's cell phone, the police determined that Defendant was at a hotel in Lebanon, Indiana.

Lebanon police went to the hotel and took Defendant and Mr. Smith into custody. Lebanon police obtained search warrants for the hotel rooms in which Defendant and Mr. Smith were staying as well as for their electronic devices.

Defendant made statements while in custody in an interview room at the Lebanon Police Department on August 17-18, 2018 and on August 20, 2018. He also made statements to Williamsport police officers on August 29, 2018 before they transported him back to Pennsylvania and on August 30, 2018 at the headquarters of the Williamsport Bureau of Police.

In Counts I and II of his Omnibus Pretrial Motion, Defendant seeks suppression of Defendant's statements and the physical evidence gathered by the police. Defendant contends that his statements and the physical evidence were obtained in violation of his constitutional rights, specifically, his right against self-incrimination, his right to

counsel, and his right against unreasonable searches and seizures under both the United States Constitution and the Pennsylvania Constitution. He also contends that the wiretap acts of the United States, Pennsylvania and Indiana were violated.

A. Defendant's statements

The Sixth Amendment guarantees the right to have counsel present at all critical stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 2085 (2009). Critical stages include but are not limited to arraignments, post indictment interrogations, post indictment lineups, and the entry of a guilty plea. *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 1405 (2012). Once the Sixth Amendment right to counsel has attached and been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective. *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 2207 (1991). The Sixth Amendment right to counsel does not depend upon a request by the defendant. *Commonwealth v. Cornelius*, 856 A.2d 62, 72-73 (Pa. Super. 2004). A valid waiver of the Sixth Amendment right to counsel “should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information.” *Id.* at 75. “[T]he Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached.” *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The right to counsel guaranteed by Article 1, §9 of the Pennsylvania Constitution is coterminous with the Sixth Amendment right to counsel. *Commonwealth v. Arroyo*, 555 Pa. 125, 723 A.2d 162, 170 (1999); *Commonwealth v. Kunkle*, 79 A.3d 1173, 1181 (Pa. Super.

2013).

The Fifth Amendment provides that “no person...shall be compelled in any criminal case to be a witness against himself.” In *Miranda*, a number of prophylactic measures were established to counteract the “inherently compelling pressures” of custodial interrogation, including the right to have counsel present. Once a suspect asserts his right to counsel, not only must the current interrogation cease, but he may not be approached for further interrogation “until counsel has been made available to him,” which means...that counsel must be present. *Commonwealth v. Romine*, 682 A.2d 1296, 1299 (Pa. Super. 1996). The right to counsel conferred by *Miranda* in a Fifth Amendment context attaches only when counsel is requested during custodial interrogation. *Cornelius*, 856 A.2d at 73. A Fifth Amendment request for counsel must be clear and unequivocal. A waiver of *Miranda* rights may constitute a waiver of both the Fifth and Sixth Amendment rights to counsel. *Kunkle, supra.*

1. Statements made on August 17-18, 2018

According to the Commonwealth’s brief, there were seven interactions that Defendant had with law enforcement on August 17, 2018 into August 18, 2018. The Commonwealth contends that not a single word that came out of Defendant’s mouth during these interactions is subject to suppression other than Defendant’s invocation of his *Miranda* rights at the 1:57:05 mark, which the Commonwealth asserts is not subject to suppression but could arguably not be shown to the jury at trial.

The court agrees that the first interaction is not subject to suppression, as the

first interaction merely consisted of Officer Knox placing Defendant in a chair in the interview room and saying, “we’ll be right back in with you.”

The second interaction, which occurred at the 0:00:42 mark on the recording was similarly innocuous. An officer opened the door and asked how Defendant was doing. Defendant attempted to engage the officer in small talk. Shortly thereafter, the officer closed the door and again left Defendant alone in the interview room.

The third interaction, which began at the 0:37:16 mark, was not as innocuous, because Defendant repeatedly asks about an attorney. Detective Bryan Spencer enters and confirms that Defendant is Edward Heck. Defendant tells Detective Spencer about his shoulder problems. Detective Spencer confirms the spelling of Defendant’s last name and requests Defendant’s date of birth. These requests were for biographical information and were permissible. *Commonwealth v. Jasper*, 587 A.2d 705, 709 (Pa. 1991).

Then Detective Spencer asks Defendant for consent to search his hotel room. Defendant asks what he is there for. Detective Spencer tells Defendant that he was not under arrest for anything; he was just part of an investigation. In reality, Pennsylvania law enforcement officers had already filed charges against Defendant and obtained a warrant for his arrest, and Indiana law enforcement officers had arrested Defendant pursuant to that arrest warrant.

Defendant inquires, “What kind of investigation?” Detective Spencer tells Defendant that other detectives who will be coming in will give him all that information.

Defendant asks if he needs a lawyer.² Detective Spencer tells Defendant that he is just there to get Defendant's name and date of birth and to ask if he would give consent to search his hotel room. Detective Spencer does not tell Defendant that he has a right to consult with an attorney or in any way answer Defendant's question.³ Defendant again asks if he needs a lawyer and says he doesn't know what he did.⁴ Detective Spencer tells Defendant he doesn't have to give consent if he doesn't want to and tells him that there is an investigation back in Pennsylvania. Again, Detective Spencer does not tell Defendant that he is under arrest for homicide or that he has a right to an attorney.

Defendant asks what kind of investigation. Detective Spencer tells Defendant that the questions he is asking will be answered in a bit by other detectives; he was only there to get some pertinent information and to ask for his consent. Defendant then asks, "Well what if I say no? You get a warrant, right? Detective Spencer tells Defendant, "You have that right to say no, that's absolutely your right to do that, so if you say no, we'll--" Defendant interrupts and says, "I've never been in trouble before in my life, so I have no idea what to do." Detective Spencer then says:

I'm not saying that you have, okay, just part of this investigation you were in the hotel room where our guys got you, okay, that's kind of part of

² Commonwealth's Exhibit 1, at 0:38:23.

³ The court questions whether the detective was really trying to obtain a valid consent from Defendant when it appears that under Indiana law to obtain a valid consent for a search of a hotel room or an automobile from an individual in custody the police must advise the individual that he has a right to consult with a lawyer. *Peel v. State*, 868 N.E.2d 569, 575 (Ind. Ct. App. 2007); *Ackerman v. State*, 774 N.E.2d 970, 981 (Ind. Ct. App. 2002), quoting *Jones v. State*, 655 N.E.2d 49, 57 (Ind. 1995)(a person in custody must be informed of the right to consult with counsel before a valid consent can be given). The court recognizes that Defendant has not argued for suppression pursuant to Indiana law other than the wiretap act. The court is only considering this in the context of whether Indiana law enforcement officers were seeking a valid consent or instead were trying to elicit information from Defendant.

⁴ Commonwealth's Exhibit 1, at 0:38:32.

the investigation, and so, for us to do our job and do it fully, to be able to say that we've checked everything, done everything we can, so it's completely up to you, you have the right to say no and for us to get a warrant or if you want to give us consent that's up to you as well. Either way will be fine to us.

Defendant then says that he will give consent. Detective Spencer says, "What's that? Are you okay with searching the room?" Defendant says, "I mean, you're not going to find anything. I didn't do anything, so...." After the Detective says okay, Defendant then explains that there is a large amount of cash in his glove box, but he is not a drug dealer; he just cleaned out his savings account. He also discloses that there is several hundred dollars in the pocket of his pants in the hotel room. Detective Spencer asks Defendant if he is okay if they search his vehicle as well. He tells Defendant that he has the right to say no and refuse a warrantless search; it is completely up to Defendant. Defendant asks, "Should I talk to a lawyer first? I mean, I don't know what to do. I mean, if I say no, am I in any more trouble because I said no?"⁵ Detective Spencer tells him no and explains that if Defendant says no the police will apply for a search warrant and a judge will decide whether there is probable cause to search the room. Defendant then asks what he is being charged with and why he is there when the detective said he was not being charged with anything. At that point Detective Spencer tells Defendant, "Well, right now, you've got a warrant for your arrest out of Pennsylvania for criminal homicide. Okay. I'm not here to ask you any questions."⁶ Detective Spencer goes on to explain that all he is asking for is consent to search the room or the vehicle. There is some further conversation where Detective Spencer explains all he is

⁵ Commonwealth's Exhibit 1, at 0:40:44.

asking for is consent to search the room and the vehicle, that Defendant has the right to tell him no and it is his decision. Defendant says things like “do it”, “you’re going to do it anyway” and “get a warrant and they’ll give you permission.” When Detective Spencer says “I just want you to know it’s your decision whether to give us permission to search your vehicle or your room” Defendant indicates he doesn’t know what to do and again asks if it will be worse on him if Detective Spencer applies for a search warrant. Detective Spencer says, “No, it has no bearing on you at all.” Defendant then says, **“I guess I should talk to a lawyer. It’s not going to make any difference.”⁷** Detective Spencer says they are going to work on a search warrant. Defendant asks about taking the cuffs off or putting them in front because he thinks his shoulder is separating and he notes that he had four shoulder surgeries. Another officer adds a second set of cuffs, Defendant indicates that is much better and thanks the officer, and the officers leave the room.

The Commonwealth concedes that Defendant’s consent to search is probably not valid. However, it is not relying on Defendant’s consent. Instead, the Commonwealth is relying on the search warrants. The Commonwealth contends that Defendant’s statements were volunteered and were not the result of interrogation; therefore, there is no legal basis for

⁶ Commonwealth’s Exhibit 1, at 0:41:15.

⁷ Commonwealth’s Exhibit 1, at 0:42:00. The court construes Defendant’s comment “it’s not going to make any difference” as referring to it won’t be worse for him if the police get a warrant versus Defendant giving consent and not a reference that an attorney would not make a difference.

those statements to be suppressed. The Commonwealth contends that asking a suspect if he will consent to the search of his property does not constitute interrogation and it relies on *Commonwealth v. Daniels*, 590 A.2d 778 (Pa. Super. 1991).

The court finds *Daniels* distinguishable. In *Daniels*, the defendant was not yet under arrest and criminal charges had not been filed against him. The defendant initiated the conversation or interaction when he asked to speak with Officer Frissora alone. Furthermore, the issue was whether the defendant's *Miranda* rights had been violated, not his Sixth Amendment right to counsel.

The Pennsylvania Supreme Court has held that the Sixth Amendment right to counsel attaches at the commencement of prosecution, i.e., when criminal proceedings are initiated by charge, preliminary hearing, indictment, information, or arraignment. *Commonwealth v. Keaton*, 45 A.3d 1050, 1065 (Pa. 2012). The purpose of the Sixth Amendment right to counsel is to protect the unaided layman at critical confrontations with his expert adversary, the government, after the adverse positions of the government and defendant have solidified with respect to a particular alleged crime. *Id.*

In *Commonwealth v. Sherwood*, 982 A.2d 483 (Pa. 2009), the Court stated it appeared that Sherwood's remark "I feel like I should have an attorney" constituted a valid request for counsel but that he was not entitled to relief because formal charges had not yet been brought against him for Marlee's murder.

Here, Defendant was in custody and formal charges had been brought against him for homicide. The detectives misled Defendant by telling him he was the subject of an

“investigation” and initially would not tell him the offense for which he was under investigation when in reality Defendant was under arrest for homicide. The detectives deceived Defendant by minimizing the seriousness of the situation by making statements such as they weren’t saying that Defendant was in trouble and they were just trying to do their job. If being charged with homicide isn’t “trouble,” the court does not know what is. Defendant repeatedly asked whether he should talk to a lawyer, and the detective never told him that he was entitled to consult with one. Finally, when Defendant said, “I guess I should talk to a lawyer,” counsel was not provided.

Defendant’s Fourth Amendment rights were not violated in this interaction. The police did not act on Defendant’s purported consent. They obtained search warrants for the hotel rooms. The validity of the search warrants will be discussed separately in this Opinion.

Defendant’s right to counsel, however, was violated. Not only was Defendant in custody, but charges had already been filed against him. Defendant did not waive his right to counsel. The detectives misled Defendant. They told Defendant that he was not under arrest, he was just the subject of an “investigation.” They avoided telling Defendant that he was under arrest for homicide. Despite the fact that Defendant repeatedly asked if he should talk to an attorney, the detectives never told him that he could consult with an attorney before deciding whether he should consent or whether he should make statements about what the detectives might find if they conducted a search. While they told Defendant that they were fine either way if he consented or not, they never said they were fine if he spoke to an

attorney. If the detectives were truly attempting to obtain a valid consent as opposed to statements about what may be inside the hotel rooms, they would have informed Defendant of his right to consult with an attorney.

Counsel is required at every stage of a criminal proceeding where substantial rights of an accused may be affected. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The court finds that the third interaction was one of those stages. Defendant, alone and without counsel, was pitted against his adversaries who were purportedly seeking a waiver of his Fourth Amendment rights. Defendant did not know what to do and clearly wanted assistance in making a decision and legal advice about any ramifications that would flow from any decision. It must be remembered that this interaction occurred **after** criminal charges were filed against Defendant and during an interaction in which Defendant repeatedly asked if he should speak with an attorney. Certainly, if an arraignment, a line-up, and custodial interrogation (which involves the waiver of the Fifth Amendment right against self-incrimination and the right to counsel) constitute critical stages, then so does questioning a **charged** defendant to obtain consent which waives his or her Fourth Amendment and Article 1 §9 rights to a warrant based on probable cause. Furthermore, as was evident from the detectives' statements, a custodial interrogation by other detectives was imminent. *See Commonwealth v. Bland*, 115 A.3d 854 (Pa. 2015)(a defendant cannot anticipatorily invoke his Fifth Amendment right to counsel; invocation must be made upon or after actual or **imminent** in-custody interrogation).

The Commonwealth bears the burden of showing that a defendant waived his

right to counsel. Based on the totality of the circumstances, the Commonwealth failed to establish that Defendant knowingly, intelligently and voluntarily waived his right to counsel. Furthermore, based on *Sherwood*, the court finds that Defendant's statement "I guess I should talk to a lawyer" was sufficient to invoke his right to counsel pursuant to the Sixth Amendment of the United States Constitution and Article 1, §9 of the Pennsylvania Constitution. Therefore, the court will suppress the third interaction other than the request for Defendant's name and date of birth.

The fourth interaction begins at 1:51:40 of Commonwealth's Exhibit 1. Detective Eric Adams and Captain Tony Bayles enter the room to interrogate Defendant. Captain Bayles moves the handcuffs from behind Defendant's back to in front of his body. Captain Bayles then asks Defendant if he would like a soda or a bottle of water. He introduces himself and Detective Adams to Defendant. Defendant indicates that he would like some water. Captain Bayles leaves the room.

Defendant then engages Detective Adams in small talk. Defendant tells Detective Adams that he had four shoulder surgeries. He then asks the detective how he was doing, if he was "from around here," and if he is a sports fan. They briefly talk about professional football, which then leads to Defendant commenting on the national anthem controversies, with Defendant doing most of the talking.

At approximately 1:54:21, Detective Adams tells Defendant that they were talking to Ken next door and "he had quite a bit to say." He tells Defendant that they are going to give him the same opportunity but "before we do that we have to read you your

rights because obviously right now we can't just let you walk out. It doesn't mean any more than that. It just means you cannot leave at the moment." Detective Adams then quickly reads Defendant his *Miranda* rights and asks if he understands them. Defendant says yes. Detective Adams never specifically asks Defendant if he is willing to waive those rights.

Detective Adams says he wants to make sure that they have all of Defendant's information, so he asks Defendant for his name, date of birth, social security number, address and phone number. While he is doing this, Captain Bayles returns with a bottle of water for Defendant. Next, Detective Adams asks Defendant if he understands what's going on and why he is there. Defendant replies, "Somebody told me criminal homicide in Pennsylvania." Detective Adams asks, "Any idea why there'd be a warrant for you for that?" Defendant says, "No." Detective Adams then asks, "How do you know Ken over there?" Defendant replies, "You know what? I know that I should probably have a lawyer, you know. Because obviously the charges against me are pretty serious, so I think I should probably have a lawyer present." Detective Adams says, "Okay, fair enough, man. I don't blame you." Defendant says, "I mean, just for my protection." Detective Adams then said, "Yeah, no sweat off my skin. Makes it easy...just hang tight. Do you need to go to the bathroom or anything like that?" Defendant says, "I'm okay for now" and the interaction ends.

The court finds that the initial discussion between Defendant and the detectives from roughly 1:51:40 to 1:54:21, which consisted primarily if not exclusively of small talk completely unrelated to the charges and initiated by Defendant, is not subject to suppression. The court finds that the remainder of the discussion with the exception of the

questions to gather biographical information is subject to suppression because Defendant invoked his right to counsel during the third interaction, counsel was not provided, and he did not waive his right to counsel. As the Commonwealth noted on page 25 of its brief, “Once [a suspect] invokes the right to counsel, a valid waiver of that right to counsel cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.” *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). In fact, Defendant again invoked his right to counsel shortly after Detective Adams read his *Miranda* rights to him.

The fifth interaction with police occurred at the 3:01:15 mark on the recording. An officer enters the room and Defendant asks if he can use the restroom. The officer says, “Give me a minute to get someone to get you down there.” Shortly thereafter, an officer waves Defendant out of the room to take him to the restroom. At 3:03:30, as Defendant is re-entering the room, he asks, “When will the lawyer be here?” The officer says, “I don’t know that we’ll be able to get you one this evening.” Defendant says, “I’m innocent, that’s why I want a lawyer.” The officer says, “Okay. We’ll be transporting you to the jail here shortly.” Defendant says, “cause I didn’t do anything wrong.” The officer says, “okay,” and then leaves the room. The court agrees with the Commonwealth that Defendant’s constitutional rights were not violated during this interaction. Defendant volunteered these statements.

The sixth interaction occurred at the 3:11:25 mark on the video recording. Detective Spencer returns to the room accompanied by a female CSI officer. Detective

Spencer tells Defendant, “We’re almost finished up here. She’s gonna take some pictures of you. You need to stand here ‘til she takes a few pictures then we’re about done.” The female officer then takes photographs of Defendant from the front, back and each side and takes photographs of his hands. As soon as the female officer finishes taking the photographs, Defendant begins volunteering statements about his innocence and why he wanted a lawyer. As Defendant spontaneously made these statements, they are not subject to suppression.

What the Commonwealth categorizes as the “seventh interaction” are the statements Defendant made while he was alone in the interview room. The room was equipped with audio and video recording equipment that captured Defendant’s statements and comments.

Defendant contends that the recording of his statements while he was alone in the interview room violated his rights against unreasonable searches and seizures pursuant to both the United States Constitution and the Pennsylvania Constitution as well as the wiretap acts of the United States, Pennsylvania and Indiana. Defendant asserts that his statements were oral communications under the wiretap acts. Defendant contends he was neither advised nor aware that he was being recorded. Nowhere on the door or in the room was there any signage that the room was being recorded. Defendant asserts that the microphone and video recording equipment were concealed and there was no visible indication that someone could hear his private conversation to himself.

The Commonwealth disagrees. The Commonwealth notes that Defendant’s

statements were spontaneous and were not in response to questioning, Defendant did not have a reasonable expectation of privacy, and both the Federal and Indiana wiretap acts have one party consent rules. The Commonwealth argues that Pennsylvania law does not control because the statements were made in the state of Indiana. Furthermore, even if the court assumes for the sake of argument that Pennsylvania law controlled, the recording process did not violate Defendant's rights because "he had no reasonable expectation that his statements made out loud in the police interview room would not be recorded."

Contrary to Defendant's contentions, the court finds that Defendant's rights were not violated. There was no coercive behavior on the part of law enforcement.

Detective Spencer testified that Indiana law does not require law enforcement to advise an individual like Defendant that he is being recorded. N.T., 5/30/2019 at 56. Indiana law requires recording for a defendant's confession to be admissible at trial. See Ind. R.E. 617 ("In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial...").⁸

Although Defendant was complaining of pain when he was initially placed in the interview room with his hands cuffed behind his back, once the officers added a second

⁸ Detective Adams indirectly alludes to such during the audio recording of Defendant's statements on August 20, 2018. Defendant asked to speak with the detectives after he heard that Kenneth Smith had been released from custody. As Defendant is brought to the conference room, he tells the detectives that he is ready to tell them some things, he didn't know they were going to release him (Kenneth Smith), and he thought he was going to get a lawyer that night. Detective Adams tells Defendant, "Just hang on. Got to turn on the camera. That's the law when you're in custody."

set of cuffs at approximately 42:36 on the recording, Defendant said, “that’s better” and he stopped complaining of pain. At approximately 1:51:40, Captain Bayles moved the handcuffs and re-cuffed Defendant so that his hands were no longer cuffed behind his back but instead were in front of his torso. Therefore, despite Defendant’s arguments to the contrary, Defendant was not ignored and in excruciating pain for hours. Furthermore, when Defendant was complaining of pain and asking for help, there were several occasions where he looked directly at the video recording device to make his complaints. While Defendant may not have been able to see an actual camera, he could see the glass orb attached to the ceiling which housed the video recording device. See Commonwealth Exhibit 7. This type of surveillance or security camera is not exclusive to law enforcement; it is commonly found in various retail and public establishments and buildings. The microphones were also obvious. They were mounted on the wall right next to the table in the room and were labeled “IP MIC” and “ANALOG MIC.” See Commonwealth Exhibit 3, 4. Mic is a common and well-known abbreviation for microphone. Based on the totality of the circumstances, the court finds Defendant was aware he was being recorded.

The court also finds that there was no wiretap act violations in this case. The Federal wiretap act states:

Except as otherwise specifically provided in this chapter any person who—

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. §2511(1). An ‘oral communication’ is “any oral communication uttered by a

person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.” 18 U.S.C. §2510(2)(emphasis added). Under the Federal wiretap act, interception is not unlawful for a person acting under color of law, where such person is a party to the communication. 18 U.S.C. §2511.

The court finds that Defendant did not have a subjective expectation of privacy because he was aware that he was being recorded. However, assuming for the sake of argument that Defendant possessed a subjective expectation of privacy in his statements, the circumstances did not objectively justify such an expectation. Generally, an individual does not have a reasonable expectation of privacy in a police station or police interrogation room. See *Napper v. United States*, 22 A.3d 758, 768 (DC 2011)(police interrogation room); *United States v. Swift*, 623 F.3d 618 623 (8th Cir. 2010)(police interrogation room); *Agnew v. Dupler*, 717 A.2d 519 (Pa. 1998)(police squad room).

Defendant relies on *Gennusa v. Shoar*, 879 F. Supp. 2d 1337 (M.D. Fla. 2012), which is clearly distinguishable. In that case, the recording was of conversations in a sheriff’s interview room between the defendant and his attorney. It was the attorney-client relationship and the confidentiality of that relationship which resulted in the defendant having an objectively reasonable expectation that his conversation would remain private.

Recording Defendant’s statements also did not violate the Federal or Indiana wiretap acts because interception is not unlawful when one party consents. Here, the police consented to all statements made in their interview room being recorded.

The court finds that since the statements were made in Indiana, the Pennsylvania wiretap act is not applicable. Even if Pennsylvania law applied, however, Defendant would not be entitled to relief as he did not have a reasonable expectation of privacy in the police interview room. *Agnew*, supra (no reasonable expectation of privacy in police station squad room); *Commonwealth v. Henlen*, 564 A.2d 905 (Pa. 1989)(prison guard suspected of theft did not violate the Act when he recorded the trooper's interrogation of him since interrogations by the police are generally recorded.).

2. Statements made on August 20, 2018

Defendant asserts that the statements made on August 20, 2018 must be suppressed because he never waived his right to counsel and there were numerous *Miranda* violations. Defendant asserts that he was never advised of the charges against him, and his desire to speak with the police was merely conditional and limited. Additionally, Defendant asserts that he invoked his right to counsel when he stated that he would not tell the police too much until he spoke to a lawyer in Pennsylvania. The police never made any attempt to clarify that statement by Defendant, to determine the scope of what he would discuss, or to dispel his false belief that he could not have a lawyer in Indiana.

The Commonwealth disputes Defendant's assertions. The Commonwealth notes the numerous instances where Defendant was made aware that he was charged with homicide and Defendant's comments that reflect his understanding of the seriousness of that charge. The Commonwealth also argues that even if Defendant had not been sufficiently advised of the extent of his charges, such would not invalidate his *Miranda* waiver or result

in the suppression of his statements. The Commonwealth also argues that Defendant's statements were at best ambiguous and insufficient to invoke his right to counsel. Furthermore, the law does not require officers to ask clarifying questions when a suspect makes an ambiguous or equivocal reference to an attorney.

The court finds that Defendant's statements are not subject to suppression. Defendant initiated the contact with Boone County Detectives on August 20, 2018. The interview was conducted in a conference room in the administrative building next to the jail. Defendant asked for the meeting and was escorted by a corrections officer to the room where he met with the detectives. The interview began at 6:55 p.m.

Overall, it is clear that Defendant initiated the meeting as an opportunity to completely exonerate himself, gain sympathy from the detectives, and to solely and completely blame Kenneth Smith for the entire incident. He not only answered questions but continually volunteered information that was not only self-serving but also damaging to Mr. Smith. When confronted with more difficult questions, he claimed varied excuses such as he couldn't remember, he didn't look to see, he was in a trance, his body was just numb or he was in shock.

There is no question that he waived his rights and that his entire interview was voluntary. Defendant asked to speak to the detectives because he learned that Mr. Smith was released from custody. Detective Adams asked Defendant to "hold on" until he turned on a camera. Detective Adams then read Defendant his *Miranda* rights again. Detective Adams asked Defendant, "You requested to speak with us, right?" and Defendant said, "yeah."

Defendant was fully aware of his rights and that he was being recorded. Nevertheless, he still desired to speak to the detectives so that he could tell them that Mr. Smith killed his wife and that Mr. Smith had disposed of the murder weapon in the trash at either the hotel in Indiana or a hotel off of Interstate 76 in Ohio where he and Mr. Smith had stayed before their arrival in Indiana. Defendant explained he initially didn't want to speak but that he requested to speak with them because there were some things that he wanted to tell them as well as some things that they needed to know.

While he qualified his statement to talk by saying that there were other things he would not tell them until he got a lawyer in Pennsylvania, he explained that it wasn't fair that he would go to jail for something he didn't do. He was thinking about it over the past few days. Initially, he thought that it was better not to say anything and that he didn't want to say something wrong. But, in the past couple of days it was eating him up and after speaking with others, he wanted to talk and wanted to tell what happened because Mr. Smith was "walking."

He indicated that he wished he would have told them the night that they picked him up, but he was afraid, didn't want to say anything wrong, and wanted a lawyer because he thought "for sure" he was going down for this. But now, they could arrest Mr. Smith, and find the evidence against Mr. Smith. Defendant described how Mr. Smith told him that he would kill his step-daughter as well if Defendant did not write the note left at his residence.

The entire interview took place in a well-lit conference room with a window.

Defendant was sitting comfortably in a nice chair. The detectives were in plain clothes with no weapons. Defendant was in no physical, mental or emotional distress (except when taking about the murdered dogs). The detectives gave him time to compose himself. The tone of the questioning was conversational. There was no pressure, coercion, implied or express threats, deception, subterfuge, promises, improper questioning methods, benefits, distortions, or feigning (except by Defendant). Defendant monopolized the entire conversation.

His statements were the product of a rational mind and free will. He decided for himself and for personal reasons to talk. His mind was not confused or burdened by promises of advantage, threats, physical or psychological abuse, or other improper influences. Taking into account his statements on the phone to others, age, intelligence, personality, experience with watching crime TV shows, his mental and physical state, the conditions of his detention (they were treating him “nice”), the attitudes and conduct of the police and all other conditions surrounding the interview, his statements were the clear product of an essentially free will and not of a will and choice overborne by pressure or burdened by improper influences. Nothing at all drained or even remotely drained his ability to make a free and voluntary choice. He clearly had the ability to resist any suggestion or coercion, although there was none.

He “absolutely” wanted to talk with the Williamsport authorities when they arrived. He said, “I’ll be glad to tell them my story” and “I’m glad you guys came.” He was left in the room alone for about 20 minutes (just resting, looking around, and laying his head down) and the detectives returned. Upon their return, Defendant indicated that he was alright

and in response to their question, indicated that it was wrong for him not to say anything originally because “you guys” may never catch Smith. Interestingly, the one detective referenced a camcorder that he was using in addition to the other recording system. Clearly, Defendant knew about the recording. In a further attempt to gain sympathy he indicated that when he left with Smith he was planning on committing suicide, because “there was no reason to live.”

They continued talking for about another half hour. Defendant continued volunteering information and trying to garner sympathy. Again, he noted that at first he didn’t want to talk but was glad that he was talking “now.” It was really good for him to talk. He didn’t want to go down for something that he did not do and was thinking about it over the past few days and wanted to talk and tell them what happened. He indicated that he absolutely felt better talking. He just wanted to tell them his “side of the story.” He said, “I’m glad that I spoke to you guys, because now it is off my chest” and “If I only told you guys earlier, this guy would be in jail.” Of import he also noted: “There are certain things that I told you tonight that I wasn’t going to tell you that I was going to tell a lawyer but that wouldn’t have helped.” He was “absolutely” OK with talking to the “Williamsport guys” when they come.

He didn’t care if what he told them would hurt him because he wanted the truth to be known. He wanted to get to Pennsylvania fast and finished the interview by reaffirming many times that he was innocent and that he was glad he spoke to them. He just wanted justice. He made comments such as “ I’m glad that you guys came... and if I could

think of anything else I'll let you guys know;" "If I think of anything, I'll write it down;" "I'm sure there will be more things that I can tell you;" and "Would you tell [Williamsport] that I'm eager to talk to them?"

Based on the totality of the circumstances, including but not limited to the fact that Defendant initiated the contact with the detectives, the detectives again read Defendant his *Miranda* rights and confirmed that Defendant requested to speak to them, and then Defendant eagerly and voluntarily spoke with them, the court finds that none of Defendant's rights were violated.

3. Statements made on August 29, 2018 in Indiana to Williamsport Law Enforcement

Defendant contends that all of the statements he made to Detective Steven Sorage and Agent Ed Lucas in Indiana must be suppressed because he did not voluntarily waive his *Miranda* rights and he invoked his right to counsel and his right to remain silent at various points throughout the interrogation.

The Commonwealth concedes that Defendant's statements made during the interview after 4:11:36 on the recording⁹ must be suppressed because Defendant invoked his right to remain silent, but the Commonwealth asserts that Defendant waived his *Miranda* rights and he did not make an unambiguous, affirmative statement invoking his right to counsel or his right to remain silent before 4:11:36 on the recording.

⁹ The video recording from August 29, 2018 was admitted as Commonwealth Exhibit 11. Although defense counsel references a transcript in his brief, a full transcript was not provided to the court. Therefore, the references in this decision are from excerpts provided by the parties and the court viewing the blu-ray disc and, to the best of its ability, setting forth what it heard and saw. It might not be a word for word transcription.

There were several instances where Defendant made statements regarding being unable to talk anymore or wanting an attorney. The law enforcement officers also made statements that they realized Defendant wished to speak about Mr. Smith and not himself. The issue with respect to the statements made on August 29, 2018 is not whether Defendant invoked his right to remain silent or his right to counsel but when he did so.

At the beginning of the interrogation, Agent Lucas tells Defendant that everything in the room is being video recorded. Defendant says, "okay." Detective Sorage then says, "I understand from the Lebanon PD that you want to tell us about this incident and this other guy." Defendant nods his head up and down in the affirmative. Shortly thereafter, Detective Sorage says, "It's my understanding that you want to talk with us, correct?" Defendant replies, "I do. Yes." Detective Sorage tells Defendant that he doesn't have to talk if he doesn't want to." Defendant says, "Okay." Detective Sorage explains to Defendant that he is not "an arm twister." Defendant says, "I want to talk to you guys but, uh, I don't know if I should have a lawyer." Detective Sorage replies, "That's entirely up to you and that's a decision you have to make. Obviously, we don't have attorneys here from Pennsylvania and we don't have the resources out here in Indiana." Defendant says, "I don't know how—I don't know what--" Detective Sorage then tells him, "If you don't want to talk to us, you don't have to." Defendant replies, "I want to talk to you guys. I want to tell you the truth. I wanna let you know what happened." Commonwealth Exhibit 11, 0:00:00 through 0:01:30.

Detective Sorage begins to talk about getting information about the other guy. Defendant indicates that he doesn't have the other guy's phone number with him; it is in his

phone. Detective Sorage tells Defendant that his phone was taken as evidence and they were going to pick up all the evidence. Defendant asks when he will going back to Pennsylvania with them and that he wanted to go back. Detective Sorage tells Defendant that his stepdaughter, Emily, told them that she had talked to Defendant and that he wanted to talk to them. Defendant said “yeah” and indicated that Emily had talked to him a couple of times. Defendant then says, “I just need to be careful about what I say because this is scary.” Detective Sorage tells Defendant that he understands and says things like, “The truth is the truth,” “If this other guy did it, this other guy did it,” and “If that’s what happened, that’s what happened.” Defendant makes statements about what he is going through and that “the wrong guy is in jail.” Agent Lucas says they are trying to find out what happened with this other guy and what he did.

DEFENDANT: I know, but I’m afraid to say anything. It’s hard to say anything. This is bad.

DETECTIVE SORAGE: I understand that. The whole thing is up to you. It’s totally up to you. I can’t twist your arm.

DEFENDANT: So what happens if I don’t speak to you and I speak to a Pennsylvania lawyer? Is that gonna change anything?

DETECTIVE SORAGE: That will not change. That will—I don’t know if that will change anything or not. I don’t know. What will change is—that takes time, okay. That takes—

AGENT LUCAS: If this other guy is involved—

DEFENDANT: He is involved.

AGENT LUCAS: Then we need to get him in custody.

DEFENDANT: But I’m afraid to say anything because you know—I’m afraid that you guys will twist things around and say—

DETECTIVE SORAGE: That’s why we’re recording it.

AGENT LUCAS: This recording—it’s for you—you and us.

DETECTIVE SORAGE: Nobody can say anything that you didn’t say.

DEFENDANT: Okay, so everything’s being recorded.

DETECTIVE SORAGE: That way it’s not going to be my

interpretation of what you say or his interpretation of what you say. Nothing's gonna be twisted. It's gonna be whatever you say.

DEFENDANT: Okay. Okay, I'll tell you what I'll do. I'll tell you what I told the detectives here. I can't tell you everything because I want a lawyer present when there are certain things that I tell you. I want to be able to know how to say it, but I'll tell you the basics of what happened. Okay, is that fair enough? Okay. I mean, it's gonna be—everything that I'm going to tell you is what I told the detectives here. Okay. You understand that?

DETECTIVE SORAGE: I understand that.

DEFENDANT: But I won't tell you everything that's happened because I want a lawyer present when I say some of the things because I don't know how to say it.

DETECTIVE SORAGE: And that's part of the rights. You can answer some questions and not answer some of the questions.

DEFENDANT: But I don't want you guys to think I'm guilty because I ain't telling you everything. I mean, I'll tell you enough to find this guy. Does that make sense? I mean, because I've been through a hell of an ordeal here.

DETECTIVE SORAGE: I understand.

DEFENDANT: This is not—this is big time. I've never been in trouble before (inaudible). I'm locked up for something I didn't do.

DETECTIVE SORAGE: Let me go through these rights with you, okay? Like I said you can answer some, part or none of these questions.

DEFENDANT: Okay.

DETECTIVE SORAGE: My name is Detective Steve Sorage of the Lycoming County DA's Office. I wish to advise you that you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney before and have an attorney present with you during questioning. If you cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you so desire. If you decide to answer questions, you may stop at any time you wish. That's the part I was telling you about where you can pick and choose what you want to answer.

DEFENDANT: Okay.

DETECTIVE SORAGE: Do you understand these rights I've explained to you?

DEFENDANT: I do. You know I'm 49 years old. I've never been in trouble in my life—ever. Never even had a speeding ticket.

DETECTIVE SORAGE: I understand because we're all older. I mean, I'm 60. He's—

AGENT LUCAS: 52

DETECTIVE SORAGE: He's 52. We're all kinda older here and

more settled down.

DEFENDANT: I never thought in my wildest dreams this would ever happen. You wake up one day and your life's changed.

DETECTIVE SORAGE: And sometimes changes aren't for the better.

DEFENDANT: Especially now.

DETECTIVE SORAGE: I get that. I understand that. With these rights in mind, do you now wish to talk without having an attorney present?

DEFENDANT: This is tough.

DETECTIVE SORAGE: Do you want us to give you a moment in private to think about it?

DEFENDANT: Oh, I think I'm all right. I think, I mean—I think—I think I can tell you but the lawyer here said don't speak to no one. The lawyer that (inaudible) he said don't speak to no one about nothin'. He said because they're not your friends. But I don't, I mean—if I don't talk, when do we go back? Can we go back today?

DETECTIVE SORAGE: You'll end up back today. You won't get an attorney until one gets assigned to you. It's not like we're gonna go back today and call an attorney right away. Okay. We won't get back today until 8-9 tonight.

DEFENDANT: Okay. So now, if I speak now—let me ask you guys a question. What I told the detectives here—do you guys have what I told the detectives here? What I told the Lebanon police—you guys have any of that at all?

DETECTIVE SORAGE: We have a portion of that. They have all the evidence and we have a portion of that. And we have some of that but there are things obviously that they didn't know because they haven't been to the house or anything—

DEFENDANT: Right, right.

DETECTIVE SORAGE: --from talking to the people in Pennsylvania.

DEFENDANT: Okay. You ask the questions. If I feel I can answer, I will. Is that fair?

DETECTIVE SORAGE: Yes.

DEFENDANT: I wanna be honest with you guys but I wanna be careful.

DETECTIVE SORAGE: I understand that. I need to get through that second question. Do you wish to talk to us now without having an attorney present?

DEFENDANT: Yes.

Miranda waiver form. There is some brief small talk and then Defendant starts making statements and answering questions about how he met Kenneth Smith, whether he saw or heard anything when Mr. Smith was killing his wife and what he saw at his house after Mr. Smith killed his wife. Defendant speaks with Detective Sorage and Agent Lucas for over an hour.

At about 1:30:00 on the recording, the following exchange occurs:

DEFENDANT: I don't know if I can talk anymore. I just—

DETECTIVE SORAGE: Do you want something to drink?

DEFENDANT: No, I'm just trying to process all of this. This is—

AGENT LUCAS: I understand it's a lot.

DEFENDANT: This is—I don't know if I can talk anymore.

AGENT LUCAS: It's emotional.

DEFENDANT: Sorry man, I don't think I can talk anymore. I just—I (shaking his head side to side indicating no).

DETECTIVE SORAGE: Ed, let me explain something to you. You're willing to testify against this guy, right? When you testify—

DEFENDANT: Absolutely.

DETECTIVE SORAGE: When you testify, they're gonna ask you a lot of the same questions we have.

DEFENDANT: Yeah, I know.

DETECTIVE SORAGE: And at that point, you can't say I don't want to talk anymore. I don't want to re-live this.

DEFENDANT: I know.

DETECTIVE SORAGE: Do you want to talk about something else? Is that okay?

DEFENDANT: Like talk about what. I don't know if I want to talk anymore.

Commonwealth Exhibit 11, 1:29:59-1:30:43.

Agent Lucas then asks Defendant if he showed Defendant some pictures would he be able to pick out Kenneth Smith. Defendant says, "Absolutely." Agent Lucas explains that they want to make sure they are talking about the same guy. He explains that

they will show him several photographs, the guy may or may not be in there, and Defendant should look through all the photos first and then let them know if he recognizes anybody. They go through this process for a couple of minutes and Defendant selects a possible photograph but notes that it is hard to tell for sure because the individual in the photograph has hair and he is trying to picture him with no hair. They also talk about providing identification at check-in to the hotel in Indiana and where Defendant stopped in Ohio and if he could show them on the way back to Pennsylvania.

At approximately 1:36:57 on the recording, Detective Sorage asks Defendant, "How many banks did you go to? How much money is in the car?" Then the following exchange occurs:

DEFENDANT: See, that's where I want a lawyer 'cause there's things in there that I don't wanna say.

DETECTIVE SORAGE: You don't have to. Like I said, you don't have to answer all the questions.

DEFENDANT: I don't want to answer that without a lawyer. It's not—it's not 'cause I'm incriminating myself; it's because there's a reason why that all this came about here. I can't tell you guys everything. I mean, I can tell you the basics of what happened but there's things involved that I just can't say. I want a lawyer present.

DETECTIVE SORAGE: You know, there's nothing gonna happen with your charges if you're holding back stuff.

DEFENDANT: But I'm not holding back. I told you everything that—

DETECTIVE SORAGE: Well, you are holding back a little. You know Ed, if you're telling me there's stuff you're not—and it's your right not to tell me everything.

DEFENDANT: I mean, because there's –listen there's (shaking his head no)

DETECTIVE SORAGE: That's fine. That's fine.

If the court understands Defendant's arguments, he argues that the waiver of his *Miranda* rights was invalid because he invoked his right to remain silent and his right to

counsel several times during the interrogation, including prior to Detective Sorage reading Defendant his rights or that the police coerced or tricked him into waiving his rights. The court cannot agree that Defendant's waiver was invalid, but the court finds that Defendant invoked his rights earlier than the 4:11:36 mark conceded by the Commonwealth.

Defendant first waived his *Miranda* rights when he initiated contact and spoke with Lebanon law enforcement officers after he learned that Kenneth Smith was no longer in custody. When Defendant spoke with the Lebanon authorities, he told them that he was eager to speak with the Williamsport authorities. Detective Sorage and Agent Lucas were following up with that request. Defendant told them unequivocally that he wanted to talk to them. However, he did not unequivocally request an attorney. Rather, he ambiguously indicated that he didn't know if he should have a lawyer. Shortly thereafter, he waived his *Miranda* rights again and indicated that he wished to speak with them without an attorney present.

Defendant asserts that Detective Sorage and Agent Lucas did not scrupulously honor Defendant's right to counsel and misled him with their statements about "we don't have attorneys here from Pennsylvania" and "we don't have the resources in Indiana." The court cannot agree.

Detective Sorage testified that he watched Defendant's interview with the Lebanon police before he spoke to Defendant. Transcript, 12/4/2019, at 13. During that interview, Defendant made statements to the effect that: he wanted to talk to the Indiana detectives because Smith had been released from custody; he did not realize when he asked

for an attorney after he was arrested that he would not get an attorney that night; if he had known, he would have talked to them without an attorney the night he was arrested so Smith would not have been released; and he wanted to speak to Williamsport officers. Detective Sorage testified that he wanted Defendant to understand that if he wanted to talk to an attorney, they wouldn't be talking. Id. at 46. As the Commonwealth aptly noted in its brief, the police did not have an obligation to wait around for hours for someone to arrange for an attorney, what they were obligated to do is stop questioning.

The court does not believe that Detective Sorage was attempting to mislead Defendant or improperly induce him to waive his right to counsel. Instead, he was being honest with him. As a practical matter, Defendant was not going to get an attorney that day, just as he did not get an attorney the night he was arrested. The court does not know of any jurisdiction that has attorneys just waiting on standby for a defendant to invoke his right to counsel. Instead, the questioning would have ceased and, depending on the time of the day, Detective Sorage and Agent Lucas would have transported Defendant back to Pennsylvania either that day or the next day. See Transcript, 12/4/2020, at 54, 97-98. The court agrees with the Commonwealth that at this initial stage of the interrogation, Defendant did not invoke his right to remain silent or his right to counsel.

Somewhere between 1:29:59 and 1:37:00, however, the court finds that Defendant invoked his right to remain silent and his right to counsel. Defendant repeatedly said that he didn't know if he could talk anymore and he didn't think he could talk anymore. Defendant continually was shaking his head no while he said this. Therefore, Defendant,

through both his words and his body language, was telling the officers that he did not wish to talk with them anymore. Despite his testimony to the contrary, Detective Sorage understood it as such because he explained to Defendant that if he was willing to testify against Smith, when he testified he would not be able to say that he didn't want to talk anymore or he didn't want to re-live it. Moreover, Defendant's decision to cease talking was not limited to the particular question or topic at hand. Detective Sorage asked Defendant if he wanted to talk about something else and Defendant still said he didn't know if he wanted to talk anymore.

During his testimony Detective Sorage attempted to explain that he interpreted Defendant's statements as it was emotionally difficult for him to talk. It does not matter why Defendant did not wish to talk anymore. Once he indicated he no longer wished to talk—even if it was because it was emotionally difficult—the questioning had to cease. That did not happen in this case. Furthermore, Defendant only wished to talk about Smith so that he could again be taken into custody. Specifically, Defendant said, “I'll tell you enough to find this guy.” When a defendant indicates that he only wants to talk about one topic and the police inquire about other topics, any statements about the other topics must be suppressed. See *Commonwealth v. Frein*, 206 A.3d 1049 (Pa. 2019)(where Frein told police he did not want to talk about the crime but he would tell them where a rifle was buried in the woods, his statements about the crime had to be suppressed).

Defendant also indicated that he wanted an attorney. When Detective Sorage asked Defendant how many banks he went to and how much money was in the car, Defendant stated that he didn't want to answer that and he wanted an attorney. Detective

Sorage did not scrupulously honor this request by obtaining an attorney, terminating the interrogation or even limiting the questions to ones concerning Smith. Rather, he tried to induce Defendant to make statements by telling him that nothing would happen with his charges if he was holding back and he couldn't say he didn't want to talk or he didn't want to re-live it if he was going to testify against Smith.

Based on the foregoing, the court finds that any statements made after the 1:29:59 mark must be suppressed.

4. Statements made on August 30, 2018 in Williamsport

The Commonwealth asserts these statements are voluntary but concedes that they are subject to suppression pursuant to *Edwards*¹⁰ because Defendant invoked his right to remain silent during the interview on August 29, 2018, and he did not initiate contact with the police.

Any statements subject to suppression in this Opinion may not be utilized by the Commonwealth in its case in chief. If Defendant testifies at trial, however, his statements may be used to impeach his credibility. Pa. Const. Art. 1, §9 (“The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.”); *Harris v. New York*, 401 U.S. 222, 225-226 (1971)(privilege to testify in one’s own defense cannot be perverted into a license to use perjury as a defense, free from the risk of confrontation with earlier conflicting statements).

¹⁰ *Edwards v. Arizona*, 451 U.S. 477, 485 (1981).

B. Physical Evidence

Defendant contends that the physical evidence seized from his Indiana motel room and the evidence obtained from the search of his cell phone that was seized from his hotel room must be suppressed because: (1) the search warrant for the motel room was based upon illegally obtained statements; (2) the warrant for the motel room was insufficiently particularized; (3) the cell phone extraction of Defendant's phone was the fruit of the illegal interrogation of Defendant; and (4) the independent source exception does not apply due to the egregious police conduct in this case.

The Commonwealth asserts that: (1) the search warrant for the motel room was not based on illegally obtained statements; (2) even if Defendant's statements are excised, the warrant still establishes probable cause to search the motel room; (3) the initial warrant to search Defendant's cell phone contained probable cause even if Defendant's statements are excised; and (4) the evidence obtained from Defendant's cell phone was obtained lawfully from two independent sources—the second search warrant issued on March 11, 2020, which does not contain any references to any statements Defendant made to the police and the search of Smith's cell phone, which Defendant has no standing to challenge, also contained the incriminating conversations between Defendant and Smith.

Probable cause is a practical and fluid concept that turns on the assessment of probabilities in particular factual contexts, which cannot readily be reduced to a neat set of legal rules. *Commonwealth v. Rapak*, 138 A.3d 666, 671 (Pa. Super. 2016), quoting *Commonwealth v. Huntington*, 924 A.2d 1252, 1256 (Pa. Super. 2007). Probable cause exists

where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted. *Commonwealth v. Leed*, 646 Pa. 602, 186 A.3d 405, 413 (Pa. 2018). The issuing magistrate must apply the totality of the circumstances test which requires him or her to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Commonwealth v. Harvee Johnson*, 615 Pa. 354, 42 A.3d 1017, 1031 (2012); see also *Commonwealth v. Manuel*, 194 A.3d 1076, 1081 (Pa. Super. 2018)(probable cause does not demand the certainty we associate with formal trials; rather, it requires only that the totality of the circumstances demonstrate a fair probability that contraband or evidence of a crime will be found in a particular place). A reviewing court's duty is merely to ensure that the issuing authority had a substantial basis for concluding that probable cause existed. The reviewing court must accord deference to the issuing authority's probable cause determination, and must view the information offered to establish probable cause in a common-sense, non-technical manner. *Commonwealth v. (Lavelle) Johnson*, 240 A.3d 575, 584 (Pa. 2020). Furthermore, where some evidence in a search warrant affidavit is unlawfully obtained, the court must consider whether the affidavit nonetheless sets forth probable cause in the absence of such evidence. *Commonwealth v. Hernandez*, 594 Pa. 319, 935 A.3d 1275, 1283-84 (Pa. 2007); *Commonwealth v. Shaw*, 476 Pa. 543, 383 A.3d 496, 501 (1978).

1. Probable Cause to Search Defendant's Motel Room

The Commonwealth introduced the search warrant for Defendant's motel room and the affidavit of probable cause in support of it, as Commonwealth's Exhibit 2. The affidavit consists of five pages.

As a result of the court's suppression decision, the court finds that the information contained in paragraphs 19 and 23 of the affidavit of probable cause was obtained in violation of Defendant's right to remain silent or his right to counsel. Nevertheless, even without these paragraphs, the affidavit contains probable cause to search Defendant's motel room for electronic devices, cell phones, clothing and weapons pertaining to the crime of criminal homicide.

The totality of the circumstances contained within the affidavit include but are not limited to the following: Defendant picked up Kenneth Smith on Wednesday afternoon, August 15, 2018, at Rock Solid Storage in Nanty Glo, Pennsylvania and they went to Defendant's residence in Williamsport, Pennsylvania, approximately two hours away (¶18e); Defendant and Smith became acquainted through chatrooms on a website approximately one year earlier and they communicated frequently through the website chatroom(¶18b); Defendant hired Smith to accompany him on a cross-country trip (¶18d); Defendant told Smith he was married, but possibly estranged from his wife (¶18h); Smith saw signs of a female living at the residence (¶18h); Defendant had told Smith that he and his wife slept in separate rooms (¶18h); during the night, Smith heard what he thought were screams (¶18i); Defendant fled from Williamsport (¶15); Defendant and Smith left Defendant's residence at

approximately 9:30-10:00 a.m. on Thursday, August 16, 2018 (¶18c, m); they went to a bank, Defendant withdrew several thousand dollars and gave Smith a partial payment for the trip (¶18m); on 8/17/2018, Defendant's stepdaughter received a phone call that her mother had not shown up for work, so she went to the her mother and Defendant's home where she found her mother deceased (¶15); the decedent was murdered in a bedroom of the home (¶¶ 15, 16, & 20); the decedent had a wound or wounds, there was a significant amount of blood and law enforcement had not yet discovered a suspected murder weapon (¶16); Defendant's step-daughter caught Defendant "cheating" on the decedent (¶15); there was a note left on the kitchen table at the crime scene (¶15); Defendant sent a text message to his step-daughter on 8/16/18 stating "I'm sorry...I dint' (sic) do it" or words to that effect and sent a text message on 8/17/18 advising her not to enter his home (¶15); by pinging Defendant's cell phone, police located Defendant at the Americas Best Value Inn motel in Lebanon Indiana (¶¶3,4 &5); Williamsport police provided Indiana police with a description (color, year, make, model, license plate number and vehicle identification number or VIN) of Defendant's vehicle (¶7,8); Indiana police went to the motel and observed Defendant's vehicle parked in the parking lot (¶7,8); Indiana police were advised by motel management that Defendant was assigned/purchased room 220 and Smith was assigned/purchased room 222(¶10); there was an active warrant for Defendant's arrest for criminal homicide and the crime occurred within the last 48 hours (¶¶3,4); Indiana police took Defendant into custody and detained Smith (¶¶11,12); when Defendant was taken into custody, Indiana police observed a cell phone on an end table next to the bed in Defendant's hotel room (¶13); Smith told Indiana police that

he had three electronic devices in his motel room – two tablets and a cell phone (¶18p); Defendant made statements while alone in a police interview room, including the following: “But I knew what I done was wrong”, “He took my wife away”, “Tell the truth, he can’t hurt me”, and “My mistake was trusting someone” (¶¶24, 25).

The affidavit requested and the search warrant authorized a search of room 220, located on the second floor on the south west corner of a two story commercial building with yellow exterior walls and red room doors known as Americas Best Value Inn for the purpose of searching and seizing any and all evidence that might pertain to the crime of Criminal Homicide; more specifically – any and all electronic devices, cell phones, clothing and weapons.¹¹ There was a fair probability that these items would be found in Defendant’s motel room in Lebanon, Indiana in light of the fact that the murder had occurred within the last 48 hours, following the murder Defendant fled from Williamsport, Pennsylvania to Lebanon, Indiana, there was a warrant to arrest Defendant for that murder, the suspected murder weapon had not yet been found, there was a significant amount of blood at the crime scene, Defendant had communicated with his step-daughter via text messages about his alleged lack of involvement in the murder and advising her not to enter the home, Smith was present in the home at the time of the murder, and Defendant communicated frequently with Smith via website chatrooms. In other words, based on the totality of the circumstances there was a fair probability that one would find evidence such as clothing with blood or DNA on it or the murder weapon among Defendant’s property in his motel room. There was also a

¹¹ A separate, nearly identical, warrant was issued to search Smith’s motel room. That search warrant is not the

fair probability that Defendant's cell phones would contain evidence of his text messages with his step-daughter and his communications with Smith. Similarly, there was a fair probability that Smith's electronic devices also would contain evidence of the communications between Defendant and Smith. Accordingly, the court rejects Defendant's arguments that the warrant to search Defendant's motel room lacked probable cause.

2. Particularity of the Description of the Items to be Search/Seized

Defendant contends that the warrant for the motel room was insufficiently particularized. He asserts that the language in the warrant—"any and all evidence that might pertain to the crime of Criminal Homicide. More specifically—any and all electronic devices, cell phones, clothing, and weapons" is far too broad and fails to satisfy the particularity requirements both under Indiana and Pennsylvania law.¹² He argues that "the warrant failed to limit the items to be seized to those that are evidence of the alleged crime or entirely failed to provide guidance to the Indiana officer conducting the search to distinguish those items that are related to the alleged crimes from those which are not, or both." The court cannot agree.

In describing the particularity requirement under Indiana law, the Indiana Appellate Court has stated:

Although the warrant must describe with some specificity where officers are to search and what they are to seize, there is no requirement that there be an exact description. Nonetheless, the warrant must be specific enough so that officers can, with reasonable effort, ascertain the place to be searched and the items to be seized. This requirement prevents the seizure

subject of Defendant's omnibus pretrial motion.

¹² Because the search occurred in Indiana, the court finds that Indiana law would apply to this issue.

of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. Ultimately, the description in a search warrant should be as particular as circumstances permit. Moreover, to satisfy the particularity requirement, it is permissible if a warrant incorporates by reference certain supporting documents—such as the probable cause affidavit—that collectively serv[e] to identify the scope of items that could properly be seized.

Carter v. State, 105 N.E.3d 1121, 1129 (Ind. Ct. App. 2018)(citations and internal quotation marks omitted).

Detective Bryan Spencer of the Lebanon (Indiana) Police Department affirmed under pains and penalties of perjury and swore upon his oath that the information contained in the affidavit for probable cause for the search warrant was true and correct to the best of his knowledge and belief. In his testimony at the hearings on Defendant's Omnibus Pre-trial Motion, Detective Spencer explained that the procedure in Indiana was that officers did not testify in front of the judge. Rather, they completed and swore to the information contained in the affidavit of probable cause, and then provided the affidavit to a prosecutor who would submit the affidavit to a judge to determine whether to grant or deny the search warrant. Transcript, 5/30/2019, at 21-23, 42. The warrant incorporated by reference the information contained in Detective Spencer's affidavit of probable cause. The search warrant states:

WHEREAS, Bryan C. Spencer, of the Lebanon Police Department *has given sworn probable cause testimony* for issuance of a Search Warrant. Based on that testimony, the Court finds probable cause exists for the issuance of this Search Warrant.

You are, therefore, authorized and ordered in the name of the State of Indiana, with necessary and proper assistance, in the daytime or nighttime, to search the property *described in the sworn evidence*, to wit:

- Two story commercial building known as Americas Best

Value Inn located at 1280 W. State Road 32 in Lebanon Indiana, more specifically described as a two story, with yellow exterior walls, and red room doors. Room numbers are affixed to the outside of each room door.

- Law enforcement is requesting to search room number 220, which is located on the second floor on the southwest corner of the building registered/assigned to Edward Heck.

For the purpose of searching the property *for the items described in the sworn evidence*, to wit:

1. Any and all evidence that might pertain to the crime of Criminal Homicide. More specifically—any and all electronic devices, cell phones, clothing, and weapons and to seize this/these item(s), or any part thereof, found by such search and make due return to this Court stating the date and time of service of such warrant and its listing of items seized, if any.

Commonwealth's Exhibit 2 (emphasis added).

During his testimony in the suppression proceedings, Detective Spencer explained that the basis for searching for cell phones and electronic devices were the conversations between Defendant and his step-daughter and Defendant and Smith. Transcript, 5/30/2019, at 25, 48-49, 53-55. Information regarding the text messages Defendant sent to his step-daughter was contained in the affidavit of probable cause (¶15) and so were references to Defendant and Smith communicating via chatrooms on a website (¶18b). The affidavit also stated that the Indiana police “observed a cell phone on an end table next to the bed in [Defendant’s] motel room” (¶13) and Smith stated that he had three electronic devices in his room—two tablets and a cell phone (¶18 p).

With respect to the clothing, Detective Spencer explained that he believed there might be evidence on clothing because they were advised by Pennsylvania that it was a

pretty gruesome scene, crime scene, so that would make them believe that there could be some blood or some type of maybe DNA or some type of other evidence that could be on the clothing that he would have been wearing at the time or subsequent and transferred to other clothing. Id. at 25-26. The fact that the crime scene was gruesome is reflected in paragraph 16 of the affidavit, which stated in part: “the decedent had a wound or wounds and there was a significant amount of blood at the crime scene.”

With respect to weapons, Detective Spencer indicated that Indiana authorities were led to believe that there were some stab or puncture wounds so the weapon probably could have been a sharp instrument, maybe a knife, but they did not know for certain that there was not a gun used because Williamsport authorities were still processing the crime scene and therefore Indiana authorities did not know the full circumstances of how the deceased was killed in Pennsylvania. Id. at 26, 47-48. Again, the affidavit of probable cause stated that the decedent had a wound or wounds, there was a significant amount of blood at the crime scene, and law enforcement had not yet discovered a suspected murder weapon (¶16).¹³ Therefore, at the time the warrant was obtained, the description was as specific as the circumstances would permit.

Based on the foregoing, the court rejects Defendant’s assertions and finds that the warrant was sufficiently particularized.

3. Warrants to Search Defendant’s Cell Phones/Cell Phone Extractions

Defendant contends that the evidence extracted from Defendant’s cell

¹³ The court does not believe that any weapons were found in Defendant’s motel room.

phone(s) should be suppressed as the fruit of the illegal interrogation conducted by Detective Sorage and Agent Lucas on August 29, 2018. Defendant asserts that his statements played an integral role in Agent Jason Bolt's search warrant affidavit¹⁴ and the Commonwealth should not benefit from that illegality. He also asserts that the independent source exception "should not be countenanced based upon the egregious police conduct."

The Commonwealth argues that only two small portions of a single paragraph in the affidavit related to the August 29 interview of Defendant must be excised. Even when those portions are excised, there is probable cause to search Defendant's phones. Additionally, the evidence should not be suppressed because there were independent sources of information that would allow police to obtain the same evidence lawfully. Specifically, Detective Calvin Irvin of the Lycoming County District Attorney's office applied for and

¹⁴ The search warrant and affidavit of probable cause was marked and admitted as Exhibit 11 during the January 28, 2020 proceeding. However, the August 29, 2018 interview was already designated as Commonwealth's Exhibit 11 in earlier proceedings. The parties later agreed to a stipulated order to correct the numbering of the Commonwealth's exhibits. See Stipulated Order 4/16/2020. Therefore, the court will refer to the search warrant for Defendant's phones and affidavit prepared by Agent Bolt as Commonwealth's Exhibit 13.

obtained search warrants to obtain information from Defendant's cell phones, and the affidavits prepared by Detective Irvin did not contain any statements made by Defendant. Additionally, the same conversations between Defendant and Smith were obtained from searches of Smith's electronic devices and Google accounts, and Defendant cannot challenge the searches of Smith's property/accounts.

The court disagrees with Defendant's assertion that the fruits of the illegal interrogation on August 29, 2018 played an integral part in Agent Bolt's affidavit of probable cause. The affidavit consists of approximately fourteen paragraphs. Information regarding the August 29 interview of Defendant was contained in only one of those paragraphs, the ninth paragraph. That paragraph, with the two small portions conceded by the Commonwealth excised,¹⁵ states:

On August 29, 2018 Agt. Lucas and Lycoming County Detective Stephen Sorage conducted an interview with Edward Heck. During the interview, Edward Heck informed investigators that Kenneth Smith had killed his wife, Sonja Heck. Heck also stated to investigators that he had been communicating with Smith for approximately one and a half years through the phone and internet, and multiple websites and apps on his phone... Heck also stated to investigators that he possessed an LG smartphone and "another phone" in his motel room. Heck stated that he used his cell phone devices to communicate with Smith and that he may have received photographs of Smith from Smith via cell phone....

As the remaining information was disclosed during the first hour and a half of the interview,¹⁶ the court finds that it is not subject to suppression or excision. The affidavit

¹⁵ The excised portions related to two statements Defendant made about Defendant's role in the incident and a specific app through which he communicated with Smith near the time of the incident that the Commonwealth conceded the police elicited from Defendant after he sufficiently invoked his right to remain silent.

¹⁶ Most, if not all of this information was disclosed between 0:30:00 – 0:40:00 (elapsed time) on Commonwealth's Exhibit 11 (blu-ray disc of August 29, 2018 interview).

with this version of the ninth paragraph clearly sets forth sufficient probable cause to search Defendant's phone for, at a minimum, the message he sent to his step-daughter and his communications with Smith.

Nevertheless, assuming for the sake of argument that the entire paragraph is subject to excision, the results of the phone searches need not be suppressed.

First, much of the information contained in this paragraph can be found elsewhere in the affidavit from other sources. For example, the last sentence of the eighth paragraph indicated that Defendant "made statements to Lebanon, Indiana officers that SMITH was involved in the death of his wife SONJA HECK." The eighth paragraph also stated that "SMITH stated that he had been communicating with HECK for approximately one year through the internet." While Smith's statement in the eighth paragraph only referenced communicating with Defendant through the internet, Agent Bolt explains in the tenth and twelfth paragraphs of the affidavit the variety of ways that the cell phones of persons involved in homicides and other violent criminal activity contain information regarding internet activity, as well as other activities and data useful in identifying suspects and determining motives. He also explained how cell phones are used as forms of communication between criminal suspects who commit crimes together, their friends, family, and associates. The seventh paragraph stated, "Among the items located in HECK's motel room was (1) black/silver 'iPhone-style' Alcatel Onetouch smartphone device in a black case [LPD Item ID: 6451-1] and (1) gray LG smartphone in a black case [LPD Item ID:6451-2]."

Second, the affidavit still contains sufficient probable cause to permit a

forensic examination of the phones. The affidavit includes the following facts and circumstances: the decedent was found dead in the west bedroom of the home she shared with Defendant at approximately 4:12 p.m. on August 17, 2018; her neck had been cut severely leaving a large amount of blood on the adjacent pillows and blankets; Defendant left a handwritten and signed note on the kitchen table which consisted of an apology for past indiscretions and said, "Forgive me for what I have done...this is goodbye to everyone," Defendant's step-daughter had caught Defendant "cheating" on her mother a couple of weeks earlier; Defendant's step-daughter received a text from Defendant's phone which said "It wasn't me" or words to that effect; Defendant was located in Room #220 of the Americas Best Value Inn motel in Lebanon, Indiana at approximately 10:00 p.m. on August 17, 2018; pursuant to a search warrant obtained by Lebanon police, an Alcatel smartphone and an LG smartphone were found in Defendant's motel room; Smith was in the company of Defendant and staying in Room 222; Smith told Lebanon police that he had been communicating with Defendant for approximately one year through the internet; Smith admitted to being in the residence with Defendant shortly before leaving Pennsylvania; Smith stated that Defendant withdrew a large amount of cash from a bank and gave Smith approximately \$1300; Defendant told police that Smith was involved in the death of his wife; and Agent Bolt's recitation of his experience, and the information contained within and the means of communication available through cell phones. Given all these facts and circumstances and the inferences that can be drawn from them, there was probable cause to believe that a search of Defendant's cell phones would reveal not only the messages Defendant sent to his step-

daughter but also information regarding the murder, including how it was planned and information about Defendant's whereabouts at the time of the murder.

Third, evidence from Defendant's cell phones is not subject to suppression due to the Independent Source Doctrine, which provides that "evidence tainted by illegal police conduct may nevertheless be admitted into evidence if the evidence can fairly be regarded as having an origin independent of the unlawful conduct." *Commonwealth v. Henderson*, 47 A.3d 797, 798 (Pa. 2012). The burden of proof is on the prosecution to establish by a preponderance of the evidence that the evidence illegally obtained would have ultimately or inevitably been discovered by legal means. *Commonwealth v. Fulton*, 179 A.3d 475, 490 (Pa. 2018). The Commonwealth satisfied its burden in this case.

At the hearing held on June 18, 2020, the Commonwealth presented testimony from Calvin Irvin, a detective with the Lycoming County District Attorney's Office. Detective Irvin testified that he had no involvement in this homicide investigation until he prepared the search warrants in March of 2020. His search warrant affidavit was based on his own investigation, and it did not include any statements Defendant made to police. Rather, the affidavit included information from Smith's interview, Smith's guilty plea, and Smith's cell phone extractions as well as background information about the crime scene. Detective Irvin testified that he did not speak with Agent Lucas, Detective Sorage or law enforcement officers in Indiana. Thus, the information from Defendant's cell phones and Google accounts was independently discovered by legal means without any reference to or reliance on Defendant's statements that were unlawfully obtained.

Defendant contends that the officers engaged in “egregious misconduct” such that the Commonwealth cannot utilize the Independent Source Doctrine. The court cannot agree. While the officers may have misconstrued Defendant’s statements invoking his right to remain silent and his right to counsel, the court has no difficulty finding that they did not engage in “willful misconduct.”

Additionally, the contents of the communications between Defendant and Smith were lawfully obtained through searches of Smith’s electronic devices and Google accounts.

ORDER

AND NOW, this ____ day of July 2021, upon consideration of the motions to suppress contained in Counts I and II of Defendant’s Omnibus Pretrial Motion, it is ordered and directed as follows:

1. The court grants in part and denies in part Defendant’s motion to suppress his statements. Specifically, the court suppresses:
 - A. Defendant’s statements made to Indiana law enforcement officers on August 17-18, 2018 from 37:50 to 42:12 (elapsed time); from 1:54:21 to 1:55:12 (elapsed time); and from 1:56:43 to 1:57:40 (elapsed time).
 - B. Defendant’s statements made to Agent Lucas and Detective Sorage on August 29, 2018 from 1:29:59 to the end of the interview.

C. All of Defendant's statements made to Agent Lucas and Detective Sorage on August 30, 2018.

Any statements subject to suppression in this Opinion may not be utilized by the Commonwealth in its case in chief. If Defendant testifies at trial, however, his statements may be used to impeach his credibility.

2. The court denies Defendant's motion to suppress physical evidence.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Edward J. Rymsza, Esquire
Michael J. Rudinski, Esquire
Gary Weber, Esquire
Judge Lovecchio

MFL/laf