

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

COMMONWEALTH OF PENNSYLVANIA

vs.

FRANK DUANE SWARTZ
Defendant

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No. 104 CR 2009

James Lavelle, Esquire
Michael Peter Gough, Esquire

Counsel for Commonwealth
Counsel for Defendant

Nanovic, P.J. - June 21, 2011

MEMORANDUM OPINION

Defendant, Frank Duane Swartz, seeks to suppress oral and written statements he made to the police on November 24, 2008. For the reasons which follow, we deny his request.

FACTUAL AND PROCEDURAL BACKGROUND

During a one-month period between March 17, 2008 and April 18, 2008, sixteen separate brush fires were intentionally set in three adjoining municipalities in southern Carbon County - Lower Towamensing Township, Franklin Township, and the Borough of Parryville. The incendiary device used - a lit cigarette, acting as a fuse, inserted in a matchbox and bound together with a rubber band - was found at many of these fires. Forensic testing revealed in one instance a cigarette filter with a DNA

profile matching Defendant's and, in another instance, a matchbook with a fingerprint of Defendant's right index finger.

With this, and other information linking Defendant to the fires, the police secured a search warrant for Defendant's home in Summit Hill, his vehicle and to obtain a DNA sample from Defendant. This was executed on November 24, 2008, in the presence of Defendant's fiancée, Carol Nickerson, by Trooper David Klitsch, a full-time fire investigator with the Pennsylvania State Police, and other law enforcement officers. At the time, Defendant was hunting with his stepsons, Donnie Christman and Harold Nickerson, Jr. As a result of the search, the police seized a bag of colored rubber bands and two matchbooks similar to those found at the fire sites.

Following their search, the police remained outside Defendant's home waiting for him to return. Defendant arrived home at approximately 5:10 P.M. at which time the police explained why they were there - to investigate a series of brush fires in Carbon County - that they had a search warrant for his home, car and for a DNA sample, and that they wished to speak to Defendant. Defendant denied knowledge of any of the fires but agreed to meet the troopers at the Summit Hill police station after he spoke with his fiancée, put his hunting gear away and took his dogs outside. With this understanding, the police left Defendant's home.

After five to ten minutes, Defendant and Mr. Nickerson, and Carol Nickerson and Mr. Christman, in separate vehicles, drove to the police station, with Defendant arriving first. Upon his arrival, Defendant was taken to a small room to be interviewed. In the meantime, Defendant's fiancée and stepsons were taken to another room of the station where they waited for Defendant.

Present in the interview room besides Defendant, was Trooper Klitsch and Robert McJilton, a fire investigator with the Pennsylvania Bureau of Forestry. The room was furnished with a table and three chairs. Defendant sat in one chair near the end of the table, and both officers sat between Defendant and the door. The door, during most of the interview, was closed.

Shortly after Defendant entered the interview room, a buccal swab was used to obtain Defendant's DNA. Before any questions were asked, Defendant was given an opportunity to review the search warrant and accompanying affidavit. After doing so, Defendant stated that he understood the documents but denied that he had any knowledge of or involvement in the fires.

At this point, Trooper Klitsch advised Defendant that they had DNA evidence and fingerprint evidence linking him to the fires and that they wanted to provide him with an opportunity to explain how and why he was involved. When told

of this information, Defendant's demeanor changed: He stood up; he had tears in his eyes; he took his jacket off; and he indicated he was would answer their questions. Before doing so, Defendant asked that he not be arrested until after the holidays. This was agreed to.¹

After obtaining some biographical information, Defendant was advised of his *Miranda* rights and signed a written waiver before any questions pertaining to the fire were asked. This waiver was signed at 5:40 P.M. In the questioning which followed, Defendant admitted setting all sixteen fires. Each fire was discussed separately. Defendant was then asked to complete a written narrative describing what he had told the police. In preparing this narrative, the Defendant frequently conferred with the police, obtaining information from them, based on what he had said earlier, in order to keep the facts of each fire straight. Defendant specifically denied his being involved in three other fires about which the police questioned him. Once Defendant completed his written statement, Defendant was allowed to return home.

On Friday, December 26, 2008, Defendant was contacted by Trooper Klitsch and told to voluntarily surrender himself at the Magistrate's Office on Monday, December 29, 2008, where he would be arrested. Defendant complied with Trooper Klitsch's

¹ The interview with Defendant occurred on Monday, November 24, 2008. The following Thursday, November 27, was Thanksgiving.

instructions and was arrested on December 29, 2008. A criminal complaint against Defendant was filed in this matter on the same date.

In Defendant's Motion to Suppress and brief filed in support of that Motion, Defendant identifies three primary reasons why the Motion should be granted: (1) that Defendant was denied counsel after requesting same while he was in custody which required that no questioning take place after this request was made; (2) that the police improperly coerced or induced Defendant's confession by promises of leniency and threats of incarceration if he did not cooperate; and (3) that Defendant's *Miranda* rights were not given until after incriminating statements had been made, at a time when Defendant was in custody and being questioned by the police.

DISCUSSION

a) Request for Counsel

As a corollary to *Miranda*, if an accused invokes his right to counsel during custodial interrogation, all interrogation must cease until counsel is made available, unless the accused initiates further conversation with the police. Edwards v. Arizona, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed.2nd 378 (1981).

[P]olice are forbidden from further interrogating a person in custody who requests an attorney

until counsel has been made available to him, or he initiates further communications, exchanges, or conversations with the police, and, additionally, that if an individual has asserted his right to counsel at an arraignment or similar proceeding, any waiver of that right during subsequent police initiated interrogation is invalid.

Commonwealth v. Briggs, 12 A.3d 291, 320 (Pa. 2011). "[I]n order to implicate the *Miranda-Edwards* right to counsel prophylaxis, both a custodial situation and official interrogation are required." United States v. Bautista, 145 F.3d. 1140, 1147 (10th Cir. 1998).

The test for determining whether a person is in custody for *Miranda* purposes is an objective one.

[B]ased on a totality of the circumstances, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the officer or the person seized. The test is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by said interrogation. Custodial interrogation does not require that the police make a formal arrest nor that the police intend to make an arrest.

In re N.M., 2010 WL 3177032 (Pa.Com.Pl. 2010) (citations omitted).

Here, there is little question that Defendant was in custody once he arrived at the police station and was taken to be interviewed. In the room where the interview occurred,

Defendant was kept from his family, the door was closed, and both officers sat between Defendant and the door. The officers told Defendant that they had "hard evidence" against him, and they did: incriminating evidence with his fingerprint and his DNA profile. Once told this and before he spoke further, Defendant wanted assurances that he would not be immediately arrested and kept from his family during the holidays. This by itself establishes that Defendant was in custody - that he was under arrest or otherwise reasonably believed that his freedom of action or movement was restricted by the interrogation.

At the suppression hearing, Defendant testified that after the police told him they had "hard evidence" implicating him in the fires, he remarked, "Maybe I should speak to an attorney." This statement is not, as Defendant contends, an unequivocal request for counsel. It is, at most, an indication that Defendant was thinking about requesting counsel but had not yet made a decision. Accordingly, even were we to find that such a remark was made, standing alone, it would be insufficient to trigger Edwards' prophylactic rule which requires as a threshold inquiry that Defendant clearly invoke his right to counsel in the first instance. Commonwealth v. Hubble, 504 A.2d 168, 175 (Pa. 1986) ("To hold that every utterance of the word 'lawyer' automatically erects the *Edwards*' 'cone of silence' around the accused, thus insulating him from *all* further police-

initiated questioning and communication, would be far too rigid and would not serve the interests or needs of justice."). Nevertheless, were we to also find, as Defendant contends, that such inquiry was followed by an ultimatum - request an attorney and wait in jail until one is appointed or waive counsel, answer questions, and go home - we would conclude that Defendant's right to counsel had been infringed upon and that Defendant's statements should be suppressed. Instead, we accept as credible Trooper Klitsch's testimony that Defendant never requested counsel and agreed to cooperate once apprised of his situation.

b. Voluntariness of Confession

Whether a confession was voluntarily rendered, or was the product of coercion or improper inducement, requires an examination of the totality of the circumstances.

Pennsylvania looks at the totality of the circumstances when assessing the voluntariness of a confession. When reviewing voluntariness pursuant to the totality of the circumstances, we should look to: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand coercion.

Commonwealth v. Roberts, 969 A.2d 594, 599 (Pa.Super. 2009).

To the extent Defendant claims the police's agreement to defer

his arrest until after the holidays either coerced his confession or improperly induced that confession, we disagree.²

First, Defendant was advised at the outset of the interview that whether he denied involvement or acknowledged his guilt, he was not going to be arrested that date because of the number of fires and victims involved and the paperwork which would have to be prepared. Second, Defendant's request that he not be arrested that day if he cooperated signifies his awareness of his predicament and his ability to independently act, for his benefit, to delay his arrest until after the holidays in order to spend this time with his family. Third, Defendant's refusal to admit involvement in two or three other fires about which he was questioned, supports, rather than weakens, our finding that Defendant's confession was the product of a rational and free choice. See Commonwealth v. Nester, 709 A.2d 879, 882 (Pa. 1998) ("The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprives the defendant of his ability to

² Defendant's argument that he had no information regarding the fires and mechanically wrote in his custodial written statement (i.e., Commonwealth Exhibit 2) what the police told him to write is belied by the evidence. To the extent the police assisted Defendant with information for this written statement, because of the number and dates of the fires involved, they did so by reiterating to Defendant what he had earlier told them in his oral confession with respect to each fire.

Also without merit is Defendant's contention that the police manufactured a "family emergency" which affected his ability to resist the police's inquiries. Prior to any interview being conducted, Defendant was aware that no family emergency existed. (N.T. 11/12/10, p.142).

make a free and unconstrained decision to confess."). At no time was Defendant subjected to any threats, promises, or coercion, psychological or physical, which improperly induced him to incriminate himself.

c. Waiver of *Miranda*

Finally, as a finding of fact, we have determined that no incriminating statements were made by Defendant before his *Miranda* rights were given. To the contrary, after reading his *Miranda* rights, these rights were waived at 5:40 P.M., before any questioning concerning the fires began.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress the oral and written statements made by him to the police on November 24, 2008, will be denied.

BY THE COURT:

P.J.