IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No: CR-527-2011
	:	
RICHARD CORKERY,	:	
Defendant	:	

William E. McDonald, Esquire
Assistant District Attorney — Counsel for the Commonwealth
Nicholas A. Quinn, Esquire — Counsel for the Defendant

MEMORANDUM OPINION

Serfass, J. – March 11, 2013

Here before the Court is Defendant Richard Corkery's "Motion for Suppression of Evidence" seeking to have statements which Defendant made to law enforcement officers during an interview at his home on May 16, 2011 suppressed on the basis that Defendant's constitutional rights were violated when the officers questioned him without administering Miranda warnings. For the reasons that follow, we will deny Defendant's Motion.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is charged with twenty-seven (27) violations of 18 Pa. Cons. Stat. Ann. § 6312 (d)(1), which prohibits the intentional viewing or the knowing possession or control of any depiction, including photographs or films, of a child under the age of eighteen (18) years engaging in a prohibited sexual act. Each violation of this subsection is graded as a felony of the third degree.

According to the Affidavit of Probable Cause filed by Nesquehoning Borough Police Chief Sean T. Smith, the charges against Defendant stem from an investigation which began on April 6, 2011 with the receipt by the Nesquehoning police of an anonymous letter requesting that they "look into allegations of child pornography concerning Richard Corkery." The letter indicated that Defendant "was recently let go from WLSH Radio in Nesquehoning due to personal use of the computer, the personal use is regarding boys and the fact that they were naked." Chief Smith obtained confirmation from an employee of the aforementioned radio station that Defendant had been terminated from the employment of the station for viewing pornography on a station-owned computer.

Chief Smith received the consent of the station manager and owner to seize the computer allegedly used by Defendant to view pornography and subject the hard drive of that computer to a forensic examination. The forensic examination revealed that thirty-four (34) images of naked males performing sex acts had been accessed on the computer between the hours of 8:00 a.m. and 10:00 a.m. on several dates between February 15, 2011 and March 28, 2011. Dr. Thomas Novinger was consulted as an expert to offer an opinion as to whether the thirty-four (34) images retrieved from the radio station computer depicted individuals under the age of eighteen (18). Dr. Novinger offered the

opinion that twenty-eight (28) of the males, who were depicted in twenty-seven (27) different images from the computer's hard drive, had been under the age of eighteen (18) at the time the images were captured.

Chief Smith then contacted Defendant to request that Defendant come to the Nesquehoning Police Station for an interview. Defendant requested instead that the interview take place at his own home, to which request Chief Smith agreed, and on May 16, 2011, Chief Smith, accompanied by Federal Bureau of Investigation Agent John Bates and Pennsylvania State Trooper Scott Sotack, met with Defendant at Defendant's home. Before questioning began, Defendant was advised that he had the right to refuse to answer any questions. Defendant invited the officers from his living room into his kitchen and the men sat at the kitchen table. Agent Bates, who was to perform the majority of the questioning, informed Defendant at that time of his right to decline to answer any questions. Agent Bates and Trooper Sotack then questioned Defendant about his possible connection to the accessing of pornographic images on the radio station's computer.

Defendant admitted during the course of the interview that he had in fact accessed certain pornographic images on the dates in question, and named a particular website as the source of some of those images. During the course of the interview,

which lasted approximately two (2) hours, apparently to clarify what he perceived as a misunderstanding on the officers' part about Defendant's good intentions, Defendant offered to show the officers various examples of his involvement in the community, including photographs from youth sports teams. When he was informed that he could move freely about the home so long as the officers, for their own safety, were able to accompany him, Defendant did lead the officers into the basement, living room and bedroom areas of his home.

A criminal complaint charging Defendant with the aforementioned twenty-seven (27) counts of Possession of Child Pornography was subsequently filed on July 13, 2011. On July 15, 2011, Defendant waived formal arraignment on those charges and the matter was bound over for trial. On August 8, 2011, the Carbon County District Attorney's Office filed an Information charging Defendant with the same twenty-seven (27) offenses.

Defendant filed a "Motion for Suppression of Evidence" on October 12, 2012, arguing for suppression of Defendant's statements made on May 16, 2011 to Chief Smith, Agent Bates and Trooper Sotack on the grounds that Defendant was not administered Miranda warnings before being subjected to questioning. The Commonwealth filed an answer on December 3, 2012, asking for dismissal of the motion to suppress on the grounds that it violated Pennsylvania Rules of Criminal

Procedure 579 (a) and 581 (b). Oral argument was held on Defendant's motion on December 14, 2012 before the undersigned. Counsel for Defendant submitted a brief on the issue of suppression on December 28, 2012, and counsel for the Commonwealth submitted a brief in response thereto on January 10, 2013.

DISCUSSION

The Commonwealth asserts that Defendant's "Motion for Suppression of Evidence" is barred as untimely by Pennsylvania Rule of Criminal Procedure 579, which mandates that an omnibus pretrial motion

> shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the defendant or defense attorney, or the attorney for the Commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.

Pa. R. Crim. P. 579 (a).

Pursuant to Pennsylvania Rule of Criminal Procedure 578, all pretrial requests for relief must be included in a single omnibus motion, unless the interests of justice require otherwise. Included in this category is a motion for the suppression of evidence. See Comment to Pa. R. Crim. P. 578. Thus, a reading of Rule 578 in conjunction with Rule 579 makes clear that Defendant's motion for the suppression of his statements to police in the instant case, because suppression is

the type of relief which is required to be included in an omnibus motion, should have been filed no later than thirty (30) days after the date of arraignment.

In this case, Defendant waived a formal arraignment on July 15, 2011. Therefore, Defendant's omnibus pre-trial motion, including, by definition, any motion to suppress evidence, could have been timely filed no later than August 15, 2011, unless there was no opportunity to do so, the grounds for the suppression had not yet been discovered, or this Court had extended the filing deadline upon a showing of good cause. As there is no basis for a finding that any of these exceptions pertains to Defendant's case, we agree that Rule 578 warrants dismissal of Defendant's motion on the basis of untimeliness alone.

Although the application of the Pennsylvania Rules of Criminal Procedure is sufficient to find that Defendant's motion should be denied, we would also deny the motion to suppress Defendant's statements on its merits. Defendant was not subject to custodial interrogation at the time of his questioning by the police on May 16, 2011, and, as a result, Defendant's constitutional rights were not violated by the undisputed lack of any Miranda warnings administered to Defendant by the law enforcement officers.

It is the settled law of this Commonwealth with respect to Miranda warnings that "[t]he prosecution may not use statements stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel." Commonwealth v. Gaul, 590 Pa. 175, 180, 912 A.2d 252, 255 (2006) (citing Commonwealth v. DeJesus, 567 Pa. 415, 787 A.2d 394 (2001)). In determining whether such warnings are necessary, a court must consider the totality of the circumstances. Gaul, 912 A.2d at 255.

"Interrogation" is police conduct or questioning "calculated to, expected to, or likely to evoke admission." Johnson, 541 A.2d at 336 (quoting Commonwealth v. Simala, 434 Pa. 219, 226, 252 A.2d 575, 578 (1969)). "Custodial" interrogation is such questioning initiated by law enforcement officers after a person has either been taken into formal custody or "otherwise deprived of his [or her] freedom of action in any significant way." Commonwealth v. Johnson, 373 Pa.Super. 312, 541 A.2d 332, 336 (1988). quoting Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706 (1966). Police detention of an individual becomes custodial, in other words, when, under the totality of the circumstances, the nature of such detention becomes so coercive as to "constitute the functional equivalent of arrest." Commonwealth v. Ellis, 379 Pa.Super. 337, 549 A.2d 1323, 1332 (1988).

In determining whether, in a particular case, police detention has risen to the level of coercion that can be considered the functional equivalent of arrest, the factors considered by the court "include: the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions." Commonwealth v. Mannion, 725 A.2d 196, 200 (Pa. Super. Ct. 1999).

Among the facts our Superior Court considered in determining that no Miranda warnings had been required in Mannion, because no custodial interrogation took place where an individual was questioned by two officers at her own home in connection with the investigation of a theft, were the following: the state trooper obtained the defendant's permission for the interview and the defendant chose the location thereof; the officers informed the defendant that she was free to refuse to speak with them or ask them to leave; the defendant moved about freely and used the telephone; the defendant was never searched, removed from the home or restrained; and the officers never made any show or threat of force. Id. at 202.

Similarly, in the instant case, Defendant's interview took place at his own home, a location which was chosen by Defendant.

Defendant gave his permission for the interview. Defendant was informed that he was free to decline to answer any questions or speak to the officers. Defendant was free to move about his home and did so. He was never searched, removed from his home or physically restrained, and none of the officers made any show or threat of force against Defendant. Just as in the Mannion case, here Defendant invited the officers into the living room and then to the kitchen table, where he offered them something to drink. Under such similar facts, as in Mannion, there is no basis for the suppression of the statements given to the police.

Defendant attempts to distinguish the facts of his case from those of Mannion on the following bases: that Defendant did not know he would be meeting with three officers at his home because he had only invited Chief Smith; that Defendant was not "free to do as he pleased" and was never told that he was, and instead was told that the officers needed to accompany him if he walked into a different area of the house; and that the officers in Mannion did not have a preconceived notion of the defendant's guilt in that case, whereas in this case at least one officer thought there was a good case against Defendant. Assuming a factual basis for each of these distinctions, they do not rise to a level which is sufficient to justify suppression of Defendant's statements. The question is whether, considering the totality of the circumstances, Defendant was subject to

custodial interrogation when he made the statements which are the subject of his motion.

That is, we must ask whether, considering all the facts surrounding Defendant's interview with police on May 16, 2011, including the presence of three officers for approximately two hours at Defendant's kitchen table after Defendant invited Chief Smith to the home for the purposes of the interview and then invited the officers into the home and from the living room to the kitchen, the fact that Defendant was told that he was not required to speak to the officers and the fact that he was never physically restrained or relocated, instead leading the officers for his own purposes on a tour of his home, Defendant was detained in such a manner and under such conditions that it is reasonable to conclude that he was subject to a level of coercion analogous to a formal arrest.

We find that the questioning of Defendant here clearly did not rise to that level; a reasonable person in Defendant's position would have known that he was not under arrest and that his liberty was not curtailed to such an extent that he was coerced into providing answers despite having been advised that he did not need to do so. Defendant could not have reasonably believed that at the time he provided his statements to the police, the nature of the encounter was of similar character to a formal arrest. Defendant's actions in inviting the officers

into his home, offering beverages, answering questions at his kitchen table and leading the officers into various rooms to demonstrate his civic engagement are not the actions of a person who believes that his personal freedoms have been denied him. Nothing in the conduct of the officers would reasonably have served to negate the specific instruction Defendant was given that he had the right to refuse to speak with them. As a result, we find that the May 16, 2011 interview did not take place while Defendant was subject to custodial interrogation, and thus no Miranda warnings were necessary. Therefore, no basis exists for the suppression of Defendant's voluntary statements to the officers.

CONCLUSION

In accordance with the foregoing, the Defendant's "Motion for Suppression of Evidence" is denied.

BY THE COURT:

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Steven R. Serfass, J.

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ORDER OF COURT

AND NOW, to wit, this 11th day of March, 2013, upon consideration of Defendant's "Motion for Suppression of Evidence," the briefs of counsel, and after hearing held thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Defendant's "Motion for Suppression of Evidence" is **DENIED.**

BY THE COURT:

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Steven R. Serfass, J.