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3RD DISTRICT COURT SALT LAKE COUNTY, STATE OF UTAH	
STATE OF UTAH, Plaintiff, v. JASON CHRISTOPHER HALL, Defendant.	STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENT Case No. 221906445 Judge: PAUL B. PARKER

STATE OF UTAH, through Assistant Attorney Heather Waite Grover, hereby submits
this Memorandum in Opposition to Defendant's Motion to Suppress Statement as follows:

SUMMARY OF ARGUMENT AND RELIEF REQUESTED

Defendant's Motion to Suppress should be denied. Defendant knowingly and voluntarily waived his Fifth Amendment right to the presence of counsel during the investigator's interview. The defendant was advised of his right to have counsel present and the consequences of giving up that right, and he did not unambiguously request counsel. When asked by the investigator for an unequivocal answer as to whether he wanted to talk, Defendant unequivocally responded, "Well, I'm happy to talk to you."

Additionally, Defendant failed to prove that the State's attorney directed contact with Defendant in violation of Rule 4.2 of the Utah Rules of Professional Conduct. Defendant did not establish that the State's attorney knew Defendant was represented during the special agents' investigation into Defendant's conduct. Defendant failed to show that the special agents were acting as the alter ego of the State's attorney. Even if Defendant had established those facts, Defendant has not demonstrated why suppression would be the appropriate remedy for such an ethical violation.

STATEMENT OF MATERIAL FACTS

1. Bluffdale City Police Department referred this case to the Utah Attorney General's Office. See Audio Recording of Motion to Suppress Hearing SCLRTS34_20231027-1304, 0:07:00 to 0:08:30.

2. On December 15, 2021, a search warrant was served upon Defendant's employee, George Schliesser, who admitted to investigator Special Agent Thomas Russell that he delivered packages and mailed envelopes for his "boss," Jason Hall, co-owner of Woodcraft Mill & Cabinet. See Exhibit 5.

3. When the search warrant was executed, Mr. Schliesser agreed to cooperate and be available for additional examination. However, a few days later, on December 21, 2021, Schliesser advised Agent Russell that Tyler Ayers was now his counsel and declined to talk further. See id.

4. On February 23, 2022, Agent Russell received a phone call from Nick Stidham, then a sergeant with the Bluffdale Police Department, and added this summary to his investigative report:

Sgt. Stidham stated that the second issue that had arisen with regards to this case, was that he was again approached by Gaston, who informed him that a close friend of his (Gaston's) who is an attorney, approached him to tell him that Jason Hall had attempted to retain his services, with regards to this investigation. Sgt. Stidham continued on to say that Gaston stated that his friend knew "all about the case" - that it was being run by the "AG's office," and that it was regarding threats he had made to Gaston. Gaston further informed Sgt. Stidham that when his friend declined to take the case, that he then referred HALL to another defense attorney named Tyler Ayers. Gaston informed Sgt. Stidham that his friend told him that HALL has since retained Ayers as his criminal attorney specifically for this investigation and whatever charges might arise out of this.

See Ex. 4.

5. Agent Russell relayed Sergeant Stidham's message to the State's lawyer, and Agent Russell summarized his conversation with the lawyer as follows:

Secondly, [the assistant attorney general] informed SA Russell that if/when he executed a search warrant on HALL and his work place, in an attempt to seize the suspected phones and computers, that he was not to try to interview HALL (since he has retained an attorney), and that review of any seized computers or phones after today would probably need to be evaluated by a "taint" team - but that would be decided down the road (since he would now possibly have "attorney-client" material on those items).

Id.

6. After consulting with the State's lawyer, Agent Russell reconsidered the message he had received from Sergeant Stidham. Agent Russell ultimately decided that the third-hand rumor Sergeant Stidham conveyed did not stop him from asking Defendant for an interview at the time he and other agents executed the search warrant. See Audio Recording of Motion to Suppress Hearing SLCCRTS34_20231027-1346, 0:01:30-0:03:15

7. Agent Russell also consulted with one of his supervisors about the rumor and afterward came to the same conclusion. See id.

8. On March 2, 2022, the search warrant was served on the business address of Defendant Hall, Woodcraft Mill & Cabinet. Neither Agent Downey nor Agent Russell specifically informed the State's lawyer regarding the date they intended to execute the search warrant. See Audio Recording of Motion to Suppress Hearing SLCCRTS34_20231027-1346, 0:03:55-0:04:35, 0:12:55-0:13:17.

9. During the execution of the search warrant, Special Agent Tyson Downey interviewed Defendant. See generally Exhibit 1.

10. The State's lawyer was not physically present at Woodcraft Mill & Cabinet while the agents searched the premises, Defendant's truck, Defendant's computer, and Defendant's phone. See id.

11. The State's lawyer did not dictate which agent conduct the interview of Defendant. See id.

12. The State's lawyer did not script nor suggest any questions that the agents should ask when they interviewed Defendant. See id.

13. As Agent Downey began his interview with Defendant, he advised Defendant of his Miranda rights stating, "Jason, you have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to have an attorney present as we talk. If you can't afford an attorney, one will be provided to you." Exhibit 1, pp. 3-4.

14. Agent Downey then told Defendant that he could invoke those rights at any time and further explained, "What that means is we can talk and then if you decide not to – or not answer any questions, you can – you can choose that." Id. p. 4.

15. Agent Downey specifically asked Defendant, “Do you understand those rights?” and Defendant stated, “I do.” Id.

16. Only then did Agent Downey ask Defendant if he wished to answer questions, to which Defendant said, “Potentially.” Id.

17. Agent Downey reminded Defendant that he could decide “at any point to not” talk. Id.

18. As Agent Downey made this statement, Defendant made a single syllabus response, which Agent Downey heard as, “Sure.”¹ See Exhibit 2, Audio Recording of Interview with Jason Hall; See also Audio Recording of Motion to Suppress Hearing, SLCCRTS34_20231027-1346, 0:15:50-0:16:30, 0:19:00-0:19:10.

19. Agent Downey proceeded with asking preliminary questions, such as Defendant’s phone number and email address. Exhibit 1, pp. 4-5.

20. Before getting into anything more substantive, Agent Downey asked Defendant, “Do you know why we’re here?” Id. p. 5.

21. Defendant stated, “More or less,” acknowledging that he knew why the agents had visited his employee, Mr. Schliesser, and asked if he could have a minute to read through the search warrant. Id. p. 5.

22. The search warrant listed the crimes that were associated with the search of Defendant’s truck, business, computers, and phone: (1) Threat of Violence, (2) Terroristic

¹ The audio, Exhibit 2, shows that Defendant responded as Agent Downey was speaking. Because they were talking over each other, Defendant’s response is muffled.

Threats, (3) Electronic Communication Harassment, (4) Interference with a Public Servant, and (5) Threats to Influence Official or Political Action. See Exhibit 3, pp. 3-4.

23. After reviewing the search warrant, Defendant told the agents that they were “off base a little bit,” and observed that the agents believed that he had “on several occasions, threatened the life of Jeff Gaston.” Id. p. 8.

24. Defendant then commented that he had an attorney who attempted to reach Agent Russell, ultimately spoke with Agent Russell, and was advised by Agent Russell that “nothing was going on.” Id. pp. 9-10.

25. At that point, Agent Downey sought to clarify if Defendant wanted to continue the interview and informed Defendant, “If you don’t want to talk to us, we’re done. We don’t care.” Id. p. 10.

26. Agent Downey stated, “So the question is: Do you want to talk to us? We’re not going to dance. We’re not going to sit here and dance with you.” Id. p. 11.

27. Defendant immediately responded, “Well, I’m happy to talk to you.” Id.

28. At some point during the interview, Agent Downey stepped out and contacted Agent Russell about Defendant’s claim that Defendant’s attorney had spoken with Agent Russell. See Audio Recording of Motion to Suppress Hearing, SLCCRTS34_20231027-1346, 0:11:15-0:11:41.

29. Agent Russell stated he had not received a phone call, voice message, or contact of any kind from anyone purporting to represent Defendant. See id.

30. Agent Downey brought up the subject of Defendant's attorney again toward the end of Defendant's interview and directly asked Defendant, "Who is your attorney?" Exhibit 1, p. 98.

31. Defendant could not remember his attorney's full name and answered only "Ty." Id.

32. After the execution of the search warrant, Agent Russell immediately revisited his call logs and email to make sure he had not overlooked attempted contact by an attorney for Defendant. See Audio Recording of Motion to Suppress Hearing SLCCRTS34_20231027-1346, 0:05:30-0:06:05.

33. Agent Russell also checked with his office's receptionist to see if she had received any calls from someone trying to reach him on behalf of Defendant; she had not. See id.

34. The day after the search warrant was executed, March 3, 2022, attorney Tyler Ayers called the Attorney General's Office. The receptionist took a message and emailed Agent Russell to notify him of the call. See Exhibit 6.

35. Tyler Ayers and Agent Russell spoke on March 3rd. See Audio Recording of Motion to Suppress Hearing SLCCRTS34_20231027-1346, 0:06:25-06:06:55.

36. Tyler Ayers made no complaint about agents speaking to Defendant the day before, but rather, was focused on getting the Affidavit of Probable Cause connected with the warrant (which was sealed). See Exhibit 3.

37. The Information in this case was filed June 30, 2022. See EFS no. 1.

ARGUMENT

I. Defendant knowingly and voluntarily waived his Fifth Amendment right to have counsel present when interviewed by special agents and chose to proceed with the interview after receiving a Miranda warning.

“The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution provides that ‘[n]o person . . . shall be compelled in any criminal case to be a witness against himself,’ and creates a privilege that protects a defendant ‘against being incriminated by his own compelled testimonial communications.’” State v. Valdez, 2021 UT App 13, ¶ 23, 482 P.3d 861 (quoting Doe v. United States, 487 U.S. 201, 207 (1988)). This Fifth Amendment right includes the “right to have counsel present during [an] interrogation.” State v. Gardner, 2018 UT App 126, ¶ 15, 428 P.3d 58. “After Miranda rights are read, ‘the suspect must unambiguously request counsel’ in such a way that ‘the desire to have counsel present is sufficiently clear.’” Id. (quoting Davis v. United States, 512 U.S. 452, 459 (1994)).

The right to have counsel present can be waived if it is done so “knowingly and voluntarily.” Id. ¶ 18. A waiver is knowing if it was “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Patterson v. Illinois, 487 U.S. 285, 292 (1988) (quoting Moran v. Burbine, 475 U.S. 412 (1986)). It is voluntary if “it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” Moran v. Burbine, 475 U.S. 412, 421 (1986).

“[W]aivers can be established even absent formal or express statements of a waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered.” Berguis v. Thompkins, 560 U.S. 370, 383 (2010). “Moreover, a ‘defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not

itself be counseled.” U.S. v. Koerber, 966 F. Supp. 2d 1207, 1224 (D. (Utah 2013) (quoting Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (citing Michigan v. Harvey, 494 U.S. 344, 352-53 (1990))). Ultimately, “[t]he determination of whether there has been an intelligent waiver of right . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938), overruled on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981).

In most circumstances, an accused person is deemed to have knowingly and voluntarily waived his Fifth Amendment rights if he was given Miranda warnings and continued to speak with law enforcement. This is because, “[f]irst, the Miranda warnings given [the person] made him aware of his right to have counsel present during the questioning.” Patterson, 487 U.S. at 293. “Second, the Miranda warnings also served to make [the person] aware of the consequences of a decision by him to waive his . . . rights.” Id. Most specifically, a Miranda warning tells a person that

any statement that he made could be used against him in a subsequent criminal proceeding. This is the ultimate adverse consequence [a person] could . . . suffer[] by virtue of his choice to make uncounseled admissions to the authorities. This warning also sufficed . . . to let [the person] know what a lawyer could “do for him” during the . . . questions: namely advise [the person] from making such statements.

Id. at 293-294.

Here, Defendant knew his rights. Agent Downey gave Defendant Miranda warnings, clarified what the warning meant, and specifically asked if Defendant understood his rights. Defendant answered, “I do.”

Defendant voluntarily waived his Fifth Amendment rights. When asked if he wanted to talk, Defendant initially said, “Potentially.” Agent Downey clarified that Defendant could “decide at any point not to” talk. Defendant told Agent Downey he knew why the agents were searching his business. Defendant had an opportunity to read the search warrant, which listed the specific crimes the agents believed they would find evidence of in Defendant’s business, vehicle, and electronic devices. While Defendant referenced an attorney, he did not request to have the attorney present with him while he spoke to agents. Finally, before the agents asked more than preliminary questions, Defendant’s phone number and email address, Agent Downey pointedly repeated his question, “Do you want to talk to us?” Defendant said, “Well, I’m happy to talk to you.”

There is no indication of coercion, deception, or intimidation. Agent Downey directly told Defendant, “If you don’t want to talk to us, we’re done.” He further alleviated pressure on Defendant by telling him that they did not care if Defendant spoke to them.

II. Defendant fails to show an ethical violation that could justify suppression of his statements.

“‘The proponent of a motion to suppress has the burden of establishing that his . . . own . . . rights were violated by the challenged [government action].’” State v. Simmons, 866 P.2d 614, 617-18 (Ut. Ct. App. 1993) (quoting Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978)). In this case, Defendant must prove both that the State’s prosecutor had “actual knowledge of [defendant’s] representation” and that the State’s prosecutor “scripted” the conversation between Defendant and the special agents thereby making the special agent’s the prosecutor’s “alter ego.” U.S. v. Koerber, 966 F. Supp. 2d 1207, 1226-27 (2013) (quoting Utah Rule of Professional Conduct 4.2(a) cmts. 21 & 14). Furthermore, Defendant must demonstrate that suppression of his

statements is an appropriate remedy by showing that the government attorney's ethical violation "implicate[d] fundamental, constitutional concerns, [was] conducted in bad-faith or has substantially prejudiced [him]." State v. Fixel, 744 P.2d 1366, 1369 (Utah 1987).

A. Defendant did not prove the State's lawyer had "actual knowledge" of Defendant's legal representation prior to Defendant's interview with Special Agent Downey.

Rule 4.2(a) of the Rules of Professional Conduct prohibits contact between a lawyer and a "person the lawyer *knows* to be represented by a legal professional in the matter, unless the lawyer has the consent of the legal professional." (Emphasis added.) Comment 21 to Rule 4.2 clarifies that "[a] person is 'known' to be represented when the lawyer has actual knowledge of the representation." A lawyer's knowledge "is a question of fact to be resolved by reference to the totality of the circumstances, including reference to any written notice of the representation." Id.

Defendant did not put forth any evidence of the State's lawyer's knowledge of Defendant's representation. Defendant merely established that the State's lawyer heard from the agent that an anonymous attorney told the alleged victim, who then told Sergeant Stidham, who then told Agent Russell that the anonymous attorney referred Defendant to an attorney named Tyler Ayers, third hand hearsay at best. Nor did Defendant produce any evidence of contact between Tyler Ayers and the State's lawyer, let alone show the State's lawyer had actual knowledge of Tyler Ayers's possible representation of Defendant.

The only proven contact between Tyler Ayers and anyone from the State occurred a day *after* the agents executed the search warrant and interviewed Defendant. Agent

Russell testified that Tyler Ayers called him on March 3, 2022, and requested a copy of the affidavit written in support of the application for the warrant.

B. Defendant failed to show the State’s lawyer scripted the special agent’s interview of Defendant, or that the special agent acted as the lawyer’s alter ego.

Even if we were to assume the State’s lawyer knew about Defendant’s representation, Defendant failed to produce any evidence that the State’s lawyer scripted Defendant’s interview such that the agents were the alter egos of the State’s lawyer. Importantly, “[n]othing in this [no-contact] rule [of professional conduct] prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented party.” Utah R. Prof. Conduct. 4.2, cmt. 14. This is because “[t]he actions of the officers will not be imputed to the government lawyer unless the conversation has been scripted by the government lawyer.” *Id.* As Utah federal courts observed, “Comment [14] effectively ties into [an] ‘alter ego’ analysis – in certain circumstances ‘enforcement officials are agents of the prosecuting party.’” *U.S. v. Koerber*, 966 F. Supp. 2d 1207, 1226 (2013) (quoting *United State v. Thomas*, 474 F.2d 110, 112 (10th Circ. 1973)). In other words, “there must be some type of coordination, influence, authorization, or communication between the agent and the prosecutor.” *U.S. v. Pena-Armenta*, 2020 WL 7645443, 14 (D. Utah 2020) (citing *Koerber*, 966 F. Supp. 2d at 1226)).

The testimony produced at the October 27, 2023 evidentiary hearing demonstrated the exact opposite of special agents acting as puppets for the prosecutor. Both Agent Downey and Agent Russell testified that the State’s lawyer did not script the interview of Defendant. They testified that the State’s lawyer had not given them any questions to ask Defendant, nor had he suggested any questions. According to these agents, the State’s lawyer had not been informed of

the day they chose to execute the search warrant, did not participate in plans for executing it, and was not present at the scene of the search.

C. Even if there was a violation of the ethical rule, Defendant failed to show a violation of his Fifth Amendment rights sufficient to justify suppression as the appropriate remedy.

Assuming Defendant can prove an ethical violation of the no-contact rule, Defendant must also prove that the violation was severe enough to require suppression of evidence as the remedy. In requesting the remedy of suppression based on an ethical violation, Defendant relies on United States v. Koerber, 966 F. Supp. 2d 1207 (D. Utah 2013).

While the Koerber court chose suppression as the remedy for an attorney's violation of the no-contact rule, other federal district courts have assessed Koerber as "an isolated, unusual case" containing an "egregious violation of the no-contact rule." United States v. Sabeau, No. 2:15-CR-175-GZS, 2016 WL 5721135, at *6 (D. Me. Oct. 3, 2016). In fact, "most [federal] courts have determined that suppression must be reserved for only the most egregious violations of the no-contact rule and have declined to order suppression." Id. (citing United States v. Joel, No. 15-CR-430-GPC, 2015 WL 5704297, at *6 (S.D. Cal. Sept. 29, 2015) (stating that in the absence of a clear precedent in the circuit establishing that the contact in question was prohibited, exclusion of evidence would be "antithetical to the administration of justice" (internal quotation omitted))); United States v. Bowen, No. CRIM.A. 10-204, 2011 WL 1980281, at *1 (E.D. La. May 20, 2011) ("Even if the ... statement was taken in violation of Rule 4.2, which issue the Court does not decide, suppression of the resulting evidence is not warranted under the circumstances presented here."); United States v. Beliveau, No. CRIM 09-304, 2010 WL 681257, at *5 (D. Minn. Feb. 23, 2010) (concluding that facts were not egregious enough to

warrant suppression and noting that “nearly every court” that has ruled on a no-contact rule violation in a criminal law context has found that suppression of a statement is “an inappropriate remedy for a lawyer’s ethical violation” (internal quotation omitted)); United States v. Carona, No. SA CR 06-224-AG, 2008 WL 1970218, at *8 (C.D. Cal. May 2, 2008) (“The court is aware of no criminal case where a communication with a government agent violating a [no-contact] rule ... was suppressed, unless the communication also violated the Sixth Amendment.”), aff’d, 630 F.3d 917 (9th Cir. 2011) & 660 F.3d 360 (9th Cir. 2011); see also United States v. Ryans, 903 F.2d 731, 737 (10th Cir. 1990) (explaining that the Tenth Circuit’s decision to suppress evidence in an earlier case resulted from an infringement on the defendant’s Sixth Amendment right to counsel, because the formal adversary process had already begun)).

This position is in harmony with Utah case law, which has long held that “[i]t is only where [a] violation [of a state law] also implicates fundamental, constitutional concerns, is conducted in bad-faith or has substantially prejudiced the defendant that exclusion [of evidence] may be an appropriate remedy.” State v. Fixel, 744 P.2d 1366, 1369 (Utah 1987) (internal quotation marks omitted).

Even if this court were to find a violation of the no-contact rule, this court should decline Defendant’s invitation to suppress the evidence. He failed to demonstrate a violation of his rights on par with Koerber. There is no precedent for this in Utah case law. Federal case law does not support the remedy of suppression in cases where an ethical violation has not reached the egregious levels of Koerber.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress Statements should be denied.

DATED: November 17, 2023.

SEAN D. REYES
Utah Attorney General

/s/ Heather Waite Grover
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served on the following via the court's e-filing system.

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