FILED
United States Court of Appeals
Tenth Circuit

August 23, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL DAMEON BLACKBURN

Defendant-Appellant.

No. 17-2141
(D.C. No. 1:14-CR-00129-WJ-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **EBEL**, **BALDOCK** and **EID**, Circuit Judges.

After entering Michael Dameon Blackburn's apartment, law enforcement officers obtained his cell phone when someone in the apartment retrieved it for them. Blackburn then consented to a search of the phone, during which officers discovered images of child pornography. Following the search, officers arrested and interviewed Blackburn. After Blackburn signed a form waiving his *Miranda* rights, he went into graphic detail about his encounters with the children. Blackburn filed a motion to suppress, which argued that 1) the seizure of the phone violated the Fourth Amendment; and 2) his *Miranda* waiver was not knowing and intelligent. The district court denied the motion, and Blackburn

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

now appeals. We affirm. First, we conclude that, even assuming the seizure of the phone violated the Fourth Amendment, it would have been inevitably discovered by lawful means. We also conclude that his *Miranda* waiver was knowing and intelligent. Accordingly, we affirm the district court's denial of Blackburn's motion to suppress.

I.

On November 15, 2013, the Department of Homeland Security Investigations (HSI) received information from the Cyber Crimes Center (C3) of a possible victim identification lead. The victim in the lead was a toddler who was being sexually abused in the Albuquerque area. The lead included an image of a small girl with her legs spread and a nude male attempting to penetrate her with his penis. The image also included EXIF data, which indicated that the phone used to take the image was an iPhone 4 and that the image was taken in May 2013, in Building 5 of the Aspen Apartments complex in Albuquerque, New Mexico. The perpetrator's face was not visible in the image, but his large belly was, leading initial investigators to assume that the perpetrator may be overweight.

After receiving the tip from C3 and attempting surveillance, HSI contacted the resident representative of Aspen Apartments and spoke to her about the residents of Building 5. Investigators learned the identity of several adults who had lived in Building 5, including two adults who would later be identified as the parents of the child in the image given to investigators. Leasing documents showed that the family, including a second child, was residing at that location when the image was taken. After receiving another image from C3 of the same victim, HSI sanitized the image and showed it to

management at Aspen Apartments to confirm that the child had lived there while the previously identified adults lived there. Records checks revealed the family had moved down the road to the Academy Heights Apartment Complex. A few days later, HSI contacted the manager at the Academy Heights complex and showed her the sanitized image of the victim's face. The manager confirmed that the victim resided in Apartment 5601, with the family previously identified by HSI.

On December 17, 2013, several HSI special agents and officers of the Albuquerque Police Department (APD) went to Apartment 5601. Defendant-Appellant Michael Blackburn answered the door. Bernalillo County Sheriff's Office (BSCO) Detective Theresa Sabaugh introduced herself and told Blackburn she was at the apartment due to possible concerns with the children living inside. She asked if law enforcement could come in and talk to him. Blackburn said yes, and law enforcement entered. Blackburn was not wearing a shirt at the time. Due to his large belly and stature, investigators began to suspect he was the adult in the images. Blackburn informed officers there were two other adults in the home—two houseguests—as well as two children. He further mentioned that the children's parents (and renters of the apartment) had left on a trip and were not there. Blackburn allowed officers to conduct a protective sweep.

The victim from the images, MM, then came down the stairs. Investigators recognized her immediately. She was wearing only a diaper and appeared disheveled. Officers asked Blackburn if he had an iPhone. Blackburn said yes, but that he had sold it at a kiosk. Franque Hatten, one of the two houseguests, then approached Special Agent

Christina Altamirano and asked if she could speak with the agent outside. Hatten indicated she had told the children's mother a few days prior that she felt Blackburn was sexually abusing them. When Altamirano asked Hatten why she felt that way, Hatten explained the children's hypersexual behaviors.

Hatten also relayed that earlier that week, Blackburn took the children up to their room for an "early nap." This nap was unusual because the children had woken up only an hour or so before. Hatten could hear the children screaming and crying upstairs, and saying "no." The mother of the children called Hatten and asked to speak to Blackburn. When Hatten brought the phone upstairs, the door was locked. Hatten also told this story to Agent Ryan Breen. Upon hearing this information, both Agent Altamirano and Agent Breen began to suspect that Blackburn was abusing the children. Additionally, Hatten told Agents Breen and Altamirano that Blackburn lied about not having a cell phone. Agent Altamirano asked Hatten whether she had seen Blackburn with the phone. In response, Hatten stated that the phone was upstairs, and that she would show Agent Altamirano where it was. Agent Altamirano followed Hatten into the apartment and upstairs. Hatten entered the upstairs middle bedroom and grabbed a cellphone. Agent Altamirano could not remember specifically where in the room the phone was. Once Hatten obtained the phone, she gave it to Agent Altamirano.

While the phone was in her possession, Agent Altamirano did not open or look through the phone. When she got back downstairs, she gave the phone to Special Agent Morjin Langer. Agent Langer asked Blackburn if the iPhone was his. Blackburn replied that it was. Agent Langer asked if he could search the phone. Blackburn orally

consented. Agent Langer then had Blackburn sign a consent to search form. Agent Langer also explained the consent to search form to Blackburn.

Agent Altamirano testified at the suppression hearing that Blackburn was calm and cooperative during the entire interaction and that he did not have any trouble understanding anything that was going on. Once Blackburn signed the consent to search form, Agent Langer began looking through the phone. There were images of child exploitation on the phone, including images of MM and the other child in the home, AM. Eventually Agent Langer cleared the house to secure a search warrant for it. A federal search warrant was issued that evening.

Blackburn was arrested and taken to an interview room at the main station at around 9 a.m. on December 17, 2013. Officers left to interview Hatten and her boyfriend and did not return until about 12:30 p.m. Blackburn was not handcuffed during this time, and officers checked in with Blackburn to see if he needed water or the restroom. Detective Sabaugh and Agent Breen conducted the interview. The interview was video-recorded and submitted as evidence at the suppression hearing.

After some background questions, Agent Breen handed Blackburn a *Miranda* waiver form. While Blackburn had the waiver form, Agent Breen and Detective Sabaugh continually spoke to him. Some of the officers' statements related to his rights, but neither law enforcement officer fully articulated Blackburn's rights to him orally. Blackburn responded to the statements as they were being made.

Agent Breen then walked Blackburn to a side table with the form. The video shows Blackburn read and initialed each line of the waiver form. Blackburn also signed

and printed his name under the waiver portion of the document. Agent Breen testified that he observed Blackburn reading the form before signing it. Agent Breen then remarked, "[w]ell, now that we have that silliness out of the way . . . ."

The interview then began. Blackburn explained how he came to know and live with the children's parents, and admitted to graphic details about his encounters with MM and AM. Blackburn admitted that he often took photographs or images while assaulting the children, and that he traded them with others online. While making these admissions, Agent Breen showed Blackburn printed images from his iPhone. Blackburn went through each image, described the abuse in the image, described when it happened, and signed and initialed each image. While in custody, Blackburn wrote an apology letter to the children's parents. Throughout the interview, Blackburn appeared calm and cooperative.

In January 2015, a federal grand jury issued a five-count indictment, charging Blackburn with various counts of distributing, receiving, possessing, and producing child pornography. Blackburn then moved to suppress the seizure and search of his iPhone. He also moved to suppress any statements made during his interview, arguing that he did not knowingly or intelligently waive his *Miranda* rights. The district court denied Blackburn's motion, and Blackburn entered a guilty plea pursuant to a conditional plea agreement reserving the right to appeal the district court's denial. On appeal, Blackburn maintains that evidence obtained from the seizure and search of his phone should be suppressed, as should statements made during his interview with investigators.

II.

Blackburn argues that the warrantless seizure of his cellphone violated the Fourth Amendment. The government responds that no Fourth Amendment violation occurred because the seizure was conducted by Hatten, a private party, rather than by law enforcement. In the alternative, the government argues that, even if a Fourth Amendment violation occurred when the phone was seized, the doctrine of inevitable discovery applies to the evidence recovered from Blackburn's phone. We agree with the government's second argument that, even assuming that the seizure of the phone violated the Fourth Amendment, the doctrine of inevitable discovery applies under these circumstances, and the evidence therefore should not be suppressed. We thus need not, and do not, address the government's first argument that the seizure was conducted by a private party operating outside the scope of the Fourth Amendment.

A.

Below, the district court found that, "even if the consent [to search Blackburn's phone] was invalid because the phone was illegally seized, . . . enough probable cause existed to obtain a search warrant a few hours later even without [Blackburn's] admissions regarding the phone contents—at which point, the inevitable discovery doctrine would apply . . . ." Dist. Ct. Op. at 19. It therefore denied Blackburn's motion to suppress. *Id.* at 29. On appeal, "our review of [this] ultimate Fourth Amendment question is de novo," though "we review the district court's factual determinations for clear error." *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005).

Evidence obtained in violation of the Fourth Amendment need not be suppressed if that evidence would have been inevitably discovered through lawful means independent of the illegal search. *United States v. Loera*, 923 F.3d 907, 928 (10th Cir. 2019). The government bears the burden of proving by a preponderance of the evidence that the evidence at issue would have been discovered through lawful means. *Id*. In this case, we conclude that the government has met this burden.

Our task is to place the officers in the position they would have been in had the illegal conduct not occurred (here, we assume the seizure was unlawful) and ask whether the government would have inevitably discovered the evidence through lawful means. *Id.* Factors to consider include:

> (1) the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search; (2) the strength of the showing of probable cause at the time the search occurred; (3) whether a warrant was ultimately obtained, albeit after the illegal entry; and (4) evidence that law enforcement agents 'jumped the gun' because they lacked confidence in their showing of probable cause and wanted to force the issue by creating a fait accompli.

United States v. Christy, 739 F.3d 534, 541 (10th Cir. 2014) (citing *United States v. Souza*, 223 F.3d 1197, 1204 (10th Cir. 2000)).

B.

At the time Hatten turned over the phone to Agent Altamirano, law enforcement already possessed probable cause to believe that Blackburn was the person in possession of the images. Upon seeing Blackburn, officers almost immediately suspected Blackburn based on physical characteristics the incriminating photographs had captured. Further, they immediately recognized MM as the victim from those images. And while Blackburn

had lied to investigators about his phone's whereabouts, Hatten volunteered to law enforcement that an iPhone belonging to Blackburn was in the home. Hatten had also told law enforcement directly about her own concerns that Blackburn was abusing the children.

We acknowledge that probable cause alone is not sufficient to justify the application of the inevitable discovery doctrine. *Christy*, 739 F.3d at 543. But the government relies on more than probable cause here. Law enforcement ultimately obtained warrants to search Blackburn's residence, allowing specifically for the seizure of smartphones. While waiting for the warrants, officers took measures to secure Blackburn's residence, but they did not conduct any additional searches until the warrants were in hand. That these steps were taken after the initial seizure and search of the phone does not undermine our conclusion that officers would have obtained a warrant for the phone in question. *Id.* at 543 ("The district court's conclusion that [the officer] would have successfully obtained a warrant independent of the illegal search is supported by the record, even though no steps to obtain a warrant had been initiated at the time of the search.").

Finally, there is no evidence that law enforcement "jumped the gun" in conducting the search. To the contrary, once officers had Blackburn's phone, they sought Blackburn's consent to search it. Further, the record indicates that, after conducting a protective sweep, officers did not search any other portion of Blackburn's home or belongings before the warrants were approved. We therefore have a "high level of confidence" that the warrant for the same phone would have been issued and that officers

would have obtained the same photographic evidence. *Id.* at 543 n.5. Because the inevitable discovery doctrine applies here, we conclude that the district court properly denied the motion to suppress the evidence obtained from the cell phone.

III.

"[W]hen reviewing the district court's order denying a motion to suppress statements under the Fifth Amendment, [this court] accept[s] the district court's factual findings unless clearly erroneous and view[s] the evidence in the light most favorable to the government." *United States v. Cash*, 733 F.3d 1264, 1276 (10th Cir. 2013). "Whether a defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights before making statements to police is a legal conclusion" subject to de novo review. *United States v. Burson*, 531 F.3d 1254, 1256 (10th Cir. 2008).

An effective *Miranda* waiver must be made "voluntarily, knowingly, and intelligently." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). As such, the waiver must be the "product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The waiver must be made with a "full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon [them]." *Id.* If a defendant claims that a statement was obtained in violation of *Miranda*, the government must prove by a preponderance of the evidence that a valid waiver was executed. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). We consider the "totality of the circumstances surrounding the interrogation" in deciding whether there is a valid waiver. *Id.* at 188.

A.

Blackburn first asserts that his waiver was not knowing or intelligent due to the minimal amount of time he had to read the document listing his *Miranda* rights. He also points to the agents' interruption of his reading and their failure to orally advise him of his rights. Blackburn contends the district court's ruling that he knowingly and intelligently waived his rights conflicts with the record and was error. We disagree.

There is no legal requirement that officers orally advise a suspect of his *Miranda* rights; a written advisement is sufficient. *United States v. Coleman*, 524 F.2d 593, 594 (10th Cir. 1975) (per curiam). Further, it is undisputed that Blackburn initialed next to each right listed on the waiver form and then signed the bottom portion indicating his waiver.[1] The parties do dispute the meaningfulness of the amount of time Blackburn was given to review the form either before or while completing it, as both Agent Breen and Detective Sabaugh continued speaking to Blackburn at various points. As the district court observed, however, the video of the interview shows Blackburn both reviewing and

[1] The waiver form is titled "Statement of Rights" and states:

- Before we ask you any questions, it is my duty to advise you of your rights.
- You have the right to remain silent.
- Anything you say can be used against you in court, or other proceedings.
- You have the right to consult an attorney before making any statement or answering any questions.
- You have the right to have an attorney present with you during questioning.
- If you cannot afford an attorney, one will be appointed for you before any questioning, if you wish.
- If you decide to answer questioning now, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting an attorney.

signing the form at the side table for about half a minute. And there was no indication from the video that Blackburn was rushed by either investigator's comments or that he felt uncomfortable while signing the form. We find none of these factual determinations to be clearly erroneous.

Blackburn also takes issue with one agent's characterization of the waiver procedure as "silliness." Aplt. Br. at 50. Agent Breen's comment, though, came after Blackburn had already signed the waiver form and would have had no impact on Blackburn's comprehension of his rights or waiver of them.

Blackburn further asserts that his waiver was invalid because he is "a slow processor and reader." *Id.* at 51. At the suppression hearing, Blackburn presented Vivian Abeles, a learning disability specialist, to support these arguments. The district court discounted Abeles's testimony for several reasons, including that: (1) she only spent three and a half hours with Blackburn; (2) her primary experience deals with individuals under the age of twenty-five, which Blackburn is not; (3) she has never tested anyone in a prison setting before; (4) she did not conduct a complete diagnostic evaluation of Blackburn; (5) she did not review any background material about Blackburn prior to administering the tests; and (6) despite knowing Blackburn was almost thirty, she gave him a test which she acknowledged is recommended for individuals up to the age of twenty-five.

"The credibility of witnesses, the weight to be given evidence, and the reasonable inferences drawn from the evidence fall within the province of the district court." *United*

States v. Browning, 252 F.3d 1153, 1157 (10th Cir. 2001) (quotation omitted). We find no basis to depart from the district court's decision to discount Abeles's testimony.

Further, video shows that Blackburn was able to understand investigators' questions and instructions during the interrogation. In fact, Blackburn was able to respond to investigators' questions, review and explain the images investigators placed before him during the interrogation, and write on those images. Blackburn's demonstrated ability to multitask undercuts the notion that he would not have been able to fully understand his *Miranda* rights or the consequences of waiving them. *See Burson*, 531 F.3d at 1258–59. Accordingly, the record supports the district court's conclusion that Blackburn's waiver was knowing and intelligent. We therefore affirm the district court's denial of Blackburn's motion to suppress due to an invalid *Miranda* waiver.

IV.

For the reasons stated above, we AFFIRM the district court's denial of Blackburn's Motion to Suppress.

Entered for the Court

Allison H. Eid
Circuit Judge