SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

STATE OF DELAWARE,	)	
	)	
v.	)	ID#: 0207016305
	)	
JOSEPH J. ANDREWS,	)	
Defendant.	)	

Submitted: March 25, 2003
Decided: June 30, 2003
Reissued: July 1, 2003

Upon Defendant's Motion for Suppression -- ***DENIED***

ORDER

Defendant has been indicted for possessing child pornography. He has filed a motion to suppress incriminating statements made to police officers in California, which provided probable cause for a search warrant issued and executed in Delaware. The search uncovered the contraband. If Defendant can knock out the statements he made to the California authorities, the search will fall and, presumably, so will the prosecution.

Defendant alleges multiple grounds as the basis for his suppression motion:

> 1. Defendant was seized without reasonable suspicion justifying seizure;
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> 2. Physical evidence was obtained as a result of the seizure consisting of a camera, a film, and Defendant's identification;
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> 3. Statements were made while Defendant was in the state of an illegal detention;
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> 4. Because of the detention's extended duration , it became tantamount to a *de jure* arrest and Defendant was not advised of *Miranda* rights before questioning was initiated.

The State concedes that the police did not recite Defendant's rights. The State contends that was unnecessary under the circumstances because Defendant was not a suspect, he was not in custody and besides, he volunteered the incriminating information. The answer to Defendant's motion turns on this case's unusual facts.

To learn what happened, the court held an evidentiary hearing during which two police officers from California, and Defendant testified. Both sides agree about many facts. Nevertheless, determining what happened in California is a challenge, and the court is relying heavily on its assessment of the witnesses based on observing their testimony. This is one of those unusual instances where the way the witnesses testified was almost as important as what they said. The transcript of the hearing may hint at the testimony's flavor, but "you had to be there."

I.

Everyone agrees that on July 16, 2002 Defendant was visiting an aquarium, a popular tourist attraction, in southern California. At around noon he was sitting outside the aquarium, videotaping passers by. The videotape's emphasis is somewhat strange, but it does not reveal anything remotely illegal. For the most part, it shows that Defendant was videotaping adults and children, with no special emphasis on children. As it happened, the last people Defendant videotaped were, unbeknownst to him at the time, an off-duty police officer, his wife and daughters. At the time, California was on edge because of a recent, notorious child-kidnaping.

Under the circumstances, Defendant's behavior caught the off-duty police officer's attention. According to the officer, not only was Defendant videotaping the officer's children, Defendant was visibly perspiring and shaking. The videotape of the officer and his family reveals some shakiness.

According to the officer, he approached Defendant and asked what Defendant was doing. Defendant says the officer approached and announced, "You're taping my daughters." Both sides agree Defendant denied that he was doing anything illegal and the officer said, "Then, you won't mind my seeing your camera." Defendant readily gave his camera to the officer and Defendant said, "But I have to leave to meet my sister." The officer then badged Defendant and according to the

State said, "I think you should stay." Defendant says that after the officer showed him the officer's police credentials, the officer asked for and received Defendant's driver's license. Then the officer said, "I'm going to call the police."

There is some dispute about what, if anything, Defendant said while he and the off-duty officer waited for the local police to arrive. The officer testified that Defendant started to talk about having problems for which he had sought help. To which the officer replied, "I don't want to hear about your problems." Defendant testified that he said to the officer, "I didn't do anything unlawful." Both versions are believable.

After the officer took Defendant's camera and license, the officer stepped away and he called the local police. Defendant claims, and the State tacitly concedes, that during the telephone call the officer, within Defendant's earshot, referred to him as a "pervert." After the telephone call, the officer moved away from Defendant and began viewing the videotape.

Eventually, a uniformed, marine patrol officer arrived. While there is uncertainty about the marine patrol officer's status as a police officer, he not only was in uniform, he was driving a marked police vehicle. Upon his arrival, the marine patrol officer was briefed by the off-duty officer and the off-duty officer turned over the video camera, videotape and Defendant's license. At that point, Defendant either

asked whether he was in trouble or stated that he thought that he was in trouble. The marine patrol officer responded along the lines of, "Why am I holding your camera?" The facts then become garbled.

It appears that during approximately the next hour, the marine patrol officer reviewed the videotape and checked on whether Defendant was "wanted." It also appears that Defendant became physically agitated, which prompted questions of concern by the marine patrol officer. It is agreed that Defendant also became highly talkative, but he did not say anything incriminating to the marine patrol officer.

As mentioned, the marine patrol officer and Defendant were together for approximately one hour. Then, a uniformed, local police officer arrived in a marked police car. Defendant emphasizes that the local police officer did not come by herself. At least two other police vehicles also arrived. So, at around the time that the local police officer began speaking with Defendant, there were several uniformed police officers and several marked or unmarked police vehicles present.

When the local police officer arrived, she began sizing up the situation. She testified that she heard Defendant say that he did not blame the officers for stopping him, and this was the first day of the rest of his life. Defendant seemingly volunteered that he had sexual problems. The State characterizes the interplay between Defendant and the police as "conversation." Defendant does not agree with

that characterization. He points to the intimidating circumstances as he spoke with the police and the undisputed fact that the "conversation" included the police asking questions. Defendant does not allege that the police officers, themselves, were overbearing.

In any event, the record concerning the most important fact is not clear. While it is agreed that Defendant eventually told the local police officer that he possessed pornography on his home computer in Delaware, it is uncertain whether he provided that incriminating information in response to a question, and if so, what that question was. But he did tell the police about the contraband in Delaware, and they passed the information along to the New Castle County Police. As mentioned, that led to a search warrant and Defendant's indictment.

When all this happened, Defendant was 36 years old and working as an accountant for a financial institution. It does not appear that Defendant had any contact with police before this incident. During the suppression hearing, Defendant had a tendency to become agitated and to ramble. Several times, his testimony was non-responsive, or it became non-responsive as Defendant went on. A relatively simple and straightforward question could elicit an inappropriately expansive response. The court infers from Defendant's testimony at the suppression hearing that when he is nervous, Defendant becomes overly talkative. Accordingly, the court

assumes that it took very little questioning for the police in California to obtain the incriminating information. By the same token, it appears that Defendant, for his own reasons, felt compelled to tell the authorities about his problems.

II.

The State has the burden of proof at a suppression hearing.[1] The State must establish that the challenged search or seizure comported with the rights guaranteed by the United States Constitution, the Delaware Constitution, and Delaware statutory law.[2] The standard on a motion to suppress is proof by a preponderance of the evidence.[3] The court determines whether the State has met its burden under the fact intensive totality of the circumstances test.[4]

There are three kinds of "stops": 1) consensual encounter in a public place; 2) *Terry*-stop, which requires articulable suspicion; and 3) full-scale arrest, which requires probable cause. A "seizure" does not occur simply because a police

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1 *State v. Santini*, 1993 WL 55341 (Del. Super Ct.).

2 *State v. Brooks*, 2002 WL 31814820 (Del. Super. Ct.) *citing Hunter v. State*, 783 A.2d 558, 560-561 (Del. 2001).

3 *Id. citing State v. Bien-Aime*, Del. Super. Ct., Cr. A. No.1K92-08-326, Toliver, J. (March 17, 1993).

4 *State v. Shirey*, 2002 WL 316595 (Del. Super. Ct.) *citing State v. Russo*, 700 A.2d 161 (Del. Super. Ct. 1996) *aff'd* Del. No. 458, 1996, Walsh, J. (April 7, 1997).

officer approaches an individual and asks a few questions. When a law enforcement officer approaches a person on the street to ask questions and that person is willing to answer, the encounter is consensual and not a "seizure" within the Fourth Amendment's meaning.[5] A police officer may restrain someone for a short time if there is "articulable suspicion" that the person has committed or is about to commit a crime.[6] Determining whether a "stop" or "detention" is supported by reasonable and articulable suspicion turns on objective assessment of the officer's actions in light of the facts and circumstances confronting that officer, and not the officer's actual state of mind at the time the challenged action was taken.[7]

The Delaware Supreme Court has determined that the standards for investigatory stops and detentions are codified in 11 *Del. C.* § 1902,[8] and that

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[5] *Florida v. Royer*, 460 US 491, 497 (1983).

[6] U.S. Const. amend. IV.

[7] *Robertson v. State*, 596 A.2d 1345 (Del. 1991).

[8] *Del. Code Ann.* tit. 11, § 1902 (2001 & Supp. 2002), Questioning and detaining suspects, stating in pertinent part: (a) A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination.
(b) Any person so questioned who fails to give identification or explain the person's actions to the satisfaction of the officer may be detained and further questioned and investigated.
(c) The total period of detention provided for this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded

"reasonable ground" is synonymous with "reasonable articulable suspicion." "The threshold of 'reasonable and articulable suspicion' under either constitutional or statutory standards requires the officer to point to specific facts, which viewed in their entirety, accompanied by rational inferences, support the suspicion that the person sought to be detained was in the process of violating the law."[9]

Under *Miranda*, the Fifth Amendment requires warnings be administered to a criminal suspect prior to "custodial interrogation."[10] Before *Miranda* applies, "two requirements must be met: 1) the suspect must be in 'custody' and 2) the questioning must meet the legal definition of 'interrogation.'"[11] The relevant inquiry concerning "custody" is "how a reasonable man in the suspect's position would have understood his situation."[12] A person has been taken into custody, whenever he "has been deprived of his freedom of action in any significant way."[13]

> as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

[9] *State v. Emory*, 2001 WL 1198681 (Del. Super. Ct.) *citing Cummings v. State*, 765 A.2d 945, 948 (De. 2001). *See also Terry v. Ohio*. 392 U.S. 1(1968).

[10] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[11] *U.S. v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993).

[12] *Id.*

[13] *Id. citing Miranda* at 444.

The seminal authority on the "interrogation" component of the *Miranda* analysis, *Rhode Island v. Innis*, establishes a two prong definition of "interrogation." The first prong is "express questioning." The second prong is questioning's "functional equivalent." Interrogation, therefore, "includes any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[14]

Rhode Island v. Innis holds that not all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." That extra measure of compulsion can be found in questioning or its equivalent.

III.

A. Initial Police Contact Justified

There is nothing wrong with videotaping a street scene. Nevertheless, the court is satisfied that it was reasonable under the totality of all the circumstances in this case for the officer to approach Defendant to find out why he seemed to be videotaping the officer's family and why he otherwise was behaving oddly.

[14] *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

Defendant was not just minding his own business, videotaping a street scene. He was videotaping strangers at a time and place where people were especially nervous about their children's safety. As it happened, one of the strangers was a police officer who became alarmed when he saw Defendant filming the officer's children. The officer's reaction was reasonable.

Even though the was not in his jurisdiction, the officer was not far from home. Thus, he had reason to be concerned about an unknown person's interest in his children. Moreover, with events unfolding in the general area, he had reason to be concerned about everyone's children. Therefore, he had an articulable reason to stop Defendant to learn why Defendant seemed to be interested in the officer's children.

As discussed below, Defendant could have misunderstood the scope of his detention. In fact, the off-duty officer merely detained Defendant until a local police officer could arrive and determine what was going on. When the local officer arrived, the off-duty officer left and the real police work began. Again, although Defendant reasonably could have misunderstood what was happening to him, the officer who actually heard Defendant's incriminating statement was reasonably handling the situation, not of her making and in which she found herself when she arrived at the aquarium. Therefore, although the total time that Defendant was

detained added-up, under a step-by-step analysis, it was justified.

B. Defendant in Custody

As suggested above, from his viewpoint Defendant was reasonably justified in believing that he was in custody. He was not handcuffed. He was not in a police car. Nor was he held in an interview room. He was either standing or sitting at curbside by a public way. And he did not ask the uniformed officer about his status. But a police officer had seized his camera and his license, and the officer had told him to stay put. Although that officer was gone, a uniformed officer still held Defendant's possessions and she had not told him that he could leave. Thus, he had reason to believe that he was not free to walk away.

The fact that Defendant was not actually "under arrest" does not mean that he was not in custody and, therefore, not entitled to *Miranda* warnings before interrogation. On the other hand, the fact that Defendant was in custody does not mean that his incriminating statements were the product of interrogation.

C. Defendant Not Interrogated

While the local police had reason to be suspicious of Defendant, he was not a suspect in any crime. No one, police or civilian, ever reported seeing Defendant do anything illegal and Defendant's video camera contained nothing criminal, not even circumstantial evidence. Defendant knew that he had committed no crime in

California and he knew that the police had no reason to believe otherwise.

Defendant does not claim that what he told the police about possessing contraband was in response to questioning and it is not established otherwise that the police obtained the incriminating statement through questioning. To the limited extent that the interchange between the uniformed officer and Defendant admittedly involved her asking questions, it cannot be said that she "should have known" that her words and actions were "reasonably likely to evoke an incriminating response" from Defendant. Nor can the court find that the way that the police responded to the aquarium was calculated to elicit an incriminating response. Mostly, from the police viewpoint, they thought they were dealing with a strange person who was behaving strangely, and they were trying to figure out what they had come upon.

In summary, it appears likely that Defendant did not tell the police about the contraband because they were interrogating him. He probably told the police about the contraband because he felt guilty about his interest in it, and he wanted to make a clean breast of it. As he told the police, he saw what was happening as the first day of the rest of his life. The police did not interrogate Defendant and so, even

if he were in custody after a fashion, the police did not have to provide *Miranda* warnings.

IV.

For the foregoing reasons, Defendant's Motion to Suppress is ***DENIED***. Trial is scheduled for September 3, 2003.

IT IS SO ORDERED.

_____ _____

Judge

oc: Prothonotary
Maria Knoll, Deputy Attorney General
Joseph Hurley, Esquire