THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT
04-S-1560

STATE OF NEW HAMPSHIRE

V.

STEPHEN MANN

ORDER ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

LYNN, C.J.

The defendant, Stephen Mann, is charged with one count of first degree murder for allegedly shooting his wife to death. Presently before the court is the defendant's motion to suppress statements he made to Canadian police authorities on July 20, and 23, 2004. I conclude that the motion must be denied.

I.

Based on the evidence presented at the suppression hearing held on September 26, 2005, I find the pertinent facts to be as follows. On July 20, 2004, at approximately 10:00 a.m., Canadian Immigration Enforcement Officer Lorenzo Michael Censoni received a telephone call from Sean Fahey of the United States Marshal's Service. Censoni assists the Toronto Police fugitive squad with the apprehension and removal of fugitives from Canada. Fahey advised Censoni that a warrant had been issued for the arrest of the defendant for the murder of his wife and that the United States Marshal's Service was assisting New Hampshire authorities in attempting to locate the defendant. Fahey informed Censoni that a trace placed upon defendant's credit card use indicated he was in the Mississauga, Ontario area, and he asked for the assistance of Canadian

authorities. Fahey then put Censoni in contact with Jeffery White of the Marshal's Service. White provided Censoni with details on the defendant that Censoni used to support issuance of a Canadian immigration warrant. Following their conversation, Censoni obtained an immigration warrant for the arrest of the defendant for violating Canadian law by entering that country without declaring his criminal fugitive status.

Subsequently, Censoni contacted Constable Thomas Urbaniak of the Toronto Police fugitive squad and advised him of the situation, informing him that he had obtained an immigration warrant for the defendant. At approximately 1:00 p.m., while en route to the pharmacy in Mississauga, the defendant's last known location, Censoni and Urbaniak received a call that the defendant's credit card had been used again in Port Hope, Ontario. Because of the distance to Port Hope, the officers did not attempt to drive there that day, but Urbaniak did post a "zone alert" -- which served as Canadian-wide notice to law enforcement officials of the immigration warrant for the defendant.

Later that day, at approximately 5:06 p.m., Constable Michael Chapman of the Ontario Police Provincial ("OPP") was on duty as a traffic officer assigned to patrol a portion of Route 401. Route 401 is a multi-lane highway in Canada that runs from Niagara Falls to the border of Quebec. Chapman received a general dispatch regarding a vehicle that was off the road at the intersection of Brock Road and Route 401 in the City of Pickering. When Chapman responded to the scene, he observed a black Mustang in a ditch on the side of the 401 westbound exit ramp leading to Brock Road. The vehicle was facing in the wrong direction.

Chapman observed the individual in the vehicle attempting to move it out of the ditch; however, it appeared that the tires were stuck in the grass. He approached the driver's side door of the vehicle and identified the driver as the defendant, Stephen Mann. The defendant provided Chapman with his driver's license. Chapman asked the defendant if he was in need of a tow truck and the defendant replied that there was a tow truck on the way. Chapman observed that the defendant's speech was slurred, that he appeared disoriented, and that he was sweating profusely. He further detected a slight odor of alcohol on the defendant's breath. As a result, he asked the defendant if he had been drinking or using non-prescription drugs. The defendant responded that he had been drinking earlier and that he had been doing cocaine all day. At some point, the defendant stepped out of the vehicle and Chapman observed that he appeared unsteady on his feet. At this point, Chapman arrested the defendant for impaired operation of a motor vehicle by alcohol or drugs. The defendant was handcuffed and placed in the back of Chapman's cruiser.

Around this time, Constable Jason Fisher of the Durham Regional Police Service arrived at the scene. Fisher testified that he had received the "zone alert" concerning the immigration warrant for the defendant. He stated that he received the alert via his computer in an e-mail format, informing him that there was a murder suspect in the area driving a black Mustang. It further informed him that the suspect allegedly shot his wife and could be armed and dangerous. Fisher stated that when he heard the dispatch regarding the motor vehicle off the road, someone on the air indicated that this individual could be the same person as described in the "zone alert."

After arriving at the scene, Fisher advised Chapman that the defendant could be the individual identified in the "zone alert." Chapman was surprised to learn this, as he had not heard the "zone alert." Fisher then took the defendant's license from Chapman and radioed to the Canadian Police Information Center in order to confirm that the defendant was the individual identified in the "zone alert." In the interim, Chapman advised the defendant of his rights pursuant to the Canadian "caution card." The defendant was informed that he was being arrested for impaired operation of a motor vehicle by alcohol or drugs as well as for violating Canadian immigration law; that he had the right to an attorney; that he had the right to remain silent; and that anything the defendant said could be used against him.[1] Chapman further informed the defendant of the "800" telephone number on the "caution card," which could be used by the defendant to access a free "duty counsel" provided by the Canadian equivalent of the public defender service. After informing the defendant of these rights, Chapman inquired as to whether the defendant would like to speak to an attorney. The defendant indicated that he did want to speak with an attorney. Chapman then asked the defendant if he had an attorney. The defendant responded that he did not have his own attorney and that he would like to speak with the duty counsel.

At some point thereafter, Chapman asked the defendant if there was a gun in his vehicle or in the immediate surrounding area. The defendant responded that he had "gotten rid of it" in a lake in New Hampshire. Chapman asked the defendant what he had gotten rid of and the defendant replied "the gun."

[1] I note that there was a slight inconsistency between the testimony of Chapman and Fisher regarding who advised the defendant that he was under arrest on the immigration warrant, read him his rights, and questioned him regarding the gun. Given the fluid circumstances, such slight inconsistency is understandable. Further, the testimony of both constables was credible and, as reflected in the text, I find it entirely plausible that both constables did these things at different times, albeit in close proximity to one another.

Fisher also spoke with the defendant following his arrest. Before doing so, he determined from Chapman that the defendant had been read his Canadian "cautions." Fisher informed the defendant that he was wanted in the United States for murder and he asked the defendant if he understood his rights. The defendant indicated that he did. Fisher asked the defendant where the gun was and the defendant informed Fisher that he had disposed of it in a lake in New Hampshire. Fisher further inquired as to what type of gun it was. The defendant indicated that it was not a revolver and that it was "like yours but smaller." Fisher also asked the defendant why he had come to Canada and the defendant stated that he had no idea. At this point, the defendant stated that he wanted an attorney and that he no longer wished to speak with Fisher. Fisher ceased communication with the defendant. Chapman then transported the defendant to the OPP station where he briefly spoke with a duty counsel.

After learning of the defendant's arrest, Censoni arrived at the OPP station at approximately 8:30 p.m. that evening. He learned that the defendant had been arrested for impaired operation of a motor vehicle as well for the immigration offense. Censoni met with the defendant in the cell area and advised him that he was there solely for purposes of investigating the immigration matter. He proceeded to obtain basic information about the defendant in order to ensure that the defendant was the same person in the immigration warrant. Upon confirming that he was, Censoni informed the defendant that he was under arrest for immigration violations and he advised the defendant of his "cautions" under Canadian law . The defendant indicated that he knew what he was charged with and also understood his rights.

Censoni then asked the defendant about his criminal record. The defendant disclosed that he had been arrested for driving under the influence six years earlier but that he was acquitted of the charge. Censoni also performed a search of the defendant and found a pack of blue pills. The defendant indicated that the pills were for sleeping. Subsequently, Censoni told the defendant that he had seen him on a television news broadcast from the Boston area earlier that afternoon. The defendant bowed his head down and then stated, "oh, so you know." After making this comment, he indicated that he did not want to talk anymore. At approximately 8:59 p.m., Censoni and Urbaniak transported the defendant to the Metro-West Detention Center.

Upon arriving at the jail, Censoni and the defendant were left alone in the vehicle while waiting for the entrance gate to be opened. Censoni inquired as to how many of the blue pills the defendant had taken. The defendant responded that he had taken approximately (20) of the pills. Censoni asked the defendant why he had taken so many and the defendant stated that he had trouble sleeping. Censoni then asked the defendant if his trouble sleeping was due to his cocaine use or something else. The defendant indicated that he had "trouble back home." The defendant then asked Censoni what he had seen on the television news broadcast. Censoni explained that the broadcast indicated that the defendant shot his wife in the head and that she died as a result of a single gunshot wound. In response, the defendant indicated that he "did it" with a 7.26 Tokarev. Censoni asked the defendant about the location of the gun. The defendant stated that he had disposed of it on his way into Canada. The defendant commented that he was trying to get back to the United States border to "check out the

heat -- I don't mean the weather. " Shortly thereafter, the defendant was brought into the jail.

On July 23, 2004, Censoni again met with the defendant. Censoni again advised the defendant of the standard Canadian "cautions." He asked the defendant if he had the opportunity to review the immigration report and if the allegations against him were correct. The defendant indicated that he had no comment.

II.

The defendant seeks to suppress the statements he made to the Canadian authorities, arguing that they were obtained in violation of his state and federal constitutional rights. The defendant concedes that Canadian law has no equivalent to the rule of Edwards v. Arizona, 451 U.S. 477 (1981). That is, while a person in custody in Canada must be advised of his rights to counsel and against self-incrimination, once that advice is given and understood by the suspect, there is no requirement that questioning cease if the suspect asks for counsel.[2] But the defendant contends that the Canadian officers were acting as agents of New Hampshire or U.S. law enforcement authorities, and therefore that the Canadians' failure to comply with the prophylactic Edwards rule requires the statements made to these officers be excluded from the trial. Specifically, he maintains that once he indicated that he wished to speak with an attorney, the Canadian authorities should have ceased questioning him. The State contends that the Canadian officers were not acting as agents of New Hampshire or United States authorities.[3]

[2] The defendant does not argue that any of the Canadian officers violated Canadian law in their interactions with him or in the manner they questioned him.

[3] The State also asserts (1) that even if the Canadian officers were subject to the strictures of Edwards, the statements made by him in response to questions about the whereabouts of the gun are admissible under the "public

"Miranda warnings advise a defendant of his constitutional rights, and must be administered when an individual is subject to a custodial interrogation by law enforcement agents." State v. Tinkham, 143 N.H. 73, 76-77 (1998) (internal citations omitted). The required warnings must apprise the suspect of his right to remain silent and his right to have counsel present during interrogation. See Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). Once an accused invokes his right to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, 451 U.S. at 484-85.

The New Hampshire Supreme Court has not addressed the issue of whether statements made to foreign law enforcement officials in a foreign country are admissible when the requirements of Miranda were not followed. However, other state and federal courts have found "that custodial interrogations by foreign law enforcement officials outside the United States are generally not governed by Miranda." Fisher v. United States, 779 A.2d 348, 354 (D.C. App. 2001); see also United States v. Yousef, 327 F.3d 56, 145 (2nd Cir. 2003); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980); Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973); United States v. Hensel, 509 F. Supp. 1364, 1375 (D. Me. 1981); Alvarado v. Texas, 853 S.W.2d 17, 21 (Tex. Crim. App. 1993). These rulings are based on the rationale that "the United States Constitution cannot compel such specific, affirmative action by foreign sovereigns, [such as requiring the Miranda warnings,] so the policy of deterring so-called 'third-degree' police tactics, which underlies the

---

safety" exception to Miranda; and (2) that the defendant's statements to Censoni, made after the defendant asked Censoni what he had seen on the television broadcast, are admissible because they were not the product of interrogation. Because I conclude that the Canadian officers were not acting as agents for New Hampshire or U.S. authorities, I find it unnecessary to address the State's alternative arguments.

Miranda exclusionary rule is inapposite to [cases where a suspect is interrogated by foreign police authorities]." Alvarado, 853 S.W.2d at 21 (citing Kilday, 481 F.2d at 656).

Courts have recognized two exceptions to this "general rule regarding the application of Miranda . . . in a foreign jurisdiction." Fisher, 779 A.2d at 354. "First, the [statements] will be excluded if the circumstances surrounding the [statements] shock[] the conscience of an American Court." Alvarado, 853 S.W.2d at 21 (citations omitted). In the present case, there is no indication, nor does the defendant argue, that there was anything extreme or shocking about the conduct of the Canadian officers. There is not the slightest suggestion that the officers resorted to physical or psychological intimidation of the defendant during their questioning; and the mere fact that the Canadian legal system – which traces its heritage to the same English common law as does our own -- has chosen not to embrace the prophylactic Edwards rule hardly qualifies as a "conscience-shocking" failure to observe rudimentary standards of decency and fair play.

Instead, the defendant relies on the second exception, which holds that statements obtained in violation of Miranda will be excluded if the "foreign officer acts as an agent of U.S. law enforcement." Fisher, 779 A.2d at 354. The defendant argues that the details conveyed to Censoni by Fahey and White regarding the charges against him and his credit card use, along with Censoni's participation in a training course offered by the United States Marshal's Service, establish that the Canadian authorities were acting as agents of United States law enforcement.

Under the agency exception, United States law enforcement officials must have had "significant involvement in or control over the foreign investigation." Id. (citations omitted). "[M]ere notification of the potential existence of a criminal in another police's

jurisdiction is not enough to create such a relationship." Alvarado, 853 S.W.2d at 24 (citations omitted). Further, "even the actual presence of American officers during interrogation will not be enough to trigger the exception if they do not participate actively in the process." Fisher, 779 A.2d at 354 (citations omitted).

In this case, the participation of United States law enforcement officials in the defendant's arrest and subsequent interrogation "was peripheral at most." Heller, 625 F.2d at 600. I recognize that the Canadian authorities would not have been aware of the defendant's presence in Canada were it not for Fahey's telephone call to Censoni. However, there is no indication that any United States officials were present at any point while the defendant was detained in Canada. Nor is there any indication that Fahey or White did more than notify Censoni of the defendant's presence in Canada, make one initial request for assistance, provide technical documents such as copies of the arrest warrant for the defendant, and provide basic information as to the defendant's credit card usage. Chapman, Fisher and Censoni all testified that at no time were they provided with instructions as to how to arrest the defendant, whether to interrogate the defendant or how to interrogate the defendant. Censoni testified that he had no interest in obtaining evidence for the New Hampshire authorities nor did he specifically ask the defendant any questions concerning the murder. And of course Chapman and Fisher had no contact with New Hampshire or U.S. officials prior to their interaction with the defendant.

The defendant finds it significant that Censoni participated in a training course offered by the United States Marshal's Service. I am not persuaded that his participation in this training course rendered him an agent of United States or the State of New Hampshire in connection with his involvement with the defendant. Censoni testified that

he attended a state and local fugitive investigators course. He stated that one portion of the course was devoted to interviewing techniques. However, there is no evidence before the court indicating that this course influenced Censoni's decision to interrogate the defendant, nor is there even evidence suggesting that the course had as its objective the training of foreign law officers for the specific purpose of assisting in the apprehension of American fugitives (as opposed to fugitives generally).

Finally, I note that defendant was initially charged with violating Canadian, not American, law. It was not until Fisher arrived that it was determined the defendant was wanted for murder in New Hampshire. Based upon Canadian law and the testimony presented, I am unable to find that anything out of the ordinary occurred here. In their interactions with the defendant, the Canadian law enforcement officials followed standard Canadian procedure. There is no indication that New Hampshire or U.S. law enforcement officials caused the Canadians to treat the defendant differently than they would any other fugitive arrested under similar circumstances.

Relying primarily on State v. Heirtzler, 147 N.H. 344 (2001), the defendant maintains that the agency question at issue here is governed by state law and that the New Hampshire Supreme Court has adopted a broader agency rule than that reflected in the cases from other jurisdictions cited previously. I need not decide whether the agency issue is governed by state or federal law[4] because, even assuming New Hampshire law

[4] Although questions regarding the admissibility of evidence in a state trial are normally governed, in the first instance, by the state's constitution, a different analysis may be called for here because of the potential foreign relations implications of the position asserted by the defendant. The upshot of defendant's position is that the Canadian officers should be required to comply with New Hampshire law. Resolution of this issue could potentially have an impact on U.S.–Canada relations that transcends this case. As such, the decision arguably must be made applying federal law under the rubric that "[t]he entire subject of foreign relations is committed

applies, it is clear that this case is not controlled by Heirtzler. In Heirtzler, the court upheld the trial court's finding of an agency relationship where there was a "'silent understanding' between [the police officer] and school officials that passing information to the school when [the police officer] could not act was a technique used to gather evidence otherwise inaccessible to [the police] due to constitutional constraints." Id. at 351-52. The situation here is completely different. As noted above, there is no evidence that New Hampshire or U.S. authorities solicited the Canadians to interrogate the defendant at all, much less that they requested the Canadians to do so in order to avoid the constraints of Miranda and Edwards.

This case also is readily distinguishable from cases in which the police obtain assistance from private citizens, the reason being that "cooperative efforts among police agencies of different countries is a natural and desirable arrangement, and thus should not be inherently suspect as a likely effort to accomplish indirectly that which could not be done directly." LAFAVE, 2 CRIMINAL PROCEDURE, DETECTION AND INVESTIGATION OF CRIME § 6.10(d) (2004) (discussing questioning by foreign police). Indeed, adoption of the defendant's position would produce absurd consequences. For example, mere notification by United States law enforcement officials to foreign police of a suspect's presence in a foreign jurisdiction, or a single request for assistance in the apprehension of the suspect, would establish an agency relationship. See Alvarado, 853 S.W.2d at 24 (noting that "Texas border officials consistently notify their Mexican counterparts when a fugitive crosses the border"). Similarly, a finding of agency presumably would be required

---

exclusively in this country to the Federal Government." 31A AM JUR 2D, EXTRADITION § 13 (2002); cf. Rocha v. State, 16 S.W.3d 1, 19 (Tex.Crim.App. 2000) (declining to enforce provisions of the Vienna Convention through application of state exclusionary rule).

whenever the foreign official had at some point participated in a training course sponsored by American police authorities.

III.

For the reasons stated above, the defendant's Motion to Suppress Statements is hereby denied.

BY THE COURT:

October 11, 2005

_____
ROBERT J. LYNN
Chief Justice