

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 01-41-B-S
	)	
JEFFREY BARNARD,	)	
	)	
Defendant	)	

**RECOMMENDED DECISION ON  
DEFENDANT BARNARD’S MOTION TO SUPPRESS**

Jeffrey Paul Barnard has moved to suppress oral statements (Docket No. 34) he allegedly made to Officer Robert Johansen of the Millinocket Police Department on December 2, 2000. Barnard claims the statements should be suppressed because they were obtained in violation of the Miranda rule and, alternatively, that the Government should be barred from using the statements at trial because of its failure to notify defendant of the existence of such statements until January 28, 2003, one week before the scheduled commencement of the trial, and more than eighteen months after the return of the indictment. I now recommend that the court adopt the following proposed findings of fact and **DENY** the motion.

**Proposed Findings of Fact**

On December 2, 2000 at approximately 6:00 a.m., Millinocket police officers and Kenneth MacMaster, agent with the Violent Crimes Task Force at the United States Attorney’s Office, executed a state search warrant at the residence of Jeffrey Paul Barnard in Millinocket, Maine. The warrant authorized the officers to search for and seize firearms allegedly possessed by Barnard in violation of state law. Barnard was present in the home when the warrant was executed. He was arrested and taken to the Millinocket police station.

Barnard claims that the officers executing the search warrant behaved aggressively toward him and jumped on his back, seriously aggravating his preexisting back problems. Barnard had back surgery a few days prior to the arrest. After Barnard's arrest he was shackled, cuffed, and transported to the holding cell at the local lock-up by Officer Robert Johansen. Barnard complained to Johansen about his back problems and the substantial pain he was experiencing. Johansen determined that it would be prudent to call for medical assistance. Emergency medical technician ("EMT") Michael Rucci went to the jail, examined Barnard, and made arrangements to transport him by ambulance to the Millinocket hospital. Rucci noted that he observed no significant medical problems except for Barnard's complaints of leg and back pain. He also noted that during the ambulance ride Officer John MacPherson of the Millinocket police department accompanied Rucci and Barnard in the ambulance. All three men agree that during this period Barnard made no statements about guns nor was he questioned in any fashion about guns. Barnard, who apparently knew MacPherson from prior incidents, did ask him why "they were doing this to him."

There is, however, a serious factual dispute between Barnard and Johansen about the interaction that occurred between the two of them. Barnard says that shortly after Johansen and he arrived at the police station, Detective Glidden of the Millinocket police department came into the interview room and punched him in the face, bruising an area above his eye. According to Barnard, after Glidden left Johansen came into the interview room and took him to the holding cell. Barnard complained to Johansen about the pain. According to Barnard, Johansen responded by asking him why he had guns at his house. Barnard told him that the guns belonged to his son who used them for hunting purposes only. Barnard denies that he made any further

statements to Johansen after the two of them arrived at the x-ray room at the Millinocket hospital.

Johansen has a different recollection. He never saw Detective Glidden at the police station. According to him, Barnard was in the holding cell until approximately 6:40 a.m. that morning. After the EMT's initial examination Barnard elected to go to the hospital and arrangements were then made for the transport. While waiting for the ambulance, Barnard made several unsolicited comments to Johansen, although Johansen told him that "now is not the time to talk" and the officer in charge would speak with him later. Johansen says that Barnard complained of the pain in his back, questioned Johansen about "why they were doing this," and stated that "he only had guns in his house to protect his family."

Johansen continued to guard Barnard after his arrival at the hospital and went with him into the x-ray room. Johansen says that in the x-ray room Barnard again made unsolicited statements about only having the guns to protect himself and his family and explained about the "time of tribulations" being upon us. He allegedly also told Johansen that he knew he was not supposed to have guns in his residence. Johansen continued to tell Barnard that he was not the one he should be talking to because it was not his case. Johansen denies ever asking any questions and further indicated that he never brought up the subject of firearms in any fashion. Both Johansen and Barnard are in agreement that the Miranda warning was never provided to Barnard.

I find that Johansen's version of the events is the more likely scenario. Furthermore, even if Detective Glidden did come to the police station and interact with Barnard as described by him, that conduct did not render any subsequent incriminating statements made by Barnard involuntarily. As Barnard describes the interaction with Glidden, it was brief and did not relate

in any way to his subsequent exculpatory statement he says he made to Johansen. Certainly there is no evidence in either version that suggests that Johansen behaved in a coercive or threatening fashion.

Although Johansen prepared a contemporaneous police report describing the events associated with his version of Barnard's statements, that report was never provided to defendant or his counsel. Finally on January 28, 2003, shortly before a trial scheduled to commence February 5, 2003, the Assistant United States Attorney received a copy of the report and promptly faxed it to defense counsel. On Barnard's request the trial in this matter was continued and Barnard was given leave to file this second motion to suppress.<sup>1</sup>

### **Discussion**

Pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny, any statement made by a defendant as a result of a custodial interrogation must be suppressed in the absence of a valid Miranda warning administered prior to questioning. See also Dickerson v. United States, 530 U.S. 428 (2000). Barnard, shackled, cuffed, and locked in a holding cell, was obviously in custody. The defendant was not advised of his Miranda warnings at any time prior to making incriminating statements to Johansen. The sole issue posed by this motion is whether the ensuing conversation between Barnard and Johansen was the "functional equivalent" of questioning. Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980).

I am satisfied that Johansen did nothing likely to elicit an incriminating response from Barnard. He did not question him. He did not engage in idle chatter about the search or the guns. He merely placed Barnard in the holding cell, removed him from the holding cell to be

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<sup>1</sup> On September 28, 2001, Barnard moved to suppress the firearms recovered from his home based upon his contention that the affidavit in support of the warrant did not contain sufficient facts to establish probable cause. The District Court granted that motion. The Government appealed. The Court of Appeals reversed. See United States v. Barnard, 299 F.3d 90 (1st Cir. 2002).

transported in the ambulance, and then remained in attendance while Barnard was being examined at the hospital. Not only did he not question Barnard, on at least two occasions he advised Barnard that it was inappropriate for Barnard to discuss the case with him.

Furthermore, there was nothing about the environment within which defendant made the statements that amounted to the functional equivalent of an interrogation. See United States v. Vega-Figueroa, 234 F.3d 744, 750 (1st Cir. 2000) (“Applying the applicable case law to the undisputed facts of the circumstances surrounding defendant’s statement, we have no difficulty finding that the statement was his free and voluntary act. Defendant’s statement was not the result of intimidation, coercion resulting from the setting in which the statement was made, or a deliberate plan by the agents to place defendant in an environment that would induce a confession.”). Certainly the fact that Barnard was under arrest, standing alone, does not render everything that occurred the functional equivalent of interrogation. While Barnard’s versions of the events, including the gratuitous assault by Detective Glidden, might arguably rise to the level of a coercive environment designed to elicit incriminating statements from the suspect, I do not find that version of events to be particularly credible. In my view Johansen did not do anything that even remotely equated with the functional equivalent of an interrogation.

Barnard’s alternative argument is that the statements should be suppressed because the Government failed to make a timely disclosure. In support of this contention Barnard relies upon Federal Rule of Criminal Procedure 16(d)(2)(A)-(D) which permits a range of sanctions for the Government’s failure to comply with Rule 16(a)(1)(A). Among the permitted sanctions is an order prohibiting a party from introducing undisclosed evidence. Barnard seeks that sanction. However, he was already granted a continuance of his trial and given leave to file a motion to suppress directed at the statements. Barnard has not shown how the late disclosure has caused

him any prejudice nor has he shown that the Government acted in bad faith in failing to make an earlier disclosure. In these circumstances I do not believe that a sanction excluding evidence is warranted. See United States v. Tajeddini, 996 F.2d 1278, 1288 (1st Cir. 1993) (holding that it was not an abuse of discretion for trial court to admit testimony concerning untimely disclosed statements allegedly made by Defendant in non-custodial environment, where there was no evidence that delayed disclosure was the product of bad faith and where Defendant failed to show that the delayed disclosure prejudiced his defense).

### **Conclusion**

Based upon the foregoing I recommend that the court **DENY** the motion to suppress.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

June 13, 2003

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Margaret J. Kravchuk

**TRIALLIST**

U.S. Magistrate Judge

**U.S. District Court  
District of Maine (Bangor)  
CRIMINAL DOCKET FOR CASE #: 1:01-cr-00041-GZS-ALL  
Internal Use Only**

**Case title:** USA v. BARNARD  
**Other court case number(s):** None  
**Magistrate judge case number(s):** 1:01-mj-00032

**Date Filed:** 08/07/01

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**Assigned to:** Judge GEORGE Z.  
SINGAL  
**Referred to:**

**Defendant(s)**

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**JEFFREY PAUL BARNARD** (1)

represented by **MARVIN H. GLAZIER**  
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*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: CJA Appointment*

**Pending Counts**

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18:922G.F UNLAWFUL  
TRANSPORT OF FIREARMS, ETC.  
(1)

**Disposition**

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**Highest Offense Level (Opening)**

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Felony

**Terminated Counts**

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None

**Disposition**

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**Highest Offense Level  
(Terminated)**

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None

**Complaints**  
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18:922(g)(1) - Possession of firearm  
after conviction of felony [ 1:01-m -  
32 ]

**Disposition**  
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**Plaintiff**  
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**USA**

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