

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS

Plaintiff,

vs.

IHSAN ASSAM,

Defendant.

CASE NO. ST-16-CR-232

MEMORANDUM OPINION

INTRODUCTION

On November 13, 2017, the Court conducted a hearing on Defendant's motion to suppress the July 27, 2016, written statement of Defendant, with the People appearing through Assistant Attorney General Eugene James Connor, Jr., Esq., and Defendant personally appearing with counsel Territorial Public Defender Melanie Turnbull, Esq., and with the assistance of an Arabic interpreter. The Court heard the testimony of defense witness Luay Alsamman and the People's witnesses Detective Ivan Christopher and Detective Sergeant Sophia Rachid, and received an exhibit offered by the People, a Warning as to Rights form, into evidence. Because the facts were developed at the hearing, the Court need not repeat them in their entirety now. Following the hearing the Court made oral findings of fact and drew oral conclusions of law on the record, which are incorporated herein, and denied the motion to suppress. However, the Court made the ruling provisional, indicating it wanted to review two cases cited by Defendant before

finalizing its ruling. The Court has now completed its review of the cases and wishes to finalize its ruling denying the motion to suppress.

LEGAL STANDARDS

As the Court indicated in its findings, on a motion to suppress a statement of the accused, the burden ordinarily rests upon the defendant to establish that the evidence sought to be suppressed was illegally obtained.¹ But, once a violation of *Miranda v. Arizona*² is claimed and the accused alleges facts demonstrating that the accused was in custody and subject to interrogation, the burden shifts to the People to prove by a preponderance of the evidence that the police complied with *Miranda* and that the statement was voluntary.³ In order to demonstrate that a statement is unlawfully obtained, the defendant must have provided testimonial information during a custodial interrogation⁴ and the defendant's waiver of his *Miranda* rights must not have been knowing, voluntary, and intelligent.⁵ In this context, the accused is in custody if the accused is deprived of freedom in any significant way such that a reasonable person in the accused's position would not feel free to leave under the totality of the circumstances.⁶ An interrogation occurs when the Defendant responds to express questioning or its functional equivalent – words or actions reasonably likely to elicit an incriminating response.⁷ And, a *Miranda* waiver is knowing, voluntary, and intelligent

¹ *Government v. Morton*, 15 V.I. 418 (T.Ct. 1978); *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

² 384 U.S. 436, 475 (1979).

³ *Colorado v. Connelly*, 479 U.S. 157 (1986).

⁴ *R.I. v. Innis*, 446 U.S. 291, 300-01 (1980).

⁵ See, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁶ See, *Yarborough v. Alvarado*, 541 U.S. 652, 663-65 (2004).

⁷ *R.I. v. Innis*, *supra*.

when made as a product of the defendant's uncoerced choice at a time when the defendant understood the nature of the rights being waived and the consequences of the waiver.⁸ To determine the validity of a *Miranda* waiver, courts review the totality of the circumstances based upon such factors as the suspect's intelligence and education⁹, age¹⁰, familiarity with the criminal justice system¹¹, physical and mental condition¹², drug or alcohol problems¹³, language barriers¹⁴, and the time lapse between the reading of the *Miranda* rights and the questioning or statement.¹⁵

ANALYSIS

Defendant's argument focused on the language barrier factor, based upon testimony from Mr. Alsamman that Azzam spoke primarily Arabic, that Alsamman conversed with Azzam in Arabic, and that Azzam didn't speak English, knowing only a few words for grocery items in Alsamman's store where Assam works stocking shelves, cleaning, and working the cash register. Alsamman opined that Azzam could not carry on a conversation in English.

Detective Christopher testified that he interviewed Azzam in English, after first reading the Warning as to Rights form to Azzam in English. Christopher said that Azzam indicated in English that he understood each of the rights as Christopher read them, that

⁸ *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

⁹ See, e.g., *U.S. v. Gaines*, 295 F.3d 293, 299 (2nd Cir. 2002)(illiterate defendant); *U.S. v. Spruill*, 296 F.3d 580, 589-90 (7th Cir. 2002)(9th grade education);

¹⁰ See, e.g., *U.S. v. Burrows*, 147 F.3d 111, 116 (2nd Cir. 1998)(16 year old).

¹¹ *U.S. v. Pruden*, 398 F.3d 241, 246 (3rd Cir. 2005)(numerous prior contacts).

¹² *U.S. v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002)(surgery, pain, and narcotic medications).

¹³ See, e.g., *U.S. v. Palmer*, 203 F.3d 55, 60-61 (1st Cir. 2000)(heroin withdrawal and antidepressants); *Clagett v. Angelone*, 209 F.3d 370, 382 (4th Cir. 2000)(intoxication).

¹⁴ *U.S. v. Sriyuth*, 98 F.3d 739, 750 (3rd Cir. 1996)(Thai immigrant in U.S. for 9 years).

¹⁵ *Pruden*, *supra*, at 246-47(20 hour delay).

Azzam signed (printed) his name on the form acknowledgement that he understood his rights, and that Azzam also signed the waiver after it was read to him. Azzam thereafter gave a statement by answering questions put to him in English by Christopher, first denying the offenses, then providing some information that some reasonable jurors might consider incriminating after Christopher confronted Azzam with evidence gathered during the investigation, but ultimately denying having engaged in the conduct of which Azzam is accused. The statement, written by Christopher in question and answer form, but signed (printed) by Azzam, was not offered as evidence. Christopher testified that Azzam spoke English during the questioning, answered the questions in English, and after the statement was read to Azzam, Azzam said it was true and signed it. According to Christopher, at no time did Azzam indicate that he didn't speak English or didn't understand the questions, that Azzam did not ever request an interpreter, and that Azzam even carried on brief conversation in English after the statement was signed.

Detective Sergeant Rachid, who was present during the advisement and questioning, largely corroborated Christopher's testimony. She indicated no translator was utilized because Azzam understood what was being said and answered the questions in English. Rachid said that after the statement was taken Christopher asked Azzam if Azzam read or wrote English, to which Azzam said "No", but that Azzam said he understood Christopher. Rachid testified she "had no doubt" that Azzam understood what was said to him. Rachid also reiterated that Azzam denied committing the offenses.

Neither of the cases relied on by Defendant persuades the Court that it should alter its interim denial of the motion to suppress. *United States v. Short*,¹⁶ dealt only tangentially with the language barrier issue. Short, a West German national who had been in the United States only three months, was not fluent in English. However, the court considered that potential language barrier primarily with reference to whether her questioning was custodial in nature. The court ultimately determined that Short's statements during an interview at an army hospital, after her three-year-old daughter was questioned using anatomically correct dolls, and a second statement during the course of a 55 mile trip after her arrest at her home the next morning, were both subject to suppression because Short had not been given *Miranda* warnings on either occasion. While the appellate court did make reference to Short's broken English and deficient understanding of English in discussing the question of whether her second statement was knowing and intelligent, the court's ruling hinged on the failure to advise Short at all of her rights under *Miranda*, not on the question of the voluntariness of a waiver.

Defendant also cited *United States v. Elfgeeh*¹⁷, in which the appellate court affirmed the defendants' convictions. In fact, the issue arose in the context of whether the jury should have been instructed on the issue of voluntariness after the statement was admitted. After stating that credibility based findings that a defendant had waived his right to remain silent in the absence of counsel are reviewed only for clear error, the court found no clear error and concluded that there was little, if any, evidence from which the

¹⁶ 790 F.2d 464 (6th Cir. 1986).

¹⁷ 515 F.3d 100 (2nd Cir. 2008).

jury could have inferred that the defendant's statement was involuntary. The court so found despite the defendant's testimony contradicting that of the officer taking the statement in question. True, the defendant was advised of his rights in both English and Arabic and signed a *Miranda* waiver that was also written in both languages. But the court did not say that bilingual warnings were mandated.

CONCLUSION

After review of the cases cited by Defendant, the Court concludes that the Court's provisional decision was correct and that the Defendants' Motion to Suppress should be denied. An Order consistent with this Opinion shall issue.

Dated: November 14, 2017.

ATTEST:

Estrella H. George
Clerk of the Court

by

Lori Boynes-Tyson
Court Clerk Supervisor

11/16/2017


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS