SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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February 5, 2014

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RE: *State v. Julius Baynard*
ID# 1303003225

Upon Defendant's Motion to Suppress Statement –
DENIED.

Dear Counsel:

As you know, the original trial judge recused herself. So, I have reviewed Defendant's motion to suppress, the State's response, the transcript of the arresting officer's cross-examination, and the video-statement. I also recall the September 23, 2013 final case review, over which I presided. First, I will address the motion's timing. Then, I will discuss the merits.

In summary, the motion is untimely, with both sides to blame for that. And, although Defendant's interrogation was artful and in some ways manipulative, it

cannot be called overbearing, coercive, or intimidating. The interrogator never tried to discourage Defendant from invoking his rights to remain silent and to counsel. It is apparent that, knowing his rights, Defendant chose to speak with the police in order to advance what he thought was his best interest.

I.

As to the motion's timing, the State is to blame for not producing Defendant's statement until after the final case review and only a week before trial. Defendant made his statement on February 20, 2013. He was indicted on May 28, 2013. The defense filed the standard discovery request. The State has no excuse for taking more than seven months to produce a DVD for the defense.

The above notwithstanding, the defense chose not to make an issue out of this in a timely way. Perhaps, the defense was trying not to antagonize the prosecution during plea negotiations. Even so, at the final case review when the defense finally made a record about the statement's non-production, it down-played the statement's significance. Even if it might be said that due to the unusual circumstances defense counsel did not appreciate the statement's significance until it was finally received, the defense had the statement for a week before trial. During that time, counsel and the court exchanged correspondence concerning a possible office conference and other things. The defense, however, did not broach a suppression motion.

Finally, when the case was called for trial on October 1, 2013, the defense announced that it was "ready for trial." Yet again, the defense passed-up an opportunity to tell the court that, after finally reviewing Defendant's statement, the defense realized that the police were overreaching and Defendant had cause for a motion to suppress. As it happened, the case went to trial on October 1, 2013, and the court declared a mistrial the next day. Then, on October 14, 2013, Defendant filed the motion to suppress his February 20, 2013 statement.

The court rejects any implication that the defense first became aware of the suppression issue during the interrogator's cross-examination. The motion to suppress primarily relies on the interaction between the interrogator and Defendant, evidenced by the statement. The cross-examination merely stressed the interrogation's potential infirmities. For example, the interrogator's testimony that he would not have let Defendant leave the police station during the interrogation merely adds details to what was apparent, or at least implied, in the statement itself.

In summary as to the motion's timeliness, taking everything into account, neither side has acted in good faith. The State did not respect its important obligation to produce Defendant's statement, and the defense did not timely press the issue. But now, when opportune, the defense asks for consideration. As far as the court is concerned, Defendant waived this motion by not filing it before his first trial.

II.

Although Defendant is not entitled to consideration on the merits, the court offers the following. It is undisputed that Defendant was stopped for a motor vehicle offense and taken to Wilmington Police headquarters on February 20, 2013. He was restrained in an interrogation room and a detective, not involved in the motor vehicle case, questioned him about a pending homicide investigation.

It is also agreed, as the video recording of the statement confirms, Defendant was given proper *Miranda* warnings. Before giving the warnings, the interrogator explained that they were unnecessary or "overkill," because although Defendant was in custody in connection with the motor vehicle offense, he was not in custody concerning the homicide investigation.

In other words, the police made it clear that, although Defendant was not being arrested in connection with the homicide investigation, he was going to be

questioned about it and he had the right to remain silent, to an attorney, and so on. Defendant must also concede that he acknowledged his rights and agreed, without hesitation, to speak with the police about the homicide. Moreover, the tone of the interrogation was conversational, even laid-back. While the interrogation took several hours, there were long breaks while the police followed-up on what Defendant said.

The State must concede that during the interrogation, the interrogator made promises, gave assurances, and otherwise cajoled Defendant. For example, more than once after the statement began, the interrogator told Defendant that it would be "one hundred percent in [Defendant's] best interest to be honest . . . ." The interrogator told Defendant he would get "jammed" if he did not tell the truth. Defendant's arguments about that and other cajolery, however, incorrectly focus on the statement's content, rather than on its voluntariness.

From the outset and throughout questioning, Defendant did not hesitate, much less vacillate about talking. Defendant and the police merely differed about what Defendant decided to tell them and what they expected to hear. When the statement is considered in its entirety and in context, it is clear that the interrogator's insistence that Defendant tell the truth, and so on, was not intended to discourage Defendant from invoking his rights. It was push-back against Defendant's supposed lack of candor while making the statement. Confronting Defendant about his lack of candor is not intimidation or "physical or psychological pressure," and Defendant does not argue he was worn down by improper interrogation tactics.[1]

Most importantly, it is also clear that Defendant did not take the interrogator's comments as insisting that Defendant should not invoke his rights, or as promises of better treatment to overbear his will or rational thinking processes.[2] At worst, from Defendant's viewpoint, the police strongly implied that if Defendant continued to be less than totally candid, he would be arrested for the homicide, or at best he would be held instead of released that night.

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[1] *DeJesus v. State*, 655 A.2d 1180, 1193 (Del. 1995).
[2] *State v. Rooks*, 401 A.2d 943, 948 (Del. 1979).

"A choice between cooperation and freedom, on the one hand, and silence followed by custody and prosecution, on the other, is a common one."[3] While an objectively unwarranted threat of arrest might rise to coercion, true information adds to the suspect's options, even if negative. Where the police factually and legally can enforce their warnings, it cannot be considered hostage-taking. As for the threat of arrest, it does not appear to have been a sham.

The interrogation can be paraphrased with the interrogator's saying to Defendant, "You have decided to talk to me, but you are not telling the truth. When speaking, it is in your best interest to be truthful. There are things I can do for you if you are truthful, and there are bad consequences if you are untruthful." The interrogation cannot fairly be paraphrased as, "If you are thinking about invoking your rights, you should not because there are things I will do for you if you keep speaking with me and I will hold it against you if you invoke." Put another way, any reluctance on Defendant's part was not about whether to speak with the police or be silent. Rather, any reluctance, if it can even be called that, stemmed from his concern about what was in his best interest to say and how to put it. There is no evidence suggesting Defendant's statement was anything other than a free and deliberate choice to speak.[4]

If it comes to it, to undermine his statement, at trial Defendant might testify that he was intimidated, or that he twisted the truth – to curry favor with the police, to win concessions, or to avoid unfavorable consequences, or otherwise. It appears, nevertheless, that Defendant's basic decision to speak with the police and never to invoke his rights was the product of rational intellect and a free will.[5] It came after Defendant had been properly warned, and was not inspired by coercion or other police misconduct. Accordingly, for admissibility purposes, the statement appears knowing and voluntary.

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[3] *United States v. Miller*, 450 F.3d 270, 272-73 (7th Cir. 2006) *abrogated on other grounds by Kimbrough v. United States*, 552 U.S. 85 (2007).
[4] *Moran v. Burbine*, 475 U.S. 412, 421 (1986).
[5] *Rooks*, 401 A.2d at 948.

It is possible that appreciating this motion's weakness, the defense prudently chose not to file it before the first trial, but then the mistrial gave Defendant second thoughts and a perceived opportunity. As explained above, however, even if Defendant's position were strong, the mistrial did not open a window for belated motion practice.

III.

For the foregoing reasons, Defendant's October 14, 2013 motion to suppress the statement he made on February 20, 2013 is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

P.S. The above was distributed as a draft, with minor variances and without citations, on the trial's eve, for counsel's benefit. Now, the court has heard the evidence at the retrial and it does not alter the court's finding.

P.P.S. Defendant did not testify, much less claim that his statement was coerced and untrue.

FSS: mes
cc: Prothonotary (Criminal)