[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-12247
Non-Argument Calendar

D.C. Docket No. 4:14-cr-00005-WTM-GRS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARL EVAN SWAIN,
a.k.a. Cowboy,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(March 9, 2016)

Before WILSON, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

Carl Swain appeals his life sentence, imposed for murder, conspiracy to murder, and conspiracy to commit murder for hire, under 18 U.S.C. §§ 1111(a), 1117, & 1958(a), respectively. On appeal, he argues that he was not properly advised on his right to counsel at his interrogation because, although his initial *Miranda*[1] warnings were adequate, the FBI agent's response to a question regarding how Swain could obtain an attorney quickly destroyed Swain's understanding of his rights. After review of the record on appeal and consideration of the parties' briefs, we find no reversible error. Swain was properly advised of his right to counsel, and the district court did not err in denying Swain's motion to suppress statements from the interrogation. Therefore, we affirm.

I.

In a superseding indictment, Swain was indicted for conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958(a) (Count One); conspiracy to commit murder, in violation of 18 U.S.C. § 1117 (Count Two); and premeditated murder in violation of 18 U.S.C. §§ 7(3) and 1111 (Count Three). The indictment alleged that Swain planned to kill John Eubank, his brother-in-law, with Swain's sister, Lillie Eubank, and that Swain actually killed John Eubank by luring him into the woods and crushing his skull in with a wooden bat.

[1] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966) (prohibiting the government from using "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

Before trial, Swain filed a motion in limine to exclude a statement he made to the Federal Bureau of Investigation (FBI) on December 6, 2013, on the grounds that his statement was not voluntary because his *Miranda* waiver was inadequate. Specifically, Swain argued that, while he was in custody, an FBI agent had improperly answered his question regarding how he would obtain an attorney by indicating that he would not receive a lawyer until he was turned over to the Marshal's service. In support of his motion, Swain attached the transcript from his interview with FBI agents Wayne Gerhardt and Blake Childress. In relevant part, Gerhardt stated:

> Before we can ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed to you before any questioning if you wish. If you decide to answer questions now without a lawyer, you have the right to stop answering at any time.

Swain told Gerhardt that he understood. However, Swain asked: "[t]he thing is if I needed a lawyer, how am I going to be able to get one appointed to me that quickly?" Gerhardt replied:

> Well the court could appoint one to you, um, honestly at that point we take you over to the marshal service and, and, and at that point you would be appointed counsel. The question is whether or not we can sit down with you here again. It would probably be back, once you got back to Georgia before, before someone can talk to you.

Swain then asked how he would get back to Alabama once the case was over.[2] He and Gerhardt briefly discussed how he arrived in Alabama originally, and Gerhardt stated he did not know what was going to happen with Swain's case, including how long the process was going to be or when the Marshals would be moving Swain to Georgia. Swain told Gerhardt "Okay," and Gerhardt asked for clarification, to which Swain said, "Whatever, just go on with whatever." Gerhardt asked if Swain wanted "to go on and waive your rights and talk to us at this time," to which Swain replied, "I will talk to you as much as I can."

Gerhardt then had Swain sign a written consent form. In relevant part, the form stated that Swain had the right to remain silent, that anything he said could be used against him in court, that he had a right to an attorney before being asked any questions, he had a right to an attorney during questioning, that an attorney would be appointed for him if he could not afford one, and that he had the right to stop answering questions at any time. Additionally, the form had a statement certifying that Swain had read the form. The agents then interviewed Swain, adducing several key facts about the case.[3]

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[2] Since the crime occurred in Georgia, the agents and Swain discussed transfer there for the proceedings during the interview, which took place in Alabama (where Swain resided and was arrested).

[3] Swain made several potentially incriminating statements, including, *inter alia*, that he was in Georgia at or near the time of the death of his brother-in-law, John; that he walked with John along the trail where John was later found; that he knew his sister Lillie and John were going through a divorce and Lillie had told him that she was scared that she would not be able to support herself; and that Lillie would receive a $500,000 life insurance policy if John died.

The magistrate judge reviewed Swain's motion and issued a Report and Recommendation (R&R). The magistrate judge determined that Gerhardt had answered Swain's questions truthfully and accurately; accordingly, the magistrate judge concluded that Swain was not deceived and Gerhardt's statements were not even in the realm of a permissible police ploy. Swain objected to the R&R and reasserted that Gerhardt's response to his question tainted his *Miranda* warning. However, the district court adopted the R&R and denied Swain's motion to suppress, finding Gerhardt's response accurately answered Swain's question and outlined the relevant procedures.

Subsequently, at trial, the government played portions of the interview to the jury. The jury found Swain guilty of all three counts charged in the superseding indictment, and he was sentenced to life imprisonment for each count, to be served concurrently. This appeal ensued.

II.

A district court's ruling on a motion to suppress "presents a mixed question of law and fact." *United States v. Barbour*, 70 F.3d 580, 584 (11th Cir. 1995). We review a district court's factual findings for clear error, whereas our review of the court's application of the law to the facts is de novo. *Id*. Further, we review de novo when deciding the ultimate issue of the voluntariness of a defendant's confession. *Id.*

III.

Swain argues on appeal that Gerhardt's above-mentioned statements to Swain concerning his right to an appointed counsel led him to form the reasonable impression that he did not have a then-present right to counsel and would only be afforded that right at a future point. *See California v. Prysock*, 453 U.S. 355, 360, 101 S. Ct. 2806, 2810 (1981) (suggesting that counsel will be appointed at a future time after the interrogation is not enough to provide an appropriate *Miranda* warning). Accordingly, Swain avers he was not properly advised of his constitutional right to counsel as required by *Miranda*, and, since there exists a reasonable possibility that the introduction of his statements obtained in violation of *Miranda* contributed to his convictions, reversal is required.

An accused has effectively waived his *Miranda* rights if the totality of the circumstances reveal he: (1) voluntarily relinquished them as "the product of a free and deliberate choice rather than intimidation, coercion, or deception"; and (2) made his decision "with a full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon [them]." *Barbour*, 70 F.3d at 585 (citing *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986)). The Supreme Court has opined that "*Miranda* does not require that attorneys be producible on call," so long as a suspect knows that he has the right to an attorney before and during questioning. *Duckworth v. Eagan*, 492 U.S. 195,

204, 109 S. Ct. 2875, 2881 (1989). As such, if appointed counsel cannot be immediately provided, "*Miranda* requires only that the police not question a suspect unless he waives his right to counsel." *Id*.

Here, FBI agents read Swain his *Miranda* rights, Swain asked a few procedural questions which the agents answered, and Swain then decided to cooperate. The FBI agents clarified that Swain was waiving his rights, which Swain affirmed, and Swain signed a written waiver that accurately outlined his *Miranda* rights. *See North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757 (1979) (noting that, although "not inevitably either necessary or sufficient to establish waiver," a written waiver "is usually strong proof of the [waiver's] validity"). Given these factors, the totality of the circumstances surrounding Swain's waiver shows that his choice was not coerced, and that he understood that he was waiving his rights and what those rights were. *See Barbour*, 70 F.3d at 585; *see also Moran*, 475 U.S. at 421, 106 S. Ct. at 1141.

Further, in considering Swain's motion to suppress, the district court concluded that Gerhardt's answer to Swain's question accurately explained that a court would address Swain's request for appointed counsel, outlined the procedures, and properly informed Swain that there would be a delay that would prevent the interview from continuing. This is not a clearly erroneous finding, nor did the answer undermine Swain's *Miranda* warnings. *See Barbour*, 70 F.3d at

585; *see also Duckworth*, 492 U.S. at 204, 109 S. Ct. at 2881. Indeed, after this explanation, Gerhardt clarified whether Swain wanted to waive his rights and talk to the agents at that time.

Therefore, after review of the record and consideration of the parties' briefs, we find that Swain's waiver of his *Miranda* rights was given knowingly and voluntarily, and we affirm the district court.

AFFIRMED.