UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 12-12956-DD

ERIC HANNA
Appellant,
v.

UNITED STATES OF AMERICA,
Appellees/Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

By filing a reply brief and addressing only some of the matters contained in the initial brief, Appellant does not intend to waive any of the components of the initial brief or concede any of the issues, arguments, or statements made by the government in its answer brief.

ARGUMENT

I. HANNA'S STATEMENTS TO LAW ENFORCEMENT WERE INVOLUNTARY & THE TRIAL COURT ERRED BY DENYING HANNA'S MOTION TO SUPPRESS THE ILLEGALLY OBTAINED STATEMENTS.

> The Fifth Amendment, which applies to the States by virtue of the Fourteenth Amendment, provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself." In Miranda v. Arizona, 384 U.S. 436 (1966), the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation. The Court observed that "incommunicado interrogation" in an "unfamiliar," "police-dominated atmosphere," involves psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Consequently, it reasoned, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Maryland v. Shatzer, 130 S. Ct. 1213, 1219 (2010). "To establish a valid waiver [of Miranda] the State must show that the waiver was knowing, intelligent, and voluntary under the high standar[d] of proof for the waiver of constitutional rights [set forth in] Johnson v. Zerbst, 304 U.S. 458 (1938)." Id. (quotation omitted). There is a two-pronged inquiry to determine whether a defendant's waiver of Miranda is knowing, voluntary, and intelligent:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than

> intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

United States v. Barbour, 70 F.3d 580, 585 (11th Cir. 1995). The fact that Miranda warnings have been read and waived by a person subjected to custodial interrogation does not necessarily mean that any subsequent statements are "voluntary" in accord with due process. See generally Jarrell v. Balkcom, 735 F.2d 1242, 1252 (11th Cir. 1984).

Even if statements have been made after a "knowing and voluntary waiver" of Miranda, "[t]he due process 'voluntariness' test . . . requires the suppression of statements obtained by techniques and methods offensive to due process, or under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will." Martin v. Wainwright, 770 F.2d 918, 924 (11th Cir. 1985) (internal quotations and citations omitted). "In order to find [the defendant's confession voluntary, [the Court] must conclude that he made an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him." Id. "Whether [a] confession was obtained by coercion or improper inducement can be determined only by an examination of all the attendant circumstances." Id. At 925 (citing Jurek v. Estelle, 623 F.2d 929 (1980) ("This [determination] is, necessarily, a case-by-case endeavor. We must weigh the totality of the circumstances and examine their impact on [the defendant]. . . . We must determine whether the sum

of the circumstances compels a finding of involuntariness.").

In the instant case, the following factual allegations surrounding HANNA's custodial interrogation are undisputed: (1) HANNA was only eighteen (18) years old at the time of the interrogation [R100 p.179-186]; (2) HANNA has only a ninth grade education [R99 p.82-89]; (3) HANNA was detained for over twenty-four (24) hours [R99 p.88]; (4) HANNA was arrested at approximately 10:40 P.M., handcuffed and placed in a police vehicle for over two hours, and then interrogated at 3:50 A.M., 8:30 A.M., 9:41 A.M., 3:45 P.M., and other occasions until 12:00 A.M. the following day [R99 p.83, 84, 208,158-59, 216]; (5) HANNA was given no reasonable facilities to sleep during this entire time period. In addition to these uncontested facts, HANNA alleges that he requested to speak with an attorney, requested to speak with his mother, and was physically threatened by the police with a shoe. [R100 p.182-84]. The totality of the circumstances clearly dictates that the State failed to meet its burden in proving that any waiver of HANNA's Miranda rights was knowing, voluntary, and intelligent. See Johnson v. Zerbst, 304 U.S. 458 (1938). During his confinement, HANNA was roused from his sleep, he was physically tired, he had a low education level and he was of young age. Law enforcement took advantage of these circumstances and characteristics and elicited a waiver of rights through pressure and exploitation of HANNA's tiredness, exhaustion, young age, and intelligence level. In addition, HANNA's statement to police, while in custody, that he had not been mistreated during his encounter with law enforcement is to be given little, if any, weight because HANNA was under the pressure of government coercion at the time that these statements were uttered.

Further, even if the waiver of HANNA's Miranda rights was knowing, voluntary, and intelligent, the conduct of law enforcement still rendered HANNA's statements involuntary because, "his will [was] [] being overborne by the pressures and circumstances swirling around him." Wainwright, 770 F.2d at 924. Accordingly, the trial court erred in denying HANNA's motion to suppress any and all statements made to law enforcement during his custodial interrogation because his waiver of Miranda and his subsequent confession were involuntary.

II. HANNA'S ARREST WAS UNCONSTITUTIONAL BECAUSE IT WAS NOT SUPPORTED BY PROBABLE CAUSE

The Government erroneously contends that HANNA did not challenge the probable cause for his arrest in the court below, and therefore, this court must review the claim under a plain error standard. [Gov. Brief at p. 38]. However, at the hearing on HANNA's motion to suppress, counsel for HANNA did raise the issue of probable cause for HANNA's arrest; counsel stated:

> [Counsel for HANNA]: . . . Now, let's talk about what they knew about Mr. Hanna . . . Well, they had a name from Mr. - - the guy in jail, whatever his name is, Mr. Marshall, Khambrel Marshall. They have his name. Other than that, I haven't heard any other evidence of what they had on Mr. Hanna. Now, if they have a name, I assume that they could probably find his address, where he lives. And if that's enough probable cause, they can arrest him right then. I think their actions demonstrate they knew they didn't have probable cause because they had nothing substantive on Mr. Hanna or Mr. Ransfer to arrest them right then or to go to their house and get them.
> [THE COURT:] Did they find anything on him at the time of his arrest?
> [Counsel for HANNA:] At the time of his arrest, he threw some cash on the floor. So there was no credit cards - - and the Government can correct me - - there's no credit cards or other items on the - - I mean, he threw some money on the ground.
> [THE COURT:] Okay.
> [Counsel for HANNA:] That's all they have.

[R324 p.38-40] (emphasis added). Counsel continued on to say that the

government may have had a reasonable suspicion to stop the vehicle and question the occupants, but that they did not have probable cause at that point to effectuate an arrest. Id. As such, this issue has been properly and adequately preserved for appellate review. The appropriate standard is mixed – the Court reviews the factual findings for abuse of discretion and reviews conclusions of law *de novo*. See United States v. King, 509 F.3d 1338, 1341 (11th Cir. 2007).

Law enforcement may effectuate a warrantless arrest, in public, if there is probable cause to believe the suspect in question has committed a felony. See United States v. Watson, 423 U.S. 411, 423 (1976). "An arrest made without probable cause violates the Fourth Amendment." Redd v. City of Enterprise, 140 F.3d 1378, 1382 (11th Cir. 1998). "Under federal law, probable cause to arrest exists 'when an arrest is objectively reasonable based on the totality of the circumstances.'" Durruthy v. Pastor, 351 F.3d 1080, 1088 (11th Cir. 2003) (quoting McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1243 (11th Cir. 2003)). This standard is met when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Id. (emphasis original). "Probable cause requires more than suspicion." Id.

The Government, in its reply brief, points to various pieces of information contributing to the probable cause to arrest HANNA; however, the majority of the evidence recounted has nothing to do with HANNA. [Gov. Brief at p. 37-38]. The evidence against HANNA, in its entirety is as follows, a jailhouse informant

(Khambrel Bynum) told law enforcement that HANNA was a member of the "Davis crew," and that crew was responsible for a number of recent robberies in the Miami area. [R99 p.7-10]. In addition to completely unreliable and unverified tip, on the night of the robbery law enforcement had the following information. First, a "white vehicle" was seen leaving the scene of a Wendy's that had just been robbed. [R99 p. 17]. Second, a white vehicle was following a white Ford Expedition that police had previously placed a GPS device on. [R99 p.18; R100 p.31-32]. Third, based upon the distance away from the scene of the crime and the amount of time that had lapsed it was physically impossible that the white Ford Expedition could have been involved in the Wendy's robbery. [R99 17-18].[1] In fact, the government's evidence crystallizes the fact that police were acting on merely a hunch when they stopped the white Ford expedition with the intent of arresting HANNA and any other individuals in the vehicle. The arresting officer testified that when law enforcement was sent to the location of the white

[1] The government contends that this assertion is inaccurate, but at the hearing on the motion to suppress the testimony revealed the following:

> [Mr. Samms]: Now you accessed [the GPS] device after the Wendy's robbery. Correct?
> [Villaverde]: That is correct.
> [Mr. Samms]: You said right after the Wendy's robbery?
> [Villaverde]: Close to it. Yes, sir.
> [Mr. Samms]: So within five minutes or so?
> [Villaverde]: We could approximate, yes.
> [Mr. Samms]: And when you accessed it, the car was not moving?
> [Villaverde]: That is correct.
> [Mr. Samms]: So then, at that point, it was your belief that that white vehicle was not involved in the Wendy's robbery. Correct?
> [Villaverde]: It was my belief that that vehicle was parked at 179 Street and 107 Avenue.
> [Mr. Samms]: And how far away is that from where the Wendy's was?
> [Villaverde]: The Wendy's was at 139th Street and US-1, if I recall correctly.
> [Mr. Samms]: Would it be fair to assume that, at that point in time you knew pretty much that the vehicle that you were surveilling through your computer was not involved in the robbery that just took place?
> [Villaverdge]: Correct. If you're asking me if it was not there at that time, no.

[R324 p.18-19]. Based upon Villaverde's own testimony it is clear that the vehicle could not possibly been at the robbery in question because of its distance away from the incident within such a short period of time after the incident occurred.

expedition, the officers were looking for a blue mini-van. [R 324 p.15-16].[2] When they arrived, they found a white vehicle, but followed the Expedition anyway and arrested its occupants. In addition, it is questionable whether law enforcement knew the identity of anyone inside the vehicle at the time that the order to "take down" the vehicle was given. Law enforcement executed a full out arrest by stopping the vehicle with little to no information tying the vehicle, and HANNA in specific to any crime.

After the "take down" of the vehicle, the following additional information was developed: (1) when HANNA exited the vehicle he threw a "wad of cash" under the tire of the vehicle; [R364 p.165] (2) HANNA confessed to two robberies; (3) HANNA confessed to brandishing a gun during these robberies; (4) HANNA's cell phone signal placed him near the scene of the Doral Ale House robbery at the time the robbery occurred. [R277 p.432-33]. If this additional information had been available before the decision to arrest HANNA had been made, there would be no question as to probable cause. But, the information was only ascertained after HANNA had already been arrested, without probable cause.[3]

[2] Villaverde testified that he sent law enforcement to the location of the white expedition in order to "go in the area [and wait] for a blue minivan with a tag that was given" they were "looking for the blue minivan." [R324 p.16].

[3] HANNA also maintains that his seizure during the the "take down" of the vehicle was unconstitutional. It is well settled that "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority terminates or restrains his freedom of movement." Brendlin v. California, 551 U.S. 249, 254 (2007). In fact, even an "unintended person … [may be] the object of [a] detention, so long as the detention is willful and not merely the consequence of an unknowning act." Id. "A seizure occurs if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. In the instant case, HANNA was clearly seized when law enforcement was instructed to take down the white Ford Expedition and effectuate a full out arrest. The government in its reply concedes this. As such it is without a question that he has the right to challenge the seizure of his person and lack of probable cause for his arrest.

III. THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE HEARSAY, WITHOUT AN EXCEPTION AS THE EVIDENCE WAS NOT OFFERED TO SHOW THE OFFICERS COURSE OF INVESTIGATION AND EVEN IF IT WERE THE JURY WAS NOT INSTRUCTED THAT THE PURPOSE OF THE TESTIMONY WAS LIMITED TO THAT PURPOSE.

The Government contends that Sergeant Villaverde's testimony was not offered for the truth of the matter asserted, but rather only for a non-hearsay purpose of establishing the course of the investigation and subsequent police action. [Gov. Brief at p. 49]. In support, the government cites United States v. Jiminez, 564 F.3d 1280, 1288 (11th Cir. 2009). However, the situation in that case stands in stark contrast with the instant case. In Jiminez, defense counsel asked the interviewing detective a series of questions related to the defendant's denial of any involvement in the case.[4] Id. at 1283. On redirect, to clarify why the Detective had interviewed the defendant a second time, the Detective was permitted to testify that the defendant's brother had implicated the defendant in the grow operation. Id. The Court found that the Detective's testimony about his conversation with the Defendant's brother was not admitted, by the trial court, for the truth of the matter asserted, but "[r]ather, it was received we believe, for the limited purpose of showing only that the statement was uttered by [the defendant's brother] to [the

[4] The Court explained:

> During extensive cross-examination, defense counsel attempted to impeach Detective Wharton, who, on direct examination, had said that [the Defendant] confessed to participating in the marijuana grow operation. Defense counsel asked [the Detective] to confirm that [the Defendant] had denied any knowledge of the marijuana the first time he spoke to [the Detective]; to confirm that [the Detective] had interviewed [the Defendant] again after he had interviewed [the Defendant's brother]; to state how long he had interviewed [Defendant's brother]; to proffer the details [the Defendant] had given about the grow house operation during his final interview to explain why he had not asked [the Defendant] to sign a written summary of his confession; to explain why he had devoted only one paragraph of the five-page police report to the defendant's confession; and to explain why he had not provided the police report to the prosecution until a week before trial.

Jiminez, 564 F.3d at1283.

Detective]." Id. at 1287. The court continued,

> [t]he cross-examination was designed to impeach [the Detective's] credibility and suggest that [the Detective] was lying about the circumstances surrounding the interviews and about [the Defendant's] confession. In order to rehabilitate the credibility of [the] Detective [], the prosecution sought to explain to the jury why [the Detective] would have been motivated to re-interview [the Defendant] and why [the Defendant] would tell [the Detective] on a successive occasion that he had participated in the marijuana grow operations.[5]

Id. (emphasis added). Far from merely rehabilitating a witnesses credibility by explaining his actions, in the instant case, Villiverde was permitted to testify that: (1) there were a group of robberies where the perpetrators wore similar clothing (i.e., "gray sweatshirts or blue sweatshirts that had a certain name, aero, red sweatpants);[6] (2) law enforcement had identified HANNA as one of the members of the Davis crew before the Wendy's robbery occurred; (3) a white expedition was being used in the crimes; (4) law enforcement had received information that a robbery was going to "go down" just days before the Wendy's robbery occurred. [R. 364 p. 72-84]. The last three pieces of information could have been discovered solely through the jailhouse informant Khambrel Bynum – this evidence was not introduced through any other witnesses at trial. Each piece of evidence was critical in regards to HANNA, because the government's evidence linking HANNA in particular to the robberies was scarce.

Based upon the context in which the evidence was heard, it cannot be said that the evidence was offered to show the "course of the investigation." Further, it is

[5] The court also notes that the defendant did not "ask the district court to give a limiting instruction" which would not be necessary had the statement been admitted as hearsay. Id. at 1286.

[6] Although the government contends that the evidence regarding the perpetrators clothing was brought out by other witnesses, [Gov. Brief at p. 50], Sergeant Villaverde was the only witness with enhanced credibility in the eyes of the jury, and the only witness who could state with certainty that the clothing in each robbery was similar or identical. Each other witness would have only been able to testify as to the robbery they themselves witnessed.

clear that unlike in Jiminez, 564 F.3d at 1287, the evidence was not offered to rehabilitate the government's witness by showing why he took a particular action. Id. As such, the evidence was inadmissible hearsay and the trial court erred in admitting it. Even assuming that the evidence could have been admitted for a non-hearsay purpose, the jury was not given any limiting instruction or indication that they were to consider the evidence for the sole purpose of explaining the course of law enforcement's investigation. Without such an instruction, the jury was free to, and likely did consider Villaverde's testimony as true. Considering that the testimony was actually that of a jail house informant, the prejudice to HANNA is overwhelming – as HANNA had no opportunity to bring out that informant's obvious bias, motive, and unreliability. See Idaho v. Wright, 497 U.S. 805, 819 (1990) ("[t]he theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.").[7]

IV. THE TRIAL COURT ERRED IN ADMITTING DIKOVITSKY's TESTIMONY REGARDING CELL TOWER SITE INFORMATION.

The Government contends that the trial court properly admitted the testimony of Dikovitsky, who was a records custodian, regarding cell tower location and

[7] The Government attempts to distinguishes United States v. Baker, 432 F.3d 1189 (11th Cir. 2005), by asserting that the testimony in the Baker went to establish that the defendant had committed the alleged crime and that in the instant case, the testimony in question did not "establish that appellants had committed the charged robberies." [Gov. Brief at p. 50]. However, as stated above, the evidence placed HANNA as part of the Davis crew, which was believed to be involved in the robberies in question; put HANNA in a vehicle (the white expedition) that was thought to be somehow involved in the robberies; and placed HANNA in a group of robberies where the assailants wore the same clothing. Although no single fact elicited by Villaverde was the smoking gun, each of these pieces of evidence contributed toward HANNA's conviction. Cf Jiminez, 564 F.3d at 1287 (finding that the evidence was merely explaining why the Detective had reinitiated questioning of the Defendant).

information. [Gov. Brief at p. 52]. In support, the Government relies strongly on United States v. Feliciano, 300 Fed. Appx. 795 (11th Cir. 2008). However, the testimony elicited in Feliciano is distinguishable from the testimony in the instant case in a number of important ways.

First, the testimony in Feliciano was elicited from a police officer, not a records custodian. Id. at 800. This is an important distinction because the trial court stressed that law enforcement officers may be qualified to testify on matters that would be improper for other lay witnesses because of the experience that law enforcement officers have. Id. Second, the information that was elicited from the officer in Feliciano was merely a summary of calls made, identification of a cellular tower closest to where the call was made, and a conclusion that the call could not have been made from a particular individual's cell phone based upon the location of the call. Id. at 801. In the instant case, Dikovitsky was allowed to testify regarding the actual process of how the cell phone tower system works as a whole. [R278 p.438-41]. Dikovitsky testified that there are "three antennas" on each tower, and that the "AS/MUTH is going to be the direction those antennas are pointed." Id. at 441. He also testified regarding how the systems works, i.e.,

> it is a giant-sized computer that takes the place from when people used to take the switch and put in a different phone number when you called and had to use a switchboard. Now it is done by computer. This tells which computer actually recorded the phone call [sic]. The sector is going to be the antenna that was used which could show direction from the tower where the mobile user was.

Id. at 438-39. This is far from a mere conclusion that a cell phone tower is located at a particular address and that a cell phone user could not have been in that location at a particular time based upon the facts. Feliciano, 300 Fed. Appx. at 800.

The additional cases relied upon by the Government are similarly flawed. See United States v. Rodriguez, 452 Fed. Appx. 883, 888 (11th Cir. 2012) (holding that a detectives testimony regarding the location of a cell phone tower and the general location of a co-defendant's phone at a particular time after reviewing the telephone records was not error, particularly in light of the fact that law enforcement officers may testify based upon their knowledge gained from experience in the field); United States v. Baker, 496 Fed. Appx. 201, 204 (3d Cir. 2012) (finding no error in admitting detective's testimony regarding the use of mapping software in order to place a particular person at a particular location based upon their cell phone call); United States v. Kale, 445 Fed. Appx. 482, 485 (3d Cir. 2011) (finding no error in admitting testimony of the custodian of records for a cell phone company, where the testimony "consisted entirely of reading and interpreting [defendant's] cell phone records).

Finally, the government contends that any error in admitting Dikovitsky's testimony was harmless because the actual records were admitted into evidence. [Gov. Brief at p. 53]. This argument is flawed because Dikovitsky did not merely testify as to where the closest tower to the call was. Cf Kale, 445 Fed. Appx. At 485 ("[Records custodian] [merely] explained that a 'cell phone is constantly searching for the strongest signal' and that the strongest signal is usually determined by 'how far away you are from the cell phone tower'"). In the instant case, Dikovistky's testimony bolstered the credibility of the admitted records by explaining the technical nature of how each cell phone wave reaches each tower. The testimony was not subject to full cross-examination because the information

that the defense sought to elicit on cross-examination (namely the rate of error of the cell cite system) was beyond the knowledge of the lay witness and could not be elicited. [R278 p. 445-46, 446-48].

CONCLUSION

Based upon the foregoing, and the reasons stated in the initial brief, HANNA respectfully submits that the judgment and sentence in this case should be reversed and the cause remanded with directions that HANNA's Fourth and Fifth Amendment motions to suppress be granted, or in the alternative that the verdict be vacated and the cause remanded for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically submitted to Anne R. Schultz, United States Attorney, Southern District of Florida, Appellate Division, 99 N.E. 4th Street, 5th floor, Miami Florida 33132-2111, on this ____, day of April 2013

Gregory A. Samms, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and length requirements of the Federal Rules of Appellate procedure 32(a) and 32(a)(7)(A).

Gregory A. Samms, Esq.