

TO BE PUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID MCCAMMON,

Defendant.

No. CR13-4099-DEO

**REPORT AND RECOMMENDATION
ON MOTION TO SUPPRESS**

I. INTRODUCTION

Defendant David McCammon is charged by indictment (Doc. No. 1) with (a) conspiracy to distribute methamphetamine, (b) possession with intent to distribute methamphetamine, (c) possession of a firearm in furtherance of a drug trafficking crime, (d) prohibited person in possession of a firearm and (e) possession of a firearm with an obliterated serial number. He has filed a motion (Doc. No. 10) to suppress evidence obtained from a post-*Miranda* interview on September 28, 2013, and a subsequent search of his residence. Plaintiff (the Government) has filed a resistance (Doc. No. 20). Judge O'Brien has referred the motion to me for the preparation of a report and recommended disposition.

I held an evidentiary hearing on January 17, 2014. Assistant United States Attorney Forde Fairchild appeared on behalf of the Government. McCammon appeared personally and with his attorney, Assistant Federal Public Defender Bradley Hansen. The Government offered the testimony of Officers Michael Koehler, Jeffrey Harstad and Joshua Tyler of the Sioux City Police Department. McCammon presented no testimony. The following sealed exhibits were admitted into evidence without objection:

- Government's Exhibit 1:* Criminal History Report for David McCammon
- Government's Exhibit 2:* Booking photo of David McCammon's torso showing tattoos
- Government's Exhibit 3:* Implied Consent Advisory Form
- Government's Exhibit 4:* Implied Consent Form containing David McCammon's signature indicating consent to chemical testing
- Government's Exhibits 5-1 through 5-4:* Photos of David McCammon's torso from front and back showing tattoos
- Defendant's Exhibit A:* Sioux City Police Department Offense Report
- Defendant's Exhibit B:* Dash camera video from Officer Michael R. Koehler
- Defendant's Exhibit C:* Audio of post-*Miranda* interview conducted by Task Force Officer Joshua J. Tyler
- Defendant's Exhibit D:* Report of Investigation by Task Force Officer Joshua J. Tyler
- Defendant's Exhibit E:* Toxicology Report
- Defendant's Exhibit F:* Affidavit and Application for Issuance of Search Warrant
- Defendant's Exhibit G:* Photograph of McCammon at hospital
- Defendant's Exhibit H:* Mercy Medical Center admission and discharge information

The motion is now fully submitted.

II. FINDINGS OF FACT

Based on the evidence presented, I find as follows:

At approximately 1:00 a.m. on September 28, 2013, Koehler received a call from dispatch to check on a motorist who appeared to be passed out in his vehicle in the parking lot of Horizon Restaurant in Sioux City. Koehler pulled up behind the vehicle, which was stopped in the middle of the parking lot with its brake lights illuminated and right turn signal flashing. Koehler could see that the driver was slumped over in the vehicle. He approached the passenger side of the vehicle and saw the gear selector was in drive. He reached through the open window, moved the gear selector into park, turned off the engine and removed the keys. Koehler placed the keys on the trunk of the car and then approached the open window on the driver's side.

Koehler asked the driver (later determined to be McCammon) if he was ok and requested that he provide identification. McCammon took a long time to respond and seemed to be impaired. Koehler suspected he was under the influence of an illegal substance because he did not smell alcohol. McCammon began reaching around in the vehicle and leaned toward the center console. At the same time, his left hand moved toward his waistband. Koehler leaned forward shining his flashlight into the car and saw the butt end of a gun in McCammon's waistband. Koehler quickly reached in, grabbed the gun and placed it in his own waistband. He then drew his service pistol and pointed it at McCammon. He ordered McCammon to unlock the door and get out of the vehicle. McCammon fumbled with the door. When he opened it and did not immediately get out, Koehler grabbed McCammon and threw him to the ground, injuring McCammon's face. Koehler then placed his foot on the back of McCammon's neck, ordered him to bring his arms to the side and used his radio to call for back-up.

Other officers quickly arrived and placed McCammon in handcuffs. They noticed McCammon's breathing was abnormal, his speech was thick and mumbled and that he had a hard time keeping his eyes open. They brought him over to Koehler's

vehicle and sat him on the hood of the police car. McCammon was under arrest at this time.

McCammon could not sit up on his own and would fall to one side if not held up by an officer. Koehler read McCammon his *Miranda* rights and asked if he understood. McCammon did not respond. Koehler stated McCammon was “too out of it” to understand his rights at that time. The officers decided medical attention was necessary and called for an ambulance. An ambulance arrived and transported McCammon to Mercy Medical Center. He was reported to be unconscious or “completely asleep” when he arrived at 1:33 a.m. and was taken to the emergency room. Def. Ex. A, Doc. No. 12-1 at 14-15. A CT scan was performed which revealed no signs of a head injury. McCammon’s facial abrasion was treated by medical staff.

Following the examination by medical staff, Harstad began an investigation to determine whether McCammon had been driving under the influence of any substance. He conducted a breath test for the presence of alcohol, but none was detected. Def. Ex. A, Doc. No. 12-1 at 16. Harstad then read McCammon an implied consent advisory and provided him a copy which states that a person suspected of driving under the influence can either consent or refuse to submit to the withdrawal of a body specimen for chemical testing. Gov. Ex. 3, Doc. No. 26. The advisory warns that refusal will result in revocation of driving privileges. If a suspect is too impaired or otherwise medically-unable to provide consent, law enforcement can request that a physician certify that situation, thus permitting the withdrawal of a specimen without the suspect’s consent. Harstad did not follow that procedure because he found McCammon to be alert and making eye contact. He believed McCammon understood what Harstad was saying. McCammon verbally acknowledged that understanding and signed a consent form at 1:46 a.m.

Meanwhile, Tyler – a drug task force officer – was contacted at 1:41 a.m. about interviewing McCammon. Upon arriving at the hospital he observed McCammon in a

hospital bed being treated by medical staff and speaking with Harstad. He noticed that McCammon appeared to doze off when no one was talking to him, but would open his eyes when he was asked a question or when there was movement in the room. He provided logical answers to questions and seemed to track what was happening in the room.

Tyler began his interview with McCammon at approximately 2:00 a.m. with McCammon lying in the hospital bed unrestrained and Tyler sitting in a chair.¹ Tyler read McCammon his *Miranda* rights from a card issued by the DEA. He asked McCammon if he understood his rights and McCammon stated that he did. Tyler then asked McCammon what he thought those rights mean. McCammon responded that they mean he could tell Tyler to “fuck off.” Koehler was also in the room during portions of the interview, while medical staff came in and out of the room. At no point during the interview were more than two law enforcement officers in the room.

During the ninety minute interview, McCammon made regular eye contact with Tyler. At times he was sitting up in his bed. He did not doze off or have trouble staying awake. He was generally responsive to questions, would laugh at jokes and was able to track the conversation. Early on, Koehler asked McCammon for his phone number and McCammon was slow to respond. Koehler made a comment about McCammon not knowing his own phone number, to which McCammon responded by clarifying that he did know it and was not trying to lie to the officers, but he was just tired and had to think about it.

McCammon initially told an elaborate story about what had happened to him that night, stating he had been set up and drugged by someone named “Jazzy.” Later, however, McCammon stated he was done lying to Tyler and admitted this story was not true. He also confessed that the gun was his and that he knew he was not allowed to be

¹ Most of the interview was recorded, with the recording being received into evidence as Defendant’s Exhibit C. Tyler testified that the first several minutes, including his discussion with McCammon about *Miranda* rights, were not recorded because the batteries in his audio recording device were dead. New batteries were brought to the room early in the interview.

around firearms due to his past felony convictions. McCammon explained some of his criminal history to Tyler, stating he had just served 85 percent of a six-year sentence in Florida.² Tyler discussed cooperation with McCammon, but McCammon refused to look at photographs to identify “Jazzy” or otherwise cooperate to implicate others, stating it did not matter because he knew he was “fucked.” He made it very clear on several occasions that he would not help Tyler obtain evidence against other suspects.

At 3:06 a.m. McCammon provided a urine sample. Def. Ex. A, Doc. No. 12-1 at 16. A quick test kit revealed positive results for amphetamines, benzodiazepines, methamphetamine, PCP, THC and possibly cocaine. Harstad informed Tyler of the results and Tyler told McCammon it looked like he was a “walking pharmacy.” Tyler then told McCammon that they could talk the next day when McCammon got “some of the shit out of [his] system.” McCammon objected, stating that he was “good” and that they could keep talking. He complimented Tyler on his interviewing technique, stating it was impressive that Tyler now had McCammon begging to talk instead of the other way around. After the interview was completed, McCammon was discharged from the hospital at 3:41 a.m. and transported by Koehler to the Woodbury County jail. During the drive, McCammon was awake, talking and asking Koehler questions.

A search of McCammon’s vehicle at the time of his arrest revealed methamphetamine, approximately 75 prescription pills that were not prescribed to him, ammunition, marijuana, two cell phones, a digital scale, a folding knife and 639 dollars. Law enforcement later obtained a search warrant and conducted a search of McCammon’s residence. They found ammunition, firearm magazines, baggies and a digital scale. McCammon does not contend that the searches of his vehicle and his person were illegal. However, he seeks to suppress his statements at the hospital and the evidence later recovered from his residence.

² McCammon has an extensive criminal history. *See* Gov. Ex 1, Doc. No. 21.

III. LEGAL ANALYSIS

A. *Were McCammon's Statements Involuntary Under the Due Process Clause?*

McCammon argues his statements to Tyler must be suppressed as involuntary because they were elicited using coercive police conduct. McCammon argues the officers knew he was impaired and they should not have interrogated him shortly after he was found unconscious.

Due process requires that incriminating statements or confessions be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (a voluntary confession may be used against a suspect, but an involuntary one offends due process). The Government must prove, by a preponderance of the evidence, that the challenged statements were voluntary. *Colorado v. Connelly*, 479 U.S. 157, 169 (1986). A statement cannot be rendered involuntary by the incapacity of the suspect alone; there must be some coercive police activity. *Connelly*, 479 U.S. at 164. The test for determining voluntariness is whether the pressures exerted on the suspect have overborne his will. *United States v. Meirovitz*, 918 F.2d 1376, 1379 (8th Cir. 1990) (quoting *United States v. Jorgensen*, 871 F.2d 725, 729 (8th Cir. 1989)). “A statement is involuntary when it [is] extracted by threats, violence or express or implied promises sufficient to overbear the [suspect’s] will and critically impair his capacity for self-determination.” *United States v. LeBrun*, 363 F.3d 715, 724 (8th Cir. 2004). To determine if the defendant’s will has been overborne, I must examine the totality of the circumstances, “including both the conduct of law enforcement in exerting pressure to confess on the defendant and the defendant’s ability to resist that pressure.” *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir. 2005) (citing *United States v. Astello*, 241 F.3d 965, 967 (8th Cir. 2001)).

McCammon’s impaired state does not necessarily make his statements involuntary or a violation of due process. *See United States v. Gaddy*, 532 F.3d 783, 788 (8th Cir. 2008) (“Sleeplessness, alcohol use and drug use are relevant to our

analysis, but ‘intoxication and fatigue do not automatically render a confession involuntary.’”). While there is no dispute that McCammon was under the influence of several drugs, “the test is whether these mental impairments caused the defendant’s will to be overborne.” *United States v. Casal*, 915 F.2d 1225, 1229 (8th Cir. 1990). *See also United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998) (refusing to adopt a per se rule for intoxication and finding that the defendant’s confession was voluntary even though the defendant was intoxicated by PCP and later exhibited “bizarre” behavior and signs of mental illness). Based on the evidence presented, and particularly my review of the recorded interview, I find that McCammon was not so impaired during the interview that his will was overborne.

During the interview, McCammon made eye contact, tracked the conversation, laughed at jokes, made up a story that he had been set up and described his awareness of his predicament. He specifically rejected certain requests, including a request to look at photos to identify “Jazzy.” While refusing requests to provide cooperation, he continued to speak with Tyler. When Tyler suggested at one point that they continue the discussion the following day, once McCammon was completely sober, McCammon insisted that the interview should continue.

These circumstances demonstrate that McCammon was not so impaired that his will was overborne and his statement could only be described as involuntary. Moreover, as noted above, a statement cannot be rendered involuntary by the incapacity of the suspect alone; there must be some coercive police activity. *See Connelly*, 479 U.S. at 167. (“Coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.”). Of course, “[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.” *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). A statement is not rendered involuntary or a due process violation merely because law

enforcement conducts an interview. *See Simmons v. Bowersox*, 235 F.3d 1124, 1132 (8th Cir.), *cert. denied*, 534 U.S. 924 (2001) (“A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant’s will and critically impair his capacity for self-determination.”).

The alleged coercive police activity here is Tyler’s questioning of McCammon with the knowledge that he was impaired and had only recently regained consciousness, along with the presence of another officer in the hospital room during the interview. These undisputed circumstances fall far short of “coercive” conduct. McCammon gave no indication that he was intimidated in any way by Tyler or Koehler. He stated that he knew he did not have to speak to Tyler. He then joked with Tyler, corrected Koehler when he stated that McCammon could not remember his phone number, complimented Tyler on his interviewing technique and refused to look at photographs or otherwise cooperate. Nor does the presence of two officers in a hospital room, interviewing an unrestrained suspect, suggest coercive conduct. *See, e.g., United States v. Harper*, 466 F.3d 634, 644 (8th Cir. 2006) (finding that two officers standing closely over the defendant as he lay on the ground handcuffed shortly before he made a statement was not coercive).

In short, I find that the Government has met its burden of proving by a preponderance of the evidence that McCammon’s statements were voluntary. The evidence demonstrates that McCammon’s will was not overborne under the circumstances due to either drug intoxication or the actions of the officers. Instead, viewing the totality of the circumstances, I find McCammon’s statements were “the product of an essentially free and unconstrained choice.” *Schneckloth*, 412 U.S. at 225.

B. *Did McCammon Provide a Voluntary, Knowing and Intelligent Waiver of His Miranda Rights?*

McCammon also argues his statements should be suppressed because he did not voluntarily, knowingly and intelligently waive his *Miranda* rights. Under *Miranda*, a suspect in custody must be advised as follows:

He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 479 (1966). A suspect may waive these rights if the waiver is made voluntarily, knowingly and intelligently. *Id.* at 444. “[A] waiver is ‘voluntary’ where the court can determine that the waiver was a product of the suspect’s free and deliberate choice, and not the product of intimidation, coercion, or deception.” *Thai v. Mapes*, 412 F.3d 970, 977 (8th Cir. 2005). “A waiver is ‘knowing and intelligent’ where it is made with full awareness of both the nature of the right being abandoned and the consequences of abandoning the right.” *Id.* A waiver of *Miranda* rights may be either express or implied. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2261-62 (2010) (“Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”). The government “need prove waiver only by a preponderance of the evidence.” *Connelly*, 479 U.S. at 168.

McCammon argues his waiver was not voluntary, knowing and intelligent because he was intoxicated on several substances and had been unconscious shortly before he was questioned. It is undisputed that McCammon did not waive his *Miranda* rights when they were read to him at the restaurant parking lot. At that time, McCammon was unresponsive when Koehler asked him if he understood his rights. McCammon could not sit up on his own, keep his eyes open or speak in complete

sentences. However, the circumstances were much different when Tyler advised McCammon of his rights at the hospital at approximately 2:00 a.m. By that time, Harstad had already spoken with McCammon, found him to be alert and aware enough to give consent to withdraw a specimen, and obtained McCammon's written consent. Tyler then read McCammon his *Miranda* rights and asked McCammon if he understood those rights. McCammon stated that he did. McCammon also colorfully described his understanding of those rights by stating he could tell Tyler to "fuck off." Despite that understanding, McCammon began answering Tyler's questions.

As discussed above, McCammon made appropriate eye contact and tracked questions during the interview. He gave logical and appropriate responses to questions. He stated that he knew Tyler worked for the DEA, acknowledged that he was not allowed to be around firearms and made it clear that he knew he was facing serious consequences. He did not meekly comply with all requests, instead stating his refusal to provide cooperation to implicate others. He even demanded that the interview continue, and assured Tyler he was "good," after Tyler suggested that they stop for the night. Moreover, the fact that McCammon has a lengthy criminal record is another factor that weighs in the Government's favor. *See, e.g., Stumes v. Solem*, 752 F.2d 317, 320 (8th Cir. 1985) (the background, experience and conduct of the accused are relevant to determining whether the accused knowingly and voluntarily waived his *Miranda* rights). This was not McCammon's first encounter with law enforcement. Various statements made during the interview demonstrate that he was well aware of his rights, yet he continued to talk with Tyler.

For all of these reasons, I find that the Government has met its burden of proving by a preponderance of the evidence that McCammon voluntarily, knowingly

and intelligently waived his *Miranda* rights at the hospital, prior to making incriminating statements. As such, suppression of those statements is not required.³

IV. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, I find that McCammon's statements and the evidence recovered from his residence should not be suppressed and **RESPECTFULLY RECOMMEND** that McCammon's motion to suppress (Doc. No. 10) be **denied**.

IMPORTANT NOTE: Because this case is scheduled for trial beginning March 3, 2014, objections to this Report and Recommendation must be filed by **February 4, 2014**. Responses to objections must be filed by **February 14, 2014**. Any party planning to lodge an objection to this Report and Recommendation must order a transcript of the hearing promptly, but not later than **January 30, 2014**, **regardless of whether the party believes a transcript is necessary to argue the objection**. If an attorney files an objection without having ordered the transcript as required by this order, the court may impose sanctions on the attorney.

IT IS SO ORDERED.

DATED this 23rd day of January, 2014.



LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE

³ Even if McCammon's statements at the hospital were to be suppressed, I would not recommend the suppression of evidence discovered later at his residence. McCammon does not challenge the searches of his person and vehicle, which resulted in the discovery of numerous incriminating items. Had he made no statements at the hospital, a lawful search of his residence almost certainly would have occurred based on these other items. Thus, I find that the evidence found in McCammon's residence is subject to the inevitable discovery doctrine. *See, e.g., Nix v. Williams*, 467 U.S. 431, 444 (1984).