

VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY, JUNE 4, 1990

COMMONWEALTH OF VIRGINIA)

v.)

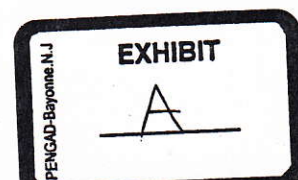
JENS SOERING)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON MOTION TO SUPPRESS
STATEMENTS OF THE ACCUSED

Facts and Proceedings

The defense filed pre-trial motions to suppress incriminating statements made by the accused, Jens Soering, in 1986 in London, England. Evidence was heard on the motions in this Court on March 1, 2, 3, and 5, 1990. Scotland Yard detectives, the accused, and others testified. The focus of the statements was on the murder of Elizabeth Haysom's parents in Bedford County, Virginia, in March of 1985. Elizabeth Haysom, Soering's companion at the time, waived extradition and pled guilty to her involvement in the crimes and is now serving a ninety-year penitentiary sentence. Soering's trial is scheduled in this Court for June 1, 1990, before a jury brought in from another county.

On April 30, 1986, the defendant, a German national, was arrested with Elizabeth Haysom and both were incarcerated in England pending trial on check fraud charges. While incarcerated, the defendant was questioned by British officials and by Ricky Gardner, a representative of the Bedford County Sheriff's Department, regarding the deaths of the parents of his then girlfriend, Elizabeth Haysom.



The defendant was represented by a British solicitor at a hearing before a magistrate regarding his transfer from the prison authority to the control of the London Metropolitan Police to facilitate questioning about the Bedford County matter. Upon his arrival at the police station on June 5, 1986, the defendant signed a custody form indicating that he had been provided with his rights under British law and that he did not want a solicitor at that time. Elizabeth Haysom signed a form requesting an attorney and was furnished one.

The defendant was questioned by or volunteered information to members of the London Police and Ricky Gardner on several occasions between June 5, and June 9, 1986, before he was formally charged in connection with the Bedford County murders.

The defendant signed several Miranda forms. Counsel was never appointed for him on the murder charges while he was in custody. However, he had not been charged with the Virginia crimes at the time of questioning in June, 1986.

Findings of Fact

A threshold issue needs to be decided because it could affect other rulings as to the voluntariness of the statements. The evidence at the March 1, 1990, hearing was in direct conflict on this factual issue, and thus the Court must make a decision based on credibility and the totality of the circumstances.

Jens Soering testified that on the evening of the first day he was interviewed by Bedford County authorities in London, a

Scotland Yard detective, Kenneth Beever, made threats to him to the effect that physical harm would come to Elizabeth Haysom, also in jail, if he (Soering) did not cooperate and waive his rights to counsel.

Simply stated, I do not believe Soering on this issue. He produced no corroboration, written or oral. The officer emphatically denied making such statement, and the subsequent taped interviews which the Court listened to for five hours gave no suggestion that Soering was acting under duress at any time. Further, he has been previously convicted of a crime of moral turpitude which affects his credibility under Virginia law. Additionally, his concern for Elizabeth Haysom at the time seems strange since he freely implicated her in his early statements to police.

Another threshold matter needs to be considered, and that is the application of the recent United States Supreme Court case of United States v. Verdugo-Urquidez, ___ U.S. ___ (Record No. 88-1353, decided Feb. 28, 1990). In that case, the Court held that the Fourth Amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States. The question presented here is whether the defendant is entitled to the protections of Fifth and Sixth Amendment right to counsel under the U. S. Constitution during an interrogation which took place in a prison outside the United States.

The Supreme Court's decision in United States v. Verdugo-Urquidez appears to leave unanswered the question of whether aliens abroad are protected by the Fifth and Sixth Amendments. Aliens who live in the United States, legally or illegally, have arguably established certain ties with this country warranting extension of certain constitutional rights to them. Aliens abroad, however, generally lack any connection to this country until government activity affects them in some manner.

Although the applicability of the Fourth Amendment to an alien abroad was the sole issue before the Court, dicta in Verdugo-Urquidez suggest that a different result would ensue if the Fifth or Sixth Amendments were at issue. The Court recognized that while a violation of the Fourth Amendment occurs at the place of an illegal search and seizure, violations of the Fifth and Sixth Amendments take place at the time of trial. Thus, the fact that a defendant is tried in the United States or in a court established under its authority appears to warrant extension of the foregoing trial-related rights to a noncitizen.

Because, as yet, there is no case authority to clarify Verdugo-Urquidez, this Court is not certain of its application to the case at bar. This Court's decision does not turn on the Verdugo-Urquidez case, however, since it finds persuasive the arguments against application in the defendant's briefs.

The defendant's Sixth Amendment right to counsel had not attached at the time the incriminating statements were made. However, he was entitled to the assistance of counsel under the

Fifth and Fourteenth Amendments by virtue of the custodial interrogation. As the defense argues, under Miranda and Edwards, any waiver of the right to counsel must be voluntary, knowing, and intelligent relinquishment, and is appraised based upon the totality of the circumstances. Since the defendant testified and admitted at the hearing in this Court that he understood his rights but did not intend to waive them, the real issue here as framed by the defendant, is waiver. Limited rather than blanket waiver is at issue.

Based upon all the evidence heard and the tapes, this Court concludes that Jens Soering never demanded counsel before agreeing to interrogation. He initiated most of the interviews himself, and he seemed quite anxious to talk about the crimes. He was never mistreated during the interviews, and frequent breaks were taken. There was nothing unusual about the place or circumstances under which he was questioned except that he was already in jail because of a prior offense. He was not under the influence of drugs or alcohol or affected by any mental disability. He seemed unable or unwilling to discuss the details of the crimes themselves. He refused to answer questions as to such details and asked for a lawyer. The interviews stopped when he said. He never obtained a lawyer and he never discussed certain aspects of the case. In summary, this is what occurred as this Court views the evidence.

The United States Supreme Court and the Virginia Supreme Court have recognized instances of limited waivers of the right to counsel. In those cases, the defendants demonstrated a willingness

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to discuss certain matters with police without an attorney present and remain silent as to other matters. The Courts held that these were indeed limited waivers, and that questioning could proceed in regard to the matters which the defendants had agreed to discuss.

To determine whether the instant case comports with the limited waiver cases, a factual determination must be made as to whether the defendant actually understood his rights to counsel and to remain silent, and whether he waived them according to the standards set out in Zerbst and subsequent cases. The defendant was an intelligent person who understood his rights to counsel and right to remain silent. The main issue is waiver.

At the time he made inculpatory statements concerning the Bedford County matter, the defendant was incarcerated on unrelated charges and had not been formally charged with the murders. The right to counsel under the Sixth Amendment has been held to arise at or after the time that judicial proceedings have been initiated against an accused, whether by way of formal charge, preliminary hearing, indictment, or arraignment. United States v. Gouveia, 467 U.S. 180, 104 S.Ct. 2292 (1984); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977). Hence, because the defendant had not been formally charged with the homicides, his Sixth Amendment right to counsel had not attached with respect to the Virginia charges at the time of the interviews. However, for custodial interrogation, he had the right to counsel under the Fifth and Fourteenth Amendments.

In the seminal case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Supreme Court determined that the Fifth Amendment's prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the defendant of his rights to remain silent and his right to the assistance of counsel. Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 1612. Under Miranda, the prosecution may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Id. at 1612. The defendant may waive his right to remain silent and his right to an attorney, provided the waiver is made knowingly and intelligently. Id. If, however, the individual indicates that he wishes to remain silent, the police may not question him. Id. Likewise, if he indicates at any time and in any manner that he wishes to consult with an attorney, all questions must cease. Id. The Court stated that its aim in imposing procedural safeguards was to assure that "the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." Id. at 1625. Thus, the right to counsel under the Fifth and Fourteenth Amendments necessarily comprehends the right to consult with counsel prior to questioning as well as the right to have counsel present during any questioning if the defendant so desires. Id. at 1625-26.

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The defendant may waive his rights to remain silent and to be represented by counsel, provided the waiver is made voluntarily, knowingly, and intelligently. Miranda, 86 S.Ct. at 1612. The Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938), defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." 58 S.Ct. at 1023. There is a presumption against waiver. Id. If the defendant indicates in any manner, at any stage of the process, that he wishes to consult with an attorney, questioning must cease. Miranda, 86 S.Ct. at 1612.

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), a case relied on by the defense, the Court held that where defendant had made an unqualified request to have counsel present during any custodial interrogation, a valid waiver could not be established by showing that he responded to police-initiated interrogation after being advised of his rights (emphasis added). Edwards agreed to submit to questioning by the police after having been read his rights. Id. at 1882. He subsequently indicated that he wanted an attorney, and questioning ceased. Id. The next morning, he was questioned by two detectives who were unaware of his previous request for counsel (emphasis added), and he thereafter gave an incriminating statement. Id. The United States Supreme Court found that Edwards had asserted his rights to counsel and to remain silent upon his arrival at the police station, and that he did not waive those rights on the following day when he responded to the detectives' questions. Id. at 1883-84.

The Court in Edwards reiterated the requirement that a waiver of the right to counsel must "not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. at 1884 (citations omitted). The Court also noted that the voluntariness of an admission and whether a knowing and intelligent waiver has been made are separate inquiries. Id. Once an accused has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Id. at 1885 (emphasis added). The Court noted that if Edwards had initiated the meeting with the detectives on the morning following his incarceration, "nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at trial. Id. There are obvious factual distinctions between this case and Edwards."

Whether there has been an intelligent waiver depends upon the particular facts of each case, "including the background, experience, and conduct of the accused." Johnson v. Zerbst, 58 S.Ct. at 1023. The Court has adopted a two-part inquiry into whether an accused has waived his right to counsel:

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. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1141 (1986) (citation omitted).

In examining the totality of the circumstances surrounding a waiver, a court must consider a myriad of factors, including the defendant's age, intelligence, background and experience with the criminal justice system, the purpose and flagrancy of any police misconduct, and the length of the interview.

The defense argues that the initial statement given by Soering taints the other statements. Since there was no coercive conduct, this argument is refuted by the holding in Oregon v. Elstad, 470 U.S. 298 (1985).

In Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828 (1987), after the suspect was advised of his rights, he told police on three occasions in the same day that he would talk to them about the incident but would give no written statement without an attorney present. Id. at 830. The trial court found that Barrett's decision to make no written statement without his attorney indicate[d] that he understood from having his rights read to him that he was under no obligation to give any statement. Id. at 830-31. The Supreme Court agreed that Barrett had made clear his willingness to talk to police, and it found no indication that his waiver of rights was other than voluntary. Id. at 831. The Court further noted that Barrett's limited requests for counsel:

were accompanied by affirmative announcements of his willingness to speak with the authorities. The fact that officials took the opportunity provided by Barrett to obtain an oral confession is quite consistent with the Fifth Amendment. Miranda gives the defendant a right to choose between speech and silence, and Barrett chose to speak (emphasis added).

Id. at 832. The parameters of Barrett's limited request did not render it equivocal or ambiguous. Id. Furthermore, the Court found that the distinction drawn by the suspect between written and oral statements was irrelevant to the question of the existence of a voluntary waiver. Id. at 832-33.

In a similar vein, in United States v. Jardina, 747 F.2d 945 (5th Cir. 1984), the defendant, after being advised of his rights, told police that he would decide which questions to answer, exercising this option at such times as he chose. Id. at 948. The defendant subsequently made inculpatory statements which were admitted at trial. The Fifth Circuit noted that:

if an accused equivocally invokes the right to counsel, future questioning of the suspect must be limited to clarifying whether the person wants to consult with an attorney. Further interrogation cannot be used as a means of eliciting any incriminating statements from the suspect relating to the subject matter of the interrogation.

Id. (citing United States v. Cherry, 733 F.2d 1124, 1130 (5th Cir. 1984)). The Fifth Circuit found the holding in Cherry inapplicable to the issue in Jardina, noting that Jardina never requested that counsel be present at the ongoing questioning. Id. at 949. The defendant "stated without the slightest ambiguity that he would then and there answer some questions but not others." Id. Accordingly, his statements and actions did not invoke any present

right to counsel. Id. The Court found, therefore, that the defendant had "selectively waived his right to remain silent by indicating that he would respond to some questions and not to others, and by exercising his voluntarily created option." Id. Based upon the evidence at the pre-trial hearing, the holding in Jardina is persuasive. Jens Soering understood his right to remain silent. He was in selective control during the interviews.¹

In United States v. Eirin, 778 F.2d 722 (11th Cir. 1985), the defendant was advised of his rights pursuant to Miranda but refused to sign a waiver form "until an attorney told him to sign it." Id. at 727. The defendant thereafter responded to questions regarding his business and interests, but refused to talk about his brother without an attorney present. Id. at 728. The Eleventh Circuit found that refusal to sign a waiver of rights form without an attorney's guidance did not amount to an affirmative request for the assistance of counsel at that time. Id. The Court recognized that the defendant's decision to selectively answer questions excluding specific inquiries related to his brother "evidence[d] his understanding that he [was] not obligated to respond to any question, either with or without the presence of an attorney. Id. Thus, the Court held that the statements were not obtained in violation of the defendant's rights and could be used at trial.

The Supreme Court has held that whenever the State bears the burden of proof in a motion to suppress a statement that the

¹Mundy v. Commonwealth, 6 V.L.R. 1890 (Court of Appeals April 3, 1990 is not relied upon since it is now scheduled for a rehearing en banc).

defendant claims was obtained in violation of Miranda, the state need prove waiver only by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 523 (1986). The burden of proving waiver seems to be the same in Virginia. Rodgers v. Virginia, 227 Va. 605, 608 (1984).

In Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093 (1988), cited by the defense, the defendant was arrested at the scene of the crime and advised of his rights. He indicated that he wanted a lawyer before answering any questions. Subsequently, while in custody and after waiving his right to counsel, he was interrogated by an officer who was unaware of his request for counsel about a different offense. The Court held that the rule of Edwards v. Arizona barred police-initiated interrogation following a suspect's request for counsel.

The Soering case differs from Roberson on several grounds. First, it is unlikely that the defendant has a Sixth Amendment right with respect to the check fraud charges brought against him by England. Rights under the United States Constitution extend to noncitizens abroad in certain situations, but only with respect to charges of violations of United States laws. Second, even if the defendant had Sixth Amendment rights regarding the English charges, it does not appear anywhere in the record that he refused to answer any questions concerning those charges without a lawyer present. Roberson stands for the proposition that where a person in custody has requested the assistance of counsel after being charged with an offense, the police-initiated interrogation of him regarding an

unrelated investigation is prohibited. As mentioned above, it appears that the defendant in the instant case was entitled to the protection of the Fifth Amendment by virtue of his being in custody, but there was no blanket refusal by Soering to answer any questions without a lawyer.

Conclusion

It was the burden of the Commonwealth to prove by a preponderance of the evidence that the statements were voluntarily. Griggs v. Commonwealth, 220 Va. 46, 234 Va. 172 (1979), and the Commonwealth must offer corroboration. Phillips v. Commonwealth, 202 Va. 207. By written and oral evidence it has done both. Any presumption against effective waiver has been overcome. Jens Soering, a highly intelligent person with previous experience in court on unrelated check fraud charges, admitted his knowledge of Miranda rights in England and while testifying in this Court. He selectively waived his right to counsel and right to remain silent when he freely discussed certain aspects of the crime with the police. He initiated most of the interviews. As to others, he participated freely even playing "word games" with the police on occasion. The police questioning was persistent, but the police had a right to aggressively try to solve the crimes within constitutional limits. Jens Soering made limited requests for counsel and decided for himself where the limits would be. This Court finds from the tapes and the evidence that Jens Soering answered certain questions and volunteered other answers with full

knowledge of all his constitutional rights. As to other questions, he chose to remain silent and requested an attorney. Transcripts of evidence show that in such instances questioning stopped as to such questions.

This Court finds that Soering's statements were "the product of an essentially free and unconstrained choice and were not produced by coercion in which his will was overcome and his capacity for self-determination critically impaired . . ." See Goodwin v. Commonwealth, 3 Va. App. 249, 349 S.E.2d 161 (1986).

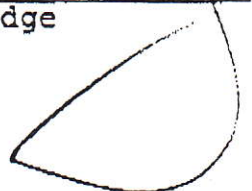
For whatever reason, Jens Soering seemed anxious in England to implicate himself to a certain point in the crimes and then stop. He admitted being at the murder scene but refused to say whether he was the killer. A jury must decide that. Under Connecticut v. Barrett, United States v. Jardina, and other authority cited here and in counsel briefs, he made an effective limited waiver.

The defendant made six statements. The third, fourth and fifth statements were taped. The last statement was not taped at the defendant's request. There were three statements given on June 5, 1986, beginning respectively at 3:35 p.m., 6:00 p.m., and 8:05 p.m. On June 6th, 7th and 8th, 1986, there was one statement given each day.

This Court finds that the last four statements were initiated by the defendant. Because of concern for the reliability and accuracy of unrecorded statements made without the defendant's

request, only the last four statements will be admitted as evidence at this trial.


William W. Sweeney, Judge



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