

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 15-cr-00212 MCA

vs.

JAMAICO TENNISON,

Defendant.

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS MADE ON JUNE 11, 2014

Mr. Jamaica Tennison, by and through undersigned counsel and pursuant to the Fifth Amendment to the U.S. Constitution, *Miranda v. Arizona*, 384 U.S. 436 (1966), and 18 U.S.C. § 3501, respectfully moves the Court to suppress all inculpatory statements made by Mr. Tennison on June 11, 2014.

BACKGROUND

I. The Alleged April 18, 2014 Incident.

Mr. Tennison's common-law wife is Dorothea Spencer. Mr. Tennison and Ms. Spencer have been in a relationship for numerous years and have had five young children together. Prior to his arrest in the instant case, Mr. Tennison was living with Ms. Spencer and his five children on the same small plot of land on which he grew up outside of Gallup, New Mexico.

On Friday, April 18, 2014, Ms. Spencer's four-year-old niece, K.C. and approximately nine-year-old nephew, J.C. spent the night at Mr. Tennison and Ms. Spencer's home. After playing together, the entire family went to sleep in Mr. Tennison and Ms. Spencer's bedroom. Mr. Tennison and Ms. Spencer went to bed with their youngest child between them. The next

oldest child went to sleep in a small bed next to the master bed, and the five older children, including K.C., went to sleep at the foot of the bed.

According to the government, on Sunday, April 20, 2014, K.C. told her mother that Mr. Tennison had touched her private area over the top of her pajamas. The contact was alleged to have occurred in Mr. Tennison's bedroom while Ms. Spencer and the other children were sleeping. Mr. Tennison learned about the allegation later the same day. Later on April 20, 2014, K.C. underwent a "SANE" examination. The examination purportedly revealed redness on both of K.C.'s labia minora. On April 25, 2014, K.C. underwent a forensic interview during which she stated that Mr. Tennison had "touched [her] pee-pee" with his hand one time over the top of her pajamas. K.C. also stated that Mr. Tennison had "scratched" her "pee pee" with his "long nails." K.C. stated that this occurred while the other people in the room were sleeping.

II. Mr. Tennison's May 15, 2014 Interrogation.

On May 15, 2014, FBI Special Agent Matthew Schaeffer went by Mr. Tennison's house while Mr. Tennison was out. SA Schaeffer left his card with Mr. Tennison's brother, Jonah, and asked Jonah to have Mr. Tennison call him. When Mr. Tennison returned the call, SA Schaeffer asked Mr. Tennison to come by his office in Gallup because he needed to ask Mr. Tennison some questions. Mr. Tennison asked SA Schaeffer whether he needed a lawyer. SA Schaeffer responded by telling Mr. Tennison that he "didn't really need one."

Mr. Tennison went to SA Schaeffer's office in Gallup later that day where SA Schaeffer confronted Mr. Tennison with K.C.'s allegation. Mr. Tennison steadfastly denied that he had touched K.C. inappropriately. SA Schaeffer told Mr. Tennison that the FBI had "physical evidence that she was touched" and that "if you just say, no, nothing happened, that's it," the situation was "not going to go away because I have this other evidence." SA Schaeffer told Mr.

Tennison that he would have to “submit [his] findings to the United States Attorney’s Office [USAO],” that the USAO would “make a decision whether or not to prosecute,” and that the process was “long” and “drawn out.” SA Schaeffer told Mr. Tennison that “it’s not something you really want to go through.” Mr. Tennison refused SA Schaeffer’s invitation to tell him that he may have touched K.C. “by mistake.” SA Schaeffer then said: “Do you understand what’s going to happen now? If I don’t have your side of the story with this, do you understand what’s going to happen? This case isn’t going to go away.” With Mr. Tennison steadfastly maintaining that he did nothing wrong, SA Schaeffer continued to attempt to elicit incriminating statements from Mr. Tennison:

No, you’re not telling me like it is because if you were telling me like it is, we’d be further along right now, okay? Now, something happened. I’m positive something happened. Whether it was an intentional incident, an accidental incident, you know what I mean? That’s what I’m trying to figure out right now. Okay? I know something happened because I have the evidence that something happened, and a four-year-old girl is not going to sit there repeatedly saying, you know, that [Mr. Tennison] touched me.

Still, Mr. Tennison did not budge. Undeterred, SA Schaeffer continued:

Look, dude, I don’t think that, you know, you’re a pedophile. You know what I mean? I don’t think that you intentionally, you know, tried to have sex with her or anything like that. But I do think that you touched her. It may have been an accident, and if it was an accident that’s fine. If you screwed up, that’s fine, you know what I mean? But I need to hear that.

Mr. Tennison responded: “I didn’t do nothing like that, sir. You’re just trying to put words in my mouth, man.” SA Shaeffer claimed that he was not attempting to put words in Mr.

Tennison’s mouth, but simply was “trying to get to the bottom of why [he has] physical evidence and a little four-year-old girl saying that [Mr. Tennison] touched her.” Mr. Tennison followed up:

Yeah, and that's my question too. . . . I don't know. Maybe her parents did something. I don't know, sir, I just — this is really wrong. This is wrong, man, that you just are really putting words in my mouth, man. . . . You know, man, I didn't do anything, sir. That's all I could say. That's all I'm saying right now.

The conversation ended by SA Schaeffer telling Mr. Tennison that if he “was dead set” that he did nothing wrong, it “would help [him] tremendously [to] clear this up” if Mr. Tennison took a “lie detector test” at a future date. Still angry that SA Schaeffer was attempting to put words in his mouth, Mr. Tennison said he was “cool with that” as he left the room and slammed the door behind him. SA Schaeffer followed Mr. Tennison down the hall and continued to badger Mr. Tennison with questions. Mr. Tennison told SA Schaeffer that he was not going to answer any more questions without a lawyer present.

III. Mr. Tennison's June 11, 2014 Polygraph and Interrogation.

Within a couple of weeks of the May 15, 2014 interrogation, Mr. Tennison's brother, Jonah, was hospitalized in Albuquerque after falling into a coma. Because doctors did not believe Jonah was going to recover, Mr. Tennison and Ms. Spencer lived out of hotels in Albuquerque over a period of weeks while looking over Jonah.

In June 2014, while Mr. Tennison was still in Albuquerque, SA Schaeffer called Mr. Tennison numerous times in an attempt to have Mr. Tennison return to Gallup to take a polygraph examination. Mr. Tennison told SA Schaeffer about Jonah and SA Schaeffer knew that Mr. Tennison was upset about Jonah's wellbeing. Nonetheless, SA Schaeffer insisted that Mr. Tennison return to Gallup to take a polygraph. SA Schaeffer continued to insist to Mr. Tennison that the situation would not go away unless Mr. Tennison took a polygraph test. Mr. Tennison asked SA Schaeffer whether he needed a lawyer. SA Schaeffer told Mr. Tennison,

“no, but once you pass you can leave.” Mr. Tennison yielded to SA Schaeffer’s insistence and, on June 11, 2014, returned to Gallup to take a polygraph test.

The polygraph test was conducted by FBI Special Agent Jennifer Sullivan. Prior to taking the polygraph test, Mr. Tennison signed a “Consent to interview with Polygraph” form ((the “Consent Form”) attached as Exhibit A), and an “Advice of Rights” form ((the “Advice Form”) attached as Exhibit B). The Consent Form and Advice Form provided that Mr. Tennison agreed to answer questions during the polygraph examination, and that he understood his rights before taking the polygraph. The Advice Form specifically provided: “If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.” Neither form indicated to Mr. Tennison that SA Sullivan and SA Schaeffer would conduct a follow-up interrogation after the conclusion of the polygraph.

Prior to the commencement of the polygraph, Mr. Tennison asked to have a lawyer appointed to him. SA Sullivan responded by stating: “we don’t appoint lawyers.” Because he was tired of getting badgered by SA Schaeffer, because he had driven all the way to Gallup notwithstanding his dying brother, and because he believed he had done nothing wrong, Mr. Tennison proceeded to take the polygraph notwithstanding SA Sullivan’s refusal to appoint him a lawyer.

At the conclusion of the polygraph, SA Sullivan repeatedly told Mr. Tennison that he had “failed” the polygraph “miserably.” SA Sullivan showed Mr. Tennison the charts on her computer screen indicating his purported deception. Like he had done with SA Schaeffer, Mr. Tennison steadfastly maintained that he had done nothing wrong. SA Sullivan, however, kept referring Mr. Tennison to her determination that he had “failed” the polygraph “miserably.” During her interrogation after the polygraph, SA Sullivan repeatedly would say, among other

things, things such as: “Why would K.C. say that?,” “you can go to jail for a really long time,” “you can go to jail for lying,” “be honest with me and we can help you,” “it’s OK if you barely touched her on the top of her clothing,” and “we can make this all go away.” Like SA Schaeffer had done a month before the polygraph examination when Mr. Tennison repeatedly stated that he had done nothing wrong, SA Sullivan would tell Mr. Tennison things like: “that’s not what I want to hear,” and “this is not going to go away.” SA Sullivan repeatedly told Mr. Tennison the specifics of what K.C. had said. At some point, SA Sullivan showed Mr. Tennison select portions of K.C.’s forensic interview.

Mr. Tennison finally yielded to SA Sullivan’s pressure. Mr. Tennison told SA Sullivan that if she wanted “to hear bullshit, fine, I barely touched her.” SA Sullivan persisted in her questioning and Mr. Tennison filled in details as suggested by SA Sullivan. SA Sullivan suggested to Mr. Tennison that he was drunk and “horny,” so he decided to touch K.C.’s private area over the top of her pajamas. Mr. Tennison agreed with SA Sullivan. SA Sullivan wanted Mr. Tennison to write an “apology” letter to K.C. but Mr. Tennison refused. SA Sullivan told Mr. Tennison that she would write the letter on his behalf and he could sign it.

SA Sullivan did not record the polygraph exam or the post-polygraph interrogation in any audio/visual medium. Subsequent to obtaining a “confession” from Mr. Tennison, SA Sullivan suggested to Mr. Tennison that he “apologize” to SA Schaeffer for “lying” to him on May 15, 2014. SA Schaeffer returned to the room and audio recorded the “confession” that SA Sullivan had obtained from Mr. Tennison and Mr. Tennison’s “apology” to SA Schaeffer. Much of Mr. Tennison’s recorded “confession” was SA Sullivan telling SA Schaeffer what Mr. Tennison had purportedly said during her unrecorded interrogation of Mr. Tennison, and Mr. Tennison responding to SA Sullivan and SA Schaeffer’s leading questions.

IV. Events Following Mr. Tennison's Purported Confession.

Even though Mr. Tennison purportedly confessed on June 11, 2014 to inappropriate sexual contact with K.C. on April 18, 2014, the government did not indict Mr. Tennison until January 21, 2015. (*See* Doc. 2.) Mr. Tennison was arrested at his home on January 23, 2015, and arraigned on January 28, 2015. (*See* Docs. 4 and 9.)

On June 15, 2015, Mr. Tennison's polygraph expert, Charles R. Honts, Ph.D., reviewed and independently scored the data SA Sullivan electronically recorded during Mr. Tennison's polygraph. On July 13, 2015, Dr. Honts executed a declaration, (the "Honts Declaration" (attached as Exhibit C)), setting forth his significant findings. The Honts Declaration reveals numerous deficiencies in the procedures SA Sullivan used in polygraphing Mr. Tennison. (*Id.* ¶¶ 16-29, at 6-10.) It also reveals that SA Sullivan lied to Mr. Tennison when she repeatedly told Mr. Tennison that he had "failed" his polygraph "miserably." (*See Id.* ¶¶ 30-35, at 10-11.) Dr. Honts's expert opinion is that "the data from the Tennison examination are inconclusive. **They clearly do not indicate deception.**" (*Id.* ¶ 34, at 11.)

ARGUMENT

I. The Statements Mr. Tennison Made on June 11, 2014 Should be Suppressed Because Mr. Tennison Did Not Voluntarily Waive His Fifth Amendment Right to Counsel.

"[O]nce a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided unless the suspect himself initiates dialogue with the authorities." *Wyrick v. Fields*, 459 U.S. 42, 45-46 (1982). Likewise, a waiver of rights is invalid when government agents affirmatively contradict the language contained in the waiver. *See United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991); *see also United States v. Womack*,

542 F.2d 1047, 1050-51 (9th Cir. 1976) (holding waiver invalid where police action negated assertion that defendant had a right to counsel).

In this case, Mr. Tennison invoked his right to counsel when, consistent with the Advice Form, Mr. Tennison requested that he be appointed counsel prior to taking the polygraph. Notwithstanding that invocation, and notwithstanding the plain language of the Advice Form, SA Sullivan told Mr. Tennison that he would not be appointed an attorney. Accordingly, any purported waiver that Mr. Tennison made of his rights prior to the commencement of the polygraph examination was ineffective and the Court should order Mr. Tennison's June 11, 2014 statements suppressed.

Moreover, even assuming SA Sullivan obtained a valid waiver of Mr. Tennison's rights before taking the polygraph examination, Mr. Tennison did not waive his rights prior to being interrogated upon the conclusion of the polygraph. Courts have held in circumstances like those faced by Mr. Tennison on June 11, 2014:

In determining whether a defendant waived his or her *Miranda* rights relative to a post-polygraph interrogation, courts should consider (1) which party requested the polygraph; (2) whether the defendant was represented by counsel; (3) whether the defendant was adequately informed about the post-polygraph interrogation; and (4) whether the post-polygraph interrogation was conducted by the same individual as the one conducting the polygraph examination.

United States v. Vaile, 2008 WL 3891587, at *5 (D. Idaho 2008) (citing *United States v. Gillyard*, 726 F.2d 1426, 1429 (9th Cir. 1984)); *see also, e.g., United States v. Johnson*, 816 F.2d 918, 921 n.4 (3d Cir. 1987).

Like other cases involving similar facts, the Consent Form signed by Mr. Tennison “says nothing about a post-polygraph interrogation. It only references being ‘examined by means of the polygraph.’” *Vaile*, 2008 WL 3891587, at *6. Thus, under the totality of the

circumstances, Mr. Tennison's did not waive his Fifth Amendment right to counsel during the post-polygraph interrogation. *See id.*; *see also United States v. Vazquez*, 2007 WL 1655429, at *4 (S.D. Fla. 2007); *Gillyard*, 726 F.2d at 1429; *Johnson*, 816 F.2d at 921 n.4. As such, the statements Mr. Tennison made during the June 11, 2014 post-polygraph interrogation should be suppressed.

II. Notwithstanding *Miranda*, the Government Cannot Prove by a Preponderance That Mr. Tennison's June 11, 2014 Statements Were Voluntary.

Even assuming the dictates of *Miranda* were adhered to, the Due Process Clause of the Fifth Amendment bars the use of a defendant's statements that were involuntarily provided to law enforcement. In short, if a defendant's "will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) (internal quotation marks omitted). The same protections are afforded to defendants by statute. *See* 18 U.S.C. § 3501. Before being allowed to use a defendant's inculpatory statements at trial, the government must prove by a preponderance that the statements were given voluntarily. *See United States v. Lopez*, 437 F.3d 1059, 1063 (10th Cir. 2006). In determining whether a statement was voluntarily provided, courts must consider the totality of the circumstances. *See, e.g., United States v. Bundy*, 966 F. Supp. 2d 1180, 1182 (D.N.M. 2013) (Armijo, C.J.). Law enforcement's misrepresentation of material facts, combined with other factors such as suggestions of leniency, can suffice to render a statement involuntary even where a suspect was provided with adequate *Miranda* warnings. *See Lopez*, 437 F.3d at 1064-65; *see also Weidner v. Thieret*, 866 F.2d 958, 963 (7th Cir. 1989) ("Misrepresentations can [render a statement involuntary] by distorting the alternatives among which the person under interrogation is being asked to choose . . ."); *cf. Barrera v. Young*, 794

F.2d 1264, 1270 (7th Cir. 1986) (“We would have a harder case if Anderson lied about the results of Garcia’s [polygraph] test, for that would be trickery, but Anderson told the truth.”).

In this case, the purported “confession” Mr. Tennison provided to SA Sullivan and SA Schaeffer was involuntary. To obtain this confession, SA Sullivan repeatedly lied to Mr. Tennison about the results of the polygraph (and showed him the purported “evidence” revealing the purported deception). This ruse, combined with SA Sullivan’s suggestions of leniency to Mr. Tennison, was sufficient to render Mr. Tennison’s June 11, 2014 inculpatory statements involuntary. *See Lopez*, 437 F.3d at 1064-65; *Bundy*, 966 F. Supp. 2d at 1186-87; *see also, e.g., People v. Hughes*, 3 N.E.3d 297, 315-16 (Ill. App. Ct. 2013) *State v. Craig*, 864 P.2d 1240 ,1243 (Mont. 1993); *State v. Cayward*, 552 So.2d 971, 973-74 (Fla. Dist. Ct. App. 1989). As such, the Court should suppress any inculpatory statements made by Mr. Tennison on June 11, 2014.

CONCLUSION

WHEREFORE, for the foregoing reasons Mr. Tennison respectfully requests that the Court, after holding an evidentiary hearing, suppress all inculpatory statements made by Mr. Tennison on June 11, 2014.

Respectfully submitted,

/s/ Todd A. Coberly

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2015, I filed the foregoing *Defendant's Motion to Suppress Statements Made on June 11, 2014* using the CM/ECF system, which will electronically send notification of such filing to all counsel of record.

/s/ Todd A. Coberly
Todd A. Coberly