IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 4:19cr84
	)	
	)	
OBINWANNE OKEKE,	)	
	)	
Defendant.	)	

RESPONSE OF THE UNITED STATES TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

The United States of America, by and through its attorneys, G. Zachary Terwilliger, United States Attorney for the Eastern District of Virginia, and Brian J. Samuels, Assistant United States Attorney, and Matthew P. Mattis, Special Assistant United States Attorney, hereby responds to the Motion to Suppress Statements and Evidence filed by the Defendant Obinwanne Okeke (ECF 24). For the reasons stated herein, the United States respectfully requests that the Defendant's motion be denied.

BACKGROUND

At approximately 9:30 pm on August 6, 2019 the Defendant was arrested at Dulles International Airport pursuant to a sealed criminal complaint and arrest warrant. Customs and Border Protection (CBP) officers initially took custody of the Defendant prior to him boarding a departing flight. As part of their lawful arrest of the Defendant, numerous electronic/computer devices, including an IPhone and Macbook, all of which Mr. Okeke was carrying with him, were seized incident to his arrest. At approximately 10:30 pm CBP officers finished processing the Defendant at Dulles Airport and he was transferred to two FBI Special Agents. After taking

custody of the Defendant at approximately 10:30 pm, the Agents transported him to an FBI office on the Dulles Airport grounds.

Once the Agents and Defendant arrived at FBI office on the Dulles Airport property, Mr. Okeke was interviewed. Prior to interviewing him, Mr. Okeke was advised of his *Miranda* rights at approximately 11:35 pm. Defendant signed the advice of rights form indicating that he was willing to speak with the Agents. Accordingly, the Defendant was lawfully interviewed during which time he essentially denied any criminal actions or knowledge of such.

At the conclusion of the post-*Miranda* interview, the Agents transported the Defendant to the Alexander Detention Center at approximately 12:23 am on August 7 (so less than one hour after Mr. Okeke's interview began). They arrived at the Detention Center at approximately 12:59 am on August 7.

Just before Mr. Okeke was transferred custody to the Detention Center (ie., after he had waived his *Miranda* rights), he was asked for consent to search only his Apple Macbook Pro and IPhone. Consent was not requested for any other electronic devices Defendant may have been carrying and that were seized and later searched pursuant to the warrant. Again, Mr. Okeke voluntarily agreed, signed a consent to search computer(s) form. Consistent with Mr. Okeke's waiver of *Miranda* rights and his consent to search his devices, the Macbook and IPhone were searched.

On August 21, 2019, FBI Special Agent Marshall Ward presented a 23 page search warrant affidavit to the Honorable United States Magistrate Judge Lawrence R. Leonard. The extensive affidavit set forth the abundant probable cause that the FBI developed during their approximately year-long investigation into Mr. Okeke. This probable cause supported the search of the electronic/computer devices seized from Mr. Okeke during his arrest, including the IPhone and

Macbook. Accordingly, Special Agent Ward included the two devices (which are now at issue) in the search warrant affidavit. The search warrant was then signed by the Court.

DISCUSSION

Defendant's motion should be denied because the FBI Special Agents properly advised Mr. Okeke of his *Miranda* rights prior to interviewing him. In addition to properly advising the Defendant of his *Miranda* rights, the Agents properly obtained Defendant's consent to search the IPhone and Macbook. Consequently, any statement made by Mr. Okeke during his interview at the FBI's Dulles Airport office or after, during his transfer to the Alexandria Detention Center, where the consent to search form was completed, are lawful.

Further, Defendant's motion may also be denied due to the Independent Source doctrine. This is because during the approximately one year investigation the FBI established overwhelming probable cause supporting the search of all Mr. Okeke's electronic devices seized at Dulles Airport on August 6, 2019. This includes Mr. Okeke's IPhone and Macbook. Therefore, regardless of when the Defendant provided the passcodes for the IPhone and Macbook, regardless of when the passcodes were used to access the two devices, or even if instead of voluntarily waiving his rights and agreeing to speak with the Agents Defendant had refused and said nothing, evidence from an independent source supported the search warrant for all the devices seized. This includes the IPhone and Macbook. Accordingly, Mr. Okeke's motion may alternatively be denied on this basis.

Finally, assuming there was a *Miranda* violation, Defendant's motion to suppress may be denied because any evidence obtained from the Macbook and IPhone, after a hypothetical *Miranda* violation, would not be subject to the exclusionary rule. *See United States v. Patane*, 542 U.S. 630, 637 (2004); and *United States v. Hernandez*, 2018 WL 3862017, 18-cr-1888-L, (S.D. Ca. August 13, 2018). This is because the "fruit of the poisonous tree" doctrine does not apply to such

physical evidence derived from a *Miranda* violation where the statement is not coerced. Consequently, Defendant's motion may be denied for this reason, as well.

A. There Was No Miranda Violation

Defendant argues that he was not properly advised of his *Miranda* rights. The evidence demonstrates that this assertion is mistaken. Because Mr. Okeke was properly advised of, and waived, his *Miranda* rights prior to being interviewed and because the Agents properly obtained Defendant's consent to search the IPhone and Macbook, Defendant's motion must be denied.

The evidence will show that Mr. Okeke was properly advised of his *Miranda* rights on August 6, 2019 at approximately 11:35 pm. Mr. Okeke signed the advice of rights form documenting his waiver of rights and his agreement to being interviewed. There is no evidence that Defendant was coerced in any way. After being interviewed, Defendant was transferred to the Alexandria Detention Center at approximately 12:23 am on the morning of August 7, 2019.

It was at the Detention Center, after Defendant had been advised of his rights and waived them, that the consent to search form for the IPhone and Macbook was properly completed. Defendant's motion argues that it is unclear whether the consent to search form was completed on August 6 or 7 because on the consent to search form "8/6/2019" is crossed out and "8/7/2019" is written immediately to the right. In reality, there is no confusion as the August 6 date appears to be written by mistake, as noted by the initials adjacent to the handwritten date. Supporting this belief is that Special Agent Ward noted the location of the signed consent to search form as Alexandria. Thus, it appears the consent to search form was completed in Alexandria. Accordingly, the Agents properly advised Defendant of his *Miranda* rights and properly completed a consent to search form for the IPhone and Macbook. The Government respectfully requests the Court deny Defendant's motion to suppress.

B. Independent Source Doctrine

As described above, Mr. Okeke voluntarily waived his *Miranda* rights and agreed to speak with Agents and also consented to a search of his Macbook and IPhone. Defendant's motion should therefore be denied. However, even if Defendant gave his passcodes for the IPhone and the Macbook prior to waiving his *Miranda* rights and prior to the completion of the consent to search form, and even if the two devices were accessed before the rights' waivers, Defendant's motion should still be denied. This is because of the independent probable cause supporting the search of all the electronic devices seized from Defendant, including the IPhone and Macbook.

"The exclusionary rule does not apply when the government 'learn[s] of the [challenged] evidence from and independent source.'" *United States v. David*, 943 F. Supp. 1403, 1416 (E.D. Va. 1996) (citing to *Wong Sun v. United States*, 371 U.S. at 487). Further, "[a]lthough a 'but for' causation relationship between the challenged evidence and the illegal conduct is not itself sufficient to justify suppression, if no such 'but for' relationship exists, the evidence may be said to have come from an independent source." *United States v. David*, 943 F. Supp. at 1416 (citations omitted). Finally, the independent source doctrine "applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 537 (1988). Accordingly, even if the passcodes were provided before Defendant's respective waivers, and even if the devices were searched before the waivers, because 1. The Agents in the end properly obtained a *Miranda* waiver; 2. The Agents in the end properly obtain consent to search; and 3. (most importantly) Because the subsequent search warrant was based upon probable cause established prior to speaking with the Defendant and searching his Macbook and IPhone, the independent source doctrine supports the denying of Defendant's motion to suppress.

The FBI's investigation into the alleged criminal acts, which eventually led to the arrest of Defendant, started in approximately July 2018. Over the next year an investigation was conducted which led to the lengthy description of probable cause in the search warrant affidavit to search Defendant's electronic devices. It was this investigation, pointing to the fraudulent use of computers and the internet, which is the independent source to search Defendant's IPhone and Macbook. Defendant will undoubtedly point out that the search warrant affidavit also attributes probable cause supporting the search warrant for the electronic devices to evidence located during the search of the IPhone and Macbook. The evidence will show, however, that based upon the totality of the circumstances, the overwhelming source of the probable cause supporting searching the Macbook, IPhone, as well as other electronic devices described in the search warrant came from the approximately year-long investigation. This investigation, conducted prior to the consent search of Defendant's IPhone and Macbook, is an independent source.

In support of the their holding that both evidence which is later lawfully seized, as well as evidence which is unlawfully seized are not subject to the exclusionary rule if there is an independent source, the Court highlighted Justice Holmes' sentiments that:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others.

Murray v. United States, 487 U.S. at 538 (citation omitted).

The FBI completed a thorough, approximately year-long investigation into alleged criminal acts involving Defendant. At the conclusion of the investigation the Agents obtained a warrant to arrest Defendant. Based upon the information acquired during the course of their investigation the agents had the requisite probable cause to support a search warrant for electronic

devices in Defendant's possession. They only needed to gain the knowledge to describe them with specificity. This knowledge was derived as soon as the Defendant was taken into custody by simply looking at the exterior of the devices in plain view. Consequently, regardless of when Defendant provided the passcodes for the IPhone and Macbook and even regardless of when the devices were searched and evidence was located, the evidence obtained from such an unlawful search is not subject to the exclusionary rule because there was an independent source— the approximately year-long investigation.

Therefore, even if the Court were to find that the passcodes to the IPhone and Macbook were provided before a *Miranda* waiver, there existed an independent source supporting the search warrant for all the electronic devices seized, including the IPhone and Macbook. Defendant's motion should therefore be denied.

C. A Miranda Violation Would Not Result in Suppression of the Seized Evidence

Even assuming that the passcodes for the IPhone and Macbook were provided by Defendant prior to any *Miranda* waiver, Defendant's motion should still be denied. This is because a *Miranda* violation does not require the suppression of any derivatively recovered physical evidence.

"[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context…[f]or this reason, the exclusionary rule articulated in cases such as *Wong Sun* does not apply." *United States v. Patane*, 542 U.S. 630, 636-637 (2004); *see also United States v. Sterling*, 283 F.3d 216, 218-219 (4th Cir. 2002) (citations omitted) (reaffirming decision where the Court "declined to extend the 'fruit of the poisonous tree' doctrine

to physical discovered as a result of statements obtained in violation of *Miranda*.") Consequently, the exclusionary rule does not apply to such physical evidence as long as the statement, although made outside of *Miranda*, was not coerced. *See Hill v. Clarke*, 2014 U.S. Dist. LEXIS 16035, 3:12-cv-174 (VAED November 14, 2014).

For determining whether a statement was "coerced," "'[t]he mere existence of threats, violence, implied promises, improper influence, or other coercive police activity, however, does not automatically render a confession involuntary [citation omitted], [i]nstead, [t]he proper inquiry 'is whether the defendant's will has been 'overborne' or his 'capacity for self-determination critically impaired.'" *Hill v. Clarke*, 2014 U.S. Dist. LEXIS 16035 at *20 (citations omitted). In order to determine whether a statement was coerced "[t]he Court looks to 'the totality of the circumstances.'" *Hill v. Clarke*, 2014 U.S. Dist. LEXIS 16035 at *20 (citations omitted).

Here, even if Defendant provided the passcodes outside of *Miranda*, such a statement was not coerced. Defendant was not threatened in any way to intimidate him into providing the passcodes. In fact, Defendant was made comfortable as the FBI Special Agents provided him with water when he was at the FBI facility at Dulles Airport. Further, the Defendant is an educated man who by his own statement has both an undergraduate and graduate degree. He also, apparently, is a regular global traveler. Consequently, his savvy and education would prevent him from being "overborne" by the situation.

Finally, the Agents properly admonished Defendant of his Miranda rights and also properly obtained consent to search the two devices. Regardless of when the passcodes were provided by the Defendant, he could have very easily declined to waive his *Miranda* rights and also declined to provide consent to search the IPhone and Macbook. Assuming that Defendant provided the passcodes prior to any Miranda warning, the totality of the circumstances make clear that such a

statement was not coerced. Accordingly, the exclusionary rule does not apply to any derivatively obtained physical evidence.

CONCLUSION

FBI Special Agents properly advised Mr. Okeke of his *Miranda* rights on August 6, 2019 and Mr. Okeke voluntarily waived them and agreed to be interviewed. Consent to search the Defendant's IPhone and Macbook were also properly obtained. Regardless of when the Defendant provided the passcodes for those two devices, there is no Miranda violation. Further, even assuming the passcodes were given prior to a *Miranda* warning, the exclusionary rule is inapplicable because an independent source supported probable cause to search the IPhone and Macbook pursuant to a search warrant. Finally, again even if the Defendant provided the passcodes prior to a Miranda warning, such a statement was not coerced and the derivatively obtained physical evidence is not subject to the exclusionary rule.

The United States respectfully requests that Defendant's Motion to Suppress be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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