IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Abdul Malik Abdul Kareem, Defendant.	No. CR-15-00707-1-PHX-SRB **ORDER**

At issue is Defendant's Motion to Dismiss the Indictment or, in the Alternative, Suppress Evidence Due to Violations of FRCrP 16 ("MTD") (Doc. 85). On November 20 and 24, 2015, the Court held an evidentiary hearing concerning Defendant's Motion. (Docs. 135 & 136, Minute Entries.)

I. BACKGROUND

Defendant is charged with four criminal counts: knowingly and intentionally conspiring to transport firearms and ammunition in interstate commerce with the intent to commit crimes punishable by imprisonment exceeding one year in violation of 18 U.S.C. § 924(b) with overt acts in furtherance thereof, in violation of 18 U.S.C. § 371 (Count 1); knowingly and intentionally transporting firearms and ammunition in interstate commerce with the intent to commit crimes punishable by imprisonment exceeding one year, in violation of 18 U.S.C. § 924(b) (Count 2); knowingly and willfully making false, fraudulent, and fictitious material statements and representations to the Federal Bureau of Investigation ("FBI"), in violation of 18 U.S.C. § 1001(a)(2) (Count 3); and having been

convicted of a crime punishable by imprisonment for a term exceeding a year, knowingly possessing, in and affecting interstate commerce, firearms, in violation of 18 U.S.C. § 922(g)(1) (Count 4). (Doc. 57, Superseding Indictment at 2-4.) Defendant moves to dismiss the Superseding Indictment or, in the alternative, suppress all evidence obtained during his May 5, 2015 interview with the FBI. (*See* MTD at 6-11.)

The factual background of this Motion arises from Defendant's May 5, 2015 interview with Task Officer ("TO") Jeffrey Nash and Special Agent ("SA") Stewart Whitson. Nash called Defendant and asked him to come to the FBI office in Phoenix, Arizona to discuss a recent incident in Garland, Texas.[1] (Docs. 148 & 149, Evid. Hr'g & Interim Pre-Trial Conference Tr. ("Hr'g Tr.") 50:15-17.) When Defendant arrived, Nash escorted him into the building. (*Id.* 50:20-51:6). Defendant was not restrained and reportedly exchanged pleasantries with Nash as they walked into the building. (*Id.* 51:7-13.) Whitson met Defendant and Nash as they entered the lobby and all three men walked back to a secured area to conduct the interview. (*Id* 51:17-20; 212:17-19.)

Sometime before Defendant arrived, Whitson requested an interview room with recording capabilities for his meeting with Defendant. (*Id.* 206:17-207:2; 19:22-20:3.) SA Brian Taylor, who is technically trained, was asked to help Whitson equip the interview room for Defendant's interview. (*See id.* 19:22-23; 207:8-10.) Taylor claims that he showed Whitson how to turn the recording equipment on and off, and had Whitson verify that the camera was angled correctly by sitting in the seat where Defendant would sit. (*See id.* 20:7-15; 23:19.) Whitson claims that Taylor only demonstrated how to turn off the recording equipment, told him the camera was facing the correct direction as he sat in the seat that would be occupied by Defendant, and that Taylor gave the "thumbs up" indicating that he had started the recording device prior to leaving. (*See id.* 209:7-20; 210:20-211:20; 212:6-15.) Nash testified that he knew Defendant was diabetic before the interview began, so Whitson brought cookies to the interview. (*Id.* 52:24-53:14.) Whitson

[1] The 2015 Garland, Texas incident involved the shooting of two Muslim American men who attempted to open fire at a "Draw Mohammed Contest."

claims that he did not know Defendant was diabetic until their second interview in June 2015. (*Id.* 237:9-23.) During the interview, neither Nash nor Whitson noted abnormal behavior or loss in concentration on the part of the Defendant. (*See id.* 53:15-22; 237:9-11.) Nash took handwritten notes while Whitson, the primary interviewer did not.

When the interview finished, Nash escorted Defendant out to the lobby and returned to the interview room. (*Id.* 86:24-87:7.) At that time, the recording equipment was turned off and Nash ejected the SD card, which should have held the recording of Defendant's interview. (*Id.* 55:6-11.) Nash took the SD card to the electronic evidence drop off ("ELSUR"). (*Id.* 55:16-18.) Sometime that afternoon, Nash, Whitson, and Taylor received an email from ELSUR stating that the SD card had a recording of Taylor's test recording but had no video or audio of Defendant's interview. (*See id.* 222:18-223:8.) Whitson asked his superiors if he should request the surveillance video from the room and they told him that was unnecessary. (*Id.* 242:14-243:7.) Whitson drafted a FBI form FD 302 of the interview, which Nash reviewed, on May 6, 2015 relying on his memory and Nash's notes. (*Id*. 86:7-13; 224:20-25.) An FD 302 of the equipment failure, however, was not drafted until July 1, 2015.

Defendant argues that the Superseding Indictment should be dismissed or his May 5, 2015 statement should be suppressed because (1) his interview with Nash and Whitson violated due process, as the agents acted in bad faith and the interview was custodial and required *Miranda* warnings; and (2) the agents' failure to record the interview was a violation of Federal Rule of Criminal Procedure ("Rule") 16. (MTD at 6-11.)

II. LEGAL STANDARD AND ANALYSIS

Dismissals are "limited to extreme cases in which the government's conduct violates fundamental fairness." *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003). An indictment can be dismissed only where the government's conduct is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011) (quoting *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991)).

A. Due Process Violation

Defendant argues that the Government's failure to record Defendant's May 5, 2015 interview violates due process under the Fifth and Fourteenth Amendments. (MTD at 6.) Defendant specifically argues that the interview contained material exculpatory evidence that was not preserved in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (*Id.* at 6-7.) Where the government fails to preserve potentially exculpatory evidence, the right to due process is violated if (1) the exculpatory nature of the item was apparent at the time of the failure to preserve evidence, (2) the defendant would be unable to obtain comparable evidence by other reasonably available means, and (3) the government acted in bad faith in failing to preserve that evidence. *Arizona v. Youngblood*, 488 U.S. 51, 56 (1988). The remedy for denial of due process in this manner is the dismissal of the indictment or suppression. *California v. Trombetta*, 467 U.S. 479, 487-88 (1984). To warrant dismissal of the indictment, the defendant must establish that the evidence was lost or destroyed in bad faith and that he suffered prejudice as a result. *See United States v. Romo-Chavez*, 681 F.3d 955, 961 (9th Cir. 2012). The Ninth Circuit has repeatedly held that failure to record an interview, alone, is insufficient to warrant suppression of the evidence or a missing evidence instruction. *See id.* at 955; *see also United States v. Smith-Baltiher*, 424 F.3d 913, 925-26 (9th Cir. 2005) (noting that suppression is not warranted simply because the government fails to record an interview).[2]

1. Bad Faith

Defendant argues that Nash and Whitson's failure to record the May 5, 2015 interview constituted bad faith. (MTD at 8.) Defendant contends that the agents' failure to record was in contravention to the FBI's latest policy ("the Policy") that created a presumption that custodial interrogations be recorded. (*Id.*) First, the Court concludes that the Policy does not apply to this situation. As discussed below, Defendant's visit to the

[2] Defendant's reliance on *United States v. Zeragoza-Moreira*, 780 F.3d 971 (9th Cir. 2015) is misplaced. In *Zeragoza-Moreira*, there was a video that the government failed to preserve which would have helped the defendant present her duress defense. In this case, however, there was never a recording and the Defendant has not alleged duress or any other capacity limitation or excuse.

FBI office building in Phoenix was noncustodial and voluntary. The Policy specifically states that there is no presumption of recording when the interviewee is not in custody. (*See* Doc. 85-2, DOJ Mem. at 1-2.) The Policy "is not intended to, does not, and may not be relied upon to create any rights or benefits, substantive or procedural, enforceable at law or in equity in any mater, civil or criminal, by any party against the United States." (*See id.* at 1-2.) Moreover, Nash and Whitson attempted to make a recording of the interview, but some error occurred thwarting their intention. Defendant's vague assertion that Government's failure to record the interview is "suspicious" does not constitute evidence the Court can evaluate to determine if Defendant has met his burden. (*See* MTD at 8.) Neither the briefing nor the hearing testimony uncovered underlying wrongdoing on the part of the agents involved. The Court cannot conclude that Whitson's steps to obtain an interview room with video recording, testing and set up with Taylor, Nash's delivery of the SD card to ELSUR, and Whitson's subsequent consultation with superiors following the discovery that the recording failed demonstrate bad faith. (*See* Hr'g Tr. 206:17-207:2; 20:7-15; 55:16-18; 242:14-243:7.). Therefore, Defendant has failed to meet his burden that the Government's conduct was so egregious and outrageous in failing to record the May 5, 2015 interview as to require dismissal of the indictment or suppression of the evidence. *See United States v. Fries*, 781 F.3d 1137, 1152 (9th Cir. 2015) (noting that when no evidence was lost or destroyed, but instead a recording was not made, a missing evidence instruction was improper).

2. Prejudice to Defendant

Defendant also argues that he suffered prejudice as a result of the agents' conduct because the FD 302 summary Nash and Whitson created does not allow Defendant to present a complete defense. (MTD at 7-8.) Defendant specifically argues that the summary does not indicate how long the interview lasted, was written the next day, did not contain any quotes from Defendant, and "only reflects the agents' subjective impressions of the interview." (*Id.* at 7.) Nash took simultaneous handwritten notes, which Whitson used to draft the FD 302. (*See* Hr'g Tr. 86:3-15.) Defendant has the

ability to cross-examine both agents. The lack of a video recording does not warrant dismissal when there is no bad faith.

Defendant also argues that the lack of a video recording makes it "impossible to determine [Defendant's] demeanor during this interview and whether he made his statement voluntarily." (MTD at 7.) Defendant argues that this prevents him from alleging a *Miranda* violation. (*Id.*) A defendant may only allege a *Miranda* violation if the defendant was in custody. *U.S. v. Crawford*, 372 F.3d 1048, 1059-60 (9th Cir. 2004). "To determine whether an individual was in custody, a court must, after examining all of the circumstances surrounding the interrogation, decide 'whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994)). "Factors relevant to whether an accused is 'in custody' include the following: (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (3) the duration of the detention; and (5) the degree of pressure applied to detain the individual." *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001). "The custody determination is objective and not based on 'the subjective views of the officers or the individual being questioned.'" *United States v. Cazares*, 788 F.3d 956, 980-81 (9th Cir. 2015) (quoting *Kim*, 292 F.3d at 973).

The Court has no reason to conclude that Defendant was in custody based on the facts presented at the hearing. Defendant arrived by himself, was free to leave the room, did not require a key to exit the secured area, was escorted out of the building, and apparently returned and was found waiting in the FBI's lobby. (Hr'g Tr. 50:20-51:4; 214:10-25; 86:24-87:7; 256:9-22.) Defendant was invited to speak to Nash and Whitson, agreed to come, was not a suspect at the time of the interview, and was never physically restrained. (*See* 50:15-17; 206:4-7; 51:7-9.) Defendant has only alleged that he is diabetic with no evidence supporting the significance of his medical condition. (MTD at 7-8.) Defendant seems to argue that his diabetic condition could have affected the

voluntariness of his statement. (*Id.* at 1-2.) Nash and Whitson both testified that Defendant showed no signs of being ill. (Hr'g Tr. 50:15-17; 206:4-7; 51:7-9.) None of the facts in evidence support a finding that Defendant was in custody or that statements he made during the interview were involuntary. Accordingly, Defendant has failed to meet his burden of showing the need for a *Miranda* warning and has failed to demonstrate that he suffered prejudice as a result of the agents' conduct.

B. Rule 16 Violation

Defendant alleges that the Government has violated Rule 16 by failing to disclose "the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the agent intends to use the statement at trial." Fed. R. Crim. P. 16(a)(1)(A); (MTD at 10.) Defendant specifically argues that Whitson's subjective summary is not adequate disclosure of the May 5, 2015 interview. (MTD at 11.) The Government argues that it has not violated Rule 16 because it has disclosed the substance of the interview through its FD 302. (Doc. 97, Resp. to MTD at 2.) The Court finds unpersuasive Defendant's arguments regarding the summary's failure to accurately relate his demeanor during the interview because Rule 16 requires disclosure of the *substance* of the statement.[3] (*See* MTD at 11.) The Court concludes that the Government did not violate Rule 16.

III. CONCLUSION

Because Defendant has failed to show that the FBI agents' failure to record his May 5, 2015 interview constitutes a due process violation or a violation of Rule 16, the Court denies Defendant's Motion.

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[3] Defendant has failed to cite any controlling authority, and the Court is aware of none, that requires the audio recording of a statement that will be used at trial in order to comply with Rule 16.

IT IS ORDERED denying Defendant's Motion to Dismiss the Indictment or, in the Alternative, Suppress Evidence Due to Violations of FRCrP 16 (Doc. 85).

Dated this 29th day of December, 2015.

Susan R. Bolton
United States District Judge