



U.S. Department of Justice

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Eastern District of New York*

SPN/TAD/MEB
F. #2015R00079

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February 29, 2016

By Hand and ECF

The Honorable Nicholas G. Garaufis
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Tairod Nathan Webster Pugh
Criminal Docket No. 15-00116

Dear Judge Garaufis:

The government respectfully submits this motion in limine to preclude the defendant from eliciting on cross examination certain false exculpatory statements that were made by the defendant during an interview at John F. Kennedy International Airport ("JFK"). In addition, the government writes to confirm its understanding of the scope of the Court's order dated February 12, 2016 granting the government's first motion in limine to introduce certain video evidence. (ECF Doc. 85).

I. The Defendant Should Be Precluded From Eliciting
False Exculpatory Statements from the JFK Interview

The government intends to introduce at trial statements that the defendant made at JFK airport during a consensual interview with Diplomatic Security Service (DSS) Special Agent Komaal Collie.¹ These statements related to electronic devices seized from the defendant while he was detained in Egypt, including the four flash drives that he is alleged to have destroyed after he was stopped at Ataturk Airport in Turkey in connection with Count Two.² Agent Collie's interview of the defendant lasted approximately 20

¹ Special Agent Collie is assigned to the Joint Terrorism Task Force Team (CT-3).

² The defendant's interview occurred before his arrest in this case, which occurred the following evening on January 16, 2015.

minutes, and it was video and audio taped in a Customs and Border Protection interview room at Terminal 4. The government will ask Agent Collie about his conversation with the defendant, including their discussion of Government's Exhibit 21a, which consists of copies of two inventory documents and photographs of the electronic devices Egyptian officials seized from the defendant and turned over to the FBI. The government intends to introduce a portion of Agent Collie's videotaped interview of the defendant, Government Exhibit 31, and to seek to use Government's Exhibit 31 T, which is a transcript of that portion of the interview, as an aid to the jury while reviewing Government's Exhibit 31. The video clip relates to the seized electronic evidence and Government's Exhibit 21a.

During the course of the same videotaped interview, during a long response to a different question from Agent Collie,³ the defendant claimed that he had traveled to Istanbul, Turkey because he was out of money and was trying to get a job. The government believes that the defendant's statement was a false exculpatory statement intended to explain away why he had been traveling to Turkey, falsely claiming that he was traveling to get job, when in fact he was traveling to Turkey as part of his attempt to join ISIL.

A. Legal Framework

It is well-established law that a defendant's statement to law enforcement officials following his arrest may be offered into evidence by the government on two possible bases:

[The government] may wish to use the statement to establish the truth of the matter stated. In these circumstances, under Rule 801(d)(2)(A) the statement is not hearsay, because it is simply a statement of the opposing party. On the other hand, the government may wish to offer the statement to show that the defendant made false representations to the authorities, from which the jury could infer a consciousness of guilt, and hence guilt.

United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982).

However, the defendant does not have a parallel ability to offer his own statements into evidence. "When the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible. When the defendant offers his own statement simply to show that it was made, rather than to establish the truth of the matter asserted, the fact that the statement was made must be relevant to the issues in the lawsuit." Id.

³ At this portion of the interview, Agent Collie had asked why the defendant had been deported from Egypt. The defendant's false exculpatory statement is at the end of his lengthy response to that question.

The government is under no obligation to offer exculpatory statements when it offers inculpatory admissions. See United States v. Johnson, 507 F.3d 793 (2d Cir. 2007) (holding that the court properly bifurcated a defendant's post-arrest statement and precluded the defense from introducing a self-serving portion of the defendant's post-arrest statement); United States v. Branch, 91 F.3d 699, 728 (5th Cir. 1996) (finding that "self serving [exculpatory] statement that does not contradict, explain, or qualify the rest of the statement" did not need to be offered by Government under rule of completeness when government offered inculpatory statements); United States v. Smith, 794 F.2d 1333, 1335-36 (8th Cir. 1986) (holding that district court did not err in precluding cross-examination on portions of post-arrest statement describing relationship to co-defendant and implicating co-defendant when government offered admission that defendant had been present at time of co-defendant's arrest; see also United States v. Choudhry, No. 13 CR 150 (WFK) (June 23, 2014 Order precluding the introduction of defendant's self-serving hearsay statements during post-arrest interview on cross-examination).

Nevertheless, there are certain instances when a defendant may seek the admission of certain portions of a statement when the government offers excerpts of a statement. Rule 106 "is stated as to writings in Fed. R. Evid. 106, but Fed. R. Evid. 611(a) renders it substantially applicable to oral testimony." United States v. Alvarado, 882 F.2d 645, 650 n.5 (2d Cir. 1989). "Under this principle, an omitted portion of a statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion." United States v. Jackson, 180 F.3d 55, 73 (2d Cir.), on reh'g, 196 F.3d 383 (1999).

"The completeness doctrine does not, however, require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages." Marin, 669 F.2d at 84-85. The burden rests with the defendant to demonstrate that the portions of the statement he seeks to offer are necessary to clarify or explain the portions the government intends to offer. See United States v. Glover, 101 F.3d 1183, 1190 (7th Cir. 1996) ("[T]he proponent of the additional evidence sought to be admitted must demonstrate its relevance to the issues in the case, and must show that it clarifies or explains the portion offered by the opponent."). The district court has broad discretion in applying the completeness doctrine. See Jackson, 180 F.3d at 73 (district court's application of rule of completeness is reviewed only for abuse of discretion).

B. Discussion

As set forth above, the government only seeks to introduce portions of the defendant's statements to Agent Collie regarding the seized electronic devices. Those statements (most of which are set out in Government's Exhibit 31 T) do not relate to the defendant's self-serving false exculpatory statement made at a different point interview in response to a different question. Thus, Rule 106 does not apply here, and the defense should

