

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

CR 17-30122-RAL

Plaintiff,

DEFENDANT'S OBJECTIONS TO THE
REPORT AND RECOMMENDATION ON
MOTIONS TO SUPPRESS STATEMENTS
AND TRIBAL COURT GUILTY PLEA

vs.

CALVIN GILLETTE,

Defendant.

Pursuant to 28 U.S.C. § 636(b)(1), Defendant Calvin Gillette, by and through his attorney, Assistant Federal Public Defender Edward G. Albright, makes the following objections to the Report and Recommendation on Motions to Suppress Statements and Tribal Court Guilty Plea issued by the Magistrate Judge on January 29, 2018 (DCD 44).

A. Motion to Suppress Statements.

The defense filed a Motion to Suppress Statements, seeking to suppress the statements Defendant made to tribal law enforcement on January 31, 2017. (DCD 31 & 32). The Magistrate Judge breaks down the statements Defendant made to the officer into two categories, "Initial Statements" and "Later Statements."

The defense concurs with the Magistrate's report and recommendation to the extent that it recommends suppression of the "Initial Statements" Defendant made to the officer following the officer's interrogation of asking Defendant what happened.

The defense objects to the Magistrate's report and recommendation denying suppression of Defendant's "Later Statements." The defense asserts that those statements were tainted by and flowed from the initial *Miranda* breach. Had Defendant been advised of *Miranda*, he would have been put on notice that any statements he made could be used against him in court. By allowing the Defendant to talk to the alleged victim or respond to additional questions by the officer, the officer allowed the continuation of the *Miranda* breach. The officer should not be permitted to stand by and allow the Defendant to make additional, un-warned statements, when the officer initially opened the door by initiating an un-*Mirandized* interrogation. Therefore, the defense objects to the Magistrate's report and recommendation concerning the "Later Statements."

B. Motion to Suppress Tribal Court Guilty Plea.

The defense filed a Motion and Memorandum to Suppress Tribal Court Guilty Plea. (DCD 33). The Magistrate Judge recommends this motion should be denied in its entirety. The defense objects to the Magistrate's report and recommendation on this issue.

The defense concedes the Sixth Amendment right to counsel argument fails based on caselaw and the evidence showing Defendant had legal counsel representing him. However, the defense asserts the remaining arguments the defense made in its motion to suppress tribal court guilty plea, and oral supplementation during the motion hearing, including the Fifth Amendment and Due Process arguments, support a ruling that the tribal court guilty plea should not be used as evidence against Defendant in his federal court jury trial. Under *Brady v. United States*, 397 U.S. 742, 747-48 (1970), a plea of guilty must be voluntary, knowing, and intelligent to satisfy

the Fifth Amendment due process clause. *See also Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Under *Brady*, “waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” 397 U.S. at 748. The record of the tribal court proceedings is not sufficient to satisfy these rights. For example, the Defendant was not advised that he was presumed innocent and that the prosecution had to prove him guilty beyond a reasonable doubt. Based on the defense motion and oral supplementation, the defense objects to the Magistrate’s report and recommendation.

WHEREFORE, the defense objects to the Magistrate’s Report and Recommendation to the extent it denies suppression of Defendant’s “Later Statements” and tribal court guilty plea.

Dated this 8th day of February, 2018.

Respectfully submitted,

NEIL FULTON
Federal Public Defender
By:

/s/ Edward G. Albright

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