IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. 2:16-CR-20016

JUSTIN ASHMORE DEFENDANT

OPINION AND ORDER

Before the Court is Defendant Justin Ashmore's motion to suppress his confessions and fruits of the confessions that allegedly occurred[1] during the execution of a search warrant at his home on February 3, 2016. (Doc. 28). The Government has filed a response. (Doc. 31). The Court held a hearing on the motion on November 29, 2016. At the hearing, Homeland Security Special Agent Earl Cranor, Task Force Officer Timothy Heffner, and Task Force Officer Paul Clifford testified during the Government's case. Alma Police Officer Joseph Clayton Wright, Crawford County Sheriff's Department Investigator Halbert Torraca, Elizabeth Hrinchir, Theresa Ashmore, and Cranor testified during Ashmore's case. At the end of the hearing, the Court took the matter under submission and advisement. For the reasons set forth below, the Court now determines that Ashmore's motion (Doc. 28) will be GRANTED IN PART.

I. Background[2]

On February 3, 2016, at approximately 6:55 a.m., officers with the River Valley Internet Crimes Against Children Task Force executed a federal search warrant at Ashmore's residence. Officers obtained the search warrant after Heffner discovered an IP address associated with

[1] Ashmore has filed a brief (Doc. 33) in which he denies that he ever confessed, yet he has filed the immediate motion seeking to suppress any confessions he allegedly made.

[2] The background is taken from the parties' briefs, the testimony presented at the hearing, and the exhibits received into evidence.

Ashmore's residence downloaded and shared child pornography via an online peer-to-peer file sharing program.

Ten officers wearing body armor and representing seven different agencies arrived at Ashmore's two-bedroom apartment to execute the search warrant. Ashmore answered the door in his underwear. The officers told him that they had a search warrant, pulled Ashmore out of the home, and asked him if anyone else was in the residence. Ashmore identified his son, who was also removed from the residence and wrapped in a blanket while officers cleared the home. Officers had their guns drawn for several minutes as they secured the residence. During this time, Ashmore sat with his son in lawn chairs outside the home as Cranor stood watch. Cranor testified that Ashmore was not free to leave during the initial sweep of the house until it was deemed secure.[3] This took several minutes, after which Ashmore and his son walked back into the home. While still in his underwear, Cranor then explained the reasoning for the search warrant to Ashmore and told him for the first and only time that he was not under arrest and was free to go. The search warrant covered Ashmore's home, vehicle, and cell phone, and Ashmore remained unclothed at the time. Ashmore's diabetic son, who was in his underwear and wrapped in a blanket, needed supplies and breakfast.

The parties dispute whether Ashmore volunteered to speak with officers or was told that officers had questions for him. Regardless, to avoid Ashmore's son overhearing the conversation, officers Cranor, Heffner, and Frank Trevino escorted Ashmore upstairs to the bedroom for questioning.[4] Once inside the room, officers handed Ashmore a pair of black jeans off of his

[3] Cranor additionally testified that if Ashmore had walked out the back door as officers were beginning to execute the search warrant that he would have been stopped.

[4] At some point, Trevino left the room because, according to Heffner, he was blocking the doorway.

dresser and allowed him to put them on.[5] Ashmore sat on the edge of his bed with only pants and socks on as officers proceeded to question him. According to the Government, Ashmore began to confess to having downloaded child pornography. Ashmore told officers the password to his computer and cell phone. Heffner then briefly left the bedroom interview to go downstairs and relay that information to officers engaging in the on-site preview of Ashmore's computer, returning to the bedroom thereafter.

During the course of the interview, officers testified that they became concerned about Ashmore's son making it to school. At approximately 7:15 a.m., they used Ashmore's phone to place a call to his mother, kept the phone on speaker, and held it while they allowed Ashmore to ask his mother to come get the child. When Mrs. Ashmore arrived just a few minutes later, she was concerned about her grandson not having eaten and needing insulin. There was an agent standing in the way of the stairway leading up to the bedroom at the time, so Mrs. Ashmore remained downstairs. When the needed supplies could not be located, an agent yelled upstairs and asked where the insulin was located, then an upstairs agent obtained that information from Ashmore and yelled back down that it was in the refrigerator. This method of conversation between the agents continued in regards to the grandson's test strips and needles. Ashmore and his mother were not permitted to see each other or communicate directly.

At approximately 7:20 a.m., Ashmore admitted to having a small amount of marijuana in his freezer.[6] Heffner again left the bedroom to go downstairs to advise officers of the marijuana

[5] According to Cranor, officers check clothing before handing it over to a suspect to make sure there is no weapon or contraband inside.

[6] It is not clear whether there was a quarter-ounce or half-ounce of marijuana in the freezer, but either amount would be a Class A misdemeanor in Arkansas. *See* A.C.A. § 5-64-215(a)(1) (placing marijuana in Schedule VI); A.C.A. § 5-64-419(b)(5)(A) (classifying possession of less than 4 ounces of a Schedule VI substance as a Class A misdemeanor).

and called Assistant United States Attorney Ashleigh Buckley. At approximately 7:30 a.m., Heffner returned to the bedroom, and Ashmore was read his *Miranda* rights for the first time. According to officers' testimony, Buckley advised that Ashmore needed to be read his *Miranda* rights because he could possibly be arrested for the marijuana. After receiving his *Miranda* warning, officers continued to ask questions about the child pornography and Ashmore again allegedly confessed. However, Ashmore never made a written statement.

Alma Police Officer Woods arrived at the scene at approximately 7:25 a.m. after speaking with Crawford County Sheriff's Department Investigator Torraca, who was part of the team executing the search warrant. Once at the residence, Torraca handed Woods sacks containing the suspected marijuana and drug paraphernalia from Ashmore's freezer. Woods testified that after speaking with his supervisor, he decided to arrest Ashmore for the possession of marijuana, and escorted him to the police station at approximately 7:50 a.m. From the time officers arrived until he was arrested, Ashmore was never further than a couple of feet away from an officer. Ashmore was specifically arrested for the present child pornography offenses on May 12, 2016.

II. Analysis

A person taken into custody for questioning must be advised by an officer prior to questioning of his or her right to be free from compulsory self-incrimination and the right to the assistance of counsel. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Both Cranor and Heffner interrogated Ashmore, so determining whether *Miranda* applies depends on whether the interrogation was custodial. Ashmore asserts that the interview was custodial and his initial confession should be suppressed. The Government asserts that because the interview was not custodial, no *Miranda* warnings were necessary and Ashmore's confessions should be admissible at trial.

As a general rule, the burden of proof is on the defendant who seeks to suppress evidence. *United States v. Phillips,* 540 F.2d 319 (8th Cir. 1976). The Government, however, bears the burden of proving by a preponderance of the evidence that *Miranda* warnings were either not necessary or that they were given and effectively waived. *United States v. Aguilar,* 384 F.3d 520, 523 (8th Cir. 2004). The Government therefore bears the burden of showing that Ashmore was not in custody at the time he initially confessed.

"*Miranda* warnings are due only when a suspect interrogated by the police is 'in custody.'" *Thompson v. Keohane,* 516 U.S. 99, 102 (1995). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. California,* 511 U.S. 318, 322 (1994) (quotations omitted). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323.

In determining whether a defendant was in custody during questioning, the Eighth Circuit has historically looked to the non-exclusive indicia of custody outlined in *United States v. Griffin*:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; [and,] (6) whether the suspect was placed under arrest at the termination of the questioning.

922 F.2d 1343, 1349 (8th Cir. 1990). More recently, the Eighth Circuit has advised against following the *Griffin* factors "ritualistically" and stated that custody "cannot be resolved merely

by counting up the number of factors on each side of the balance and rendering a decision accordingly." *United States v. Czichray*, 378 F.3d 822, 827 (8th Cir. 2004). "The ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest." *Id.* at 828. The *Griffin* factors remain useful in applying this "totality of the circumstances" analysis. *See United States v. Laurita*, 821 F.3d 1020 (8th Cir. 2016).

The parties dispute whether Ashmore was told at the time of questioning that his involvement was voluntary, as well as whether he was told that he was not under arrest and free to leave. Though the Court questions their credibility in light of other testimony, the Court believes the officers' testimony that Ashmore was informed that he was not under arrest and was free to leave. Yet, the Court would have preferred if officers had informed Ashmore on more than the one occasion that he was free to leave, especially given the facts surrounding this case. *Cf. United States v. Czichray*, 378 F.3d 822, 826 (8th Cir. 2004) ("That a person is told *repeatedly* that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview.") (emphasis added).

"The practice of agents providing such advice is a proper method to ensure that a noncustodial interview is not misinterpreted as a custodial interrogation and to avoid *Miranda* problems." *United States v. Estey*, 595 F.3d 836, 839 (8th Cir. 2010) (citation omitted). These are not magic words that act as a prophylactic against a finding of custody, however. Ashmore was undressed in February, had no access to a phone or a car, and his son needed breakfast and diabetic supplies before leaving the house. Additionally, Ashmore and his son had just been in obvious custody during the protective sweep of the residence. In the Court's view, this factor can only weigh in favor of the Government if the statement "you are free to leave" is true. It was not in this case. Under these circumstances, merely stating "you are free to leave" would not have led a

reasonable person in Ashmore's position to believe he was free to leave or terminate or refuse an interrogation.[7] Thus, the Court finds this factor to weigh against the Government.

Ashmore also did not possess unrestrained freedom of movement during questioning. Although officers contend that they would have allowed him to move throughout the home, testimony reflects that Ashmore was always within a couple of feet of any officer. Ashmore would have been stopped had he gone where officers were searching. Instead, he sat on the edge of his bed in only jeans and socks in the middle of the winter while being questioned by two to three armed officers in tactical gear. At one point, an officer stood in front of the doorway.[8] Officers controlled Ashmore's property, communication, and location during questioning, handing him a pair of pants, placing the call to his mother on his cell phone, and yelling the location of his son's insulin and test strips in response to Mrs. Ashmore's requests, rather than allowing Ashmore to go down to her. Ashmore did not enjoy unrestrained freedom of movement during the interrogation.

Ashmore did not initiate contact with officers—they came to his home to execute a search warrant—and the Court finds that he did not voluntarily acquiesce to questioning. When officers asked to speak with him, Ashmore was in his underwear on a morning in February, surrounded by ten officers in tactical gear in his two-bedroom apartment, and was responsible for his diabetic son. His interaction with officers began when he was taken into custody during the protective sweep of his home, and never changed substantially from that initial contact. He was escorted to his small and private bedroom by three officers and had to ask if he could put on a pair of pants once inside. Ashmore's actions, including answering questions, cannot be described as voluntary.

[7] In fact, during his testimony, Cranor could not identify anything apart from his words that would have given Ashmore an indication that he was free to go.

[8] Ashmore additionally contends that the door was shut and an officer stood in front of it at all times, but the Court need not determine the reliability of this assertion in determining that this *Griffin* factor favors custody.

The Court does not take a position on whether strong arm tactics or deceptive stratagems were employed during questioning, but notes that the parties factually disagree here. Ashmore contends that he was repeatedly asked why officers were there and that he was told "it may be a very long time before he sees his son again." (Doc. 28, p. 3). Officers testified that the questioning was much more calm and did not involve the line of questioning alleged by Ashmore.

More importantly, there is no doubt that, viewed objectively, the atmosphere was police dominated. There were ten officers from seven different agencies executing a search warrant at Ashmore's two-bedroom apartment. When he was questioned, it was by two or three officers in his small bedroom, and Ashmore's movement, outside communication, and clothing were completely under officer control.[9] With respect to his diabetic son's needs, Ashmore was forced to communicate with his mother through officers as to the location of his son's insulin and test strips. Common sense provides that a reasonable person would clearly have wanted to come downstairs and show his mother the location of his son's diabetic supplies.

Finally, with regards to the sixth *Griffin* factor, the Court notes that Ashmore was immediately arrested following questioning, even though it was on a separate charge.

Bearing in mind the ultimate inquiry is whether the defendant was restrained as though he were under formal arrest, the Court finds that Ashmore was in custody. Often, the circumstances surrounding an interrogation in the suspect's own home are less indicative of custody. *See Axsom*, 289 F.3d 496, 502 (8th Cir. 2002) ("When a suspect is interrogated in the comfort and familiarity

[9] While not cited by the Government, the Court is aware of the Eighth Circuit's decision in *United States v. Axsom*, where the court reasoned on this factor that "[w]hile nine persons participated in the execution of the search warrant, only two agents conducted the interview." 289 F.3d 496, 502 (8th Cir. 2002). That case is distinguishable, though, in that the appellate court noted on this fifth indicium that the suspect sat on an easy chair and smoked a pipe while engaging in "two-way questioning." *Id*. That scenario is far different from the present one, where Ashmore sat shirtless with his arms crossed on the edge of his bed while being questioned by officers.

of his home, a court is less likely to find the circumstances custodial."); *see also Griffin*, 922 F.2d at 1356 n. 15 ("It is the accepted logic that an interrogation in familiar surroundings such as one's home softens the hard aspects of police interrogation and moderates a suspect's sense of being held in custody.") (citing *Miranda*, 384 U.S. at 450). Yet, while "[q]uestioning which occurs in the suspect's own home may provide a margin of comfort, … the setting of the interrogation is not so important to the inquiry as the question of police domination of that setting." *Griffin*, 922 F.2d at 1354-55.[10] As mentioned before, the police domination evident at Ashmore's home was such that any comfort for a reasonable person associated with being interrogated in his or her own home surely evaporated. Ashmore did not maintain control over his home in that he could not exclude the officers from it. Any "margin of comfort" disappeared with that control. Ashmore was restrained as though he were in custody, so his alleged initial confession will be suppressed.

With respect to Ashmore's second alleged confession, the Court finds that officers deliberately circumvented providing a *Miranda* warning, and the Government has not otherwise met its burden of showing that Ashmore made a knowing and voluntary waiver of his *Miranda* rights. "Warned statements elicited after an initial *Miranda* violation may be admissible, so long as officers do not purposefully elicit an unwarned confession from a suspect in an effort to circumvent *Miranda* requirements." *United States v. Morgan*, 729 F.3d 1086, 1091-92 (8th Cir. 2013) (citing *Missouri v. Seibert*, 542 U.S. 600, 604 (2004); *United States v. Torres–Lona*, 491 F.3d 750, 757-58 (8th Cir. 2007) (treating Justice Kennedy's concurrence in *Seibert* as "controlling")). In this situation, the "prosecution must prove, by a preponderance of the evidence,

[10] The Eighth Circuit went on to find that "it is not difficult to envision that a suspect's sense of captivity can actually be intensified by the intrusive and intimidating environment created when agents of the law take control of a person's private residence. After all, a person can not reasonably expect to be free anywhere if not within the refuge of his home." *Griffin*, 922 F.2d at 1356 n. 15.

that the officer's failure to provide warnings at the outset of questioning was not part of a deliberate attempt to circumvent *Miranda*." *United States v. Ollie*, 442 F.3d 1135, 1142–43 (8th Cir. 2006). The Government contends that the only reason Ashmore was apprised of his *Miranda* rights at all was because of his arrest for possessing a small amount of marijuana. (Doc. 31, p. 10). The Government's position is effectively that because officers never Mirandized Ashmore for his alleged confession related to child pornography, they could not have circumvented *Miranda* on purpose. Having listened to their testimony and observed their demeanor on this point, the Court does not believe the officers' testimony and finds that they deliberately avoided giving Ashmore a *Miranda* warning. The purpose behind the search warrant and interrogation was exclusively the alleged possession of child pornography. Officers did not provide Ashmore with a *Miranda* warning solely for the unrelated and unexpected marijuana confession—a Class A misdemeanor in Arkansas—only to immediately return to questioning him about the child pornography. The marijuana was simply an opportunity for officers to veil their *Miranda* mistake. In addition, because officers contend that the *Miranda* warning was only given in relation to the marijuana possession, the midstream warning could not have been effective.

However, even if officers had not deliberately circumvented *Miranda*, in cases where the failure to warn is not deliberate, the Court's analysis is not finished. While "*Seibert* is not implicated," *Oregon v. Elstad*, 470 U.S. 298 (1985), governs whether the second alleged confession should still be suppressed. *See Torres–Lona*, 491 F.3d at 757-58. According to *Elstad*, "a post warning confession is admissible so long as it was knowingly and voluntarily made." *Id.* at 758 (citing *Elstad*, 470 U.S. at 309). "First, the waiver must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the suspect must have waived his rights with a full awareness of both the nature of the

right being abandoned and the consequences of the decision to abandon it." *United States v. Vinton*, 631 F.3d 476, 483 (8th Cir. 2011). "The government has the burden of proving the validity of the *Miranda* waiver by a preponderance of the evidence." *United States v. Haggard*, 368 F.3d 1020, 1024 (8th Cir. 2004). "To determine whether a waiver ... was voluntary, a court looks at the totality of the circumstances and must determine whether the individual's will was overborne." *United States v. Syslo*, 303 F .3d 860, 866 (8th Cir. 2002). The Government has neither addressed *Elstad* nor produced any evidence on the issue of Ashmore's *Miranda* waiver, focusing solely on whether the officers engaged in a deliberate process of avoiding *Miranda*. This is clearly not sufficient to meet its burden of showing that Ashmore's *Miranda* waiver was made both voluntarily and knowingly. Additionally, the circumstances that demonstrate custody also indicate that the confession was not voluntary. Therefore, the second alleged confession will also be suppressed.

Finally, Ashmore seeks to have any fruits of his confessions suppressed. Specifically, he provided officers with the passwords to his computer and cell phone during the custodial interrogation. The Court will suppress the passwords themselves from disclosure at trial, but will not suppress the evidence obtained on the computer and cell phone because the independent source doctrine applies.[11] "[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation [including] … confessions or statements of the accused obtained during an illegal arrest and detention." *United States v. Crews*, 445 U.S. 463, 470 (1980). Nevertheless, "[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly

[11] The independent source doctrine typically applies to Fourth Amendment searches and seizures, but it can apply to any constitutional violation. Here, the Fourth Amendment was implicated by officers executing a valid search warrant which included Ashmore's computer and cell phone.

independent of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443 (1984). Additionally, the independent source doctrine extends to evidence that would have been discovered independent of a constitutional violation. *Id.* at 447. The reasoning for allowing such evidence is as follows:

> [I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct.

Id.; *see also United States v. Fellers*, 397 F.3d 1090, 1094 (8th Cir. 2005) ("Whether the exclusionary rule applies to evidence acquired subsequent to a constitutional violation requires consideration of the possible admissibility of the evidence in light of the distinct policies and interests of each Amendment.").

Officers executed a valid search warrant which included both the computer and the cell phone. Also, Heffner testified that having the passwords to Ashmore's computer and cell phone made the on-site preview simpler, but that those passwords were unnecessary for a later forensic analysis. Heffner stated that during forensics he removes the hard drive from the computer and does not need a password to access the hard drive unless it is encrypted, and Ashmore's hard drive was not encrypted. In addition, Ashmore's cell phone was a Samsung Android, which, according to Heffner, have passwords that can be bypassed with the right software or equipment. Heffner made clear that he would have been able to access the information on Ashmore's computer and cell phone without the passwords provided by Ashmore at his residence. Thus, the Court finds that the independent source doctrine applies, and the contents of Ashmore's computer and cell phone will not be suppressed.

III. Conclusion

IT IS THEREFORE ORDERED that Defendant Justin Ashmore's motion to suppress (Doc. 28) is GRANTED IN PART. The alleged confessions and passwords are inadmissible at trial, but the evidence obtained from gaining access to Ashmore's computer and cell phone will not be suppressed.

IT IS SO ORDERED this 7th day of December, 2016.

/s/ P. K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE