

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. 1:02CR00085
)	
v.)	OPINION AND ORDER
)	
GUYE GLENN LILLY,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for the United States of America; Jay H. Steele, Lebanon, Virginia, for Defendant.

In this criminal case, the defendant seeks to compel discovery of a federal law enforcement agent's notes of statements made by the defendant after his arrest. Based on the facts of this case, I will grant the defendant's motion.

I

The defendant, Guye Glenn Lilly, is charged with drug trafficking offenses. These charges stem from the execution of a search warrant at the defendant's business premises on July 31, 2002. During the search, law enforcement officers allegedly discovered large amounts of the illegal drug known as methamphetamine, together

with firearms. In addition, the defendant and certain of his co-defendants allegedly made incriminating statements to the officers.

At the time of the search, the defendant was interviewed by Special Agent Tom Lesnak of the federal Bureau of Alcohol, Tobacco, and Firearms, about his involvement with the illegal drugs and firearms. The questioning of the defendant was not audio or video tape recorded, nor did the defendant sign or write a statement. The only record made of the interview was Agent Lesnak's handwritten notes. At the end of the questioning, Agent Lesnak asked the defendant to review the notes. Following the interrogation, the defendant was taken into custody.

On August 6, 2002, the defendant received a preliminary hearing, at which Agent Lesnak testified to the substance of the defendant's statements during his questioning. After the defendant's indictment, the government provided the defendant in discovery with a Drug Enforcement Agency Form 6 ("Form 6"), which it represented summarized Agent Lesnak's notes of the defendant's statements.

On November 25, 2002, the defendant filed a Motion to Compel Discovery of Agent Lesnak's notes in reference to the questioning of the defendant on July 31, 2002. This motion was considered by the magistrate judge and denied "based on the court's finding that the government has complied with Federal Rule of Criminal

Procedure 16(a)(1)(A), in that it has provided the defendant with the substance of his oral statements made to government agents at the time of his arrest.”

The defendant has appealed the magistrate judge’s determination and the issues have been briefed and orally argued.

II

Rule 16 of the Federal Rules of Criminal Procedure requires that

[u]pon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: . . . that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent.

Fed. R. Crim. P. Rule 16(a)(1)(A).

In this case, it is clear that Agent Lesnak’s notes are (1) a “written record” and (2) contain the “substance of . . . oral statement[s] made by the defendant.” This is not a question relating to the Jenck’s Act, 18 U.S.C.A. § 3500 (West 2000), or Federal Rule of Criminal Procedure 26.2, both relating to the production of statements of witnesses at trial. *See United States v. Layton*, 564 F. Supp. 1391, 1393-1395 (D. Or. 1983). The question before the court is simply whether or not the

summary of the defendant's statements, as provided in the Form 6, satisfies the requirements of Rule 16(a)(1)(A).

The government argues that the summary does satisfy Rule 16(a)(1)(A) and sufficiently places the defendant on notice regarding the substance of his oral statements. In addition, the government cites to *United States v. Brown*, 303 F.3d 582 (5th Cir. 2002), and *United States v. Muhammad*, 120 F.3d 688 (7th Cir. 1997), for the proposition that a defendant is not entitled to the agent's notes if the information in those notes has been accurately provided through a summary or other means. The government also acknowledges that the Fourth Circuit has not yet ruled on the question.

The defendant argues that the production of the Form 6 may not accurately reflect the substance of Agent Lesnak's notes because it was prepared by another agent who had no contact with the defendant. The defendant also asserts that because Agent Lesnak allegedly had the defendant review the notes at the end of the interrogation, they necessarily became the most important record of the statements made by the defendant.

The Advisory Committee Notes to Rule 16(a)(1)(A) explain that the 1991 amendments to the rule require that the government must "disclose any written record which contains reference to a relevant oral statement by the defendant which was in

response to interrogation, without regard for whether the prosecution intends to use such statement at trial.” In addition, the Notes state that “[a]lthough the rule does not specify the means for disclosing the defendant’s statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, and photograph them.”

The Fifth and the Seventh Circuits have approved the *in camera* review of an agent’s notes to determine if any substantial difference is present between the notes and any summary provided to the defendant. *See Brown*, 303 F.3d 589-91; *United States v. Walker*, 272 F.3d. 407 (7th Circuit 2001). In those circumstances, the courts have deemed the notes discoverable only upon a showing of significant inconsistencies. *See id.*

Other courts have determined that Rule 16(a)(1)(A) requires the disclosure of law enforcement officers’ notes taken during interrogations upon request by the defendant without *in camera* review. *See United States v. Wright*, 2001 WL 523394, at *18 (D. Kan. April 26, 2001); *United States v. Poindexter*, 727 F. Supp. 1470, 1483 (D.D.C. 1989); *United States v. Egan*, 501 F. Supp. 1252, 1264 (S.D.N.Y. 1980); *United States v. Salsedo*, 477 F. Supp. 1235, 1238-39 (E.D. Cal. 1979), *vacated on other grounds*, *United States v. Torres*, 622 F.2d 465 (9th Cir. 1980).

Based on the specific facts of this case, I believe that discovery of the agent’s notes is the most appropriate means of protecting the rights of the accused. Agent

Lesnak's notes, which were reviewed by the defendant, are the only record of the defendant's statements during his interrogation on July 31, 2002. Even though the government provided the defendant with a summary of the statements made to Agent Lesnak, "in some cases the information contained in thorough notes taken from the witness himself might be more credible and more favorable to the defendant's position than the final version." *Poindexter*, 727 F. Supp. at 1483. The proposition stated in *Poindexter* is particularly appropriate because Agent Cash, and not Agent Lesnak, prepared the Form 6 that allegedly summarized the defendant's statements.

Moreover, there appears no reason why *in camera* review of the agent's notes is necessary in order to protect a legitimate law enforcement interest. The interrogation of the defendant occurred at a discreet time and place and the portion of the notes relating to the defendant's statements can be disclosed without jeopardizing other information.

It is accordingly **ORDERED** that the defendant's appeal from the decision of the magistrate judge's order is sustained and the Motion to Compel Discovery [Doc. No. 34] is granted. The government is directed to provide the defendant with that portion of Agent Lesnak's notes containing the substance of any relevant oral statements made by the defendant during his interrogation on July 31, 2002.

ENTER: January 24, 2003

United States District Judge