

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 11 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES FRANK BERRY,

Defendant - Appellant.

No. 08-50259

D.C. No. 8:07-cr-00127-DOC-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted March 2, 2009
Pasadena, California

Before: O'SCANNLAIN, RYMER and WARDLAW, Circuit Judges.

James Berry appeals his conviction under 18 U.S.C. § 472 for possession of counterfeit U.S. currency, and the terms of his supervised release. We affirm the conviction and remand the sentence for the limited purpose of conforming certain conditions of supervised release to the court's oral pronouncement of sentence.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Although Berry may well have been uncomfortable in the patrol car, his will was not overborne. He was *Mirandized* before both interviews, which lasted about ten minutes each, and he spoke freely and voluntarily on each occasion. *See Blackburn v. Alabama*, 361 U.S. 199, 206 (1960); *Clark v. Murphy*, 331 F.3d 1062, 1072 (9th Cir. 2003). Agent Warren's statement that he planned to take Berry's computers was not a threat, as Berry contends, but a statement about standard procedure in the circumstances. Finally, questioning immediately stopped once Berry asked for a lawyer during the Warren interview. It is clear from the district court's decision that it necessarily found that Berry made no earlier request for counsel.

The district court did not abuse its discretion in treating the testimony of Agent Beamer as akin to a fact witness rather than an expert. Beamer simply testified to what he found on the hard drive of Berry's computer, without expressing an opinion that required specialized knowledge or offering insight beyond common understanding. *See Fed. R. Evid. 702.*

As the parties agree, conditions 8 and 9 of the terms of supervised release are not consistent with the terms of the oral sentence. Accordingly, we remand for the district court to correct the judgment, so that those conditions are replaced by one that will instead provide: "The defendant shall not use or own a personal

computer. If the defendant obtains employment requiring him to have and use a computer, the court will allow it.”

CONVICTION AFFIRMED; SENTENCE REMANDED FOR LIMITED PURPOSE.