STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 23, 2002
v	No. 233952 Wayne Circuit Court
MICHAEL LEMPICKI, Defendant-Appellee.	LC No. 00-007640

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

The prosecutor appeals as of right from the trial court's March 29, 2001, order of dismissal, which followed the trial court's partial grant of defendant's motion to suppress evidence. We reverse and remand.

Defendant was charged with third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration with person at least 13 years of age and under 16 years of age) arising from an incident that allegedly took place between August 15 and August 31, 1999. During the June 21, 2000, preliminary examination, the fourteen-year-old complainant testified that after talking to defendant near a playscape in a park in the city of Wayne, he and defendant went into a nearby public restroom. The complainant was unable to recall the exact date of the incident. According to the complainant, he pulled down his pants, and defendant performed fellatio on him. After defendant told the complainant that it was "[the complainant's] turn," the complainant walked out of the restroom.

On September 1, 2000, defendant moved to suppress statements he made at the time of his arrest and shortly after, as well as the complainant's testimony. Specifically, defendant contended that the statements and the complainant's testimony were inadmissible because they were the fruit of an illegal arrest, and that they were given in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In his brief in support of the motion to suppress, defendant argued that the police did not have probable cause to arrest him, that his statement at the police station was not given voluntarily, and that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights.

The trial court conducted a *Walker*[1] hearing on March 29, 2001. At the hearing, the prosecutor and defendant stipulated, on the basis of a psychological report[2] regarding defendant's competency to waive his *Miranda* rights, that defendant was unable to knowingly, voluntarily, and intelligently waive these rights. As a result, the parties further agreed that defendant's statement to the police at the police station following his arrest was inadmissible at trial. Therefore, the key issues at the suppression hearing focused on the admissibility of defendant's statement to the police at the time of his arrest and the complainant's testimony.

During the suppression hearing, city of Wayne Police Officer Sean Randolph testified that on October 14, 1999, he and another police officer, Officer Buckley,[3] visited Franklin Middle School to investigate a burglary alarm. According to Randolph, an unidentified[4] young boy approached Officer Buckley to report that he was talking to defendant near the playscape in a nearby park when defendant observed the police cars arrive at the school. According to the young boy, defendant said, "there's the police, I have to go," and ran toward woods south of the park. An unidentified young girl present in the park showed the police a hole in the fence that defendant ran through to exit the park.

After the officers entered the woods to investigate, they observed defendant standing about thirty feet away, looking at them. When defendant saw the police, he began to run away. Although the police officers yelled to defendant to stop at least three or four times, he continued to run away. A chase ensued, after which defendant was stopped on the other side of the woods by another police officer and his canine. Defendant was then arrested for violating a city of Wayne loitering ordinance.

Sergeant Kevin Karson also testified at the suppression hearing. He indicated that he interviewed defendant at the police station following his arrest. According to Karson, defendant had made "disturbing statements" to Buckley and Randolph when he was arrested. Specifically, defendant told the officers as they tried to subdue him "please don't hurt me, please don't hurt me. I'd be very mad if I was with somebody who hurt, a, who hurt a kid too. But please don't hurt me. I deserve to die in prison." Before defendant made these statements, the police were unaware of any sexual misconduct occurring at the school.

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] Marilyn K. Gerwolls, Ph.D., prepared the report. In the report, Dr. Gerwolls noted that defendant was diagnosed with autism at the age of five, and that he suffered from Tourette Syndrome. Dr. Gerwolls further indicated that defendant's adaptive skills fell significantly below cognitive levels, and defendant's intellectual testing placed him at a mildly impaired range of functioning. According to the report, defendant's word recognition is at a first-grade level, and defendant is suggestible and vulnerable to manipulation by others. In sum, Dr. Gerwolls concluded that defendant's "limited cognitive abilities and lack of socially adaptive behavior make it unlikely that he would be able to grasp the import of the *Miranda* warnings." [Emphasis supplied.]

[3] Officer Buckley did not testify at the suppression hearing, but his report detailing the incident on October 14, 1999, was admitted as an exhibit.

[4] Although Randolph did not state the name of the young boy at the suppression hearing, the name of the boy, as well as a later female witness, were included in Buckley's report.

Karson testified that he advised defendant of his *Miranda* rights, and that he asked defendant if he was under the influence of drugs or alcohol. In response to defense counsel's queries during cross-examination, Karson stated that from a layman's perspective, it appeared to him that defendant may have had "issues." Specifically, Karson recalled that defendant rocked back and forth during the interview, and that it appeared that defendant "had problems" but he was unaware of the nature of these problems. Karson readily conceded that he did not attempt to obtain a lawyer for defendant, or assess the nature of his "problems," but interviewed him as he would any other individual. Specifically, Karson testified:

> I treated [defendant] as I would any other defendant that was in custody [that] I was interviewing. I read him his *Miranda* rights. I asked him if he could read and write and he stated he could. And we went over the *Miranda* Rights[,] asking any questions.

As a result of his questioning of defendant, Karson ascertained the identity of the complainant. At the close of the suppression hearing, the trial court, in a lengthy bench ruling, concluded that defendant's arrest was unlawful because the police did not have grounds to arrest defendant for a violation of the loitering ordinance, and that the police engaged in misconduct by interviewing defendant after observing his mental limitations. However, the trial court concluded that defendant's initial statement to the police at the time of his arrest was voluntarily given, and therefore admissible. Defendant then moved to dismiss the case against him, which the trial court granted. The prosecutor now appeals as of right.

On appeal, the prosecutor contends that the trial court erred in concluding that the police did not have probable cause to arrest defendant. We agree.

The trial court's findings of fact in a suppression hearing are reviewed for clear error. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, [this Court's] review is de novo." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

It is undisputed that the police did not secure a warrant to arrest defendant on October 14, 1999. However, "the [United States] Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *Michigan v DeFillippo*, 443 US 31, 36; 99 S Ct 2627; 61 L Ed 2d 343 (1979); *People v Shabaz*, 424 Mich 42, 58; 378 NW2d 451 (1985). In the instant case, the police officers had probable cause sufficient to support a warrantless arrest of defendant if "at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that defendant violated the applicable ordinance. *Hunter v Bryant*, 502 US 224, 228; 112 S Ct 534; 116 L Ed 2d 589 (1991); see also *Adams v Williams*, 407 US 143, 148; 92 S Ct 1921; 32 L Ed 2d 612 (1972).

> Probable cause is not easily defined. See *Ornelas v United States*, 517 US 690, 695; 116 S Ct 1657; 134 L Ed 2d 911 (1996); *People v Russo*, 439 Mich 584, 608; 487 NW2d 698 (1992). It 'is a fluid concept –turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced

to a neat set of legal rules.' *Illinois v Gates*, 462 US 213, 232; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Thus, the totality of the circumstances must be considered. [*People v Nunez*, 242 Mich App 610, 620; 619 NW2d 550 (2000) (O'Connell, J., concurring).]

In the instant case, section 656.02 of the city of Wayne ordinance provides:

(a) No person shall loiter or prowl in any public or private place at a time, in a manner or under circumstances which warrant alarm for the safety of persons or security of property in the surrounding area.

(b) The following circumstances shall be considered in determining whether such alarm is warranted:

(1) The flight of a person upon the appearance of a police officer;

(2) Attempted concealment by a person upon the appearance of a police officer; or

(3) The systematic checking by a person o[f] doors, windows or other means of access to buildings, houses or vehicles.

(c) Unless flight by the actor or other circumstances make it impractical, a police officer shall, prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him or her to identify himself or herself and explain his or her presence and conduct. No person shall be convicted of an offense under this section if the police officer did not comply with the preceding criteria and request for information, or if it appears at trial that the explanation given by the actor was true, and if believed by the police officer at the time, would have dispelled the alarm.

Subsection (d)(1) of the ordinance defines "loitering" as "lingering, hanging around, delaying, sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

After a thorough review of the record, we disagree with the trial court's assessment that the police did not have probable cause to believe that defendant had committed, or was committing, an offense at the time of his arrest. Officer Randolph testified at length about the circumstances surrounding defendant's arrest. He indicated that a young boy present in the park told Officer Buckley that defendant was standing in the park when the police cars arrived, and that on their arrival defendant fled. After a young girl pointed out the direction in which defendant ran, the police entered the woods and saw defendant standing there. When defendant saw the police, he continued to flee in spite of repeated shouted requests by the police for him to stop. Defendant was eventually arrested at the other side of the woods after he was apprehended by another police officer and his canine.

To the extent that the trial court concluded that insufficient evidence was presented to suggest that defendant engaged in any of the conduct prohibited by the loitering ordinance, specifically "lingering, hanging around, delaying, sauntering, and moving slowly about," the record is clear that the young boy present in the park informed the officers that defendant was talking to him in the park when the police arrived at the school. The witness' information in this regard may properly support the police officer's determination that probable cause existed to believe that defendant was hanging around as contemplated by the ordinance. See *Chambers v Maroney*, 399 US 42, 44-46; 90 S Ct 1975; 26 L Ed 2d 419 (1970) (where police officers spoke with teenagers who gave description of suspects of crime and getaway car, police had probable cause to arrest the defendant). Further, the police themselves saw defendant standing in the woods, and then flee upon seeing them.

During the suppression hearing, Officer Randolph testified that the decision to arrest defendant for violation of the ordinance was based on defendant's fleeing from the police. Rejecting this testimony, the trial court concluded that mere flight was not sufficient to support a finding of probable cause to believe that the ordinance was violated. We are not in agreement with the trial court's conclusion. Officer Randolph's subjective belief with regard to whether probable cause existed is of little import. Specifically, our Supreme Court has instructed that the probable cause inquiry is "objective." *People v Cipriano*, 431 Mich 315, 342; 429 NW2d 781 (1988).

> An arresting officer's subjective characterization of the circumstances surrounding an arrest does not determine its legality. Rather, probable cause to justify an arrest has always been examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. [*Id.*]

Because the surrounding facts and circumstances were sufficient to warrant a prudent individual to believe that defendant had committed an offense, the police had probable cause to arrest defendant. Further, to the extent that the record facts may reflect that the arrest did not adhere to MCL 764.15(1)(a), which allows a peace officer to arrest an individual without a warrant for an ordinance violation if it is committed in the peace officer's presence, we note that failure to satisfy the statute does not require exclusion of the evidence in this case. *People v Hamilton*, 465 Mich 526, 532-533; 638 NW2d 92 (2002). Because the police had probable cause to arrest defendant, his arrest did not violate the Fourth Amendment, and the exclusionary rule is not applicable. *Id.* at 533.

The prosecutor next asserts that the trial court erred in suppressing the complainant's testimony. We agree.

In essence, the prosecutor argues that even if defendant's arrest violated Fourth Amendment protections, the complainant's testimony need not be excluded, given that it was "sufficiently attenuated" from the illegal arrest. However, we have concluded that defendant's warrantless arrest did not violate the Fourth Amendment because it was supported by probable cause. In the alternative, the prosecutor notes that pursuant to *People v Kusowski*, 403 Mich 653; 272 NW2d 503 (1978), a defendant's inability to knowingly, voluntarily and intelligently waive his *Miranda* rights does not necessitate exclusion of testimonial evidence from a third party

discovered as a result of the defendant's confession. See also *People v Melotik*, 221 Mich App 190, 199; 561 NW2d 453 (1997).

In *Kusowski, supra*, the defendant was charged with and convicted of second-degree murder. The trial court concluded that the defendant was unable to knowingly, voluntarily and intelligently waive his *Miranda* rights, and therefore excluded the defendant's incriminating statements. *Kusowski, supra* at 658, 660. As a result of the defendant's confession, the police had obtained the names of two witnesses, Richard Ban and Robert Savoie, and subsequently questioned the men about their knowledge of defendant's involvement in the murder. *Id.* at 657. Both indicated that defendant had told them that he thought he had killed the victim, and that the defendant had blood on his clothing after the murder, and appeared agitated. *Id.* at 658. The trial court denied the defendant's motion to suppress Ban and Savoie's evidence, and they both testified at trial. *Id.*

On appeal to our Supreme Court, the defendant maintained that Ban and Savoie's evidence should have been excluded as the fruit of the poisonous tree, *Wong Sung v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), because he could not effectuate a valid waiver of his *Miranda* rights. Relying on the United States Supreme Court's decision in *Michigan v Tucker*, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974),[5] Chief Justice Kavanagh, speaking for the Court, ruled as follows:

> In *Tucker, supra*, the United States Supreme Court held that third-party testimonial evidence derived from a *Miranda* violation is not to be excluded where the interrogation occurred before the decision in *Miranda*. The Court has not decided whether the same result obtains in a case such as this, where the questioning occurred after the *Miranda* decision. Our reading of *Tucker* convinces us that it does.
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> Prior to *Tucker* the Court appeared to equate a *Miranda* violation with an infringement of a constitutional right. But *Tucker* makes it clear that a majority of the Court does not now consider a violation of *Miranda* as necessarily involving a violation of the Constitution. Thus, *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), which held "that the 'fruits' of police conduct

[5] The defendant in *Tucker* was charged with rape arising from the sexual assault of a forty-three-year-old woman in Pontiac. In *Tucker, supra* at 436, the defendant gave a statement to the police before the United States Supreme Court handed down its decision in *Miranda*. Therefore, the defendant was not advised of his right to appointed counsel. *Id.* When questioned about his activities on the night of the rape, the defendant told the police he was with another man, Robert Henderson. *Id.* After the police spoke with Henderson, he discredited the defendant's story, indicating that the defendant left his presence at an earlier time, and that defendant had scratches on his face the next day. *Id.* According to Henderson, the defendant told him that he was with a woman the night before. *Id.*

Concluding that the defendant's statement did not violate the Fifth Amendment privilege against compulsory self-incrimination because it was voluntarily given, *id.* at 444-445, the *Tucker* Court noted that although the "procedural safeguards" of *Miranda* were not adhered to, *id.* at 444, exclusion of Henderson's testimonial evidence was not warranted. *Id.* at 448.

which actually infringed a defendant's Fourth Amendment rights must be suppressed", is not controlling precedent is involved. *Tucker, supra*, 445-446.

Tucker therefore indicates that the applicability of the exclusionary rule under circumstances involving testimony obtained as a result of *Miranda* violation is not a foregone conclusion, but would in essence involve an extension of the suppression rule. In recent cases the Supreme Court has refused to extend application of the exclusionary rule beyond those circumstances in which it already operates. [*Kusowski, supra* at 660-661 (footnote omitted).]

After reviewing other cases from the United States Supreme Court, the *Kusowski* Court reversed the judgment of the Court of Appeals, thereby affirming the trial court's denial of the defendant's motion to suppress the testimonial evidence of the two witnesses discovered as a result of defendant's statement after an invalid *Miranda* waiver. *Id.* at 662.

Our Supreme Court decided *Kusowski* in 1978. In 1985, the United States Supreme Court decided *Oregon v Elstad*, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985). In *Elstad*, the defendant, convicted of first-degree burglary, argued that the fruit of the poisonous tree doctrine precluded the admission of his statement given after he was properly advised of his *Miranda* rights, which followed an initial statement made in violation of *Miranda*. When the defendant was arrested by the police, before he was advised of his *Miranda* rights, he told them he was involved in the burglary. *Id.* at 301. Later, at the sheriff's headquarters, after being advised of his *Miranda* rights, the defendant gave a fully voluntary statement, in which he confessed in detail to his involvement in the burglary. *Id.* at 301-302. The United States Supreme Court, speaking through Justice O'Connor, rejected the defendant's argument that the second statement was inadmissible under the fruit of the poisonous tree doctrine. *Id.* at 306.

[A]s we explained in [*New York v*] *Quarles* [467 US 649; 104 S Ct 2626; 81 L Ed 2d 550 (1984)], and *Tucker*, a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. *Dunaway v New York*, 442 US 200, 216-217; 99 S Ct 2248; 60 L Ed 2d 824 (1979); *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975). "The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those that it serves under the Fifth." *Id.* at 601, 95 S Ct 2254; 45 L Ed 2d 416.

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The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda's* preventative medicine

> provides a remedy even to the defendant who has suffered no constitutional harm. See *New York v Quarles, supra*, at 654; 104 S Ct 2626; 81 L Ed 2d 550; *Michigan v Tucker*, 417 US 433, 444; 94 S Ct 2357; 41 L Ed 2d 182 (1974).] [*Elstad, supra* at 306-307.]

Because the defendant's second statement in *Elstad* was given voluntarily and was not the product of coercive police conduct, the *Elstad* Court concluded that it was admissible at trial. *Id.* at 318. Thus, in *Elstad*, the United States Supreme Court reiterated its previous position from *Tucker, supra*, that the fruit of the poisonous tree doctrine is not applicable where the procedural safeguards of *Miranda* were not complied with and the defendant's constitutional rights have not been infringed on. *Id.* at 308.

Returning to the present case, the parties have agreed that defendant could not competently waive his *Miranda* rights. Thus, his statement to the police given after he was advised of *Miranda* was properly suppressed. *Tucker, supra* at 445. However, under the authority of *Tucker, Elstad, and Kusowski*, it is clear that the derivative testimonial evidence of the complainant, discovered as a result of defendant's confession, may properly be admitted into evidence.

On appeal, defendant intimates that Karson engaged in misconduct by continuing to interview defendant after becoming aware of defendant's mental limitations. In this vein, the trial court also expressed its concern that Karson continued to interview defendant after observing defendant's demeanor. However, defendant does not specifically argue that his statement to Karson at the police station was involuntary to the extent that it violated the Fifth Amendment right against compulsory self-incrimination or the Due Process Clause of the Fourteenth Amendment. See *People v Daoud*, 462 Mich 621, 631; 614 NW2d 152 (2000); *Cipriano, supra* at 331, 334. Although we are aware that an individual's mental limitations and concomitant "susceptibility to surrounding pressures or inability to comprehend the circumstances" should be accounted for in determining voluntariness, *People v Belknap*, 146 Mich App 239, 241; 379 NW2d 437 (1985), our independent review of the record, *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972), does not reveal any indication of "police overreaching" or otherwise coercive police activity, a "necessary predicate" to a finding that a statement was involuntary and that its admission would violate the Fourteenth Amendment. *Colorado v Connelly*, 479 US 157, 163-164, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986); *People v Cheatham*, 453 Mich 1, 15-16; 551 NW2d 355 (1996) (Boyle J.); *People v Wells*, 238 Mich App 383, 388; 605 NW2d 374 (1999). Therefore, there is no basis for excluding the evidence under the fruit of the poisonous tree doctrine. *Elstad, supra* at 308.

Finally, we would be remiss if we did not acknowledge that in *Dickerson v United States*, 530 US 428, 120 S Ct 2326; 147 L Ed 2d 405 (2000), the United States Supreme Court recently held that *Miranda* is a "constitutional decision" and is "constitutionally based." See *Attebury, supra* at 669; *Daoud, supra* at 638. Although defendant does not advance this argument on appeal, we are not persuaded that the Court's decision in *Dickerson* renders improper our reliance on *Tucker, Elstad*, and *Kusowski*, cases recognizing that the *Miranda* warnings were not constitutionally required. For instance, recently in *United States v DeSumma*, 272 F3d 176, 180 (CA 3, 2001), the United States Court of Appeals for the Third Circuit rejected the defendant's argument that *Dickerson's* "pronouncement of *Miranda's* constitutionality casts doubt on earlier

[United States Supreme Court] cases denying suppression of derivative evidence" on the basis of the fruit of the poisonous tree doctrine where a *Miranda* violation has occurred.

> We cannot agree with the defendant's reading of *Dickerson* because the Supreme Court appeared to anticipate and reject it. The Court explained that "[o]ur decision in [*Elstad*] – refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases – does not prove that *Miranda* is an unconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogations under the Fifth Amendment."
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> *Dickerson* thus continued to observe the distinction between *Miranda's* application to cases involving the Fifth, rather the Fourth Amendment. Ultimately, the Fifth Amendment prevents the use of the non-*Mirandized* statement rather than the introduction of derivative evidence. [*DeSumma, supra* at 180.]

We are in agreement with the *DeSumma* Court's reasoning, and adopt it as our own. See also *United States v Orso*, 266 F3d 1030, 1034, n 3 (CA 9, 2001) (concluding that *Dickerson* does not alter the Supreme Court's earlier holding that "fruits" doctrine does not apply to *Miranda* violation); *United States v Newton*, 181 F Supp 2d 157, 180 (ED NY, 2002) (holding that *Dickerson* did not overrule the Court's earlier holding in *Elstad*); but see *United States v Kruger*, 151 F Supp 2d 86, 101 (D Me, 2001) (holding that *Dickerson* "changed the landscape" by conferring constitutional status on *Miranda* and that tangible evidence derived from a *Miranda* violation must be suppressed). Accordingly, we agree with the prosecutor that the trial court erred in suppressing the complainant's testimony.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper