STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 28, 2012
v	No. 300978 Wayne Circuit Court
JOHN WAYNE DAVIS, JR., Defendant-Appellee.	LC No. 10-007832-FH

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

The prosecution appeals by right the trial court's order granting defendant's motion to suppress evidence and dismiss all charges. We affirm in part, reverse in part, and remand for further proceedings.

Defendant was charged with larceny in a building, MCL 750.360, and receiving and concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3)(a). He filed a motion to suppress and to dismiss, arguing that he was subject to custodial interrogation without having been given warnings required by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The trial court agreed and suppressed not only an unwarned statement defendant made in his home before his arrest, but also physical evidence seized at the home. The trial court also suppressed a statement defendant gave at the station house after waiving his *Miranda* rights and dismissed the case.

We review de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009). The trial court's factual findings, however, are reviewed for clear error. *Id*. Here, whether defendant was interrogated while "in custody," so entitled to *Miranda* warnings, presents a mixed question of law and fact. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). A trial court's factual finding "is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id*.

The first issue is whether defendant was subject to a custodial interrogation without first having been advised of his *Miranda* rights. We conclude that under the facts and circumstances

of this case, defendant was in custody for purposes of *Miranda* when he was questioned in his home.

The Fifth Amendment's privilege against self-incrimination requires that before the police may question a person deemed to be "in custody," they must warn the person that he or she has certain rights. *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Vaughn*, 291 Mich App 183, 188-189; 804 NW2d 764 (2010), lv granted limited to other issues 490 Mich 887 (2011). These *Miranda* warnings include:

> the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [*Miranda*, 384 US at 479.]

A suspect is in custody for purposes of *Miranda* when the degree of restraint on the suspect's freedom of movement is comparable to the restraint of a formal arrest, such that a reasonable person would not feel free to end the interrogation and leave. See *Miranda*, 384 US at 444; *Vaughn*, 291 Mich App at 189. To determine if an individual was in custody when police questioning occurred, courts must look to the totality of the circumstances, *Coomer*, 245 Mich App at 219, and conclude that the suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 US at 444. This determination must be made based on the objective circumstances of the questioning, without regard for the subjective beliefs of the interrogating officers or the suspect. *Yarborough v Alvarado*, 541 US 652, 662-663; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

The following factors may be relevant in determining if an individual was in custody for purposes of *Miranda*: 1) the number of police officers present, 2) whether the officers were in uniform or had their weapons drawn, 3) what the officers told the individual, i.e., whether he was not under arrest or free to leave, 4) where the questioning occurred, 5) when the questioning occurred, 6) whether the individual was restrained or directed where the questioning would occur, 7) who else was present during the questioning, and 8) the duration of the questioning. See *People v Steele*, 292 Mich App 308, 317-319; __ NW2d __ (2011); *Vaughn*, 291 Mich App at 189-190; *Coomer*, 245 Mich App at 220; *Zahn*, 234 Mich App at 449-450. Generally, a person is not in custody for purposes of *Miranda* when questioned in their own home. See *Vaughn*, 291 Mich App at 190; *Coomer*, 245 Mich App at 220.

In granting defendant's motion to suppress, the trial court relied almost exclusively on *Orozco v Texas*, 394 US 324; 89 S Ct 1095; 22 L Ed 2d 311 (1969), in which the defendant was awakened in the middle of the night at the boarding house where he stayed and questioned about a murder. While several facts in *Orozco* are analogous to the instant case, the trial court erred in relying on that case to conclude that defendant was in custody when the police questioned him in his bedroom and therefore should have been given *Miranda* warnings. The issue of whether the defendant in *Orozco* was in custody was not presented; rather, the Court assumed that the defendant was in custody based on police testimony and addressed whether *Miranda* applied

outside the station-house setting. *Orozco*, 394 US at 325-327. "*Orozco* does not stand for the proposition that being awakened at night in one's room in the presence of officers necessarily constitutes arrest." *United States v Mejia*, 953 F2d 461, 467 (CA 9, 1991).

Nevertheless, based on the objective circumstances surrounding the questioning, we conclude that defendant was in custody for purposes of *Miranda* because a reasonable person in defendant's position would not have felt free to leave or end the interrogation. *Yarborough*, 541 US at 663; *Vaughn*, 291 Mich App at 189. Eighteen-year old defendant was questioned by three uniformed police officers standing in his bedroom at 3 a.m. The officers never told defendant that he was not under arrest or free to leave. Although the questioning occurred in the home where defendant lives with his grandmother, it did not occur in a common area of the home or a room of defendant's choosing. Instead, the officers followed defendant's grandmother, who permitted their entry, back to defendant's bedroom, without invitation, and questioned defendant while standing between him and the door. The 3 a.m. questioning occurred immediately after defendant's grandmother woke him, and the officers questioned defendant while he sat on his bed wearing only his boxer shorts. Defendant testified that he was groggy and unable to see clearly. The only other person present was defendant's grandmother, who testified she was not in the room for at least part of the questioning. Although defendant was in his own home, the time of day, defendant's age, condition, the number of officers, their position and their failure to tell defendant he was not in custody and free to leave, support the conclusion that a reasonable person in defendant's position would have felt they were unable to end the interrogation or leave.[1]

The second issue is whether the laptop defendant gave to police and the statement he subsequently made at the police station should have been suppressed. We conclude that the trial court erred in suppressing these two pieces of evidence.

The Fifth Amendment's Self-Incrimination Clause states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. Therefore, a suspect's constitutional rights are not violated when the police, for whatever reason, fail to inform him of the *Miranda* warnings. *United States v Patane*, 542 US 630, 641; 124 S Ct 2620; 159 L Ed 2d 667 (2004) (plurality opinion). Rather, the Fifth Amendment is implicated only when the suspect's unwarned statement is introduced into evidence at trial. *Id*. Excluding such statements "is a complete and sufficient remedy for any perceived *Miranda* violation." *Id*. at 641-642. Because the failure to administer *Miranda* rights is not in itself a violation of the Fifth Amendment, the exclusionary rule that fruits of a constitutional violation must be suppressed does not apply. *Patane*, 542 US at 643-645 (admitting nontestimonial physical fruits of unwarned statement); *Oregon v Elstad*, 470 US 298, 308-309; 105 S Ct 1285; 84 L Ed 2d 222 (1985) (admitting a statement given after *Miranda* warnings following an initial unwarned voluntary statement); see also *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d

[1] More accurately, under the circumstances, the question is whether a reasonable person would have felt free to ask the officers to leave the bedroom or the house. See *Mejia*, 953 F2d at 467.

441 (1963) (suppressing evidence obtained as a result of an illegal arrest because it was the "fruit of the poisonous tree").

The trial court suppressed the laptop and second statement defendant made after being advised of and waiving his *Miranda* rights as "fruit of the poisonous tree." But evidence obtained as a result of an unwarned statement is not automatically inadmissible as "fruit of the poisonous tree." *Patane*, 542 US at 641-643; *Elstad*, 470 US at 308-309. Admission of such evidence violates the Fifth Amendment only if the evidence is the fruit of an actually coerced statement. *Patane*, 542 US at 644; *Elstad*, 470 US at 309. An "actually coerced statement" is one that is accompanied by "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." *Elstad*, 470 US at 309. If a suspect's first statement is not actually coerced but rather merely the product of unwarned custodial interrogation, then the admissibility of a second statement after having been advised of *Miranda* rights turns on whether the suspect has knowingly and voluntarily waived his rights. *Id*. at 309. "The relevant inquiry is whether, in fact, the second statement was also voluntarily made." *Id*. at 318.

In this case, defendant's initial statement, though unwarned, was not coerced. Compulsion proscribed by the Fifth Amendment is that which results when the police use threats or violence, improper influence, or direct or implied promises, however slight, to create a circumstance in which a person is unable to remain silent. See *People v Daoud*, 462 Mich 621, 632; 614 NW2d 152 (2000), quoting *Malloy v Hogan*, 378 US 1, 7; 84 S Ct 1489, 1493; 12 L Ed 2d 653 (1964). The record does not support finding that defendant's statement without *Miranda* warnings was the product of coercion proscribed by the Fifth Amendment. The police did not use physical violence or threat of force in any way to obtain the statement. Defendant argues that his first confession sealed his fate and led directly to his second confession at the police station. However, "the psychological impact of voluntary disclosure of a guilty secret" does not qualify as state compulsion. *Elstad*, 470 US at 312.

1. SUPPRESSION OF THE LAPTOP

We also conclude the laptop should not have been suppressed. First, as discussed already, defendant's initial statement, though unwarned, was not coerced. In addition, the laptop itself is nontestimonial, and the Fifth Amendment is not concerned with nontestimonial evidence. See *Elstad*, 470 US at 304; see also *Patane*, 542 US at 635 ("The Self-Incrimination Clause . . . is not implicated by the admission into evidence of the physical fruit of a voluntary statement."). Rather, "[t]he Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony." *Elstad*, 470 US at 306-307. Here, once defendant retrieved the laptop from under his bed, it was in plain view and therefore lawfully seized by police.

Second, there were intervening circumstances between defendant's unwarned statement and his pulling the laptop from under the bed. According to the police, defendant initially denied knowing anything about the laptop. Only after his grandmother said to defendant, "I told you that laptop he brought you was stolen," did he retrieve the laptop from under his bed and hand it to Officer Keimig. Consequently, there is no basis to suppress the laptop.

2. SUPPRESSION OF DEFENDANT'S SECOND STATEMENT

For the reasons already discussed, the statement defendant made at the police station should not have been suppressed. Suppression of a subsequent statement made after the defendant has been read his *Miranda* rights and knowingly, intelligently, and voluntarily waived them is only appropriate if there is a causal connection between a prior statement that is the product of police coercion or some other improper police tactic[2] and the subsequent statement. *Elstad*, 470 US at 309, 318. If the prior statement was actually coerced, we must consider certain factors in deciding whether the taint has dissipated, including the amount of time passed and the location of the interrogation or the identity of the interrogators, the nature of the prior misconduct, and any intervening circumstances. *Elstad*, 470 US at 310; *Coomer*, 245 Mich App at 222. Generally, the subsequent administration of *Miranda* warnings will remedy any problems that existed with the initial, unwarned statement. *Elstad*, 470 US at 314.

Whether a defendant voluntarily waived his *Miranda* rights depends on the absence of police coercion; a waiver is made knowingly and intelligently if the person has a basic understanding of his rights. *People v Gipson*, 287 Mich App 261, 264-265; 787 NW2d 126 (2010). The voluntariness of a statement is determined by examining the totality of the circumstances, which may include "the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of the arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency." *Id*. at 265.

Here, after defendant gave his first unwarned statement, he dressed and rode with the police officers to show them where his friend, Kirk, lived. The officers then drove defendant to the police station, where he was provided his *Miranda* warnings, waived them, and made his second statement. It is unclear how much time had passed, but the location and questioning officer had changed. In addition, defendant was not only read his *Miranda* rights, he was also provided them in writing. Thereafter, defendant wrote out a full page statement regarding the theft of the laptop. By this time, defendant was no longer drowsy; he was completely awake. There is no evidence defendant was threatened or abused, or that the questioning at the police station was prolonged. The totality of the circumstances indicates that defendant was exercising his free will when he knowingly and intelligently waived his *Miranda* rights and voluntarily gave a second statement. Consequently, the trial court erred in suppressing defendant's second statement. *Steele*, 292 Mich App at 320-321; *Coomer*, 245 Mich App at 222-223.

3. EVIDENCE WAS NOT FRUIT OF ILLEGAL SEARCH OR ARREST

Defendant also argues that the laptop and defendant's second statement were the fruit of an illegal search and an illegal arrest. A search occurs when the government intrudes on an expectation of privacy that society recognizes as reasonable. *Chowdhury*, 285 Mich App at 523.

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[2] See, e.g., *Missouri v Seibert*, 542 US 600; 124 S Ct 2601; 159 L Ed 2d 643 (2004), where the police engaged in a deliberate two-stage interrogation technique of first obtaining a confession and then giving the suspect his *Miranda* warnings.

The lawfulness of a search depends on its reasonableness. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). A search without a warrant is generally unreasonable unless probable cause exists and the circumstances justify the absence of a warrant. *Id.* One such circumstance is consent that is unequivocal, specific, and freely and intelligently given. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Another exception to the warrant requirement is plain view. *Chowdhury*, 285 Mich App at 516. "A police officer is authorized to seize without a warrant an item in plain view if the officer is lawfully in the position to observe the item and the item's incriminating nature is immediately apparent." *People v Lapworth*, 273 Mich App 424, 430; 730 NW2d 258 (2006).

Here, the police went to defendant's home to ask him questions regarding a stolen laptop. Moss, the owner of the trailer, gave them permission to enter.[3] Moss claims that two of the officers were later looking in the bedroom closets; however, these alleged searches did not yield any evidence that the prosecution seeks to admit. Rather, while the officers were lawfully present in his bedroom, defendant pulled the laptop and a box of accessories out from under his bed. At that point, based on the information the police received from the complainant, statements Moss made, and the appearance of the laptop with its accessories, the incriminating nature of the evidence was readily apparent. The seizure of the evidence without a warrant was therefore reasonable. *Lapworth*, 273 Mich App at 430.

To lawfully arrest someone without a warrant, the police officer must possess information establishing probable cause to believe that a crime has occurred and that the defendant committed it. *People v Reese*, 281 Mich App 290, 294-295; 761 NW2d 405 (2008). In this case, as just discussed, the police lawfully seized the laptop before defendant's arrest; it was not the fruit of an arrest, illegal or otherwise. Additionally, the laptop and the circumstances leading to its seizure, apart from defendant's statements, provided the police with probable cause to arrest defendant. And with respect to defendant's statements, he admitted having the laptop and knowing it was stolen. Even though defendant should have been administered his *Miranda* warnings before the officers began questioning him, the statements he made in his home could still be used as a basis for probable cause to support his arrest. A *Miranda* violation occurs only when the unwarned statement is admitted into evidence during the prosecution's case in chief at trial. See *Patane*, 542 US at 641-642. Consequently, defendant's arrest was not illegal, nor is it a basis to suppress any evidence.

[3] Defendant claims that Moss's consent was not voluntary. But the trial court concluded that Moss gave the police officers consent to enter the trailer. Given that both Officer Keimig and Moss testified that Moss gave the officers permission to enter, the lower court's finding of fact was not clearly erroneous.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey