STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 31, 2012
v	No. 302821 Saginaw Circuit Court
JEFFREY MONTREAL CURRY, Defendant-Appellant.	LC No. 06-027797-FC

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying his motion to suppress a custodial statement. We affirm.

This case was previously before this Court. In *People v Curry*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2009 (Docket No. 279254), we affirmed defendant's convictions of second-degree murder, MCL 750.317; resisting or obstructing a police officer, MCL 750.81d(1), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] Defendant subsequently filed an application for leave to appeal to our Supreme Court. The Supreme Court issued an order vacating this Court's judgment and remanding to the trial court for factual findings on defendant's motion to suppress his statement to police. *People v Curry*, 485 Mich 903; 773 NW2d 15 (2009). Specifically, the Supreme Court noted that although the trial court had "denied defendant's motion by order of April 11, 2007, [it] failed to make factual findings or set forth its reasons for denying the motion." *Id.* On remand, the trial court held another *Walker*[2] hearing and again denied defendant's motion to suppress his custodial statement to police. After reviewing the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988),

[1] We remanded "to the trial court for the purpose of correcting the judgment of sentence to provide that defendant's sentences for CCW and second-degree murder are to be served concurrently." *Curry*, Docket No. 279254 at p 5.

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

the court concluded that defendant's post-*Miranda*[3] statement was voluntarily, knowingly, and intelligently made and was admissible under *Oregon v Elstad*, 470 US 298, 308–309; 105 S Ct 1285; 84 L Ed 2d 222 (1985). Defendant now appeals from the order denying his motion to suppress.[4]

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*. A trial court's factual findings are clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

Defendant argues that the police violated his fifth amendment right against self-incrimination when they wrongfully extracted a statement from him before informing him of his *Miranda* rights which, in turn, led to a more elaborate statement during post-*Miranda* interrogation.

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. 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. However, the failure to administer *Miranda* rights is not in itself a violation of the Fifth Amendment, and 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); *Elstad*, 470 US at 308–309; (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 441 (1963) (suppressing evidence obtained as a result of an illegal arrest because it was the "fruit of the poisonous tree").

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*

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[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] In his previous appeal to this Court, defendant presented additional issues that were decided by this Court. However, the Supreme Court vacated this Court's opinion. Defendant has not raised those additional arguments in this appeal.

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.

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). In this case, the record does not support a finding that defendant's initial statement, though unwarned, was coerced. The police did not use physical violence or threat of force in any way to obtain the statement. No evidence supports that during the initial questioning the police deliberately utilized an interrogation technique "calculated . . . to undermine the *Miranda* warning." *Missouri v Seibert*, 542 US 600, 622 (Kennedy, J., concurring); 124 S Ct 2601; 159 L Ed 2d 643 (2004). The transcript reveals that a detective briefly questioned defendant regarding a previous shooting encounter with the victim, and then inquired, "And you shot in self defense is what you are saying?" Defendant answered affirmatively. Following additional discussion regarding the injuries defendant sustained during the arrest, a detective stated, "Now I know you're saying that it was self defense, and like I say I got questions for you, you got questions for me obviously. Okay we got to get this straight. You are in custody right now so I have to read you your rights, okay?"

The preponderance of defendant's statements followed the *Miranda* warning. During the post-*Miranda* interrogation, defendant elaborated regarding his self-defense claim and supplied information in much greater detail than during his initial statement. As previously noted, the relevant inquiry is whether, in fact, the post-*Miranda* statement was voluntarily made.

Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity to understand the warnings given. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). In *Cipriano*, 431 Mich at 334, our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

No single factor is conclusive. *Cipriano*, 431 Mich at 334; *People v Fike*, 228 Mich App 178, 181–182; 577 NW2d 903 (1998).

The record indicates that defendant understood his rights and knowingly and intelligently waived them. The court found that defendant was 28 years of age, that he had at least one other

criminal incident involving contact with the police, that he had a 9th grade or 11th grade education, and that he had sufficient ability to express himself and did not appear to be suffering from any mental illness or retardation. The court also found that the questioning was not prolonged, and noted that

> [T]he Court viewed the video statement in its entirety, and I would challenge anyone, any reasonable person watching that, to conclude that he was under the influence of any alcohol, medication, or drugs. I don't believe that any reasonable person viewing that could conclude that. To the contrary he appeared to be coherent, did not appear to be in any distress at all . . . [T]here appears to be during the interview no evidence of any force or coercion. Nobody tried to trick him by deceit or by promises. He didn't appear to be ill, confused, sleepy, stoned from drugs or medication or illegal substances. . . . There was other testimony that there was no smelling of alcohol by the officers, no appearance of intoxication, no signs of drugs, never said he took drugs, didn't need assistance in walking, appeared to be okay . . .

Giving deference to the trial court's determinations as to the relative weight and credibility of the evidence, the trial court's findings of fact with regard to the *Cipriano* factors were not clearly erroneous. Viewing the totality of the circumstances, we are not convinced that a mistake was made in denying defendant's motion to suppress his statement.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray