STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 18, 2002
v	No. 236052 Wayne Circuit Court
DOLPH D. CLARK, Defendant-Appellee.	LC No. 99-006862

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order dismissing the case against defendant. Defendant was charged with possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. After the trial court granted defendant's motion to suppress his confession, the case was dismissed without prejudice. We reverse.

The prosecution contends that the trial court erred in granting defendant's motion to suppress his confession. We agree. After the motion hearing, the trial court found:

> [The police officer] interviewed the defendant and failed to advise him of his *Miranda* rights intentionally. He questioned him. He threatened the defendant with charging his girl friend [sic] with a charge related to the drugs that were found in the house, and advised [defendant] that his girl friend's [sic] child would be taken into protective custody which [sic] is not necessarily true at all.
>
> The defendant's statements were not – were coerced and they were made without benefits of *Miranda*, and they are not admissible.
>
> The written statement was clearly – clearly emanates from the statements made before the *Miranda* rights were given.

We conclude, upon review of the lower court record, that the trial court erred in granting defendant's motion to suppress. "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court must determine under the totality of the circumstances." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). This Court

reviews de novo the entire record, but we will not disturb the trial court's factual findings unless they are clearly erroneous. *Id.*; *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999) (citations omitted). The lack of *Miranda*[1] warnings in and of itself does not make a statement involuntary, even though a statement made during a custodial interrogation before *Miranda* warnings were given will be suppressed. *Oregon v Elstad*, 470 US 298, 309-310; 105 S Ct 1285, 1293; 84 L Ed 2d 222 (1985); *People v Anderson*, 209 Mich App 527, 531; 531 NW2d 780 (1995).

In *Elstad*, the defendant gave an inculpatory statement to police officers who were talking to him at his home before he was arrested. About an hour later, the defendant waived his *Miranda* rights at the police station and gave an incriminatory written statement. The trial court suppressed the statement obtained at the defendant's home because he had not been given his *Miranda* rights and was arguably in police custody. However, the trial court did not suppress the subsequent written statement, even though the defendant argued that it was tainted by the first statement. *Elstad*, *supra* at 301-302. On appeal to the Oregon Court of Appeals, the defendant's conviction was reversed on the basis that the psychological impact of the unconstitutionally obtained first statement tainted the subsequent statement absent some period of time to dissipate its coercive effect on the defendant. *Id.* at 302-303.

The United States Supreme Court reversed the decision of the Oregon Court of Appeals, noting that, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. Therefore, a subsequent voluntary statement, made "after a careful and thorough administration of *Miranda* warnings," is considered to be an exercise of a defendant's choice to waive his Fifth Amendment rights. *Id.* at 310-311, 314. Hence, the main issue here is whether defendant's pre-*Miranda* statement was voluntary. If the pre-*Miranda* statement was voluntary, then it is not necessary to suppress the subsequent statement that defendant made voluntarily after knowingly and intelligently waiving his *Miranda* rights. *Id.* at 318.

The following factors for determining whether a statement is voluntary were set forth in *People v Cipriano*, 431 Mich 315, 334-335; 429 NW2d 781 (1988):

> the 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.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is

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

> whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.

In this case, defendant[2] had been in custody for fifteen hours before the interview began. Defendant was not under the influence of alcohol or drugs. The total interview was about one-half hour in length. The police officer spoke with defendant for ten to fifteen minutes before he gave defendant his *Miranda* warnings, during which time defendant gave some information about other drug dealers and their operations, as well as some information as to how much money defendant made selling drugs. The police officer then read defendant the *Miranda* rights form and continued the interview for another ten minutes. The police officer wrote defendant's answers to the questions, asked after *Miranda* rights were given, on the *Miranda* rights form and defendant read and initialed each. The police officer stated that he wrote only the information defendant gave after the *Miranda* warnings on the *Miranda* rights card, and not the information from the interview prior to the *Miranda* warnings being given. After defendant's interview ended, the police officer recorded the information obtained before the *Miranda* warnings were given on a separate typed record.

The police officer admitted telling defendant at the beginning of the interview that, if he cooperated as an informant, his charges might *possibly* be reduced. The police officer also admitted telling defendant that, *if* defendant and his girlfriend were both convicted of drug charges, the girlfriend's daughter *might* end up in protective custody. However, the police officer denied that he told defendant that, if he acknowledged possessing the drugs, the child would not have to go into protective custody or that defendant's cooperation had any bearing on the child being placed in protective custody. Also, defendant's girlfriend was not in custody, nor was the child in protective custody, when the police officer made the statement.[3] Importantly, defendant offered no evidence or testimony to dispute the police officer's testimony or to demonstrate that the police officer's statements coerced him into confessing.

The prosecution has shown, by a preponderance of the evidence, that both the pre- and post-*Miranda* statements were voluntarily given by defendant. The police officer's statement that *possibly* defendant's charges would be reduced if he gave information about other drug dealers did not amount to a *promise* of leniency,[4] nor did the police officer's evaluation of what

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[2] Defendant did not testify at the suppression hearing. Rather, only the police officer testified.

[3] The facts in *People v Richter*, 54 Mich App 598, 600-601; 221 NW2d 429 (1974), which defendant cites in support of his coercion theory, are inapposite because, unlike *Richter*, (1) defendant was not the child's natural or adoptive parent, (2) the child was not actually taken into protective custody, and (3) defendant did not allege that he confessed out of concern for the child.

[4] The Michigan Supreme Court in *People v Conte*, 421 Mich 704, 712; 365 NW2d 648 (1984), stated:

> [A] statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess. In determining whether a promise of leniency exists, the relevant inquiry is whether the defendant reasonably understood the official's statements to be a promise of leniency. In determining whether that

(continued…)

might happen to defendant's girlfriend's daughter if a conviction of the girlfriend occurred amount to a threat. There is no indication that either of the police officer's statements overcame defendant's will or that defendant's statements were the product of coercion. See *People v Daoud*, 462 Mich 621, 633, 635; 614 NW2d 152 (2000). Because the pre-*Miranda* statement was voluntary, and defendant voluntarily, knowingly, and intelligently chose to waive his rights when he confessed after he was advised of his *Miranda* rights, the trial court erred in granting defendant's motion to suppress and in dismissing the case. *Abraham*, *supra*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray

(…continued)

> promise caused the defendant to confess, we will ask whether the promise was one relied upon by the defendant in making his decision to offer inculpatory statements, and whether it was one that prompted him in fact to give those statements. If the answer to all of the foregoing inquiries is affirmative, the defendant's statements are involuntary and inadmissible. If the answer to any of the questions is negative, the defendant's statements are admissible.

Here, because defendant did not testify at the hearing, there is no indication in the record that defendant relied on Officer Strong's statement that his charges could *possibly* be reduced if he cooperated.