IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

03-CR-0030-C-01

v.

DONALD L. GILMORE,

Defendant.

- -

Defendant Donald L. Gilmore has filed objections to the report and recommendation entered by United States Magistrate Judge Stephen L. Crocker on February 6, 2004, in which the magistrate judge recommended denial of defendant's motion to suppress his statements to law enforcement officers concerning his ownership and possession of guns. I agree that the motion should be denied but only as to the physical evidence and the second, warned statement that defendant made. I do not agree with the magistrate judge's conclusion that defendant's first, unwarned statements can be used against him.

The unusual context in which defendant made the contested statements gives rise to knotty questions about the applicability of the exclusionary rule announced in Miranda v. Arizona, 384 U.S. 436 (1966). According to the magistrate judge's uncontested factual

findings, defendant was in custody after having been arrested on an obstruction charge because he fled after a routine traffic stop rather than submit to a weapons search. He would not have been stopped had the police not been looking for a man named Randall Thomas, who was believed to have information about Russell Cage, who was wanted for questioning in connection with a murder investigation in Hammond, Indiana. When the police spotted the car defendant was driving, they thought it belonged to Thomas, so they stopped it for having an expired vehicle registration tag. After the stop and subsequent apprehension of defendant, officers took him to the police station, where Detective Craig Johnson and a patrol officer took him aside for questioning about the whereabouts of the man wanted for questioning. It appears that the officers had no intention of questioning defendant about any crimes he might have committed and definitely not about the crime for which they had just apprehended him. Presumably, it was for this reason that they did not bother to give him any Miranda warnings. As they asked about Cage, defendant volunteered that he had witnessed a shoot-out the preceding Tuesday, had seen the participants drop their weapons in the bushes and had retrieved the guns and kept them.

When defendant divulged this information, the officers checked to see whether he had a prior felony conviction. He did. At that point, another officer asked defendant whether he would agree to a search of his residence; he said he would. The officers searched the residence and found the rifle and shotgun defendant said he had found in the bushes.

Later in the day, another officer administered Miranda warnings to defendant and re-initiated questioning. Defendant repeated his statements about retrieving and keeping the guns.

In his factual findings, the magistrate judge characterized defendant as a witness being questioned, rather than as a suspect. Defendant objects to this characterization, arguing that it is unwarranted speculation on the part of the magistrate judge. He contends that if the court follows the same reasoning, police officers could conduct custodial questioning of any suspect about any criminal behavior without benefit of Miranda so long as they do not question him about the specific offense for which he was arrested. I have not adopted this precise factual finding, because it is not necessary to do so.

Defendant objects also to the magistrate judge's finding that "completely out of the blue [defendant] volunteered information" about the firearms. Rep. & Rec., dkt. #29, at 3. I do not read this statement as a denial by defendant that his statements about the guns were voluntary. Rather, I read it as part of defendant's argument against making any exception to the Miranda rule for volunteered statements. This conclusion is bolstered by defendant's subsequent assertion that statements given in a custodial environment without Miranda warnings can never be voluntary. Def.'s Obj. to Rep. & Rec., dkt. #30, at 8. Defendant has never denied that he made the statements about the guns without any coercion by the interrogating officers, although he has had opportunities to do so, both in

the affidavit he submitted in support of his request for a suppression hearing and at his evidentiary hearing, when he chose not to take the stand.

After defendant was indicted on a federal charge of being a felon in possession of guns, he moved to suppress both sets of statements and the guns themselves on the ground that the evidence had been obtained in violation of his Miranda rights. In a thoughtful and well reasoned report, the magistrate judge recommended denial of defendant's suppression motion as it related to defendant's initial, unwarned statement. He found that defendant had volunteered his statements; Miranda itself says that it does not bar volunteered statements; the police did nothing to elicit the statements about the guns because they were interested in Russell Cage's whereabouts, not in abandoned guns; the circumstances of defendant's situation are so unusual that it is not necessary to suppress the physical evidence and statements in order to deter similar actions in the future to protect constitutional rights; and excluding this relevant evidence would impose a substantial cost on society's interest in the enforcement of the laws.

Although the question is a close one, I find myself in disagreement with the magistrate judge about the admissibility of defendant's unwarned statements. I accept the magistrate judge's conclusion that defendant's statements were both volunteered and voluntary. However, I do not conclude from this that the statements could be used against defendant without violating Miranda. The purpose of Miranda was to establish a bright line

test that would protect suspects from the "coercion inherent in custodial interrogation," id. at 435, and reduce the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to incriminate himself." Id. at 435. The Court reaffirmed that purpose in Dickerson v. United States, 530 U.S. 428 (2000), when it revisited Miranda to consider the constitutionality of 18 U.S.C. § 3501, a statute that appeared to allow courts to admit in evidence confessions that they find were made voluntarily, regardless whether Miranda warnings were given.

As the Supreme Court has recognized, close observance of Miranda may lead to the loss of uncoerced statements, but this societal cost is offset by the advantages of the bright line rule that Miranda establishes. Dickerson, 530 U.S. at 444. The rule is easy for police officers to understand and to follow. If they want to question persons in custody, they must administer the required warnings. They do not need to decide whether the person they are questioning is a witness and not a suspect. They simply administer the warnings whenever they are interrogating someone who is in custody for any reason and thereby avoid the risk that any incriminating responses they elicit will be thrown out before trial.

It is true, as the magistrate judge pointed out, that in Miranda, 384 U.S. at 478, the Court made the statement that "[v]olunteered statements of any kind are not barred by the Fifth Amendment." However, there is no indication that the Court was referring to statements "volunteered" during a custody interrogation and every indication that it was

referring to statements volunteered by persons who are not in custody. The Court's two examples of volunteered statements were of persons not in custody, such as a person "who enters a police station and states that he wishes to confess to a crime" or a person "who calls the police to offer a confession." Id. Under Miranda, *every* statement made without warnings is presumptively involuntary. As the Court confirmed in Dickerson, 530 U.S. at 442, courts are not to engage in a "totality-of-the-circumstances" inquiry to determine whether an unwarned statement is truly voluntary. Doing so would run the risk of overlooking an involuntary custodial confession.

The government asserts that defendant was not subject to interrogation, but I disagree. It is undisputed that police officers put questions to defendant. Such questioning falls within this circuit's definition of interrogation. United States v. Briggs, 273 F.3d 737, 740 (7th Cir. 2001) ("'Interrogation,' so as to trigger the right to counsel, means direct questioning by the police, as well as 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'").

Although I am persuaded that defendant's initial statements about the guns must be suppressed, this does not end the analysis. Instead, it makes it necessary to decide defendant's motion to suppress the physical evidence of the guns and the statements defendant made later in the day, after receiving his Miranda warnings but after the police

had searched his residence and seized the guns.

Some background is necessary to follow the arguments for and against suppression. A good starting point is Wong Sun v. United States, 371 U.S. 471 (1963), in which the Supreme Court suppressed evidence of a defendant's statements and physical evidence obtained only as the result of an illegal, warrantless arrest. Such evidence is "fruit of the poisonous tree" and subject to suppression if "'the evidence to which the instant objection is made has been come at by exploitation of [a primary] illegality . . . [rather than] by means sufficiently distinguishable to be purged of the primary taint.'" Id. at 488 (quoting Maguire, Evidence of Guilt, 221 (1959)). In suppressing both the statements and the physical evidence, the Court explained that the two kinds of evidence were both fruit of official illegality and therefore subject to suppression to deter lawless conduct by federal officers. Id. at 485-86. Refusing to allow the government to use such evidence "make[s] effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person." Id. at 484.

Oddly enough, in the more than 40 years that have passed since the Supreme Court decided Wong Sun and the almost 40 since it decided Miranda, the Supreme Court has never determined whether physical evidence must be suppressed if it has been obtained by exploitation of an illegally obtained admission. The Court came close to doing so in Commonwealth v. White, 439 U.S. 280 (1978), when it considered a state court's decision

to suppress evidence obtained during execution of a search warrant derived from statements given in violation of Miranda, but it was unable to gain a majority vote on either side of the issue. An evenly divided court affirmed the ruling of the Supreme Judicial Court of Massachusetts. In 1985, the Court considered the effect of unwarned statements on subsequent statements given after a suspect had received his Miranda warnings. In Oregon v. Elstad, 470 U.S. 298 (1985), the Court rejected the defendant's argument that such statements were fruits of the poisonous tree and subject to suppression under Wong Sun and overruled the Oregon Supreme Court's decision requiring suppression of the statements.

The Supreme Court found the situation in Elstad distinguishable from that in Wong Sun. In the Fourth Amendment context, the Court excludes the fruits of illegal searches to carry out the purpose of the Fourth Amendment exclusionary rule, which is "to deter unreasonable searches, no matter how probative they are." Elstad, 470 U.S. at 306. The individual who undergoes an illegal search of his residence, property or person has sustained a constitutional injury. In contrast, Miranda's exclusionary rule serves the Fifth Amendment's purpose of prohibiting the compulsion of incriminating testimony, but it "sweeps more broadly than the Fifth Amendment itself." Id. Even if a court finds statements voluntary, it must still bar them from evidence because the failure to give Miranda warnings "creates a presumption of compulsion." Id. at 307. Therefore, "Miranda's preventive medicine provides a remedy even to the defendant who has suffered

no identifiable constitutional harm." Id.

The Court noted that in Michigan v. Tucker, 417 U.S. 433 (1974), it had refused to extend the Wong Sun fruit of the poisonous tree doctrine to the testimony of a witness whose identity was derived from an unwarned statement of the defendant. In that case, the Court explained, the breach of Miranda procedures had involved no actual compulsion, merely a departure from the prophylactic rules of Miranda. "Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in Wong Sun that fruits of a constitutional violation must be suppressed." Elstad, 470 U.S. at 308. The only question is "'how sweeping the judicially imposed consequences' of a failure to administer the Miranda warnings should be." Id. In the case of unwarned but uncoerced testimony, it is not necessary to suppress the witness's testimony. Doing so would not serve either "the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." Id.

Relying on the reasoning it had used in Tucker, the Court found the statements that Elstad made after he received his Miranda warnings admissible in evidence, even if Elstad thought he had "already let the cat out of the bag" in his first, unwarned statements. Id. "We believe that this reasoning applies with equal force when the alleged 'fruit' of a noncoercive Miranda violation is neither a witness nor an article of evidence but the accused's own voluntary testimony." Id. No broader rule is needed because the absence of

coercion or improper tactics "undercuts the twin rationales — trustworthiness and deterrence" for such a rule. Id.

Were it not for Dickerson, 530 U.S. 428, the language of Elstad would suggest that this court should deny suppression of the evidence of the guns and of defendant's second, warned statement, particularly when considered in light of the Court's linking of physical and verbal evidence in Wong Sun, 371 U.S. at 485-86. Perhaps it does anyway, but the Dickerson opinion injects questions because of its holding that Miranda is a constitutional decision, not merely a prophylactic rule arising out of the Supreme Court's supervisory authority over the federal courts. Id. at 437-38. If Miranda announces a constitutional rule, what effect does that have on the Court's decision in Elstad? In that case, the Court distinguished Fourth Amendment violations, which taint any subsequent confession, from violations of Miranda, which have no such taint because they are merely violations of a prophylactic rule.

In Dickerson, the Court referred to Elstad, saying that the opinion did not prove that Miranda is a nonconstitutional decision but "simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." Dickerson, 530 U.S. at 441. As at least one court has noted, the Court did not say "how searches under the Fourth Amendment are 'different.'" United States v. Patane, 304 F.3d 1013, 1025 (10th Cir. 2002), cert. granted,

__ U.S. __, 123 S.Ct. 1788 (2003). The courts of appeals that have addressed the issue in light of Dickerson have reached differing conclusions, as might be predicted. The Third, Fourth and Eighth Circuits have held that physical evidence is admissible even when it is the "fruit" of an unwarned but voluntary incriminating statement; United States v. Villalba-Alvarado, 345 F.3d 1007 (8th Cir. 2003); United States v. Sterling, 283 F.3d 216 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176 (3d Cir. 2001); the First Circuit has held that physical evidence is admissible when the circumstances show that the Miranda violation was not intentional and suppression of the physical evidence would not advance Miranda's deterrent purposes, United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002); and the Tenth Circuit has held all derivative evidence inadmissible, regardless of the interrogating officers' intent. Patane, 304 F.3d 1013.

In Villalba-Alvarado, 345 F.3d 1007, the court reasoned as follows. Before Dickerson was decided, many courts applied the rulings of Elstad and Tucker, 417 U.S. 433, to admit various forms of derivative evidence, including physical evidence. Although Dickerson held that the Miranda decision was a constitutional decision and not simply a prophylactic rule, it did not undermine the theoretical underpinnings of Elstad and Tucker; derivative physical evidence is at least as trustworthy as derivative, voluntary statements or testimony, if not more so; and the element of deterrence is identical with respect to both derivative statements and derivative physical evidence. Villalba-Alvarado, 345 F.3d at 1010-

16. See also Sterling, 283 F.3d at 218-19 (holding that Dickerson did not undermine Tucker and Elstad; those cases support holding that "'derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never "fruit of the poisonous tree'"; court did not discuss concerns of trustworthiness or deterrence) ; DeSumma, 272 F.3d at 180 (holding that Dickerson continued to observe distinction between Miranda's application to cases involving Fifth, rather than Fourth and Fifth Amendment and that fruit of poisonous tree doctrine does not apply to physical evidence derived from unwarned, voluntary statements).

In Faulkingham, 295 F.3d 85, the Court of Appeals for the First Circuit agreed with the Third, Fourth and Eighth Circuits that Dickerson had not undermined the holding in Elstad. However, it expressed its unwillingness to say that "the interest of deterrence may never lead to the suppression of derivative evidence from a Miranda violation." Id. at 93. The court cited an earlier case of its own, United States v. Byram, 145 F.3d 405 (1st Cir. 1998), in which it had suppressed both the unwarned statements the defendant made originally as well as later statements he made at trial because it found that the prosecutor had kept the defendant in jail without ready access to counsel, had subpoenaed defendant for trial without giving him any new warnings and had deliberately asked him questions designed to elicit the same incriminating statements defendant had made earlier.

Until the Supreme Court reviews Patane, 304 F.3d 1013, it is impossible to know

with certainty whether it will agree with the courts that have continued to rely on Elstad to justify the denial of suppression of evidence derived from Miranda violations. My prediction is that it will. The Court referred expressly to Elstad in Dickerson, 530 U.S. 428, without disavowing the case. Id. at 441. It is fair to infer from the reference that the Court did not intend to undermine the holding in Elstad (or in Tucker, 417 U.S. 433, on which Elstad relied) when it decided Dickerson. The majority of courts of appeals that have addressed the question have drawn this inference and have concluded that it is still the law that, as a general rule, violations of Miranda do not bar the admission into evidence of derivative physical evidence or statements derived from voluntary unwarned statements.

Exclusion may be warranted in instances in which the government's failure to give the warnings is designed intentionally to elicit incriminating statements or procure incriminating physical evidence, as the Court of Appeals for the First Circuit recognized in Faulkingham, 293 F.3d 85. See also State v. Knapp, 2003 WI 121, ¶ 74, 265 Wis. 2d 278, 313, 666 N.W.2d 881, 899 (overruling trial court's denial of defendant's motion to suppress evidence derived from defendant's voluntary statement because officer refrained intentionally from advising defendant of his rights and holding that admitting evidence would "minimize the seriousness of the police misconduct producing the evidentiary fruits, breed contempt for the law, and encourage the type of conduct that Miranda was designed to prevent").

A blanket holding that derivative evidence is always admissible provided only that the

unwarned statement is voluntary might have the effect of encouraging officers not to give Miranda warnings when their primary interest is in locating physical evidence. See discussion in David H. Wollin, Policing the Police: Should Miranda Violations Bear Fruit?, 53 Ohio St. L.J. 805, 843-48 (1992). However, this case presents no apparent need for suppression as deterrent and defendant has not shown any actual need. The officers questioning defendant had no idea that he was in possession of guns; they did not ask any questions about gun ownership or possession; and, as the magistrate judge found, they were actually surprised when defendant volunteered the information about the guns. In other words, the record contains no evidence to suggest that the officers deliberately failed to provide Miranda warnings to defendant in the hopes that they could elicit incriminating evidence from him. As in Elstad, 470 U.S. at 309, this case involves only a "simple failure to administer the warnings." Thus, suppressing the waived statements and physical evidence would create no disincentive for future police misconduct.

ORDER

IT IS ORDERED that the recommendation of the United States Magistrate Judge to deny defendant Donald L. Gilmore's motion is ADOPTED insofar as he recommended denial of the suppression of the physical evidence of the guns and defendant's warned statements. It is not ADOPTED with respect to the magistrate judge's recommendation to

deny suppression of defendant's original, unwarned statements. Defendant's motion to suppress his original, unwarned statements is GRANTED; his motion to suppress the physical evidence and the warned statements is DENIED.

Entered this 16th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge