IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONALD L. GILMORE,

Defendant.

REPORT AND RECOMMENDATION

03-CR-30-C

REPORT

The grand jury has indicted defendant Donald Gilmore on one charge of being a felon in possession of firearms. All of the evidence against Gilmore can be traced back to statements he made on January 17, 2003 while being interviewed by Beloit Police about a completely unrelated investigation. Before the court for report and recommendation is Gilmore's motion to suppress these post-arrest statements and all evidence derived therefrom. (dkt. 15). Gilmore claims that his self-incriminating statements were the result of custodial interrogation not preceded by *Miranda* warnings.

The government concedes that police officers questioned Gilmore without *Mirandizing* him,[1] but contends that his statements about the firearms charged in this case were not in response to police interrogation, and that in any event, the police obtained an untainted statement later. As discussed below, it's a bit more complicated than this and the court

[1] For efficiency's sake, I will be using *Miranda* as a verb and an adjective. If this offends anybody's lexicological sensibilities, too bad.

could justify granting or denying Gilmore's motion. I conclude, however, that suppression is not appropriate and I am recommending that the court deny the motion to suppress.

On January 5, 2004, this court held an evidentiary hearing on Gilmore's motion, at which Officer Tracey Summers testified. Having heard and seen Officer Summers and having considered all the other evidence in the record, I find the following facts:

Facts

Some time in late 2001 or early 2002 (the date is not in our record), police in Hammond, Indiana opened an investigation into the murder of a woman named Ty Doss. They learned that Doss had dated a man named Russell Cage (a/k/a "Pretty Ricky"), who quickly became an investigative target. Police also wanted to talk to a man named Randall Thomas about the Doss murder. One of the first items on the police agenda was to locate these men, whose whereabouts were unknown.

Cage's half-brother, defendant Donald Gilmore, lived in Beloit, so the Hammond police requested assistance from the Beloit Police Department. Beloit Police Detective Craig Johnson was assigned as the point man. Detective Johnson advised Beloit's patrol officers that he wanted them to locate Gilmore–whom the police apparently already knew–so that Detective Johnson could ask him where Cage was.

Fast forward to 9:00 a.m. on January 17, 2003, when Patrol Officer John Fahrney performed a traffic stop of a motor vehicle driving with an expired registration tag. Officer

Fahrney stopped this particular car because Randall Thomas had been known to drive it; Fahrney was hoping to find Thomas at the wheel and take him in for questioning. Instead, he found Donald Gilmore and James Green in the car. Officer Fahrney knew that Gilmore was on parole for kidnaping and armed robbery convictions; Officer Fahrney also was concerned that Gilmore and Green seemed to be reaching down between the front seats of the car. Accordingly, he directed both men to step out of the car for a weapons frisk.

Gilmore stepped out and fled. Officer Fahrney and his colleagues pursued and subdued Gilmore with batons, then arrested him for having fled.

Officers transported Gilmore to the Beloit Police Department. Detective Craig Johnson and Patrol Officer Tracey Summers intercepted Gilmore in the booking area and took him to a table in the open room so that Detective Johnson could ask if Gilmore knew where to find Russell Cage. Neither officer was remotely interested in asking Gilmore questions about the obstruction charge on which he had been arrested; perhaps this accounts for the fact that neither officer provided Gilmore with *Miranda* warnings before questioning him about Cage. Gilmore told Detective Johnson that he had not seen Cage recently and did not know where he was.

Then, completely out of the blue, Gilmore volunteered that just last Tuesday he had looked out the window of his house and witnessed a shoot-out. Gilmore told the officers that he had watched the King brothers initiate a gun battle with the Perkin brothers then

drop their weapons in the bushes as they fled. After everyone left, Gilmore retrieved the firearms (a rifle and a shotgun) and kept them.

Neither Detective Johnson nor Officer Summers were sure why Gilmore was telling them this. They had not asked Gilmore any questions about firearms because they had no reason to. They did not suspect Gilmore of any gun-related crimes; in fact they weren't questioning him about *any* crime in which he was a suspect: their sole focus had been on learning what Gilmore might know about the Doss murder, and whether he knew where to find Russell Cage. Officer Summers testified as follows:

> Detective Johnson and I entered the room. We began speaking to him about the Ty Doss homicide. And shortly after the conversation began, he begins a discussion about a disturbance involving guns that he had seen, and he rambled on about it. And we just listened.
>
> * * *
>
> It came on totally unexpected. I don't know why the conversation came up. It came up, we heard him out on it; and then we decided that we probably better pull back and discuss maybe why he even brought this to our attention.

Transcript, dkt. 24, at 22-23.

The officers' best conjecture as to why Gilmore told this story was that maybe this was a roundabout way of hinting that these guns had been involved in the Doss killing. But at that point, Indiana had not revealed the cause of Doss's death, so the officers did not even know if firearms had been involved. Accordingly, the officers had not even broached the

topic of weapons with Gilmore. Not sure where Gilmore intended to lead the conversation, Officer Summers called a time-out and asked Detective Johnson for a private consultation.

Out of Gilmore's earshot, Officer Summers told Detective Johnson that he was not sure whether Gilmore had a prior felony conviction that would make his possession of these firearms unlawful. So they checked with Officer Fahrney, who confirmed that Gilmore was a felon.

As a result of this new twist, Officer Fahrney approached Gilmore and asked for consent to search his residence. Gilmore readily agreed. Police officers then searched Gilmore's residence and found the two long guns where Gilmore said they would be.

Officer Fahrney then re-initiated questioning of Gilmore at about 2:30 p.m. that afternoon. This time, prior to questioning Gilmore, Officer Fahrney provided him with a *Miranda* advisal and had Gilmore sign a written *Miranda* waiver form. Officer Fahrney then questioned Gilmore about the two firearms; Gilmore repeated his self-incriminating statements, acknowledging that he retrieved and retained the guns after the shoot out in front of his residence.

On January 21, 2003, ATF Agent Jason Salerno met with Gilmore, *Mirandized* him, obtained a waiver, and obtained a similar confession in response to questioning.

Analysis

Gilmore's argument is straightforward: he is entitled to suppression of all testimonial and physical evidence because the statements the government intends to use against him–and the physical evidence discovered as a result of those statements–were directly obtained as the result of an un-*Mirandized* custodial interrogation. The parties do not dispute that Gilmore was in custody, that the officers did not *Mirandize* him, that they asked him questions, and that he told them that he possessed firearms. The parties *do* dispute whether Gilmore's statements were in response to the officers' questions or were volunteered. Related to this factual dispute is the legal question whether the "volunteered statement" exception to *Miranda* can apply to statements made *during* a custodial interrogation.

The government contends that even if there was a *Miranda* violation here, pursuant to *Oregon v. Elstad*, 470 U.S. 298 (1985), any taint was purged by the subsequent administration of *Miranda* warnings, after which Gilmore re-confessed. But in so arguing, the government blows past the fact that between the un-warned and warned confessions, police seized physical evidence as a direct result of Gilmore's first statement. There is a split in the circuits as to whether *Elstad* applies to physical evidence, particularly after the Supreme Court's recent pronouncement in *Dickerson v. United States*, 530 F.3d 428 (2000) that *Miranda* actually has a constitutional pedigree.

I. Does *Miranda* apply to statements "volunteered" *during* a custodial interrogation?

I have found as a fact that Gilmore volunteered his statements about the firearms during his first custodial interrogation. The officers asked him no questions about firearms, they did not resort to any words or deeds that could be construed as the functional equivalent of questioning about firearms, and they could not have known that their questions about Doss and Cage were reasonably likely to trigger Gilmore's impromptu riff about clan warfare, al fresco firefights and his felicific filching of firearms hidden in the hedge.

I make this factual finding cognizant of its arguable illogic. Why would any sane person, particularly a felon familiar with the criminal justice system, volunteer to the police that he had recently snatched some guns ditched after a shoot-out? I don't know. But I saw and heard Officer Summer testify, and I found his testimony on this point genuinely guileless.

Skeptics still might scoff at the police version of events, but even Gilmore doesn't take strong issue with it. In his affidavit requesting a suppression hearing, he put it this way:

> . . . I was questioned by Beloit Police Officers at the Beloit Police Station. During that questioning . . . I was not given a Miranda Warning orally or in writing. During that questioning I made statements regarding the location of guns which form the basis of the charges now before this court.

Dec. 22, 2003 affidavit of Donald L. Gilmore, dkt. 21, at 1-2.

Gilmore chose not to testify at the suppression hearing to amplify this. I assume that Gilmore carefully crafted his affidavit, so I also assume that he is being intentionally ambiguous regarding any link between the officers' questions and his statements regarding the location of guns. The long and short of it is that Gilmore broached the topic of his own volition.

By its own terms, *Miranda* does not apply to volunteered statements, *see Miranda v. Arizona*, 384 U.S. 436, 478 (1966); neither does it apply to responsive police questioning intended to clarify a voluntary declaration, because such exchanges are not the sort of coercive interrogations that *Miranda* seeks to prevent. *See Andersen v. Thieret*, 903 F.2d 526, 532 (7th Cir. 1990). As the Supreme Court put it,

> There is no requirement that the police stop a person who enters a police station and states he wishes to confess to a crime . . .. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Miranda, 384 U.S. at 478. Put another way,

> But since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980). The latter portion of this definition focuses primarily on the perceptions of the suspect, rather than the intent of the police. *Id.*; *See also Arizona v. Mauro*, 481 U.S. 520, 526-27 (1987)("We doubt that a suspect, told by

officers that his wife will be allowed to speak with him, would feel that he was being coerced to incriminate himself in any way;" mere *possibility* that incrimination would result from a police act does not make it the functional equivalent of interrogation).

Finally, at least one district court has held, based on the above-cited case law, that an arrestee's volunteered statements would not be suppressed even though he made them after being subjected to a cursory custodial interrogation without first having been *Mirandized*. *See United States v. Lutz*, 207 F. Supp.2d 1247, 1256 (D. Kan. 2002).

So far, so good for the government. But do these holdings really apply to our facts? The jurisprudential focus in the cases cited above is whether a defendant was subjected to interrogation or its equivalent. For instance, in *Dickerson v. United States*, 530 U.S. 428, the Court stated that *Miranda* "held that certain warnings must be given before a suspect's statement made *during* custodial interrogation could be admitted in evidence." *Id*. at 431, emphasis added. To the same effect:

> [*Miranda's*] guidelines established that the admissibility in evidence of *any statement given during custodial interrogation* of a suspect would depend on whether the police provided the suspect with . . . '*Miranda* rights.'

Dickerson, 428 U.S. at 435, emphasis added.

In this case, there *was* direct interrogation of an arrested suspect without provision of *Miranda* rights; in light of this, can this court deem *any* of the statements Gilmore made "during" that interrogation to have been "volunteered"? Wouldn't recognition of such an

exception rip a messy and unnecessary loophole in *Miranda*? As the Court noted in *Dickerson*, although the bright line rule of *Miranda* rule has its flaws, it's still better than the totality-of-circumstances test that it replaced. 428 U.S. at 444.

On the other hand, so long as courts act as fact-finding gatekeepers, why not take the Supreme Court at its word in *Miranda* when it says that volunteered statements *of any kind* are not barred by the Fifth Amendment? Taking a cue from *Colorado v. Connelly*, 479 U.S. 157 (1986), if the evidence did not result from police misconduct, then why should society be punished by application of the exclusionary rule to a defendant's self-incriminating statement that is both volunteered and voluntary? Admittedly, *Connelly* is not exactly on point either factually or legally: there, a mentally ill man approached the police and confessed to a murder after the police *Mirandized* him; he subsequently claimed that his mental illness compelled him to confess. The issue before the Supreme Court was the voluntariness of the confession, not *Miranda*. *See* 479 U.S. at 161-63.

But the principles underlying *Connelly* still are relevant to the instant analysis. First, the Court acknowledged that the exclusionary rule, by proscribing concededly relevant evidence, imposes substantial costs on society's interest in law enforcement; therefore, the Court is chary of expanding exclusionary rules that block juries from considering truthful and probative evidence. Counterpoised against this is the tenet that the exclusionary rule is necessary to enforce constitutional guarantees by deterring similar violations in the future. On the facts before it, the Court found that suppression would be warranted "only if we were

to establish a brand new constitutional right–the right of a criminal defendant to confess to his crime only when totally rational and properly motivated." 479 U.S. at 166.

Similarly, in *Nix v. Williams*, 467 U.S. 431 (1984) (endorsing the inevitable discovery doctrine), the court reasoned that society's interests in deterring unlawful police conduct while allowing juries to consider receive all probative evidence of a crime are properly balanced by putting police in a position the same as, not worse than, they would have been in if no police error or misconduct had occurred. *Id.* at 443.

Finally, as discussed in the next section, in *Oregon v. Elstad*, 470 U.S. 298 and *Michigan v. Tucker*, 417 U.S. 433 (1974), the Supreme Court ruled that sometimes police may use evidence derived from *Miranda* violations. While these cases are not exactly on point (and may have been weakened by *Dickerson*, discussed below), they establish that the exclusionary rule is not applied as forcefully in *Miranda* disputes as in fourth amendment cases.

The upshot is that although there is support for the court to go either way on this one, the more logical course is to conclude that *Miranda* does not apply to Gilmore's statements about his guns because those statements were volunteered. This is true even though Gilmore made the statements during an un-*Mirandized* custodial interrogation which focused on an investigation unrelated to the reason for Gilmore's arrest and in which he was not the suspect.

Granted, the police are not completely blameless here: they should have *Mirandized* Gilmore before hectoring him about Ty Doss and Pretty Ricky. But even so, nothing that they said or did during this interrogation triggered the launch sequence on Gilmore's self-incriminating soliloquy. The circumstances are unusual enough to defy routine recurrence; therefore, the deterrent value of applying the exclusionary rule to the police in this case is almost nil. Factor in society's legitimate interest in keeping firearms out of the hands of felons and the balance tilts toward denying the motion to suppress.

If the court accepts this recommendation, then there is no need to consider the government's fallback position. Because this is a close case, I will analyze the issue, which also could go either way.

II. Do *Elstad* and *Tucker* apply to physical evidence derived from a *Miranda* violation?

The government's reliance on *Oregon v. Elstad* as a fallback position to avoid suppression presents an issue just as messy as the government's primary response to Gilmore's motion. In *Elstad*, the Supreme Court held that when police obtain a voluntary confession in violation of *Miranda*, but subsequently *Mirandize* the defendant and obtain a second confession, the second confession is not tainted by the original violation and may be used as evidence against the defendant. 470 U.S. at 308-18. (To the same effect, in *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court deemed admissible against a defendant

the testimony of a third party witness whom police located as a result of a violation of defendant's *Miranda* rights. *Id.* at 446-51).

But here, there's an intervening material fact: the police recovered physical evidence as a direct result of Gilmore's un-*Mirandized* statement. Only after recovering the firearms revealed to them by Gilmore did the police (and later the ATF) provide Gilmore with *Miranda* warnings and ask him to reaffirm his earlier confession.

Perhaps the *Elstad/Tucker* principle will turn out to be a universal solvent on these facts, but this is not nearly so clear as the government would have it. This is because there is no judicial consensus on whether the exclusionary rule even applies to physical evidence obtained in violation of *Miranda*. The parties did not address this issue in their briefs, but because it is pivotal to the analysis, the court must explore it.

By way of background, about seven years prior to *Elstad*, the Supreme Court affirmed by a split vote a state supreme court's decision to suppress evidence discovered during execution of a search warrant obtained as a result of a *Miranda* violation. *See Commonwealth v. White*, 374 Mass. 132, *aff'd by evenly divided ct.,* 439 U.S. 280 (1978).

Elstad followed; the issue before the court was derivative statements, but there was room to interpret the court's ruling as also encompassing physical evidence. Or perhaps not: in *Patterson v. United States*, 485 U.S. 922 (1988), Justices White and Brennan dissented from denial of the petition for a writ of certiorari, stating that *Elstad* and *Tucker* had left open the question of the admissibility of physical evidence obtained in violation of *Miranda*.

The Seventh Circuit does not appear to have ruled directly on this issue. In *Winsett v. Washington*, 130 F.3d 269, 276 n.4 (7th Cir. 1997), the court noted the cases cited above and implied in dicta that *Elstad*'s holding encompassed derivative physical evidence. On the other hand, in *United States v. Gravens*, 129 F.3d 974 (7th Cir. 1997), the court upheld the denial of a suppression motion on the ground of inevitable discovery after the district court had found the physical evidence otherwise suppressible because the police had learned of the firearms' existence and location during a an un-*Mirandized* custodial interrogation. *Id.* at 977-78.

In 2000 the Supreme Court ruled in *Dickerson v. United States*, 530 U.S. 428 that although *Miranda* warnings are not required by the Constitution, the *Miranda* decision announced a new "constitutional rule." *Id*. at 437. Scholars and courts still are sorting out what this actually means; *Dickerson* it is relevant here because it prompted several federal appellate courts–but not the Seventh Circuit–to address the question whether to allow admission of physical evidence derived from a *Miranda* violation. The circuits have split: three say that such evidence is admissible, one says it is not, and one says it depends on the circumstances. *See United States v. Villalba-Alvarado*, 345 F.3d 1007 (8th Cir. 2003)(evidence admissible; 2-1 decision, en banc review denied); *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002)(evidence not admissible), *cert. granted* ___ U.S. ___, 123 S.Ct. 1788 (2003)[2];

[2] The Supreme Court heard oral argument on December 9, 2003.

United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002)(admissibility depends; court fashions a balancing test); *United States v. Sterling*, 283 F.3d 216 (4th Cir. 2002) (evidence admissible); *United States vv. DeSumma*, 272 F.3d 176 (3rd Cir. 2001)(evidence admissible).

There are thoughtful arguments in support of both positions. By way of cursory overview, a plurality of the circuits have held that derivative physical evidence is admissible after a *Miranda* violation. They have concluded that, because the Supreme Court already has held in *Elstad* and *Tucker* that the twin rationales of *Miranda*–*i.e.*, trustworthiness of the evidence and deterrence of police misconduct–did not support applying the exclusionary rule to testimonial evidence derived from a *Miranda* violation, and because physical evidence is at least as reliable as, if not more reliable than testimonial evidence, it follows that physical evidence derived from a *Miranda* violation should be treated similarly.

The minority view is that such derivative physical evidence is inadmissible because, as *Dickerson* clarified, *Miranda* is not just a prophylactic rule, it is of constitutional dimension. Therefore, courts must protect a suspect's fifth amendment rights by deterring the police from exploiting a *Miranda* violation to obtain additional evidence. *Elstad* and *Tucker* protect defendants from such secondary exploitation by interposing a volitional firewall: in *Elstad*, the defendant's first statement cannot be used, and his second may be used only if he makes it with a full understanding of his *Miranda* rights. In *Tucker*, secondary exploitation is tempered by the third-party witness's decision whether or not to speak to police. In contrast, there is no firewall with physical evidence: once the police seize it, it's theirs to use.

As Judge Heaney of the Eighth Circuit put it in dissent, the real issue is: "May the police violate a person's constitutional rights, and then exploit that violation to obtain evidence that they otherwise would not have secured?" 345 F.3d at 1021.

Put that baldly, the question might seem to answer itself, but it's more complicated than that: as *Elstad* and *Tucker* demonstrate, when the Court deems challenged evidence reliable and sees no great deterrent value in suppression, it is willing to forgive police their trespasses and expiate any arguable taint imbuing the evidence. It is likely that the Court again will employ a utilitarian calculus to the issue when it rules in the *Patane* case. In other words, *Dickerson*, which could be viewed as the Court's defense of its turf from perceived incursions by Congress, probably did not significantly alter the legal landscape.

Because it is unlikely the Supreme Court will issue its opinion in *Patane* in the next few weeks, this court must decide under which circuit court template it will review the facts of this case. I suggest that the court follow the First Circuit's lead in *Faulkingham* and balance the reliability of the unwarned derivative evidence against the need for deterrence. 295 F.3d at 93. In the absence of the Supreme Court's guidance, a balancing test gives both sides the opportunity to be heard and leaves discretion with the court to determine the fairest outcome on the facts presented.

On the facts before it in *Faulkingham*, the First Circuit found that the police merely had been negligent in failing to *Mirandize* an arrested drug suspect and that it had not been their intention deliberately to manipulate the defendant in order to locate physical evidence.

The court noted that the defendant started talking without much questioning, at one point calling the police away from a car search so that he could provide information to them. Finally, the court rattled off a checklist of other concerns: there were no fourth amendment violations, no violation of the right to counsel, and no other conduct evincing fundamental unfairness. The court concluded that suppression of the derivative physical evidence was not necessary on these facts, but it reserved the power to suppress physical evidence in future cases unless the Supreme Court's ruling in *Patane* provided different instructions. *Id.* at 93-94.

In Gilmore's case, the totality of circumstances militates against suppression. Assuming, *arguendo*, that the police violated Gilmore's *Miranda* rights, they did not do so for the purpose of generating physical evidence of a gun crime by Gilmore. As noted previously, the police were questioning Gilmore as a witness, not a suspect and their agenda did not include extracting a confession to an unrelated crime. Detective Johnson hadn't asked for Gilmore's arrest and he probably hadn't anticipated conducting a custodial interview. Although suppression might help reinforce the importance of *Mirandizing* every arrestee before asking him substantive questions on any topic, in this case, Gilmore's arrest for flight was a fluke that had no nexus to the questions posed by the officers. At worst, this was sloppy police work, not malfeasance.

Then we factor in these circumstances: Gilmore volunteered his self-inculpatory admissions out of left field; the police obtained his consent to search before looking for the

guns; the guns themselves are reliable evidence of the crime now charged; the police *Mirandized* Gilmore before asking him a second time about the firearms; and, nothing else occurred that would suggest that it is fundamentally unfair to Gilmore to use this evidence against him. Accordingly, I am recommending that if the court reaches stage two of the analysis, that it then deny Gilmore's motion to suppress.

CONCLUSION

There are two components to Gilmore's suppression motion and each could go either way. First, either *Miranda* applies to statements volunteered during a custodial interview or it doesn't; second, either the exclusionary rule applies to physical evidence derived from a *Miranda* violation or it doesn't. Of the four combinations of outcomes on these two issues, Gilmore can only win one while the government wins three. If the court concludes that *Miranda* does not apply to Gilmore's volunteered statements about the guns, then the government wins and there is no need to answer the second question. If the court concludes that *Miranda* applies to Gilmore's statements about the guns, then Gilmore is entitled to suppression only if the court then concludes that the exclusionary rule should apply on these facts to the guns discovered and seized as a result of the *Miranda* violation. If the court concludes that the exclusionary rule either does not apply or should not be invoked, then the government wins.

As noted above, on these facts there is a legal basis to support any of the four possible outcomes. For the reasons stated above, I am recommending that the court decide in the government's favor on the first question and if it does not, that it then decide in the government's favor on the second question.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) I recommend that this court deny defendant Donald Gilmore's motion to suppress statements.

Entered this 6th day of February, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge