COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-0721-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

NATHANIEL WONDERGEM,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. The State appeals from the trial court order suppressing Nathaniel Wondergem's custodial statements and derivative physical evidence. The State argues that the court erred in concluding that the arresting

officer failed to properly advise Wondergem of his ***Miranda***[1] rights and, further, erred in concluding that the nontestimonial physical evidence derived from Wondergem's statements was inadmissible. We conclude that the trial court correctly suppressed Wondergem's statements. We also conclude that, under the unusual circumstances of this case, the nontestimonial physical evidence derived from the statements was inadmissible. Accordingly, we affirm.

I. BACKGROUND

¶2 Evidence at the hearing on Wondergem's suppression motion established that on October 9, 1996, University of Wisconsin-Milwaukee Police Officer Ken Peters went to suite North 1280-B of Sandburg Hall to investigate student drug trafficking. Officer Peters knocked on the dormitory door and Wondergem opened the door holding an open beer can. Officer Peters arrested Wondergem for underage drinking and handcuffed him. Officer Peters then told Wondergem that the purpose of his visit was to investigate whether Wondergem was trafficking drugs. Officer Peters testified that he then advised Wondergem of his ***Miranda*** rights and Wondergem agreed to talk to him. Officer Peters asked Wondergem whether he preferred to talk in his room or at the police station; Wondergem agreed to talk in his dorm room.

¶3 Officer Peters testified that he asked Wondergem if he had any marijuana and that Wondergem responded, "What would happen if I said yes?" Officer Peters replied that he "would confiscate the marijuana and investigate further," but said nothing about whether that could lead to arrest, conviction, incarceration, or any other consequences. Wondergem then told Officer Peters

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

that he had marijuana in his desk drawer and, upon Officer Peters's request, opened the drawer, revealing two baggies of marijuana. Officer Peters then asked whether Wondergem had any more, and Wondergem told him that more marijuana was hidden in the closet in the other room of his suite, North 1280-A. Officer Peters proceeded to 1280-A, asked Wondergem's suitemate for consent to search the closet, obtained his consent, and seized the marijuana. Finally, Officer Peters returned to Wondergem's room, obtained Wondergem's consent to search it, and seized rolling papers, a rolling machine, and a marijuana pipe.

¶4 At the motion to suppress hearing, Officer Peters testified that he advised Wondergem of his ***Miranda*** rights by reading them from a card. Officer Peters, however, had neglected to bring the card to court. The prosecutor asked, "Can you tell us what you told him?" Officer Peters replied, "Not to these [sic] exact words." Officer Peters then recited the warnings he said he gave Wondergem, but failed to say that any statement could be used against him in court. The trial court ruled that because Officer Peters had failed to testify that he had provided this warning, the State had failed to meet its *prima facie* burden to prove that Wondergem had been properly advised of his ***Miranda*** rights. The court suppressed Wondergem's statements and the evidence found in his portion of the suite.[2] The State appeals.

[2] The trial court also ruled that the evidence seized from Wondergem's suitemate's closet was admissible because Wondergem had no reasonable expectation of privacy over the closet. This ruling is not at issue because Wondergem has not appealed that portion of the trial court order. *See* WIS. STAT. RULE 809.10(2)(b) (1995-96), made applicable to this proceeding by WIS. STAT. RULE 809.30(2).

II. ANALYSIS

A. The Statements

¶5 The State argues that the trial court erred in suppressing Wondergem's statements. Specifically, the State first contends that "the court's suppression of Wondergem's custodial statement . . . was improper without the trial court first conducting a hearing affording the State the opportunity to present evidence that the requirements of ***Miranda*** and ***Edwards***[3] were complied with." (Footnote added.) The State maintains that the trial court never permitted it to establish that Wondergem had been properly Mirandized, claiming that the court was only taking testimony on whether Wondergem had standing to challenge the search of his suitemate's closet, not on whether Wondergem had been properly Mirandized. We disagree.

¶6 Although somewhat muddled, the record nevertheless establishes that the trial court heard testimony on all of Wondergem's motions, including his motion to suppress statements and evidence. Further, the prosecutor's questioning of Officer Peters clearly reflects the State's attempt to establish the propriety of the custodial interrogation to support the admissibility of the evidence under ***Miranda*** and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). Contrary to the State's representations, the court never limited either

[3] *See* ***Edwards v. Arizona***, 451 U.S. 477 (1981).

party's questioning and never prevented the State from litigating the facts or law typically developed at a ***Miranda-Goodchild*** hearing.[4]

¶7 The State next argues that the trial court erred in concluding that Officer Peters failed to administer complete ***Miranda*** warnings. Again, we disagree.

¶8 Whether a trial court erred in suppressing a statement allegedly obtained in violation of ***Miranda*** presents a mixed question of fact and law. *See* ***State v. Williams***, 220 Wis. 2d 458, 464, 583 N.W.2d 845 (Ct. App. 1998). The trial court's findings of historical fact are given great deference and will not be overturned unless they are "clearly erroneous." *See* ***id.*** Whether, based on the historical facts, a person's ***Miranda*** rights were violated is a question of "constitutional fact," which we review de novo. *See* ***id.***

¶9 The State may not use statements made by a suspect during custodial interrogation unless the suspect received ***Miranda*** warnings. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 344-45, 588 N.W.2d 606 (1999). When the State seeks to introduce a defendant's custodial statement, constitutional due process requires that it make two discrete showings: "First, ... that the defendant was informed of his ***Miranda*** rights, understood them and intelligently waived them. Second, ... that the defendant's statement was voluntary." ***State v. Lee***, 175 Wis. 2d 348, 359, 499 N.W.2d 250 (Ct. App. 1993) (citations and footnote omitted). If the evidence establishes both a defendant's waiver of the ***Miranda***

[4] Wondergem also argues waiver, pointing out that the State never moved to reopen the hearing and present additional evidence. The record supports Wondergem's waiver argument, to which the State offers no reply. *See* ***Charolais Breeding Ranchers, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

rights and the voluntariness of the defendant's custodial statement, the statement is admissible. *See* ***id.*** If the evidence fails to establish both, then the statement is inadmissible, at least in the State's case-in-chief. *See* ***id.***

¶10 As noted, Officer Peters used a ***Miranda*** rights card to advise Wondergem but failed to bring the card to court. When asked to recite the ***Miranda*** warnings he stated to Wondergem, Officer Peters omitted one of the rights.[5] Understandably, therefore, the trial court concluded that there was "a significant omission." The trial court's finding is not clearly erroneous. Accordingly, we conclude that the State failed to meet its *prima facie* burden of establishing that Wondergem was advised of his ***Miranda*** rights and, therefore, that the trial court was correct in suppressing his statements.

B. The Derivative Physical Evidence

¶11 We must next determine whether the trial court was correct in suppressing the marijuana and drug paraphernalia—the physical evidence derived from Wondergem's statements. The State, citing ***Oregon v. Elstad***, 470 U.S. 298 (1985), argues that the "fruit of the poisonous tree" doctrine, enunciated in ***Wong Sun v. United States***, 371 U.S. 471 (1963), does not apply to evidence derived from statements following an error in administering the ***Miranda*** warnings. The State contends that the "fruits" doctrine applies only to evidence seized following a violation of a constitutional right, such as the right to counsel, and not to a violation of ***Miranda***'s prophylactic requirements. *Compare* ***State v. Harris***, 199 Wis. 2d 227, 246, 544 N.W.2d 545 (1996) (recognizing the critical difference

[5] From the questioning that followed, one might surmise that the State did not notice the omission. The State never tried to rehabilitate or clarify Officer Peters's responses.

between a defect in the administration of ***Miranda*** warnings, and an interrogation initiated by police despite a suspect's invocation of the right to have counsel present during questioning), *with* ***Elstad***, 470 U.S. at 309 (limiting its discussion of the inapplicability of the fruit of the poisonous tree doctrine to errors in administering ***Miranda***'s prophylactic warnings). The State argues that Wondergem's custodial statements were the product of neither inherently coercive police tactics nor methods offensive to due process. The State maintains, therefore, that no Fifth Amendment violation occurred and, accordingly, the derivative physical evidence was admissible.

¶12 In ***Elstad***, officers investigating a burglary first questioned Elstad at his house without providing ***Miranda*** warnings, and obtained an uncoerced, incriminating statement. ***Elstad***, 470 U.S. at 300-01. Approximately one hour later, at police headquarters, officers advised Elstad of his ***Miranda*** rights and obtained a second incriminating statement. ***Id.*** at 301-02. Elstad argued for suppression of both statements contending that "the statement he made in response to questioning at his house 'let the cat out of the bag' . . . and tainted the subsequent confession as 'fruit of the poisonous tree.'" ***Id.*** at 302. Thus, the Supreme Court considered "whether the Self-Incrimination Clause of the Fifth Amendment requires suppression of a confession made after proper ***Miranda*** warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant." ***Id.*** at 303. The Court held that the initial failure to provide the ***Miranda*** warnings did not require suppression of the subsequent confession. The Court reasoned:

> If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of Miranda to hold that a simple

> failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Id. at 309.

¶13 Extending the ***Elstad*** rationale to physical evidence derived from a statement obtained in violation of ***Miranda***, the federal court of appeals for the fourth circuit explained:

> Although the Supreme Court has not specifically rejected application of the "fruit of the poisonous tree" doctrine to physical evidence discovered as the result of a statement obtained in violation of *Miranda*, it is clear to us that the Court's reasoning in [*Michigan v.*] *Tucker* [417 U.S. 433 (1974)] and *Elstad* compels that result. The holdings in *Tucker* and *Elstad* could not be any clearer: the "tainted fruits" analysis applies only when a defendant's constitutional rights have been infringed. It is well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation. As a result, we hold that *Wong Sun* and its "fruit of the poisonous tree" analysis is inapplicable in cases involving mere departures from *Miranda.* Accordingly, derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never "fruit of the poisonous tree."

United States v. Elie, 111 F.3d 1135, 1141-42 (4th Cir. 1997) (citations and footnotes omitted).

¶14 The majority of courts addressing this issue have extended the ***Elstad*** rationale and concluded that nontestimonial physical evidence derived from a statement taken in violation of ***Miranda*** is admissible *as long as the statement itself was voluntary*. *See*, *e.g.*, ***United States v. Crowder***, 62 F.3d 782, 786 (6th Cir. 1995) (nontestimonial evidence derived from unwarned statement is

admissible if unwarned statement was not product of coercion under the Fifth Amendment); ***United States v. Mendez***, 27 F.3d 126, 130 (5th Cir. 1994) (mere violation of ***Miranda*** absent constitutional violation does not trigger the "fruits" doctrine and, therefore, derivative evidence is admissible); ***United States v. DeSumma*** 44 F. Supp.2d 700 (E.D. Pa. 1999) (absent evidence of coercion, statement deemed voluntary and derivative evidence deemed admissible); ***United States v. Coley***, 974 F. Supp. 41 (D.D.C. 1997) (absent proof of unconstitutional conduct, fruit of ***Miranda*** violation not excluded).

¶15 Recently, in ***State v. Yang***, 2000 WI App 63, ___ Wis. 2d ___, 608 N.W.2d 703, this court considered whether physical evidence derived from a statement obtained in violation of ***Miranda*** must be suppressed. Consistent with the reasoning expressed in the prevailing authorities, this court concluded that "the 'fruit of the poisonous tree' doctrine does not apply to physical evidence discovered as the result of a statement obtained in violation of ***Miranda's*** prophylactic rules, as opposed to a constitutional infringement." ***Id.*** at ¶36 (footnote omitted). And here, as in ***Yang***, "the inquiry whether there was a constitutional violation … concerns whether the defendant gave his statement freely and voluntarily."

C. Voluntariness of the Statement

¶16 "To determine voluntariness, we examine whether police coercion overcame the defendant's free will." ***Yang***, 2000 WI App 63 at ¶21. Whether undisputed facts meet the appropriate legal standard presents a legal issue we decide independently of the trial court. *See* ***id.*** at ¶17. Here, while a first glance might not detect any apparent police coercion, a more discerning view reveals two

forms of police misconduct that, in combination, deceived Wondergem about the *consequences* of his statement, thus rendering it involuntary.

¶17 As explained, Officer Peters failed to advise Wondergem that his statements could be used against him in court. But there is more. Relating his conversation with Wondergem that led to the discovery of the marijuana and drug paraphernalia, Officer Peters testified:

> A: I asked him if he was in possession of marijuana, and he paused for about a minute, and until he was—I could tell he was very nervous. *Then he said: What would happen if I said yes? And I advised him that I would confiscate the marijuana and investigate further.*
>
> Q: So then what happened?
>
> A: He stated that he had marijuana in his [desk] drawer—the top [desk] drawer.

(Emphasis added.) Officer Peters's response to Wondergem was, at best, a half-truth. Officer Peters not only failed to advise Wondergem that his statements could be used against him in court, but also misled him regarding the *consequences* of any disclosure that would lead to the discovery of physical evidence. As the Supreme Court has explained:

> "First the relinquishment of the [Fifth Amendment **Miranda**] right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Colorado v. Spring, 479 U.S. 564, 573 (1987) (emphasis added; quoted source omitted).

¶18 Thus, in the instant case, the police officer employed two "improper practices," *see* ***Yang***, 2000 WI App. 63 at ¶26. Together, these practices deceived

Wondergem about the consequences of his statements, rendering them involuntary. *See* ***id.*** (police conduct *not* coercive, in part, because police did not "lie[] to" suspect and made "[n]o promises of leniency"). Therefore, we conclude that Wondergem's statements were involuntary and, accordingly, the derivative physical evidence was inadmissible.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.