Appeal No. 00-2590-CR **Cir. Ct. No. 99-CF-363**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MATTHEW J. KNAPP,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

FILED

Aug 15, 2002

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Deininger and Lundsten, JJ.

Pursuant to WIS. STAT. RULE 809.61 (1999-2000), this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Should physical evidence obtained as the direct result of a ***Miranda*** violation be suppressed when the violation was an intentional attempt to prevent the suspect from exercising his Fifth Amendment rights?

BACKGROUND[1]

Resa Scobie Brunner was found dead in her home on December 12, 1987, having been beaten to death with a baseball bat. Police suspected Matthew Knapp, who had been with Brunner on the night of her death, as the killer.

The day after Brunner's murder, Detective Timothy Roets and another officer went to Knapp's home to arrest him for violating his parole. Knapp was then residing in the upper flat of a two-family house. Roets opened and entered an exterior door without knocking or announcing his presence, and climbed the stairs to the door of Knapp's apartment. Roets knocked on the apartment door, announced that Knapp's parole officer had issued an apprehension request for him, and asked Knapp to answer the door. Knapp opened the door and told Roets that he was calling his attorney. Roets responded that Knapp had to come with him to the police station.

Knapp told Roets that he needed his shoes, which were in his bedroom. Roets followed Knapp into the bedroom. Without giving ***Miranda*** warnings, Roets began questioning Knapp. Roets asked Knapp what he was wearing "last Friday night," the night of Brunner's death. Knapp pointed to a sweatshirt, which Roets then seized.

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[1] Although there are several issues in this case involving their own relevant facts, our background focuses on the facts central to the resolution of the issue regarding application of the "fruits of the poisonous tree" doctrine to ***Miranda*** violations. The other issues include: (1) whether Knapp's brother was authorized to allow the police to search Knapp's bedroom; (2) whether an unwarned admission can be used by the State for the purpose of impeachment at trial; and (3) whether Knapp is entitled to present evidence at trial that implicates a third party in the murder. We conclude that these issues can be resolved under current precedent. We therefore do not address them in this certification.

At the station, Roets continued questioning Knapp without providing ***Miranda*** warnings. Roets did not inform Knapp that he was a suspect but instead told him that he wanted Knapp's help in finding the murderer. After Knapp told Roets that he was willing to make a statement "off the record," Roets again asked Knapp about the clothes he was wearing the previous night, and Knapp again referred to the sweatshirt.

Roets later testified that he knew he was obligated to provide Knapp with ***Miranda*** warnings. However, he chose not to inform Knapp of his rights because of Knapp's statements about contacting his attorney and because he believed that Knapp might not speak to him after receiving ***Miranda*** warnings.

Twelve years later, the State charged Knapp with first-degree intentional homicide. Knapp moved to suppress the sweatshirt seized from the apartment. The circuit court denied the motion, and Knapp petitioned for leave to appeal, which we granted.

DISCUSSION

The State concedes that, at the time Knapp identified the sweatshirt, he was in custody and being interrogated by the police. Further, the State does not dispute that Knapp's pointing to the shirt was testimonial in nature. Thus, the State does not challenge either the circuit court's conclusion that the police violated Knapp's ***Miranda*** rights or its subsequent decision to suppress all of the statements the police obtained in violation of ***Miranda***.

However, Knapp argues that the sweatshirt should also be suppressed because it was obtained as a direct result of an intentional violation of his ***Miranda*** rights.[2] The State disagrees, relying on ***State v. Yang***, 2000 WI App 63, ¶3, 233 Wis. 2d 545, 608 N.W.2d 703, which held that the "fruits of the poisonous tree" doctrine does not apply to physical evidence discovered as the result of a ***Miranda*** violation. Knapp responds that ***Yang***'s rationale was disavowed by the Supreme Court in ***Dickerson v. United States***, 530 U.S. 428 (2000), and, therefore, cannot be relied upon to avoid suppression.

This case potentially raises two issues. First, to what extent, if any, does the Supreme Court's decision in ***Dickerson*** undermine ***Yang***? Second, if ***Yang***'s rationale is no longer viable, can its holding be supported on other grounds?

In concluding that the fruits doctrine did not apply in ***Yang***, we relied exclusively on what we viewed as the non-constitutional basis for ***Miranda*** warnings. We interpreted ***Michigan v. Tucker***, 417 U.S. 433 (1974), and ***Oregon v. Elstad***, 470 U.S. 298 (1985), as holding that the "[f]ailure to administer ***Miranda*** warnings is not in itself a violation of the Fifth Amendment." ***Yang***,

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[2] Knapp also argues that the sweatshirt should be suppressed because: (1) the police violated the knock and announce rule before entering the house; and (2) Detective Roets violated ***Edwards v. Arizona***, 451 U.S. 477 (1981), when he questioned Knapp after he stated he was trying to call his attorney. With regard to the first issue, the circuit court concluded that the police were not required to knock on the lower door because Knapp did not have a reasonable expectation of privacy in the stairway. To the extent that this conclusion may be incorrect, the Fourth Amendment violation may not require suppression if the seizure of evidence was sufficiently attenuated from the illegal entry. *See* ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998). We note, however, that the State did not raise the issue of attenuation.

With regard to the second issue, the circuit court concluded that Knapp never clearly invocated his right to counsel, so ***Edwards*** does not apply. We have concluded that the dispositive issue with respect to the admissibility of the shirt is whether the ***Miranda*** violation requires suppression.

2000 WI App 63 at ¶20. We further concluded that ***Tucker*** and ***Elstad*** instructed that the fruits of the poisonous tree doctrine had no application unless there was a constitutional violation. ***Id.*** at ¶36. We therefore concluded: "It is well established that the failure to deliver ***Miranda*** warnings is not itself a constitutional violation. Accordingly, derivative physical evidence obtained as a result of an unwarned statement that was voluntary is not 'tainted fruit.'" ***Id.*** (citation omitted).

Several months after ***Yang*** was decided, the United States Supreme Court held in ***Dickerson*** that ***Miranda v. Arizona***, 384 U.S. 436 (1966), was a "constitutional decision" and that it created a "constitutional rule," and therefore Congress could not legislatively overrule ***Miranda***. ***Dickerson***, 530 U.S. at 432, 441. Knapp contends that "[t]he entire underpinnings of ***Yang*** have been stripped away by ***Dickerson***." The State disagrees, asserting that "***Yang*** remains good law."

Whether Knapp or the State is correct is not immediately apparent from the face of the ***Dickerson*** decision. As Justice Scalia noted in his dissent, the Court did not state explicitly that a violation of ***Miranda*** is a per se violation of the Fifth Amendment. ***Dickerson***, 530 U.S. at 445 (Scalia, J., dissenting). And the Court appeared to agree that ***Miranda*** warnings are not required by the Constitution, "in the sense that nothing else will suffice to satisfy constitutional requirements." ***Id.*** at 442. At the same time, the Court stated that a totality of the circumstances test that considers only whether a statement is "voluntary," which Congress had attempted to reinstate, does not "meet the constitutional minimum." ***Id.*** The Court further explained that although the "Constitution does not require police to administer the particular ***Miranda*** warnings," it *does* require "a procedure that is effective in securing Fifth Amendment rights." ***Id.*** at 440 n.6. Thus, although

there is nothing magical about the specific words required under ***Miranda***, ***Dickerson*** seems to suggest that the Constitution requires *some* procedure that will effectively secure the right to remain silent. ***Id.*** at 438 (concluding that ***Miranda*** is a constitutional decision in part because it applies to state courts, and "[w]ith respect to proceedings in state courts, our authority is limited to enforcing the *commands* of the United States Constitution.") (emphasis added) (internal quotations omitted); *see also* ***id.*** at 454 (Scalia, J., dissenting) ("[W]hat makes a decision 'constitutional' … is the determination that the Constitution *requires* the result that the decision announces."). Therefore, it can be argued that until there is an "adequate substitute for the warnings required by ***Miranda***," a violation of ***Miranda*** is a violation of the Fifth Amendment. ***Id.*** at 442.

Although both courts and commentators are currently in disagreement over the implications of ***Dickerson***, most appear to agree that ***Miranda*** warnings are

now constitutionally required.[3] This suggests that ***Yang***'s rationale in declining to apply the fruits doctrine, that ***Miranda*** is not constitutionally required, may conflict with ***Dickerson***. No other Wisconsin case has decided the applicability of the fruits doctrine to physical evidence in the context of ***Miranda*** violations. *See* ***Yang***, 2000 WI App 63 at ¶32 n.9.

However, the question of whether a violation of ***Miranda*** is a violation of the Constitution is only the first part of the analysis. Even if ***Yang***'s rationale is no longer sound, this still leaves ***Tucker*** and ***Elstad***, the cases upon which ***Yang***

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[3] *See* ***United States v. Faulkingham***, 295 F.3d 85, 90 (1st Cir. 2002) ("It is also clear, however, that Faulkingham's statements were obtained in violation of the Fifth Amendment because he was not given a ***Miranda*** warning."); ***United States v. Garcia-Ley***, 2002 WL 826081, *1 (9th Cir. April 30, 2002) ("***Dickerson*** holds that defendants are constitutionally entitled to ***Miranda*** warnings."); ***United States v. Orso***, 275 F.3d 1190, 1191 (9th Cir. 2001)("[***Dickerson***] calls this premise [that failure to provide ***Miranda*** warnings is not a constitutional violation] into question."); ***United States v. Talley***, 275 F.3d 560, 564 (6th Cir. 2001) ("In ***Dickerson***, the Court held that the right to a ***Miranda*** warning is constitutionally based, rather than 'prophylactic.'"); ***Abraham v. Kansas***, ___ F. Supp. 2d ___, 2002 WL 1610925, *11 (D. Kan. July 19, 2002) ("Under ***Dickerson***, the admission of a statement gathered in violation of ***Miranda***, standing alone, is sufficient to demonstrate a trial error of constitutional magnitude.'"); ***United States v. Kruger***, 151 F. Supp. 2d 86, 101 (D. Me. 2001) ("The decision in ***Dickerson*** changed the landscape, however, by conferring constitutional status on the ***Miranda*** right to a warning."); ***People v. Trujillo***, 49 P.3d 316, 324 (Colo. 2002) ("[***Dickerson***] made clear that the ***Miranda*** warnings are rooted in the Constitution."); Donald A. Dripps, *Constitutional Theory for Criminal Procedure*, 43 WM. & MARY L. REV. 1, 36 (2001) ("Yet if Miranda is 'based on the Constitution,' and if the only apparent constitutional basis is the Fifth Amendment privilege, it would seem to follow that Miranda violations are violations of the Fifth Amendment."); Stephen Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1115 n.60 (2002); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 63-64 (2000); *but see* ***State v. Walton***, 41 S.W.3d 75, 89 (Tenn. 2001) ("***Dickerson*** is more properly read to reaffirm that ***Miranda***'s specific procedures are still prophylactic in nature.").

The Wisconsin Supreme Court has not directly addressed this issue, but noted briefly in a footnote that ***Dickerson*** holds that "***Miranda*** warnings are based upon the United States Constitution." *See* ***State v. Piddington***, 2001 WI 24, ¶20 n.10, 241 Wis. 2d 754, 623 N.W.2d 528; *see also* ***State v. Jennings***, 2002 WI 44, ¶26 n.5, 252 Wis. 2d 228, 647 N.W.2d 142 ("The United States Supreme Court has recently reaffirmed that [***Miranda***] established a federal constitutional rule governing the admissibility of custodial statements in both state and federal courts under the Fifth and Fourteenth Amendments.").

relied to reach its conclusion. There is also ***State v. Armstrong***, 223 Wis. 2d 331, 588 N.W.2d 606 (1999), in which the Wisconsin Supreme Court interpreted and applied ***Elstad***.

The issue in ***Tucker*** and ***Elstad*** was not whether physical evidence obtained in violation of ***Miranda*** should be suppressed.[4] Rather, in ***Tucker*** the police obtained testimony from a third party based on a partially unwarned statement made by the defendant. 417 U.S. at 436-37. The Court held that the third party's testimony should not be suppressed. ***Id.*** at 452. In ***Elstad***, police had failed to provide ***Miranda*** warnings to a first confession, but later Mirandized the defendant and obtained a second confession. 470 U.S. at 301. The Court concluded that while the first confession must be suppressed, the second confession, which was properly warned and voluntarily made, was admissible. ***Id.*** at 318. In ***Armstrong***, the supreme court followed ***Elstad***, and concluded that failure to provide ***Miranda*** warnings before a first confession did not necessarily render inadmissible a subsequent written confession given after the defendant properly waived his ***Miranda*** rights. ***Armstrong***, 223 Wis. 2d at 364-65.

As the State notes, ***Dickerson*** declined to overrule ***Tucker*** or ***Elstad***, both of which were based, at least partially, on the rationale that ***Miranda*** violations

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[4] The Supreme Court has yet to consider this issue. *See* ***Patterson v. United States***, 485 U.S. 922 (1988) (White, J., dissenting from denial of certiorari) ("In ***Michigan v. Tucker***, 417 U.S. 433 (1974), this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in ***Miranda v. Arizona***, 384 U.S. 436 (1966).").

were not constitutional violations.[5] Instead, the Court appeared to put a new gloss on those decisions. In addressing ***Elstad***, the Court stated: "Our decision in that case—refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases—does 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. The Court did not further elucidate this sentence, and the dissent criticized the explanation as "true but supremely unhelpful." ***Id.*** at 455 (Scalia, J., dissenting).

Although the Court's statement suggests that the fruits doctrine may not apply in the Fifth Amendment context in the same way that it would apply under the Fourth Amendment, we do not read ***Dickerson*** as holding that the fruits doctrine is simply inapplicable with respect to Fifth Amendment violations. The Court has held in other situations that it does apply. *See, e.g.,* ***Nix v. Williams***, 467 U.S. 431, 442 (1984); ***Kastigar v. United States***, 406 U.S. 441, 453 (1972); *cf.* ***Harrison v. United States***, 392 U.S. 219, 222 (1968) (holding that confessions subject to suppression under the ***McNabb-Mallory*** exclusionary rule constitute a "poisonous tree" for purposes of suppressing derivative evidence).

In addition, we note that in ***State v. Harris***, 199 Wis. 2d 227, 231, 544 N.W.2d 545 (1996), the Wisconsin Supreme Court concluded that the fruits

[5] Most courts considering the issue agree that ***Oregon v. Elstad***, 470 U.S. 298 (1985), remains viable after ***United States v. Dickerson***, 530 U.S. 428 (2000). *See* ***United States v. Newton***, 181 F. Supp. 2d 157, 179 n.16 (E.D.N.Y. 2002) (noting that federal circuits agree that ***Dickerson*** did not overrule ***Elstad***); ***State v. Walton***, 41 S.W.3d 75, 89 (Tenn. 2001). *But see* ***United States v. Morris***, 2002 WL 1365556, *4 n.5 (10th Cir. June 25, 2002) (questioning ***Elstad***'s continuing viability after ***Dickerson***).

doctrine did apply to physical evidence obtained through a violation of ***Edwards v. Arizona***, 451 U.S. 477 (1981), which is grounded in the Fifth Amendment. Specifically, the court held that when police continue to interrogate a suspect after he or she invokes the right to counsel, physical evidence obtained as a result of a confession that the suspect makes must be suppressed. ***Harris***, 199 Wis. 2d at 231. The court concluded that, because the presence of counsel during custodial interrogation was guaranteed under the Fifth Amendment, the fruits doctrine should apply. ***Id.*** at 248, 251-52. If ***Miranda*** warnings are now considered to be protected under the Fifth Amendment as well, then the logic of ***Harris*** could be applied to ***Miranda*** violations. *See also* ***State v. Hill***, 781 A.2d 979, 984 (N.H. 2001) (holding that state constitution requires that fruits of ***Miranda*** violation be suppressed).

Of course, recognizing that an illegally obtained confession may be a "poisonous tree" does not mean all fruits of a ***Miranda*** violation should be suppressed. Both ***Tucker*** and ***Elstad*** instruct otherwise. ***Elstad*** in particular focused centrally on whether the confession was "involuntary." However, ***Elstad*** did not hold that the fruits doctrine never applies in the context of ***Miranda*** violations unless the defendant can show his or her confession was "involuntary." Rather, the Court concluded that when there is a "simple failure" to administer ***Miranda*** warnings before a first confession, but police then "cure" this deficiency by properly warning the suspect, the "twin rationales" of ***Miranda***—trustworthiness and deterrence—would not be furthered by suppressing the second confession. ***Elstad***, 470 U.S. at 308-09, 311.

The focus on the purposes behind the exclusionary rule was also apparent in ***Tucker***, which emphasized that, "[b]efore we penalize police error ... we must consider whether the sanction serves a valid and useful purpose." 417 U.S. at 446.

Because the police conduct in ***Tucker*** occurred before ***Miranda*** was decided and because the officers made an attempt to inform the suspect of his rights, the deterrent purpose would not be served by suppressing the second confession. ***Id.*** at 447-48. Thus, ***Tucker*** and ***Elstad*** could be read as requiring suppression when either the trustworthiness or the deterrent rationale of ***Miranda*** would be furthered.

With regard to physical evidence, trustworthiness is generally not an issue. This leaves deterrence. In the present case, the officer knew that he was required to provide ***Miranda*** warnings but deliberately avoided doing so because he believed that Knapp would not speak or would demand an attorney if he knew his rights. The question is whether under ***Tucker*** and ***Elstad***, the need to deter officers from purposefully violating rights justifies suppression. There is language in decisions from both the United States and Wisconsin supreme courts suggesting the need to deter this type of conduct is strong.[6]

This view would be consistent with ***Armstrong***, which noted that the officers in that case had only "technically violated" ***Miranda*** and that before the defendant confessed officers had not intended to interrogate him, but rather believed that he was only a witness. ***Armstrong***, 223 Wis. 2d at 364-65.[7] It would

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[6] *See, e.g.*, ***Escobedo v. Illinois***, 378 U.S. 478, 490 (1964) ("[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."); ***State v. Dagnall***, 2000 WI 82, ¶30, 236 Wis. 2d 339, 612 N.W.2d 680 ("Police and prosecutors are under an affirmative obligation not to circumvent or exploit the protections guaranteed by the right."); ***State v. Samuel***, 2002 WI 34, ¶21, 252 Wis. 2d 26, 643 N.W.2d 423 (quoting ***Arizona v. Fulminante***, 499 U.S. 279, 293 (1991), and noting the "'deep-rooted feeling that the police must obey the law while enforcing the law'").

[7] Knapp also argues that ***State v. Yang***, 2000 WI App 63, 233 Wis. 2d 545, 608 N.W.2d 703, could be interpreted as applying only to "technical" ***Miranda*** violations.

also be consistent with ***Harris***, which involved police conduct that purposefully violated a suspect's Fifth Amendment right to counsel.

We note also, however, that in determining whether an officer has violated an individual's constitutional rights, courts generally do not consider whether the officer *believed* he or she was violating the law. In other words, we generally do not suppress evidence obtained by an officer who thought he or she was acting illegally, but in fact was not. Rather, to the extent that a subjective standard is used at all, it is the suspect's state of mind and not the officer's, that is relevant. *See, e.g,* ***Whren v. United States***, 517 U.S. 806, 813 (1996) (traffic stop based on probable cause valid regardless of subjective motivation of the officer); ***Arizona v. Roberson***, 486 U.S. 675, 687 (1988) (***Edwards*** "focuses on the state of mind of the suspect and not of the police."); ***New York v. Quarles***, 467 U.S. 649, 655-56 (1984) (officer's motivation not relevant to application of the "public safety" exception to ***Miranda***); ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980) (whether "interrogation" occurred focuses on perceptions of suspect, not intent of police).

A different analysis may be appropriate when the issue is not whether the law was *violated* but whether a violation of the law merits suppression of illegally obtained evidence. *See* ***Tucker***, 417 U.S. at 447 (suggesting that whether an officer's violation was "willful" was a relevant consideration in deciding whether to suppress); *see also* ***Michigan v. Harvey***, 494 U.S. 344, 348 (1990) (holding that statements made by a defendant must be suppressed only when they are "deliberately elicited" from a defendant outside the presence of counsel). When no law has been violated, the interest in suppressing evidence is reduced significantly, regardless of the officer's motivations.

Finally, we point out that commentators have suggested that there may be an analytical difference in applying the fruits doctrine to a warned, voluntary statement versus a piece of physical evidence. *See* WAYNE R. LAFAVE ET. AL, CRIMINAL PROCEDURE § 9.5(b) at 387 (2d ed. 1999). As ***Elstad*** noted: "Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities .... A living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized." 470 U.S. at 308-09 (internal quotations omitted). Further, in the context of physical evidence, the deterrence rational may be particularly strong. When police are seeking to elicit information regarding evidence rather than a confession, there would be little disincentive to avoid providing ***Miranda*** warnings if the officer knows that the evidence will not be suppressed.

Few courts have considered the effect that a deliberate intent to circumvent ***Miranda*** has on the decision to suppress the fruits of a ***Miranda*** violation, although many courts interpret ***Tucker*** and ***Elstad*** as making the fruits doctrine inapplicable in the context of all ***Miranda*** violations, and have continued to do so, even after ***Dickerson***. *See, e.g.,* ***United States v. Sterling***, 283 F.3d 216 (4th Cir. 2002); ***United States v. DeSumma***, 272 F.3d 176 (3d Cir. 2001); ***Taylor v. State***, 553 S.E.2d 598 (Ga. 2001). The First Circuit, however, has concluded that "where the apparent reason the police failed to give a warning was their intention to manipulate the defendant into giving them information," suppression of derivative evidence may be appropriate. ***United States v. Faulkingham***, 295 F.3d 85, 2002 WL 1431809, *8 (1st Cir. 2002); *see also* ***United States v. Carter***, 884 F.2d 368, 373-74 (8th Cir. 1989) (concluding that fruits doctrine applies to ***Miranda*** violations where violation is more than "technical").

We conclude that this issue is appropriate for review by the supreme court. Resolution of this case requires consideration of important constitutional questions as well as harmonizing ***Dickerson*** with Wisconsin case law. Further, the supreme court has instructed that certification is appropriate where a decision by the United States Supreme Court has "arguably" overruled Wisconsin case law. *See* ***State v. Jennings***, 2002 WI 44, ¶17, 252 Wis. 2d 228, 647 N.W.2d 152. We therefore respectfully request the Wisconsin Supreme Court to accept jurisdiction over this appeal.