STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY JAMES WORDEN,

Defendant-Appellant.

UNPUBLISHED
December 9, 1997

No. 193522
St. Clair Circuit Court
LC No. 95-000602-FH

Before: Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 50 or more but less that 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was thereafter sentenced to an enhanced sentence of fifteen to forty years' imprisonment pursuant to MCL 333.7413(2); MSA 14.15(7413)(2). He appeals as of right and we affirm.

Defendant's cocaine charge arose from information police obtained during a custodial interrogation when defendant was arrested on a weapons offense. Defendant was interrogated on September 22, 1994 by a deputy with the St. Clair County Sheriff's Department. At one point during the interrogation, defendant requested an attorney, but the officer continued to interrogate defendant. As a result of the interrogation, the officer elicited information concerning defendant's drug sales. Based on this admission, the Sheriff's Department obtained a search warrant for defendant's van. While executing the warrant, the officers found cocaine. The police seized approximately 137 grams of cocaine, along with other narcotics paraphernalia.

Defendant was subsequently charged with the present offense, and moved before trial to suppress his police statement and the cocaine as "poisonous fruit" of that statement. The trial court found that defendant invoked his right to counsel at the interrogation and that defendant did not initiate further questioning. The trial court ruled that defendant's statement must be suppressed, but that the custodial interrogation did not implicate any constitutional right to counsel and that the statement was otherwise voluntary.[1] Rather, the trial court ruled that the evidence seized as a result of the statement implicated only the prophylactic rule of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d

694 (1966), and the evidence seized as a result of the interrogation did not have to be suppressed because there was no constitutional violation.

Defendant's statement was suppressed at trial, but the evidence seized as a result of his admissions was admitted. The jury convicted defendant as charged. On appeal, defendant raises four issues. He argues that the trial court erred in failing to suppress the evidence seized as a result of his statement under the "fruit of the poisonous tree" doctrine. He also argues that certain other "bad acts" evidence was improperly admitted, that the prosecutor violated the discovery order in failing to disclose evidence that police found a cutting agent in the same van where the cocaine was found, and that the trial court erred in refusing to instruct the jury on unlawful use of cocaine. We do not find any issue to require reversal in this case.

I

Defendant's first argument is that the trial court erred in failing to suppress the evidence found in the van because the evidence was the fruit of an illegal confession. Defendant contends that his Fifth Amendment right to counsel was violated at the custodial interrogation where the police failed to cease questioning when defendant requested an attorney. Defendant then contends that because his Fifth Amendment right to counsel was violated, all evidence seized as a result of his police statement must be suppressed as "fruit of the poisonous tree."[2]

The critical question to be determined in this case is whether any Fifth Amendment right to counsel had been implicated at the custodial interrogation. Based on the United States Supreme Court's pronouncements that the right to counsel established by *Miranda* is not constitutionally based, but merely a measure to ensure that the right against compulsory self-incrimination is protected, we must conclude that no constitutional right to counsel has been implicated in this case. Therefore, the trial court did not err in not suppressing the evidence seized as a result of defendant's police statement.

There is no question in this case that defendant was subjected to a custodial interrogation, thus triggering the need to give *Miranda* warnings to defendant. See *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Further, it is undisputed that defendant requested an attorney during his interrogation, that the police officer failed to honor defendant's request, that the officer continued to interrogate defendant, and that defendant did not initiate further questioning. Therefore, the bright-line rule of *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), was implicated. Under the rule of *Edwards*, police officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during a custodial interrogation.[3] Because the officer in this case did not cease questioning and because defendant did not initiate further questioning, the trial court properly ordered that defendant's statement was not admissible. *Id.*, p 487; *McNeil v Wisconsin*, 501 US 171, 177; 111 S Ct 2204; 115 L Ed 2d 158 (1991).

However, we must determine whether the evidence obtained as a result of the statement must also be suppressed as "fruit of the poisonous tree." In *Davis v United States*, 512 US 452; 114 S Ct 2350; 129 L Ed 2d 362, 370 (1994), the Supreme Court made clear that the right to counsel established in *Miranda* is not a right protected by the federal constitution, but is one of a series of recommended procedural safeguards set up to insure that the right against compulsory self-incrimination

is protected. Accord, *Michigan v Tucker*, 417 US 433, 443-444; 94 S Ct 2357; 41 L Ed 2d 182 (1974); *Withrow v Williams*, 507 US 680; 113 S Ct 1745; 123 L Ed 2d 407, 418 (1993). Moreover, the Supreme Court in *Davis*, p 371, stated that the prohibition on further questioning, like other aspects of *Miranda*, is not required by the Fifth Amendment's prohibition against compulsory self-incrimination, but "is instead justified only by reference to its prophylactic purpose," citing *Connecticut v Barrett*, 479 US 523, 528; 107 S Ct 828; 93 L Ed 2d 920 (1987). See also, *People v Hoffman*, 205 Mich App 1, 10; 518 NW2d 817 (1994) ("*Miranda* is not a constitutional rule, but a prophylactic rule designed to insure protection of an accused's right against compelled self-incrimination.").

Accordingly, there is no constitutional violation in this case as argued by defendant. The police officer's failure to honor defendant's request for an attorney at the custodial interrogation was a violation of the bright-line rule of *Edwards*, but that rule is not constitutionally based. Rather, the prohibition on further questioning is justified only by reference to the prophylactic purpose of *Miranda*. *Davis, supra*, p 371. As more fully explained below, because there is no constitutional violation with respect to defendant's police statement, the "fruit of the poisonous tree" doctrine does not apply.

In *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), the United States Supreme Court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence as "fruit of the poisonous tree." In *Tucker, supra*, the Supreme Court held that the testimony of a witness whose identity was discovered as the result of a statement taken from the accused without benefit of full *Miranda* warnings was not subject to suppression as "fruit of the poisonous tree." The Supreme Court in *Tucker* specifically noted that there was no actual infringement of the accused's constitutional rights where full *Miranda* warnings were not given, and that the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed. Thus, in *Tucker*, the unwarned confession had to be suppressed, but the introduction of the witness' testimony did not violate the defendant's Fifth Amendment rights. Accord, *People v Kusowski*, 403 Mich 653, 662; 272 NW2d 503 (1978) (third-party testimony discovered as a result of a *Miranda* violation need not be suppressed).[4]

Defendant relies on *State v Harris*, ___ Wisc ___; 544 NW2d 545 (1996), in which the Wisconsin Supreme Court held that a police-initiated interrogation conducted after a suspect unambiguously invokes the right to have counsel present during the questioning constitutes the violation of a constitutional right. The court in *Harris* held that the violation of the rule in *Edwards* triggers the fruit of the poisonous tree doctrine requiring suppression of the fruits of the constitutional violation. Given the United States Supreme Court's clear statements that the *Miranda* right to counsel is not constitutionally based, we cannot agree with the court in *Harris* that the "fruit of the poisonous tree" doctrine is applicable where there is a violation of *Edwards*. Our understanding of the Supreme Court's rulings in this respect is that the "fruit of the poisonous tree doctrine" does not apply where there is an *Edwards* violation.

Accordingly, we hold that the trial court did not err in denying defendant's motion to suppress the evidence gathered as a result of his illegally obtained confession. Because the confession was obtained only in violation of the prophylactic right to counsel rule in *Miranda*, but was not a

constitutional violation of the right to counsel, the "fruit of the poisonous tree" doctrine does not apply and the evidence obtained as a result of defendant's police statement did not have to be suppressed.

II

Defendant next argues that evidence of other "bad acts" concerning drug transactions in Texas and Ohio was improperly admitted at trial.

At trial, the prosecutor elicited testimony from Deputy O'Boyle that defendant had admitted to him that he had engaged in drug transactions in Texas and Ohio. Defense counsel objected to this testimony, however, it was admitted over objection. Later, defense counsel moved for a mistrial because of the admission of O'Boyle's testimony, but that motion was denied.

Defendant contends that he was not given proper notice that the prosecutor intended to offer the other acts evidence as required by MRE 404(b)(2). However, the prosecutor stated to the court, without being refuted by defense counsel, that he had "made counsel aware of the statement that Deputy O'Boyle, when I reviewed this case, that he was told that he was dealing in cocaine." Accordingly, we conclude that the prosecutor provided reasonable notice in advance of trial of the general nature of the evidence he would later intend to introduce at trial.

Defendant also argues that the other acts evidence was improperly introduced to attack his character, his status as a drug dealer, and to prove that he acted in conformity with his propensity to sell cocaine. As noted by defendant, the issue in this case was whether defendant intended to deliver the cocaine. That was the element denied by defendant and attacked at trial. To be admissible, other acts evidence must satisfy the test set forth in *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993): (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) the evidence must be relevant under MRE 402 as enforced through MRE 104(b); (3) the probative value of the evidence cannot be substantially outweighed by any unfair prejudice; and (4) that trial court may, upon request, provide a limiting instruction to the jury.

In this case, the evidence was offered to show defendant's intent to deliver, since that was the disputed issue at trial. The evidence was probative with respect to intent because defendant's involvement in other drug transactions made it more likely that he intended to distribute the cocaine to others, as opposed to merely possessing the cocaine for himself. Nor can we conclude that the probative value of the evidence was *substantially* outweighed by the unfair prejudice. The probative value of the evidence in this case was high considering that it was directly probative of the contested issue in this case, that being defendant's intent to deliver the cocaine from his van.

Accordingly, because the evidence was relevant under MRE 404(b)(1), and was not offered solely to show defendant's criminal propensity to establish that he acted in conformity therewith, the trial court did not abuse its discretion in admitting the other acts evidence and in denying defendant's motion for mistrial. *VanderVliet, supra*, p 65.

III

Defendant next argues that the prosecutor violated the discovery order and violated his constitutional due process and confrontation rights by failing to disclose evidence that police discovered a cutting agent in the same van where they found the cocaine. On the first day of trial, defense counsel objected to the prosecutor's intention to introduce evidence of a cutting agent found by the police during their search of defendant's van. The trial court permitted the prosecutor to introduce evidence of the cutting agent.

Before trial, defendant requested discovery of any report produced by or for an expert witness intended to be called at trial by the prosecutor and a description of and an opportunity to inspect any tangible physical evidence that the prosecutor intended to introduce at trial. See MCR 6.201. We find that the prosecutor adequately complied with the discovery order in this case. The police report given to defense counsel, under the heading of "PROPERTY TAGS/EVIDENCE" states that tag number 94-371 was a "gallon sized zip lock plastic baggie with a small amount of off-white substance within (did not field test positive for any illegal controlled substance which [the police officer] tested for). This was located inside of a fire box, which was to the rear area of the above white van." At trial, after defense counsel objected to the introduction of the cutting agent, the prosecutor explained that he had become involved in the case only in the week before trial. The prosecutor explained that he had the officer thoroughly check the substance found in the baggie the day before trial. It was then that the prosecutor learned that the substance was actually inositol, which is not an illegal substance. The prosecutor also stated that he had received the final report on the substance on the first day of trial, and that he gave the report to defense counsel at the same time.

Because the police report shows that the baggie did not contain an illegal substance and was described as an off-white substance that did not test positive for any illegal controlled substance, we conclude that the prosecutor did not violate the discovery order. The police report clearly indicates that the substance was an off-white substance which did not contain any illegal controlled substances. Moreover, as soon as the prosecutor knew of the exact nature of the substance, he reported it to defense counsel. Accordingly, we find that the prosecutor did not violate the discovery order in this case, and the trial court properly declined to suppress the evidence of the inositol at trial.

IV

As his last issue, defendant argues that the trial court erred in failing to instruct the jury on unlawful use of cocaine as a lesser offense of possession with intent to deliver.

Defendant requested that the trial court give an instruction on the misdemeanor offense of unlawful use of cocaine as a lesser offense of possession with intent to deliver cocaine. The trial court denied the request, ruling that there was no competent evidence to support an instruction on unlawful cocaine use. Defendant counters that there was a sufficient evidentiary basis from Todd Wilson's testimony to give the requested misdemeanor instruction of unlawful cocaine use. Wilson testified at trial that he and defendant frequently used drugs together and that defendant retrieved cocaine from his van which they used together.

With respect to jury instructions, the rule for giving a misdemeanor lesser included offense is: (1) there must be a proper request for the misdemeanor instruction, (2) there must be an appropriate

relationship between the charged offense and the requested misdemeanor, (3) the requested misdemeanor must be supported by a rational view of the evidence, and (4) the requested instruction must not result in undue confusion or some other injustice. *People v Stephens*, 416 Mich 252, 261-264; 330 NW2d 675 (1982). In *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991), this Court held that the misdemeanor offense of unlawful use fails to bear an appropriate relationship to the greater offense of possession with intent to deliver. This Court noted that an appropriate relationship exists if the greater and lesser offenses relate to the protection of the same interests and they are related in an evidentiary sense such that proof of the misdemeanor is necessarily presented as proof of the greater charged offense. *Id.* This Court further held that proof of drug use is never necessarily presented as part of the proofs supporting possession with intent to deliver. *Id.*, citing *People v Steele*, 429 Mich 13, 23-24; 412 NW2d 206 (1987).

Accordingly, the trial court did not err in refusing to give defendant's requested misdemeanor instruction of unlawful use of cocaine because there is not an appropriate relationship between the offenses of possession with intent to deliver and unlawful use.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

I concur in the result only.

/s/ Michael J. Kelly

[1] Defendant does not argue that his statement was involuntary.

[2] We note that defendant's argument in this regard is based exclusively on the federal constitution. Defendant advances no argument that the state constitution provides broader protection under these circumstances or that a prophylactic rule should be applied in this case. See *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996) (a majority of the Supreme Court adopted a prophylactic rule that the police must inform a suspect that a retained attorney is immediately available for consultation and the failure to do so per se, before a confession is obtained, precludes a knowing and intelligent waiver of the right to counsel and the right to remain silent).

[3] The fact that defendant had been arrested on a wholly separate charge is not dispositive. The rule in *Edwards* is not offense specific. Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, the suspect may not be reapproached regarding any offense unless counsel is present. *Arizona v Roberson*, 486 US 675; 108 S Ct 2093; 100 L Ed 2d 704 (1988).

[4] This Court's recent decision in *People v Melotik*, 221 Mich App 190; 561 NW2d 453 (1997) is not dispositive of this issue. In *Melotik*, this Court assumed that the defendant's police statement was obtained in violation of a constitutional right. In the present case, we have found that there is no constitutional violation because the right to counsel under *Miranda* is not constitutionally based.