

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRANDON RICHARDS,

Defendant-Appellee.

UNPUBLISHED

June 13, 2013

No. 314284

Oakland Circuit Court

LC No. 2012-241253-FH

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals by leave granted¹ an order granting defendant's motion to suppress blood test results for marijuana. Defendant was charged with one count of operating a motor vehicle under the influence of alcohol or a controlled substance, third offense, MCL 257.625(1), (8), and one count of driving while his license was suspended, MCL 257.904. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEEDINGS

The issue in this case surrounds the trial court's decision to suppress blood tests taken from defendant pursuant to a search warrant after he was arrested following a traffic stop. In his motion defendant argued that the blood test results should be suppressed because he was never provided with *Miranda*² warnings, even though he was under arrest at the time Officer Sarah Moulik asked defendant at his booking whether he had been utilizing any drugs. Therefore, defendant argued, his blood test results for marijuana—and not just his positive response to Officer Moulik's question—should be suppressed. After a one-day evidentiary hearing the trial court issued a well written opinion and order. Neither party has challenged the trial court's findings of fact, so we quote those findings to set the proper framework for our opinion:

¹ *People v Richards*, unpublished order of the Court of Appeals, entered February 15, 2013 (Docket No. 314284).

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The facts of this relevant to the present motion are undisputed. At approximately 9:00 pm on September 11, 2009, Officer Sarah Moulik of the Novi Police Department was assigned to road patrol when she happened upon defendant's vehicle in traffic. When she is on patrol, Officer Moulik "regularly" runs plates of vehicles that she encounters, and she did so on defendant's vehicle. The plate on defendant's vehicle came back with "no title information." As a result, Officer Moulik pulled defendant's vehicle over to check why there was no title information in the police computer.

When Officer Moulik activated her overhead lights, defendant's vehicle failed to stop. In order to "get the vehicle's attention," Officer Moulik testified that she had to activate her siren—which succeeded in getting the driver's attention. Officer Moulik testified that drivers "usually" react to overhead lights along—particularly when it is dusk or dark—and a driver's failure to do so "indicates that the driver isn't aware of what is going on around them."

When she approached defendant's vehicle, Officer Moulik observed that defendant was the only occupant. She testified that she "immediately smelled an odor of intoxicants coming from the vehicle," and observed that "his eyes were glassy"—which are both indicators of alcohol. Thereafter, Officer Moulik had defendant perform field sobriety tests (Nstagnus, walk & turn, and one-leg stand), and "he showed multiple indicators of alcohol or drug use."

Specifically, Officer Moulik testified that defendant showed "lack of smooth pursuit" in the Nstagnus test; side-stepping, turning incorrectly, and arm-raising in his walk and turn; and putting his foot down and raising his arms and swayed to retain balance in his one-leg stand.

Defendant was also administered a PBT, which returned "multiple results." The officer testified that defendant was "unable to give a good, solid breath sample." The PBT machine would not register a result in "automatic" mode, so the officer placed the machine on manual mode, which returned results of 0.059, 0.069, and 0.071. The officer, however, testified that these were not "good breath samples."

Defendant initially indicated to the officer that he had not had anything to drink, but he eventually told her that he had consumed four beers within two hours. Defendant also made a statement to the officer that "he was probably over the .08 limit." Based on her training and observations, Officer Moulik believed defendant to be under the influence of drugs or alcohol and placed him under arrest. The officer also learned that defendant had a suspended driver's license.

The officer then transported defendant to the Novi Police Department with the intent to go into further alcohol testing. At the police station, defendant refused to take a blood test. The officer testified that defendant told her that he would not consent because he believed that the police would not pursue OWI charges if he refused the blood test.

Because defendant refused, the officer then obtained a search warrant for an involuntary blood test. Defendant was transported to Providence Park Hospital—where his blood was drawn. The officer then returned the defendant to the police stations “for booking.”

The officer testified that, when book an individual, “we ask multiple questions” such as identification and contact information. And if a person is going to be placed into a cell, the officer testified that “we ask medical question.” Defendant was going to be placed into a cell, so the officer asked questions from a prepared list of 15-20 questions. As a part of this list, the officer asked defendant when his last alcohol and drug use was. The officer testified that these questions are a part of normal department protocol, which are asked

It’s so that when [an individual is] in a cell, if something happens, if they go into some kind of withdrawals or anything like that, or have an asthma attack or something along those lines, we know that they have that certain medical condition, and we can help medical personnel with it if they’re unable to help us.

The officer testified that she did not advise defendant of his *Miranda* rights before asking him about recent drug and alcohol use. In response to this question, defendant admitted to marijuana use in the previous two weeks. **As a result of defendant’s admission**, the officer testified that she requested the defendant’s blood be tested for marijuana—in addition to alcohol. In other words, the officer did not decide to test defendant’s blood for marijuana until he admitted recent use. The blood results returned positive results for THC (marijuana) and metabolites. The blood-alcohol test results came back at .06. [Emphasis in the original.]

After making these findings the trial court concluded that defendant was in custody at the time Officer Moulik asked defendant about his alcohol or drug use. The court also held that this case was outside the scope of the “booking exception” to the judicially created *Miranda* rule, which permits questions regarding biographical data necessary to complete booking or pretrial services. According to the trial court, Officer Moulik should have known that the only possible answer that defendant would give would result in an incriminating statement and Officer Moulik admitted that she decided to test defendant’s blood for marijuana based solely on his affirmative response to her question. Thus, defendant’s motion was granted because Officer Moulik failed to give defendant his *Miranda* warnings, and both defendant’s statement and the blood test results for marijuana were suppressed.

II. ANALYSIS

The prosecution argues that *Miranda* warnings were not required to be given to defendant because Officer Moulik’s question to defendant was within the “booking exception” to *Miranda*. See *Pennsylvania v Muniz*, 496 US 582, 601; 110 S Ct 2638; 110 L Ed 2d 528 (1990). Additionally, the prosecution argues that, even if *Miranda* warnings were required, the blood test results for marijuana should not have been suppressed because the blood test was obtained

pursuant to a valid search warrant and it was not fruit of the poisonous tree. We agree with the latter argument, but not the former.

This Court reviews a trial court's findings of fact on a motion to suppress for clear error, but reviews the ultimate decision on the motion de novo. *People v Tavernier*, 295 Mich App 582, 584; 815 NW2d 154 (2012). The right against self-incrimination is guaranteed by both the federal and state constitutions. US Const, Am V; Const 1963, art 1, § 17. To protect a defendant's privilege against self-incrimination, a suspect must be informed of certain rights before he is subjected to a custodial interrogation. *Miranda*, 384 US at 444-445. When a defendant is subjected to a custodial interrogation, the defendant must be warned that he "has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

A custodial interrogation is defined as "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v Elliott*, 295 Mich App 623, 631-632; 815 NW2d 575 (2012) lv gtd 491 Mich 938 (2012), quoting *Miranda*, 384 US at 444. "Whether an accused was in custody depends on the totality of the circumstances" and "[t]he key question is whether the accused could have reasonably believed that he or she was not free to leave." *People v Steele*, 292 Mich App 308, 316-317; 806 NW2d 753 (2011). "Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are likely to elicit an incriminating response from the subject." *Elliott*, 295 Mich App at 632. Statements made by a defendant during custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his or her Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

The trial court correctly held that the "booking exception" to *Miranda* did not extend to the questions posed to defendant regarding alcohol or drug use that was asked for "medical purposes." The "booking exception" to *Miranda* exempts from *Miranda*'s coverage questions to secure the biographical data necessary to complete booking or pretrial services. *Muniz*, 496 US at 601. These questions include the defendant's name, address, height, weight, eye color, date of birth, and current age. *Id.* In addition, the Court noted that the booking exception "does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminating admissions." *Id.* at 602 n 14.

Here, as the trial court found, defendant was in custody at the time the question was posed, as Officer Moulik was in the process of booking defendant and defendant could have reasonably believed that he was not free to leave. See *Steele*, 292 Mich App at 316-317. We also agree with the trial court that Officer's Moulik question sought information far beyond "'biographical data necessary to complete booking or pretrial services.'" See *Muniz*, 496 US at 601 (citation omitted). Officer Moulik testified that after she pulled defendant over to investigate why defendant's vehicle had no title information, defendant showed multiple indicators of alcohol or drug use, including marijuana. It was only during booking, however, that Officer Moulik asked defendant about his last drug use. Officer Moulik should have known that her question during booking was likely to elicit an incriminating response from defendant. Therefore, because Officer Moulik did not provide defendant with *Miranda* warnings and did not

obtain a waiver, the prosecution may not use at trial defendant's statement regarding his use of marijuana two weeks before his arrest. See *Muniz*, 496 US at 602 n 14.

Nonetheless, once the trial court determined that *Miranda* warnings were required before Officer Moulik asked defendant about his drug use, the trial court needed to determine whether the physical fruit of the unwarned statement, i.e., the blood test results for marijuana, should have been suppressed.

A suspect's constitutional rights are not violated when the police, for whatever reason, fail to provide him with the *Miranda* warnings. *United States v Patane*, 542 US 630, 641; 124 S Ct 2620; 159 L Ed 2d 667 (2004) (plurality opinion). Rather, the Fifth Amendment is implicated only when the suspect's unwarned statement is introduced into evidence at trial. *Id.* The exclusion of such statements is the "complete and sufficient remedy for any perceived *Miranda* violation." *Id.* at 641-642 (quotation marks and citation omitted). As a result, and because the failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment, the exclusionary rule does not apply to automatically exclude all evidence obtained as a result of the unwarned statement. *Id.* at 644-645 (KENNEDY, J., concurring) (admitting nontestimonial physical fruits of unwarned statement), citing *Oregon v Elstad*, 470 US 298, 308-309; 105 S Ct 1285; 84 L Ed 2d 222 (1985) (admitting a statement given after *Miranda* warnings following an initial unwarned voluntary statement); see also *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963) (suppressing evidence obtained as a result of an illegal arrest because it was the "fruit of the poisonous tree"). Indeed, the Supreme Court has ruled that admission of such evidence violates the Fifth Amendment only if the evidence is the fruit of an actual coerced statement. *Patane*, 542 US at 644; *Elstad*, 470 US at 309. An "actually coerced statement" is one that is accompanied by "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will. . . ." *Elstad*, 470 US at 309.

Compulsion proscribed by the Fifth Amendment is that which results when the police use threats or violence, improper influence, or direct or implied promises, however slight, to create a circumstance in which a person is effectively unable to remain silent. See *People v Daoud*, 462 Mich 621, 632; 614 NW2d 152 (2000), quoting *Malloy v Hogan*, 378 US 1, 7; 84 S Ct 1489; 12 L Ed 2d 653 (1964). The evidentiary hearing did not cover whether defendant's statement was voluntary, and so we are reluctant on this record to conclude whether defendant's initial statement, though unwarned, was coerced or not. Although nothing in the record reveals that Officer Moulik used physical violence or threat of force when asking that one question, and although Officer Moulik obtained a valid search warrant before she obtained a sample of defendant's blood, we conclude that a remand is necessary for further factual development. See *United States v Morse*, 569 F3d 882, 885 (CA 8, 2009) (Remanding for further fact finding "[b]ecause the district court truncated its analysis by focusing on the *Miranda* rule, [and thus] . . . did not undertake a thorough examination of the circumstances that may bear on voluntariness. . . ."). We emphasize that it is immaterial whether Officer Moulik decided to test defendant's blood solely based on his statement because the proper test is whether the blood test was the physical fruit of an actual, coerced statement. See *Patane*, 542 US at 644; *Elstad*, 470 US at 309. In other words, Officer Moulik had every right to use the statement as a basis for the request for testing so long as defendant's statement was voluntarily made.

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra