NOTICE
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2011 IL App (5th) 100010-U

NO. 5-10-0010

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 08-CF-2399
	)	
DOUGLAS TOTTY,	)	Honorable
	)	James Hackett,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Presiding Justice Chapman and Justice Welch concurred in the judgment.

O R D E R

¶ 1 *Held*: Because the circuit court made no findings regarding the voluntariness of the defendant's unwarned statements and because the mere failure to give *Miranda* warnings does not automatically require a suppression of the fruits of a voluntary but unwarned statement, we must vacate the suppression order and remand this case to determine whether the defendant's statements and consent were voluntarily made or whether they were the product of coercive police tactics.

¶ 2 The defendant, Douglas Totty, was charged in the circuit court of Madison County with one count of unlawful possession of a methamphetamine precursor, one count of unlawful participation in methamphetamine manufacturing, one count of unlawful disposal of methamphetamine-manufacturing waste, and three counts of unlawful possession of methamphetamine-manufacturing materials. The defendant filed a motion to suppress. Following an evidentiary hearing, the circuit court granted the motion and barred the State from using statements made by the defendant while in police custody and evidence derived from those statements because the police

officers did not give *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436 (1966)) to the defendant prior to questioning him. On appeal, the State contends that the circuit court erred in granting the defendant's motion to suppress because the defendant's unwarned statements were voluntary and because physical evidence derived from a defendant's unwarned but voluntary statements is not fruit of the poisonous tree and is admissible at a trial. We vacate the suppression order and remand the case with directions.

¶ 3 In this case, Agent Robert Patterson and Agent Michael Fisher (two Illinois State Police officers assigned to the Methamphetamine Response Team), the defendant, and the defendant's son testified during the suppression hearing. For purposes of the motion to suppress, the facts leading up to the agent's questioning of the defendant are not contested, but there is a factual question regarding whether statements made by the defendant during questioning while in the agents' custody were voluntary or coerced. We begin with a summary of the pertinent facts leading to the questioning of the defendant and then recount the testimony of the witnesses regarding the voluntariness issue.

¶ 4 On July 24, 2008, Special Agent Robert Patterson, an Illinois State Police officer assigned to the multijurisdictional Methamphetamine Response Team, was notified by a Walgreens pharmacy in Collinsville, Illinois, that a man identified as Douglas Totty had purchased a box of pseudoephedrine pills earlier that day. The information was significant to Agent Patterson because he had recently fielded calls from other pharmacies advising that the defendant had purchased pseudoephedrine pills and because he was aware that the defendant was a subject of prior methamphetamine investigations and had a conviction related to methamphetamine production. Agent Patterson testified that the call from Walgreens raised a suspicion

that the defendant might be purchasing pseudoephedrine in order to make methamphetamine.

¶ 5 Agent Patterson and Special Agent Michael Fisher, the lead investigator, went to the defendant's residence to talk to the defendant. The defendant resided in a mobile home that was enclosed by a fence. When Agent Patterson and Agent Fisher pulled up outside the defendant's residence, they saw the defendant's brother, Donald Totty, standing in the driveway. Agent Patterson exited his vehicle with his phone in hand. He was in contact with a police dispatcher, who advised that there was an active warrant for the defendant's arrest and that the warrant indicated the defendant was considered armed and dangerous. The agents walked up to Donald and asked if the defendant was inside the residence. Donald stated that the defendant was inside. The agents asked Donald to get the defendant. Donald went to the door of the defendant's residence and called for the defendant. The defendant exited his residence and approached Agent Patterson and Agent Fisher, who had remained in the driveway.

¶ 6 Agent Fisher testified that he notified the defendant that there was an active arrest warrant for him out of Collinsville. He placed the defendant under arrest. Agent Fisher stated that he then asked the defendant some questions pertinent to his investigation. Agent Fisher said that he asked if the defendant had purchased pseudoephedrine pills from Walgreens earlier that day and the defendant said that he had. Agent Fisher said that he then asked the defendant where the pills were located and that the defendant stated that the pills were in a cabinet above the kitchen sink. Agent Fisher asked if he could go inside the residence and retrieve the pills. The defendant stated that Agent Fisher could go get the pills if Donald could go along.

¶ 7 Agent Fisher testified that he and Donald entered the residence and that once

inside, Donald directed him to the kitchen cabinet. Agent Fisher looked inside the cabinet and saw a Walgreens bag that contained a box of pseudoephedrine pills. He also observed a bottle of peroxide and two bottles of alcohol inside the cabinet. Agent Fisher noted that peroxide and alcohol are used in the methamphetamine-manufacturing process. Agent Fisher testified that he seized the box of pseudoephedrine but left the alcohol and peroxide in the cabinet. Agent Fisher and Donald emerged from the residence a few minutes later. Agent Fisher was carrying the box of pseudoephedrine. He walked up to the defendant and showed him the box of pills. Agent Fisher asked the defendant if those were the pills he had purchased from Walgreens earlier that day. The defendant indicated that they were. Agent Fisher testified that he asked the defendant for consent to search the residence and that the defendant refused.

¶ 8 Agent Fisher testified that he returned to the defendant's residence later that day with a warrant authorizing a search of the residence for methamphetamine-related items and that several items commonly associated with the production of methamphetamine were discovered during the search. Agent Fisher testified that neither he nor any other law enforcement agent coerced the defendant or made any promises to him at any point during the encounter that day. Agent Fisher stated that he would not have entered the defendant's residence to retrieve the pseudoephedrine if the defendant had not given consent.

¶ 9 During cross-examination, Agent Fisher acknowledged that it was not illegal to buy a single box of pseudoephedrine pills and that the purchase of one box, by itself, would not establish probable cause that the defendant was doing anything illegal. Agent Fisher testified that he could not recall whether he gave *Miranda* warnings to the defendant prior to questioning him at his residence that day. He

acknowledged it was not mentioned in his police report. Agent Fisher testified that he did not ask the defendant to sign a *Miranda* waiver form before he initiated questioning and that he did not ask the defendant to sign a consent-to-search form because the defendant had given oral consent.

¶ 10 Agent Patterson testified that he did not believe that the defendant was given *Miranda* warnings before he was questioned about the pseudoephedrine purchase. Agent Patterson otherwise corroborated Agent Fisher's recollection of the events.

¶ 11 The defendant's son, Douglas Totty II, testified that on the afternoon of July 24, 2008, he was detained by several police officers who were with a drug enforcement unit. Douglas stated that the officers asked him why he had been in Walgreens earlier that day and that he told them he had not been in Walgreens. Initially, the officers did not believe him. They handcuffed him and transported him to his father's residence. Douglas testified that once the officers discovered that he was not the Douglas Totty who had purchased a box of pseudoephedrine at Walgreens, they released him and told him to leave the premises. Douglas stated that while he was detained in the squad car, he heard his father tell the officers several times that they could not go into his residence. He never heard his father give any officer permission to enter the residence. He did not see any police officer enter the residence after his father's protests. During cross-examination, Douglas testified that he had no knowledge of any conversations that his father might have had with the police officers before he arrived at his father's residence.

¶ 12 The defendant testified that he bought a single box of pseudoephedrine from Walgreens between 3 p.m. and 4 p.m. on July 24, 2008. He then returned home and put the box of pseudoephedrine into the medicine cabinet. A short time later, the defendant's brother, who was outside, shouted to the defendant that a swarm of police

officers was outside. The defendant stated that he went outside and asked the officers what was going on and that one of the officers, Agent Fisher, stated that Collinsville had an active arrest warrant for the defendant for arson and battery. The defendant stated that he told Agent Fisher that the police had the wrong guy. The defendant stated that he was handcuffed and that Agent Fisher called him a "MF-liar." The defendant testified that he was not given *Miranda* warnings and that he was not asked to sign a *Miranda* waiver form. The defendant stated that the scene was confused and that police officers were inquiring about the whereabouts of the girl who had been spotted inside his car at Walgreens. He said that one officer asked him how he would like "to get smacked in the chops." The defendant testified that Agent Fisher asked him whether he had purchased pills from Walgreens earlier that day and that he confirmed that he had. The defendant stated that Agent Fisher then asked him where the pills were located and that he told Agent Fisher that the pills were in a kitchen cabinet. The defendant testified that Agent Fisher said he was going to go inside the residence and get the pills. The defendant shouted out to Agent Fisher, stating that Agent Fisher did not have permission to enter his home. The defendant testified that he directed his brother, Donald, to go inside and get the pills and that at that point, Agent Fisher stated that he would go with Donald. The defendant testified he repeatedly said that he would not permit Agent Fisher to enter the residence and that Agent Fisher entered the residence despite his protests.

¶ 13 The defendant testified that Agent Fisher was inside the residence for a few minutes and then exited with a box of pills in hand. At that point, the defendant directed Donald to lock the door. The defendant stated that two officers approached and asked for permission to search his residence and that he refused the request. The defendant stated that Agent Fisher then walked up to him, snatched his keys, stated

that he had permission, and reentered the residence. The defendant stated that he was "pretty sure" that his son was in a police car nearby at the time of these events.

¶ 14 Following the hearing, the circuit court issued a written order granting the defendant's motion to suppress. The court found that the defendant was in police custody and was entitled to receive *Miranda* warnings before being questioned by the police officers, that the police officers did not give *Miranda* warnings to the defendant before they questioned him about the purchase and location of pseudoephedrine pills, that the defendant's responses led to the seizure of the pseudoephedrine pills from the defendant's residence, and that the police officer's entry into the defendant's residence, "consensual or not," led to observations that in turn led to the issuance of a search warrant and the seizure of additional incriminating evidence. The court concluded that all the items seized and all the observations made were barred because the defendant had not been given *Miranda* warnings before he was questioned.

¶ 15 In reviewing a circuit court's decision to grant or deny a motion to suppress, we initially consider whether the circuit court's findings of fact are against the manifest weight of the evidence and then review *de novo* the legal question of whether the evidence should be suppressed. *People v. Pitman*, 211 Ill. 2d 502, 512, 813 N.E.2d 93, 101 (2004).

¶ 16 After reviewing the record, we conclude that the circuit court's suppression order must be vacated and the cause remanded for further proceedings because the circuit court did not make any findings regarding whether the defendant's unwarned statements were coerced or voluntary and whether the conduct of the police infringed on the defendant's constitutional privilege against compelled self-incrimination or whether it violated the prophylactic rules of *Miranda*.

¶ 17 The self-incrimination clause in the fifth amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. Const., amend V. The United States Supreme Court has stated that the self-incrimination clause contains its own self-executing exclusionary rule in that any person subjected to coercive police interrogations has an automatic protection against the use of their involuntary statements and any evidence derived therefrom in a subsequent criminal trial. *United States v. Patane*, 542 U.S. 630, 639 (2004); *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

¶ 18 The *Miranda* exclusionary rule is a judicially created, prophylactic device that is designed to deter the police from engaging in unlawful conduct by barring the use of statements taken in disregard of the principles in *Miranda*. *People v. Winsett*, 153 Ill. 2d 335, 352, 606 N.E.2d 1186, 1195 (1992). The *Miranda* exclusionary rule extends further than the exclusionary rule in the self-incrimination clause in that it bars the use of any unwarned statement in the prosecution's case in chief, even if the statement was not *compelled* within the meaning of the fifth amendment. *Oregon v. Elstad*, 470 U.S. 298 (1985); *Winsett*, 153 Ill. 2d at 352-53, 606 N.E.2d at 1196.

¶ 19 The failure to give *Miranda* warnings does not necessarily constitute a violation of a defendant's constitutional rights. *Patane*, 542 U.S. at 641. A distinction has been drawn between police conduct that infringes directly upon a constitutional right and police conduct that violates prophylactic measures developed to safeguard that right. *Elstad*, 470 U.S. 298. When police conduct violates the prophylactic rules of *Miranda* but does not actually violate the defendant's fifth amendment privilege against compelled self-incrimination, physical or testimonial evidence derived from a defendant's unwarned statements is not barred under the fruit-of-the-poisonous-tree doctrine. *Elstad*, 470 U.S. 298; *Winsett*, 153 Ill. 2d at 353-54, 606 N.E.2d at 1196.

The doctrine has been applied only when police conduct has been found to violate a defendant's constitutional rights. *Elstad*, 470 U.S. 298; *Winsett*, 153 Ill. 2d at 353, 606 N.E.2d at 1196.

¶ 20 In this case, the circuit court issued a written order in which it found that the defendant was in custody at the time the police initiated questioning, that the defendant was entitled to and was not given *Miranda* warnings prior to the questioning, and that unwarned statements made by the defendant in response to the questioning led to the seizure of potentially incriminating evidence. But the circuit court made no findings regarding whether the defendant's unwarned statements were coerced or voluntary and whether the conduct of the police infringed on the defendant's constitutional privilege against compelled self-incrimination or whether it violated the prophylactic rules of *Miranda*. Because the circuit court made no findings regarding the voluntariness of the defendant's unwarned statements and because the mere failure to give *Miranda* warnings does not automatically require a suppression of the fruits of a voluntary, unwarned statement, we must vacate the suppression order and remand the case for a determination of the voluntariness of the defendant's statements and consent.

¶ 21 Accordingly, the decision of the circuit court granting the defendant's motion to suppress is vacated, and the cause is remanded for further proceedings in accordance with this decision.

¶ 22 Suppression order vacated; cause remanded.