STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

LEANN LORRAINE BILBREY,

Defendant.

Case No. **CRF 2009 5470**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

I. FACTUAL BACKGROUND.

On October 23, 2008, probation officer Jerry Lema (Lema) received a report that one of his probationers, Kim Bilbrey, had been involved in a "domestic violence situation" with his wife Leann Bilbrey (Bilbrey), the defendant in the instant case. Memorandum in Support of Motion to Suppress, p. 2. Lema spoke with Leann Bilbrey by telephone in an effort to locate Kim Bilbrey. At the time, Leann Bilbrey was residing with her parents. Leann Bilbrey informed Lema there was methamphetamine at the home she had shared with her husband. Lema asked Leann Bilbrey to meet him at the home. Once she arrived, Lema and three other police officers instructed Bilbrey to unlock the front door, wait outside while a protective sweep was performed, and to then show them where to find the drugs. Bilbrey's parents were instructed to remain in their vehicle and were not permitted to enter

the home. Bilbrey directed the officers to a Kleenex box in an upstairs bedroom, the officers seized methamphetamine from the Kleenex box. "Without advising Ms. Bilbrey of her *Miranda* rights, the officers began to question her about her use of methamphetamine. Leann Bilbrey subsequently made incriminating statements." Memorandum in Support of Motion to Suppress, p. 2.

Leann Bilbrey now moves this Court to suppress her statements as involuntary because she was in custody during police interrogation without the benefit of *Miranda* warnings. *Id.,* p. 1. Leann Bilbrey also argues her statements should be suppressed as tainted fruit of the poisonous tree. *Id.*

II. STANDARD OF REVIEW.

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court's determination as to whether constitutional requirements were satisfied in light of the facts. *State v. Whiteley,* 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993); *State v. Atkinson,* 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct.App. 1996); *State v. Cruz,* 144 Idaho 906, 906, 174 P.3d 876, 878 (Ct. App. 2007). When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post,* 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall,* 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson,* 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999).

In determining whether *Miranda* warnings apply, reviewing courts will not reverse a trial court where substantial competent evidence supports the court's factual findings. *State v. Kirkwood,* 111 Idaho 623, 625, 726 P.2d 735, 737 (1986). The application of legal principles to factual findings is given free review. *State v. Hiassen,* 110 Idaho 608, 611, 716 P.2d 1380, 1383 (Ct.App. 1986).

III. ANALYSIS.

Preliminarily, "where…defendant is in non-exclusive possession of the premises upon which drugs were found there can be no legitimate inference that he knew of the drugs and had control of them in the absence of other circumstances such as incriminating statements which tend to support such inference." *State v. Warden,* 97 Idaho 752, 754, 554 P.2d 684, 686 (1976); *see* Annotation, *Conviction of Possession of Illicit Drugs Found in Premises of Which Defendant was in Nonexclusive Possession,* 56 A.L.R.3d 948 (1974). Here, Leann Bilbrey informed Lema of the presence of methamphetamine in the home while on the telephone with him. Rathdrum Police Officer Mark Sherman, present at the Leann Bilbrey home with Lema and Lieutenant McLean, writes in his report that Officer Sherman asked Leann Bilbrey who sleeps on the side of the bed closest to where the Kleenex box containing the methamphetamine was found. Leann Bilbrey replied that she did. It is clear Leann Bilbrey had knowledge and control of the methamphetamine.

In *Miranda,* the U.S. Supreme Court held that police must inform individuals of their right to remain silent and their right to counsel before undertaking custodial interrogation in order to protect the Fifth-Amendment privilege against self-incrimination. *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 1624 (1966). The *Miranda* rule applies where an individual is "in custody" or where their "freedom of action is curtailed to a degree associated with formal arrest." *Berkemer v. McCarthy,* 468 U.S. 420, 440, 104 S.Ct. 3138,

3150 (1984) (quoting *California v. Behler,* 463 U.S. 1121, 1125, 103 S.Ct 3517, 3520 (1983)). The totality of the circumstances must be objectively evaluated to determine whether there was pressure sufficient to make a reasonable person in the defendant's position believe they were in custody for the purposes of *Miranda*. *See State v. Medrano,* 123 Idaho 114, 117-8, 844 P.2d 1364, 1367-68 (Ct.App. 1992). For the purposes of *Miranda*, interrogation would result where a defendant is questioned in a way reasonably likely to elicit an incriminating response. *See e.g., Rhode Island v. Innis,* 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-90 (1980) (Interrogation must involve a measure of compulsion beyond that inherent in custody and refers not only to express questioning, but also any words of action by the police reasonably likely to elicit an incriminating response.); *State v. Bagshaw,* 141 Idaho 257, 260-61, 108 P.3d 404, 407-08 (Ct.App. 2004).

Even where the State is not obligated to give *Miranda* warnings, an individual may nevertheless hold the privilege against self-incrimination. *Minnesota v. Murphy,* 465 U.S. 420, 430-34, 104 S.Ct. 1136, 1143-46 (1984) (recognizing that the privilege could have been invoked in interview with the probation officer, but holding that *Miranda* was inapplicable because the interview was not a custodial interrogation); *United States v. Cortes,* 922 F.2d 123, 125-27 (2nd Cir. 1990) (recognizing that the defendant had a Fifth Amendment right to remain silent in a presentence interview, but holding that *Miranda*-type warning prior to the interview were not required).

Both Lema and Officer Sherman testified at the April 21, 2009, preliminary hearing. A transcript of that hearing has been provided to the Court and read by the Court. Both Lema and Officer Sherman testified at the July 7, 2009, hearing on Leann Bilbrey's motion to suppress.

Here, Leann Bilbrey's initial statement to Lema, that there was methamphetamine in

the Bilbrey home, was entirely voluntary. At the July 7, 2009, hearing, Lema testified that Lema had two phone conversations with Leann Bilbrey before meeting her at the Bilbrey home. Lema could not recall if he called Leann Bilbrey or if Leann Bilbrey called him. Lema was certain that it was Leann Bilbrey who brought up the subject of methamphetamine, that there was methamphetamine in the house, and that she would give it to Lema and to law enforcement. Lema was clear that his purpose was to find Kim Bilbrey, and Lema called local law enforcement to meet him there to handle any methamphetamine. The statement to Lema by Leann Bilbrey regarding the presence of methamphetamine in the home was made over the phone and was made without prompting by Lema. During the second phone conversation, Lema told Leann Bilbrey that her residence would have to be searched.

Next, the following occurred at the home in which Leann and Kim Bilbrey had been living. Lema showed up, followed immediately by at least two uniformed officers, perhaps three. Shortly thereafter, Leann Bilbrey, along with her parents, arrived in a car. Leann Bilbrey got out of the car. A Rathdrum police officer ordered her parents to remain in the car. Lema thinks one of the Rathdrum officers asked Leann Bilbrey to open the front door, and Leann Bilbrey did not object to that request and opened the font door. After Leann Bilbrey let the officers and Lema into the house, a protective sweep was conducted to see if Kim Bilblrey was present. During the protective sweep, an officer remained downstairs with Leann Bilbrey, while the others searched upstairs. Kim Bilbrey was not present. All officers and Lema then came back downstairs, and Lema recalls either he or one of the officers asked Leann Bilbrey to show them where the methamphetamine was located. No guns were ever drawn. Leann Bilbrey was not handcuffed, nor was she restrained. The only occasion on which Leann Bilbrey was ordered to do anything was when she was told

to stay downstairs during the protective sweep for Kim Bilbrey. At the end of the encounter, Leann Bilbrey was not arrested, even though the methamphetamine was seized from the bedroom of Kim and Leann Bilbrey. Officer Sherman testified at the July 7, 2009, hearing, that he told Leann Bilbrey she could collect her belongings, and he assumed Leann Bilbrey knew she was free to leave because she in fact did collect her belongings while at the residence before leaving. Leann Bilbrey did leave the residence not in custody, and no one stopped her or questioned her about her leaving. Later that day, Lema testified that Kim Bilbrey was located with additional information given by Leann Bilbrey.

Again, Leann Bilbrey had taken all law enforcement officers and Lema upstairs to their bedroom, and showed them the methamphetamine was inside a Kleenex box in a drawer to one side of the bed. Once Leann Bilbrey had disclosed the location of the methamphetamine, she argues she was not informed of her *Miranda* rights and argues her freedom of movement was restrained, she was only at the residence at the request of Lema, and she was subject to a police-dominated atmosphere. Memorandum in Support of Motion to Suppress, pp. 5-6.

Leann Bilbrey was questioned about her methamphetamine use by the officers. Such questioning is clearly "reasonably likely to elicit an incriminating response." *See e.g., Rhode Island v. Innis,* 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-90. Even that questioning was focused on Kim Bilbrey, the object of Lema's investigation, and not Leann Bilbrey. Lema testified at the July 7, 2009, hearing that he asked Leann Bilbrey how she knew Kim Bilbrey was using methamphetamine, and she responded that "they had used the day before." At issue for this Court is whether Leann Bilbrey was in custody for the purposes of *Miranda.* In discussing the cases before it in *Miranda,* the United States Supreme Court states:

> In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed… In each of theses cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures…To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

384 U.S. 436, 456-58, 86 S.Ct. 1602, 1618-19. At the residence, Leann Bilbrey was questioned about the methamphetamine which she had earlier voluntarily told Lema about over the telephone. Leann Bilbrey then voluntarily retrieved the methamphetamine for the officers. The State argues: Leann Bilbrey chose the time and location of the alleged interrogation because she initiated the call to law enforcement and agreed to meet at the home; the officers' conduct toward Bilbrey was "appropriate and measured"; the officers did not act with hostility or use any physical restraint; the conversation between the officers and Bilbrey was "open and forthright"; Bilbrey was free to move about; and Bilbrey was not arrested following her incriminating statements. Memorandum Opposing Defendant's Motion to Suppress, pp. 4-5. The State argues *State v. Massee,* 132 Idaho 163, 968 P.2d 258 (Ct.App. 1998) is instructive. *Id.,* p. 3. In *Massee,* the Idaho Court of Appeals held that a defendant was not in custody for the purposes of the right against self-incrimination where a probation officer made a home visit, and "[q]uestioning by a probation officer in the familiar surroundings of Massee's own home, in the presence of his girlfriend, is readily distinguishable from the 'incommunicado interrogation…in a police-dominated atmosphere' contemplated by *Miranda.*" 132 Idaho 163, 165, 968 P.2d 258, 260.

In *State v. Ybarra,* 102 Idaho 573, 634 P.2d 435 (1981), the Idaho Supreme Court discussed the objective test for determining whether questioning is custodial or merely investigative. 102 Idaho 573, 576, 634 P.2d 435, 438. Factors to consider include: the

threatening presence of several officers, display of a weapon by an officer, physical touching of the person, or the language or tone of the officer indicating compliance with any request may be compelled. *Ybarra,* 102 Idaho 573, 576, 634 P.2d 435, 438 fn. 5 (quoting *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870 (1980)). In the present case, no weapons were ever displayed (other than as ordinarily located on an officer's person); there was one probation officer and two or three police officers, but none were a threatening presence to Leann Bilbrey; there is no evidence that Leann Bilbrey was ever touched; and there was no testimony that the requests of any of the officers or Lema were compelled. Leann Bilbrey brought up the presence of methamphetamine on her own while on the phone with Lema. Lema in essence "warned" Leann Bilbrey that the residence would have to be searched.

In *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711 (1977), the Supreme Court found no significant deprivation of freedom of action where the defendant called the officer and the defendant voluntarily appeared at the police station to talk, was questioned for about a half an hour in a room in the police station behind a closed door, and where the officer told the defendant his fingerprints had been found at the scene (which was not true). *Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714. *Mathiason* appears to involve some of the psychological ploys warned against in *Miranda,* but the Court nevertheless found "no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way." *Id.* Here, there is no evidence that Leann Bilbrey was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures or subjected to overt physical coercion or patent psychological ploys. *See Miranda,* 384 U.S. 436, 456-58, 86 S.Ct. 1602, 1618-19.

Leann Bilbrey has argued that her statements should be suppressed as tainted fruit

of the poisonous tree. Memorandum in Support of Motion to Suppress, p. 7, citing *Wong Sun v. United States,* 371 U.S. 471 (1963). In *Oregon v. Elstad,* 470 U.S. 298, 105 S.Ct. 1285 (1985), the United States Supreme Court discussed *Miranda* rights in detail. "Prior to *Miranda,* the admissibility of an accused's in-custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause." 407 U.S. 298, 304, 105 S.Ct. 1285, 1290. In *Miranda,* however, the Court held suppressible many of the statements that would have been admissible under the earlier analysis; it presumed that in-custody statements made without adequate warnings were protected by the Fifth Amendment. *Id.* The Court in *Miranda* presumed interrogation in custodial circumstances is inherently coercive and unless a suspect is specifically advised of his rights, statements made are inadmissible. *Id.* at 305, 105 S.Ct. 1285, 1291.

In *Elstad,* the respondent argued his confession was tainted by an earlier failure by police to provide *Miranda* warnings, and he sought exclusion under the fruit of the poisonous tree doctrine. *Id.* But the Court held the procedural requirements of *Miranda* differ significantly from violations of the Fourth Amendment: a Fourth Amendment violation deters unreasonable searches and "taints" a confession (no matter how probative the fruit may be), while "a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence." *Id.* at 306, 105 S.Ct at 1291.

> The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda.*

Elstad, 470 U.S. 298, 306-307, 105 S.Ct 1285, 1292.

A *Miranda* violation is a factor to be considered in determining whether a statement

was involuntary and therefore a due process violation, but there is no such thing as a "Fruit of the poisonous *Miranda* violation." *U.S. v. Patane,* 542 U.S. 630, 639, 124 S.Ct. 2620, 2628 (2004). Ultimately, the *Miranda* rule "does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted" because such suppression is not justified by the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale. *Elstad,* 470 U.S. 298, 307-08, 105 S.Ct. 1285, 1292-93. Thus, even if this Court were to find a *Miranda* violation (which it does not), Leann Bilbrey's statements would nevertheless remain admissible so long as they were voluntary and not taken in violation of her due process rights.

IV. ORDER.

IT IS HERBY ORDERED THAT Leanne Bilbrey's Motion to Suppress is **DENIED** for the reasons set forth in this Memorandum Decision.

DATED this 16th day of July, 2009.

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Anne C. Taylor
Prosecuting Attorney -

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy