2017 IL App (1st) 151430-U

FIRST DIVISION
December 26, 2017

No. 1-15-1430

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD VILLAREAL, Defendant-Appellant.	) Appeal from the Circuit Court of) Cook County, Criminal Division))) No. 12 CR 16528)) Honorable Evelyn B. Clay,) Judge Presiding)

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in admitting into evidence defendant's second statement made to police after defendant was given his *Miranda* warnings. Trial counsel was not ineffective.

¶ 2 Following a bench trial, defendant Richard Villareal was convicted of three counts of unlawful use of a weapon by a felon and sentenced to six years in prison. Prior to his trial, defendant filed a motion to suppress two incriminating statements he made to police. One statement was made by defendant prior to being advised of his *Miranda* rights, and the second statement was made after being given his *Miranda* rights. The court suppressed the first

statement, but admitted into the evidence defendant's second statement. On appeal, defendant claims that the trial court erred when admitting into the evidence defendant's second incriminating statement claiming that it was the product of a deliberate "question first, warn later" interrogation technique. For the following reason, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with three counts of armed habitual criminal, and three counts of unlawful use of a weapon by a felon after police executed a search warrant in his home located at 13251 South Houston in Chicago. The search warrant was based on John Doe's statement to Officer Concialdi on August 1, 2012, that he had seen a Latin Dragons street gang member, known as "White Boy," exiting the building armed with a chrome revolver. "White Boy" displayed the gun to Doe and then returned to the building with the gun in his hand. The search warrant described "White Boy" between the ages of 20 and 25, weighing about 150 pounds.

¶ 5 Defendant filed a motion to suppress his statements made to police arguing that subsequent to being detained, Officer Concialdi interrogated defendant regarding weapons and drugs found in his home absent *Miranda* warnings. In his statements to police, defendant admitted that the firearm, ammunition and drugs found inside his home belonged to him. At the hearing, defendant testified that the police executed the search warrant at 10:35 p.m. on August 1, 2012. At that time, defendant was at home in his bedroom when approximately 10 police officers arrived at his front door with their guns drawn, and "rushed in" to his home. Defendant stated that the officers placed him and his three children, ages 14, 17 and 20, under arrest immediately upon entering the home indicating that they had a search warrant. Defendant testified that he believed they were under arrest because they were placed in handcuffs. After the

police searched his house and found cannabis and several weapons, the officers asked defendant if the weapons belonged to him, and defendant responded "no." Defendant testified that the police said they would charge his children instead. Defendant then admitted the weapons and drugs belonged to him. Defendant testified that police officers did not read him the *Miranda* warnings prior to questioning him about the weapons.

¶ 6 Officer Concialdi testified that, on August 1, 2012, at 10:30 p.m. he and about ten police officers executed a search warrant in Chicago. Officer Concialdi stated that he did not know whose residence they were entering, and that defendant was not the target of the search warrant. The target of the search warrant was not inside the home. Defendant and his three children were home. Concialdi testified that the officers detained defendant and his three children for their safety, a standard procedure when executing a search warrant. Concialdi asked defendant who was in the house, and which room belonged to him. Defendant stated the middle bedroom was his. Officer Concialdi searched that bedroom and recovered a .44 caliber silver revolver handgun. He showed it to defendant, who stated that the gun was belonged to him and not his children.

¶ 7 Concialdi then advised defendant of his *Miranda* rights and defendant acknowledged that he understood his *Miranda* rights. The officers continued to search the rest of the home and found two other weapons and cannabis in the basement. Officer Concialdi questioned defendant regarding the ownership of the items. Defendant admitted that all of the items belonged to him.

¶ 8 The court granted defendant's motion to suppress his initial statement admitting the ownership of the chrome gun which was made before officer Concialdi issued *Miranda* warnings. The court found that defendant knowingly waived his *Miranda* rights when he decided to answer additional questions posed by police officers after he was given *Miranda* warnings,

and it allowed the statement that was made following the warnings. Defendant's counsel did not argue that the second statement should be suppressed as a product of the earlier, unwarned questioning, but argued that the evidence was insufficient to show a valid *Miranda* waiver.

¶ 9 At the bench trial, the parties stipulated to Concialdi's testimony from the hearing on the motion to suppress statements. In addition, Concialdi testified that he saw several items being recovered from the basement during the execution of the search warrant: one carbine rifle, a 9 millimeter handgun, cannabis, shotgun shells, and several rounds of ammunition. The officers recovered a pay stub, defendant's driver's license, and a Sears credit card bill—all bearing defendant's name and address.

¶ 10 The parties stipulated that defendant had two prior felony convictions. The court found defendant guilty of three counts of unlawful possession of a weapon by a felon, and sentenced defendant to six years in prison followed by two years of mandatory supervised release. This appeal follows.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant argues he gave a statement to Officer Concialdi without first receiving *Miranda* warnings, which the trial court correctly suppressed. However, defendant claims his trial counsel was ineffective for not moving to suppress the second statement he gave to Officer Concialdi after *Miranda* warnings were given. Defendant argues that the "question first, warn later" technique utilized by police requires suppression of the second confession.

¶ 13 Defendant acknowledged that he forfeited this issue by failing to object at trial or raise the issue in a posttrial motion. Nevertheless, defendant asks us to review the forfeited error on the basis that he was denied effective assistance of counsel as a result of counsel's failure to raise

this argument in the motion to suppress, and for counsel's failure to preserve the error for review. Defendant also argues that we should consider the issue under the plain error doctrine.

¶ 14 To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must show "counsel's representation fell below an objective standard of reasonableness" *(Strickland,* 466 U.S. at 688), and second, that he was substantially prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. When the deficient performance involves a failure to file a motion to suppress, substantial prejudice exists if there is a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Orange*, 168 Ill. 2d 138, 153 (1995).

¶ 15 "Where a defendant challenges the admissibility of his confession through a motion to suppress, the State has the burden of proving the confession was voluntary by a preponderance of the evidence." *People v. Braggs*, 209 Ill. 2d 492, 505 (2003) (citing 725 ILCS 5/114–11(d) (West 2000)). In reviewing a trial court's ruling on a motion to suppress, "we will accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence." *People v. Flores,* 2014 IL App (1st) 121786, ¶ 35 citing *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001)."[W]e will review *de novo* the ultimate question of the defendant's legal challenge to the denial of his motion to suppress." *Id.*

¶ 16 A confession is voluntary if it is the product of free will, rather than the product of the inherently coercive atmosphere of the police station." *People v. Nicholas*, 218 Ill. 2d 104, 115 (2005). As a guard against self-incrimination, statements made in response to custodial

interrogation must be suppressed unless they are preceded by *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966). The failure to give a defendant his *Miranda* warnings before his initial inculpatory statement does not necessarily require the suppression of later warned statements. *People v. Loewenstein*, 378 Ill. App. 3d 984, 990 (2008); *Oregon v. Elstad*, 470 U.S. 298, 314 (1985); *People v. Fuller*, 141 Ill. App. 3d 737, 743 (1986).

¶ 17 The United States Supreme Court has held that, although "*Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309. "[A]bsent deliberatively coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.* at 314.

¶ 18 In *Missouri v. Seibert*, 542 U.S. 600 (2004) the United States Supreme Court condemned the "question first, warn later" interrogation technique and mandated the suppression of statements that resulted from use of that tactic. Under the "question first, warn second" technique, an officer initially interrogates a suspect, obtains an incriminating statement, then provides the *Miranda* warnings, and repeats the question until the accused repeats the answer provided before the warnings. *Id.* at 611. The court reasoned that midstream *Miranda* warnings given after eliciting a confession would be ineffective in conveying to a defendant the nature of his rights, including the right to remain silent, and the consequences of abandoning those

rights. *Id*. at 613–14. In his concurrence, Justice Kennedy advocated a narrower test finding the plurality's test was too broad because it applied to both intentional and unintentional two-step interrogations. *Id*. at 621–22 (Kennedy, J., concurring). In contrast, Justice Kennedy's test applied only in the infrequent cases where police deliberately employed a two-step interrogation in a calculated effort to undermine *Miranda* warnings. *Id*. at 622 (Kennedy, J., concurring).

¶ 19 The *Seibert* Court noted that there are situations where officers do not deliberately withhold *Miranda* warnings, and that "[a]n officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time." *Id.* at 620. Since *Elstad* and *Seibert* have been decided, the *Elstad* standard has been applied, unless it is shown that police deliberately attempted to evade the requirements of *Miranda* by not offering those warnings until after a defendant has confessed. See See *People v. Lopez*, 229 Ill. 2d 322, 360–61 (2008).

¶ 20 In *People v. Lopez*, 229 Ill. 2d at 360, our supreme court adopted Justice Kennedy's concurrence in *Seibert* as controlling authority in Illinois. *Lopez* reiterated that the relevant framework is to first determine if the police deliberately engaged in a "question first, warn later" technique during their interrogation of a defendant. *Id*. If there is no evidence supporting a finding of deliberate conduct, then the *Seibert* analysis ends. *Id*. " '[I]n determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning.' " *Id.* at 361 quoting *United States v. Williams*, 435 F. 3d 1148, 1158 (9th Cir. 2006).

¶ 21 The supreme court acknowledged that police officers generally refuse to admit on the record to using a question first, warn later interrogation technique to secure a confession. *Id.* at 361. However, by considering the objective evidence in addition to any subjective evidence, such as an officer's testimony, the court may be able to determine whether the officer employed the question first, warn later technique to circumvent *Miranda. Id.* To review the objective evidence, our supreme court set forth the following factors as guidelines for consideration: the timing, setting and completeness of the prewarning interrogation; the continuity of police personnel; and the overlapping content of the unwarned and warned statements. *Id.* at 361-62 (citing Williams, 435 F. 3d at 1159).

¶ 22 Looking at the subjective evidence presented in *Lopez,* the supreme court noted that the detective involved explicitly denied using the question first, warn later technique. *Id.* at 362. Looking at the objective evidence, the court noted that the police brought the 15–year–old defendant into an interrogation room at the police station at approximately 1 p.m. on July 21, 1998, one week after the murder, and told him that another person (Mr. Leal) had implicated him in the murder. *Id.* After leaving defendant for four or five hours in the interrogation room, the same detectives re-interviewed Mr. Leal, who admitted his own involvement and again implicated defendant. *Id.* The detectives arrested Mr. Leal, returned to the police station, and spoke with defendant at 6 p.m. and again informed him that Mr. Leal had implicated him in the murder. *Id.* Without providing *Miranda* warnings, the detectives asked the defendant whether he was involved in the murder. *Id.* The defendant responded by making an oral incriminating statement. *Id.* After his confession, detectives gave the defendant his *Miranda* warnings. Defendant subsequently gave a handwritten statement again confessing to his part in the crime. *Id.* at 365.

¶ 23 Viewing the evidence in its totality, the supreme court determined that the detectives engaged in a "question first, warn later" interrogation when, after about five hours at the police station, the same detectives who had initially confronted defendant with Mr. Leal's statement confronted defendant again with Mr. Leal's statement and obtained an oral confession without benefit of any *Miranda* warnings. *Id.* at 362–63. Noting the testimony of one of the detectives that defendant would not have been free to leave the police station at 6 p.m. after Mr. Leal's incriminating statement had been obtained, the supreme court stated it could "think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings prior to the 6 p.m. confrontation, other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement." *Id.* at 363–64.

¶ 24 Applying the *Lopez* analysis here, we find that, there is no evidence, subjective or objective, to indicate that the officers engaged in an intentional process to prevent defendant from asserting his *Miranda* rights, or that Officer Concialdi deliberately delayed the issuance of his *Miranda* warnings. According to Officer Concialdi's testimony, he and several police officers entered defendant's home and detained defendant and three other individuals for the officers' safety, following a standard procedure when executing a search warrant. Detaining defendant and his children was, therefore, not conducted as a coercive measure with the purpose of inducing an admission over the weapons and the contraband, but for a legitimate reason—the officers' safety when executing the search warrant. Officer Concialdi inquired as to which room belonged to defendant attempting to determine "the bedroom that belonged to the target of the search warrant." After Officer Concialdi showed defendant the weapon found in his bedroom and asked defendant "whose gun it was," defendant stated that the weapon belonged to him and not his children. Defendant was then given his *Miranda* rights. Defendant indicated that he

understood his *Miranda* warnings, and the officers continued to search the home. Approximately 10 to 15 minutes later, when additional weapons and cannabis were located, Officer Concialdi asked defendant if the items found in the basement belonged to him. Defendant told the officers that the items found in the basement were his.

¶ 25 Unlike *Lopez*, where the interrogation occurred at the police station one week after the murder, here, the setting and instantaneous interrogation indicates Officer Concialdi did not have the time, opportunity, or motivation to conger up a strategy to circumvent *Miranda*. Further, Officer Concialdi's interrogation of defendant consisted of two questions (asking defendant "which bedroom was his," and "who's gun it was"), and one response, unlike the questioning in *Seibert*, which was "systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 616. The brevity of the questioning further indicates that Officer Concialdi was attempting to quickly locate the target of the search warrant and that the failure to first give *Miranda* warnings was not deliberate. The immediacy of the *Miranda* warnings following defendant's reply is another objective factor showing that the officer did not deliberately attempt to engage in the question first, warn later interrogation technique.

¶ 26 Although the police personnel and the setting did not change when Officer Concialdi questioned defendant the second time, there was nothing in the record to indicate that this was an intentional tactic used to induce confession. Rather, these were merely the circumstances under which the weapons and the drugs were recovered as the events unfolded in the residence where the search was being executed. In addition, the content of the unwarned and warned statements was not identical. In the second statement, defendant claimed ownership of different weapons, ammunition and drugs which were discovered in the basement subsequent to defendant being given *Miranda* warnings. Therefore, viewing all the objective evidence in its totality, we

conclude that Officer Concialdi did not deliberately attempt to engage in the question first, warn later technique to circumvent the *Miranda* requirements.

¶ 27 Where, as here, the officers did not deliberately engage in the question first, warn later interrogation technique, *Elstad* and not *Seibert* governs the admissibility of postwarning statements. See *People v. Lopez*, 229 Ill. 2d at 360; *People v. Loewenstein*, 378 Ill. App. 3d 984, 992 (2008); *People v. Montgomery*, 375 Ill. App. 3d 1120, 1127 (2007). As *Elstad* applies, "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Elstad*, 470 U.S. at 318. Among the elements considered are age, education, intelligence, experience with the criminal justice system, the length of detention and interrogations, whether the accused was advised of his constitutional rights, and whether he was mistreated or abused. *People v. Williams*, 230 Ill. App. 3d 761, 776 (1992).

¶ 28 Defendant here was a 46-year-old male who completed his second year of high school and obtained an auto technician and an automotive electronic certificate. Defendant had an extensive criminal background, was subject to a short interrogation and given *Miranda* warnings prior to making the second statement. The trial court found that there was no indication that the warnings were incomplete. There is no evidence that the officers used any coercive tactics to obtain the second statement. Thus, there is no evidence to suggest that defendant's second statement was in any way involuntary. As the second statement was voluntarily made, *Miranda* does not require suppression, and accordingly defense counsel was not ineffective for not attempting to suppress the second statement on the ground that it was obtained in violation of *Seibert*.

¶ 29 Lastly, because defendant's voluntary statements were not taken in violation of *Seibert*, the trial court did not err in admitting those statements into evidence at trial, and absent any error, there is no plain error. See *People v. Smith*, 2016 IL 119659, ¶ 76.

¶ 30 CONCLUSION

¶ 31 Based on the foregoing, we affirm the trial court's judgment denying defendant's motion to suppress his statements made to police. We affirm defendant's conviction and sentence.

¶ 32 Affirmed.