FOURTH DIVISION
MARCH 28, 2013

No. 1-11-0519

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 19276
	)	
FREDDY CRAIG,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

HELD: Judgment of the circuit court affirmed where defendant was not deprived of his right to effective assistance of trial counsel.

¶ 1 Following a bench trial, defendant Freddy Craig was convicted of burglary and sentenced to 6 years' imprisonment. On appeal, defendant challenges his conviction and the sentence imposed thereon, arguing that he was denied his right to effective assistance of trial counsel. For

the reasons explained herein, we affirm the judgment of the trial court.

¶ 2 I. BACKGROUND

¶ 3 On September 23, 2009, defendant and another man, Floyd Roberts, were arrested and charged with burglary (720 ILCS 5/19-1(a) (West 2008)). Roberts entered a guilty plea and is not a party to this appeal. Defendant, in turn, elected to proceed by way of a bench trial.

¶ 4 A. Pre-Trial

¶ 5 On October 18, 2010, the date the cause was set for trial, defense counsel addressed the court as follows: "This matter is set for trial today, and I anticipated being ready. This morning my client gives me information which now I must file a motion [to suppress]. It's an issue we had discussed before. But today he gave me different information, so I believe I need to file a motion. I have informed [the State]. *** The information I received today from my client now causes me, so as not to be ineffective, to file a motion [to suppress his statements]."

¶ 6 A hearing on the motion was set for November 9, 2010. On that date, however, defense counsel once again addressed the court. This time, counsel indicated that she was withdrawing the motion to suppress. Counsel explained: "On the last court date even though the matter had been set for trial, I had requested a date for hearing based on information I had received that day, and did file a motion. However, based on information now I've received today I'm requesting that motion be withdrawn." The motion was withdrawn and the cause was again set for trial.

¶ 7 B. Trial

¶ 8 At trial, Chicago Police Officer Chris Stenzel testified that on September 23, 2009, at approximately 9:40 a.m., he and his partner, Officer Uldrych, were traveling northbound on

Harding Avenue in a marked police vehicle when they observed defendant and another man pushing a city of Chicago garbage can along the sidewalk. Officer Stenzel curbed the vehicle near the intersection of Harding Avenue and 13th Street and approached the two men "for a field interview." As he came closer to defendant, Officer Stenzel noticed that he was wearing "working gloves" with rubberized tips and that he had "white powder" on his hair, face, and clothing. Officer Stenzel spoke to both men and asked them whether the garbage can belonged to them. Based on the response provided by Roberts, Officer Stenzel considered the men to be "in custody." He explained that they were in custody for "[p]ossession of lost/mislaid property. You cannot remove city of Chicago property from its location."

¶ 9 Officer Stenzel then looked inside of the garbage can and observed coils of copper piping. When Officer Stenzel asked the men where they had gotten the copper piping, defendant responded that they had gotten it "out of an abandoned building down the street." Defendant and Roberts were then both put in the back of the police car and "were *Mirandized* while they were in the backseat of the car." Officer Stenzel indicated that he admonished the men "[f]rom memory." After acknowledging that he understood his rights, defendant indicated that he had taken the piping with the intent "to scrap" the material because he was unemployed and needed money. Defendant then directed the officers to the building from which he and Roberts had obtained the copper piping, which was located at 1507 South Kedvale. The building "seem[ed] to be a newer construction" house and there were plywood boards covering the windows and doors of the residence. On closer examination, Officer Stenzel discovered that the plywood on the rear door of the residence "had a hole in it and it had been pried away from the door frame."

¶ 10 Defendant and Roberts were subsequently brought to the 10th District police station for processing and an evidence technician was assigned to take photographs of the building where the burglary occurred.

¶ 11 On cross-examination, Officer Stenzel acknowledged that he did not recover a screwdriver or crowbar from either defendant or Roberts. Moreover, neither man tried to run or failed to cooperate when he and his partner approached them.

¶ 12 Officer Uldrych confirmed her partner's account of the events that led to defendant's arrest. Specifically, she confirmed that defendant made a statement while he was sitting in the backseat of the squad car after being verbally advised of his *Miranda* rights. Defendant directed them to the building located at 1507 South Kedvale. Defendant indicated that he had entered the rear of the residence and removed copper piping from that building. Officer Uldrych testified that her partner remained with defendant and Roberts while she went into the residence. She confirmed that the plywood in the rear of the residence had been pried away from the back door. Once she entered the house, Officer Uldyrch went down to the basement. There, she "observed drywall pulled from the ceiling. The drywall was all over the ground area [and] [t]here was copper piping that had been pulled from the ceiling, pulled away and removed." The piping was similar to the piping found in the garbage can that defendant had been pushing down the street. Defendant and Roberts were subsequently transported to the police station and Officer Uldyrch later returned to the South Kedvale location with an evidence technician to process the scene.

¶ 13 Officer Dean Barney was the evidence technician dispatched to 1507 South Kedvale after defendant had been taken into custody. Officer Uldrych went with him to the location and

showed him the area from which the copper piping had been removed. Officer Barney took photographs of the basement, specifically, the ceiling where the drywall and copper piping had been "ripped out." In addition to photographing the scene, Officer Barney also dusted it for fingerprints. He discovered a pattern on some of the copper pipes that appeared to be "consistent" with a pattern one would expect to be left by someone wearing rubberized gloves. Officer Barney explained: "If somebody is wearing a particular type of gloves that's actually got rubber circles on it, a pattern, and they touch the surface, like a window, they'll leave a consistent pattern where the dust on the window would be removed. In this case they actually left that consistent pattern on the pipe."

¶ 14 After photographing the crime scene, Officers Barney and Uldrych returned to the 10th District Police Station. There, he took a picture of a pair of gloves that had been recovered from one of the perpetrators as well as a picture of defendant. The picture depicted defendant with, what appeared to be, drywall dust on his clothing.

¶ 15 Chicago Police Officer Jodi Longos, a detective in the RBT (robbery, burglary, theft) division, testified that he interviewed defendant after he had been taken to the 10th District Police Station. The interview took place sometime around 2 or 3 p.m. that afternoon. Detective Longos advised defendant of his *Miranda* rights and defendant indicated that he understood his rights. During the conversation that followed, defendant admitted that he and Roberts were in need of money. They were walking around when they came across a house that looked like it was abandoned. Defendant and Roberts then entered the building using the front door. He denied that they had broken anything to get into the house. Defendant then indicated that he and

Roberts proceeded to the basement and "pulled some pipes out of the ceiling." They put the pipes in a black garbage can that was located outside of the building. Police officers stopped them as they were pushing the garbage can down the street.

¶ 16 On cross-examination, Detective Longos acknowledged that he was not present when defendant was initially stopped and when the copper pipes were recovered. He did not speak to defendant until 2 or 3 p.m., which was "I don't know–four, six hours later, five hours later." He also acknowledged that in the report he prepared after interviewing defendant, he described the item that defendant used to transport the pipes as a "black push cart" rather than a garbage can. Detective Longos never asked defendant to sign a *Miranda* waiver or make a handwritten statement.

¶ 17 Steve Olszewski, a realtor with Area Wide Realty, testified that on September 23, 2009, he was managing the property located at 1507 South Kedvale. He was responsible for ensuring the maintenance and security of the property and routinely made trips to the building. Olszewski testified that he was contacted by a Chicago police officer sometime on September 23, 2009. After receiving the phone call, he went to the property to look around and take pictures. Olszewski observed that the rear door had been broken. When Olszewski entered the building, he saw damage in the basement. Specifically, drywall and copper piping had been removed. Neither the back door nor the basement had been damaged when he visited the property the previous week. Olszewski confirmed that neither he, nor anyone else at Area Wide Realty, had given anybody permission to enter or remove any materials from that location. Olszewski confirmed that he had never met defendant and that defendant had not been authorized to enter

the building or remove copper piping from the basement.

¶ 18 On cross-examination, Olszewski acknowledged that Area Wide Realty did not own the South Kedvale property; rather, it was "bank-owned property." He explained that Aurora Loan was the bank that owned the property and that the bank entered into a contract with Area Wide Realty to manage the property.

¶ 19 After calling the aforementioned witnesses, the State then rested its case. Defendant elected not to testify and the defense did not call any witnesses or present any evidence. The court denied defendant's motion for a directed finding, and after hearing closing arguments from both parties, took the case under advisement. At a subsequent court date, the court entered its verdict on the case, finding defendant guilty of one count of burglary. In explaining its verdict, the court observed: "The Defendant directed the officers to the address when they inquired as to the material that was in the—that they were—that was being carried there. *** [Defendant] took them to where he got the stuff from, and it was the address of this place that was being renovated and was for sale, and there's the photos showing the removal of material from the ceiling, the copper pipes, et cetera, et cetera, just as Defendant pointed out in his–the indication of where he received that material was corroborated."

¶ 20 The cause proceeded to sentencing. After hearing the arguments advanced in aggravation and mitigation, the court observed that based on defendant's criminal history, he was subject to a "mandatory [class] X" sentence, and imposed the "minimum" Class X sentence of 6 years' imprisonment. Defendant's post-sentencing motion was denied and this appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant argues that trial counsel was ineffective for failing to file a motion to suppress the statements that he made to police while in custody. He argues that the first statement he made after being stopped by Officers Stenzel and Uldrych, should have been suppressed because it was given while he was subjected to a custodial interrogation absent *Miranda* admonishments. Although the later statements that he made in the police car and at the police station were given after receiving *Miranda* admonishments, defendant argues that pursuant to the Supreme Court's ruling in *Missouri v. Siebert*, 542 U.S. 600 (2004), these statements should also have been suppressed because they were not sufficiently attenuated from the first unlawfully obtained statement. Because a motion to suppress "would have enjoyed a reasonable probability of success," defendant argues that counsel's failure to file such a motion constituted ineffective assistance because those statements were "the lynchpin evidence to convict him of burglary."

¶ 23 The State, in turn, responds that defense counsel was not ineffective for opting not to file a motion to suppress defendant's statements because the motion would not have been granted. The State argues that defendant was not in custody when he was initially stopped by Officers Stenzel and Uldrych, and thus the officers were not required to *Mirandize* him when they were simply asking "general on-the-scene questions." Therefore, there was no constitutional violation with respect to the first statement. Even assuming there was a *Miranda* violation with respect to the first statement, the State maintains that suppression of the latter post-*Miranda* statements was not warranted because there was no evidence that the police engaged in a deliberate "ask-first, warn-later" interrogation technique in contravention of *Siebert*. Because defense counsel

exercised sound trial strategy in electing not to file a merit-less motion to suppress, the State argues that defendant was not denied his right to effective assistance of counsel.

¶ 24 Every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). " 'In recognition of the variety of factors that go into any determination of trial strategy, *** claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *Wilborn*, 2011 IL App. (1st) 092802, ¶ 79, quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002). To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A reasonable

probability that the trial result would have differed is "a probability sufficient to undermine confidence in the outcome-or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans,* 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 25 Generally, the decision whether or not to file a motion to suppress is regarded as a matter of trial strategy, and is thus generally immune from ineffective assistance of counsel claims. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). To prevail on such a claim, a defendant must establish that there was a reasonable probability that a motion to suppress would have been granted and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Givens*, 237 Ill. 2d 311, 331 (2010); *People v. Orange*, 168 Ill. 2d 138, 154 (1995); *People v. Ayala*, 386 Ill. App. 3d 912, 917 (2008). If, however, filing such a motion would have been futile, then counsel's failure to file the motion, or decision to withdraw the motion, does not amount to ineffective assistance. *Givens*, 237 Ill. 2d at 331.

¶ 26 The threshold of our inquiry necessarily begins with the fifth amendment and the United States Supreme Court's seminal ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). The fifth amendment of our federal constitution protects against involuntary self-incrimination (*People v. Lopez*, 229 Ill. 2d 322, 355 (2008)) and in *Miranda*, the Supreme Court, in an effort to reduce the risk of coerced confessions and preserve the right against involuntary self-incrimination, held:

"[W]hen an individual is taken into custody or otherwise deprived of his freedom by the

> authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. *** He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney[,] one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 478-79.

Pursuant to the "bright-line rule" forged by *Miranda*, the failure to give the prescribed warnings and obtain a defendant's knowing waiver of those rights when the defendant is subjected to a custodial interrogation generally requires exclusion of any custodial statements. *Lopez*, 229 Ill. 2d at 356.

¶ 27 Custody is what triggers the applicability of *Miranda* pre-interrogation admonishments. See *People v. Slater*, 228 Ill. 2d 137, 149 (2008), *quoting Yarborough v. Alvarado*, 541 U.S. 652, 661 (1966) (recognizing that *Miranda* warnings were designed to ensure that any inculpatory statement made by a defendant is not due to " 'the compulsion inherent in custodial surroundings' "); see also *People v. Fischetti*, 47 Ill. 2d 92 (1970 ("The *Sine qua non* for invoking the *Miranda* rule is that the interrogation be focused on the accused while he is 'taken into custody or otherwise deprived of his freedom of action in any significant way' "). Accordingly, it is well-recognized that *Miranda* is not triggered, and admonishments are not required, when police conduct general investigatory on-the-scene questioning as to the facts surrounding a crime. *People v. Parks*, 48 Ill. 2d 232, 237 (1971); *People v. Peterson*, 372 Ill. App. 3d 1010, 1018 (2007); *People v. Kilfoy*, 122 Ill. App. 3d 276, 288 (1984). That is because "[i]n such situations

the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Miranda*, 384 U.S. at 478.

¶ 28 To determine whether a defendant is "in custody" for *Miranda* purposes, courts must consider the circumstances surrounding the interrogation, and determine whether a reasonable person in those circumstances, would have felt that he was free to terminate the interrogation and leave. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). Our supreme court has identified a number of relevant factors to be considered in determining whether a defendant's statement was made in a custodial setting, including: (1) the location, time, length, mood, and mode of the questioning; (2) the number of law enforcement officers present during the questioning; (3) the presence or absence of any friends and family of the individual at the time of the questioning; (4) any indicia of formal arrest, including the use of weapons or force, physical restraint, or booking procedures; (5) the manner in which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused. *Slater*, 228 Ill. 2d at 150; *People v. Harris*, 389 Ill. App. 3d 107, 119-20 (2009). No single factor is dispositive. *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 37.

¶ 29 Here, the record reflects that once Officers Stenzel and Uldrych observed defendant and Roberts pushing a garbage can down the street, they curbed their vehicle and approached the men on foot to conduct "a field interview." Officer Stenzel then asked two questions. He first inquired whether the garbage can that defendant and Roberts were pushing belonged to them. Although the exact response provided by Roberts is not contained in the record, he evidently provided a negative response because Officer Stenzel indicated that he believed that the garbage

can was lost or mislaid property. Officer Stenzel then made one additional initial inquiry and asked where the men had obtained the copper pipes contained in the garbage can. At this point, defendant made his first incriminating statement, responding that he had gotten the pipes "out of an abandoned property down the street." Following defendant's admission, defendant and Roberts were put in the back seat of the officers' squad car and admonished of their rights in accordance with *Miranda*. Defendant, however, argues that Officer Stenzel erred in failing to administer *Miranda* admonishments immediately following Roberts' statement. He observes that Officer Stenzel testified at trial that he considered both men to be in custody at that point, and accordingly, defendant argues that Officer Stenzel erred in asking him about the contents of the garbage can prior to advising him of his *Miranda* rights. Because defendant's incriminating response was obtained while he was in custody in contravention of *Miranda*, he argues that this statement would have been suppressed had counsel filed a motion.

¶ 30 Based on a review of the record, and *all* the relevant factors, we do not agree that defendant's response was obtained during the course of a custodial interrogation in contravention of *Miranda*. Although Officer Stenzel testified at trial that he considered both defendant and Roberts to be in custody following Roberts' apparent response that the garbage can did not belong to them, we note that "a police officer's subjective belief, uncommunicated to the person in question, and/or his testimony that the person was not free to leave, is not the controlling factor in deciding whether a person is in custody." *People v. Kilfoy*, 122 Ill. App. 3d 276, 287 (1984); see also *People v. Goyer*, 265 Ill. App. 3d 160, 166-67 (1994). That is because "[i]f undisclosed, the officer's knowledge, suspicion, intent, focus, subjective view, or thought of any

kind can neither influence the defendant nor affect the coercive atmosphere of the interview in any way." *Goyer*, 265 Ill. App. 3d 167. Here, although Officer Stenzel possessed a subjective belief that defendant and Roberts were in custody following Roberts' response to his first inquiry, there is no evidence that this belief was ever communicated to either man. Accordingly, this factor is not dispositive.

¶ 31 In addition, the remaining factors do not support defendant's contention that he was in custody when he informed Officers Stenzel and Uldrych that he had taken the copper pipes from an abandoned house down the street. A significant factor is the location, time, length, mood and mode of the questioning. We observe that defendant and Roberts were on the street when they were approached by two officers and asked two questions. Defendant was not in an intimidating environment, nor was he alone. The two questions posed by Officer Stenzel were short and discrete and there is no evidence that they were asked in a threatening manner. Moreover, at that time, there was no indicia of formal arrest, including use of weapons, force or physical restraint. In addition, there is nothing in the record to suggest that defendant's age or intelligence had any effect on his ability to understand and process what was occurring. Indeed, the record reflects that defendant had a number of prior convictions and, thus had some familiarity with police and their protocol. Based on our analysis of all of the relevant factors, we find that defendant was not subjected to a custodial interrogation when he was approached on the street and asked about the copper pipes; rather, we find that the questions posed here, under the circumstances present in the case at bar, fell within the category of preliminary on-the-scene questions that do not require *Miranda* warnings. See, *e.g.*, *Fischetti*, 47 Ill. 2d at 97; *Peterson*, 372 Ill. App. 3d at 1018;

Kilfoy, 122 Ill. App. 3d at 288.

¶ 32 In so finding, we are unpersuaded by defendant's reliance on *People v. Jordan*, 90 Ill. App. 3d 489 (1980). In that case, the defendant, after appearing to be publicly intoxicated and smelling of alcohol, was told to relinquish his drivers' license, and put in the back of a police car. The defendant was informed that he was under arrest and transported to the police station. He was then brought into a "report room" and interrogated without first being admonished of his *Miranda* rights. On review, the Third District held that the officers' failure to comply with the *Miranda* safeguards prior to interrogating the defendant while he was in custody rendered the defendant's responses inadmissible. *Id*. at 496. Here, in contrast, when defendant was asked where he had obtained the pipes, he had not been arrested and transported to the police station for questioning. The question posed by Officer Stenzel was investigatory and conducted on-scene and not designed, or necessarily likely, to elicit an incriminating response from defendant. Accordingly, *Jordan* does not mandate a different result. We find that defendant's initial statement was not obtained in contravention of *Miranda*, and thus, counsel was not ineffective for failing to seek suppression of his statement. *Ayala*, 386 Ill. App. 3d at 918-19.

¶ 33 Because defendant's pre-warning statement was not obtained in contravention of *Miranda*, we necessarily reject his argument that the two post-*Miranda* statements that he provided should have been suppressed because they were not sufficiently attenuated from the initial allegedly improperly obtained pre-warning statement. Moreover, even if we were to assume that defendant was in custody and subjected to a custodial interrogation at the time he provided his initial statement and that a *Miranda* violation did, in fact occur, we are not

persuaded that suppression of his two post-*Miranda* statements would have been required.

¶ 34 In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court recognized that suppression of all statements following a *Miranda* violation is not always necessary. In *Elstad*, police executed an arrest warrant for the defendant at his home. While one officer was explaining the arrest to the defendant's mother, another officer asked the defendant questions in another room of the house without admonishing him of his *Miranda* rights. Defendant made an incriminating statement in response to the questioning. After being transported to the police station, the defendant was admonished in accordance with *Miranda*, waived his rights and provided another statement. At trial, the defendant's pre-warning statement was suppressed, but his post-warning statement was admitted. The Supreme Court found no error in admitting the post-warning statement. In doing so, the Court noted the difference between statements that are coerced and confessions that are freely given in response to unwarned, but noncoercive questioning and concluded:

> "[A]bsent deliberately 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." *Elstad*, 470 U.S. at 314.

¶ 35 The Court revisited *Elstad* in *Siebert*. In that case, the defendant was arrested for murder

and interrogated by police, who did not admonish her in accordance with *Miranda*. After making an incriminating statement, the police administered the admonishments, obtained a written waiver of the defendant's rights, confronted the defendant with her pre-warning statement and obtained another confession. At the suppression hearing in the lower court, the investigating officer admitted that he had deliberately withheld *Miranda* warnings and employed an ask-first, admonish-later interrogation technique. A plurality of the Supreme Court condemned this approach and concluded that the defendant's post-warning statement should have been suppressed. In doing so, the court distinguished *Elstad* in which there had been a "good faith *Miranda* mistake" versus the questioning that the defendant had been subjected to, which had been "systemic, exhaustive, and managed with psychological skill" *Siebert*, 542 U.S. 615-16. The plurality then created a new test to determine whether *Miranda* warnings administered after questioning commenced was effective enough to protect a defendant's rights against involuntary self-incrimination. The new test called for consideration of "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id*. at 616. Applying that test, the plurality concluded that the defendant's post-warning statement was inadmissible since it was obtained through a police strategy intentionally designed to undercut and circumvent *Miranda*. *Id*.

¶ 36 Justice Kennedy wrote a concurring opinion, advocating use of a "narrower test [to determine the admissibility of post-warning statements] applicable only in the infrequent case

*** in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Siebert*, 542 U.S. at 622 (Kennedy, J., concurring). He explained:

> "The admissibility of postwarning statements should continue to governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspects's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Siebert*, 542 U.S. at 622 (Kennedy, J., concurring).

¶ 37 Given the lack of a majority opinion in *Siebert*, the Illinois Supreme Court, in *People v. Lopez*, 229 Ill. 2d 322 (2008), adopted the position set forth in Justice Kennedy's concurrence to determine the admissibility of a defendant's post-*Miranda* statement following an initial *Miranda* violation because it "resolve[d] the case on the narrowest grounds and [wa]s therefore controlling authority." *Id*. at 360. In applying Justice Kennedy's concurrence, the court instructed that a reviewing court

> "must first determine whether the detectives deliberately used a question first, warn later technique when interrogating defendant. If there is no evidence to support a finding of deliberateness on the part of the detectives, [the] *Siebert* analysis ends. If there is evidence to support a finding of deliberateness, then [the reviewing court] must consider whether curative measures were taken, such as a substantial break in time and

> circumstances between the statements, such that the defendant would be able 'to distinguish the two contexts and appreciate that the interrogation has taken a new turn.' " *Id*. at 360-61, quoting *Siebert*, 542 U.S. at 622, (Kennedy, J., concurring).

Recognizing that police officers often refuse to admit on the record that they employed an ask-first, warn-later interrogation technique, the court set forth objective factors to be considered in determining whether such a technique was utilized, including: the timing, setting and completeness of the pre-warning interrogation; the continuity of police personnel; and the overlapping content of the defendant's warned and unwarned statements. *Id*. at 362.

¶ 38 Keeping these principles in mind, wn find that there is no evidence that the officers in this case deliberately employed an improper two-step interrogation technique and subjected defendant to an improper pre-warning custodial interrogation in an effort to circumvent the requirements of *Miranda.* When Officers Stenzel and Uldyrch stopped defendant and Roberts, the officers posed two on-scene questions. Immediately after defendant responded that the copper pipes had been taken from an abandoned house, Officer Stenzel placed both men in their police car and admonished them of their *Miranda* rights. Based on these facts, we are unable to conclude that defendant was subjected to pre-warning questioning that was "systematic, exhaustive, and managed with psychological skill," that was designed to force him into making a statement that the officers would use against him after administering *Miranda* warnings. *Siebert*, 542 U.S. at 616. Although defendant's first post-*Miranda* statement was made to Officers Stenzel and Uldrych very shortly following his pre-*Miranda* statement, his second post-*Miranda* statement was made hours later at the police station to Detective Longos. There was thus no

continuity of police personnel. In addition, there was not much overlap between the content contained in defendant's pre- and post-*Miranda* statements. While defendant's pre-*Miranda* statement contained a vague description of the location where the copper piping had been obtained–an abandoned house down the street–his post-*Miranda* statements contained additional detail, including the motive behind his actions and the method employed to remove the materials from the house. Thus, viewing the objective evidence in totality, there is no evidence which would lead this court to conclude that the officers deliberately employed an ask-first, warn-later interrogation technique. There is also no evidence that defendant's post-*Miranda* statements were involuntarily made. Accordingly, given that defendant was not subjected to a deliberately improper interrogation technique, and provided voluntary post-*Miranda* statements, a motion to suppress those statements would not have been granted. See, *e.g., People v. Harris*, 389 Ill. App. 3d 107 (2009); *People v. Lowenstein*, 378 Ill. App. 3d 984 (2008). Defendant's ineffective assistance of counsel claim is thus without merit.

¶ 39 III. CONCLUSION

¶ 40 Accordingly, the judgment of the circuit court is affirmed.

¶ 41 Affirmed.