2012 IL App (2d) 101218-U
No. 2-10-1218
Order filed May 16, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES A. BEBO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-CF-350 Honorable Blanche Hill Fawell, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: Defendant forfeited his contention by failing to raise it in the trial court, and he forfeited plain-error review by failing to argue for it; in any event, his statement was not inadmissible under *Seibert*, as there was no evidence that the police had deliberately employed a question first, warn later interrogation technique.

¶ 1 Defendant, James A. Bebo, appeals from his conviction of possession of a controlled substance (720 ILCS 570/402(c) (West 2010)), contending that a statement he made after he had been given warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), should have been suppressed because the police used a question first, warn later interrogation technique. We determine that

defendant forfeited his argument on the issue and that, in any event, the argument lacks merit because there was no evidence that the police deliberately used such a technique. Accordingly, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On February 11, 2010, a parole officer visited defendant's home to determine whether defendant's failure of a drug test constituted a parole violation. Lombard police detective Garrett Klunk accompanied the parole officer to ensure her safety. Defendant would not allow them into the residence, and the parole officer called a supervisor, who said that a parole warrant would be issued, although no warrant ever was issued.

¶ 4 Klunk and other detectives later returned to the residence and saw defendant arrive in a vehicle. Klunk then performed a traffic stop for the purpose of arresting defendant on the parole warrant that he thought had been issued. Klunk handcuffed defendant, walked him to the residence, and conducted a search of the residence with the consent of defendant's mother. Nothing was found, and Klunk asked defendant where his drugs were located. Defendant responded that they were in the vehicle. Klunk asked how much there was, and defendant told him there was about a "quarter." Another detective then recovered cocaine from a console next to the driver's seat.

¶ 5 Defendant was indicted for possession of a controlled substance, and he filed a motion to suppress his statement to Klunk that his drugs were in the vehicle when he had not been given *Miranda* warnings. That motion was granted.

¶ 6 Defendant next moved to quash his arrest and suppress evidence based on an argument that the search of his vehicle was improper when no parole warrant had been issued. That motion was denied.

¶ 7 Defendant later moved to suppress what he described as a pre-*Miranda* statement that he had bought the drugs in Chicago. The motion made clear his belief that the statement was made while he was still at his residence and before he was taken to the police station and given *Miranda* warnings. At the hearing on the motion, defendant's counsel stated that the purpose of the hearing was to determine when the statement was made.

¶ 8 Klunk testified that the statement was made at the police station after defendant had been read the *Miranda* warnings. Klunk said that his purpose in the interrogation was to obtain information that could lead to the arrest of another person. Klunk did not believe that he asked where the drugs had been purchased while at defendant's residence, but he did not know if other detectives asked him that question. Another detective corroborated Klunk's testimony. Defendant said that the question was asked while he was at his residence.

¶ 9 The court found that the question was asked at the police station after *Miranda* warnings were given. The court denied the motion. Defendant never argued that the statement should be suppressed under *Missouri v. Seibert*, 542 U.S. 600 (2004), as the result of a question first and warn later interrogation technique. When the statement was introduced at trial, there was no objection.

¶ 10 Defendant was convicted, and he moved for a new trial. That motion mentioned the motion to suppress the statement, but made no argument that it was inadmissible if it was made after *Miranda* warnings were given. The motion was denied, and defendant was sentenced to four years' incarceration. He appeals.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues that his statement that the drugs were purchased in Chicago should have been suppressed under *Seibert*, which prohibits the use of a question first, warn later interrogation

technique. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). The State contends that defendant forfeited the matter by failing to raise it in the trial court and that he further forfeited plain-error review by failing to argue plain error on appeal.

¶ 13 In order to preserve an issue for review, a defendant must both offer a specific objection at trial and raise the matter in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Mendoza*, 354 Ill. App. 3d 621, 627 (2004). In his brief, defendant does not acknowledge his forfeiture of the issue and does not ask that we review the matter for plain error. Accordingly, any argument concerning plain error has also been forfeited. See *People v. Nieves*, 192 Ill. 2d 487, 503 (2000) (finding that the failure to argue "that the evidence was closely balanced [or that] the error is so severe that it must be remedied to preserve the integrity of the judicial process" forfeited plain error on appeal); see also Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 14 In his reply brief, defendant points to his pretrial and posttrial motions to argue that he did raise the issue. But none of the motions sought to suppress the statement based on *Seibert*. Instead, defendant focused on the argument that it was made before *Miranda* warnings were given, with counsel making no argument that it was inadmissible if made after *Miranda* warnings were given. Thus, the matter never was raised and it was forfeited. Because defendant did not ask for plain-error review, that was forfeited as well. We have sometimes reviewed errors of a constitutional dimension despite forfeiture. But our supreme court has found forfeiture of plain-error review in connection with a *Miranda* issue, albeit under circumstances where the record was also not complete because of defendant's forfeiture, which is not the case here. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Regardless, the court also observed that "[a] defendant who fails to argue for plain-error

review obviously cannot meet his burden of persuasion." *Id*. at 545. That remains the case anytime plain error is not argued. Thus, here, the issue was forfeited.

¶ 15 In any event, we observe that, even if we were to review for plain error, the statement was not barred by *Seibert*. A reviewing court may consider a forfeited error under the plain-error rule when the evidence in a case is so closely balanced that the guilty finding may have resulted from the error and not the evidence or when the error is so serious that the defendant was denied a substantial right. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The "closely balanced evidence" prong of the plain-error doctrine "guards against errors that could lead to the conviction of an innocent person," while the substantial-rights prong "guards against errors that erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *Id.* at 186. Obviously, there can be no plain error if no error occurred at all.

¶ 16 "The fifth amendment protects against involuntary self-incrimination." *People v. Lopez*, 229 Ill. 2d 322, 355 (2008). In *Miranda*, the United States Supreme Court conditioned the admissibility at trial of any custodial confession on warning the defendant of his rights, and a failure to give the prescribed warnings and obtain a waiver of rights generally requires exclusion of any statements obtained. *Id.* at 355-56.

¶ 17 Under *Seibert*, officers cannot deliberately practice an "ask first, warn later interrogation strategy" in order to avoid the application of *Miranda*. See *id*. at 359 (citing *Seibert*, 542 U.S. at 622). But the practice must be shown to be deliberate. " '[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.' " *Id*. at 356-57 (quoting *Oregon v. Elstad*, 470 U.S. 298, 314 (1985)). The later administration of *Miranda* warnings to a suspect who

has given a voluntary but unwarned statement ordinarily will suffice to remove the conditions that precluded admission of the earlier statement. *Id*. (citing *Elstad*, 470 U.S. at 314). " '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 357 (quoting *Elstad*, 470 U.S. at 314).

¶ 18 In determining whether a statement should be suppressed, the court must first determine whether the police used a question first, warn later technique. *Id*. at 360. If there is no evidence to support such a finding, the analysis ends. *Id*. If there is evidence to support a finding of deliberateness, then the 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 had taken a new turn. *Id*. at 360-61.

¶ 19 " '[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)). Such objective evidence would include " 'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.' " *Id*. at 361-62 (quoting *Williams*, 435 F.3d at 1159).

¶ 20 Here, there was no evidence of a deliberate use of a question first, warn later interrogation technique. The questions were brief, the statements different, and there was nothing to indicate that

the police were deliberately seeking to undermine *Miranda*. Instead, the police stated that their purpose when defendant was questioned at the station was to see if defendant would provide evidence that would allow them to arrest a different person. Thus, *Seibert* does not apply.

¶ 21 III. CONCLUSION

¶ 22 Defendant forfeited his argument on appeal. In any event, the statement was properly admitted. Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 23 Affirmed.