DIVISION ONE
FILED: 05-25-2010
PHILIP G. URRY, CLERK
BY: PJL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-1098
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
AUSTIN FENNELLO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-125512-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Kessler Law Offices — Mesa
by Eric W. Kessler
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Austin Fennello challenges his felony conviction for unlawful flight from law enforcement vehicle and

his misdemeanor conviction for leaving the scene of a damage accident. He argues that the trial court improperly admitted statements he made during a custodial interrogation. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Phoenix Police Officer L.S. observed two persons on "sport type" motorcycles traveling westbound on East Bell Road on the evening of April 23, 2008. After witnessing one of the riders perform a "wheelie," the officer pursued the motorcycles in an attempt to conduct a traffic stop on "at least the driver . . . who had brought his front tire up off the ground." Once he caught up to the motorcycles, Officer L.S. activated his emergency lights and siren. One of the riders slowed down and moved into the turn lane, but the other "looked over his left shoulder . . . [and then] put his head back forward on the road and accelerated." Officer L.S. testified that the rider "absolutely disappeared" at "maybe 100 miles an hour." He initially gave chase, but decided to abandon the pursuit for safety reasons.

¶3 A minute or two later, Officer L.S. overheard a "hot call" regarding a motorcycle accident that had occurred "about a quarter mile" from his location. Upon arriving at the scene of the accident, he saw a "[s]mall, blue sport bike" in the roadway, of the "same basic size" as the motorcycles he had

pursued minutes earlier. Defendant was later identified as the owner of the motorcycle in the roadway. Because the rider had left the accident scene, Officer L.S. began to search for him on foot.

¶4 Another officer, N.O., also responded to the scene and assisted in the search. He eventually located Defendant in a nearby gas station. Defendant had road rash on his left side and had in his possession a motorcycle helmet and motorcycle jacket. Shortly thereafter, another motorcycle rider arrived and identified himself as the second rider Officer L.S. had pursued earlier.

¶5 While waiting for the fire department to arrive to treat his injuries, Officer L.S. asked Defendant some questions, including why he had run from him.[1] Defendant was eventually transported to a hospital, and, after tending to the accident scene, Officer N.O. went there to question him. After receiving *Miranda*[2] warnings,[3] Defendant told Officer N.O. that he was

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[1] It is unclear from the record the precise questions Officer L.S. asked Defendant, or his answers. Because the State agreed to suppress Defendant's on-the-scene statements, they were not elicited during the suppression hearing or at trial.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] At the suppression hearing, Defendant testified that Officer N.O. did not give him *Miranda* warnings before questioning him. The trial court, however, found that "Officer [N.O.] read the Defendant the *Miranda* warnings prior to questioning him." Because the factual finding was supported by the evidence, we defer to the trial court's determination. *See State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009).

riding one of the motorcycles that Officer L.S. pursued, he was aware of the pursuit, he decided not to stop because he did not have insurance, and he ultimately crashed when a vehicle entered his path. He further stated that he did not know why he kept running after the crash. Defendant was charged with one count of unlawful flight from law enforcement vehicle, a class five felony, and one count of leaving the scene of a damage accident, a class two misdemeanor.

¶6 Prior to trial, Defendant filed a motion to suppress the statements he made to both officers. He argued that his statements to Officer L.S. were elicited without the benefit of *Miranda* warnings, and that his statements at the hospital to Officer N.O. were "tainted by the improper confession obtained by Officer [L.S.]." The State conceded that the statements made to Officer L.S. "were in violation of [his] *Miranda* rights and should be precluded,"[4] but argued that the statements made to Officer N.O. were admissible. Following an evidentiary hearing, the court found that, under *Missouri v. Seibert*, 542 U.S. 600 (2004), the statements made to Officer N.O. "[were] not tainted by the confession initially obtained by Officer [L.S.]," and found them admissible.

[4] The court subsequently suppressed any statements made to Officer L.S.

¶7 Defendant was subsequently convicted as charged, and placed on concurrent two-year terms of probation. Defendant appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A) (2010).[5]

DISCUSSION

¶8 Defendant contends that the trial court erred in denying his motion to suppress his post-*Miranda* statements to Officer N.O. because they were tainted by his pre-*Miranda* statements to Officer L.S. We review for an abuse of discretion, and will not reverse absent clear and manifest error. *Zamora*, 220 Ariz. at 67, ¶ 7, 202 P.3d at 532; *State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994). We defer to the trial court's factual determinations, however, we review issues of law de novo. *Zamora*, 220 Ariz. at 67, ¶ 7, 202 P.3d at 532. We review "only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings," *State v. Fornof*, 218 Ariz. 74, 76, ¶ 8, 179 P.3d 954, 956 (App. 2008), and will infer any necessary findings to affirm the trial court, *State v. Ossana*, 199 Ariz. 459, 461, ¶ 8, 18 P.3d 1258, 1260 (App. 2001).

[5] We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

¶9 In *Zamora*, we addressed the precise approach to be applied in the circumstances presented by this case:

> [U]nder current law one of two tests is used to determine whether the post-*Miranda* statements are admissible. Under [*Oregon v.*] *Elstad*[, 470 U.S. 298 (1985)], an uncoerced pre-*Miranda* warning statement made in custodial interrogation does not disable a person from later waiving his rights and confessing after he has been given the requisite *Miranda* warnings. If, however, there is evidence the pre-*Miranda* warning statements were coerced or involuntary, then the post-*Miranda* statements are admissible only if "the taint dissipated through the passing of time or a change in circumstances." *United States v. Williams*, 435 F.3d 1148, 1153 (9th Cir. 2006) (quoting *Seibert*, 542 U.S. at 628, 124 S.Ct. 2601 (O'Connor J., dissenting)). The concern is that after a defendant makes involuntary inculpatory statements, then is *Mirandized* and is asked the same questions, his choice of how to proceed may not necessarily be voluntary, especially regarding the right to remain silent, because he had already spoken to the police.
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> In *Seibert*, however, the Supreme Court in a plurality decision held that courts should review two-step interrogation cases by first determining whether the police deliberately withheld the *Miranda* warnings. To determine deliberateness, "courts should consider whether objective evidence and any available subjective evidence . . . support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *Williams*, 435 F.3d at 1158.
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> If a court finds police acted deliberately to undermine *Miranda*, it must determine whether the *Miranda* warnings were effective-based on both objective and curative factors-to "apprise[] the suspect that he had a 'genuine choice whether to follow up on [his] earlier admission.'" *Williams*, 435 F.3d at 1160.
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> . . . .
>
> If the *Miranda* warnings are effective, then uncoerced post-*Miranda* statements are admissible. If, however, the *Miranda* warnings are not effective, then

> post-*Miranda* statements should be suppressed unless curative measures were employed. If curative measures "are absent or fail to apprise a reasonable person in the suspect's shoes of his rights, the trial court should suppress the confession." *Id.* at 1158.
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> . . . .
>
> In contrast, when no deliberateness to undermine *Miranda* is found, the court is to apply the *Elstad* standard: (1) uncoerced post-*Miranda* warning statements are admissible if the Fifth Amendment waiver was valid, but (2) uncoerced post-*Miranda* statements are inadmissible if the pre-*Miranda* warning statements were otherwise coerced and the taint from such coercion has not dissipated through the passing of time or a change in circumstances.

Zamora, 220 Ariz. at 69-70, ¶¶ 15-18, 202 P.3d at 534-35 (footnotes and internal citations omitted).

¶10 Based on the evidence and allegations presented to the court, it could reasonably have concluded that there was no deliberate attempt on the part of the officers to undermine *Miranda*, that Defendant's Fifth Amendment waiver to Officer N.O. was valid, and that both his pre- and post-*Miranda* confessions were not coerced. *See Ossana*, 199 Ariz. at 461, ¶ 8, 18 P.3d at 1260 (stating that we may infer any necessary findings to affirm the trial court). In his motion to suppress, Defendant alleged no facts indicating either a deliberate attempt to undermine *Miranda* or coercion on the part of either officer. Likewise, Defendant did not allege or argue that the officers had deliberately attempted to undermine *Miranda* or that the officers' interrogations were coercive. In his motion to

suppress, Defendant alleged only that: (1) while waiting for the medical help to arrive at the scene of the accident, Officer L.S. asked him some questions, including why Defendant had not stopped earlier when pursued; and (2) after receiving his *Miranda* warnings, he "agreed to talk and gave a confession" to Officer N.O. at the hospital. Defendant's factual allegations, even if true, would not support suppression of his post-*Miranda* statements.

¶11 Similarly, during the evidentiary hearing, Defendant failed to present any evidence indicating that the officers acted deliberately to undermine *Miranda* or that either his pre- or post-*Miranda* confessions were involuntary. In fact, Defendant testified at the hearing that he answered Officer N.O.'s questions "willingly."

¶12 Because no objective or subjective evidence was presented to the trial court that would support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning, *see Williams*, 435 F.3d at 1158, the standard set forth in *Seibert* is inapplicable, and the *Elstad* standard controls. Under *Elstad*, because no evidence was presented that supported an inference that either the pre- or post-*Miranda* statements were coerced, or that the Fifth Amendment waiver obtained by Officer N.O. was invalid, the post-

Miranda statements were admissible. Therefore, the trial court did not err in admitting the statements.

CONCLUSION

¶13 Based on the foregoing, we affirm Defendant's convictions and sentence.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Judge

/s/
_____
MARGARET H. DOWNIE, Judge