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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN CHRISTOPHER DALE V, Appellant.	)	2 CA-CR 2011-0280 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201002502

Honorable Robert Carter Olson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph T. Maziarz — Phoenix
Attorneys for Appellee

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By Matthew A. Ritter — Florence
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 John Dale was found guilty after a bench trial of possession of drug paraphernalia, which the trial court designated as a class one misdemeanor pursuant to the parties' stipulation. *See* A.R.S. § 13-604(A). The court suspended the imposition of

sentence and placed Dale on a one-year term of probation. Dale argues on appeal that the court erred in denying his motion to suppress testimony concerning statements he had made after a police officer had advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).[1]

¶2 We view the evidence in the light most favorable to upholding the trial court's ruling. *See State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009). In December 2009, Deputy Sheriff Tyler Scheiss stopped a vehicle for "erratic driving." The vehicle's driver was arrested on suspicion of driving under the influence. Dale, a passenger in the vehicle, was arrested on suspicion of "[m]inor consumption of alcohol" because he appeared to be intoxicated and was "under the legal drinking age." Deputy Chris Platt transported Dale and the driver to a department substation. During an inventory search of the vehicle, Scheiss found a bag containing several items of clothing and a pipe containing marijuana residue. After learning of the bag and its contents, Platt asked the driver and Dale to whom the bag belonged, and Dale stated the bag belonged to him. Platt immediately took Dale to an interview room and advised him, for the first time, of his rights pursuant to *Miranda*. Dale waived his rights, and when asked about the pipe, admitted he had used it to smoke marijuana but denied ownership of the pipe, claiming another person had placed it in his bag without his knowledge.

[1]The parties stipulated on the first day of trial that "any issue of *Miranda* or voluntariness" would be "raised in the form of a Motion to Strike after the testimony is elicited from the witnesses." Because, in these circumstances, a motion to strike is analytically indistinguishable from a motion to suppress, we refer to it as such.

¶3 During trial, the court granted Dale's motion to suppress Platt's testimony describing Dale's statement, made before he had been advised of his rights, that the bag belonged to him. The court denied Dale's later motion to suppress his statements about the pipe made after Platt had advised him of his rights. The court found that Platt had not "deliberate[ly]" attempted "to circumvent the purpose of the *Miranda* warning" and that Dale's statements were voluntary and "were not coerced."

¶4 Dale asserts on appeal that the trial court erred in denying his motion to suppress his latter statements. We review the denial of a motion to suppress for an abuse of the court's discretion. *Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d at 532. In doing so, we defer to the court's factual findings but, "to the extent its ultimate ruling is a conclusion of law, we review de novo." *Id.*

¶5 Pursuant to *Miranda*, law enforcement officers must inform a person in custody of certain rights before questioning that person. *Id.* ¶ 10. Absent such information and a waiver of those rights, any statements that person makes in response to questioning are inadmissible. *Id.* ¶¶ 10, 15. And, if "there is evidence [any] pre-*Miranda* warning statements were coerced or involuntary, then [any] post-*Miranda* statements are admissible only if 'the taint dissipated through the passing of time or a change in circumstances.'" *Id.* ¶ 15, *quoting United States v. Williams*, 435 F.3d 1148, 1153 (9th Cir. 2006). "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." *Id.*

¶6 The United States Supreme Court has identified two analyses to apply in such circumstances to determine whether statements made after the *Miranda* warnings are admissible.[2] *Id.* ¶¶ 17-18. First, under the analysis outlined by the plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004),[3] should the trial court conclude that law enforcement officers "acted deliberately to undermine *Miranda*," the court must examine "objective and curative factors" to determine whether the questioned suspect made a genuine choice to waive his or her rights. *Zamora*, 220 Ariz. 63, ¶ 17, 202 P.3d at 535. Those factors include:

> "(1) the completeness and detail of the prewarning interrogation, (2) the overlapping content of the two rounds of interrogation, (3) the timing and circumstances of both interrogations, (4) the continuity of police personnel, (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first and (6) whether any curative measures were taken."

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[2]Dale cites our supreme court's decision in *State v. Hein*, 138 Ariz. 360, 364-65, 674 P.2d 1358, 1362-63 (1983), in which the court applied the "fruit of the poisonous tree" doctrine in similar circumstances, concluding the post-*Miranda* warning statements were the result of "the exploitation of th[e] original improper act." To the extent Dale suggests that *Hein* controls here, we agree with the court in *Zamora* that *Hein*'s reasoning has been modified by the United States Supreme Court in *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Oregon v. Elstad*, 470 U.S. 298 (1985), and that we are required to apply the standards adopted in those decisions. *See Zamora*, 220 Ariz. 63, n.7, 202 P.3d at 534 n.7.

[3]As the court noted in *Zamora*, "[i]n a plurality decision [by the Supreme Court], when 'no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.'" 220 Ariz. 63, n.8, 202 P.3d at 535 n.8, *quoting Williams*, 435 F.3d at 1157. Thus, here, we apply Justice Kennedy's determination that *Oregon v. Elstad*, 470 U.S. 298 (1985), applies absent deliberate efforts by law enforcement to undermine *Miranda*. *Zamora*, 220 Ariz. 63, n.8, 202 P.3d at 535 n.8; *see also Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

Id., *quoting Williams*, 435 F.3d at 1160.

¶7 If there is no deliberate effort to undermine *Miranda*, however, the trial court must apply the analysis used in *Oregon v. Elstad*, 470 U.S. 298 (1985). *Zamora*, 220 Ariz. 63, ¶ 18, 202 P.3d at 535. This analysis requires the court first to determine whether the initial, pre-*Miranda* warning statements were coerced and, if so, whether "the taint from such coercion has not dissipated through the passing of time or a change in circumstances." *Id*.

¶8 Dale contends *Seibert* applies here because Platt questioned him about the bag prior to providing the *Miranda* warnings, and did so to "solicit culpability for the contraband contained therein." But because an officer's questions were intended to establish culpability does not answer the threshold question whether that officer intentionally sought to circumvent *Miranda*. *See Zamora*, 220 Ariz. 63, ¶ 17, 202 P.3d at 535. The Court in *Seibert* addressed a deliberate investigative technique that included pre-*Miranda* warning questioning in an interview room that exceeded thirty minutes and was "systematic, exhaustive, and managed with psychological skill," leaving "little, if anything, of incriminating potential left unsaid." 542 U.S. at 604-05, 616. Here, Platt asked a single question while Dale and the vehicle's driver were being processed. These facts do not resemble those in *Seibert*, and Dale has identified nothing in the record suggesting the trial court clearly erred in finding that Platt had not intended to circumvent *Miranda*. *See United States v. Narvaez-Gomez*, 489 F.3d 970, 974 (9th Cir. 2007) (factual question whether law enforcement officer deliberately sought to undermine

Miranda). Absent such intent, *Seibert* does not apply. *See Zamora*, 220 Ariz. 63, ¶¶ 17-18, 202 P.3d at 535.

¶9 Alternatively, Dale contends the trial court failed to apply the analysis articulated in *Elstad*. We disagree. As we noted above, *Elstad* provides that the post-*Miranda* warning statements must be suppressed only if the preceding statements were coerced. *See Elstad*, 470 U.S. at 318; *Zamora*, 220 Ariz. 63, ¶ 18, 202 P.3d at 535. The trial court expressly found that none of Dale's statements had been coerced. This conclusion is entirely consistent with the analytical framework described in *Elstad* and Dale has identified nothing in the record suggesting the court applied the improper analysis.

¶10 Dale additionally contends the trial court erred in finding his initial statement had not been coerced. He argues that, because that statement was obtained in violation of *Miranda*, it was "presumptively coerced and involuntary" and the resulting taint had not "dissipated through the passage of time or a change in circumstances." Dale's argument, however, ignores the reasoning in *Elstad*. In *Elstad*, the court observed that the "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" and, therefore, "unwarned statements that are otherwise voluntary . . . must nevertheless be excluded from the evidence." 470 U.S. at 307. But, "a simple failure to administer the warnings," standing alone, does not "so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Id.* at 309. Thus, "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has

been given the requisite *Miranda* warnings." *Id.* at 318. In short, absent actual coercion, there is no taint that must dissipate before the suspect may properly waive his or her rights after being advised of them.

¶11 Beyond his contention that coercion presumptively was present, Dale identifies no facts suggesting Platt's question regarding the bag's ownership was coercive, nor that Dale's later waiver of his right to remain silent was involuntary. Accordingly, he has identified no basis for us to disturb the trial court's denial of his motion to suppress.

¶12 For the reasons stated, Dale's conviction and the imposition of probation are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge