IN THE COURT OF APPEALS OF IOWA

No. 2-123 / 11-0350
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICIA JOAN GOMEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall (motion to suppress) and Robert B. Hanson (trial and sentencing), Judges.

Patricia Gomez appeals her convictions for conspiracy to deliver a controlled substance enhanced as a subsequent offender, possession of a controlled substance with intent to deliver enhanced as a subsequent offender, and failure to possess a drug tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrell Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Patricia Gomez appeals her drug-related convictions following a stipulated bench trial. She contends the district court erred in denying her motion to suppress statements she made after proper *Miranda* warnings and a valid waiver of rights, when the police had already obtained an earlier unwarned admission from her. We affirm.

I. Background Facts and Proceedings.

In April 2010, Officer Matt Flattery from the Mid-Iowa Narcotics Enforcement task force began a narcotics investigation into Elwanda Prothero, Gomez's mother. In April and May 2010, a confidential informant was utilized to purchase methamphetamine from Prothero on three separate occasions.

On June 29, 2010, the confidential informant arranged to make a fourth controlled buy of methamphetamine from Prothero. Prothero informed the informant that the purchase would occur at a business's parking lot on Southeast 14th Street in Des Moines. While conducting surveillance on the parking lot, officers observed a younger white male, later identified at Sonny Palmer, pull into the parking lot in a red Cutlass Ciera. Shortly thereafter, a black Mazda pulled into the parking lot and parked next to the Cutlass Ciera. The female driver of the Mazda was later identified as Gomez. After a few minutes, Gomez drove the Mazda to a trailer park about a block away on East Glenwood Drive.

Gomez parked the Mazda in front of a trailer home, exited the vehicle, and met briefly with an unidentified male. Gomez then walked back to the parking lot from which she had just driven, and got into the passenger seat of the Cutlass

Ciera. The confidential informant, who was on the phone with Palmer, was then told the drugs could be purchased from a red Cutlass Ciera in the business's parking lot.

At this time, four officers from the drug task force wearing overlay vests that had "police" on the front and back approached the Cutlass Ciera with their guns drawn. Gomez and Palmer were instructed to exit the vehicle, and both complied. Officer Anthony Giampolo placed Gomez in handcuffs, and advised her that she was not under arrest, but was being detained as a part of a narcotics investigation. Gomez asked Officer Giampolo what was going on, and he replied that he would escort her to the case agent, Officer Flattery, who would explain everything. Officer Giampolo then asked Gomez if there was anything illegal in the vehicle, and Gomez replied, "Yes." Gomez was walked about ten feet and placed into the front passenger seat of Officer Flattery's vehicle.

After one to two minutes, Officer Flattery returned to his vehicle to speak with Gomez. Officer Flattery immediately read Gomez her *Miranda* rights from a card. Gomez acknowledged that she understood her rights and agreed to speak with Officer Flattery. Gomez told him there were two "eight balls" of methamphetamine in the vehicle and a smaller amount for personal use in her purse. Gomez admitted that her mother, Prothero, gave her the two eight balls to sell for $550 to a female named "Tanya," who turned out to be the confidential informant. Gomez further stated she had used methamphetamine the previous day, and that her mother sells narcotics. During the questioning, Gomez was

upset and crying, and told Officer Flattery that "she would do anything not to go back to prison."

The Cutlass Ciera was searched and two plastic bags containing a total of 8.1 grams of methamphetamine were found in a plastic cup by Gomez's purse on the floor in between the front seats. Neither bag had a drug tax stamp affixed. A small amount of methamphetamine was also found in Gomez's purse. Since Gomez indicated an interest in cooperating with law enforcement officials, she was released without being taken to jail.

On July 2, 2010, Gomez met with Officer Flattery at the Urbandale Police Department. At the outset of the interview, Gomez was provided *Miranda* warnings, which she waived. Gomez did not request the assistance of an attorney, and was forthcoming about her involvement with narcotics. During the interview, Gomez expressed an interest in being a confidential informant, and provided a few names of people from whom she had previously purchased methamphetamine.

On July 7, 2010, Gomez, again without the assistance of counsel, met with Officer Flattery and an assistant county attorney at the Polk County Attorney's office. At this time, Gomez signed a memorandum of understanding. The memorandum included a document entitled "admission of involvement in criminal activity," which set forth the *Miranda* warnings, under which Gomez handwrote the admission: "On June 29th, 2010, I was meeting Tanya to drop off more than 7 grams of ice to her and picking up $550.00." After this meeting, Gomez failed to stay in contact with the police and was eventually arrested.

On September 8, 2010, the State filed a trial information charging Gomez with conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a drug tax stamp. *See* Iowa Code §§ 124.401(1)(b)(7), 453B.12. The State further sought sentencing enhancements on the conspiracy and possession charges due to Gomez's previous conviction in federal court in March 2005 for conspiracy to deliver a controlled substance. *Id*. § 124.411. Gomez pled not guilty to the charges.

On October 27, 2010, Gomez filed a motion to suppress seeking to exclude the use of all statements made during her encounters with law enforcement.[1] Gomez alleged the statements made prior to *Miranda* warnings should be excluded under the Fifth Amendment, and that the statements made after the *Miranda* warnings were "fruits of the poisonous tree."

Following a hearing, the district court granted the motion in part, and denied it in part. The district court determined that Gomez's response of "Yes" to Officer Giampolo's initial question regarding whether there were drugs in the vehicle prior to *Miranda* warnings should be suppressed. However, the court also determined that the statements made to Officer Flattery post-*Miranda* warnings as well as the statements made at the police station and the county attorney's office were voluntary and knowingly and intelligently given, and thus could be used at trial.

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[1] Gomez also argued that the warrantless search of the vehicle and her purse was unreasonable in violation of the Fourth Amendment. The district court rejected this argument, and Gomez has not challenged this finding on appeal.

Gomez subsequently waived her right to a jury trial and agreed to a stipulated bench trial on the minutes of testimony. The district court found Gomez guilty as charged. Gomez now appeals arguing the district court erred in denying her motion to suppress.

II. Standard of Review.

The *Miranda* warnings protect a suspect's Fifth Amendment right against self-incrimination. *State v. Ortiz*, 766 N.W.2d 244, 249 (Iowa 2009). Accordingly, we review a district court's refusal to suppress statements allegedly made in violation of this constitutional protection de novo. *State v. Palmer*, 791 N.W.2d 840, 844 (Iowa 2010). In doing so, we make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Watts*, 801 N.W.2d 845, 850 (Iowa 2011).

III. Issues on Appeal.

Gomez argues that her response to Officer Giampolo's question was correctly suppressed as a violation of her *Miranda* rights, but the district court erred by not suppressing all of the other post-*Miranda* statements because they were tainted by this unwarned admission. Gomez ultimately seeks a "cat is out of the bag" approach to *Miranda* violations; namely, once an unwarned admission is gained, any subsequent warnings are not likely to be effective.

The State contends that *Miranda* warnings were not required for Officer Giampolo's single question, and that even if they were, the subsequent *Miranda* warnings provided before each additional questioning were sufficient to remove

the conditions that precluded admission of the earlier statement. We will address each questioning event in turn.

IV. Pre-*Miranda* Admission on June 29 to Officer Giampolo.

In *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966), the United States Supreme Court determined that when an individual is subjected to a custodial interrogation, the person's constitutional rights require the police to inform the individual

> prior to any questioning that he has the right to remain silent, that anything he says can be used against him in the 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.

Absent these warnings and a valid waiver, statements made during a custodial interrogation are inadmissible. *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726. However, these warnings are not required unless there is both custody and interrogation. *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S. Ct. 2394, 2397, 110 L. Ed. 2d 243, 251 (1990) ("It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation.").

Although the circumstances of each case must certainly influence a determination of whether an individual is "in custody" for purposes of receiving *Miranda* protection, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275, 1279 (1983) (quoting *Oregon v. Mathiason*, 429 U.S.

492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719 (1977)). We apply an objective test to determine whether "a reasonable person" in the individual's position would perceive their situation to be one of custody. *Stansbury v. California*, 511 U.S. 318, 325, 114 S. Ct. 1526, 1530, 128 L. Ed. 2d 293, 300 (1994).

Interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. Interrogation refers "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297, 307-08 (1980).

In considering the facts and circumstances of this case, we believe Gomez was subjected to a custodial interrogation when she was questioned by Officer Giampolo. Gomez was ordered out of the vehicle by several police officers at gun point. She was immediately placed in handcuffs, and informed that she was being detained as a part of a narcotics investigation. The circumstances show that she was not free to leave the scene. In looking to the factors for custody, we believe a reasonable person in Gomez's position would have understood that she was in custody. Further, while in custody, Officer Giampolo asked Gomez if any drugs were in the vehicle. The question is one a reasonable officer should have known would be reasonably likely to evoke an

incriminating response. Therefore, we find the district court properly suppressed Gomez's initial response of "Yes."

V. Post-*Miranda* Statements on June 29 to Officer Flattery.

The question now turns to whether Officer Flattery's questioning of Gomez after providing *Miranda* warnings and receiving a valid waiver was tainted by this prior unwarned admission. Gomez relies on *Missouri v. Seibert*, 542 U.S. 600, 612-13, 124 S. Ct. 2601, 2610, 159 L. Ed. 2d 643, 655 (2004), in arguing the *Miranda* warnings could not "reasonably be found effective" under the circumstances. The State contends Gomez's statements to Officer Flattery are admissible under *Oregon v. Elstad*, 470 U.S. 298, 314, 105 S.Ct. 1285, 1296, 84 L.Ed.2d 222, 235 (1985), because the subsequent administration of *Miranda* warnings sufficed to remove the conditions that precluded admission of the earlier statement. In order to resolve this dispute, we must analyze these opinions and their progeny in greater detail.

A. *Oregon v. Elstad*. In *Elstad*, officers went to the home of Elstad, who was only eighteen, with a warrant for his arrest for the burglary of a neighbor's residence. *Id*. at 300, 105 S. Ct. at 1288, 84 L. Ed. 2d at 226. While one officer spoke with Elstad's mother in the kitchen, another officer remained in the living room with Elstad. *Id*. at 300-01, 105 S. Ct. at 1288, 84 L. Ed. 2d at 226-27. In the living room, the officer told Elstad he felt Elstad was involved in the burglary of the neighbor's house, and Elstad replied, "Yes, I was there." *Id*. at 301, 105 S. Ct. at 1289, 84 L. Ed. 2d at 227. Elstad was then transported to the police station, and approximately one hour later was advised of his *Miranda* rights. *Id*.

Elstad waived his rights and gave a full statement admitting his involvement in the robbery. *Id*. The statement was typed, reviewed by Elstad, read back to him for correction, and then signed by Elstad and the questioning officers. *Id*.

Elstad was charged with first-degree burglary, and prior to trial, sought to suppress his oral statements and signed confession. *Id*. at 302, 105 S. Ct. at 1289, 105 L. Ed. 2d at 227. The trial court excluded Elstad's statement made in his home, but admitted his statements and confession given at the station. *Id*. The Oregon Court of Appeals reversed, holding the second confession also should have been excluded. *Id*. at 302-03, 105 S. Ct. at 1289, 84 L. Ed. 2d at 228. The Oregon Court of Appeals held that because of the brief period separating the two incidents, the "cat was sufficiently out of the bag to exert a coercive impact on [Elstad's] later admissions." *Id*. at 303, 105 S. Ct. at 1290, 84 L. Ed. 2d at 228.

Upon granting certiorari, the United States Supreme Court reversed in a six to three decision. The majority opinion, authored by Justice O'Connor, rejected the "tainted fruit of the poisonous tree" and the "cat is out of the bag" arguments as applied to *Miranda* violations. *Id*. at 303-04, 105 S. Ct. at 1290, 84 L. Ed. 2d at 228. As to the application of the "fruit of the poisonous tree" doctrine, the majority stated,

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *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.

Id. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d at 232. The majority further rejected "the psychological impact" of "letting the cat out of the bag" stating:

> [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.

Id. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235. In conclusion, the majority held that "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, 105 S. Ct. at 1298, 84 L. Ed. 2d at 238.

> Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The 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. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

Id. at 318, 105 S. Ct. at 1297-98, 84 L. Ed. 2d at 238.

Justice Brennan, joined by Justice Marshall, dissented arguing that "[t]he correct approach . . . is to presume that an admission or confession obtained in violation of *Miranda* taints a subsequent confession unless the prosecution can show that the taint is so attenuated as to justify the admission of the subsequent confession." *Id*. at 335, 105 S. Ct. at 1306-07, 84 L. Ed. 2d at 249 (Brennan, J., dissenting). In determining the dissipation of the taint of the prior illegality, the dissenters argued for courts to carefully consider such factors as "the strength of the causal connection between the illegal action and the challenged evidence, their proximity in time and place, the presence of intervening factors, and the 'purpose and flagrancy of the official misconduct.'" *Id*. at 336, 105 S. Ct. at 1307, 84 L. Ed. 2d at 249 (quoting *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261, 45 L. Ed. 2d 416, 427 (1975)).

Justice Stevens dissented separately agreeing in general that an unwarned yet uncoerced statement does not disable a person from waiving his or her rights and confessing after being given *Miranda* warnings, but nevertheless dissented

> because even such a narrowly confined exception is inconsistent with the Court's prior cases, because the attempt to identify its boundaries in future cases would breed confusion and uncertainty in the administration of criminal justice, and because it denigrates the importance of one of the core constitutional rights that protects every American citizen from the kind of tyranny that has flourished in other societies.

Id. at 365, 105 S. Ct. at 1322, 45 L. Ed. 2d at 268 (Stevens, J., dissenting).

B. *Missouri v. Seibert*. In *Seibert*, the Supreme Court addressed the admissibility of post-warning admissions resulting from a two-step interrogation

technique in which the police deliberately withheld *Miranda* warnings in the hope of gaining an unwarned statement that could then be used to induce the individual to provide a confession in a second interview after *Miranda* warnings.

Seibert was arrested for murder, and upon being taken to the police station, the interrogating officer made a "conscious decision" to withhold *Miranda* warnings at the outset of questioning. *Seibert*, 542 U.S. at 604, 124 S. Ct. at 2606, 159 L. Ed. 2d at 650. Seibert was questioned for approximately thirty to forty minutes before she made an incriminating admission. *Id*. at 604-05, 124 S. Ct. at 2606, 159 L. Ed. 2d at 650. She was then given a twenty-minute coffee and cigarette break, before the same interrogating officer returned, turned on a tape recorder, gave *Miranda* warnings, and obtained a signed waiver. *Id*. at 605, 124 S. Ct. at 2606, 159 L. Ed. 2d at 650. The officer proceeded to confront Seibert with her prior admission, getting her to repeat it. *Id*. at 605, 124 S. Ct. at 2606, 159 L. Ed. 2d at 650-51.

After being charged with first-degree murder, Seibert sought to suppress her pre- and post-warning statements. *Id*. at 605, 124 S. Ct. at 2606, 159 L. Ed. 2d at 651. The trial court suppressed the pre-warning statement but admitted the responses given after the *Miranda* recitation. *Id*. at 606, 124 S. Ct. at 2606, 159 L. Ed. 2d at 651. On appeal, the Missouri Supreme Court reversed on the basis that the *Miranda* warnings had admittedly been intentionally withheld to deprive Seibert of the opportunity to knowingly and intentionally waive her rights, and since there were no circumstances that would dispel the *Miranda* violation, the

post-warning confession was involuntary and inadmissible. *Id*. at 606, 124 S. Ct. at 2606-07, 159 L. Ed. 2d at 651.

A fractured Supreme Court affirmed, finding that both the pre-warning and post-warning statements should have been excluded. *See id*. at 607, 124 S. Ct. at 2607, 159 L. Ed. 2d at 652 (Souter, J., plurality); *id*. at 618, 124 S. Ct. at 2614, 159 L. Ed. 2d at 659 (Kennedy, J., concurring in judgment). Justice Souter wrote for a four-justice plurality, Justice O'Connor wrote for four dissenting justices, and Justice Kennedy wrote separately concurring in the judgment to suppress all of Seibert's statements.

Justice Souter's plurality condemned the "question-first tactic" finding it "drain[s] the substance out of *Miranda*" and "effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted." *Id*. at 617, 124 S. Ct. at 2613, 159 L. Ed. 2d at 658 (Souter, J., plurality). As the plurality stated,

> [W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. By the same token, it would ordinarily be unrealistic to treat spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. at 613-14, 124 S. Ct. at 2611, 159 L. Ed. 2d at 656. Distinguishing *Elstad* as "at the opposite extreme" as the facts in *Seibert*,[2] the plurality found that a series

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[2] Although the plurality did not explicitly overrule *Elstad*, the plurality essentially limited *Elstad* to its facts, concluding that it applied where the police officers' failure to warn amounted to "a good-faith *Miranda* mistake, not only open to correction by careful

of factors should be considered in determining whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object:

> 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 615, 124 S. Ct. at 2612, 159 L. Ed. 2d at 657. The plurality rejected using the subjective intent of the officer as a factor. *Id*. at 616 n.6, 124 S. Ct. at 2612 n.6, 159 L. Ed. 2d at 657 n.6. In weighing these factors the plurality determined that "a reasonable person in the suspect's shoes would not have understood [the *Miranda* warnings] to convey a message that she retained a choice about continuing to talk." *Id*. at 617, 542 S. Ct. at 2613, 159 L. Ed. 2d at 658.

Justice Breyer concurred specially. He joined the plurality's opinion "in full," while at the same time agreeing with Justice Kennedy insofar as it "makes clear that a good-faith exception applies." *Id*. at 618, 124 S. Ct. at 2614, 159 L. Ed. 2d at 659 (Breyer, J., concurring).

Justice Kennedy concluded that the plurality's multifactor test that would apply to both intentional and unintentional two-stage interrogations "cuts too broadly." *Id*. at 622, 124 S. Ct. at 2616, 159 L. Ed. 2d at 661 (Kennedy, J., concurring in judgment). Rather, Justice Kennedy would "apply a narrower test applicable only in the infrequent case . . . in which the two-step interrogation

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warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." *Seibert*, 542 U.S. at 615, 124 S. Ct. at 2612, 159 L. Ed. 2d at 657.

technique was used in a calculated way to undermine the *Miranda* warning." *Id*. Under Justice Kennedy's approach, if a deliberate two-step strategy has been used, then the "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." *Id*. Curative measures could include "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." *Id*. However, in the absence of a deliberate two-step strategy, the admissibility of post-*Miranda* warning statements would still be governed by the principles of *Elstad*. *Id*.

Justice O'Connor wrote for four dissenting justices. Justice O'Connor agreed with the plurality that Seibert's statements cannot be held inadmissible under a "fruits of the poisonous tree" theory, and that it correctly declined to focus its analysis on the subjective intent of the interrogating officer. *Id*. at 623, 124 S. Ct. at 2616, 159 L. Ed. 2d at 662. However, Justice O'Connor believed the plurality gave insufficient deference to *Elstad* by failing to "analyze the two-step interrogation procedure under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad*." *Id*. at 628, 124 S. Ct. at 2619, 159 L. Ed. 2d at 665. Justice O'Connor would have remanded for the Missouri courts to conduct the proper voluntariness inquiry. *Id*.

C. Federal Circuits Response to *Elstad-Seibert*. In the wake of *Elstad* and *Seibert*, the majority of the federal circuits have employed Justice Kennedy's separate concurrence as the controlling opinion under the narrowest grounds

doctrine. *See*, *e.g.*, *U.S. v. Moore*, 670 F.3d 222, 229 (2d Cir. 2012); *U.S. v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006); *U.S. v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *U.S. v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006); *U.S. v. Williams*, 435 F.3d 1148, 1157-58 (9th Cir. 2006); *U.S. v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir. 2005); *U.S. v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005). *But see U.S. v. Heron*, 564 F.3d 879, 884-85 (7th Cir. 2009) (questioning whether Justice Kennedy's concurrence controlled, but nonetheless finding that the challenged "statements would be admissible under any test one might extract"); *U.S. v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (same); *U.S. v. Rodriguez-Preciado*, 399 F.3d 1118, 1138-43 (9th Cir. 2005) (Berzon, J., dissenting) (arguing the plurality opinion should be adopted because *Seibert* left the court with no binding precedent as to the governing standard).[3]

Thus, the majority of federal circuits have found that unless the *Miranda* warnings were deliberately withheld during a two-step approach,

> The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in 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, 105 S. Ct. at 1298, 84 L. Ed. 2d at 238; *see also* 2 Wayne R. LaFave, et al., *Criminal Procedure* § 6.8(b), at 803-04 (3d ed. 2007).

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[3] The First and Sixth Circuits have addressed *Seibert* and *Elstad*, but have refused to determine whether the plurality or concurrence controls finding the post-*Miranda* statements at issue admissible under both opinions. *See U.S. v. Jackson*, 608 F.3d 100, 104 (1st Cir. 2010); *U.S. v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008).

D. Applying the Federal Standard to this Case. Here, there is no evidence that Officer Giampolo's failure to convey *Miranda* warnings to Gomez was a part of a deliberate two-step interrogation process. Nor is there any evidence showing that Gomez's initial unwarned statement of "Yes" was involuntary or obtained through deliberately coercive or improper tactics. Like *Elstad*, we believe Gomez's limited response was a "voluntary disclosure of a guilty secret" which was "freely given in response to an unwarned but noncoercive question." 470 U.S. at 312, 105 S. Ct. at 1295-96, 84 L. Ed. 2d at 234. Under these circumstances, the subsequent administration of *Miranda* warnings "ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id*. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235. Nonetheless, we must still determine whether the subsequent statements were voluntarily made.

There is "no talismanic definition of 'voluntariness.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 93 S. Ct. 2041, 2046, 36 L. Ed. 2d 854, 861 (1973). The ultimate test of voluntariness is whether an examination of the totality of the circumstances discloses that the conduct of law enforcement officials was such as to overbear an individual's will to resist or critically impair the individual's capacity for self-determination. *Id*. at 225-26, 93 S. Ct. at 2047, 36 L. Ed. 2d at 862; *Colorado v. Connelly*, 479 U.S. 157, 169-70, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473, 486 (1986) ("There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context."). In applying this test, we look to

"both the characteristics of the accused and the details of the interrogation," which may include the age, education, and mental capacity of the individual, the individual's prior experience in the criminal justice system, the individual's physical and emotional reaction to questioning, whether the individual showed an ability to understand the questions and respond, whether the individual was advised of constitutional rights, the length of any detention, the nature of the questioning, and the use of physical punishment. *Schneckloth*, 412 U.S. at 226, 93 S. Ct. at 2047, 36 L. Ed. 2d at 862; *accord State v. Madsen*, ___ N.W.2d ___, ___, 2012 WL 136607 (Iowa 2012).

Gomez made her post-*Miranda* admissions while handcuffed in the front seat of Officer Flattery's vehicle within a couple of minutes of her unwarned admission and approximately ten feet from where she was placed into custody. However, Gomez's initial admission was limited, only answering "Yes" to the single question of whether there was anything illegal in the vehicle. Her admissions to Officer Flattery went much further disclosing the conspiracy with her mother to sell narcotics. The questioning officers were different. Gomez was read her *Miranda* rights from a card prior to any questioning by Officer Flattery and she does not argue that she did not knowingly and voluntarily waive them. Although Gomez was crying and upset, she responded to Officer Flattery's questioning because she feared returning to prison. There is no evidence that Officer Flattery used coercion, threats, dishonesty, deception, or trickery in questioning Gomez, and Gomez was not subjected to prolonged questioning. There is no indication in the record that Gomez had any trouble understanding

any of the questions asked to her. Under the totality of the circumstances, we find that Gomez's statements to Officer Flattery post-*Miranda* warnings were made voluntarily and free from coercion.[4] Accordingly, we find the district court did not err in denying Gomez's motion to suppress these statements.

VI. Subsequent Statements made on July 2 and July 7.

Gomez also argues the district court erred by not suppressing the statements made to law enforcement on July 2 at the police station and on July 7 at the county attorney's office. We have already determined Gomez's statements to Officer Flattery on June 29 should not be suppressed. The reasoning is equally applicable here. In addition, these challenged statements were made three and eight days after the prior unwarned statement at different

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[4] "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20, 104 S. Ct. 3138, 3147 n.20, 82 L. Ed. 2d 317, 331 n.20 (1984); *see*, *e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 396-402, 98 S. Ct. 2408, 2415-2418, 57 L. Ed. 2d 290, 302-06 (1978) (statements found involuntary despite *Miranda* warnings when defendant was in the intensive care unit at the hospital suffering from a serious and painful wound, was being medicated to the edge of consciousness, was evidently confused and unable to think clearly, and was relentlessly interrogated despite asking questioning to stop and requesting counsel); *accord Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S. Ct. 1152, 1154, 20 L. Ed. 2d 77, 79-80 (1968) (confession involuntary where defendant requested but was denied counsel, not provided warnings, and went over eighteen hours without food, sleep, or necessary medication); *Beecher v. Alabama*, 389 U.S. 35, 38, 88 S. Ct. 189, 191, 19 L. Ed. 2d 35, 39 (1967) (confession involuntary where defendant, who was already wounded, was ordered to speak at gunpoint, and this confession was later used to obtain an additional confession while he was in the hospital and under the influence of morphine); *Townsend v. Sain*, 372 U.S. 293, 308-09, 83 S. Ct. 745, 754-55, 9 L. Ed. 2d 770, 783 (1963) (confession involuntary when induced by police administering "truth serum"); *Payne v. Arkansas*, 356 U.S. 560, 567, 78 S. Ct. 844, 850, 2 L. Ed. 2d 975, 980-81 (1958) (confession involuntary where defendant was held incommunicado for three days, without counsel, limited food, and was threatened with attack from a lynch mob); *Brown v. Mississippi*, 297 U.S. 278, 286, 56 S. Ct. 461, 465, 80 L. Ed. 682, 687 (1936) (confession involuntary when extracted through brutal torture).

locations. On both occasions, Gomez came to the meeting on her own accord, and was provided *Miranda* warnings before questioning, which she knowingly and voluntarily waived. Under any of the tests enunciated in *Seibert*, the admissions made on these occasions were admissible. *Seibert*, 542 U.S. at 615-16, 124 S. Ct. at 2612, 159 L. Ed. 2d at 657 (Souter, J., plurality) ("In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission."); *id*. at 622, 124 S. Ct. at 2616, 159 L. Ed. 2d at 661 (Kennedy, J., concurring in judgment) ("[A] substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn."); *id*. at 628, 124 S. Ct. at 2619, 159 L. Ed. 2d at 665 (O'Connor, J., dissenting) (Even if the first statement was involuntarily made, "the court must examine whether the taint dissipated through the passing of time or a change in circumstances"); *see also Bobby v. Dixon*, __ U.S. __, __, 132 S.Ct. 26, 31-32, 181 L.Ed.2d 328, 334 (2011) (finding a sufficient change in circumstances such that a prior unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings provided before a subsequent interrogation). The district court did not err in refusing to suppress any statements made on July 2 and July 7.

VII. Iowa Constitution.

Gomez further argues that to the extent the federal constitutional analysis does not provide her relief; we should reject the *Elstad* holding under the Iowa Constitution and adopt the "cat is out of the bag" and "fruit of the poisonous tree" doctrines. Gomez recognizes that her counsel did not raise an independent state constitutional argument to the district court, and thus frames her claim as ineffective assistance of counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although we generally preserve such claims for postconviction relief, where the record is sufficient to address the issue, we may resolve the claim on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). We find the record is adequate in this case.

To establish ineffective assistance of counsel, Gomez must demonstrate by a preponderance of the evidence: (1) her trial counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). If either element is not met, the claim will fail. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008).

A. Essential Duty. To establish her trial counsel failed to perform an essential duty, Gomez must prove her counsel "'made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment.'" *Vance*, 790 N.W.2d at 785 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693). "We begin with a presumption that

counsel performed his or her duties competently." *Id*. We measure counsel performance "'against an objective standard of reasonableness, under prevailing professional norms.'" *Maxwell*, 743 N.W.2d at 195 (quoting *Rompilla v. Beard*, 545 U.S. 374, 380, 125 S. Ct. 2456, 2462, 162 L. Ed. 2d 360, 371 (2005)).

In determining whether counsel failed to perform an essential duty by not raising an independent state challenge to existing and unfavorable federal precedent, we look to any dissenting opinions of the Supreme Court, our state's reaction to the opinion, alternative approaches utilized by other state supreme courts under state constitutional provisions similar to ours, upon analysis of law found in the academic literature, or upon our collective constitutional common sense distilled from law, logic, and experience. *Vance*, 790 N.W.2d at 786-90; *State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J., specially concurring).

Elstad was a six to three opinion in which Justice Brennan, joined by Justice Marshall, wrote a lengthy dissent. The dissenters specifically urged state courts to "shoulder the burden" of protecting individual rights in light of the majority's erosion of *Miranda*'s protection. *Id*. at 363 n.44, 105 S. Ct. at 1321 n.44, 45 L. Ed. 2d at 267 n.44. According to the dissenters, *Elstad* was "but the latest of the escalating number of decisions that are making this tribunal increasingly irrelevant in the protection of individual rights." *Id*. at 363, 105 S.Ct. at 1321, 45 L.Ed.2d at 267.

Iowa followed the holding of the *Elstad* majority in *Irving v. State*, 533 N.W.2d 538, 542 (Iowa 1995). The main issue in *Irving* was not the admissibility

of the post-warning statements, but whether defendant's trial counsel breached an essential duty by not investigating and challenging an initial confession as being in violation of *Miranda*. *Id*. at 541. In its holding, the supreme court first noted the overwhelming evidence of guilt, before finding as further support that even if counsel was successful in challenging the initial confession, the second warned confession would be admitted, thus limiting the effect of counsel's alleged error. *Id*. at 542. Even though not central to its ruling, the supreme court approved the *Elstad* decision:

> Controlling on this point is *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The United States Supreme Court stated: "We hold that 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, 105 S.Ct. at 1298, 84 L.Ed.2d at 238. Irving's second confession was admissible based on this authority.

Irving, 533 N.W.2d at 542.[5]

Notwithstanding the lengthy dissent in *Elstad*, the *Elstad* dissenter's insistence that state constitutional claims be raised, and other states' mixed reaction to *Elstad*,[6] given the *Irving* court's approval of *Elstad,* we do not believe

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[5] Although the Iowa Constitution does not contain a specific provision protecting against self-incrimination, the Iowa Supreme Court has long held that such a right exists under the due process provisions of Article I, section 9. *State v. Iowa Dist. Ct.*, 801 N.W.2d 513, 518 n.2 (Iowa 2011).

[6] Several states have refused to follow the *Elstad* holding under their state constitutions. *See*, *e.g.*, *State v. Pebria*, 938 P.2d 1190, 1196 (Haw. Ct. App. 1997); *Commonwealth v. Smith*, 593 N.E.2d 1288, 1295-96 (Mass. 1992); *People v. Bethea*, 493 N.E.2d 937, 939 (N.Y. 1986); *State v. Smith*, 834 S.W.2d 915, 919 (Tenn. 1992). However, several other states have found that the *Elstad* holding conforms to their state constitutions. *See*, *e.g.*, *State v. Corbeil*, 674 A.2d 454, 458-59 (Conn. Ct. App. 1996); *State v. Aubuchont*, 679 A.2d 1147, 1149 (N.H. 1996); *State v. Hicks*, 428 S.E.2d 167, 177 (N.C. 1993),

counsel was required to raise a state constitutional claim. *Vance*, 790 N.W.2d at 786 (citing Iowa Rule of Professional Conduct 32:1.1 on competency when determining whether counsel failed to perform an essential duty). Accordingly, we find that counsel did not breach an essential duty in performance, and her ineffective assistance of counsel claim must fail.

VIII. Conclusion.

Gomez was subjected to a custodial interrogation by Officer Giampolo; thus, the district court properly suppressed her response made without a proper *Miranda* warning. However, all subsequent statements made by Gomez followed proper *Miranda* warnings and valid waivers. The district court correctly determined that these statements were admissible at trial because they were made voluntarily. We further reject Gomez's claim that her counsel rendered ineffective assistance by failing to raise a state constitutional challenge to the *Elstad* analysis. We affirm the district court's ruling granting in part and denying in part Gomez's motion to suppress.

AFFIRMED.

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abrogated in part on other grounds by State v. Buchanan, 543 S.E.2d 823, 828 (N.C. 2001); *State v. Elstad*, 717 P.2d 174, 175-76 (Ore. Ct. App. 1986).