STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY MONTREAL CURRY,

Defendant-Appellant.

UNPUBLISHED
March 12, 2009

No. 279254
Saginaw Circuit Court
LC No. 06-027797-FC

Before: Gleicher, P.J., and K. F. Kelly and Murray, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority in result, but write separately to express my disagreement with one aspect of the majority opinion.

The majority holds that defendant's "first statement was voluntary, and the second Mirandized statements (which in fact contained much more detail than the pre-Mirandized statements) were also voluntary, and therefore admissible in defendant's prosecution." *Ante* at 5. According to the majority, *Oregon v Elstad*, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), constitutes the "controlling authority" in this regard. *Ante* at 4. Because the police initially questioned defendant in a custodial setting without providing the *Miranda*[1] warnings, I disagree that defendant's first statements qualified as admissible substantive evidence pursuant to *Elstad*, *supra*.

The interrogation conducted in the instant case bears no resemblance to that conducted in *Elstad*. There, the police went to suspect Elstad's home with a warrant for his arrest. Elstad's mother admitted the officers into the family home. *Id*. at 300-301. One of the officers spoke to Elstad in the home's living room, and inquired whether he had been involved in the burglary of a neighbor's house. Elstad acknowledged having participated in the crime. *Id*. at 301. At the police station, Elstad offered a full written confession. *Id*. at 301-302. After his conviction, Elstad challenged the admission at trial of both statements. *Id*. at 302-303. In an opinion affirming Elstad's conviction, the United States Supreme Court observed that the police

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

conversation with Elstad in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest," and viewed the event as possessing "none of the earmarks of coercion." *Id*. at 315-316. The Supreme Court concluded that the officer's failure to give *Miranda* warnings was an "oversight," possibly resulting from "confusion as to whether the brief exchange qualified as 'custodial interrogation'. . . ." *Id*. Despite that the first statement arose from noncoercive questioning, the Supreme Court forbade its use as substantive evidence, finding 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." *Id*. at 318.

In contrast with the facts presented in *Elstad*, defendant's first round of statements resulted from custodial interrogation that required the preliminary administration of *Miranda* warnings. The transcript reflects that a detective questioned defendant regarding a previous shooting encounter with the victim, and then inquired, "And you shot in self defense is what you're saying?" Defendant answered affirmatively. Following additional discussion regarding the injuries defendant sustained during his arrest, a detective finally expressed, "Now I know you're saying that it was self defense, and like I say I got questions for you, you got questions for me obviously. Okay we got to get this straight. You are in custody right now so I have to read you your rights okay?"

The police interrogation conducted before a detective read defendant his rights violated *Miranda*. The police must provide the *Miranda* warnings before interrogating a suspect in custody. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Miranda* teaches that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id*. at 467. "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). The inherent coercion accompanying custodial interrogation "blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment… not to be compelled to incriminate himself." *Dickerson v United States*, 530 US 428, 435; 120 S Ct 2326; 147 L Ed 2d 405 (2000) (internal quotation omitted). Consequently, defendant's initial responses are "presumed compelled," and should have been "excluded from evidence at trial in the State's case in chief." *Elstad*, *supra* at 317.

However, despite my disagreement with the majority opinion, I concur in affirming defendant's convictions. The preponderance of defendant's statements followed his acknowledgement and voluntary waiver of his *Miranda* rights. The initial questioning was brief, superficial, and included only a fraction of the subject matter covered in the second round. During the post-*Miranda* interrogation, defendant elaborated considerably regarding his self-defense claim, and supplied information far more detailed than the answers he gave to the initial questions. No evidence supports that during the first round the police deliberately utilized an interrogation technique "calculated … to undermine the *Miranda* warning." *Missouri v Seibert*,

542 US 600, 622 (Kennedy J., concurring); 124 S Ct 2601; 159 L Ed 2d 643 (2004). Accordingly, I would hold that the admission of defendant's initial statements constituted harmless error. *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

/s/ Elizabeth L. Gleicher