STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2011
v	No. 293284 Wayne Circuit Court
VAUGHN MITCHELL, Defendant-Appellant.	LC No. 08-013700-FC

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

SAWYER, J. (*dissenting*).

I respectfully dissent.

The majority concludes that this matter needs to be remanded to the trial court to determine whether there was proper compliance with *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), particularly in light of the more recent decision in *Missouri v Seibert*, 542 US 600; 124 S Ct 2601; 159 L Ed 2d 643 (2004).[1] But I believe that the majority's decision to remand is fundamentally flawed for three basic reasons, and I would merely affirm on this issue.

First, as the majority acknowledges, defendant did not preserve this issue in the trial court. *Ante*, slip op at 4. Accordingly, this Court must determine whether defendant has forfeited this issue under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture, defendant must meet three requirements: (1) an error must have occurred, (2) the error must be plain, that is to say, it is clear or obvious, and (3) the error must have affected substantial rights. *Id.*

[1] Inexplicably, the majority concludes that we need not determine whether the plurality decision in *Seibert* controls or Justice Kennedy's concurrence controls, *ante*, slip op at 7, yet ultimately directs the trial court on remand to make factual findings under the factors identified by the *Seibert* plurality, *ante*, slip op at 10. While I agree that we need not reach the question of which opinion in *Seibert* is controlling, I would be more inclined to look to Justice Kennedy's opinion for guidance.

Although the majority acknowledges the applicability of the plain error rule, it does not devote any appreciable analysis of the application of the rule to this case. I surmise that the majority has concluded that a remand for further fact-finding is necessary to resolve the first factor of the test, whether an error has occurred. But I would conclude that it is inappropriate to remand for further fact-finding to determine if error has occurred because to do so overlooks the second prong, that the error must be plain or obvious. When the majority concludes that "the facts surrounding their discussions and the specific content of the discussions are not entirely clear" and that "[i]n order for us to determine . . . the trial court must make factual findings . . . ," *ante*, slip op at 9-10, it necessarily follows that the error is *not* plain, clear or obvious. In other words, if a remand for further fact-finding is necessary to determine if an error has even occurred, then we must conclude that any such error is not plain and, therefore, the issue has been forfeited.

Second, as the majority itself points out, it is somewhat unsettled whether either the *Seibert* plurality controls or Justice Kennedy's concurrence controls. But if we do not even know which test controls, how can it be said that any error is plain? Which test was plainly violated? In short, I do not believe there can be plain error in an area of the law that is unsettled.

Third, as the majority also acknowledges, *ante*, slip op at 9 n 5, this Court, indeed this very panel, already considered defendant's request for a remand on this issue and denied it. I am not aware of a case that has specifically determined the applicability of the law of the case doctrine where a panel of this Court revisits in its formal opinion an issue in previously decided by order disposing of a motion. But it is well settled that a decision of an appellate court is binding on that court in subsequent appeals of the same case. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). And the rationale is, I believe, equally applicable to the situation presented in this case. The law of the case doctrine "is premised on a need for finality of judgment and the want of jurisdiction of an appellate court to modify its judgment except on rehearing." *Id.* n 260. Because nothing has changed following the denial of defendant's motion to remand, I would apply the law of the case doctrine and decline to now remand the matter.

For the above reasons, I conclude that it is both unnecessary and inappropriate to remand this matter to the trial court on the *Miranda* issue.

Turning to the issue whether there was a misleading advice of rights, I disagree with the majority's conclusion that this case is distinguishable from *Duckworth v Eagan*, 492 US 195; 109 S Ct 2875; 106 L Ed 2d 166 (1989). In the case at bar, defendant was properly given the *Miranda* warnings, including informing him of his right to have an attorney "present before and during the time I answer any questions or make any statement" and that if he could not afford an attorney "one will be appointed for me without cost by the Court prior to any questioning." Defendant read these rights from a notice of rights form. Defendant indicated that he had a question regarding the appointment of counsel, saying to the detective, "that's not speaking currently—right now?" The detective agreed, apparently reading in part from the notice, and then stating, "That means down the line." Defendant then starts to say, "Meaning when the court . . . ," to which the detective agrees with defendant.

The primary difference in *Duckworth* is that the reference to counsel being appointed later was contained in the advice of rights itself contained in a waiver form. Regarding the appointment of counsel, the form stated, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." 492 US at 198. The Court concluded that the advice of rights in *Duckworth* adequately complied with *Miranda*. The Court noted that it has never insisted on any particular form of the warnings. 492 US at 202. The Court concluded that the defendant was adequately advised that he had the right to consult with an attorney before and during questioning, that the right existed even if he could not afford an attorney, and that he could stop answering questions at any time. 492 US at 203. Turning to the phrase in the waiver form that counsel would be appointed "if and when you go to court," the Court concluded that this merely accurately described how the process works in Indiana—that counsel is appointed at the defendant's initial court appearance. 492 US at 204. The Court observed that *Miranda* never required that an attorney be produced upon demand, only that the suspect be informed of his right to have an attorney before and during questioning. *Id.*

Furthermore, this case is more like the situation in *California v Prysock*, 453 US 355; 101 S Ct 2806; 69 L Ed 2d 696 (1981), than the "problem cases" discussed in *Prysock*. Those cases did not make it clear to the suspect that there was a right to have counsel present during questioning. 453 US at 360. The Court distinguished *Prysock* itself from those cases, noting that "nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned, . . . while you are being questioned, and all during the questioning.'" 453 US at 360-361. Similarly, in the case at bar, nothing the detective told defendant contradicted the clear statement in the advice of rights that defendant had the right to have counsel present during questioning and that he had the right to appointed counsel.

For these reasons, I would conclude that the requirements of *Miranda* were adequately complied with and there is no need for the trial court to further consider this matter on remand.

Finally, concerning the majority's conclusion that a remand is necessary to resolve the newly discovered evidence issue, I return to two of the points that I raised in the first issue. As the majority acknowledges, this issue is unpreserved and must be reviewed for plain error and it was also the subject of defendant's motion to remand. As I discussed above, I do not believe that an error can be plain if an evidentiary hearing is necessary to determine if it even is error and that it is inappropriate to grant a remand in our opinion when the request for a remand on the same issue was previously denied by order.

I would affirm the trial court on these issues without remanding for further proceedings.

/s/ David H. Sawyer