STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0202

State of Minnesota,
Appellant,

vs.

Philip August Mortell,
Respondent.

Filed August 19, 2008
Affirmed in part and reversed in part
Peterson, Judge

Stearns County District Court
File No. 73-CR-07-2051

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Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this pretrial prosecution appeal, appellant state argues that (1) the district court's order suppressing respondent's two statements to law-enforcement officers will have a critical impact on the state's ability to prosecute respondent for criminal sexual conduct; and (2) the district court erred in determining that (a) respondent made his first statement during a custodial interrogation; and (b) respondent's second statement was tainted by the previous custodial interrogation. We affirm in part and reverse in part.

FACTS

On March 31, 2007, St. Joseph Police Officer Matthew Johnson received a report of a sexual assault from a student at the College of St. Benedict. Johnson took a taped statement from the victim, who reported that she had been touched sexually by a person she knew as Phil, who was a friend of her friend M.K. The victim said that she recognized Phil's voice because it was distinctive. She said that M.K. was a student at St. John's University and gave Johnson the name of his dormitory and his room number. Johnson called the St. John's campus security life-safety office, explained that he needed to talk to M.K. and Phil, and asked them to go to M.K.'s room to let M.K. and Phil know that Johnson wanted to speak to them.

Respondent Philip Mortell was at St. John's visiting M.K. He was sleeping on the floor in M.K.'s dorm room when he woke up and saw two uniformed security officers in the room. The security officers asked Mortell who he was, and he gave his name. The officers said that he needed to go with them; respondent asked if he needed to bring

anything (indicating his jacket and duffel bag) and was told that he did not. Respondent went with the officers to the life-safety office. The security officers made no threatening or intimidating statements, but respondent went with them because he was not given a choice. One of the security officers told respondent to have a seat because a police officer was coming to talk to him. One officer sat, and the other stood near the door. Respondent was never left alone and was never told that he could leave. He waited because it seemed that he could not go anywhere else. Johnson arrived after respondent had waited about 15 to 20 minutes.

The security officers stayed in the office while Johnson took a recorded statement from respondent. Johnson did not give respondent a *Miranda* warning, but asked respondent what he recalled about what had happened that evening. Respondent said that the victim felt sick and had gone to lie down. Respondent, respondent's friends, and the victim's friends periodically checked on her. Johnson asked whether respondent had any sexual contact with the victim, and respondent said that the first time he went to check on her, he shook her elbow to see if he could get a response, the second time he rubbed or patted her back, and the third time he undid her pants, pulled them down, and digitally penetrated her. After five to ten minutes of questioning, Johnson said that he would be right back. Johnson spoke with M.K., who said that the victim had been feeling ill and went to lie down in M.K.'s dorm room, where individuals at the party periodically checked on her. Johnson then went back to the security office, arrested respondent, and took him to the Stearns County jail.

Later that morning, Stearns County Sheriff's Deputy Dennis Heinen interviewed respondent at the jail. Heinen knew that respondent had been arrested by a St. Joseph officer for sexual assault and was told to see what information respondent would give him. Respondent said that he had already given a statement to another officer. Heinen explained that he did not know what had happened and he just knew that he was there to investigate a sexual assault. Heinen read respondent a *Miranda* warning, and respondent said that he understood and would talk to the deputy. Respondent did not invoke his right to counsel and did not ask to end the conversation. Johnson's investigation and the statement that respondent made to Johnson were not mentioned. Respondent admitted to Heinen that he digitally penetrated the victim and that he knew that she was lying down because she was intoxicated and had been sick.

Respondent was charged with one count of third-degree criminal sexual conduct. Respondent moved to suppress the statements that he made to Johnson and Heinen. After a contested omnibus hearing, the district court granted respondent's motion and ordered both statements suppressed. This appeal followed.

D E C I S I O N

I.

Critical Impact

In a pretrial appeal regarding suppression of evidence, "the state must clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). Critical

impact is shown when "the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *Id.* (quotation omitted). "Suppressed evidence particularly unique in nature and quality is more likely to meet the critical impact test." *In re Welfare of L.E.P.*, 594 N.W.2d. 163, 168 (Minn. 1999). Generally, "the suppression of a confession will have a critical impact on the prosecution." *Scott*, 584 N.W.2d at 416.

Because the victim and respondent were the only people present during the assault and there are no independent witnesses who can provide direct evidence of the offense nor other prosecution evidence that would significantly diminish the effect of suppressing respondent's statements, we conclude that the district court's order will have a critical impact on the state's ability to prosecute respondent.

II.

Statement to Johnson

A *Miranda* warning is required before a suspect is subjected to custodial interrogation. *State v. Walsh*, 495 N.W.2d 602, 605 (Minn. 1993). A *Miranda* warning is not required for "[o]n-the-scene questioning, where the officers are simply trying to get a preliminary explanation of a confusing situation" or "where the officers need to ask questions to sort out the situation and determine who, if anyone, should be arrested." *Id.* at 604-605.

"The test for determining whether a suspect was in custody is whether a reasonable person in the suspect's situation would have understood that he was in custody." *State v. Heden*, 719 N.W.2d 689, 695 (Minn. 2006). In *Heden*, the supreme court explained:

> While no factor alone is determinative, . . . the following factors may combine to indicate custody: the police interviewing the suspect at the police station; the police telling the individual that he or she is the prime suspect; the police restraining the suspect's freedom; the suspect making a significantly incriminating statement; the presence of multiple police officers; and a gun pointing at the suspect. We have also recognized circumstances that may indicate that a suspect is not in custody: questioning taking place in the suspect's home; the police expressly informing the suspect that he or she is not under arrest; the suspect leaving the police station at the close of the interview without hindrance; the brevity of questioning; the suspect's freedom to leave at any time; a nonthreatening environment; and the suspect's ability to make phone calls.

Id. (emphasis omitted) (citation omitted). A court should not consider the fact that an interview was recorded as indicating that it was custodial. *State v. Staats*, 658 N.W.2d 207, 212 (Minn. 2003) ("While police are not currently required to record noncustodial interrogations, we want to encourage the practice and a rule that treats recording as indicative of custody would undermine that policy.").

An appellate court reviews the district court's findings of fact for clear error but makes an independent determination about whether a suspect was in custody. *Id.* at 211. "We grant considerable, but not unlimited, deference to a [district] court's fact-specific resolution of such an issue when the proper legal standard is applied." *Id.* (quotation omitted). When the district court "used the proper legal standard and made a fact-specific determination" and "did not clearly err in resolving the matter as it did," the district court's determination may be affirmed even if "individual members of this court might well have resolved the dispute differently." *State v. Champion*, 533 N.W.2d 40, 44 (Minn. 1995).

The district court concluded: "Based on the totality of the circumstances, the facts establish that a reasonable person in the same situation would have believed he was in police custody / restrained to the degree associated with a formal arrest." This conclusion was based on the district court's careful recitation of the facts, but the court did not specifically refer to any of the factors identified in *Heden*. The district court specifically noted that the police are not required to record noncustodial interrogations and that respondent's statement was recorded.

Respondent was awakened during the night by security officers who worked for the university where he was a guest. Respondent was not handcuffed or otherwise physically restrained, but he was not given a choice whether to accompany the security officers. The questioning occurred in a campus-security office, which is more like a police station than a private home. The questioning lasted only five to ten minutes, but respondent was required to wait in the security office for 15 to 20 minutes before Johnson arrived. Johnson asked the security officers to let respondent know that Johnson wanted to talk to him, and Johnson went to the security office specifically to speak with respondent. Johnson did not tell respondent that he was a suspect, but he also did not tell him that he was not under arrest or that he was free to go. Respondent was questioned by only one police officer, but two uniformed security officers were also present. Respondent made incriminating statements, and he was arrested shortly after the interview.

Although it appears that the district court improperly considered the fact that the interview was recorded, we are not persuaded that this factor was determinative in the

court's conclusion that respondent was in custody when the questioning occurred. Based on all of the other factors present, the district court did not clearly err in concluding that a reasonable person in respondent's situation when he was questioned by Johnson would have believed that he was in police custody.

III.

Statement to Heinen

The district court concluded that respondent's statement to Heinen was obtained by exploiting respondent's previous, unwarned statement to Johnson and, therefore, was inadmissible under the derivative-evidence rule. The Supreme Court has rejected this approach. *Oregon v. Elstad*, 470 U.S. 298, 309-11, 105 S. Ct. 1285, 1293-94 (1985); *see also State v. Bailey*, 677 N.W.2d 380, 389 (Minn. 2004) ("In *Elstad*, the Court concluded that the traditional 'taint' analysis does not apply to *Miranda* violations."). In *Elstad*, police officers went to Elstad's home with a warrant for his arrest. *Elstad*, 470 U.S. at 300, 105 S. Ct. at 1288. The officers asked Elstad's mother to join them in the kitchen, where they told Elstad that they thought that he had been involved in a recent burglary. *Id.* at 300-01, 105 S. Ct. at 1288-89. Elstad admitted that he had been present at the burglary. *Id.* at 301, 105 S. Ct at 1289. The officers placed Elstad in the back of a patrol car, and as they were about to leave for the sheriff's office, Elstad's father arrived home and came to the rear of the patrol car. *Id.* When the officers told him that his son was a suspect in a burglary, he became agitated and admonished Elstad. *Id.* At the sheriff's headquarters about an hour later, Elstad was first informed about his *Miranda* rights. *Id.* He waived those rights and gave a full statement. *Id.* The Supreme Court 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. The Supreme Court explained that

> the task of defining "custody" is a slippery one, and [police officers] investigating serious crimes cannot realistically be expected to make no errors whatsoever. If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. 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 (quotation omitted).

In *Bailey*, the Minnesota Supreme Court distinguished *Elstad* based on Bailey's unwarned statements having been "made during interrogation in the detective's car immediately after he was arrested at gunpoint, placed against the squad car, patted down for weapons, handcuffed, and placed in the back seat." 677 N.W.2d at 391. The court concluded that these circumstances constituted coercion and held that

> where a suspect is apprehended under coercive circumstances, is subjected to lengthy custodial interrogation before being given a *Miranda* warning, does not have the benefit of a significant pause in the interrogation after the *Miranda* warning is given, and essentially repeats the same inculpatory statements after the *Miranda* warning as before, the statements made after the *Miranda* warning are inadmissible.

Id. at 392.

Most recently, the Supreme Court in *Missouri v. Seibert*, 542 U.S. 600, 611-12, 124 S. Ct. 2601, 2610 (2004), disapproved of a two-stage interrogation technique in which police deliberately conducted unwarned interrogations until they obtained a confession and then sought to have the suspect repeat the confession in a post-*Miranda* interview. The plurality framed the question of the admissibility of a subsequent warned statement as one of "whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object." *Seibert*, 542 U.S. at 615, 124 S. Ct. at 2612. Specifically, the plurality asked whether "a reasonable person in the suspect's shoes could have seen the [subsequent] questioning as a new and distinct experience, [such that] the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.* at 615-16, 124 S. Ct. at 2612.

Unlike *Seibert*, this case does not involve a deliberate effort to undermine the *Miranda* requirement. There is no evidence that Johnson and Heinen worked together to coerce respondent's confession. Johnson testified that he did not read respondent a *Miranda* warning because he was taking an investigatory statement, which appears to be the kind of good-faith belief that a *Miranda* warning was not required that was found in *Elstad*. Because he did not know what respondent had told Johnson, Heinen did not confront respondent with the statement that he had made to Johnson, and there is no evidence that he could have used the technique described in *Seibert*.

Unlike Bailey, respondent was not patted down for weapons, handcuffed, or placed in the back of a squad car. Although respondent could have reasonably believed

that he was in police custody when he gave his first statement, there is no evidence that his statement was coerced. And respondent gave his post-*Miranda* statement three hours after his initial statement, in a different location, and to an officer from a different jurisdiction who told respondent that he did not know what had happened. Respondent acknowledged that he understood his rights. He nevertheless chose to talk to Heinen without invoking his right to remain silent or his right to counsel. The facts of this case are most analogous to *Elstad*; any police error falls short of that found in *Bailey* and *Seibert*.

Respondent argues that his statement was not knowingly and voluntarily given because Heinen did not advise him that his prior statement to Johnson could not be used against him. The Supreme Court rejected this argument in *Elstad* and explained: "The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking. Police officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately be held admissible." 470 U.S. at 316, 105 S. Ct. 1296-97.

Because Johnson's questioning of respondent was unaccompanied by any actual coercion or other circumstances calculated to undermine respondent's ability to exercise his free will, the district court erred in determining that respondent's statements to Heinen must be suppressed because Johnson's questioning so tainted the investigatory process that respondent's voluntary and informed waiver of his *Miranda* rights before he was questioned by Heinen was ineffective.

Affirmed in part and reversed in part.