IN THE COURT OF APPEALS OF IOWA

No. 6-671 / 05-1307
Filed October 11, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICKY GENE TITUS, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Defendant appeals his judgment and sentence on the basis his statements made at the police station should have been suppressed and his counsel was ineffective. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, William E. Davis, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Ricky Gene Titus appeals his judgment and sentence on the basis the district court erred in denying his motion to suppress statements made during an interrogation at the police station. Titus asserts that even though he was advised of his Miranda[1] rights prior to the interrogation, such statements were not voluntary, given that he made prewarning statements to another officer. He also raises a claim of ineffective assistance of counsel.

On March 18, 2005, Titus was involved in an automobile accident in a restaurant parking lot. Titus, who was driving, and the passenger Roy Roberson fled to a nearby Kmart store. Davenport police officers were informed by Kmart security that Roberson dropped his coat near the Kmart entrance. The officers discovered the coat, and inside of it they found a Smith and Wesson revolver. Off-duty Officer Gordon Morse apprehended Titus in a parking lot near Kmart. Officer Mark Dinneweth took custody of Titus and placed him in his squad car. Dinneweth did not inform Titus of his *Miranda* rights.

According to Dinneweth, while Titus was sitting in the backseat of the squad car with the window cracked, he voluntarily "started talking about the gun," saying it was Roberson's gun. After Titus voluntarily mentioned the gun, Dinneweth asked him questions about who owned the gun and whether his fingerprints would be on it. Titus responded that had touched the gun. Dinneweth remained at the scene of the accident (with Titus in the backseat of the squad car) for about ten minutes and then transported him to the police station.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966).

At the police station, Dinneweth placed Titus in an interview room and then had a conversation with Officer Steven Brown for about three minutes. Titus testified he could see Dinneweth and Brown talking outside the interview room. Dinneweth testified he told Brown Titus would cooperate and had said it was not his gun. Brown then entered the room and advised Titus of his *Miranda* rights. Titus waived his rights. During the interview with Brown, Titus admitted he was driving the car and claimed the gun belonged to Derek Downs. He denied knowing that Roberson was carrying the gun on March 18 until after the auto accident. But, Titus stated Roberson had the gun when they were riding around the day before.

The trial information charged Titus with felon in possession of a firearm, carrying a revolver in a vehicle, and driving under suspension while barred as a habitual offender. Titus filed a motion to suppress his "March [18,] 2005 statements to police." The motion alleged Dinneweth placed Titus in custody and did not advise him of his *Miranda* rights before "actively" questioning him. Following a hearing on the motion, the district court entered an order suppressing "any statements [Titus] made in response to questions asked him by Officer Dinneweth while [Titus] was in custody." However, the district court overruled the motion as to any statements made after Brown advised Titus of his *Miranda* rights.

A jury found Titus not guilty of possession of a firearm, but guilty of carrying a revolver in a vehicle and driving while barred. The district court entered judgment, and Titus was sentenced to an indeterminate term of two years and a fine for carrying a revolver and an indeterminate term of two years

and a fine for driving while barred. The sentences were ordered to run concurrently. Titus appeals.

Motion to Suppress

Titus asserts the district court erred in not suppressing his statements made to Brown. Our review of a constitutional question is de novo. *State v. Lloyd*, 701 N.W.2d 678, 680 (Iowa 2005).

Titus relies on *Missouri v. Seibert*, 542 U.S. 600, 617, 124 S. Ct. 2601, 2613, 159 L. Ed. 2d 643, 657-58 (2004), in arguing he was interrogated in "two stages" and the second stage was a "mere continuation" of the first interrogation, causing the *Miranda* warnings rendered "between" the stages "meaningless." The State contends Titus's statements to Brown 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 Titus's statements to Dinneweth.

In *Elstad*, officers went to a young suspect's home with a warrant for his arrest. *Id*. at 300, 105 S. Ct. at 1288, 84 L. Ed. 2d at 226. Prior to arresting Elstad, one officer spoke with his mother, and the other officer remained with Elstad in the living room. *Id*. at 300-01, 105 S. Ct. at 1288, 84 L. Ed. 2d at 226-27. While in the living room, the officer told Elstad he "felt" Elstad was involved in a robbery at the Gross house. *Id*. at 301, 105 S. Ct. at 1289, 84 L. Ed. 2d at 227. Elstad acknowledged he had been at the scene. *Id*. Elstad was then transported to the station, and approximately one hour later was advised of his *Miranda* rights. *Id.* Elstad waived his rights and admitted his involvement in the robbery. The trial court excluded Elstad's statement made in his home, but admitted his

confession given at the station. *Id*. at 302, 105 S. Ct. at 1289, 84 L. Ed. 2d at 227-28. The Oregon Court of Appeals reversed, holding the second confession should have also been excluded. *Id*. at 300, 105 S. Ct. at 1288, 84 L. Ed. 2d at 226.

On appeal, the U.S. Supreme Court reversed, finding:

> [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.

Elstad, 470 U.S. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235.

The *Elstad* court found neither the environment nor the manner of "interrogation" was coercive: the initial conversation took place at midday, in the living room of Elstad's own home, with his mother in the kitchen; when he made his statements he had not been informed he was under arrest; and the officers did not intend to interrogate Elstad but to notify his mother of the reason for his arrest. *Id.* at 315, 105 S. Ct. at 1296, 85 L. Ed. 2d at 236. The Court held, "[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. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. *Id*. The court deemed Elstad's second statement to be voluntary and admissible.

In *Seibert*, the defendant was arrested, but not read her *Miranda* rights. *Id.* at 604-05, 124 S. Ct. at 2606, 159 L. Ed. 2d at 650. At the police station, she was questioned for approximately thirty to forty minutes, she confessed, and then after a twenty-minute break, she was given *Miranda* warnings, which she waived. *Id.* After waiving such rights, the questioning officer confronted her with her pre-warning statements, getting her to repeat her confession. *Id.* at 605-06, 124 S. Ct. at 2606, 159 L. Ed. 2d at 651. The trial court excluded only Seibert's pre-warning statements. *Id*, at 606, 124 S. Ct. at 2606, 159 L. Ed. 2d at 651. The Missouri Supreme Court reversed on the basis that the *Miranda* warnings had admittedly been intentionally withheld ("a question-first practice"[2]), and there were no circumstances that would dispel the *Miranda* violation. *Id*. at 606, 124 S. Ct. at 2606-07, 159 L. Ed. 2d at 651. The United States Supreme Court affirmed, finding that both the pre-warning and post-warning statements should have been excluded. *Id.* at 607, 124 S. Ct. at 2607, 159 L. Ed. 2d at 652.

The *Seibert* plurality distinguished *Elstad*, stating, "[I]t is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." *Id*. at 615, 124 S. Ct. at 2612, 159 L. Ed. 2d at 657. The court continued:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on 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

[2] *Seibert*, 542 U.S. at 610-11, 124 S. Ct. at 2608-09, 159 L. Ed. 2d at 653-54.

> interrogator's questions treated the second round as continuous with the first.

Id. at 615, 124 S. Ct. at 2613, 159 L. Ed. 2d at 657.

In evaluating these factors, the *Seibert* court found: the police strategy was to undermine *Miranda*; the unwarned interrogation was conducted in the station house and the questioning was systematic, exhaustive, and managed with psychological skill; there was little incriminating information left unsaid during the unwarned phase; the second phase occurred only fifteen to twenty minutes after the first, in the same place as the unwarned phase; the same officer conducted both phases and advised Seibert of her *Miranda* rights; she was not advised that her prior statement could not be used; and the second phase referred to answers already given in the first phase, evidence the second phase was a mere continuation. *Id*. at 616, 124 S. Ct. at 2612-13, 159 L. Ed. 2d at 657-58. The Supreme Court concluded the question-first tactic "effectively threatens to thwart *Miranda's* purpose" and the facts did "not reasonably support a conclusion that the warnings given could have served their purpose." *Id*. at 617, 124 S. Ct. at 2613, 159 L. Ed. 2d at 658. Thus, the court held Seibert's post-warning statements were also inadmissible. *Id.*

In the instant case, we must determine whether the *Miranda* warnings given to Titus after arriving at the police station were effective enough to accomplish their objective and whether Titus's statements to Brown were voluntary. *See Seibert*, 542 U.S. at 615, 124 S. Ct. at 2613, 159 L. Ed. 2d at 657, 2612; *Elstad*, 470 U.S. at 318, 105 S. Ct. at 1298, 84 L Ed. 2d at 238. There was no evidence the police strategy here was to undermine *Miranda*. Detective Brown testified he thought Titus had already been given the *Miranda*

warnings, and he had no knowledge of a "question-first" strategy, nor was it the police department's policy. Officer Dinneweth testified he did not intend to interview Titus, he was "merely securing him and was to transport him to the station" and then a detective would interview him. Dinneweth testified Titus's statement about the gun was made voluntarily without any "prompting," and in response to the voluntary statement he asked two to four questions. The first interrogation, again, two to four questions, took place in Dinneweth's squad car, and the second interrogation occurred at the police station in an interview room. The first interrogation essentially covered who owned the gun and whether Titus touched the gun. The second interrogation was much more in-depth, discussing the events leading up to the accident, the events relating to the gun, whether Titus knew about the gun, who owned the gun, and whether Titus touched the gun. The officers performing the two interrogations were different: Dinneweth conducted the first interrogation, and Brown gave Titus his *Miranda* rights and conducted the second interrogation. The second interrogation was recorded on videotape. Brown treated the second interrogation as a new interview, not a continuation of any statements made prior to the interrogation, as Brown does not refer to any prewarning statements Titus may have made. Finally, Titus testified he wanted the police to know it was not his gun or his coat and he knew it was up to him whether he wanted to talk or not. Based on our de novo review, the administration of *Miranda* warnings prior to the second interrogation cured the condition that rendered the unwarned statement inadmissible. *See Elstad*, 470 U.S. at 310-11, 105 S. Ct. at 1294, 84 L Ed. 2d at 233. In examining the surrounding circumstances and the entire course of police conduct, Titus's

statements to Brown made after the requisite *Miranda* warnings were issued were voluntary and admissible. *See Elstad*, 470 U.S. at 318, 105 S. Ct. at 1298, 84 L Ed. 2d at 238; *Irving v. State*, 533 N.W.2d 538, 542 (Iowa 1995).

Ineffective Assistance of Counsel

Titus asserts his counsel was ineffective in failing to file a timely and specific motion to suppress and in failing to cite and rely upon the Iowa Constitution. We review an allegation of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Although ineffective assistance of counsel claims are typically reserved for postconviction proceedings, we will resolve these claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

As to Titus's claim that counsel failed to file a timely and specific motion to suppress, Titus was not prejudiced by this alleged failure because his motion was sufficiently addressed by the district court and was not dismissed for being untimely. Moreover, the court addressed whether the statements to both Dinneweth and Brown should be suppressed. Thus, Titus was not prejudiced, and his argument is without merit.

Titus claims his counsel was also ineffective in failing to cite and rely upon the Iowa Constitution in the motion to suppress. However, Titus cites no

authority in either the Iowa Constitution or in case law as a basis for such argument. We deem such argument waived. See *State v. Demaray*, 704 N.W.2d 60, 65 (Iowa 2005) (citing Iowa R. App. P. 6.14(1)(*c*) that failure in the brief to cite authority in support of an issue may be deemed waiver of that issue).

AFFIRMED.