IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

YVONNE D. COOK

Defendant-Appellee.

CASE NO. 12-0285

ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT

COURT OF APPEALS CASE NO. 24524

MEMORANDUM IN SUPPORT OF JURISDICITON OF APPELLANT, THE STATE OF OHIO DISCRETIONARY APPEAL

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THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

This case presents the question of whether a very brief on-scene interview of a shooting suspect, lasting five minutes or less but done without benefit of *Miranda* warnings, taints a subsequent interview conducted at the police station after the suspect has been Mirandized and has agreed to speak to the police. If allowed to stand, the Second District Court of Appeals's decision in this case will require the suppression of post-warning statements made at a different location than earlier pre-warning statements, even when the circumstances presented the suspect with a genuine choice whether to follow up on her earlier statements. The court of appeals's decision represents an incorrect application of this Court's case law, as well as precedent from the United States Supreme Court, and, if not reversed, will undoubtedly lead to more incorrect suppression hearing results.

STATEMENT OF THE CASE AND FACTS

Yvonne D. Cook was indicted by a Montgomery County grand jury on August 27, 2010, with one count of intimidation of a crime victim or witness, two counts of felonious assault, each accompanied by a firearm specification, and one count of having a weapon while under disability. The charges arose out of an incident in which Cook shot Terrance Bolton on the grounds of the DeSoto-Bass apartments. Cook moved to suppress the statements she made to police, all physical evidence obtained by the police, and all forensic test results. Following an evidentiary hearing, the Hon. Timothy O'Connell issued a written decision that included the following findings of fact:

> On June 19, 2010 Dayton Police Officers responding to a 911 call went to Banker Place in the DeSoto-Bass apartment complex at about 4 a.m. The DeSoto-Bass apartment complex is located in the southwest quadrant of the City of Dayton, Montgomery County, Ohio.

Officers found a man lying in a grassy common area near Banker Place, a street or drive within the DeSoto-Bass complex. The man, later identified as Terrance Bolton, had been shot.

Officers Chance, Kleinhanns and Stack were the first police officers to arrive on the scene. Officer Kleinhanns told Officer Stack that they were looking to talk to a woman by the name of "Granny." Officer Stack proceeded to 818 Oldfield Place in the DeSoto-Bass complex. 818 Oldfield Place is in the general proximity of Banker Place. Officer Stack knocked on the door at 818 Oldfield Place and a woman answered the knock by opening the door. Officer Stack asked for the woman's name and the woman responded, "Yvonne." The officer asked if the woman went by the nickname of Granny. The woman admitted she was known by that nickname.

The dispatch and other radio transmissions and officer discussion advised Officer Stack that Mr. Bolton was purportedly shot by Granny. So, for officer safety, Officer Stack handcuffed Yvonne and patted her down. Officer Stack did not find any weapons on the person of Yvonne, yet decided to escort her back to the police cruiser and place her in the back seat.

After Yvonne, (Defendant Yvonne D. Cook), was sitting in the back seat of the cruiser in handcuffs Officer Stack engaged in a conversation with her. Officer Stack proclaimed to Yvonne, "Terry said you shot him." Yvonne denied that she shot Terry.

Officer Stack then went and spoke with an apparent witness. The witness, a woman named Alves, told Officer Stack that she heard a shot. Then she looked out and saw Terry laying in the yard. Officer Stack asked the woman if Yvonne would have any reason to be upset with Terry. The woman indicated that Terry and Granny had argued earlier in the day. The witness said that she had seen Granny with a firearm previously. The witness was able to give a description of Granny. Officer Stack asked Yvonne if she could search Yvonne's apartment. Yvonne said there was "nothing to find" so she gave Officer Stack verbal consent to search the apartment.

Officer Stack provided Yvonne D. Cook with a consent-to-search form. The form advised Yvonne that she had a constitutional right not to have a search made of her premises without a search warrant and that she had a right to refuse to consent to such a search. Nonetheless, Yvonne signed a consent-to-search form giving officers of the Dayton Police Department authorization to conduct a complete search of her apartment for a handgun.

According to the form, the Defendant acknowledged that she was granting the consent to search voluntarily and that no threats or promises of any kind were made to her. Yvonne appeared coherent at that time.

Officer Stack did not advise Yvonne of her Miranda Rights at the time she handcuffed Yvonne in front of the apartment. She was not advised of her Miranda Rights when she was placed in the rear of the cruiser. Yvonne was not advised of her Miranda Rights when Officer Stack questioned Yvonne about the assertion of Terry Bolton.

Detective Darrell Smith arrived on the scene at about 6:00 a.m. on June 19, 2010. Detective Smith learned from Sergeant White and other officers that Yvonne had executed a consent to search. Detective Smith went into Yvonne's apartment and looked around. He saw some shoes on the staircase and confiscated them.

Prior to searching Yvonne's apartment, Detective Smith conversed with Yvonne as she sat in the back of the police car. He asked Yvonne what happened. Yvonne responded to him. A series of questions were asked and answers were given. Yvonne provided a significant amount of information to Detective Smith about the incident. She provided him with details of the encounter. Detective Smith did not advise Yvonne of her Miranda Rights prior to engaging in conversation with her as she sat in the back of the cruiser at the scene.

Officer Stack transported Yvonne D. Cook to the Dayton Safety Building from DeSoto-Bass at about 6:30 a.m. on June 19, 2010. Upon arrival at the safety building, Yvonne was escorted to an interview room. The interview was to be conducted by Detective Smith.

Detective Smith arrived from Oldfield Place. Detective Smith noticed that Yvonne was wearing shoes. Of course, Detective Smith had possession of another pair of shoes, which he had found on the staircase of Yvonne's apartment. Based on his investigation, Detective Smith believed that the shoes Yvonne was wearing were the ones that were related to the incident as compared with the ones he confiscated. So, he asked if Yvonne would, in effect, switch shoes. Yvonne did that. The shoes on Yvonne's feet at the time she arrived at the safety building were collected by the police and she was given the other pair so she had something to wear.

Under normal procedure, upon a person being admitted to the Montgomery County Jail as a suspect all clothing, including shoes, is confiscated. The Dayton Police planned to formerly arrest Defendant for felonious assault as a result of this incident and book her into the Montgomery County Jail.

After Detective Smith collected Yvonne's shoes he presented her with a pre-interview form. The form advised Yvonne of her rights. By use of the form, Yvonne was advised that she was being interviewed with regards to the crime of felonious assault. The form further advised her that she had a right to remain silent and that anything she said could and would be used against her in a court of law. Yvonne was advised that she had the right to talk to a lawyer for advice before being asked any questions, and have a lawyer with her during questioning.

> Yvonne D. Cook was advised that she would have a lawyer appointed for her if she did not have money to hire a lawyer. She was advised that if she decided to answer questions immediately without a lawyer present she still had a right to stop answering questions at any time. Detective Smith advised Yvonne D. Cook of the various rights by reading them to her and eventually presenting the form to her so she could read it and sign it.
>
> The form contains a disclosure on the bottom half of the page. This disclosure states: "The above statement of rights has been read to me. I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." Detective Smith read that disclosure to the Defendant. The Defendant signed her name to the pre-interview form after it was read to her. She indicated she had completed ten (10) years of schooling.
>
> Yvonne Cook told Detective Smith that she could read. Detective Smith did not make any threats against her to get her to answer questions. Detective Smith did not promise Yvonne anything in return for her statement.
>
> After Yvonne signed the pre-interview form she was interrogated by Detective Smith. The question and answer session lasted approximately thirty (30) minutes. The suspect, Yvonne, gave Detective Smith detailed information. In fact, the information provided in the interview was consistent with that which had been provided by Yvonne at the scene about an hour earlier. Yvonne was able to provide coherent answers to the Detective's questions. He said she answered "smartly." She appeared to be sober although somewhat sleepy. The Detective determined that she was about forty-eight (48) years old and that she did have some prior experience with the criminal justice system, having, at least, one prior case.

Judge O'Connell granted the motion to suppress, in part, and denied it, in part. He suppressed the statements Cook made to police at the scene of the shooting but overruled the suppression motion with respect to statements Cook made to the police at the Safety Building on the date of the incident, the physical evidence obtained by the police, and statements Cook made on August 5, 2010.

Cook appeared again before the trial court on February 14, 2011, and entered no contest pleas to all charges and specifications. Judge O'Connell found Cook guilty and subsequently sentenced her to serve three years for intimidating a crime victim or witness, three years for

felonious assault with a deadly weapon[1], and three years for having a weapon while under disability, all to be served concurrently. The court merged the firearm specifications and imposed a three-year term to be served consecutively to the sentences imposed for counts one, two, and three. Cook appealed.

With one judge dissenting, the Second District Court of Appeals concluded that Cook was subjected to one continuous custodial interrogation that was tainted by the lack of *Miranda* warnings prior to the first interrogation. Thus, the court of appeals reversed the trial court's decision with respect to the statements Cook made to the police at the Safety Building about one-half hour after she was removed from the scene. From the court of appeals's January 13, 2012 decision, the State now appeals to this Honorable Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

The privilege against compelled self-incrimination is not violated when a shooting suspect is Mirandized and questioned at the police department after first being questioned for no more than five minutes, without benefit of *Miranda* warnings, at the scene of the shooting.

Detective Daryl Smith of the Dayton Police Department was dispatched to a shooting scene in the DeSoto-Bass apartment complex in the early morning hours of June 19, 2010. When he arrived, Yvonne Cook was already seated in the back of a police cruiser. After obtaining information from other officers, Smith went to the police cruiser where Cook was detained and engaged in a brief conversation with her, about the shooting incident, that lasted five minutes, or less. Detective Smith then asked Officer Jennifer Stack to transport Yvonne Cook to the Safety Building so that she could be interviewed. About thirty minutes had passed

[1] The court merged the felonious assault count that alleged Cook caused serious physical harm to Terrance Bolten with the felonious assault with a deadly weapon count.

between Smith's contact with Cook at the scene and the start of the interview at the Safety Building. Cook was *Mirandized* and agreed to speak without an attorney present. The interview at the station house lasted about half an hour.

"In a question-first scenario in which the *Miranda* warning is withheld and the suspect makes inculpatory statements, the risk is that the warning will mean less when it is eventually recited." *Farris*, at ¶ 19. Therefore, "[t]he threshold issue when interrogators question first and warn later is *** whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. *** For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." *Seibert*, 542 U.S. at 611-612.

As this Court pointed out in *Farris*, supra, "*Elstad* and *Seibert* stand on opposite sides of the line defining where pre-warning statements irretrievably affect post-warning statements." *Farris*, at ¶ 22. In *Elstad*, the U. S. Supreme Court held that the defendant's post-*Miranda* statements were admissible where arresting officers had a brief discussion with Elstad in his home about the burglary of a neighbor's house before transporting him to the sheriff's department where he was *Mirandized* and interviewed about one hour later. *Farris*, at ¶ 23, citing *Elstad*, 470 U.S. at 301. In contrast, Seibert's post-*Miranda* statements had to be suppressed where the police used a strategy adapted to undermine the *Miranda* warnings. The unwarned phase of questioning was conducted at the station house and was "systematic, exhaustive, and managed with psychological skill." *Farris*, at ¶ 28, discussing *Seibert*, supra. Then, after only a fifteen to twenty-minute pause, the warned phase of questioning proceeded in

the same place and was conducted by the same officer, who said nothing to counter the probable misimpression that Seibert's prior inculpatory statement could also be used against her. *Id.*

"The contrast between *Elstad* and [*Seibert*] 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 interrogator's questions treated the second round as continuous with the first." *Farris*, at ¶ 28, quoting *Seibert*, 542 U.S. at 615-617.

In this case, the actions of the police more closely resembled the *Elstad* case than the *Seibert* case. The unwarned portion of the questioning conducted by Detective Smith occurred at the scene of the shooting, which was the apartment complex where Yvonne Cook lived. Furthermore, that initial conversation between Smith and Cook lasted for five minutes, or less. On the other hand, the warned portion of the questioning occurred at the Safety Building approximately half an hour later, and a second detective was present for that interview. Although there was admittedly some overlap of the information obtained from Cook, the warned portion of the interview was certainly more thorough than the questioning at the scene. The station house interview took some thirty minutes to complete, whereas the discussion between Detective Smith and Yvonne Cook at the scene was estimated to last no more than five minutes.

Thus, under these circumstances, and similar to the *Elstad* case, "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 [the scene]." *Farris*, at ¶ 28. "[S]ince a reasonable person in [Cook'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 her earlier [statements]." *Id.*

CONCLUSION

The post-*Miranda* questioning conducted by Detective Smith at the Safety Building was not a mere continuation of earlier questions and responses that occurred at the scene of the shooting, in a very brief conversation and without benefit of *Miranda* warnings. Instead, the post-warning questioning was conducted at a different location, about half an hour later, and in the presence of an additional detective who did not speak to Cook at the scene. Thus, the second stage of the interrogation was distinct from the first stage, and the *Miranda* warnings functioned effectively – allowing Yvonne Cook to make an informed choice as to whether she wanted to talk to the police at the Safety Building without a lawyer present, even though she had already made some statements at the scene.

For these reasons, the State respectfully requests that this Court take jurisdiction over this case, reverse the decision of the Second District Court of Appeals, and reinstate Yvonne Cook's convictions for intimidating a crime victim or witness, felonious assault, having a weapon while under disability, and a firearm specification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support was sent by first class mail on this 14th day of February, 2012, to the following: J. David Turner, P.O. Box 291771, Kettering, OH 45429 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, OH 43215-9311.

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Appendix A Page 1

Case: CA 024524
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24524
v.	:	T.C. NO. 10CR2375
YVONNE D. COOK	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 13th day of January, 2012.

. . . . . .

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. . . . . .

DONOVAN, J.

Defendant-appellant Yvonne D. Cook appeals from her conviction and sentence for one count of intimidation of a crime victim, in violation of R.C. 2921.04(B), a felony of the third degree; two counts of felonious assault, in violation of R.C. 2903.11(A)(1) & (2), both

felonies of the second degree; and one count of having a weapon while under disability, in violation of R.C. 2923.13.(A)(2), a felony of the third degree. Each count of felonious assault was accompanied by a firearm specification.

Cook filed a timely notice of appeal with this Court on March 9, 2011.

I

The incident which forms the basis for the instant appeal occurred on June 19, 2010, at approximately 4:00 a.m., when Dayton Police responded to a 911 call reporting that a man, later identified as Terence Bolton, had been shot in the DeSoto-Bass apartment complex located in southwest Dayton, Ohio. After a brief investigation, officers began looking for a woman going by the name "Granny," who was purported to have shot Bolton. Dayton Police Officer Jennifer Stack soon contacted Cook at her nearby home and identified her as "Granny." For her own safety, Officer Stack handcuffed Cook and patted her down. Officer Stack then placed Cook in the back of the police cruiser.

While Cook was in the back of the cruiser, Officer Stack engaged her in a brief conversation, stating "Terry said you shot him." Cook denied shooting Bolton. Shortly thereafter, Officer Stack spoke to a witness named Alves who stated that she had seen Cook with a firearm earlier. Officer Stack asked Cook for consent to a search of her apartment, and Cook provided verbal consent. Thereafter, Officer Stack provided Cook with a consent form for the search of her apartment. Cook signed the consent form. Cook, however, was never advised of her *Miranda* rights by Officer Stack.

Detective Darryl Smith arrived at the scene at approximately 6:00 a.m. and was informed that Cook had signed a consent to search form. Two homicide detectives were already on scene when Detective Smith arrived, and no evidence was adduced that they

advised Cook of her rights. After searching her apartment, Detective Smith spoke with Cook while she sat cuffed in the rear of the cruiser. Detective Smith did not advise Cook of her *Miranda* rights prior to questioning her. Detective Smith asked Cook a series of questions about what happened and Cook provided a significant amount of incriminating information about the incident. Detective Smith testified that he spoke to Cook for approximately five minutes. After the interview, Cook was transported to the Dayton Safety Building at about 6:30 a.m.

Prior to interviewing Cook again at the Safety Building, Detective Smith presented Cook with a pre-interview form which advised her of her constitutional rights. Detective Smith read the contents of the form to Cook, and she signed it. Cook indicated to Detective Smith that she had completed ten years of schooling. Cook also informed Smith that she could read.

After Cook signed the pre-interview form, she was questioned a second time by Smith. The question and answer session lasted about thirty minutes. Cook provided Detective Smith detailed information regarding the events surrounding the shooting, which was consistent with the information Cook gave at the scene about an hour earlier. Thereafter, Cook was transported to jail.

On August 27, 2010, Cook was indicted for one count of intimidation of a crime victim, two counts of felonious assault, each count accompanied by a firearm specification, and one count of having a weapon while under disability. At her arraignment on August 31, 2010, Cook stood mute, and the trial court entered a plea of not guilty on her behalf.

Cook filed a motion to suppress on September 20, 2010. A hearing was held on said motion on November 5 and 15, 2010. On January 21, 2011, the trial court issued a

decision in which it sustained Cook's motion to suppress with respect to the statements she made to Detective Smith while she was seated in the rear of Officer Stack's cruiser before she had been *Mirandized.* The trial court, however, overruled Cook's motion regarding the statements she made to Detective Smith at the Safety Building after she had been *Mirandized* and signed the pre-interview form.

On February 15, 2011, Cook pled no contest to all of the counts in the indictment. The trial court subsequently found her guilty on all counts and sentenced her to an aggregate prison term totaling six years.

It is from this judgment that Cook now appeals.

II

Cook's sole assignment of error is as follows:

"WHETHER THE STATEMENTS APPELLANT COOK MADE AFTER RECEIVING A MIRANDA WARNING CONFIRMING HER PRE-MIRANDA STATEMENTS CAN BE USED AGAINST HER."

In her sole assignment, Cook contends that the post-*Miranda* statements she made to Detective Smith while in custody at the Safety Building were a mere continuation of the initial statements she made to the detective earlier at the scene without the benefit of *Miranda* warnings, and therefore, should have been suppressed as well. Thus, Cook argues that the trial court erred when it overruled that portion of her motion to suppress regarding her post-*Miranda* statements.

In regards to a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham*

(1994), 96 Ohio App.3d 649, 653. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac* (July 15, 2005), Montgomery App. No. 20662, 2005-Ohio-3733, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. Id.

In support of her argument that the trial court erred when it found that her post-*Miranda* statements were admissible, Cook relies on the United States Supreme Court's holding in *Missouri v. Seibert* (2004), 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 642. In *Seibert*, the U.S. Supreme Court considered whether the technique of successive interrogations, first unwarned and then warned, violated a defendant's *Miranda* rights.

In *Seibert*, a police officer questioned the defendant without *Miranda* warnings for approximately thirty to forty minutes. The defendant made an admission, and the officer gave the defendant a twenty-minute break. After the break, the same officer returned, gave the defendant *Miranda* warnings, obtained a signed waiver, and resumed questioning. During the second round of questioning, the officer confronted the defendant with her pre-*Miranda* statements, and the defendant repeated her admission. The court referred to this testimony as "question first" and stated that "[t]he object of question first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611, 124 S.Ct. 2601, 159 L.Ed.2d 643. The court ultimately held that the post-warning statements were inadmissible. Id. at 617.

"In a question first scenario in which the *Miranda* warning is withheld and the

suspect makes inculpatory statements, the risk is that the warning will mean less when it is eventually recited." *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255. "The threshold issue when interrogators question and warn later is thus whether it would be reasonable to find that in these circumstances the warning could function 'effectively' as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." *Seibert*, 542 U.S. at 611-612, 124 S.Ct. 2601, 159 L.Ed.2d 643.

In support of its argument that the trial court did not err in ruling Cook's post-warning statement admissible, the State relies on *Oregon v. Elstad* (1985), 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222. The court in *Elstad* held admissible a post-*Miranda* warning confession that followed a pre-warning admission solicited by an officer while the suspect was in custody.

"*Elstad* and *Seibert* stand on opposite sides of the line defining where pre-warning statements irretrievably affect post-warning statements. Still, that line cannot be said to be bright or sharply defined." *Farris*, 109 Ohio St.3d at 523, 2006-Ohio-3255.

In *Elstad*, police went to the home of an eighteen-year old defendant with a warrant for his arrest. While one officer went to the kitchen to explain to the suspect's mother that her son was being arrested in connection with a burglary that occurred at the home of a

neighbor, another officer stayed with Elstad in the living room and had a brief discussion with him. The officer explained the neighbor's house had been robbed and that he thought Elstad was involved. Elstad stated to the officer "Yes, I was there." *Elstad*, 470 U.S. at 301, 105 S.Ct. 1285, 84 L.Ed.2d 222.

Police took Elstad to the police station, and about one hour later, interviewed him in the office of one of the officers. The police administered *Miranda* to Elstad for the first time without mentioning his previous admission. Elstad subsequently waived his rights and made a full, detailed confession regarding his involvement in the burglary. Both confessions were admitted into evidence at trial, and Elstad was convicted. His conviction, however, was reversed by an Oregon appellate court who found that the post-*Miranda* confession was inadmissible. *Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222.

The U.S. Supreme Court reversed the holding of the Oregon appellate court and allowed the post-*Miranda* confession to be used. Id. The *Elstad* court noted that "a finding of voluntariness for the purposes of the Fifth Amendment is a threshold requirement in determining whether the confession may be admitted in evidence." The *Elstad* Court emphasized that "there was no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary." Id. at 318, 105 S.Ct. 1285, 84 L.Ed.2d 222. Instead, "*the relevant inquiry is whether, in fact, the second statement was also voluntarily made*." Id. This is determined by an examination of the surrounding circumstances and the entire course of police conduct. Accordingly, the *Elstad* 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.

In *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, the Ohio Supreme Court found that a defendant's post-*Miranda* confession was inadmissible when he was questioned by a police officer and made pre-*Miranda* admissions. During a routine traffic stop, an officer ordered the defendant out of the vehicle after smelling an odor of marijuana emanating from the defendant's vehicle. The officer conducted a pat-down search of the defendant, but found no drugs.

The officer then ordered the defendant to sit in the front seat of the police cruiser. While they were seated in the cruiser, the officer told the defendant that he had smelled marijuana. Without administering *Miranda* warnings, the officer asked the defendant about the smell. After the defendant provided an explanation, the officer told the defendant that he was going to search the car, and specifically asked whether any drugs or drug devices were in the car. The defendant admitted that there was a marijuana pipe in his trunk. The officer testified that after the defendant made these statements, he immediately administered *Miranda* warnings, but did not tell the defendant that his previous admissions could not be used against him. After he administered *Miranda*, the officer asked the defendant the same questions and obtained the same responses regarding the location of the drug paraphernalia.

Applying the elements discussed in *Seibert*, the Ohio Supreme Court compared Farris's case to the facts of *Seibert* and *Elstad*. The Court held that the interrogation was much closer to *Seibert* than to *Elstad*. Although the whole process was extremely brief, "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Seibert*, at 616–617, 124 S.Ct. 2601, 159 L.Ed.2d 643. Although the

questioning was very simple, not in-depth, and not lengthy, it covered exactly the same subject both before the warning and after the warning. Both of Farris's statements were made in the police cruiser to the same police officer within moments of each other. Temporally and substantively, the officer's questioning of Farris constituted a single interrogation. The officer made no attempt to tailor the *Miranda* warning he eventually gave to the particular situation and did not convey any distinction whatsoever between statements that might come after the warning and those that came before. Thus, the Ohio Supreme Court held that Farris was not in a position to make a *Seibert* informed choice regarding the waiver of his constitutional rights. Importantly, the court held that the intent of the officer doing the questioning is *not relevant* in a *Miranda* analysis. Rather, the suspect's state of mind is the key.

After police arrived at the scene of the shooting, Cook was taken into custody by Officer Stack, handcuffed, and placed in the back of a police cruiser. After she waited in the rear of the cruiser for approximately an hour and a half, Cook was questioned by Detective Smith who did not administer *Miranda* warnings to her. Cook made admissions regarding her role in the shooting. According to Detective Smith, the pre-*Miranda* interview lasted approximately five minutes, after which Cook was transported to the Safety Building. The second interrogation occurred shortly thereafter. Prior to the second interrogation, also conducted by Detective Smith, Cook was informed of her constitutional rights which she subsequently waived. Detective Smith testified that the second interrogation was substantially longer than the first. Specifically, Detective Smith testified that while the second interview covered the same event as the first interview, the second interview "started at the beginning and went through to the end."

The *Seibert* Court identified "a series of relevant factors that bear on whether *Miranda* warnings delivered mid-stream could be effective enough to accomplish their object: [1] the completeness and detail of the questions and answers in the first round of interrogation; [2] the overlapping content of the two statements; [3] the timing and setting of the first and second; [4] the continuity of police personnel; and [5] the degree to which the interrogator's questions treated the second round as continuous with the first." Id. at 615, 124 S.Ct. 2601, 159 L.Ed.2d 643. Accordingly, in such a scenario, the post-*Miranda* warning statements are inadmissible because "the earlier and later statements are realistically seen as parts of a single unwarned sequence of questioning." *State v. Tate*, Mahoning App. No. 07 MA 130, 2008-Ohio-3245, citing *Seibert*, 542 U.S. at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643.

At the suppression hearing, the State bore the burden of establishing that Cook's admissions from the second interview were voluntary, and therefore, admissible. Based on the record before us, the State failed to meet its burden in that regard. Upon review, we conclude that the instant case falls on the *Seibert* side of the *Elstad/Seibert* continuum. The record establishes that although the second interview was temporally longer than the first, both interviews by Detective Smith were thorough and designed to elicit incriminating details regarding Cook's involvement in Bolton's shooting. We recognize that the interrogations were conducted in separate locations, but unlike *Elstad*, Cook was not in the comfort of her living room initially. Rather, Cook had been handcuffed and seated in the rear of a locked cruiser for almost two hours. Homicide detectives had been called to the scene and a search of Cook's residence was conducted. The content elicited in both interviews clearly overlapped. It is also important to note that Detective Smith conducted

both the pre-*Miranda* and post-*Miranda* interviews of Cook. On the record before us, it appears that the post-*Miranda* questioning of Cook was merely a continuation of the pre-*Miranda* interview initiated by Detective Smith at the crime scene. The second post-*Miranda* interview simply memorialized the earlier pre-*Miranda* admissions made by Cook. The record contains no explanation regarding how the prior interview affected any subsequent statements that Cook made after being *Mirandized*. Furthermore, it is apparent from the record that the police failed to inform Cook about how her privilege against self-incrimination applied to her pre-*Miranda* admissions.

We conclude that given the state of this record, Cook was subject to essentially one continuous custodial interrogation conducted by Detective Smith which was tainted by the lack of an initial *Miranda* warning prior to the first interrogation. This is clearly a case of "question first," *Mirandize* later. Accordingly, we find that the trial court erred when it failed to suppress the statements made by Cook during the second half of the interrogation.

Cook's sole assignment of error is sustained.

III

Cook's sole assignment of error having been sustained, the judgment of the trial court is reversed, and this matter is remanded for proceedings consistent with this opinion.

. . . . . .

FROELICH, J., concurs.

HALL, J., dissenting:

Because I am of the opinion that the interrogations in this case are much more like *Oregon v. Elstad* (1985), 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222, than *Missouri v. Seibert* (2004), 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643, I would affirm the trial

court's denial of the defendant's Motion to Suppress statements she made in an interview room at the police station after acknowledging and waiving *Miranda* warnings. The five-minute questioning in the rear of a police car in the vicinity of the scene of the shooting differs greatly in time, place, and circumstance from the interview, more than a half hour later, in a police station office with written *Miranda* warnings. The trial court did not conclude that the post-*Miranda* interview was a continuation of the pre-*Miranda* questioning, nor would I. Therefore, I dissent.

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Hon. Timothy N. O'Connell

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24524
v.	:	T.C. NO. 10CR2375
YVONNE D. COOK	:	**FINAL ENTRY**
Defendant-Appellant	:	
	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 13th day of January, 2012, the judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this court's opinion.

Costs to be paid as stated in App.R. 24.

Mary E. Donovan

MARY E. DONOVAN, Judge

Jeffrey E. Froelich

JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

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