Recent Case Report

U.S. v. Narvaez-Gomez

(9th Cir. 2007) 489 F.3d 970

ISSUE

Did an officer utilize the illegal "two-step" tactic when he questioned the defendant?

FACTS

While detaining the defendant for smoking in a public park in Southern California, officers determined that he was an illegal alien. They notified the U.S. Border Patrol which dispatched an agent to the scene. After arresting the defendant, the agent asked him if he had been deported previously. He said yes.

About four hours later, another agent, accompanied by the arresting agent, interviewed the defendant who waived his *Miranda* rights and, once again, admitted that he had previously been deported. He was subsequently charged with illegal re-entry. At trial, his first admission was suppressed because of the *Miranda* violation, but the second one was admitted. He was convicted.

DISCUSSION

Although the defendant had waived his *Miranda* rights before making the second admission, he contended that it should have been suppressed on grounds that it was obtained by means of the illegal "two-step" procedure. The court disagreed.

It is, of course, settled that a suspect's statement obtained in violation of *Miranda* may not be used to prove his guilt.[1] If, however, officers later obtained a second statement in full compliance with *Miranda*, the second statement may be admissible if the earlier *Miranda* violation was, (1) not coercive in nature, and (2) not a tactical maneuver designed to undermine the *Miranda* protections.[2]

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[1] See *Miranda* v. *Arizona* (1966) 384 U.S. 436, 476-7; *Oregon* v. *Elstad* (1985) 470 U.S. 298, 317.

[2] **NOTE**: Although the second statement may be the "fruit" of the first statement, it will be admissible because the Fourth Amendment's "fruit of the poisonous tree" rule does not apply to uncoercive *Miranda* violations. This is because *Miranda* rights are not constitutional rights—they are court-created rights that *help prevent* constitutional violations. See *Dickerson* v. *United States* (2000) 530 U.S. 428, 437, 440, fn.4, 442 [*Miranda* warnings are not "required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements."]; *United States* v. *Patane* (2004) 542 U.S. 630, 640-1 [by characterizing *Miranda* as "a constitutional rule," the Court in *Dickerson* did not transform *Miranda* violations into a constitutional violations]; *Missouri* v. *Seibert* (2004) 542 U.S. 600, 612, fn.4 ["But the Court in *Elstad* rejected the *Wong Sun* fruits doctrine for analyzing the admissibility of a subsequent warned confession following an initial failure to administer the warnings required by *Miranda*."]; *Michigan* v. *Tucker* (1974) 417

The "two step" is a classic example of a tactical *Miranda* violation. Officers who employed it would deliberately question an arrested suspect without first obtaining a *Miranda* waiver. Then, if he confessed or made a damaging admission, they would seek a wavier and a second admission in which he would essentially repeat the first one. In many, maybe most, cases the suspect would freely waive his rights after making the first admission because he would figure that he had nothing to loose, having already "let the cat out of the bag." And that, of course, was objective of the two-step. And it is why the United States Supreme Court ruled in *Missouri* v. *Seibert* that it is unlawful.[3]

In *Narvaez-Gomez,* the defendant argued that he, like Seibert, was the victim of the two-step. Specifically, he contended that the first agent questioned him in violation of *Miranda* and had gotten him to admit he had been previously deported. Then the second agent came along, obtained a waiver, and got him to admit it again.

As noted, the two-step can occur only if the *Miranda* violation that produced the first admission was committed intentionally. Thus, the question in *Narvaez-Gomez* was whether the failure of the first Border Patrol agent to obtain a waiver was a tactical decision or merely an oversight. In making this determination, the courts will consider the following circumstances:

- **Length of pre-waiver questioning**: Did the defendant make the first admission during a lengthy and comprehensive interview, or a brief and informal one?
- **Interrogation techniques**: In obtaining the first admission, did officers utilize interrogation techniques that are designed to secure an admission; e.g., the "good cop/bad cop routine?"
- **Time lapse**: Was there a significant time lapse between the two admissions?[i]
- **Same officers**: Were the two admissions obtained by the same officer?
- **Utilizing the earlier admission**: In obtaining the second admission, did the officer refer to the suspect's earlier admission or otherwise remind him that he had already let the cat out of the bag?[4]

U.S. 433, 444 ["[The *Miranda* warnings] are not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination is protected."]; *Oregon* v. *Elstad* (1985) 470 U.S. 298, 310 ["The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced"]; *Chavez* v. *Martinez* (2003) 538 U.S. 760, 771] ["[V]iolations of judicially crafted prophylactic rules do not violate the constitutional rights of any person."]; *People* v. *Storm* (2002) 28 Cal.4th 1007, 1033, fn.11 [*Elstad* survived *Dickerson,* thus a *Miranda* violation is not a constitutional violation]; *People* v. *Lujan* (2001) 92 Cal.App.4th 1389, 1409 ["*Dickerson* makes it clear that the fruit of the poisonous tree doctrine does not apply in the *Miranda* context when the subsequent statement follows a proper warning and waiver and is voluntary given the holding in *Elstad*."]; *People* v. *Brewer* (2000) 81 Cal.App.4th 442, 454, fn.8 ["[Per *Dickerson*] the fruit of the poisonous tree doctrine . . . does not apply in cases involving noncoercive violations of *Miranda*"].

[3] See *Missouri* v. *Seibert* (2004) 542 U.S. 600. NOTE: Although *Seibert* was technically a plurality opinion of four justices, a fifth justice, Justice Kennedy, agreed with the result although he would prohibit such a tactic only if it was used in "a calculated way to undermine the *Miranda* warning." See *U.S.* v. *Aguilar* (8th Cir. 2004) 384 F.3d 520, 525.

[4] See *Missouri* v. *Seibert* (2004) 542 U.S. 600, 616 [the questioning was "systematic, exhaustive, and managed with psychological skill," adding that when the police were finished "there was little, if anything, of incriminating potential left unsaid."]; *Missouri* v. *Seibert* (2004) 542 U.S. 600, 622 (conc. opn. of Kennedy, J.) ["a substantial break in time" is relevant]; *Oregon* v. *Elstad* (1985) 470 U.S. 298, 312, 310 ["the time that passes between confessions" and a "change in identity of the

In analyzing these circumstances in *Narvaez-Gomez*, the court noted that the defendant's first admission was in response to a single and brief question; a different agent conducted the second interview, which occurred four hours later at a different location; and that the agent who conducted the second interview did not even mention the defendant's earlier admission. Consequently, the court ruled that the agents had not utilized the two-step procedure, and that the defendant's second admission was properly admitted into evidence.

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[i] **USSC**: *Missouri* v. *Seibert* (2004) 542 U.S. 600, 622 (conc. opn. of Kennedy, J.) ["a substantial break in time" is relevant]; *Oregon* v. *Elstad* (1985) 470 U.S. 298, 312, 310 ["the time that passes between confessions" is relevant]. **9th CIR**: *U.S.* v. *Narvaez-Gomez* (9th Cir. 2007) __ F.3d __ [2007 WL 1614778] [four-hour delay]. **OTHER FED**: *U.S.* v. *Carrizales-Toledo* (10th Cir. 2006) 454 F.3d 1142, 1152.

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interrogators" are relevant]; *People* v. *San Nicolas* (2005) 34 Cal.4th 614, 639 ["[D]efendant answered a few questions posed by the Nevada police officer concerning the location of his car and his duffel bag. Defendant did not speak about the crime itself."]; *U.S.* v. *Williams* (9th Cir. 2006) 435 F.3d 1148, 1159 [relevant circumstances include "the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements."]; *U.S.* v. *Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 ["[T]he method and timing of the two interrogations establish intentional, calculated conduct by the police"; the unwarned interrogation "lasted approximately ninety minutes" and "included some good cop/bad cop questioning tactics"]; *U.S.* v. *Mashburn* (4th Cir. 2005) 406 F.3d 303 [there was "no evidence that the agents' failure to convey *Miranda* warnings to Mashburn was deliberate or intentional."]; *U.S.* v. *Carrizales-Toledo* (10th Cir. 2006) 454 F.3d 1142, 1151-2 [courts consider "the completeness and detail of the questions and answers in the first round of interrogation" and the extent of "the overlapping content of the two statements"].