

7-5-2016

State v. Wass Appellant's Brief Dckt. 43844

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"State v. Wass Appellant's Brief Dckt. 43844" (2016). *Idaho Supreme Court Records & Briefs, All*. 6328.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6328

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 43844 & 43845
Plaintiff-Respondent,)	
)	CANYON COUNTY NOS.
v.)	CR 2015-15219 & CR 2015-15271
)	
SHAWN WILLIAM WASS,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

HONORABLE CHRISTOPHER S. NYE
District Judge

ERIC D. FREDERICKSEN
Interim State Appellate Public Defender
State of Idaho
I.S.B. #6555

ANDREA W. REYNOLDS
Deputy State Appellate Public Defender
I.S.B. #9525
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	6
ARGUMENT	7
The District Court Erred When It Denied Mr. Wass' Motion To Suppress	7
A. Introduction	7
B. Standard Of Review	7
C. The <i>Miranda</i> Warnings Given By Deputy Drake Did Not Effectively Advise Mr. Wass Of His Fifth Amendment Privilege Against Self-Incrimination	8
CONCLUSION	11
CERTIFICATE OF MAILING	12

TABLE OF AUTHORITIES

Cases

<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	1, 8
<i>Missouri v. Seibert</i> , 542 U.S. 600 (2004).....	8, 9, 10
<i>Oregon v. Elstad</i> , 470 U.S. 298 (1985)	8, 9
<i>State v. Aguirre</i> , 141 Idaho 560 (Ct. App. 2005)	7
<i>State v. Henson</i> , 138 Idaho 791 (2003).....	8
<i>State v. Purdum</i> , 147 Idaho 206 (2009)	7
<i>United States v. Ray</i> , 803 F.3d 244 (6th Cir. 2015).....	10

STATEMENT OF THE CASE

Nature of the Case

Shawn William Wass appeals from his conviction for felony possession of a controlled substance, challenging the district court's denial of his motion to suppress. He contends the district court erred when it denied his motion to suppress the statements he made to a police officer after he was initially questioned by the officer without being advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). He contends the officer's *Miranda* warnings did not effectively advise him of his Fifth Amendment privilege against self-incrimination because the warnings were given just two minutes after his non-*Mirandized* statements, by the same officer, in the same location, and a reasonable person in his position would not have understood the warnings to convey a message that he retained a choice about answering the officer's questions.

Statement of Facts and Course of Proceedings

At approximately 12:30 a.m. on August 9, 2015, Canyon County Sheriff's Deputy Dan Drake was patrolling in a location where a public road dead-ends into a river, which is an area open during daylight hours only. (10/22/15 Tr., p.5, L.21 – p.6, L.7.) Deputy Drake observed a purple vehicle parked in the parking area. (10/22/15 Tr., p.7, Ls.2-8.) There was a man standing behind the vehicle and a woman sitting in the passenger seat. (10/22/15 Tr., p.7, Ls.2-8.) Deputy Drake put on his spotlights and approached the man, who identified himself as Shawn Wass. (10/22/15 Tr., p.7, L.16 – p.8, L.6.) Mr. Wass stated he had driven to the area and did not have a driver's license. (10/22/15 Tr., p.7, L.15 – p.8, L.15; p.17, Ls.10-12.) Deputy Drake smelled alcohol on

Mr. Wass' breath and Mr. Wass admitted he had been drinking. (10/22/15 Tr., p.9, Ls.4-6; p.25, Ls.24-25.) Deputy Drake learned from dispatch that Mr. Wass' license had been suspended and that there were two outstanding warrants for his arrest. (10/22/15 Tr., p.10, Ls.5-17.) Deputy Drake asked Mr. Wass to empty his pockets and Mr. Wass did so, stating he had a wallet with identification, and had lied about not having identification earlier. (10/22/15 Tr., p.10, L.18 – p.11, L.4.) Deputy Drake asked Mr. Wass to perform a field sobriety test, which Mr. Wass did successfully. (10/22/15 Tr., p.11, Ls.5-11.) Deputy Drake placed Mr. Wass under arrest pursuant to the outstanding warrants and walked him to his police car. (10/22/15 Tr., p.11, Ls.12-14.)

As Deputy Drake was walking Mr. Wass to his police car, he asked Mr. Wass if there was anything illegal in his vehicle and Mr. Wass answered, "Yes, there are syringes." (10/22/15 Tr., p.11, Ls.18-21.) Deputy Drake realized he had made a mistake in questioning Mr. Wass without providing the *Miranda* warnings. He was asked at the suppression hearing, "Now, right after [Mr. Wass] responds with that answer, what are you thinking to yourself?" (10/22/15 Tr., p.11, L.25 – p.12, L.1.) He answered, "I was thinking that I made a mistake and that I should stop asking questions." (10/22/15 Tr., p.12, Ls.2-8.)

Deputy Drake then placed Mr. Wass in his police car, and "looked through the windows of the vehicle to see if there was anything illegal in plain view and there was not." (10/22/15 Tr., p.12, Ls.12-19.) Approximately two minutes after Deputy Drake placed Mr. Wass in his police car, he returned to his police car, opened the door, and said, "Well, I need to read you your Miranda warning." (10/22/15 Tr., p.12, L.23 – p.13,

L.5.) Deputy Drake then read Mr. Wass the following *Miranda* warnings from a card he had with him:

You have the right to remain silent. Anything you say may be used against you in a court of law. You have the right to talk to a lawyer and have them present while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to you—appointed to represent you before questioning. Do you understand these rights as I've explained them to you?

(10/22/15 Tr., p.12, L.23 – p.13, L.5; p.15, L.19 – p.16, L.7.) Mr. Wass stated he understood his rights. (10/22/15 Tr., p.13, Ls.9-13.) Deputy Drake asked Mr. Wass again whether there was anything illegal in his vehicle and Mr. Wass told Deputy Drake for a second time that there were syringes in the back. (10/22/15 Tr., p.14, Ls.1-5.) Deputy Drake searched the vehicle and located syringes and an “aluminum foil bundle that contained a green leafy substance.” (10/22/15 Tr., p.15, Ls.4-11; R., p.57.)

Mr. Wass was charged by Information in CR-2015-15271 with felony possession of a controlled substance. (R., pp.25, 29-30.) He was charged in CR-2015-15219 with misdemeanor possession of a controlled substance and misdemeanor possession of drug paraphernalia. (R., pp.12, 13.) The two cases were consolidated in the district court. (R., pp.22, 23.)

Mr. Wass filed a motion to suppress. (R., pp.42-51.) The State filed a memorandum opposing Mr. Wass' motion. (R., pp.59-67.) The district court held a hearing, at which Deputy Drake testified. (R., pp.68-70.) The district court denied Mr. Wass' motion, and announced its findings of fact and conclusions of law on the record. (10/22/15 Tr., p.27, Ls.11-12.) The district court framed the issue as “whether the drug evidence must be suppressed . . . because of the first unwarned statements

about the syringes or . . . does the Miranda warnings given a few minutes later cure that problem.”¹ (10/22/15 Tr., p.26, Ls.13-17.) The district concluded:

And I find that it does cure the problem and I’m going to deny the suppression. I find that the officer did not tactically induce a confession prior to Miranda warnings—or coerce a confession or use improper tactics to obtain the confession prior to Miranda warnings. And the second Miranda warnings do[] cure the failure to administer it the first time. It’s not a coercion where the actual circumstances are [not] calculated to undermine the suspect’s ability to exercise his free will.

(10/22/15 Tr., p.26, L.18 – p.27, L.2.) The district court further concluded that Mr. Wass’ post-*Miranda* statements about the syringes provided Deputy Drake with reasonable suspicion to search the vehicle pursuant to the automobile exception to the warrant requirement. (10/22/15 Tr., p.27, Ls.3-7.)

Following the suppression hearing, the parties entered into a plea agreement pursuant to which Mr. Wass pled guilty to felony possession of a controlled substance and the State dismissed the misdemeanor charges and recommended a rider. (R., pp.75-76, 96-97; 10/27/15 Tr., p.3.) Mr. Wass reserved his right to appeal from the denial of his motion to suppress. (10/27/15 Tr., pp.3-4.)

The district court accepted Mr. Wass’ guilty plea and sentenced him to a unified term of seven years, with three years fixed. (10/27/15 Tr., p.9; 12/22/15 Tr., p.7; R., p.94.) The district court suspended the sentence and placed Mr. Wass on probation for a period of five years. (R., p.94.) The judgment was entered on December 22, 2015, and Mr. Wass filed a timely notice of appeal on December 23, 2015. (R., pp.99-

¹ At the suppression hearing, counsel for Mr. Wass also argued that the *Miranda* warnings given by Deputy Drake were insufficient as a matter of law because he did not advise Mr. Wass that he could stop answering questions at any time. (10/22/15 Tr., p.16, Ls.8-15; p.22, Ls.7-16.)

102, 104-05.) The notice of appeal referenced both case numbers, CR-2015-15271 and CR-2015-15219. (R., p.104) This Court issued an order on January 15, 2016, consolidating the two appeals. (R., p.125). Mr. Wass does not raise an issue with respect to CR-2015-15219, which was assigned Case No. 43844. (R., pp.12, 95.)

ISSUE

Did the district court err when it denied Mr. Wass' motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Wass' Motion To Suppress

A. Introduction

The district court denied Mr. Wass' motion to suppress because it concluded that even though Deputy Drake initially questioned Mr. Wass without advising him of his *Miranda* rights, the fact that Mr. Wass responded to the same questioning after being advised of his rights cured any error. Mr. Wass contends the officer's *Miranda* warnings did not effectively advise him of his Fifth Amendment right to remain silent because the warnings were given just two minutes after his non-*Mirandized* statements, by the same officer, in the same location, and a reasonable person in his position would not have understood the warnings to convey a message that he retained a choice about answering the officer's questions.

B. Standard Of Review

"In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated." *State v. Purdum*, 147 Idaho 206, 207 (2009) (citation omitted). "This Court will accept the trial court's findings of fact unless they are clearly erroneous. However, this Court may freely review the trial court's application of constitutional principles in light of the facts found." *Id.* (citations omitted). "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005) (citations omitted).

C. The *Miranda* Warnings Given By Deputy Drake Did Not Effectively Advise Mr. Wass Of His Fifth Amendment Privilege Against Self-Incrimination

In *Miranda v. Arizona*, the United States Supreme Court held that a person must be informed of his Fifth Amendment privilege against self-incrimination prior to custodial interrogation; otherwise, any incriminating statements made are inadmissible. 384 U.S. at 444-45; see *State v. Henson*, 138 Idaho 791, 795 (2003) (citation omitted) (discussing *Miranda*). A person is in custody when he is subjected to a restraint on his liberty in any degree similar to a formal arrest. *Henson*, 138 Idaho at 795 (citations omitted). A person is interrogated whenever subjected to express questioning or its functional equivalent. *Id.* (citation omitted).

In the present case, it is undisputed that Mr. Wass was subjected to a custodial interrogation by Deputy Drake without being given his *Miranda* warnings. Deputy Drake placed Mr. Wass under arrest pursuant to two outstanding warrants, then asked him whether there was anything illegal in his vehicle. (10/22/15 Tr., p.11, Ls.12-14, 18-21.) Mr. Wass told Deputy Drake there were syringes in his vehicle. (10/22/15 Tr., p.11, Ls.20-21.) The question presented here is whether this obvious *Miranda* violation was “cured” when Deputy Drake advised Mr. Wass of his *Miranda* rights two minutes later, and asked Mr. Wass again whether there was anything illegal in his vehicle. (10/22/15 Tr., p.12, L.23 – p.13, L.5; p.14, Ls.1-5.) The answer can be found by examining two cases from the United States Supreme Court, *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality opinion).

In *Elstad*, a burglary suspect made an initial incriminating statement in his home, without being advised of his *Miranda* rights, then later made a full confession at the police station, after receiving *Miranda* warnings and waiving his rights. 470 U.S. at 300-

01. The *Elstad* Court held the second statement was admissible and voluntary, noting “[i]t 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 informed waiver is ineffective for some indeterminate period.” *Id.* at 309.

In *Seibert*, the United States Supreme Court addressed the two-step interrogation technique of giving *Miranda* warnings only after an interrogation has produced a confession, and then questioning the suspect so as to “cover the same ground a second time.” 542 U.S. at 604. A plurality of the Court distinguished the case from *Elstad*, and concluded that “when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.” *Id.* at 613-14 (quotation marks, alterations and citation omitted). Under the multi-factor test set forth by the *Seibert* plurality, the admissibility of statements given after midstream *Miranda* warnings hinges on whether “a reasonable person in the suspect’s shoes could have seen the [second round of] questioning as a new and distinct experience, [and whether] the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.” *Id.* at 616. The factors identified as relevant to this inquiry are “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 [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."² *Id.*

Turning to the present case, a reasonable person in Mr. Wass' position would not have seen Deputy Drake's second round of questioning as a separate and distinct experience from the first, and would not have believed he had a genuine choice regarding whether to remain silent. Mr. Wass' second statement was the same as the first, and was given in the same location, within a matter of minutes, to the same police officer. He surely perceived the questioning as continuous. Upon hearing the standard *Miranda* warnings given by Deputy Drake, Mr. Wass would hardly think he had a genuine right to remain silent, let alone persist in so believing once Deputy Drake asked him the very same question he had asked before. *See Seibert*, 542 U.S. at 613. It is more likely that Mr. Wass was perplexed about the reason for discussing rights when Deputy Drake did not expressly inform him that the statement he had previously given—a mere two minutes earlier—could not be used against him. *See id.*

The *Miranda* warnings given to Mr. Wass by Deputy Drake, inserted in the midst of what was effectively a single interrogation, did not effectively advise Mr. Wass of his Fifth Amendment right to remain silent. Deputy Drake testified at the suppression hearing that the syringes were not located in plain view in Mr. Wass' vehicle. (10/22/15 Tr., p.12, Ls.12-19.) Absent Mr. Wass' first pre-*Miranda* statement, and his second,

² Following *Seibert*, a circuit split has developed regarding whether all two-step interrogations are eligible for a *Seibert* inquiry (per the plurality opinion), or whether the inquiry only applies to those cases involving deliberate use of the two-step procedure (per Justice Kennedy's concurrence). *See United States v. Ray*, 803 F.3d 244, 272-73 (6th Cir. 2015) (discussing circuit split, adopting multi-factor test announced by the plurality and rejecting Justice Kennedy's subjective intent-based test). Idaho has not yet decided this issue.

post-ineffective *Miranda* statement, Deputy Drake lacked reasonable suspicion or probable cause for a drug investigation. Both of Mr. Wass' statements should have been suppressed under *Miranda* and *Siebert*.

CONCLUSION

Mr. Wass respectfully requests that this Court vacate his conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings.

DATED this 5th day of July, 2016.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of July, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

SHAWN WILLIAM WASS
C/O LIGHTHOUSE RESCUE MISSION
304 16TH AVEUNE NORTH
NAMPA ID 83687

CHRISTOPHER S NYE
DISTRICT COURT JUDGE
E-MAILED BRIEF

DAVID J SMETHERS
CANYON COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas