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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. KAYLEN CHANDLER, Defendant and Appellant.	B279421 (Los Angeles County Super. Ct. No. MA067873)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Cynthia Grimm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Nicholas J. Webster, Deputy Attorney General, for Plaintiff and Respondent.

In convicting defendant and appellant Kaylen Chandler (defendant) for transporting methamphetamine and possessing methamphetamine for sale, the jury heard evidence defendant told a Los Angeles County Sheriff's Department deputy she possessed the drugs and planned to sell them. At an earlier pre-trial hearing, the trial court refused to exclude testimony about her admissions to the deputy based on the defense contention that "the court should have uncertainty about whether the [*Miranda*[1]] admonition was properly given and at the proper time . . . ." We consider whether defendant's convictions must be reversed because, as defendant now asserts, (1) the deputy's *Miranda* advisement failed to inform her she had a right to an attorney before any questioning, and (2) the deputy deliberately elicited incriminating statements in a two-step interrogation prohibited by *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*).

I. BACKGROUND

A. The Suppression Hearing

The day before trial began, the court conferred with the attorneys for the People and defendant. Defense counsel "raised a *Miranda* issue and requested a 402 [i.e., an evidentiary hearing], on the issue of *Miranda*, any statements that may have been made [by defendant] . . . ." The court scheduled the evidentiary hearing to take place the morning of trial.

The law enforcement officer who arrested defendant, Los Angeles County Sheriff's Department Deputy Estevan Perez, was

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

the only witness.[2] He testified he had been a deputy sheriff for over seven-and-a-half years and encountered defendant when he effected a traffic stop of her vehicle in January 2016.

During that traffic stop, Deputy Perez detained defendant and advised her of her *Miranda* rights. Deputy Perez testified he did so "pursuant to [his] SHAD 477 card," explaining he read the rights advisement "verbatim off the card" as per his "common practice." The trial court interjected and told the prosecutor the court "need[ed] the 477 read" because "[t]hat's the whole issue as to what rights she was advised of." The prosecutor asked Deputy Perez if he had the SHAD 477 card with him, and when the deputy replied he did not, the prosecutor asked him to describe the rights advisement on the card. Deputy Perez answered, "It reads as follows: 'You have the right to remain silent. Do you understand? You have the right to an attorney. If you cannot afford one, one will be appointed to you. Anything you say can or may be used in court. That being said, would you like to talk about what occurred?'"

Deputy Perez testified defendant "waive[d] *Miranda*" and spoke to him after he read the rights of the SHAD 477 card. She told him she had methamphetamine inside her vehicle and she initially claimed the drugs were for personal use. Later in her conversation with Deputy Perez, however, defendant admitted she was going to sell the methamphetamine for profit.

During his suppression hearing testimony, Deputy Perez was unable to recall certain details of his interaction with

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[2] Deputy Perez arrived an hour late for the suppression hearing. The prosecutor explained the deputy had worked a double shift the night before.

defendant—at least absent the ability to refresh his memory with his report of the incident. Deputy Perez knew defendant was in handcuffs at some point but did not recall "exactly when the handcuffs came on." He did not independently recall (meaning, without having his recollection refreshed with his report) the specifics of what defendant said after he read the *Miranda* advisement to her off the SHAD 477 card. He also did not recall whether he drew his weapon during the encounter with defendant. When asked on cross-examination whether defendant made the statement about having methamphetamine after she had been Mirandized, Deputy Perez replied he would have to refer to his report to refresh his recollection (but he was not asked to do so). Deputy Perez did testify, without reference to his report, that defendant was definitely in the back of his patrol car when he Mirandized her.

In arguing for suppression after Deputy Perez completed his testimony, defense counsel emphasized the deputy "had difficulty recalling the chronology of when certain things happened" and asserted "the court should have uncertainty about whether the admonition was properly given and at the proper time . . . ." The prosecution argued Deputy Perez was consistent in testifying both that he read defendant her *Miranda* rights via the SHAD 477 card and that defendant made the incriminating admissions after she was Mirandized.

The trial court invited defense counsel to raise any other asserted defects in the *Miranda* advisement "other than the issue of lack of recall as to certain aspects of the sequence of events." The court explained it believed there did "not appear to be any lack of recall regarding the reading of [the] SHAD 477 card, which I think we all know is the—the sheriff's-issued mechanism

or card for purposes of addressing *Miranda*. The deputy testified he read those rights, and summarized those rights today." Defense counsel then complained of a prolonged detention of his client (which the trial court dismissed as a separate issue not presented when objecting on *Miranda* grounds), but counsel did not otherwise identify any other specific problems with the *Miranda* advisement.

The trial court denied the defense motion to suppress. The court found "*Miranda* was properly given, it was sufficient, . . . and . . . defendant, by making her statement, voluntarily waived and gave up her rights . . . ." The court elaborated on the reasons for its ruling: "[L]ooking at the totality of circumstances, the nature of the admonition, the deputy testified clearly that he read off the SHAD 477 card, which includes the advisement of the right to remain silent, and that anything that may be said could be used against the individual, and that they have a right to a[n] attorney during questioning, and if they cannot afford an attorney, one can be appointed for them. The Deputy summarized those today, indicated that he, as I said, read off the SHAD 477 card directly, and that it would appear the defendant was either detained or in custody at the time. So, obviously, *Miranda* would have been necessary for any statement. She was then interrogated, and made certain statements about that."

B. Trial

Deputy Perez was the only witness to testify at trial.[3] Toward the beginning of his testimony, the prosecutor asked Deputy Perez whether he reviewed his incident report prior to testifying and Deputy Perez stated that "as [he] just came in from the hallway is when I thoroughly went through the report." The deputy explained he had not reviewed the report before his "opportunity to speak with the judge and [the prosecutor] and [defense] counsel earlier this morning [i.e., the suppression hearing]." The salient aspects of Deputy Perez's testimony on direct and cross-examination are as follows.

1. Direct examination

Deputy Perez encountered defendant when he was pulling his patrol car into the parking lot of the Sands Motel. She was driving alone in the opposite direction and Deputy Perez noticed a large crack in the windshield of her car. He activated his "red take-down lights" to effect a traffic stop.

Deputy Perez exited his car, and as he approached defendant's car, he observed her "shuffling and moving around within the floorboard of the driver's seat." He ordered defendant to keep her hands where he could see them, but she did not comply and continued shuffling. Deputy Perez drew his gun and pointed it at defendant because he feared she might be arming herself. That prompted defendant to comply with his command

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[3] The parties stipulated that if called to testify, a criminalist would testify that the substance recovered from defendant's car was methamphetamine and that it weighed approximately one ounce. The defense did not call any witnesses.

to show her hands, and Deputy Perez re-holstered his gun, approached the driver's side window of defendant's car, and asked defendant what she was doing. Defendant responded she was looking for her registration, or something to that effect.

While Deputy Perez was speaking to defendant, he saw an orange pill bottle in plain view on the front seat of the car. The pill bottle, which Deputy Perez knew from his training and experience was used by drug dealers or users to carry narcotics, contained "some type of crystalline residue." At that point, Deputy Perez detained defendant by ordering her out of her car and walking her to the rear of his patrol car where he placed her inside. Deputy Perez still did not recall whether defendant was in handcuffs at that point, but he did acknowledge he placed her in handcuffs at some point.

When asked by the prosecutor whether he spoke to defendant once she was inside the patrol car, Deputy Perez agreed he did. The prosecutor then asked, "Prior to speaking with her, did you Mirandize her?" Deputy Perez answered, "Yes, I did," explaining he read defendant her rights off a *Miranda* advisement card he carried in his police uniform. The prosecutor then asked, "[A]fter you Mirandized her, did she tell you that there was methamphetamine on the floorboard of the car?" Deputy Perez responded, "She told me there was meth inside the car, yes."

According to Deputy Perez, defendant told him she had approximately one ounce of methamphetamine inside the car and she initially claimed it was for personal use. Deputy Perez was incredulous and told defendant that an ounce of methamphetamine would be over one thousand doses of the drug (which the deputy knew from his training and experience—.02

grams of methamphetamine being a usable quantity of the drug). Defendant then "said something to the effect of she did possess it, and she was going to sell it to gain some profit off of it."

When Deputy Perez spoke with defendant, she did not appear to be under the influence of any controlled substance. In a search of defendant's car, Deputy Perez found three cell phones (he took pictures of the phones but did not book them into evidence). Deputy Perez did not find any of several common means for ingesting methamphetamine (e.g., a syringe or a pipe) in defendant's car.

Deputy Perez was asked, based on his training and experience, to offer an opinion on whether defendant possessed the ounce of methamphetamine for sale. In his opinion, she did. In forming that opinion, Deputy Perez relied on (1) the relatively large quantity of methamphetamine recovered (over 28 grams), which would take even a heavy user almost a month to consume; (2) defendant's appearance, which was not consistent with being a heavy methamphetamine user; (3) defendant's admission to possessing the methamphetamine for purposes of selling it to gain some profit; and (4) the absence, in defendant's car, of common means of ingesting methamphetamine.

2. Cross-examination

The defense's examination of Deputy Perez focused on eliciting testimony that could be used to undermine his opinion that defendant possessed and transported the methamphetamine with intent to sell it. Defense questioning, for instance, established Deputy Perez did not find baggies, a scale, or certain other accoutrements of drug dealing when searching defendant and her vehicle. More pertinent for our purposes, the defense

cross-examination of Deputy Perez also touched on where (and, to a certain extent, when) he advised defendant of her *Miranda* rights, and the deputy's answers varied to a degree from his suppression hearing testimony.

Defendant's attorney revisited the chronology of events and initially secured Deputy Perez's agreement that he approached defendant's vehicle, there was some conversation between the two, Deputy Perez ordered her out of her vehicle, Deputy Perez placed defendant in the back of his patrol car, and Deputy Perez then spoke to defendant and "that's when she . . . said she was going to generate a profit off [the methamphetamine]."[4] Then defense counsel asked a series of questions concerning the *Miranda* advisement:

> Q [Y]ou asked her what was inside that orange pill bottle, correct?
>
> A Correct.
>
> Q At that time, she spontaneously stated, 'I have meth,' right?
>
> A Yes.
>
> Q At that point, you ordered her out of the vehicle, and you gave her her *Miranda* rights, pursuant to SHAD 477, correct?
>
> A At some point, yes.
>
> Q Well, based on your report—and, as you said, you do write it in the order that the events

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[4] Deputy Perez testified he spoke to defendant through the window of his patrol car and also "at some point" while he was in the driver's seat of his car.

unfold, that is what's reflected in your report. Do you agree?

A Yes.

Q Okay. And after giving of the SHAD 477, she agreed to speak to you, without an attorney, correct?

A Correct.

Following this exchange, Deputy Perez testified defendant thereafter told him she had an ounce of methamphetamine in a cigarette box, she initially claimed the drugs were for personal use, and she later admitted she was going to try to make a profit by selling the drugs. Defense counsel then confronted Deputy Perez with his incident report, which indicated he placed defendant in his patrol vehicle only after "all the things we just went over, about the methamphetamine, the cigarette box, the profit . . . ." Deputy Perez agreed this suggested he "had this conversation with her outside of the patrol vehicle, and once that conversation was over, [he] placed her in the back seat of [his] patrol vehicle." The following exchange between Deputy Perez and counsel then ensued:

Q Now, in relation to what you told us a few minutes ago, that you had that conversation with her while she was seated in the patrol vehicle, are you saying that that is accurate or is that not accurate?

A No, I'm not saying it's not accurate.

What I'm saying is: I had a lengthy conversation with [defendant] while she was outside of my patrol vehicle, while she was in the back seat of my patrol vehicle, while I was standing outside of my patrol vehicle talking to her, and, as well, when—

while I was sitting in the front seat of my patrol vehicle and she was in the back seat of my patrol vehicle.

What I write is just a summary of the—of the events that take place. That's what I'm saying.

Q Okay. But do you agree, though, that at least in terms of the report you took in connection with this matter, you indicated that you placed [defendant] in the back seat of your patrol vehicle after you'd had the conversation with her about the methamphetamine, the amount of it[,] and trying to turn a profit on it? [¶] . . . [¶]

A Yes.

II. DISCUSSION

Miranda and its progeny provide no basis for reversing defendant's conviction. Although Deputy Perez omitted three significant words—the right to an appointed attorney *before any questioning*—when he described the SHAD 477 card from memory during the suppression hearing, he testified he read defendant her rights verbatim off that card as per his common practice. That testimony, i.e., that he read the rights off the card verbatim, is substantial evidence supporting the trial court's finding that Deputy Perez gave defendant an adequate *Miranda* warning. Accepting defendant's argument to the contrary would have us unreasonably hold a card generated for deputies to use in complying with *Miranda* actually fails to comply with *Miranda*'s requirements.

Defendant's alternative asserted basis for reversal, that Deputy Perez deliberately engaged in a two-step interrogation to

evade *Miranda*'s requirements, is both forfeited and meritless in any event. Defendant did not raise a *Seibert* issue in the trial court, which leaves us with an undeveloped record and warrants application of the forfeiture doctrine. Defendant maintains the forfeiture constitutes ineffective assistance of counsel, but even on the record as it stands (i.e., without the clarification Deputy Perez could have provided if the issue had been properly raised), we see no basis to conclude Deputy Perez deliberately obtained incriminating statements without a *Miranda* warning only to turn around minutes later and have defendant repeat her admissions post-*Miranda*. At most, the record establishes Deputy Perez testified inconsistently about *where* the *Miranda* advisement occurred, but there is no material inconsistency regarding *when* it occurred, i.e., before defendant's key admission that she possessed the methamphetamine to sell it for profit.

A. Miranda *and the Standard of Review*

"The Fifth Amendment provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' (U.S. Const., 5th Amend.; see *Malloy v. Hogan,* 378 U.S. 1, 6[ ].) To safeguard a suspect's Fifth Amendment privilege against self-incrimination from the 'inherently compelling pressures' of custodial interrogation (*Miranda, supra,* 384 U.S. at p. 467), the high court adopted a set of prophylactic measures requiring law enforcement officers to advise an accused of his right to remain silent and to have counsel present prior to any custodial interrogation (*id.* at pp. 444-445). . . . '[T]he prosecution bears the burden of establishing by a preponderance of the evidence that [a *Miranda*] waiver was knowing, intelligent, and voluntary under the totality of the circumstances of the

interrogation.' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 338-339.) "A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in a criminal case." (*Id.* at p. 339.)

Defendant's appellate briefs rely on Deputy Perez's suppression hearing testimony and his later testimony at trial to argue the trial court erred in denying his suppression motion. But that is not the manner in which our review must proceed. Instead, when reviewing a trial court's denial of a suppression motion, we consider only the testimony that was before the trial court when it ruled, i.e., Deputy Perez's testimony during the pre-trial suppression hearing. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77, fn. 18 ["[S]ubsequent to the *suppression hearing* (the ensuing ruling of which we review here), Arturo testified at the *jurisdictional hearing* that he in fact gave the registration document to the officer. This testimony was not before the trial court at the time of the suppression hearing, and it is irrelevant to our inquiry now; in reviewing the trial court's suppression ruling, we consider only the evidence that was presented to the trial court at the time it ruled"]; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1007, fn. 23.) """"[W]e accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged

statement was illegally obtained.""""[5] (*People v. Duff* (2014) 58 Cal.4th 527, 551.)

B. Substantial Evidence Supports the Trial Court's Finding That the Miranda *Advisement Was Adequate*

Although the *Miranda* objection defendant raised in the trial court was not as precise as it should have been, it did suffice to alert the trial court of the need to consider the adequacy of the specific advisement defendant received. Under the circumstances, we address defendant's challenge to the manner in which she was advised of her right to counsel on the merits, without holding it was forfeited. (*People v. Clark* (2011) 52 Cal.4th 856, 966 [citing *People v. Scott* (1978) 21 Cal.3d 284 for the proposition that "'[i]n a criminal case, [an] objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented'"]; *People v. Dell* (1991) 232 Cal.App.3d 248, 254, fn. 1 ["Even if the objection was phrased improperly, we deem it sufficient to reach the merits of the issue . . ."].)

"*Miranda* prescribed the following four now-familiar warnings: [¶] '[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' [*Miranda*, *supra,* 384 U.S. at

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[5] An asserted violation of *Seibert*, *supra*, 542 U.S. 600, is also reviewed on appeal for substantial evidence. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1372 (*Camino*).)

p. 479.]" (*Florida v. Powell* (2010) 559 U.S. 50, 59-60; accord *People v. Kelly* (1990) 51 Cal.3d 931, 948-949 [a defendant must be informed of the right to consult with an attorney before being questioned].)

The trial court found Deputy Perez's *Miranda* advisement "was sufficient," and substantial evidence supports that determination as to the only element of the advisement defendant challenges, namely, the requirement to advise a suspect he has a right to an appointed attorney before any questioning. Granted, Deputy Perez's recitation of the SHAD 477 card from memory during the preliminary hearing included only a statement about the right to an appointed attorney, not an appointed attorney before any questioning. But Deputy Perez testified he read defendant her rights verbatim off the SHAD 477 card, and the trial court credited that testimony. We see no reason to countermand the trial court's assessment, and Deputy Perez's testimony that he read defendant her rights verbatim off the card is enough to sustain the trial court's finding that the *Miranda* advisement was adequate. After all, using a *Miranda* advice of rights card (as opposed to reciting *Miranda* rights from memory) is designed to ensure an advisement is precise and correct, and defendant's argument (once we accept the *Miranda* advisement was read verbatim off the SHAD 477 card) would require us to hold deputies using the SHAD 477 card routinely misadvise defendants of their constitutional rights. Such a holding would be unreasonable, and we instead uphold the

factual finding that defendant was "properly given" an advisement of her *Miranda* rights.[6]

C. Defendant's Seibert *Claim Is Forfeited and Lacks Merit Regardless*

After the suppression hearing, defendant's attorney made no further *Miranda*-based objection during trial to the admission of defendant's statement that she planned to sell the methamphetamine. Defendant now contends, however, that Deputy Perez's trial testimony indicates he deliberately interrogated defendant twice—first without a *Miranda* warning and then a second time after a *Miranda* warning "once the 'cat [wa]s out of the bag'" (*Oregon v. Elstad* (1985) 470 U.S. 298, 304 (*Elstad*)). Defendant asserts this two-step procedure was unconstitutional under *Seibert*, *supra*, 542 U.S. 600.

Defendant concedes her trial attorney did not "renew" his suppression motion during trial on *Seibert* grounds. Without such a renewal or contemporaneous objection, Deputy Perez was never asked questions to clarify whether there were two separate interrogations, much less questions designed to ferret out whether the deputy was "'following a policy of disregarding the teaching of *Miranda*.'" (*People v. Scott* (2011) 52 Cal.4th 452, 478 [quoting *People v. Williams* (2010) 49 Cal.4th 405, 448].) The

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[6] Were we to consider Deputy Perez's testimony at trial, not just his testimony at the suppression hearing, it would only serve to further undermine defendant's argument that the *Miranda* warning was inadequate. At trial, Deputy Perez was asked if, "after giving of the SHAD 477, [defendant] agreed to speak to you, without an attorney" and Deputy Perez answered in the affirmative.

Seibert claim is therefore forfeited. (Evid. Code, § 353, subd. (a); *People v. Linton* (2013) 56 Cal.4th 1146, 1170; see also *People v. Partida* (2005) 37 Cal.4th 428, 434 [requiring a contemporaneous objection is necessary in criminal cases because a "'contrary rule would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal"'"].)

Defendant argues, however, that if the *Seibert* issue is forfeited, his trial attorney was constitutionally ineffective in failing to raise it below. Reversal is not warranted on ineffective assistance grounds either.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694[ ]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217[ ].)'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) We presume "'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.' [Citations.]" (*Ibid.*) If the appellate record "'sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.' [Citation.]" (*Ibid.*) "If it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington*, *supra*, at p. 697.) Here, both prongs of the *Strickland v. Washington* test effectively merge because "[f]ailure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90.)

"In *Elstad*, *supra*, 470 U.S. 298[ ] and *Seibert*, *supra*, 542 U.S. 600[ ], the United States Supreme Court discussed the admissibility of a defendant's inculpatory statements made before and after advisement of *Miranda* rights.

"*Elstad* held that a suspect who responds 'to unwarned yet uncoercive questioning' may later waive his rights and confess after being 'given the requisite *Miranda* warnings.' (*Elstad*, *supra*, 470 U.S. at p. 318[ ].) If the suspect's unwarned statement was voluntary, the 'relevant inquiry is whether, in fact, the second statement was also voluntarily made.' (*Ibid.*) 'As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.' (*Ibid.*) *Elstad* did not, however, 'condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him.' (*Id.* at p. 317[ ].)

"In *Seibert*, an officer 'testified that he made a "conscious decision" to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "until I get the

answer that she's already provided once.'" (*Seibert*, *supra*, 542 U.S. at pp. 605-06[ ].) Employing this 'question-first practice' (*id.* at p. 611[ ]), the interrogating officer left the defendant alone in an interview room at the police station for 15 to 20 minutes, then 'questioned her without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating' a suggestive, accusatory remark (*id.* at pp. 604-605[ ]). After the defendant confessed and was given a 20–minute break, the officer read her the *Miranda* warnings, resumed the questioning by mentioning their previous conversation, 'and confronted her with her prewarning statements.' (*Seibert*, at p. 605[ ].)

"A divided Supreme Court held the defendant's postwarning statements were inadmissible. (*Seibert*, *supra*, 542 U.S. at pp. 617, 622[ ].) Justice Souter's plurality opinion focused on whether 'it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires' (*id.* at pp. 611-612[ ]), noting that the giving of midstream *Miranda* warnings 'without expressly excepting the statement just given, could lead to an entirely reasonable inference that what [the accused] has just said will be used, with subsequent silence being of no avail' ([*id.*], at p. 613[ ]).

"Justice Kennedy's concurring opinion expressed his view that the plurality's test, which 'envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations,' was too broad. (*Seibert*, *supra*, 542 U.S. at pp. 621-622[ ].)" (*Camino*, *supra*, 188 Cal.App.4th at pp. 1368-1369.) Instead, Justice Kennedy concluded the principles in *Elstad* should continue to apply except "in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to

undermine the *Miranda* warning." (*Seibert*, *supra*, 542 U.S. at p. 622.) In that scenario, "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." (*Ibid.*) The rule as articulated by Justice Kennedy in his *Seibert* concurrence is the controlling rule for precedential purposes. (*Camino*, *supra*, 188 Cal.App.4th at p. 1370; *People v. Rios* (2009) 179 Cal.App.4th 491, 505.)

In this case, there can be no reversible error for failing to object on *Seibert* grounds because Deputy Perez's trial testimony provided no adequate reason to believe a two-step interrogation occurred, let alone a two-step interrogation calculated to undermine *Miranda* protections. The key statement by defendant that at least arguably affected the jury's determination of guilt was her admission to possessing the methamphetamine with intent to sell it for profit. But there is nothing in Deputy Perez's trial testimony that indicates defendant made this statement before being advised of her *Miranda* rights. Rather, on direct examination, Deputy Perez testified defendant made that statement "after [he] Mirandized her." And similarly, on cross-examination, Deputy Perez agreed that he "ordered [defendant] out of the vehicle[ ] and . . . gave her her *Miranda* rights" and that "after giving of the SHAD 477, [defendant] agreed to speak to [him], without an attorney . . . ."

To be sure, that trial testimony was inconsistent with Deputy Perez's suppression hearing testimony (given without the benefit of reviewing his incident report). But that does not mean, as defendant contends, a competent attorney would have objected and asserted the variance means Deputy Perez engaged in a calculated two-step interrogation to evade *Miranda* protections.

Rather, a competent defense attorney would understand the difference instead indicates a vulnerability in Deputy Perez's testimony about where defendant made the key incriminating admission (outside the patrol car or inside) given the deputy's acknowledgement that he had a "lengthy conversation" with defendant over a period of time "while she was outside of [his] patrol vehicle, while she was in the back seat of [his] patrol vehicle, while [he] was standing outside of [his] patrol vehicle talking to her, and, as well, . . . while [he] was sitting in the front seat of [his] patrol vehicle and she was in the back seat of [his] patrol vehicle." Defendant's trial attorney exploited that vulnerability by using Deputy Perez's inconsistent recollection concerning where certain events occurred to cast doubt on whether defendant actually made the incriminating statement at all. A decision to instead renew a previously denied suppression motion on the theory that there had been a deliberate two-step interrogation—notwithstanding Deputy Perez's consistent testimony that the incriminating statement came (only) post-*Miranda*—would have been a far less promising avenue of attack. Indeed, based on our review of the record presented, it would have been a meritless one.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.