Circuit Court for Anne Arundel County
Case No. C-02-CR-15-000062

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1616

September Term, 2016

AUNDREY JEROME TURNBULL

v.

STATE OF MARYLAND

Wright,
Kehoe,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: May 3, 2018

Aundrey Jerome Turnbull was convicted by a jury in the Circuit Court for Anne Arundel County of possession of a regulated firearm after a disqualifying crime; possession of oxycodone; and possession of marijuana. He was sentenced to 15 years, with all but five years suspended, without possibility of parole, for unlawful possession of a regulated firearm; a concurrent sentence of two years, with one year suspended, for possession of oxycodone; and a concurrent sentence of one year, with six months suspended, for possession of marijuana. Appellant presents one question, which we have reworded:

> Did the police engage in a constitutionally-impermissible "two-step" interrogation process so as to render their *Miranda* warnings meaningless?

We will remand this case to the circuit court for it to hold a supplemental hearing on appellant's suppression motion.

1. Background

Our description of the facts is focused on appellant's contention, which is whether the police involved in appellant's arrest subjected him to an impermissible "two-step" interrogation, that is, intentionally eliciting an inculpatory statement before giving him *Miranda* warnings, and then asking him the same question after giving him his constitutionally-required warnings.

On July 15, 2015, approximately 15 Anne Arundel County police officers executed a search warrant on a residence occupied by appellant located at 118 West Meadow Road in Brooklyn, Maryland. The warrant was obtained by Mark Neptune, a detective in the

Baltimore City Police Department. Three Anne Arundel County Police detectives, Mark Bianchi, Brian Bielot, and Theodore Giunta, participated in the execution of the warrant, as did Neptune. All of these officers testified at the suppression hearing. Appellant was the focus of the investigation.

Shortly before the warrant was executed, Detective Bielot saw appellant leave the premises in a van. Detective Bielot instructed Detective Bianchi to stop appellant, which he did on nearby Ritchie Highway. During the stop, police officers asked appellant if there was anything in the vehicle that was illegal, and he responded that there was a marijuana cigarette in the van. The police then took appellant from his vehicle and drove him to the parking lot of "Bingo World," where police were gathering before executing the warrant. While he was at the parking lot, an officer, never identified at the hearing, questioned appellant about what was in the house, and appellant responded that there was a handgun in a safe in his bedroom and a small amount of marijuana. The police then took appellant to the residence.

The police witnesses testified that appellant cooperated with them while they executed the search warrant. He let the police into the house by means of his garage door opener and preceded the officers into the house so that he could secure his dog for the safety of the officers and the dog. All of this took place fairly quickly— Detective Bielot testified that appellant was back at the house, in police custody, about five minutes after Detective Bielot radioed Detective Bianchi to detain appellant; appellant testified that he was returned to the house about 15 minutes after he was stopped.

Up to this point, no officer had given *Miranda* warnings to appellant.

According to the police witnesses, one or more officers escorted appellant, who was in handcuffs, to the living room, where he was told to sit on a couch with two women—his mother and his sister. At this point, Detective Giunta advised all three of their *Miranda* rights. After the advisements were given, Detective Bielot heard appellant, who remained calm and cooperative throughout the encounter, say "something to the effect of 'I have a gun in the safe that I'm holding for a friend.'" According to the detective, "Mr. Turnbull provided the combination for the safe downstairs in his bedroom." He also heard appellant state that "he had a little bit of weed in the garage."

Detective Bielot found the safe in the downstairs bedroom and opened it with the combination provided by appellant. In the safe were a .38 caliber revolver, several thousand dollars of currency, appellant's social security card, and a credit card in his name. A digital scale was also located on top of the safe, and a small amount of marijuana was found in the garage. All of this material was confiscated by Detective Bielot or other officers. On cross-examination, Detective Bielot clarified that he did not go into the basement area until after appellant was given his *Miranda* advisements.

Detective Giunta testified that he gave the three persons on the sofa—that is, appellant, his mother and his sister— a "group advisement of rights." Although they were advised as a group, each individual was asked separately if he or she understood each of their rights under *Miranda*. Detective Giunta testified that appellant answered in the affirmative, indicating that he understood his rights. Detective Giunta continued:

> And they all replied "yes," they understood their rights. After their rights were advised to them in the verbal group, they all agreed to talk to us without the presence of a lawyer, and I'd ask the – I asked them all in a group, "Question: Is there anything illegal in the house or anything that shouldn't be in the residence, before we search?" So, you know, we don't have to be so hard on the residents. And at that time, the Defendant replied that he did have a handgun that he was holding for a friend of his in a safe in his room.
>
> * * *
>
> Detective Bielot standing next me, then asked him if the safe was open, and we – we actually got a – a combination [inaudible] for the safe. Detective Bielot wrote it down on a – I guess a piece of paper; he wrote it somewhere, as I wouldn't have remembered. He told it was in his – his bedroom in the basement.

According to Detective Giunta, appellant was "cooperative" and "very pleasant" during this exchange. Appellant appeared to understand what was being said, and did not appear to be under the influence or in any sort of distress at the time. Detective Giunta also testified that it took between five to ten minutes, "at the most," to read the three individuals their rights under *Miranda*.

On cross-examination, Detective Giunta agreed with defense counsel that, when police executed search warrants, it was common for officers to "debrief" occupants and to ask them "safety questions," such as who was inside the residence, for purposes of officer safety. He later elaborated:

> [I]t's procedure to – if the main target that's named in a warrant is stopped outside the residence to absolutely get as much information as you can inside the residence for officer safety reasons. And also, for the subjects located inside the residence, so nobody gets hurt; I mean, it's a safety factor.

But, the detective maintained that he did not speak to appellant before he met him in the living room. And, he further testified that, although the basement may have been scanned for safety upon initial entry, the basement area was not searched for evidence until after he spoke with appellant. Detective Giunta provided more detail, still on cross, about appellant's statement after he was read his *Miranda* rights and agreed to speak with police:

> Q: Now – now, after you read Mr. Turnbull his Miranda rights –
>
> A: Yes, sir.
>
> Q: – Did you ask him any questions?
>
> A: Yes. We asked – not him direct; I asked – he was part of it – I asked a group question. "Is there anything in the house that shouldn't be in the house? Anything illegal, anything that we should know about?"
>
> Q: Was there a reply?
>
> A: Yes, there was.
>
> Q: What was the reply?
>
> A: Mr. Turnbull said, "I have a – I have a gun that I'm holding for a friend of mine, in a safe in my room."
>
> Q: Did you hear another officer say, "Yeah, he's telling the truth; he's already told us about that"?
>
> A: No, I didn't hear that. If he did, I mean, that's –
>
> [PROSECUTOR]: Objection in to any speculation; just whether or not you're –
>
> A: I didn't hear it, no.

Detective Neptune, the Baltimore City detective, testified that he was present during execution of the search warrant. He recalled hearing Detective Giunta read appellant his *Miranda* rights, but he did not recall hearing any statements by appellant.

Appellant and his sister testified at the hearing. With one exception, appellant's testimony was consistent with those of the police officers. He told the court that he had been brought back to the house by about 15 police officers. The police allowed him to enter to secure his dog to protect the dog and police officers. He then opened his garage door and the door connecting the garage and his house so that the police could enter the premises. He testified that he was cooperative (as did the police witnesses who mentioned his behavior in their testimony). He related that, on the day in question, he was questioned by police officers when he was initially stopped, when he was at the parking lot, and in the living room of his home after receiving his *Miranda* advisements.

Appellant's version of events differed from the narrative established by the police testimony in one regard: he testified that, after he let the officers into the house, he was handcuffed, placed on a sofa in the basement, and was again questioned by the police about contraband in the house. In response, he told the police he had a gun in a safe, and gave the police its combination. Then he was taken upstairs.

Appellant further testified that he was then read his *Miranda* rights by a detective, who asked him if there was anything in the house. After appellant told him again about the gun in the safe and the marijuana in the garage, Detective Bielot, who was standing nearby, replied, "He already stated that there's a gun in the safe and a little marijuana in

the garage." Appellant's sister, Shanique Turnbull, testified that she overheard another, otherwise unidentified, officer state that appellant had already admitted to the gun in the safe, prior to the Miranda warnings. [1]

At the close of the hearing, appellant moved to suppress any evidence about any of the statements he had made to the police both before and after he had been given the *Miranda* warnings, as well as the contents of the safe. His counsel stated:

> The fact that he was subjected to a custodial interrogation without being *Mirandized*, Your Honor, carries the day. [T]he Court, based upon what it has heard from this witness stand, from these witnesses, must grant our motion to suppress.

This led to the following exchange:

The Court:	What's your position with regard to the fact that he . . . answered those questions after [being] given *Miranda*[?]
Appellant's Counsel:	Well, Your Honor, what my position would be is that the bell had already rung, and that the fact that he had already given that information pre-*Miranda* cannot be cured or remedied by him . . . giving the same information after he had been *Mirandized.*

* * *

[1] Thus, there are two somewhat conflicting narratives: was appellant questioned twice before he was *Mirandized* (the testimony of the police witnesses) or three times (appellant's version)? The circuit court ultimately ruled that the first and second statements were inadmissible, and that the post-*Miranda* statement was. The court did not address the statement allegedly made in the basement. Appellant does not discuss the third statement (if there was one) in his brief at all. By doing so, he has waived the right to assert that the putative third interrogation could affect the outcome of this appeal. (For its part, the State asserts that the circuit court found the third statement was not given, but we don't read the transcript that way.)

> I believe certainly, Your Honor, in this case, the fact that the information that the police obtained from Mr. Turnbull prior to his being *Mirandized* had been acted upon prior to his being *Mirandized* the second time. Because Mr. Turnbull testified that he gave the combination to the safe to the officers downstairs while he was seated on the sofa downstairs. And certainly, Your Honor, that is not any information that he gave after he had been *Mirandized* upstairs. So therefore, Your Honor, I don't think that even if there could be some miracle cure under the *Oregon*, *Elstad* case, that it changes the facts of this case, but the information that have been obtained from Mr. Turnbull had been utilized by the police before here was *Mirandized*.
>
> * * *
>
> The Court: . . . . Okay. Anything else you want to tell me?
>
> Appellant's Counsel: No, Your Honor. Thant's all and we would submit.

After hearing a response from the prosecutor, the court granted the motion in part, and denied the motion in part.

With respect to the part of the motion that was granted, the court found that appellant was asked, when he was first taken out of the vehicle after the initial stop, "if he had anything illegal in the car, at which he responded that he had a little bit of marijuana in the vehicle. The car was searched; a little bit of marijuana was found." The court also accepted appellant's testimony that he was then taken to the pre-raid staging area prior to execution of the search warrant, where appellant was asked "who was in the house, what was in the house, and was there anything illegal in the house, at which time he provided information of other individuals, the fact that he had a dog, and the fact that he had a weapon in the safe." The court found appellant credible as to these two events, and then

stated that "I believe that that happened before you were given your *Miranda* rights." For those reasons, the court granted the motion to suppress in part, stating "[b]ased on that, I will suppress both the first statement in the vehicle, as well as the second statement; the first statement about the marijuana in the vehicle, as well as the second statement provided outside Bingo World."

With respect to the statements appellant made inside the residence, the court came to a different conclusion (emphasis added):

> *The problem, though, then becomes, under the current case law, which is valid case law, Supreme Court, Oregon vs. Elstad* [470 U.S. 298 (1985)], what happens after that. Okay? At that point in time, you're taken in the house. By all accounts, you're extremely cooperative. You – you are cordial to the police. You answer – you know, you help get the dog away, if you listen to – to certain officers, as well as your testimony, and you certainly let them in the house. *There's no allegations of any coercion, physical violence, anything that would create anything that happens from that point on to be seen as involuntary, as – as to be coercive in nature.* And you're – you're put in a living room with your sisters – your sister and your mom, and Giunta . . . read you your *Miranda* warnings. And by all accounts, in response, after given *Miranda* and being asked the question, and that's in response to Giunta testified this way, Detective Bielot testified this way, you testified consistently, as well as your sister, that you respond to their questions after getting *Miranda* and after understanding *Miranda*, and letting them know that there is a gun in the safe downstairs.
>
> There's also, then, testimony which makes sense chronologically, that you were asked – Giunta says this – Giunta says this, as well as Bielot, that you were asked about the combination to the safe at that point in time; that the combination is provided by you, and Bielot, as I go through my notes, does say that he then goes down and recovers the handgun from the safe. So chronologically . . . I find the officers credible, that it happens in that chronological order.

After summarizing *Oregon v. Elstad*, the court continued:

> So the fact that you were not given *Miranda* and gave statements, and then were given *Miranda* and gave statements, it – you can't – the law doesn't – doesn't allow for that. You've rung – you can't unring the bell, and they do say that, in fact, you can. And that – *that second statement given Miranda, absent some evidence of an involuntary coercive situation, once a determination is made that that statement has been voluntarily made, which I find under the facts that it was, that statement can come in*.
>
> So on that basis, I am granting your Motion to Suppress as to the first two statements. I'm denying your Motion to Suppress as to the third statement, which is the statement made in the living room. The other two statements cannot come in the State's case-in-chief. I'm not finding that any of them were involuntary, so they can certainly be used as in – for the basis of what they can be used for in that – that circumstance as the trial develops. Okay? But I – that's – that's the ruling of this Court.

After the court announced its decision, appellant's counsel asked to the court to reconsider its ruling:

> We believe, Your Honor, that the statements that the Court . . . has suppressed, *taint the evidence that was recovered* . . . because the police were made aware of . . . the contents of the safe
>
> [A]ccording to the Court's holding, the combination was given upstairs, which [appellant] testified very differently . . . . But in any event, the knowledge of what was in the safe was learned by the police through an un*Mirandized* statement. And the information that they have from the statement . . . gave them the impetus to ask for the combination of the safe, which led to the discovery of the gun inside the safe.
>
> * * *
>
> The information that the police obtained to open the safe was . . . obtained after he was *Mirandized.* But the police knowledge of what was in the safe was obtained beforehand. So I don't know if it[2] means that the police can obtain knowledge in violation of the *Miranda* rights, and them come back and get additional information after [he has been] *Mirandized* to . . . . supplement the information he got before he was *Mirandized.*

[2] We believe that counsel was referring to *Oregon v. Elstad*, 470 U.S. 298 (1985).

The court's response addressed both the physical evidence as well as the post-*Miranda* statement:

> *So there's no actions on the police officers with that information prior to having a Mirandized statemen*t. So I – I don't know that I would feel differently if there was. But in these facts, there isn't. They didn't go get the officers to testify; they didn't retrieve that gun until after they got that combination. That's what I'm finding credible, based on their testimony here today, based on the chronological way that it happened, based on the fact that *they wouldn't have needed to ask for the safe if they already had the gun before they got that statement upstairs in the living room*.
>
> So all of that, and applying common sense, to me says that he was upstairs in the living room. They hadn't gotten into that safe yet. That's why they asked – they asked the questions. He said again there was a gun in the safe, and here's the combination, after he was given *Miranda* and provided that warning.
>
> So based on that, again, *I will grant you the suppression on the first two statements. I will deny the suppression on the third*. I know it doesn't feel like a win under these circumstances at all, and I understand that. But that is – that's the ruling of this Court.

2. Basic Principles and The Standard of Review

We begin with a cornerstone of the American criminal justice system:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. . . . He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

"[A] suspect may waive his Fifth Amendment privilege 'provided the waiver is made voluntarily, knowingly and intelligently.'" *Colorado v. Spring*, 479 U.S. 564, 572 (1987)

(quoting *Miranda,* 384 U.S. at 444). "[T]he burden of proving the admissibility of a challenged confession is always on the State." *Smith v. State*, 186 Md. App. 498, 519 (2009) (citing *State v. Tolbert*, 381 Md. 539, 557 (2004)).

Our role in a case such as this is clearly established:

> Our review of a grant or denial of a motion to suppress is limited to the record of the suppression hearing. The first-level factual findings of the suppression court and the court's conclusions regarding the credibility of testimony must be accepted by this Court unless clearly erroneous. The evidence is to be viewed in the light most favorable to the prevailing party. We "undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case."

Thomas v. State, 429 Md. 246, 259 (2012) (quoting *State v. Tolbert*, 381 Md. 539, 548 (2004) (other citations omitted)).

3. *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v. Seibert*, 542 U.S. 600 (2004)

Appellant's argument to this Court implicates two Supreme Court decisions that address the problems that arise when an accused gives an inculpatory statement to the police before he is given the *Miranda* advisements, and then gives substantially the same statement after he has been advised: *Oregon v. Elstad* and *Missouri v. Seibert*.

We begin with *Elstad.* The police suspected that Elstad might have been involved in a burglary. A warrant was issued for his arrest, and was served on him while he was at his parents' home. While one officer explained to his mother that they had a warrant for their son, another informed Elstad that he was a suspect. Elstad admitted his involvement, was

taken to the sheriff's office, and gave a fuller confession after receiving his *Miranda* advisements. 470 U.S. at 315–16.

The issue before the Supreme Court was "whether an initial failure of law enforcement officers to administer the warnings required by *Miranda* . . . , without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights." *Id.* at 300. The Supreme Court rejected this contention. It first noted that "[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." *Id.* at 310 (citations omitted). The Court continued:

> [T]here is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question. . . . It is difficult to tell with certainty what motivates a suspect to speak. . . . *We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion*.

Id. at 312–14 (emphasis added).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court addressed the "two-stage" interrogation procedure. Seibert was taken to the police station and questioned for 30-40 minutes even though she had not been given *Miranda* warnings. During this time, she made an incriminating statement. *Id.* at 604-05. After a 20 minute break, the officer returned, read her the *Miranda* warnings, obtained a signed waiver of rights, and began to

record the conversation that followed. *Seibert*, 542 U.S. at 605. The officer then confronted the defendant with her pre-*Miranda* statement and elicited a second confession. *Id.* The 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*, 542 U.S. at 605-06. The trial court suppressed the first statement but allowed the second to be admitted into evidence. *Id.* at 606.

Although five justices concluded that the second statement should have been suppressed, there was no majority opinion. Justice Souter wrote the plurality opinion.[3] The plurality concluded that this form of questioning would likely render the *Miranda* warning ineffective:

> After all, the reason that question-first is catching on [among law enforcement agencies] is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Seibert, 542 U.S. at 613 (footnote omitted). According to the plurality of the Court, to determine if a violation occurs, a court should look at:

[3] Justices Stevens, Ginsburg, and Breyer joined in Justice Souter's opinion. Justices Kennedy and Breyer filed concurring opinions. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined.

> 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.

Seibert, 542 U.S. at 615.

Because there was no majority opinion in *Seibert*, Justice Kennedy's concurring opinion is of particular significance. In pertinent part, he explained:

> *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection. In light of these realities it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning. *That approach would serve neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the testimony*.
>
> This case presents different considerations. *The police used a two-step questioning technique based on a deliberate violation of Miranda. The Miranda warning was withheld to obscure both the practical and legal significance of the admonition when finally given.*

542 U.S. at 620 (citations, quotation marks and an ellipsis omitted).

Justice Kennedy's concurring opinion is the governing law in Maryland on this issue. *See Wilkerson v. State*, 420 Md. 573, 594 (2011); *Robinson v. State*, 419 Md. 602, 623 (2011); *Cooper v. State*, 163 Md. App. 70, 87–91 (2005).

The relationship between *Elstad* and *Seibert* was addressed by this Court in *Cooper*:

> Violation of Miranda's safeguards, the *Elstad* Court declared, in and of itself does not create a coercive atmosphere that automatically renders

> involuntary any subsequent, properly warned statement. The relevant inquiry should be whether, in fact, the second statement was also voluntarily made, considering the surrounding circumstances and the entire course of police conduct with respect to the suspect. The Court held that Elstad's second confession was voluntary and that it complied with *Miranda*; consequently, it was admissible.

163 Md. App. at 86–87 (citations, quotation marks, brackets and ellipses omitted).

Turning to *Seibert*, this Court explained:

> *Elstad*, it must be remembered, dealt only with 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.
>
> * * *
>
> Nearly 20 years after *Elstad*, the Supreme Court was presented in *Seibert* with the situation hypothesized in *Elstad*: the failure of police to administer *Miranda* warnings under circumstances calculated to undermine the suspect's ability to exercise his free will.
>
> * * *
>
> Justice Kennedy eschewed the plurality's multi-factor test, which would apply to both intentional and unintentional two-stage interrogations, as a test that "cuts too broadly." Justice Kennedy set forth "a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the Miranda warning."

163 Md. App. at 86–87, 90–91 (citations and some quotation marks omitted).

This Court's take on the relationship between *Elstad* and S*eibert* was cited with approval by the Court of Appeals in *Robinson v. State*, 419 Md. 602, 620–23 (2011), and has been applied by us in *Buck v. State*, 181 Md. App. 585, 629 (2008) ("For the *Seibert* holding to apply at all, there must be an unwarned custodial interrogation followed by a warned custodial interrogation, carried out deliberately as a two-step 'question first'

process to undermine the effectiveness of the *Miranda* warnings given at the beginning of the second interrogation.").

In *Wilkerson v. State*, 420 Md. 573, 602 n.16 (2011), the Court explained another conceptual distinction between challenges to the admissibility of a confession based on *Seibert* as opposed to *Elstad* (emphasis in orginial):

> After *Miranda*, then, a trial court's initial task is to determine whether valid warnings were given and whether there was a knowing and intelligent waiver of those warnings, and *not* whether any statements made were "voluntary." *Seibert* answered in the affirmative the question of whether two-step or interrogation-first interrogation tactics so tainted, not the general voluntariness of any post-advisement statements made, but the effectiveness of the advisements themselves. *See Seibert*, 542 U.S. at 611–12 ("The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires."). Accordingly, *Seibert* and voluntariness challenges are cut from different cloth, such that the former is not subjected to the two layers of trial-level scrutiny applied to the latter.

We have lingered on the distinctions between *Elstad* and *Seibert* because those differences are directly relevant to the State's preservation argument.

4. Analysis

A. The Admissibility of Appellant's statement

Appellant asserts that the circuit court erred in denying his motion to suppress his statement made to the police (and the evidence discovered in his safe) after he was given his *Miranda* warnings. His argument is premised on the supposition that, because the pre- and post-*Miranda* interrogations "created the presumption that police employed a question-first technique to delay *Miranda* warnings, only curative measures could have

potentially saved the admissibility of the post-warning statement." Appellant concedes that, while trial counsel "did not characterize his challenge as a *Seibert* challenge, that [was], in essence, what was urged." He concludes:

> In light of the evidence elicited at the suppression hearing, the State failed to meet its burden of showing that the detectives did not deliberately delay *Miranda* warnings by employing a question-first technique.[4] The detectives did not undertake anything remotely resembling curative measures.

For its part, the State asserts that appellant did not raise *Seibert* argument in the suppression hearing, and that, therefore, his claim is unpreserved for our review. It explains:

> To the extent that Turnbull's post-*Miranda* statements were "tainted," the theory of taint was not linked to an allegation of deliberate conduct by law enforcement calculated to undermine the effectiveness of the *Miranda* warnings; but rather, arose from defense counsel's belief that police would not have thought to ask for the combination to the safe without the information contained in the unwarned statements. Defense counsel was making a "fruit of the poisonous tree" argument; not raising "in essence" a "*Seibert* challenge."

The State also addresses the merits, responding that appellant's statement, and the fruits thereof, were obtained in compliance with *Seibert*, and that any error was harmless

[4] In *Wilkerson v. State*, 420 Md. 573, 597 n.10 (2011), the Court explained:

> Accordingly, although we adopt the notion that the prosecution bears the burden of showing that the withholding of *Miranda* advice was not deliberate, we hold that such a burden only attaches once the defendant alleges sufficiently that law enforcement, in fact, employed two-step or question-first interrogation tactics.

beyond a reasonable doubt given that the evidence was obtained during the execution of an existing search warrant.

"The failure to raise a particular argument in support of a request to exclude evidence acts as a waiver of the argument for the purposes of appellate review." *Jones v. State*, 213 Md. App. 483, 493 (2013) (citation omitted), *cert. denied*, 438 Md. 740 (2014). However, "an appellant/petitioner is entitled to present the appellate court with 'a more detailed version of the [argument] advanced'" in the trial court. *Starr v. State*, 405 Md. 293, 304 (2008) (internal quotations omitted); *see also State v. Greco*, 199 Md. App. 646, 658 (2011) (concluding that an issue was not waived where the State generally made the argument at trial, and the trial court clearly decided the issue on the grounds raised on appeal), *aff'd*, 427 Md. 477 (2012). In other words, a party preserves an issue for appellate review if he or she "clearly makes the judge aware of the course of action he or she desires the court to take and the reasons for such course of action[.]" *In re Ryan S.*, 369 Md. 26, 35 (2002).

In our view, the present case is, for all practical purposes, indistinguishable from what confronted the Court in *Wilkerson v. State*, 420 Md. 573, 595–98 (2011):

> In the present case, the State argues that Wilkerson's *Seibert* appellate contention was not preserved for appellate review, suggesting that "it should be incumbent on a defendant to raise the substance of the claim with sufficient clarity to enable the trial court and the State to address it." As the State reads the transcript of the suppression hearing, Wilkerson "did not argue that the delay was deliberate, or that it was to avoid the requirements of *Miranda*, or that it was a two-step technique, or that it violated *Seibert*," and that, although arguing that the pre-advisement questioning "tainted" the post-advisement statements, "that term ['taint'] is also used to refer to many

other kinds of alleged legal errors." In response, Wilkerson argues that, considering "the context in which defense counsel raised [the] 'taint'—in a hearing in a motion to suppress Mr. Wilkerson's statements made both before and after [a] Miranda warning[ ]," "'taint' could only have referred to a *Seibert* violation."

At bottom, the question the parties in the present case would have us answer initially is whether Wilkerson's trial defense counsel, by stating during her argument directed to the post-advisement statements, yet alluding also to the pre-advisement statements, "I think that because that groundwork was laid, it laid the framework to taint sort of the rest of that, even after there was some *Miranda*," raised the issue sufficiently to preserve Wilkerson's rather more focused *Seibert* appellate claim for review. The State would have us answer this question in the negative and affirm the judgment of the Court of Special Appeals. On the other hand, Wilkerson would have us answer in the affirmative, reach the merits of his *Seibert* claim, find that the police detectives engaged in a deliberate two-step tactic such that certain of his post-advisement statements should have been suppressed, and remand the case to the Circuit Court for a new trial. We shall do neither at this point.

* * *

The question of whether a *Seibert* challenge plainly appears on the record to have been raised in or decided by the trial court in the present case is too close to call. It would not be fanciful wholly to contend, as Wilkerson does, that his trial defense counsel intended to allude to a *Seibert* challenge in her argument to the trial judge, albeit in a somewhat oblique and obscure fashion. On the other hand, the "taint" argument was preceded immediately and followed immediately by arguments relating to general voluntariness of Wilkerson's statements and the potential deficiency in the Miranda warnings. Such an argument did not alert apparently either the prosecutor or the trial judge such that they should respond to or rule on, respectively, a *Seibert* challenge. Rather, it seems that the prosecutor and the trial judge perceived that Wilkerson's counsel was raising an *Elstad* challenge. The State is correct that Wilkerson "did not argue that the delay [in giving him *Miranda* warnings] was deliberate, or that it was to avoid the requirements of *Miranda*, or that it was a two-step technique, or that it violated *Seibert* or any other case." Clearly, the trial judge did not rule on a *Seibert* challenge, if in fact one was raised. We believe that the appropriate disposition of the present case is a limited remand to the Circuit Court for additional evidence—should the parties choose to introduce it—and argument on a clear *Seibert* challenge and appropriate findings by the trial judge.

(Citations and footnotes omitted.)

We have previously summarized what occurred at the suppression hearing. The argument presented in the present case at the suppression hearing was certainly no less focused than the one presented on Wilkerson's behalf.[5] As in *Wilkerson*, 420 Md. at 599, it seems to us that "because of [appellant's] trial counsel's choice of language [his] putative *Seibert* challenge did not register on the State's radar, [so] the State was deprived of the opportunity to lift the yoke of attempting to prove that the delay in advising [appellant] of his *Miranda* rights was not deliberate and that any question-first or two-step tactics were absent from the interrogation."

The critical issue raised by the facts presented to the suppression court in the present case was whether the repeated interrogations of the appellant rendered ineffective the subsequent *Miranda* advisement. Answering this question will require the suppression court to assess what actually motivated the police officers who questioned appellant when he was stopped and when he arrived at the parking lot. The court will also have to decide whether appellant's testimony that he was subjected to a third pre-*Miranda* interrogation in the basement of his house is credible. These are matters are first-level findings of fact that lie in the province of the suppression court. *Wilkerson*, 420 Md. at 598 n.13.

[5] The contentions made at the suppression hearing in *Wilkerson* are summarized in more detail at 420 Md. at 581.

(continued)

Therefore, as did the Court in *Wilkerson*, we will remand this case to the circuit court pursuant to Md. Rule 8-604(d)(1)[6] with instructions for it to conduct a supplemental suppression hearing to permit the State and appellant to present additional evidence and argument on appellant's *Seibert* challenge to the admission of appellant's post-*Miranda* statement.

B. The Admissibility of the Contents of the Safe

There was another issue in the suppression hearing, namely, whether the search warrant for appellant's home was valid. The court concluded that it was. In his brief, appellant also asserts that "any evidence discovered because of the illegally obtained confession must likewise be suppressed as fruit of the poisonous tree." Appellant doesn't expand on this concept, but we assume he's referring to the contents of the safe.

Assuming for the purposes of analysis that the court concludes on remand that appellant's post-*Miranda* statement was unlawfully obtained, it does not necessarily follow that the physical evidence obtained in the search is inadmissible. The fruit of the

[6] The rule states in pertinent part:

> (d) *Remand*.—
>
> (1) *Generally*.—If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

poisonous tree doctrine does not apply to evidence seized through the execution of a validly-issued search warrant as long as the application for the warrant was not tainted by inclusion of illegally-obtained evidence. *See Williams v. State*, 372 Md. 386, 412–13, (2002) (citing *Murray v. United States*, 487 U.S. 533, 542 (1988) and S*egura v. United States,* 468 U.S. 796, 814 (1984)). In the present case, the warrant was obtained before appellant was questioned by the police, so there is no question of taint.

Appellant does not contest the warrant's validity on appeal. Moreover, the circuit court found as a fact that the police did not search appellant's bedroom or attempt to open the safe until after appellant made his post-*Miranda* statement. Appellant does not assert that the court's finding in this regard was in error. We have no doubt that the police, in the course of executing a search warrant, would examine ultimately the contents of a safe located in the bedroom of the target of the investigation. To be sure, when appellant gave the police the combination to the safe, he made their job easier, but there are other ways to open a safe. Appellant is foreclosed from relitigating the admissibility of the physical evidence recovered in the search. [7]

THIS CASE IS REMANDED WITHOUT AFFIRMANCE OR REVERSAL TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. PAYMENT OF COSTS TO ABIDE THE RESULT.

[7] The State presents a harmless error argument but we will not undertake a harmless error analysis at this time. How the teachings of *Seibert* relate to the admissibility of answers to questions posed by police officers in the course of executing a search warrant is an important issue that warrants clarification.