

U.S. v. Orso

(9th Cir. December 8, 2000) \_\_ F.3d \_\_

NOTE: On September 17, 2001, an en banc panel of the 9th Circuit overruled the decision below. The panel determined that Elstad applies when, as in Orso, the Miranda violation was not coercive.

## ISSUE

Was a confession obtained by a postal inspector inadmissible because the inspector had previously obtained incriminating statements from the suspect in violation of Miranda?

## FACTS

Jody Orso was arrested by Redondo Beach police on a federal arrest warrant based on charges she robbed a letter carrier. Two U.S. postal inspectors were transporting her from the police station to their office for questioning when one of them told her he was going to inform her of the evidence against her. After telling Orso not to say anything, he falsely informed her that a witness to the robbery said Orso may have had a gun. He also told her that she could be sentenced to 25 years for armed robbery but he didn't believe she used a gun, in which case she would probably be looking at five years. Orso responded, "Oh, I can do five years."

The inspector also told Orso the letter carrier had identified her in a photo lineup as the robber. In response to this news, which was also false, Orso said, "Well, if the letter carrier said it's me, then it must be me."

Upon arrival at the Postal Inspection Service Office, Orso waived her Miranda rights and confessed.

## DISCUSSION

The government conceded the inspector's remarks constituted "interrogation" under Miranda, that Orso was in "custody," and that she had not waived her rights. Thus, the statements obtained in the car were plainly inadmissible. The real issue was whether the confession she gave later was admissible.

In *Oregon v. Elstad*,<sup>[1]</sup> the United States Supreme Court discussed when, or under what circumstances, a statement obtained after a Miranda violation may be admissible. Unfortunately, as Orso demonstrates, the Court's discussion was not as lucid as it might have been.

Most courts have interpreted Elstad as holding that a statement taken in full compliance with Miranda would be admissible, despite an earlier statement taken in violation of Miranda, if the violation was "technical" in nature, meaning it was not coercive. An example of a "technical" violation would be a failure to advise a suspect of his Miranda rights, provided the questioning was non-coercive. If, however, the violation was coercive in nature, the subsequent statement would be suppressed unless the prosecution was able to prove the taint of the violation was attenuated to the point the statement was not the "fruit" of the violation.

The court in Orso, however, viewed Elstad differently. It read the opinion as requiring suppression (unless attenuation was proved) if the officers who obtained the first statement engaged in either coercive conduct or “deliberately improper tactics.”

The court’s conclusion that “deliberately improper tactics,” as well as coercive conduct, rendered a Miranda violation “non-technical” was critical in Orso because the court concluded that while the inspector’s conduct was not coercive, it was deliberately improper. Consequently, it ruled Orso’s confession obtained at the postal inspection office must be suppressed unless, as noted, the taint of the violation was sufficiently attenuated.

In determining whether the taint of a Miranda violation has been attenuated, the courts consider such circumstances as the time lapse between the violation and the subsequent statement, the purpose and flagrancy of the officer’s misconduct, and whether an independent intervening act broke the chain of causation leading from the violation to the subsequent statement.

Applying these principles to the facts of the case, the court ruled the taint was not sufficiently attenuated, and that Orso’s confession was inadmissible. This was mainly because it appeared the Miranda violation was not only intentional, but its purpose was to cause Orso to waive her rights and confess, which she did. Said the court, “[T]he deliberate use of improper tactics and the deliberate failure to give Orso a Miranda warning prior to the initial interrogation had their intended effects. There was no break in the chain of events.”

#### DA’s COMMENT

In a concurring opinion, Judge O’Scannlain said he disagreed with the majority’s interpretation of Elstad, referring to it as “very controversial” and “erroneous.” We agree.

He added, “In fairness to the majority, the language in Elstad is sufficiently imprecise to have apparently created a Circuit split on the question of whether ‘improper tactics’ is a separately actionable category of behavior from involuntariness.” In light of this, it may be time for the U.S. Supreme Court to clear up the confusion caused by its “imprecise” language in Elstad.

[1] (1985) 470 US 298.