NO. 96897-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS CHARLES BABB,

Petitioner.

ANSWER TO PETITION FOR REVIEW

ADAM CORNELL
Prosecuting Attorney

SETH A FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. IDENTITY OF RESPONDING PARTY

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

A. SUPPRESSION HEARING

The relevant facts are set out in the Findings of Fact and Conclusions of Law on CrR 3.6 Hearing. CP 4-9. Since no error has been assigned to any of these findings, they will be accepted as verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

According to the findings, on January 6, 2016, Master Police Officer Steven Ross of the Everett Police Department responded to a "slumper" call. Such a call indicates a medical issue, including a possible drug overdose. When Officer Ross arrived at the scene, he saw the defendant, Thomas Babb. He was coming down the stairs of an apartment with three firefighters. He appeared to be uneasy on his feet and staggering. Officer Ross suspected that the defendant was affected by alcohol or drugs. CP 4-5.

One of the firefighters told Officer Ross, "You need to talk to this guy." Officer Ross accordingly told the defendant that he needed to talk to him. The defendant continued walking. Officer

Ross placed his right hand on the defendant's shoulder and told him to stop. He also told the defendant to put down his long board and backpack. The defendant complied, but he then started running away. CP 5-6.

Officer Ross pursued the defendant, caught him, and placed him under arrest for Obstruction. The defendant resisted the arrest. Officer Ross testified that while the defendant was resisting, the defendant hit him with a closed fist. Officer Ross subdued the defendant. In a subsequent search incident to arrest, the officer discovered a controlled substance and drug paraphernalia. CP 6.

At the suppression hearing, Officer Ross explained his reasons for attempting to detain the defendant:

> So, since it was a slumper male, groaning, acting funny call, I thought that the guy was probably on drugs or looked like he was on drugs or having medical or maybe mental issues. Then the firefighters told me he was not supposed to be there, I thought he might be trespassing. Since they mentioned a stepmom, I thought that would possible be a domestic situation. There could be a domestic violence protection order or something of that nature.

11/14 RP 14.

When Officer Ross tried to detain the defendant, he fled. Officer Ross chased him. The defendant ran across a busy street with no regard for traffic. He ran into a grassy area and then started

to climb a fence. Officer Ross grabbed him and pulled him down onto the ground. 11/4 RP 16-17.

Officer Ross tried to place the defendant in handcuffs. "He was trying to pull his left arm out of my grasp and trying to keep his right arm underneath him, which caused me concern that he was trying to retrieve a weapon or something like that." 11/14 RP 18. Officer Ross struck the defendant on the back twice. In response, the defendant struck him on the left side of the head. 11/14 RP 20.

Office Ross used his taser. The defendant said that he was having a seizure and then went limp. Officer Ross placed him in handcuffs and searched him incident to arrest. Other officers arrived and summoned medical aid. 11/14 RP 23-24.

B. TRIAL

The defendant was charged with third degree assault and possession of a controlled substance. CP 139. With regard to the defendant's use of force, the jury was given the following instructions:

> Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

CP 101, inst. no. 10

> Stephen Ross did not have a lawful basis to initially detain Thomas Babb, or to initiate arrest procedures when he contacted Thomas Babb at the fence.

CP 102, inst. no. 11.

> A person who is being unlawfully arrested has a right to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of the arrest. A person may not use force against the arresting officer if he is faced only with a loss of freedom.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charge of assault in the third degree.

CP 103, inst. no. 12.

The jury found the defendant guilty of possessing a controlled substance but not guilty of assault. CP 87-88. The jury was then asked to decide whether the defendant had proved, by a preponderance of the evidence, that he had used lawful force. 11/16 RP 342-43. The jury was unable to reach a verdict on that question. 11/17 RP 371-72.

III. ARGUMENT

A. THE RESULT REACHED BY THE COURT OF APPEALS IS REQUIRED BY THIS COURT'S DECISIONS ESTABLISHING A "SECOND ARREST" DOCTRINE.

The outcome of this case is dictated by two decisions of this court: State v. Rousseau, 40 Wn.2d 92, 241 P.2d 447 (1952), and State v. Holeman, 103 Wn.2d 426, 693 P.2d 89 (1985). In

Rousseau, the defendant assaulted a police officer who had unlawfully arrested him. This court held that the defendant could lawfully be rearrested for that assault. Evidence found in a search incident to that arrest was admissible to prove a prior burglary. Rousseau, 40 Wn.2d at 96.

Rousseau does not specify whether it reached this result under the state or federal Constitution. At that time, however, there was *no* exclusionary rule under the federal Constitution that was applicable in state courts. Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); see Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (overruling Wolf). Prior to 1961, the only exclusionary rule in Washington courts was the rule derived from the state Constitution. See State v. Gibbons, 118 Wash. 171, 188–89, 203 P. 390 (1922) (adopting exclusionary rule under Const., art, 1, § 7). In holding the evidence admissible, Rousseau necessarily applied the state Constitution.

The same result was reached in Holeman. There, police unlawfully entered the defendant's home to arrest him. The defendant's father attempted to prevent this arrest by threatening the officers with a crowbar. The officers arrested the father. The defendant then obstructed his father's arrest and was arrested a

second time. Holeman, 103 Wn.2d at 427-28. Applying article 1, § 7, the court held that the second arrest was lawful. Id. at 429. Consequently, the defendant's second confession was properly admitted into evidence to prove a prior theft. Id. at 431.

The rule established by Rousseau and Holeman is clear. A person who commits a crime in response to an unlawful arrest may be re-arrested for that new crime. Evidence derived from that second arrest may then be used to prove a prior crime. This "second arrest" doctrine does not rest on any "attenuation" analysis. Rather, it rests on the need to prevent violent confrontations that endanger everyone — not only the officers, but innocent bystanders and the arrestee himself. Holeman, 103 Wn.2d at 430.

In the present case, the petitioner argues that evidence derived from the second arrest should be suppressed as fruits of the illegal first arrest. Adopting such a rule would require overruling Rousseau and Holeman.

This court's prior holdings may be rejected on a clear showing that the established rule is incorrect and harmful. Alternatively, the may be rejected on a showing that their legal underpinnings have changed or disappeared altogether. State v.

Otton, 185 Wn.2d 673, 678 ¶ 6, 374 P.3d 1108 (2016). No such showing has been made in the present case.

The petitioner claims that the Court of Appeals holding is inconsistent with State v. Mayfield, 434 P.3d 58 (Wash. 2019). That case recognizes the existence of an attenuation doctrine under article 1, § 7. Mayfield, 434 P.3d at 66-67 ¶ 23. Since the "second arrest" rule does not rest on any attenuation analysis, that case is irrelevant. There is no inconsistency that warrants review.

B. THE RULE SOUGHT BY THE PETITIONER WOULD REQUIRE EITHER LEGALIZING ASSAULTS ON POLICE OFFICERS OR SUPPRESSING EVIDENCE OBTAIN THROUGH LAWFUL ARRESTS.

In urging this court to reject the rule of Rousseau and Holeman, the petitioner is inconsistent about what should replace it. On the one hand, he argues that his use of force was "well within the realm of the foreseeable in response to unlawful use of police force." PRV at 12. If this court accepted this argument, it would mean that evidence of the assault would be suppressed if the underlying arrest was unlawful. This is what the petitioner argued in both the trial court and the Court of Appeals. In his suppression memorandum in the trial court, he asserted that "[a]ll evidence obtained directly or indirectly through the exploitation of an illegal

seizure, including a suspect's post-arrest conduct, must be suppressed." CP 169. At oral argument in the Court of Appeals, counsel asserted that even if a police officer was killed while conducting an illegal arrest, evidence of the murder would be inadmissible. State v. Babb, Oral Argument Recording at 20:56 to 21:35 (October 30, 2018).[1]

Without acknowledging the inconsistency, the petitioner now claims that the State could properly take him to trial for the assault. P.R.V. at 14. To take someone to trial, however, it is usually necessary to arrest him. When a person is arrested, it is necessary to search him for reasons of officer safety. State v. Byrd, 178 Wn.2d 611, 620 ¶ 17, 310 P.3d 793 (2013). The petitioner is thus claiming that a person can commit a crime, be lawfully arrested for that crime, and be lawfully searched incident to that arrest — but evidence derived from that arrest must then be suppressed. There is no support in Washington law for such a rule.

The petitioner seeks to support his novel argument by speculating about the motives of the arresting officer. P.R.V. at 14.

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[1] The recording of the oral argument is available on the Washington Court's website at https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20181030.

In the trial court, however, he acknowledged that the officer acted in good faith. 11/4 RP 56. Both there and in the Court of Appeals, he argued that good faith was irrelevant. CP 166; Brief of Appellant at 26. This court should not grant review on the basis of factual speculation that is unsupported by any findings.

The petitioner also questions the credibility of the officer's testimony that the assault occurred. At the suppression hearing, the defense did not challenge the credibility of that testimony. Rather, he argued that any assault was the product of an illegal detention. 11/4 RP 56-57. A court's suppression ruling is based on the court's own factual findings, not those that might be later made by a jury. See State v. Hill, 123 Wn.2d 641, 870 P.2d 641 (1994). There is no precedent for the suggestion that a jury acquittal can retroactively render an arrest illegal.

This should especially be true when the jury verdict was at least partially based on an erroneous legal standard. The jurors were instructed that a person who is unlawfully arrested may use force "to resist an attempt to inflict injury on him." CP 103, inst. no. 12. They were further instructed that "bodily injury" includes physical pain. CP 101, inst. no. 10. The jury was thus told that a person who is unlawfully arrested may use force to resist the

infliction of *any* degree of pain. The correct standard is that the person may not resist *any* threatened injury, but only *serious* injury. State v. Bradley, 141 Wn.2d 731, 737-38, 10 P.3d 358 (2000).

This distinction was particularly significant in this case. At the time the petitioner struck the officer, he had already been hit twice in the back. 11/15 RP 123-26. Those blows undoubtedly caused physical pain. The jurors were told that the arrest was unlawful. CP 102, inst. no. 11. Based on their instructions, it is not surprising that at least some jurors believed that the defendant was justified in hitting the officer in order to prevent the infliction of further pain. To reach that conclusion, it was not necessary for them to either disbelieve the officer's testimony or believe that he had used excessive force. Had the jurors been told that a person can only use force to resist *serious* injury, the verdict may well have been different.

The petitioner also exaggerates the force used by the officer. Her claims that that he was "beaten into unconsciousness, and much of this occurred prior to point in time when Babb allegedly reached behind his back to strike the officer." P.R.V. at 14 (petitioner's emphasis). In fact, the testimony shows that before the petitioner struck the officer, the officer struck him on the back twice.

1 RP 19-20. There is no evidence that the petitioner suffered any significant injury from those or any other blows. According to his suppression motion, he was diagnosed at the hospital with taser wounds and a cut on his palm — not any injuries resulting from the officer's blows. CP 160-61.

Ultimately, however, none of this matters. The acquittal on the assault cannot, of course, be reviewed. The trial court's ruling on the suppression motion must be based on the evidence at the suppression hearing and the court's findings. Under those findings, the officer lawfully arrested the defendant for assaulting him in the course of resisting arrest. CP 4-9. If the officer used excessive force after that point, it could be grounds for a civil lawsuit — but it does not invalidate the arrest or the subsequent search.

Under this court's precedents, the Court of Appeals correctly held that evidence obtained in a search incident to a lawful arrest was admissible at trial. That holding does not warrant review.

IV. CONCLUSION

The petition for review should be denied.

Respectfully submitted on March 29, 2019.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: _____
SETH A FINE, WSBA #10937
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, THOMAS CHARLES BABB, Petitioner.	No. 96897-7 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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The undersigned certifies that on the 29th day of March, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Nielsen, Broman & Koch; Sloanej@nwattorney.net; rampersadr@nwattorney.net

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of March, 2019, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

March 29, 2019 - 3:18 PM

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Appellate Court Case Title:	State of Washington v. Thomas C. Babb
Superior Court Case Number:	16-1-00281-6

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