

FILED
SUPREME COURT
STATE OF WASHINGTON
2/27/2019 3:59 PM
BY SUSAN L. CARLSON
CLERK

SUPREME COURT NO. 96897-7

NO. 76321-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS CHARLES BABB,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce I. Weiss, Judge

The Honorable Janice E. Ellis, Judge

PETITION FOR REVIEW

E. RANIA RAMPERSAD
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>IDENTITY OF PETITIONER/COURT OF APPEALS DECISION</u>	2
C. <u>ISSUES PRESENTED FOR REVIEW</u>	2
D. <u>STATEMENT OF THE CASE</u>	3
1. <u>Charges & Defense</u>	3
2. <u>Suppression Hearing</u>	3
3. <u>Trial Evidence</u>	7
4. <u>Closing Arguments</u>	8
5. <u>Verdict, Sentence & Appeal</u>	10
6. <u>Appellate Arguments & Decision</u>	10
E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u>	11
THIS COURT’S REVIEW IS WARRANTED TO DETERMINE WHETHER THE COURT OF APPEALS’ DECISION CONFLICTS WITH WASHINGTON’S NARROW ATTENUATION DOCTRINE AS RECENTLY DEFINED IN STATE V. MAYFIELD.....	11
1. <u>The court of appeals’ decision presents a conflict with a published Washington Supreme Court decision under RAP 13.4(b)(1).</u>	11
2. <u>This case presents a significant question of State constitutional law under RAP 13.4(b)(3).</u>	13

TABLE OF CONTENTS (CONT'D)

	Page
3. <u>This case presents an issue of substantial public interest under RAP 13.4(b)(4).</u>	13
F. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Boland</u> 115 Wn.2d 571, 800 P.2d 1112 (1990).....	15
<u>State v. Cormier</u> 100 Wn. App. 457, 997 P.2d 950 (2000).....	7
<u>State v. Mayfield</u> ___ Wn.3d ___, 434 P.3d 58 (2019).....	1, 2, 11-14
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RAP 13.4(b)(1)	2, 11, 13, 15
RAP 13.4(b)(3)	2, 13
RAP 13.4(b)(4)	2, 13, 15
U.S. CONST., AMEND. IV	10, 11
WASH. CONST., ART. I, § 7.....	2, 10, 11, 13

A. INTRODUCTION

It is undisputed an officer illegally chased, tackled, repeatedly punched and then arrested Mr. Babb. At trial, the parties disputed whether Babb struck the officer during this interaction. The trial court found probable cause to arrest Babb for officer assault and denied his motion to suppress drugs found in his pocket in a search incident to this arrest. The jury convicted Babb of drug possession but acquitted him of the assault, and thereby necessarily found the officer's testimony of assault not credible.

The State undeniably had the remedy to bring Babb to trial for the alleged assault. The question presented by this case is whether the State also gains a benefit—the fruits of the illegal arrest, in the form of the contents of Babb's pockets—as a result of the highly questionable allegation by its officer. This case presents the opportunity to address the outlines of the so-called 'officer assault exception,' and to define its limits to avoid creating an incentive for officers to escalate use of force or manufacture allegations of officer assault in order to gain access to evidence. This case also presents the opportunity to clarify the contours of Washington's new attenuation doctrine, as recently articulated in State v. Mayfield, ___ Wn.3d ___, 434 P.3d 58 (2019); to define what are "unforeseeable intervening circumstances" and whether the State meets its burden of proof where a trial court found probable cause but a jury acquits.

B. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Thomas Babb asks this Court to grant review of the court of appeals' unpublished decision in State v. Babb, 2019 WL 350661, filed January 28, 2019 (Appendix A).

C. ISSUES PRESENTED FOR REVIEW

This case presents the question, what is an “unforeseeable intervening circumstance” under Washington’s narrow attenuation doctrine? It also presents the question, what is the State’s burden of proof, and is it met where the trial court found probable cause to arrest for the alleged circumstance, but a jury did not find it beyond a reasonable doubt?

1. Is this Court’s review warranted under RAP 13.4(b)(1) because the decision of the court of appeals conflicts with State v. Mayfield, ___ Wn.3d ___, 434 P.3d 58 (2019), requiring the State to meet its burden to prove “unforeseeable intervening circumstances” before admitting evidence under Washington’s attenuation doctrine?

2. Is this Court’s review warranted under RAP 13.4(b)(3) because it presents a “significant question” of constitutional law under article I, section 7, and presents the opportunity to define the limitations of Washington’s newly articulated attenuation doctrine?

3. Is this Court’s review warranted under RAP 13.4(b)(4) because it presents a question of “substantial public interest,” specifically

whether the State may benefit and gain access to otherwise inadmissible evidence following an allegation of officer assault that is later rejected by a jury?

D. STATEMENT OF THE CASE

1. Charges & Defense

The Snohomish County Prosecutor's Office charged Thomas Babb with third degree assault of law enforcement officer Stephen Ross (count I) and possession of heroin, a controlled substance (count II). CP 139.

Babb asserted general denial, as well as self-defense against the assault charge. 1RP 7¹; CP 6.

2. Suppression Hearing

At a pretrial suppression hearing, Babb argued Ross lacked legal authority to seize or arrest him, argued he was lawfully entitled to resist the unlawful arrest, and subsequently obtained evidence of his conduct and evidence of heroine must be suppressed. 1RP 7. The State argued because an officer assault occurred, evidence of both the assault as well as the heroin was admissible, regardless of the legality of the initial seizure. 1RP 51-55.

Babb did not testify and called no other witnesses. 1RP 47-48. The State offered testimony from Officers Ross and Anderson to establish the

¹ This petition refers to the verbatim report of proceedings as follows: 1RP (11/04/16), 2RP (11/10/16), 3RP (11/14/16-11/17/16), 4RP 12/14/16, 5RP (12/22/16).

following. 1RP 7-47. On January 6, 2016, Ross responded to a dispatch call reporting a “slumper.” 1RP 9, 13; CP 4-5. In his experience “slumper” calls generally indicate a person who is unconscious from alcohol, drug use or a medical condition. 1RP 12; CP 4. This call had only very basic information and no indication a crime had been committed. 1RP 27. On scene, Ross observed three firefighters and Babb walking down a flight of stairs. 1RP 28. Babb had a vacant expression, was staggering and was uneasy on his feet. CP 5; 1RP 14. Ross was concerned Babb might be affected by alcohol or drugs. CP 5; 1RP 14. By the time Ross reached them, Babb had reached the foot of the stairs without falling. 1RP 28, 30.

One of the firefighters told Ross, “You need to talk to this guy.” 1RP 29; CP 5. Ross also testified, “Someone, I think his stepmom, said he’s not supposed to be here.” CP 5; see also 1RP 13, 29. The court found this statement came from an unidentified person at the apartment complex and been passed on to Ross via the firefighter. CP 5 (Findings I.10-11).

When Babb reached the bottom of the stairs, he was walking toward the public street. 1RP 30. Babb was carrying a longboard and a backpack. 1RP 15. As Babb was walking past Ross, Ross told Babb he was a police officer and he needed to speak to him. CP 5; 1RP 15. Babb continued toward the street and walked past Ross. CP 5; 1RP 15. Ross testified that had he not stopped Babb, Babb would have continued to walk away with

his back turned to Ross. 1RP 31-32. As Babb continued to walk past, Ross placed his right hand on Babb's shoulder, told him to stop, and told him to put down the longboard and backpack. CP 5-6; 1RP 15.

Ross put down his longboard and backpack and immediately began to run away. CP 6; 1RP 15. Ross began chasing him. CP 6; 1RP 16. Ross testified that as he was running, he told Babb to stop, and stated "Everett Police. You are under arrest." 1RP 16.

Babb ran down the sidewalk and across the street, and attempted to climb a fence. 1RP 16, 17, 34. Ross pulled him down. 1RP 17. Babb "landed face[]down on the ground." 1RP 17. Ross testified he was on top of Babb, Babb's arms were beneath him and he told him to put his arms behind his back. 1RP 18, 19. Ross grabbed Babb's left arm and tried to grab his right arm to put him into handcuffs. 1RP 17. Babb struggled. CP 6; 1RP 18.

Ross testified Babb tried to roll over and kept his right arm beneath him out of his grasp, and during the struggle, he punched Babb twice in the back. 1RP 18, 20. Babb rolled over and struck Ross on the side of the head. 1RP 20; see also CP 6. Ross punched Babb in the torso, and Babb again struck Ross in the head. 1RP 21; see also CP 6.

Ross then testified he applied his TASER four times, firing one set of two TASER darts into Babb's torso, a second set of TASER darts into

his left leg, and then applying two “drive stuns” with his TASER. 1RP 21. Babb said, “I’m having a seizure” and went limp. 1RP 21, 24.

Ross rolled Babb over and handcuffed him. 1RP 21, 24. Other officers, including Officer John Anderson, arrived on scene to find Babb handcuffed and unresponsive in Ross’s custody down by the fence. 1RP 40. They assisted in moving Babb up the hill where the firefighters checked him. 1RP 24, 1, 45. Ross then searched Babb’s person and clothing. 1RP 24; CP 6. At some later point, Ross searched Babb’s backpack. 1RP 38; CP 6. He found drug paraphernalia in both. 1RP 38; CP 6.

The State argued Ross’s initial seizure was a valid investigative detention, or alternatively, community caretaking stop. See 1RP 51-53. The State also argued regardless of seizure’s legality, the officer assault made evidence the assault and the heroine admissible. 1RP 53-55. Babb argued the evidence of drugs “flowed as a direct result of that initial illegal detention,” and “must be suppressed.” 1RP 56.

The trial court concluded Ross illegally seized Babb when he touched his shoulder and told him to stop. 2RP 5-6; CP 7 (Conclusions II.1, 3, 6-9). The court reasoned evidence of assault on a police officer was not subject to suppression, despite an unlawful arrest, and denied suppression of all evidence related to the assault. CP 8 (Conclusion II.9-11); 2RP 6. The court also denied Babb’s motion to suppress evidence of drugs. 2RP

7-10 (citing State v. Cormier, 100 Wn. App. 457, 997 P.2d 950 (2000)); CP 8 (Conclusion II.13).

3. Trial Evidence

At trial, the State presented testimony of several officers who responded to the scene, a firefighter, and a forensic scientist, and presented several photographs of Babb and Ross and a baggie of heroin found in Babb's possession.

Ross's testimony was substantially similar to his suppression hearing testimony, with two notable exceptions. At trial, Ross testified that he applied "several" drive stuns, rather than just two. Compare 3RP 133 ("several") with 1RP 21 ("just a couple"). Ross also testified that he was kneeling next to Babb and that "I think -- I wasn't on his back I don't think," as compared to his unequivocal agreement during the suppression hearing that he was "on top of" Babb. Compare 3RP 122 (kneeling) with 1RP 19 (agreed to "on top of").

Ross also testified, and a photograph confirmed, that Babb's alleged strike left no mark on Ross. 3RP 145. A photograph also showed an abrasion on Ross's leg. 3RP 271-72. Ross testified that he believed he had received this scrape during the confrontation with Babb. 3RP 145. Ross also testified he applied a band-aid to his leg himself and did not seek medical attention from anyone. 3RP 196.

Anderson's trial testimony was essentially consistent with his suppression hearing testimony. 3RP 209-230. In addition, both he and another officer testified at trial that they observed Babb's hand bleeding at the scene, as verified by photos of Babb's injuries. 3RP 226-27; 3RP 269-70. Despite Ross's testimony that Babb's hand had struck him on his hat, both Ross and another officer who took pictures at the scene testified that they did not note any blood on Ross's hat. 3RP 205, 273.

A hospital photograph of Babb showed a red mark on his abdomen. 3RP 206. When viewing the photograph during cross-examination, Ross agreed the injury was consistent with a TASER application, and testified because Babb was wearing a t-shirt and moving around, it was "hard to say exactly" where he deployed the TASER. 3RP 206.

The forensic scientist testified that the baggie of drugs found in Babb's possession contained 0.06 grams of heroin. 3RP 250, 252.

4. Closing Arguments

In closing, the State argued the evidence showed Babb intentionally struck Ross. 3RP 317. Babb's real reason for resisting was not a fear of injury, but a desire to avoid arrest. 3RP 316. As a result, Babb was not legally authorized to resist even an unlawful detention or arrest, because all he faced was a loss of freedom. 3RP 318-19. The State also argued Babb's hand injury could have been due to being dragged up the hill, and in any

case, was the result of his own actions of resisting. 3RP 328-29. Finally, the State argued that Ross's story was credible because if fabricated, he would have fabricated a greater degree of injury, or even injured himself to make it appear as if Babb had injured him. 3RP 328.

Babb argued Ross acted illegally by chasing him across the street, grabbing him and pulling him off of the fence, resulting in a cut to his finger, getting on top of him, ordering him to pull his arms out from underneath him, and punching him in the back. 3RP 321. Up to this point, Babb's only actions had been the lawful and non-violent act of running away. 3RP 322, 325. Also, at this point, even if Babb had punched Ross, Babb had already been injured and faced more than a loss of freedom. 3RP 222.

Babb also argued Ross's testimony that a punch even occurred was not credible and not corroborated. 3RP 322-24. Although photos showed Babb's hand bleeding, there was no blood on Ross's hat, his hat had not come off his head, there was no mark, and officers on the scene took Ross at his word, rather than bothering to take a photograph of Ross's head or asking him for more details. 3RP 323-24. Also, Ross's description of the confrontation did not make sense. 3RP 322. Another officer had testified the confrontation occurred at the bottom of a steep slope that went right up to the fence, and had not ended in a flat space of ground as Ross had testified. 3RP 322-23. Babb would have been pinned in between the slope

and the fence, with Ross on higher ground. 3RP 323. For Ross's version of events to be true, Babb would have had to roll up the hill and swing his arm up high enough to strike Ross on the side of his head by the eyebrow, rather than on a lower point such as his chin. 3RP 323.

5. Verdict, Sentence & Appeal

The jury found Babb guilty of possession of a controlled substance, and not guilty of third degree assault. CP 87-88. The court sentenced Babb to 7 days of confinement. CP 21; 5RP 10. Babb timely appealed. CP 15.

6. Appellate Arguments & Decision

On appeal, Babb argued article I, section 7 affords greater protection than Amend. IV, and the court should reject the federal versions of the independent source and attenuation doctrines, and the State's so-called "officer assault exception. Br. App. at 13, 22, 26. Babb also argued the attenuation doctrine could not be applied to his case and remain consistent with art. I, §7, unless it resulted in suppression of evidence seized after his arrest, particularly where such evidence was unrelated to the alleged officer assault. Br. App. at 37, 49.

The State argued the evidence was admissible both because it was obtained after an officer assault and because it was sufficiently attenuated from the initial illegal arrest. Br. Resp. at 3, 7.

The court of appeals held under both the Fourth Amendment and article I, section 7, evidence of an officer assault is admissible, even where the initial seizure or stop was unlawful. Babb, No. 76321-1-I, slip op. at 4-6. The court essentially formulated and applied its own variation of the attenuation doctrine, and reasoned this case was “a bridge too far.” Babb, slip op. at 6-7. The court found a valid arrest for officer assault “breaks the causal chain” and the evidence was admissible. Babb, slip op. at 8.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT’S REVIEW IS WARRANTED TO DETERMINE WHETHER THE COURT OF APPEALS’ DECISION CONFLICTS WITH WASHINGTON’S NARROW ATTENUATION DOCTRINE AS RECENTLY DEFINED IN STATE V. MAYFIELD.

1. The court of appeals’ decision presents a conflict with a published Washington Supreme Court decision under RAP 13.4(b)(1).

The court of appeals’ decision conflicts with this Court’s recent decision in State v. Mayfield, ___ Wn.3d ___, 434 P.3d 58 (2019).

In Mayfield, this Court first outlined Washington’s attenuation doctrine. Mayfield, slip op. at 2. The Court explained, “to comply with the heightened protections of article I, section 7, the attenuation doctrine must be narrow and apply only where intervening circumstances have genuinely severed the causal connection between official misconduct and the

discovery of evidence.” Id. The Court found that such circumstances did not exist in Mayfield’s case, and so suppression was required. Id.

The Court took great pains to distinguish Washington’s new attenuation rule from the more expansive federal rule, stating “we recognize a narrow, Washington-specific attenuation doctrine, to be applied only where the State proves that unforeseeable intervening circumstances truly severed the causal connection between official misconduct and the discovery of evidence.” Id., slip. op. at 29

The court of appeals’ decision in Babb’s case violates this newly articulated rule in two manners. First, it is entirely foreseeable that after being illegally chased down the street, tackled, repeatedly punched in the back, and TASERed, Babb might flail around and strike the officer. Even if this act occurred, which defense does not concede, it is well within the realm of the foreseeable in response to unlawful use of police force. Second, the State did not meet its burden at the suppression hearing to show this event actually occurred. Although the trial court found there was probable cause for the arrest, the jury later acquitted Babb, meaning it did not find the circumstance occurred beyond a reasonable doubt. Even if the State’s burden to prove the circumstance is somewhat lower than beyond a reasonable doubt, this burden should be higher than mere probable cause,

in order to satisfy Washington's narrow attenuation doctrine under Mayfield.

This Court should accept review under RAP 13.4(b)(1), because it affords the Court the opportunity to define the limits of "unforeseeable intervening circumstances" and define the State's burden of proof under Mayfield.

2. This case presents a significant question of State constitutional law under RAP 13.4(b)(3).

As discussed above, this case addresses the limits of Washington's attenuation doctrine under Mayfield. As such, it presents a significant question of law under Washington's Constitution, article I, section 7, defining searches and seizures in Washington. This case presents the opportunity to define the limits and burdens of proof under this newly articulated framework under Washington's more protective constitution.

This Court should accept review under RAP 13.4(b)(3).

3. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

In addition to recent case law and the newly articulated rule under Washington's Constitution, this case creates a compelling issue of substantial public interest because it touches on policy considerations that incentivizes police misconduct and excessive use of force.

Here, the State received its proper remedy to the allegation of officer assault; it took Babb to trial on the assault. The State seeks to gain an additional benefit from its officer's misconduct—the contents of Babb's pockets. It is clear from the officer's conduct that the desire to invade Babb's privacy and search him for drugs based on his hunch, was his motivation from the outset of the interaction. Allowing the State to meet its burden under Mayfield with a mere allegation of officer assault, or even a preliminary finding of probable cause, will incentivize officer misconduct.

Here, given the officer's admissions at the pre-trial hearing and during the trial, it is clear Babb was subjected to excessive force. See 1RP 17, 20-21. On the basis of a potential allegation of loitering or drug use, Babb 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. 1RP 27; CP 5; see also 1RP 13, 21, 24, 29. The reason for this over-the-top use of force is unclear, but includes the possibility, as discussed by Judge Chun during oral argument at the court of appeals, that the officer was escalating the level of violence in an effort to elicit a reaction that would then justify the initially illegal arrest.

While Mayfield points out that an officer's good or reasonable conduct is not a reason to admit evidence under Washington's more protective constitution, the reverse is not true. See Mayfield, slip op. at 28.

While protection of individual privacy rights is our constitution's primary concern, discouraging police misconduct is still a secondary concern, along with maintaining the integrity of the judiciary by avoiding reliance on unlawfully obtained evidence, and both warrant consideration. State v. Boland, 115 Wn.2d 571, 581-82, 800 P.2d 1112 (1990).

This Court should accept review under RAP 13.4(b)(4), and take the opportunity to define the limitations of Washington's attenuation doctrine in a manner that will not encourage police misconduct or excessive use of force against Washington citizens.


F. CONCLUSION

For the aforementioned reasons, Babb respectfully asks this Court to grant review under RAP 13.4(b)(1), (3), and (4).

DATED this 27th day of February, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



E. RANIA RAMPERSAD

WSBA No. 47224

Office ID No. 91051

Attorneys for Appellant

Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 76321-1-1
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
THOMAS CHARLES BABB,)	
)	
Appellant.)	
_____)	FILED: January 28, 2019

ANDRUS, J. — Thomas Charles Babb was unlawfully stopped, chased, and arrested by a police officer. The State alleged Babb struck the officer, who arrested him for assault in the third degree. A search incident to arrest led to the discovery of drugs in his pocket and backpack. He was subsequently charged with both assault of a police officer and possession of heroin. Babb filed a motion to suppress evidence of the drugs found in the search, which the trial court denied under State v. Cormier, 100 Wn. App. 457, 997 P.2d 950 (2000).

A jury convicted Babb of possession of a controlled substance but acquitted him of the assault charge. Babb contends that the trial court erred in admitting the evidence unrelated to the assault charge, including the evidence of heroin discovered in the search incident to arrest.

FACTS

On January 6, 2016, Everett Police Officer Steven Ross responded to a call reporting a "slumper."¹ The slumper, later identified as Babb, was "hanging out" in the walkway of an apartment building on 112th Street Southeast in Everett. When Officer Ross arrived, he saw Babb and three firefighters walking down the building's stairs. Babb was uneasy on his feet and staggering. One of the firefighters told Officer Ross that he needed "to talk to [that] guy" because someone, possibly Babb's stepmother, had told the firefighter that "[Babb]'s not supposed to be there."

As Babb approached the bottom of the stairs, Officer Ross saw Babb was carrying a backpack and longboard. Officer Ross identified himself as a police officer and told Babb that he wanted to talk. Babb did not reply and continued to walk past him. At that point, Officer Ross put his hand on Babb's shoulder and told him to stop and to put down the backpack and longboard. Babb put down his possessions and ran away from the police. Officer Ross chased Babb, yelling that he was under arrest. Officer Ross chased Babb across 112th St. SE and down a hill into a grassy area. When Babb reached a fence and tried to climb it, Officer Ross pulled Babb off the fence and a struggle ensued. As Officer Ross tried to handcuff Babb, he testified that he struck Babb twice in the back because Babb would not comply with his verbal requests to put his hands behind his back. Babb responded by striking Officer Ross twice in the head. After the second strike,

¹ A slumper is someone passed out due to a medical emergency or under the influence of drugs or alcohol.

Officer Ross drew his Taser and fired multiple darts into Babb's torso and right leg, and when those failed to subdue Babb, Ross started doing drive stuns.²

Babb went limp, at which point Officer Ross was able to handcuff him. Officer Ross and a second officer carried Babb up the hill to receive medical assistance. Officer Ross searched Babb's person and found drug paraphernalia and what looked to be heroin. Officer Ross found additional drug paraphernalia inside Babb's backpack. The police arrested Babb for third degree assault and later charged him with both assault and possession of a controlled substance (heroin).

Babb moved to suppress the drug evidence, contending that his detention and subsequent arrest were unlawful. The court concluded the initial detention and arrest were unlawful because the police had no probable cause to believe Babb had committed any crime. However, the court denied the motion to suppress, reasoning that the police found the drugs as a result of the assault on Officer Ross while he was engaged in his official duties. A jury convicted Babb of possession of a controlled substance but acquitted him of the assault charge.

ANALYSIS

Babb challenges the trial court's legal conclusion that "[c]onsistent with State v. Cormier, . . . even though the stop was illegal, because the drugs were found as a result of the arrest for Assault in the Third Degree, they are admissible." We review this conclusion of law de novo. State v. Armenta, 134 Wn.2d 1, 9, 948

² Officer Ross testified that "a drive stun is when you place the front of the taser on a person's body. The idea is that it will create an electrical connection between the darts and the taser and that either neuromuscular incapacitation will occur to prevent someone from using their muscles like they normally would or the pain that it causes convinces them to stop resisting and stop fighting."

No. 76321-1-I/4

P.2d 1280 (1997). Because Babb does not assign error to the trial court's findings of fact, they are deemed true on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Babb argues that the trial court erred in basing its decision to deny the motion to suppress on State v. Cormier, 100 Wn. App. 457, 997 P.2d 950 (2000). In that case, the court held that if the defendant is illegally detained or arrested but is then lawfully arrested, the evidence derived from the second, lawful arrest is admissible. Babb argues Cormier is inconsistent with article I, section 7 of the Washington State Constitution, was based on Fourth Amendment jurisprudence, and implicitly relied on the federal attenuation doctrine, an exception to the exclusionary rule not expressly adopted in Washington.

Article I, section 7 of the Washington State Constitution states that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision generally provides more protections to an individual's privacy than the Fourth Amendment to the United States Constitution. State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999); see also Blomstrom v. Tripp, 189 Wn.2d 379, 399, 402 P.3d 831 (2017). In general, under the Fourth Amendment and article I, section 7, evidence found as the result of an illegal search or seizure must be suppressed. State v. Bonds, 98 Wn.2d 1, 11, 10-11, 653 P.2d 1024 (1982).

However, under the Fourth Amendment, if a defendant assaults a police officer during an unlawful stop or detention, evidence of the assault has been deemed admissible. See State v. Mierz, 127 Wn.2d 460, 473, 901 P.2d 286 (1995)

(holding that when the initial entry or arrest is unlawful, but the individual assaults an officer, evidence of the assault is not foreclosed by the exclusionary rule). In State v. McKinlay, 87 Wn. App. 394, 398-99, 942 P.2d 999 (1997), this court held the result is the same under article I, section 7:

When an individual assaults a police officer whose intrusion allegedly violates Fourth Amendment protections, evidence of the assault is outside the scope of the exclusionary rule. A contrary rule would allow one who was subject to an illegal search to respond with unlimited force and be immunized from prosecution. Even an illegal law enforcement entry would not justify assaultive conduct by an accused against a police officer unless a traditional self-defense analysis is possible This reasoning applies equally under article I, section 7 of the Washington State Constitution.

Id. (internal quotation marks omitted)

While Mierz and McKinlay addressed the admissibility of evidence of the assault, neither case addressed the admissibility of evidence of other crimes discovered in a search incident to the assault arrest. That issue arose in Cormier, where the court held that evidence of drugs found in a search incident to an arrest for assault on a police officer was admissible. Cormier, 100 Wn. App. at 464.

Cormier was arrested after riding his bike around an area under police investigation. Id. at 459. The detective on scene asked Cormier why he was there, if he knew anything about a crime at that location, and to remove his hands from his pockets. Id. Cormier did not comply. Id. When the detective asked Cormier again to remove his hands from his pockets, he threatened that he would arrest Cormier for obstruction. Id. Cormier still did not comply, and the detective attempted to handcuff Cormier, at which point a struggle began. Id. Cormier hit

the detective twice. Id. The detectives were able to handcuff Cormier and take him to jail, at which point they found drugs in his shirt pocket. Id.

Concluding that “the officers did not have a reasonable belief that Mr. Cormier was armed and, therefore, were not justified in stopping him,” the court determined that the initial seizure was unlawful. Id. at 462. However, the court continued to say that “[b]ut Mr. Cormier has no right to assault an officer. And that assault justified the resulting custodial arrest.” Id. Relying on our Supreme Court’s decision in Mierz, the court held that even when there is an illegal arrest or act, “an assault against police officers . . . is outside the scope of the exclusionary rule, because it is sufficiently distinguishable from any initial police illegality to be purged of the primary taint.” Id. (internal quotation marks omitted) (quoting Mierz, 127 Wn.2d at 473-74).

Babb argues that Cormier implicitly relies on the federal “attenuation doctrine,” an exception to the exclusionary rule not yet recognized under article I, section 7 of our state constitution. Babb contends this exception should be rejected just as the Washington Supreme Court has rejected the inevitable discovery doctrine in State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009) and the “good faith” exception in State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010). The attenuation doctrine defines the parameters of the “fruit of the poisonous tree” rule. Evidence is not deemed “fruit of the poisonous tree” if the connection between the challenged evidence and the illegal actions of the police is “so attenuated as to dissipate the taint.” State v. Eserjose, 171 Wn.2d 907, 919, 259 P.3d 172 (2011). Babb seeks a ruling that under article I, section 7 of the state

constitution, once it is determined that the police have effected an unlawful arrest, the defendant's conduct thereafter becomes irrelevant and any evidence discovered must be excluded as "fruit of the poisonous tree."

We do not need to resolve the issue of whether the attenuation doctrine is compatible with article I, section 7 to resolve this case. Babb's formulation of the exclusionary rule under our constitution is a bridge too far. Babb does not challenge the legality of his arrest for assault on a police officer. Nor does he dispute that the drugs were found during a lawful search incident to this lawful arrest. Under these circumstances, the discovery of the drugs was not the result of an unlawful arrest. Cormier's reasoning is sound under both the Fourth Amendment and article I, section 7 of the state constitution.

The reasoning in Cormier is supported by State v. Rousseau, 40 Wn.2d 92, 241 P.2d 447 (1952), overruled on other grounds by State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997) and State v. Holeman, 103 Wn.2d 426, 693 P.2d 89 (1985). In both cases, there were two, distinctive arrests: an unlawful arrest followed by a lawful arrest, and evidence discovered incident to the second, lawful arrest, was deemed admissible.

In Rousseau, the police unlawfully searched and arrested the defendant for burglary. 40 Wn.2d at 93. As the officer escorted Rousseau to his vehicle, Rousseau pushed the officer into oncoming traffic and fled by foot. Id. When the officer caught up with Rousseau, he searched him and recovered a stolen watch. Id. at 94. The Supreme Court held that when deciding whether to suppress evidence obtained after a second arrest, the trial court must determine whether

that arrest was lawful. Id. The court concluded that the defendant was lawfully arrested following the assault, reasoning that the watch was found during a search incident to the lawful arrest, and therefore, there was no error in denying suppression of the evidence. Id. at 96.

Similarly, in Holeman, officers illegally arrested the defendant in his home without a warrant. 103 Wn.2d at 429. However, after reading the defendant his Miranda³ rights, the defendant's father raised a crowbar above the officers in a "threatening position," and the defendant attempted to intervene, resulting in the arrest of both the defendant and his father for obstruction. Id. at 428. The court concluded that the defendant's second arrest for obstructing a public servant was lawful, and therefore, the defendant's subsequent jailhouse confession was admissible. Id. at 430-31. In Cormier, as in Rousseau and Holeman, the second arrest was lawful and the evidence found thereafter was admissible. See Rousseau, 40 Wn.2d at 96; Holeman, 103 Wn.2d at 431; Cormier, 100 Wn. App. at 463.

Thus, Cormier follows well-established case law in Washington to hold that a valid and lawful arrest for assault on a police officer breaks the causal chain between an illegal detention and a subsequent search. See Eserjose, 171 Wn.2d 930, 932 (only evidence obtained by unlawful government action need be suppressed; causation turns on the logical link between the illegal government conduct and the acquisition of the challenged evidence) (Madsen, J., concurring)).

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

We conclude that the trial court did not err in denying Babb's motion to suppress evidence of the drugs. Because the trial court did not err in denying Babb's motion to suppress, Babb's motion for reconsideration of the motion to suppress was correctly denied.

Affirmed.

WE CONCUR:

Chen, J.

Andrus, J.

Becker, J.P.T.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2019 JAN 28 AM 8:39

February 27, 2019 - 3:59 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: State of Washington, Resp-Cross App v. Thomas C. Babb, App-Cross Resp (763211)

The following documents have been uploaded:

- PRV_Petition_for_Review_20190227155914SC429040_7268.pdf
This File Contains:
Petition for Review
The Original File Name was BabbPetRev.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- diane.kremenich@snoco.org
- sfine@snoco.org

Comments:

Sender Name: E. Rania Rampersad - Email: rampersadr@nwattorney.net
Address:
1908 E. MADISON ST.
SEATTLE, WA, 98122-2842
Phone: 206-623-2373

Note: The Filing Id is 20190227155914SC429040