

NO. 35110-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SALINAS,

Appellant.

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

The Honorable Steve Dixon, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Charge, conviction, and sentence</u>	2
2. <u>Suppression hearing testimony</u>	3
a. <i>State's witnesses</i>	3
b. <i>Defense testimony</i>	8
3. <u>Argument to suppress evidence and ruling denying suppression</u>	9
C. <u>ARGUMENT</u>	11
THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE EVIDENCE, WHICH WAS THE FRUIT OF THE ILLEGAL SEIZURE.	11
a. <u>Standard of review</u>	12
b. <u>The court erred in implicitly relying on a theory of inevitable discovery and/or attenuation to find the evidence was admissible, despite the illegal seizure</u>	12
i. <i>In Washington, illegal seizure triggers the exclusionary rule</i>	13
ii. <i>The trial court's conclusions were erroneous, and therefore suppression was warranted</i>	16
iii. <i>The trial court also erred in implicitly relying on inevitable discovery and/or the attenuation doctrine to deny suppression</i>	19

TABLE OF CONTENTS (CONT'D)

	Page
iv. <i>The attenuation doctrine is a federal doctrine incompatible with article 1, section 7.....</i>	22
v. <i>Even if the attenuation doctrine were applied, it does not support admissibility of the evidence in this case.....</i>	33
D. <u>CONCLUSION</u>	39

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>City of Seattle v. McCready</u> 123 Wn.2d 260, 868 P.2d 134 (1994).....	23
<u>Ferree v. Doric Co.</u> 62 Wn.2d 561, 383 P.2d 900 (1963).....	12
<u>In re Nichols</u> 171 Wn.2d 370, 256 P.3d 1131 (2011).....	30
<u>State v. Afana</u> 169 Wn.2d 169, 233 P.3d 879 (2010).....	23, 38
<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997).....	15, 27
<u>State v. Arreola</u> 176 Wn.2d 284, 290 P.3d 983 (2012).....	13
<u>State v. Avila-Avina</u> 99 Wn. App. 9, 991 P.2d 720 (2000).....	33, 34, 35, 36, 39
<u>State v. Chenoweth</u> 160 Wn.2d 454, 158 P.3d 595 (2007).....	23, 30
<u>State v. Childress</u> 35 Wn. App. 314, 666 P.2d 941 (1983).....	33
<hr/>	
<u>State v. Duncan</u> 146 Wn.2d 166, 43 P.3d 513 (2002).....	14
<u>State v. Eisfeldt</u> 163 Wn.2d 628, 185 P.3d 580 (2008).....	14, 19
<u>State v. Eserjose</u> 171 Wn.2d 907, 259 P.3d 172 (2011).....	20, 21, 27, 31, 37

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Gaines</u> 154 Wn.2d 711, 116 P.3d 993 (2005).....	23
<u>State v. Gantt</u> 163 Wn. App. 133, 57 P.3d 682 (2011) <u>review denied</u> , 173 Wn.2d 1011 (2012)	13
<u>State v. Garvin</u> 166 Wn.2d 242, 207 P.3d 1266 (2009).....	12
<u>State v. George</u> 146 Wn. App. 906, 193 P.3d 693 (2008).....	17, 39
<u>State v. Gonzales</u> 46 Wn. App. 388, 731 P.2d 1101 (1986).....	34
<u>State v. Gunwall</u> 106 Wn.2d 54, 720 P.2d 808 (1986)	13
<u>State v. Harrington</u> 167 Wn.2d 656, 222 P.3d 92 (2009).....	13
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996).....	14
<u>State v. Hopkins</u> 128 Wn. App. 855, 117 P.3d 377 (2005).....	14, 19, 39
<hr/>	
<u>State v. Ibarra-Cisneros</u> 172 Wn.2d 880, 263 P.3d 591 (2011).....	33, 35
<u>State v. Kinzy</u> 141 Wn.2d 373, 5 P.3d 668 (2000).....	14
<u>State v. Ladsen</u> 138 Wn.2d 343, 979 P.2d 833 (1999).....	22
<u>State v. Larson</u> 93 Wn.2d 638, 611 P.2d 771 (1980).....	16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Lesnick</u> 84 Wn.2d 940, 530 P.2d 243 (1975)	15
<u>State v. Marcum</u> 149 Wn. App. 894, 205 P.3d 969 (2009).....	15
<u>State v. Mendez</u> 137 Wn.2d 208, 970 P.2d 722 (1999).....	15, 18
<u>State v. Morse</u> 156 Wn.2d 1, 123 P.3d 832 (2005).....	24
<u>State v. O'Bremski</u> 70 Wn.2d 425, 423 P.2d 530 (1967).....	28
<u>State v. O'Neill</u> 148 Wn.2d 564, 62 P.3d 489 (2003).....	12
<u>State v. Parker</u> 139 Wn.2d 486, 987 P.2d 73 (1999)	13
<u>State v. Rankin</u> 151 Wn.2d 689, 92 P.3d 202 (2004).....	15
<u>State v. Reid</u> 98 Wn. App. 152, 988 P.2d 1038 (1999).....	12
<u>State v. Rothenberger</u> 73 Wn.2d 596, 440 P.2d 184 (1968).....	28
<u>State v. Samalia</u> 186 Wn.2d 262, 375 P.3d 1082 (2016).....	36
<u>State v. Smith</u> 177 Wn.2d 533, 303 P.3d 1047 (2013).....	22, 27
<u>State v. Vangen</u> 72 Wn.2d 548, 433 P.2d 691 (1967).....	28, 37

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Warner</u> 125 Wn.2d 876, 889 P.2d 479 (1995).....	27
<u>State v. White</u> 97 Wn.2d 92, 640 P.2d 1061 (1982).....	24, 29, 30
<u>State v. Winterstein</u> 167 Wn.2d 620, 220 P.3d 1226 (2009).....	20, 23, 32, 33, 37

FEDERAL CASES

<u>Arizona v. Johnson</u> 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).....	15
<u>Brendlin v. California</u> 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).....	15
<u>Brown v. Illinois</u> 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)..	21, 25, 26, 31, 34-38
<u>Coolidge v. New Hampshire</u> 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).....	15
<u>Elkins v. United States</u> 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).....	25
<u>Herring v. United States</u> 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).....	24
<u>Mapp v. Ohio</u> 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).....	28, 30
<u>Michigan v. DeFillippo</u> 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).....	24, 29
<u>Miranda v. State of Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	8, 25, 34, 35, 36

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Nardone v. United States</u> 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).....	26, 33
<u>New York v. Harris</u> 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990).....	21, 26
<u>Nix v. Williams</u> 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).....	19
<u>Payton v. New York</u> 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).....	20
<u>Stone v. Powell</u> 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).....	24, 25, 26
<u>Terry v. Ohio</u> 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	10
<u>United States v. Calandra</u> 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).....	27
<u>United States v. Ceccolini</u> 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978).....	27, 31, 32, 38
<u>United States v. Crews</u> 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980).....	26
<u>Wong Sun v. United States</u> 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)..	14, 16, 24, 26, 34, 36

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5.....	10, 11
CrR 3.6.....	2, 10, 11
RCW 9.41.250	7

TABLE OF AUTHORITIES (CONT'D)

	Page
Sanford E. Pitler, <u>The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy</u> , 61 WASH. L. REV. 459 (1986)	28
U.S. CONST. Amend. IV	13, 14, 20, 23, 24, 25, 26, 28, 29, 31
CONST. Art. I, § 7	1, 13, 14, 20-24, 27-29, 31, 32, 37

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the evidence, which was the fruit of an illegal seizure.

2. The trial court erred in entering conclusions of law 2, 3, 4, 5, 6, 7, and 8. CP 31-32.¹

Issues Pertaining to Assignments of Error

1. Did the trial court err in failing to suppress the evidence, which was the fruit of the appellant's illegal detention?

2. Did the court err in implicitly applying the inevitable discovery doctrine to find the evidence admissible, despite the illegal detention?

3. Did the trial court likewise err in implicitly applying the attenuation doctrine to find the evidence admissible, despite the illegal detention?

4. Is the attenuation doctrine, as applied by the trial court, incompatible with article 1, section 7?

¹ The court's written findings and conclusions on the motion to suppress are appended to this brief. CP 27-33.

5. Assuming for the sake of argument that the attenuation doctrine applied in this case, was the evidence, nonetheless, inadmissible under the applicable factors?

B. STATEMENT OF THE CASE²

1. Charge, conviction, and sentence

The State charged Robert Salinas with possession of a controlled substance, methamphetamine, based on events occurring December 10, 2016. CP 4-5. According to the probable cause statement, shortly after midnight, Othello police officers stopped a car driven by Ricky Ramirez. Salinas was the passenger. After a series of events led to the discovery of illegal brass knuckles on Salinas's person, Salinas was searched incident to arrest, and police discovered a smoking device with residue that ultimately tested positive for methamphetamine. Officers also searched Ramirez's car and found a baggie with a small amount of a substance that likewise tested positive. Shortly after his arrest, Salinas admitted the baggie was his. CP

2.

Under CrR 3.6, Salinas moved to suppress the pipe containing the residue as well as his post-arrest statements to police acknowledging ownership of the methamphetamine in Ramirez's car. CP 8. The trial court

² This brief refers to the verbatim reports as follows: 1RP – 2/13 and 2/28/17 and 2RP – 3/6/17.

denied the motion, concluding the evidence was admissible. RP 95-99 (oral ruling); CP 27-33 (written findings and conclusions).

Salinas waived his right to a jury and other trial rights. He agreed the case should be tried to the bench based on stipulated documentary evidence. CP 34-57; 1RP 101-05.

A judge found him guilty as charged, and Salinas was sentenced to 30 days of confinement based on an offender score of zero. CP 60; 2RP 2-

3. Salinas timely appeals. CP 76.

2. Suppression hearing testimony

a. *State's witnesses*

In December of 2016, Officer Eduardo Martinez was patrolling the snowy streets of Othello shortly after midnight. 1RP 9-10. He noticed a Buick sedan heading south on the 1300 block of East Main Street. The car slow as it approached North 13th Avenue. It then sped up and turned right on North 12th Avenue. As the car approached East Pine Street, the car made a sudden left turn and slid on the slippery street. The car then came to a stop, blocking the road. 1RP 10.

Because Martinez believed the car had been driving too fast for conditions, he decided to perform a traffic stop. 1RP 10.

The driver, Ricky Ramirez, acknowledged he had had difficulty making the turn. He explained he was not used to driving a car with automatic transmission. 1RP 11.

Officer Martinez asked Ramirez for his license and proof of insurance. Ramirez explained he had neither license nor insurance but gave his name and a date of birth indicating he was 20 years old. 1RP 11-12. Ramirez also acknowledged his license might be suspended. 1RP 12-13.

Officer Martinez testified, in addition, that he smelled marijuana as soon as he reached the car. 1RP 13, 34. Martinez asked Ramirez how much marijuana he had in the car. Ramirez said, "a little bit." 1RP 13. Martinez noticed a glass pipe between Ramirez and the passenger, Salinas. He also noticed a small jar containing marijuana in the back seat. 1RP 14.

Salinas interjected that he also had some marijuana, but that he was 22 years old. 1RP 14-15.

Believing that Salinas looked younger than his claimed age, and that therefore marijuana possession would be illegal, Officer Martinez asked Salinas for identification. 1RP 34-35. Salinas produced a state identification card establishing that he was 22 years old. 1RP 16-17. Even though the identification appeared to be valid, Martinez asked Ramirez to hold the identification in view while Martinez wrote down the information for additional verification. 1RP 16, 36.

At the suppression hearing, Martinez acknowledged that, at that point, he had no reason to believe Salinas was committing a crime and no basis to detain him. 1RP 38.

Nonetheless, Officer Martinez told both men to stay in the car³ and that he would return. 1RP 38-40; Ex. 1 (audio/video recording of traffic stop, at approx. 5 minutes 55 seconds (5:55) from start). Martinez went to his patrol car to run the men's names through dispatch. 1RP 17-18.

The process took about 10 minutes, which was longer than normal. 1RP 41. Dispatch revealed Ramirez had a suspended license but that Salinas was indeed 22 and had no warrants or criminal history. 1RP 17-18, 20; Ex. 1 at approx. 11:20. Meanwhile, Officer Seth Carlson arrived as backup. 1RP 21, 41, 50-51.

Officer Martinez returned to the car and asked Ramirez to get out; Martinez planned to arrest him. 1RP 20. As Martinez appeared to tease Ramirez about some wetness on the front of his sweatpants, Officer Carlson can be heard addressing Salinas through the driver's side window. The statements are, however, unclear from the recording. Ex. 1 at approx. 12:25.

Meanwhile, Officer Martinez asked Ramirez if there were other drugs in the car. Ramirez commented that the car belonged to his sister but

³ Indeed, at the suppression hearing, police officers acknowledged that Salinas was never told he was free to leave. 1RP 59-60.

gave Martinez permission to search it. 1RP 20-21; Ex. 1 at approx. 12:40. Martinez testified he overheard something about a knife, and then Carlson directed Salinas to get out of the car. 1RP 22; see also Ex. 1 at approx. 13:02.

As Salinas got out, Officer Martinez told Salinas he had no warrants. Martinez then immediately directed Salinas to stand in a specific location. Martinez stated, “we’re just gonna . . . if you wanna stick around for a little bit, if you can just stand over here.” Ex. 1 at approx. 13:18-13:22; 1RP 22, 45 (Martinez’s hearing testimony). Martinez directed Salinas to stand a few feet from the trunk on the passenger side. 1RP 22; Ex. 1 at approx. 13:22.

While Martinez was directing Salinas to stand “over here,” Officer Carlson notified Martinez he had learned that Salinas had a knife. 1RP 22, 55. Martinez approached Salinas and asked to remove the knife from his pocket. Ex. 1 at approx. 13:28-13:40.

Officer Carlson’s discovery came about as follows: Carlson explained he had seen Salinas making “furtive movements,” i.e., “[e]xcessive movement about his person.” 1RP 52, 60. In Carlson’s experience, such movement may indicate a person is concealing something or preparing to arm himself. 1RP 53. In addition, Carlson noticed that the men were wearing red clothing, suggesting they affiliated with Norteño gangs, whereas (according to Carlson) in Othello most gang members and

prospective gang members align themselves with the Sureños.⁴ 1RP 52-53. Due to the furtive movements and possible gang membership, Carlson had asked Salinas—who was still in the car—if he had any weapons. 1RP 53, 64. According to Carlson, Salinas said he had a “switchblade.” 1RP 54, 65. As Carlson testified, it is illegal to possess such a weapon.⁵ 1RP 54.

Martinez, who was not aware of Carlson’s concern the knife might be illegal, testified that, nevertheless, he did not want Salinas standing around with a knife. 1RP 44-46. Martinez asked Salinas where the knife was, and then asked to extract it himself rather than having Salinas remove it. 1RP 22-23. Martinez then asked Salinas if he had more weapons, and Salinas acknowledged he also had brass knuckles in his pocket. 1RP 23-24. Possession of brass knuckles is a crime,⁶ so Martinez handcuffed and arrested Salinas. 1RP 24.

Salinas notified police he had to use the bathroom, so Carlson took him to the police station. 1RP 25. Martinez remained at the scene about 20 more minutes. 1RP 28; see Ex. 1 (showing passage of approximately 25

⁴ Martinez agreed that Ramirez’s and Salinas’s clothing suggested gang affiliation but, unlike Carlson, he did not believe the men posed any specific danger. 1RP 42-43.

⁵ See RCW 9.41.250 (illegal to possess “spring blade knife”). The knife turned out *not* to be an illegal knife. 1RP 65-66.

⁶ See RCW 9.41.250 (also illegal to possess “metal knuckles”).

minutes between Salinas's departure and Martinez's arrival at the police station).

While waiting for Officer Martinez to arrive at the police station, Carlson searched Salinas again. Carlson found a pipe containing a white residue on Salinas's person. 1RP 56-58.

Meanwhile, in a search of Ramirez's car, Martinez discovered a prescription bottle containing a baggie, which contained a white substance. 1RP 27. The substance tested positive for methamphetamine, as did the residue in the pipe Carlson found. CP 50, 54, 56 (documents submitted for bench trial on stipulated facts).

After Officer Martinez returned to the station, he spoke with Salinas, who was still in the booking room. 1RP 29. After receiving Miranda warnings,⁷ Salinas admitted the prescription bottle was his and that it contained methamphetamine. 1RP 31.

b. *Defense testimony*

Salinas testified that Martinez told him to stay in the car. 1RP 72-73. He did not feel free to leave. 1RP 72. Salinas believed if he did not stay in the car, he would go to jail. 1RP 73. He acknowledged, however, that he was not from Othello so he did not know where he would have gone.

⁷ Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

1RP 72. Salinas clarified that he was first questioned about weapons while he was still in the car. 1RP 76.

3. Argument to suppress evidence and ruling denying suppression.

Salinas argued that he was illegally seized the moment that Officer Martinez told him to stay in the car. 1RP 91, 93. All the pertinent evidence flowed from that illegal detention. 1RP 93.

The court denied the motion to suppress. 1RP 95-99 (oral ruling); CP 27-33. The written findings recount the traffic stop, the officers' interaction with Salinas and Ramirez, the arrest and subsequent search of Salinas, as well as Salinas's inculpatory statement at the police station. CP 27-31 (Findings 1-16).

From this, the court concluded:

1. At the time Officer Martin asked Salinas for identification, reasonable suspicion, if not probable cause, existed for the request. Once [Salinas's] age was verified, any reasonable suspicion that he was involved in criminal activity dissipated.
2. The point . . . when Salinas was asked to remain in the vehicle amounted to a seizure. **However, nothing was gained by this seizure; no evidence was seized and no statements were made as a result of the request.**
3. **The point in the investigation when Salinas was asked to exit the vehicle did not amount to a seizure. Salinas was told that he did not have to stay at the scene, but if he was going to "stick around[,"] he needed to stand in a particular location, out of their way.** The officers

had the right to control the scene in order to safely conduct an investigation and search the vehicle.

4. **The Terry⁸ frisk or pat down of Salinas was lawful.** Officer Carlson observed Salinas making furtive movements and asked him if he had any weapons on him. Salinas told the officer he had a switchblade knife[, an illegal weapon,] on his person. . . .
5. Reasonable suspicion no longer existed once Officer Martinez learned that the knife was not an illegal weapon. The fact that Salinas was armed did, however, contribute to the officer's heightened awareness of danger.
6. After securing the knife, the officer asked Salinas if that was the only weapon he had on him. **The asking of that question did not constitute a seizure.**
7. Salinas **volunteered** that he had a set of brass knuckles on his person. Because brass knuckles are illegal to possess, the officer had probable cause to remove the weapon and [arrest Salinas].
8. **The search of Salinas incident to arrest was lawful. The items removed from his person were lawfully seized.**

CP 31-32 (determinations challenged on appeal are indicated in bold font).

The remaining conclusions of law establish only that Salinas's statements were admissible for purposes of CrR 3.5, rather than CrR 3.6.

CP 32-33 (conclusions 9-12).⁹

⁸ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁹ Salinas assumes, for example, that conclusion 12 (regarding the voluntariness/lack of coercion corresponding to the inculpatory statement)

C. ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE EVIDENCE, WHICH WAS THE FRUIT OF THE ILLEGAL SEIZURE.

The trial court erred in failing to suppress the evidence, which included the residue-containing pipe discovered in a search incident to arrest, as well as Salinas's incriminating statement claiming ownership of the illicit substance found in the driver's sister's car.

The detention of Salinas was illegal. The evidence discovered incident to arrest, and any incriminating statements, flowed directly from the illegal detention.

In determining that the evidence did not flow from the illegal detention, the court appears to have implicitly relied on a theory of inevitable discovery or attenuation. Washington courts have repudiated inevitable discovery based on application of the state constitution. A majority of state Supreme Court justices have, in recent cases, declined to adopt the "attenuation" doctrine for purposes of state constitutional analysis as well. As argued below, the doctrine is, incompatible with the state constitution.

is a conclusion of law addressing CrR 3.5 concerns rather than those under CrR 3.6, governing suppression of evidence. Therefore, he does not assign error to the conclusion on appeal. That does not mean, however, that Salinas accepts that his statement was ultimately admissible.

Without the improperly admitted evidence, there was insufficient evidence to support a conviction. Salinas's conviction should, therefore, be reversed and dismissed.

a. Standard of review

In reviewing a trial court's decision on an accused person's motion to suppress evidence, this Court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial if it is enough "to persuade a fair-minded person of the truth of the stated premise." Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). This Court reviews de novo conclusions of law relating to the suppression of evidence. Garvin, 166 Wn.2d at 249. But unchallenged findings are deemed verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). This Court reviews statements entitled "conclusions of law" as it would findings of fact if they are in the nature of factual findings, rather than legal conclusions. Ferree v. Doric Co., 62 Wn.2d 561, 383 P.2d 900 (1963).

b. The court erred in implicitly relying on a theory of inevitable discovery and/or attenuation to find the evidence was admissible, despite the illegal seizure.

The trial court erred because it appears to have relied on a theory of inevitable discovery or attenuation to find the evidence was admissible,

despite the officers' illegal seizure of Salinas. This Court should determine, therefore, that the illegal seizure violated Salinas's rights under the state constitution. As a result, this Court should find that suppression is the appropriate remedy and order dismissal of the charge.

- i. *In Washington, illegal seizure triggers the exclusionary rule.*

An illegal seizure requires suppression of the fruits of that seizure. Where the remaining evidence is insufficient to support a conviction, dismissal of the charge is required.

When a person is unlawfully seized in violation of the Fourth Amendment or article I, section 7,¹⁰ or both, the evidence obtained because of that seizure must be excluded. State v. Gantt, 163 Wn. App. 133, 144, 57 P.3d 682 (2011) (citing State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009)), review denied, 173 Wn.2d 1011 (2012). "The exclusionary

¹⁰ The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

This provision of the state constitution is explicitly broader than the Fourth Amendment, protecting private affairs broadly and requiring actual legal authorization for any disturbance of those affairs. State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). This is well established and therefore no analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) is required. State v. Parker, 139 Wn.2d 486, 493 n. 2, 987 P.2d 73 (1999).

rule mandates the suppression of evidence gathered through unconstitutional means.” State v. Einfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (quoting State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)). In other words, where evidence is obtained as a direct result of an unconstitutional search, that evidence must be excluded as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (internal quotation omitted). “The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.” Einfeldt, 163 Wn.2d at 639-40 (quoting Wong Sun, 371 U.S. at 485). In addition, verbal evidence that derives immediately from illegal police action is “no less the ‘fruit’ of official illegality than the more common tangible fruits of the unwarranted intrusion.” Wong Sun, 371 U.S. at 485. When the untainted evidence fails to support a conviction, the conviction must be reversed. State v. Hopkins, 128 Wn. App. 855, 866, 117 P.3d 377 (2005) (reversing because conviction rested solely on evidence obtained via improper warrantless seizure).

Under both the Fourth Amendment and article 1, section 7, moreover, warrantless seizures are “per se unreasonable.” State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citing Coolidge v. New Hampshire, 403 U.S.

443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). A warrantless seizure is not justified by what a subsequent search discloses; rather, the officer must justify the search by his or her knowledge at the time of the interference in the accused's privacy. State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

A person is seized when a reasonable person would believe that he is not free to leave or to decline the officer's requests or otherwise terminate the encounter. State v. Armenta, 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997). Moreover, a person is seized when, by means of a show of force or authority, his freedom of movement is restrained. State v. Mendez, 137 Wn.2d 208, 222, 970 P.2d 722 (1999), abrogated by Brendlin v. California, 551 U.S. 249, 255, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). "[I]t is now well established that '[f]or the duration of a traffic stop . . . a police officer effectively seizes everyone in the vehicle.'" State v. Marcum, 149 Wn. App. 894, 910, 205 P.3d 969 (2009) (second and third alterations in original) (internal quotation marks omitted) (quoting Arizona v. Johnson, 555 U.S. 323, 327, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009)); see also Brendlin, 551 U.S. at 255 (quoted in Johnson). "[P]assengers are unconstitutionally detained when an officer requests identification 'unless other circumstances give the police independent cause to question [the] passengers.'" State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)

(second alteration in original) (quoting State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980)).

- ii. *The trial court's conclusions were erroneous, and therefore suppression was warranted.*

Considering the foregoing well-established law and the evidence in this case, several conclusions of law regarding the seizure constituted error. Contrary to the erroneous conclusions, suppression was required.

Here, the court correctly concluded that, once Salinas presented valid identification, Officer Martinez's suspicion that Salinas was underage dissipated. Thus, Martinez's directive to remain in the car—which a reasonable observer would have concluded applied to both Ramirez and Salinas—constituted an illegal seizure. Conclusions 1-2.

But, the court erred when it found the State gained nothing from—that no evidence flowed from—that seizure. Conclusion 2. The court also erred when it determined the items ultimately removed from Salinas's person were lawfully obtained. Conclusion 8. Rather, Salinas's arrest and the evidence obtained from the search incident to arrest flowed directly from the illegal seizure. Wong Sun, 371 U.S. at 487-88. Salinas's inculpatory statement, which was made shortly after his seizure and arrest, was also the fruit of the illegal seizure.

For example, while Salinas was still in the car—unlawfully seized—Carlson asked Salinas if he was armed. 1RP 53, 64. Salinas’s resulting acknowledgement that he had a knife led directly to the discovery of the illegal weapon, which, in turn, led to Salinas’s arrest.¹¹ The arrest then led directly to (1) discovery of a pipe containing methamphetamine residue and (2) inculpatory statements admitting the methamphetamine in Ramirez’s sister’s car belonged to Salinas. Without this evidence, however, there was insufficient evidence to convict Salinas of methamphetamine possession. See State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008) (in reversing a drug paraphernalia conviction based on evidence found in a car, noting that a defendant’s mere proximity to drugs is insufficient to prove constructive possession).

In summary, Salinas believes that the initial illegal detention (described in Conclusion 2) renders all subsequently discovered evidence suppressible.

Putting that aside, however, the court *also* erred in when it concluded that Salinas was not seized when he was told to get out of the vehicle and then directed where to stand. Conclusion 3. Contrary to the court’s conclusions, when viewed objectively, Martinez’s statements did

¹¹ Correspondingly, the pat-down search cannot be considered lawful, because it flowed directly from the initial illegal seizure. Conclusion 4.

not on balance convey to Salinas that the illegal seizure had terminated. Even though Martinez commented that Salinas didn't have any warrants, Salinas—who had already been told to stay put—would not have understood from that passing comment that he was free to leave. In the same breath, Martinez directed Salinas precisely where to stand. Salinas was then immediately questioned about a knife. Ex. 1 at approx. 13:18-13:22. Under the circumstances, a reasonable person would not have believed he was free to leave at some point during that exceedingly narrow timeframe. See Mendez, 137 Wn.2d at 222 (a person is seized when, by means of a show of force or authority, his or her freedom of movement is restrained); see also Johnson, 555 U.S. at 333 (“[f]or the duration of a traffic stop . . . a police officer effectively seizes everyone in the vehicle.”). Similarly, some of the court’s conclusions of law suggest a temporal separation of events that simply was not present. See Conclusions 4, 5, and 6 (suggesting that reasonable suspicion came and went as to the possibly illegal knife and that therefore Salinas was not seized at all points during the transaction).¹² To the extent that they do, they are also erroneous.

¹² The remaining assignments of error challenge Conclusions of Law 6 and 7. These challenges are, however, subordinate to the challenges raised in the main text of this brief. Salinas challenges Conclusion 6 to the extent that it suggests that Salinas was not, at the time the question was asked, still seized. Salinas challenges Conclusion 7 because use of the term

The incriminating evidence flowed from the illegal seizure and therefore must be suppressed. Eisfeldt, 163 Wn.2d at 639-40. And because the only evidence supporting the crime of conviction was fruit of the poisonous tree, the conviction should be reversed, and the charge dismissed. Hopkins, 128 Wn. App. at 866.

- iii. *The trial court also erred in implicitly relying on inevitable discovery and/or the attenuation doctrine to deny suppression.*

Here, the trial court concluded that the State gained nothing from the illegal seizure. Conclusion 2. Yet, as explained above, the evidence clearly flowed from the illegal detention. Thus, the trial court appears to have implicitly relied on a theory of inevitable discovery and/or attenuation to find the evidence admissible in this case. But the highest Court of this state has (1) explicitly rejected inevitable discovery and (2) never stated that attenuation is consistent with the state constitution. This Court should decline any invitation to rely on either doctrine in this case.

In contrast to the independent source doctrine that allows admission of legally obtained evidence despite a prior illegal search and seizure, the inevitable discovery doctrine allows the government to use evidence it obtained illegally but would have, in theory, obtained legally at some point

“volunteered” suggests that Salinas was not then seized. But insofar as that term is used as a synonym for “stated,” it is not objectionable.

in the future. Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). But the state Supreme Court has rejected the inevitable discovery doctrine as “incompatible with the nearly categorical exclusionary rule under article I, section 7.” State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009).

Moreover, under the Fourth Amendment, evidence obtained following illegal acts may, nonetheless, be admissible if the connection between the evidence and the illegal acts is sufficiently attenuated or remote. This has been discussed as a *possible* exception to the fruit-of-the-poisonous-tree doctrine in Washington. See State v. Eserjose, 171 Wn.2d 907, 920-21, 259 P.3d 172 (2011) (three-justice lead opinion, joined by one justice concurring in result only, and another justice joining the result but explicitly disavowing “attenuation” doctrine analysis). Yet a majority of Supreme Court justices have never held the doctrine complies with article 1, section 7 of the state constitution.

The facts in Eserjose were as follows: Upon receiving a tip that Eserjose and a housemate might have been responsible for a burglary of a coffee shop, police officers were dispatched to Eserjose’s father’s home, where all three men lived. Eserjose, 171 Wn.2d at 909-10. The father let police into the house but did not give them permission to go upstairs to the bedroom area. Police disregarded the limited permission, went upstairs, and

arrested both suspects in violation of Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Eserjose, 171 Wn.2d at 910. Eserjose was taken to the police station and, after being advised of his rights and being told his accomplice had implicated him, confessed to the crime. Id. at 911.

Relying on a factually similar federal constitutional case, the lead opinion found the attenuation doctrine rehabilitated Eserjose's otherwise tainted confession. Id. at 917-18 (citing New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990)). The lead opinion concluded that "the proper inquiry is whether the confession is 'sufficiently an act of free will to purge the primary taint'" and found under the facts it was. Id. at 918-19 (quoting Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)). One justice signed this opinion in "result only."

Writing separately, the chief justice concluded the confession was "connected to [Eserjose's] learning of his accomplice's confession, and not to any illegality associated with the deputies' exceeding the scope of consent to enter the home. This should end the analysis." Eserjose, 171 Wn.2d at 931 (Madsen, C.J., concurring).

A four-justice dissent wholly rejected the doctrine. Id. at 940 (C. Johnson, J., dissenting). The four justices rejected the proposition that "time, intervening circumstances, or less egregious misconduct can infuse

the fruits of an illegal seizure with the authority of law required by article I, section 7.” *Id.* The dissent concluded that “[e]vidence obtained in violation of a person’s constitutional rights, even if attenuated, still lacks the authority of law and should be suppressed.” *Id.*¹³

This Court should recognize that the attenuation doctrine has conspicuously *not* been adopted in by the highest court of this State in the context of article 1, section 7 analysis. Thus, this Court should find the trial court erred insofar as it relied on the doctrine to deny suppression of the evidence in this case. Again, the trial court also erred to the extent that it relied on a theory of inevitable discovery.

iv. *The attenuation doctrine is a federal doctrine incompatible with article 1, section 7.*

In any event, the attenuation doctrine—implicitly relied upon by the trial court—violates article 1, section 7 of the state constitution. When police have engaged in an unconstitutional search or seizure in violation of article 1, section 7, “all subsequently uncovered evidence becomes fruit of

¹³ In *State v. Smith*, 177 Wn.2d 533, 303 P.3d 1047 (2013), the Court remained fractured. There, police conducting an illegal search responded to a motel room, and then entered to assist a bloodied assault victim. The four-judge lead opinion found the entry into the room was justified to provide aid, applying the search exception without regard to the prior illegality. *Id.* at 542 n. 2. The three-judge concurrence would have applied the attenuation doctrine to admit the testimony of the victims found in the room. *Id.* at 553-54.

the poisonous tree and must be suppressed.” State v. Ladsen, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). This strict rule applies not only to evidence seized during the unlawful search or seizure, but also to evidence derived therefrom, and “saves article 1, section 7 from becoming a meaningless promise.” State v. Gaines, 154 Wn.2d 711, 717-18, 116 P.3d 993 (2005); Ladsen, 138 Wn.2d at 359 (citation omitted).

The state Supreme Court has repeatedly reaffirmed that, unlike the federal exclusionary rule, Washington’s rule is “nearly categorical,” rejecting both the federal “good faith” and “inevitable discovery” exceptions to our rule. State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) (“good faith”); Winterstein, 167 Wn.2d at 636 (“inevitable discovery”).

“In determining the protections of article 1, section 7 in a particular context, ‘the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.’” State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007) (quoting City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). As discussed below, the federal and state exclusionary rules are based on different concerns and aimed at achieving different goals. Although the federal attenuation doctrine (like the “good faith” and “inevitable discovery” doctrines) serves its intended goals under the Fourth

Amendment, it is inconsistent with the unique purpose and history of article 1, section 7.

Again, the Fourth Amendment provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” In contrast, article 1, section 7 provides, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The latter’s greater privacy protections are well established. State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). Whereas Fourth Amendment protections turn on the reasonableness of government action, article 1, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” State v. White, 97 Wn.2d 92, 104-05, 110, 640 P.2d 1061 (1982).

This difference in purpose impacts the remedy available for any violation. With its focus on the reasonableness of officers’ actions, the primary justification for excluding evidence under the Fourth Amendment is deterrence of police misconduct. Herring v. United States, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979); Stone v. Powell, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); Wong Sun, 371 U.S. at 486. “The [federal] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in

the only effectively available way—by removing the incentive to disregard it.” Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

A derivation of the federal exclusionary rule, the attenuation doctrine rooted in this same goal of deterring police misconduct. It requires federal courts to examine the admissibility of evidence “in light of the distinct policies and interests of the Fourth Amendment.” Brown, 422 U.S. at 602. Thus, in Brown, the United States Supreme Court refused to apply a “but for” rule of exclusion and, instead, adopted a case-by-case balancing approach for determining when the causal connection between a Fourth Amendment violation and subsequently-discovered evidence is sufficiently attenuated. Id. at 603. Factors to consider are (1) temporal proximity of the unlawful arrest and confession, (2) intervening circumstances, (3) “and, particularly, the purpose and flagrancy of the official misconduct.” Id. at 603-04. Where the subsequent evidence is a confession, a fourth factor is whether Miranda warnings were given after the initial illegality. Id.

In his concurring opinion in Brown, Justice Powell explained the connection between these factors and the Fourth Amendment:

[S]trict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule’s deterrent purposes. The notion of the “dissipation of the taint” attempts to mark the point at which the detrimental

consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. . . .

Brown, 422 U.S. at 609 (Powell, J., concurring). Justice Powell continued, “[t]he basic purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests.” Id. at 610. “[T]he Wong Sun inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus.” Id. at 612.

In short, the federal attenuation doctrine concedes a connection between the illegality and the evidence in question but, rather than automatically exclude the evidence, aims to determine whether deterrence of police misconduct requires that result. See Harris, 495 U.S. at 19 (attenuation analysis is “appropriate where, as a threshold matter, courts determine that ‘the challenged evidence is in some sense the product of illegal governmental activity.’”) (quoting United States v. Crews, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)); see also Nardone v. United States, 308 U.S. 338, 340-41, 60 S. Ct. 266, 84 L. Ed. 307 (1939) (“Sophisticated argument may prove a causal connection between information obtained [illegally] and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint”).

The Supreme Court also focused on this goal of deterrence in another “attenuation” case, United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978), albeit one involving different circumstances than those present here. In Ceccolini, the Court examined the admissibility of a *witness’s* trial testimony where that witness’s information was discovered because of an unlawful search. Noting the federal rule’s “broad deterrent purpose,” the Ceccolini Court emphasized “application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” Ceccolini, 435 U.S. at 275 (quoting United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)).

As discussed above, the Washington Supreme Court has not explicitly adopted the federal attenuation doctrine under article 1, section 7. Eserjose, 171 Wn.2d at 919; State v. Smith, 177 Wn.2d 533, 303 P.3d 1047 (2013). And even though the state Supreme Court has employed or mentioned the doctrine in several cases, critically, in none of these cases did the appellant specifically challenge its compatibility with article 1, section 7 in light of our provision’s greater privacy protections. E.g., Armenta, 134 Wn.2d at 10 n.7; State v. Warner, 125 Wn.2d 876, 888-89, 889 P.2d 479 (1995); State v. Rothenberger, 73 Wn.2d 596, 600-01, 440

P.2d 184 (1968); State v. Vangen, 72 Wn.2d 548, 554-55, 433 P.2d 691 (1967); State v. O'Bremski, 70 Wn.2d 425, 428-29, 423 P.2d 530 (1967).

The exclusionary rule under article 1, section 7 is not dependent on Fourth Amendment jurisprudence. Indeed, not until 1961 did the United States Supreme Court hold that the Fourteenth Amendment compelled the extension of Fourth Amendment protections to accused persons in state prosecutions. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). By that time, Washington had applied a rule of automatic exclusion to violations of article 1, section 7 for more than 40 years, frequently rejecting attempts to weaken the rule. See Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 WASH. L. REV. 459, 473-85 (1986).

In the years following Mapp, which compelled states to apply, at a minimum, the federal exclusionary rule, the Washington Supreme Court was content to rely on federal precedent when ordering exclusion under article 1, section 7. Pitler, 61 WASH. L. REV. at 486. "As long as the United States Supreme Court continued to require state courts to automatically apply the federal exclusionary remedy whenever they found a fourth amendment violation, the Washington court had little reason to independently apply the Washington exclusionary rule." Id. at 487. That

changed, however, considering the Burger Court's "retrenchment in the area of federally guaranteed civil liberties," triggering an eventual return to independent application of the rule of automatic exclusion under article 1, section 7. Id. at 487-88.

In State v. White, the state Supreme Court declared a statute making it a crime to "obstruct a public servant" unconstitutionally vague. White, 97 Wn.2d at 95-101. White was arrested for violating the statute and then confessed to a burglary. At issue was whether White's unlawful arrest required suppression of the confession. Id. at 101. In DeFillippo, the United States Supreme Court (with Justice Burger writing for the majority) had upheld the defendant's arrest, and use of the fruits of that arrest, for violating a similar obstruction statute under the federal good faith exception to the Fourth Amendment exclusionary rule. White, 97 Wn.2d at 35-40.

In holding that article 1, section 7 required suppression, the White Court noted the difference in purpose behind the state and federal rules:

The result reached . . . in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be served. This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable government intrusions. [Article 1, section 7] differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

....
We think the language of our state constitutional provision constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions. This view toward protecting individual rights as a paramount concern is reflected in a line of Washington Supreme Court cases predating Mapp. . . . The important place of the right to privacy in [Article 1, section 7] seems to us to require that whenever the right is unreasonably violated, the remedy must follow.

White, 97 Wn.2d at 109-10 (citations and footnotes omitted). The Court concluded that the state constitution required exclusion of White's confession. Id. at 112.

More recently, the state Supreme Court highlighted the difference in purpose between the federal and state exclusionary rules:

The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful government intrusions.

Chenoweth, 160 Wn.2d at 472 n.14 (citing cases, including White); see also In re Nichols, 171 Wn.2d 370, 375, 256 P.3d 1131 (2011) ("We have consistently rejected the sort of balancing test that federal courts apply[.]").

Given the material differences between the state and federal rules, Washington's exclusionary rule should not be tied to its Fourth Amendment counterpart. An examination of the factors federal courts use to find the point at which the deterrent effect no longer justifies exclusion under the Fourth Amendment further highlights these differences.

Under the attenuation doctrine, the most important factor is "the purpose and flagrancy of the official misconduct." Brown, 422 U.S. at 604 (noting this factor "particularly"); see also Ceccolini, 435 U.S. at 279-80 ("not the slightest evidence" officer intended unlawful discovery of evidence). Yet, this factor should be largely irrelevant under article 1, section 7, given its primary concern with protecting privacy rights. Under the Washington provision, the purpose and flagrancy of the constitutional violation matters little.

The same is true for the other Brown attenuation factors. Although these factors may help federal courts in their cost/benefit analysis aimed at deterring police misconduct, they do not ensure the protection of privacy rights and are inconsistent with Washington's "nearly categorical" exclusionary rule. None of these factors converts a violation of article 1, section 7 into a non-violation or the fruits of that violation into non-fruit.¹⁴

¹⁴ As four justices of the Supreme Court indicated in the Eserjose dissent, "Evidence obtained in violation of a person's constitutional rights, even if

Rejecting the federal attenuation doctrine is also consistent with the reasoning in Winterstein, in which the Supreme Court found the inevitable discovery doctrine “necessarily speculative.” Winterstein, 167 Wn.2d at 634. Attenuation is also speculative. Inevitable discovery rests on the State’s ability to prove that, despite unlawful police conduct, the evidence in question would theoretically have been discovered through proper means. Id. at 634-35. Similarly, federal attenuation—in the context of witness testimony—rests on the State’s ability to prove, despite unlawful police conduct, the source of the evidence would have acted in precisely the same way. See Ceccolini, 435 U.S. at 276. In short, both doctrines call for a speculative hindsight examination of the same question, “What if police had not acted unlawfully”?

This Court should hold that the federal attenuation exception—like the federal good faith and inevitable discovery exceptions—is, under the circumstances, incompatible with article 1, section 7.

attenuated, still lacks the authority of law [required by article 1, section 7] and should be suppressed.” Eseriose, 171 Wn.2d at 940 (C. Johnson, J., dissenting).

v. *Even if the attenuation doctrine were applied, it does not support admissibility of the evidence in this case.*

Assuming for the sake of argument that the attenuation doctrine applies in Washington, the State cannot demonstrate that it applies in this case to avoid suppression of the evidence. Significantly, the State retains the burden to demonstrate the evidence is sufficiently attenuated from the illegal search to dissipate the taint of the illegal action. State v. Ibarra-Cisneros, 172 Wn.2d 880, 885, 263 P.3d 591 (2011) (citing State v. Childress, 35 Wn. App. 314, 316, 666 P.2d 941 (1983); Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)). Here, the State cannot meet that burden.

In Avila-Avina, for example, Division One of this Court found that, during a homicide investigation, police officers' detention of the accused in a patrol car for six hours before formally arresting him constituted an illegal detention. State v. Avila-Avina, 99 Wn. App. 9, 15-16, 991 P.2d 720 (2000), abrogated by Winterstein, 167 Wn.2d at 636. For much of the time, police were waiting for an interpreter to arrive so they could communicate with Avila, who spoke Spanish. Avila-Avina, 99 Wn. App. at 12. Shortly after the interpreter arrived, Avila signed a consent form allowing police to search his apartment and car. Id. Police discovered bullets of a type used in the homicide, and Avila made an incriminating statement. Id.

Meanwhile, another suspect asserted he had obtained the gun used in the homicide from Avila. Id. at 13. Avila was ultimately convicted of a firearm possession offense. Id.

The Court was asked to determine whether the illegal detention tainted the physical evidence obtained from Avila's apartment and car, as well as Avila's confession. The question, according to the Court, was "whether police obtained the evidence by exploiting the illegality, or whether the means of obtaining the evidence were sufficiently distinguishable from the illegality to purge the primary taint." Id. at 15 (citing Wong Sun, 371 U.S. at 488; State v. Gonzales, 46 Wn. App. 388, 398, 731 P.2d 1101 (1986)). "If evidence is obtained as the result of a defendant's consent to search or confession, the voluntariness of the consent or confession is a requirement but is not alone sufficient to purge the primary taint." Avila-Avina, 99 Wn. App. at 15 (citing Brown, 422 U.S. at 602). Thus, the giving of Miranda warnings was not dispositive in determining whether the evidence must be excluded. Rather, the evaluating court must determine whether the means of obtaining the evidence were "distinguishable" from the illegal act, based on the facts of each case. Avila-Avina, 99 Wn. App. at 15 (citing Brown, 422 U.S. at 603). The Court announced the test to be applied as follows:

When police obtain evidence as the result of a defendant's consent to search or confession, four factors are relevant in determining whether police obtained the evidence by exploiting an illegal arrest: (1) the temporal proximity of the arrest and the subsequent consent or confession; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of Miranda warnings.

Avila-Avina, 99 Wn. App. at 15-16 (citing Brown, 422 U.S. at 603-04).

Moreover, “[t]he prosecution has the burden of showing admissibility.”

Avila-Avina, 99 Wn. App. at 16 (quoting Brown, 422 U.S. at 604).

The Court found that application of the four factors revealed that the taint of the illegal arrest had not been purged. As for the first two factors, Avila’s consent to search was contemporaneous with the illegal detention, and there were no intervening circumstances. As for the third factor, police improperly detained Avila for several hours after the initial purpose of the seizure was fulfilled. Finally, Avila did not receive Miranda warnings before consenting to the search. Avila-Avina, 99 Wn. App. at 16. The Court ultimately reversed Avila’s conviction. Id. at 21 (reversing after also rejecting admission under “inevitable discovery” analysis).

Here, analysis of the Brown factors reveals the evidence in this case should, likewise, be suppressed. The State bears the burden of proving the means of obtaining the evidence was “sufficiently distinguishable from the

illegality to purge the primary taint.” Avila-Avina, 99 Wn. App. at 16.¹⁵ The State cannot meet this burden. Under the circumstances, the evidence flowed directly from the illegal seizure of Salinas.

Here, the first and second factors weigh strongly in favor of suppression. The passage of time was short between the initial seizure, the discovery of the pipe, and the confession. The record suggests that all these events occurred within an hour or so. See Ex. 1 (video lasting approximately 46 minutes); 1RP 28-29 (Officer Martinez testimony that he remained at the scene about 20 minutes after Salinas was taken away, but then interviewed Salinas soon after arrival at the station). This demonstrates a close association between the illegal act and the resulting consent. See Brown, 422 U.S. at 604-05 (where less than two hours passed between illegal arrest and initial confession, and no significant intervening event broke connection between arrest and incriminating evidence, Wong Sun exclusionary rule applied). For similar reasons, there were no intervening circumstances between the initial illegal detention and the eventual discovery of the evidence and subsequent confession.

¹⁵ See Ibarra-Cisneros, 172 Wn.2d at 885 (reversing Ibarra-Cisneros’s conviction and disapproving of Court of Appeals sua sponte application the attenuation doctrine); see also State v. Samalia, 186 Wn.2d 262, 279, 375 P.3d 1082 (2016) (although affirming conviction, similarly disapproving of Court of Appeals’ sua sponte application of attenuation doctrine)

On the other hand, unlike the accused in Avila-Avina, Salinas was read Miranda warnings. But Miranda warnings alone are insufficient to purge the taint of an illegal seizure upon a confession. See Avila-Avina, 99 Wn. App. at 15 (recognizing that the voluntariness of the consent or confession is a prerequisite to admissibility, but is not alone sufficient to purge the primary taint); see also Brown, 422 U.S. at 597-604 (noting that state court erred in assigning too much importance to the reading of Miranda warnings in this respect, and reversing state court's decision to admit evidence). Any argument that Salinas would have confessed to ownership of the methamphetamine had he *not* been arrested would be specious, and a near facsimile to the prohibited doctrine of inevitable discovery. Winterstein, 167 Wn.2d at 634-35.¹⁶

¹⁶ In Vangen, in contrast, the Supreme Court ruled admissible a confession that occurred several hours after an illegal arrest, and following the occurrence of various intervening circumstances. 72 Wn.2d 548.

Vangen was cited with approval by the lead opinion in Eserjose. 171 Wn.2d at 921-22. Yet, even putting aside the lack of article 1, section 7 analysis in Vangen, the facts are distinguishable. There, police officers arrested a person who was suspected of defrauding an innkeeper of \$200 with credit cards bearing a false name. The police officers erroneously believed that what was in fact only a misdemeanor constituted a felony. Because they had no warrant for the person's arrest, and the misdemeanor had not been committed in their presence, the arrest was unlawful. "This circumstance," the Supreme Court said, had "'ballooned' into a 'false arrest' and a 'poisoned tree,'" which the defendant contended rendered his subsequent confession at the police station inadmissible as "fruit of the

Finally, although it is unlikely the illegal detention was the product of flagrant misconduct, this portion of the analysis is more suited to a federal exclusionary analysis. Compare Brown, 422 U.S. at 604 (noting this factor “particularly”) and Ceccolini, 435 U.S. at 279-80 (“not the slightest evidence” officer intended unlawful discovery of evidence) with Afana, 169 Wn.2d and 180 (“[o]ur state’s exclusionary rule, like its federal counterpart, aims to deter unlawful police conduct, but “its paramount concern is protecting an individual’s right of privacy”). This factor is insufficient to break or even loosen the link between the illegal seizure and the evidence and statements.

poisonous tree.” Vangen, 72 Wn.2d at 552. Holding that the confession was properly admitted, the Supreme Court stated

[I]t is clear that the confession was not the result of that arrest or of information procured solely therefrom. The appellant—arrested late on October 21, and taken to his cell at 12:05 a.m. on October 22—at all times stoutly maintained that he was Elmer J. Johnson and that the credit cards in his possession were his. He insisted that he was Elmer J. Johnson through a second interrogation on the morning of October 22. Not until after the police had contacted the real Elmer J. Johnson in Minneapolis by telephone would the appellant admit that he was not Elmer J. Johnson, but Dean Allen Vangen. He then gave an entirely voluntary statement to Detective Homer Hall, after being advised of his constitutional rights, including his right to counsel and to remain silent.

Id. at 553.

In summary, assuming, for the sake of argument that the attenuation doctrine applies in Washington, the trial court erred when it implicitly applied the doctrine in this case. See Conclusion 2 (erroneously concluding that initial detention, although unlawful, produced no evidence to suppress). The State cannot come close to proving that the means of obtaining the evidence were “sufficiently distinguishable from the illegality” to purge the overwhelming taint of the illegal seizure. Avila-Avina, 99 Wn. App. at 16. Thus, even if attenuation applies in Washington, suppression is required. Because, without the suppressed evidence there is sufficient evidence, the charge should be dismissed. See Hopkins, 128 Wn. App. at 866 (reversing because conviction rested solely on evidence obtained via improper warrantless seizure); George, 146 Wn. App. at 920 (a defendant’s mere proximity to drugs is insufficient to prove constructive possession).

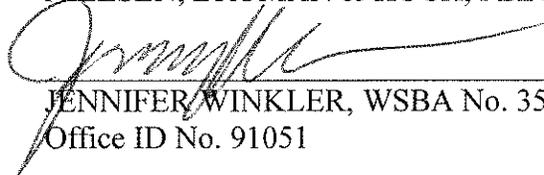
D. CONCLUSION

Salinas’s conviction should be reversed and the charge dismissed.

DATED this 29th day of August, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorney for Appellant

APPENDIX

1 a high rate of speed. The vehicle abruptly turned left and then slid on the
2 roadway, blocking the lane of travel.

3 2. Officer Martinez activated his emergency lights and then stopped the vehicle
4 for the traffic infraction. It was dark, snowing and bitterly cold that night.
5 Officer Martinez did not recognize the driver or the passenger, but observed
6 that the passenger was wearing gang affiliated clothing. He advised the driver
7 the reason of the stop and explained they were being recorded.
8

9 3. The driver acknowledged the reason for the stop and told the officer that he
10 did not have any form of identification or proof of insurance. He verbally
11 identified himself as Ricky D. Ramirez and provided a date of birth of
12 11/27/1996. He added that his license might be suspended. Ramirez gave
13 conflicting stories as to why they were in Othello, where they were going and
14 where they came from.
15

16 4. While Officer Martinez was speaking with Ramirez, he smelled the odor
17 marijuana coming from inside the car. Officer Martinez asked Ramirez how
18 old he was and he replied 20 years old. He also asked him how much
19 marijuana he had in the vehicle. Ramirez told him "a little bit" and pointed to
20 a glass jar in the back seat.
21

22 5. In addition to smelling the marijuana, Officer Martinez also observed a glass
23 smoking device in the center of the seat between Ramirez and the front
24 passenger. He then asked Ramirez if he had anymore marijuana in the car.
25
26
27

1 6. The passenger replied that he had some marijuana and showed Officer
2 Martinez a baggie, but stated that he was 22 years old. Upon learning that
3 the passenger also had marijuana, Officer Martinez asked him if he could see
4 his identification. The passenger identified himself as Robert J. G. Salinas
5 and handed his identification to Ramirez who held it while the officer wrote
6 down the name. Officer Martinez informed Salinas that he was not allowed to
7 have marijuana in the car.
8

9 7. After obtaining consent from Ramirez, Officer Martinez collected the glass
10 smoking device and the glass jar of marijuana and placed both items on the
11 roof of the car.
12

13 8. He then ran a driver's check on Ramirez which revealed his driver's license
14 was suspended in the 3rd degree. Officer Martinez also confirmed that
15 Ramirez was 20 years old and that Salinas was 22 years of age.
16

17 9. Upon learning that Ramirez was driving with a suspended license and that he
18 was in fact under 21 years of age, Officer Martinez asked Ramirez to step out
19 of the vehicle. He asked Ramirez if he had anymore marijuana or drugs in the
20 vehicle. Ramirez said he did not and further told Officer Martinez that he
21 could search the vehicle.
22

23 10. While Officer Martinez was speaking with Ramirez, Officer Carlson of the
24 Othello Police Department, arrived on scene to assist with the traffic stop. As
25 he walked up to the vehicle, he noticed Salinas was making furtive
26 movements. He asked Salinas if he had any weapons on him. Salinas told
27

1 Officer Carlson that he had a switch blade knife on him and began pulling it
2 out. Officer Carlson then instructed Salinas to stop and asked if he would
3 step out of the vehicle.

4
5 11. Once out of the vehicle, Officer Martinez had Salinas place his hands behind
6 his back and interlace his fingers. He then removed the switch blade knife
7 from Salinas. Officer Martinez asked Salinas if he had any other weapons
8 and he replied "brass knuckles". Officer Martinez removed the brass
9 knuckles from Salinas and placed him under arrest.

10
11 12. While handcuffing Salinas, Officer Martinez smelled a strong odor of alcohol
12 from his person. A search of Salinas, incident to arrest, revealed marijuana in
13 his pocket, a glass smoking device with burnt green leafy substance, and
14 another glass object that appeared to be used for smoking.

15
16 13. Officer Martinez also found a red bandana on his person. Salinas was
17 wearing a red hoodie sweater and a 49ers hat. He admitted to being involved
18 with a gang and said he was a Norteno.

19
20 14. Salinas was subsequently transported to the Othello Police Station where a
21 detailed search of his person was conducted by Officer Carlson. Another
22 glass smoking device, with white powdery residue, was located on his person.

23
24 15. Officer Martinez remained at the scene and conducted a search of the
25 vehicle. On the front passenger floor board he located an open can of beer,
26 along with a case of Budweiser beer. Under the front passenger seat, he
27 located a prescription bottle containing a plastic baggie. Inside the plastic

1 baggie, Officer Martinez observed a white, crystal like substance which tested
2 positive for methamphetamine.

3 16. Once at the police station, Officer Martinez read Salinas his Miranda
4 Warnings off of a Department issued card. Salinas verbally indicated he
5 understood his rights and was willing to speak with Officer Martinez. Salinas
6 admitted the prescription bottle was his and that it contained
7 methamphetamine.
8

9
10
11 Based on the above Findings of Fact, the Court makes the following:

12
13 **II. CONCLUSIONS OF LAW**

- 14 1. At the time Officer Martinez asked Salinas for identification, reasonable
15 suspicion, if not probable cause, existed for the request. Once Salina's age
16 was verified, any reasonable suspicion that he was involved in criminal
17 activity dissipated.
18
- 19 2. The point in the investigation when Salinas was asked to remain in the
20 vehicle amounted to a seizure. However, nothing was gained by this seizure;
21 no evidence was seized and no statements were made as a result of the
22 request.
23
- 24 3. The point in the investigation when Salinas was asked to exit the vehicle did
25 not amount to a seizure. Salinas was told that he did not have to stay at the
26 scene, but if he was going to "stick around", he needed to stand in a particular
27

1 location, out of their way. The officers had the right to control the scene in
2 order to safely conduct an investigation and search the vehicle.

3 4. The *Terry* frisk or pat down of Salinas was lawful. Officer Carlson observed
4 Salinas making furtive movements and asked him if he had any weapons on
5 him. Salinas told the officer he had a switchblade knife on his person. A
6 switchblade knife is an illegal weapon, thus giving rise to reasonable
7 suspicion, if not probable cause, that a crime is being committed.

8
9 5. Reasonable suspicion no longer existed once Officer Martinez learned that
10 the knife was not an illegal weapon. The fact that Salinas was armed, did,
11 however, contribute to the officer's heightened awareness of danger.

12
13 6. After securing the knife, the officer asked Salinas if that was the only weapon
14 he had on him. The asking of that question did not constitute a seizure.

15
16 7. Salinas volunteered that he had a set of brass knuckles on his person.
17 Because brass knuckles are illegal to possess, the officer had probable cause
18 to remove the weapon and place Salinas under arrest .

19
20 8. The search of Salinas incident to arrest was lawful. The items removed from
21 his person were lawfully seized.

22 9. Salinas was verbally advised of his Miranda rights.

23 10. Salinas understood his rights and indicated so verbally.

24 11. Salinas knowingly, intelligently, and voluntarily waived his Miranda rights.

25
26 12. Salinas' statement to Officer Martinez was voluntary and not the product of
27 coercion.

1 13. Salinas' statement to Officer Martinez is admissible pursuant to CrR 3.5.

2 **III. ORDER**

3 The Court having entered the foregoing Findings of Fact and
4 Conclusions of Law, and being duly advised, IT IS HEREBY ORDERED that the
5 Defendant's CrR 3.6 Motion to Suppress is denied. The State's CrR 3.5 Motion to
6 Admit Defendant's Statements is hereby granted.
7

8
9 Signed this 28 day of February, 2017.

10
11 
12
13
14 JUDGE STEVE DIXON

15
16
17 PRESENTED BY:

APPROVED AS TO FORM: *only*:

18
19 
20 CAROLYN J. BENZEL, WSBA #23501
21 DEPUTY PROSECUTING ATTORNEY


22 KYLE R. SMITH, WSBA #39760
23 ATTORNEY FOR DEFENDANT
24
25
26
27

28 CrR 3.5/3.6 HEARING
29 FINDINGS OF FACT AND
CONCLUSIONS OF LAW

NIELSEN, BROMAN & KOCH P.L.L.C.

August 29, 2017 - 3:35 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35110-6
Appellate Court Case Title: State of Washington v. Robert Joseph Garcia Salinas
Superior Court Case Number: 16-1-00163-7

The following documents have been uploaded:

- 351106_Briefs_20170829153018D3552893_6413.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 35110-6-III.pdf

A copy of the uploaded files will be sent to:

- padocs@co.adams.wa.us
- randyf@co.adams.wa.us

Comments:

Copy mailed to : Robert Garcia-Salinas 9855 Stone Rd Moses Lake, WA 98837

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20170829153018D3552893