IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. ROMAN LANCE SUPPAH, Defendant-Appellant, Respondent on Review.	Sherman County Circuit Court No. 100016CT CA A149412 SC S062648

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the District Court for Sherman County
Honorable THOMAS M. HULL, Judge

Opinion Filed: August 6, 2014
Author of Opinion: Duncan, J.
Before: Haselton, Chief Judge, and Armstrong, Wollheim, Ortega, Sercombe, Duncan, Nakamoto, Hadlock, Egan, DeVore, Tookey, Garrett, Judges, and Schuman, Senior Judge.
Dissenting: Hadlock, J.

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INTRODUCTION

Defendant's principal argument in response to the state's brief on the merits is that this court should not decide the exclusionary-rule issue presented for review. That issue, however, is the only issue the Court of Appeals decided, defendant having presented no other on appeal. Now, based on an argument for judgment of acquittal that defendant made in the trial court but chose not to present to the Court of Appeals—an argument that has nothing to do with the exclusionary rule—defendant asks this court to affirm the Court of Appeals' decision without reaching the exclusionary-rule issue or, alternatively, to dismiss review as improvidently allowed. For the reasons discussed below, this court should decline those invitations. Nothing justifies insulating from this court's review an important question of state constitutional law that, because of defendant's strategy on appeal, provided the sole basis for the Court of Appeals' reversal of his conviction.

Defendant argues in the alternative that this court should reject the state's argument for an "exception" to Article I, section 9's exclusionary rule. As explained below, the state's proposed rule of law does not create an exception to the exclusionary rule. Rather, it asks this court to recognize that, when an unlawfully detained person commits a "new crime," the existing causation-

based principles underpinning the exclusionary rule generally preclude its application to evidence of the new crime.

ARGUMENT

A. This court should not affirm or dismiss based on an argument that defendant chose not to make in the Court of Appeals.

Defendant first argues that a person does not commit the crime of giving false information to a police officer under ORS 807.620 by providing a false name during an "unlawful and arbitrary stop."[1] (Resp BOM 14). He asserts that, because the police officer who stopped him "did not articulate any specific basis for the stop at the time of the traffic encounter or during the suppression hearing," the officer was acting "arbitrarily" (*i.e.*, without "*any* objective basis to support the seizure"). (Resp BOM 26, 27) (emphasis in original). Consequently, defendant reasons, the officer was not "enforcing motor vehicle laws" when he stopped defendant, and thus defendant could not have violated ORS 807.620 by giving the officer a false name. According to defendant, under those circumstances he was free to identify himself in any way he chose without committing a crime, and therefore the state's argument that "new crime" evidence generally is admissible cannot assist it in this case. Based on that

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[1] "A person commits the offense of giving false information to a police officer if the person knowingly uses or gives a false or fictitious name, address or date of birth to any police officer who is enforcing motor vehicle laws." ORS 807.620(1).

argument, defendant asks this court either to affirm the Court of Appeals' reversal of his conviction or to dismiss review as improvidently allowed. As explained below, defendant's "no crime" argument is not properly before this court and, even if it is, it lacks merit. Either way, neither affirmance nor dismissal would be proper.

As defendant notes, although he made his ORS 807.620 argument to the trial court in a motion for judgment of acquittal, he abandoned that argument in the Court of Appeals. (Resp BOM 13 n 3). In challenging his conviction, defendant's only argument on appeal was that "the trial court erred in denying his motion to suppress *his statements* that derived from the unlawful traffic stop." (Resp BOM 13) (emphasis in original). More particularly, his sole argument was that Article I, section 9's exclusionary rule required the trial court to suppress the statements he made to the officer during the unlawful stop, as well as the incriminating statements he subsequently made to the district attorney's office and another police officer. *See* App Br 6-18. The Court of Appeals considered that narrow issue and reversed defendant's conviction, holding that the statements he made during the stop should have been suppressed as the product of an Article I, section 9 violation, even though his subsequent statements were sufficiently attenuated from the police illegality to avoid suppression**.** *State v. Suppah*, 264 Or App 510, 527-32, 334 P3d 463 (2014) (*en banc*), *rev allowed*, ___ Or ___ (2015).

In light of defendant's strategy on appeal, he is in no position to ask this court to ignore the exclusionary-rule issue and affirm the Court of Appeals' decision or dismiss review based on an unrelated, judgment-of-acquittal argument he chose not to make in the Court of Appeals. "It has long been the rule in this court that [it] will not address arguments that were not raised in the Court of Appeals." *State v. Burgess*, 352 Or 499, 508, 287 P3d 1093 (2012); *see also State v. Anderson*, 354 Or 440, 449 n 6, 313 P3d 1113 (2013) ("[T]he Court of Appeals described the only issue before it as whether, at that point in the encounter, defendant was seized for purposes of Article I, section 9. That, likewise, is the only issue before us on review." (emphasis, internal quotation marks, and citation omitted)); *State v. King*, 307 Or 332, 338, 768 P2d 391 (1989) (although defendant made a due process argument in the trial court, "where [he] failed to present *any* constitutional issue to the Court of Appeals, we decline to consider any of his constitutional arguments").

That rule has particular force where, as here, the party making an argument to this court made a conscious choice not to present it to the Court of Appeals, after presenting a similar argument to the trial court. Moreover, where a party has made such a choice and led the Court of Appeals into deciding a discrete and important state constitutional question in his or her favor, as defendant did here, that party should not be heard to argue in this court that the Court of Appeals' decision is immune from review (due to a purportedly

alternative basis for affirming the ultimate result). Allowing that to occur would encourage "sandbagging" in the Court of Appeals – that is, withholding an argument in that court and then presenting it in this court as a vehicle for protecting the Court of Appeals' favorable legal ruling from review. More importantly, such a practice would undermine this court's role as final arbiter of state law questions. For those reasons, this court should reject defendant's ORS 807.620 argument for affirmance or dismissal.

B. Alternatively, defendant's argument that, on this record, he could not have violated ORS 807.620 lacks merit.

If this court concludes that defendant's ORS 807.620 argument is properly before it, the argument lacks merit because it is based on the faulty premise that the state's evidence failed to establish that the officer who stopped him was "enforcing motor vehicle laws" under ORS 807.620(1). Again, that statute criminalizes the giving of false information about one's name, address, or date of birth to a police officer who is enforcing the motor vehicle laws. As defendant acknowledges, Deputy Hulke testified at the suppression hearing that he stopped defendant for a traffic violation, but that he was "not sure what the violation was." (Tr 8). Hulke further testified that the stop was for "something where [he] would normally just give that individual a warning, and not a Uniform Citation for that violation." (Tr 8-9). That testimony was sufficient to establish that Hulke was enforcing the motor vehicle laws—*i.e.*, a violation of

one of those laws was in his mind—when he stopped defendant; he just could not remember *which* of those laws he saw defendant violate.

And although the record does not reveal whether Hulke had the quantum of suspicion necessary to *lawfully* stop defendant for a traffic violation (due to Hulke's inability to remember the specific facts underlying the stop), an officer is "enforcing motor vehicle laws" under ORS 807.620(1) whenever the officer stops a driver for the purpose of issuing a traffic-violation warning or citation. That is so regardless of whether the traffic stop later is deemed legal or illegal. Defendant seemingly recognizes that. (Resp BOM 29 n 7). Indeed, ORS 807.620(1)'s text does not require that the officer be *lawfully* enforcing motor vehicle laws in order for the defined crime to occur. If defendant is suggesting that the statute does so require, such an interpretation would violate the settled principle that when construing a statute a court may not insert words—here, insertion of "lawfully" before "enforcing motor vehicle laws"—that the legislature has not included. *See* ORS 174.010 (in construing a statute, a court may not "insert what has been omitted"); *State v. Mullins*, 352 Or 343, 362, 284 P3d 1139 (2012) (applying that principle).

In sum, Hulke was "enforcing motor vehicle laws" when defendant gave him a false name. Defendant therefore violated ORS 807.620(1). This court properly allowed review on the exclusionary-rule question and should now decide it.

C. The state's proposed rule of law does not create an "exception" to the exclusionary rule; rather, it asks this court to apply the existing rule.

The state and defendant agree that the exclusionary rule this court has fashioned for Article I, section 9 is based solely on causation principles. That is, the rule operates to exclude evidence at a criminal trial only if there is a significant causal connection between the disputed evidence and a preceding violation of Article I, section 9. *See, e.g., State v. Watson*, 353 Or 768, 784-85, 305 P3d 94 (2013) (finding it unnecessary to determine the constitutionality of certain police actions during a traffic stop because "those actions did not lead to the discovery of the evidence that defendant sought to suppress"). Put another way, only evidence that derives from or is the product of illegal police conduct must be suppressed. *State v. Unger*, 356 Or 59, 68, 80-81, 333 P3d 1009 (2014). But the state and defendant part ways when he asserts that the state is asking this court "to graft a 'new crime' *exception* into the Article I, section 9, suppression remedy." (Resp BOM 34) (emphasis added). That is not what the state is asking for. Rather, the state is simply asking the court to apply existing exclusionary-rule principles—causation principles—to the "new crime" scenario, a scenario this court has not yet considered.[2]

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[2] If the state were asking for an exception to the exclusionary rule in this case, it would be assuming that there was a sufficient causal connection between the police illegality and the disputed evidence for the exclusionary rule to apply. To the contrary, the state's argument is that here, as in most cases presenting the "new crime" scenario, there was an insufficient causal

Footnote continued…

As the state explains in its opening brief, the exclusionary rule operates to suppress evidence only if the evidence is causally connected in more than a mere "but for" way to illegal police conduct. A defendant's voluntary evidence-producing act, like that in issue here (defendant's voluntary act of giving Deputy Hulke a false name), must have a significant causal connection to a prior police illegality before suppression of the resulting evidence is required. Defendant argues that there was a significant causal connection between his act of providing a false name and the ongoing illegal detention because that act was "responsive to the police request or questioning during the illegality." (Resp BOM 41). In making that argument, defendant distinguishes an act that is "responsive" to such a request or questioning from an act that is "unresponsive," contending that evidence resulting from the former, but not the latter, must be suppressed.

An illegal seizure, however, does not require suppression whenever a voluntary evidence-producing act can be described as somehow "responsive" (as opposed to "unresponsive") to a request or questioning by the police during the seizure. If that were the rule, then evidence resulting from a defendant's voluntary consent to a search during an illegal detention would automatically be

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(…continued)
connection between the police illegality and the evidence of the new crime to trigger the exclusionary rule.

suppressed, because the consent was "responsive" to the detaining officer's request for consent. *Unger* and its companion cases—*State v. Lorenzo*, 356 Or 134, 335 P3d 821 (2014); and *State v. Musser*, 356 Or 148, 335 P3d 814 (2014)—make clear that is not the rule. *See Unger*, 356 Or at 78-79 ("[T]he fact that an officer requested consent does not demonstrate that the officer *necessarily exploited* the prior illegal conduct to gain consent." (emphasis in original)).

In the *Unger* trilogy, this court's determination in each case whether there was a significant causal connection between the disputed evidence (which resulted from a consent search) and the police illegality focused on whether the illegality significantly affected the defendant's *decision* to consent to the search. The court did not ask whether the ultimate act of giving consent was a "responsive" or "unresponsive" act. *See Unger*, 356 Or at 65, 69, 76, 92 (repeatedly noting the statement in *State v. Hall*, 339 Or 7, 35, 115 P3d 908 (2005), that a causal connection requiring suppression may exist if a police illegality "'significantly affected' the defendant's *decision* to consent," and holding that in the case at bar "nothing about the limited nature of the unlawful [police] conduct, or the purpose or flagrancy of the conduct, suggests that it caused defendant to consent to the search" (emphasis added)); *Lorenzo*, 356 Or at 140 (as framed by defendant, issue was whether police illegality affected "defendant's *decision* to consent" to the search (emphasis added)); *Musser*, 356

Or at 159 ("The initial and developing purpose of the police misconduct in continuing to detain defendant while inquiring about various possible crimes shows the state taking advantage of that misconduct in a way that likely had an effect on defendant's *decision* to consent." (Emphasis added).).

Similarly, in *State v. Crandall*, 340 Or 645, 136 P3d 30 (2006), this court—in holding that drugs the police seized after illegally detaining the defendant were not subject to suppression—focused on the "defendant's unilateral, voluntary *decision*" to dispose of the drugs upon being detained (by putting them underneath a car as he complied with an officer's unlawful command to "stop" and "come here"). 340 Or at 652 (emphasis added). The court emphasized that the defendant's decision was unaffected by the police illegality and thus "sufficiently attenuated the discovery of [the drugs] from the prior [police] illegality" to render the causal connection between the police illegality and the evidence insignificant. 340 Or at 652. Again, the court did not consider whether the defendant's ultimate evidence-producing act was "responsive" or "unresponsive" to the police illegality; it instead examined whether the police illegality affected the defendant's decision to commit the evidence-producing act.

Defendant makes no argument that Deputy Hulke's illegal detention of him had a significant effect on his *decision* to give a false name (*i.e.*, to create evidence of a crime). Indeed, as the state explains in its opening brief, nothing

in this record suggests that there was anything more than a mere "but for" causal connection between the illegal detention, defendant's voluntary decision to give a false name, and his ultimate act of falsely identifying himself (the "new crime" evidence). Hulke did not ask, direct, or goad defendant to give him a false name or to commit a crime – scenarios that clearly would suggest a significant causal connection between the ongoing police illegality (the illegal detention) and the resulting "new crime" evidence, such that the exclusionary rule would apply. *See* Resp BOM 39 (where defendant correctly suggests that if a person's decision to jaywalk, for example, is a decision in conformity with an officer's request that the person illegally cross the street (*i.e.*, commit jaywalking), then there is a significant causal connection between the police conduct and the evidence of jaywalking (the person's act of illegally crossing the street)).

In sum, under existing (causation-based) exclusionary-rule principles, the evidence of defendant's new crime of providing false information to an officer was not subject to suppression. Defendant's voluntary decision to commit an evidence-producing act (commission of a crime) was—for purposes of the causation-based, exclusionary-rule analysis—unaffected by a preceding police illegality, just as were the voluntary decisions to commit an evidence-producing act in *Unger*, *Lorenzo*, and *Crandall*: the defendants' voluntary decisions to consent to a search in *Unger* and *Lorenzo* and the defendant's voluntary

decision to dispose of incriminating evidence in *Crandall*. In short, the significant causal connection between a police illegality and evidence obtained incident to the illegality that is required for the exclusionary rule to apply did not exist with respect to the evidence of defendant's new crime.[3]

CONCLUSION

Contrary to defendant's argument, the prerequisite for operation of the exclusionary rule—a significant causal connection between a police illegality and the evidence the police obtain thereafter—is absent in this case. The trial court therefore correctly denied defendant's motion to suppress the evidence of his new crime.

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[3] Defendant suggests that "[t]he absence of significant intervening events (such as release of the defendant or contact with an attorney or third person) supports the *presumption* that the stop affected defendant's decision to speak." (Resp BOM 45) (emphasis added). But, under *Unger*, that perceived "presumption" is incorrect. As this court noted in *Lorenzo*, 356 Or at 141, "In *Unger*, * * * we also rejected defendant's view that voluntary consent that follows unlawful police conduct generally is the product of exploitation and must lead to suppression[.]"

Defendant makes an additional argument this court disagreed with in *Unger*. He contends that his response to Deputy Hulke's request for his name "was the direct product of the initial unlawful stop"—thus requiring suppression of the "new crime" evidence—because the "traffic stop placed the deputy in the position to ask for defendant's identification * * * and then [there was] the officer's request for identification." (Resp BOM 50). That argument mirrors the "but for" causation argument rejected in *Unger*, 356 Or at 92 (evidence resulting from a consent search was not subject to suppression simply because "'the illegal trespass placed the [detectives] in a position to request defendant's consent,' and 'but for' that illegal conduct, 'the [detectives] would not have been in a position to obtain defendant's consent").

This court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 17, 2015, I directed the original Reply Brief of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Joshua B. Crowther, attorneys for respondent on review, and Robert M. Atkinson, attorney for amicus curiae, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,405 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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