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

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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PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
JOSHUA B. CROWTHER #032998
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
joshua.b.crowther@opds.state.or.us

Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
DAVID B. THOMPSON #951246
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: david.b.thompson@doj.state.or.us

Attorneys for Petitioner on Review

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INTRODUCTION

Article I, section 9 of the Oregon Constitution protects citizens against unreasonable searches and seizures.[1] This case is about the exclusionary rule under that provision and whether evidence of a crime committed by a person during an unlawful police detention—commonly called a "new crime"—must be suppressed.[2]

The Court of Appeals held that evidence of the new crime that defendant committed here during an unlawful traffic stop—giving the officer a false name—was inadmissible because it was not "attenuated" from the unlawful stop. That holding gives all unlawfully detained persons a free pass to commit any number of crimes, including crimes that may endanger the public (*e.g.*, an illegally detained person's high-speed flight from the police in a vehicle). The

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[1] Article I, section 9 provides:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

[2] A "new crime" is distinguished from crimes already in progress when the person is illegally detained, such as unlawful possession of a weapon or drugs.

question here is whether the legal principles or the purposes underlying the exclusionary rule compel that result. As explained below, they do not.

QUESTION PRESENTED

When a police officer illegally detains a person in violation of Article I, section 9, and that person commits a new crime during the detention, under what circumstances is the new-crime evidence subject to suppression?

PROPOSED RULE OF LAW

When an illegally detained person commits a new crime, evidence of that crime generally is not subject to suppression. Suppression may be required, however, if the police have flagrantly violated Article I, section 9 in effecting the detention or if they have illegally detained the person with the purpose of obtaining new-crime evidence.

SUMMARY OF ARGUMENT

Sometimes, as here, police officers illegally detain citizens. And occasionally, again as here, citizens who are illegally detained commit a "new crime" during the detention. The issue thus presented is whether evidence of the new crime must be suppressed at a subsequent criminal trial. Under the correct rule, the new-crime evidence generally is admissible because it lacks a sufficient causal connection to the prior police illegality to trigger the exclusionary rule. That rule reflects that the defendant made a unilateral and voluntary decision to commit a new crime. As a result, the new-crime evidence

generally bears an insufficient causal connection to the prior police illegality to justify suppression. New-crime evidence should be suppressed only in the following limited circumstances: (1) the police have flagrantly violated the constitution or have acted illegally with the purpose of obtaining such evidence, *and* (2) their conduct likely affected the illegally detained person's decision to commit a new crime. A new-crime rule with those components comports with this court's existing exclusionary-rule case law.

Here, a police officer unlawfully stopped defendant for a traffic violation. When the officer asked defendant for his name, defendant decided to lie and gave someone else's name. In doing so, defendant committed the crime of giving false information to a police officer. The record reveals no flagrant or purposeful misconduct by the officer in effecting the stop or in dealing with defendant thereafter. Accordingly, under the state's proposed new-crime rule, the trial court properly admitted the evidence of defendant's criminal conduct and correctly convicted him of giving false information to an officer.

SUMMARY OF FACTS

A. During a traffic stop, defendant gave a false name to a police officer.

Sherman County Deputy Sheriff Brian Hulke stopped defendant for a traffic violation. (Tr 6-7, 8).[3] During the stop, Hulke asked defendant for his

[3] At the hearing on defendant's motion to suppress, Deputy Hulke testified that he stopped defendant for a traffic violation, but he was "not sure

Footnote continued…

name and date of birth. In response, defendant decided to lie, giving the officer the name and birthdate of a friend, Harold (Tr 7, 11). Hulke ran that information through dispatch and learned that license was suspended. (Tr 7). Hulke then issued defendant a traffic citation in name for driving while suspended. (Tr 8).

Approximately one month later, defendant informed the district attorney's office that he had given a false name during the traffic stop. (Tr 11). Thereafter, defendant gave a statement to another deputy sheriff, admitting to the misconduct. (Tr 11-12). The state then charged defendant with giving false information to a police officer, a Class A misdemeanor, under ORS 807.620.[4]

B. The trial court denied defendant's motion to suppress.

Before trial, defendant moved to suppress all evidence that Deputy Hulke obtained during the traffic stop and the admissions defendant later made to the other deputy about having falsely identified himself to Hulke. (App Br ER 2-6). Defendant argued that the traffic stop violated Article I, section 9, and that

(…continued)
what that violation was." (Tr 8). He could say only that "it was something where [he] would normally just give that individual a warning, and not a Uniform Citation for that violation." (Tr 8-9).

[4] ORS 807.620(1) provides:

> 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.

the challenged evidence should be suppressed as fruit of the illegal stop. (Tr 5-6, 21-24; App Br ER 6). Based on Hulke's inability to recall why he had stopped defendant, the trial court ruled that the stop was illegal. (Tr 28-29). Nonetheless, the court denied defendant's suppression motion, concluding that despite the illegal stop, the evidence of the false information defendant provided Hulke during the stop and his subsequent incriminating statements to the other deputy were admissible. (Tr 29). Thereafter, the court convicted defendant of giving false information to a police officer. (Tr 50; App Br ER 8).

C. The Court of Appeals held that the statements defendant made during the traffic stop should have been suppressed.

A divided en banc Court of Appeals reversed. *State v. Suppah*, 264 Or App 510, 532, 334 P3d 463 (2014) (*en banc*), *rev allowed*, ___ Or ___ (2015). The majority held that although the incriminating statements defendant made to the deputy a month after the traffic stop were admissible, the statements he made to Deputy Hulke during the stop (which included the false name he gave in identifying himself) were not. 264 Or App at 527-32. Applying the exploitation test from *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), the majority reasoned that suppression of the traffic-stop statements was required because they were made during a stop that violated Article I, section 9, and—unlike the statements defendant made a month later—were not "attenuated" from that illegality. *Id*. at 527-28. Further, because defendant's crime did not threaten

officer safety, the evidence could not escape suppression under *State v. Gaffney*, 36 Or App 105, 583 P2d 582 (1978), which created an exception to the exclusionary rule for evidence of new crimes threatening officer safety. *Id*. at 530-31.

The dissent concluded that suppression of defendant's traffic-stop statements providing a false name was not required. It reasoned that his decision to commit a new crime "was an intervening circumstance that attenuated the causal connection between the unlawfulness of the stop and the newly created evidence (the giving of the false name)." *Id.* at 540 (Hadlock, J., dissenting).

This court granted the state's petition for review. *State v. Suppah*, S062648, ___ Or ___, ___ P3d ___ (2015).

ARGUMENT

A. Deeming "new crime" evidence generally admissible comports with this court's exclusionary-rule case law.

Under Oregon's longstanding exclusionary rule, evidence that derives from a police violation of Article I, section 9 generally is inadmissible at a subsequent criminal trial. *See State v. Davis*, 295 Or 227, 238, 666 P2d 802 (1983) ("those rules of law designed to protect citizens against unauthorized or illegal searches or seizures of their persons, property, or private effects are to be given effect by denying the state the use of evidence secured in violation of

those rules against persons whose rights were violated"). "Evidence seized by police will be treated as 'fruit of the poisonous tree' and suppressed if the police commit an illegality, such as an invalid stop or arrest, and subsequently exploit that illegality to obtain the disputed evidence." *State v. Ashbaugh*, 349 Or 297, 319-20, 244 P3d 360 (2010) (Durham, J., specially concurring) (citing *State v. Rodriguez*, 317 Or 27, 38, 854 P2d 399 (1993)). Nonetheless, suppression of evidence is not automatic simply because some connection exists between a police illegality and evidence obtained thereafter; exclusion is required only if a significant causal connection exists between the two. *See Rodriguez*, 317 Or at 40 ("[T]he fact that, 'but for' the unlawful conduct the police would not have been in a position to seek (for example) a person's consent does not, in and of itself, render any evidence uncovered during the ensuing consent search inadmissible."). The state's new-crime rule is grounded in those causation principles.

1. The state's new-crime rule incorporates existing exclusionary-rule principles.

In a line of cases beginning with *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), this court has sought to define the exclusionary rule's reach when police—after violating Article I, section 9—obtain evidence as the result of the defendant's voluntary act. The foundational principles for the state's proposed new-crime rule are found in that line of cases. Those cases demonstrate that the

exclusionary rule operates only if illegal police conduct likely had a significant influence on the defendant's voluntary, evidence-producing act. That principle is central to determining how the rule operates with respect to new-crime evidence.

In *Hall*, the court adopted an "exploitation" test to determine whether suppression is required for evidence resulting from an illegally detained person's voluntary consent to a police search. The court recently clarified and significantly modified that test in *State v. Unger*, 356 Or 59, 85-87, 333 P3d 1009 (2014). *Unger* held that "when a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." 356 Or at 74-75. Put differently, if police exploitation of the constitutional violation produced the consent to search, the resulting evidence—even though the consent was voluntary—must be suppressed. *Id*. at 86-87. The exclusionary rule applies, however, only if evidence is causally connected in more than a mere "but for" way to the illegal police conduct. *See id*. at 92 ("Where a defendant has consented voluntarily to a search following police misconduct, we consistently have held that mere but-for causation is insufficient to justify suppression of the evidence, even in the absence of intervening or mitigating circumstances.").

a. The causation principles from *Hall* and *Unger* support the state's proposed new-crime rule.

The causation principles applied in *Hall* and *Unger* provide the foundation for the state's proposed new-crime rule. In the consent-to-search arena, "[a] causal connection requiring suppression * * * may exist because the unlawful police conduct, even if not overcoming the defendant's free will, significantly affected the defendant's decision to consent." *Hall*, 339 Or at 35. "*Hall* identified several considerations relevant to determining whether the 'causal connection' between the unlawful police conduct and the defendant's [voluntary] decision to consent is sufficiently strong that the police can be said to have 'exploited' their unlawful conduct to gain the consent[.]" *Id.* at 76-77. Those considerations are:

> "(1) the temporal proximity between the unlawful police conduct and the defendant's consent, (2) the existence of any intervening circumstances, and (3) the presence of any circumstances—such as, for example, a police officer informing the defendant of the right to refuse consent—that mitigated the effect of the unlawful police conduct."

Id. at 77 (quoting *Hall*, 339 Or at 35).

In *Unger*, the court reaffirmed the relevance of those factors to the exploitation analysis. But the court concluded that the *Hall* test gave undue weight to the temporal proximity factor and insufficient weight to "a defendant's decision to voluntarily relinquish his or her Article I, section 9, right to be free from unreasonable governmental searches and seizures." *Id.* at

79. As *Unger* explained, "a defendant's voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id.* In other words, the "voluntary consent[—*i.e.*, the defendant's voluntary act—]itself may be sufficient to demonstrate that the unlawful [police] conduct did not affect or had only a tenuous connection to the evidence produced." *Id.* at 77-78.

To summarize, if a person's voluntary decision to consent to a search was independent of or only tenuously related to prior illegal police conduct, suppression of the resulting evidence is not required. *See id.* at 87-92 (holding that officers did not exploit their unlawful entry into the defendant's backyard to obtain his consent to enter his house or to search it; because nothing about the illegal police conduct caused the defendant to consent to the search, the evidence obtained in that search was admissible); *State v. Lorenzo*, 356 Or 134, 143-46, 335 P3d 821 (2014) (applying *Unger* and holding that the defendant's consent to a search of his apartment—which a police officer had unlawfully entered by reaching through the front door to knock on a bedroom door—"was not the result of police exploitation of their unlawful conduct"; nothing about the police illegality was likely to have significantly affected the defendant's

consent).[5] Stated more generally, if a person's voluntary decision to commit an evidence-producing act was independent of or only tenuously related to a prior police illegality, suppression of the resulting evidence is not required. That principle applies to a person's voluntary decision to commit a "new crime" after police have violated the person's Article I, section 9 rights.

An illegally detained person's commission of a new crime typically results from a voluntary decision to act that is independent of or only tenuously related to the prior police illegality. Indeed, the absence or weakness of such a causal connection in the new-crime situation is even more apparent than in the consent-to-search situation. Usually, as was the case here, the new crime is not prompted by a police request to commit that crime. In contrast, a person's consent to search typically *is* prompted by the officer's request for the consent.

The decision to commit a new crime is fairly described as an insulating circumstance that renders the causal connection between the prior police

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[5] *See also State v. Kennedy*, 290 Or 493, 504, 624 P2d 99 (1981) (suppression not required where there was an insignificant causal connection between illegal police conduct and the evidence produced by a consent search; the defendant's consent was not "tainted" by police illegality in the "absence of any coercive circumstances surrounding [the] defendant's consent" and where he had volunteered consent without prompting from the officers); *State v. Rodriguez*, 317 Or 27, 854 P2d 399 (1993) (evidence found in a consent search after an unlawful arrest was not subject to suppression because the defendant's spontaneous offer for the police to search his house sufficiently attenuated the evidence from the preceding unlawful arrest).

illegality and the resulting new-crime evidence factually and legally insignificant. That decision also can be described as an "intervening circumstance" that sufficiently attenuates the new-crime evidence (the actual commission of the crime) from the prior police illegality to render the exclusionary rule inapplicable. *See Hall*, 339 Or at 35 (listing "the existence of any intervening circumstances" as a factor in the exploitation analysis); *Suppah*, 264 Or App at 536 (Hadlock, J., dissenting) (an illegally detained person's "unilateral choice to [commit a new crime and thus create new-crime evidence] [is] an intervening circumstance that attenuate[s] the discovery of that [evidence] from the prior illegality"). Based on those causation principles, the state's proposed rule generally precludes suppression of new-crime evidence – evidence which usually does not derive from the preceding police illegality.

b. *State v. Crandall*'s "unilateral and voluntary act" analysis also supports the state's proposed new-crime rule.

Perhaps the best example of the "insignificant causal connection" principle in operation is *State v. Crandall*, 340 Or 645, 136 P3d 30 (2006). That case supports the state's proposed new-crime rule. In *Crandall*, a police officer unlawfully stopped the defendant without reasonable suspicion of criminal activity, by telling him to "stop" and "come here" as he left an apartment. 340 Or at 647. The "[d]efendant obeyed that direction, but before he reached the officer, he put a clear plastic 'baggie' containing a controlled

substance underneath one of the cars in the apartment parking lot." *Id*. Although the illegal stop was the "but for" cause of the defendant's decision to dispose of the controlled substance, this court concluded that the "defendant's unilateral, voluntary decision to put the baggie underneath the car sufficiently attenuated the discovery of that evidence from the prior [police] illegality" to render insignificant—for purposes of the suppression question—the causal connection between the police illegality and the evidence. *Id*. at 652. In other words, "'the unlawful police conduct [could not] be viewed properly as the source of that evidence.'" *Id*. at 653 (quoting *Hall*, 339 Or at 25). The baggie containing the controlled substance therefore was not subject to suppression. *Id*. at 653.

An illegally detained person's decision to commit a new crime is directly comparable to the *Crandall* defendant's "unilateral, voluntary decision to put the baggie underneath the car." Neither of those decisions has a significant causal connection to the prior police illegality. For the same reason that discovery of the drugs in *Crandall* could not be viewed as derived from or the product of the preceding illegal detention of the defendant, discovery of new-crime evidence cannot be viewed as derived from or the product of a prior police illegality.

For the same reason that a person's voluntary decision to dispose of evidence may itself demonstrate no (or at most a weak) causal connection

between illegal police conduct and evidence resulting from that voluntary decision, a person's voluntary decision to commit a new crime during an illegal stop may itself demonstrate the absence of a significant causal connection between the prior police illegality and the resulting new-crime evidence. In that regard, the new-crime situation is nearly indistinguishable from the situation in *Crandall*.

2. The state's proposed rule incorporates *Unger*'s and *Crandall*'s causation principles.

In sum, the state's proposed new-crime rule incorporates the causation principles this court highlighted in *Unger* and *Crandall*. Under those principles, evidence of a new crime that follows illegal police conduct generally will be admissible. In most situations where a person commits a new crime after illegal police conduct, the decision to commit the crime is both unilateral and voluntary – that is, it is not causally connected (at least in a significant way – *i.e.*, in more than a mere "but for" way) to the prior police illegality. And as this court has repeatedly said, in the absence of a significant causal connection between a prior police illegality and a person's voluntary, evidence-producing act, suppression of the evidence is not required.

3. The state's proposed rule reflects this court's concern with the purpose or flagrancy of the police misconduct.

In *Unger*, the court moved beyond the three factors set forth in *Hall* for determining whether the police have exploited their illegal conduct to obtain

evidence—temporal proximity of the illegality to the evidence, the existence of intervening circumstances between the two, and the presence of any circumstances mitigating the effect of the police illegality—and concluded that the "purpose and flagrancy" of police misconduct is also pertinent. *Unger*, 356 Or at 81-83. The court concluded that "[a]n overlapping but distinct concern relevant to whether a defendant's consent resulted from exploitation of police misconduct is the 'purpose and flagrancy' of the misconduct." *Id*. at 81. "Particularly flagrant conduct," the court observed, "is more likely to affect the defendant's decision to consent than more restrained behavior." *Id*. at 82. Similarly, "the 'purpose' of what is later determined to be unlawful police conduct could well be relevant to both understanding the nature of the misconduct and, ultimately, to deciding whether the police exploited that misconduct to obtain consent to search." *Id*. at 83.

In short, "purpose and flagrancy" of the illegal police conduct are now considerations in determining whether that conduct could have significantly affected the illegally detained person's decision to consent to a search or to commit some other voluntary, evidence-producing act. If the purpose or flagrancy of the police illegality likely affected the person's decision to act, then there is a sufficient causal connection between evidence resulting from the person's voluntary act and the prior police illegality to trigger the exclusionary rule. Accordingly, although the state's new-crime rule generally admits

evidence of a new crime, suppression may be required if the illegal police conduct—due to its purpose or flagrancy—likely affected the person's decision to commit a new crime.[6]

B. The state's proposed new-crime rule is consistent with similar rules in other jurisdictions.

Numerous courts have adopted rules that—like the new-crime rule the state proposes here—generally preclude suppression of evidence of a new crime that a person commits after being illegally detained by the police. *See Brown v. City of Danville*, 44 Va App 586, 600-02, 606 SE2d 523, 530-31 (2004) (collecting cases); *United States v. Awadallah*, 349 F3d 42, 81 n 8 (2d Cir 2003) (Straub, J., concurring) (collecting cases), *cert den*, 543 US 1056 (2005). Those courts have recognized "strong policy reason[s] for holding that a new and distinct crime, even if triggered by an illegal stop [or search], is a sufficient

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[6] The state recognizes, as did this court in *Unger*, that applying the "purpose and flagrancy" factor may involve "difficult weighing." *Unger*, 356 Or at 85. But as this court observed, such weighing often is required in deciding whether suppression of evidence is warranted in a given case. *Id*. The state also recognizes that the "purpose and flagrancy" factor may potentially have a broader application than simply for determining whether a police illegality affected a person's decision to commit an evidence-producing act (*e.g.*, to consent to a search or to commit a new crime while illegally detained). *See id.* at 95-96 (Landau, J., concurring) (offering deterrence of future police misconduct as an "explanation for why, notwithstanding a defendant's consent, certain unlawfully obtained evidence should be excluded: * * * [t]here are some forms of police misconduct that the courts simply should not countenance[,]" thus warranting suppression of the resulting evidence "to prevent police from reaping the benefits of their misconduct").

intervening event to provide independent grounds for arrest" and use of the new-crime evidence in a subsequent criminal prosecution. *United States v. Sprinkle*, 106 F3d 613, 619 (4th Cir 1997). The Eleventh Circuit has aptly explained those reasons:

> Unlike the situation where in response to the unlawful police action the defendant merely reveals a crime that *already* has been or is being committed, extending the fruits doctrine to immunize a defendant from arrest for *new* crimes gives a defendant an intolerable *carte blanche* to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct.

United States v. Bailey, 691 F2d 1009, 1017 (11th Cir 1982), *cert den*, 461 US 933 (1983) (emphasis in original).

The reasons for the new-crime rule are even stronger when it comes to new crimes that threaten officer safety. "[F]ederal and state courts alike have uniformly rejected the argument that trial courts should suppress 'evidence relating to [the defendant's] violence or threatened violence toward police officers subsequent to an unlawful search or seizure or warrantless entry.'" *Brown*, 606 SE2d at 530 (quoting *United States v. Waupekenay*, 973 F2d 1533, 1537 (10th Cir 1992); *see also State v. Gaffney*, 36 Or App 105, 583 P2d 582 (1978) (recognizing an exception to the exclusionary rule for evidence of new crimes that threaten officer safety). The exclusionary rule simply is not designed "to provide citizens with a shield so as to afford an unfettered right to

threaten or harm police officers in response to [their illegal conduct]." *State v. Brocuglio*, 264 Conn 778, 826 A2d 145, 152 (2003). If the law were otherwise, that "would in effect give the victims of illegal searches [and seizures] a license to assault and murder the officers involved—a result manifestly unacceptable." *State v. Miller*, 282 NC 633, 194 SE2d 353 (1973); *see also State v. Panarello*, 157 NH 204, 207-09, 949 A2d 732, 735-37 (2008) (where purposes of exclusionary rule are to (1) deter police misconduct, (2) redress the injury to the privacy of the victim of the illegal police conduct, and (3) safeguard compliance with state constitutional protections, exclusionary rule does not operate to exclude evidence of crimes committed against police officers after an unlawful search or seizure); *State v. Miskimins*, 435 NW2d 217, 221 (SD 1989) (to rule that new-crime evidence is inadmissible "would allow a defendant carte blanche authority to go on whatever criminal rampage he desired and to do so with virtual legal impunity as long as such actions stemmed from the chain of causation started by police misconduct, be it minor or major").

The state's proposed rule reflects the prevailing view that "if a person engages in new and distinct criminal acts in response to unlawful police conduct, the exclusionary rule does not apply, and evidence of the events constituting the new criminal activity, including testimony describing the defendant's own actions, is admissible." *Brown*, 606 SE2d at 530. That view implicitly rejects the notion that a person has a right to self-help by resort to

criminal conduct when confronted with illegal police conduct. Oregon has long recognized that such self-help measures generally are prohibited. *See State v. Wright*, 310 Or 430, 799 P2d 642 (1990) (arrestee may not lawfully resist arrest, even if arresting officer lacks authority to make arrest; arrestee may use only such physical force as is reasonably necessary under circumstances to defend against any excessive force the officer is using). And numerous courts have relied on that principle as additional support for concluding that new-crime evidence generally is admissible. *See, e.g.*, *State v. Holt*, 206 Md App 539, 51 A3d 1 (2012), *aff'd*, 435 Md 443 (2013) ("we now hold that a new crime, even if causally linked to illegal activity on behalf of law enforcement, is an intervening circumstance that attenuates the taint from that illegal activity[,] [and thus] [e]vidence of the new crime should not be suppressed[;] [t]his conclusion is supported by the fact that, in Maryland, a suspect has no right to resist an illegal stop or frisk").

Finally, the frequently close questions concerning the legality of a police search or seizure "must be resolved in the courtroom and not fought out on the streets." *Commonwealth v. Hill*, 264 Va 541, 548, 570 SE2d 805, 809 (2002). Nothing in this court's jurisprudence suggests a different view. In short, the compelling societal interests in preventing criminal conduct, particularly conduct that threatens physical harm to police officers, and in discouraging

citizens from resorting to self-help as the remedy for illegal police conduct, further support the state's proposed new-crime rule.

C. The trial court properly admitted the evidence of defendant's new crime.

Here, a police officer unlawfully stopped defendant for a traffic violation. When the officer asked defendant for his name—a routine inquiry in a traffic stop—defendant decided to lie and gave the officer a false name. In doing so, he committed the crime of giving false information to a police officer. Defendant unilaterally and voluntarily decided to commit that crime; nothing in the record suggests otherwise. Under the "causal connection" principles applied in *Unger* and *Crandall*, evidence of defendant's new crime was not causally connected in a legally significant way to the preceding unlawful stop.

There was only a "but for" causal connection between the new crime evidence and the police illegality—unlawful police conduct and then a request for defendant's name, followed immediately by defendant's commission of the new crime. *See State v. Musser*, 356 Or 148, 158, 335 P3d 814 (2014) (giving the following example of "but for" causation: "unlawful police conduct and then a request for consent"). As *Unger* and *Crandall* make clear, absent a *significant* (more than "but for") causal connection between the disputed evidence and the prior police illegality, suppression of the evidence is not warranted. The illegal police conduct simply cannot be viewed as the source of

the evidence. Under those principles, as embodied in the state's proposed new-crime rule, the trial court properly admitted the evidence that defendant provided false information to Deputy Hulke.

That conclusion is not altered by applying the "purpose and flagrancy" factor. Nothing in the record suggests the officer engaged in particularly flagrant or purposeful conduct in making the unlawful stop or in dealing with defendant. There is no hint that Deputy Hulke's conduct was anything but restrained, without threats or intimidation, rather than flagrant. *See Unger*, 356 Or at 82 ("Particularly flagrant conduct—such as excessive use of force in unlawfully arresting a defendant, the unlawful forcible entry into a home by multiple officers wielding automatic weapons, or unlawful and lengthy in-custody interrogation—is more likely to affect the defendant's decision to consent than more restrained behavior."). Further, the stop apparently was relatively short; Hulke made the stop, obtained a name and birthdate from defendant, performed a records check, and issued a citation for driving while suspended.

Finally, there is no indication that the stop had an unlawful purpose—*i.e.*, that it was a "fishing expedition for incriminating evidence," *Unger*, 356 Or at 91 (describing "purpose" that may taint a defendant's voluntary, evidence-producing act), or "a 'shot in the dark' to check for criminal activity," *Musser*, 356 Or at 159 (describing the officer's improper "purpose" in making an

unlawful stop of the defendant, which was a significant factor in the court's application of *Unger*'s exploitation test to conclude that the officer had "improperly exploited [the] unlawful stop of [the] defendant to obtain her consent to search").

At bottom, missing from this case is the causal connection between a police illegality and subsequently discovered evidence that is required to warrant suppression under Article I, section 9's exclusionary rule. Admitting the evidence of defendant's new crime comports with the settled principle that evidence will be suppressed only if it is the product of illegal police conduct. Defendant's unilateral and voluntary decision to lie about his name and thus commit a crime insulated—in a causal sense—the resulting evidence from the taint of the prior police illegality. The trial court properly admitted that evidence, and correctly convicted defendant of giving false information to a police officer.

CONCLUSION

The Court of Appeals' decision should be reversed, and the trial court's judgment affirmed.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ David B. Thompson
DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

DBT:ka3/6308461

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 20, 2015, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Joshua B. Crowther, attorneys for respondent on review, 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 5,235 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).

/s/ David B. Thompson

DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

DBT:ka3/6308461