IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JEFFERY LORENZO, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court No. C100238CR CA A145826 SC S060969

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

Appeal from the Judgment of the Circuit Court
for Washington County
Honorable STEVEN L. PRICE, Judge

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SUMMARY OF ARGUMENT

Defendant argues, in part, that officers unlawfully seized him under Article I, section 9, of the Oregon Constitution, by knocking on his bedroom door and asking if he was "okay." (Resp BOM 8, 48). He argues that the seizure was ongoing when he subsequently consented to have officers enter his apartment and search his bedroom, and that the discovered evidence thus should be deemed presumptively inadmissible, even though his consents were voluntary. (Resp BOM 50, 13). Yet defendant failed to preserve an argument that officers seized him when they knocked on his door and asked about his welfare. Regardless, no seizure occurred at that point and—even if a seizure did occur—it was not ongoing when defendant gave his consents.

Furthermore, the presumption of inadmissibility that defendant asks this court to adopt is at odds with the "personal rights" focus that drives Article I, section 9' s exclusionary rule. Instead, if a record demonstrates that consent to a search was voluntary, the state bears no burden to show anything more to justify admission of evidence found during the search.

ARGUMENT

A. Defendant did not preserve an argument that officers seized him by knocking on his door and asking if he was "okay."

Defendant argues that Officer Wujcik seized him—for purposes of Article I, section 9—when he knocked on defendant's bedroom door and called out, "Police, Jeff, are you okay." He further argues that his subsequent consents were the "product," in part, of that "ongoing illegal seizure." (Resp BOM 48, 51; Tr 27). While in the trial court, however, defendant never asserted that officers seized him by knocking on his bedroom door and asking if he was "okay." Although the memo supporting defendant's motion to suppress argued that officers "unlawfully detained or stopped him," it defined the "Stop of a Person" by referring exclusively to "[t]he taking of a suspect's identification" and to "[a]pproaching a suspect and obtaining their identification to conduct a warrant check." (Trial Court Register, Pages 13-14, Memo 3-4). Rather than suggesting that Officer Wujcik seized him when he knocked on his door, defendant's memo thus suggested that the officer seized him at a much later point—namely, by asking for his identification after seeing defendant emerge from his bedroom, obtaining defendant's consent to re-enter the apartment, and (upon re-entering the apartment) smelling the odor of marijuana.[1] (*See* Tr 27-34, containing officer's testimony about sequence of events). Yet defendant

[1] Defendant has abandoned that argument on appeal.

never suggested that the officer had seized him by knocking on his door and asking about his welfare.

In fact, defendant—at the hearing on his motion—did not assert that he had been unlawfully seized at all. (Tr 182-201, 216-17). Instead, he relied exclusively on the assertion that officers unlawfully *entered* the apartment when they knocked on his door, and that they exploited that entry to obtain his consents. (*See* Tr 201, containing argument that "there was a warrantless entry into [defendant]'s home"; Tr 197, containing argument that "the illegality of the police searching rendered his consent * * * invalid"). Unsurprisingly, the trial court—in denying defendant's motion to suppress—did not address whether officers seized defendant by knocking on his bedroom door and asking about his welfare. (Tr 211-16).

Defendant did not preserve his argument that officers seized him by knocking on his door and inquiring about his welfare. Accordingly, this court should not review that argument. *See* ORAP 5.45(1) (generally, "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court").

B. In any event, officers did not seize defendant by knocking on his bedroom door and asking if he was "okay."

A seizure occurs under Article I, section 9, only

> (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that

> individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances would believe that (a) above has occurred.

State v. Ashbaugh, 349 Or 297, 316, 244 P3d 360 (2010) (emphasis omitted). Defendant argues that Officer Wujcik—in knocking on his bedroom door and saying, "Police, Jeff, are you okay"—seized him under that latter formulation: Because "[t]hat police conduct was a show of authority intended to draw the occupant to the door," it "would cause a reasonable person in defendant's position to believe that he was being summoned to the bedroom door for official police business." (Resp BOM 48-49). Defendant is mistaken.

Instead, no basis exists for concluding that a person in defendant's circumstances would have believed that officers were intentionally and significantly restricting, or significantly interfering with, his liberty or freedom of movement. Defendant may reasonably have concluded that the officer—in knocking while saying, "Police, Jeff, are you okay"—*wanted* to talk to him. And defendant reasonably may have concluded that the officer *hoped* that defendant would either answer his door or shout out that he was, in fact, "okay." Yet the officer did not command, order, or direct defendant to answer his door, or direct defendant to take any other action. He merely knocked on defendant's door while posing an essentially innocuous question about defendant's welfare. Nothing

about the officer's conduct reflected an intent to control or restrict defendant's movements, much less an intent to do so significantly.

Moreover, defendant occupied a bedroom inside an apartment that he shared with "Kyle," the apparently suicidal man who officers had just encountered outside the apartment. (Tr 20-21, 97-99, 134). The knock on defendant's bedroom door thus can be analogized to a knock that one might receive on one's door if one occupied a studio apartment inside a building containing other studio apartments. If defendant is correct, and if Officer Wujcik seized him in this case, officers would effect a warrantless seizure any time that they knocked on an occupied dwelling's door while saying, "Police—are you okay?"

A reasonable person in defendant's circumstances would not have concluded that Officer Wujcik's conduct had intentionally and significantly restricted, or interfered with, his liberty or freedom of movement. No seizure occurred under Article I, section 9.

C. Moreover, any seizure would have terminated before officers asked for consent.

Even if Officer Wujcik had seized defendant by knocking on his door and asking if he was "okay," any seizure terminated before the officer asked for consent. By the time defendant opened his bedroom door and emerged, Officer Wujcik had withdrawn his arm (his feet had remained outside the apartment

throughout), and he again was "standing outside the door" of defendant's apartment. (Tr 27-28). Although the apartment door was open, defendant was free at that point to simply close the door, to otherwise remain inside the apartment while leaving the officers outside, or to exit the apartment through the open door. At that point, nothing about the officers' physical placement—or about their conduct—would have suggested that they were trying to significantly restrict or interfere with defendant's liberty or freedom of movement.

As a result, when Officer Wujcik then asked if he could enter the apartment, and when he subsequently asked if he could search defendant's bedroom, defendant was not subject to an ongoing seizure.

D. Article I, section 9, does not require a presumption that, if a defendant gives voluntary consent to a search while unlawfully seized, evidence found during the search is inadmissible.

In part, defendant asks this court to hold—under Article I, section 9—that when a defendant voluntarily consents to a search, but does so while unlawfully seized, evidence found during the search is presumptively inadmissible. (Resp BOM 6).[2] Yet neither the case law that defendant relies on

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[2] In this respect, defendant's argument is identical to the argument made by the defendant in *State v. Musser* 060868, which will be argued in this court on the same day that this case will be argued. (*See* Resp BOM 12 n 1, noting that sections I-IV in defendant's brief in this case are identical to

Footnote continued…

nor the practical considerations that he purports to identify provides a basis for that presumption.[3] Instead, courts should presume the opposite: If a defendant voluntarily consented to a search, the discovered evidence is admissible, even if consent was given during an unlawful seizure.

1. Defendant relies on Fourth Amendment principles that do not apply to Article I, section 9's exclusionary rule.

Defendant asserts that "the fruit of the poisonous tree doctrine assumes that the illegal seizure affects the decision to consent and [that] the evidence from the consent search is the presumptive product of the illegal seizure, unless and until the state demonstrates that a significant intervening event broke the connection between the illegal seizure and the consent." (Resp BOM 13; emphasis omitted). Yet even though defendant does not allege a Fourth

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sections I-IV in the defendant's brief in *Musser*). Accordingly, the remainder of this brief is identical to the reply brief that the state filed in *Musser*.

[3] Defendant claims that he "agrees with most of the analysis in [*State v.*] *Hemenway,*" 353 Or 129, 295 P3d 617, *vacated*, 353 Or 498 (2013). (Resp BOM 3). But by urging this court to adopt the presumption that he identifies, defendant asks this court to *reject* the approach that it adopted in *Hemenway*, and to adhere to the holdings in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), and its progeny. *See Hemenway*, 353 Or at 151-54 (holding that the defendant's voluntary consent rendered discovered evidence admissible, even though consent was given while an unlawful stop was ongoing, and identifying no presumption that the evidence was inadmissible absent additional intervening circumstances); (Pet BOM 14, noting that *Hall* and subsequent decisions required suppression when consent was given during an unlawful stop).

Amendment violation in this case, the doctrine that he purports to invoke is a Fourth Amendment doctrine. (*See* Resp BOM 21-25, 36-40, citing case law excluding evidence based on Fourth Amendment violations).[4] In other words, defendant asks this court to adopt an exclusionary rule whose primary goal—as defendant acknowledges—is deterrence of unlawful police conduct in future cases. *See Herring v. United States*, 555 US 135, 141, 129 S Ct 695, 172 L Ed 2d 496 (2009) ("the [Fourth Amendment] exclusionary rule * * * applies only where it 'result[s] in appreciable deterrence,'" and "the benefits of deterrence must outweigh the costs"), quoting *United States v. Leon*, 468 US 897, 909, 104 S Ct 3405, 82 L Ed 2d 677 (1984); (Resp BOM 41: "the primary

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[4] Although defendant primarily cites federal court decisions, he does cite two of this court's decisions. (*See* Resp BOM 25-26, citing *State v. Olson*, 287 Or 157, 598 P2d 670 (1979), and *State v. Jones*, 248 Or 428, 433-34, 435 P 2d 317 (1967)). Yet neither of those decisions purports to discuss Article I, section 9's exclusionary rule. *See Olson*, 287 Or at 164-66 (addressing police conduct that violated both Article I, section 9, and the Fourth Amendment, but ultimately applying the Fourth Amendment suppression rule exclusively); *Jones*, 248 Or at 431-32 (stating that evidence may not be used if "obtained as the fruit of illegal police conduct," but citing three United States Supreme Court decisions, along with *State v. Krogness*, 238 Or 135, 388 P2d 120 (1963), *cert denied*, 377 US 992 (1964), for that proposition, and citing *State v. Dempster*, 248 Or 404, 434 P2d 746 (1967), for proposition that state had not shown sufficient attenuation between arrest and confession); *Krogness*, 238 Or at 138 (relying on federal case law exclusively for proposition that "fruits of illegal police conduct" are inadmissible); *Dempster*, 248 Or at 407-08 (citing federal case law exclusively when discussing exclusionary principles).

motivation for the Fourth Amendment exclusionary rule is to deter illegal police conduct").

But as this court repeatedly has explained, deterring future police misconduct is *not* the purpose of Article I, section 9's exclusionary rule. *See State v. Davis*, 313 Or 246, 254, 834 P2d 1008 (1992) ("the focus [of suppression under Article I, section 9] * * * is on protecting the individual's rights *vis-a-vis* the government, not on deterring or punishing the excessive conduct of any particular government actor"); *State v. Tanner*, 304 Or 312, 315, 745 P2d 757 (1987) (noting that, "[u]nlike the Fourth Amendment exclusionary rule, which has been predicated in recent years on deterrence of police misconduct, * * * the exclusionary rule of section 9 is predicated on the personal right of a criminal defendant to be free from an 'unreasonable search, or seizure'"), quoting Art I, § 9; *Hall*, 339 Or at 24 (noting that the court "explicitly has rejected the view that the Oregon exclusionary rule is predicated upon a deterrence rationale"). In short, the focus of the Fourth Amendment's exclusionary rule is on the government's conduct, and on the impact that exclusion in a given case will have on the government's future conduct.[5] In

[5] It does not appear, from the decisions that defendant cites, that the United States Supreme Court has expressly adopted the presumption that defendant posits for voluntary-consent-to-search cases (although it does appear that a number of United States Courts of Appeal have done so). For example, *Brown v. Illinois*, 422 US 590, 591-92, 95 S Ct 2254, 45 L Ed 2d 416 (1975);

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contrast, the focus of Article I, section 9's exclusionary rule is on the defendant, and on the impact that governmental misconduct had on him or her. *See Hall*, 339 Or at 24 (noting that "the aim of the Oregon exclusionary rule is to restore a defendant to the same position as if 'the government's officers had stayed within the law'"), quoting *Davis*, 295 Or at 234. Hence, the federal and state constitutions' exclusionary rules might play out differently in a particular case, even if the police conduct that preceded consent to a search violated both constitutions.

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New York v. Harris, 495 US 14, 16, 110 S Ct 1640, 109 L Ed 2d 13 (1990); and *Dunaway v. New York*, 442 US 200, 202-04, 216, 99 S Ct 2248, 60 L Ed 2d 824 (1979), involve the admissibility of a defendant's statements or confessions. *Wong Sun v. United States*, 371 US 471, 477, 83 S Ct 407, 9 L Ed 2d 441 (1963), involves the admissibility of incriminating statements and of drugs that a third party handed to officers. None of those cases involves evidence found during a consent search. And neither *Florida v. Royer*, 460 US 591, 103 S Ct 1319, 75 L Ed 2d 229 (1983), nor *Florida v. Bostick*, 501 US 429, 111 S Ct 2382, 115 L Ed 2d 389 (1991), held that evidence found during a voluntary-consent search must be presumed inadmissible when consent is given during an unlawful seizure. Instead, the legal question in each case was whether an unlawful seizure had occurred in the first place, and it appears that the state *conceded* that suppression would be required if an unlawful seizure had occurred. *Bostick*, 501 US at 433-34; *see Royer*, 460 US at 493 ("[we] are required in this case to determine whether * * * Royer was being illegally detained at the time of his purported consent to a search of his luggage"); *id.* at 507-08 (rejecting the state's "third and final argument"—"that Royer was not being illegally held when he gave his consent"—and agreeing with Florida Court of Appeals that "the consent was tainted by the illegality," but engaging in no analysis of the "taint" issue).

Because the goal of Article I, section 9's exclusionary rule is to vindicate and protect the rights of the defendant in the case at issue, the presumption that defendant posits has no place. If consent to a search was voluntary despite an unlawful seizure, the seizure—as a matter of law—did not "coerce" the consent. If the consent was voluntary, officers necessarily had posed a question that, under the circumstances, conveyed to the defendant that he or she had a genuine choice to consent or not. As a result, the defendant's ability to prevent officers from conducting a search, and from discovering items in his or her possession, was unchanged by the ongoing seizure. Put differently, that consent was voluntary reflects that the seizure did not alter the defendant's constitutional position with respect to the discovered evidence. Under Article I, section 9, that is dispositive. When—as in this case—consent is voluntary, courts should presume that it was independent of any preceding or ongoing unlawful seizure, and that the discovered evidence is admissible.

2. The "factual" premise behind the presumption that defendant asks this court to adopt is also flawed.

In urging a presumption that an ongoing unlawful seizure necessarily "influenced the decision to consent,"[6] defendant asserts that "a seized person

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[6] In urging a "presumption that the seizure influenced the decision to consent" (Resp BOM 21), defendant—in the state's view—essentially asks for a presumption that consent given during an unlawful seizure is *not* voluntary.

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reasonably believes that cooperation and compliance with the officer will improve the prospect of release." (Resp BOM 21, 19). At heart, defendant presumes that a seized person—if asked for consent to a search—will believe that saying "yes" will hasten his or her release. (*Id.*). That is, defendant presumes that if a person is seized when officers ask for consent, the seizure automatically creates an incentive to consent. As a matter of logic, that presumption is flawed.

Instead, a person who consents to a search of his or her person or belongings will know that the result of the consent will, in fact, be a search. In other words, the person will know that consent will trigger an event that—by itself—likely will *extend* any ongoing police investigation, and likely will prove more intrusive than any seizure that the person has been subjected to thus far. Rather than concluding that he or she can hasten a seizure's end by consenting to a search, a seized person likely would conclude that consent will lengthen the seizure.

Moreover, if the seized person knowingly possesses contraband, the person will know that consent will result not just in a search, but likely will result in an arrest. Under those circumstances, consent will result in more

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(…continued)
Defendant has not disputed, however, that his consents in this case were voluntary.

extensive restrictions on the person's liberty than any mere "stop" had imposed. For a seized person to assume that consenting to a search will help hasten the seizure's end, or otherwise "improve the prospect of release," ultimately would make little sense. The presumption that defendant asks this court to adopt lacks logical or factual support.

3. Even if the necessary analysis includes an "exploitation" component, the state—after voluntary consent is established—bears no burden to show anything more.

Even if this court agrees with defendant that Article I, section 9's exclusionary rule requires courts to assess both the voluntariness of consent to a search *and* whether the state "exploited" a police illegality to obtain the consent, the state—after voluntary consent is established—should not bear the burden to establish anything more. (*See* Resp BOM 15, arguing that "the state must satisfy two separate prongs of the attenuation analysis, voluntariness and exploitation," if consent is given during an unlawful stop). Again, a showing that consent was voluntary and hence uncoerced justifies a presumption that the consent was independent of any preceding police misconduct. As a result, the defendant should bear the burden to show that, even though consent was voluntary, the police illegality nonetheless had a significant effect on the decision to consent. (*See* Pet BOM 24-25, containing state's argument that, if voluntary consent alone does not render discovered evidence admissible,

suppression is warranted only if "circumstances suggest * * * that the police illegality significantly affected the defendant's decision to consent").

Of course, even if the state does bear the burden to establish "attenuation," the burden should prove minimal in most voluntary-consent cases. If the record shows that consent was voluntary, even though given during an unlawful seizure, it shows that the seizure did not coerce the consent. If the record further reflects that the seizure did not involve any inappropriately aggressive or intimidating police behavior, it generally will show that the seizure also did not "significantly affect" the decision to consent. Under those circumstances, the state will have shown that the voluntary consent was sufficiently independent from the ongoing seizure to render the discovered evidence admissible.

CONCLUSION

Because defendant consented voluntarily to the searches at issue, and because any unlawful search or seizure did not significantly affect his consents, the trial court correctly denied his motion to suppress. 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 September 5, 2013, 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 Peter Gartlan, attorney 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 3,465 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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