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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP001808-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

v.

ERIC D. BOURGEOIS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

Petition for Review of Decision of Wisconsin Court of Appeals, District II, Affirming Final Order Entered October 26, 2020, Denying Motion for Postconviction Relief, the Honorable Laura Lau Presiding, in Waukesha County Circuit Court Case No. 16-CF-929

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ISSUES PRESENTED

1. Did the Court of Appeals err because it did not remand this case for fact-finding in the circuit court, when the circuit court and the parties had focused only on whether an unlawful search and gun seizure had occurred, and the record was undeveloped as to whether Bourgeois' subsequent, stolen gun offense arrest and his threatening response were derived from the unlawful gun seizure?

Although Bourgeois had asked the Court of Appeals for a "remand, [in which] the circuit court will need to determine whether the second arrest was tainted by the prior seizure," and the Court stated that "n]either party sufficiently develops an argument on this issue or on the more pointed question of whether evidence related to the threatening-a-law-enforcement-officer conviction must be suppressed," the Court announced that it had conducted "a thorough review of the record," and it "conclude[d] that the evidence underpinning the threatening-a-law-enforcement-officer conviction—for threatening Mukwonago Police Officer Steinbrenner—is not 'derivative evidence acquired as a result of the illegal search' of Bourgeois's hotel room." *State v. Bourgeois*, No. 2020AP1808-CR, ¶ 29. (P. App. 19).

2. Did the Court of Appeals erroneously exercise its discretion, where Bourgeois was arrested for theft of the seized gun, because it did not apply the accepted "attenuation" test for deciding whether a

defendant's post-arrest statements were derived from prior unlawful police conduct?

The Court of Appeals did not use the well-established, three-part attenuation test for deciding the derivative evidence issue in the context of post-arrest statements. Instead, it limited "derivative evidence" to *physical* evidence which is subsequently discovered by police from their use of illegally acquired evidence: "In this case, law enforcement did not "use" the handgun or any other evidence seized from Bourgeois's hotel room to "discover" the evidence related to the threatening-a-law-enforcement-officer charge." *State v. Bourgeois*, No. 2020AP1808-CR, ¶ 30. (P. App. 19).

CRITERIA FOR REVIEW

The remand issue. The first issue for review is whether the Court of Appeals should have remanded this case to the circuit court for further proceedings to enter findings of fact and conclusions after the Court of Appeals ruled that a seizure of a gun was unlawful. Remand would have allowed development of the facts as to whether Bourgeois' subsequent arrest for theft of the seized gun and his threatening statements during that arrest were derived from the prior, illegal police conduct.

This issue meets the criteria for review in Wis. Stat. (Rule) 809.61(1r) (c) and (d) because a decision by this Court will help develop, clarify or harmonize the law, because the issue is not factual in nature but

rather is a question of law of the type that is likely to recur unless resolved by this Court.

Bourgeois asked that a remand follow the Court of Appeals' decision that police had unlawfully searched his hotel room and had seized evidence (an allegedly stolen gun). He argued that a remand was needed to develop the record about his subsequent arrest for the stolen gun charge and how his threatening outbursts at officers during that arrest arose out of the prior unlawful search and seizure of the gun.

While the Court of Appeals stated that it had conducted a "thorough review of the record" to affirm the conviction (¶ 29), it did not mention that the parties had not created a fact record or that Judge Dreyfus had not entered alternative findings of fact and conclusions of law on the derivative evidence - attenuation issue. Unfortunately, Judge Dreyfus did not abide this Court's advisory in *State v. Fillyaw*, 104 Wis. 2d 700, 726, 312 N.W.2d 795, 808 (1981): "In the interest of facilitating appeals and rendering justice to all parties to an action, we again direct that the trial courts of this state make findings of fact and conclusions of law in support of their decisions on motions to suppress."

In a much-cited decision on the appropriateness of the remand remedy, this Court stated that inadequate findings of fact by a lower court will support the remedy. In *Wurtz v. Fleischman*, 97 Wis. 2d 100, 108, 293 N.W.2d 155, 159 (1980), it stated:

"When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings."

The attenuation issue. The second issue for review, assuming *arguendo* that a remand was not necessary, is whether the Court of Appeals erred as a matter of law by not properly applying the established "attenuation" exception to the Fourth Amendment's derivative-evidence doctrine. The issue to be determined was whether Bourgeois' threatening, post-arrest statements were attenuated from the prior unlawful, hotel room search and gun seizure.

This issue meets the criteria for review in Wis. Stat. (Rule) 809.61(1r) (c) and (d) because a decision by this Court will help develop, clarify or harmonize the law because the court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court, this Court, and other court of appeals' decisions.

In *Brown v. Illinois*, 422 U.S. 590, 597 (1975) the Court decided "the issue [of] whether statements and other evidence obtained after an illegal arrest or search should be excluded." *Brown* is the leading case on whether *statements* arising out of Fourth Amendment violations area are too attenuated to justify suppressing them as the fruits of police illegality. *Brown's* analysis has been adopted by this Court and the Court of Appeals.

But Court of Appeals did not use the *Brown* attenuation analysis in this case. Instead, it quoted a Black's Law Dictionary "derivative evidence" definition, which is sorely inappropriate compared to the *Brown* analysis. The dictionary definition is aimed at deciding whether the seizure of *physical* evidence, after an illegal search or seizure or arrest, is derivative. It does not offer insight, as *Brown* and the subsequent cases do, for determining if a defendant's *oral statements* are directly or indirectly derived from illegal police conduct.

Brown v. Illinois, and more recently, *Utah v. Strieff*, 579 U.S. 232, 239 (2016), instruct that on remand three factors are relevant to the attenuation analysis: (1) the temporal proximity of the illegality and the statements at issue, (2) whether intervening circumstances are present, and (3) whether the official illegal conduct was purposeful and flagrant. 422 U.S. at 603-604.

Bourgeois submits that, if the Court of Appeals had recognized those factors, it would have seen the need for a remand in Bourgeois' case to develop the fact record before deciding whether the attenuation exception to the derivate evidence doctrine applied.

STATEMENT OF THE CASE

Eric D. Bourgeois was convicted of two Class H felonies: threatening a law enforcement officer (Count 1) and theft of movable property (the seized gun) (Count 3). On October 2, 2019, the court withheld

imposition of a sentence and placed defendant on probation for four years (with 90 days condition time stayed) as to Count 1 and ordered a $294.30 forfeiture on Count 3. (R. 114).

Count 1 had charged that on July 12, 2016, Bourgeois threatened to harm a police officer Steinbrenner, when Steinbrenner arrested him and placed him in handcuffs at the duplex where Bourgeois lived in the upper unit. Steinbrenner had arrested Bourgeois for stealing a firearm from the tenant who lived downstairs. Police had previously seized that gun based on a warrantless entry into the hotel room where Bourgeois had been staying. Count 3 charged Bourgeois with theft of that firearm. (R.2, 13).

Prior to trial the defense sought to suppress any evidence that constituted "the fruits" of the warrantless entry, and seizure of the firearm. (R. 24, 25, 27). The defense argued that the forcible, warrantless hotel room entry was not supported by probable cause and exigent circumstances, but Judge Dreyfus denied the motion. (R. 102; A. App. 103-115).

The Court of Appeals reversed and remanded this case for a new trial on the theft-of-a-handgun charge, "with evidence from the illegal entry and search of Bourgeois's hotel room suppressed." (P. App. 19). The Court found that:

> Ultimately, the record fails to show any reason why a reasonable officer would have believed Bourgeois had

> any intention of harming the officers as no testimony suggested that the manner in which he turned away from the door was threatening, that he had made any threatening statements toward any officers at or before that time, or that he had ever committed a violent act against anyone, much less law enforcement. Nor is there any evidence to suggest Bourgeois was injured in any way, was in an otherwise medically-concerning condition, or was in a state of significant personal, self-harming distress.

(P. App 18). Accordingly, the Court ruled: "As a result, the evidence recovered by the West Milwaukee police officers from Bourgeois's hotel room—most notably the handgun—must be suppressed." (Id.)

STATEMENT OF FACTS

At about 1:46 a.m. on July 12, 2016, West Milwaukee police officers conducted a forcible, warrantless entry into Bourgeois' hotel room and discovered a handgun that had been reported stolen. An officer broke open the door, and he and two other officers placed Bourgeois in handcuffs, searched the room, and seized a handgun on the bed. Bourgeois made repeated verbal threats toward the officers during that time.

The officers arrested Bourgeois and thereafter sought to have him examined at a mental health facility. Medical staff concluded that there were no grounds to detain him. Following his discharge, officers drove Bourgeois back to his duplex in Mukwonago and released him there, uncharged, hours

after the entry into his hotel room, the seizure of the gun and his arrest.

Upon returning home, Bourgeois went upstairs to his upstairs apartment. Later, he went to the lower apartment and began "pounding" on the door of his duplex-neighbor, who had reported the stolen handgun to police on July 10. She told him to go away, but he continued, adding swears and threats, prompting her to call the Mukwonago Police. Bourgeois eventually returned to his upstairs apartment.

After Mukwonago police officers responded to the neighbor, Bourgeois came downstairs. Officers then arrested him (again) for theft of the gun seized from his hotel room and placed him in handcuffs. It is in the record that Bourgeois' second arrest was related to the same theft of the same illegally seized firearm. Officer John Schubel testified at trial (R. 112) that Bourgeois then made threats during his second arrest for theft of the seized firearm:

> *Q* Was he told that he was being arrested for the theft of a firearm? *A* Yes. *Q* How did he react to that? *A* . . . He became upset. He was told why we were taking him into custody, and that some of the threats he had made and also of the stolen property that was taken. *Q* Did he make more threats at that time? *A* He did. As we were going out to the car he stated something about Dallas was nothing, and referring to the Dallas shooting of officers.

(Id. at 195-196)

Arresting officer Jason Steinbrenner presumed this was a reference to "a shooting [a few days earlier] of several Dallas police officers ... committed by a former military veteran who was singling out police officers and shooting them." Bourgeois' post-arrest outburst with the police at that time—specifically with Steinbrenner—led to Bourgeois being charged with threatening a law enforcement officer, along with theft of the handgun.

ARGUMENT

I. A remand to the circuit court was the appropriate remedy and should have be used by the Court of Appeals, when the circuit court had not considered whether Bourgeois' subsequent arrest and his threatening statements were derived from the illegal gun seizure.

The Court of Appeals should have remanded this case for fact-finding. The record shows that at the October 17, 2019, suppression hearing (R. 101:4), Judge Dreyfus had planned to conduct a follow-up, "derivative evidence" hearing, *but only if* he had concluded that there was a Fourth Amendment violation. Because Judge Dreyfus found that no violation had occurred, neither the parties nor the circuit court delved into the separate fact question of what statements, if any, were derived from the illegal search of Bourgeois' room and his arrest.

Bourgeois had requested that the Court of Appeals order further fact-finding, as he explained in

his reply brief at 8: "*on remand*, *the circuit court will need to determine whether the second arrest was tainted by the prior seizure*." (Emphasis added). While the Court stated that it had conducted a "thorough review of the record" to affirm the conviction (¶ 29), it did not mention that the parties had not created a fact record or that Judge Dreyfus had not entered findings on the attenuation issue. So, the Court rendered its ruling before the circuit court had created a record; and this Court could not have reviewed the issue "thoroughly."

This Court has stated that inadequate findings of fact by a lower court will support a remand remedy. In *Wurtz v. Fleischman*, 97 Wis. 2d 100, 108, 293 N.W.2d 155, 159 (1980), it stated: "When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause." Likewise, in *State v. Kleser*, 2010 WI 88, ¶123, 328 Wis. 2d 42, 96, 786 N.W.2d 144, 170, this Court stated: ("Remand is the appropriate course of action '[w]hen an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute.'" (Internal citation omitted.)

Remand is particularly justified when there are no circuit court findings for the appeals court to either affirm or reverse, as was the case here. This Court

stated in *Perrenoud v. Perrenoud*, 82 Wis.2d 36, 42-43, 260 N.W.2d 658 (1978):

> When confronted with inadequate findings by the trial court, we may affirm if the trial court's conclusions are supported by the great weight and clear preponderance of the evidence; reverse if they are not so supported; or remand the cause for the purpose of making appropriate findings of fact and conclusions of law.

The Court of Appeals in other decisions has followed suit. See, *State v. Mendoza*, 220 Wis. 2d 803, 822, 584 N.W.2d 174, 182 (Ct. App. 1998). In *Guardianship &Protective Placement of Shaw,* 87 Wis.2d 503, 518, 275 N.W.2d 143, 151 (Ct. App. 1979).

II. Because of its mistaken approach, the Court of Appeals erred in its attenuation analysis.

Brown v. Illinois, 422 U.S. 590 (1975) is the leading case on whether statements arising out of Fourth Amendment violations should be suppressed as fruits of police illegality. The Court of Appeals did not use the *Brown* attenuation analysis, but instead quoted a Black's Law Dictionary "derivative evidence" definition, which is sorely lacking compared to the *Brown* analysis. The dictionary definition is aimed at deciding whether the seizure of *physical* evidence, after an illegal search or seizure or arrest, is derivative. It does not offer insight, as *Brown* and the subsequent cases do, for determining if a defendant's *oral statements* are directly or indirectly derived from

a prior illegality. Hence, the Court of Appeals court erroneously exercised its discretion when it applied the wrong legal standard. *State v. McConnohie,* 113 Wis. 2d 362, 371, 334 N.W.2d 903 (1983).

Because of its errant analysis, the Court of Appeals neglected to consider the possibility that Bourgeois' threatening outbursts during his second arrest for stealing a gun were themselves subject to suppression. Where an arrest is illegal, a defendant's statements to the police that resulted from that arrest may be subject to suppression as well.

In *Brown*, the Court so noted:

> [E]ven if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." 371 U.S., at 486. *Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.

See, Brown v. Illinois, 422 U.S. 590, 601-02 (1975) (citing *Wong Sun* v. *United States,* 371 U.S. 471 (1963)). *Brown's* analysis has been used with approval by this Court and the Court of Appeals in other cases. See, *Muetze v. State*, 73 Wis. 2d 117, 131-35, 243 N.W.2d 393, 399-401 (1976); *State v. Verhagen*, 86 Wis. 2d 262, 270-72, 272 N.W.2d 105, 109 (Ct. App. 1978);

State v. Kiekhefer, 212 Wis. 2d 460, 478-84, 569 N.W.2d 316, 326-29 (Ct. App. 1997).

Brown v. Illinois, and the above-cited cases, instruct that on remand three factors are relevant to the attenuation analysis: (1) the temporal proximity of the illegality and the statements at issue, (2) whether intervening circumstances are present, and (3) whether the official illegal conduct was purposeful and flagrant. 422 U.S. at 603-604.

Bourgeois submits that, if this Court had recognized those factors, a remand would have followed. First, police effectuated Bourgeois' second arrest for theft of a firearm within a day of his first arrest, after they had illegally seized the gun. Thus, the temporal proximity factor could easily be met. *See Verhagen*, 86 Wis. 2d at 271, 272 N.W.2d at 109 (although defendant's statement occurred five days after the illegal search, that "did not purge the taint of the illegal search.").

As to the second factor, there was no intervening circumstance because Bourgeois' threats flowed from the same facts on which the illegal search and his first arrest were based, so that his statements were tied to the same police seizure of a gun from his hotel room. (It would be odd indeed if the prosecution cannot prosecute Bourgeois for making the threats during his first arrest because of a taint, but it could proceed against him for making the same threats during a second arrest for the same theft offense.)

The third factor, the flagrancy of the official misconduct involved, is of particular importance in determining if a statement had been tainted by a prior illegality. *See Muetze v. State*, 73 Wis. 2d at 134, 243 N.W.2d at 401. The flagrancy of the police misconduct in Bourgeois' case, where this Court admonished the police for forcibly entering the hotel room without a warrant, matched the police illegality in *Kiekhafer,* where the Court noted "[n]o reason [was] offered for not obtaining a search warrant except the inconvenience to the officers," quoting *Johnson v United States*, 333 U.S. 10, 15 (1948). "Such flagrant misuse of authority simply cannot be ignored. This is a case where suppression of the seized evidence would further the deterrent function of the exclusionary rule." *Kiekhefer*, 212 Wis. 2d at 483, 569 N.W.2d at 329.

CONCLUSION

Accordingly, this Court should grant review and direct the Court of Appeals to remand this case for fact-finding in the circuit court for application of the *Brown* factors.

Dated this 13th day of May, 2022.

Electronically signed by:

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,173 words.

Dated this 13th day of May, 2022.

Electronically signed by:

James A. Walrath

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 13th day of May, 2022.

Electronically signed by:

James A. Walrath