RECEIVED
05-27-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1808-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

ERIC D. BOURGEOIS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

CRITERIA FOR REVIEW

The issues Petitioner presents do not satisfy the criteria for review. The Court of Appeals made no error.

Background. This case concerns the second of two convictions. The first, for gun theft, was investigated after Bourgeois's neighbor contacted police on July 10 to report that Bourgeois had stolen her gun. The second, for threatening a law enforcement officer, was based on Bourgeois's conduct toward officers who responded to Bourgeois's residence on July 12 after the neighbor contacted police again to say he had threatened to kill her. The first conviction was vacated on appeal by the court of appeals on the ground that the stolen gun had been recovered in an unlawful warrantless search and was inadmissible. The second conviction was affirmed on appeal because the court concluded that the record showed that evidence of the threats was "new criminal evidence," not "derivative evidence acquired as a result of the illegal search." This petition relates solely to the second conviction.[1]

The remand issue. Petitioner argues that the first issue warrants review because "[a] decision by the supreme court will help develop, clarify or harmonize the law, and . . . [t]he question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." *See* Wis. Stat. § (Rule) 809.62(1r)(c)3. Because the court of appeals did not wrongly apply the law, there is no basis for review.

Petitioner argues that the court of appeals erred as a matter of law because it was required to remand the matter for fact-finding about "how his threatening outbursts at officers during [his] arrest arose out of the prior unlawful search and seizure of the gun." (Pet. 5.) The court of appeals did not err. It did not take any further fact-finding for the

---

[1] (Pet-App. 19.)

court of appeals to reject the argument that the criminal statements "arose out of" the unlawful search because Bourgeois was still so upset about it that he threatened police with death when they were called *back* to his residence in Mukwonago *on a separate occasion*. That logic would seem to effectively insulate any person who lashed out at law enforcement after an illegal search. But in any event, such conduct is not a "fruit" of the unlawful search for purposes of Fourth Amendment law.

Further, Petitioner has not shown why the facts in the record were insufficient for the court of appeals' decision or what additional facts are needed. A lack of factual findings does not automatically and always require remand. In *Carroll*, this Court declined to remand for factual findings in a similar tainted evidence case, concluding that even though "the circuit court did not make the explicit findings" concerning law enforcement's intent, its "failure to do so . . . does not require remand."[2] Over a strong dissent that would have required remand in that case, the Court held that "absent an explicit finding, a clear inference could compel the conclusion," and circumstances in that case "permit[ted] such an inference to be drawn."[3]

The same is true here. It was thus not error for the court of appeals to decide the issue based on its review of the record. Petitioner quotes case law for the proposition that remand is "the only appropriate course for the court" in instances where "an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute." (Pet. 6 (quoting *Wurtz v. Fleischman*, 97 Wis. 2d 100, 108, 293 N.W.2d 155 (1980).) The court of appeals concluded here that it did not need further findings to resolve the legal question

---

[2] *State v. Carroll*, 2010 WI 8, ¶ 50, 322 Wis. 2d 299, 778 N.W.2d 1.

[3] *Id.* ¶¶ 50–51.

because the facts necessary to the determination were in the record. Thus, the conditions that require remand—inadequate findings and dispute about *material* facts—were not present here.

The attenuation issue. Petitioner asserts that 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." (Pet. 6.) He therefore asserts that this issue warrants review under Wis. Stat. § (Rule) 809.62(1r)(d). The court's decision is fully consistent with controlling precedent on attenuation, and it does not warrant review.

Although Petitioner correctly states that the court of appeals did not explicitly "use the *Brown*[4] attenuation analysis in this case" (Pet. 7), he has not shown that the court's analysis conflicts with *Brown* or that the court would have reached a different legal conclusion based on those facts if it had cited to *Brown* rather than *Carroll*[5] in its attenuation analysis. The court's concise but sufficient analysis rested on the fact that the statements at issue—Bourgeois's threats to officers—were not derived from the illegal search but "[r]ather" were "new criminal evidence [Bourgeois created] when he committed this new crime against Officer Steinbrenner separate from the unlawful entry into

---

[4] *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975) (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).

[5] *Carroll*, 322 Wis. 2d 299, ¶ 19 ("This [exclusionary] rule applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the State shows sufficient attenuation from the original illegality to dissipate that taint.").

Bourgeois's hotel room."[6] Under either the test stated in *Carroll*, which the court referenced and which Petitioner cited in his court of appeals reply brief, or the one stated in *Brown*, the evidence that Bourgeois made threats to an officer in Mukwonago was not derived from the illegal search of his hotel room in West Milwaukee in the middle of the night. Bourgeois's separate conduct in a different encounter with police satisfies *Carroll*'s "sufficient attenuation" analysis and *Brown*'s "intervening circumstances" analysis such that the statements are not, under either test, the fruit of the State's unlawful conduct. The court of appeals' decision does not conflict with *Brown*.

The bottom line is that it did not take many facts for the court of appeals to reject the argument that because the State unlawfully searched a hotel room and recovered a gun, the law also required the suppression of evidence of the "new crime"—threatening officers—that Bourgeois committed on a separate occasion. The decision not to remand under these circumstances is sound under the principles stated in *Wurtz*, 97 Wis. 2d at 108, and *State v. Carroll*, 2010 WI 8, ¶ 50, 322 Wis. 2d 299, 778 N.W.2d 1. The decision not to suppress the threat statements is sound under *Brown v. Illinois*, 422 U.S. 590, 603–04, and *Carroll*, 322 Wis. 2d 299, ¶ 19.

---

[6] *State v. Bourgeois*, 2022 WI App 18, ¶ 30, ___ Wis. 2d ___, ___ N.W.2d ___.

CONCLUSION

This Court should deny Bourgeois's petition for review of the published decision that affirmed his conviction for making threats to an officer.

Dated this 27th day of May 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,190 words.

Dated this 27th day of May 2022.

Sonya K Bice

SONYA K. BICE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 27th day of May 2022.

Sonya K Bice

SONYA K. BICE
Assistant Attorney General