

CONCURRING OPINION BY NAKAMURA, J.

I join in the majority opinion. I agree that under State v. Kachanian, 78 Hawai'i 475, 485, 896 P.2d 931, 941 (App. 1995), the circuit court erred in suppressing "all the evidence derived from the seizure of [Defendant-Appellee Shayne Edralin (Edralin)], including the observations of the officer[.]" In Kachanian, this court held that despite the illegality of Kachanian's prior seizure or arrest, Kachanian was not privileged to resist an arrest made under color of law. Id. at 485-86, 896 P.2d at 941-42. Accordingly, we concluded that Kachanian's indictment on the resisting arrest charge could not be treated as the product or fruit of his illegal seizure or arrest, and we affirmed Kachanian's resisting arrest conviction. Id. at 486, 896 P.2d at 942.

I write separately to discuss how courts from other jurisdictions have analyzed the situation presented in this case. Consistent with Kachanian, such courts have refused to suppress evidence pertaining to or derived from a distinct crime committed by the defendant against law enforcement officers after an unlawful seizure.

I.

One of the leading cases on this subject is United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982). In Bailey, federal agents stopped Bailey and a companion at the airport. Id. at 1011. Bailey fled and was chased by one of the agents. Id. When the agent caught up to Bailey, a struggle ensued, and Bailey struck the agent in the head and exchanged blows with the agent before being subdued and arrested. Id. at 1012. The government used drugs recovered from Bailey's person incident to his post-flight arrest to convict him of drug offenses. Id.

The Eleventh Circuit assumed that the agents' initial encounter with Bailey constituted an illegal arrest. Id. at 1012-13. However, it held that the "second" post-flight arrest was valid (based on Bailey's conduct in resisting arrest) and that the drugs recovered pursuant to the second arrest were

admissible. Id. at 1012-19. The court held that "notwithstanding a strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new, distinct crime, then the police constitutionally may arrest the defendant for that crime." Id. at 1016-17 (emphasis added). The court reasoned:

[W]here the defendant's response is itself a new, distinct crime, there are strong policy reasons for permitting the police to arrest him for that crime. A contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct. . . . [E]xtending 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.

Id. at 1017.

In Clark v. United States, 755 A.2d 1026, 1027 (D.C. 2000), Clark was convicted of threatening a police officer with bodily harm. The District of Columbia Court of Appeals assumed that Clark was subject to an unlawful arrest at the time he threatened the officer. Id. at 1028. The court rejected Clark's argument that his threatening statements should be suppressed as the fruit of his unlawful arrest. Id. at 1028-30. The court noted that other federal and state appellate courts have "almost uniformly held" that the "commission of a separate and distinct crime constitutes the kind of independent act that purges the primary taint of illegal custody." Id. at 1029.

After discussing Bailey, the court stated:

The vast majority of appellate courts have followed Bailey, refusing to suppress either evidence of the distinct crime itself or evidence seized incident to arrest for the distinct crime. See, e.g., United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) (shooting at police officer); United States v. Dawdy, 46 F.3d 1427, 1431 (8th Cir.) (struggle with police officer), cert. denied, 516 U.S. 872, 116 S.Ct. 195, 133 L.Ed.2d 130 (1995); United States v. Pryor, 32 F.3d 1192, 1196 (7th Cir. 1994) (misrepresentation of identity to police officer); United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992) (pointing rifle at police officer); United States v. Garcia-Jordan, 860 F.2d 159 (5th Cir. 1988) (misrepresentation of citizenship status to

border patrol official); United States v. Mitchell, 812 F.2d 1250 (9th Cir. 1987) (threats against United States President uttered to police officers); United States v. King, 724 F.2d 253 (1st Cir. 1984) (shooting at police officer); United States v. Marine, 51 M.J. 425 (C.A.A.F. 1999) (disrespectful statements to military guard officer); Nicholson v. State, 707 A.2d 766 (Del. 1998) (disorderly conduct, resisting arrest, and criminal mischief); State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (traffic offenses); State v. Miskimins, 435 N.W.2d 217 (S.D. 1989) (pointing shotgun at officer and threatening to kill him); Woodson v. Commonwealth, 245 Va. 401, 429 S.E.2d 27 (1993) (pulling gun and struggling with police officer).

While many of such cases involved physical use of force against police officers, others involved unlawful verbal responses such as threats or false statements. In any event, the critical issue is not the gravity of the defendant's response to unlawful police action, but the legality of it. We hold today that, at least absent unforeseen exceptional circumstances, the commission of a separate and distinct crime while in unlawful police custody is the type of intervening act which purges the primary taint [of the unlawful seizure].

Id. at 1029-30 (footnotes omitted).

In State v. Burger, 639 P.2d 706, 707 (Or. Ct. App. 1982), Burger was charged with resisting arrest and assault based on evidence that he kicked two police officers after they made an arguably unlawful entry into his home. Burger argued that the evidence that he kicked the police officers should have been suppressed. Id. at 707-08. In rejecting this claim, the Oregon Court of Appeals stated:

We decline to hold that after an unlawful entry[,] evidence of subsequent crimes committed against police officers must be suppressed. Such a rule would produce intolerable results. For example, a person who correctly believed that his home had been unlawfully entered by the police could respond with unlimited force and, under the exclusionary rule, could be effectively immunized from criminal responsibility for any action taken after that entry. We do not believe that either the state or federal constitution compels such a result.

Id. at 708 (citation omitted) (emphasis added).

II.

I agree that a rule that would require suppression of evidence pertaining to a distinct crime committed by the defendant against law enforcement officers after an unlawful seizure or search would produce intolerable results. Take, for

example, a situation where two police officers unlawfully detain a suspect where the only witnesses to the detention are the officers and the suspect. The suspect then shoots and kills one officer and shoots and seriously injures the other officer. Under the above-described rule, the suspect would be immunized from prosecution because evidence of the suspect's crimes, including the surviving officer's observations, would be suppressed.

Here, the prosecution at the suppression hearing presented evidence that in response to being unlawfully detained by Officer Miller, Edralin pointed a knife blade at Officer Miller's stomach, swore at Officer Miller, flicked the knife at Officer Miller, and threw a sock filled with coins at Officer Miller, which hit a glass wall behind the officer and landed on the floor. The circuit court erred in suppressing the evidence related to the terroristic threatening charge brought against Edralin.

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