

**FILED: September 21, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

SHERYL DIANE SINGER,  
Defendant-Appellant.

Jackson County Circuit Court  
072595FE

A138767

On remand from the Oregon Supreme Court, *State v. Singer*, 349 Or 663, 249 P3d 1281 (2011).

William G. Purdy, Judge.

Submitted on remand March 22, 2011.

Meredith Allen, Senior Deputy Public Defender, Peter Gartlan, Chief Defender, Appellate Division, Office of Public Defense Services, for appellant.

Robert M. Atkinson, Assistant Attorney General, John R. Kroger, Attorney General, Jerome Lidz, Solicitor General, and Anna M. Joyce, Assistant Attorney General, for respondent.

Before Haselton, Presiding Judge, and Brewer, Chief Judge, and Armstrong, Judge.

ARMSTRONG, J.

Reversed and remanded.

1 ARMSTRONG, J.

2 This case is on remand from the Supreme Court, which vacated our prior  
3 decision, [State v. Singer](#), 230 Or App 485, 216 P3d 897 (2009) (*Singer I*), and remanded  
4 the case to us for reconsideration in light of [State v. Ashbaugh](#), 349 Or 297, 244 P3d 360  
5 (2010). *State v. Singer*, 349 Or 663, 249 P3d 1281 (2011) (*Singer II*). In *Singer I*, we  
6 applied the analysis from *State v. Holmes*, 311 Or 400, 409-10, 813 P2d 28 (1991), and  
7 concluded that it was objectively reasonable for defendant to have believed that her  
8 liberty had been significantly restricted when a police officer asked her for identifying  
9 information and used the information to run a warrant check. Whether the restriction  
10 constituted a stop under Article I, section 9, of the Oregon Constitution turned on whether  
11 defendant had, in fact, believed that her liberty had been restricted. Because the trial  
12 court had not addressed that issue, we remanded the case to the trial court to do so.  
13 *Singer I*, 230 Or App at 487.

14 In *Ashbaugh*, the Supreme Court adopted the following test for a seizure  
15 under Article I, section 9, in place of the *Holmes* test that we had applied in *Singer I*:

16 "A 'seizure' of a person occurs under Article I, section 9, of the  
17 Oregon Constitution: (a) if a law enforcement officer intentionally and  
18 significantly restricts, interferes with, or otherwise deprives an individual of  
19 that individual's liberty or freedom of movement; or (b) if a reasonable  
20 person under the totality of the circumstances *would* believe that (a) above  
21 has occurred."

22 349 Or at 316 (emphasis in original). Our task on remand is to determine whether, under  
23 that test, defendant was seized during her encounter with the police. We conclude that  
24 she was and, accordingly, reverse and remand.

1 Defendant was a front-seat passenger in a car whose driver made an  
2 unlawful turn. Officer Kirkpatrick saw the driver make the turn, and he stopped the  
3 driver for the traffic violation by activating the overhead lights on his patrol car, which  
4 remained lit throughout the ensuing encounter. Once stopped, Kirkpatrick approached  
5 the driver, obtained the driver's license, and advised him of the reason for the stop. While  
6 Kirkpatrick did that, he noticed that defendant appeared to be nervous. He asked  
7 defendant for her name and date of birth in order to determine if there were any  
8 outstanding warrants for her arrest, but he did not tell defendant the reason for the  
9 request. After defendant had given him the requested information, Kirkpatrick returned  
10 to his patrol car to run a warrant check on the driver and defendant. By that time, another  
11 uniformed officer had arrived to act as a cover officer.

12 The warrant check disclosed no outstanding warrants but did show that  
13 defendant was on probation for a conviction for a drug-related crime. Rather than  
14 proceeding to address the traffic violation that was the basis for the stop of the driver,  
15 Kirkpatrick returned to the passenger side of the stopped car and asked defendant to step  
16 out of the car. As defendant got out of the car, she placed her purse underneath the  
17 passenger seat. Kirkpatrick told defendant that he knew that she was on probation for a  
18 drug offense, and he asked her to remove the sunglasses that she was wearing. She  
19 complied, which allowed Kirkpatrick to see that her pupils were unduly constricted,  
20 leading him to conclude that she was under the influence of intoxicants.

21 Kirkpatrick asked defendant for consent to search her person for illegal

1 drugs, and she agreed. Kirkpatrick searched defendant's pockets and wallet and found no  
2 drugs. He then asked to search her purse. Defendant hesitated but ultimately retrieved  
3 her purse and handed it to Kirkpatrick after Kirkpatrick asked her if she had a search  
4 clause as a term of her probation. After giving her purse to Kirkpatrick, defendant  
5 warned him that there was a "rig" in it, which Kirkpatrick understood to refer to a  
6 hypodermic needle used to inject drugs.

7           In searching the purse, Kirkpatrick found a sunglass case that contained a  
8 syringe with a brown liquid in it and a compact that contained a spoon covered with a  
9 brown residue and a piece of cotton covered with a brown substance. Defendant  
10 admitted that the syringe contained heroin and that the spoon was paraphernalia used to  
11 prepare and inject heroin. Kirkpatrick then arrested defendant for possession of a  
12 controlled substance.

13           Before trial, defendant moved to suppress all of the evidence obtained from  
14 her on the ground that it had been obtained as a result of her unlawful seizure by  
15 Kirkpatrick. The trial court denied the motion, and defendant entered a conditional guilty  
16 plea to unlawful possession of heroin, ORS 475.854, reserving her right on appeal to  
17 obtain review of the court's denial of her suppression motion.

18           We conclude that Kirkpatrick's conduct toward defendant would lead a  
19 reasonable person in defendant's position to believe that she was the subject of a criminal  
20 investigation and, hence, that Kirkpatrick had seized defendant for purposes of Article I,  
21 section 9, before he requested consent to search her and her purse. Although the record

1 does not establish that defendant knew that Kirkpatrick had requested her name and date  
2 of birth in order to run a warrant check on her, Kirkpatrick's actions after completing the  
3 check would reasonably lead defendant to believe that she was the subject of an  
4 investigation. Rather than returning from the warrant check to speak with the driver,  
5 whose unlawful turn had led to the stop, Kirkpatrick went to the passenger side of the  
6 stopped car and asked defendant to get out of the car, which she did. Kirkpatrick then  
7 told her that he knew that she was on probation for a drug offense and asked her to  
8 remove her sunglasses, which she also did. Those actions by Kirkpatrick constituted a  
9 show of authority that would lead a reasonable person in defendant's position to believe  
10 that Kirkpatrick had significantly restricted her freedom of movement. Therefore, under  
11 the test articulated in *Ashbaugh*, Kirkpatrick had seized defendant for purposes of Article  
12 I, section 9, before he asked her for consent to search her and her purse.

13           The state does not contend that Kirkpatrick had a lawful basis to stop  
14 defendant, nor that the evidence that he obtained from her was the attenuated product of  
15 an unlawful seizure, and we see no basis in this record to reach either conclusion. It  
16 follows that the trial court erred in denying defendant's suppression motion.

17           Reversed and remanded.