

FILED: December 29, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Appellant,

v.

PRESSLEY DOWANE WIGGINS, JR.,
Defendant-Respondent.

Douglas County Circuit Court
08CR1481FE

A141607

Ronald Poole, Judge.

On respondent's petition for reconsideration filed October 31, 2011, and appellant's response to petition for reconsideration filed November 8, 2011. Opinion filed August 17, 2011. 245 Or App 119, 260 P3d 826.

Peter Gartlan, Chief Defender, and Daniel C. Bennett, Deputy Public Defender, Office of Public Defense Services, for petition.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Janet A. Klapstein, Senior Assistant Attorney General, for response.

Before Sercombe, Presiding Judge, and Brewer, Chief Judge, and Ortega, Judge.

SERCOMBE, P. J.

Reconsideration allowed; former opinion modified and adhered to as modified.

1 SERCOMBE, P. J.

2 Defendant petitions for reconsideration of our decision in [State v. Wiggins](#),
3 245 Or App 119, 260 P3d 826 (2011), in which the state appealed a pretrial order
4 suppressing evidence discovered in a warrantless search of defendant's car. We reversed
5 the trial court, concluding that the search was justified by the automobile exception to the
6 warrant requirement of Article I, section 9, of the Oregon Constitution. In doing so, we
7 relied, in part, on this court's decision in [State v. Kurokawa-Lasciak](#), 237 Or App 492,
8 239 P3d 1046 (2010) (*Kurokawa I*), which was subsequently reversed by the Supreme
9 Court in [State v. Kurokawa-Lasciak](#), 351 Or 179, 263 P3d 336 (2011) (*Kurokawa II*).
10 Defendant contends that the Supreme Court's decision in *Kurokawa II* requires us to
11 adopt a different analysis than the one that we applied in our previous opinion in this
12 case. We write to disclaim any reliance on *Kurokawa I* and to clarify the basis for our
13 decision.

14 We briefly summarize the facts. The police received a report of a verbal
15 altercation in which one of the participants was heard saying that he was going to get a
16 gun and would return. Defendant's car was seen leaving the place of the altercation.
17 Fifteen minutes later, an officer located defendant's car, which was headed back toward
18 the spot of the altercation, and initiated a traffic stop with two deputies acting as backup.
19 As defendant was being stopped, he pulled his car into a private driveway; defendant
20 apparently knew the owners of the property. Defendant admitted to the officer that he
21 was involved in a verbal altercation but denied making any threats. He declined consent

1 to search the car for firearms, and he was subsequently arrested for a parole violation.

2 Defendant was transported to jail by the officer. His car keys were left with
3 the property owners, who were directed (by defendant) to contact his girlfriend to retrieve
4 the car. The two deputies left the scene to further investigate the possibility that a gun
5 was in the car. The car was left unattended for about 25 minutes; the car was locked, but
6 a window was left down. The property owners were adamant that nobody had accessed
7 the car during that time.

8 The deputies returned to the car believing they had probable cause that it
9 contained a gun. They guarded the car while they sought a search warrant. Before a
10 warrant was obtained, defendant's girlfriend arrived and demanded to take the vehicle.
11 The deputies then searched the car and found a loaded gun and additional ammunition.
12 Defendant was charged with crimes related to his possession of a firearm. Before trial,
13 the court suppressed the evidence found during the search of defendant's car. The state
14 appealed.

15 In our prior opinion, we explained that, under the automobile exception,
16 police may conduct a warrantless search of a vehicle where (1) the vehicle is mobile at
17 the time it is stopped by police or other governmental authority and (2) probable cause
18 exists for the search of the vehicle. *Wiggins*, 245 Or App at 125 (citing *State v. Brown*,
19 301 Or 268, 274, 721 P2d 1357 (1986)). In this case, there was no dispute that the police
20 had probable cause. *Id.* at 126. Nor was there any real dispute about whether defendant's
21 vehicle was "mobile" at the time of the stop; as defendant acknowledges on

1 reconsideration, "the officers in this case did stop defendant's car while he was driving
2 it." Instead, the dispute centered on whether the officers' temporary break in contact with
3 the vehicle rendered it immobile for purposes of the automobile exception. We
4 concluded that, because defendant's car was mobile when it was stopped by the officers,
5 and "[n]othing occurred between the moment of the initial encounter and the time the
6 officers searched defendant's car that rendered the vehicle immobile," the exception
7 applied. *Id.* at 127.

8 In reaching that conclusion, we partly relied on the facts in *Kurokawa I*,
9 where this court applied the automobile exception "[d]espite the lapse in time and
10 apparent break in contact with the vehicle." *Id.* We also cited that case for the
11 proposition that a vehicle need only be "operable" in order to be considered "mobile" for
12 purposes of the automobile exception. *Id.* at 125. However, the latter point had no
13 bearing on the disposition of the case.

14 Subsequent to our decision, the Supreme Court reversed *Kurokawa I*,
15 rejecting the notion that any operational vehicle is "mobile" under the automobile
16 exception. *Kurokawa II*, 351 Or at 193. The court reaffirmed the principles that it had
17 announced in its earlier cases, which did not permit the warrantless search of a vehicle
18 merely because it was capable of mobility. See [State v. Meharry](#), 342 Or 173, 149 P3d
19 1155 (2006); *State v. Kock*, 302 Or 29, 725 P2d 1285 (1986); *Brown*, 301 Or 268. The
20 court had drawn a "bright line," excluding from the automobile exception "any search of
21 an automobile that was parked, immobile and unoccupied at the time the police first

1 encountered it in connection with the investigation of a crime * * *." *Kurokawa II*, 351
2 Or at 190 (quoting *Kock*, 302 Or at 33) (emphasis omitted).

3 On reconsideration, defendant argues that his car was "parked, immobile,
4 and unoccupied" at the time of the search and that "the fact that [the] car was known to be
5 'operable' at [that time] does not mean that it remained mobile." Thus, in defendant's
6 view, his car had ceased to be mobile due to either the break in contact with the vehicle
7 or to the general delay--"90 minutes or more"--between the initial stop and the time of the
8 search.

9 The Supreme Court has not directly addressed when a "mobile" vehicle,
10 stopped by police in connection with a crime, ceases to be mobile for purposes of the
11 automobile exception of Article I, section 9.¹ Nonetheless, the court's decision in
12 *Meharry*, 342 Or 173, is instructive. In that case, the police received a report that the
13 defendant had been driving erratically. The police officer responding to the call saw the

¹ We note that previous decisions do contain casual references to the timing of a search under the automobile exception. *See, e.g., Meharry*, 342 Or at 180 ("The search occurred *shortly after* [the officer] had observed the van in motion and had parked his police car behind her van." (Emphasis added.)); *Kock*, 302 Or at 33 ("Searches of automobiles that have *just* been lawfully stopped by police may be searched without a warrant * * * when police have probable cause to believe that the automobile contains contraband or crime evidence." (Emphasis added.)); *Brown*, 301 Or at 277, 278 (describing an "immediate" search of an automobile); *cf. State v. Zigler*, 100 Or App 700, 704-05, 788 P2d 484 (1990) (relying on a case decided under the Fourth Amendment to conclude that a warrantless search of an automobile must be commenced within a reasonable time, but noting that a delay may be reasonable where police need to perform other tasks before searching the automobile). Nonetheless, the Supreme Court has not expressly imposed any temporal limitation on searches conducted under the automobile exception. We decline to articulate any such limitation here.

1 defendant pass in front of him as he left the police station. Before the officer stopped the
2 defendant, the defendant pulled into a store parking lot and parked her vehicle. The
3 officer pulled in behind her to prevent her vehicle from leaving. The officer followed the
4 defendant into the store, observed facts suggesting that she was driving under the
5 influence of intoxicants, and arrested her. He subsequently searched the defendant's
6 vehicle and obtained evidence that the defendant sought to suppress. This court
7 invalidated the search on the ground that the vehicle was not mobile at the time that the
8 officer encountered the defendant in the store. [*State v. Meharry*](#), 201 Or App 609, 618,
9 120 P3d 520 (2005). The Supreme Court reversed, concluding that the van was mobile at
10 the time that it was first encountered. *Meharry*, 342 Or at 179-81. The court also
11 observed:

12 "Nothing occurred between [the time of the initial encounter] and the
13 search that rendered the van immobile. [The officer] had not impounded
14 the van, and there was no physical or mechanical impediment to the van's
15 being driven away once [the officer] relinquished control over it. In short,
16 the van remained mobile and the exigency continued."

17 *Id.* at 180; *see also Kurokawa II*, 351 Or at 192 (noting that the court in *Meharry*
18 "discussed the van's continuing operability at the time of the search only to correct the
19 Court of Appeals' statement that the initial exigency no longer existed when the police
20 searched the van").

21 Similarly, here, defendant's car was mobile at the time it was stopped. That
22 exigency persisted at the time of the search despite the intervening break in contact with
23 the vehicle and the lapse of time. *See, e.g., Meharry*, 342 Or at 180 ("[T]he exigency that

1 permits the police to conduct a warrantless search of a mobile vehicle arises from the fact
2 that the vehicle can be quickly moved out of the locality or jurisdiction in which the
3 warrant must be sought." (Citations and internal quotation marks omitted.)). As we
4 noted in our prior opinion, defendant's car continued to be the subject of the officers'
5 ongoing investigation, and "[n]othing occurred between the moment of the initial
6 encounter and the time the officers searched defendant's car that rendered the vehicle
7 immobile. The car had not been impounded, the car was not functionally disabled, and
8 nothing prevented the car from being driven away once the officers relinquished control
9 over it." *Wiggins*, 245 Or App at 127. That conclusion is consistent with *Meharry*.

10 We need not go further and decide when a "mobile" vehicle ceases to be
11 mobile by virtue of police delay. The Supreme Court has made clear that the automobile
12 exception has only two requirements: (1) the vehicle must be mobile at the time that it is
13 first encountered by police and (2) probable cause must exist for the search of the vehicle.
14 *Kurokawa II*, 351 Or at 187. Under the facts in this case, those requirements are met.
15 Thus, defendant's motion to suppress should have been denied.

16 Reconsideration allowed; former opinion modified and adhered to as
17 modified.