

FILED: April 24, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

KYLE NELS PETTERSEN,
Defendant-Appellant.

Deschutes County Circuit Court
MI083223

A146379

Edward L. Perkins, Senior Judge.

Submitted on May 30, 2012.

Peter Gartlan, Chief Defender, and Alice Newlin-Cushing, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Leigh A. Salmon, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Brewer, Judge pro tempore.

SERCOMBE, J.

Reversed and remanded.

1 SERCOMBE, J.

2 Defendant appeals a judgment of conviction for driving under the influence
3 of intoxicants (DUII), ORS 813.010. He assigns error to the trial court's denial of his
4 motion to suppress evidence obtained after a police officer--having initially stopped
5 defendant for a traffic violation with probable cause--continued his investigation of that
6 violation notwithstanding the appearance of new information, which, defendant asserts,
7 vitiated probable cause such that the officer was required to cease his investigation. For
8 the reasons set forth below, we agree with defendant that probable cause dissipated when
9 the officer obtained that new information. Specifically, we conclude that, upon viewing
10 the information, the officer no longer subjectively believed that defendant had more
11 likely than not committed a violation. Accordingly, we reverse and remand.

12 We review a trial court's denial of a motion to suppress for legal error and
13 defer to its findings of fact, both explicit and implicit, provided that there is sufficient
14 evidence in the record to support them. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993);
15 *see also Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) (where there is evidence
16 from which the facts could be decided in more than one way, we presume that the trial
17 court decided the facts in a manner consistent with its ultimate conclusion). On
18 November 17, 2008, Bend Police Officer Gault, while on routine patrol duty, was unable
19 to view the registration tags on defendant's vehicle as he drove behind it. Gault called
20 dispatch to inquire as to the validity of defendant's registration and, based on the
21 Department of Motor Vehicles (DMV) records available to dispatch, was informed that

1 defendant's registration had expired approximately one month previously. Based on that
2 information, Gault stopped defendant for violation of, *inter alia*, ORS 803.300 (failure to
3 register a vehicle).

4 However, when Gault walked up behind defendant's vehicle, he observed--
5 contrary to the information from the DMV--facially valid, current registration tags on
6 defendant's license plate. Registration tags depict the numeric month of their issuance
7 and expiration. Gault testified that, "[a]s [he got] right to the trunk[, he] could see that *
8 * * they d[id] look like they [we]re current registration tags." Notably, "there is a delay
9 in the record keeping of the [DMV,]" and Gault testified that he was aware of that fact--
10 going so far as to note that he had experienced one or more issues with DMV "error" or
11 delay in the past where "[the] DMV just had not changed the status, the registration status
12 in the computer system." Nevertheless, despite his observation of the facially valid and
13 recently issued tags and knowledge of the DMV records' potential inaccuracy, Gault
14 proceeded to "investigate and *make sure* the vehicle was registered" by approaching
15 defendant and requesting that he produce his driver's license, proof of insurance, and
16 vehicle registration form.¹ (Emphasis added.) Specifically, Gault testified:

17 "[THE STATE]: Now when you approached [defendant] did
18 you--after you saw that the license plates appeared to be valid what was
19 your reason for continuing on to go speak to the Defendant at that time?"

20 "[GAULT]: Well, if I get a return from dispatch saying that the
21 plates are expired, just through training and experience *it has been known*

¹ Gault testified that, because it was approximately midnight, he could not have made further inquiries with the DMV at that time.

1 *that people have stolen tags or altered the tags on the vehicle. So it is just*
2 *out of--as far as my standpoint on that it was--I felt it was my duty to*
3 *investigate and make sure the vehicle was registered."*

4 (Emphases added.)

5 Upon asking defendant for the registration form and other documents,
6 Gault noticed that defendant "had very slow movements" in retrieving them along with
7 "bloodshot, watery eyes." Specifically, Gault testified that, "[a]s [defendant] reached
8 over to look for his proof of insurance of his vehicle he--he opened up the glove
9 compartment, grabbed a whole wad of paper. Which is not untypical, but it was very,
10 very slow movements, very robotic, slow." Based upon those observations, Gault
11 developed probable cause that defendant was driving while intoxicated and arrested him
12 for that offense.

13 Defendant was charged with one count of DUII and subsequently filed a
14 motion to suppress "all evidence obtained by the police as a result of the stop of [his]
15 vehicle" under Article I, section 9, of the Oregon Constitution. Specifically, defendant
16 argued that probable cause dissipated once Gault saw the valid registration tags on
17 defendant's license plate before interviewing him. In advancing that argument, defendant
18 noted that "[Gault] didn't testify that he believed the tags were expired" and that "[t]here
19 is no testimony that [Gault] subjectively believed that there wasn't a valid reason [for the
20 discrepancy between the DMV records and the tags], just that [Gault] thought it was his
21 duty to investigate it further because there was *a possibility* [that the registration] * * *
22 could [have been] invalid." (Emphasis added.) Accordingly, defendant argued, at no

1 point after viewing the facially valid tags did Gault hold either a subjective or objectively
2 reasonable belief that defendant had more likely than not committed a violation as
3 required to meet the legal standard for probable cause.

4 The state countered by focusing on alternative explanations for the
5 discrepancy, arguing that probable cause did not dissipate when Gault saw the facially
6 valid registration tags because "there [were] a number of different reasons as to why
7 those valid registration stickers could be on the license plate--some of them valid, some
8 of them invalid. But the only way for [Gault] to further investigate and determine the
9 reason for that discrepancy would * * * be by making contact with the Defendant."

10 Although the trial court expressly questioned the state's theory during closing arguments,
11 it ultimately denied defendant's motion--emphasizing the nature of the information from
12 dispatch in reasoning that Gault "[had] a right to rely upon the official [DMV] records"--
13 that is, that Gault "had a right to give weight--greater weight, if you will, to [the] official
14 [DMV] records, to the public records."

15 On appeal, defendant reprises his argument that Gault neither subjectively
16 nor reasonably believed, after observing the facially valid registration stickers, that
17 defendant had *more likely than not* committed a violation. Accordingly, defendant
18 argues, probable cause to support the stop dissipated with that observation, and any
19 evidence obtained during the continuation of that stop must be suppressed under Article I,
20 section 9, as the product of an unlawful extension of the stop. The state counters, relying
21 on *State v. Vantress*, 195 Or App 52, 96 P3d 867 (2004) (officer not required to accept

1 suspect's innocent explanation for seemingly unlawful conduct), and *State v. Codr*, 99 Or
2 App 417, 782 P2d 442 (1989) (similar), that Gault "was not required to accept the
3 seemingly innocent explanation that [the] DMV's records were inaccurate or out of date."
4 Consequently, the state argues, Gault was not required to draw the inference most
5 favorable to defendant--that the DMV's records were "inaccurate or out of date"--and thus
6 Gault was entitled "to complete his investigation by inspecting the registration card
7 itself." Thus, the state focuses on whether or not Gault *reasonably* believed that
8 defendant had more likely than not committed a violation--failing to address evidence in
9 the record establishing that Gault did not *subjectively* believe that defendant had more
10 likely than not committed a violation.

11 The state's argument is inapposite. Based on this record, there is no
12 evidence from which a reasonable factfinder could conclude that, upon viewing the
13 facially valid registration tags, Gault subjectively believed that defendant had more likely
14 than not committed a violation. Probable cause therefore dissipated at that point, and
15 Gault unlawfully extended the stop. In turn, because Gault had no reason to interact with
16 defendant beyond simple, brief formalities in informing him that he was free to leave, we
17 conclude that Gault's observations resulting from that unlawful extension of the stop and
18 associated investigation should have been suppressed.

19 "In order to stop and detain a person for a traffic violation, an officer must
20 have probable cause to believe that the person committed a violation." *State v. Boatright*,
21 222 Or App 406, 409, 193 P3d 78, *rev den*, 345 Or 503 (2008) (citing ORS 810.410;

1 *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994)). In order to have probable
2 cause, the officer "must subjectively believe that a violation occurred and * * * the
3 officer's belief must be objectively reasonable." *Id.* (citing *State v. Miller*, 345 Or 176,
4 186, 191 P3d 651 (2008)). Further, "[p]robable cause exists when a law enforcement
5 officer reasonably believes that, *more likely than not*, the suspect has committed an
6 offense." *State v. Berringer*, 234 Or App 665, 669, 229 P3d 615, *rev den*, 348 Or 669
7 (2010) (citation omitted; emphasis added). Finally, this court has repeatedly affirmed the
8 principle that "[a] stop that begins lawfully can become unlawful when the reason for the
9 stop has dissipated." *Id.* (citations and internal quotation marks omitted); *see, e.g., State*
10 *v. Farley*, 308 Or 91, 94, 775 P2d 835 (1989) (holding that, after an officer lawfully
11 stopped the defendant for operating a vehicle without license plates, "[u]pon seeing [a
12 valid] temporary permit, the justification of any investigation was vitiated" and "the
13 officer had no statutory authority to proceed further").

14 Here, the unambiguous evidence demonstrates that Gault, upon observing
15 the facially valid registration tags, did not subjectively believe that defendant had more
16 likely than not committed a violation. Accordingly, probable cause dissipated at the time
17 of that observation, and Gault was then required to cease his investigation and terminate
18 the stop. Above all, Gault's testimony establishes that, upon observing the facially valid
19 tags, he merely believed that it was *possible* that defendant had committed a violation.
20 He relied on his training and experience in acknowledging that "it has been known" that
21 people steal or alter registration tags and therefore felt that it was his "duty to investigate

1 and *make sure* the vehicle was registered." (Emphasis added.) That testimony clearly
2 establishes that Gault did not have probable cause after he saw the facially valid
3 registration tags. Put simply, a belief that it is *possible* that a person committed a
4 violation does not amount to probable cause, and that is precisely the case here. *See State*
5 *v. Stearns*, 196 Or App 272, 275, 101 P3d 811 (2004) (an officer must "subjectively
6 believe[] that the infraction occurred" in order for probable cause to exist in the context
7 of a traffic stop); *see also State v. Rayburn*, 246 Or App 486, 490, 266 P3d 156 (2011),
8 *rev den*, 351 Or 675 (2012) (confirming the "more likely than not" component of
9 probable cause).

10 For the reasons set forth above, we conclude that Gault's probable cause to
11 believe that defendant committed a violation dissipated when he saw the facially valid
12 registration tags on defendant's vehicle. His subsequent investigation therefore
13 constituted an unlawful extension of the stop. Evidence obtained as a product of an
14 unlawful stop is subject to suppression under Article I, section 9. *See State v.*
15 *Rodgers/Kirkeby*, 347 Or 610, 623-24, 227 P3d 695 (2010). Accordingly, the trial court
16 erred in denying defendant's motion to suppress.

17 Reversed and remanded.