

FILED: August 14, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RICHARD A. FAUBION,
aka Richard Faubion,
Defendant-Appellant.

Deschutes County Circuit Court
09FE1146SF

A147053

Stephen P. Forte, Judge.

Argued and submitted on November 07, 2012, Woodburn High School, Woodburn.

David O. Ferry, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Tiffany Keast, Assistant Attorney General, argued the cause for respondent. With her on the brief was John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Haselton, Chief Judge, and De Muniz, Senior Judge.

DE MUNIZ, S. J.

Affirmed.

1 DE MUNIZ, S. J.

2 In this criminal case, defendant entered a conditional guilty plea¹ to a
3 charge of unlawful possession of methamphetamine, ORS 475.894, following the trial
4 court's denial of a motion to suppress evidence obtained during a traffic stop. Defendant
5 appeals the judgment of conviction and assigns error to the trial court's denial of his
6 motion to suppress. The issues in this case are when during the police officer's contact
7 with defendant was defendant "seized" and whether the officer had reasonable suspicion
8 to investigate the crimes of minor in possession of alcohol and furnishing alcohol to a
9 minor when defendant was seized. As explained below, we assume without deciding that
10 defendant was seized when an officer asked him to identify himself, and we conclude that
11 the officer had reasonable suspicion at that time. Therefore, we affirm the judgment.

12 On September 17, 2009, at 9:50 p.m., Deschutes County deputy sheriff
13 Jackson observed a vehicle stopped on remote county land marked "[d]ay use only park,
14 no camping." Jackson knew that the area was frequented by people using drugs and
15 alcohol. As Jackson approached in his marked patrol car and began to pass the parked
16 vehicle, the driver turned on the vehicle's lights and drove away. Jackson turned his
17 patrol car around to follow the vehicle and, as he followed, noticed that the registration

¹ ORS 135.335(3) provides:

"With the consent of the court and the state, a defendant may enter a conditional plea of guilty or no contest reserving, in writing, the right, on appeal from the judgment, to a review of an adverse determination of any specified pretrial motion. A defendant who finally prevails on appeal may withdraw the plea."

1 stickers and Oregon identifier on the license plate were covered by the plate holder.

2 Jackson initiated a traffic stop because the vehicle's plate was obscured.² He noted that
3 there were four occupants in the car.

4 Jackson approached the vehicle, explained to the driver the basis for the
5 stop, and requested her identifying information. The driver provided Jackson with her
6 registration and insurance information but did not have her driver's license with her. She
7 orally provided her name and date of birth, which indicated that she was 18 years old.
8 While talking to the driver, Jackson detected a smell of alcohol coming from the interior
9 of the car but was unable to determine whether the driver had consumed alcohol. Jackson
10 also determined that the front-seat passenger appeared to be under the influence of a
11 stimulant. According to Jackson, each occupant of the vehicle appeared to be between
12 the ages of 18 and 25.

13 Jackson returned to his vehicle to perform a warrant and status check on the
14 driver. Because of the remote location of the stop, Jackson also requested that a backup
15 officer respond to the scene. While Jackson was standing outside his police vehicle
16 waiting for the results of the identification verification and warrants check, he observed
17 defendant, who was in the backseat, and the front-seat passenger "making motions below
18 the rear windshield so I could not see, as if they were moving items to and from each
19 other." Jackson believed that defendant and the front-seat passenger were "trying to

² Under ORS 803.550(2)(c), the offense of illegal alteration or display of a registration plate includes use of "[a]ny frame or plate holder that obscures the numbers, letters or registration stickers, so as to render them unreadable."

1 disguise movements" that "looked like they were placing or pushing items back and forth
2 to each other."

3 The driver's warrant check came back clear and indicated that she had a
4 valid driver's license. Jackson decided to write the driver a citation for the obscured
5 license plate; however, he did not write the citation at that time. Instead, Jackson
6 determined that, because, among other things, the driver was 18 years old, there was a
7 smell of alcohol emanating from the vehicle, one passenger appeared to be under the
8 influence of stimulants, defendant and another passenger apparently had passed some
9 items back and forth while attempting to hide those motions from him, and all of the
10 occupants of the vehicle appeared to be between the ages of 18 and 25, he had reasonable
11 suspicion to investigate the violation of minor in possession of alcohol³ and the crime of

³ ORS 471.430 provides, in relevant part:

"(1) * * * Except when such minor is in a private residence accompanied by the parent or guardian of the minor and with such parent's or guardian's consent, a person under 21 years of age may not have personal possession of alcoholic beverages.

"(2) For the purposes of this section, personal possession of alcoholic beverages includes the acceptance or consumption of a bottle of such beverages, or any portion thereof or a drink of such beverages. * * *

* * * * *

"(4)(a) Except as provided in paragraph (b) of this subsection, a person who violates subsection (1) or (3) of this section commits a Class B violation.

"(b) A person commits a Class A violation if the person violates subsection (1) of this section by reason of personal possession of alcoholic

1 furnishing alcohol to a minor.⁴

2 Jackson returned to the vehicle to investigate whether there was a possible
3 minor in possession of alcohol or an adult who had or was furnishing alcohol to a minor.
4 He asked the other occupants in the vehicle for their names and dates of birth to ensure
5 that they were at least 21 years of age. In response, the three passengers either gave
6 Jackson an identification card or orally provided their names and dates of birth.
7 Defendant orally provided his name and date of birth. The information provided to
8 Jackson indicated that the front-seat passenger was 22 years old, that defendant was 23
9 years old, and that the other backseat passenger was 25 years old. As Jackson obtained
10 that information, he smelled alcohol on defendant's breath.

11 A backup officer, Huey, arrived while Jackson was speaking to the
12 passengers. Jackson returned to his vehicle and ran all three passengers' names to
13 confirm their ages and identities. In doing so, Jackson learned that defendant was on

beverages while the person is operating a motor vehicle, as defined in ORS
801.360."

4 ORS 471.410 provides, in relevant part:

"(2) No one other than the person's parent or guardian may sell, give
or otherwise make available any alcoholic liquor to a person under the age
of 21 years. * * *

" * * * * *

"(5) Except as provided in subsection (6) of this section, a person
who violates subsection (1) or (2) of this section commits a Class A
misdemeanor. * * * "

1 felony probation for possession of marijuana and that the terms of defendant's probation
2 included a no-alcohol clause.

3 Next, Jackson requested that a canine officer respond to the scene because
4 it appeared that one passenger in the vehicle was under the influence of stimulants,
5 another passenger, defendant, was on felony probation for drug possession, those two
6 passengers had been making motions as though passing objects back and forth between
7 one another while Jackson checked the driver's information, and the vehicle had been
8 parked in an area known to be frequented by persons using drugs and alcohol, all of
9 which led Jackson to suspect that there could be drugs in the car. After requesting a
10 canine officer, Jackson returned to the vehicle and asked defendant to step out of the car.

11 At some point during those events, Jackson called defendant's probation
12 officer and advised him that defendant had been consuming alcohol. The probation
13 officer told Jackson to release defendant and have him report to the probation officer in
14 the morning. Jackson continued to smell alcohol on defendant's breath once defendant
15 was out of and away from the vehicle. Jackson patted down defendant's waistband to
16 check for weapons and did not discover any. The canine officer, Officer Fraker, arrived
17 at the scene shortly before the weapons frisk and observed the frisk. Fraker then
18 deployed his drug dog. The dog alerted on the vehicle, indicating that there were drugs
19 present, at the front passenger side of the vehicle. At that time, the officers asked the
20 other occupants of the vehicle to step outside so that the vehicle could be searched.

21 A search of the vehicle revealed two partially consumed bottles of alcohol,

1 but no drugs. One bottle was found under the driver's seat, with the cap end protruding
2 several inches from under the seat at the place where defendant had been sitting. The
3 other bottle was found inside a purse on the backseat of the vehicle behind the front
4 passenger seat. After the bottles of alcohol were found, Jackson returned to his vehicle
5 where defendant had been waiting and advised defendant of his *Miranda* rights.

6 Fraker requested permission to search defendant because, based on his
7 training and experience, he believed that, during Jackson's earlier frisk, defendant may
8 have been concealing a weapon. Defendant consented and emphasized that Fraker could
9 check his pockets. For safety reasons, Fraker asked defendant to separate his legs for the
10 pat down, and defendant separated his legs about three inches. Fraker noticed that
11 defendant was shaking uncontrollably. Fraker asked defendant again to separate his legs,
12 and defendant moved his legs an inch or two further apart. Fraker asked defendant a
13 third time to separate his legs, and defendant pointed his toes outward without actually
14 moving his legs. According to Fraker, at this point in the weapons frisk, he demanded
15 that defendant separate his legs "[b]ecause now I have got extreme fear of a weapon and I
16 can't even--I am in a position where I can't even let go of him because I have got a
17 situation where I know I have got an immediate threat." Because defendant's evasive
18 actions led Fraker to believe that he was concealing an item that posed a risk to officer
19 safety, Fraker testified that at that point he needed to complete the pat down with or
20 without defendant's permission.

21 Defendant complied with Fraker's demand and spread his feet wide apart.

1 At that time, a scale fell out of his left pant leg. The scale landed on the ground and
2 bounced away from defendant. Fraker was concerned that defendant may have had an
3 item that posed a threat to officer safety. He asked defendant whether there were drugs in
4 his right sock and shoe area. Fraker asked three times, and defendant did not respond.
5 Eventually, defendant indicated that there were baggies in his right shoe, but that they did
6 not belong to him. Defendant later stated that the baggies were his.

7 Fraker continued to pat defendant down and felt a methamphetamine pipe
8 in defendant's sock. Fraker then permitted defendant to remove the items, which
9 included the pipe and three baggies, from his shoe and sock. The baggies contained a
10 white substance that Fraker believed to be methamphetamine.

11 On appeal, defendant asserts that the evidence (methamphetamine) obtained
12 when defendant was removed from the vehicle and searched should have been suppressed
13 under Article I, section 9, of the Oregon Constitution. According to defendant, he was
14 seized when Jackson requested his identifying information and ran a warrants check, and,
15 at that time, Jackson did not have reasonable suspicion that defendant had engaged in
16 criminal activity. Alternatively, defendant argues that, if Jackson did have reasonable
17 suspicion that he was a minor in possession of alcohol or an adult furnishing alcohol to a
18 minor, that suspicion dissipated once defendant and the other passengers in the vehicle all
19 provided Jackson with dates of birth that indicated that they were over the age of 21.

20 ORS 810.410 governs the authority of a police officer to stop a vehicle for
21 a traffic violation, and that statute describes both what police officers can and cannot do

1 during a traffic stop. *See, e.g., State v. Rodgers/Kirkeby*, 347 Or 610, 620, 227 P3d 695
2 (2010) ("[B]y implication, [ORS 810.410] proscribes any further action by the police
3 [beyond that specifically authorized] * * * unless [that further action] has some basis
4 other than the traffic infraction." (Internal quotation marks omitted; brackets in
5 *Rodgers/Kirkeby*)).

6 When the driver of a vehicle is stopped for a traffic infraction,
7 "[i]t is a truism that all passengers in a validly stopped car have been
8 'stopped,' at least physically. However, such a stop is not a 'seizure' of
9 those passengers for constitutional purposes. *See [State v. Holmes*, 311 Or
10 400, 410, 813 P2d 28 (1991)] (discussing circumstances in which police-
11 citizen encounters are not 'seizures'). It also is true that an officer may take
12 reasonable steps respecting the passengers, including, for example, asking
13 the passengers to exit the vehicle so the officer may search the vehicle,
14 assuming that the driver has consented to the search or that it otherwise is
15 justified. However, an officer's further exercise of coercive authority over
16 the passengers after they are out of the vehicle may, in certain
17 circumstances, constitute a seizure."

18 *State v. Amaya*, 336 Or 616, 630, 89 P3d 1163 (2004).

19 In *Rodgers/Kirkeby*, the Supreme Court commented that,

20 "[t]o put the matter another way, constitutionally, Article I, section
21 9, protects persons and effects from unreasonable searches and seizures by
22 requiring a judicially authorized warrant supported by probable cause
23 authorizing a search or seizure. There are, however, certain limited
24 exceptions to the warrant and probable cause requirements. One such
25 exception permits the police to stop and briefly detain motorists *for*
26 *investigation of noncriminal traffic violations*. Police conduct during a
27 noncriminal traffic stop does not further implicate Article I, section 9, so
28 long as the detention is limited and the police conduct is reasonably related
29 to the investigation of the noncriminal traffic violation. However, a police
30 search of an individual or a vehicle during the investigation of a
31 noncriminal traffic violation, without probable cause and either a warrant or
32 an exception to the warrant requirement, violates Article I, section 9.
33 Because police inquiries during a traffic stop are neither searches nor

1 seizures, police inquiries in and of themselves require no justification and
2 do not necessarily implicate Article I, section 9. However, police inquiries
3 unrelated to a traffic violation, when combined with physical restraint or a
4 police show of authority, may result in a restriction of personal freedom
5 that violates Article 1, section 9."

6 347 Or at 624 (emphasis in original).

7 Similarly, in *State v. Ashbaugh*, 349 Or 297, 308-09, 244 P3d 360 (2010),

8 the court observed that

9 "[t]he issue that the state raises--whether a putatively unreasonable
10 'seizure' was in fact 'mere conversation' with no constitutional implications
11 --is a familiar one to this court. We long have recognized that, out of the
12 broad range of potential encounters between police and citizens, only some
13 implicate the prohibition in Article I, section 9, against unreasonable
14 'seizures.' We have divided police-citizen encounters, very roughly, into
15 three categories: (1) 'mere conversation,' that is, noncoercive encounters
16 that are not 'seizures' and, thus, require no justification under Article I,
17 section 9; (2) 'stops,' a type of seizure that involves a temporary restraint on
18 a person's liberty and that violates Article I, section 9, unless justified by,
19 for example, necessities of a safety emergency or by reasonable suspicion
20 that the person has been involved in criminal activity; and (3) 'arrests,'
21 which are restraints on an individual's liberty that are steps toward charging
22 individuals with a crime and which, under Article I, section 9, must be
23 justified by probable cause to believe that the arrested individual has, in
24 fact, committed a crime. The thing that distinguishes 'seizures'--that is,
25 'stops' and 'arrests'--from encounters that are 'mere conversation' is the
26 imposition, either by physical force or through some 'show of authority,' of
27 some restraint on the individual's liberty."

28 As noted, defendant contends that his freedom of movement was restricted
29 sufficiently to constitute a seizure when Jackson requested that defendant and the other
30 passengers provide their names and dates of birth.

31 According to Jackson, he began to investigate whether one or more of the
32 passengers was a minor in possession of alcohol or was an adult furnishing alcohol to a

1 minor after he had smelled the odor of alcohol emanating from the interior of the vehicle,
2 learned that the driver was 18 years old, believed that one of the passengers was
3 displaying symptoms of being under the influence of a stimulant, and observed defendant
4 and the front-seat passenger passing an item back and forth while trying to hide those
5 actions.

6 It is a close question whether defendant was seized at the point that Jackson
7 asked him and the other passengers for their identifying information. Defendant
8 reasonably knew that Jackson was not requesting defendant's identifying information in
9 connection with the license plate infraction, but for some other investigative purpose.
10 Nor did Jackson say or do anything to dispel a reasonable belief that defendant and the
11 other passengers could not leave the vehicle until Jackson had completed the
12 identification process. Those circumstances may be sufficient to demonstrate the
13 required nexus between verbal inquiries and a show of authority necessary to constitute a
14 seizure for purposes of Article I, section 9. *see State v. Hall*, 339 Or 7, 19, 115 P3d 908
15 (2005) ("[W]e find it difficult to posit that a reasonable person would think that he or she
16 was free to leave at a time when that person is the investigatory subject of a pending
17 warrant check."); *State v. Magana/Rivera*, 257 Or App 251, 263, ___ P3d ___ (2013)
18 (defendant was stopped when he was questioned in connection with a multiofficer
19 narcotics investigation; a reasonable person in defendant's position would have believed
20 that he was under criminal investigation and was not free to leave). However, for
21 purposes of this opinion, we need not resolve that issue. Instead, we assume that

1 defendant was seized and proceed to analyze whether Jackson had reasonable suspicion
2 to investigate the crime of furnishing alcohol to a minor and the violation of minor in
3 possession.

4 Reasonable suspicion is established when an officer forms an objectively
5 reasonable belief under the totality of the circumstances that a person may have
6 committed or may be about to commit a crime. ORS 131.605(6); ORS 131.615(1); *State*
7 *v. Mitchele*, 240 Or App 86, 91, 251 P3d 760 (2010). However, "[r]easonable suspicion
8 'does not require that the facts as observed by the officer conclusively indicate illegal
9 activity but, rather, only that those facts support the reasonable inference of illegal
10 activity by that person.'" *State v. Dampier*, 244 Or App 547, 551, 260 P3d 730 (2011)
11 (quoting *State v. Hiner*, 240 Or App 175, 181, 246 P3d 35 (2010)). To determine
12 whether Jackson had reasonable suspicion, we examine "the objective facts known to the
13 officer at the time of the stop." *State v. Frias*, 229 Or App 60, 64, 210 P3d 914 (2009)
14 (internal quotation marks omitted).

15 At the time that Jackson began investigating the violation of minor in
16 possession of alcohol and the crime of furnishing alcohol to a minor, he was aware of the
17 following facts that were unrelated to the traffic violation: (1) the vehicle was, at 9:50
18 p.m., in a remote location known to be frequented by people using drugs and alcohol and
19 marked "Day Use Only-No Camping"; (2) when he spoke with the driver about the
20 reason for the traffic stop, he could smell alcohol emanating from the vehicle's interior
21 and could not determine whether it came from the driver, one or more of the passengers,

1 or from the vehicle generally; (3) the front-seat passenger appeared to be under the
2 influence of a stimulant; (4) the driver was 18 years old; and (5) the other passengers all
3 appeared to be between the ages of 18 and 25.

4 No one of those facts or circumstances is sufficient to establish reasonable
5 suspicion. However, based on the totality of the circumstances, we conclude that Jackson
6 had reasonable suspicion to investigate the crime of furnishing alcohol to a minor and the
7 violation of minor in possession of alcohol at the time that he asked defendant and the
8 other passengers for their identifying information.

9 Defendant contends that, absent a reasonable suspicion that defendant was
10 lying to Jackson about his age, when defendant provided information to Jackson that
11 indicated that he was 23 years old, any reasonable suspicion relating to minor in
12 possession of alcohol and furnishing alcohol dissipated, and Jackson was required to end
13 his investigation without retaining and running defendant's identification. We disagree.
14 This court has previously observed that the existence of possible lawful explanations for
15 circumstances or behavior does not negate the development of reasonable suspicion of
16 criminal activity. Jackson was entitled to confirm the validity of defendant's age and
17 identification by running the records check. *See Dampier*, 244 Or App at 553 (rejecting
18 the argument that any reasonable suspicion of delivery of marijuana had dissipated
19 because bicyclist denied purchasing marijuana from defendant and defendant offered an
20 explanation for his presence in front of motel).

21 Once the warrants check revealed that defendant was on felony probation

1 that included a no-alcohol clause, and when Jackson continued to smell alcohol on
2 defendant's breath after defendant was out of the vehicle, Jackson had probable cause to
3 detain defendant for violating a term of his probation.⁵ *See Hiner*, 240 Or App at 180
4 (under ORS 137.545(2), an officer may stop a probationer when the officer has
5 reasonable suspicion that the probationer has violated the terms of probation). It was at
6 that point that defendant voluntarily consented to a search of his person. It was that
7 search that uncovered the methamphetamine that defendant possessed.

8 Affirmed.

⁵ ORS 137.545(2) provides, in part, that "[a]ny parole and probation officer, police officer or other officer with power of arrest may arrest a probationer without a warrant for violating any condition of probation * * *."