

FILED: June 18, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RICKEY DALE CHARLES,
Defendant-Appellant.

Jackson County Circuit Court
101545MI

A149306

Timothy Barnack, Judge.

Submitted on June 18, 2013.

Peter Gartlan, Chief Defender, and Erik Blumenthal, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Tiffany Keast, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

SERCOMBE, J.

Reversed and remanded.

Hadlock, J., dissenting.

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 discovered as a result of what he contends was an unlawful
5 seizure under Article I, section 9, of the Oregon Constitution and the Fourth Amendment
6 to the United States Constitution. In particular, defendant argues that he was unlawfully
7 stopped when an officer knocked on the door of his residence, asked him to come outside
8 and talk, accompanied him to a place outside to conduct field sobriety tests, read him his
9 *Miranda* rights, and then asked for his consent to a patdown search. The state responds
10 that, under the totality of the circumstances, a reasonable person would have understood
11 that he or she was free to leave and, therefore, defendant was not stopped under either the
12 state or federal constitution. We agree with defendant that the circumstances in this case
13 amounted to a stop under Article I, section 9. Accordingly, we reverse and remand.

14 We review a trial court's ruling on a motion to suppress for legal error and
15 are bound by the court's findings of historical fact if there is evidence to support them.
16 *State v. Hall*, 339 Or 7, 10, 115 P3d 908 (2005). To the extent that the court did not
17 make express findings on disputed factual issues, we state the facts consistently with the
18 court's ultimate conclusion. *Id.* We state the facts of this case in light of those standards.

19 Just before 8:00 p.m. on April 10, 2010, Groom, a deputy with the Jackson
20 County Sheriff's Department, received a call about a vehicle stuck in a ditch in front of a
21 residence on Butte Falls Highway. Approximately 15 minutes later, Groom pulled into

1 defendant's driveway in a marked patrol car and saw a pickup truck with its front end
2 stuck in a large ditch on the side of the road, near the driveway. The truck was registered
3 to defendant.

4 It appeared to Groom that the driver of the truck had taken too wide a turn
5 when attempting to enter the driveway. Groom believed that the circumstances indicated
6 that the person who had been driving the truck may have been impaired and, with that in
7 mind, he "went to look for an impaired driver at the residence." Groom, who was in
8 uniform, knocked on the door of the residence, and it was answered by defendant's wife.
9 She told Groom that she had been driving the truck and had gotten stuck in the ditch
10 when she swerved to avoid hitting a dog, but Groom did not believe that she was being
11 truthful. A second deputy, Avery, who had arrived at the residence near the same time as
12 Groom, was also present while Groom spoke with defendant's wife. Groom then asked
13 Avery to go across the street and speak to the witness who had called in the report about
14 the truck, and Avery did so.

15 While he was talking with defendant's wife, Groom saw defendant, who
16 appeared to be very intoxicated, "staggering around in the house." Defendant then sat
17 down on the couch in the view of Groom. Groom asked defendant, who is hard of
18 hearing, to come out and speak with him and, in response, defendant went out on the
19 porch or front landing of the residence. Immediately after defendant went outside, he
20 walked with Groom "into a flat area where [Groom intended] to have [defendant]
21 perform field sobriety tests." Groom then read defendant his *Miranda* rights because he

1 was conducting an investigation of a possible DUII or "some kind of crime." Defendant
2 acknowledged that he understood those rights. Groom then asked defendant for
3 permission to pat him down for weapons--Groom's "common practice" after giving
4 *Miranda* warnings--and defendant agreed. While conducting the patdown, Groom
5 located the keys to the truck in defendant's pocket. Thereafter, defendant made
6 incriminating statements and was subsequently arrested for DUII.

7 Before trial, defendant filed a motion to suppress, asserting that he had been
8 unlawfully seized before the patdown search and that evidence obtained as a result must
9 be suppressed under Article I, section 9, and the Fourth Amendment. After holding a
10 hearing, the court denied the motion to suppress.

11 On appeal, defendant contends that the trial court erred in denying his
12 motion to suppress, arguing that, under the state and federal constitutions, Groom's
13 actions in coming to his residence, asking him to come out and talk, reading him *Miranda*
14 warnings, and asking for consent to pat him down amounted to a stop. Further, he asserts
15 that the stop was not justified by reasonable suspicion. *See State v. Ehly*, 317 Or 66, 80,
16 854 P2d 421 (1993) ("[I]f a police officer is able to point to specific and articulable facts
17 that give rise to a reasonable inference that a person has committed a crime, the officer
18 has 'reasonable suspicion' and hence may stop the person for investigation."). The state,
19 for its part, does not contend that there was reasonable suspicion to support a stop or that,
20 if the encounter amounted to a stop, suppression of the evidence is not required. Rather,
21 the state argues only that, "[b]ecause asking defendant to come outside, reading him his

1 *Miranda* rights, and asking for consent to pat him down did not effect a stop, the trial
2 court correctly denied defendant's motion to suppress."

3 Thus, the question we must resolve in this case is whether the encounter
4 amounted to a stop. Under Article I, section 9, individuals are guaranteed the right to be
5 "secure in their persons * * * against unreasonable search, or seizure."¹ Because "[n]ot
6 all governmental intrusions trigger the protections guaranteed" by Article I, section 9,
7 "we must first decide whether the action is either a 'search' or a 'seizure' within the
8 meaning of that section." *State v. Juarez-Godinez*, 326 Or 1, 5, 942 P2d 772 (1997).

9 "Analytically, police-citizen encounters typically fall into one of three
10 categories that correlate the degree of intrusiveness on a citizen's liberty
11 with the degree of justification required for the intrusion. At one end of the
12 continuum are mere encounters for which no justification is required. At
13 the other end are arrests, which involve protracted custodial restraint and
14 require probable cause. In between are temporary detentions for
15 investigatory purposes, often termed "stops," which generally require
16 reasonable suspicion. Both stops and arrests are seizures for constitutional
17 purposes, while less restrictive encounters are not."

18 *State v. Backstrand*, 354 Or 392, 399, 313 P3d 1084 (2013) (quoting *State v. Fair*, 353 Or
19 588, 593-94, 302 P3d 417 (2013)). "The thing that distinguishes 'seizures' * * * from
20 encounters that are 'mere conversation' is the imposition, either by physical force or
21 through some 'show of authority,' of some restraint on an individual's liberty." *State v.*
22 *Ashbaugh*, 349 Or 297, 309, 244 P3d 360 (2010) (quoting *State v. Rodgers/Kirkeby*, 347
23 Or 610, 621-22, 227 P3d 695 (2010)). The test to determine whether a seizure has

¹ We begin by considering defendant's contentions under state law. See *State v. Juarez-Godinez*, 326 Or 1, 5, 942 P2d 772 (1997).

1 occurred under Article I, section 9, "is an objective one: Would a reasonable person
2 believe that a law enforcement officer intentionally and significantly restricted, interfered
3 with, or otherwise deprived the individual of his or her liberty or freedom of movement."
4 *Backstrand*, 354 Or at 399 (citing *Ashbaugh*, 349 Or at 316). The "inquiry is necessarily
5 fact-specific and requires an examination of the totality of the circumstances involved."
6 *Id.*

7 As the court in *Backstrand* observed, "the constitutional concern is with
8 police-imposed restraints on citizen liberty, not with limiting contacts between police and
9 citizens." *Id.* at 400. Therefore, police may "'approach persons on the street or in public
10 places, seek their cooperation or assistance, request or impart information, or question
11 them.'" *Id.* (quoting *State v. Holmes*, 311 Or 400, 410, 813 P2d 28 (1991)). A seizure
12 occurs only where the officer's conduct "would cause the citizen to reasonably believe
13 that the officer is intentionally restraining the citizen's liberty or freedom of movement in
14 a significant way--that is, in a way that exceeds the bounds of ordinary social encounters
15 between private citizens." *Id.*

16 Thus, the concept of a "show of authority," in this context, refers to "a
17 reasonable perception that an officer is exercising his or her official authority to restrain,"
18 *id.* at 401; that is, "[e]xplicitly or implicitly, an officer must convey to the person with
19 whom he is dealing, either by word, action, or both, that the person is not free to
20 terminate the encounter or otherwise go about his or her ordinary affairs," *id.* at 400-01.
21 A constitutionally significant "show of authority" can be inferred from "the content of the

1 questions [asked by a police officer], the manner of asking them, or other actions that
2 police take (along with the circumstances in which they take them)." *Id.* at 412. Under
3 those principles, for example, a "mere request for identification made by an officer in the
4 course of an otherwise lawful police-citizen encounter does not, in and of itself, result in
5 a seizure." *Id.* at 410; *cf. State v. Rodriguez-Perez*, 262 Or App 206, 212, ___ P3d ___
6 (2014) (where officers approached the defendant and his brother, told them that they
7 suspected that the men were violating the law, asked for identification, and returned to
8 their patrol car to verify the validity of the identification, "[u]nder the principles
9 articulated in *Backstrand*, [the] circumstances were sufficiently coercive to result in a
10 seizure").

11 In this case, were we to look at each piece of the encounter between
12 defendant and the officer independently, we would not necessarily conclude that any one
13 piece, standing alone, amounted to a stop. For example, an officer may, generally,
14 approach a citizen's front door and knock on it without effecting a seizure. *See State v.*
15 *Portrey*, 134 Or App 460, 464, 896 P2d 7 (1995) ("[A]bsent evidence of an intent to
16 exclude, an occupant impliedly consents to people walking to the front door and
17 knocking on it, because of social and legal norms of behavior."). Likewise, we could not
18 conclude that an officer's request that a person come out of a residence to talk to the
19 officer, on its own, constitutes a stop. *See State v. Shaw*, 230 Or App 257, 262-63, 215
20 P3d 105, *rev den*, 347 Or 365 (2009) (an officer's request that the defendant come over
21 and speak with him was not a stop); *cf. State v. Dahl*, 323 Or 199, 207-08, 915 P2d 979

1 (1996) (police order that the defendant come out of the house with his hands up was an
2 unlawful seizure under Article I, section 9, because it effectively "deprived [the]
3 defendant of any choice in the matter"). For the same reason, an officer's suggestion that
4 a person walk together with the officer may not evidence a stop. *See State v. Crandall*,
5 197 Or App 591, 595, 108 P3d 16 (2005), *rev'd on other grounds*, 340 Or 645, 136 P3d
6 30 (2006) (a person is stopped "if the individual is forced to alter his course of conduct or
7 is summoned away from a task"). Nor would an officer's request for consent to conduct a
8 patdown search alone amount to a stop. *See State v. Kinkade*, 247 Or App 595, 599-601,
9 270 P3d 371 (2012) (the defendant was not stopped when an officer walked up to him on
10 the street, asked if he could talk with him, and then inquired if he could pat him down).
11 However, the inquiry is not whether each of the officer's actions here, examined
12 separately, would convey to a reasonable person that the person was not "free to
13 terminate the encounter or otherwise go about his or her ordinary affairs." *Backstrand*,
14 354 Or at 401-02. Rather, the question is whether all of the officer's actions combine to
15 form a whole greater than the sum of its parts; that is, whether, based on the totality of the
16 circumstances, a reasonable person would believe that the officer had intentionally and
17 significantly deprived defendant of his freedom of movement.

18 We note that the state appears to be of the view that the officer's giving of
19 *Miranda* warnings should not be a consideration in whether defendant was stopped. It
20 cites the Oregon Supreme Court's decision in *State v. Ayles*, 348 Or 622, 237 P3d 805
21 (2010), as support for its contention that "giving *Miranda* warnings should not be taken

1 as effecting a restraint on a person's liberty." In *Ayles*, the court did not address the
2 question of whether the giving of *Miranda* warnings is a factor to be considered in
3 evaluating whether a person was stopped for purposes of Article I, section 9. Instead, in
4 that case, the court considered whether the giving of *Miranda* warnings attenuated a prior
5 illegality and, in that context, evaluated whether "the giving of *Miranda* warnings itself
6 has a coercive effect that negates the voluntariness of subsequent statements." *Id.* at 635.
7 The court observed that the "giving of the warnings, which is intended to assure
8 voluntariness, cannot be used * * * to prove a contrary theory." *Id.* at 635-36.

9 That, of course, is not the issue in this case. Rather, here, we must evaluate
10 the totality of the circumstances before the patdown to determine whether a reasonable
11 person, in those circumstances, would have believed that the officer had significantly
12 deprived him or her of his or her liberty or freedom of movement. In our view, the
13 officer's giving of *Miranda* warnings is a factor to be considered in determining whether
14 the officer's actions conveyed a restraint on defendant's liberty.

15 In *Miranda v. Arizona*, 384 US 436, 444, 86 S Ct 1602, 16 L Ed 2d 694
16 (1966), the Supreme Court held that the Fifth Amendment to the United States
17 Constitution required that particular warnings be given when "a person has been taken
18 into custody or otherwise deprived of his freedom in any significant way." The Oregon
19 Supreme Court requires the same warnings in those circumstances under Article I,
20 section 12, of the Oregon Constitution. *See State v. Shaff*, 343 Or 639, 645, 175 P3d 454
21 (2009) (*Miranda* warnings are required only where a person is in full custody or "in

1 circumstances that create a setting which judges would and officers should recognize to
2 be compelling" (internal quotation marks omitted)). Those warnings are that a person
3 "has a right to remain silent, that any statement he does make may be used as evidence
4 against him, and that he has the right to the presence of an attorney, either retained or
5 appointed." *Miranda*, 384 US at 444. Analogously, a person is not entitled to the
6 presence of an attorney during a police interview unless the person "is in custody, *i.e.*, not
7 free to leave" (under Article I, section 12) or "his or her freedom has been 'significantly
8 restrained'" (under the Fifth Amendment). *State v. Terry*, 333 Or 163, 172, 37 P3d 157
9 (2001). Thus, when an officer informs a person that he is entitled to the presence of an
10 attorney during the course of further conversation with the officer, it would generally be
11 reasonable to conclude that that entitlement is because the person "is in custody, *i.e.*, not
12 free to leave." *Id.* Indeed, the popular understanding of *Miranda* warnings is that they
13 are given when an individual is placed under arrest. *See Commonwealth v. Donaldson*,
14 786 A2d 279, 285 (2001) ("It is our belief that the average layperson would equate being
15 *Mirandized* with being placed in police custody.").

16 The reasoning of the Florida Supreme Court in *Caldwell v. State*, 41 So 3d
17 188, 201-02 (2010), is instructive. There, discussing the reading of *Miranda* warnings in
18 determining whether a defendant was stopped under the Fourth Amendment, the court
19 noted:

20 "*Miranda* warnings are a formality of arrest and are required *only* at the
21 time of an arrest or prior to custodial interrogation. Further, the warnings
22 are associated in the public mind with the spectacle of an individual being
23 placed under arrest. Therefore, it is not unreasonable to conclude that an

1 individual who is given *Miranda* warnings during what begins as a
2 consensual encounter may interpret those warnings as a restraint on his or
3 her freedom. For this reason, courts that have considered the application of
4 *Miranda* in the context of an on-the-street police encounter have generally
5 found it to be at least a factor in determining whether an individual has
6 been subjected to an illegal investigatory stop under the Fourth
7 Amendment. *See, e.g., [United States v.] Poitier*, 818 F2d [679, 683 (8th
8 Cir 1987)]; *United States v. Lara*, 638 F2d 892, 898 n 10 (5th Cir 1981)
9 ('Giving *Miranda* warnings in a police-citizen encounter which is otherwise
10 a nondetention interrogation may very well elevate such an encounter to a
11 seizure * * * in light of the public's association of *Miranda* warnings with
12 an arrest. '); *see also United States v. Montgomery*, 377 F2d 582, 587 (6th
13 Cir 2004) (noting that the district court listed the reading of *Miranda* rights
14 as one factor indicating that a reasonable person in the defendant's position
15 would not have felt free to leave).

16 "This conclusion on the part of a reasonable person would be further
17 supported by the fact that outside the context of an arrest or custodial
18 interrogation, not all of the stated rights apply. In particular, *Miranda*
19 requires that suspects be advised that they have the right to an attorney and
20 that if they cannot afford an attorney one will be provided for them. * * *
21 While this advisory warning is true during a custodial interrogation, it is not
22 true during a consensual encounter or investigatory stop."

23 (Footnote omitted; emphasis in original.) We have implied much of the same in *State v.*
24 *Cordray*, 91 Or App 436, 442, 755 P2d 735 (1988) ("We conclude that a stop did not
25 occur until the officers approached defendant and began reciting his rights to him.").

26 In this case, we are not called upon to determine whether the giving of
27 *Miranda* warnings in the course of a police interview, by itself, constitutes a sufficient
28 "show of authority" to create a constitutional seizure. *See Caldwell*, 41 So 3d at 203
29 (concluding that there was no stop when officers gave the defendant *Miranda* warnings
30 and informed him that he was not under arrest but that the officer merely wanted to make
31 sure that the defendant was aware of his rights). Rather, it is the totality of the
32 circumstances here that would have conveyed to a reasonable person that he or she was

1 not free to end the encounter and depart. The officer, accompanied initially by a second
2 officer, approached defendant's residence in the evening and spoke with defendant's wife
3 to ask about criminal conduct. At least part of that conversation was in defendant's
4 presence. Although defendant's wife gave an explanation for the location of the truck,
5 the officer did not accept that explanation and asked defendant, who was seated inside the
6 house, to come outside and talk. At that point, a reasonable person in defendant's shoes
7 would have concluded that he or she was the subject of a criminal investigation. Once
8 defendant was outside on the porch, the officer then walked defendant to a flat area so
9 that he could conduct field sobriety tests. By then, defendant's course of conduct had
10 been altered twice by the police actions in beckoning him to the porch and then leading
11 him into a flat area for field sobriety tests.

12 The officer also read defendant his *Miranda* warnings and asked for
13 consent to conduct a patdown search. Given that *Miranda* warnings are required only in
14 circumstances where a person is *not* free to leave (where a person is arrested or in
15 compelling circumstances), a person given those warnings in circumstances like those
16 here would interpret them as communicating some restraint on his or her freedom.
17 Finally, in context, the request for a patdown search implied that a search was
18 constitutionally appropriate, that it was necessary either because defendant would remain
19 in the officer's presence for some time and therefore present a risk to the officer's safety
20 or because defendant was being searched incident to being taken into custody. Either
21 implication contributes to the reasonable conclusion in this context that defendant was

1 detained. *Compare Ashbaugh*, 349 Or at 317-18 ("Although it is possible to restrict a
2 person's liberty and freedom of movement by purely verbal means," a request to search
3 purse did not amount to a seizure under Article I, section 9, because the preceding
4 conversation between the police officer and the defendant was "relaxed and
5 nonconfrontational" and the "content" of the questions could not be perceived as a "show
6 of authority").

7 In short, under all of the circumstances presented here, we conclude that the
8 officer's actions constituted a show of authority such that a reasonable person would have
9 believed that the officer had intentionally and significantly restricted, interfered with, or
10 otherwise deprived the individual of his or her liberty or freedom of movement.
11 Accordingly, the encounter in the case was a stop, and the trial court erred in denying the
12 motion to suppress.

13 Reversed and remanded.

1 HADLOCK, J., dissenting

2 This case began when a deputy sheriff responded to a report about a vehicle
3 that was stuck in a ditch in front of a house. After going to the house and speaking to
4 defendant's wife, who gave an explanation for the stuck vehicle that the deputy
5 disbelieved, the deputy noticed defendant "staggering around in the house," apparently
6 intoxicated. After defendant sat down on a couch inside the house, the deputy asked
7 defendant "if [the deputy could] speak with him," and defendant went outside.¹ The
8 deputy testified that he and defendant walked "out into [a] flat area" where the deputy
9 intended to have defendant perform field sobriety tests, but the record does not reflect
10 what questions, statements, or actions by the deputy may have prompted defendant to
11 walk with him to that area. As the pair walked, the deputy testified, he "read [defendant]
12 his *Miranda* rights."² After defendant acknowledged that he understood those rights, the

¹ The deputy first testified that he "ask[ed]" defendant if he could speak with him, and responded affirmatively when questioned whether he had "ask[ed] the defendant out of the house." In addition, the deputy specifically denied having ordered defendant to leave the house. However, when the deputy was cross-examined about the sequence of events, he responded, "Yeah," when asked whether he had told defendant to come out of the house. But the deputy subsequently clarified that he had *not* ordered defendant to come to the door, and reiterated that he had only asked defendant to do so. The trial court found that the deputy "asked [defendant] to step outside."

² The deputy did not explain exactly what he said when he read defendant his "*Miranda* rights." Accordingly, I, like the majority, presume that the deputy read defendant the standard advice of rights under *Miranda*, including the right to counsel. See *State v. Acremant*, 338 Or 302, 318 n 13, 108 P3d 1139 (2005) (describing *Miranda* warnings).

1 deputy asked, as was his common practice, whether he could pat down defendant for
2 weapons. During the resulting consensual patdown search, the deputy found the keys to
3 the vehicle that was in the ditch.

4 The majority concludes, based on the totality of the circumstances, that
5 defendant had been "stopped" by the time that the deputy patted him down and that (in
6 the absence of any claim by the state that the stop was justified by reasonable suspicion
7 of criminal activity or a safety threat) the trial court should have suppressed evidence that
8 the deputy discovered as a result of that stop. The majority focuses on two aspects of the
9 encounter: the giving of *Miranda* warnings and what it characterizes as two alterations in
10 "defendant's course of conduct * * * by the police actions in beckoning him to the porch
11 and then leading him into a flat area for field sobriety tests." ___ Or App at ___ (slip op
12 at 11). With respect, I dissent.

13 As the Supreme Court recently explained in *State v. Backstrand*, 354 Or
14 392, 402 n 11, 313 P3d 1084 (2013), in determining whether an encounter between a
15 police officer and another person amounted to a "stop" of that person, a court's analysis
16 should focus on "the officer's words and actions and what *they* would convey to a
17 reasonable person." (Emphasis in original.). Thus, the question this case presents is
18 whether a reasonable person would believe that the deputy had "intentionally and
19 significantly restricted, interfered with, or otherwise deprived [defendant] of his or her
20 liberty or freedom of movement," when the deputy asked defendant if he could speak
21 with him, walked with defendant to the "flat area," read him *Miranda* warnings, and

1 requested consent to pat him down. *Id.* at 399; *see also id.* at 402 ("Again, what is
2 required is a show of authority by which, through words or action, the officer's conduct
3 reasonably conveys that the officer is exercising his or her authority to significantly
4 restrain the citizen's liberty or freedom of movement."). I would hold that the deputy's
5 questions and actions did not have that effect.

6 First, the deputy's requests of defendant--that he come outside to speak with
7 the deputy and that he allow the deputy to perform a patdown search (as well, perhaps, as
8 an implicit request that defendant walk with the deputy to the "flat area")--would not,
9 standing alone, constitute a stop. In that regard, it is worth emphasizing that the deputy
10 did not, at any point in the encounter, order defendant to move in a particular direction or
11 otherwise change his physical location. The deputy repeatedly denied having ordered
12 defendant out of his house, and the trial court found that the deputy merely asked
13 defendant to come outside. Moreover, nothing in the record suggests that the deputy
14 *directed* defendant to follow him to the "flat area" where he intended to administer field
15 sobriety tests. Accordingly, I do not find the same significance that the majority does in
16 defendant's movement from inside the house to the flat area outside.

17 Because the deputy's requests were just that--requests--they did not, alone,
18 constitute a stop. "Rather, something more than just asking a question, requesting
19 information, or seeking an individual's cooperation is required" before an officer can be
20 said to have made "a 'threatening or coercive' show of authority requiring compliance
21 with the officer's request." *Id.* at 403 (quoting *State v. Ashbaugh*, 349 Or 297, 317, 244

1 P3d 360 (2010)). Here, the majority finds that "something more" in the deputy's reading
2 of *Miranda* warnings, which the majority describes as communicating that defendant had
3 been arrested or otherwise was in compelling circumstances that had restrained his
4 freedom. ___ Or App at ___ (slip op at 11). I agree that the *Miranda* warnings--at least,
5 the recitation that defendant had a right to legal counsel--could reasonably suggest that
6 defendant was the subject of a criminal investigation, perhaps even that the deputy
7 believed that he had *reason* to detain defendant. However, that does not resolve the
8 question of whether defendant was stopped. Rather, the question remains whether a
9 reasonable person would conclude that the officer's words or actions *in fact* amounted to
10 a significant restraint on defendant's liberty.

11 The majority's conclusion that the circumstances described above amounted
12 to a stop is implicitly based on the notion that a law enforcement officer seizes a person if
13 the officer's words or actions convey to the person that he or she is the subject of a
14 criminal investigation. That conclusion is consistent with much of our pre-*Backstrand*
15 case law. *See, e.g., State v. Dierks*, 257 Or App 88, 95, 306 P3d 653 (2013), *decision*
16 *vac'd by order*, 354 Or 837 (2014) (concluding that the defendant had been stopped
17 because "a reasonable person in defendant's circumstances * * * would have believed that
18 * * * she was being subjected to a criminal investigation and was, therefore, not free to
19 leave"). In my view, however, it conflicts with *Backstrand* and other recent Supreme
20 Court decisions. In *Backstrand* itself, Justice Walters wrote a concurring opinion in
21 which she explained her view that a police officer's interaction with the defendant

1 amounted to a stop "because the officer's communication and conduct would cause a
2 reasonable person in [the] defendant's position to believe that he was the subject of a
3 criminal investigation and therefore that he must stop, respond, and remain until the
4 immediate investigation was complete." 354 Or at 418 (Walters, J., concurring in the
5 judgment).³ The majority, however, "decline[d] to debate whether a person in [the]
6 defendant's position would have believed he was the subject of a 'criminal investigation'"
7 because, it held, "the fact that an officer asks a citizen for cooperation *in the course of*
8 *conducting a criminal investigation* is not a talisman in the [stop] analysis, as it is for
9 Justice Walters." 354 Or at 396 n 4 (emphasis added). Thus, under *Backstrand*, a person
10 may reasonably believe, based on an officer's words or conduct, that he or she is the
11 subject of a criminal investigation, yet not have been *stopped* by the officer's actions.

12 The Supreme Court emphasized that point in other cases that it decided on
13 the same day as *Backstrand*. In *State v. Anderson*, 354 Or 440, 313 P3d 1113 (2013), the
14 court addressed the constitutionality of an interaction between police officers and two
15 individuals who arrived at an apartment complex where the officers were executing a
16 search warrant. The individuals, including the defendant, approached the apartment that
17 was the focus of the warrant, but they briskly returned to their car after they saw officers
18 searching the living room. *Id.* at 443. Three of the officers followed the individuals back

³ Despite her disagreement with the *Backstrand* court's determination that no stop had occurred, Justice Walters concurred in the Supreme Court's ultimate decision that the officer had not *unlawfully* stopped the defendant because, she concluded, the stop "was constitutionally justified." 354 Or at 419 (Walters, J., concurring in the judgment).

1 to their car, explained that they were executing a search warrant, and said they were
2 contacting the defendant and his companion to find out who they were, "what interest
3 they might have had" with what the officers were doing at the apartment, or whether they
4 knew the person who lived there. *Id.* The officers also asked the defendant and his
5 companion for identification. The defendant denied that he had identification with him
6 and gave a name that one of the officers knew was incorrect. That officer said to the
7 defendant "you're not him, I recognize you," and asked the defendant to step out of the
8 car. *Id.* at 444. The officer again asked the defendant whether he had identification, the
9 defendant produced identification, and the officer "ran a warrant check on defendant" and
10 discovered that he was wanted on an outstanding arrest warrant. *Id.* The defendant
11 unsuccessfully moved to suppress evidence that the officers subsequently discovered. *Id.*
12 at 445-46.

13 On review, the Supreme Court addressed whether the officers seized the
14 defendant before they asked him to get out of the car. The court held that no seizure
15 occurred before that point, even though the officers' explanation of what they were doing
16 at the apartment complex "objectively conveyed possible suspicion that [the defendant
17 and his companion] could be involved in criminal activity related to the apartment" and
18 "equally conveyed that the officers were interested in whatever information the two
19 might be able to provide." *Id.* at 453. "In all events," the court explained, "by those brief
20 verbal exchanges and inquiries alone, the officers did not communicate an exercise of
21 authority of the kind required for a seizure--*i.e.*, authority to restrain." *Id.* The court

1 found significant that the uniformed officers "took no physical action other than to
2 approach the parked car" and "requested no physical action from defendant and the driver
3 at that point." *Id.* at 453-54. Even though there was one more officer present than there
4 were people in the car, the circumstances "would not cause a reasonable person seated in
5 the car to believe that the officers were significantly restricting his or her liberty." *Id.* at
6 454. The court went on to conclude that the defendant *was* seized later in the encounter,
7 after an officer "expressed disbelief in defendant's identification of himself" and made
8 "requests" that the defendant and his companion exit their car in a way that, under the
9 circumstances, a reasonable person would have understood as "directives" that
10 significantly restrained the defendant's liberty. *Id.* That later seizure, however, was
11 justified, because once the defendant gave a false name to the officers, they had
12 reasonable suspicion to detain him. *Id.* at 455.

13 Dissenting justices disagreed with the *Anderson* majority's analysis of when
14 a seizure of the defendant occurred, focusing on whether the defendant would have
15 believed that he was the subject of a criminal investigation:

16 "When considered in combination, the facts that the officers were in the
17 process of conducting a drug investigation, that the officers indicated that
18 they considered defendant a potential suspect in that investigation, and that
19 the officers asserted physical authority over defendant by surrounding the
20 car in which he was seated, add up to a show of authority that would have
21 conveyed to a reasonable person that he was the subject of a criminal
22 investigation and therefore was not free to leave or go about his ordinary
23 business until the immediate investigation was completed."

24 *Id.* at 457 (Walters, J., dissenting). Again, the majority of the court rejected that focus on
25 whether the defendant would have believed the officers were investigating him for

1 possible criminal activity, focusing instead on whether a reasonable person would
2 understand that the officers had engaged "in a 'show of authority' that, explicitly or
3 implicitly, reasonably conveys to the person a significant restriction on the person's
4 freedom to terminate the encounter or otherwise go about his or her ordinary affairs." *Id.*
5 at 450.

6 Similarly, in *State v. Highley*, 354 Or 459, 313 P3d 1068 (2013), the
7 Supreme Court held that a patrol officer did not stop the defendant when the officer--who
8 previously had been interacting with defendant's companion--spoke with the defendant
9 (who was, along with his companions, "milling around" in the parking lot of an apartment
10 complex), asked the defendant whether he was "still on probation," requested the
11 defendant's identification, used the information that he obtained from the defendant's
12 license to check defendant's probationary status (as the defendant had asserted, he was no
13 longer on probation), asked the defendant for consent to search, and then--after the
14 defendant said that he would empty his pockets for the officer and, in doing so, attempted
15 to hide items in his hand--repeatedly asked the defendant about the items he was
16 removing from his pockets and what he was doing with his hands. *Id.* at 462-64.⁴ None
17 of those events resulted in a seizure, because the officer's actions did not "convey a

⁴ Toward the end of that "game of 'cat and mouse,'" another officer saw a small baggie in the defendant's fist, and subsequent events led to the discovery of baggies that contained methamphetamine. *Id.* at 465, 470. The defendant did not dispute the trial court's conclusion that the officer who spotted the baggie then had sufficient cause to force the defendant's hand open to reveal the drugs that the officer believed he possessed. *Id.* at 473.

1 restraint on [the] defendant's liberty," but instead, the officer made "verbal inquiries only"
2 that "were not seizures." *Id.* at 470-71.

3 As in *Anderson* and *Backstrand*, a *separate* opinion in *Highley* focused on
4 whether a police officer's inquiries would lead "a reasonable person [to] believe that he or
5 she is being subjected to a criminal investigation and therefore must stop, respond, and
6 remain until the immediate investigation is complete." *Id.* at 486 (Walters, J., dissenting).
7 In such circumstances, the *Highley* dissent would have held, "the officer effects a seizure
8 under Article I, section 9, of the Oregon Constitution." *Id.* (Walters, J., dissenting). But
9 that was the dissenting view.

10 Considering the majority, dissenting, and concurring opinions in
11 *Backstrand*, *Anderson*, and *Highley*, I derive the general principle that a police officer
12 does not stop a person merely by making inquiries or by seeking information from the
13 person in a way that reasonably could suggest that the person is the subject of a criminal
14 investigation. Rather, the officer must say or do "something more" that "would
15 reasonably be construed as a 'threatening or coercive' show of authority requiring
16 compliance with the officer's request." *Backstrand*, 354 Or at 403.

17 Applying that principle here, I would hold that, although standard *Miranda*
18 warnings may have suggested to defendant that he was the subject of a criminal
19 investigation, that suggestion did not (either alone or in combination with the interactions
20 between the deputy sheriff and defendant that preceded it) constitute a stop. The
21 remaining question is whether, in some other respect, the *Miranda* warnings constituted

1 the kind of "something more" that can transform an encounter into a stop. I would hold
2 that they did not. The "something more" must be a police officer's words or actions that
3 communicate that a person is required to comply with whatever subsequent requests the
4 officer may make. *Backstrand*, 354 Or at 403; *see Anderson*, 354 Or at 454 (The
5 defendant was stopped when, in the totality of the circumstances, the defendant would
6 have understood "officers' 'requests' to exit the car to be directives and would believe that
7 his or her liberty was significantly restrained."). Here, the *Miranda* warnings would not
8 have had that effect. By their very nature, the warnings explicitly communicate that a
9 person is *not* required to speak with the police officer, thus at least implicitly
10 communicating that the person is not required to comply with, for example, any
11 subsequent request for consent to search. *See State v. Ayles*, 348 Or 622, 635-36, 237
12 P3d 805 (2010) ("The giving of [*Miranda*] warnings * * * is intended to assure
13 voluntariness" and, therefore, "cannot be used * * * to prove a contrary theory"; rejecting
14 the Court of Appeals' suggestion that the warnings could perpetuate a "person's
15 perception that his or her liberty continued to be restrained as the officer pursued a
16 criminal investigation by seeking consent to a search"). Because the deputy's recitation
17 of the *Miranda* warnings did not communicate that defendant was required to comply
18 with the deputy's subsequent requests, that recitation did not effect a seizure under Article
19 I, section 9, either considered standing alone or in combination with the events that
20 preceded it.

21 For similar reasons, I would conclude that defendant was not seized for

1 purposes of the analysis under the Fourth Amendment to the United States Constitution.
2 "A person is seized by the police and thus entitled to challenge the government's action
3 under the Fourth Amendment when the officer, by means of physical force or show of
4 authority, terminates or restrains his freedom of movement." *Brendlin v. California*, 551
5 US 249, 254, 127 S Ct 2400, 168 L Ed 2d 132 (2007) (citations and internal quotation
6 marks omitted). As under Article I, section 9, a "feel-free-to-leave formulation does 'not
7 state the entire [federal] test for a "seizure" of a person by a non-forcible "show of
8 authority.'"" *Backstrand*, 354 Or at 402 n 11 (quoting *State v. Holmes*, 311 Or 400, 413,
9 813 P2d 28 (1991)). Rather, "the requirement that a reasonable person would not have
10 felt free to leave is a '*necessary*' condition for a 'seizure' of a person but not a '*sufficient*'
11 one where no force is used." *Holmes*, 311 Or at 413 (quoting *California v. Hodari D.*,
12 499 US 621, 628, 111 S Ct 1547, 113 L Ed 2d 690 (1991) (emphasis in *Hodari D.*). The
13 Oregon Supreme Court recently has explained that, "[u]nder that more complete
14 articulation of the federal test [found in *Hodari D.*], the analysis of what constitutes a
15 seizure under Article I, section 9, and under the Fourth Amendment is not meaningfully
16 different." *Backstrand*, 354 Or at 402 n 11. Accordingly, having determined that
17 defendant was not seized for purposes of Article I, section 9, I also would hold that he
18 was not seized for purposes of the Fourth Amendment.

19 In short, defendant had not been stopped at the time he consented to the
20 patdown search, and the trial court therefore correctly denied defendant's motion to
21 suppress evidence discovered as a result of that search. I respectfully dissent.