

FILED: September 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOSEPH TAYLOR RUSSELL,
Defendant-Appellant.

Curry County Circuit Court
11CR0006

A149887

Cynthia Lynnae Beaman, Judge.

Argued and submitted on November 26, 2013.

Erica Herb, Deputy Public Defender, argued the cause for appellant. With her on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

David B. Thompson, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

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

SERCOMBE, J.

Affirmed.

1 SERCOMBE, J.

2 Defendant appeals a judgment of conviction for felon in possession of a
3 firearm. ORS 166.270. He assigns error to the trial court's denial of his motion to
4 suppress evidence obtained after the car he was riding in was stopped by a police officer.
5 Defendant contends that that evidence should be suppressed, raising two arguments. He
6 first argues that the evidence was obtained after an unlawful extension of a traffic stop.
7 We reject that argument without further discussion. Defendant also challenges the trial
8 court's conclusion that the patdown search that yielded the evidence was justified by the
9 officer-safety exception to the warrant requirement. He argues that several facts
10 underlying the trial court's conclusion are not supported by the record. Considering only
11 those facts that--in his view--are supported by the record, defendant contends that officer-
12 safety concerns were not objectively reasonable. We disagree that the disputed facts are
13 not supported by the record, and, for the reasons explained below, we affirm.

14 We are bound by the trial court's findings of fact if there is constitutionally
15 sufficient evidence in the record to support them. *State v. Ehly*, 317 Or 66, 75, 854 P2d
16 421 (1993). If the trial court did not make express findings of fact on a pertinent issue
17 and there is evidence from which those facts could be decided more than one way, we
18 presume that the court found the facts in a manner consistent with its ultimate conclusion.
19 *Id.* We state the facts in light of those standards. In this case, the parties' dispute hinges
20 on whether, before starting the patdown, a police officer had asked defendant if he had a
21 weapon and received a response indicating that defendant had "something." We discuss

1 in detail below the evidence related to those facts.

2 While on patrol with his canine, Charger, police officer Watson observed a
3 gold Honda with several license plate traffic infractions. He recognized the vehicle
4 because he knew that another police officer had arrested a then-occupant of the vehicle
5 for possession of methamphetamine two weeks earlier. Both Watson's patrol car and the
6 vehicle were traveling in the same direction in two separate lanes in a 25 mile-per-hour
7 zone. The vehicle passed Watson but then fell behind him, ultimately slowing to a
8 "crawling" speed of between 17 and 19 miles per hour. After the vehicle turned into a
9 gas station, Watson turned on his patrol car's emergency lights and initiated a traffic stop.

10 Watson's patrol car is equipped with a video recording device. Except as
11 noted, the events described below were recorded. The video recording was admitted into
12 evidence and played during the hearing on defendant's motion to suppress; it is also part
13 of the record on appeal.

14 The area of the gas station where this encounter took place was well
15 lighted. Watson approached the vehicle and saw three people: the driver and two
16 passengers. Watson recognized the driver, Jones, whom he had encountered previously
17 in the context of Watson's work as a police officer. Watson also knew that Jones was the
18 person who had been in the vehicle and then arrested for possession of methamphetamine
19 by another officer two weeks earlier.

20 Watson approached the driver's side of the vehicle and began talking to
21 Jones. Watson discussed with Jones the possibility that traveling at such a low speed

1 could impede traffic. Watson also pointed out the license plate violations. Watson
2 obtained Jones's license and vehicle information, and asked Jones who his passengers
3 were. Defendant was in the front seat on the passenger side. Watson recognized
4 defendant from "several * * * law-enforcement related" contacts, one, several years
5 earlier, involving theft of a van that had been burned and another involving menacing or
6 "some sort of a dispute." The second passenger, Hellrig, was in the backseat on the
7 driver's side. Watson also recognized Hellrig. Hellrig had been present when Watson
8 arrested Hellrig's wife or fiancée for possession of methamphetamine. Watson did not
9 ask for defendant's or Hellrig's identification. Watson returned to his patrol car and
10 requested dispatch to run a records check on defendant and Hellrig.

11 While Watson was at his patrol car, a second officer, Murray, arrived.
12 Murray eventually performed the patdown search of defendant. As had Watson, Murray
13 recognized defendant. Murray had originally met defendant when he "first was released
14 from prison" and knew about the incident involving defendant and a vehicle that had
15 been burned. In addition, Murray described defendant as "intimidating, considering his
16 past [and] his size." Defendant is about 6'4" and weighs about 225 to 230 pounds.
17 Murray is 5'10" and weighs 175 pounds. According to Murray, "I'm concerned every
18 time I talk with [defendant]." Murray testified that the reason why he ultimately patted
19 down defendant was his general concern that defendant is bigger than he is. While they
20 were at his patrol car, Watson mentioned to Murray that defendant had been "in and out
21 of prison" and was on post-prison supervision.

1 As he was talking to dispatch and Murray, Watson prepared Charger to do
2 an exterior sniff of the vehicle and gave Jones's driver's license to Murray so that he
3 could "run" it. Watson then returned to the vehicle with Charger. Watson told the
4 occupants that he and Charger would be running the dog sniff and instructed them to
5 keep their hands where he could see them. There is no evidence that the occupants did
6 not comply with that instruction. When Charger sniffed the vehicle, he alerted to several
7 places on the vehicle as having a current or residual odor of controlled substances. One
8 of the places Charger alerted to was the front passenger side where defendant was sitting.

9 After returning Charger to his patrol car, Watson motioned toward
10 defendant and said to Murray, "He is not a nice guy." Because they had probable cause
11 to believe that there were illegal drugs in the vehicle based on Charger's alert, Watson
12 and Murray decided to have all the occupants get out of the vehicle so that they could
13 deploy Charger inside it.

14 By the time that Murray directed defendant to get out of the vehicle, four
15 officers and four police cars were present. Murray approached the vehicle and tried,
16 unsuccessfully, to open defendant's door; he then tapped on the window. Murray
17 instructed defendant to get out of the vehicle. In the vehicle, defendant was talking on a
18 cell phone and was smoking; he also was moving around in his seat, leaning his body to
19 the right and left. Murray again tried to open the door; about 10 seconds later, defendant
20 got out of the vehicle. About 45 seconds elapsed between when Murray first tried to
21 open the door and when defendant got out of the vehicle.

1 When defendant got out of the vehicle, he had a cell phone up to his ear in
2 his right hand and a lit cigarette in his left hand. Immediately after defendant got out of
3 the vehicle, Murray took hold of his left wrist. Defendant and Murray spoke--although
4 that exchange is not audible in the video recording--then Murray lifted defendant's left
5 hand in the air, turning him around; another officer took defendant's cigarette. Murray
6 then put both defendant's hands behind his head. By this time, Watson was standing
7 several feet behind and to the right of defendant, and the third officer was several feet
8 behind and to the left of defendant. Murray then began the patdown, while asking
9 defendant, "Do you have any weapons on you?" and defendant responded, "Yeah."
10 Continuing with the patdown, Murray asked defendant, "What do you have?" Defendant
11 mumbled a response that is not audible on the video recording. Murray then asked
12 defendant, "What is it?" and defendant said, "I don't know." Murray then quickly
13 lowered defendant's hands to his waist and, with Watson's assistance, handcuffed him.
14 Watson and the third officer proceeded to examine defendant's pants pockets.
15 Ultimately, Watson retrieved a gun from defendant's front pants pocket.

16 The state charged defendant with felon in possession of a firearm, and
17 defendant moved to suppress, arguing that evidence had been obtained in violation of his
18 rights under Article I, section 9, of the Oregon Constitution. As pertinent, defendant
19 contended that the patdown was a warrantless search not justified by reasonable officer-
20 safety concerns. Defendant argued that a patdown search for officer-safety reasons must
21 be justified by specific, articulable facts that support a reasonable suspicion of danger,

1 and there were no such facts in this case.

2 The state cited the following specific facts that, it argued, supported a
3 search based on officer-safety concerns: defendant's size, his criminal history, Watson's
4 and Murray's previous experiences with defendant, and the positive alert for drugs in the
5 vehicle, which Watson recognized because another officer had recently arrested its then-
6 occupant for possession of methamphetamine. The state also argued that, as a factual
7 matter, the patdown did not occur until after Murray had asked defendant whether he had
8 a weapon and defendant had indicated that he had something; accordingly, in the state's
9 view, those facts also supported reasonable officer-safety concerns.

10 The trial court held that the patdown was justified in light of the following
11 facts--"the fact that [defendant] is a large person, previous criminal contact, the [probable
12 cause] on the drug use, and [the fact that Murray] asked [defendant] if he had a weapon
13 [and defendant] said he had something"--and denied defendant's motion to suppress.

14 Defendant now appeals, challenging the denial of his motion to suppress,
15 reprising his argument that the patdown search that revealed the firearm was not
16 supported by reasonable officer-safety concerns. For its part, the state contends that the
17 trial court's conclusion that the search was justified is supported by the court's explicit
18 and implicit findings of fact.

19 Article I, section 9, provides:

20 "No law shall violate the right of the people to be secure in their
21 persons, houses, papers, and effects, against unreasonable search, or
22 seizure; and no warrant shall issue but upon probable cause, supported by

1 oath, or affirmation, and particularly describing the place to be searched,
2 and the person or thing to be seized."

3 Under Article I, section 9, a warrantless search or seizure is unreasonable unless it is
4 justified by a recognized exception to the warrant requirement. *State v. Juarez-Godinez*,
5 326 Or 1, 8-9, 942 P2d 772 (1997); *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991).

6 In some circumstances, a search for officer-safety reasons can provide a
7 constitutionally sufficient justification for a warrantless search. In *State v. Bates*, 304 Or
8 519, 524, 747 P2d 991 (1987), the Supreme Court explained that

9 "Article I, section 9, of the Oregon Constitution, does not forbid an officer
10 to take reasonable steps to protect himself or others if, during the course of
11 a lawful encounter with a citizen, the officer develops a reasonable
12 suspicion, based upon specific and articulable facts, that the citizen might
13 pose an immediate threat of serious physical injury to the officer or to
14 others then present."

15 Thus, under the officer-safety doctrine, the state bears the burden of proving that the
16 officer had a reasonable suspicion, based on specific and articulable facts, that the
17 defendant posed an immediate threat of serious physical injury. *State v. Hendricks*, 213
18 Or App 360, 364, 160 P3d 1014, *rev den*, 343 Or 467 (2007). Satisfying that burden
19 requires the state to establish not only that the officer subjectively believed that the
20 defendant posed an immediate, serious threat, but also that the officer's belief was
21 objectively reasonable. *Id.*

22 To support a conclusion that an officer reasonably believed that a defendant
23 posed an immediate threat of serious physical injury, "the officer's safety concerns must
24 be based on facts specific to the particular person searched, not on intuition or a

1 generalized fear that the person may pose a threat to the officer's safety." *State v.*
2 *Rodriguez-Perez*, 262 Or App 206, 213, 325 P3d 39 (2014) (internal quotation marks
3 omitted). As noted, the trial court relied on several facts particular to defendant to
4 support its conclusion that reasonable officer safety concerns justified the patdown.
5 Among those facts were that "[Murray] asked [defendant] if he had a weapon [and
6 defendant] said he had something."

7 Defendant challenges the trial court's reliance on those facts. Defendant
8 does not assert that there is no evidence of such an exchange, but he contends that there is
9 no evidence that such an exchange occurred before Murray began the patdown.
10 Defendant contends that the record--most critically the video recording of the incident--
11 can be understood only to support a finding that that exchange occurred after the patdown
12 began. Accordingly, in defendant's view, those facts were not among those Murray could
13 have relied on in deciding to engage in the patdown and thus cannot be used in assessing
14 the trial court's conclusion that the patdown was justified by reasonable officer-safety
15 concerns. The state, on the other hand, contends that the trial court reasonably
16 interpreted the video recording, in light of defendant's own testimony, as including two
17 exchanges involving a similar question and response, one before the patdown began and
18 the second during the patdown. And, the state argues that, in light of those facts--that
19 Murray had asked defendant if he had a weapon and had received a vague response--the
20 trial court properly concluded that Murray's officer-safety concerns were reasonable.

21 The video recording reveals the following. The first exchange between

1 Murray and defendant, just after defendant got out of the vehicle, is not audible in the
2 video recording. Then, simultaneously with the beginning of the patdown, Murray asked
3 defendant, "Do you have any weapons on you?" and defendant responded, "Yeah."
4 Continuing with the patdown, Murray asked defendant, "What do you have?" Defendant
5 mumbled a response that is not audible on the video recording. Murray then asked
6 defendant, "What is it?" and defendant said, "I don't know."

7 Defendant contends that the video recording establishes that Murray did not
8 ask defendant about weapons (and defendant did not indicate that he had something) until
9 *after* Murray had already begun the patdown. The state, on the other hand, contends that
10 the trial court could have understood the audible exchange to be a continuation of a
11 conversation that had begun during the inaudible exchange. So viewed, the state asserts,
12 the court reasonably inferred that both exchanges involved questioning about weapons
13 (and vague responses). The state finds support for that inference in defendant's own
14 testimony about the sequence of events:

15 "[DEFENSE COUNSEL]: So it was an order to get out of the car now?"

16 "A Yeah.

17 "Q Okay. At the time you got out of the car, did anyone question you
18 about weapons?"

19 "A Yeah. They were asking me if I had weapons, and I was like, 'Well,
20 I have, you know, have something. I don't know what it is,' because it's
21 wrapped up in a towel and tied up with something, dropped in my lap, you
22 know, as he walked up towards the door, and I kind of panicked and I
23 shoved something in my cargo pants pocket, but at no point did I say I had
24 a weapon. I said, 'I have something. I don't know what it is.'

1 "Q Okay. Specifically did you tell him it was in your cargo pants
2 pocket, though?

3 "A No.

4 "Q Okay. Did they pat you down?

5 "A Yes."

6 The trial court implicitly found that Murray received a vague response to
7 questioning about weapons before he began the patdown; that implicit finding is apparent
8 from the court's reliance on that fact in support of its ultimate conclusion that the
9 patdown was justified. We agree with the state that that finding is supported by a
10 reasonable inference that the inaudible exchange--which occurred before the patdown
11 began--included questioning about weapons and a vague response, and by defendant's
12 own testimony, which describes sequentially an order to get out of the vehicle,
13 questioning about weapons at the time he got out of the vehicle, and, finally, the
14 patdown. Although the inaudible and audible exchanges would be repetitive, it is well
15 within the realm of the possible that an officer, confronted with a vague response about
16 weapons, would repeat a question in order to try to obtain a more clear response. The
17 trial court's finding is supported by evidence in the record and inferences that reasonably
18 could be drawn from the record, and so we are bound by it.

19 Accordingly, among the facts known to Murray before the patdown began
20 were that Murray had asked defendant if he had a weapon and defendant had responded
21 that he had "something." The trial court did not err in relying on those facts to conclude

1 that Murray's officer-safety concerns were reasonable.¹

2 Affirmed.

¹ Defendant does not argue that Murray's officer-safety concerns were unreasonable if Murray knew those facts before he began the patdown. That is, defendant's only argument that Murray's officer-safety concerns were unreasonable assumes that Murray did not know those facts before the patdown started. Accordingly, we express no opinion about whether, in light of all the facts--including the question about weapons and the vague response--known to Murray at the time of the patdown, it was reasonable to believe that defendant posed an immediate threat of serious physical injury.