

FILED: December 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

KATRINA MARIE OLENDORFF,
Defendant-Appellant.

Douglas County Circuit Court
11CR0882FE

A152068

Frances Elaine Burge, Judge.

Argued and submitted on May 27, 2014.

Mary M. Reese, Senior Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Michael S. Shin, 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 Sercombe, Presiding Judge, and Hadlock, Judge, and Mooney, Judge pro tempore.

HADLOCK, J.

Conviction for possession of methamphetamine reversed and remanded; remanded for resentencing; otherwise affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
-

1 HADLOCK, J.

2 Defendant appeals a judgment of conviction for unlawful possession of
3 methamphetamine, ORS 475.894, and driving while suspended, ORS 811.182,
4 challenging only the first of those convictions. That conviction followed an incident in
5 which police officers seized defendant's purse after arresting her for a traffic offense. A
6 later inventory of the purse revealed a bindle containing methamphetamine. The trial
7 court denied defendant's motion to suppress evidence of the methamphetamine and of
8 statements that she made about the contents of the purse. Defendant argues that the
9 police unlawfully seized the purse because they did not honor her request to give it to
10 another person at the scene of her arrest. She also argues that her statements were the
11 product of exploitation of that unlawful seizure. We agree on both points and, therefore,
12 reverse the conviction for unlawful possession of methamphetamine.

13 The facts are not in dispute. A month before the incident at issue in this
14 case, Corporal Dahl arrested defendant for driving while suspended. Defendant
15 consented to a search of the car and her purse. That search evidently did not reveal any
16 weapons or contraband. Dahl allowed defendant to call her father to come pick up the
17 car (and defendant's children, who were in the car), and he gave defendant's purse to her
18 father as well. Defendant was cited, booked, and then released.

19 A month later, Dahl saw defendant's car parked at the home of her former
20 boyfriend Keller. Dahl was aware of defendant's relationship with Keller and that Keller
21 was the father of one of defendant's children. He also knew that both defendant and

1 Keller had previously been involved in illegal drug activity and that Keller was currently
2 being investigated for dealing methamphetamine. Dahl verified that defendant's license
3 was still suspended, and then he parked nearby and waited. Later, he saw defendant pull
4 out of the driveway and drive toward him.

5 Defendant saw Dahl when she drove past him, and she immediately pulled
6 into a parking lot right around the corner from Keller's home and parked the car. Dahl
7 pulled in behind her. Officer Allen, who had been parked nearby, pulled into the parking
8 lot a few seconds later. Dahl walked up to defendant and asked why she was driving.
9 According to Dahl, defendant was "immediately more aggressive and immediately more
10 pissed off" about being pulled over than she had been the previous time, though she was
11 not physically aggressive and did not appear to be under the influence of any controlled
12 substance. Nothing that defendant did made Dahl concerned about his safety.

13 Defendant asked if she could call her mother to pick up the car so it would
14 not be impounded. Dahl told her that she could, and defendant started making telephone
15 calls, eventually calling both her mother and Keller. Dahl asked defendant if he could
16 search her car. Defendant agreed, grabbed her purse, and got out of the car. She stood by
17 Allen's patrol car, with her purse on her shoulder, and continued to talk on the phone.
18 When defendant finished her calls, Allen asked for her consent to search the purse.
19 Defendant declined, saying that she had dirty underwear in the purse and that she wanted
20 to give the purse to her mother when she came for the car.

21 Dahl did not find anything illegal in defendant's car. When he finished

1 searching, he told Allen to handcuff defendant and put her in the back of Dahl's patrol
2 car. Allen did so, advised defendant of her *Miranda* rights, and then put her purse in the
3 trunk of the patrol car.

4 As Allen was putting the purse in the trunk, Keller and another man were
5 approaching from Keller's house. When they arrived, defendant asked Dahl to give her
6 keys and purse to Keller. Dahl knew that Keller's license had also been suspended, so he
7 would not release the car to him. He also refused to give Keller the purse. He told
8 defendant, "[B]ased on what I know about you, it's pretty obvious by the way you're
9 acting and by what happened last time that there's something illegal in the purse." He
10 said that he knew about defendant's history of drug use and that she had been at Keller's
11 house. He told her, "It's pretty obvious there's something in there, probably drug related."
12 He also told her that she could be charged with supplying contraband to the jail if she did
13 not tell him about any drugs she had so that he could remove them from the purse before
14 they went to the jail. After Dahl again asserted, "There's something in there," defendant
15 replied, "Yes." Dahl asked what it was, and defendant said, "I'm not going to tell you
16 about it."

17 At that point, Dahl allowed defendant to give her keys to Keller, who said
18 he would wait there until defendant's mother arrived. Allen then left the scene, and Dahl
19 took defendant to the Douglas County Jail. A deputy inventoried the purse at the jail and
20 found a small amount of methamphetamine. Defendant was charged with unlawful
21 possession of methamphetamine and driving while suspended.

1 Before trial, defendant moved to suppress the evidence found in her purse
2 and her statements about it. At the suppression hearing, Dahl explained that he had
3 refused to release defendant's purse to Keller for several reasons. First, he said that he
4 had suspected that defendant had drugs in the purse, given the fact that she had consented
5 to having the purse searched only a month earlier, the difference in her demeanor
6 between the two encounters, her "pretty adamant" refusal to consent this time, her history
7 of drug use, and the fact that she had just come from Keller's house. Dahl also testified
8 that officer-safety concerns were part of his decision because "all kinds of things * * *
9 could be in a purse," including weapons, and if there were dangerous items in the purse,
10 the officers "didn't want to give it to [Keller] on the scene."

11 Allen also testified at the suppression hearing. He described the encounter
12 with defendant at the point that she consented to the search of her car as "pretty laid
13 back" and said that, while she was standing by his patrol car talking on her phone,
14 nothing about her behavior or demeanor caused him to believe that he needed to
15 "separate her from her purse" for safety reasons. Allen also testified about the decision
16 not to release the purse to Keller. He cited both officer safety and liability as reasons for
17 not releasing the purse:

18 "Well, the biggest reason is officer safety. She wouldn't let us search
19 her purse and so I'm not about to hand a purse off to somebody that could
20 potentially, you know, contain a weapon or anything else. Nor will I be
21 liable for what's inside that purse if something were to come up missing. I
22 would never ever release a purse to anybody without looking through it[.]"

23 Allen stated that the decision whether to release a purse without searching it is left to the

1 discretion of each officer. He said that he had never released a purse without looking
2 through it, adding that, if he arrests someone with a purse, he either searches it or it "goes
3 to the jail with that person," where he knew that it would be inventoried. According to
4 Allen, the fact that defendant's purse was already in the trunk of Dahl's patrol car when
5 defendant asked Dahl to give it to Keller was not a factor in the decision not to release it.

6 The trial court denied the motion to suppress. It found that Dahl and Allen
7 had reasonably suspected that defendant might have a weapon or means of escape in her
8 purse. Accordingly, the court concluded, the officers' action in placing the purse in the
9 trunk of the patrol car fell within the "search incident to arrest" exception to the warrant
10 requirement. The court did not address defendant's argument that the officers should
11 have granted her request to have the purse released to Keller, apparently accepting the
12 idea that, once the officers lawfully came into possession of defendant's purse, they were
13 entitled to retain it. The court then concluded that the purse had been inventoried
14 lawfully at the jail. With respect to defendant's statement to Dahl that something illegal
15 was in her purse, the court ruled that she had made the statement voluntarily and that
16 evidence of the statement was therefore admissible. After a jury trial, defendant was
17 convicted of both charges.

18 On appeal, defendant assigns error to the denial of her motion to suppress.
19 She argues that Dahl and Allen unlawfully seized her purse and that the inventory was
20 therefore also unlawful. She also contends that her statement to Dahl about the contents
21 of the purse was a product of exploitation of the unlawful seizure or, alternatively, that

1 Dahl coerced her into making the statement by threatening to charge her with supplying
2 contraband. The state contends that the officers' seizure of defendant's purse was lawful
3 and that her statements were not impermissibly coerced.

4 At the outset, the parties disagree about when the officers seized
5 defendant's purse. "A 'seizure' occurs when there is a significant interference with a
6 person's possessory or ownership interests in property." *State v. Owens*, 302 Or 196, 207,
7 729 P2d 524 (1986). Here, the state asserts that defendant's purse was seized when Allen
8 put it into the trunk of Dahl's patrol car and that the seizure was *then* lawful because the
9 officers' only reasonable choice was to transport the purse with defendant to jail.
10 Moreover, the state contends, once the officers had lawfully seized defendant's purse,
11 they had no obligation to release it at defendant's request. The state does not base that
12 argument on any case-specific circumstances. Rather, the state argues generally that,
13 once an officer has lawfully seized property that was "attached to" a person when that
14 person was arrested, the officer need not later release the property at the arrestee's
15 request.

16 Defendant does not agree that her purse was seized when the officers
17 arrested her and put the purse in the patrol car's trunk. Defendant asserts that she, like
18 most arrestees, would rather have her personal items transported with her to jail, not left
19 unattended at the scene of her arrest. She also acknowledges that officers have authority
20 to conduct arrests safely and that Dahl and Allen could reasonably choose to separate her
21 from her purse and its contents when they seated her in the back of the patrol car. *Cf.*

1 *State ex rel Juv. Dept. v. Singh*, 151 Or App 223, 228, 949 P2d 303 (1997) (noting the
2 permissibility of a pat-down or limited search for weapons whenever a person is taken
3 into custody and further observing that "[t]he proximity of an officer to an arrestee during
4 arrest and handcuffing makes it imperative that the arrestee not have immediate access to
5 a weapon or tool of escape that might be easily concealed and reachable even if the
6 arrestee were handcuffed."). Defendant concludes that, because she *wanted* to take the
7 purse with her to jail, the officers did not interfere with her possessory interests when
8 they accommodated her wishes and took the reasonable step of putting the purse in the
9 trunk of the car for transport. According to defendant, the officers did not seize the purse
10 until later, when they retained possession of it instead of releasing it to Keller when
11 defendant made that request. And at that point, defendant contends, officer-safety
12 concerns did not justify the seizure because the state did not establish either that Dahl or
13 Allen subjectively believed that her purse contained a weapon or that such a belief would
14 have been objectively reasonable.

15 In short, defendant contends that the purse was not seized until Dahl
16 refused to give it to Keller and that, at that point, there was no justification for the seizure
17 because giving the purse to Keller would have posed no threat. The state contends that
18 officers were entitled to seize the purse by putting it into the trunk for safe transport; it
19 further argues that, once the purse was seized, the officers needed no additional
20 justification to retain it.

21 For the reasons set out below, we conclude that this case does not require

1 us to determine whether a "seizure" occurred for purposes of Article I, section 9, of the
2 Oregon Constitution when Allen placed defendant's purse in the trunk of Dahl's patrol
3 car. The constitutional analysis does not depend on whether that initial action was a
4 seizure. Neither party contends that the officers' action was unlawful at that point. Either
5 the act was a justified seizure (as the state contends) or the act was not a seizure because
6 it did not meaningfully interfere with defendant's possessory interests (as defendant
7 contends). The real question, then, is whether the officers acted lawfully by denying
8 defendant's later request to release the purse to Keller, after he arrived. In that regard,
9 defendant argues that, although the officers had authority to keep the purse from her, they
10 were permitted to interfere with her possessory interest only to the extent minimally
11 necessary to conduct a safe arrest, and that the justification for that interference dissipated
12 when Keller arrived on scene and defendant asked that he be given her purse. The state
13 responds that, once an officer has lawfully seized property--at least "property that was
14 attached to the arrestee's person at the time of arrest"--the officer may retain it.

15 Both parties rely on *State v. Komas*, 170 Or App 468, 13 P3d 157 (2000).
16 In that case, a Portland police officer arrested the defendant, who was wearing a shoulder
17 bag, and handcuffed him. *Id.* at 475. The defendant asked one of the officers if he could
18 give the shoulder bag to a friend who was in a crowd that was gathering at the scene. *Id.*
19 at 471. Because of the way in which the shoulder bag was constructed and the defendant
20 was handcuffed, the bag could not be taken from the defendant without either destroying
21 the bag's strap or uncuffing the defendant. "The officer decided not to remove the

1 handcuffs, and instead, knowing that the bag would accompany [the] defendant into the
2 [patrol] car, he opened it to inventory its contents," and found illegal drugs. *Id.* The
3 defendant unsuccessfully moved to suppress the evidence from the shoulder bag arguing,
4 in part, that the officers should have released the shoulder bag to another person as the
5 defendant had requested. In that regard, the defendant appears to have argued primarily
6 that the city's inventory ordinance was invalid because it allowed an officer discretion
7 about whether to comply with an arrestee's request to give property to a friend before
8 being taken to jail. *Id.* at 476. We rejected that argument, concluding that "inventory
9 policies govern the examination of property and not its seizure" and, therefore, that the
10 ordinance was not invalid because it did not limit officer "discretion about whether to
11 release seized property to a third person." *Id.* at 478. In a footnote, we also observed,
12 "We have not been apprised of any constitutional principle that would have required [the
13 officer] to remove the handcuffs, particularly in light of the increasing hostility of the
14 crowd." *Id.* at 475 n 3.

15 Defendant reads the *Komas* footnote to say that no constitutional principle
16 required the officer *to remove the defendant's handcuffs* and, therefore, the officer was
17 not required to release the bag. According to defendant, given the "increasing hostility of
18 the crowd" and the risk that removing the handcuffs could have presented, the *Komas*
19 officer acted within his discretion in deciding not to remove them. In her view, the fact
20 that the defendant's bag could not be taken from him was incidental to that lawful
21 decision, and, thus, the officer's refusal to release the bag was reasonable.

1 The state reads *Komas* to say something very different--that the officer did
2 not have an affirmative duty *to release the defendant's bag* to another person and,
3 therefore, was not required to remove the handcuffs so that the bag could be taken off the
4 defendant's shoulder. From that, the state infers the "general principle that when an
5 arrestee requests release of property that was attached to the arrestee's person at the time
6 of arrest and therefore lawfully seized by the arresting officer, the officer does not have
7 an affirmative duty to release the property."

8 The *Komas* footnote does not bear the weight that the state places on it.
9 Our holding in that case related to the validity of the city's inventory policy and whether
10 such policies are required to limit officers' discretion in deciding when to release an
11 arrestee's property to another person at the arrestee's request. We did not analyze more
12 generally the circumstances under which officers may or may not deny arrestees' requests
13 that their property be released.

14 In our view, defendant has the better view of the footnote from *Komas*. In
15 that passage, we focused on the hostility of the gathering crowd, strongly suggesting that
16 we had officer-safety principles in mind when we noted the absence of citation to a
17 constitutional principle that would have required officers to remove the defendant's
18 handcuffs. Nothing in the footnote suggests that we intended to announce a principle
19 that, once police officers have arrested a person, they need never release the arrestee's
20 personal belongings to another person upon the arrestee's request.

21 Other than its misplaced reliance on *Komas*, the state cites no other

1 authority in support of its position that, once a police officer has lawfully taken control of
2 property that was "attached to" an arrestee, the officer is never required to release that
3 property to another person at the arrestee's request, and our research has revealed none.
4 The state's position raises the question, when exactly does the property have to be
5 returned? Plainly, an arrest and concomitant taking of the arrestee's personal property
6 (whether or not that taking constitutes a seizure) does not fully and permanently divest
7 the arrestee of his or her interest in that property: unless it is contraband or otherwise
8 subject to forfeiture, the police will have to give it back eventually.

9 Our opinion in *State v. Johnson*, 177 Or App 244, 35 P3d 1024 (2001),
10 makes that point. In that case, the defendant was arrested on a probation violation. The
11 police suspected that he had committed an unrelated homicide, and, after interviewing
12 him, they seized his clothing and boots as evidence in the homicide investigation. The
13 defendant later sought to suppress that evidence, arguing that the warrantless seizure was
14 unlawful. The state conceded that the seizure was unlawful but argued that the evidence
15 would inevitably have been discovered because, had it not been seized after the
16 interview, it would have been taken into inventory at the jail. We accepted the premise
17 that the evidence would have been inventoried and held at the jail for institutional
18 purposes, *i.e.*, "to control what enters the facility and what items those who are
19 incarcerated may possess." *Id.* at 251. Nonetheless, we rejected the state's conclusion
20 that investigators inevitably would have later discovered the evidence:

21 "The testimony does not address how long the clothing would have been
22 kept in the jail, whether it would have been released to a relative or friend

1 of defendant's if he had so requested, or any steps that the police would
2 have had to take to obtain a transfer of items in the jail's possession. Those
3 are all things that defendant could have done with the clothes, because they
4 remained his property while he was in custody."

5 *Id.* at 250. Our holding in *Johnson* was based on the principle that the government may
6 not indefinitely retain property that it lawfully has taken from an arrestee; at some point,
7 the justification for that retention may no longer exist.

8 Although *Johnson* involved property impounded at a jail (hypothetically)
9 rather than property taken from an arrestee before transport to jail, the same principle
10 applies. The officers' retention of defendant's purse after she asked for it to be released--
11 whether that retention was the *continuation* of a seizure that already had occurred or was
12 the first point at which the purse was seized--was lawful only if some exception to the
13 warrant requirement applied. The original justification for placing the purse in the trunk
14 of the patrol car no longer existed: the officers no longer were faced with a choice
15 between transporting the purse to jail along with defendant in a safe manner (as she
16 desired) or leaving it unattended at the scene of the arrest, contrary to her wishes. In
17 other words, once defendant gave the officers another option--releasing the purse to
18 Keller pursuant to defendant's request--their original justification for taking the purse
19 from defendant dissipated. *Cf. State v. Rodgers/Kirkeby*, 347 Or 610, 623, 227 P3d 695
20 (2010) ("Police authority to perform a traffic stop arises out of the facts that created
21 probable cause to believe that there has been * * * a traffic infraction. Police authority to
22 detain a motorist dissipates when the investigation reasonably related to the traffic
23 infraction, the identification of persons, and the issuance of a citation (if any) is

1 completed or reasonably should be completed."). Thus, the officer's continued retention
2 of the purse was lawful only if it was justified by some exception to the warrant
3 requirement under the circumstances that existed once defendant asked the officers to
4 give the purse to Keller.

5 Before addressing that issue further, we pause to note what the state does
6 *not* argue on appeal (and, as discussed below, what the trial court did not decide). The
7 state does not argue that the officers' refusal to give Keller the purse (or, implicitly, to
8 release it only if he could look inside first) was justified by officer-safety concerns that
9 existed after Keller arrived on scene. *Cf. Komas*, 170 Or App at 472-74 (officer's stated
10 safety concerns were not sufficient to justify him in searching the arrested defendant's
11 wallet for weapons before releasing the wallet to one of the defendant's friends). Nor
12 does the state argue that the seizure of the purse resulting from their refusal to release it
13 to Keller (whether an initial seizure or a continuation of the initial seizure, the
14 justification for which had partly dissipated) could have been justified as incident to
15 defendant's arrest in the same way that a search may be permissible incident to an arrest
16 because, considering all the circumstances, it is "necessary to protect the arresting
17 officers, to prevent the destruction of evidence, or to discover evidence related to the
18 crime for which [defendant was] under arrest." *State v. Newport*, 204 Or App 489, 493,
19 130 P3d 792 (2006); *cf. State v. Washington*, 265 Or App 532, 536, 335 P3d 877 (2014)
20 ("Article I, section 9, authorizes a search incident to arrest for three purposes: (1) to
21 protect the officer's safety; (2) to prevent the destruction of evidence; and (3) to discover

1 evidence of the crime of arrest."). The state also does not point to any other sort of
2 exigency that would have justified the warrantless seizure. Rather, as noted above, the
3 state simply insists that, because (in its view) the officers had lawfully seized the purse at
4 the outset of the encounter, they were entitled to keep it notwithstanding defendant's
5 request that it be released. That argument cannot be squared with cases discussing the
6 requirement that officers terminate searches and seizures when the justification for them
7 dissipates. *See, e.g., Rodgers/Kirkeby*, 347 Or at 623 (discussing dissipation of
8 justification for a traffic stop); *State v. Stanley*, 223 Or App 1, 6, 195 P3d 454 (2008), *rev*
9 *den*, 347 Or 446 (2009) (discussing how safety concerns may dissipate during the course
10 of an officer's encounter with a suspect); *State v. Ford*, 220 Or App 247, 251, 185 P3d
11 550 (2008) (discussing a person's right to revoke consent that the person has given to a
12 search).

13 The state's analysis mirrors that of the trial court, which did not address
14 whether officer-safety concerns or any other circumstances justified the officers' refusal
15 to give Keller the purse pursuant to defendant's request. Instead, the court appears to
16 have concluded that, as the state argues on appeal, once the officers lawfully took
17 defendant's purse and put it in the trunk of the patrol car, they were entitled to retain it
18 regardless of defendant's later request for its release. For the reasons we have discussed,
19 that conclusion is incorrect. Once defendant asked the officers to release her purse to
20 Keller, the officers could deny that request--thereby either effecting or continuing a
21 seizure--only if the denial was justified by some exception to the search warrant

1 requirement. As noted, the state does not argue that any such justification existed (in its
2 mistaken view, no justification was necessary). Accordingly, the state has not established
3 that the warrantless seizure, which resulted in the purse being transported to the jail and
4 inventoried, was lawful. We therefore conclude that the trial court erred when it denied
5 defendant's motion to suppress the evidence that was found inside the purse.

6 We turn to defendant's second assignment of error. Defendant asserts that
7 the trial court erred in denying her motion to suppress her admission to Dahl that there
8 was "something" illegal in her purse. Defendant made that statement only after Dahl (1)
9 refused defendant's request that he give Keller the purse and (2) told defendant that she
10 could be charged with supplying contraband to the jail if she did not tell him about any
11 drugs she had so that he could remove them from the purse before taking her to jail.
12 Thus, defendant argues, Dahl exploited the unlawful seizure of the purse to obtain her
13 admission by putting her in the position of having to either admit that the purse contained
14 contraband or risk prosecution for supplying contraband to the jail.¹ *Cf. State v. Unger*,
15 356 Or 59, 75, 333 P3d 1009 (2014) (when a defendant has established that an illegal
16 search or seizure occurred "and challenges the validity of his or her subsequent consent to
17 a search, the state bears the burden of demonstrating that (1) the consent was voluntary;

¹ Defendant also argues that putting her in that position constituted unlawful coercion, in violation of Article I, section 12, of the Oregon Constitution, because she could not, in fact, have been prosecuted for supplying contraband. We need not address that alternative argument.

1 and (2) the voluntary consent was not the product of police exploitation of the illegal stop
2 or search"); *State v. Ayles*, 348 Or 622, 327 P3d 805 (2010) (applying exploitation
3 analysis to the determination of whether a person's incriminating statements must be
4 suppressed because they were the product of an unlawful detention). In response, the
5 state argues only that the seizure was not unlawful, so her admission was not tainted by it.
6 That argument is unavailing in light of our resolution of the seizure question. The state
7 does not further argue that Dahl did not obtain defendant's statements by exploiting any
8 illegal seizure that had occurred. The state's reticence in that regard is understandable,
9 given the circumstances outlined above, which demonstrate that Dahl took advantage of
10 the unlawful seizure by putting defendant in the position of having to choose between
11 disclosing the contents of her purse and risking the prosecution that Dahl said could
12 follow if defendant's purse arrived at the jail with drugs inside it. *See generally Unger*,
13 356 Or at 80 (describing court's task as determining "whether police 'exploited' or 'took
14 advantage of' or 'traded on' their unlawful conduct" to obtain a person's consent to
15 search). It follows that defendant's statements must be suppressed.

16 Conviction for possession of methamphetamine reversed and remanded;
17 remanded for resentencing; otherwise affirmed.