

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

MATTHEW J. BLADORN,
Defendant-Appellant.

Coos County Circuit Court
13CR1283; A156441

Richard L. Barron, Judge.

Submitted December 22, 2015.

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

Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Egan, Judge.

HADLOCK, C. J.

Affirmed.

HADLOCK, C. J.

Defendant appeals a judgment of conviction for three counts of unlawful possession of a firearm. He was charged with those crimes after a state trooper found three guns in defendant's Jeep following a traffic stop. Defendant acknowledges that the trooper permissibly searched for, and found, one of those weapons—a handgun that was concealed beneath clothing on the front seat of the Jeep. Accordingly, he does not challenge his conviction for possessing that gun (Count 1). However, defendant challenges his convictions on Counts 2 and 3, contending that the trial court erred by denying his motion to suppress evidence found during the trooper's further search of the Jeep, which revealed the other two guns. For the reasons set out below, we reject defendant's challenge to the denial of his suppression motion. Defendant also makes an unpreserved argument that the trial court should have merged the determinations of guilt on Counts 2 and 3 into a single conviction for unlawful possession of a firearm. We reject that argument without discussion. Accordingly, we affirm.

In considering the denial of defendant's suppression motion, we review for legal error, "accepting the facts as found by the trial court, so long as there is constitutionally sufficient evidence in the record to support the findings." *State v. Jones*, 286 Or App 562, 564, 401 P3d 271 (2017). "To the extent that the trial court did not make findings on a particular issue, and there is evidence from which the facts could be found more than one way, we presume that the trial court found the facts consistently with its ultimate determination." *Id.* We set out the facts in accordance with that standard.

While on patrol, Oregon State Trooper Timm saw a Jeep traveling faster than the posted speed limit. Timm "turned around to initiate a traffic stop on that vehicle" and, as he caught up with the Jeep, saw the driver—defendant—"doing a lot of motion in the vehicle beyond what you would normally see," including "leaning down as if reaching maybe to the floorboard, even, or at least onto the seat."

After the Jeep came to a stop, defendant started to get out of the vehicle, which Timm described as “not what the average motorist does.” Although Timm repeatedly told defendant to stay in the car, defendant got out. Timm moved quickly toward defendant and put his hand on defendant’s upper arm “to control his movements.” In that manner, Timm “kind of held [defendant] toward the car” at the fog line of the highway along which the Jeep had stopped.

When Timm looked in the Jeep’s window, he saw a large machete on the front passenger seat. Timm moved defendant toward the front of the Jeep, checked defendant’s belt, and discovered that defendant “had pistol magazines and a holster on his belt,” in addition to two knives. The holster was empty, and Timm asked defendant what was going on. Defendant responded that he had “an open carry going on.” Timm then asked defendant “if he had a permit, and he said no.” At that point, Timm had not seen a gun and, given the empty holster, he believed that “there was an unlawfully possessed, concealed firearm.”

Timm put defendant’s arms behind his back, without immediately handcuffing him, and asked defendant where the gun was. Defendant initially said “nowhere”; he then said that the gun was in the car. Timm handcuffed defendant and told him that it was because of the weapons and because of the way defendant had been moving. Although defendant was handcuffed, he continued to fidget and move around.

Another law enforcement officer soon arrived. Timm told that officer about the situation, explained that defendant was in handcuffs because of a firearm, and stated that defendant was not under arrest at that time. During a continuing exchange with defendant, Timm also said something about needing to figure out who defendant was. In addition, defendant told Timm that there were two more guns in the Jeep.

Timm then opened the passenger door of the Jeep and retrieved a handgun from the front seat. Timm asked defendant whether that was the gun that defendant had removed from his belt holster and defendant responded that

it was; he also said that “it’s an open carry.” Timm asked where the other guns were, removed a gun case from the car, and then read defendant *Miranda* warnings. Timm eventually found a total of three guns in the vehicle. Defendant was charged with unlawfully possessing each of those weapons.

Before trial, defendant moved to suppress evidence of all three guns that Timm found in the Jeep and the statements that defendant made after he was handcuffed. Defendant argued that the evidence should be suppressed because Timm obtained it as a result of interrogating defendant while he was in compelling circumstances without first administering *Miranda* warnings. The state made multiple arguments in response, including that Timm’s search of the car was a permissible search incident to arrest because Timm had probable cause to believe that defendant had unlawfully possessed a concealed weapon. The state acknowledged that the “search incident to arrest” theory would allow only the guns to come into evidence, not the statements that defendant made after he was handcuffed.

The trial court denied defendant’s motion to the extent that it sought to suppress evidence of the guns that Timm found in defendant’s Jeep. The court ruled that Timm had probable cause to arrest defendant on a weapons charge and that his search of the vehicle was incident to that arrest. Thus, the state was allowed to introduce evidence that Timm found three guns in the Jeep.

The court granted the suppression motion, however, with respect to statements that defendant made after the second officer arrived on the scene, when defendant was in handcuffs and Timm indicated that he and the other officer needed to determine defendant’s identity. The court ruled that *Miranda* warnings were required at that point because defendant “then *** was in custody.” Those suppressed statements include defendant’s acknowledgement that more than one gun was in the Jeep. However, the court did not suppress the statements that defendant made before he was handcuffed.¹

¹ The record does not readily reveal the precise moment at which, according to the trial court, *Miranda* warnings became necessary. However, it is clear that statements that defendant made before he was handcuffed—i.e., that he had “an

In keeping with the trial court’s ruling, Timm testified at trial about his stop of defendant, the statements that defendant made before being handcuffed, and the search of defendant’s Jeep that revealed three handguns: one on the passenger seat under some clothing, and two in cases on the floorboard. The jury convicted defendant of the three counts charged.

On appeal, defendant no longer asserts that the trial court should have suppressed evidence of the first handgun that Timm found—the gun that defendant had removed from his holster, which Timm located underneath clothing on the passenger seat of the Jeep. Rather, he now seeks only “suppression of the two handguns that Timm found in gun cases on the passenger floorboard of defendant’s Jeep.” Defendant challenges the trial court’s determination that Timm found those two guns during a lawful search incident to arrest; he contends on appeal that the search violated Article I, section 9, of the Oregon Constitution.²

The general principles that govern searches incident to arrest are settled. To comport with Article I, section 9, certain conditions must be met. First, the officer must have either lawfully arrested the person or have developed probable cause to arrest the person for committing a crime. *See State v. Jacobs*, 187 Or App 330, 333, 67 P3d 408 (2003) (“Under the Oregon Constitution, police officers may conduct a search incident to an arrest if the search ‘relates to a crime which there is probable cause to believe the arrestee has committed’; moreover, a search “ may be considered to be ‘incident to arrest’ even though it preceded the arrest.”). Second, the officer must conduct the search for one or more of these reasons: “(1) to protect a police officer’s safety; (2) to prevent the destruction of evidence; or (3) to discover evidence of the crime of arrest.” *State v. Mazzola*, 356 Or

open carry,” that he did not have a permit, and that a gun was in the Jeep—were not suppressed, and evidence of those statements eventually was introduced at trial. Defendant does not contend that the trial court should have suppressed those statements.

² Defendant does not develop an argument that the trial court should have suppressed evidence of the two guns because of the *Miranda* violation that preceded Timm’s search of the Jeep even if that search otherwise would have been a permissible search incident to arrest.

804, 811, 345 P3d 424 (2015). “Whichever the purpose, *** a search incident to arrest must be reasonable in time, scope, and intensity.” *State v. Delfino*, 281 Or App 725, 727, 386 P3d 133 (2016), *rev den*, 361 Or 525 (2017).

In this case, defendant does not dispute on appeal that Timm had probable cause to arrest him for unlawful possession of a firearm. The question, then, is whether the trial court erred when it determined that Timm properly could search defendant’s Jeep incident to that arrest. Defendant accurately asserts that the “only *** plausible purposes” for the search in this case could be to protect officer safety or to discover evidence relevant to defendant’s act of unlawfully possessing a firearm. Defendant argues, however, that the search cannot be justified on either of those bases. First, defendant asserts that, because he had been handcuffed by the time Timm searched the car, the search was not justified on officer-safety grounds. Second, defendant argues that the search was not justified as a means of discovering evidence related to the crime of unlawfully possessing a firearm. In that regard, defendant acknowledges that Timm *could* lawfully search the Jeep for the single firearm that defendant had admitted possessing before Timm handcuffed him. But defendant contends that Timm could not continue to search the vehicle for additional firearms after he had found the first one. Once Timm found that gun, defendant argues, “it was not reasonable for him to believe that more evidence of that crime would be in the Jeep.”

We address only the “discovering evidence related to the crime” prong of the issue because it is dispositive and, therefore, we do not reach the officer-safety question. As defendant acknowledges, Supreme Court precedent undermines his argument that, once Timm discovered the handgun that he knew defendant possessed unlawfully, he had no reason to continue searching the Jeep for evidence.

That line of precedent includes *State v. Owens*, 302 Or 196, 729 P2d 524 (1986), which addressed whether a police officer acted constitutionally when he searched a purse belonging to the defendant, who had stolen items from a store. A store security officer had seen the defendant take perfume and earrings from store shelves, place

them in her purse, and leave without paying. *Id.* at 198. After the security officer confronted the defendant, she eventually admitted having stolen the perfume and earrings and removed them from her purse. *Id.* A police officer then arrived and insisted that the defendant remove more items from her purse and allow a further search, despite her protestations that she had already removed everything that she had stolen. *Id.* The defendant eventually complied. *Id.* In holding that that search of the defendant’s purse was a constitutional search incident to her arrest for theft, the Supreme Court observed that the police officer reasonably believed that the purse contained other stolen items. *Id.* at 202. The officer “was not required to accept as true defendant’s statement that she had removed everything that she had stolen from her purse and had laid it on the table.” *Id.*

A few years later, the Supreme Court relied on that aspect of *Owens* when it decided *State v. Anfield*, 313 Or 554, 836 P2d 1337 (1992). Police officers encountered the *Anfield* defendant when they responded to a motor-vehicle accident. *Id.* at 556. The defendant, who was present at the accident scene, was holding two bags, one of which looked like a gun bag that contained heavy items. *Id.* The defendant dropped the bag, which made a loud metallic sound when it hit the ground. *Id.* An officer picked up the bag, felt it, then opened it and discovered guns inside. *Id.* at 556-57. The officer arrested the defendant for carrying concealed weapons; he then searched the defendant and found heroin. *Id.* at 557. The defendant was charged with unlawful possession of a controlled substance and unsuccessfully moved to suppress the heroin, arguing that the officer’s searches had been unconstitutional. *Id.* On review, the Supreme Court held that the officer’s observations of the bag (including its type, its weight, and the sound it made when it hit the ground) gave the officer probable cause to believe that the bag contained concealed weapons and to arrest the defendant for that crime. *Id.* at 561. Thus, the officer’s search of that bag was a permissible search incident to arrest. *Id.* In addition, the court held—citing *Owens*—that the officer had authority, incident to the defendant’s arrest, to search the defendant for more weapons. *Id.*

Here, defendant acknowledges that, under *Anfield*, “Timm could continue searching defendant’s vehicle for the two additional handguns incident to his arrest for unlawful possession of the open carry handgun.” He is correct. Having observed that defendant possessed multiple weapons, including one unlawfully concealed handgun, Timm reasonably could search the Jeep for evidence of illegal weapon possession, including additional weapons. Under *Anfield*, he had authority to search for that evidence. See also *State v. Ehly*, 317 Or 66, 91, 854 P2d 421 (1993) (citing *Anfield* as upholding a “search for other weapons incident to lawful arrest,” the Supreme Court held that an officer who had probable cause to arrest the defendant for unlawfully possessing a firearm had authority to search the defendant’s bag incident to that arrest).

Having acknowledged that Timm’s search was permissible under *Anfield*, defendant seemingly urges us not to follow *Anfield*’s holding based on an argument that, he contends, was not presented to the Supreme Court in that case. That new argument is based on a distinction that defendant perceives between the nature of the crime in both this case and *Anfield*—unlawful possession of a firearm—and the nature of the crime at issue in *State v. Caraher*, 293 Or 741, 653 P2d 942 (1982), a case that the Supreme Court discussed at length in *Owens*. After the *Caraher* defendant was arrested for selling narcotics, a police officer searched her purse. *Id.* at 744. The Supreme Court upheld that search as a permissible search incident to arrest, in part because the defendant’s arrest for possession of a controlled substance made it “reasonable to believe that defendant would carry contraband in her purse and, although the officers already possessed some evidence they were not prevented from searching further.” *Id.* at 759.

Defendant contends that the crime of possessing narcotics differs fundamentally from the crime of possessing an unlawful weapon in that the weapons crime is complete with the possession of a single weapon, whereas “[t]he crime of possession of a controlled substance prohibits possession irrespective of the quantity of the illegal substance.” Thus, defendant asserts, an officer who has arrested a person for

possessing *some* controlled substances (as in *Caraher*) may search incident to arrest for *more* controlled substances because that extended search is for evidence of a single—the original—act of possession. In contrast, defendant argues, an officer who has discovered one weapon that a person possesses unlawfully cannot search further incident to arrest because the officer would be searching for evidence of a *new* crime—not additional evidence of the person’s original unlawful act of possession.

Reduced to its fundamentals, defendant’s argument is that the Supreme Court’s decision in *Anfield* (and, perhaps, in *Owens*) is wrong because it does not recognize the distinction that defendant makes. But *Anfield* is binding on us. Under *Anfield*, Timm’s search of defendant’s Jeep for additional weapons was permissible as a search incident to his arrest for unlawful possession of a firearm.

Affirmed.