IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
BENJAMIN DEAN WOODS,
Defendant-Appellant.

Marion County Circuit Court
13C46649; A158553

Dale Penn, Judge.

Argued and submitted May 24, 2016.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Peenesh Shah, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before DeVore, Presiding Judge, and Garrett, Judge, and Shorr, Judge.*

SHORR, J.

Reversed and remanded.

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* Garrett, J., *vice* Flynn, J. pro tempore; Shorr, J., *vice* Duncan, J. pro tempore.

SHORR, J.

Defendant appeals from a judgment convicting him of five counts of encouraging child sexual abuse in the second degree. ORS 163.686. Defendant assigns error to the trial court's denial of his motion to suppress evidence. That evidence was obtained after an officer searched defendant's cell phone after a woman, who had kicked defendant out of her home, surrendered the phone to the police department. The state contends that the trial court correctly concluded that the officer's search was justified by the lost property exception to the warrant requirement of Article I, section 9, of the Oregon Constitution. We disagree with the state and conclude that the lost property exception did not justify the search in this case. Accordingly, we reverse and remand.

We are bound by the trial court's findings of historical fact that are supported by constitutionally sufficient evidence in the record. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). Further, if findings of historical fact are not made on all pertinent issues and there is evidence from which such facts could be decided in more than one way, we will presume that the facts were decided in a manner consistent with the court's ultimate conclusion. *Id.* Applying that standard of review, we recite the following facts.

One evening, Officer Grady Nelson of the Hubbard Police Department was pulling up to the Hubbard police station. As he approached the station, Nelson noticed a white sport utility vehicle (SUV) driving away. Because the police station had closed to the public 15 minutes earlier and, in Nelson's experience, people often show up at the police station when they are having a problem, Nelson recorded the SUV's license plate and ran it through a law enforcement and Oregon Driver and Motor Vehicle Services (DMV) database to determine the owner. Both of those databases indicated that the vehicle was unregistered. Nelson was also unable to identify the SUV's driver as it drove away.

After the SUV departed, the police department's finance director approached Nelson. The finance director told Nelson that a woman had come into the police station and told him that she had just kicked a man out of her home and that the man had left a phone behind. He also told

Nelson that the woman had told him that she was forfeiting the phone to the police so that the man would not return to her home to retrieve it.

Nelson asked the finance director if he had obtained any information about who the woman was. The finance director said that he had not. He noted that the woman just dropped off the phone and left because he was locking up the police station. The finance director did say, however, that the woman was driving a white vehicle that Nelson assumed to be the white SUV that he had just watched leave.

After the finance director left, Nelson entered the police station and found the cell phone that the woman had left behind. At that point, in an attempt to ascertain the phone's owner, Nelson picked up the phone, opened it, and began searching for any indication of who owned the phone. He began by looking at the phone's "home screen" for any indication of an owner. After that search proved fruitless, he checked the call log for any names indicating a familial relationship, such as "mom," "dad," "wife," or "kid," so that he could call that person and determine who owned the phone. That search was similarly fruitless.

Finally, Nelson opened the photograph file on the phone; Nelson was acquainted with "most" of the people in the small town of Hubbard and thought he might recognize someone in the pictures. Nelson began searching for pictures of people or locations that he knew or license plates that he could run to track down the phone's owner. After looking at three or four images, during which he recognized the woman who he had had contact with earlier that day, Nelson stopped examining the pictures in the phone after he discovered an image of a naked female who he believed was a minor in a lewd sexual position. After finding the lewd image, Nelson immediately stopped searching the phone, closed the photos folder, and shut the phone's call log. While shutting down the call log, Nelson saw a text message screen that included the name "Wood." Nelson recognized that name as the last name of defendant, whom he had met earlier that day when responding to a call of an unwanted subject located in a woman's house. At that point, Nelson believed that the phone belonged to defendant and that the

woman who dropped it off was the woman who had called the police earlier that day.

After viewing the text message screen, Nelson continued to shut the phone down. He removed the phone's battery and "put the phone into evidence." Nelson then went to the home that he had visited earlier and spoke with the woman who had dropped off the phone at the police station. That woman confirmed that defendant owned the phone and handed Nelson a purple file that she alleged that defendant also owned. She further stated that it contained child pornography. Nelson accepted the file folder, though he did not open it at that time. He returned to the police station and applied for a warrant to search both defendant's cell phone and the file folder. That warrant was issued, and, based on the results of the executed search, defendant was charged by indictment with 15 counts of encouraging child sexual abuse in the second degree. ORS 163.686.

Defendant filed a motion to suppress "[a]ll evidence derived from the warrantless search of [defendant's] cell phone," arguing that Nelson's initial search violated defendant's Article I, section 9, rights because, at that stage, Nelson lacked probable cause to believe that the phone contained evidence of a crime, and no exception to the Article I, section 9, warrant requirement applied. In response, the state argued that Nelson's search was justified under the lost property exception to the Article I, section 9, warrant requirement. After a hearing where only Nelson testified, the trial court found that Nelson's testimony was credible and concluded that his search was justified under the lost property exception to the warrant requirement. A short, stipulated-facts bench trial was held, and defendant was convicted of five counts of encouraging child sexual abuse in the second degree. Defendant now appeals and assigns error to the trial court's denial of his motion to suppress.

We review a trial court's denial of a defendant's motion to suppress evidence for errors of law. *Ehly*, 317 Or at 75. Article I, section 9, provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but

> upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

An exception to the Article I, section 9, warrant requirement exists when an officer, while attempting to discover the owner of lost or misplaced property, searches a piece of property "in an attempt to identify the owner" of the property.[1] *State v. Pidcock*, 306 Or 335, 340, 759 P2d 1092 (1988), *cert den*, 489 US 1011 (1989).

In *Pidcock*, the Supreme Court noted that officers' authority to search lost property for its owner's identity comes from ORS 98.005.[2] 306 Or at 339. ORS 98.005, by its own terms and as interpreted by previous case law, applies in very specific circumstances. That statute provides:

> "(1) If any person *finds* money or goods valued at $250 or more, and if the owner of the money or goods is *unknown*, such person, within 10 days after the date of the finding, shall give notice of the finding in writing to the county clerk of the county in which the money or goods was found. Within 20 days after the date of finding, the finder of the money or goods shall cause to be published in a newspaper of general circulation in the county a notice of the finding once each week for two consecutive weeks. Each such notice shall state the general description of the money or goods found, the name and address of the finder and final date before which such goods may be claimed.
>
> "(2) If no person appears and establishes ownership of the money or goods prior to the expiration of three months after the date of the notice to the county clerk under subsection (1) of this section, the finder shall be the owner of the money or goods."

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[1] The state does not argue on appeal that the cell phone was abandoned property either when the woman, who was acquainted with defendant, dropped off the phone or at some earlier point. Thus, we do not address whether Nelson's search was justified as a search of abandoned property. *See State v. Belcher*, 89 Or App 401, 404, 749 P2d 591, *aff'd*, 306 Or 343, 759 P2d 1096 (1988) (noting that defendants "have no right to expect privacy from the government or anyone else" when they abandon property).

[2] ORS 98.005 has been amended since defendant was arrested in this case; however, because that amendment does not affect our analysis, we refer to the current version of the statute in this opinion.

ORS 98.005 (emphases added). Thus, as the Supreme Court noted in *Pidcock*, ORS 98.005 "place[s] a burden on the finder of lost property to discover the owner of the property" when the property owner is unknown to the property's finder. 306 Or at 340. However, "[i]f the owner [of the lost property] is known [to the finder], ORS 98.005 does not apply." *Id.*; *see also State v. Paasch*, 117 Or App 302, 306, 843 P2d 1011 (1992) ("[P]olice may search lost property to identify the owner[,] but * * * the search must stop when identification is found.").

Oregon case law has recognized two situations in which officers are authorized to search lost property for the owner's identifying information under ORS 98.005. First, in *Pidcock*, the Supreme Court noted that officers are authorized to search lost property when a finder of property, who has the burden to discover the property's owner under ORS 98.005, "turn[s] [that property] over to [those officers], on the finder's own initiative." 306 Or at 339; *see also State v. Vanburen*, 262 Or App 715, 722, 337 P3d 831 (2014) ("[T]he Supreme Court's reasoning in *Pidcock* focuses on the rights and duties that accrue to law enforcement officers who are simply assisting the finder of the property to ascertain the identity of the owner or to determine if the owner of the property was indeed unknown, as described in ORS 98.005." (Internal quotation marks and brackets omitted.)). Second, in *Vanburen*, we "assume[d]—as [did] the parties [in that case]—that *Pidcock* [also] authorize[s] police to search lost property that they *discover directly*, so long as the purpose of the search [is] to identify the owner and not to locate contraband related to criminal activity." 262 Or App at 723 (emphasis added).

Here, even assuming that police otherwise would have been authorized under ORS 98.005 to search the phone, the state failed to prove the predicate for a permissible warrantless search pursuant to that statute: that it was objectively reasonable for the police to believe that the phone was, in fact, "lost property" within the meaning of ORS 98.005 and *Pidcock*.

Lost property is property that an owner has involuntarily parted possession with, "through neglect,

carelessness, or inadvertence." *Vanburen*, 262 Or App at 728 (internal quotation marks omitted). Put another way, "[i]t is property which the owner has unwittingly suffered to pass out of his possession, and of the whereabouts of which he has no knowledge." *Id.* at 728-29 (internal quotation marks omitted). To search lost property, officers need to have a good faith, subjective belief that the property is lost and that belief needs to be "objectively reasonable under the circumstances." *Id.* at 728.

In this case, neither party questions that Nelson had a good faith, subjective belief that defendant's phone was lost. Accepting that Nelson had such a belief, the issue before us is whether that belief was "objectively reasonable under the circumstances." *Id.*

In *Vanburen*, we set out a nonexhaustive list of factors to consider when determining whether an officer's belief that property is lost is objectively reasonable. *Id.* at 729. Those factors include "the location in which [the property] was found, the manner in which [the property] was found, the potential or possible amount of time the property may have been separated from its owner, and the presence or absence of any other measure taken to determine ownership before searching it." *Id.*

Vanburen involved officers' search of a closed bag that they had found lying on a walkway less than five feet from the front door of a defendant's apartment. *Id.* at 717. We held that the officers could not have formed an objectively reasonable belief that the defendant had "involuntarily parted with his bag or that he had no knowledge of its whereabouts" where the bag was found on private property in close proximity to the defendant's front door and would not have been visible to someone walking down the street, and where the officers began searching the bag within two minutes of finding it and made no effort to contact any other residents of the apartment complex to try to identify the bag's owner. *Id.* at 729.

Similarly here, in light of the circumstances under which police "found" and searched the phone, any belief that the phone was "lost" was not objectively reasonable. The record reflects that Nelson understood that the phone

was delivered to the police station minutes before it closed for the day by a woman who knew the phone's owner and whose purpose was not to ask the police to identify the owner of the phone but, rather, to ensure that the owner did not return to her house to retrieve it. Further, the state presented no evidence that the police department's finance director attempted to obtain defendant's or the woman's identity from the woman when she dropped off the phone. Under those circumstances, it was unreasonable for Nelson to quickly regard the phone as "lost" and begin searching it without waiting a reasonable time for the phone's owner to come forward.

The remaining question is what evidence should be suppressed due to the state's violation of defendant's Article I, section 9, right? On appeal, the state argues that, if Nelson's search was unauthorized, defendant is only entitled to suppression of the evidence found on defendant's phone. Specifically, the state argues that defendant is not entitled to suppression of the contents of the folder obtained from the woman who dropped off the phone when Nelson contacted that woman after discovering defendant's name in his phone.

"Whenever the state has obtained evidence following the violation of a defendant's Article I, section 9 rights, it is presumed that the evidence was tainted by the violation and must be suppressed." *State v. Jackson*, 268 Or App 139, 151, 342 P3d 119 (2014). However, "[t]he state may rebut that presumption by establishing that the disputed evidence did not derive from the preceding illegality." *Id.* (internal citation marks omitted). The state may prove that the evidence did not derive from the illegality by showing either that "(1) the police inevitably would have obtained the evidence through lawful procedures; (2) the police obtained the evidence independently of the illegal conduct; or, * * * (3) the illegal conduct was independent of, or only tenuously related to, the disputed evidence." *State v. Unger*, 356 Or 59, 64, 333 P3d 1009 (2014) (internal quotation marks omitted).

Here, the state argues that the evidence discovered in the folder should not be suppressed because, "[u]nder defendant's view, the police should have located defendant

by first locating the woman who turned his phone over to the police" and "even if the police had done that, the record contains nothing to suggest that a visit with that woman would have unfolded any differently if the police had spoken to her without having first found pornography on the cellphone." We understand that argument as a claim that discovery of the folder was inevitable through lawful procedures.

"To satisfy its burden under the inevitable-discovery doctrine, the state [is] required to show by a preponderance of the evidence (1) that certain proper and predictable investigatory procedures would have been utilized in the instant case, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question." *State v. Hensley*, 281 Or App 523, 535, 383 P3d 333 (2016) (internal quotation marks omitted). The state cannot meet this burden by merely showing "that evidence might or could have been otherwise obtained." *Id.* (internal quotation marks omitted). Instead, "[a] conclusion that predictable investigatory procedures would have produced the evidence at issue must be substantiated by factual findings that are fairly supported by the record." *Id.* (internal quotation marks omitted).

The state failed to meet that burden based on the record in the trial court. The state claims merely that, had Nelson attempted to discover the identity of defendant as the owner of the phone by first locating the woman who turned his phone over to the police, Nelson would inevitably have discovered defendant's folder containing additional child pornography. However, the record lacks any evidence that Nelson would have undertaken that investigation. Further, the state failed to present any evidence that Nelson would have discovered the woman's identity had he undertaken that investigation. The only evidence in the record is that Nelson was incapable of discovering the woman's identity using the only identifying information that he lawfully had—her license plate number—because her car did not show up as registered in either law enforcement or DMV databases. Nelson just as easily could have waited for defendant to eventually show up at the police station to claim his phone, and the folder may never have been discovered. Consequently, because the state failed to meet

its burden, all of the evidence obtained by the state after Nelson's unauthorized search of defendant's phone must be suppressed.

Reversed and remanded.