IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Appellant,
v.
JOSEPH ABRAM PERROTT,
Defendant-Respondent.
Lane County Circuit Court
201409428; A158804

Charles M. Zennaché, Judge.

Argued and submitted June 21, 2016.

David B. Thompson, Assistant Attorney General, argued the cause for appellant. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

David A. Hill argued the cause and filed the brief for respondent.

Before DeVore, Presiding Judge, and James, Judge, and Duncan, Judge pro tempore.*

DUNCAN, J. pro tempore.

Affirmed.

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* James, J., *vice* Flynn, J. pro tempore.

DUNCAN, J. pro tempore

The state appeals a trial court order suppressing evidence. ORS 138.060(1)(c). Defendant moved to suppress evidence obtained after a police officer entered defendant's property without a warrant. In response, the state argued, as relevant here, that, due to an exigency created by the dissipation of alcohol in the defendant's blood, the warrantless entry was justified by the exigent circumstances exception to the warrant requirement of Article I, section 9, of the Oregon Constitution.[1] After determining that the state had failed to meet its burden of proving that exigency, the trial court granted defendant's motion. On appeal, the state assigns error to that ruling.[2] We affirm.

We review the trial court's ruling on a motion to suppress for errors of law, and are bound by the trial court's express and implicit findings of fact if there is constitutionally sufficient evidence in the record to support them. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). While looking for a car that had been involved in driving-related offenses, an officer made observations from outside defendant's fenced and gated property that provided him with probable cause to believe that defendant had been driving while under the influence of intoxicants (DUII). Moments after the officer made those observations, he entered the property. The officer thought it would take hours to get a warrant to enter the property, and among the officer's concerns at the time was his knowledge that "[a]lcohol dissipates from the blood[.]" That was the only evidence in the record concerning alcohol dissipation.

After a pretrial hearing, the trial court ruled on defendant's motion, making express findings of fact and

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[1] Article I, section 9, provides in part: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]"

[2] The trial court described defendant's motion as containing a first suppression motion (concerning the warrantless entry), a second suppression motion (concerning statements made to emergency medical technicians), and a motion *in limine* concerning statements. In the trial court order that is the subject of this appeal, the court granted the first suppression motion, denied the second, and denied the motion *in limine*. The state assigns error to the first of those rulings. The other rulings are not at issue.

conclusions of law. It determined that, before the officer entered defendant's property, he had subjective and objective probable cause to believe that the car he observed inside was the one he was looking for, that defendant had been driving that car, and that he had been driving while impaired. The trial court also found, based on testimony from the officer and another, that it likely would have taken two to four hours to get a warrant to enter the premises. The trial court concluded, however, that the state had failed to establish exigent circumstances, because it had not presented evidence of the time it would take for the evidence to be lost:

> "[T]hat is where the state, I think, has failed to meet its burden, to show that the officer was required to do what he did at that point in time. There was no evidence about dissipation or dissipation rates that the court could conclude.
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> "I mean I understand there's some case law and I am familiar as a matter of just practice that inhalants dissipate rather quickly and alcohol dissipates at a steady rate and there's even case law in which you could sort of recognize as that but the United States Supreme Court has made it clear that we need to be more—the record needs to be clearer regarding that."

The court granted defendant's motion, and this appeal followed.[3]

Article I, section 9, prohibits unreasonable searches and seizures. Warrantless searches and seizures are *per se* unreasonable unless they fall within an established exception to the warrant requirement. *State v. Baker*, 350 Or 641, 647, 260 P3d 476 (2011). Warrantless action may be justified when officers are "presented with both probable cause to believe that a crime ha[s] occurred and an exigent circumstance." *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991). Exigency exists when "a situation * * * requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence." *Id.* It is the state's burden to establish exigency.

[3] Before the trial court, the state argued other justifications for the warrantless entry, which the trial court also rejected. On appeal, the state pursues only the exigent circumstances theory, based on the dissipation of alcohol in the blood.

We have held, specifically in the context of a warrantless entry to secure evidence of a person's intoxication, that such an entry can be justified if the state satisfies the exigent circumstances exception:

> "Because of the peculiar nature of the DUII offense, [the] defendant's personal condition and, therefore, his person are evidence. In some circumstances, the need to secure that evidence of the crime of DUII—[the] defendant's body—might justify a warrantless entry of a home, *if the state proves that the arresting officers could not have obtained a warrant before the alcohol in the suspect's body dissipated*."

State v. Roberts, 75 Or App 292, 296, 706 P2d 564 (1985) (emphasis in original); *see also State v. Gerety*, 286 Or App 175, 179, 399 P3d 1049, *rev den*, 362 Or 39 (2017) (quoting same).

As framed by the state's assignment of error and its sole argument on appeal, this case presents the narrow issue of whether the trial court erroneously concluded that the state had failed to establish the existence of an exigency created by the dissipation of alcohol in defendant's blood, because the record lacked any evidence of the rate of dissipation. To satisfy its burden to prove the existence of an exigency here, the state was required to develop a record that would permit an assessment of whether, at the time he entered the property, the officer reasonably believed that the blood-alcohol evidence he sought was at risk of complete dissipation in the time it would take to get a warrant. *State v. Ritz*, 361 Or 781, 798 n 9, 399 P3d 421 (2017) (*Ritz II*). Given that the record does not include any evidence of the amount of time that the officer reasonably believed it would take for the evidence to be lost, the state has urged us to rely on our decision in *State v. Ritz*, 270 Or App 88, 100, 347 P3d 1052 (2015) (*Ritz I*), *rev'd*, 361 Or 781, 399 P3d 421 (2017). Specifically, the state has argued on appeal that our calculation of the amount of time it could take for the defendant's blood alcohol content (BAC) to drop to zero in *Ritz I*, which relied in part on the presumptive intoxication threshold of 0.08 percent BAC and used a dissipation rate of 0.015 percent per hour, applies equally here.[4]

[4] That dissipation rate was based on testimony in the record in *Ritz I*. 270 Or App at 100. We also note that the state does not, and could not, argue that

Since this case was briefed and argued, however, the Supreme Court has reversed our decision in *Ritz I*, and in doing so, it specifically rejected those calculations on which the state relies. *See Ritz II*, 361 Or at 798 n 9 (stating, "without some evidentiary support, the use of such presumptions improperly relieves the state of its burden to prove that officers reasonably believed that the blood-alcohol evidence was at risk of complete dissipation").

Because the Supreme Court held that reliance on the presumption we applied in *Ritz I* is improper, and the state has not pointed to any evidence in the record from which the trial court could have determined that the dissipation of alcohol presented an exigency in this case, we conclude that the trial court did not err in concluding that the state had failed to meet its burden of proving exigency.

Affirmed.

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the trial court should have relied on the analysis or calculation in our decision in *Ritz I*, which had not yet been decided at the time of the trial court's ruling.