IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
AUDREY DENISE NELSON,
Defendant-Appellant.

Coos County Circuit Court
14CR2518; A159202

Martin E. Stone, Judge.

Argued and submitted January 19, 2017.

Sarah De La Cruz, Deputy Public Defender, argued the cause for appellant. Also on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Robert M. Wilsey, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Ortega, Presiding Judge, and Egan, Chief Judge, and Allen, Judge pro tempore.

EGAN, C. J.

Reversed and remanded.

EGAN, C. J.

Defendant appeals her conviction for unlawful possession of methamphetamine, ORS 475.894,[1] arguing that the trial court erred in denying her motion to suppress. Defendant contends that the officer unlawfully stopped her when he told her that he believed that she was under the influence of methamphetamine, asked her if she possessed illegal drugs, and told her "[i]t would be easy to prove me wrong, you know, *** [b]y showing me that your purse doesn't contain drugs." We agree and, consequently, reverse and remand.

We review a trial court's denial of a motion to suppress for legal error. *State v. Rodriguez-Perez*, 262 Or App 206, 208, 325 P3d 39 (2014). We are bound by the trial court's findings of fact so long as there is sufficient evidence in the record to support them. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). The following facts reflect that standard of review.

On an October night, around 9:00 p.m., Deputy Lillie was patrolling the small city of Lakeside and saw defendant walking on a sidewalk. Lillie noticed that defendant's body movements were irregular, in that she walked with "jerky *** kind of spastic type movements." Defendant walked with a cane, but Lillie thought her movements were "something beyond" what could normally be attributed to walking with a cane. Lillie believed that defendant might be under the influence of methamphetamine.

Without activating his lights or using his PA system, Lillie pulled over and parked his marked patrol vehicle in a parking space abutting the sidewalk. Lillie got out of his vehicle, approached defendant from the side, and initiated a conversation about local fall festivities. Lillie observed that defendant's speech was very fast, her mouth appeared dry, her lips were chapped, and her eyes were dilated—all things that Lillie knew, from his training and experience, were signs of stimulant usage. Lillie told defendant that he "was observing these certain signs" and that based on his

[1] ORS 475.894 has been amended since defendant was convicted; however, because those amendments do not affect our analysis, we refer to the current version of the statute in this opinion.

knowledge, he "believed that she was under the influence of methamphetamine." He then asked her if she had any illegal drugs on her person. Defendant, taken aback, said, "I don't appreciate you insinuating that I have drugs on me." Lillie responded, "It would be easy to prove me wrong, you know, *** [b]y showing me that your purse doesn't contain drugs."

Defendant admitted that she had a marijuana joint in her purse, and stated that she did not have a medical marijuana card.[2] Defendant told Lillie that he could look through the top of her purse for the joint. When he did, Lillie saw a tissue darkened with soot sticking out of a hard glasses case. From his training and experience, Lillie believed that the case contained a pipe for smoking methamphetamine. He asked defendant what was in the case, and defendant told him that it was a marijuana pipe. Lillie told defendant she could not keep the pipe. Defendant said, "Yep, I understand," and told Lillie that he could take the case. Lillie did so, and found a pipe inside the case that subsequently tested positive for methamphetamine.

The state charged defendant with unlawful possession of methamphetamine. Defendant moved to suppress all evidence that Lillie seized as a product of the encounter, arguing that Lillie lacked reasonable suspicion to justify a stop under Article I, section 9, of the Oregon Constitution. That is, defendant argued that Lillie stopped her when he accused her of using drugs, and that because Lillie lacked reasonable suspicion that defendant was in possession of illegal drugs, the stop was unlawful. Defendant and Lillie both testified at the hearing on the motion to suppress.

The trial court denied the motion to suppress, concluding that Lillie did not stop defendant until after she consented to the search of her purse. The court explained, "[Lillie] parked his car and [defendant] stopped and looked at him and they began a conversation. *** And, when he told her about his suspicions she might have been taken aback by that, but she allowed him to glance in her purse." After the suppression hearing, defendant waived her right to a

[2] Defendant's conduct took place before the recreational use of marijuana was legalized in Oregon.

jury trial. The parties stipulated that the trial court could consider Lillie's testimony and a lab report stating that the pipe contained methamphetamine, and the court found her guilty of the possession charge.

On appeal, defendant renews her argument that the trial court erred in denying her motion to suppress. Defendant contends that Lillie stopped defendant when he confronted her with his belief and observations that she was under the influence of methamphetamine, asked her if she possessed any illegal substances, and told her that she could easily prove him wrong by consenting to a search of her purse. Because Lillie lacked reasonable suspicion that defendant possessed methamphetamine at that point, defendant argues that the stop was unlawful, and that the results should therefore be suppressed. The state responds that, under the totality of the circumstances, the interaction between Lillie and defendant did not implicate Article I, section 9, until after defendant consented to the search of her purse. The state does not dispute defendant's contentions that, if defendant was seized before that point, (1) Lillie acted without reasonable suspicion and (2) the evidence sought to be suppressed was the unattenuated product of that alleged unlawful seizure. Thus, our review turns on whether Lillie stopped defendant before or after defendant's consent.

Article I, section 9, protects individuals against unreasonable searches and seizures. A stop is "a type of seizure that involves a temporary restraint on a person's liberty and that violates Article I, section 9, unless justified by, for example, *** reasonable suspicion that the person has been involved in criminal activity[.]" *State v. Ashbaugh*, 349 Or 297, 308-09, 244 P3d 360 (2010). However, not every encounter between law enforcement and a citizen constitutes a stop. *State v. Newton*, 286 Or App 274, 279, 398 P3d 390 (2017). Police officers are "free to approach persons on the street or in public places, seek their cooperation or assistance, request or impart information, or question them without being called upon to articulate a certain level of suspicion in justification if a particular encounter proves fruitful." *State v. Backstrand*, 354 Or 392, 400, 313 P3d 1084 (2013).

Whether a particular encounter constitutes a stop is "fact-specific and requires an examination of the totality of the circumstances involved[,]" and we consider all of an officer's actions "as a whole greater than the sum of its parts." *Newton*, 286 Or App at 280, 286. At the very least, to effect a stop, "some exercise of coercive authority by the officer" is required. *Id.* at 281. The officer must explicitly or implicitly "convey to the person with whom he is dealing, either by word, action, or both, that the person is not free to terminate the encounter or otherwise go about his or her ordinary affairs." *Backstrand*, 354 Or at 401. If, by "the content of the questions, the manner of asking them, or other actions that police take (along with the circumstances in which they take them)" a reasonable person would understand that an officer is exercising their authority to detain, the encounter rises to the level of a stop. *Id.* at 412.

We have held that "[a]n officer stops a person when he or she communicates that he or she is conducting an investigation that could result in the person's citation or arrest at that time and place." *State v. Jackson*, 268 Or App 139, 145, 342 P3d 119 (2014) (internal quotations omitted). Thus, when an officer "makes a direct and unambiguous accusation" that an individual has committed a violation or crime, the officer has stopped that individual. *Id.* at 149. An individual is not stopped, however, when an officer "make[s] statements conveying possible suspicion." *Id.* Nor is an individual stopped when an officer makes only "an *inquiry* about criminal activity." *State v. Allen*, 224 Or App 524, 531, 198 P3d 466 (2008) (emphasis in original). As is true for the entire analysis of the continuum between "mere conversations" and stops, this distinction "does not lend itself to easy demarcation." *See Backstrand*, 354 Or at 399; *see also State v. Wiener*, 254 Or App 582, 591, 295 P3d 152, *rev den*, 354 Or 387 (2013) ("We have drawn a line, perhaps a fine one, between an officer's statements or actions that would convey, to a reasonable person, that the officer *suspects a defendant might be engaged* in criminal activity and an officer's statements or action that would convey, to a reasonable person, that the officer *believes the defendant is engaged* in criminal activity." (Emphasis in original.)).

Other cases in which officers accused persons of drug use or possession are instructive here. In *State v. K. A. M.*, 361 Or 805, 807-08, 812-13, 401 P3d 773 (2017), the Supreme Court held that an officer stopped a youth when he effectively accused the youth's friend of methamphetamine use and entered, without explanation, a bedroom in which the youth and his friend were waiting. The combination "created a coercive atmosphere that reasonably conveyed that [the youth and his friend] were suspected of illegal drug use and were not free to leave until [the officer] had completed his inquiry." *Id.* at 811. The court also noted "other circumstances" supporting a stop, including that the officer asked the youths whether they "had anything illegal on them, a question that, given [the officer's] prior accusation of methamphetamine use, reasonably added to the coercive pressure." *Id.* Similarly, in *Allen*, 224 Or App at 531, we held that an officer had stopped the defendant when he told her that he "knew she was coming from a dope house" and "that if she was honest and gave [him] the dope [he] would give her a citation" (brackets in original). We explained that the officer's statements were tantamount to an announcement that "the officer had just seen defendant break the law." *Id.* In contrast, in *State v. Baker*, 154 Or App 358, 360, 961 P2d 913, *rev den*, 327 Or 553 (1998), we held that the officer did not stop the defendant, whom he saw coming out of a known "crack house," when the officer asked defendant, "[D]id you buy any good crack in there?" *Baker* is distinguished from *Allen* because "the officer asked the defendant a question and did not announce that he had seen the defendant break the law." *State v. Morfin-Estrada*, 251 Or App 158, 166 n 4, 283 P3d 378, *rev den*, 352 Or 565 (2012) (internal quotation marks and brackets omitted).

In this case, a reasonable person in defendant's position would perceive that she was not free to leave when Lillie told defendant that it would be "easy to prove [Lillie] wrong" by letting him look inside her purse. A reasonable person would understand that, at that point, Lillie was conducting a drug-possession investigation, and that defendant could not leave until she let Lillie look in her purse. Lillie had just stated that he "believed" defendant was under the influence of methamphetamine, confronted her with "certain signs"

of methamphetamine use, and asked her if she possessed illegal drugs. Given that context, Lillie's request that defendant "prove [him] wrong" was an accusation that defendant would feel compelled to disprove by allowing Lillie to look in her purse. That statement went beyond conveying suspicion and was more than merely engaging in an inquiry about unlawful drug possession. In that circumstance, no reasonable person would conclude that she could say "no thanks" or walk away until the accusation of drug possession was disproven. Thus, we are convinced that Lillie engaged in a "show of authority" such that defendant was stopped for purposes of Article I, section 9, before defendant consented to the search of her purse.

"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." *Newton*, 286 Or App at 288. Our conclusion that defendant was stopped for purposes of Article I, section 9, fully resolves the appeal, because the state has not argued that Lillie had reasonable suspicion to stop defendant or that the challenged evidence was nonetheless admissible. *Id.* at 289. The trial court erred in denying defendant's motion to suppress.

Reversed and remanded.