IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
CECIL L. SCHMITZ,
Defendant-Appellant.

Wheeler County Circuit Court
16CR49015; A164644

Karen Ostrye, Judge.

Argued and submitted January 17, 2019.

John P. Evans, 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.

Lauren P. Robertson, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Powers, Presiding Judge, and Egan, Chief Judge, and James, Judge.

POWERS, P. J.

Reversed and remanded.

POWERS, P. J.

Defendant appeals from a judgment of conviction for possession of methamphetamine, ORS 475.894, assigning error to the trial court's denial of his motion to suppress. On appeal, defendant challenges both the initial stop and whether the extension of that stop was justified by reasonable suspicion of drug possession. As explained below, we conclude that, although the stop was justified by the emergency aid exception, the extension of the stop was not justified by specific and articulable facts particularized to defendant beyond defendant's intoxication. Accordingly, we reverse and remand.

We review a trial court's denial of a motion to suppress for legal error and are bound by the court's express factual findings if evidence in the record supports them. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). "In addition, if the trial court did not make findings on all pertinent historical facts and there is evidence from which those facts could be decided more than one way, we will presume that the trial court found facts in a manner consistent with its ultimate conclusion." *State v. Stevens*, 311 Or 119, 126-27, 806 P2d 92 (1991). We describe the facts in a manner consistent with that standard.

An employee at RJ's Restaurant called the Wheeler County Sheriff's Office to report a man, later identified as defendant, parked in a car across the street from the restaurant who was "rocking back and forth, back and forth, *** [and] hitting his head on the steering wheel." The employee stated that she "wasn't sure if it was a medical situation, [or] if it was a drug situation, but [she] just called law enforcement and said they needed to come down and take a look at this guy." Wheeler County Sheriff Humphreys responded to the call.

Upon arriving at the scene, Humphreys stopped his truck across the intersection from defendant's car for a short period of time to observe defendant. Humphreys testified that defendant "would like dip his whole body *** it appeared to me like leaning over into the passenger seat, and then he came back up—and this was really quick—he

straightened himself out *** extending his whole body." Humphreys suspected a medical issue, specifically that defendant was having a seizure or experiencing a medical condition. Humphreys then pulled his truck nose-to-nose with defendant's car, leaving enough room for defendant to pull around the truck, and activated his overhead lights because his truck was partially blocking a lane of traffic.

Humphreys initially asked defendant, "Do you need an ambulance?" The record does not indicate whether or not defendant responded. Although defendant was no longer arching and rocking his body when Humphreys initially made contact, Humphreys explained that he immediately suspected, based on his interaction with defendant and on his observation of defendant, that defendant was under the influence of a stimulant, specifically methamphetamine. At that point, Humphreys concluded that there was not an immediate medical emergency, so he returned to his truck, put on his body armor, activated the body camera, and returned to defendant's car.

Humphreys asked defendant if he was okay or if he was injured, and defendant explained that he was having back and leg problems and was on some medication. Suspecting that defendant was under the influence of methamphetamine based on his jerky movements, head shaking, and body vibrations, Humphreys asked for identification. Defendant replied that it was in the trunk and, after Humphreys patted him down for weapons, he went to get it. As defendant rifled through his wallet, Humphreys noticed that defendant's body was shaking and that he was mumbling. Humphreys told defendant that he was acting "strung out" and that his eyes were "pinprick."

Humphreys then asked for consent to search the car, which defendant gave, and he ultimately found a zippered cloth bag that had a methamphetamine pipe in it. Humphreys arrested defendant and subsequently found a plastic bag in defendant's pants pocket that tested positive for methamphetamine.

The state charged defendant with a single count of unlawful possession of methamphetamine. Before trial,

defendant filed a motion to suppress, arguing that the stop was unlawful because it was made without probable cause or reasonable suspicion and that the stop was unlawfully extended without reasonable suspicion. The state remonstrated that the motion should be denied because a mere encounter between law enforcement and a citizen is not a stop, and that an officer with the training and expertise to know that persons are presently under the influence of controlled substances has reasonable suspicion to believe such persons possess controlled substances.

At the suppression hearing, Humphreys testified to the circumstances of the encounter described above and to his extensive training and experience in narcotics investigations. The trial court denied defendant's motion, concluding that Humphreys stopped defendant when he activated his overhead lights, that the stop was justified by Humphreys's community caretaking function under ORS 133.033,[1] and that there was reasonable suspicion of possession of a controlled substance given defendant's obvious intoxication and Humphreys's extensive training and experience. When defense counsel asked the court to make findings regarding the extension of the stop in light of case law that holds that the use of an intoxicating drug is insufficient alone to establish reasonable suspicion of apparent possession, the trial court explained:

> "[T]he officer suspected your client was under the influence. That suspicion was reasonable under the circumstances. He suspected, based on his training and experience, that there would be some indicia of use, either the packaging or the means of ingestion, and that would be somewhere in the vehicle. And he asked for consent to search for that specifically."

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[1] On appeal, neither party argues that the stop was justified under the community caretaking statute; rather, the parties focus on whether the stop was justified by the emergency aid exception to Article I, section 9, of the Oregon Constitution. Likewise, we focus our discussion on whether the emergency aid exception applies to the stop. *See, e.g.*, *State v. Fredericks*, 238 Or App 349, 357, 243 P3d 97 (2010) (observing that "the determination that a warrantless search is authorized under ORS 133.033 implicitly incorporates a determination by the trial court that the requirements of the emergency aid doctrine under Article I, section 9, have been met").

Following the denial of his motion, defendant waived his right to a jury, proceeded to a stipulated facts trial, and was convicted of unlawful possession of methamphetamine.

On appeal, defendant renews both his challenge to the initial stop and to the extension of the stop once Humphreys determined that there was no longer a medical emergency. The state first contends that the stop was justified by the emergency aid exception and that the extension of the stop was justified by a combination of defendant's obvious intoxication and Humphreys's extensive training and experience.

We first consider whether the initial stop of defendant was justified by a valid exception to the warrant requirement in Article I, section 9, of the Oregon Constitution.[2] The emergency aid exception for warrantless searches

> "is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm."

State v. Baker, 350 Or 641, 649, 260 P3d 476 (2011) (footnote omitted). The exception requires both that an officer hold the subjective belief that there is a need to provide immediate aid and that the belief be objectively reasonable. *State v. McCullough*, 264 Or App 496, 502, 334 P3d 973 (2014). A speculative belief that someone might require aid does not justify a warrantless search. *State v. Hamilton*, 285 Or App 315, 322, 397 P3d 61 (2017).

As an initial matter, defendant appears to question whether the emergency aid exception applies to warrantless stops by citing *Sivik v. DMV*, 235 Or App 358, 364, 231 P3d 1177 (2010), where we expressly left open the question whether the exception can justify warrantless stops, and by arguing that the doctrine is tailored more for warrantless searches such as an intrusion into a home. Defendant,

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[2] Article I, section 9, of the Oregon Constitution 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[.]"

nonetheless, later acknowledges that the exception, "at least in theory, *** can apply to seizures just as it does to searches." To the extent that defendant is arguing that the emergency aid exception does not apply to warrantless stops, we reject that argument. The constitutional reasoning that allows law enforcement to enter a home without a warrant to provide emergency aid applies equally to law enforcement effectuating a stop for the same purpose. *See State v. Fessenden/Dicke*, 355 Or 759, 764, 333 P3d 278 (2014) (explaining that the emergency aid exception can apply to "warrantless entries, searches, and seizures"); *State v. Ashbaugh*, 349 Or 297, 308-09, 244 P3d 360 (2010) (outlining the three different types of police-citizen encounters and explaining that the second category, "'stops,' [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, necessities of a safety emergency or by reasonable suspicion that the person has been involved in criminal activity").

On the merits, the parties agree that defendant was stopped when Humphreys pulled his truck in front of defendant's car and activated his overhead lights. Defendant contends that the state "failed to provide evidence that Humphreys believed that seizing defendant was necessary to aid someone who had suffered or would soon suffer serious physical injury." Defendant argues that, because evidence suggested that Humphreys stopped defendant to determine whether he needed medical aid, rather than to render immediate aid, Humphreys acted on speculation and therefore the stop was not justified. The state counters, relying on evidence of the body camera, that Humphreys stopped defendant only after concluding that defendant likely needed an ambulance. We conclude that the stop was justified under the emergency aid exception.

The record does not support a conclusion that Humphreys acted on speculation alone. As noted above, an observer called the Sheriff's Office to report a man jerking back and forth in his car and hitting his head on the steering wheel, and when Humphreys arrived, he too observed defendant's head jerking back and forth. Humphreys also

saw defendant's body dip down toward the passenger side of the vehicle and then go completely rigid. Humphreys, believing that defendant was having a seizure or experiencing a medical condition, asked if defendant needed an ambulance. Those facts, taken together, support a conclusion that Humphreys had both a subjective and an objectively reasonable belief that stopping defendant was necessary to render immediate aid to a person who had suffered, or who was imminently threatened with suffering, serious physical injury or harm. Accordingly, we conclude that the initial stop was justified by the emergency aid exception to the warrant requirement.

Having established that the initial seizure was justified, we turn to whether the extension of the stop—that is, after Humphreys determined that no medical emergency existed—was justified by reasonable suspicion of drug possession. Stops are limited in time and scope, and an officer may not extend a stop to investigate another crime for which the officer does not also have reasonable suspicion. *State v. Miller*, 267 Or App 382, 392, 340 P3d 740 (2014). Once the initial justification for a detention of a person ends, continued detention requires a separate justification for the stop to pass constitutional muster. *See, e.g.*, *State v. Rodgers/Kirkeby*, 347 Or 610, 627-28, 227 P3d 695 (2010) (concluding that after an officer's justification for a traffic stop ended, the officer's subsequent requests for consent for a patdown and to search the defendant's pocket were an unlawful continuation of the seizure).

Reasonable suspicion exists if a police officer subjectively believes that an individual has committed, or is about to commit, a crime, and the officer's belief is objectively reasonable under the totality of the circumstances. *State v. Davis*, 286 Or App 528, 532, 400 P3d 994 (2017). An officer's subjective belief is objectively reasonable when the officer can point to specific and articulable facts that support a reasonable inference that the defendant has committed or is about to commit the crime that the officer suspects. *State v. Holdorf*, 355 Or 812, 825, 333 P3d 982 (2014). The articulated facts need not "conclusively indicate illegal activity," but, rather, need only "support the reasonable

inference that a person has committed a crime." *Davis*, 286 Or App at 532-33 (emphases and internal quotation marks omitted). Importantly, however, "the officer's suspicion must be particularized to the individual based on the individual's own conduct." *State v. Farrar*, 252 Or App 256, 260, 287 P3d 1124 (2012) (internal quotation marks omitted).

Specifically, when the crime the officer suspects a defendant has committed is drug possession, "an officer's reasonable suspicion that a person is under the influence of intoxicants is insufficient on its own to provide an objectively reasonable basis for concluding that the person presently possesses drugs." *Davis*, 286 Or App at 534. "[S]omething more" is required. *Id.* (internal quotation marks omitted); *see, e.g.*, *Farrar*, 252 Or App at 261 (concluding that reasonable suspicion could not be supported when the only facts articulated by the responding officer were that defendant exhibited behavior consistent with methamphetamine intoxication).

On appeal, the parties agree that Humphreys held a subjective belief that defendant presently possessed methamphetamine. Defendant asserts that Humphreys's belief was not objectively reasonable because it was not supported by specific and articulable facts beyond defendant's obvious intoxication and Humphreys's training and experience. The state responds that Humphreys's subjective belief that defendant presently possessed methamphetamine was objectively reasonable because his extensive training and experience in narcotics investigations, combined with his observations of defendant's obvious intoxication, establish the "something more" required to meet the reasonable suspicion standard. We agree with defendant's argument.

The only specific and articulable fact directly related to defendant is that he appeared intoxicated based on his jerky movements, head shaking, body vibrations, and mumbling. We have emphasized that an officer's observation of a defendant's intoxication is insufficient to establish the inference that a defendant presently possesses a controlled substance. *See, e.g.*, *Davis*, 286 Or App at 537 (concluding that a defendant exhibiting behavior indicative of someone under the influence of methamphetamine did not give rise

to reasonable suspicion that defendant currently possessed methamphetamine); *Miller*, 267 Or App 382 (concluding that an officer's testimony regarding defendant's intoxication and that individuals under the influence of a drug often retain "a drug kit" or some form of drug paraphernalia were insufficient to establish reasonable suspicion of current drug possession, some other specific and articulable fact that gave rise to the officer's suspicion was required).

To the extent that the state advances an argument that the "something more" required for reasonable suspicion may be met by combining an officer's training and experience with observations of intoxication, we disagree. An officer's training and experience does not provide facts that are "particularized to the individual based on the individual's own conduct." *Farrar*, 252 Or App at 260-62 (internal quotation marks omitted). An officer's training and experience may help an officer interpret a specific and articulable fact in a given situation or event, but training and experience is not, in and of itself, a specific and articulable fact that can provide the "something more" to establish reasonable suspicion of current drug possession. Here, Humphreys testified as to his extensive training and experience, including to his knowledge that drug users often retain implements of drug use that are likely to contain trace amounts of the drug. But that testimony is not particularized to this defendant as is required under *Farrar* and does not—by itself—constitute a specific and articulable fact upon which reasonable suspicion can be based. Here, the only specific and articulable fact particularized to defendant permitting Humphreys to infer present possession of methamphetamine was defendant's intoxication, and we conclude that that is not enough to meet the reasonable suspicion standard.[3]

[3] We also disagree with the state's alternative argument that reasonable suspicion of drug possession may be established by applying the reasoning in *State v. Kolb*, 251 Or App 303, 283 P3d 423 (2012), to the facts of this case. Importantly, *Kolb* does not supplant or offer an alternative to the well-established reasonable suspicion analysis that, among its other requirements, looks for whether there are specific and articulable facts that are specific to the person being stopped. In *Kolb*, we deconstructed into five interlocking premises the trial court's determination that reasonable suspicion of drug possession justified a stop:

> "(1) Defendant was under the influence of a central nervous system stimulant (*e.g.*, methamphetamine);

In short, although the stop was justified by the emergency aid exception to the warrant requirement, the extension of the stop after Humphreys determined that there was no medical emergency was not justified by reasonable suspicion of drug possession. Accordingly, the trial court erred in denying defendant's motion to suppress.

Reversed and remanded.

"(2) People who are under the influence of methamphetamine commonly also possess the implements or paraphernalia of methamphetamine use;

"(3) Those implements are commonly retained and reused;

"(4) Because those implements are retained and reused they will bear evidence of prior uses; and

"(5) That retained evidence of prior use will include traces of methamphetamine."

251 Or App at 312-13. We emphasized that, if any of the five premises collectively are impermissibly speculative, or if any of the premises is individually insupportable, the stop was not justified by reasonable suspicion. The converse, however, is not necessarily true. That is, *Kolb* does not stand for the proposition that merely matching the five premises discussed would meet the constitutional standard for reasonable suspicion of drug possession. Moreover, because it is the state's burden to prove that an officer's belief that a defendant presently possesses drugs was objectively reasonable under the totality of the circumstances, including through specific and articulable facts that are particular to a defendant, the record in this case falls short.