

FILED: July 13, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JUAN JOSE ZAMORA-MARTINEZ,
Defendant-Appellant.

Washington County Circuit Court
C051006CR

A129382

On remand from the Oregon Supreme Court, *State v. Zamora-Martinez*, 349 Or 664, 249 P3d 1282 (2011).

Jon B. Lund, Senior Judge.

Submitted on remand May 11, 2011.

Peter Gartlan, Chief Defender, and Stephanie J. Hortsch, Deputy Public Defender, Office of Public Defense Services, for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Tiffany Keast, Assistant Attorney General, for respondent.

Before Brewer, Chief Judge, and Ortega, Judge, and Carson, Senior Judge.

ORTEGA, J.

Reversed and remanded.

1 ORTEGA, J.

2 This case is on remand from the Oregon Supreme Court, which vacated our
3 prior decision and remanded the case for reconsideration in light of *State v. Ashbaugh*,
4 349 Or 297, 244 P3d 360 (2010) (*Ashbaugh II*). Our first opinion in this case applied
5 principles articulated in [State v. Ashbaugh](#), 225 Or App 16, 200 P3d 149 (2008), *rev'd*,
6 349 Or 297, 244 P3d 360 (2010) (*Ashbaugh I*), and concluded that a reasonable person
7 could have believed, under the circumstances presented here, that he was not free to leave
8 at the critical point in the encounter with law enforcement at issue. Accordingly, we
9 vacated the trial court's denial of defendant's motion to suppress evidence and remanded
10 the case for the trial court to determine whether, during defendant's encounter with law
11 enforcement, defendant subjectively believed that he was not free to leave. After our
12 decision, the Supreme Court issued its opinion in *Ashbaugh II*, reversing *Ashbaugh I*.
13 We are now called upon to examine whether, under the standard set forth in *Ashbaugh II*,
14 defendant's encounter with law enforcement amounted to an illegal stop under Article I,
15 section 9, of the Oregon Constitution.

16 We take the facts and pertinent procedural history from our earlier opinion:

17 "[U.S. Immigration and Customs Enforcement (ICE) Senior Special
18 Agent Billison] accompanied Hillsboro narcotics officers as they executed
19 a search warrant at defendant's sister's residence. Although execution of the
20 warrant was undertaken primarily by the narcotics officers, Billison was
21 present to deal with any immigration-related issues. Forged immigration
22 and Social Security documents were discovered during the search and, as a
23 result, Billison detained some of the persons in the residence for
24 immigration violations. Hillsboro police arrested others on drug charges.
25 Ultimately, all of the adults in the residence were taken into custody.

1 "Because there were several minors at the residence who would have
2 been left without adult supervision, Billison telephoned their mother--
3 defendant's sister--and asked her to return to the residence to care for her
4 daughters. Defendant arrived at the residence 10 to 15 minutes later, and
5 Billison testified that it appeared as though defendant's arrival was related
6 to Billison's telephone call.

7 "When defendant arrived, he was approached by the Hillsboro
8 officers, who asked why he was present. After learning that defendant was
9 there to take custody of the children, the officers called Billison, who had
10 been inside the residence, to defendant's location. Billison, who was in
11 plain clothes but wearing a badge, introduced himself to defendant,
12 identified himself as an ICE agent, and asked to see defendant's
13 identification. Defendant produced an Oregon identification card. Billison
14 looked at the card and then asked defendant where he was from. After
15 defendant responded, 'Mexico,' Billison asked whether defendant had any
16 other identification. Defendant responded affirmatively and produced a
17 resident alien card and a Social Security card, both of which Billison
18 immediately recognized as forgeries. Billison later testified that, had
19 defendant chosen to walk away at any point before he produced the forged
20 documents, he 'suppose[d]' that he would have allowed defendant to do so.
21 The entire encounter lasted 'less than two minutes.'

22 "Defendant was arrested and charged with two counts of first-degree
23 criminal possession of a forged instrument. Before trial, defendant moved
24 to suppress evidence of the forged instruments. The trial court denied
25 defendant's motion, reasoning that defendant's interaction with Billison was
26 a 'mere street encounter,' that Billison's request to see identification was not
27 a stop of defendant, and that defendant's production of the fraudulent
28 identification provided probable cause to arrest him. * * * [D]efendant
29 agreed to a stipulated facts trial and was convicted."

30 [*State v. Zamora-Martinez*](#), 229 Or App 397, 399-400, 211 P3d 349 (2009), *vac'd and*
31 *rem'd*, 349 Or 664 (2010) (footnotes omitted; second brackets in original).

32 As we explained in our original opinion, the only issue on appeal is whether
33 "Billison's inquiry regarding *additional* identification escalated the encounter into a stop
34 and * * * the stop was unsupported by reasonable suspicion, in violation of Article I,
35 section 9[.]" 229 Or App at 400 (emphasis in original). Defendant asserted that, in

1 seeking additional identification, the officer indicated that he was "not satisfied with the
2 initial offer of identification and * * *, given the presence of other officers, that inquiry
3 was sufficient to cause a reasonable person to believe that he or she was not free to
4 leave." *Id.* at 401. The state, on the other hand, argued that defendant was not stopped
5 because the request for additional information "was not a temporary restraint on
6 defendant's liberty for investigatory purposes or otherwise[.]" *Id.*

7 We analyzed that issue by reference to our decision in *Ashbaugh I*, in which
8 we concluded that a seizure occurs when a reasonable person under the circumstances
9 "*could have believed*" that he or she was not free to leave. 225 Or App at 25 (emphasis in
10 original; quotation marks omitted). Using that construct, we concluded that, under the
11 circumstances presented in this case, "a reasonable person *could* have concluded that,
12 after his initial request for identification, Billison's inquiries were investigatory and were
13 intended to determine whether defendant was lawfully in the United States and that, as a
14 result, defendant was not free to leave." *Zamora-Martinez*, 229 Or App at 404 (emphasis
15 added). In addition, as we did in *Ashbaugh I*, we remanded the case to the trial court to
16 make a factual determination regarding whether defendant in this case "in fact believed
17 that he was not free to leave[.]" *Zamora-Martinez*, 229 Or App at 404; *see Ashbaugh I*,
18 225 Or App at 28.

19 Subsequently, the Supreme Court's decision in *Ashbaugh II*, "abandon[ed]"
20 the subjective component of the test for whether a seizure has occurred for purposes of
21 Article I, section 9. 349 Or at 316. In addition, the court clarified that the proper inquiry
22 is not whether a reasonable person *could* have believed that his liberty or freedom of

1 movement was significantly restricted; rather,

2 "[a] 'seizure' of a person occurs under Article I, section 9, of the Oregon
3 Constitution: (a) if a law enforcement officer intentionally and
4 significantly restricts, interferes with, or otherwise deprives an individual of
5 that individual's liberty or freedom of movement; or (b) if a reasonable
6 person under the totality of the circumstances *would* believe that (a) above
7 has occurred."

8 *Id.* (emphasis in original). Thus, the question in this case reduces to whether a reasonable
9 person, in light of the totality of the circumstances, would have believed that he or she
10 was not free to leave when asked by the ICE agent for additional identification.

11 In determining whether a reasonable person would believe that a law
12 enforcement officer interfered with the defendant's liberty or freedom of movement, the
13 court in *Ashbaugh II* "addressed whether the content of the officer's questions or the
14 officer's manner or actions would reasonably be perceived as a show of authority that
15 restricted the defendant's freedom of movement." [State v. Levias](#), 242 Or App 264, 266-
16 67, ___ P3d ___ (2011). "In earlier cases, however, the court has also held that a
17 reasonable person would perceive a limitation on his or her freedom if the person knew
18 that he or she was the subject of a criminal investigation." *State v. Radtke*, 242 Or App
19 234, 239, ___ P3d ___ (2011); *see, e.g., State v. Thompkin*, 341 Or 368, 378-79, 143 P3d
20 530 (2006) (it is "doubtful that a reasonable person * * * would think that he or she was
21 free to leave at a time when that person was the investigatory subject of a pending
22 warrant check and was being questioned about illegal activity"); [State v. Hall](#), 339 Or 7,
23 19, 115 P3d 908 (2005) (a reasonable person would not think that he or she was free to
24 leave when that person was the subject of a pending warrant check). Thus, as we

1 explained in *Radtke*, "taking a person's identification for the purpose of checking on the
2 person's status is one way in which a police officer can show authority that, in
3 combination with other circumstances, can convey to the person whose identification has
4 been obtained that he or she is not free to leave." 242 Or App at 239-240.

5 In *Radtke*, which we decided on remand from the Supreme Court for
6 reconsideration in light of *Ashbaugh II*, we considered whether the defendant was seized
7 for purposes of Article I, section 9, when an "officer asked for and obtained [the]
8 defendant's name and date of birth, then wrote that information in a notebook but did not
9 'run' that information to determine whether there was some reason to detain her" and
10 "immediately" began questioning the defendant about whether she was in possession of
11 anything illegal. 242 Or App at 238-39. Under those circumstances, we concluded that a
12 reasonable inference existed

13 "that [the officer] took defendant's name and date of birth for the purpose of
14 running a check on her and the reason that he had not done so in no way
15 indicated that he was not going to--in other words, that the investigatory
16 process had commenced and was ongoing up to the point of arrest. That
17 inference is bolstered by several other circumstances. First, defendant
18 observed that the person whom she was planning to meet was under arrest,
19 in the 'caged' back seat of the patrol car. Second, there were two officers
20 present and both were armed and in uniform. Third, as noted, in addition to
21 taking her information, [the officer] also questioned defendant about illegal
22 activity, albeit in a calm and nonconfrontational voice."

23 *Id.* at 240. Applying the relevant legal principles, we concluded that the defendant was
24 seized because "a reasonable person in [the] defendant's position would have believed
25 that an investigation began when [the officer] took note of her name and date of birth;
26 thus, she was not only being questioned about illegal activity, she was under the

1 impression that the police had begun an investigation of her and had not given her any
2 reason to believe that it had ended." *Id.* at 241; *see also State v. Parker*, 242 Or App 387,
3 394, ___ P3d ___ (2011) (where an officer "(1) asked defendant, a passenger in a stopped
4 vehicle, if he had any warrants; (2) requested defendant's identification; (3) wrote down
5 defendant's name and date of birth; and (4) then immediately returned to his vehicle and
6 ran a check to determine whether defendant was the subject of any warrants[,] applying
7 the principles set forth in *Ashbaugh II*, a reasonable person would have concluded that he
8 or she was not free to leave).

9 Likewise, applying those principles here, we conclude that, in light of all
10 the circumstances in this case, a reasonable person in defendant's position would
11 conclude that he or she was the subject of an investigation and was not free to leave.
12 Specifically, defendant arrived to pick up his nieces after every adult at the residence had
13 been either arrested on drug charges or detained for immigration violations. After
14 defendant informed Hillsboro police officers at the scene that he was there to take
15 custody of the children, the officers called Billison--an ICE officer who, though in plain
16 clothes, was wearing a badge identifying himself as a federal immigration officer--to talk
17 to defendant. Although defendant produced an Oregon identification card in response to
18 Billison's initial request for identification, the officer did not proceed to release
19 defendant's nieces to him. Instead, Billison asked defendant where he was from and,
20 upon hearing that defendant was from Mexico, asked whether he had additional
21 identification. Furthermore, Billison did not inform defendant that he was not in trouble.
22 A reasonable person would have concluded that Billison's questions after defendant

1 provided his Oregon identification card were intended to determine whether defendant
2 was legally in the United States. Thus, under all the circumstances presented here, a
3 reasonable person would have believed that he or she was the subject of an investigation
4 and was not free to leave. The trial court therefore erred in denying defendant's motion to
5 suppress.

6 Reversed and remanded.