

**FILED: July 20, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

RICHARD LANTZSCH,  
Defendant-Appellant.

Washington County Circuit Court  
C070765CR

A136096

On remand from the Oregon Supreme Court, [\*State v. Lantzsch\*](#), 349 Or 663, 249 P3d 1281 (2011).

Steven L. Price, Judge.

Submitted on remand March 22, 2011.

Peter Gartlan, Chief Defender, and Mary Shannon Storey, Deputy Public Defender, Office of Public Defense Services, filed the opening brief for appellant. Peter Gartlan, Chief Defender, and Ernest G. Lannet, Chief Deputy Defender, filed the supplemental brief.

Hardy Myers, Attorney General, Mary H. Williams, Solicitor General, and Anna M. Joyce, Assistant Attorney General, filed the answering brief for respondent. John Kroger, Attorney General, Mary H. Williams, Solicitor General, and Tiffany Keast, Assistant Attorney General, filed the supplemental brief.

Before Sercombe, Presiding Judge, and Brewer, Chief Judge, and Nakamoto, Judge.

BREWER, C. J.

Affirmed.

1 BREWER, C. J.

2 This case is on remand from the Oregon Supreme Court, which vacated our  
3 prior decision, [State v. Lantzsch](#), 229 Or App 505, 214 P3d 22 (2009) (*Lantzsch I*), and  
4 remanded for reconsideration in light of [State v. Ashbaugh](#), 349 Or 297, 244 P3d 360  
5 (2010) (*Ashbaugh II*). [State v. Lantzsch](#), 349 Or 663, 249 P3d 1281 (2011) (*Lantzsch II*).  
6 In *Lantzsch I*, we vacated the trial court's order denying defendant's motion to suppress  
7 evidence found during the search of defendant's person and remanded the case to the trial  
8 court to determine whether "defendant believed that he was not free to leave when the  
9 deputy asked him to get out of the car." 229 Or App at 516-17. Our holding in that  
10 regard was predicated on our decision in [State v. Ashbaugh](#), 225 Or App 16, 200 P3d 149  
11 (2008) (*Ashbaugh I*), which the Supreme Court reversed in *Ashbaugh II*. The issue on  
12 remand is whether, in light of *Ashbaugh II*, the encounter between defendant and the  
13 officer constituted a seizure under Article I, section 9, of the Oregon Constitution.<sup>1</sup>

14 We take the material facts and a description of the procedural history from  
15 our opinion in *Lantzsch I*.

16 "Defendant was a passenger in a car that a sheriff's deputy observed  
17 making an illegal turn at 12:35 a.m. The deputy initiated a traffic stop and  
18 asked the driver for her identification. The driver replied that she had no  
19 identification, but thought that her license was suspended. The deputy  
20 asked her to step out of the car and accompany him to the police cruiser.  
21 The driver complied. The deputy then began running a computer check to

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<sup>1</sup> The state does not dispute our conclusion in *Lantzsch I* that the officer lacked reasonable suspicion to believe that defendant was involved in criminal activity, *see* 229 Or App at 514, and nothing in *Ashbaugh II* casts doubt on that holding. Accordingly, the only issue in this case is whether defendant was unlawfully seized.

1 verify the driver's identity and whether her license was, in fact, suspended.  
2 During that time, which the deputy testified lasted 'five or six minutes,'  
3 defendant was left unattended in the passenger seat of the car. The deputy  
4 testified that defendant turned to look at the police cruiser several times  
5 during that period.

6 "After completing the records check, the deputy arrested the driver  
7 on an outstanding warrant. He also searched her, finding a small packet of  
8 marijuana. The deputy placed the driver in the back of the police cruiser  
9 and then approached defendant, who was still seated in the passenger seat  
10 of the car. The deputy stood outside the car, with defendant still seated in  
11 the passenger's seat, and asked defendant to step out of the car and talk to  
12 him. The deputy did not tell defendant that he was free to go. The deputy  
13 testified that he did not order defendant to get out of the car but, rather,  
14 merely asked him to step out so they could talk. Defendant got out of the  
15 car and was asked to walk back to the rear of the car to meet the deputy.  
16 By this time, a second deputy had arrived to act as a cover officer and was  
17 standing behind the deputy who had first contacted defendant. As they  
18 reached the rear of the car, the deputy asked defendant whether he had any  
19 'weapons or contraband.'

20 \* \* \* \* \*

21 "Defendant told the deputy that he was carrying a pocketknife. The  
22 deputy asked defendant if he could 'check' for the knife.

23 \* \* \* \* \*

24 "The deputy searched defendant, and found a package of  
25 methamphetamine in defendant's pants pocket."

26 *Lantzsch I*, 229 Or App at 507-08.

27 The trial court denied defendant's motion to suppress and gave the  
28 following reasons for its denial:

29 "Okay. Well, I don't find that [defendant] did anything while he was  
30 left alone in the car that really led the officer to believe that [defendant] was  
31 anymore \* \* \* dangerous than anybody else would be in that particular  
32 situation. I mean, anybody would turn around and look and see what was  
33 going on with your—the person who was driving the car and the police

1 officer, and then turn back, and there would be a little movement, and there  
2 was nothing extraordinary in this case.

3 "I do find that in the legal sense, as opposed to the Newtonian sense,  
4 physics, that [defendant] wasn't stopped when the car was stopped, and  
5 when the officer asked him to—if he would get out of the car and talk to  
6 him, that wasn't \* \* \* under Oregon or federal law a show of authority that  
7 would amount to a stop."

8 *Id.* at 510.

9 We began our analysis in *Lantzsch I* by holding that the officer was  
10 required to have an independent basis for detaining defendant and that the officer had  
11 lacked such an independent basis. *Id.* at 513-14. Accordingly, the dispositive question  
12 became "whether the deputy's conduct constituted an unjustified seizure of defendant."  
13 *Id.* Consistently with the construct that we had followed in *Ashbaugh I*, we concluded  
14 that,

15 "[a]t the time the deputy asked defendant to get out of the car, a  
16 second deputy had arrived and was standing 'a few feet' behind the deputy;  
17 defendant was asked not only to get out of the car, but also to walk to the  
18 rear of the car to speak with the deputy. According to the deputy's  
19 testimony, he did not tell defendant that he was free to go, and there is no  
20 evidence in the record showing that the deputy made defendant aware that  
21 he was being approached simply as part of the deputy's investigation of the  
22 driver. Indeed, the deputy said nothing to defendant to indicate that he  
23 himself was not the target of a criminal investigation. Thus, if defendant  
24 believed that he was not free to leave when the deputy asked him to get out  
25 the car, that belief was reasonable."

26 *Id.* at 516. Having concluded that, if defendant had believed that he was not free to leave,  
27 that belief was reasonable, we remanded the case to the trial court for a determination of  
28 defendant's subjective belief. *Id.*

29 In *Ashbaugh II*, the Supreme Court reversed our decision in *Ashbaugh I*. In

1 *Ashbaugh II*, the Supreme Court "abandon[ed] forthrightly the subjective component" of  
2 its prior case law and set out the following template for determining whether a person has  
3 been seized:

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

10 349 Or at 316 (emphasis in original). As the court indicated, the guiding principle in  
11 determining whether an encounter is a constitutionally significant seizure is whether the  
12 officer has manifested a "show of authority" that restricts an individual's "freedom of  
13 movement." *Id.* at 317. In light of the Supreme Court's overriding analysis in *Ashbaugh*  
14 *II*, our original disposition of this case--a remand to the trial court to determine whether  
15 defendant subjectively believed he was not free to leave--was erroneous. Accordingly,  
16 we now analyze the circumstances of this case under the principles announced in  
17 *Ashbaugh II*.

18 Our recent opinion in [State v. Jones](#), 241 Or App 597, 250 P3d 452 (2011),  
19 is instructive. There, the defendant was a passenger in a car that was pulled over by a  
20 police officer after the driver committed a traffic infraction. *Id.* at 599. The officer,  
21 Berne, requested the defendant's identification; the defendant did not have any, but gave  
22 the officer his name and birth date. *Id.* at 600. Berne told the defendant and another  
23 passenger that they were free to leave; the defendant remained in the car. *Id.* After  
24 Berne discovered that the driver did not have a valid license and the car had to be towed,

1 another officer, Jensen, began "getting people out of the car." *Id.* Jensen asked the  
2 defendant to get out and, after the defendant complied, Jensen asked him whether he had  
3 any drugs or weapons on his person. *Id.* The defendant replied that he did not, and  
4 Jensen asked for consent to search the defendant's person. *Id.* The defendant acquiesced,  
5 and the search revealed controlled substances. *Id.* About five minutes had elapsed  
6 between the time Berne told the defendant that he was free to leave and the search. *Id.*

7           In affirming the trial court's denial of defendant's motion to suppress in  
8 *Jones*, we explained that,

9           "[a]s in [*Ashbaugh II*], defendant here challenges a police officer's  
10 request to search that followed the lawful seizure of a companion. In  
11 *Ashbaugh [II]*, the defendant's husband was arrested and the defendant  
12 remained in a public park for about five minutes before the officers  
13 returned and reinitiated contact with her. Here, the driver of the car in  
14 which defendant was a passenger was lawfully pulled over for a traffic  
15 infraction. Although the officer retained the driver's identification to  
16 further investigate the traffic stop, the officer told defendant that he was  
17 free to leave. Defendant remained in the car and was there for about five  
18 minutes before a second officer contacted defendant. Also, in *Ashbaugh*  
19 [*II*] as here, the police officer's request for consent to search occurred after  
20 the defendant had denied possessing contraband."

21 *Id.* at 603-04. We rejected the defendant's contention that the officer's question about  
22 drugs or weapons had been a "show of authority" that restricted his movement:

23           "There is no such 'show of authority,' as the Supreme Court has  
24 implicitly construed that term in *Ashbaugh [II]*, on this record. Jensen was  
25 the sole officer talking to defendant; Berne was still in his patrol car  
26 preparing the driver's citation, and a third officer was standing some  
27 distance away with the driver. There were no weapons drawn, and Jensen  
28 testified that he spoke with defendant in the same tone he used when  
29 answering counsels' questions at the motion hearing. We conclude that,  
30 under *Ashbaugh [II]*, Jensen did not 'intentionally and significantly'  
31 interfere with defendant's liberty or freedom of movement and, also under

1           that case, we must conclude that a reasonable person in defendant's  
2           situation would not have believed Jensen had done so."

3    *Id* at 604.

4           The same result obtains here. Although, unlike in *Jones*, the deputy here  
5    did not tell defendant that he was free to leave, there were no weapons drawn and no  
6    evidence that the deputy raised his voice or otherwise spoke in a nonconversational  
7    manner when he asked defendant to step out of the car. Although a second officer was  
8    standing "a few feet" behind the deputy, there was no evidence that the second officer  
9    made any show of authority toward defendant or, indeed, had any interaction with  
10   defendant at all. In that regard, the Supreme Court's observation in *Ashbaugh II* is  
11   pertinent: here, the deputy "did not, for example, position himself and his fellow officer  
12   in a way that would suggest to defendant that [he] was surrounded," and, thus, the mere  
13   presence of a second officer is, on this record, not a sufficient basis for us to conclude  
14   that the deputy's "manner or actions" involved a "show of authority." *Ashbaugh II*, 349  
15   Or at 317-18.

16           This case is distinguishable from our recent decision in [\*State v. Courtney\*](#),  
17   242 Or App 321, \_\_\_ P3d \_\_\_ (2011). In that case, the defendant was a passenger in a  
18   car that was pulled over for a traffic violation, and the driver was arrested for driving  
19   with a revoked license. *Id.* at 324. The police officer, Stenzel, told the defendant not to  
20   leave the car. After ordering the driver and another passenger from the car, Stenzel  
21   approached the defendant, who was still seated in the car, and asked him if he had any  
22   weapons. *Id.* at 325. The defendant said that he did not; Stenzel asked for consent to

1 search the defendant, and the defendant gave consent. Stenzel then asked the defendant  
2 to place his hands on his head, interlace his fingers, and get out of the car. The defendant  
3 complied, and as he got out of the car, a methamphetamine pipe fell out of the car. *Id.*  
4 The defendant moved to suppress that evidence, arguing that he had been unlawfully  
5 seized by Stenzel's actions with regard to the occupants of the car and that a reasonable  
6 person, observing Stenzel's actions, would not have felt free to leave.

7 Applying the Supreme Court's analysis in *Ashbaugh II*, we concluded that

8 "[S]everal factors counsel in favor of concluding that a reasonable  
9 person in defendant's position would have believed that his or her freedom  
10 of movement had been restricted by a police show of authority. First,  
11 rather than telling defendant he was free to leave, [officer] Stenzel--  
12 however casually or nonchalantly--initially told both passengers in the car  
13 to stay where they were. Second, there were two officers at the scene, and,  
14 although the cover officer did not interact with defendant, his presence on  
15 the nearby sidewalk with Bennett and the back seat passenger is a relevant  
16 consideration when determining whether there was a show of police  
17 authority that restrained defendant's liberty. Third, although Stenzel had a  
18 valid reason related to the traffic stop for asking defendant to step out of the  
19 car (because Stenzel intended to have it towed), that reason may not have  
20 been expressed to defendant. Finally, and perhaps most significantly,  
21 Stenzel directed defendant to put his hands on top of his head, with his  
22 fingers interlaced--an order with which defendant complied."

23 *Id.* at 332-33. Under the totality of those circumstances, we concluded that

24 "[u]nder the standard enunciated in *Ashbaugh [II]*, a reasonable  
25 person in defendant's position would have believed, prior to the point at  
26 which the car door was opened, that his or her liberty and freedom of  
27 movement had been restricted. Defendant was seized in the constitutional  
28 sense."

29 *Id.* at 333.

30 Here, unlike in *Courtney*, the deputy did not direct defendant to take any  
31 physical action beyond stepping out of, and walking to the back of, the car. Moreover,



1 the particular physical action directed in *Courtney*, that the defendant place his hands on  
2 top of his head and interlace his fingers, came directly after Stenzel's question to the  
3 defendant about weapons. Thus, Stenzel's question, unlike the deputy's identical question  
4 in this case, was coupled with an order that the defendant take an action designed to  
5 prevent him from obtaining access to any weapon. By contrast, when the deputy here  
6 asked defendant to get out of the car, he had not been subjected to the kind of "show of  
7 authority" to which the defendant in *Courtney* was subjected. It follows under *Ashbaugh*  
8 *II* that the officer did not "intentionally and significantly" interfere with defendant's  
9 liberty or freedom of movement when he asked defendant to get out of the car and that a  
10 reasonable person in defendant's situation would not have believed that the officer had  
11 done so.

12 Affirmed.