

FILED: June 20, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOHN LEONARD HOLDORF, JR.,
Defendant-Appellant.

Linn County Circuit Court
09061153

A144719

Glen D. Baisinger, Judge.

Argued and submitted on December 21, 2011.

Alice Newlin-Cushing, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Joanna L. Jenkins, Assistant Attorney General, argued the cause for respondent. With her on the brief was John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Reversed and remanded.

1 SCHUMAN, P. J.

2 Defendant appeals from a conviction for possession of marijuana and
3 methamphetamine, assigning error to the trial court's denial of his motion to suppress
4 evidence. According to defendant, the evidence derived from an unlawful stop; he takes
5 issue with the trial court's conclusion that the police officer who executed the stop had
6 reasonable suspicion that defendant was involved in criminal activity and with the court's
7 alternative conclusion that the stop was justified by officer safety concerns. We reverse
8 and remand.

9 The following facts are not disputed. Albany Police Detective Davis was
10 on duty at approximately 8:00 one morning when he noticed a blue SUV occupied by a
11 driver and a passenger. Davis recognized the driver as a man named Watts. Davis knew
12 that Watts had been convicted of a felony and was wanted on an outstanding warrant for
13 violating parole; that he was under investigation for involvement in a methamphetamine
14 ring; that he had been observed recently in the same blue SUV in what another officer
15 believed was a drug transaction in a fast food restaurant parking lot; and that, according
16 to that other officer, Watts had on another occasion attempted to elude capture in a high
17 speed chase in the same blue SUV. Davis put out a call for other officers in the area,
18 alerting them to be on the lookout for the SUV and relating that it was being driven by a
19 wanted felon. Officer Salang heard the call and contacted Davis, who advised him to
20 stop the SUV. He also told Salang that the driver was Watts and gave him a "thumbnail
21 sketch" about Watts's suspected activities. Salang knew Watts from prior encounters and

1 knew that there was an outstanding probation violation warrant for him.

2 Shortly thereafter, Salang spotted Watts driving the SUV and followed him
3 until he committed a traffic infraction, at which point Salang activated his overhead
4 lights. Watts pulled over and stopped in a K-Mart parking lot. Salang called for backup.
5 He then approached the SUV and confirmed that the driver was, in fact, Watts. Salang
6 asked Watts for his driver's license; Watts provided a jail inmate identification card
7 instead.

8 Defendant was a passenger. Salang noticed that he appeared nervous and
9 fidgety, and, based on those facts, Salang suspected that he was under the influence of
10 methamphetamine.

11 Salang then checked the warrant status of Watts and defendant. He learned
12 that Watts was, as suspected, wanted on an outstanding warrant for violating probation,
13 but that defendant was "clear." Defendant asked if he could leave. Salang, worried that
14 defendant might circle back and stab or shoot him, told defendant he could not. Shortly
15 thereafter Salang's backup arrived; the officers handcuffed and arrested Watts.

16 After Watts was handcuffed and arrested, Salang returned to the SUV and
17 asked defendant if there were any weapons or contraband in it. Defendant told him that
18 there was a pocket knife between the passenger seat and the door; when Salang opened
19 the door, the knife was there. Salang then asked defendant if there were any other
20 weapons or contraband in the SUV, and defendant replied that he was carrying a pocket
21 knife. When defendant began to reach into his pocket to extract it, Salang ordered him

1 not to do so, but defendant did not comply. At that point, Salang restrained defendant,
2 told him to "settle down," informed him that he would be detained, told him he was not
3 under arrest, but read him the *Miranda* warnings nonetheless. Defendant was then
4 handcuffed and patted down. Salang felt the knife that defendant had referred to in his
5 pocket; he also felt a hard rectangular shape. Further pat downs disclosed two additional
6 containers. Salang extracted them from defendant's pocket and asked for consent to open
7 them. Defendant declined. A drug dog was brought to the scene and alerted to the
8 containers. An officer asked for consent to open them, and this time defendant
9 consented. They contained the disputed contraband.

10 Defendant was charged with possession of marijuana, ORS 475.864(3), and
11 possession of methamphetamine, ORS 475.894. At a pretrial hearing, he moved to
12 suppress all of the evidence on the ground that it resulted from an unlawful stop. The
13 court denied the motion, and defendant entered a conditional guilty plea, reserving the
14 right to appeal the court's denial of the motion to suppress. Defendant was subsequently
15 convicted.

16 On appeal, defendant renews the argument he made to the trial court that
17 Salang stopped him without reasonable suspicion that he was involved in criminal
18 activity. Reasonable suspicion

19 "requires an objective test of observable facts. Whether the suspicion is
20 reasonable often will depend on the inferences drawn from the particular
21 circumstances confronting the officer, viewed in the light of the officer's
22 experience. If a police officer is able to point to specific and articulable
23 facts that give rise to a reasonable inference that a person has committed a

1 crime, the officer has 'reasonable suspicion' and hence may stop the person
2 for investigation."

3 *State v. Ehly*, 317 Or 66, 80, 854 P2d 421 (1993) (citations and footnote omitted). The
4 relevant "particular circumstances" include the totality of the circumstances existing at
5 the time and place of the interaction between the officer and defendant. ORS 131.605(6).
6 Here, it is indisputable that Salang stopped defendant when he told defendant that he was
7 not free to leave. The circumstances confronting Salang at that time consisted of the
8 following "specific and articulable facts": (1) Defendant appeared nervous, fidgety, and
9 unwilling to look Salang in the eye, traits that led Salang to believe, based on his
10 experience, that defendant was currently under the influence of methamphetamine. (2)
11 There were no warrants out on defendant. (3) Defendant was in the company of a person
12 suspected of being involved in drug crimes and who was the subject of an outstanding
13 felony probation violation warrant. (4) Defendant had reportedly been in a vehicle that
14 had been seen at what appeared to be a drug transaction and (5) that same vehicle had
15 apparently eluded a police officer.

16 Defendant points out that we have stated, "The mere fact that a person
17 associates with another person involved with methamphetamine does not support a
18 reasonable suspicion that that person is also involved with methamphetamine." [State v.](#)
19 [Zumbrum](#), 221 Or App 362, 369, 189 Or App 1235 (2008). He also notes that, in [State v.](#)
20 [Holcomb](#), 202 Or App 73, 77-78, 121 P3d 13, [adh'd to on recons](#), 203 Or App 35, 125
21 P3d 22 (2005), we declined to endorse the proposition that "a person's recent drug use is
22 sufficient, without more, to establish reasonable suspicion of present drug possession."

1 And he calls our attention to the following discussion in *State v. Frias*, 229 Or App 60,
2 65-66, 210 P3d 914 (2009), noting its many similarities to the present case:

3 "The facts relied on by the trial court do not supply reasonable
4 suspicion that defendant possessed drugs at that time. Simply put,
5 whatever the inference that could be reasonably drawn about defendant's
6 *past* drug use, there was no evidence of a current or imminent crime, *e.g.*,
7 possession of a controlled substance (ORS 475.840(3)) or driving under the
8 influence of an intoxicant (ORS 813.010). The fact that defendant was
9 awaiting sentencing on a drug charge does not give rise to reasonable
10 suspicion that, at the time the officer prolonged the stop, defendant was
11 engaged in criminal activity. Similarly, a person may show signs of past
12 drug use, as possibly suggested by the dark circles under defendant's eyes.
13 But that past drug use, without more, does not make it reasonable to suspect
14 that a current drug crime has occurred or is imminent. And that inference is
15 even weaker when, as here, the physical symptom can be caused by any
16 number of things. * * * In addition, defendant's evasive reaction to
17 questioning that he is constitutionally entitled to refuse to answer cannot,
18 under these circumstances, form the basis for reasonable suspicion.

19 "The state argues that, although the facts that defendant was evasive,
20 awaiting sentencing, and had dark circles under his eyes might not justify
21 reasonable suspicion of criminal activity by themselves, they are sufficient
22 in light of the officer's assessment of those facts based on his training and
23 experience. Although we appreciate that a police officer's experience can
24 cast a different light on seemingly innocent circumstances, the facts here
25 are straightforward. It was not objectively reasonable to suspect present
26 criminal drug activity solely because defendant had been involved in drugs
27 in the past and did not want to fully answer police questions."

28 (Emphasis in original; citations omitted.)

29 In response, the state points out that, in *Zumbrum*, 221 Or App at 369, we
30 expressly noted that, unlike the officer in the present case, the arresting officer "did not
31 suspect that [the] defendant was under the influence of methamphetamine and was not
32 investigating him for any drug-related offense"; that, in *Holcomb*, 202 Or App at 78 n 2,
33 we stated, "Because [the] defendant here was not under the influence of a controlled

1 substance at the time of the stop, we need not address, and imply no view regarding,
2 whether, or to what extent, the assessment of reasonable suspicion would differ if the
3 person subjected to the stop were under the influence of a controlled substance"; and we
4 note that there was no evidence of present drug intoxication in *Frias*, so that case, as
5 well, is not on all fours with this one. Further, the state emphasizes that, even if none of
6 the factors relied on by defendant is sufficient by itself, we must focus on the totality of
7 the circumstances. [State v. Ehret](#), 184 Or App 1, 7, 55 P3d 512 (2002).

8 The degree to which this area of law lacks bright lines is perhaps best
9 illustrated by [State v. Regnier](#), 229 Or App 525, 533-34, 212 P3d 1269 (2009), where we
10 noted that, "[i]n general, individualized suspicion that a particular individual is involved
11 in criminal conduct may objectively exist when the circumstances demonstrate that an
12 individual associates with someone who has committed an offense and is also involved
13 with the other person in the criminal activity," but added that, "in other circumstances,
14 there must be factors beyond the mere association of the defendant with another person to
15 support a suspicion the defendant is reasonably connected with the illegal activity."

16 These arguments and authorities highlight what this court has long known:
17 every "reasonable suspicion" case must be decided on its own facts, [State v. Ruggles](#), 238
18 Or App 86, 92, 242 P3d 643 (2010), *rev den*, 349 Or 601 (2011), and attempting to fact-
19 match with existing cases can be a fool's errand, *State v. Senn*, 145 Or App 538, 545, 930
20 P2d 874 (1996). With those precepts in mind, we conclude that Salang did not have
21 reasonable suspicion that defendant was involved in criminal activity at the time he was

1 stopped. The only fact cited by Salang that relates to defendant himself, as opposed to
2 the SUV or Watts, is his nervous, fidgety demeanor. But even if recent
3 methamphetamine use could in some circumstances be an indicator of present
4 methamphetamine possession, defendant's demeanor, although consistent with
5 methamphetamine use, could "be caused by any number of things," *Frias*, 229 Or at 65--
6 for example, with being questioned by a police officer while occupying a vehicle driven
7 by a wanted felon. And as for Watts and the extent to which being in his proximity might
8 indicate ongoing criminal activity by defendant, it is significant that the only criminal
9 activity that Salang *knew* Watts was engaged in was being in violation of his parole. He
10 apparently had heard second-hand information that Watts was suspected of
11 methamphetamine distribution. The information about the parking-lot drug transaction
12 was something that Salang heard from Davis who heard it from a third officer who was
13 not even certain about what he had seen. The information about the SUV was similarly
14 indirect and speculative. We conclude that, under the totality of the circumstances, any
15 suspicion that defendant was currently involved in criminal activity at the time and place
16 where he was detained was not objectively reasonable.

17 We reach a similar conclusion with respect to the state's officer safety
18 argument. To justify a stop based on officer safety concerns, the state must establish that
19 the officer has "a reasonable suspicion, based upon specific and articulable facts, that the
20 citizen [may] pose an immediate threat of serious physical injury to the officer[.]" *State*
21 *v. Bates*, 304 Or 519, 524, 747 P2d 991 (1987). Again, we focus on the totality of the

1 circumstances. *Zumbrum*, 221 Or App at 366. There may be a legitimate dispute over
2 whether defendant presented a threat of immediate serious physical injury to Salang at
3 the time when defendant asked if he was free to leave, and if that were the only relevant
4 consideration, we would not "uncharitably second-guess" the officer's "life-or-death"
5 decision. *Bates*, 304 Or at 524. However, once backup officers arrived and Watts was
6 arrested--both of which events occurred before defendant disobeyed Salang's order to
7 stop reaching for his pocket knife, the earliest time at which reasonable suspicion arose--
8 all danger had dissipated. It was shortly after 8:00 a.m., in the parking lot of a K-Mart,
9 with at least three armed officers present. Allowing defendant to leave the scene would
10 have presented no immediate threat.

11 Reversed and remanded.