

**FILED: December 19, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

DEBRA FRANCIS THOMPSON,  
Defendant-Appellant.

Washington County Circuit Court  
C100064CR

A145643

Suzanne Upton, Judge.

Argued and submitted on June 27, 2012.

Kali Montague, Deputy Public Defender, argued the cause for appellant. With her on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Jeff J. Payne, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

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

SCHUMAN, P. J.

Reversed and remanded.

1 SCHUMAN, P. J.

2 After the trial court denied defendant's motion to suppress evidence--drugs  
3 that a police officer found in defendant's purse and incriminating statements that she  
4 made thereafter--defendant was convicted of possession of methamphetamine. ORS  
5 475.894. On appeal, she argues that, although she consented to the search that led to the  
6 discovery of the drugs and the subsequent statements, the consent occurred during an  
7 unlawful stop. The state maintains that the consent occurred during an encounter that  
8 was not a stop, but mere conversation and, for that reason, the encounter did not violate  
9 defendant's right to be free from unlawful seizure. We agree with defendant. We  
10 therefore reverse and remand.

11 The facts were adduced at a brief motion to suppress hearing, and they are  
12 not disputed. After what defendant described as a stressful day, she was visiting a friend,  
13 L. While she was sitting on a couch in L's apartment, three members of the Washington  
14 County Sheriff's Department, in plain clothes but displaying badges, arrived. They  
15 suspected that L was involved in theft and drugs, and they wanted to conduct a so-called  
16 "knock and talk," that is, a consensual interview at the suspect's residence. While two of  
17 the officers interviewed L inside her apartment, a third, Monk, asked defendant to step  
18 outside. Believing that she had no right to refuse--"He's an officer, he had a badge and he  
19 was asking me to do something. So I just figured that I should do it"--defendant  
20 complied. Monk assumed a position in the apartment doorway facing outward so as not  
21 to block defendant if she wanted to walk away. He asked defendant for identification,

1 which she provided. He wrote down her name and date of birth, and then may or may not  
2 have returned the identification to defendant; he testified at the hearing that he could not  
3 remember, and the only other witness--defendant--was not questioned about that fact.

4 Monk then told defendant that he and the other officers were at the  
5 apartment on a drug-related investigation, and he asked defendant what she was doing  
6 there. She replied that she was visiting. Monk then asked her if she used drugs, and,  
7 when defendant said that she did not, he asked if she had any drugs or weapons in her  
8 purse. She said that she did not. Monk then asked if he could search her purse. He did  
9 not tell her that she had a right to refuse the request. Without orally responding,  
10 defendant opened the purse and showed Monk its contents. He then asked if he could  
11 look in it himself, and she replied that he could. When he did, he saw a small pink coin  
12 purse that he suspected contained drugs. He opened it, and saw what he believed to be  
13 methamphetamine.<sup>1</sup> When he asked defendant where she had obtained it, she said she  
14 "got it from some guy in a bar," but, when pressed, she said that she had obtained it from  
15 L. Monk subsequently asked one of his partners to contact "dispatch" and "run"  
16 defendant's information. The record does not disclose what, if anything, he learned. At  
17 no time during the encounter did defendant ask to leave or attempt to leave, nor did Monk  
18 inform her that she could do so, although he testified that, had she made that request, he  
19 would not have objected and, had she walked away, he would not have pursued her. He

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<sup>1</sup> Although defendant challenges the search of her purse, she does not separately challenge the opening of the smaller, closed coin purse that contained the methamphetamine.

1 also testified that, when he asked for consent to search her purse, he did not suspect her  
2 of criminal activity. The court expressly found Monk's testimony to be credible.

3           At the motion to suppress hearing, defendant argued that she was stopped  
4 when the officer asked her to come outside, obtained her identification, and wrote down  
5 her name and date of birth. Alternatively, defendant also argued that, if the stop did not  
6 occur at that point, it certainly occurred when Monk also told defendant that the officers  
7 were in L's apartment on a drug investigation, asked defendant if she was a drug user, and  
8 asked defendant if she had any drugs or weapons in her purse. The state responded that  
9 the encounter was low-key and conversational, there was no show of force, there was no  
10 physical restraint of defendant's freedom of movement, and that a reasonable person in  
11 defendant's position would (unlike defendant) have believed that she was free to leave.  
12 The court agreed with the state and denied defendant's motion to suppress. Subsequently,  
13 defendant stipulated to the elements of the charged offense, possession of  
14 methamphetamine. She was convicted and sentenced to 18 months of probation. She  
15 now appeals.

16           A warrantless seizure in the absence of reasonable individualized suspicion  
17 is unlawful. *State v. Holmes*, 311 Or 400, 410-11, 813 P2d 28 (1991), *abrogated in part*  
18 *on other grounds by* [State v. Ashbaugh](#), 349 Or 297, 316, 244 P3d 360 (2010). Evidence  
19 that is the "fruit" of that "poisonous tree" must be suppressed. [State v. Hall](#), 339 Or 7, 21,  
20 115 P3d 908 (2005). The state concedes that Monk did not have reasonable suspicion  
21 that defendant had engaged or was engaging in criminal activity when he asked for

1 consent to search her purse and that the discovery of the disputed evidence derived  
2 directly and proximately from that request. We agree. Therefore, if Monk's request  
3 occurred while defendant was "seized" for purposes of Article I, section 9, of the Oregon  
4 Constitution, the evidence must be suppressed.

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

11 *Ashbaugh*, 349 Or at 316 (emphasis in original; footnote omitted). "The thing that  
12 distinguishes 'seizures' \* \* \* from encounters that are 'mere conversation' is the  
13 imposition, either by physical force or through some 'show of authority,' of some restraint  
14 on the individual's liberty." *Id.* at 309. Whether a seizure has occurred is "a fact-specific  
15 inquiry into the totality of the circumstances of the particular case." *Holmes*, 311 Or at  
16 408. Defendant maintains that a reasonable person in her situation would have believed  
17 that her freedom of movement had been impaired by a show of authority--that, in  
18 essence, a person in such circumstances would not feel free to leave. The state disagrees.  
19 The parties focus on the fact that, at the time of the request, Monk had asked for and  
20 obtained defendant's identification card and written down her name and date of birth.

21 The Supreme Court and this court have on several occasions dealt with  
22 cases revolving around the taking of a suspect's identification, and several principles may  
23 be inferred from them. "[M]erely asking for identification, in the absence of other  
24 circumstances manifesting a show of authority, does not amount to a stop[.]" at least

1 when the person who is subject to the request is the driver of an automobile. [State v.](#)  
2 [Jones](#), 245 Or App 186, 191, 263 P3d 344 (2011). However, if the officer takes a  
3 person's identification card, the person is stopped until the card is returned. *State v.*  
4 *Painter*, 296 Or 422, 425, 676 P2d 309 (1984). That is so because "that action had the  
5 practical effect of making the defendant unable to leave." *Hall*, 339 Or at 19. Further, if  
6 the officer takes the person's identification card and then radios the information that it  
7 contains to "dispatch," the person is stopped, because the person at that point has reason  
8 to believe that he or she has become the object of a law enforcement investigation, at  
9 least until the person is informed that the "warrant check" revealed no inculpatory  
10 information. *Id.*; [State v. Lay](#), 242 Or App 38, 40, 44-45, 252 P3d 850 (2011). Beyond  
11 these precepts, however, the cases reveal only that taking a person's identification and  
12 writing it down, as occurred here, is one factor to consider when determining whether,  
13 under the totality of the circumstances, a reasonable person would believe that her liberty  
14 had been restrained. In *Ashbaugh*, 349 Or at 317, for example, the court noted that "it  
15 may have been true" that the defendant was stopped after officers had taken her  
16 identification and she "had watched a clear show of authority directed at her husband,"  
17 but she was *not* stopped after the identification was returned, a significant amount of time  
18 had elapsed, and officers had treated her in a relaxed and nonconfrontational manner. *See*  
19 *also* [State v. Wright](#), 244 Or App 586, 592, 260 P3d 755 (2011) (invoking "totality of the  
20 circumstances"; distinguishing *Ashbaugh*).

21 On appeal, defendant argues that taking her identification and writing down

1 her information, in combination with other circumstances, amounted to what a reasonable  
2 person would regard as a significant restraint on her liberty. We agree. Although, as the  
3 state maintains, the facts here resemble those in *Ashbaugh*, there are significant and, we  
4 believe, dispositive differences. In both cases, it is true, police officers, in the context of  
5 what had obviously been an exercise of their law enforcement authority, approached a  
6 person about whom they had no reasonable suspicion of criminal conduct, inquired  
7 whether the person had anything illegal in her purse and, when she denied that she did,  
8 asked for consent to search. *Ashbaugh*, 349 Or at 301-02. In both cases, the officers  
9 were not threatening or coercive. *Id.* at 317.

10           In the present case, however, there was no significant break in time  
11 between Monk's request for, and recording of, defendant's identification and his  
12 questioning, whereas in *Ashbaugh*, the officers had taken the defendant's identification,  
13 run a warrant check, and returned the card to her; the defendant could, therefore, presume  
14 that she was no longer, at that point, the subject of an investigation. *Id.* at 300-01.  
15 Further, although the officers in *Ashbaugh* approached the defendant, in the present case,  
16 Monk asked defendant to change her location. The situation here more closely resembles  
17 [\*State v. Radtke\*, 242 Or App 234, 255 P3d 543 \(2011\)](#). In that case, the defendant  
18 approached by bicycle an ongoing interview between a police officer and the defendant's  
19 friend, who was in the back of a patrol car. *Id.* at 236-37. The officer asked the  
20 defendant if he could talk to her and motioned for her to approach him. *Id.* at 237.  
21 Believing that he did not have enough suspicion to effect a stop, he nonetheless asked the

1 defendant for her identification and took down her name and date of birth. *Id.* "He then  
2 asked [the] defendant if she had any drugs, weapons, [or] anything illegal on her. When  
3 [the] defendant said that she did not, [the officer] asked if he could check her person and  
4 pockets for any drugs." *Id.* at 237 (quoting [State v. Radtke](#), 230 Or App 686, 688-89, 217  
5 P3d 220 (2009), *vac'd and rem'd*, 349 Or 663, 249 P3d 1281 (2011)) (second brackets in  
6 original; internal quotation marks omitted). We reasoned:

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

18 *Id.* at 240. We held that, under the totality of the circumstances, the defendant was  
19 stopped. *Id.* at 241. Similar reasoning applies here. As defendant was being questioned,  
20 her friend L was clearly under investigation for some drug-related offense. Three  
21 officers, in plain clothes but identified as officers by visible badges, were present, albeit  
22 not armed. And, like the officers in *Radtke*, Monk questioned defendant about illegal  
23 activity, "albeit in a calm and nonconfrontational voice."

24 Further, the questioning here was somewhat more intrusive than in  
25 *Ashbaugh*. There, the officers asked the defendant only if "she had anything illegal in her  
26 purse." *Id.* at 302 (internal quotation marks omitted). Here, in the *immediate* context of



1 what defendant had been told was an *ongoing* drug investigation, Monk asked her to  
2 relocate and then asked if she, too, was a drug user; when she denied it, he then asked to  
3 search her purse. We cannot conclude that a reasonable person in these circumstances  
4 would believe that she was free to simply stop answering questions and depart. For that  
5 reason, we conclude that she was stopped without reasonable suspicion, and the evidence  
6 that concededly derived from that stop should have been suppressed.

7                   Reversed and remanded.