

Filed: November 21, 2013

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Petitioner on Review,

v.

ALEM JONATHAN ANDERSON,

Respondent on Review.

(CC 05C51184; CA A135075; SC S058504)

On review from the Court of Appeals.*

Argued and submitted on June 8, 2011; resubmitted January 7, 2013.

Anna Marie Joyce, Deputy Solicitor General, Salem, argued the cause for petitioner on review. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Ryan T. O'Connor, Senior Deputy Public Defender, Office of Public Defense Services, Salem, argued the cause for respondent on review. With him on the brief was Peter Gartlan, Chief Defender.

Before Balmer, Chief Justice, and Kistler, Walters, Linder, and Baldwin, Justices.**

LINDER, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

Walters, J., dissented and filed an opinion in which Baldwin, J., joined.

*Appeal from Marion County Circuit Court, Dennis J. Graves, Judge. 234 Or App 420, 228 P3d 638 (2010).

**Landau and Brewer, JJ., did not participate in the consideration or decision of this case.

1 LINDER, J.

2 This is one of three cases that we decide today in which we examine the
3 legal standard for what constitutes a seizure under Article I, section 9, of the Oregon
4 Constitution.¹ All three cases involve police contacts with individuals in which, at the
5 outset of the contact, the officers asked the individuals for identification. In the first of
6 the three cases, *State v. Backstrand*, ___ Or ___, ___, ___ P3d ___ (Nov 15, 2013) (slip
7 op at 25-26) (decided this day), we held that an officer's request for and verification of a
8 person's identification are not acts that, in and of themselves, convert an encounter that is
9 not a seizure for constitutional purposes into one that is. We further concluded in
10 *Backstrand* that nothing in the accompanying circumstances of that case -- *i.e.*, the
11 context of the officer's contact with the individual, the content of the officer's request for
12 identification, or the manner in which he made the request -- resulted in a seizure of the
13 defendant. *Id.* at ___ (slip op at 29-31).

14 In this case, we examine a different set of circumstances that surround the
15 officers' request for and verification of identification. As we will explain, we likewise
16 conclude in this case that the officers did not seize defendant and his companion by
17 asking them for identification. We further conclude, however, that the actions that the
18 officers took after asking for that identification did result in seizing defendant and his
19 companion. Defendant does not dispute, however, that by then the officers had

¹ The other two cases are *State v. Backstrand*, ___ Or ___, ___ P3d ___ (Nov 15, 2013), and *State v. Highley*, ___ Or ___, ___ P3d ___ (Nov 15, 2013). We allowed review in all three cases after having held them in abeyance pending our decision in *State v. Ashbaugh*, 349 Or 297, 244 P3d 360 (2010).

1 reasonable suspicion for his seizure. Consequently, we reverse the decision of the Court
2 of Appeals and affirm the trial court judgment.

3 BACKGROUND

4 The circumstances that gave rise to this case occurred when several police
5 officers were executing a nighttime search warrant at an apartment. The officers were
6 members of a "Community Response Unit" that is specially charged with investigating
7 suspected drug activity in local neighborhoods in response to citizen complaints. They
8 were looking for evidence that the person who resided at the apartment, Wilson, was
9 involved in drug dealing.

10 While police were searching Wilson's apartment, a car pulled into the
11 parking lot directly in front of it. By then, police had found evidence in the apartment of
12 illegal drug activity. Two people got out of the car, walked up to the apartment, and
13 "peeked" inside the open front door. When they saw the officers searching the living
14 room, the two immediately turned around, walked "briskly" back to the car, and got back
15 inside. Officer Zavala, who was immediately informed about their approach and quick
16 retreat, left the apartment to contact them. Two other officers, Officer Johnson and
17 Detective Bamford, followed Zavala. When the three officers reached the car, it was still
18 parked, the engine was not running, the windows were partially rolled down, and the two
19 were sitting inside. Zavala approached the driver, while Johnson and Bamford
20 approached defendant, who was sitting in front on the passenger's side. Zavala was
21 wearing his badge and was in uniform. Johnson was wearing a "raid vest," which is an

1 outer vest with the word "police" displayed in large yellow letters across the front.²

2 Zavala explained to the driver that the officers were executing a search
3 warrant at the apartment and that they were contacting them "to find out who [defendant
4 and the driver] were, what interest they might have had with what [the police] were doing
5 there, or maybe they knew the * * * individual that lived there." The driver immediately
6 responded that she knew Wilson and that she and defendant were there to "meet with"
7 him and his girlfriend.

8 Zavala asked the driver for identification. She denied having any but gave
9 Zavala her name and date of birth. As Zavala talked to the driver, Johnson asked
10 defendant for identification. Defendant, too, denied having any identification, but told
11 Johnson that his name was Steve Tipton. Johnson, however, knew Steve Tipton, who
12 was a member of the Tipton family that lived in the area. Johnson also recognized
13 defendant from past "patrol contacts." Although Johnson could not "put [defendant's]
14 name with his face," Johnson was sure that defendant was not Steve Tipton. Believing
15 that defendant was lying about his name, Johnson responded by telling defendant that
16 Johnson knew the Tipton family, knew Steve Tipton, and "you're not him, I recognize
17 you."

18 Johnson then asked defendant to step out of the car, which defendant did.
19 Johnson did so both to better determine if defendant had any identification on him and for
20 officer safety reasons. In Johnson's 15 years of experience as a police officer, when a

² The record does not reflect whether Detective Bamford was in uniform.

1 person gives him a false name, that person is trying to hide his or her identity "for a
2 reason," such as to avoid arrest on an outstanding arrest warrant or otherwise to evade
3 detection in connection with some kind of illegal activity. As Johnson explained: "If he's
4 lying to me at this point or not giving me a truthful name, I want to make sure that * * * I
5 can see his hands[.]"

6 Zavala, who had heard the conversation between Johnson and defendant
7 about the false name, asked the driver to step out of the car as well, and she did so.
8 Based on the birth date that she had given him, Zavala realized that the driver might be
9 17 years old and, therefore, a minor. From Zavala's observations, the driver seemed
10 nervous and unsure of herself, and was watching defendant for cues as to whether she
11 should say anything to the officers. After the driver stepped out of the car, Zavala moved
12 her several yards away from the car and out of defendant's "earshot," thinking that she
13 might be more willing to "let us know what exactly is happening" or produce
14 identification if she did not have to talk in front of defendant.

15 As Zavala was getting the driver get out of the car, Johnson again asked
16 defendant if he had any identification. Defendant immediately admitted that he did and
17 said that it was in his wallet, which was in his pocket. Defendant produced the
18 identification for Johnson. Johnson then ran a warrant check on defendant and, within "a
19 couple of minutes," determined that defendant was wanted on an outstanding arrest
20 warrant. Johnson placed defendant under arrest. He then went over to where Zavala and
21 the driver were standing and interrupted their conversation to ask the driver for consent to
22 search the car and its contents. Zavala left them to call dispatch and verify the

1 information that the driver had given him about her identity and the car's registration (the
2 driver had said that she did not own the car). The information appeared to be correct.
3 Zavala also determined that there were no warrants or "holds of any kind" on the driver.

4 Johnson, meanwhile, told the driver that he would like to search the car for
5 controlled substances and weapons. He asked her, as the person who had custody and
6 control of the car, if she "had an issue with that." She said that she did not. Johnson then
7 read her a "consent to search" card and asked her if she would sign it. She did. The
8 driver identified where her purse was in the car, and Zavala, who by then had rejoined
9 Johnson and the driver, retrieved it. Zavala searched the purse pursuant to the consent
10 that the driver had given Johnson. In the purse, Zavala discovered a glass pipe with white
11 residue that he believed was a controlled substance. Zavala, therefore, took the driver
12 into custody at that point and proceeded to search the car. In the car, the officers
13 discovered methamphetamine on the floor behind the passenger's seat, along with drug-
14 related paraphernalia (*e.g.*, glass pipes, packaging materials, a straw, tweezers), money,
15 and weapons found throughout the car. In a duffle bag in the rear of the car, officers
16 found, along with some personal items, a two-way radio, a police scanner, and a stun gun.
17 Defendant acknowledged to the officers that the duffle bag was his but asserted that the
18 drugs belonged to the driver. The driver told the officers that the drugs seized from the
19 car belonged to defendant.

20 Defendant was charged with delivery of methamphetamine. Before trial, he
21 moved to suppress "any and all evidence" that had been discovered during the encounter.
22 In support of his motion, defendant argued that the officers had unlawfully stopped and

1 detained him, and that the evidence obtained in the search was a product of that illegal
2 stop. Defendant also argued that the driver's consent had not been given voluntarily. At
3 the hearing on the motion, relying on the events as described by the officers, the state
4 argued that the officers' initial contact with defendant and the driver was not a stop. By
5 the time that the officers asked the two to step out of the car, defendant had lied about
6 who he was, which the state urged gave the officers reasonable suspicion to detain him by
7 at least that point, especially in combination with the surrounding circumstances (*i.e.*, that
8 the two had approached a "drug house," saw police, and then quickly left). As to the
9 voluntariness of the driver's consent, the state urged that the officers' testimony was
10 "extremely different" from that of the driver, that the driver was not a credible witness,
11 and that, if the officers' testimony was believed, the driver's consent was voluntary.

12 In response, defense counsel argued that the stop occurred as soon as the
13 officers approached the car because, according to the driver's testimony, the driver had
14 started the car and was prevented from leaving when one officer stood behind it to block
15 it. Defendant argued, alternatively or additionally, that the officers stopped defendant
16 and the driver by having them get out of the car without reasonable suspicion -- at that
17 point -- that defendant and the driver were involved in criminal activity. Defense counsel
18 further urged, again relying on the driver's testimony, that the officers also coerced the
19 driver into consenting to the search by repeatedly requesting consent while she was
20 unlawfully detained and eventually obtaining her consent involuntarily only after telling
21 her that, if she did not consent, she would be put in jail.³

³ The driver's testimony differed significantly from that of the officers.

1 In denying defendant's motion, the trial court expressly found that the
2 driver was not credible and that both officers were. With that finding, the trial court
3 implicitly rejected defendant's argument that the driver had not voluntarily consented to
4 the search. The trial court then resolved the remaining issue -- *viz.*, whether defendant
5 had been unlawfully stopped. In doing so, the trial court found that, "at the time the
6 officers first approached the [d]efendant and asked his name, [d]efendant was a passenger
7 in a parked motor vehicle without the engine running." The trial court concluded, based
8 on those factual findings, that the initial contact was "not a stop." The trial court further
9 concluded that, once defendant gave the officers a false name, the officers had reasonable
10 suspicion to detain defendant, "given the circumstances which took the officers to the
11 location[.]" Based on those findings and conclusions, the court denied the motion. The
12 case went to trial, and a jury found defendant guilty as charged.

13 Defendant appealed, assigning error to the denial of his motion to suppress.
14 In support of the assigned error, defendant abandoned his claim that the driver's consent
15 had been involuntary. He instead argued only that the officers' actions constituted a stop
16 "when they stood at the windows of the car and asked for identification so that they could

According to the driver, by the time that the officers approached the car, she had the engine running, was in reverse gear, and was preparing to leave. She said that one the officers stood behind the car to prevent her from backing up and that she would have had to hit him to leave. She also said that she was first asked to consent to the search while still sitting in the car and that she had told the officer that she was could not consent because she was a minor and the car belonged to her uncle. After getting out of the car, the officers asked her twice more for consent, and each time she refused. She consented to the search only after one officer told her that they could search her car based on the search warrant for the apartment and that, if she did not consent, "he could take [her] to jail."

1 run warrants checks" on defendant and the driver. At that point, defendant urged, the
2 officers lacked reasonable suspicion that either defendant or the driver was involved in
3 criminal activity. Defendant argued that, "[a]s a result of the unlawful stop, defendant
4 provided the officer with a false name[,]" which in turn caused the officers to have the
5 two step out of the car and to ask the driver for consent to search her purse and the car.
6 Based on that sequence, defendant asserted that the driver's consent was a direct result of
7 the unlawful stop and that all evidence against defendant obtained from the search should
8 be suppressed. In response, while expressly declining to concede that the initial
9 encounter between the officer and defendant was unlawful, the state principally argued
10 that defendant did not have a cognizable privacy interest in the general contents of the car
11 and therefore could not challenge the lawfulness of the search.

12 The Court of Appeals, sitting *en banc*, reversed in a split decision. The
13 majority rejected the state's argument that defendant lacked a cognizable interest in the
14 car and its contents. *State v. Anderson*, 231 Or App 198, 202 n 2, 217 P3d 1133 (2009),
15 *adh'd to on recons*, 234 Or App 420, 228 P3d 638 (2010). The majority then determined
16 that the driver and defendant were seized when the officers approached the parked car,
17 explained that they had been executing a search warrant at the apartment, and asked the
18 driver and defendant for identification. *Id.* at 203. The majority reasoned that, under the
19 circumstances, defendant reasonably could have believed that his liberty was
20 significantly restrained when the officers asked him for identification. *Id.* at 204. Under
21 that court's then-current case law, if defendant also subjectively believed as much, he was

1 seized.⁴ Because defendant had not given the officers a false name by then, thus giving
2 the officer reasonable suspicion to stop him, the majority concluded that the seizure was
3 unlawful. *Id.* at 203-04.

4 Four judges dissented, disagreeing that the officers seized the occupants of
5 the car during the initial encounter by explaining the reason for the contact and asking for
6 identification. *Id.* at 208-09 (Edmonds, J., dissenting). The dissent further concluded
7 that the encounter rose to the level of a seizure when the officers asked defendant and the
8 driver to step out of the car, but at that point, the seizure was justified by reasonable
9 suspicion. *Id.* at 208, 210. The dissent, accordingly, would have affirmed the trial court's
10 judgment. *Id.* at 213.

11 The state sought review of whether, as the Court of Appeals majority had
12 concluded, defendant was seized for purposes of Article I, section 9, when the officers
13 contacted the car's occupants and asked them for identification. The state's argument on
14 that issue tracks the reasoning of the dissent in the Court of Appeals -- *viz.*, no seizure
15 occurred before defendant and the driver were asked to get out of the car, at which point

⁴ Relying on its decision in *State v. Ashbaugh*, 225 Or App 16, 28, (2008) *rev'd*, 349 Or 297, 244 P3d 360 (2010), the Court of Appeals remanded the case to the trial court for findings regarding whether defendant in fact believed that his freedom was significantly restrained at that point. *Anderson*, 231 Or App at 204. Subsequently, in *Ashbaugh*, we explained that a seizure for purposes Article I, section 9, is not determined by the subjective impressions of the person interacting with the officer. 349 Or at 316. The determinative question is therefore not whether defendant reasonably *could* have believed that the officers significantly restricted his liberty, but rather whether a reasonable person in defendant's circumstances *would* believe that to be the case.

1 the officers had reasonable suspicion to detain them.⁵ In response, defendant urges us to
2 adopt the reasoning of the Court of Appeals majority and conclude that defendant and the
3 driver were unlawfully seized when the officers first requested their identifications. We
4 turn to the parties' arguments in those regards.⁶

⁵ Preliminarily, the state asks us also to further revise the two-part "seizure" test that we recently modified in *Ashbaugh*. 349 Or at 316. We declined the state's invitation to revisit that test in *Backstrand* because, as the parties agreed, the case did not adequately implicate the prong of the test that the state asks us to reconsider. ___ Or at ___ n 8 (slip op at 8 n 8). Likewise, the parties here also agree that this case does not implicate that prong. We therefore decline the state's invitation in this case as well.

⁶ The parties' arguments also suggest a further issue, one that we conclude has not been presented and preserved in this case. In its petition for review, the state urged that the Court of Appeals "implicitly held that defendant could establish exploitation -- or 'but for' causation of the discovery of the evidence -- not by reference to the alleged unlawful seizure of [defendant's] person, but with respect to the allegedly unlawful seizure of *the driver*." (Emphasis in original.) The state petitioned the Court of Appeals for reconsideration to address that perceived implicit holding, asserting that defendant could not seek suppression based on a *Hall*-type claim that the officers exploited an unlawful stop of the driver to obtain her voluntary and otherwise lawful consent. *See generally State v. Hall*, 339 Or 7, 24-25, 115 P3d 908 (2005) (discussing suppression of derivative evidence based on exploitation of initial illegality). The Court of Appeals declined to consider the state's arguments in that regard, declaring that they had not been raised either in the state's brief or at trial. *Anderson*, 234 Or App at 424.

In its merits brief to this court, the state does not further address that exploitation issue. Defendant, for his part, analyzes at some length whether -- separate and apart from whether defendant was unlawfully stopped -- the officers unlawfully stopped the driver at any of a series of points in time, ranging from when Zavala first approached her while sitting in the car to when Johnson asked her for consent to search. Defendant, too, however, does not address whether defendant is entitled to suppression based on an argument under *Hall* that the driver's consent was tainted, not by exploitation of a violation of defendant's rights, but by exploitation of a violation of the driver's rights.

That novel exploitation issue, however, is not properly before us. As we have described, defendant made only two arguments at trial. First, he argued that he and the driver were illegally stopped as soon as the officers approached the car and that the driver's consent was a product of the illegality that was common to both the driver and defendant. Second, he argued that the driver's consent was involuntary. Defendant did

1 ANALYSIS

2 In *Backstrand*, also decided today, we outline at some length the principles
3 that guide the analysis of what constitutes a seizure for purposes of Article I, section 9,
4 and in particular, when a police request for information or cooperation results in such a
5 seizure. __ Or at __ (slip op at 7-26). In doing so, we reaffirm certain propositions that
6 our case law has endorsed over the last several decades. Key among those propositions,
7 for purposes of the three related stop cases decided today, is that not every police-citizen
8 encounter rises to the level of a seizure for constitutional purposes. Rather, as this court
9 has long held and frequently reaffirmed, "law enforcement officers remain free to
10 approach persons on the street or in public places, seek their cooperation or assistance,
11 request or impart information, or question them without being called upon to articulate a
12 certain level of suspicion in justification if a particular encounter proves fruitful." *State*
13 *v. Holmes*, 311 Or 400, 410, 813 P2d 28 (1991).⁷ That is true even though the person
14 approached may be discomforted by an officer's inherent authority as such and, for

not argue that, if he was lawfully stopped and the driver was not, the driver's voluntary consent was the tainted product of her separate illegal stop and defendant was entitled to suppression on that basis. In the Court of Appeals, defendant abandoned any argument about the voluntariness of the driver's consent, and he did not challenge the trial court's ruling that the officers had developed reasonable suspicion when defendant gave Johnson a false name. Thus, the Court of Appeals described the only issue before it as whether, "at that point in the encounter, *defendant* was seized for purpose of Article I, section 9." *Anderson*, 231 Or App at 203 (emphasis added). That, likewise, is the only issue before us on review.

⁷ That principle was immediately reaffirmed following *Holmes* in *State v. Gerrish*, 311 Or 506, 513, 815 P2d 1244 (1991), and most recently in *State v. Watson*, 353 Or 768, 774, 305 P3d 94 (2013). Other cases reaffirming *Holmes* in the interim are too numerous for citation.

1 reasons personal to the individual, feel inclined or obliged to cooperate with the officer's
2 request. *Backstrand*, ___ Or at ___ (slip op at 9-12). For an encounter between an officer
3 and a citizen to be a seizure under Article I, section 9, the officer must add to those
4 inherent pressures by either physically restraining the citizen's liberty in a significant way
5 or engaging in a "show of authority" that, explicitly or implicitly, reasonably conveys to
6 the person a significant restriction on the person's freedom to terminate the encounter or
7 otherwise go about his or her ordinary affairs. *Id.* at ___ (slip op at 12); *see also Holmes*,
8 311 Or at 410 ("physical contact does not transform the encounter into a 'seizure' if it is a
9 normal means of attracting a person's attention (*e.g.*, policeman tapping citizen on the
10 shoulder at the outset to get a citizen's attention)").

11 We, therefore, reaffirm in *Backstrand* that verbal police inquiries are not,
12 by themselves, seizures. *Id.* at ___ (slip op at 13) (citing propositions from *State v.*
13 *Rodgers/Kirkeby*, 347 Or 610, 622, 624, 227 P3d 695 (2010)). "Something more" is
14 required. *Id.* (slip op at 13). That something more can be "the content or manner of
15 questioning, or the accompanying physical acts by the officer, if those added factors
16 would reasonably be construed as a 'threatening or coercive' show of authority requiring
17 compliance with the officer's request." *Id.* at ___ (slip op at 13-14) (citing *State v.*
18 *Ashbaugh*, 349 Or 297, 317, 244 P3d 360 (2010)). If an officer does not, by words or
19 conduct, convey such a show of authority, the officer remains free to contact or otherwise
20 engage a citizen to request information and cooperation or to impart information without
21 justification. *Id.*

22 With those precepts reaffirmed, *Backstrand* resolves an issue that this court

1 has not before decided: Whether an officer's request for and verification of a person's
2 identification are actions that, in and of themselves, convert an encounter that is not a
3 seizure for constitutional purposes into one that is. We hold in *Backstrand* that they do
4 not. "Asking for identification," we observe, "is exactly the kind of interaction that
5 *Holmes* contemplated -- a request for information and a citizen's cooperation." *Id.* at ___
6 (slip op at 21). Thus, a mere request for identification made by an officer in the course of
7 an otherwise lawful police-citizen encounter is not sufficient, in and of itself, to result in
8 a seizure. *Id.* at ___ (slip op at 21-22). Nor does an officer's action of verifying a person's
9 identification, without more, convert the encounter into a seizure. *Id.* at ___ (slip op at
10 26). As the decision in *Backstrand* explains:

11 "We see no principled basis for concluding that, when an officer checks the
12 validity of a proffered identity or piece of identification, such an action *per*
13 *se* conveys to a reasonable person -- who is not otherwise restrained and
14 who has willingly tendered the information to the officer -- that the officer
15 is now exercising his or her authority to coercively restrain the person's
16 liberty or freedom of movement. To be sure, as we have already discussed,
17 a person tendering identification to an officer may not subjectively feel
18 comfortable refusing the officer's request. Instead, for any number of
19 personal reasons or instincts, the person may be unwilling to decline the
20 officer's request. Those internalized motivations and feelings are not the
21 test for whether there is a seizure under Article I, section 9. A person who
22 turns over identification to a law enforcement officer reasonably would
23 expect that the officer will take steps to verify its validity. For the officer to
24 do so does not objectively convey an exercise of the officer's authority to
25 restrain the person's liberty or freedom of movement. The circumstance is
26 akin to when a person gives valid consent to search. Part and parcel with
27 giving consent is a reasonable person's expectation that he or she will likely
28 either need or want to stand by while the officer performs the search. The
29 person who waits while a consent *search* is completed is not thereby *seized*
30 for purposes of Article I, section 9. So, too, with a person who, in a
31 noncoercive setting, gives an officer his or her identification for the
32 officer's examination. The fact that the officer conducts that examination is

1 not, in and of itself, a basis to conclude that the otherwise noncoercive
2 encounter has become a *coercive* restraint on the person's liberty."

3 *Id.* at ___ (slip op at 25-26) (emphasis in original) (footnote omitted).

4 Our analysis in this case begins with that holding from *Backstrand*. The
5 question framed by the parties' arguments is whether the officers seized defendant and the
6 driver by walking up to them in the car, explaining why the officers were contacting
7 them, and asking them for identification. If defendant was seized at that point, the
8 seizure was unlawful. At that point, as the trial court concluded and we agree, the
9 officers lacked reasonable suspicion to temporarily detain either the driver or defendant.⁸
10 If, however, defendant was not seized at that point, this case effectively ends with that
11 conclusion. The trial court found that the officers seized defendant by asking him to get
12 out of the car, but also found that by then defendant had given them a false name. The
13 trial court concluded that, under the circumstances, the false name that defendant had
14 provided to the officers gave rise to reasonable suspicion to detain him further.
15 Defendant did not challenge the trial court's reasonable suspicion conclusion on appeal to
16 the Court of Appeals, see ___ Or at ___ n 6 (slip op at 9-10 n 6), and does not do so --
17 nor could he -- now. Thus, the question before us is focused specifically and narrowly on
18 the officers' initial contact with defendant and the driver.

19 Factually, that contact -- up to and including the request for identification --

⁸ The trial court expressly found that the officers developed reasonable suspicion when defendant identified himself with a name that one officer immediately recognized as false. The state did not challenge that conclusion on appeal. *Anderson*, 231 Or App at 202-03. Nor does it challenge it before this court.

1 was both brief and limited. Zavala, in a matter of seconds, explained to the driver what
2 the officers were doing at the apartment and why the officers were interested in talking to
3 them. Then, Zavala asked the driver for identification, while Johnson asked defendant
4 for the same. Under *Holmes*, the officers did not seize the occupants of the stopped car
5 by merely approaching them to explain why they had followed them from the apartment
6 and why they wanted to talk to them. 311 Or at 410. Nor, under *Backstrand*, did the
7 contact become a seizure because the officers then asked them for identification. A
8 request for identification, in and of itself, is a request for information or cooperation of
9 the kind that falls outside of the constraints of Article I, section 9. *Backstrand*, ___ Or at
10 ___ (slip op at 21-22).

11 The remaining question is whether the circumstances as a whole
12 transformed the encounter into a seizure despite those conclusions. In particular, the
13 question is whether the content of the officers' requests, the manner in which they were
14 made, or the overall context of the contact elevated the encounter to the level of a seizure
15 by conveying to defendant and the driver that the officers would not allow them to leave.
16 The record does not suggest, however, that the officers' tone or manner were overbearing
17 or controlling, such that what otherwise were mere verbal exchanges were, in fact,
18 something more. Nor was the content of the brief verbal exchange coercive. Zavala's
19 explanation of the officers' reasons for the contact and the officers' requests for
20 identification informed defendant and the driver that the officers were interested in why
21 they had come to the apartment and what they knew about Wilson's activities. That
22 information objectively conveyed possible suspicion that the driver and defendant could

1 be involved in criminal activity related to the apartment, but they equally conveyed that
2 the officers were interested in whatever information the two might be able to provide. In
3 all events, by those brief verbal exchanges and inquiries alone, the officers did not
4 communicate an exercise of authority of the kind required for a seizure -- *i.e.*, authority to
5 restrain. *See Backstrand*, ___ Or at ___ (slip op at 27-30) (officer's request for
6 identification, even though it might convey concern that defendant was under age in adult
7 book store and might not be permitted to remain inside, was not sufficient, without more,
8 to seize defendant); *Ashbaugh*, 349 Or at 317 (after arresting defendant's husband, officer
9 returned to defendant, asked if she had anything illegal in her purse, and asked for
10 consent to search; encounter not a seizure). The officers were uniformed, but took no
11 physical action other than to approach the parked car, and the officers requested no
12 physical action from defendant and the driver at that point. Under those circumstances,
13 the fact that there was one more officer present than there were people in the car would
14 not cause a reasonable person seated in the car to believe that the officers were
15 significantly restricting his or her liberty. Rather, the circumstances here fall into the
16 large category of cases in which police officers approach and question persons sitting in
17 parked vehicles without triggering constitutional protections against unreasonable
18 seizures. *See* Wayne R. LaFare, 4 *Search and Seizure* § 9.4(a), 576 (5th ed 2012) (citing
19 cases).⁹

⁹ Defendant relies on two of our prior decisions, *State v. Warner*, 284 Or 147, 585 P2d 681 (1978), and *Rodgers/Kirkeby* to argue that the officers' request for identification here constituted a seizure. We discussed both cases at some length in *Backstrand*. ___ Or at ___ (slip op at 22-23, 25) (discussing *Warner*) and ___ (slip op at 17-

1 Although the parties disagree whether the officers seized the driver and
2 defendant when they approached them in the parked car and requested their
3 identifications, they concur that the two were seized when the officers asked them to get
4 out of the car. Given the totality of circumstances, including Johnson's expressed
5 disbelief in defendant's identification of himself as Steve Tipton, a reasonable person
6 would take the officers' "requests" to exit the car to be directives and would believe that
7 his or her liberty was significantly restrained. *See State v. Jacobus*, 318 Or 234, 236,
8 240-41, 864 P2d 861 (1993) (officer seized the defendant by repeated "requests" that the
9 defendant "step out" of a parked vehicle). We therefore agree with the parties that, given
10 the attendant circumstances, defendant was seized at that point for purposes of Article I,
11 section 9.

12 But as we earlier observed, the trial court concluded that, once defendant
13 gave a false name to Johnson, the officers had reasonable suspicion to detain him.
14 Defendant did not challenge that conclusion in the Court of Appeals, and he does not --
15 and cannot, having not done so in the Court of Appeals -- challenge the trial court's

18) (discussing *Rodgers/Kirkeby*). *Warner* involved the "something more" than a mere request for identification that this case and *Backstrand* lack. There, police made it clear that the defendant and his companion were the central focus of their criminal interest, and then asked for his identification, removed it from him physically, and advised him that he could "be on [his] way" as soon as they could "clear this matter up." *Warner*, 284 Or at 150-52. In *Rodgers/Kirkeby*, the defendants had been lawfully stopped, and thus already seized. The officers completed their investigations, but then continued questioning the defendants. In that distinctive context, such conduct meant that the officers' verbal inquiries conveyed to the defendants that they remained subject to the officers' restraint, and thus were seized for constitutional purposes. 347 Or at 627-28. Just as we concluded those cases were distinguishable in *Backstrand*, we conclude they are distinguishable here.

1 reasonable suspicion determination now.¹⁰ Consequently, at the point that defendant was
2 first seized, there is no dispute that the officers had reasonable suspicion for the seizure.
3 The seizure was, therefore, lawful.

4 CONCLUSION

5 The officers did not seize the driver and defendant by walking up to the two
6 in a parked car, inquiring into their connection to an apartment that they had just
7 approached, and asking the two for their identifications. Those questions did not
8 constitute a sufficient show of authority to cause a reasonable person under the
9 circumstances to believe that his or her liberty was significantly restrained and, therefore,
10 did not constitute a "seizure." The encounter rose to the level of a seizure only once the
11 officers asked the driver and defendant to step out of the car. Defendant, however, has
12 not challenged the trial court's conclusion that the officers at that point had reasonable
13 suspicion for the seizure. Because the seizure was lawful, the trial court correctly denied
14 defendant's motion to suppress the items discovered in the car.

15 The decision of the Court of Appeals is reversed. The judgment of the
16 circuit court is affirmed.

¹⁰ The trial court did not specify whether it found reasonable suspicion based on either or both of the grounds that Johnson identified, which were that he believed that defendant had committed the crime of giving a false name to an officer, ORS 162.385 (crime to give false information to an officer for the purpose of the officer's arresting the person on a warrant or issuing a citation), and that, in Johnson's training and experience, people usually give false names to avoid being arrested on an outstanding warrant or to avoid detection for criminal activity.

1 WALTERS, J., dissenting.

2 I respectfully dissent. For the reasons I explain today in *State v.*
3 *Backstrand*, ___ Or ___, ___ P3d ___ (Nov 21, 2013) (Walters, J., concurring) (slip op at
4 1), it is my view that when an officer requests an individual's identification in
5 circumstances in which a reasonable person would believe that he or she is being
6 subjected to a criminal investigation and therefore must respond, provide the
7 identification, and remain until the officer completes the immediate investigation, the
8 officer restrains the individual's liberty and effects a seizure under Article I, section 9, of
9 the Oregon Constitution.

10 In this case, officers were searching an apartment as part of a criminal drug
11 investigation when defendant came to the open door of the apartment. When defendant
12 saw the officers searching the apartment, he walked from the apartment to the car in
13 which he had arrived and got into the passenger's seat. Three officers approached the car;
14 two stood on one side of the car and the other stood on the opposite side. One officer was
15 in uniform, another was wearing a raid vest. One officer explained that the officers were
16 executing a search warrant at the apartment, that the officer had been told that the driver
17 and defendant had approached the door of the apartment, and that the officer wanted to
18 know "who they were," and "what interest they might have" with what the officers were
19 doing. That officer then asked the driver for identification; another officer asked
20 defendant for identification.

21 The majority recognizes that the officers objectively conveyed "possible
22 suspicion" that defendant "could be involved in criminal activity related to the

1 apartment," but also suggests that the officers "equally conveyed that [they] were
2 interested in whatever information [defendant and the driver] might be able to provide."
3 ___ Or at ___ (slip op at 15-16). The majority then concludes that those "brief verbal
4 exchanges" did not "communicate an exercise of authority of the kind required for a
5 seizure -- *i.e.*, authority to restrain." *Id.* at ___ (slip op at 16). Neither, the majority
6 concludes, did the fact that three officers surrounded the car. The majority reasons that
7 the officers requested no physical action from defendant and that there was only one
8 more officer present than there were people in the car. *Id.* at ___ (slip op at 16).

9 Although the majority recites the requirement that the court consider the
10 circumstances as a whole, *id.* at ___ (slip op at 15), the majority does not wrestle
11 sufficiently with the combined effect that the officer's communication and conduct would
12 have on a reasonable person. When considered in combination, the facts that the officers
13 were in the process of conducting a drug investigation, that the officers indicated that
14 they considered defendant a potential suspect in that investigation, and that the officers
15 asserted physical authority over defendant by surrounding the car in which he was seated,
16 add up to a show of authority that would have conveyed to a reasonable person that he
17 was the subject of a criminal investigation and therefore was not free to leave or go about
18 his ordinary business until the immediate investigation was completed. *Id.* at ___ (slip op
19 at 18). *See State v. Thompkin*, 341 Or 368, 378-79, 143 P3d 530 (2006) (officers seized
20 defendant, a car passenger, when they requested and retained her identification,

21

1 conducted a records check, and questioned her about drugs). The majority's contrary
2 conclusion is, in my view, wrong.¹¹

3 The reasoning that the majority uses to reach that conclusion also illustrates
4 two of the points that I seek to make in my concurrence in *Backstrand*. First, in this case,
5 the majority correctly focuses on whether the officers' communication and conduct would
6 cause a reasonable person to believe that his or her liberty was restrained, and, in doing
7 so, calls attention to the majority's different focus in *Backstrand*. In this case, the
8 majority does not consider whether a reasonable person in the circumstances presented
9 would *expect* the officers' conduct or consider it *appropriate*, or whether the officers'
10 investigation continued for more than a *reasonable* period -- considerations that the
11 majority considered determinative in *Backstrand*. ___ Or at ___ (slip op at 28-30). If
12 such considerations were relevant to whether the officers seized defendant, then, in this
13 case, they would demonstrate that the officers engaged in conduct that a reasonable
14 person would not expect or consider appropriate if engaged in by others. The majority's
15 failure to address those considerations in this case demonstrates either that those
16 considerations are not relevant to determine whether a seizure has occurred or, if they are
17 relevant, that the majority is unwilling to consider them in an instance in which they
18 demonstrate that a seizure did occur.

19

¹¹ I recognize that the majority goes on to consider the officers' actions after obtaining defendant's identification and concludes that those actions resulted in a seizure. ___ Or at ___ (slip op at 1). I disagree only about the point in time at which the seizure occurred.

1 Second, in deciding that an individual who is sitting in a parked car
2 surrounded by officers who could be investigating his involvement in drug activity is free
3 to leave and need not remain and respond to the officers' inquiries, the majority invites
4 conduct that officers do not expect or intend an individual in that circumstance to take. If
5 the individual were to make a move toward the door of the car or begin to exit, the
6 officers might reasonably believe that their safety was threatened. The majority's
7 decision encourages the public to act in ways that increase rather than reduce the risk of
8 conflict.

9 I respectfully dissent.

10 Baldwin, J., joins in this dissenting opinion.

11