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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, -VS- STEVE SMITH Defendant	CASE No. 18CRXXXXX MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

Summary Of Facts From Discovery

(DELETED FOR ON-LINE POSTING)

Points And Authorities In Support Of Motion To Suppress

1. Police Unlawfully Extended The Duration Of The Traffic Stop Of Mr. Smith And His Truck.

Stopping a vehicle and detaining its occupants is a "seizure" of the person within the meaning of Article 1, Section 9 of the Oregon Constitution, and must be supported by probable cause that the person has committed a traffic infraction. *State v. Matthews,* 320 Or 398, 402 (1994). Even if the initial traffic stop of a defendant was reasonable, his continued detention by law enforcement officers may be

excessive, becoming an unlawful stop, unless supported by reasonable suspicion that the defendant is committing a crime in addition to the traffic violation. "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illionois v. Caballes*, 543 US 405, 407 (2005). Furthermore, Prolonged detention of a person may constitute an illegal arrest if not based on probable cause. *Dunaway v. New York,* 442 US 200 (1979); *State v. Carter/Dawson,* 287 Or 479 (1979); *State v. Morgan,* 106 Or App 138 (1991).

"Police authority to detain a motorist dissipates when the investigation reasonably related to that traffic infraction, the identification of persons, and the issuance of a citation (if any) is completed or reasonably should be completed." *State v. Rodgers,* 347 Or 610, 623 (2010)(rejecting State's claim that a slight delay to request consent to search does not render the stop "unreasonable"). In Mr. Smith's case, he had provided his license and registration, and was cleared for any warrants at approximately 11:51 a.m. Rather than issue the traffic citations, the officers continue to detain him and question him about his association with two local residents with felony drug convictions, awaiting arrival of K-9 Max at 11:57.

A traffic stop becomes excessive when, as an alternative to processing the infraction, the officer delays by questioning the motorist about unrelated matters, even if the questioning takes only a minute or two. *State v. Rodgers*, 219 Or App 366, 369 & 372 (2008), *affirmed*, 347 Or 610 (2010). Questioning on matters unrelated to the traffic infraction, or a request to search, that do not occur "during an

unavoidable lull in the [traffic infraction] investigation," unlawfully extends the duration of a stop beyond the time reasonably required to cite a defendant for the traffic infraction. *State v. Foland*, 224 Or App 649, 653-654 (2008), *rev. den.,* 348 Or. 14 (2010); *State v. Broughton*, 221 Or App 580, 590 (2008), *rev. den.,* 345 Or. 415 (2010)("To allow an officer to elicit potentially incriminating information from a motorists while that officer considers whether to issue a citation allows an officer to extend a stop for too long.").

> [W]hen a person is approached by a police officer—whether the person is in an automobile, on a bicycle, or on foot—for committing a noncriminal traffic violation, and the police officer and the person know that is the basis of the stop, then the officer who has approached the person must proceed to process the traffic violation, and may not launch an investigation into unrelated matters unless the inquiries are justified by reasonable suspicion of the unrelated matter, the inquiry occurred during an unavoidable lull in the citation-writing process, or some exception to the warrant requirement applies.

State v. Jimenez, 263 Or App 150, 158 (2014), *aff'd.,* 357 Or. 417 (2015). In the case at bar, Det. Schwab informed Mr. Smith he was stopped due to improper lane changes and using his cell phone by driving, and then proceeded to launch his investigation into suspected drug trafficking activity. *Foland, supra,* 224 Or App at 654 (when officer questioned defendant about drug possession as an alternative to continuing to process traffic citation or ending the traffic stop, officer unlawfully extended the stop); *Broughton, supra,* 221 Or App at 589(officer unlawfully extended stop by initiating conversation on an unrelated topic after records check was clear).

Under the Fourth Amendment, "[F]or the duration of a traffic stop, a police officer effectively seizes 'everyone in the vehicle,' the driver and all passengers. *State*

v. Bailey, 356 Or. 486, 507 (2014)(quoting *Arizona v. Johnson,* 555 US 323, 327 (2009)). If an officer unlawfully extends a traffic stop without reasonable suspicion or probable cause of criminal activity with respect to the driver, under Article 1, section 9, the defendant-driver was likewise unlawfully seized under the Fourth Amendment. *Id.; Johnson* at 333; *see, Rodriquez v. United States,* 135 SCt 1609, 1512 (2015)(reaffirming rule from *Illinois v. Caballes* that police may not exceed the time needed to "complete the mission of issuing a ticket," to conduct a dog sniff, in the absence of reasonable suspicion of crime).

2. Reasonable Suspicion Did Not Exist, Or If It Existed Did Not Support, The Duration Of The Stop Of Mr. Smith's Truck, Person And Effects, And The Scope Of Police Investigation And Interrogation.

"Reasonable suspicion" that a particular person "has committed or is about to commit a crime" can justify a stop-level seizure in order to enable the officer to make reasonable inquires of the person about the crime. *State v. Belt*, 325 Or. 6, 12 (1997); *State v. Maciel-Figueroa*, 361 Or. 163, 170 (2017)("reasonable suspicion" is the term of art for the degree of justification an officer must have before conducting a criminal investigative stop). Article I, section 9, typically requires that the level of justification for a seizure correlate with the extent to which the seizure infringes on a citizen's liberty. *State v. Fair*, 353 Or. 588, 603 (2013). Thus, to arrest a citizen, an officer must have probable cause; however, a temporary detention for investigation (hereinafter referred to as a "stop") requires a lower standard—reasonable suspicion of criminal activity. *Id.*

After reviewing the evolution of the "reasonable suspicion" standard in Oregon, the Supreme Court found it "well established" that police "must reasonably suspect—based on specific and articulable facts—that the person committed a *specific* crime or type of crime or was about to commit a *specific* crime or type of crime." *Maciel-Figueroa*, 361 Or. at 182 (emphasis added). "For a court to determine that an investigative stop was lawful under Article I, section 9, the court (1) must find that the officers actually suspected that the stopped person had committed a specific crime or type of crime, or was about to commit a specific crime or type of crime, and (2) must conclude, based on the record, that the officers' subjective belief—their suspicion—was objectively reasonable under the totality of the circumstances existing at the time of the stop." *Id*. Courts must only "look to the objective facts known to the officer *at the time of the stop*" and cannot rely on information learned after the stop. *State v. Chambers*, 69 Or App 681, 685 (1984)(emphasis supplied).

Mr. Smith was seized within the meaning of Article 1, section 9, as well as the Fourth Amendment, *Arizona v. Johnson, supra,* from the initiation of the purported traffic stop. At the outset, Officer Fulmer ordered Smith to place his hands on the steering wheel and keep them there, and advised Smith he's been stopped because "some detectives need to talk to you . . . . So just go ahead and remain right there." *See, Rodgers,* supra 347 Or. at 623 ("if the purpose of a traffic stop is to investigate crime, evidence gained from the stop must be obtained in compliance with Article 1, section 9."); *United States v. Chan-Jimenez,* 125 F3d 1324, 1326 (9th Cir. 1997)(a seizure occurs when a police officer retains a motorist's license longer than necessary

to ascertain everything is in order, and initiates further inquiry). That is the start of a criminal investigatory detention—not a traffic stop for issuance of a non-criminal citation.

Det. Schwab arrived approximately 4-5 minutes after Fulmer pulled Smith over, and began questioning him about Thornton while holding on to his license and registration. A reasonable person would believe he or she was not free to leave when the person was the investigatory subject of a pending warrant check and was being questioned about illegal activity. *E.g., State v. Thompkin,* 341 Or. 368, 378-79 (2006); *State v. Hall*, 339 Or. 7, 19 (2005). "A 'seizure' of a person occurs under Article I, section 9, of the Oregon Constitution: (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances would believe that (a) above has occurred." *State v. Ashbaugh,* 349 Or. 297, 316 (2010). Reasonable suspicion—not probable cause—is all that is required to stop a vehicle to investigate whether the person in it has committed a crime. *State v. Ricks*, 166 Or App 436, 441 (2000).

At the time of the investigatory seizure of Mr. Smith and his truck, officers lacked reasonable suspicion that he had committed any crime. At that point in time, the only information possessed by officers was an anonymous tip that Jerry Thorton "was in possession of a dealer amount of methamphetamine in the Medford area and was driving a blue Ford Mustang," and Mr. Smith's association with him in public view outside a restaurant and in the parking lot. From those observations, Det. Neville

surmised "both individuals appeared to be familiar with each other . . . . On at least one occasion both Jerry and Steve stood behind the Ford Mustang with the trunk open, reached into the trunk, and talked to each other for what appeared to be a couple of minutes."

Officers made no observations that Mr. Smith retrieved any item from the trunk of Thornton's car, put any item in the trunk, handed anything to Thornton, or was handed anything by Thornton. Furthermore, they had no information that Thornton—who was not spotted in Medford, but rather in Central Point—allegedly remained in possession of methamphetamine; or for that matter, had ever possessed the methamphetamine inside his car rather than at a stash house or other location. Neville also learned Thornton had active warrants for felony drug charges, and Smith had a 30-year-old conviction for possession of controlled substance for sale, and a 2010 conviction for misdemeanor drug possession. Mr. Smith did not exhibit nervousness in conversing with the officers nor was he observed making any furtive movements while inside his vehicle. He did not exhibit any signs of being under the influence of drugs.

The conclusory, anonymous tip that Thornton possessed "a dealer amount of methamphetamine in the Medford area and was driving a blue Ford Mustang" is a red herring as to Mr. Smith, and does not support a reasonable suspicion that he was committing a drug crime. *See, Florida v. J.L.,* 529 US 266, 271-72 (2000)(An anonymous tip that a specific person at a particular location is carrying a gun is not, by itself, sufficient to justify an investigative stop, when police have no basis for believing that a tipster had "knowledge of concealed criminal activity" because he did

not explain how he knew about the gun, did not suggest that he had any special familiarity with the defendant's affairs, and did not predict any future behavior that officers could verify for corroboration).

Even when reasonable suspicion, rather than probable cause, is the standard, the State must show that the information supplied is reliable or that the informant is credible. *State v. Guggenmos*, 350 Or. 243, 255-256 (2011). "[T]he reliability of an unnamed informant's statements is determined by evaluating the basis of knowledge of the facts reported and the facts demonstrating that the informant is credible or that the information reported is reliable." Id., at 256. In Mr. Smith's case, the tipster was anonymous, so not exposed to possible criminal and civil prosecution if the report was false. The tip was conclusory and as such, provided no reason to find the informant had personal knowledge of Thorton possessing drugs, rather than perhaps knowing Thorton's car and its proximate location in Oregon; and those innocent details were the only ones corroborated by the officers. The Supreme Court in *Guggenmos* found that similar conclusory tips from two different unnamed informants that drug sales occurred at a particular house, that people with warrants were there, and that a brown pickup parked outside the house might contain drugs, along with other factors, did not rise to reasonable suspicion, as there was no information about the informants' credibility or bases of knowledge.

Furthermore, the officer's suspicion must be particularized to the person based on that person's conduct, demeanor or appearance—not that of the person's companions. *State v. Kingsmith*, 256 Or App 762, 770 (2013); *State v. Miglavs*, 337

Or. 1, 12 (2004)("A police officer's suspicion must be particularized to the individual based on the individual's own conduct."). Here, the officers lacked any information specific to Mr. Smith that he—rather than Thornton—was committing a crime.

Mr. Smith's known history of past drug use—most recently a 2010 misdemeanor drug possession conviction—also does not equate with a reasonable inference of his current or imminent participation in drug crime. *State v. Frias*, 229 Or App 60, 64-66 (2009)(facts that defendant was evasive in response to officer's questions during traffic stop, was awaiting sentencing on drug charges, and had dark circles under eyes did not provide reasonable suspicion that defendant possessed drugs at time of stop).

Mr. Smith's brief association with Thornton—reportedly a known drug dealer—on a single occasion, for less than an hour, at a restaurant and the public parking lot—falls far short of reasonable suspicion. *See, State v. Heater,* 263 Or App 298, 306 ("We have squarely rejected the proposition that a person's association with an individual involved with criminal drug activity is a basis for a reasonable suspicion of that person's own involvement in criminal drug activity."), *rev'd on other grounds,* 356 Or. 574 (2014); *State v. Bertsch*, 251 Or App 128, 134 (2012)("It is not reasonable to conclude that a person is involved in drug crimes because he or she is in the company of a known drug user or dealer," and finding additional facts that defendant was visiting an apartment building suspected of drug activity, left the apartment shortly after arriving, was accompanied by a person known to associate with drug dealers, and had recently completed probation for drug conviction, did not provide

reasonable suspicion); *State v. Wiggins,* 262 Or App 351, 362 (2014)(stating that the circumstances establish nothing more than that the defendant, who had admitted to using drugs months before the stop, was present in high drug use areas and was associating with others who had been or may have been involved in drug-related activities. "If that were sufficient to establish reasonable suspicion, we would be effectively sanctioning nonparticularized status-based stops of individuals who have used drugs in the past.").

The defense does not anticipate testimony that the restaurant where Smith and Thornton were spotted is a known or suspected drug house, but even that would not provide reasonable suspicion. *Bertsch, supra*; *State v. Rutledge*, 243 Or App 603, 610 (2011)(holding that facts were insufficient to justify reasonable suspicion where the defendant "had just left a motel that the police believed was involved in drug activity, [and] was in a car with a person suspected of drug activity" and acted nervous when officer asked to look in her purse); *State v. Zumbrum,* 221 Or App 362, 369-70 (2008)(stating that although the defendant was present in the same apartment as a person who participated in "mid- to upper-level drug deals," that the apartment was located in a "high-crime area," and that the apartment was the subject of tips about illegal drug activity, those facts did not "tell [the court] whether [the] defendant * * * was involved in criminal activity").

Assuming officers will testify at hearing on this motion that the conduct observed between Thornton and Smith in the restaurant parking lot, coupled with them leaving at the same time and Smith circling round to see why Thornton was

stopped by police, caused them to believe a drug transaction had or was occurring, that also does not amount to reasonable suspicion. An officer's subjective belief that the stopped person is committing a crime fails to establish "reasonable suspicion" if that belief is not "objectively reasonable." *State v. Guest*, 207 Or App 395, 399 (2006); *State v. Villemeyer*, 227 Or App 193, 198 (2009)(An officer's "special intuitions" cannot form the entire basis for reasonable suspicion).

The Court of Appeals has found circumstances more persuasive of a drug transaction occurring than those in Mr. Smith's case, to not amount to reasonable suspicion. *See, e.g., State v. King,* 67 Or App 749 (1984); *State v. Jacobs*, 187 Or App 330 (2003). In *King,* officers observed two cars parked door to door in a secluded area of a freeway rest stop. *Id.* at 752. The officers knew that there had been instances of drug use in the rest area. *Id.* Two men in their early twenties were sitting in one of the cars. The other car was unoccupied. The officers observed the defendant get out of the occupied car and walk to the vacant car carrying a brown paper bag, which could have contained drugs. *Id.* The officers subjectively believed that they had just witnessed a "drug buy." *Id.* The police stopped the defendant and obtained an admission that the bag contained drugs. *Id.* at 751. The Court of Appeals concluded that those facts failed to establish an objectively reasonable suspicion of a drug transaction. *Id.*

In *Jacobs*, *supra,* officers were driving through downtown Salem, a "high drug traffic area," when they saw three men "huddled together" near an automated teller machine. They were looking around "in a nervous manner" when the defendant passed

what looked like money to one of the others. The officers suspected that a drug transaction was occurring, so they approached the men and said, "[I]t looks like you guys just did a drug deal." The defendant denied the accusation. One of the officers searched the defendant and found a plastic bag containing marijuana. The court held that there was "no evidence that the specific location was a site of continuous, hand-to-hand drug traffic. There is only a vague reference to the entirety of downtown Salem as a 'high drug traffic area.'" *Id.* at 335. The court continued, holding "furtiveness in the act of engaging in what may nevertheless be entirely lawful conduct does not establish an objectively reasonable basis for a belief that a crime has been committed." *Id.* at 336.

Assuming, arguendo, that officers would only need reasonable suspicion starting at the time they unlawfully extended a valid traffic infraction stop—rather than at the time of the stop—the only additional factor would be Mr. Smith's answers to initial questioning by Det. Schwab regarding his association with Thornton and travel plans, which Det. Schwab will likely characterize at hearing on this motion as "evasive." However, the Court of Appeals has held that "evasive" answers in response to "questioning that he [was] constitutionally entitled to refuse to answer," does not furnish reasonable suspicion. *Frias*, *supra,* 229 Or App at 65-66.

As previously discussed, the traffic stop was unlawfully extended prior to the reported alert of K-9 Max to Mr. Smith's truck, which may or may not establish

probable cause to search.[1] Reasonable suspicion was also lacking from the outset of the stop and prior to the reported canine alert. For the deployment of K-9 Max to be constitutionally valid, the seizure of Mr. Smith and his truck prior to and at the time would have to be lawful. As previously discussed, it was not. However, dependent on the State's response to this motion, the defense reserves the right to challenge the reliability of K-9 Max's alert as giving rise to probable cause to search the truck.

3. Mr. Smith's Verbal Consent To Search His Truck Was Not Knowing And Voluntary; Or, Alternatively, Det. Schwab's Subsequent Search Of The Toiletry Bag Seized From The Truck Exceeded The Scope Of Consent; Or Was Otherwise The Product Of Earlier Unlawful Police Conduct.

A "search" occurs when a person's privacy interests are invaded. *State v. Owens*, 302 Or. 196 (1986). Police conduct a search within the meaning of Article I Section 9, of the Oregon Constitution when the officer opens the door of the vehicle to inspect the interior compartment of the vehicle for evidence. *State v. Turechek,* 74 Or App 228, 232 (1985); *State v. Finlay*, 170 Or App 359, 364-65 (2000). Police opening a defendant's notebook which exposed its contents to inspection constituted a search. *State v. Barnum,* 136 Or App 167, 172 (1995), *rev. den.,* 323 Or. 336 (1996). Opening a folded piece of paper or tinfoil is a search that required probable cause. *State v. Fugate*, 210 Or App 8, 15-16 (2006). No search can be

[1] The use of a dog to sniff the exterior of property for odors of drugs is not a search under Oregon or federal law. However, the State has the burden, upon a proper challenge by the defendant, to demonstrate that a drug-detection dog's alert was sufficiently reliable to provide probable cause to search. E.g., *State v. Helzer*, 350 Or. 153 (2011); *State v. Farmer*, 258 Or App 693 (2013).

conducted without probable cause, and a warrant or valid exception to the warrant clause. *Id.*

Police conduct a search within the meaning of the Fourth Amendment when they move an item to check for a serial number, *Arizona v. Hicks*, 480 US 321 (1987). See also, *Bond v. United States,* 529 US 332 (2000)(officer's physical manipulation of opaque bag on a storage rack of a bus, for exploratory purposes, constituted a search).

A. Mr. Smith Did Not Knowingly And Voluntarily Consent To The Search Of His Truck.

At the time police sought consent to search, Mr. Smith had been detained for approximately 12-15 minutes, questioned repeatedly about association with local drug dealers rather than being handed a traffic citation, and officers retained possession of his license and registration. He had been told to exit his truck and was surrounded by 2 officers in uniform, 3 plain clothes officers, now joined by officer Havice and his police dog. Schwab questioned Smith about whether his truck contained drugs after the dog reportedly alerted to the rear passenger side, and when Smith replied "no," said, "You wouldn't have a problem with us looking inside the truck?" Smith protested: "Well, there's no need for it, but whatever," and Schwab pressed for permission, saying "It looks like the dog has some interest in that truck. That's not normal." Smith says, "Go ahead and look in it all you want." Schwab responds, "So we'll take a look. If there's nothing there, then you'll be on your way," and he will "give you your ID and everything back."

An officer's authority to retain a person's drivers license ends when the officer has all the evidence needed to issue a citation. *State v. Dow,* 116 Or App 542 (1992)(running records check on defendant's license was unnecessary for issuance of citation for failure to register vehicle). Det. Schwab who observed the alleged traffic infractions had all of the evidence needed to issue the citations upon informing Mr. Smith of what he had observed and obtaining Mr. Smith's admissions to being on the phone while driving and changing lanes to pull over so he could stop and continue the phone call. That conversation occurred about one minute after Schwab arrived on scene.

The test is whether, under the totality of the circumstances, the defendant's consent was an act of free will or, instead, resulted from police coercion, either express or implied. *State v. Wolfe,* 295 Or. 567, 572 (1983); *State v. Hall*, 339 Or 7, 20 (2005). The analysis of voluntariness of a consent and voluntariness of a confession is the same. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) (finding that "there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness'"); *State v. Burdick*, 57 Or. App. 601, 603 (1982)(where the state concedes that the concept of voluntariness applies equally to confessions and consent searches); *State v. Marshall*, 254 Or. App. 419, 428 (2013) (determining the voluntariness of consent to search based on promises or threats, follows a similar analysis as voluntariness of a confession based on the same).

> Voluntariness requires that neither duress nor intimidation, *hope nor inducement* caused the defendant to confess. The test for voluntariness under Article I, section 12, is whether, under the totality of the circumstances, the waiver of rights and the confession were the

> product of an essentially free, unconstrained and informed choice or *whether the accused's capacity for self-determination was critically impaired. Threats, promises, inducements, and similar overreaching by the police have consistently led to suppression of a defendant's resulting statements and confessions;* by contrast, in the absence of police overreaching, challenges to the voluntariness of a defendant's statements or confessions have consistently failed. Under Article I, section 12, police overreaching is an essential predicate of a challenge to the admissibility of a statement or a confession as involuntary.

State v. Tanner, 236 Or App 423, 431 (2010).

The court must view the voluntariness of consent from the perspective of a reasonable person in the defendant's circumstances. *Marshall, supra* at 428. A reasonable person in Mr. Smith's situation surrounded by six officers and a drug detection dog would believe he would be detained until the police concluded their investigation, and that would require his consent for them to look in his truck for drugs. Det. Schwab's prompt promise to let him go once Mr. Smith said "go ahead," bespeaks that conclusion, and was further inducement for him to not further equivocate.

> A stop can affect a person's decision whether to respond to an officer's request for information in at least two ways. First, it restricts the person's legal options. Unlike a person who has not been stopped, a person who has been stopped is not free to walk away from an officer seeking information; the person's legal options for responding to an inquiry by the officer have been restricted.
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> Second, a stop can affect a person's decision whether to respond to an officer's request for information because it brings additional considerations to bear on the person's decision—considerations such as what effect noncompliance with the officer's request could have on the person's release. In other words, a stop changes a person's decisional calculus by introducing additional factors that weigh in favor of compliance.

State v. Suppah, 264 Or App 510, 526-27 (2014), *rev'd on other grounds,* 358 Or. 565 (2016).

Mere acquiescence to lawful authority is not consent and does not justify any search and/or seizure. *State v. Little*, 249 Or. 297, 302 (1967); *State v. Freund*, 102 Or App 647, 651-52 (1990); *Schneckloth v. Bustamonte*, *supra*. An inference that a person consented will not support the evidentiary test. The courts consider conduct as well as words in distinguishing between voluntary consent and mere passive acquiescence to the search. *State v. Briggs*, 257 Or App 738, 742, *rev. den.,* 354 Or. 386 (2013). When a defendant is not provided with a reasonable opportunity to choose to consent, or is left with the impression that a search is inevitable, the courts have consistently found acquiescence rather than consent, absent strong countervailing factors. *Id.,* at 742-43.

B. The Search Of The Toiletry Bag Exceeded The Scope Of Consent.

Det. Schwab asked to "look inside the truck." Mr. Smith said "go ahead and look in it," and Schwab confirmed he would "take a look." *See, State v. Fugate*, 210 Or App 8 (2006)(An officer's obtaining consent "to see" a fold of tinfoil, which he suspected contained drugs, did not authorize opening the tinfoil in the absence of probable cause.); *State v. Jacobsen,* 142 Or App 341, 350 (1996)(When officer asked simply to "look inside the cab" of defendant's truck, he exceeded scope of search by opening a zipped duffle bag inside the truck; circumstances showed authorization for "a more general sweep of the truck's cab."). Schwab never asked for permission to search any closed containers that he saw when he looked inside the truck, Mr. Smith did not

observe Schwab seizing the bag and was not in a position to voice objection to Schwab looking inside it.

The scope of the permissible search is limited to the consent given. *State v. Allen*, 112 Or App 70, 74, *rev. den.*, 314 Or. 176 (1992). When the State relies on consent to support a search, it must prove by a preponderance of the evidence that officials complied with any limitations on the scope of the consent. *State v. Paulson*, 313 Or. 346, 351-52 (1992).

Furthermore, Schwab lacked probable cause to seize and search this closed container. *See, State v. Elkins*, 245 Or 278 (1966)(A search can be legal, yet the resulting seizure of property discovered in the course thereof may be illegal.). The toiletry bag was opaque and did not "announce its contents". The weight of the bag would not have led to a reasonable conclusion that it contained "dealer quantities of meth." It was not observed at the restaurant parking lot where the interactions between Thornton and Smith were observed. K-9 Max had not alerted to the bag. "Probable cause" requires articulable facts that must lead a reasonable person to believe that evidence of a crime will probably be found in the location to be searched or the property to be seized. *See, State v. Anspach,* 298 Or 375 (1984). This is the more-likely-than-not requirement. A "well-warranted suspicion" is not probable cause because a suspicion, no matter how well-founded, does not rise to the level of probable cause. *State v. Verdine,* 290 Or 553, 556 (1981); *State v. Spencer,* 101 Or App 425, 427-28 (1990). A police officer's instinct and experience cannot, by

themselves, furnish probable cause, in the absence of any very remarkable activity. *State v. Valdez*, 277 Or 621, 628 (1977).

As discussed earlier, Mr. Smith maintained a distinct privacy interest in all of his various effects—the truck and all of its contents that were not in "plain view." He also maintained a distinct possessory interest in his various effects. Under the Fourth Amendment, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 US 109, 113 (1984). For Det. Schwab to seize, search and remove the toiletry bag and cash inside it from Mr. Smith's truck, required probable cause and a warrant or valid exception to the warrant clause of the Fourth Amendment. *See, e.g., United States v. Place,* 462 US 696, 701-02 (1983).

The scope of a person's consent does not turn on what the person subjectively intended. *Jacobsen*, *supra,* 142 Or App at 349. Rather, it turns on what a reasonable person would have intended. *Id*. The specific request that the officer made, the stated object of the search, and the surrounding circumstances all bear on a court's determination of the scope of a person's consent. *Id.*

C. Any Consent Given By Mr. Smith Was The Direct Result Of Exploitation Of Earlier Unlawful Police Conduct.

Three issues arise in every case where the state asserts that the defendant gave consent to a search. *State v. Unger*, 356 Or 59 (2014):

> [T]he inquiry into whether evidence obtained pursuant to a consent search must be suppressed involves three overlapping issues: (1) whether the initial stop or search was lawful; (2) whether the defendant's consent to the subsequent search was voluntary; and (3) assuming that the initial stop or search was unlawful and the consent

> to the subsequent search was voluntary, whether the police exploited the illegality to obtain the disputed evidence. *Id.*, at 76, 86.

Where the state attempts to prove attenuation (*i.e.*, lack of exploitation) on the grounds that the defendant's voluntary consent was a sufficient intervening factor to break the chain of causation between the police illegality and the obtaining of the evidence, it should fail where "police sought the defendant's consent solely as the result of knowledge of inculpatory evidence obtained from unlawful police conduct" or "because the unlawful police conduct, even if not overcoming the defendant's free will, significantly affected the defendant's decision to consent." *Unger*, 356 Or at 70-71.

Consent obtained during an unlawful stop or seizure is presumed invalid: "[The dissenters] suggest that we have modified the *Hall* analysis to remove the presumption that a consent search following unlawful police conduct is "tainted" or is invalid. On the contrary, * * * we adhere to *Hall* in requiring the state to prove that the consent was independent of, or only tenuously related to, the illegal police conduct." *Id.,* at 74–75.

As explained by the Court of Appeals in *Suppah*, *supra*, this presumption of invalidity "reflects the reality—both legal and practical—that unlawful police conduct puts an individual at a disadvantage that can affect the person's decision whether to, for example, consent to a search, surrender property, or make a statement."

> When a person has been *illegally* stopped, the person's options have been *illegally* restricted, and additional factors that weigh in favor of compliance have been *illegally* introduced. Thus, an illegal stop subjects the person to "the pressure of police action that [is] available to police only by the prior unauthorized conduct." *State v.*

> *Williamson*, 307 Or 621, 626, 772 P 2d 404 (1989). It puts the person "in a worse position than if the governmental officers had acted within the bounds of the law." *Hall,* 339 Or at 25.

264 Or App at 526-27.

Here, there is a direct connection between the unlawful police conduct of detaining Mr. Smith, his truck and other effects to conduct a drug investigation without reasonable suspicion while awaiting arrival of the K-9, and police "exploited" this unlawful conduct by deploying the K-9 and using the dog's "interest" in the truck to continue the unlawful detention and press for consent to search.

The burden of proving lawful consent to search and/or seize is on the State. *Schneckloth v. Bustamonte*, *supra*. The prosecution must show that the consent was voluntarily given and that proof must be by a preponderance of the evidence. *State v. Stevens*, 311 Or 119 (1991).

4. All Seizures And Searches Of Mr. Smith's Person And Property Were Unreasonable And Not Supported By Probable Cause, Warrant, Nor Any Exception To The Warrant Clause.

Assuming, *arguendo,* that police had lawful authority to seize Mr. Smith and his effects, and to search his truck and search the toiletry bag found to contain $5000 cash, probable cause was required to continue the seizure of his person and effects, to subject his toiletry bag to a subsequent canine search, and to place him in handcuffs and drive him to another location to be further interrogated by Det. Neville.

During his search of Mr. Smith's truck, Det. Schwab found no contraband or other indicia of drug trafficking.[2] After confirming that Smith had the $5000 cash with him to shop for trailers—consistent with his earlier statements about what he was doing in the Medford area[3]—officers continued to detain and interrogate him regarding their drug trafficking investigation for another 8 minutes, before taking the bag with the cash some distance from the truck and subjecting it to a dog sniff. The dog purportedly alerted to the presence of drugs. By then Mr. Smith had been detained by police for about 25 minutes, with police obtaining no additional evidence of possible criminal activity from the time he was initially stopped. The duration and intrusive nature of his detention—at least by now—required probable cause. As explained by *State v. Dupay*, 62 Or App 798, 805-806, *rev. den.,* 295 Or. 541 (1983):

> *Terry* and the Oregon statutes recognize an exception to the requirement that Fourth Amendment seizures of persons and effects be based on probable cause. The narrow exception permitted by *Terry* and the Oregon statutes, however, is confined to (1) a stop of the person, (2) a brief inquiry regarding the immediate circumstances that aroused the officer's suspicions, (3) a protective frisk if the officer reasonably suspects that the person is armed and presently dangerous to the officer or other persons present and (4) seizure of weapons found by the frisk. This limited search and seizure is allowed to ensure the safety of the officers and other persons nearby. A warrantless search or seizure of broader scope than permitted by ORS 131.605 to ORS 131.625 must be based on probable cause and exigent circumstances, or consent.

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[2] Indeed, Mr. Smith, age 56, was found in possession of only a "flip phone," not a smart phone which virtually all persons involved in commerce of any type—legal or illegal—find essential.

[3] The defense has independently verified Mr. Smith was indeed shopping for trailers at 3 different stores in that area this morning, based on interviews of sales staff at those locations, which is contrary to the police assertion that they had Smith and Thornton under surveillance all morning and his trailer story was B.S.

"Probable cause" requires articulable facts that must lead a reasonable person to believe that evidence of a crime will probably be found in the location to be searched or the property to be seized, *see, State v. Anspach,* 298 Or 375 (1984), or that the person subject to a seizure tantamount to an "arrest" is more-likely-than-not guilty of a specific crime.

Furthermore, probable cause was required—and lacking—when Schwab prolonged his seizure of Mr. Smith's bag with the cash, transported it a distance from the scene, and subjected it to a K-9 sniff, given Mr. Smith's innocent explanation coupled with only an officer's hunch that the money could be drug-related. A "seizure" of property "clearly" occurs when police physically remove property from a person's possession. *State v. Juarez-Godinez,* 326 Or. 1, 6 (1997). Mr. Smith retained property rights of constitutional stature against further deprivation and physical intrusion of his bag and cash under the Fourth Amendment. *See, United States v. Jones,* 132 SCt 945, 949 (2012)(attaching GPS device to car, for purpose of gathering information, constitutes a search); *United States v.* Thomas, 726 F3d 1086, 1092-93 (9th Cir. 2013), *cert. den.,* 572 US 1108 (2014)("[I]t is conceivable that, by directing the drug dog to touch the truck and toolbox in order to gather sensory information of what was inside, the border patrol agent committed an unconstitutional trespass or physical intrusion.").

The reported alert by K-9 Max to the currency does not rise to the level of probable cause that the cash was drug-related, as there is no evidence that K-9 Max has been trained to perform a sophisticated dog alert, i.e., evidence that the dog

would not alert to drug residue found on currency in general circulation and was trained to and would only alert to currency that had recently been in contact with drugs. *See, e.g., United States v. $22,474,00 in U.S. Currency,* 246 F3d 1212, 1216 (9th Cir. 2001).

Following the reported alert by K-9 Max to the bag and cash, which did not provide probable cause for prolonging the seizures of Mr. Smith and his effects, and approximately 30 minutes after the initial stop, Schwab read Miranda warnings to Smith. *See, State v. Charles,* 263 Or App 578, 585-87 (2014)(Miranda warnings are a factor in determining whether the officer had intentionally and significantly restricted, interfered with, or otherwise deprived a person of his liberty).

Schwab then told him Thornton was talking to detectives and "there's a pound of methamphetamine in that car. He said you gave it to him and he gave you money." Smith responds, "No way."[4] Important for determining the weight of Thornton's claim of Smith's involvement, in establishing probable cause to justify Smith's prolonged and intrusive seizure, is that another 15 minutes passed before officers searched Thornton's car and verified his possession of the pound of methamphetamine. Additionally, during those 15 minutes, Mr. Smith was subjected to threats and aggressive interrogation, e.g., "[W]e don't fuck around. We're done being nice. The gig is up. We know everything that's going on." Smith persisted that he did not supply

[4] In contrast, according to Neville's report, Thornton said Smith told him to sell his (Smith's) pound of meth to work off $500 of his $30,000 drug debt to Smith. The likelihood is greater that Thornton made inconsistent statements of Mr. Smith's alleged involvement, rather than Schwab lied to Smith as an interrogation technique, given the dearth of evidence apart from Thornton's statements to implicate Smith.

drugs to Thornton nor receive the $5000 from Thornton. Eventually he was patted down, handcuffed, patted down again and crammed into the back seat of a caged police car to be transported to where Neville was waiting to interrogate him. That occurred more than a minute *before* officers found the drugs in Thornton's car.

It is well established in Oregon that an informant is not credible simply because the informant is named. Where the named informant is disinterested and supplies non-incriminating evidence of an ordinary sort, the Supreme Court has held that information is self-verifying and needs no further establishment of veracity. *State v. Villagran*, 294 Or. 408, 412 (1983). In considering the reliability and veracity of persons furnishing information to the police, the connection of the person to the crime itself or to the criminal world is relevant. At the one extreme is the participant in the criminal activity who, for a variety of reasons, decides to become an 'informer'. . . often for money or for other reward or gain. *Villagran*, *supra*, 294 O.r at 409. Common sense informs that Thornton would have reason to lessen his own culpability by claiming Smith was the leader of this criminal enterprise who supplied the drugs, and he was only a "mule," and attempt to cut his losses by cooperating with the officers who caught him red-handed with a pound of methamphetamine.[5]

The reliability of information police obtain from persons who are participants in the very criminal activity under investigation, who decide for a variety of reasons to

[5] Based on available discovery, it appears Thornton only consented to the search of his Mustang after being advised it would be towed, and that either an inventory search would occur or a search warrant would be obtained. It is likely that Neville used the same approach as Schwab at some point, telling Thornton that cooperation would "decide if you go to jail today, or not." Court records show that Thornton was cited and released on the new felony drug charges.

become an informant, is presumptively suspect. *See, e.g.. State v. Goecks*, 265 Or App 158, 174 (2014)(discussing case law on this topic). Moreover, it is well established that an accomplice's testimony should be viewed with distrust. E.g., UCrJI Nos. 1053, 1054. Therefore, the courts have long held that information provided by that class of named informants must be corroborated. *E.g., State v. Carlile,* 290 Or 161, 168 (1980)(fact that informant was named and made an admission against penal interest is insufficient guarantee of reliability where no police corroboration of the information was made); *State v. Arnold*, 115 Or App 258, 263 (1992).

In *State v. Liberman*, 51 Or App 345 (1981), the court suppressed evidence seized in a search authorized by warrant, where the affidavit recited facts somewhat similar to those in the case at bar: The affidavit was based on hearsay information obtained by police from a named informant who sold drugs to an undercover officer, was arrested, and thereupon named the defendant as his supplier. The appellate court held this was insufficient to establish probable cause because there was no corroboration. Here, the information known to Neville—that Thornton alone had a large quantity of methamphetamine *prior to* being seen with Smith at the restaurant—contradicted what Thorton reportedly told him of Smith's involvement. Additionally, the $5000 cash found during the search of Smith's truck is far short of the amount of cash to be expected from his alleged sale of a couple of pounds the night before, further undermining the credibility of Thorton's information.

Thornton's reliability is not established simply because he confessed to having a pound of meth in the trunk, when he clearly had no way to avoid detection. For

reliability to be established based on the informant making statements against penal interest, the informant must reveal self-incriminatory information for additional criminal acts. *United States v. Patayan Soriano*, 361 F3d 494 (9th Cir. 2004). As that Court explained:

> The dissent cites to a line of cases where a suspect's statements implicating a third-party were deemed "inherently unreliable" as "self-exculpatory" or "blame-shifting" statements, as opposed to self-inculpatory statements. *Post,* at 514 (citing *Williamson v. United States,* 512 U.S. 594, 599–600 (1994); *Lilly v. Virginia,* 527 U.S. 116, 131 (1999); *Lee v. Illinois,* 476 U.S. 530, 541 (1986); and *United States v. Hall,* 113 F.3d 157 (9th Cir.1997)). But this case is not like those, where the suspects did not incriminate themselves as to anything more than the officers already had. Having been caught for a criminal offense, the suspects were simply trying to shift the primary responsibility to others. Here, French was picked up for trying to pass *one* altered check, but told the police about much, much more. . . . Although he may have painted Soriano as the mastermind, it is undeniable that French implicated himself in criminal activity well in excess of what the police had him for at that time. 361 F3d at 506.

Thus, Thornton's statements were insufficiently credible or reliable to undermine Mr. Smith's reasonable explanation for his possession of $5000 cash, which in turn was the only evidence—apart from his observed association with Thornton that morning, which did not involve criminal activity—that would minimally tend to support an inference that Smith had committed any crime. The totality of the circumstances do not rise to the level of reasonable suspicion, and much less, probable cause even after police discovered the meth in Thornton's car; whereas, probable cause for Smith's continued seizure was required at least by the point he was handcuffed and transported in the back of a patrol car, more than 42 minutes after the initial stop. *See, Juarez-Godinez, supra* (investigative detention of 46 minutes was unlawful); *see*

also, United States v. Bailey, 743 F.3rd 322, 340 (2d Cir. 2014)(holding that lawful detention incident to search because unlawful at the moment police handcuffed the individual, because he had already been searched for weapons and was not a flight risk).

5. Mr. Smith's Statements To Law Enforcement, Were Made Involuntarily, Or Made While In Custody Or Under Compelling Circumstances Prior To Advice Of *Miranda* Rights, Or Made While In Custody Without A Valid Waiver Of *Miranda* Rights.

Article I, section 12, and the Fifth and Fourteenth Amendment, prohibit the use of statements in three general circumstances. First, statements made in response to threats or promises should be excluded. ORS 136.425(1); *State v. Powell*, 352 Or. 210 (2012). Second, statements made by a defendant while in police custody or in compelling circumstances prior to reading of Miranda must be suppressed. *Jackson v. Denno*, 378 US 368, (1964); *Miranda v. Arizona*, 384 US 436 (1966); *State v. Sparklin*, 296 Or 85 (1983). Third, regardless of whether any of the above circumstances exist, the court must perform a totality of the circumstances analysis to determine whether statements made by a defendant were voluntarily provided. *Schneckloth v. Bustamonte*, 412 US 218, 225-26 (1973); *State v. Burks*, 107 Or App 588, 592 (1991).

A question given before a Miranda warning must be limited to the type of questions attendant to an arrest, or narrowly tailored to officer safety and not likely to elicit an incriminating response. *State v. Pender*, 181 Or App 559, 562 (2002). If the question is specifically about any other incriminating circumstances it constitutes interrogation and a Miranda warning must first be given. *Id.* Here, Mr. Smith was

questioned about drug activity starting with Det. Schwab's arrival and within a few minutes of being stopped. Questioning related to his involvement in drug trafficking continued through the ensuing dog sniff and search of his truck, the seizure and search of the bag with $5000 cash, and the reported dog alert to the cash—a time span of approximately 30 minutes, before he was given Miranda warnings.

Article I, Section 12 of the Oregon Constitution requires *Miranda* warnings be given to a person who is in "full custody," as well as under circumstances that create a compelling, police-dominated atmosphere. *State v. Roble-Baker*, 340 Or 631, 638 (2006). In determining whether the police placed a defendant in compelling circumstances, the overarching inquiry is whether the officers created the sort of police-dominated atmosphere that Miranda warnings were intended to counteract. *State v. Roble-Baker*, *supra* at 640-41(recognizing that Oregon's *Miranda* requirement protects same interests as federal requirement*); Miranda v. Arizona*, 384 U.S. 436, 455-57 (1966)(explaining that warnings are necessary to ensure that a person's statement is truly the product of free choice when that person is placed in an "incommunicado police-dominated atmosphere").

In deciding whether a defendant's encounter with police officers has so evolved, the courts considered a host of factors, including: (1) the location of the encounter, i.e., was it at a noncustodial facility or in surroundings relatively familiar to defendant; (2) the length of the encounter, i.e., whether the stop as a whole, and the questions, were brief; (3) the amount of pressure exerted on the defendant, i.e., was there evidence the police coerced or pressured defendant to answer questions; and (4) the

defendant's ability to terminate the encounter. Those factors are neither the exclusive factors to be considered, nor are they to be applied mechanically. *State v. Roble-Baker, supra.* As previously noted, Mr. Smith was in a police-dominated environment (six officers and a police dog), at a location unfamiliar to him, disposed of his driver's license, and accused of involvement in drug trafficking. These were "compelling circumstances" that necessitated Miranda warnings long before they were given. *See, State v. Werowinski*, 179 Or App 522, 530-33, *rev. den.,* 334 Or 632 (2002); ("compelling circumstances" existed where the defendant was questioned for 10-15 minutes while officer blocked his egress from the back of a patrol car); *State v. Shirley,* 223 Or App 45 (2008)(officer who commanded defendant to undertake actions, and accused him of lying about denial of drug activity, created a coercive atmosphere during street encounter).

While routine traffic stops do not present "compelling circumstances," factors including the number of officers at the scene, the use of lights and sirens in the stop, the use of confinement during questioning, the duration of the stop, and the demeanor of the investigating officer, and confrontation of the suspect with evidence may make the circumstances sufficiently compelling to require *Miranda* warnings. *State v. McMillan*, 184 Or App 63, 67-69 (2002). From the outset, Mr. Smith was subjected to a drug investigation, not a routine traffic stop.

Failure to give *Miranda* warnings, when required, is itself a constitutional violation, and the remedy for that violation extends not only to defendant's unwarned

responses to the officer's questions, but also to the physical and testimonial evidence this is the product of that violation. *State v. Jarnagin*, 351 Or. 703, 715-16 (2012).

The reason for a Miranda warning is to make a suspect aware that any waiver of rights is not only made voluntarily but knowingly. *State v. Vondehn*, 348 Or. 462, 481 (2010). Although "the state typically need only establish that the police recited the warnings completely and coherently," a unique problem arises when "police question first and warn later." *State v. Vondehn*, 348 Or. 462, 481 (2010). The court uses an objective test to determine if a belated warning is sufficient by looking at what message is actually conveyed by the conduct of the police. *Id.,* at 482. Unless police accurately and effectively convey to the suspect the information needed to make further waiver valid and remove coercion, the belated warning is ineffective. *Id.*, 485. "When the police question first and warn later, their exhibition and exercise of authority and violation of the defendant's constitutional rights may communicate to a defendant . . . that before the defendant will be released he or she must answer the questions asked". *Id.*, at 481. Mr. Smith was questioned first—for nearly 30 minutes—then warned—and the questioning continued in a repetitive but much more aggressive fashion. He was then transported in handcuffs to be interrogated further by Det. Neville.

6. Probable Cause For The Warrant That Issued For The Later Search Of Mr. Smith's Truck Was Derived From The Prior Illegalities.

Stripped of the information unlawfully obtained from the seizures, searches and interrogations of Mr. Smith and his effects, the affidavit for the warrant to search his truck a second time fails to state probable cause. *State v. Binner,* 128 Or App 639,

645, *rev. den.,* 320 Or. 325 (1994)(evidence referenced in an affidavit that is based on an unconstitutional search or seizure should be excised from the affidavit, and a determination made of whether the remaining information is sufficient to establish probable cause). As discussed above, the anonymous tip Neville received mentioned only Thornton possessing drugs, and Thornton's post-arrest statements regarding Mr. Smith as his supplier for the pound of meth do not meet the standard for probable cause.

CONCLUSION

Exclusion of evidence is the proper remedy for a violation of a person's statutory or constitutional rights pursuant to Article I, Section 9, of the Oregon Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution. *State v. Valdez*, 277 Or 621 (1977); *State v. Tanner, supra*. This includes any and all oral derivative evidence. *State v. Olson*, 287 Or 157 (1979); *Dunaway v. New York*, 442 US 200, 99 S Ct 2248 (1979).

Under Oregon's Constitution, the good faith of the police officers may not be considered with regard to the reasonableness of any search or seizure. *See, State v. Carsey*, 295 Or 32, 45-46 (1983); *State v. Bonilla*, 267 Or App 337, 342 (2014), *aff'd,* 358 Or. 475 (2015). The reason for the exclusionary rule under the Oregon Constitution is to protect the privacy interests of its citizens and not simply to deter police misconduct. *State v. Tanner, supra*.

RESPECTFULLY SUBMITTED this 14th day of November, 2018.

s/ Terri Wood

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