

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Appellant,
Cross-Respondent,
Petitioner on Review,

v.

ANTHONY DOUGLAS KIRKEBY,

Defendant-Respondent,
Cross-Appellant,
Respondent on Review.

Yamhill County Circuit
Court No. CR030112

CA A128263

SC S056237

BRIEF ON THE MERITS OF
PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Yamhill County
Honorable RONALD W. STONE, Judge

Opinion Filed: May 21, 2008
Author: Armstrong, J.
Concurring Judges: Haselton, P.J. and Rosenblum, J.

Continued.....

INGRID SWENSON #79412
Executive Director
Office of Public Defense Services
PETER GARTLAN #87046
Chief Defender
SHAWN WILEY #95515
Chief Deputy Defender
1320 Capitol Street NE, Suite 200
Salem, Oregon 97301
Telephone: (503) 378-3349

Attorneys for Defendant-Respondent

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
ANNA M. JOYCE #01311
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

STATEMENT OF THE CASE.....	1
Legal Question Presented.....	1
Proposed Rule of Law.....	2
Summary of Argument.....	2
Facts Material to Review.....	5
A. The officer lawfully stopped defendant for driving with a suspended license and then asked for, and obtained, defendant’s consent to pat down his clothing and search his pockets.....	5
1. Officer Steele lawfully stopped defendant for driving with a suspended license.....	5
2. The officer then asked defendant about the presence of weapons and for consent to pat down the exterior of defendant’s clothes and to search defendant’s pockets.	5
3. The trial court granted defendant’s motion to suppress.....	6
B. The Court of Appeals affirmed the trial court’s decision, concluding that unless the officer asked about the presence of weapons and for consent to search during an “unavoidable lull” or while simultaneously performing a stop-related task, the officer’s questions amounted to an unreasonable seizure.....	7
ARGUMENT.....	8
A. Under Article I, section 9, only police questioning during a lawful traffic stop that unreasonably extends the scope or duration of the stop amounts to a constitutional violation.....	8
1. Article I, section 9 prohibits only those searches or seizures that are “unreasonable.”.....	9
2. Rather than adopting a bright-line approach, this court has previously considered the length of any delay in proceeding with a traffic stop and whether that delay can be categorized as <i>de minimis</i>	11
3. Questions or requests for consent during the course of a lawful traffic stop are permissible so long as the questions or the request for consent do not unreasonably extend the length or scope of the stop.	15

B. Here, the officer did not violate Article I, section 9 when he asked defendant questions unrelated to the initial purpose of the traffic stop.	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Cited

<i>Lockett v. State</i> , 747 NE 2d 539 (Ind SC 2001).....	17
<i>People v. White</i> , 331 Ill App 3d 22, 264 Ill Dec 367, 770 NE2d 261 (2002), cert den, 538 US 1053 (2003)	17
<i>State v. Amaya</i> , 336 Or 616, 89 P3d 1163 (2004).....	12
<i>State v. Baker</i> , 154 Or App 358, 961 P2d 913, rev den, 327 Or 553 (1998).....	8
<i>State v. Bea</i> , 318 Or 220, 864 P2d 854 (1993).....	10
<i>State v. Caraher</i> , 293 Or 741, 653 P2d 942 (1982).....	16
<i>State v. Caron</i> , 153 Or App 507, 958 P2d 845 (1998).....	8
<i>State v. Cocke</i> , 334 Or 1, 45 P3d 109 (2002).....	16
<i>State v. Ehret</i> , 184 Or App 1, 55 P3d 512 (2002).....	7
<i>State v. Gauluapp</i> , 207 Wis 2d 600, 558 NW2d 696 (1996), rev den, 208 Wis 2d 213 (1997).....	17
<i>State v. Gibbons</i> , 248 Ga App 859, 547 SE2d 679 (2001).....	17
<i>State v. Holmes</i> , 311 Or 400, 813 P2d 28 (1991).....	8, 10, 15, 16, 18
<i>State v. Jackson</i> , 296 Or 430, 677 P2d 21 (1984).....	13, 14, 15
<i>State v. Kirkeby</i> ,	

220 Or App 177, 185 P3d 510 (2008).....	7
<i>State v. Mesa</i> , 110 Or App 261, 822 P2d 143 (1991), <i>rev den</i> , 313 Or 211 (1992).....	8
<i>State v. Mitchell</i> , 265 Kan 238, 960 P2d 200 (1998)	17
<i>State v. Morelli</i> , 109 Or App 589, 820 P2d 1369 (1991), <i>rev den</i> , 313 Or 221 (1992).....	9
<i>State v. Parkinson</i> , 135 Idaho 357, 17 P3d 301 (App 2000).....	17
<i>State v. Pegeese</i> , 351 NJ Super 25, 796 A2d 934, 937 (2002)	17
<i>State v. Taylor</i> , 126 NM 569, 973 P2d 246 (App 1998), <i>rev den</i> , 126 NM 534 (1999).....	17
<i>United States v. Chavez-Valenzuela</i> , 268 F3d 719 (9 th Cir 2001).....	17
<i>United States v. Childs</i> , 277 F3d 947, <i>cert den</i> , 537 US 829 (7 th Cir 2002).....	17, 18
<i>United States v. Holt</i> , 264 F3d 1215 (10 th Cir 2001).....	17
<i>United States v. Shabazz</i> , 993 F2d 431 (9 th Cir 1993).....	17, 18

Constitutional & Statutory Provisions

Or Const Art I, § 9.....	1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20
ORS 810.410	12
ORS 810.410(3)	12
ORS 810.410(3)(d).....	12
US Const Amend IV	17

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Legal Question Presented¹

a. Under Article I, section 9, a police officer may approach an individual on the street and ask questions, seek consent to search, and even accompany that person to another location without the encounter constituting a “seizure,” unless the officer intentionally and significantly restricts that person’s freedom of liberty or movement. Does a different rule apply in the context of a lawful traffic stop? Stated another way, are questions or requests for consent that an officer could ask of an individual on the street nevertheless unconstitutional when an individual is already the subject of a lawful traffic stop?

b. A police officer lawfully stopped defendant for a traffic violation. The officer asked for defendant’s identification and ran that information through dispatch. The officer then asked defendant if he had any weapons and whether defendant would consent to an exterior patdown of defendant’s clothing. When the officer asked for consent, only two minutes had elapsed since the initial traffic stop. Defendant consented to a patdown, and also consented to allow the officer to

¹ The legal questions presented, proposed rule of law, and the argument that follows is substantially similar to the questions, proposed rule of law, and legal argument the state set forth in its brief on the merits filed in the companion case of *State v. Rodgers*, S056239. The facts of the two cases are quite similar, in that both involve an officer asking questions of a lawfully stopped driver. In *Rodgers*, the state prevailed in the trial court, while in this case, the state did not. That distinction, however, has no effect on the analysis in either case.

search his pockets. When the officer saw drugs in a container in defendant's pockets (drugs that he then seized and which provided the basis for the criminal prosecution in this case), between four and five minutes had elapsed from the time he stopped defendant.

Did the officer unreasonably seize defendant by requesting consent to conduct a patdown or by requesting to search defendant's pockets?

Proposed Rule of Law

a. Just as police questioning, without more, does not constitute to a "seizure" *outside* of the traffic stop context, questioning unrelated to the traffic stop or a request for consent *during* a lawful traffic stop does not constitute an unconstitutional seizure unless that questioning unreasonably extends or expands the traffic stop.

b. Here, the officer's single question to defendant about the presence of weapons, followed by the officer's request for consent to conduct a patdown of defendant's clothing and to search his pockets did not create an unreasonable seizure. Because the initial question took only moments, and because the remaining delay in the stop was both *de minimis* and consented to by defendant, the officer's conduct did not violate Article I, section 9.

Summary of Argument

Article I, section 9 of the Oregon Constitution protects individuals against "unreasonable" searches and seizures. As both this court and the Court of Appeals have recognized on multiple occasions, an officer may approach an individual on the street and ask questions about the presence of weapons and for consent to

search without effecting a seizure. Similarly, an officer lawfully may ask about weapons and for consent to search of an individual is already in custody.

The question presented in this case is whether different rules apply when an individual is already the subject of a lawful traffic stop. The Court of Appeals implicitly concluded that the answer to that question is “yes,” thus fashioning a new rule for determining whether an unreasonable seizure occurs when an individual is already the subject of a lawful traffic stop. According to the Court of Appeals, unless the officer asks about weapons or for consent to search during an “unavoidable lull” in the stop or while the officer is performing another task-related activity, any questioning creates an unreasonable seizure. That bright-line rule has no basis in this court’s opinions or Article I, section 9 itself.

Nothing inherent in the traffic-stop context warrants creating a separate rule, one that prohibits officers from asking individuals who are the subject of lawful traffic stop the same questions that are permissible if asked of a citizen on the street. And in fact, this court has already rejected the premise that *any* questioning that is unrelated to the reason for the stop renders the stop unlawful. Instead, this court has focused on the totality of the circumstances of the individual stop and has inquired—in part—whether the delay was *de minimis* or the stop otherwise unreasonable. This court has taken a similar approach when considering the steps that an officer can take during a lawful citizen encounter outside of the traffic-stop context.

Thus, rather than carving out a particular category of cases and applying a particular bright-line rule to what are inherently and necessarily fact-intensive situations, this court should take the same approach that it has taken in analogous circumstances: any questions or requests for consent during the course of a lawful traffic stop should be evaluated by their scope and length to determine whether those questions or requests rendered the seizure unreasonable.

Applied to the facts of this case, that standard demonstrates that the officer did not unreasonably seize defendant. The officer merely asked about the presence of weapons and for consent to conduct an exterior patdown. Those two questions, combined with the time that it took the officer to stop defendant and obtain his identifying information, took only two minutes. Because defendant agreed to the patdown, he consented to the short delay that ensued when the officer conducted the patdown. The officer then asked for consent to search defendant's pockets and a container in defendant's pocket. When the officer opened the container, only four to five minutes had passed since the inception of the stop. Because that amount of time was *de minimis* and because defendant consented to that portion of the delay, the officer's conduct did not transform a lawful seizure into an unreasonable one. The Court of Appeals thus erred in concluding otherwise.

Facts Material to Review

A. The officer lawfully stopped defendant for driving with a suspended license and then asked for, and obtained, defendant's consent to pat down his clothing and search his pockets.

1. Officer Steele lawfully stopped defendant for driving with a suspended license.

Officer Steele saw defendant driving in downtown Willamina. (Tr 12).

The officer knew defendant by sight and knew that defendant's license was suspended. (Tr 12). Officer Steele checked with dispatch, which confirmed that defendant's license was suspended. (Tr 12). Based on that violation, Officer Steele activated his overhead lights and stopped defendant.² (Tr 12). As soon as defendant pulled over, he exited his car and started walking towards Officer Steele. (Tr 13). Officer Steele became concerned for his safety because defendant had left his car, increasing the risk to the officer. (Tr 13). When Officer Steele informed defendant that defendant's license was suspended, defendant seemed surprised, but remained polite and unthreatening. (Tr 16). Both defendant and the officer were "businesslike." (Tr 16). Defendant gave Officer Steele his driver's license. (Tr 14).

2. The officer then asked defendant about the presence of weapons and for consent to pat down the exterior of defendant's clothes and to search defendant's pockets.

At that point, Officer Steele did not yet have all the information that he needed to issue the citation because he had not yet asked for or received

² Defendant has never disputed that the initial stop was lawful. (Tr 50-56).

defendant's vehicle registration and proof of insurance. (Tr 30). Instead of issuing the citation or asking defendant to produce proof of insurance and the vehicle registration, Officer Steele asked defendant if he had any weapons. (Tr 14, 33, 42). Defendant stated that he did not. (Tr 14, 33). Officer Steele then asked for, and obtained, defendant's consent to conduct an exterior patdown of defendant's clothing to "search for weapons." (Tr 14). At that point, "[p]robably about two minutes" had elapsed between the initial stop and that request. (Tr 14-15).

Officer Steele felt several objects in defendant's pockets but "felt fairly confident" that none of the objects were firearms. (Tr 18, 34-35). He then asked for, and obtained, defendant's consent to search the contents of defendant's pockets. (Tr 18, 35). One of the items in defendant's pocket was a small metal cylinder. (Tr 19). Officer Steele asked for consent to open that item. (Tr 19). Defendant agreed. (Tr 19). Inside, Officer Steele found "two Ziplock bindle Baggies" that contained what appeared to the officer to be methamphetamine. (Tr 20). When the officer saw the drugs, "probably four minutes, maybe five at the most" had elapsed from the point that the officer had first stopped defendant. (Tr 21).

3. The trial court granted defendant's motion to suppress.

The trial court concluded that the officer violated defendant's Article I, section 9 rights, concluding that the officer seized defendant by asking for permission to conduct a patdown. (Tr 65). The trial court appeared to find the timing of the request for consent dispositive, noting that the officer had not

completed citing defendant before asking him for consent to search. (Tr 63). The trial court interpreted the Court of Appeals' decision in *State v. Ehret*, 184 Or App 1, 55 P3d 512 (2002), to mean that officers lawfully may complete a citation and *then* ask for consent to search. However, it further read *Ehret* to mean that a request for consent that comes before the citation is delivered extends the duration of the detention unconstitutionally. (Tr 47-48, 65). The court thus concluded that the officer had no right to ask defendant for permission to conduct a patdown him and that, by doing so, the officer extended the duration of the traffic stop. (Tr 63-66). Accordingly, the trial court granted defendant's motion to suppress the evidence. (Tr 66).

B. The Court of Appeals affirmed the trial court's decision, concluding that unless the officer asked about the presence of weapons and for consent to search during an "unavoidable lull" or while simultaneously performing a stop-related task, the officer's questions amounted to an unreasonable seizure.

The Court of Appeals agreed with the trial court. It concluded that the officer's request to conduct a patdown of defendant and to search the items in defendant's pockets unlawfully extended the scope of the traffic stop. Although the court acknowledged that an officer may, without violating Article I, section 9, question a motorist about matters unrelated to a traffic stop during the stop, the court nevertheless held that an officer is not permitted to pose any such question to the motorist unless the officer is in an "unavoidable lull" or otherwise simultaneously attending to some aspect of the traffic stop. *State v. Kirkeby*, 220 Or App 177, 185-86, 185 P3d 510 (2008). Rather than adhere to the pertinent stop-related tasks, such as issuing a citation to defendant or asking him for proof

of insurance and vehicle registration, the officer chose to request defendant's consent to search objects that the officer "felt fairly confident" were not firearms. The court ruled that because the officer lacked reasonable suspicion to believe that defendant was armed and presented an immediate threat of serious physical injury, the officer unlawfully extended defendant's detention by requesting defendant's consent to search of his pockets. *Id.* at 187.

ARGUMENT

A. Under Article I, section 9, only police questioning during a lawful traffic stop that unreasonably extends the scope or duration of the stop amounts to a constitutional violation.

Indisputably, an officer may approach an individual on the street, engage that individual in conversation, and ask about the presence of weapons and for consent to search without effecting an unreasonable seizure of that individual. *State v. Holmes*, 311 Or 400, 409-10, 813 P2d 28 (1991). The Court of Appeals has applied that principle in innumerable cases. *See e.g., State v. Caron*, 153 Or App 507, 958 P2d 845 (1998) (defendant not in custody and no stop occurred when officers asked defendant for identification, asked whether he possessed any drugs or weapons, and asked for permission to search); *State v. Mesa*, 110 Or App 261, 822 P2d 143 (1991), *rev den*, 313 Or 211 (1992) (defendant under arrest for failure to display operator's license; request for consent did not go beyond the permissible scope of the stop: "Consent may be requested * * * of a citizen on the street" in respect to whom the police have neither reasonable suspicion nor probable cause); *State v. Baker*, 154 Or App 358, 961 P2d 913, *rev den*, 327 Or

553 (1998) (same); *State v. Morelli*, 109 Or App 589, 820 P2d 1369 (1991), *rev den*, 313 Or 221 (1992) (same).

The question here, then, is whether the nature of questioning or of requests for consent to search during a lawful traffic stop compels a contrary conclusion or a different analysis. The Court of Appeals concluded that unless questions or requests for consent occur during an “unavoidable lull” or while the officer is engaged in a stop-related task such as writing the citation, the officer has violated the individual’s Article I, section 9 right to be free from unreasonable seizures.

In so holding, the Court of Appeals refused to engage in what is necessarily a fact-specific inquiry into the reasonableness of the totality of the encounter. Instead, the court adopted a bright-line rule that is at odds with this court’s prior holdings and with Article I, section 9.

1. Article I, section 9 prohibits only those searches or seizures that are “unreasonable.”

Article I, section 9 of the Oregon Constitution protects an individual’s right “to be secure * * * against unreasonable search or seizure[.]”³ This court has offered some general guidance for determining whether an encounter between a law-enforcement officer and a citizen is a seizure within the meaning of Article I,

³ Article I, section 9 provides:

No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

section 9. Mere conversations without any restraint of liberty do not constitute seizures. Temporary restraints of liberty for the purposes of investigation, along with arrests, do constitute seizures. *State v. Holmes*, 311 Or 400, 407, 813 P2d 28 (1991). This court has explained that the wide variety of encounters between officers and citizens require a fact-specific inquiry into the totality of the circumstances of the particular case to determine “whether the officer, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner that would be perceived as a non-offensive contact if it had occurred between two ordinary citizens.” *Id.* at 410.

This court also has repeatedly reiterated that law enforcement officers may approach individuals on the street and question them, seek consent to search, and even accompany the individual to another location without effecting an unlawful seizure:

Under the[] “seizure” standards, law enforcement officers remain free to approach persons on the street or in public places, seek their cooperation or assistance, request or impart information, *or question them* without being called upon to articulate a certain level of suspicion in justification if a particular encounter proves fruitful.

Holmes, 311 Or at 409-10 (emphasis added). An officer can similarly question or seek consent from an individual who is already in custody without effecting an unlawful seizure. *E.g.*, *State v. Bea*, 318 Or 220, 229-30, 864 P2d 854 (1993).

Of course, in the context of a lawful traffic stop, the police will have already stopped the motorist in order to question him or her about an observed traffic violation. Courts, therefore, typically are not asked to rule whether a

defendant had been seized by an officer in traffic-stop cases. Instead, in those cases—as here—the question becomes whether an officer is entitled to ask questions or for consent to search (the very questions an officer could constitutionally ask a citizen on the street) without effecting an unreasonable seizure under Article I, section 9. Stated another way, in light of this court’s prior holdings that an officer can approach an individual on the street and question that person without automatically effecting a seizure, the question necessarily reduces to whether there is something inherently different about the nature of a lawful traffic stop that somehow compels the conclusion that an officer cannot ask questions unrelated to the stop without creating an unconstitutional seizure.

In the Court of Appeals’ view, any question unrelated to the stop and not asked during an unavoidable lull in the traffic stop is *per se* unreasonable in the absence of reasonable suspicion. The state submits that the question of reasonableness—no less than the question of whether someone has been seized—requires an inquiry into the specific facts of the stop and is not susceptible to the bright-line rule favored by the Court of Appeals.

2. Rather than adopting a bright-line approach, this court has previously considered the length of any delay in proceeding with a traffic stop and whether that delay can be categorized as *de minimis*.

As a starting point, this court already has rejected the premise that an officer may not ask any questions unrelated to the stop: “[T]o the extent that defendant argues that *every* question by an officer that is unrelated to the reason for a valid traffic stop violates Article I, section 9, unless the question is based on

reasonable suspicion, we reject defendant's argument." *State v. Amaya*, 336 Or 616, 626, 89 P3d 1163 (2004) (emphasis in original). This court noted that to accept such an argument would be to accept the fact that ORS 810.410—which describes an officer's authority during a traffic stop—is unconstitutional on its face, a proposition that it was unwilling to accept.⁴ See 336 Or at 636 ("That

⁴ ORS 810.410(3) provides a police officer with the following authority when conducting a traffic stop. The officer:

- (a) Shall not arrest a person for a traffic violation.
- (b) May stop and detain a person for a traffic violation for the purposes of investigation reasonably related to the traffic violation, identification, and issuance of the citation.
- (c) May make an inquiry into circumstances arising during the course of a detention and investigation under paragraph (b) of this subsection that give rise to a reasonable suspicion of criminal activity.
- (d) May make an inquiry to ensure the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons.
- (e) May request consent to search in relation to the circumstances referred to in paragraph (c) of this subsection or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.

The state recognizes that this case arises out of Article I, section 9 and not ORS 810.410. Nevertheless, the necessary import of defendant's position is that ORS 810.410 is unconstitutional on its face, a position this court explicitly rejected in *Amaya*. In all events, the Court of Appeals' decision in this case is inconsistent with the Oregon legislature's clear intent, embodied in ORS 810.410, that there are some actions officers can take during the course of a lawful traffic stop that are reasonable. Stated another way, ORS 810.410 reflects the societal view (parlayed through the legislative process) that nothing about a traffic stop is so inherently different as to require different rules than those that apply to an officer-citizen street encounter.

argument is tantamount to asserting that ORS 810.410(3)(d) is unconstitutional on its face because it allows safety-related questions without requiring reasonable suspicion that there is an immediate threat to the officer's safety.”).

Rejecting such a bright-line approach, this court has instead taken into account the length of any “delay” in proceeding with a traffic stop. For instance, in *State v. Jackson*, 296 Or 430, 677 P2d 21 (1984), an officer stopped the defendant for a traffic violation. After the defendant produced a valid license and registration, the officer walked from the driver's side of the car to the passenger side and observed open beer containers. *Id.* at 432. The defendant argued that “the officer had unlawfully detained [him] after all matters concerning the initial stop had been ‘satisfactorily processed’” and that walking around the car and looking into it constituted an unreasonable search or seizure. *Id.* at 433.

This court rejected the defendant's claim. In doing so, the court noted that the action that the defendant focused on was “the brief time during which the officer” walked around the car. *Id.* at 438. That “delay,” this court concluded, was “*de minimis*” and therefore did not violate Article I, section 9. This court went on to note the absurd result that would obtain were the defendant's position correct:

Were the defendant to prevail here, an interpretation of the Court of Appeals standard would seem to dictate that once an officer returns an operator's license to the driver of a stopped vehicle, he or she must execute an abrupt about-face and march directly back to the police vehicle. Such an interpretation would not be reasonable. An officer who has lawfully stopped a vehicle does not violate any occupant's rights in walking around the vehicle[.]

Id. at 438.

Thus, under *Jackson*, a *de minimis* delay in the traffic stop does not, without more, violate an individual's right to be free from unreasonable seizures. A contrary ruling, as this court noted, would impose an artificial and unnecessary restriction upon officers in conducting traffic stops and is in no manner compelled by Article I, section 9.

Yet that is precisely what the Court of Appeals here did. Under the Court of Appeals' holding, an officer can ask the motorist about suspicious containers in the vehicle or request consent to search while waiting for a license check to be completed, but cannot ask those same questions once the license information has been obtained *even while* the officer is deciding what step to take next in the process. Instead, the officer must march lockstep through the investigation and citation process. Arguably, even a benign question about the weather or the outcome of the recent Seattle Seahawks game—if not asked while the officer is writing a ticket or awaiting a call from dispatch—would serve to unconstitutionally prolong a traffic stop and would itself be unconstitutional.

In short, under the Court of Appeals' decision, whether the officer-citizen encounter is offensive contact (and therefore unconstitutional) or nonoffensive contact (and therefore constitutional) turns only on the happenstance of (1) how quickly the process can be completed; (2) whether an "unavoidable lull" has occurred; and (3) whether an officer is able to multi-task and simultaneously work on a step related to the citation process while asking the motorist questions

unrelated to the traffic stop. This court should reject that approach because it impermissibly substitutes a bright-line rule for one that is inherently fact specific and takes into account the totality of the circumstances.

3. Questions or requests for consent during the course of a lawful traffic stop are permissible so long as the questions or the request for consent do not unreasonably extend the length or scope of the stop.

The better approach is the one that this court took in *Jackson* and *Holmes*. That is, any questions or requests for consent that take place during the course of a lawful traffic stop should be evaluated by their scope and length, with an eye towards the ultimate determination of whether those questions or requests for consent rendered the seizure unreasonable. That approach promotes the concerns underlying Article I, section 9 in that it protects individuals from those seizures that are “unreasonable.” At the same time, that approach recognizes that officers may pose the same questions to individuals who are subject to a lawful traffic stop that the officers could pose to any person on the street, so long as the questions create only a *de minimis* delay during an otherwise lawful traffic stop.

The state recognizes, as this court did in *Holmes*, that this test may at first appear vague:

We recognize that this test will seem rather vague when unadorned by judicial interpretation based upon specific fact situations, as would be the ‘reasonable suspicion’ test for temporary detention or the ‘reasonable grounds to believe’ test for arrest, or, for that matter, the ‘probable cause’ requirement of both Article I, section 9, and the Fourth Amendment. We do not expect that these seizure-of-person standards that serve as a starting point for analysis will, from their inception, provide a ready answer for every conceivable fact situation that may arise in this complex area of the law. Nevertheless, we believe that the ‘seizure’ standards we set forth today can be understood and applied by the police.

Holmes, 311 Or at 410. That dilemma, however, is inherent in the “infinite variety” of events that occur during traffic stops and serves to underscore the importance of adopting a flexible, fact-specific inquiry rather than the Court of Appeals’ rigid test.

Moreover, the appropriate reasonableness inquiry is consistent with the approach this court has taken in other cases in which it has considered the steps that an officer may take during a lawful officer-citizen encounter outside of the traffic-stop context. In the context of officer safety searches, this court has held that courts must examine the totality of the circumstances to determine whether the precautions taken by the officers were “reasonable at the time that the decision to search was made.” *State v. Cocke*, 334 Or 1, 9-10, 45 P3d 109 (2002).

Similarly, in the context of searches conducted incident to arrest, this court has held that the search must be a “reasonable search” of the person. *State v. Caraher*, 293 Or 741, 752, 653 P2d 942 (1982).

Again, the touchstone of this court’s inquiries into the extent to which officers may question or search individuals who are already the subject of a lawful stop or seizure is—as Article I, section 9 dictates—reasonableness. That same approach should apply in the context of a lawful traffic stop.

Courts, both state and federal, have divided over the issue of whether asking a driver questions unrelated to the purpose for the stop results in an

impermissible seizure.⁵ However, this court should apply the same reasoning to Article I, section 9 that the Ninth Circuit applied to the Fourth Amendment in *Shabazz*: questioning that is unrelated to the purpose of the stop is permissible, so long as the duration of the stop is not unreasonably extended. That is because the concern, in a stop or seizure context, is on “detention, not questioning.” *Shabazz*, 993 F2d at 436. The Seventh Circuit similarly has explained:

[B]ecause questions are neither searches nor seizures, police need not demonstrate justification for each inquiry. Questions asked during detention may affect the reasonableness of that detention (which *is* a seizure) to the extent that they prolong custody, but questions that do not increase the length of detention (or that extend it by only a brief time) do not make the custody itself unreasonable or require suppression of evidence found as a result of the answers.

Childs, 277 F3d at 949.

⁵ See *United States v. Shabazz*, 993 F2d 431, 436-37 (9th Cir 1993) (questioning that occurs during investigation of traffic infraction but that is unrelated to that subject is permissible); *United States v. Childs*, 277 F3d 947, 949 (7th Cir 2002) (en banc), *cert den*, 537 US 829 (2002) (same); *State v. Pegeese*, 351 NJ Super 25, 796 A2d 934, 937 (2002) (relying on *Shabazz*); *State v. Gauluapp*, 207 Wis 2d 600, 558 NW2d 696 (1996), *rev den*, 208 Wis 2d 213 (1997) (same). Compare *State v. Gibbons*, 248 Ga App 859, 547 SE2d 679 (2001); *People v. White*, 331 Ill App 3d 22, 264 Ill Dec 367, 770 NE2d 261 (2002), *cert den*, 538 US 1053 (2003); *State v. Mitchell*, 265 Kan 238, 960 P2d 200 (1998); *State v. Taylor*, 126 NM 569, 973 P2d 246 (App 1998), *rev den*, 126 NM 534 (1999).

Some courts take more intermediate or compromise positions on the issue. See *United States v. Holt*, 264 F3d 1215, 1217 (10th Cir 2001) (en banc) (both scope and duration of stop matter, but officer may always ask about presence of loaded weapons); *State v. Parkinson*, 135 Idaho 357, 17 P3d 301, 306 (App 2000) (agreeing in part with *Shabazz*, but “reject[ing] any notion that duration [of the stop] is the only relevant factor”); *Lockett v. State*, 747 NE 2d 539, 542-43 (Ind SC 2001) (taking position much like espoused in *Holt*; officer may ask questions about weapons if the questions do “not materially extend the duration of the stop or the nature of the intrusion”).

Of course, this court is not bound by *Shabazz* or *Childs*. However, the analysis set out in those decisions is fully consistent with *Holmes* and Article I, section 9, which recognizes that police questioning *per se* does not amount to a “seizure” of constitutional moment.

B. Here, the officer did not violate Article I, section 9 when he asked defendant questions unrelated to the initial purpose of the traffic stop.

Here, the officer’s single question to defendant about whether he had any weapons, followed by a request for consent to search, did not constitute an unreasonable seizure. The initial traffic stop was unquestionably valid. The officer then asked defendant whether he had any weapons on him. The officer followed that question with a request for consent to conduct a patdown of defendant’s clothing, and defendant agreed. Those two questions, combined with the time it took for Officer Steele to stop defendant and obtain his identifying information, took a mere two minutes.

Officer Steele then followed up his initial request for consent with a request to search the contents of defendant’s pockets. After defendant agreed, Officer Steele located a small metal cylinder, which defendant allowed Officer Steele to open. At the point that the officer saw the methamphetamine inside of the cylinder, only four to five minutes had passed since the time that Officer Steele initially stopped defendant.

In other words, in the span of only four to five minutes, the officer stopped defendant, had an initial conversation with him about the stop, asked for and obtained identifying information, asked about the presence of weapons, and asked

for consent to conduct a patdown and search. That conduct effected no unreasonable seizure. Instead, Officer Steele merely posed the same questions to defendant during the course of the lawful traffic stop that he could have posed to defendant had he simply approached defendant on the street. The initial question about the presence of weapons and the request for permission to conduct an exterior patdown produced only *de minimis* delay. Indeed, the two minutes that elapsed between the initial traffic stop and the officer's questions included the stop, the conversation with defendant, and the actions required to obtain defendant's identifying information. Because the question about the presence of weapons and for consent to conduct a patdown took only moments to ask, nothing about them rendered the traffic stop unreasonable in its length or its scope.

Moreover, because defendant consented to the patdown, he also necessarily consented to the delay that occurred while Officer Steele conducted the patdown. That is, defendant cannot be heard to complain that the patdown rendered the stop unreasonable. Instead, any delay that resulted from the patdown was one that defendant agreed to.

Similarly, the officer's subsequent request to search defendant's pocket contents was also *de minimis* and reasonable in the circumstances. As noted above, only two to three additional minutes passed between defendant's consent and the point at which the officer found the methamphetamine. As a result, the amount of time it took to request consent to search defendant's pockets must only have been brief. The ensuing delay of two to three minutes—the delay between

the request for consent and the point that the officer found the methamphetamine—was both *de minimis* and, again, consented to by defendant. The request for consent to search defendant's pockets thus did not effect an unlawful seizure and it did not unconstitutionally prolong the traffic stop in this case.

CONCLUSION

This court should reject the Court of Appeals' attempt to apply a different constitutional standard to traffic stops than this court applies in non-traffic stop contexts. Because the officer's questions to defendant were brief and limited in scope, the questions did not effect an unreasonable seizure of defendant under Article I, section 9. The Court of Appeals erred in concluding otherwise. For those reasons, this court should reverse the Court of Appeals' decision.

Respectfully submitted,

HARDY MYERS
Attorney General
MARY H. WILLIAMS
Soli

ANI
Assi

Attorneys for Petitioner on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on October 30, 2008.

I further certify that I directed the Brief on the Merits to be served upon Ingrid Swenson and Shawn Wiley, attorneys for respondent, on October 30, 2008, by having the document personally delivered to:

Ingrid Swenson
Executive Director
Office of Public Defense Services
Peter Gartlan
Chief Defender
Shawn Wiley
Chief Deputy Defender
1320 Capitol Street NE, Suite 200
Salem, Oregon 97301

AN
As:
Att

eral
: on Review

AMJ:slc/1097651-v1