IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. ANTONIO MACIEL-FIGUEROA, Defendant-Respondent, Respondent on Review.	Polk County Circuit Court No. 11P3134 CA A148894 SC S063651

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 Polk County
Honorable MONTE S. CAMPBELL, Judge

Opinion Filed: August 26, 2015
Author of Opinion: Duncan, P.J.
Before: Duncan, P.J., Haselton, C.J., Wollheim, S.J.

Continued…

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
ZACHARY L. MAZER #066670
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: zack.mazer@opds.state.or.us

Attorneys for Defendant-Respondent

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
SUSAN G. HOWE #882286
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: susan.howe@doj.state.or.us

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

INTRODUCTION 1

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW 1

First Question Presented 1

First Proposed Rule of Law 1

Second Proposed Question 2

Second Proposed Rule of Law 2

STATEMENT OF THE CASE 2

A. Summary of Argument 2

B. Statement of Facts and Procedural Background 4

1. Officers respond to a call for police assistance to a domestic disturbance 4

2. The Court of Appeals rules that the officers lacked reasonable suspicion to detain defendant. 7

ARGUMENT 7

I. Article I, section 9 authorizes investigatory detentions. 7

II. An investigatory detention requires minimal justification under Article I, section 9. 11

A. Investigatory detentions are essential to effective law enforcement 12

B. The purpose of an investigatory detention is to determine whether criminal activity is afoot—*i.e.*, has recently occurred, is occurring, or is about to occur. 15

III. Officer Moffitt reasonably suspected that criminal activity may be afoot in residence. 21

IV. Officer Moffitt reasonably suspected that defendant was involved in the possible criminal activity or had witnessed it. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases Cited

Adams v. Williams,
407 US 143, 92 S Ct 1921, 32 L Ed 2d 612 (1972) 14, 16

Dunaway v. New York,
442 US 200, 99 S Ct 2248, 60 L Ed 2d 824 (1979) 14

Howell v. Boyle,
353 Or 359, 298 P3d 1 (2013) 9

Illinois v. Gates,
462 US 213, 103 S Ct 2317, 76 L Ed 2d 527 (1983) 9, 16

Illinois v. Wardlow,
528 US 119, 120 S Ct 673, 145 L Ed 2d 570 (2000) 14, 16

Kolander v. Lawson,
461 US 352, 103 S Ct 1855, 75 L Ed 2d 903 (1983) 8

Navarette v. California,
__ US __, 134 S Ct 1683, 188 L Ed 2d 680 (2014) 15

Parson v. State,
392 SW3d 809 (Tex 2012) 24, 26

People v. O'Neil,
43 Misc 3d 693, 986 NYS 2d 302 (NY 2014) 26

Safford Unified School District No. 1 v. Redding,
557 US 364, 129 S Ct 2633, 174 L Ed 2d 354 (2009) 16

Samson v. California,
547 US 843, 126 S Ct 2193, 165 L Ed 2d 250 (2006) 28

State v. Backstrand,
354 Or 392, 313 P3d 1084 (2013) 12

State v. Campbell,
306 Or 157, 759 P2d 1040 (1988) 8

State v. Classen,
285 Or 221, 590 P2d 1198 (1979) 13

State v. Cloman,
254 Or 1, 456 P2d 67 (1969) 27

State v. Ehly,
317 Or 66, 854 P2d 421 (1993) 9, 10, 15, 17, 18

State v. Fair,
353 Or 588, 302 P3d 417 (2013) 12, 29, 30

State v. Figueroa,
148 NM 811, 242 P3d 378 (NM 2010) 25, 26

State v. Freeland,
295 Or 367, 667 P2d 509 (1983) 12

State v. Gerrish,
311 Or 506, 815 P2d 1244 (1991) 12

State v. Haynes,
288 Or 59, 602 P2d 272 (1979),
cert den 446 US 945 (1980) 13

State v. Holdorf,
355 Or 812, 333 P3d 982 (2014) 9, 22

State v. Jacobus,
318 Or 234, 864 P2d 861 (1993) 9, 18

State v. Jordan,
288 Or 391, 605 P2d 646,
cert den 449 US 846 (1980) 12

State v. Kennedy,
290 Or 493, 624 P2d 99 (1981) 9

State v. Lichty,
313 Or 579, 835 P2d 904 (1992) 9, 12, 21

State v. Maciel-Figueroa,
273 Or App 298, 356 P3d 674 (2015) 22

State v. Madrigal,
65 Wash App 279, 827 P2d 1105 (1992) 26

State v. Miller,
207 P3d 541 (2009) 25, 26

State v. Moore,
264 Or App 86, 331 P3s 1027 (2014) 20

State v. Schultz,
170 Wash 2d 746, 248 P3d 484 (2011) 23

State v. Unger,
356 Or 59, 333 P3d 1009 (2014) 15, 27

State v. Valdez,
277 Or 621, 561 P2d 1066 (1977) 2, 9, 14, 15, 22

Terry v. Ohio,
392 US 1, 88 S Ct 1868,
20 L Ed 2d 889 (1968) 9, 10, 12, 13, 16, 21, 24, 29

United States Paetsch,
782 F3d 1162 (10th Cir 2015) 28

United States v. Cortez,
449 US 411, 101 S Ct 690, 66 L Ed 2d 621 (1981) 10

United States v. Garza,
980 F2d 546 (9th Cir 1992) 17

United States v. Grant,
682 F3d 827 (9th Cir 2012) 17

United States v. Hensley,
469 US 221, 105 S Ct 675, 83 L Ed 2d 604 (1985) 14

United States v. Kaplansky,
42 F3d 320 (6th Cir 1994) 20

Constitutional & Statutory Provisions

Or Const Art I, § 9 ..... 1, 2, 3, 7, 8, 11, 14, 24, 27, 29

ORS 131.615 9

ORS 164.354(1)(b) 22

US Const Amend IV 7, 8, 14, 28

Other Authorities

A Model Code of Pre-Arraignment Procedure §110.2 (1975) 12, 13, 28

Charles L. Hobson, *Flight and Terry*: *Providing the Necessary Bright Line*,
3 Md J. Contemp. Issues 119, 139 (1992) 29

Wayne R. LaFave,
4 *Search and Seizure* §9.1(a) (5th ed 2015) 12

Wayne R. LaFave,
Jerold H. Israel, Nancy J. King, and Oris S. Kerr,
2 *Criminal Procedure §3.8(d)* (4th ed 2015) 16, 20, 28

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

INTRODUCTION

Article I, section 9, of the Oregon Constitution entitles police officers to temporarily detain a citizen, for investigatory purposes, if they reasonably suspect that criminal activity is afoot (*i.e.*, that criminal activity has just occurred, is ongoing, or is about to occur). Officers may do so, however, without first *confirming* that criminal activity is afoot, or confirming that a specific criminal statute has already been violated. At issue in this case is whether officers had reasonable suspicion to detain defendant when, responding to a 9-1-1 call for assistance about a disturbance occurring in a private residence, they saw defendant exit said residence a mere ten minutes after the 9-1-1 call for assistance was placed.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

For reasonable suspicion to exist under Article I, section 9, of the Oregon Constitution, to what extent must an officer have gathered evidence establishing the elements of a particular crime?

First Proposed Rule of Law

Article I, section 9, does not require a police officer to first confirm that criminal activity, much less of a specific criminal statute, is afoot (*i.e.*, that

criminal activity has just occurred, is ongoing, or is imminent) to have reasonable suspicion to temporarily seize a citizen for the purpose of an investigatory detention.

Second Proposed Question

For the purposes of Article I, section 9, does a police officer have the reasonable suspicion necessary to stop a person after he exits a residence that the police reasonably believe is the site of possible criminal activity?

Second Proposed Rule of Law

Yes. For purposes of Article I, section 9, a police officer has the reasonable suspicion necessary to lawfully stop a person if the officer reasonably believes that the person was either somehow involved with, or a witness to, possible criminal activity. Article I, Section 9 does not require the officer to first reach a conclusion about the person's precise role with respect to the criminal activity.

STATEMENT OF THE CASE

A. Summary of Argument

Article I, section 9, authorizes a police officer to conduct a brief, investigatory stop when the officer can point "to specific and articulable facts which give rise to the inference that criminal activity is afoot" and that the person stopped "is somehow involved." *State v. Valdez*, 277 Or 621, 626, 561 P2d 1066 (1977). The purpose of an investigatory detention is to freeze the

scene long enough for the officer to clarify whether criminal activity has occurred, is occurring, or is about to occur and whether the person stopped is involved. Reasonable suspicion thereby accepts the risk that officers may stop innocent people.

Here, police officers temporarily detained defendant as he was leaving a house where a fight had been reported. The Court of Appeals held that the detention was unlawful because the police officer did not know precisely what criminal offense had committed. But reasonable suspicion does not require an officer to conclude definitively that a crime has occurred, much less a specific crime. Reasonable suspicion exists when the totality of circumstances provide a moderate chance that criminal activity may be afoot, and that the person stopped was somehow involved. Reasonable suspicion, in other words, permits an officer to act *before* his reasonable suspicion is verified.

The officers in defendant's case had sufficient information from a named informant that a domestic disturbance was occurring inside a known residence and that an angry male was threatening to break the female resident's property. Given that information, the officers reasonably suspected that a crime of violence may have occurred, was occurring, or might occur in the residence. Given that defendant was seen exiting the involved residence a mere ten minutes after the call for police assistance had been made, the officers also reasonably suspected that defendant was involved in or had witnessed criminal

activity. As a result, the officers were entitled to temporarily detain defendant at that point for investigative purposes. The Court of Appeals erred by holding that the officers, before seizing defendant, needed to do more to confirm that a particular crime had occurred.

B. Statement of Facts and Procedural Background

1. Officers respond to a call for police assistance to a domestic disturbance.

On April 27, 2011, a person who identified herself as Jennifer mother called 9-1-1 to ask for police assistance. Tr 12. According to mother, had just called her to report that a person named Antwon was at her house and threatening to break her things. Tr 13. mother also "heard a lot of yelling in the background." Tr 13. The caller was very concerned about and asked the police to respond to residence. Tr 13.

One of the officers who responded, Officer Moffitt, was familiar with and her residence from previous contacts. Tr 12-13, 15, 17-18. On one occasion, a person of interest barricaded himself inside the residence in an attempt to avoid police contact. Tr 17. On another occasion, while Officer Moffitt was knocking on the front door, a person of interest jumped out the back window to avoid police contact. Tr 18. Officer Moffitt was also familiar with the layout of residence. Tr 15.

Officer Moffitt and a cover officer arrived at residence approximately ten minutes after the 9-1-1 call. Tr 14. As they pulled up, Officer Moffitt observed defendant, an adult male, come around from the side of house, where Officer Moffitt knew the front door to be and walk down the driveway away from the officers. Tr 14-15. Based upon the dispatch report and the brief passage of time, Officer Moffitt believed that criminal activity either had just occurred, was occurring, or was about to occur and that defendant may have been involved. Tr 15, 38.

Officer Moffitt called out to defendant, asking him if he would speak with him. Tr 15-16. Defendant looked back at the officers, placed his hands in his pants pockets, and continued to walk away. Tr 16. Officer Moffitt then directed defendant to come back and speak to him, and asked defendant to take his hands out of his pockets. Tr 16, 17. Defendant responded by walking back up driveway, to front door, and placing his hands in his pants pockets again. Tr 16-17. Concerned that defendant could be armed or contemplating barricading himself inside residence, Officer Moffitt again ordered defendant to stop. Tr 18. Defendant stopped at front porch. Tr 18.

Officer Moffitt ordered defendant to take his hands out of his pockets two or three more times before defendant complied. Tr 19. Officer Moffitt told defendant that he was concerned that defendant might be carrying a weapon. Tr

19. Defendant denied carrying a weapon and consented to a search of his person. Tr 19. During the search, Officer Moffitt seized a used methamphetamine pipe and a scale from defendant's pants pockets. Tr 19-20.

Based on evidence found after discovery of the methamphetamine pipe,[1] the state indicted defendant for identity theft (Count 1), unlawful possession of methamphetamine (Count 2), furnishing false information to an officer (Count 3), and tampering with physical evidence (Count 4). ER-1-3. Prior to trial, defendant moved to suppress evidence of the methamphetamine and methamphetamine paraphernalia—and the evidence subsequently discovered—on the grounds that the officers had unlawfully seized him outside residence. ER-4-8. The trial court denied the motion, concluding that Officer Moffitt reasonably suspected that defendant may have been involved in possible criminal activity at the time that the officer ordered defendant to stop. Tr 52-53. Based on a stipulated facts trial, the trial court convicted defendant of all charges. Tr 68; ER-9-12, -13-19.

---

[1] Defendant had a forged identification card identifying himself as David Torres-Smith in his wallet. ER-9. He also initially identified himself as Torres-Smith to the officers. ER-11.

2. The Court of Appeals rules that the officers lacked reasonable suspicion to detain defendant.

The Court of Appeals reversed the trial court's judgment. It held that Officer Moffitt lacked reasonable suspicion that any specific crime had been committed inside residence.[2] 273 Or App 307-08. The court ruled that, assuming that the 9-1-1 caller's report was reliable, it did not provide any objective reasons to conclude that a crime had been committed, because the caller did not report "any violence, physical injury or imminent violence." *Id.* at 307. It also noted that the police observed no evidence that a crime had been committed upon their arrival, because they did not witness "any violence, encounter any injured people, hear items breaking, or observe broken objects." *Id.* Consequently, defendant's consent to the search of his person was tainted by the unlawful seizure, justifying suppression of any evidence found as a result of the search. *Id.* at 309.

ARGUMENT

I. Article I, section 9 authorizes investigatory detentions.

Article I, section 9, of the Oregon Constitution,[3] like the Fourth Amendment to the United States Constitution,[4] prohibits only those seizures

---

[2] The Court of Appeals expressly limited its ruling to Article I, section 9. 273 Or App at 309 n 3.

[3] Article I, section 9 provides:

Footnote continued…

that are "unreasonable." *State v. Campbell*, 306 Or 157, 166, 759 P2d 1040 (1988). Under Article I, section 9, an officer may conduct a brief, investigatory stop when the officer can point "to specific and articulable facts which give rise to the inference that criminal activity is afoot."[5] *State v. Lichty*, 313 Or 579,

---

(…continued)

> "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."

[4] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[5] The phrase "criminal activity is afoot" refers to the possibility that criminal activity has recently occurred, is occurring, or is about to occur. The United States Supreme Court first used the phrase in *Terry* to articulate when an officer may temporarily seize a citizen. *See* 392 US at 30 ("where an officers observes unusual conduct which leads him reasonably to conclude in light of his experience that *criminal activity may be afoot.*") (emphasis added). Although the word "afoot" implies a temporal requirement of some kind, both this court and the United States Supreme Court have made it clear that an officer has authority to detain a suspect when the officer has a reasonable belief that criminal activity may have recently occurred, was occurring, or was about to occur. *See Kolander v. Lawson*, 461 US 352, 366, 103 S Ct 1855, 75 L Ed 2d 903 (1983) ("In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual * * * for the purpose of asking investigative questions."); *State v. Holdorf*, 355 Or 812, 823, 333 P3d 982

Footnote continued…

584, 835 P2d 904 (1992) (interpreting statutory basis for reasonable suspicion).[6] The "reasonable suspicion" standard for stopping and questioning a person is less stringent than "probable cause" for arrest. *State v. Ehly*, 317 Or 66, 80, 854 P2d 421 (1993).

The concept of "reasonable suspicion," however, is not "readily, or even usefully, reduced to a neat set of legal rules" that may be easily applied to any given set of facts. *Illinois v. Gates*, 462 US 213, 103 S Ct 2317, 76 L Ed 2d 527 (1983); *Howell v. Boyle*, 353 Or 359, 388, 298 P3d 1 (2013) ("The fact is that not every constitutional provision can be reduced to a neat formula that

---

(…continued)
(2014) ("[I]f an officer is able to point to specific and articulable facts that a person has committed a crime or is about to commit a crime, the officer has a 'reasonable suspicion' and may stop the person to investigate.").

[6] The majority of this court's cases discussing whether an officer possessed reasonable suspicion of criminal activity have addressed the statutory standard for stopping and questioning individuals under ORS 131.615. *See, e.g.*, *State v. Jacobus*, 318 Or 234, 864 P2d 861 (1993) (discussing statutory standard for reasonable suspicion to make a stop); *State v. Lichty*, 313 Or 579, 584, 835 P2d 904 (1992) (same). This court has generally held, however, that the constitutional and statutory standards are the same. *See State v. Kennedy*, 290 Or 493, 496-97, 624 P2d 99 (1981) (analysis of a defendant's rights under statutes "is substantially the same as [an] analysis of [the defendant's] rights under the search and seizure provisions of the Oregon and Federal constitutions"). *But see State v. Valdez*, 277 Or 621, 625 n 4, 561 P2d 1006 (1977) (noting that the legislature adopted a different rule than that adopted by the United States Supreme Court in *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968)).

avoids the necessity of applying careful judgment to the facts and circumstances of each case."). Rather, as the United States Supreme Court has said:

> The process [of determining reasonable suspicion] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same—and so are law enforcement officers.

United States v. Cortez, 449 US 411, 417-18, 101 S Ct 690, 695, 66 L Ed 2d 621 (1981). In drawing that "common-sense conclusion[] about human behavior," the court must consider the totality of the circumstances—that is, "the *whole* picture." *Id*. at 418 (emphasis added); *Ehly*, 317 Or at 83 (considering "totality of the circumstances" in determining whether officer's suspicion was reasonable).

The best description of what constitutes "reasonable suspicion"—as an inherently flexible concept—is simply as described above: a common-sense conclusion about human behavior. *Cortez*, 449 US at 417-18. Reasonable suspicion does not require an officer to eliminate possible innocent explanations for the observed conduct. Rather, reasonable suspicion can exist even when the observed conduct is ambiguous and susceptible of innocent explanation, as long as the inference of criminal activity is reasonable. *Terry v. Ohio*, 392 US 1, 23, 88 S Ct 1868, 20 L Ed 2d 889 (1968); *Ehly*, 317 Or at 80.

At issue in this case is whether Article I, section 9 requires an officer to have objective evidence to conclude that a particular criminal offense has occurred as well as objective evidence identifying the citizen stopped as the perpetrator of the specific criminal offense. To answer those questions, it is important to understand the role investigatory stops plays in law enforcement and what type and how much evidence is required under Article I, section 9. The next section of this brief addresses those issues. From there, this brief will demonstrate why, under the totality of circumstances of defendant's case, Officer Moffitt had reasonable suspicion to temporarily detain defendant.

II. An investigatory detention requires minimal justification under Article I, section 9.

Here, the Court of Appeals ruled that the facts known to the officers, including the information from mother, at the time they stopped defendant "were not sufficient to support an objectively reasonable conclusion that a crime had occurred." 273 Or App at 305. The court found it significant that the officers did not personally observe evidence that a crime had been committed, because they did not witness "any violence, encounter any injured people, hear items breaking, or observe broken objects." *Id.* at 307.

Contrary to the Court of Appeals' ruling, Article I, section 9, does not require an officer to conclude that a crime had been committed in order for an officer to conduct an investigatory detention. The purpose of an investigatory

detention is to clarify whether criminal activity is, in fact, afoot—whether it has already occurred, is occurring, or is about to occur. An officer need only point to specific and articulable facts which give rise to the inference that "criminal activity is afoot." *Lichty*, 313 Or at 584.

A. Investigatory detentions are essential to effective law enforcement.

Even before the United States Supreme Court issued its seminal opinion in *Terry v. Ohio*, law enforcement has long used investigatory detention as a significant tool in both crime prevention and crime detection. Wayne R. LaFave, 4 *Search and Seizure* §9.1(a) (5th ed 2015). The *Terry* court acknowledged that effective crime prevention and detection serves an important societal interest. 392 US at 22 ("One general interest is of course that of effective crime prevention and detection."). The American Legal Institute (ALI) officially endorsed use of the investigative detention as reasonable in 1975, when it issued its Model Code of Pre-Arraignment Procedure (Model Code)[7], explaining in its commentary:

---

[7] This court has previously cited the *Model Code* as a source of persuasive legal authority. *See, State v. Backstrand*, 354 Or 392, 402, 313 P3d 1084 (2013); *State v. Fair*, 353 Or 588, 606, 302 P3d 417 (2013); *State v. Gerrish*, 311 Or 506, 515 n 4, 815 P2d 1244 (1991); *State v. Freeland*, 295 Or 367, 371 n 3, 667 P2d 509 (1983); *State v. Jordan*, 288 Or 391, 395 n 1 and 398 n 6, 605 P2d 646, *cert den* 449 US 846 (1980); *State v. Haynes*, 288 Or 59, 71 n

Footnote continued…

> [A] law enforcement officer will be confronted with many situations in which it seems necessary to acquire some further information from or about a person whose name he does not know, and whom, if further action is not taken, he is unlikely to find again. * * *
>
> * * * [I]n such circumstances, where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to "freeze" the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken. To deny the police such a power would be to pay a high price in effective policing and in the police's respect for the good sense of the rules that govern them.

ALI Model Code 270-72 (1975).

Moreover, courts recognize that officers necessarily have limited time and information when deciding whether to initiate an investigative detention. The *Terry* Court acknowledged:

> But we deal here with an entire rubric of police conduct – necessarily swift action predicated upon on-the-spot observations of the officer on the beat – which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.

392 US at 20. Officers generally are responding to a call for assistance or reacting to conduct that, although indicative of ongoing criminal activity, is also susceptible to innocent explanation. Both situations require the officer to respond quickly. Accordingly, officers need to be able to quickly assess

---

(…continued)
4 and 72 n 6, 602 P2d 272 (1979), *cert den* 446 US 945 (1980); and *State v. Classen*, 285 Or 221, 230-32, 590 P2d 1198 (1979).

whether they have sufficient reasonable suspicion to stop a citizen. Peace officers should not be expected to be legal experts or to use a multifactor balancing test to assess whether reasonable suspicion exists to initiate an investigatory detention. *Dunaway v. New York*, 442 US 200, 213-14, 99 S Ct 2248, 60 L Ed 2d 824 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."). Rather, public interest dictates that officers need the ability to maintain the status quo momentarily by temporarily seizing potential suspects and witnesses to obtain more information to determine if a crime, in fact, has been committed. *United States v. Hensley*, 469 US 221, 229, 105 S Ct 675, 83 L Ed 2d 604 (1985); *Adams v. Williams*, 407 US 143, 146, 92 S Ct 1921, 32 L Ed 2d 612 (1972). Given the limited purpose and scope of the investigative detention, both this court and the United States Supreme Court have concluded that such a seizure is reasonable under Article I, section 9, and the Fourth Amendment. *Illinois v. Wardlow*, 528 US 119, 123, 120 S Ct 673, 145 L Ed 2d 570 (2000) ("[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot."); *Valdez*, 277 Or at 626 (An officer may temporarily stop a citizen when specific and articulable facts "indicate to the office that there is some type of criminal

activity afoot and that this particular individual is somehow involved.") (internal citation omitted).

B. The purpose of an investigatory detention is to determine whether criminal activity is afoot—*i.e.*, has recently occurred, is occurring, or is about to occur.

Furthermore, the purpose of an investigatory detention is not to gather evidence to support a previously reached conclusion that a crime has occurred. Instead, the detention's purpose is to clarify whether a suspicion of criminal activity (*i.e.*, that a crime may have just been completed, may be occurring, or may be imminent) was correct. Unlike an arrest, which requires probable cause to believe the citizen arrested has committed a criminal offense, reasonable suspicion to temporarily detain a citizen requires minimal justification. *Valdez*, 277 Or at 628. An officer need only have specific and articulable facts to support a reasonable inference that a person is involved in possible criminal activity. *State v. Unger*, 356 Or 59, 71, 333 P3d 1009 (2014); *Ehly*, 317 Or at 80.

An officer, in fact, does not need to see the person in question engage in criminal conduct in order to seize the person, as long as the officer has other objective evidence to believe that he or she might be involved in criminal activity. *See Navarette v. California*, __ US __, 134 S Ct 1683, 188 L Ed 2d 680 (2014) (officers had reasonable suspicion to stop the defendant even though they did not observe any suspicious driving); *Adams v. Williams* (officers

reasonably frisked the defendant for weapons, even though the officer did not observe any suspicious behavior). In other words, even though a citizen's conduct may be consistent with innocent behavior, reasonable suspicion can still exist to believe that criminal activity might be afoot. *Terry v. Ohio*, 392 US at 23. The very purpose of an investigatory detention, after all, is to clarify ambiguous situations in which criminal activity *may* have occurred or may be occurring. Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Oris S. Kerr, 2 *Criminal Procedure §3.8(d)* (4th ed 2015). Officers need only believe that there is a "moderate chance" of finding evidence of ongoing criminal activity. *Safford Unified School District No. 1 v. Redding*, 557 US 364, 371, 129 S Ct 2633, 174 L Ed 2d 354 (2009). By requiring a lower standard of proof, reasonable suspicion accepts the risk that officers may stop innocent people. *Illinois v. Wardlow*, 528 US at 126 ("*Terry* accepts the risk that officers may stop innocent people."). The very nature of reasonable suspicion allows that the probability of an innocent explanation for known facts outweighs a guilty one; if it did not, there would be no distinction between reasonable suspicion and probable cause.[8]

---

[8] *See Illinois v. Gates*, 462 US at 244 n 13 ("probable cause requires only a probability or substantial chance of criminal activity"); *United States v. Grant*, 682 F3d 827, 832 (9th Cir 2012) ("Probable cause for a search requires a 'fair probability that contraband or evidence of a crime will be found in a particular place,' based on the totality of the circumstances."); *United States v.*

Footnote continued…

This court's own jurisprudence demonstrates that reasonable suspicion does not require an officer to *conclude* that a crime had been or was about to be committed in order to conduct an investigatory detention and that reasonable suspicion can be based on behavior that also is consistent with innocent explanation. Instead, reasonable suspicion requires only an objective suspicion that a crime *might* be occurring. In *Ehly*, this court held that the officers reasonably suspected that the defendant had committed the crime of felon in possession of a firearm, based upon inferences that the officer drew from the defendant's behavior. 317 Or at 81. In *Ehly*, officers responded to a request to help evict a belligerent hotel resident who had failed to check out as required. *Id.* at 68. They knew the defendant had prior felony convictions, was a methamphetamine user, and associated with others known to be armed. *Id.* at 69. The defendant was arguing with the hotel manager and acting as if he were under the influence of methamphetamine. *Id.* The officers requested that the defendant look through two bags that were in the room for the room key, and the defendant complied. *Id.* at 70. Based on the way that the defendant rummaged through one of the bags, with both hands concealed, the officer

---

(…continued)
Garza, 980 F2d 546, 550 (9th Cir 1992) (probable cause for arrest requires a "fair probability that" the suspect has committed a crime); *Foster*, 350 Or at 169 (probable cause standard is "one of probability, not certainty").

feared that the defendant was reaching for a gun. *Id.* at 71-72. She ordered the defendant to back away from the bag and then tipped the bag's contents onto the bed, revealing a loaded .32 automatic handgun inside. *Id.* at 72.

On appeal, the defendant argued that he had been unlawfully stopped by, among other things, the officer's command for him to back away from the duffel bag. *Id.* at 76-80. This court agreed that the defendant was seized at that point, but ruled that, under the totality of circumstances, the officer reasonably suspected that the defendant was in possession of a firearm, even though the suspicion was based entirely on inferences drawn from the defendant's behavior when reaching inside the duffel bag, and even though the circumstances simultaneously permitted an inference that the bag did not contain a gun. *Id.* at 79-81. Based upon that reasonable suspicion, the officer was entitled to temporarily detain defendant to confirm whether, in fact, he was in possession of a firearm. *Id.* at 81.

This court has also held reasonable suspicion to be present even when officers were presented with less information than that in *Ehly*. In *State v. Jacobus*, 318 Or 234, 864 P2d 861 (1993), a convenience store employee called for police assistance after a customer overheard occupants of a car parked nearby say that "there was only one clerk in the store." *Id.* at 236. Upon arriving, the officer observed a car as described in the call park near the convenience store, in a darkened area not visible from the store. *Id.* When the

officer approached the car, the occupants—defendant being one of them—began to "move around the vehicle quite frantically" and stuff something underneath the car seats. *Id.* at 236. Upon stopping the defendant and obtaining consent to search his coat, the officer recovered heroin from a coat pocket. *Id.* at 237.

This court ruled that under the totality of circumstances, the officer was entitled reasonably to infer that criminal activity[9] was either imminent or perhaps in progress. *Id.* at 241. Reasonable suspicion, therefore, existed, even though no one had called to report a crime—much less a specific crime—and even though the information provided by the store clerk was ambiguous and secondhand.

Those cases demonstrate that an officer need not have reason to believe that a crime is, in fact, occurring, in order to have reasonable suspicion to believe that a crime *might* be occurring. Reasonable suspicion permits officers to act *before* their reasonable belief is verified. Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Oris S. Kerr, 2 *Criminal Procedure §3.8(d)* (4th ed 2015) ("Because the very purpose of such stops is to clarify ambiguous situations, * * * police must be permitted to act *before* their reasonable belief is

---

[9] Specifically, the court stated that the officer reasonably suspected the defendant of criminal activity that *included* robbery or theft. *Id.* at 241.

verified[.]" (emphasis in original); *e.g., United States v. Kaplansky*, 42 F3d 320 (6th Cir 1994) (reasonable suspicion existed to stop the defendant, who "suspiciously" used van to watch and follow a teenage girl). As long as an officer can point to specific and articulable evidence that creates a reason to believe that a citizen might be involved in ongoing or recent criminal activity, the officer is entitled to temporarily detain that person to for investigative purposes.

Here, as will be explained in the next sub-section, the Court of Appeals applied too strict a standard of proof to establish reasonable suspicion. The court erred by presuming that an officer must have sufficient information to *conclude* that a crime had, in fact, been committed in order for reasonable suspicion to exist.[10] The purpose of an investigatory detention stop is to clarify *whether* a crime has been committed and whether the person stopped is somehow involved – the very information the Court of Appeals ruled that the officer lacked.

---

[10] The court's error is not isolated. *See also, e.g. State v. Moore*, 264 Or App 86, 90, 331 P3s 1027 (2014) (finding no reasonable suspicion because the information known to the officer "did not establish the elements of the offense of trespassing.").

III. Officer Moffitt reasonably suspected that criminal activity may be afoot in residence.

With that understanding of reasonable suspicion, this court should conclude that Officer Moffitt had reasonable suspicion to temporarily detain defendant for purposes of investigating whether a crime had been committed at residence. The state acknowledges that Moffitt did not observe defendant engage in any criminal behavior prior to calling out to him. The totality of circumstances, however, including the 9-1-1 call from mother, warranted further investigation, because it created a reasonable possibility that a crime in the residence may have actually occurred in the intervening ten minutes, might still be in progress, or was imminent. *See Terry v. Ohio*, 392 US at 22 ("[The officer] had observed * * * a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation.").

Most importantly, a named citizen had called 9-1-1 requesting police assistance. mother identified herself, thus opening herself up to the possibility of being charged with initiating a false police report if the information she reported was not true. *See State v. Lichty*, 313 Or at 584-85 (a named informant is presumed to be credible and reliable). mother described a loud verbal altercation, which she herself overheard, at her daughter's house. Tr 12-13. According to her daughter, a person named

"Antwon" was present and threatening to break "things" inside her residence. Tr 13. mother stated that she was "very concerned" about her daughter. Tr 13.

The Court of Appeals held that, assuming mother was credible and reliable, the facts known to the officers at the time they stopped defendant "were not sufficient to support an objectively reasonable conclusion that a crime had occurred." *State v. Maciel-Figueroa*, 273 Or App 298, 305, 356 P3d 674 (2015). The court erred in at least three ways, because reasonable suspicion does not require an officer to (1) *conclude* that a (2) *crime* had in fact been (3) *committed*. The totality of circumstances need only provide a "moderate chance" that "criminal activity" may be "afoot," and that the person stopped was somehow involved. *Safford* ("moderate chance"), *State v. Holdorf*, 355 Or 812, 820, 333 P3d 982 (2014) (citing *Valdez*, 277 Or at 627-28, that "criminal activity was afoot"); *Valdez*, 277 Or at 626 ("somehow involved").

Here, the officers were told that was engaged in a heated verbal altercation with "Antwon," in which "Antwon" threatened to break belongings. At the most basic level, the information was sufficient for the officers reasonably to believe that a "moderate chance" existed that Antwon may, in fact, do what he was threatening to do—break belongings—thus committing second-degree criminal mischief. *See* ORS 164.354(1)(b) (defining second-degree criminal mischief as when a person intentionally

damages property of another). The officer did not need to confirm that the criminal mischief had occurred. Rather, they only needed an objective basis to believe the criminal mischief may be "afoot."

Additionally, the fact that mother was concerned enough for her daughter's welfare supported a reasonable belief that criminal activity *other* than criminal mischief might be afoot. Specifically, Corporal Welsh, who also responded to the call, testified that he felt he reasonably suspected that the crimes of menacing, or assault could be afoot, in addition to criminal mischief. Tr 38.

Even without more information, belief that criminal activity of a domestic violence nature might be afoot in residence was reasonable. The officers knew of a heated verbal altercation occurring inside residence, where the male participant threatened to break property. It is not a leap in logic to infer from those circumstances that some kind of domestic violence criminal activity might be afoot. Domestic violence altercations are volatile scenarios, in which the level of physical confrontation can quickly escalate from animated yelling to that of significant injury. *See State v. Schultz*, 170 Wash 2d 746, 755, 248 P3d 484 (2011) ("Domestic violence situations can be volatile and quickly escalate into significant injury.").

Lastly, the police encountered defendant as he was exiting residence a mere ten minutes after mother had called 9-1-1. Tr 14. It

was reasonable to infer that defendant had been present to observe the disturbance that caused to call her mother. Defendant either was Antwon himself or was somehow involved with whatever criminal activity may have been occurring.

Courts in other states have decided reasonable suspicion existed to support the detention of a citizen even when provided less information than that provided to Officer Moffitt and Corporal Welsh.[11] The Court of Appeals of Texas held in *Parson v. State*, 392 SW3d 809 (Tex 2012), for example, that the officer had reasonable suspicion to stop the defendant even when no crime had been reported. In *Parson*, a woman had called 9-1-1 to report that she was afraid for her children's safety after observing a violent ex-boyfriend parked outside her residence. *Id.* at 813. The court held that when the officer responded and saw the defendant parked as described, the officer reasonably suspected that "something of an apparently criminal nature is brewing." *Id.* at 816.

---

[11] The state realizes that none of the opinions cited from other state courts are controlling on this court. The state nevertheless cites them for persuasive argument that reasonable suspicion existed in defendant's case. Every state cited has adopted a "reasonable suspicion" standard identical to that in *Terry v. Ohio*; consequently, it is also substantially similar to that in Article I, section 9.

In *State v. Figueroa*, 148 NM 811, 242 P3d 378 (NM 2010), the Court of Appeals of New Mexico held reasonable suspicion existed to stop the defendant even when the defendant was not the subject of the call to 9-1-1. Specifically, in *Figueroa*, a woman called 9-1-1 to report that her brother had been "harassing" her, first by throwing her cell phone onto the roof of her residence and also by harassing her on the telephone. *Id*. at 814. When the officers arrived, they observed a pick-up truck pull up and park so that it was facing the wrong way on the street across from the complainant's residence. *Id*. While the driver kept the engine running, the passenger—the defendant—got out and went into the complainant's residence. *Id.* The court ruled that the officer was justified in stopping the defendant, even though he was not the subject of the 9-1-1 calls, stating:

> Given that two reported incidents of domestic problems had occurred at the [complainant's] house in less than two hours, [the officer] was justified in making brief inquiries to find out what [the defendant] was doing at the woman's house.

Id. at 816.

Similarly, the Supreme Court of Alaska held in *State v. Miller*, 207 P3d 541 (2009) that officers had reasonable suspicion to stop the defendant after a named citizen reported seeing defendant "not like physical punching, but like yelling, I mean fighting and pointing, and like waving of arms" with a woman in a parking lot. *Id.* at 542. The Supreme Court reversed the ruling of the Court

of Appeals, which had held that the police could not infer a domestic violence situation from a report of a domestic argument. *Id.* at 543. The Supreme Court noted that the public argument "was sufficiently extreme to prompt a citizen's 9-1-1 call." *Id.* at 545. Noting that domestic violence crimes "are so pervasive and yet so unreported," the court ruled that there was sufficient risk of domestic violence for the officers to have reasonable suspicion to temporarily detain the defendant. *Id.* at 546. The Court of Appeals of Washington arrived at the same conclusion in *State v. Madrigal*, 65 Wash App 279, 827 P2d 1105 (1992), holding that the officer had reasonable suspicion to stop the defendant after receiving report that the defendant was engaged in a "loud altercation" with a woman on a public street. *See also People v. O'Neil*, 43 Misc 3d 693, 986 NYS 2d 302 (NY 2014) (the officer had reasonable suspicion to stop the defendant after a named citizen reported seeing the defendant engage in a "heated argument" with a woman).

The totality of circumstances of defendant's case closely resembles those in *Parson, Figueroa*, *Miller*, *Madrigal*, and *O'Neil*. The officers received report that a man was engaged in a loud verbal altercation with inside house, and threatening to break property. 12-13. mother, who had heard part of the altercation, was concerned enough for her daughter to ask for police assistance. 12-13. Just as in the above-cited out-of-state cases, the officers had reason to believe there was a "moderate chance"

"criminal activity" of some kind was afoot in residence. Further, defendant's presence outside of the residence just ten minutes later supported a reasonable inference that he was somehow involved with any criminal activity that might have occurred or that might still be occurring.

IV. Officer Moffitt reasonably suspected that defendant was involved in the possible criminal activity or had witnessed it.

The Court of Appeals also erred in concluding that the stop was justified only if the officers reasonably concluded that *defendant* had committed a crime. Reasonable suspicion supports the temporary detention of someone reasonably believed to be involved in criminal activity, as well as someone who may have witnessed criminal activity. Here, Officer Moffitt was not required to conclude that defendant was "Antwon" in order to question him to determine if a crime had occurred inside residence.

More specifically, Article I, section 9 authorizes an officer to briefly detain a person whom the officer reasonably suspects "is involved" in "some type of criminal activity." *State v. Unger*, 356 Or 59, 71, 333 P3d 1009 (2014); *see also State v. Cloman*, 254 Or 1, 6, 456 P2d 67 (1969) (holding that officers may stop a car if they have "reasonable suspicion that the car or its occupants *have a connection with* criminal activity") (emphasis added). Officers respond to dynamic, fluid situations, where it is oftentimes unclear what a person's precise involvement is in suspected criminal activity. The ability to "freeze the

scene," if only temporarily, permits officers to make an inquiry and arrive at a considered judgment about further action to be taken. To the extent that innocent people are inconvenienced, it is to further a clear and compelling public need. *A Model Code of Pre-Arraignment Procedure* §110.2, 277 (1975) (*Model Code*).

As an example, police officers commonly respond to calls for police assistance with only vague descriptions of a "suspect." Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Oris S. Kerr, 2 *Criminal Procedure §3.8(d)* (4th ed 2015). In those circumstances, it may be reasonable for an officer to stop a person found near the scene of the disturbance to determine if that person was the perpetrator of a crime.[12] Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Oris S. Kerr, 2 *Criminal Procedure §3.8(d)* (4th ed 2015). The

---

[12] Professors LaFave, Israel, King and Kerr cite *United States Paetsch*, 782 F3d 1162 (10th Cir 2015) as "an excellent example" of a valid stop despite the lack of individualized suspicion. Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Oris S. Kerr, 2 *Criminal Procedure §3.8(d)* (4th ed 2015). In *Paetsch*, police officers barricaded 20 cars carrying 29 people at a street intersection after determining that one of the vehicles carried a tracker secreted in money stolen minutes earlier in a bank robbery. The court held that the detention of the 29 citizens—including the defendant, who had just robbed the bank and was in possession of the tracker—was reasonable under the totality of the circumstances, even though no individualized suspicion existed for any of the 29 people. 782 F3d at 1168. The court cited to *Samson v. California*, 547 US 843, 855 n 4, 126 S Ct 2193, 165 L Ed 2d 250 (2006), in which the United States Supreme Court noted that "the touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." 547 US at 855 n 4.

purpose of the stop, after all, is to determine whether a crime has been committed and whether the person stopped is somehow involved – the very nature of an investigative

detention.

Moreover, Article I, section 9 also permits the temporary stop of a potential crime witness as part of an investigatory detention. "Identifying the witnesses and obtaining their stories is * * * an essential part of police work, and is best done as quickly as possible. A *Terry* stop of a * * * witness is therefore the essence of good police work." Charles L. Hobson, *Flight and Terry*: *Providing the Necessary Bright Line*, 3 Md J. Contemp. Issues 119, 139 (1992). In *State v. Fair*, 353 Or 588, 302 P3d 417 (2013), this court ruled that the stop and temporary on-the-scene detention of a likely witness will be constitutional if:

> (1) the officer believes that an offense involving danger of forcible injury to a person recently has been committed nearby; (2) the officer reasonably believes that the person has knowledge that may aid the investigation of the suspected crime; and (3) the detention is reasonably necessary to obtain or verify the identity of the person, or to obtain an account of the crime.

Id. at 609. Defendant was seen coming out of house only ten minutes after mother had placed the 9-1-1 call. Tr 14. It was reasonable, therefore, to infer that defendant either was Antwon and had participated in the domestic disturbance or he had witnessed the domestic disturbance. If Officer

Moffitt reasonably suspected that a crime of forcible injury may have been committed inside residence, as the state is arguing, he also had reasonable suspicion under the rule announced in *Fair* to temporarily detain defendant as a possible witness.

Officer Moffitt, however, was not required to have enough information to be able to conclude that defendant was, in fact, the perpetrator, or witness, of a crime that had been committed prior to detaining him. The purpose of the detention was to question defendant to clarify whether a crime had occurred, was occurring, or was about to occur inside residence and, if so, to determine defendant's involvement in it. The Court of Appeals erred in concluding the officers lacked reasonable suspicion because they lacked the very information they sought to obtain.

CONCLUSION

In summary, based on the 9-1-1 call placed by mother and defendant's presence at residence so shortly after the reported call, the officers reasonably believed there was a "moderate chance" that criminal activity had occurred, was occurring, or was about to occur inside residence and that defendant was either somehow involved or otherwise had witnessed the criminal activity. The officers did not need to conclude that a specific crime had, in fact, been committed in order to temporarily detain defendant. The purpose of the investigatory detention was to clarify whether

criminal activity had, in fact, occurred. This court should reverse the ruling of the Court of Appeals and affirm the judgment of the circuit court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
PAUL L. SMITH
Deputy Solicitor General

/s/ Susan G. Howe

SUSAN G. HOWE #882286
Senior Assistant Attorney General
susan.howe@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

SGH:bmg/7148976

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 8, 2016, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Zachary L. Mazer, attorneys for respondent, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,452 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Susan G. Howe

SUSAN G. HOWE #882286
Senior Assistant Attorney General
susan.howe@doj.state.or.us

Attorney for Petitioner on Review

SGH:bmg/7148976