IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. DANNY LEE BLAIR, Defendant-Appellant, Respondent on Review.	Tillamook County Circuit Court No. 131055 CA A156756 SC S064262

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 Tillamook County
Honorable JONATHAN R. HILL, Judge

Opinion Filed: May 25, 2016
Author of Opinion: Judge DeHoog
Before: Presiding Judge Sercombe, Judge DeHoog, and Judge Tookey

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
LAURA E. COFFIN #075825
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: laura.coffin@opds.state.or.us

Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
ROLF C. MOAN #924077
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: rolf.moan@doj.state.or.us

Attorneys for Petitioner on Review

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

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

If a person consents to have a police officer conduct a "search" of his backpack, and if the words used to request and give consent do not further qualify the consent, does Article I, section 9, of the Oregon Constitution permit the officer to open closed, unlocked containers inside the backpack?

Proposed Rule of Law

Yes. If a person consents to a search of his backpack, and if the words used to request and give consent do not further qualify the consent, the consent authorizes an officer to open closed, unlocked containers inside the backpack—unless other circumstances show that the consent did not extend so far.

SUMMARY OF ARGUMENT

A sheriff's deputy asked defendant for consent to conduct a "search" of his backpack, and defendant said, "[Y]eah, go ahead." That consent authorized the officer, as part of the search, to open a knotted and tied plastic grocery bag inside the pack, and to thereby discover psilocybin mushrooms. The Court of Appeals erred by concluding otherwise.

Viewed objectively, the words used to request and grant consent show that defendant's consent encompassed the opening of unlocked, closed containers inside the backpack. A "search" commonly is understood as a careful, thorough, rigorous inspection of an item. Hence, if a person consents to a "search" of a backpack without qualification, the person consents to an inspection meant to determine the pack's contents—which include containers within the pack *and* any materials inside those containers.

The other circumstances further support the conclusion that defendant's consent encompassed the opening of the plastic grocery sack. Defendant never asked the deputy to stop searching and expressed no surprise when the officer began to open the knotted and tied grocery bag. Further, because the person seeking consent was a law-enforcement officer, a reasonable person would have presumed that the search would encompass anything—including drugs that could fit inside a closed container—that could not legally be possessed. Each of those circumstances supports the conclusion that defendant's consent encompassed the opening of opaque containers inside the backpack.

To be sure, circumstances can exist that might limit an otherwise general consent to a search of a backpack: If an officer seeks consent to search for a specific item, consent might not encompass the opening of containers that are too small to contain the item. Further, if an officer would need to break or

dismantle a container to open it, the consent generally will not authorize such conduct. Here, neither circumstance existed. Instead, defendant's consent encompassed the opening of unlocked, closed containers inside his backpack, including the plastic grocery sack.

SUMMARY OF FACTS

A. A police officer asked to conduct a "search" of defendant's backpack, defendant consented without qualification, and the officer found psilocybin mushrooms inside a bag within the backpack.

On March 12, 2013, Tillamook County Sheriff's Deputy Troy Jackson responded to a report—apparently initiated by defendant—that defendant was being chased in Nehalem, Oregon by "three armed subjects." (Tr 1-3, 12; Exhibit 1, p 1 of "Tillamook County Sheriff's Office Case Report"; *see also* Tr 7-8, containing Deputy Jackson's testimony that Exhibit 1 is a copy of his "report from this contact," and containing court's statement admitting exhibit). When Deputy Jackson and a Detective Garcia contacted defendant, defendant "was agitated," "couldn't hold still," was "fidgeting a lot," and "couldn't respond to questions completely." (Tr 9). Defendant was also "scratched up" and "very unkempt, dirty." (Tr 14). Deputy Jackson suspected that defendant was "under the influence" of methamphetamine. (Tr 13-14). "[W]hen we talked to him it became more and more" apparent that defendant's initial report was "probably not completely true." (Tr 19).

Defendant eventually told Deputy Jackson that "he had left * * * a backpack" at a nearby park and "had lost his sweatshirt." (Tr 10). He said "I don't want to go by myself" and the officers "offered to go up with him." (Tr 10). The officers accompanied defendant "through the field and back up the hill." (Exhibit 1, Case Report at p 2). At the base of the hill, they discovered defendant's sweatshirt. (*Id.*).

They then travelled "up the hill to where [defendant] had left his pack." (Exhibit 1, Case Report at 2). Defendant "started to become a little more coherent as [they] went up the hill." (Tr 11). Defendant did not "have any trouble locating the backpack," and he took the officers "directly to its location." (Tr 10). The pack was "[a]pproximately 75 yards down the trail and 25 yards off the main trail." (Tr 17). By then, defendant "was responding to questions appropriately." (Tr 11).

Deputy Jackson testified that "when we got to the pack I asked if I could search the pack." (Tr 11). The officer did so because he "was looking for * * * controlled substances" and for weapons (Tr 18), although nothing indicates that he communicated that purpose to defendant.

When asked for consent to search the backpack, defendant "readily agreed." (Tr 11). He said, "[Y]eah, go ahead." (Tr 12).

Inside the backpack, Deputy Jackson encountered a tan or beige plastic Fred Meyer grocery bag. (Tr 11, 18-19). The bag was tied and knotted. (Tr 18). The deputy untied the grocery bag and, inside it, saw a plastic Ziploc bag that contained "[w]hat [he] recognized as * * * mushrooms." (Tr 18, 12).

When the deputy pulled the bag of mushrooms out of the backpack, defendant said "shit, those aren't mine." (Tr 12).

B. After being charged with possession of a controlled substance, defendant moved to suppress evidence of the mushrooms found inside his backpack, but the trial court ruled that his voluntary consent authorized their discovery.

The state charged defendant with one count of unlawful possession of a controlled substance (psilocybin mushrooms). (ER-1, Indictment). Defendant filed a motion to suppress the evidence found in his backpack, and he based the motion, in part, on Article I, section 9, of the Oregon Constitution. (ER-4, Motion to Suppress). Defendant argued that, due to his mental state at the time he consented, his consent to the search was not voluntary. (ER-8, Motion). He also argued that his consent did not encompass the opening of the grocery bag inside his backpack. (Tr 39).

The trial court denied the motion. (Tr 40-41). Although defendant presented testimony at the suppression hearing from a "forensic consultant" that defendant's behavior was consistent "with somebody who has been using mushrooms," and that a person "under the influence of [such a] hallucinogen" is

not "in any kind of state of mind * * * to consent to a * * * legal request" (Tr 23, 28-29), the trial court found that—by the time defendant consented to a search of his backpack—"[i]t does not appear that he * * * was mid-episode on the psilocybin mushrooms." (Tr 41). The court rejected the argument that defendant, at that point, "didn't know what he was consenting to," and it concluded that "certainly it's voluntary." (Tr 41, 40).

The trial court also rejected defendant's scope-of-consent argument. It found that defendant was "there when it is searched," that "the consent wasn't revoked," and that "there was a consensual search of the Fred Meyer bag." (Tr 41). Defendant subsequently entered a conditional no-contest plea to the possession charge, reserving his right to appeal the denial of his motion to suppress. (ER-12, Judgment; 2/24/2014 Plea Petition).

C. The Court of Appeals reversed, holding that consent, even if voluntary, did not encompass the opening of the bag found in the backpack.

The Court of Appeals reversed, basing its holding on Article I, section 9. *State v. Blair*, 278 Or App 512, 513, 516, 380 P3d 313, *rev allowed*, 360 Or 400 (2016). The court wrote that "[w]e need not address whether defendant's consent was voluntary, because, in any event, the state did not meet its burden of establishing that any such consent to the search of his backpack extended to the closed bag within the backpack." 278 Or App at 513.

The court explained that "[t]he scope of consent is determined by reference to what a typical, reasonable person would have understood by the exchange between the officer and the suspect in light of the totality of the circumstances surrounding the grant of consent in a particular case." *Blair*, 278 Or App at 516 (quote marks and citation to prior Court of Appeals decision omitted). "Here, * * * the record fails to disclose anything said to, or in the presence of, defendant that would have led a reasonable person in his position to understand that [Deputy] Jackson was looking for something that could have been hidden in the closed grocery bag in his backpack." 278 Or App at 519. The court also stated that "other than the backpack itself, the only item that either Jackson or defendant expressly identified was defendant's lost sweatshirt"; "while a person observing the encounter might reasonably have concluded that Jackson was checking defendant's bag to determine whether it contained the lost sweatshirt, nothing about the exchange conveyed that Jackson would be looking for small items, like drugs, that might have been in the knotted bag." 278 Or App at 520.

ARGUMENT[1]

A. Under the Oregon Constitution, the scope of a consent to a search depends on the totality of the circumstances; to authorize the opening of an item, consent need not expressly refer to that item.

Article I, section 9, of the Oregon Constitution 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.

Under that provision, warrantless searches by the state are "*per se* unreasonable," "subject to certain specifically established and limited exceptions." *State v. Bonilla*, 358 Or 475, 480, 366 P3d 331 (2015). One of those exceptions is consent, which "relinquishes a person's privacy interest in property so that there is no unlawful intrusion." *Id.*, 358 Or at 480. "When the state relies on consent, it must prove by a preponderance of the evidence that 'someone having the authority to do so' voluntarily gave the police consent to search the defendant's property and that any limitations on the scope of the consent were complied with." *Id.* at 481, quoting *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994).

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[1] The legal arguments at pages 8-18 of this brief are essentially identical to the legal arguments at pages 7-17 of the state's petitioner's brief on the merits in *State v. Winn*, 278 Or App 460, 375 P3d 539, *rev allowed*, 360 Or 400 (2016). Both cases will be argued on March 9, 2017.

In this case, it is undisputed that defendant (1) had authority to consent to the opening of the plastic grocery bag inside his backpack and (2) consented to a "search" of the backpack. Further, the trial court deemed that consent voluntary, and the Court of Appeals did not disturb that particular conclusion. The real question, it follows, is whether defendant's consent encompassed the opening of the plastic grocery bag.

The Court of Appeals, in assessing the scope of defendant's consent, correctly explained that the "scope of consent is determined by reference to what a typical, reasonable person would have understood by the exchange between the officer and the suspect in light of the totality of the circumstances surrounding the grant of consent in a particular case." *Blair*, 278 Or App at 516 (quote marks and citation to prior Court of Appeals decision omitted); *see also State v. Helow*, 171 Or App 236, 240-41, 15 P3d 103 (2000), *rev den*, 332 Or 56 (2001) ("the intent of the parties is determined objectively in light of the totality of the circumstances"). The United States Supreme Court has applied that same general standard under the Fourth Amendment to the United States Constitution, which is worded similarly to Article I, section 9.[2] *See Florida v.*

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[2] 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,

Jimeno, 500 US 248, 251, 111 S Ct 1801, 114 L Ed 2d 297 (1991) ("[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). In sum, when a defendant voluntarily consents to a search, a court must examine the words used to request consent, the words used to give consent, and the surrounding circumstances to determine the scope of the consent.

But to prove that the communicated consent authorized an officer to open a particular item, the state need not show that the words used expressly referred to that item. The state instead may rely on other circumstances to establish that the communicated consent encompassed the opening of the item. *State v. Paulson*, 313 Or 346, 833 P2d 1278 (1992), supports that conclusion. In *Paulson*, the record sufficed to show that the defendant consented to an officer's entry into her house, even though she had not explicitly invited the officer in: Evidence that she called 9-1-1 and "asked for emergency assistance for [her husband]," that she "did not limit her request to medical personnel," and that "she never asked the police to leave" after seeing an officer enter with

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supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

other emergency personnel, permitted a conclusion that she "consented to the officers' presence." *Paulson*, 313 Or at 352.

Thus, to prove that consent authorized an officer to open a particular item, the state may rely on the totality of the circumstances; it need not prove that the words used expressly referred to that item.

B. A reasonable person would understand an unqualified and voluntary consent to search a backpack as authorizing an officer to open closed, unlocked containers inside the backpack.

1. The requirement that consent must be voluntary supports that conclusion.

When a court assesses the scope of a defendant's consent, it generally does so only after the state has shown that consent was "voluntary." Here, the trial court deemed defendant's consent voluntary (Tr 40-41), the record supports that conclusion,[3] and the Court of Appeals did not disturb that

[3] This court has held that, in a case in which the evidence supported a trial court's determination that the defendant's "drug use did not impair his capacity to make a knowing, voluntary, and intelligent choice," and in which nothing suggested "that police intimidated or coerced [the] defendant in any way," the defendant's consent to a search was voluntary. *State v. Stevens*, 311 Or 119, 136, 806 P2d 92 (1991). The same conclusion applies here: The trial court found that any drug use by defendant did not impair his ability to consent voluntarily, and the record supports that finding. (*See* Tr 41, containing finding that "[i]t does not appear that [defendant] * * * was mid-episode on the psilocybin mushrooms"; Tr 10-11, containing testimony that defendant became "a little more coherent" after initially encountering officers, subsequently did not "have any trouble locating [his] backpack," and ultimately "was responding to questions appropriately"; Tr 12, containing testimony that defendant said,

conclusion. *See Blair*, 278 Or App at 513 ("[w]e need not address whether defendant's * * * consent was voluntary"). If a defendant's consent was voluntary, that means that nothing coerced his choice to consent; nothing impaired his ability to either grant or deny the request for consent. *See State v. Unger*, 356 Or 59, 72, 333 P3d 1009 (2014) (for consent to exempt the state from Article I, section 9's warrant requirement, "the state must prove that the defendant's consent was the product of his or her own free will, rather than the result of coercion").

That the person who consented exercised the ability to make a free-will decision, and thereafter retained that ability, is significant. That freedom means that the person necessarily was able to limit the consent, and to place express restrictions on what the state could examine. Similarly, the person remained free, after initially consenting, to subsequently limit the scope of the consent or to revoke consent altogether. That a person voluntarily consented to a general and unqualified request to conduct a search, and that the person chose not to limit or qualify the consent despite the ability to do so, is an important factor when assessing the scope of that consent.

"shit, those aren't mine," when deputy pulled mushrooms out of bag, which reflects his comprehension of the significance of the search).

2. The common meaning of "search" supports the conclusion that an unqualified consent to a search of a backpack authorizes the opening of containers inside the backpack.

Deputy Jackson asked defendant "if [he] could search the pack," and defendant said, "[Y]eah, go ahead." (Tr 11, 12). The key word in the exchange thus was "search." In light of the word's common meaning, a request for consent to search a backpack is akin to asking, "May I inspect your backpack to determine its contents?" In turn, a backpack's contents include additional containers inside the pack *as well as* the contents of those containers. Hence, one who consents to the search of a backpack consents to an examination that will encompass the interior of containers within it (with some possible exceptions, as is discussed later).

Dictionary definitions of the word "search" support that conclusion. *Webster's Third New International Dictionary* at 2048 (unabridged ed 1993), for example, defines the noun "search"—at least as it relates to personal property or other objects—as "an act or the action of searching: an endeavor to find, ascertain, recover, or bring into view," or as "a critical scrutiny or survey (as of a ship's cargo or baggage)." (App-1). The same dictionary defines the verb "search," as it pertains to personal property or objects, as a careful, thorough, rigorous examination of an object and its contents: Definition **1** defines search as "to look into or over carefully or thoroughly in an effort to

find something"; **1b** defines search as "to look into with thorough scrutiny and rigorous objective examination"; **1c** defines search as "to look through or explore thoroughly esp. by checking on possible places of concealment"; **1d** defines search as "to peruse thoroughly and usu. with a particular objective: subject to a careful check." (App-1, *Webster's Third New Int'l Dictionary* at 2048).[4]

As a result, when a person consents to a general "search" of a backpack, and places no limits on the search, the consent—viewed objectively—is a consent to a careful, thorough, rigorous inspection meant to determine the backpack's contents. Those contents necessarily include not just any containers within the backpack, but any items or materials inside those containers. Consequently, consent to "search" a backpack encompasses consent to open unlocked, closed containers within it.

The Second Circuit has, based on the common meaning of "search," reached an analogous conclusion in the context of a car search. That court has held that a defendant's consent to a "search" of his car entitled officers to open "closed containers discovered inside," even though the defendant "was not

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[4] Definitions **1a** ("to go about or traverse in careful quest"), **1e** ("to examine (a person) thoroughly"), and **1f** ("to look at fixedly in order to or as if in order to discover true intention," as in "searched him with a glance") of the verb "search" appear to be inapplicable to a search of personal property. Definition **2** through **4** also appear inapplicable. (App-1).

informed of the purpose of the search." *United States v. Snow*, 44 F3d 133, 135 (2d Cir 1995). In so holding, the court noted that the definitions of "search" in *Webster's New World Dictionary* at 1210 (3d ed 1988), and in the Oxford English Dictionary 804-05 (2d ed 1989), show that "the term 'search' implies something more than a superficial, external examination," and "entails 'looking through,' 'rummaging,' 'probing,' 'scrutiny,' and 'examining internally.'" *Snow*, 44 F3d at 135.

The common meaning of "search" shows that an unqualified consent to "search" a backpack encompasses consent to open unlocked, closed containers within the pack.

3. The fact that a "search" is requested by a law-enforcement officer supports that same conclusion.

Any time that consent to a general "search" of a piece of property is requested by a law enforcement officer, that will further support the conclusion that consent encompasses the opening of unlocked containers found within the examined object.

As the Second Circuit commented in *Snow*, it generally is "self evident" that a police officer who seeks consent to search is seeking "evidence of illegal activity"; further, "[i]t is just as obvious that such evidence might be hidden in closed containers." *Snow*, 44 F3d at 135 ("[i]t is self-evident that a police officer seeking general permission to search a vehicle is looking for evidence of

illegal activity"). That further supports the conclusion that, when a person consents to such a request, the consent encompasses consent to look inside closed, unlocked containers.

4. Even so, the circumstances in a particular case may show that consent to search a backpack does not encompass opening closed containers.

Even when a person consents to a request to "search" a backpack, surrounding circumstances might indicate that consent is not granted to the opening of closed containers inside the pack. At least two common circumstances will generally indicate that the consent does not extend so far.

First, if the officer seeking consent has communicated that the object of the search is something that would not fit within containers of a certain size, consent might not extend to opening such containers. For example, if an officer asks for and obtains consent to search a duffel bag for a bowling ball, consent would not necessarily encompass the opening of a make-up compact or aspirin bottle found inside the bag.

Second, consent to search a backpack generally will not encompass opening closed containers inside the pack that can be opened only by breaking or damaging them. If an officer would need to break or damage a closed item to determine its contents, that generally will fall outside any general consent to search. An objectively reasonable person likely will not understand consent to

a "search"—even though stated unconditionally—as authorizing conduct that will harm or disassemble property.

Finally, it should be noted that resolving this case in the state's favor will not suggest that a general consent to search a backpack or analogous container necessarily authorizes the opening of a cell phone or laptop found inside it, or the scrutiny of data inside such items. Under the state's proposed rule, consent to search a backpack or similar item generally will authorize an officer to open closed, unlocked containers for the purpose of determining what types of physical *objects* they contain. Historically, those faced with an officer's request for consent to search generally would have presumed that the focus of the search (absent some indication of a different focus) would encompass *objects* that may not lawfully be possessed or that constitute plain evidence of a crime. Whether citizens today would presume that such a search would encompass a search for *data*—including information contained in a cellular phone or analogous device—may not be so apparent. Whether consent to search a backpack encompasses consent to open a cell phone and peruse the data within it is better left for another day.

5. As a general matter, consent to search a backpack authorizes the opening of unlocked, closed containers inside it.

Although the Court of Appeals correctly noted that the scope of a defendant's consent to search for drugs will extend to closed containers that

might contain drugs, its ultimate holding creates a paradox. *See Blair*, 278 Or App at 517 (noting prior holding that consent to a search of a defendant's car "extended to a closed suitcase found in the car's trunk due, in large part," to fact that officer sought permission "to look for * * * narcotics"). Under the Court of Appeals' holding, agreement to a general search will often authorize a *narrower* search than will agreement to a search whose stated objective is more limited. The Court of Appeals held that consenting to a "search" without qualification precludes the opening of closed containers inside a purse, and that consenting to a search whose stated objective is limited to a particular item (drugs, for example) authorizes a *more intrusive* inspection (including opening closed containers). The rule should be the reverse: When the request to search a backpack is general and unqualified, subsequent consent should be deemed general as well, and as encompassing efforts to determine the backpack's contents, including contents within closed containers inside the pack. When the request is limited, and is expressed as a request to search for a particular item, consent should be deemed similarly limited—limited to the portions of the backpack capable of containing that item.

If a person consents to a search of a backpack and does not qualify the consent, consent authorizes an officer to open closed, unlocked containers

inside the backpack, unless other circumstances show that the consent did not extend so far.[5]

C. The totality of the circumstances shows that defendant's consent was unqualified, and that it authorized the officer to open closed unlocked containers inside his backpack.

1. The request for consent to "search" the backpack, defendant's affirmative response, and defendant's conduct after, show that defendant gave unqualified consent to a search of the backpack.

Nothing that Deputy Jackson said before requesting consent to search defendant's backpack suggested that he was seeking consent for a limited purpose, or that he was otherwise asking to conduct a search that would be restricted in any way. Instead, he simply asked "if [he] could search the pack."

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[5] At least four federal circuit courts of appeal have reached an analogous conclusion under the Fourth Amendment. *See United States v. Infante-Ruiz*, 13 F3d 498, 500, 505 (1st Cir 1994) (concluding that "*Jimeno* would seem to allow a finding of consent" to search a briefcase found inside a car, based on the driver's agreement to give "consent to search the vehicle," even though officer did not tell the driver "that he was looking for drugs," and holding that consent did not extend to the briefcase's contents only because the driver said that it belonged to someone else); *Snow*, 44 F3d at 135 (in which the Second Circuit held that consent to "search" a car, given by a defendant who "was not informed of the purpose of the search," entitled officers to search closed containers inside the car); *United States v. Crain*, 33 F3d 480, 483, 484-85 (5th Cir 1994), *cert denied*, 513 US 1169 (1995) (consent to "look inside the car" entitled officers to open a paper bag inside car that had "been twisted and rolled up," although officers "did not tell [the defendant] what they were looking for in the search"); *United States v. Lechuga*, 925 F2d 1035, 1037, 1042-43 (7th Cir 1991) (because "the scope of the consent [the defendant] gave on the form he completed was unlimited," the consent—which appeared to refer to the defendant's apartment—entitled law enforcement officials to look inside a suitcase found inside the apartment).

(Tr 11). Similarly, defendant said nothing to qualify his consent or to indicate that any of the contents of the backpack would be off limits. Defendant responded to the request for consent by saying, "[Y]eah, go ahead." (Tr 12).

Consequently, the words used to request and give consent did not qualify or limit the search. The common meaning of the word "search," as used by the deputy, supports the conclusion that the consented-to search encompassed the opening of unlocked, closed containers inside the backpack.

That conclusion is consistent, moreover, with defendant's behavior during and after the search. Although defendant was present for the search, nothing suggests that, at any point, he asked Deputy Jackson to stop searching, not even when the deputy began to open the tied and knotted grocery bag. (*See* Tr 18, containing testimony that bag was "tied and knotted" and that deputy untied it to look inside). Although those circumstances are not by themselves dispositive, they are pertinent. Construing defendant's affirmative broad consent as encompassing the opening of containers within the backpack is consistent with defendant's behavior when Deputy Jackson opened the grocery bag. *Cf. Paulson*, 313 Or at 352 (evidence that defendant called 9-1-1 and requested emergency assistance for her husband and "did not limit her request to medical personnel," and that "she never asked the police to leave" despite

observing an officer enter with other emergency personnel, permitted trial court to conclude that she had consented "to the officers' presence").

3. The Court of Appeals' reference to defendant's "lost sweatshirt" provides no basis for concluding that defendant's consent was limited.

The Court of Appeals wrote that, "other than the backpack itself, the only item that either [Deputy] Jackson or defendant expressly identified was defendant's lost sweatshirt." *Blair*, 278 Or App at 520. It stated that, "while a person observing the encounter might reasonably have concluded that Jackson was checking defendant's bag to determine whether it contained the lost sweatshirt, nothing about the exchange conveyed that Jackson would be looking for small items, like drugs, that might have been in the knotted bag." 278 Or App at 520. As a result, the court appeared to view the record as suggesting that defendant's consent was limited to portions of the backpack that were large enough to hold a sweatshirt, and as suggesting that consent thus did not extend to the plastic grocery bag. Yet the record's references to the lost sweatshirt do not support that conclusion.

Instead, the record shows that defendant and the officers found the lost sweatshirt *before* they found the backpack, and before Deputy Jackson asked for consent to search the pack. The officers accompanied defendant through a field and toward a hill after he told them that he had

left his backpack behind and "had lost his sweatshirt." (Tr 10; Exhibit 1, Case Report at p 2; *see also* Tr 7-8, containing court's statement admitting exhibit). At the base of the hill, they discovered defendant's sweatshirt. (Exhibit 1, Case Report at 2). Only after that did they travel "up the hill to where [defendant] had left his pack," at which point they found and picked up the backpack. (*Id.*).

As result, when Deputy Jackson asked for consent to search the backpack, defendant would have understood that the deputy would *not* be searching for the sweatshirt. The subsequent consent, it follows, could not have been limited to objects that were big enough to hold a sweatshirt.

The words used to request and grant consent, and the other circumstances surrounding the consent, show that defendant's voluntary consent was unlimited, and that it encompassed the opening of unlocked, closed containers inside his backpack. The trial court correctly denied defendant's motion to suppress.

CONCLUSION

This court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General

/s/ Rolf C. Moan
ROLF C. MOAN
Senior Assistant Attorney General
rolf.moan@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 5, 2016, I directed the original Brief on the Merits of Petitioner on Review, State or Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Laura E. Coffin, attorneys for respondent on review, 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 5,221 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/ Rolf C. Moan

ROLF C. MOAN
Senior Assistant Attorney General
rolf.moan@doj.state.or.us

Attorney for Petitioner on Review
State of Oregon

RCM:bmg\7885602