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

STATE OF OREGON,

Plaintiff,

-VS-

JASON McGHEE,

Defendant

CASE No. 23-07-18957

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

SUMMARY OF ARGUMENT

Trooper Goldsmith lawfully stopped Mr. McGhee in his vehicle for exceeding the speed limit. During the course of completing the traffic infraction stop, Trooper Goldsmith obtained probable cause of another infraction committed by McGhee, possession of less than one ounce of marijuana. Goldsmith had completed his traffic stop investigation, including issuing a citation for the marijuana infraction, when he returned to McGhee's vehicle. Rather than give McGhee his drivers license and citations, Goldsmith unlawfully extended the stop by making inquiries about possible criminal conduct not supported by reasonable suspicion;

Trooper Goldsmith's request to search McGhee's vehicle was conditional, i.e., "let me search your vehicle, then I will give you the citations and you can leave." By then, Goldsmith had been joined by another uniformed trooper who positioned himself opposite Goldsmith, by

the passenger-side door. McGhee's single-word response of "sure" was acquiescence to a show of authority, not voluntary consent; alternatively, Goldsmith obtained consent by exploiting the unlawfully extended stop;

McGhee and his vehicle were unlawfully seized when Goldsmith instructed him to exit the SUV and stand by the other trooper while Goldsmith searched the vehicle. The seizures of McGhee and his SUV were not supported by probable cause, warrant or voluntary consent;

Goldsmith's search of McGhee's SUV was without probable cause, warrant or voluntary consent;

During the course of searching McGhee's SUV, Goldsmith seized and searched his luggage, prior to asking for McGhee's consent to open the bags, without probable cause, warrant or voluntary consent; Goldsmith's seizure and search of McGhee's luggage exceeded the scope of his initial request to search the vehicle, assuming, *arguendo*, that McGhee had consented to that initial request; McGhee did not voluntarily consent to opening his bags, but rather acquiesced to a show of authority;

All in violation of Article 1, Section 9 of the Oregon Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution.

MEMORANDUM OF LAW

Standing

1. An assertion of standing is not necessary under Article 1, Section 9, of the Oregon Constitution. A criminal defendant always has standing to challenge the admission of evidence introduced by the State. See, e.g., *State v. Tanner*, 304 Or 312 (1987). The defendant does not have to assert any privacy interest in property if the search is warrantless. *State v. Tucker*, 330 Or 85 (2000); *State v. Cook*, 332 Or 601 (2001). Defendant's person, vehicle and property each represent distinct privacy interests, and the state must have an

articulable basis for invading any privacy interest. *State v. Brown*, 110 Or App 604 (1992); *State v. Barnum*, 136 Or App 167 (1995).

Remedy For Violation Of Article 1, Section 9

2. Exclusion of evidence is the proper remedy for a violation of a person's constitutional rights pursuant to Article I, Section 9, of the Oregon Constitution. *State v. Tanner, supra*.

Good Faith of Officer Is Not A Factor

3. The good faith of the police officers in seizing evidence may not be considered with regard to the reasonableness of any search or seizure. *State v. Carsey*, 295 Or 32 (1983); *State v. Miller*, 116 Or App 174 (1992). The reason for the exclusionary rule under the Oregon Constitution is to protect the privacy interests of its citizens and not simply to deter police misconduct. *State v. Tanner, supra.*

What Constitutes A “Stop”

4. A "stop" occurs when a person is approached by a law enforcement officer who demands and retains a person's identification. *State v. Gonzalez-Galindo*, 146 Or App 291 (1997). A stop also occurs if the person must change his/her direction in order to talk with the police officer. *State v. Johnson*, 105 Or App 587 (1991). During these encounters a person cannot refuse to cooperate and walk away. *Brown v. Texas*, 443 US 47, 99 S Ct 2637 (1977); *State v. Starr*, 91 Or App 267 (1988).

The test is whether the police, through some "show of authority," restrained a person's liberty so a reasonable person would not feel free to refuse to cooperate or leave the scene of the investigation.

Reasonable Suspicion Required

5. A "stop" of a person is unreasonable when the officer has insufficient articulable facts providing a reasonable suspicion that a crime has been committed. ORS 131.615; *State v. Hall*, 339 Or 7 (2005). An officer may broaden the scope of the investigation of a traffic

infraction if there is a reasonable suspicion that a defendant has committed illegal acts other than the traffic infraction. A reasonable suspicion is defined as an objective test that requires an officer to point to specific, articulable facts giving rise to a reasonable inference that the defendant committed a crime. *State v. Morton,* 151 Or App 734, 738 (1997). An officer's subjective belief that the stopped person is committing a crime fails to establish "reasonable suspicion" if that belief is not "objectively reasonable." *State v. Guest*, 207 Or App 395 (2006).

Prolonged Or "Excessive" Stop Is Unlawful

6. Even if the initial traffic stop of a defendant was reasonable, his continued detention by law enforcement officers may be excessive, becoming an unlawful stop, unless supported by reasonable suspicion that the defendant is committing a crime. An officer's authority to retain a person's drivers license ends when the officer has all the evidence needed to issue a citation. *State v. Dow,* 116 Or App 542 (1992); *State v. Ehret*, 184 Or App 1 (2002)(when officer, rather than handing defendant the traffic citation, asked him to get out of the car and questioned him about whether there were drugs in the vehicle, he unlawfully extended the traffic stop); *State v. Raney*, 215 Or App 339, 343 (2007)(officer can lawfully detain a driver in association with a traffic stop for "the time reasonably required to complete a citation and any other documents that must be given to the citizen in connection with the detention."). In the absence of reasonable suspicion that the defendant is committing a crime, the officer has no lawful authority to extend the stop, and any ensuing conversation, consent and search are also unlawful. *State v. Hall, supra.*

An excessive "stop" constitutes a seizure of the person; prolonged detention may constitute an illegal arrest if not based on probable cause. *Dunaway v. New York,* 442 US 200 (1979); *State v. Carter/Dawson,* 287 Or 479 (1979); *State v. Morgan,* 106 Or App 138 (1991).

Consent Obtained During Unlawful Stop Is Invalid

7. The following cases are illustrative of police exceeding the scope of the initial traffic stop before obtaining consent to search, resulting in illegal search and seizure. In *State v.*

Hadley, 146 Or App 166 (1997), the officer gave the defendant a citation, returned his identification, then questioned him about having drugs in the car—which the defendant denied—and then obtained permission to search, finding methamphetamine. The Court of Appeals upheld suppression of the evidence because there was not a sufficient temporal break between completion of the traffic stop and the officer's request to search. In *State v. Bailey,* 143 Or App (1996), the officer retained defendant's gun while waiting for information from dispatch to clarify whether he was a convicted felon, but returned his license and told him he was free to leave; immediately thereafter, he obtained consent to search and found drugs in the truck. The Court of Appeals found that consent invalid because it was obtained by unlawfully prolonging the stop. If the possession of one gun by a person who may be a convicted felon does not provide reasonable suspicion to prolong the stop by asking for consent to search for additional weapons, possession of less than one ounce of marijuana likewise does not provide reasonable suspicion to prolong the stop to seek consent to search for more marijuana.

<u>All Evidence Obtained By Exploiting Unlawful Stop Is Excluded</u>

8. Any and all evidence obtained as the result of an illegal stop must be suppressed as "fruit of the poisonous tree." *State v. Valdez,* 277 Or 621 (1977); *State v. Gonzalez-Golinda*, *supra*. This includes any and all oral derivative evidence. *State v. Olson,* 287 Or 157 (1979); *State v. Morgan,* 106 Or App 138 (1991). If consent was illegally obtained, a subsequent consent does not purge the taint of the illegally received consent. *State v. Auer,* 90 Or App 459 (1988). If the consent was obtained by exploiting the illegal stop, it is invalid. *State v. Johnson,* 105 Or App 587 (1991); *State v. Hall*, *supra*.

<u>Fourth Amendment Jurisprudence Mirrors Oregon Law</u>

9. Under the Fourth Amendment, a seizure occurs whenever there is a "meaningful interference, however brief, with an individual's freedom of movement." *United States v. Jacobsen*, 466 US 109 (1984). A person is ""seized" "when the officer, by means of physical

force or show of authority has in some way restrained the liberty of a citizen." *Michigan v. Chesternut*, 486 US 567 (1988). A person is "seized" "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 US 544 (1980).

An officer's inquiry about drugs may constitute an unlawful seizure. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably necessary to complete that mission. *Illinois v. Caballes*, 125 S Ct 834 (2005).

Possession Of Less Than One Ounce Does Not Create Probable Cause

10. Additional facts beyond the discovery of less than an ounce of marijuana is required to justify a belief that more is present, so as to support a search of a vehicle. "As a matter of law, possession of less than one ounce cannot by itself create probable cause to search for more." *State v. Tallman*, 76 Or App 715, 720 (1985). This follows from the Legislature's decriminalization of small quantities of marijuana. *Id.*

Meaning of "Probable Cause" To Search

11. "Probable cause" requires articulable facts that must lead a reasonable person to believe that evidence of a crime will probably be found in the location to be searched. *See, State v. Anspach,* 298 Or 375 (1984). This is the more-likely-than-not requirement. A "well-warranted suspicion" is not probable cause because a suspicion, no matter how well-founded, does not rise to the level of probable cause. *State v. Verdine,* 290 Or 553 (1981); *State v. Spencer,* 101 Or App 425 (1990).

Possession of "Drug Paraphernalia" Does Not Create Probable Cause

12. The observation of "drug paraphernalia" does not constitute probable cause to support either its seizure or a subsequent search. *State v. Parks*, 5 Or App 601(1971); *State v. Ford,* 20 Or App 384 (1975); *State v. Miller,* 23 Or App 341(1975); *State v. Chipley,* 29 Or App 691 (1977); *State v. Herrin*, 323 Or 188 (1996). Specific examples held not to be seizable

include a "roach holder" in *Chipley*; "four small vials containing pills" in *Miller*; a "hash pipe" in *Parks*; a "bent spoon" in *Ford* and syringes in *Herrin*. Subsequently obtained information which verifies the officer's probable cause will not cure the lack of probable cause at the time of the initial search and/or seizure. *State v. Elkins,* 245 Or 279 (1966); *State v. Dunavant,* 250 Or 570 (1968).

What Constitutes A “Search”

13. Police conduct a search within the meaning of Article I Section 9, of the Oregon Constitution when the officer opens the door of the vehicle to inspect the interior compartment of the vehicle for evidence. *State v. Turechek,* 74 Or App 228 (1985); *State v. Martin,* 100 Or App 256 (1990); *State v. Rhodes,* 315 Or 191 (1992); *State v. Wetzell*, 148 Or App 122 (1997). Likewise, a search occurs when an officer inserts his head into an open car window. *State v. Hendricks*, 151 Or App 271 (1997).

Police conduct a search within the meaning of the Fourth Amendment when they move an item to check for a serial number, *Arizona v. Hicks*, 480 US 321 (1987); or when they physically manipulate a carry-on bag aboard a bus, *Bond v. United States*, 529 US 334 (2000). No search can be conducted without probable cause. *Id.* When Trooper Goldsmith began handling and moving McGhee’s luggage around inside the vehicle, including picking up and placing each piece outside of the vehicle on the pavement, he effected a search of the luggage before asking for McGhee’s consent to search his bags.

Probable Cause Plus Exigent Circumstances Required To Search Luggage

14. No probable cause and exigent circumstances justified the warrantless search of any closed container belonging to the defendant. Exigent circumstances include, among other things, situations in which immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence. See, *State v. Stevens*, 311 Or. 119, 126 (1991)(explaining that “[a]n exigent circumstance is a situation that requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's

escape or the destruction of evidence"). Once Goldsmith had removed McGhee's luggage from his vehicle and placed the bags on the pavement, the bags were no longer "mobile" so as to come within the automobile exception. *See, State v. Kruchek*, 156 Or App 617 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001)(A closed ice chest could not be searched as part of an automobile inventory search, even though the smell of marijuana was emanating from that container, because the container did not announce its entire contents; *State v. DeLong*, 43 Or App 183 (1979)(camera bag lawfully seized by police during valid automobile exigency to warrant clause could not be opened without first securing a warrant); *State v. Dickerson*, 135 Or App 192 (1995)(once officer had defendant's pocketknife in his temporary possession, he could not open the knife without probable cause).

Meaning Of Voluntary Consent

15. Defendant did not consent to any search and/or seizure. Mere acquiescence to lawful authority is not consent and does not justify any search and/or seizure. *State v. Douglas*, 260 Or 60 (1971); *State v. Little*, 249 Or 297 (1967); *Schneckloth v. Bustamonte*, 412 US 218, 93 S Ct 2041 (1973); *State v. Freund*, 102 Or App 647 (1990).

To be an effective consent, the consent cannot be obtained after the search has commenced. *State v. Weaver*, 121 Or App 362 (1993).

If a person feels that he/she had no choice but to grant the officers request to search, there is no consent. *State v. Ledbetter*, 95 Or App 187 (1989); *State v. Courson*, 98 Or App 576 (1989).

Scope of Consent Limits Scope of Lawful Search

16. The scope of the permissible search is limited to the consent given. *State v. Allen*, 112 Or.App. 70, 74, *rev. den*., 314 Or. 176 (1992). When the state relies on consent to support a search, it must prove by a preponderance of the evidence that officials complied

with any limitations on the scope of the consent. *State v. Paulson*, 313 Or. 346, 351-52 (1992). The scope of a person's consent does not turn on what the person subjectively intended. *State v. Jacobsen*, 142 Or.App. 341, 349 (1996). Rather, it turns on what a reasonable person would have intended. *State v. Arroyo-Sotelo*, 131 Or.App. 290, 294-96 (1994). The specific request that the officer made, the stated object of the search, and the surrounding circumstances all bear on a court's determination of the scope of a person's consent. *Id.*

An officer's obtaining consent "to see" a fold of tinfoil, which he suspected contained drugs, did not authorize opening the tinfoil in the absence of probable cause. *State v. Fugate*, 210 Or App 8 (2006). When an officer obtains consent to search for specific items, the courts may conclude the scope of consent authorized looking in places where such items are generally stored. *Fugate*, *supra*. When an officer did not state he was looking for anything in particular, and casually asked to look in the cab of the defendant's truck, defendant's consent did not extend to opening a zipped duffel bag that was found in the cab. *State v. Jacobsen*, 142 Or App 341 (1996). Goldsmith's request to "check out the vehicle to make sure there's nothing else," was casually made, did not specify any items the officer hoped to find; his asking for further consent to search the luggage also demonstrates that his initial request for consent to look in the SUV did not extend to a search of any closed, opaque containers.

<u>Standards For Determining Validity Of Consent</u>

17. The burden of proving lawful consent to search and/or seize is on the State. *Schneckloth v. Bustamonte, supra*; *State v. Douglas,* 260 Or 60 (1971). The prosecution must show that the consent was voluntarily given and that proof must be by a preponderance of the evidence. *State v. Stevens,* 311 Or 119 (1991); *State v. Wood*, 188 Or App 89 (2003). In any case, the issue of the voluntariness of consent is a question of fact for the trial judge to determine and must rest upon the unique facts and circumstances of the particular case. *Schneckloth v. Bustamonte, supra*, *State v. Little,* 249 Or 297 (1967). An inference that a

person consented will not support the evidentiary test. *State v. Nelson,* 103 Or App 299 (1990).

Although the "totality of circumstances" approach is to be applied in testing consents given after illegal police conduct as well as in testing consents given where police conduct has been proper, the burden on the State to show voluntariness when consent occurs after illegal conduct is greater than when no illegality has occurred. *State v. Kennedy,* 290 Or 493 (1981); *State v. Williamson,* 307 Or 621 (1989).

If an officer asks for consent to search solely on the basis of evidence discovered as a result of a prior unlawful police conduct, evidence discovered must be suppressed. In *State v. Dominquez-Martinez*, 321 Or 206 (1995), the Supreme Court determined that defendant's consent to search, following an excessive detention for a traffic infraction, was not voluntary. In *State v. Hall, supra*, the Supreme Court reaffirmed that consent to search obtained through "exploitation" of an unlawful stop is invalid. 339 Or at 36-37.

Remedy for Unlawful Search Or Seizure

19. Any and all evidence derived from an unreasonable search and/or seizure must be suppressed as "fruit of the poisonous tree." *State v. Warner*, 284 Or 147 (1978). This includes any and all oral derivative evidence*. State v. Olson*, 287 Or 157 (1979); *Dunaway v. New York*, 442 US 200 (1979).

DATED: March _____, 2008.

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