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7
8 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

9
10 STATE OF OREGON,
11 Plaintiff,

CASE No. 09-XXXX-FE

12 -VS-

13 KEVIN C.,

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO SUPPRESS EVIDENCE

14 Defendant

15
16 **SUMMARY OF ARGUMENT**

17
18 Trooper Gaither lawfully stopped Mr. C. and co-defendant Chance in their rental
19 car for driving 10 mph over the posted 55 mph speed limit on Interstate 5. The stop
20 occurred at 12 noon on Friday, May 8, 2009. Rather than issue the speeding citation,
21 Trooper Gaither engaged in a series of acts to investigate her suspicion that the men
22 were transporting narcotics back to Washington. After C. refused to consent to the
23 search of the car, Gaither called for a drug detection dog to be brought to the scene.

24
25 The dog arrived at 1:22 p.m.; during this one hour and twenty-two minute
detention, C. repeatedly asked to leave; most of that time he and Chance were

1 required to stand or sit on the right-of-way of the highway, outside of their vehicle,
2 under guard of Gaither and back-up officers. During this lengthy period, most of which
3 Gaither spent simply waiting for the dog to arrive, she did not seek to obtain a
4 telephonic warrant to either seize the rental car, or seize and search the car. The dog,
5 whose drug-detection reliability is at issue, allegedly alerted on one of the items of
6 luggage that officers had removed from the trunk of the car, without consent.
7

8 After removing all of the baggage from the trunk and placing it on the
9 pavement, officers opened one or more items of baggage, then opened closed
10 opaque container(s) found within the baggage, where they discovered marijuana.
11 Officers stopped their search to place C. and Chance in handcuffs and under formal
12 arrest at 1:37 p.m., and then resumed opening pieces of luggage and closed opaque
13 containers inside the luggage, where they discover more marijuana.
14

15 In particular, Trooper Gaither and assisting officers violated Article 1, Section 9
16 of the Oregon Constitution, and the Fourth and Fourteenth Amendments to the
17 United States Constitution, in one or more of the following respects:

18 1. The officer unlawfully extended the duration of the traffic stop by inquiring
19 about a non-drug odor she detected from the vehicle and the source of the odor,
20 rather than taking steps to issue the citation, without reasonable suspicion that
21 defendants were committing a crime;
22

23 2. The officer unlawfully extended the duration of the traffic stop by
24 requesting and waiting for receipt of a criminal history check on both defendants,
25

1 after their driver's licenses came back valid, rather than completing the issuance of
2 the citation, without reasonable suspicion that defendants were committing a crime.

3 3. The officer unlawfully extended the duration of the stop by requesting
4 consent to search their car, rather than issuing the citation, without reasonable
5 suspicion that defendants were committing a crime.
6

7 4. The officer unlawfully extended the duration of the stop by separately
8 questioning both defendants concerning their course of travel and their relationship,
9 rather than issuing the citation, without reasonable suspicion that defendants were
10 committing a crime.

11 5. Even if the officer had reasonable suspicion to extend the duration of the
12 stop to make brief inquiry as to whether defendants were committing a crime, the
13 duration of the stop—from noon until past 1:30 p.m.—was unreasonable and not
14 supported by probable cause, warrant, or any exception to the warrant requirement.
15

16 6. Officers unlawfully seized defendants' car when, without probable cause,
17 they deprived defendants of the use of their car and access to its contents for more
18 than one hour while waiting for the arrival of a drug detection dog.
19

20 7. Even if officers had probable cause to seize defendants' car prior to the
21 alleged alerts by the drug detection dog, no exigency existed to justify the
22 warrantless seizure of the car.

23 8. Officers unlawfully searched defendants' vehicle when, without probable
24 cause, they opened the car doors, hood and trunk for the purpose of conducting a
25 canine sniff of these interior compartments.

1 9. Officers unlawfully seized and searched the luggage inside the trunk of
2 defendants' vehicle when, without probable cause, they removed all of the luggage
3 from the trunk and placed it outside the vehicle.

4 10. The alleged alerts of canine Charlie to the vehicle or the luggage did not
5 give rise to probable cause to search.
6

7 11. Even if officers had probable cause to search the vehicle and remove the
8 luggage from inside the trunk once the canine alerted, no exigency existed after the
9 passage of more than 90 minutes from the time of the stop when the vehicle was
10 last "mobile," to justify this warrantless search of the vehicle's interior compartments
11 or the search of the luggage by removing it from the vehicle.
12

13 12. Even if there was probable cause to open a backpack upon which the
14 canine alerted, and probable cause to open a small tin container inside the backpack
15 which contained less than one ounce of marijuana, that did not give rise to probable
16 cause to open the remainder of the luggage.

17 13. Even if there was probable cause to open and search the luggage and the
18 closed, opaque containers found inside the luggage, no exigency existed after the
19 passage of more than 90 minutes from the time of the stop, to justify the
20 warrantless search of the luggage and closed opaque containers found inside the
21 luggage, once the luggage was removed from the trunk of the car.
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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

1 interests of its citizens and not simply to deter police misconduct. *State v. Tanner*,
2 *supra*.

3 What Constitutes A “Stop”

4 4. “A ‘stop’ is a temporary restraint of a person’s liberty by a peace officer
5 lawfully present in any place.” ORS 131.605; see *Terry v. Ohio*, 392 US 1 (1968). As
6 explained by *State v. Dupay*, 62 Or App 798, 805-806 (1983):

8 *Terry* and the Oregon statutes recognize an exception to the
9 requirement that Fourth Amendment seizures of persons and
10 effects be based on probable cause. The narrow exception
11 permitted by *Terry* and the Oregon statutes, however, is confined
12 to (1) a stop of the person, (2) a brief inquiry regarding the
13 immediate circumstances that aroused the officer's suspicions,
14 (3) a protective frisk if the officer reasonably suspects that the
15 person is armed and presently dangerous to the officer or other
16 persons present and (4) seizure of weapons found by the frisk.
17 This limited search and seizure is allowed to ensure the safety of
18 the officers and other persons nearby. A warrantless search or
19 seizure of broader scope than permitted by ORS 131.605 to ORS
20 131.625 must be based on probable cause and exigent
21 circumstances, or consent.

22 A "stop" occurs when a person is approached by a law enforcement officer
23 who demands and retains a person's identification. *State v. Gonzalez-Galindo*, 146 Or
24 App 291 (1997); *State v. Hall*, 339 Or 7 (2005). A “stop” is a seizure under Article
25 1, Section 9. *Hall, supra*, 339 Or at 19. There is a stop when a defendant gives the
license to the officer voluntarily and the officer retains it. *State v. Campbell*, 207 Or
App 585 (2006). Running a records check on a passenger is a stop. *State v.*
Thompson, 341 Or 368, 377-379 (2006). 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

1 and walk away. *Brown v. Texas*, 443 US 47, 99 S Ct 2637 (1977); *State v. Starr*, 91
2 Or App 267 (1988).

3 The test is whether the police, through some "show of authority," restrained a
4 person's liberty so a reasonable person would not feel free to refuse to cooperate or
5 leave the scene of the investigation.
6

7 Scope of a Traffic Stop

8 5. The scope of a valid stop is limited to inquiry about the immediate
9 circumstances that aroused the initial suspicion of the officer, and must also be
10 limited to a reasonable amount of time. *State v. Rozzell*, 87 Or App 424, 428
11 (1987)(continued questioning of burglary suspect for 13 minutes before arrest not
12 unreasonable); ORS 131.615(3). Traffic stops should be the "minimum possible
13 intrusion" on Oregon motorists, and not an excuse to begin questioning, searching, or
14 investigating subjects unrelated to the reason for the stop. *State v. Carter/Dawson*,
15 287 Or 479 (1979); *State v. Wight*, 48 Or App 731 (1980). When investigating a
16 traffic infraction, police are limited to the inquiry specified in ORS 810.410.
17

18 Prolonged Or "Excessive" Stop Is Unlawful

19 6. Even if the initial traffic stop of a defendant was reasonable, his continued
20 detention by law enforcement officers may be excessive, becoming an unlawful stop,
21 unless supported by reasonable suspicion that the defendant is committing a crime.
22 "A seizure that is justified solely by the interest in issuing a warning ticket to the
23 driver can become unlawful if it is prolonged beyond the time reasonably required to
24 complete that mission." *Illionois v. Caballes*, 543 US 405, 407 (2005).
25

1 An officer's authority to retain a person's drivers license ends when the officer
2 has all the evidence needed to issue a citation. *State v. Dow*, 116 Or App 542
3 (1992)(running records check on defendant's license was unnecessary for issuance of
4 citation for failure to register vehicle).

5
6 A traffic stop becomes excessive when, as an alternative to processing the
7 infraction, the officer delays by questioning the motorist about unrelated matters,
8 even if the questioning takes only a minute or two. *State v. Rodgers*, 219 Or App
9 366, 368-69, 372 (2008), review allowed, 345 Or 301 (2008); *State v. Ehret*, 184
10 Or App 1 (2002)(when officer, rather than handing defendant the traffic citation,
11 asked him to get out of the car and questioned him about whether there were drugs
12 in the vehicle, he unlawfully extended the traffic stop); *State v. Raney*, 215 Or App
13 339, 343 (2007)(officer can lawfully detain a driver in association with a traffic stop
14 only for "the time reasonably required to complete a citation and any other
15 documents that must be given to the citizen in connection with the detention"). In
16 the absence of reasonable suspicion that the defendant has committed a crime, the
17 officer has no lawful authority to extend the stop, and any ensuing conversation,
18 consent and search are also unlawful. *State v. Hall, supra*.

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21 Questioning on matters unrelated to the traffic infraction, or a request to
22 search, that do not occur "during an unavoidable lull in the [traffic infraction]
23 investigation," unlawfully extends the duration of a stop beyond the time reasonably
24 required to cite a defendant for the traffic infraction. *State v. Foland*, 224 Or App
25 649, 653-654 (2008)(quoting *Rogers, supra*); *State v. Huggett*, 228 Or App 569

1 (2009)(same); *State v. Broughton*, 221 Or App 580, 590 (2008) (“To allow an
2 officer to elicit potentially incriminating information from a motorists while that
3 officer considers whether to issue a citation allows an officer to extend a stop for too
4 long.”).

5
6 Reasonable Suspicion Of Crime Required To Extend Traffic Stop

7 7. A "stop" of a person is unreasonable when the officer has insufficient
8 articulable facts providing a reasonable suspicion that a crime has been committed.
9 ORS 131.615; *State v. Hall*, 339 Or 7 (2005). An officer may broaden the scope of
10 the investigation of a traffic infraction if there is a reasonable suspicion that a
11 defendant has committed illegal acts other than the traffic infraction. A reasonable
12 suspicion is defined as an objective test that requires an officer to point to specific,
13 articulable facts giving rise to a reasonable inference that the defendant committed a
14 crime. *State v. Morton*, 151 Or App 734, 738 (1997). An officer’s subjective belief
15 that the stopped person is committing a crime fails to establish “reasonable
16 suspicion” if that belief is not “objectively reasonable.” *State v. Guest*, 207 Or App
17 395 (2006).
18

19 Trooper Gaither Lacked Reasonable Suspicion That A Crime Was Committed

20
21 8. The Court must analyze sequentially each action by Trooper Gaither that
22 delayed issuance of the speeding ticket as she began investigating her suspicion of
23 drug trafficking, to determine at what point—if any—her suspicion became reasonable
24 so as to justify the continued detention of C. and Chance. Suspicion based on a
25 strong non-drug odor emanating from the car cannot be the entire basis for

1 reasonable suspicion, and delay in processing the citation by making inquiries about
2 the odor is unlawful. *See, e.g., State v. Villemeyer*, 227 Or App 193, 198 (2009)(An
3 officer's "special intuitions" cannot form the entire basis for reasonable suspicion, and
4 intuitions include such things as suspecting criminal activity based on the observation
5 that a person "looked real sharp" or "like a typical pusher, to me").
6

7 Obtaining conflicting stories, or evasive responses, even in combination with
8 other factors, does not give rise to reasonable suspicion. *See, e.g., State v. Frias*, 229
9 Or App 60, 62-63 (2009)(Facts that defendant was evasive in response to officer's
10 questions during traffic stop, was awaiting sentencing on drug charges, and had dark
11 circles under eyes did not provide reasonable suspicion that defendant possessed
12 drugs at time of stop). In *Broughton, supra*, 221 Or App 580, police stopped
13 defendant for a broken taillight and to investigate suspicions defendant had
14 committed a drug transaction, based on observing defendant's short visit to a house
15 under surveillance for drug activity. After running a records check, the officer began
16 questioning defendant about stopping at the drug house. His suspicions were
17 increased when defendant said she stopped to drop off laundry, but he knew her
18 hands had been empty. The Court of Appeals reversed the trial court, holding the
19 officer did not have reasonable suspicion defendant had committed a crime when he
20 began the inquiry which unlawfully delayed him issuing the citation.
21
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23 Refusal to consent to search, and nervous behavior, likewise does not provide
24 reasonable suspicion to prolong a traffic stop. *See, e.g., State v. Foland*, 224 Or App
25 649, 655-656 (2008)(defendant's demeanor and refusal to consent to search after

1 officer inquired about drugs inside a container cannot contribute to reasonable
2 suspicion of drug crime).

3 An Excessive “Stop” Constitutes A Seizure That Requires Probable Cause

4 9. An excessive "stop" constitutes a seizure of the person that requires
5 probable cause; prolonged detention may constitute an illegal arrest if not based on
6 probable cause. *Dunaway v. New York*, 442 US 200 (1979); *State v. Carter/Dawson*,
7 287 Or 479 (1979); *State v. Morgan*, 106 Or App 138 (1991); *see also, State v.*
8 *Bishop*, 157 Or App 33 (1998).

9
10 Property is “seized” for the purposes of Article I, section 9, when the police
11 significantly interfere, even temporarily, with a person's ownership and possessory
12 interests in the property. *State v. Smith*, 327 Or 366, 375 (1988). Depriving
13 Defendants of the use of their car and access to its contents for over an hour and 30
14 minutes constituted a seizure requiring both probable cause and a warrant. *See*
15 *Smith*, 307 Or at 375. Invasion of possessory rights are no less significant than
16 invasions of privacy rights under the Oregon Constitution. *Id.*

17
18 In *State v. Dupay*, 62 Or App 798, 806 (1983), the court held that even if
19 brief detention of defendant and baggage was supported by reasonable suspicion that
20 defendant was transporting narcotics, prolonged detention of one hour and 20
21 minutes while awaiting arrival of drug detection dog was impermissible in the absence
22 of a warrant. More recently, the Oregon Supreme Court held that probable cause and
23 a warrant were required to support the seizure of a vehicle for less than an hour for
24 the purpose of subjecting it to a drug dog sniff. *State v. Juarez-Godinez*, 326 Or 1
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1 (1997)(car stopped for speeding and detained a total of 46 minutes before dog
2 arrived).

3 While police may seize personal property upon reasonable suspicion that the
4 items contain contraband, a seizure lasting 90 minutes for purposes of subjecting an
5 item to a drug detection dog sniff, as a predicate to obtaining a warrant, was
6 unreasonable and violated the Fourth Amendment. *United States v. Place*, 462 US
7 696 (1983). "When the nature and extent of the detention are minimally intrusive of
8 the individual's Fourth Amendment interests, the opposing law enforcement interests
9 can support a seizure based on less than probable cause." *Id.*, at 703. In the case at
10 bar, Trooper Gaither stopped Mr. Chance and C. for going 10 miles over the speed
11 limit in a construction zone at 12 noon, and detained them on the highway off ramp
12 for more than one hour and thirty minutes before the drug detection dog allegedly
13 alerted to a suitcase that officers had taken out of the trunk of the car. This is far
14 beyond what could reasonably be viewed as a "minimal intrusion" of their liberty
15 interest.
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18 Meaning of "Probable Cause" To Seize or Search

19 10. "Probable cause" requires articulable facts that must lead a reasonable
20 person to believe that evidence of a crime will probably be found in the location to be
21 searched or the property to be seized. *See, State v. Anspach*, 298 Or 375 (1984).
22 This is the more-likely-than-not requirement. A "well-warranted suspicion" is not
23 probable cause because a suspicion, no matter how well-founded, does not rise to the
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25

1 level of probable cause. *State v. Verdine*, 290 Or 553 (1981); *State v. Spencer*, 101
2 Or App 425 (1990).

3
4 Trooper Gaither Lacked Probable Cause To Seize Defendants' Car

5
6 11. The outcome of this case on this issue is controlled by the Supreme
7 Court's decision in *State v. Juarez-Godinez*, 326 Or 1 (1997), which turned on
8 strikingly similar facts. The Court found that the following evidence gathered by
9 police during the course of a 46-minute detention did not amount to the requisite
10 probable cause: "(1) defendant and his companions were Hispanic and expensively
11 dressed, (2) the car's occupants were making a long trip with no visible luggage, (3)
12 the car was owned by a drug offender, (4) defendant was "visibly nervous" and
13 unable to produce identification, and (5) the car smelled of aromatic air fresheners
14 and was registered to a third party who was on probation for delivery of a controlled
15 substance." 326 Or at 9. "Even when viewed through the filter of [the officer's]
16 training and experience, those observations did not amount to probable cause and
17 were, consequently, insufficient to support the issuance of the search warrant." *Id.*

18
19 In the case at bar, many of the circumstances identified by Gaither are not
20 suggestive of any illegal activity: renting a car for a long trip even though carrying
21 insurance on three vehicles; renting a car for three days; no luggage in the passenger
22 compartment; and allowing the passenger, who was not on the rental agreement, to
23 drive. The primary facts that objectively support an inference of criminal activity were
24
25 (1) the strong odor or air freshener or deodorizer coming from the car, with no

1 source in plain view; (2) conflicting statements from the defendants regarding how
2 long they had known each other; and (3) both defendants having criminal histories,
3 with C.'s including drug convictions. Even if the innocuous circumstances regarding
4 the car rental and operation are factored in, these circumstances fail to reach the
5 level of probable cause.
6

7 Officers Needed A Warrant To Seize Defendants' Car

8 12. In *State v. Juarez-Godinez, supra*, the Court held that officers violated
9 Article I, Section 9 when they seized the defendant's vehicle following his arrest
10 rather than release it to a passenger, and held it for 46 minutes (30 minutes post-
11 arrest) pending arrival of a drug detection dog: "We have stated, on various
12 occasions, that a warrantless seizure is unconstitutional unless it is justified under one
13 of a few carefully circumscribed exceptions to the warrant requirement. We do not
14 find that any exception applies to the circumstances in this case. We conclude that
15 the seizure of the car was invalid." 326 Or at 8-9.
16

17 All Evidence Obtained By Exploiting Unlawful Stop Or Seizure Is Excluded

18 13. Any and all evidence obtained as the result of an illegal stop must be
19 suppressed as "fruit of the poisonous tree." *State v. Valdez*, 277 Or 621 (1977);
20 *State v. Gonzalez-Golinda, supra*. This includes any and all oral derivative evidence.
21 *State v. Olson*, 287 Or 157 (1979); *State v. Morgan*, 106 Or App 138 (1991).
22

23 Possession Of Less Than One Ounce Does Not Create Probable Cause

24 14. Additional facts beyond the discovery of less than an ounce of marijuana is
25 required to justify a belief that more is present, so as to support a search of a

1 vehicle. “As a matter of law, possession of less than one ounce cannot by itself
2 create probable cause to search for more.” *State v. Tallman*, 76 Or App 715, 720
3 (1985). This follows from the Legislature’s decriminalization of small quantities of
4 marijuana. *Id.*

5 What Constitutes A “Search”

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7 15. Police conduct a search within the meaning of Article I Section 9, of the
8 Oregon Constitution when the officer opens the door of the vehicle to inspect the
9 interior compartment of the vehicle for evidence. *State v. Turechek*, 74 Or App 228
10 (1985); *State v. Rhodes*, 315 Or 191, 196197 (1992). Likewise, a search occurs
11 when an officer inserts his head into an open car window. *State v. Hendricks*, 151 Or
12 App 271 (1997). Opening of a car trunk is a search. *State v. Kosta*, 304 Or 549, 554
13 (1987).
14

15 A dog sniff performed on the exterior of a car while the driver was lawfully
16 seized for a traffic violation does not violate the Fourth Amendment. *Illinois v.*
17 *Caballes*, 543 US at 409. When officers open the door to a vehicle and permit the
18 dog to enter the vehicle, that constitutes a search. *United States v. Winningham*, 140
19 F.3d 1328, 1330-31 (10th Cir. 1998). A dog sniff of luggage that is located in a
20 public place is not a search within the meaning of the Fourth Amendment. *Place*,
21 *supra*, 462 US at 707. The interior of a car trunk is not a “public place”. *Cf. State v.*
22 *Smith*, 327 Or 366, 646 (1998)(dog sniff conducted in public place of odor
23 molecules in the air outside of a clearly defined, private space, is not a “search” under
24 the Oregon Constitution; sniff of exterior of closed storage unit).
25

1 Police conduct a search within the meaning of the Fourth Amendment when
2 they move an item to check for a serial number, *Arizona v. Hicks*, 480 US 321
3 (1987); or when they physically manipulate a carry-on bag aboard a bus, *Bond v.*
4 *United States*, 529 US 334 (2000). No search can be conducted without probable
5 cause. *Id.* When the officers began handling and moving defendants' luggage around
6 inside the vehicle, including picking up and placing each piece outside of the vehicle
7 on the pavement, they effected a search of the luggage.

8
9 Officers Needed A Warrant To Search Defendants' Car

10 16. In *State v. Brown*, 301 Or 268 (1986), a divided Supreme Court
11 recognized for the first time an "automobile exception" to the warrant requirement of
12 Article 1, Section 9: If the automobile is "mobile" and there is probable cause to
13 search at the time of the stop, the Court held the police are not required to obtain a
14 warrant prior to searching the car. *Brown* noted in particular there need be no inquiry
15 into "whether a magistrate was available, whether by telephone or otherwise." 301 Or
16 at 278.

17
18 On closer examination, *Brown* is clearly inapplicable to the search of
19 Defendants' car. *Brown* presented "the question whether police officers are required
20 to obtain a warrant before [immediately] searching the trunk of a lawfully stopped
21 automobile when the officers who arrested the driver have probable cause to believe
22 that the trunk contained relevant evidence of the crime for which the arrest could
23 have been made." 301 Or at 270. "We hold that under these circumstances no
24 warrant was required and the search of the trunk and the seizure of the crime
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1 evidence did not violate Article I, section 9, of the Oregon Constitution, or the Fourth
2 Amendment to the United States Constitution.” *Id.*

3 Trooper Gaither had probable cause to stop Defendants’ car and to cite co-
4 defendant Chance for speeding. Although “mobile” at the time of the stop, there was
5 no probable cause at the time of the stop to search the car for drugs. Assuming,
6
7 *arguendo*, that a canine alert to the right rear quarter panel of the car provided
8 probable cause to search the trunk for drugs, the car had not been “mobile” for about
9 an hour and a half before that search; rather, it had been parked on the right-of-way,
10 guarded by at least two officers, with the occupants detained outside the vehicle.

11 *Compare, Brown, supra* 301 Or at 277(“[We] hold that probable cause to believe that
12 a lawfully stopped automobile which was mobile at the time of the stop contains
13 contraband or crime evidence justifies an *immediate* warrantless search of the entire
14 automobile for the object of the search, despite the absence of any additional exigent
15 circumstances”)(emphasis supplied); *State v. Kock*, 302 Or 20, 33 (1986)(“Searches
16 of automobiles *that have just been lawfully stopped* by police may be searched
17 without a warrant and without a demonstration of exigent circumstances when police
18 have probable cause to believe that the automobile contains contraband or crime
19 evidence.”)(emphasis supplied); *State v. Herrin*, 323 or 188, 193 n.1 (1996)(“police
20 may search a lawfully stopped automobile without waiting to obtain a warrant if: (1)
21 there is “probable cause to believe that the lawfully stopped automobile contains
22 contraband or crime evidence” and (2) *exigency is present, because the automobile is*
23 *mobile at the time*. Provided that those elements are met, the exception “justifies an
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1 *immediate* warrantless search of the entire automobile for the object of the search,
2 despite the absence of any additional exigent circumstances.”)(emphasis supplied).

3 Under the facts of the instant case, to search without a warrant is an
4 unreasonable search. *See, Brown, supra*, 301 Or at 278 n.6 (“In this modern day of
5 electronics and computers, we foresee a time in the near future when the warrant
6 requirement of the state and federal constitutions can be fulfilled virtually without
7 exception [T]he desired goal of having a neutral magistrate could be achieved
8 within minutes without the present invasion of the rights of a citizen created by the
9 delay under our current cumbersome procedure and yet would fully protect the rights
10 of the citizen from warrantless searches”; discussing telephonic warrants); *State v.*
11 *Wise*, 305 Or 78, 82 n.3 (1988)(“It was the present unavailability of a general
12 speedy warrant procedure that led the court to allow an exception for warrantless
13 searches after stops of mobile vehicles, as Justice Jones noted in *State v. Brown*”);

14
15
16 Probable Cause Plus Exigent Circumstances Required To Search Luggage

17 17. No probable cause and exigent circumstances justified the warrantless
18 search of any closed container seized from defendants’ vehicle. Exigent
19 circumstances include, among other things, situations in which immediate action is
20 necessary to prevent the disappearance, dissipation, or destruction of evidence. *See,*
21 *State v. Stevens*, 311 Or. 119, 126 (1991)(explaining that “[a]n exigent
22 circumstance is a situation that requires the police to act swiftly to prevent danger to
23 life or serious damage to property, or to forestall a suspect's escape or the
24 destruction of evidence”). Once the officers had removed the luggage from
25

1 defendants' vehicle and placed the bags on the pavement, the bags were no longer
2 "mobile" so as to come within the automobile exception. *See, State v. Kruchek*, 156
3 Or App 617 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001)(A closed
4 ice chest could not be searched as part of an automobile inventory search, even
5 though the smell of marijuana was emanating from that container, because the
6 container did not announce its entire contents; *State v. DeLong*, 43 Or App 183
7 (1979)(camera bag lawfully seized by police during valid automobile exigency to
8 warrant clause could not be opened without first securing a warrant); *State v. Lane*,
9 135 Or App 233 (1995)(Defendant arrested for DUI; officer searched vehicle and
10 seized and unlawfully searched wallet and closed film canister; no probable cause or
11 exigent circumstances for search of these items); *State v. Walker*, 173 Or App 46
12 (2001)(container discovered during inventory after defendant was removed from the
13 vehicle and no longer in control nor in reach of it could not be searched without a
14 warrant; any exigency created by vehicle's mobility had been extinguished).

17 The police may not search a closed opaque container they have seized without
18 a warrant unless the container announces its contents "to the world." In other words,
19 the officer cannot rely on his personal expertise to understand what the container
20 holds. *State v. Heckathorne*, 218 Or App 283 (2008). A canine alert on an opaque
21 container does not justify a warrantless search of the container. *See, United States v.*
22 *Place, supra*.

24 No Exigent Circumstances When Officers Had Time To Obtain Telephonic Warrant

1 18. Exceptions to the warrant requirement are narrow, and the state has the
2 burden of proving probable cause and that exigent circumstances exist that outweigh
3 the strong interest in requiring a warrant. *State v. Peller*, 287 Or. 255, 598 P.2d 684
4 (1979). One relevant consideration is whether the police attempted to get a
5 telephonic warrant, and it is no excuse that police are unfamiliar with the procedure.
6 *State v. Wise, supra; State v. Stoudamire*, 198 Or App 399, 412 (2005)(“Warrants
7 are available by telephone, ORS 133.545(5) and 133.555(3), and the availability of
8 such a warrant is to be considered in determining the existence of exigent
9 circumstances.”), The state’s burden of establishing the existence of exigent
10 circumstances requires it to offer evidence on the availability of a telephonic warrant.
11 *Id. See, State v. Wynn*, 102 Or App 1 (1990)(Exigent circumstances did not exist to
12 support warrantless entry into defendant’s home to arrest him when police had time
13 to obtain telephonic warrant).

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16 Remedy for Unlawful Search Or Seizure

17 19. Any and all evidence derived from an unreasonable search and/or seizure
18 must be suppressed as "fruit of the poisonous tree." *State v. Warner*, 284 Or 147
19 (1978). This includes any and all oral derivative evidence. *State v. Olson*, 287 Or 157
20 (1979); *Dunaway v. New York*, 442 US 200 (1979).
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