2009 WL 6697961 (Or.App.) (Appellate Brief)
Court of Appeals of Oregon.

STATE OF OREGON, Plaintiff-Respondent,
v.
Debra Denise DAVIS, Defendant-Appellant.

No. A139682.
May 28, 2009.

Washington County Circuit Court Case No. D080806M
Appeal from the Judgment of the Circuit Court for Washington County Honorable Gayle A. Nachtigal, Judge

Appellant's Opening Brief

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***i TABLE OF CONTENTS**

TABLE OF AUTHORITIES
CASES

*1 STATEMENT OF THE CASE

Nature of the Proceeding

This is an appeal in a criminal case in which defendant seeks reversal of her convictions for theft of services, ORS 164.125, and interfering with public transportation, ORS 166.116. Defendant was charged by misdemeanor complaint with theft of services, criminal trespass in the second degree (ORS 164.245), and interfering with public transportation. A copy of the complaint is attached in the excerpt of record at ER 1-2.

Nature of the Judgment

Defendant waived jury, was tried by the court, found guilty of theft of services and interfering with public transportation, and acquitted of criminal trespass in the second degree. For both counts of conviction, the trial court imposed a sentence of discharge. A copy of the judgment is attached at ER 3-4.

Jurisdiction

This court has jurisdiction pursuant to ORS 138.040.

Notice of Appeal

Defendant timely filed notice of appeal on August 13, 2008, from the Washington County judgment entered on July 14, 2008.

*2 Questions Presented

Was defendant stopped in violation of Article I, section 9, when, while riding a public train, a Hillsboro police officer demanded proof that she had paid her fare?

Was the officer's warrantless seizure and search of defendant's train ticket authorized as a valid governmental regulatory activity?

Summary of Argument

Defendant was stopped when a police officer demanded proof of having paid her fare for public transportation. The officer's demand was an investigation into defendant's potentially criminal behavior from which no reasonable person would feel free to refuse their cooperation. The stop was made without individualized suspicion of wrongdoing and thus violated Article I, section 9.

The officer's warrantless seizure and search of defendant's train ticket were not authorized as valid governmental regulatory activity because the officer had a law enforcement purpose in conducting the seizure and search, and because the officer was not acting pursuant to a properly authorized policy that limits an officer's discretion in conducting fare checks.

Summary of Facts

Motion to Suppress

On February 1, 2008, Hillsboro police officer Deborah Case was working as a light rail enforcer, checking fares on TriMet Max trains. Tr 10-11. At about 1:15 p.m., while riding an eastbound train, Case demanded "proof of fare" from defendant. Tr 11, 15. Case wore her police uniform and displayed a badge. Tr 16-17.

***3** Defendant produced an invalid proof of fare, so Case "requested that she disembark the train" with her at the next stop. Tr 17. Case intended to investigate the crime of theft. Tr 19, 21. Once off the train she wrote defendant a criminal citation for theft of services. Tr 19.

Case received no formal training on how to perform a fare check, but she typically conducts fare checks by requesting proof of fare from everyone on a Max train, starting from one end of the train and working her way to the other end of the train. Tr 12, 22. She has discretion regarding which train she will board and whether to conduct checks on trains or on train platforms. Tr 22-23. She makes no notes regarding the number of fares checked or regarding the number of invalid fares discovered. Tr 24. No supervisor reviews her fare checks. *Id. Trial*

Case's trial testimony was similar to her pre-trial testimony. On February 1, 2008, she was a Hillsboro police officer conducting fare checks on TriMet Max trains. Tr 74-75. She announced to defendant, a passenger on a Max train, "Fare check." Tr 76. Defendant gave Case a ticket that bore a validation date of January 31, 2007. Tr 76-77.

Case told defendant the ticket had already been used, and defendant explained that she was just trying to get home. Tr 78. Case asked defendant to disembark the train with her at the next stop, which was her custom when investigating a crime. *Id.* Once off the train, Case checked defendant's warrant status through "Dispatch," and learned that she was warrant-free. *Id.* She also learned that defendant had no current ***4** "exclusions." *Id.* She issued defendant a citation to appear in court for theft of services. *Id.* Defendant accused Case of targeting her because of her race. Tr 79.

The Max train fare was $1.75. Tr 78. Signs on Max train doors read, "Valid fare required before boarding." Tr 79. Defendant suffers from several physical and mental health disabilities. Tr 93-95, 97, 103.

ASSIGNMENT OF ERROR

The trial court erred in denying defendant's motion to suppress.

Preservation of Error

Pre-trial, defendant moved to suppress evidence obtained as the fruit of Officer Case's warrantless detention as follows:

> "The defendant * * * moves this Court for an order suppressing all evidence, both tangible and intangible, obtained as a result of the unlawful stop, detention and warrantless seizure and search of [defendant] on [February 1, 2008], including [defendant's] identity, her statements, her stamped [T]ri-met voucher, and any other evidence seized from her person."

Defendant's Motion to Suppress at 1.

In a supporting memorandum defendant asserted that she was stopped without reasonable suspicion in violation of ORS 131.615, Article I, section 9, of the Oregon Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution. Defendant's Memorandum in Support of Motion to Suppress at 1. Defendant compared the fare check to an unconstitutional roadblock, relying on *Edmunds v. Indiana*, 531 US 32, 121 S Ct447, 148 L Ed 2d 333 (2000), *Delaware v. Prouse*, 440 US 648, 99 S Ct 1391, 59 L Ed 2d 660 (1979), ***5** *State v. Williamson*, 307 Or 621, 772 P2d 404 (1989), *State v. Anderson*, 304 Or 139, 743 P2d 715 (1987), and *State v. Boyanovsky*, 304 Or 131, 743 P2d 711 (1987). *Id*. at 2.

The relevant colloquy and ruling on the motion were as follows:
"[DEFENSE COUNSEL]: Your Honor, the Defense is moving to suppress the evidence obtained as a result of an unlawful stop of [defendant]. It's the Defense's position that Officer Case stopped [defendant] without having individualized reasonable suspicion that [defendant] had committed a crime. Therefore, the stop was unlawful. It violated Article I, section 9, of the Oregon Constitution.

"And, for that reason, we ask that all evidence obtained from that unlawful stop be suppressed.

"THE COURT: Are you making the argument that all fare checks on MAX are, you know, unlawful?

"[DEFENSE COUNSEL]: No, Your Honor, we're not making that argument. Tri-Met employs fare inspectors--

"THE COURT: Mm-hmm.

"[DEFENSE COUNSEL]: who would be able to make lawful fare checks. It's the Defense's position that fare checks by police officers need to be supported by individualized, reasonable suspicion.

"THE COURT: Okay.

"[PROSECUTOR]: And, Your Honor, * * * it's the State's position that, in fact, fare checks are not a stop of a person[.]"

Tr 4-5.

"[DEFENSE COUNSEL]: The State's position in this case presents a serious threat to the civil liberties of individuals that use Tri-Met. To put forth that there's no privacy interest, that an individual has no privacy interest on Tri-Met, just doesn't make any sense.

"THE COURT: Well, isn't it more that it's no privacy interest as to whether or not they have a valid fare? * * *.

"* * * [I]n being on Tri-Met, according to the rules, you are required to show, upon request, proof of fare payment[.] You know that going onto Tri-Met, that you have to show proof of fare payment.

***6** "[DEFENSE COUNSEL]: That's correct, Your Honor. The regulations say that a person entering Tri-Met has to show proof of fare.

"THE COURT: Oh, no, it says, * * * 'Any person failing to exhibit proof of payment upon demand by an inspector or peace officer.'

"*****

"[DEFENSE COUNSEL]: And I think that the State's example regarding a movie theater is quite telling in this case. A person has to pay [for] a ticket to enter a movie. * * * And if a person were to enter a movie without paying for their ticket, they could be convicted of the crime of Theft of Services.

"THE COURT: Correct.

"[DEFENSE COUNSEL]: Similarly, if a person were to enter Tri-Met without paying for their ticket they could be convicted of the crime of Theft of Services.

"And, in order to do movie ticket inspections, the movie theater employs ushers--

"THE COURT: Mm-hmm.

"[DEFENSE COUNSEL]: -who collect people's tickets.

"THE COURT: Mm-hmm.

"[DEFENSE COUNSEL]: And if they suspect that a person does not have a ticket, the usher would then walk down the movie theater aisle, * * * ask the person to see proof of their ticket.

"THE COURT: Mm-hmm.

"[DEFENSE COUNSEL]: -the usher then would escort the person out of the movie theater, and possibly--

"THE COURT: Mm-hmm.

"[DEFENSE COUNSEL]: -contact the police.

"[DEFENSE COUNSEL]: The same should hold true on Tri-Met.

"*****

***7** "[DEFENSE COUNSEL]: * * * [I]t did not because there was no 'usher' that then contacted the police.

"*****

"[DEFENSE COUNSEL]: Under Tri-Met's own regulation it grants itself the authority to have police.

"*****

"[DEFENSE COUNSEL]: And the Defense position is that that's unconstitutional.

"*****

"[DEFENSE COUNSEL]: [I]t is a stop, Your Honor, and it's a stop because defendant, similarly to the person in the movie theater, had a privacy interest while they were * * * using services. * * * [W]e don't have police officers walking through movie theaters checking people's tickets. And if we did have that, that would be police officers violating Article I, section 9, because they would have no individualized reasonable suspicion that any one patron in the movie theater did not have their proof of the ticket.

"Similarly, in this case, the police officer didn't have any individualized reasonable suspicion that any one person on MAX had not paid their fare.

"[T]herefore, * * * it's the Defense position that there is a stop in this case. When the police officer demanded that [defendant] show her her fare, the police officer testified that she was in her uniform, that she was displaying her badge, and she testified that she demanded to see proof of fare.

"There is absolutely no indication in the testimony that [defendant] was free to leave, free to not show her her fare. And the * * * State has the burden of proof in this case, and they have not presented any evidence, at all, that [defendant] was free to leave at that time. She was detained by Officer Case without any individualized reasonable suspicion.

"And I think that this can also be analogized to driving, in that a person is required to have a license to drive a vehicle. But a police officer isn't allowed to pull over any driver that they see going down the road, to ask them if they have a driver's license. * * *.

***8** "The same should hold true on MAX. In order to find out whether or not a person has satisfied the regulatory requirements to be using the * * * public transit system, a police officer would need individualized reasonable suspicion * * *.

"The Defense position is that a Tri-Met Fare Inspector, who is not a police officer, could do a fare inspection, and then detain the person for a police officer to issue a criminal citation * * *.

"I want to address, also, the State's second point. The State argues that this is--that there's a regulatory purpose. And there's a great deal of case law on regulatory purpose. I would point the Court to *State v. Atkins[on], State v. Eldridge*, and *Nelson* and *State v. Nor[oh]*.

"State v. Atkins [on] sets out a three-pronged test for regulatory searches. First, there has to be a lawful stop. * * * Even if the Court finds that there is a lawful stop, the State would still need to meet the second two prongs, which are an authorized administrative inventory program that the agency administers systematically to prevent discretion on the part of law enforcement personnel who direct or conduct inventories.

"And the third prong being that performance of the inventory, according to the program's established policy and procedure.

"And *State v. Eldridge* tells us that, 'An inventory violates Article I, section 9, when it fails to incorporate any instruction on how to conduct an inventory, any oversight of the personnel directing and conducting the inventory, or any definition of the places to look or what constitutes an item that should be examined or documented.

"I think that this second prong is another place where the State fails when arguing that this is a regulatory search. And that is because Officer Case testified that she never had any formal training on how to do these fare checks. That the way that she does them could very well be different from the way that other police officers within her department do them; that she keeps no log notes; that she does them either standing on the platform or on the train; that she has no oversight, she doesn't have her commanding officer or a commanding sergeant review her fare checks.

"And, therefore, it's the Defense position that this type of regulatory enforcement fails the second prong of the *Atkinson* test, and, therefore, is not a valid regulatory search.

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***9** "Finally, under the third prong, *State v. Norl[oh]*, instructs us that the power to inventory a vehicle's contents exists only pursuant to properly authorized policy. Whether the policy itself is properly authorized does not depend on circumstances of the application.

"The third prong has to do with whether or not, in the individual instance, the police officer is actually following their policy.

"And in this case the police officer indicated that she only made it halfway through the train when she contacted [defendant], she then asked [defendant] to step off the train with her, and she did not continue to inventory the train for the remaining passengers.

"Therefore * * * the police officer didn't follow her own personal policy of starting at one end of the train and going all the way to the other end of the train * * *.

"*****

"So, in summary, the Defense argues that this is a stop. * * *.

"Second, if this is a regulatory search, * * * that * * * the Hillsboro Police Department does not have a proper policy in place, or the proper exercise of oversight.

"And, third, that the police officer did not fully inventory this train.

"*****

"THE COURT: Under the statutory scheme for Tri-Met[,] fare inspectors and police officers have the same authority to conduct fare checks.

"In this particular case the fare check was conducted on a moving train. I don't know where [defendant] could have gone to. She wasn't stopped. If she was, her forward motion continued as she was continuing to move with the train.

"I don't believe it was a stop, it was simply an encounter. That is allowed under the regulations.

"And, * * * unlike going down the road, in order to board the train, which is a voluntary act, it is not required that anybody ride MAX, but if you are going to enter MAX or the bus you must do so with valid fare and you must show proof of valid fare upon demand. So, if you want to be on the train, you are agreeing to show your valid fare upon demand.

***10** "There is no expectation of privacy when you enter the train, as far as your ticket is concerned. * * * It is more akin to coming into the courthouse, but you can't come in with a gun. And if you come through the doors of the courthouse, you are agreeing to the search for a weapon * * *. If you do not want to go through that search, you do not enter the courthouse.

"If you do not want to show your proof of fare, you do not get on MAX, because the requirement to be on MAX is to have valid fare and show proof upon demand, to an inspector or a police officer.

"So I don't believe it was a stop, it was [an] encounter * * *.

"This is much more akin to a regulatory sort of behavior on the part of the law enforcement officers, be they inspectors or police officers. There are certainly the valid Administrative Rules and statutory regulation allowing Tri-Met and the Tri-Met Board * * * to promulgate these rules. * * *.

"The scope of the matter is to demand proof of payment. There isn't anything more than that. * * *.

"And the fact that she stopped midway through the train because the stop was coming up * * * and taken off for a criminal investigation somehow invalidates the search, really makes no sense to me. * * *.

"So, for those reasons, the Motion is Denied."

Tr 35-47.

Standard of Review

In reviewing the lawfulness of a warrantless search, this court is bound by the trial court's express factual findings, if they are supported by evidence in the record. *State v. Parker*, 317 Or 225, 230, 855 P2d 636 (1993). This court's function is to determine whether the trial court correctly applied the law in the light of those facts. *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991); *State v. Martin*, 124 Or App 459, 466, 863 P2d 1276 (1993).

***11 Argument**

Defendant was charged with theft of services [1] and interfering with public transportation [2] after she failed to present proper proof of fare upon demand to do so by a police officer on a public transit train. Defendant moved for suppression of her invalid train ticket and her statements about the ticket on the grounds that (1) the demand for proof of fare was a stop made without reasonable suspicion, and (2) the ***12** officer's warrantless search and seizure of the ticket was not justified as a valid governmental regulatory activity. The trial court denied defendant's motion and her claims are here renewed on appeal.

1. Defendant was stopped without reasonable suspicion.

In Oregon, "both statutory and constitutional law limit the authority of police to detain citizens." *State v. Hall*, 339 Or 7, 15, 115 P3d 908 (2005). Police may temporarily restrain, or stop, a person only when they reasonably suspect that the person has committed a crime, ORS 131.615(1), and Article I, section 9, protects "the right of the people to be secure in their person, * * * against unreasonable search, or seizure[.]"

In *Hall* the court stated the framework for determining when a police-citizen encounter has resulted in a citizen's seizure: "In [*State v]. Holmes*, 311 Or [400], 409-10, 813 P2d 28 (1991), [the] court held that a 'seizure' of a person under Article I, section 9, occurs when either (1) a police officer intentionally and significantly interferes with a person's liberty of movement; or (2) a person believes that his or her liberty of movement has been so restricted and such a belief is objectively reasonable under the circumstances. Police conduct interfering with a person's liberty of movement may take the form of either physical force or a show of authority. *State v. Juarez-Godinez*, 326 Or 1, 6, 942 P2d 772 (1997). In deciding whether police conduct implicates Article I, section 9, the pivotal consideration is whether 'the officer, even if making inquiries a private citizen would not, has otherwise conducted [himself or herself] in a manner that would be perceived as a nonoffensive contact if it had occurred between two ordinary citizens.' *Holmes*, 311 Or at 410, 813 P2d 28. The determination whether a person has been 'seized' under Article I, section 9, requires a fact-specific inquiry examining the totality of the circumstances in the particular case. *Id.* at 408, 813 P2d 28."

Hall, 339 Or at 18.

***13** In *Hall* the court concluded there was a seizure of the defendant when, after stopping his vehicle next to the defendant and gesturing to the defendant to approach him, the officer took the defendant's identification card and radioed dispatch for a warrant check. The court held, "When [the officer] took defendant's identification card and radioed the police dispatch for a warrant check, the consensual nature of the encounter dissipated, and the encounter evolved from a 'mere conversation' encounter into a restraint upon defendant's liberty of movement." 339 Or at 19. Key to the court's conclusion was the fact that, when the identification was taken, "defendant was cognizant that [the officer] was investigating whether defendant was the subject of any outstanding warrants." *Id.* Further observed the court, "[W]e find it difficult to posit that a reasonable person would think that he or she was free to leave at a time when that person is the investigatory subject of a pending warrant check." *Id.*

This case is not materially distinguishable from *Hall*. Defendant was a passenger on a public train when an officer demanded that she produce proof of having purchased the proper fare. In response, defendant handed the officer a ticket which the officer then inspected. The officer testified that her objective in demanding proof of fare was to investigate whether defendant had committed a misdemeanor. Tr 21. On these facts it is not reasonable to believe that defendant would think that she was free to refuse the officer's demand or to disembark the train (or move to a different seat) when she was the subject of a police investigation into a potential criminal matter was. Defendant was clearly stopped when Officer Case demanded and inspected her train ticket. *See also State v. Thompkin*, 341 Or 368, 143 P3d 530 (2006) (passenger in a lawfully stopped vehicle was seized when she became the ***14** investigatory subject of illegal activity); *State v. Boyanovsky*, 304 Or at 131 (the defendant was seized when his vehicle was stopped in a roadblock that was intended to detect persons driving under the influence and to check driver licenses and vehicle registrations).

Under Article I, section 9, police may stop a person only when they reasonably suspect that the person has committed a crime. *Thompkin*, 341 Or at 377. When Officer Case demanded and inspected proof of defendant's fare, she lacked any suspicion, let alone reasonable suspicion, that defendant had committed a crime. Neither the prosecutor nor the trial judge even suggested otherwise. Defendant was thus detained in violation of Article I, section 9. *See Pooler v. Motor Vehicles Div.*, 306 Or 47, 51, 755 P2d 701 (1988) (random, suspicionless stops by police hoping to identify an occasional DUII offender are unconstitutional); *Boyanovsky*, 304 at 377 (suppression required in case of roadblock stop that was conducted in absence of any belief that the defendant had committed an offense); *State v. Anderson*, 304 Or 139, 141, 743 P2d 715 (1987) (same).

2. The officer's seizure and search of defendant's train ticket was unreasonable.

In addition to prohibiting unreasonable seizures of persons, Article I, section 9, also prohibits unreasonable seizures and searches of property: "No law shall violate the right of the people to be secure in their * * * papers, and effects, against unreasonable search, or seizure[.]" A seizure occurs when a government agent significantly interferes with a person's possessory or ownership interests in property. *State v. Owens*, 302 Or 196, 207, 729 P2d 524 (1986). A search occurs when a ***15** government agent invades a person's interests in privacy. *State v. Wacker*, 317 Or 419,425, 856 P2d 1029(1993).

Warrantless searches and seizures are per se unreasonable unless falling within one of the few "specifically established and well-delineated exceptions" to the warrant requirement. *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983). One such exception to the warrant requirement is the administrative search exception. *State v. Coleman*, 196 Or App 125, 129, 100 P3d 1085 (2004), *rev den*, 338 Or 16(2005). A valid administrative search is a search conducted for purposes other than law enforcement pursuant to a policy that is authorized by a politically accountable lawmaking body. *Id.* Furthermore, in order to be valid, such a policy must limit the discretion of those responsible for conducting the search and the scope of the search authorized must reasonably relate to its purpose. *Id.*

The officer's retention and inspection of defendant's train ticket was plainly a seizure and a search. *See Boyanovsky*, 304 Or at 133 (inspection of documents in possession of person detained in roadblock was a seizure and a search). The officer testified that the purpose of her fare check was to investigate whether defendant had committed a misdemeanor offense. Tr 21, Because the seizure and search were conducted for a law enforcement purpose, they may not be excused from the warrant requirement as an administrative search. *Anderson*, 304 Or at 141 (a roadblock that is intended to enforce criminal laws does not qualify as "an administrative search, that is, one for a purpose other than the enforcement of laws by means of criminal sanctions"); *Boyanovsky*, 304 Or at 134 ("Before government officials can embark on a search or seizure for evidence to be used for [criminal prosecution], they must have ***16** individualized suspicion of wrongdoing"); *Nelson v. Lane County*, 304 Or 97, 104-05, 743 P2d 692 (1987) ("If offenders face criminal sanctions, the inspection implicates criminal law enforcement purposes and is not 'administrative' in nature."). The search and seizure in this case were thus not reasonable and suppression is required.

Even had the officer conducted the search and seizure for only a non-law enforcement purpose, they still would have failed the test for a properly-authorized administrative search because no administrative rule authorizes the officer's conduct in this case or limits an officer's discretion in conducting fare checks. *See State v. Atkinson*, 298 Or 1,10, 688 P2d 832 (1984) (a properly authorized administrative program for vehicle inventories must be "designed and systematically administered so that the inventory involves no exercise of discretion by the law enforcement person directing or taking the inventory"); *State v. Lecarros*, 187 Or App 105, 111, 66 P3d 543 (2003) (because neither the State Marine Board nor any other governmental agency had created rules to limit the discretion of officers authorized carry out boat searches and seizures, seizure of the defendant's boat violated Article I, section 9).

In support of its argument that Officer Case's fare check was authorized as an administrative search, the state attempted to show that Case's conduct was pursuant to a proper policy that was enacted by a politically-accountable lawmaking body and relied first on Oregon Revised Statutes, Chapter 267, governing mass transit and transportation districts. Tr 30, 34-35; State's Exhibit 1. ORS 267.010(1) provides that, for purposes of ORS 267.010 to 267.390, a "district" is a mass transit district established under ORS 267.101 to 267.390. ORS 267.101(2) provides that a "district board" is "the board of directors of a district." ORS 267.150(2) provides that a ***17** district board may "enact police ordinances relating to the protection, use and enjoyment of district property and facilities." ORS 267.150(2) provides further that:

> "A district may appoint peace officers who shall have the same authority as other peace officers, except that such authority shall be limited to the enforcement of police ordinances of the district and

> the enforcement, for purposes relating to the protection, use and enjoyment of district property and facilities, of state and local laws."

The state also relied on TriMet Code Chapter 29, Regulations Governing Proof of Fare Payment. Tr 29, 34-35; State's Exhibit 3. A copy of TriMet Code Chapter 29 is attached at ER 5-7. Chapter 29.15A provides, "It shall be unlawful for any person to occupy, ride in or use, any District Vehicle without paying the applicable fare." Chapter 29.15B provides, "It shall be unlawful for any person to occupy, ride in or use, any District Vehicle without carrying proof of fare payment." Chapter 29.20 provides:

> "A person failing to exhibit Proof of Payment upon demand by an Inspector or a peace officer shall provide the Inspector or peace officer, his or her name and residence address and shall exhibit upon request of the Inspector or peace officer whatever written identification, in any, may be carried by the person. Pursuant to ORS 153.039, an Inspector or a peace officer may stop and detain persons for the purpose of issuing a citation."

ORS 153.039 in pertinent part here provides:
"(1) An enforcement officer may not arrest, stop or detain a person for the commission of a violation except to the extent provided in this section and ORS 810.410.

"(2) An enforcement officer may stop and detain any person *if the officer has reasonable grounds to believe that the person has committed a violation."*

(Italics added.) An enforcement officer includes a member of the police of a city. ORS 153.005(1)(c).

***18** The foregoing authority relied on by the state, though, as authority for the officer's conduct in this case, is deficient. TriMet Code Chapter 29 requires that any person who rides in a TriMet vehicle both pay the applicable fare and carry proof of fare payment. TriMet Code Chapter 29 also provides that a peace officer may stop and detain a person to issue a citation to a rule violator. Nowhere in the TriMet Code or anywhere else, however, is there authority for a police officer to demand proof of fare payment in the absence of individualized suspicion that fare has not been paid or proof of payment has not been retained. *See Anderson*, 304 Or at 141 (though Oregon drivers must drive sober, ORS 813.010, and must carry proof of a vehicle's registration, ORS 803.505(1), those requirements alone fail to authorize a suspicionless detention to check for sobriety and proof of registration).

Furthermore, even had such authorization been provided, no rule even remotely purports to limit an officer's discretion in conducting fare checks. Officer Case, herself, testified that she was provided no training in conducting fare checks and receives no supervision or oversight in conducting fare checks. In other words, nothing in the TriMet code prohibits police officers from requesting proof of fare payment in an arbitrary and discriminatory fashion.

The policy relied on by the state in this case does not authorize the seizure and search of defendant's train ticket and the motion to suppress should have been granted. *Compare Nelson v. Lane County*, 304 Or at 103-04 (observing that roadblocks are seizures of the person, possibly to be followed by a search of the person or the person's effects, and for that reason authority to conduct roadblocks cannot be implied but must instead be explicit); ***19** *State v. Eldridge*, 207 Or App 337, 341, 142 P3d 82 (2006) (holding that police department's inventory policy for impounded vehicles was unconstitutional for lacking standardized criteria or procedures to prevent officer discretion and limit the scope of each inventory to constitutional administrative action instead of an unlawful warrantless search); *State v. Lecarros*, 187 Or App at 111 (holding that seizure of boat violated Article I, section 9, because no government agency had created rules to limit officers' discretion in conducting searches and seizures of boats).

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this court reverse her convictions for theft of services and interfering with public transportation.

Footnotes

1 Theft of services is proscribed by ORS 164.125 in pertinent part as follows:

"(1) A person commits the crime of theft of services if:

"(a) With intent to avoid payment therefore, the person obtains services that are available only for compensation, by force, threat, deception or other means to avoid payment for the services; or

*****

"(2) As used in this section, 'services' includes, but is not limited to, * * * transportation, * * *.

*****

"(5) Theft of services is:

"(a) A Class C misdemeanor if the aggregate total value of services that are the subject of the theft is under $50[.]"

2 Interfering with public transportation is proscribed by ORS 166.116 in pertinent part as follows:

"(1) A person commits the crime of interfering with public transportation if the person:

"(a) Intentionally or knowingly enters or remains unlawfully in or on a public transit vehicle or public transit station;

*****

"(2) Interfering with public transportation is a Class A misdemeanor."