IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SEAN MICHAEL MCNALLY, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court Case No. 111152528 CA A150977 S063644

PETITIONER'S REPLY BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on appeal from a judgment of the Circuit Court for Multnomah County
Honorable Alicia A Fuchs, Judge

Opinion Filed: July 8, 2015
Author of Opinion: Armstrong, Presiding Judge
Concurring Judge(s): Nakamoto, Judge, and De Muniz, Senior Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF OF PETITIONER ON REVIEW

SEAN MICHAEL MCNALLY

A person commits the crime of interfering with a peace officer if the person, knowing that another person is a peace officer, refuses to obey a lawful order by the peace officer. ORS 162.247(1)(b). However, the crime "does not apply in situations in which the person is engaging in * * * passive resistance." ORS 162.247(3)(b). This court must determine the correct interpretation of the term "passive resistance" in that context. Under defendant's interpretation, "passive resistance" refers to conduct that does not consist of physical action, but instead takes an inactive form, such as a failure or refusal to move one's body. It does not have to be part of a political protest. In response, the state offers a criticism of defendant's interpretation and two alternative interpretations of its own. Defendant submits this reply to the state's arguments.

I. Defendant's interpretation of the "passive resistance" exception is not so broad that it would "all but swallow" the crime.

The state's chief criticism of defendant's interpretation is that it would "all but swallow" or "largely eliminate" the "refuses to obey" form of interfering with a peace officer, ORS 162.247(1)(b). *See* Res BOM 17-18. In support of that argument, the state cites ORS 174.010, which states: "where there are several provisions or particulars such construction is, if possible, to be

adopted as will give effect to all."[1] The state argues that if non-active disobedience is excluded from the statute, there would be little conduct remaining for ORS 162.247(1)(b) to prohibit, because "[t]ypically, a person refuses to comply with an order verbally, or by refusing to act." Res BOM 18.

There are two problems with that criticism of defendant's interpretation. First, as a factual matter, there is no reason to assume that "active" refusals are atypical. The annals of police procedure must include innumerable examples of people "actively" disobeying orders to cease engaging in particular conduct and other orders to stop. One need only recall any televised foot chase preceded by "Stop! Police!" Such disobedience would not constitute "passive resistance." The state offers no support for the assumption that inactive refusals are "typical." This court should not rely on an unproven assumption to guide its statutory interpretation. There is no reason to think that adhering to the words that the legislature used would unduly diminish the effective scope of 162.247(1)(b).

Second, even assuming for the moment that most refusals would constitute passive resistance, there is no rule of statutory interpretation

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[1] *See also Force v. Dept. of Rev.*, 350 Or 179, 190, 252 P3d 306 (2011) ("Statutory provisions, however, must be construed, if possible, in a manner that 'will give effect to all' of them."); *Liles v. Damon Corp.*, 345 Or 420, 424, 198 P3d 926 (2008) ("We begin with the text and context of the statutes and endeavor to give meaning to all parts of those statutes.")

disfavoring exceptions that apply to the majority of conduct that otherwise would be criminalized. The medicinal distribution of hydrocodone exempted by ORS 475.125 and ORS 475.814, for example, hopefully eclipses the illicit and illegal delivery and possession of the drug criminalized by ORS 475.806 to 475.814.

The state cites ORS 174.010, but that rule would bar defendant's interpretation only if it gave *no* significant effect to the underlying criminal prohibition. Here, defendant's interpretation is admittedly broad, such that the exception frequently will apply to refusals to obey. But the breadth of the exception would not preclude defendant's interpretation under ORS 174.010. That statute is concerned with interpretations that render a related provision ineffective. Here, even if most refusals are inactive and thus exempt under defendant's interpretation, the prohibition still would apply to the remaining minority of "active" refusals. Accordingly, defendant's interpretation would not fail to give effect to ORS 162.247(1)(b).

In sum, the state's general point seems to be that this court should reject defendant's interpretation because it would make the exception apply to the majority of the conduct that would otherwise be prohibited by the underlying rule. Defendant is aware of no authority for that interpretive preference. And in any case, there is no reason to assume that inactive refusals would outnumber active ones. Regardless, under defendant's interpretation of the exception, ORS

162.247(1)(b) still would prohibit plenty of conduct. The state's claim that defendant's interpretation would "all but swallow" the rule lacks merit.

II. The "passive resistance" exception does not apply only to resistance to an arrest.

In its primary argument, the state concludes that the "passive resistance" exception applies only to resistance to an *arrest*. Res BOM 12. It admits that the text does not express that limitation. Res BOM 13. Nevertheless, the state maintains that the text's context and legislative history support it. Specifically, the state points to Representative Prozanski's statement that the exception would apply to a situation in which a protester refused an order to stand up to be arrested. Res BOM 13. But even if Prozanski's comment shows that the exception was intended to apply to an arrest situation, it does not suggest that the exception was intended to apply *only* to an arrest situation, any more than it suggests that the exception was intended to apply only to a protest situation.

The state's point may be that the legislature's specific purpose in enacting the "passive resistance" exception was to ensure that passive resistance to an arrest would be excluded from IPO, in addition to being excluded from resisting arrest. It gleans that purpose from the proposed changes to the IPO statute that the legislature considered, revised, and enacted.

Originally, IPO excluded passive resistance to an arrest because ORS 162.247 did not apply "in situations in which a peace officer is making an

arrest." Or Laws 1997, ch 719, § 1. Two years later, the legislature considered changing that exception to exclude instead "activity that would constitute resisting arrest," thereby narrowing the exception applicable to arrests, but still precluding charges under both statutes for the same conduct. But because the definition of resisting arrest excludes passive resistance, that change would allow a prosecutor to charge IPO for passive resistance to an arrest. The state's point seems to be that the legislature avoided that result by including the text at issue, thereby ensuring that passive resistance to an arrest would continue to be excluded from IPO.

Even if that was the legislature's sole purpose,[2] it would not support the state's "arrests-only" interpretation of the exception. As this court has frequently noted, the legislature sometimes uses broad solutions to solve narrow problems. *See, e.g.*, *Hamilton v. Paynter*, 342 Or 48, 55, 149 P3d 131 (2006). The legislature could have easily specified that the IPO statute applied neither to activity that would constitute resisting arrest nor passive resistance to an arrest. Given the unlimited reference to "passive resistance" that was enacted

[2] Excluding passive resistance to an arrest seems unlikely to have been the legislature's *sole* purpose, given the references in the legislative record to passive resistance that do not explicitly involve an arrest. *See, e.g.*, Tape Recording, House Judiciary Committee, S.B. 3374, May 4, 1999, Tape 178, Side B (statement of Rep. Prozanski) ("I wanted to make certain that the crime of interfering would not include a passive civil disobedience protestor. So if an order comes in to move, they're not going to be cited for this particular crime.").

instead, the most reasonable conclusion is that the legislature provided an exception for passive resistance in general (a broad solution) to ensure that passive resistance to an arrest remained outside the scope of IPO. Nothing in the legislative history or statutory context compels this court to accept the state's strained interpretation of the text at issue.

III. The "passive resistance" exception does not apply only to civil disobedience.

The state's alternative rule fares no better. The state points to Representative Prozanski's intent to provide an exception for a "passive civil disobedience protester," and concludes that the legislature must therefore have used "passive resistance" to refer only to "civil disobedience." Res BOM 14-15. "Civil disobedience," in turn, requires "an intentional violation of the law that is inactive in nature, public, and motivated by reasons of principle or conscience."[3] Res BOM 17.

That reasoning is not significantly different from the Court of Appeals' reasoning in *State v. Patnesky*, 265 Or App 356, 335 P3d 331 (2014), and it suffers from the same defect. In particular, each assumes that the legislature's intent to include civil disobedience within the exception implies that it intended to exclude everything else. To be sure, "passive resistance" can be used as a

[3] Defendant agrees with the state that under its alternative interpretation, the trial court erred by refusing to give his "passive resistance" instruction, because defendant presented evidence that he refused to leave the bus station "as a matter of principle." Res BOM 21.

compound noun to refer to a category of conduct defined by its political status. But here, as discussed in defendant's brief on the merits, the weight of the contextual and historical evidence shows that the legislature used "passive resistance" to refer to a broader category defined instead by readily-identifiable physical characteristics. Specifically, the legislature used "passive" to modify the "resistance" presented by the person's interference or disobedience. In that sense, "passive resistance" refers to interference or disobedience that does not consist of physical action, but instead takes an inactive form, such as a failure or refusal to move one's body. Contrary to the state's alternative interpretation, there is no political requirement.

CONCLUSION

This court should reverse the decision of the Court of Appeals as to the charge of interfering with a peace officer, reverse the conviction for that crime, and remand the case to the trial court for a new trial.

Respectfully submitted,

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

Brief length

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 1,622 words.

Type size

I 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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 18, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, and Jamie K. Contreras, #022780, Assistant Attorney-in-Charge, Criminal Appeals, attorneys for Respondent on Review.

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