FILED December 15, 2015 08:53 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. BELL MURPHY ANDERSEN, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court No. C111600CR CA A150872 SC S063169

REPLY BRIEF OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Washington County
Honorable KIRSTEN E. THOMPSON, Judge

Opinion Filed: March 18, 2015
Author of Opinion: Armstrong, J.
Concurring Judges: Haselton, C.J.; Duncan, J.; Nakamoto, J.; Egan, J.; Flynn, J.; Wollheim, S.J.
Author of Dissent: DeVore, J.
Dissenting Judges: Ortega, J.; Sercombe, J.; Hadlock, J.; Tookey, J.; Garett, J.

Continued…

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INTRODUCTION

In response to the state's opening brief, defendant argues that this court should abandon the Article I, section 9 automobile exception formally recognized in *State v. Brown*, 301 Or 268, 721 P2d 1357 (1986). Def BOM 23-42. This court should decline abandoning the automobile exception because defendant has failed to meet the high burden placed on litigants seeking to depart from seeking to overrule existing precedent. Defendant has failed to demonstrate why the *Brown* court erred in its constitutional interpretation, much less offer a suitable alternative paradigm for this court. The *Brown* decision is entirely consistently with Article I, section 9's "reasonableness" requirement, and with the Article I, section 9 case law that preceded it. And, as other states have recently concluded, eliminating the automobile exception would unduly complicate search and seizure law when an automobile is involved.

I. Defendant has not demonstrated why this court should reconsider *State v. Brown*.

In addition to defendant's argument about the applicability of Article I, section 9's automobile exception to her case, she argues that this court should abandon the automobile exception entirely. Def BOM 23-42. In particular, she contends that an automobile exception under Article I, section 9, was and remains controversial; that technological advancements have eliminated the

need for an automobile exception; that the automobile exception has not proved easy to apply; and that the *Brown* court did not engage in an adequate independent analysis under the Oregon Constitution. Def BOM 23-42. None of the reasons defendant has cited, however, is compelling enough for this court to consider abandoning what amounts to nine decades of precedent.[1]

Under the principle of *stare decisis*, this court begins "with the assumption that issues considered in [its] prior cases are correctly decided." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011). *Stare decisis* promotes "[s]tability and predictability" in the law because "individuals and institutions act in reliance on this court's decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness." *Id.*

As a result, "the party seeking to change a precedent must assume responsibility for affirmatively persuading [the court] that [it] should abandon [its] precedent." *Farmers Ins. Co.*, 350 Or at 698 (internal quotation marks omitted). To successfully persuade this court to abandon controlling precedent, a party must do more than merely convince the court that, if confronted with the

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[1] As discussed in the state's brief on the merits, grounds for recognizing an automobile exception under Article I, section 9 existed long before this court officially recognized it in *Brown*. *See Carroll v. United States*, 267 US 132, 45 S Ct 280, 69 L Ed 543 (1925); *State v. DeFord*, 120 Or 444, 250 P 220 (1926).

same issue, it would rule differently. A decision to overrule precedent should rest on some special reason over and above the belief that a prior case was wrongly decided. *Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015). In order to overcome well-established precedent, a party must convince the court that (1) the constitutional rule it attacks was not formulated either by means of the appropriate paradigm or by some suitable substitute; (2) engaging in an appropriate interpretive paradigm demonstrates that the rule at issue is incorrect; and (3) overturning the rule will not unduly cloud or complicate the law. *State v. Ciancanelli*, 339 Or 282, 291, 121 P3d 613 (2005). Defendant fails to meet this high burden.

A. Defendant has not demonstrated that *Brown's* recognition of the automobile exception was clearly wrong.

Defendant argues this court should abandon the automobile exception to Article I, section 9 because the *Brown* court failed to conduct an independent state constitutional analysis. Def BOM 38-41. Putting aside for the moment the fact that defendant fails to offer any independent constitutional analysis of her own, the *Brown* court did, in fact, take a considered approach in arriving at its ruling.

1. The *Brown* court did conduct an independent analysis of Article I, section 9.

Defendant criticizes the *Brown* court for basing its Article I, section 9 ruling upon federal jurisprudence. Def BOM 38-41. As this court is well

aware, Article I, section 9 is its own source of constitutional authority that may, under certain circumstances, offer greater personal guarantees than the Fourth Amendment. *State v. Caraher*, 293 Or 741, 653 P2d 942 (1982). Nevertheless, this court will consider Fourth Amendment jurisprudence to help inform its interpretation of Article I, section 9. *See State v. Davis*, 295 Or 227, 241 n 18, 666 P2d 802 (1983) ("Inasmuch as certain federal cases under the Fourth Amendment are instructive, we shall refer to federal cases in outlining our view of exigencies which apply equally under [Article I, section 9].").

Although the *Brown* court shaped Article I, section 9's automobile exception after *Carroll v. United States*, 267 US 132, 45 S Ct 280, 69 L Ed 543 (1925), it took pains to note that it was deciding the parameters of Oregon's automobile exception "independent of federal law." 301 Or at 274. Nothing about constitutional originalism prohibits a state court from incorporating federal jurisprudence into its state constitution if it finds it persuasive. *See* Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 Rutgers LJ 863, 864 (1991) ("There is nothing improper in concluding that the [United States] Supreme Court's construction of similar text is sound."). This court has continued to consider Fourth Amendment case law when ruling on Article I, section 9. As recently as 2009, in fact, this court found Fourth Amendment case law with respect to third-party

searches persuasive enough to adopt consistent law under Article I, section 9. *See State v. Luman*, 347 Or 487, 493-94, 223 P3d 1041 (2009).

To be clear, the state is not advocating that this court adopt an automobile exception consistent with that of the Fourth Amendment. The fact, however, that the *Brown* court relied on federal jurisprudence to help shape Article I, section 9's automobile exception is not noteworthy.[2] The *Brown* court, therefore, engaged in sufficient independent constitutional analysis when it chose to rely upon federal case law—specifically, *Carroll v. United States* and its progeny—when recognizing an automobile exception under Article I, section 9.

2. *Brown* is consistent with Article I, section 9's text, case law, and history.

Moreover, there is nothing about the automobile exception as recognized in *Brown* that is inconsistent with how this court interprets Oregon constitutional provisions. When construing a provision of the original Oregon Constitution, this court engages in a three-part analysis. *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992). This court examines the text of the

[2] Like the *Brown* court, the majority of those states that provide greater privacy rights to their citizens through their own state constitutions than the Fourth Amendment have cited to federal automobile exception jurisprudence as justification for recognizing a Fourth-Amendment-like automobile exception under their state constitutional provisions. APP-1-3.

provision, the historical circumstances of the adoption of the provision, and the case law that has construed the provision.[3] *Id*. The court's goal is "to determine the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution." *State v. Mills*, 354 Or 350, 354, 312 P3d 515 (2013).

Nothing in the wording of Article I, section 9 can be said to address the automobile exception to the warrant requirement rule directly. Historical circumstances surrounding its adoption provide no greater support. There is no direct evidence of the intention of the framers of the Oregon Constitution in adopting Article I, section 9. *See generally*, Carey, *The Oregon Constitution and Proceedings of the Debates of the Constitutional Convention of 1857* (Salem 1926).

A *Priest v. Pearce* analysis of Article I, section 9, however, is not foreclosed. *See State v. Avila-Nava*, 356 Or 600, 610-13, 341 P3d 714 (2014)

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[3] Defendant correctly notes that it is unusual for this court to engage in a *Priest v. Pearce* analysis when interpreting Article I, section 9. Def BOM 39 n 11. This court, however, has engaged in a *Priest v. Pearce* analysis of Article I, section 9 in at least one recent case. *See State v. Carter*, 342 Or 39, 42-45, 147 P3d 1151 (2006). This court has also adopted the *Priest v. Pearce* paradigm as its preferred method of constitutional analysis. *See Couey v. Atkins*, 357 Or 460, 490, 355 P3d 866 (2015) ("As a general matter, we examine the text of the constitution in its historical context, along with relevant cases interpreting it.") (citing to *Priest v. Pearce*).

(using the *Priest v. Pearce* framework to interpret Article I, section 12 despite the fact that "the text in context and historical circumstances of the adoption of Article I, section 12, do not assist our analysis."). By its terms, Article I, section 9 does not prohibit all searches—it prohibits *unreasonable* searches. *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013). Accordingly, in determining whether a search is lawful, "the touchstone [inquiry] is reasonableness." *Id.* To determine whether a search is reasonable, this court considers the degree of justification for the action under the circumstances and "the extent to which police conduct intrudes on that person's liberty." *Id.* at 603.

As early as 1926, this court recognized the unique exigency presented when officers develop probable cause to believe contraband or evidence of an offense is to be found in a motor vehicle. *See State v. DeFord*, 120 Or 444, 455, 250 P 220 (1926) ("The automobile is a swift and powerful vehicle * * * [which] furnish[es] for a successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before [its] advent.") (citing *People v. Case*, 220 Mich 379, 190 NW 289 (Mich 1922). Accordingly, it has recognized the inherent reasonableness of being able to conduct a quick search of a vehicle. *See State v. Duffy*, 135 Or 290, 307, 295 P 953 (1931) ("Moreover, the search of an automobile can be more readily sustained than that of a *stationary* piece of property.") (emphasis added); *State*

v. Krogness, 238 Or 135, 142, 388 P2d 120 (1963) ("Because of the *mobility* of criminals and of their pursuers, and for other reasons, the search warrant is not commonly employed.) (emphasis added). In *State v. Greene*, this court upheld the warrantless search of a parked car due to the inherent mobility of the vehicle and the "distinct possibility that someone might try to [remove the car or evidence] before a warrant could be obtained." 285 Or 337, 345, 591 P2d 1362 (1979). Although the *Brown* court did not cite specifically to these cases as justification for recognizing the automobile exception of Article I, section 9, its reasoning is entirely consistent with this court's prior jurisprudence. *See Brown*, 301 Or at 275 (citing to *Carroll v. United States* for the same proposition).

Furthermore, requiring police to obtain a search warrant to search a seized vehicle considerably burdens a citizen in ways in which requiring a warrant to search a citizen's residence or office does not. Most search warrants authorizing the search of an office or residence are obtained secretly, so that the citizen is unaware of the upcoming search and, consequently, unencumbered by the warrant application process. It is virtually impossible, however, to obtain a search warrant to search a citizen's car when it is encountered in transit *prior* to having contact with that citizen. Consequently, the first opportunity to request a search warrant for the search of a vehicle occurs virtually always *after* the

officers have seized the citizen, causing a prolonged seizure of the citizen and his or her vehicle.

Historically, this court has recognized that burden and has concluded that an immediate, warrantless search of a citizen's seized automobile is *as reasonable* as obtaining a search warrant. *See Greene*, 285 Or at 343 ("For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.") (citing with approval to *Chambers v. Maroney*, 399 US 42, 52, 90 S Ct 1975, 26 L Ed 2d 419 (1970)); *State v. Quinn*, 290 Or 383, 392-93, 623 P2d 630 (1981) (same). As Justice Jones reasoned, "[a] citizen's rights of privacy are not protected by seizing him or his property and holding the person or property for hours pending the receipt of a warrant issued by a magistrate." *See State v. Bennett*, 301 Or 299, 721 P2d 1375 (1986) (an automobile search opinion issued the same day as *Brown*). Oregon's automobile exception applies to circumstances that furnish probable cause to search a vehicle that are unforeseeable and the opportunity to conduct a search is fleeting. Requiring an officer to obtain a warrant to search the vehicle would not provide significant protection of the defendant's privacy interests.

Defendant cannot demonstrate that the *Brown* court's reasoning for recognizing an automobile exception under Article I, section 9 was unjustifiable

or incorrect. In determining that the warrantless search of an automobile that is mobile when encountered is reasonable, the *Brown* court considered the degree of justification for the search (the inherent mobility of an automobile that is stopped while it is in use) and the extent to which the search intruded on a citizen's liberty (holding that requiring a warrant would not, in the circumstances of a mobile automobile, serve a citizen's privacy interests). Defendant, therefore, has failed to meet the first hurdle of overcoming *stare decisis*. *Ciancanelli*, 339 Or at 291.

B. Defendant does not offer an alternative paradigm.

Although defendant criticizes the *Brown* court for how it conducted its independent constitutional analysis, defendant fails to offer an alternative method of interpreting Article I, section 9. Def BOM 38-41. Defendant, therefore, has failed to meet the second hurdle of overcoming *stare decisis*, in that she has failed to demonstrate that an appropriate interpretive paradigm would produce a result different than that in *Brown*. *Ciancanelli*, 339 Or at 291.

C. Eliminating the automobile exception will unduly cloud or complicate search and seizure law.

The final step to overcome *stare decisis* is for the advocating party to demonstrate that overturning the established precedent will not unduly cloud or complicate the law. *Ciancanelli*, 339 Or at 291. Defendant fails in this regard.

As an initial matter, defendant argues that one of the reasons this court should abandon the automobile exception is because its application has not proved easy to apply. Def BOM 31-38. Although Article I, section 9's automobile exception may need clarification now and again, it nevertheless provides law enforcement with a far more reliable guideline to assess when a warrantless search of an automobile is authorized than would be if an automobile's mobility were *not* recognized as a *per se* exigency. Any difficulty in determining whether a warrantless search of a vehicle was valid under Article I, section 9 comes from applying the rule of the automobile exception without considering whether the *purpose* behind the automobile exception was also being served.[4] Any rule may be subject to varying results if "sliced too thinly." *State v. Amaya*, 336 Or 616, 629, 89 P3d 1163 (2004). *See also, e.g.*, *State v. Cromwell*, 109 Or App 654, 659, 820 P2d 888 (1991) (comment that finding a parked, but occupied, truck was immobile because it was not in motion when the police encountered it "draws too fine a distinction."). The

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[4] This court frequently looks to the purpose of a rule—whether constitutional, statutory, administrative or common law—when applying it in a contested case. *See State v. Macbale*, 353 Or 789, 305 P3d 107 (2013) (examining purpose behind OEC 412 hearing to determine whether it violated Oregon's open-courts constitutional clause); *State v. Hall*, 339 Or 7, 115 P3d 908 (2005) (examining purpose of Article I, section 9's exclusionary rule to explain court's causal connection analysis); *State v. Allen*, 332 Or 244, 26 P3d 814 (2001) (examining purposes behind Article I, section 21's prohibition against *ex post facto* laws).

purpose behind the automobile exception is not to apply an absolutist bright-line rule for law enforcement to apply, but to provide justification for conducting a warrantless search when unforeseeable circumstances furnish probable cause to search a vehicle and the opportunity to conduct a search is fleeting.

If this court were not to recognize the *per se* exigency a "mobile" automobile provides, officers would be required to assess a dizzying number of factors to assess whether obtaining a search warrant was too impracticable. First, without the automobile exception, it is unclear whether officers would retain the authority to seize a vehicle while applying for a search warrant. *See State v. Smith*, 327 Or 366, 963 P2d 642 (1998) (officers unlawfully seized the defendant's storage locker by padlocking it while they applied for a search warrant). Assuming that authority exists to seize a vehicle in order to prevent the destruction of evidence while applying for a search warrant, officers and courts would then be required to consider whether the following circumstances overcome the need to obtain a warrant:

> [F]or example, the time of day; the location of the stop; the nature of the neighborhood; the unfolding of the events establishing probable cause; the ratio of officers to suspects; the existence of confederates who know the location of the car and could remove it or its contents; whether the arrest was observed by passersby who would tamper with the car or its contents; whether it would be safe to leave the car unguarded and, if not, whether the delay that would be caused by obtaining a warrant would place the officers or the evidence at risk.

State v. Witt, ___ A3d ___ (NJ 2015) (2015 WL 5601436). Different courts can easily reach different conclusions regarding the same factual circumstances. For example, if an officer was available to guard a stopped vehicle while a search warrant was obtained, would the length of time required to obtain the warrant be relevant? When does it become too risky for the safety of the officer or stopped citizens to take the time to apply for a warrant? If a stopped vehicle along the side of a busy street is plainly visible, is the safety of the officer or stopped citizens or evidence sufficiently minimized to require a warrant to search the vehicle? Does the presence of someone wanting to drive the vehicle away provide sufficient exigency?

A significant factor contributing to determining whether obtaining a search warrant is impracticable is the time required to obtain a search warrant. The *Brown* court observed that, "'[i]n this modern day of electronics and computers,' a day will come when the warrant requirement can be fulfilled expeditiously." *See State v. Mazzola*, 356 Or 804, 811, 345 P3d 424 (2015) (citing *Brown*, 301 Or at 278 n 6). Despite the admitted technological advances that make obtaining a search warrant more efficient, however, delay will necessarily still be part of the process.[5]

[5] Although extolling the advancements in the "expeditious processing of warrant applications," in *Missouri v. McNeely*, Justice Sotomayor also recognized that other inherent factors, such as the availability of a

Footnote continued…

This court need look no further than New Jersey for proof. Up until recently, its Supreme Court held that Article I, paragraph 7 of its constitution did *not* recognize an automobile exception that infused a vehicle with *per se* exigent circumstances. *See State v. Pena-Flores*, 198 NJ 6, 965 A2d 114 (2009) (holding that "exigency above and beyond the mere mobility of the vehicle is required" to justify a warrantless automobile search under Article I, paragraph 7). The court encouraged the use of telephone and electronic warrants as a means to meet the constitutional challenges of motor-vehicle stops. *Id.*, at 33-36.

Roughly six years later, the state presented evidence to the court that, even with modern technology, the average time to obtain a telephonic or electronic search warrant of a vehicle was "approximately 59 minutes" according to one study, and "1.5 to 2 hours" according to a second study. *Witt* (slip opinion at 14). Despite the court's encouragement to resort to telephonic or electronic warrants, requests for warrants did not increase "a statistically significant level." (slip opinion at 14). Instead, officers relied more and more

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(…continued)
magistrate judge, will lengthen the amount of time needed to obtain a warrant. __ US __, 133 S Ct 1552, 1562, 185 L Ed 2d 696 (2013).

on consent searches rather than obtain a warrant.[6] (slip opinion at 14). The New Jersey Supreme Court concluded that an undue burden had been placed on law enforcement to consider too many factors, leading to too much second-guessing and disparate results in the court system to overrule its prior case law and return to recognizing a vehicle's *per se* exigency. (slip opinion at 18-19).

New Jersey is not the only state to return to recognizing an automobile exception under its state constitution. Nevada did so in 2013, noting that the confusion in its automobile search jurisprudence "not only makes it difficult for district courts to apply the law, it also makes it difficult for police to comply with the law in the field." *See State v. Lloyd*, 312 P3d 467, 471-74 (Nev 2013). The Supreme Court of Pennsylvania also reversed course in *Commonwealth v. Gary*, 625 Pa 183, 91 A3d 102 (Pa 2014). Prior to *Gary*, Article I, section 8 of the Pennsylvania Constitution required warrantless automobile searches to be accompanied not only by probable cause "but also exigent circumstances beyond mere mobility." 625 Pa at 218. After conducting an extensive review

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[6] The *Witt* court noted that, in response to *Pena-Flores*, state police consent searches of automobiles surged ten-fold, and municipal law enforcement consent searches of automobiles increased by two hundred percent. (slip opinion at 14). The court opined that more officers relied on consent search of vehicles since *Pena-Flores* because "[c]onsent searches avoid the dangers of protracted roadway stops while search warrants are procured, and they remove the legal unpredictability surrounding a warrantless search based on [complex factors]." *Witt* (slip opinion at 16).

of Pennsylvania automobile search jurisprudence, the *Gary* court concluded that justification for the warrantless search of an automobile turned on "small facts in the midst of a complex, volatile, fast-moving, stressful, and potentially threatening situation in the field" that often were given varying emphasis by the courts. *Id.* at 236, 240. Like the Nevada Supreme Court did the year before, it reincorporated a Fourth-Amendment-like automobile exception into its state constitution. *Id.* at 242.

Despite the fact that modern technology has facilitated obtaining a search warrant, requiring an officer to obtain a search warrant to search a stopped vehicle will still lengthen the time of the police-citizen encounter, as the state of New Jersey has demonstrated, potentially endangering both the officer and the stopped citizens. Furthermore, eliminating the automobile exception will deprive law enforcement and courts of a clear guideline to determine the constitutionality of the challenged search. Oregon officers may react as the New Jersey officers did and increasingly rely upon consent to conduct a warrantless search of a stopped automobile. Although this is a constitutionally permissible alternative, it eliminates a court's ability to assess whether the search was supported by probable cause, which the state must now do under the automobile exception. Given that abandoning the automobile exception would only further complicate the law, defendant has failed to meet the third hurdle to justify departure from *stare decisis*. *State v. Ciancanelli*, 339 Or at 291.

CONCLUSION

For the foregoing reasons and the reasons argued in the state's brief on the merits, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 15, 2015, I directed the original Reply Brief of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Ingrid MacFarlane, attorneys for respondent on review, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,956 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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