IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. AMANDA L. NEWCOMB, Plaintiff-Respondent, Respondent on Review.	Multnomah County Circuit Court No. 110443303 CA A149495 SC S062387

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable ERIC J. BERGSTROM, Judge

Opinion Filed: April 16, 2014
Author of Opinion: Sercombe, J.
Concurring Judges: Ortega, P.J., and Hadlock, J.

Continued …

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PETITIONER ON REVIEW'S BRIEF ON THE MERITS

INTRODUCTION

Animals hold a special place in the hearts of many Oregonians. For many, animals—especially dogs and cats—are four-legged family members. Consistently with that social ethic, Oregon has enacted some of the strongest animal protection laws in the country. Those laws recognize that animals are living, sentient beings that may not be subjected to avoidable pain and suffering. At the same time, however, Oregon law classifies animals as property, the same classification that applies to inanimate objects.

That tension—between recognizing that animals are sentient beings, and yet classifying them as personal property—is at the heart of this case. This case calls upon this court to reconcile that tension in the context of Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution. Specifically, this court must decide whether a person has a "protected privacy interest" in an animal that he or she is suspected of neglecting or abusing.

This court should hold that the owner has no protected privacy interest in the physical condition of a lawfully seized animal, and therefore the state does not effect a search when it runs laboratory tests on the animal to determine the cause of its distress and provide appropriate treatment. To determine whether a

person has a protected privacy interest, this court looks to social and legal norms of behavior and asks whether a person has an interest in freedom from scrutiny. When it comes to animals, current social and legal norms of behavior indicate that the needs of an endangered animal outweigh any ownership interest held by the suspected abuser. In that sense, animals are not mere property. They are living, breathing beings to which society attaches special significance and has a powerful interest in protecting from harm. Because a person has no privacy interest in a lawfully seized animal, law enforcement officers may authorize and perform diagnostic tests to determine the cause of the animal's condition and provide appropriate treatment without violating the Oregon Constitution.

The same is true under the Fourth Amendment.[1] To determine whether conduct constitutes a search under the Fourth Amendment, the inquiry hinges on whether police conduct infringes upon "an expectation of privacy that society is prepared to consider reasonable." The same social and legal norms of behavior that inform the Article I, section 9, analysis also indicate that society does not recognize that the owner of a lawfully seized animal has a reasonable

[1] Although the Court of Appeals did not decide the case on Fourth Amendment grounds, defendant made an argument under the Fourth Amendment. Therefore, if this court reverses the Court of Appeals' decision, it should address defendant's Fourth Amendment argument.

expectation of privacy in the physical condition of the animal that he or she is suspected of abusing or neglecting. Because there is no protected privacy interest in a lawfully seized animal, there can be no search.

But even if this court were to conclude that a person retains some privacy interest in a lawfully seized animal, and therefore that the tests in this case constituted a search, it should hold that the search was lawful. Both Article I, section 9, and the Fourth Amendment prohibit only unreasonable searches and seizures. Performing minimally invasive laboratory diagnostic tests to determine the cause of an animal's distress and provide it with appropriate care is reasonable and therefore constitutional.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Under Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution, does the owner of an animal[2] retain a protected privacy interest in the animal's physical condition when the animal has been lawfully seized?

[2] Throughout this brief, the state uses the term "animal" to refer to "any nonhuman mammal, bird, reptile, amphibian, or fish." ORS 167.310(3) (defining "animal").

First Proposed Rule of Law

No. Any privacy right in an animal's physical condition exists only when a person has the right to possess the animal. When a person loses the right to possess an animal based on probable cause of abuse or neglect, he or she also loses any protected privacy interest in that animal. Accordingly, diagnostic veterinary testing of a lawfully seized animal does not constitute a "search" for purposes of either Article I, section 9, or the Fourth Amendment.

Second Question Presented

Even if a person retains some protected privacy interest in an animal that has been lawfully seized, must a law enforcement officer obtain a warrant or establish that an exception to the warrant requirement exists before a veterinarian may perform diagnostic tests necessary to provide the animal with appropriate care?

Second Proposed Rule of Law

No. Performing diagnostic medical tests on a lawfully seized animal to determine the cause of the animal's condition is not an unreasonable search that implicates Article I, section 9, or the Fourth Amendment. Accordingly, a law enforcement officer need not obtain a warrant or establish that an exception to the warrant requirement applies before authorizing or directing a veterinarian to perform diagnostic tests, even if the results of testing may be used as evidence in a criminal prosecution of the owner.

FACTUAL BACKGROUND

A named informant called the Oregon Humane Society (OHS) to report that defendant was abusing and neglecting her dog. A sworn law enforcement officer working as an animal cruelty investigator for OHS went to defendant's home to investigate. Defendant consented to the officer entering her apartment. Once inside, the officer saw defendant's dog, Juno, in the yard. The dog was "in a near-emaciated condition," and was "kind of eating at random things in the yard" and "try[ing] to vomit." When the officer asked defendant why the dog was in that condition, defendant admitted that she had run out of dog food. The officer, concerned about the dog's condition, asked defendant to sign a temporary medical release, but she refused. The officer then took custody of the dog and took it to OHS "in order to make a determination if [he] was going to pursue this criminally" and to "determine what [was] wrong with [the dog], to get him vet care." 262 Or App at 259.

To that end, the OHS veterinarian took blood and fecal samples for diagnostic testing, and fed the dog, charting his weight gain over several days. The tests revealed that Juno "was a healthy dog" and, with appropriate feeding, "he rapidly began to gain weight. So basically there was nothing wrong with him." *Id.* at 260.

Based in part on the results of those tests, the state charged defendant with second-degree animal neglect. Defendant moved to suppress the test-

result evidence, arguing that Juno was unlawfully seized because the cause of his condition was not immediately apparent. Alternatively, she argued that, even if the seizure was lawful, the diagnostic tests effected an additional search that violated Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution. The trial court denied the motion, and a jury found defendant guilty of second-degree animal neglect. *Id.* at 261.

On appeal, defendant reiterated both of her arguments for suppression. The Court of Appeals agreed with the trial court that the officer lawfully seized the dog under the plain-view doctrine, because the dog's condition was in plain view. *Id.* at 264.[3] But it agreed with defendant that the diagnostic tests of Juno's blood constituted an unlawful search under Article I, section 9. In reaching that conclusion, the Court of Appeals applied its case law dealing with searches of "concealed personal effects":

> "The extraction of blood from the dog involved a physical intrusion into defendant's property, and the testing of blood revealed evidence that was not otherwise exposed to public view or to those who had lawful access to the dog while it was in the state's custody. Specifically, the tests revealed information about the dog's physiological condition, which, in turn, showed that the dog was healthy aside from being malnourished."

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[3] Defendant did not petition this court for review of the plain-view seizure issue. Accordingly, this court's analysis should start from the premise that Juno was lawfully seized.

Id. at 269-70. The Court of Appeals reversed the trial court's denial of the motion to suppress and remanded the case to the trial court. Because the record was unclear how the veterinarian obtained the fecal sample—either by "physical intrusion" or after it was expelled by the dog—the Court of Appeals instructed the trial court to make that determination on remand; if it was the former, the fecal test result should also have been suppressed. *Id.* at 270 n 10.

SUMMARY OF ARGUMENT

At issue in this case is whether an OHS veterinarian—a state actor, for purposes of this analysis—unlawfully searched defendant's dog when she performed diagnostic laboratory tests to determine the cause of the dog's condition. Both Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution guarantee a person's right to be free from unreasonable searches of their effects. But there can be no search unless a person has a protected privacy interest in a particular "effect"—that is, an interest in freedom from particular types of scrutiny. In determining whether such an interest exists, this court looks to "social and legal norms of behavior" or—under the Fourth Amendment analysis—whether a person has an "expectation of privacy that society is prepared to consider reasonable."

This court—nor any other court in the United States of which the state is aware—has never been asked to determine whether the owner of an animal has

a protected *privacy* interest in that animal. Were animals like any other kind of personal property, the analysis would be relatively straightforward, for a person generally has a protected privacy interest in the invisible interior of a piece of property.

But animals are different. They are living creatures that hold a place in modern society unlike any other kind of property. Those fundamental differences mean that this court should not apply the existing law governing searches of property, as the Court of Appeals did in this case in equating a dog with a closed container. Instead, this court should treat animals as a distinct category for purposes of the search and seizure analysis. "Social and legal norms of behavior," when it comes to animals, reflect that Oregonians value animals for more than their value as chattels. In modern society, animals are—in some respects—treated more like children than they are purses or pieces of luggage. As a society, we value animals for their own sake and recognize the need to protect them from suffering. For that reason, it would make little sense to conclude that a person has a protected privacy interest in the very animal that he or she is suspected of harming. Instead, this court should hold that, when a person loses the right to possess an animal based on probable cause that he or she has committed a crime against the animal—much like a parent who loses custody of a child that he or she is suspected of abusing—he or she also loses any privacy interest in that animal.

Even if this court were to conclude that a person retains some protected privacy interest in a lawfully seized animal, however, it should hold that the tests performed in this case were lawful. Both Article I, section 9, and the Fourth Amendment prohibit only unreasonable searches and seizures, and diagnostic laboratory tests of an animal in distress are not unreasonable.

ARGUMENT

A. Article I, section 9, applies only to protected privacy interests, which are not the same thing as ownership interests.

Whether the state violated Article I, section 9, of the Oregon Constitution turns on whether the dog was "searched" when the OHS veterinarian performed laboratory tests to determine the cause of his condition. Article I, section 9, provides that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure * * *." Or Const, Art I, sec 9.

There can be no search unless a government action invades a "protected privacy interest," which this court has defined as an "interest in freedom from particular forms of scrutiny." *State v. Campbell*, 306 Or 157, 170, 759 P2d 1040 (1988). And "[i]ndividual freedom from scrutiny is determined by social and legal norms of behavior, such as trespass laws and conventions against eavesdropping." *Id.* at 170.

Property laws are among those "social and legal norms," although "the privacy that Article I, section 9, protects is not necessarily coextensive with property law." *State v. Howard/Dawson*, 342 Or 635, 642, 157 P3d 1189 (2007). Instead, "the degree to which property law informs questions of privacy varies with the context in which the challenged action occurs." *Id.* *See also State v. Meredith*, 337 Or 299, 306, 96 P3d 342 (2004) (whether a protected privacy interest exists is determined "in light of the particular context in which the government conduct occurred").

Therefore, a person does not necessarily have a "protected privacy interest" in a piece of property simply by virtue of his or her ownership interest. To be private, the interest must be one that is recognized by "social and legal norms of behavior."

B. "Social and legal norms of behavior" dictate that a person has no privacy interest in an animal that is seized based on probable cause that the person abused or neglected the animal.

At present, animals are personal property in Oregon. *See State v. Fessenden/Dicke*, 355 Or 759, 770, 333 P3d 278 (2014) (reviewing statutes). But the "social and legal norms of behavior" surrounding animals reflect that modern society does not view animals as mere property. More than 63 percent of Oregon households owned at least one pet in 2011—the fourth highest percentage in the country. https://oregonvma.org/media (last visited Oct 23, 2014) (citing the American Veterinary Medical Association 2011 US Pet

Ownership & Demographics Study). 70% of American animal owners in one survey reported that they thought of their animals as children. Sonia S. Waisman & Barbara R. Newell, *Recovery of 'Non-Economic' Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 Animal L 45, 59 (2001) (citing 1995 survey by American Animal Hospital Association). Americans spend billions of dollars each year on veterinary care for their animals, and according to one survey, 38% of animal owners "stated that they would spend any amount of money to save the life of their animal companion." *Id.* at 61-62. *See also* Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 Rutgers J L & Pub Pol'y 314 (2007) (citing statistics on spending for veterinary care in the United States). In yet another survey, 50% of respondents said that they would be "very likely" to risk their lives to save the life of their animal companion. Waisman & Newell, 7 Animal L at 60.

But our concern for animal welfare is broader than concern for the animals that we ourselves own, and has nothing to do with their status as property. The Oregon Humane Society—a single charity that cares for homeless animals—received more than $10 million in donations from individuals and businesses last year. http://www.oregonhumane.org/about_us/documents/OHS_2013_AnnualReport_web.pdf (last visited Oct 28, 2014). Dove Lewis, a nonprofit animal hospital

in Portland, received more than $2 million in donations last year to fund veterinary treatment for stray animals and wildlife, treatment for abused animals, and emergency treatment for animals whose owners need financial assistance. http://www.dovelewis.org/pdf/general/FY2013_Annual-Report_final-web.pdf (last visited Oct 28, 2014).

That social interest in animal welfare is also reflected in Oregon's animal welfare laws, which serve to protect animals regardless of whether they happen to be owned by a person. The legislature has granted animals statutory rights separate and apart from the rights of their owners—the rights to basic care and freedom from suffering. *See State v. Nix*, 355 Or 777, 796-97, 334 P3d 437 (2014) ("Oregon's animal cruelty laws have been rooted—for nearly a century—in * * * [a] tradition of protecting individual animals themselves from suffering.").

Those basic rights require an animal owner—or any other person charged with the responsibility to care for an animal—to provide the animal with adequate nutrition and necessary veterinary care, or face criminal prosecution for animal neglect or abandonment. *See* ORS 167.310(9) (defining "minimum care" requirement), ORS 167.325-167.330 (animal neglect in first and second degrees), ORS 167.340 (animal abandonment). An animal owner is not free to physically or sexually assault or kill an animal by virtue of his or her ownership (with exceptions for rodeo animals, slaughter of livestock for food, and "good

animal husbandry practices"). *See* ORS 167.315-167.322 (animal abuse in first and second degrees and aggravated animal abuse), ORS 167.333 (sexual assault of animal), ORS 167.335 (exemptions). And Oregon law prohibits a person convicted of any of those crimes from possessing "a domestic animal or any animal of the same genus" for at least five years, with some exceptions. ORS 167.332.

In sum, we as a society do not treat our animals (excepting livestock) as mere chattels, like pieces of inanimate personal property. We recognize that animals have needs, and care about what happens to them. The prevailing social and legal ethic of animal protection—in Oregon and across the country—contradicts any notion that an animal owner has a privacy interest in the "contents" of a lawfully seized animal, which may reveal evidence of a crime committed by the owner *against* the animal. Therefore, when an animal is lawfully seized on suspicion of abuse or neglect by the owner, the owner loses any privacy interest in the animal.

In that respect, animals are less like personal property and more like children who are taken into state custody when their parents are suspected of abuse or neglect. To be sure, the analogy is an imperfect one, for animals do not have the same rights as human beings. But animals, like human children, are vulnerable to abuse and neglect by to their caregivers. Although the parents of such children have a constitutional right to raise their children as they see fit,

that right exists only as long as the parents are fit and have legal custody. *See generally Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). The same should be true for animals taken into state custody to protect them from their owners.

To the extent that property law is relevant to social and legal norms of behavior concerning animals, it compels the same conclusion. Property ownership is not a fixed thing; it is a collection of rights—a "bundle of sticks," to use the traditional metaphor—that is governed by statutes and case law and changes over time. *See generally* Restatement (First) of Property § 5 (1936) (the "totality [of what comprises a complete property right] varies from time to time, and from place to place, either because of changes in the common law, or because of alterations by statute"); David Favre, *Living Property: A New Status For Animals*, 93 Marq L Rev 1021, 1024-25 (2010) ("Property law is an institution with four component parts: the persons who hold the rights, the relationships between persons, the objects to which property concepts attach, and sanctions for violations of the rules."). The nature of a property right is a social construct that is constantly changing "as the moral and ethical perspectives of society change." Favre, 93 Marq L Rev at 1031.

Put in property law terms, the "bundle of sticks" that comes with ownership of a living being is more limited—or at least different—than the bundle that comes with ownership of an inanimate object. In light of the

statutory limitations on what an animal owner may lawfully do with an animal, there is no stick in the bundle that entitles an animal owner to privacy in the animal's physical condition after the animal has been lawfully seized.

To summarize, social and legal norms of behavior compel the conclusion that the owner of an animal has no protected privacy interest in the physical condition of an animal lawfully seized based on probable cause of abuse or neglect by the owner. The same social and legal norms indicate that, for purposes of property law, ownership of an animal does not include the right to privacy after a person loses the legal right to possess the animal. Because there is no protected privacy interest in that scenario, there is no "search" for purposes of Article I, section 9, of the Oregon Constitution.

C. Under the Fourth Amendment analysis, a person has no legitimate expectation of privacy in the physical condition of a lawfully seized animal.

Although the analysis under the Fourth Amendment[4] differs from the Article I, section 9, analysis, the outcome is the same. The Fourth Amendment test for determining whether a person has a protected privacy interest "involves two questions: first, whether the individual has shown that he or she seeks to

[4] The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

preserve something as private; second, whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'" *State v. Wacker*, 317 Or 419, 427-28, 856 P2d 1029 (1993) (quoting *United States v. Knotts*, 460 US 276, 281, 103 S Ct 1081, 75 L Ed 2d 55 (1983)).

All of the social and legal norms discussed above that compel the conclusion that the owner of a lawfully seized animal retains no protected privacy interest under Article I, section 9, also compel the conclusion that she has no protected privacy interest under the Fourth Amendment. Because our society values animals for their own sake and has enacted laws to protect them from abuse and neglect at the hands of their owners, it follows that society does not recognize a right to privacy in the physical condition of the very animal that the owner is suspected of abusing or neglecting. Therefore, once the animal is lawfully seized, its owner retains no protected privacy interest and the state may perform diagnostic laboratory tests on the animal without effecting a "search" under the Fourth Amendment.

D. Even if a person retains some privacy interest in a lawfully seized animal, performing diagnostic medical tests on that animal does not constitute an unreasonable search that violates Article I, section 9, or the Fourth Amendment.

If this court rejects the state's first argument and concludes that the diagnostic tests on Juno constituted a search, the state should still prevail because the search was reasonable.[5]

By their terms, Article I, section 9, and the Fourth Amendment do not prohibit all searches—they prohibit *unreasonable* searches. *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013). Accordingly, in determining whether a search is lawful, "the touchstone 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. Also relevant to the general reasonableness inquiry is whether the legislature has imposed any "special duties" upon law enforcement in a particular circumstance. *Id.* at 612 n 13.

Applying that test here leads to the conclusion that the veterinarian's actions of obtaining the blood and fecal samples and running the laboratory tests were reasonable. The tests served a critically important purpose—identifying the cause of the dog's distress and ensuring that he received appropriate treatment. The tests also served society's general interest in

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[5] This court does not consider the reasonableness of police action unless it concludes that the action constitutes a "search." *State v. Ainsworth*, 310 Or 613, 801 P2d 749 (1990). *See also State v. Fair*, 353 Or 588, 593, 302 P3d 417 (2013) ("threshold question" is whether person was seized; if not, "that ends the inquiry").

protecting animals from suffering and from abuse and neglect. The OHS officer who seized Juno had probable cause to believe that he was the victim of animal neglect based on his poor physical condition and odd behavior, as well as the citizen report that led the officer to defendant's home in the first place.

The additional intrusion on defendant's interests caused by the laboratory tests—above and beyond the seizure of the dog—was minimal, and tailored specifically to meet the dog's immediate needs. The OHS veterinarian performed standard, minimally invasive diagnostic tests of the dog's blood and feces to determine the cause of his poor condition.[6] As the veterinarian testified, several medical conditions could have caused Juno to be underweight—"[v]arious intestinal conditions, parasites, * * * kidney disease, liver disease. So there's a variety of things that we have to rule out and say that they do not have before I can say that it's simply due to lack of proper nutrition." (Tr 118).

[6] Although the veterinarian did not testify that blood and fecal tests are regularly performed in veterinary medicine, this court may take judicial notice of that fact. *See generally* OAR 875-015-0030 (Oregon Veterinary Medical Board rule requiring veterinarians to "have the capability for use of either in-house or outside laboratory service for appropriate diagnostic testing of animal samples"). *See also* http://www.merckmanuals.com/pethealth/special_subjects/diagnostic_tests_and_imaging/tests_routinely_performed_in_veterinary_medicine.html (last visited Oct 30, 2014) (identifying blood and fecal tests, among others, as tests routinely performed in veterinary medicine).

Finally, the legislature has specifically authorized OHS—and other animal shelters caring for impounded animals—to provide veterinary treatment to animals in their care. ORS 164.345(4) (such facilities "shall provide adequate food and water and may provide veterinary care"). That is precisely what the veterinarian in this case was doing when she tested Juno's blood and feces. Indeed, if she failed to do so, she (as Juno's custodian) could have been charged with animal neglect—the same crime that defendant was charged with committing. Because the tests were performed to diagnose the cause of Juno's poor condition and provide him with necessary veterinary care, they were reasonable. Accordingly, the search was lawful.

CONCLUSION

This court should reverse the decision of the Court of Appeals and affirm the trial court's judgment of conviction.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 30, 2014, I directed the original Petitioner on Review's Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Andrew Robinson, attorneys for respondent on review, and Lora Dunn, attorney for *amicus curiae*, 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 4,403 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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