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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review	Douglas County case number 10CR2251MI
v.	A150092
TERESA ANN DICKE, Defendant-Appellant, Petitioner on Review	S061770

PETITIONER'S REPLY BRIEF ON THE MERITS

Reviewing the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County, Honorable George William Ambrosini, Judge.

Per curiam opinion filed September 25, 2013.

Ortega, Presiding Judge
Sercombe, Judge
Hadlock, Judge

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Reply Brief on the Merits of Teresa Ann Dicke Petitioner on Review

Petitioner Teresa Ann Dicke replies to the respondent's brief on the merits and to the brief of amicus curiae Animal Legal Defense Fund, National District Attorneys Association, and Association of Prosecuting Attorneys.

I. This court should decline the state's request for piecemeal reduction in the constitutional right to privacy.

Every search-and-seizure case is fundamentally about the tension between the constitutional protection of privacy on one hand, and the need to perform other important governmental functions on the other. This case is no different; the court is faced with the choice between the immediate and specific value of providing aid to an emaciated horse and the abstract future value of protecting the privacy of the citizenry.

The abstract value of protecting the privacy of the citizenry is so important that it is the subject of specific protections in both Article I, section 9 of the Oregon Constitution and the Fourth Amendment to the United States Constitution. Police intrusions on that privacy generally require permission from a judge. This court has held that "warrantless entries and searches of premises 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 (1983) (citations and internal quotation marks omitted.) With every new exception to the warrant requirement, and every new set of circumstances that permits a warrantless

search or seizure, the fundamental right of privacy is further eroded. The erosion should go no further.

In arguing for a contrary conclusion, the state notes that several other jurisdictions have held that the emergency-aid doctrine applies to animals. Respondent's Brief on the Merits at 31. The state does not explain why those decisions should serve to reduce the right against unreasonable searches and seizures in Oregon.

Amicus curiae present a parade of horribles to justify the entry in this case based on the possibility of sadistic torture or abuse to other animals, or even the possibility of imminent death by burning or drowning. A police officer aware of such facts could reasonably view it as an ongoing emergency, and a warrantless search or seizure might well be would be justified. This case is different. The horse was emaciated and hungry, and would still have been emaciated and hungry after a few hours to get a warrant. The horse may well deserve sympathy, but it is not a human being and does not warrant the same legal protections as a human being.

II. A police officer's vague perception of an emergency is not sufficient to justify a warrantless search or seizure.

The search and seizure in this case was based largely on the testimony of Deputy Bartholomew, who feared that the horse would fall and described the situation as an emergency. Deputy Bartholomew did not say how urgent it was, and presumably did not know with any precision. A warrantless entry onto private property should not be justified based on such vague evidence; without a more specific, objective need for expediency, courts should require

a warrant. *See, e.g., State v. Vasquez-Villagomez*, 346 Or 12, 23 (2009) (discussing objective component to probable cause).

The state argues that the emergency-aid doctrine does not require a "true emergency," although that language appears in this court's decisions, such as *State v. Bridewell,* 306 Or 231, 237 (1988): "even where courts may accept a reasonable belief or suspicion, as opposed to probable cause, as a basis to apply the emergency aid doctrine to law enforcement activities, this means a true emergency." It is certainly true that, in some contexts, the issue is whether the police officer's view of the facts is reasonable, not whether it is correct. *E.g., State v. Snow*, 337 Or 219, 225 (2004) ("The proper focus is on the reasonableness of the officers' actions at the time they took them in response to the exigency, not on the results of those actions.") If so, the term "true emergency" would be a misnomer; an "apparent emergency" would suffice, if it is apparent to a reasonable observer. In other words, under the state's view, the emergency-aid doctrine is satisfied if the necessary condition appears to exist to a reasonably prudent officer, even if the necessary condition does not truly exist. That interpretation is consistent with this court's opinion in *State v. Baker*, 350 Or 641, 649 (2011), which discussed the emergency-aid doctrine.

Even if that is correct, the matter must *appear* to be an emergency; it must be apparently exigent and important. The Baker court held that an emergency-aid search required an "objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are

imminently threatened with suffering, serious physical injury or harm." *Id.* (footnote omitted). This record contains sparse evidence to that effect. Deputy Bartholomew testified that "anytime you get a horse this skinny internal organs start shutting down. This literally was the thinnest horse I've seen that was still on its feet. It was, of course, wavering. I was afraid it was going to fall over and not be able to get back up." Tr. 113-114. Deputy Bartholomew described it as a "medical emergency," but did not explain the precise significance of that term. Tr. 113. Deputy Bartholomew testified that it would take "at least a day" to get a warrant, but that some quicker officers would require "four or five hours." Tr. 120, 121. Deputy Bartholomew has never sought a telephonic warrant. Tr. 121. Deputy Bartholomew explained: "I didn't think the horse -- I felt it was swaying and I was afraid it was going to go down, I didn't think it had the time for me to go [get a warrant.]" Tr. 123.

Deputy Bartholomew was an animal control officer, and was surely sympathetic to the horse's condition. But intrusions on privacy should not be permitted on the basis of a police officer's sympathy or preference not to bother getting a warrant. Deputy Bartholomew's gut feeling that the horse was going to fall provides little basis for a suppression court to engage in any sort of meaningful review.

This case is unlike *State v. Heckathorne*, 347 Or 474 (2009), on which the state relies. In that case, a searching officer's observation of traces of anhydrous ammonia and expertise in methamphetamine production provided probable cause. Although the suppression judge may not have

known the facts that led to the officer's conclusion, once those facts were explained, the judge could consider whether probable cause existed. In this case, Deputy Bartholomew testified that there was an emergency because the horse was going to fall. Deputy Bartholomew did not specify when such an event would occur, and surely did not know with any certainty. Balancing the possibility that the horse would fall before a warrant could be obtained with the resulting intrusion onto private land is not a matter to leave to the police, especially when the decision can hardly be explained in court afterward. *See* Michael D. Pepson & John N. Sharifi, *Lego v. Twomey*: *The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 Am Crim L Rev 1185, 1231-32 (2010) (arguing courts do not give police testimony at suppression hearings necessary level of scrutiny).

III. The error was not harmless.

Ms. Dicke joins in the argument made by her co-petitioner, Ms. Fessenden. As Ms. Fessenden argued, the state's most persuasive evidence was the result of the seizure of the horse and its subsequent medical examination and the results of improved care in the hands of a more experienced rancher. Without that evidence, Deputy Bartholomew's testimony that the horse was skinny might not have persuaded the jury.

CONCLUSION

The importance of search warrants is reflected in the Oregon and United States constitutions. The trial court was wrong in holding that providing food to a horse was sufficiently important to expand the

emergency-aid exception to the warrant requirement to include animals. This court should hold that the emergency-aid doctrine does not apply on the facts of this case, and that the warrantless search and seizure violated the defendants' rights against unreasonable searches and seizures.

Respectfully submitted,

/s/ Rankin Johnson IV
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CERTIFICATE OF SERVICE

I certify that I filed the enclosed corrected brief with the State Court Administrator by e-filing it on April 7, 2014. I served it on opposing counsel, Attorney General Ellen Rosenblum and Solicitor General Anna Joyce, by e-filing it on April 7, 2014. Because the Oregon Attorney General's Office is registered as an e-filer, e-filing also constitutes service. See ORAP 16.45. Opposing counsel's address is:

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this petition complies with the word-count limitation in ORAP 5.05(2)(b) and ORAP 9.17(2)(c) and (2) the word count of this petition (as described in ORAP 5.05(2)(a)) is 1395 words.

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).

Respectfully submitted,

/s/ Rankin Johnson IV
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