1999

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	Circuit Court No. 98CF2120FE
Plaintiff-Respondent,	)	
Respondent on Review,	)	
vs.	)	Appellate Court No. A106960
	)	
TAMERA LOUISE MEREDITH,	)	Supreme Court No. S50173
	)	
Defendant-Appellant,	)	
Petitioner on Review.	)	

PETITIONER'S BRIEF ON THE MERITS

Petition to Review the Decision of the
Court of Appeals on Appeal from a Judgment of the Circuit Court
for Douglas County
Honorable JOAN G. SEITZ, Judge

Opinion Filed: October 30, 2002
Author of Opinion: Edmonds, Judge
Dissenting Judges: Kistler, Armstrong, Wollheim, and Brewer, Judges

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Under Article I, section 9 of the Oregon Constitution, is the government's use of a hidden radio transmitter to surreptitiously track a government employee a search?

PROPOSED RULE OF LAW

Under Article I, section 9, the government's use of a hidden radio transmitter to surreptitiously track a government employee is a search. It is a practice that, if unchecked by constitutional requirements, would significantly impair the people's freedom from scrutiny. Because it is a search, it must satisfy Article I, section 9's requirement of reasonableness.

NATURE OF THE PROCEEDING

Defendant, a government employee, was indicted on 35 counts of first-degree arson. ORS 164.325. Before trial, defendant moved to suppress evidence obtained by law enforcement agents who, with the consent of defendant's employer, attached a hidden radio transmitter to defendant's work truck and used the transmitter to surreptitiously locate and track defendant. The trial court denied defendant's motion to suppress, holding that use of the transmitter was a search under Article I, section 9, but that it was reasonable given the employer's consent.

Following the trial court's denial of her motion to suppress, defendant tried her case to a jury. During trial, the trial court granted defendant's motion for judgment of acquittal on one count. The remaining counts were submitted to the jury, which acquitted defendant of all but two counts.

Defendant appealed, assigning error to the trial court's denial of her motion to suppress. In an *en banc* decision with four judges dissenting, the Court of Appeals affirmed on different grounds. *State v. Meredith*, 184 Or App 523, 56 P3d 943 (2002), *rev allowed*, 335 Or 422, 69 P3d 1232 (2003). The court held that the agents' use of the transmitter was not a search under Article I, section 9. Defendant petitioned for review, which this court allowed.

STATEMENT OF FACTS

In August 1998 defendant was employed by the United States Forest Service (USFS). (Tr 16). She worked as a fire prevention technician in the Fire Management Office (FMO) of the Tiller Ranger District. (Tr 16). Defendant's job duties included maintaining the district's fire prevention signs, patrolling campgrounds, cleaning campgrounds and rental cabins, and making public presentations. (Tr 16, 93). In addition, because defendant had special training beyond that required by her official job, she also served as an emergency medical technician. (Tr 16).

Due to the nature of her job as a fire prevention technician, defendant traveled throughout the ranger district on a daily basis. (Tr 29). Like many employees of the FMO, defendant used a USFS truck to perform her work duties. (Tr 14). A particular truck was assigned to her. (Tr 15, 94). It was a Ford F-150 pick-up truck, numbered 8200. (Tr 15). Defendant picked up the keys to the truck at the beginning of her work shift and returned them at the end. (Tr 14, 108). The truck was available to be used by others when defendant was not working. (Tr 14-15,108). It was conceivably possible that others could drive the truck during defendant's working hours, but that never actually happened. (Tr 14-15, 108, 28-29, 96). Once the truck was assigned to defendant, she was the only one who drove it. (Tr 28, 29, 96).

Defendant kept personal property in the truck, including clothes and equipment that she used on the job, as well as food, reading materials, and personal papers that she used during her breaks. (Tr 95-99). This was common practice among FMO employees. (Tr 15, 25-26). Defendant often left personal belongings in the truck overnight, with the expectation that they would be there the next day. (Tr 99).

Defendant was free to drive where her duties took her. It was not unusual for her to cover the ranger district from one side to the other in a single shift. (Tr 29). According to Emily Sands, one of the FMO managers, defendant had "as broad and free a reign as most anybody on the district." (Tr 30). Defendant's supervisor, Rob Marshall, was "really hands off" and "could let [defendant] go and not worry about where she was going to go and if she was going to do her duty." (Tr 33). When asked how the FMO kept track of defendant's whereabouts, Sands testified, "Well, if she was leaving the office and saying she was going up to the South Umpqua Falls, you know, we would know that." (Tr 19).

Defendant used a radio in the truck to communicate with others. (Tr 18-19). Defendant could call in her location and could be called and asked her location. (Tr 18-19). Unlike some other FMO employees, such as firefighters, defendant was not required to check in every time she changed location. (Tr 18). Nor was she required to report her location at any given interval. (Tr 19). When defendant made a radio transmission she would report her location "sometimes." (Tr 32-33). The radio in the truck had been "experiencing problems" for some time. (Tr 23).

In mid-August, USFS special agents were assigned to investigate fires that were being set in and around the ranger district. Special agent Thomas Russell was in charge of the investigation. (Tr 36). The investigation was a criminal investigation, conducted for law enforcement purposes. (Tr 142). As the trial court found, the investigation was not instituted for "purposes of employee misconduct." *Id.*

As part of the criminal investigation, Russell decided to attach a radio transmitter to the truck defendant drove. Russell asked another special agent, Paul Williamson, "to contact the district ranger and get that vehicle available for installation of the Bird Dog [radio transmitter]." (Tr 37). Williamson did. (Tr 70).

On the evening of August 18, 1998, special agent Howard McConnell attached a radio transmitter to the truck. (Tr 44). The next day, McConnell, accompanied by USFS law enforcement officer Dave Baldwin, chartered a plane to fly over the ranger district. (Tr 48). While in the plane, McConnell used a radio receiver to monitor signals from the transmitter. (Tr 48-56). The signals indicated when the truck was moving and when it was stopped. (Tr 46-47). As displayed on the receiver, the signals also indicated whether the transmitter was to the left or right of the receiver. (Tr 47). The strength of the signals varied, depending on how close the transmitter was to the receiver. (Tr 46). By flying so that the strength of the received signals increased, the agents were able to locate the truck and track its movements. (Tr 48). They were able to track the truck continuously, even though forest cover prevented them from maintaining continuous visual surveillance. (Tr 50).

While monitoring the radio transmitter signals, the agents saw a truck, which they believed to be defendant's, travel on Johnny Springs Road and then turn onto a logging spur. (Tr 53). McConnell, who was not using binoculars, saw someone get out of the driver's side, but "the distance was too great for [him] to discern anything else." (Tr 53). Baldwin, who was using binoculars, saw the driver exit the truck, take a step, then squat along the edge of the grass for approximately 20 seconds. (Tr 82). He "saw the person squat and [he] couldn't see what the hands were doing." (Tr 82). The person then got up and entered the truck. The truck turned around and started down the road. (Tr 82-83). As it did, Baldwin saw a small flash of orange were the person had squatted. (Tr 83). The plane flew closer and McConnell and Baldwin saw smoke rising and a widening black spot on the ground. (Tr 54, 83).

SUMMARY OF ARGUMENT

Surreptitious electronic surveillance of a government employee is a search under Article I, section 9 because it is type of surveillance that, "if engaged in wholly at the discretion of the government, will significantly impair 'the people's' freedom from scrutiny." *State v. Campbell*, 306 Or 157, 171, 759 P2d 1040 (1988). Although the operational realities of government employment may reduce the privacy rights of government employees, they do not justify the use of surveillance techniques that would cause the employees, and all others in contact with them, to go through the day wondering whether their movements and communications are being electronically monitored. Allowing such surveillance, without constitutional restraints, would undermine the freedom from governmental scrutiny that Article I, section 9 is intended to protect.

In the present case, the government used a radio transmitter to surreptitiously track defendant while she drove a USFS truck in her capacity as a USFS employee. Use of the radio transmitter was a search. Nothing about the nature of defendant's job or use of the truck reduced her right to be free from surreptitious electronic tracking by the government.

Because the government's use of the radio transmitter was a warrantless search, the state had to prove that it was reasonable under Article I, section 9. The state failed to do so. The state argued that the search was justified by the employer's consent. But, because defendant had a privacy right against the employer with regard to this type of surveillance, the employer could not give valid consent.

Because the warrantless search was unreasonable, the evidence resulting from it should have been suppressed on defendant's motion. The trial court's denial of defendant's motion was reversible error. It was not harmless because, as the state asserted in its closing argument, the evidence resulting from the use of the transmitter was the "key" to its case.

ARGUMENT

I. Introduction

At trial and in the Court of Appeals, defendant contended that the government's use of a hidden radio transmitter to surreptitiously track her movements violated her rights under Article I, section 9, of the Oregon Constitution, which protects individuals against unreasonable government searches and seizures. Article I, section 9, provides, in part:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search, or seizure; * * * ."

To determine whether defendant's Article I, section 9, rights were violated, it must first be determined whether, as defendant contended, the use of the transmitter was a search. *State v. Wacker*, 317 Or 419, 426, 856 P2d 1029 (1993) ("The threshold question in any Article I, section 9, search analysis is whether the police conduct is sufficiently intrusive to be classified as a search"). If the use of the transmitter was a search, it must then be determined whether it was reasonable. *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983).

II. The government's use of a hidden radio transmitter to surreptitiously track defendant was a search under Article I, section 9.

A. Under Article I, section 9, a search is a government action that infringes upon an individual's privacy interest, which is an interest in freedom from particular forms of scrutiny.

Under Article I, section 9, whether a government action is a "search" depends on whether the action, "if engaged in wholly at the discretion of the government, will significantly impair 'the people's' freedom from scrutiny." *Campbell*, 306 Or at 171. This is an objective test. *Wacker*, 317 Or at 425. It is based on the "general privacy interests of 'the people' rather than the privacy interests of particular individuals." *State v. Tanner*, 304 Or 312, 320, 745 P2d 757 (1987). As this court stated in *Campbell*, "the privacy protected by

Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." *Campbell*, 306 Or at 165 (emphasis in original).

Although this court often stated that Article I, section 9 protects "privacy," it had "little occasion to further define that interest" before *Campbell*. *Campbell*, 306 Or at 163. That was because, before *Campbell*, "[n]early all the government actions * * * challenged under Article I, section 9, [had] long been recognized as searches, and this court * * * had no difficulty equating these traditionally recognized searches with infringements of privacy interests." *Id.*

In *Campbell*, however, this court confronted a new type of government action: the surreptitious use of a radio transmitter to track an individual's movements. This court noted that, "since 1859, when Article I, section 9, was adopted, the government's ability to scrutinize the affairs of 'the people' has been enhanced by technological and organizational developments that could not have been foreseen then." *Id.* at 171. It further noted that, "tiny radio transmitters for surreptitiously locating objects to which the transmitters are attached are among these developments." *Id.* Because the use of radio transmitters to track individuals was not a "traditionally recognized search," this court had to determine what privacy interests, if any, are violated by such surveillance.

The form of the surveillance in *Campbell* was the same as in the present case. In order to track the defendant, who they suspected was burglarizing rural residences, police officers attached a small radio transmitter to the underside of his car when it was parked in a public lot. The transmitter broadcast radio signals that could be picked up by a companion receiver.

The officers took the receiver with them in a small airplane, and, by flying in widening circles, picked up a faint signal. They followed the signal to a rural area in another county and found the defendant's car parked on the side of a public road near a residence.

From the airplane, the officers watched the car move to the driveway of a second residence. They saw the defendant exit the car and act in a manner that led them to believe that he was burglarizing the residence.

Based in part on the officers' observations, the defendant was indicted for burglary. Before trial, he moved to suppress the evidence resulting from the use of the radio transmitter. The trial court granted the motion, and the state appealed. The Court of Appeals affirmed, holding that the attachment of the transmitter was a trespass, and, as such, was an *illegal seizure* under Article I, section 9. *State v. Campbell*, 87 Or App 415, 419-20, 742 P2d 683 (1987), *aff'd on other grounds,* 295 Or 32 (1988). This court granted review and affirmed, but on different grounds; it held that the use of the radio transmitter was an *illegal search* under Article I, section 9. *Campbell*, 306 Or at 172.

When determining whether the use of the radio transmitter was a search, this court expressly rejected two approaches that the United States Supreme Court had taken with regard to Fourth Amendment search questions. First, this court rejected the Supreme Court's historic "trespass" approach, which had been used for more than a half-century, and which defined a Fourth Amendment search as "a physical trespass to a 'constitutionally protected area,' *i.e.*, a physical trespass to those 'areas' explicitly protected by the Fourth Amendment: persons, houses, papers and effects." *Campbell*, 306 Or at 168 (citing *Olmstead v. United States*, 277 US 438, 465-66, 48 S Ct 564, 568, 72 L Ed 944 (1928) (telephone tap was not a search because the tap did not involve a trespass to a person, house, paper or effect). The trespass approach had long been "criticized for its narrow and arbitrary reading of the interest protected by the Fourth Amendment" and ultimately was rejected by the Supreme Court in *Katz v. United States*, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967). *Campbell*, 306 Or at 168.

The issue in *Katz* was whether police use of a listening device attached to the outside of a public phone booth was a search. The parties disputed whether the phone booth was a "constitutionally protected area," but the Supreme Court rejected their formulation of the Fourth Amendment issue, explaining:

> "[T]his effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places." *Katz*, 389 US at 351-52, 88 S Ct at 511-12 (footnote and citations omitted).

Following *Katz*, the *Campbell* court rejected the historic trespass approach to search questions, stating that "the question whether an individual's privacy interests have been infringed by an act of the police cannot always be resolved by reference to the area at which the act is directed." *Campbell*, 306 Or at 169 (citing *Katz*, 389 US 347, and *Tanner*, 304 Or at 323 (search of home in which defendant had no possessory interest nevertheless violated defendant's privacy interests).

But, the *Campbell* court did not follow *Katz* further. Under *Katz*, a Fourth Amendment search is a government action that infringes upon an individual's "reasonable expectation of privacy." *Katz*, 389 US at 360 (Harlan, J., concurring). *See also, e.g.*, *Terry v. Ohio*, 392 US 1, 9, 88 S Ct 1868, 1873-74, 20 L Ed 2d 889 (1968). In *Campbell*, this court expressly rejected use of the phrase "reasonable expectation of privacy" for defining searches under Article I, section 9, on grounds that the phrase "becomes a formula for expressing a conclusion rather than a starting point for analysis, masking the various substantive considerations that are the real bases on which Fourth Amendment searches are defined." Instead, this court adopted a test that transcends "the search for subjective expectations or legal attribution of assumption of risk," *Campbell*, 306 Or at 165 (quoting *United States v. White*, 401 US 745, 786, 91 S Ct 1122, 1143, 28 L Ed 2d 453 (1971) (Harlan, J., concurring), and focuses on whether the government action at issue infringes upon "the people's" privacy

interests. *Campbell*, 306 Or at 171. It announced the following test for determining whether government practices, like using radio transmitters to track individuals, are searches:

> "In deciding whether government practices that make use of [technological] developments are searches, we must decide whether the practice, if engaged in wholly at the discretion of the government, will significantly impair 'the people's' freedom from scrutiny." Campbell, 306 Or at 171.

In other words, the ultimate question:

> "is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." *Campbell*, 306 Or at 171 n 8 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn L Rev, 349, 403 (1974).

In sum, under *Campbell*, whether a government practice is a search under Article I, section 9, depends on whether the practice, if unchecked by constitutional requirements, would impair the people's privacy and freedom to a "compass inconsistent with the aims of a free and open society." *Id.* It does not depend on whether the practice constitutes a trespass, or whether it infringes upon an individual's reasonable expectation of privacy. *Campbell*, 306 at 157, 165. Rather, the "fundamental inquiry" is whether the practice, if not subjected to constitutional restraints, "would be intolerable because it would either encroach too much on the 'sense of security' or would impose unreasonable burdens upon those who wished to maintain that security." 1 LaFave, Search and Seizure 313 (2d Ed 1987) (quoted in *Campbell*, 306 Or at 171 n 8). The focus of the inquiry, therefore, is on the potential societal harm of the practice if it is not subjected to Article I, section 9's requirement of reasonableness. If, unchecked, the practice would have a chilling effect on the exercise of individual rights and freedoms (such as the right to speak freely and the right to assemble), then it is a search under Article I, section 9.

B. Using a hidden radio transmitter to surreptitiously track an individual is a search under Article I, section 9.

Applying its rule, the *Campbell* court held that use of the radio transmitter was a search under Article I, section 9. *Campbell*, 306 at 172. This court based its holding on the form of the surveillance. It noted that use of the transmitter enabled the police to locate defendant's vehicle, at any time, within a large geographic area. *Id.* As such, it was a "significant limitation on freedom from scrutiny." *Id.* The limitation was "made more substantial" by the fact that the transmitter was difficult to detect:

> "Without an ongoing, meticulous examination of one's possession, one can never be sure that one's location is not being monitored by means of a radio transmitter. Thus, individuals must more readily assume that they are the objects of government scrutiny." *Id.* at 172.

As this court recognized, allowing the government to use radio transmitters for surveillance, without a warrant, would have a chilling effect on the exercise of individual liberties because the threat of secret surveillance would be omnipresent. There would be "no ready means for individuals to know when they were being scrutinized and when they were not." *Id.* This court concluded that allowing the government to use hidden radio transmitters to surreptitiously track individuals would be "nothing short of a staggering limitation upon personal freedom. We could not be faithful to the principles underlying Article I, section 9, and conclude that such forms of surveillance are not searches." *Campbell*, 306 Or at 172.

In reaching its conclusion, this court rejected arguments by the state that were based on "trespass" and "reasonable expectation of privacy" theories. The state's first argument was that use of the transmitter was not a search because the defendant, who was seen on public roads, was outside of any "protected premises." *Id.* at 169. This court rejected the argument, holding that it was "unsustainable given this court's repeated recognition of privacy as the principal interest protected against unlawful searches." *Id.* Trespass of "protected premises" is not a required element of an Article I, section 9 search.

The state's second argument was that use of the radio transmitter was not a search because it "disclosed only what any member of the public could have legitimately observed." *Id.* at 165. This court "did not accept either the factual or legal premise" of the argument. As a factual matter, this court found that "use of a radio transmitter to locate an object to which the transmitter is attached cannot be equated to visual tracking." *Id.* at 171-72. This court explained that, "[t]he transmitter has nothing to do with vision; it broadcasts a signal that enables the police to locate, with little delay, the transmitter from anywhere that its signal can be received." *Id.* at 166.

As a legal matter, this court deemed "unsound" the state's argument "that information legitimately available through one means may be obtained through any other means." *Id.* at 166. The state based its argument on *United States v. Knotts*, 460 US 276, 103 S Ct 1081, 75 L Ed 2d 530 (1983), in which the United States Supreme Court held that using a radio transmitter to track an individual driving on public roads was not a Fourth Amendment search. Quoting *Knotts*, the state argued that the defendant "voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads[.]" *Knotts*, 460 US at 281-82, 103 S Ct at 1085-86.

This court rejected the state's argument that the defendant lacked a protected privacy interest because he was "exposed to public view". *Campbell*, 306 Or at 167. It noted that, if the state's argument were correct, "no movement, no location and no conversation in a 'public place' would in any measure be secure from the prying of the government." *Id.* at 172. Rather than follow *Knotts*, this court expressly held that whether a government act of surveillance is a search does not depend on whether the resulting information could have been gathered in a less intrusive way: "Whether police conduct is a search does not turn on

whether its object could be discovered by conduct that is not a search." *Campbell*, 306 Or at 167. This court explained:

> "For example, in *State v. Louis*, [296 Or 57, 60-61, 672 P2d 708 (1983)] the defendant exposed himself to public view through his living room window. This court held that police officers did not engage in a search by photographing him from a house across the street with a 135 mm camera lens, which provided only minimal enhancement of what could be observed with the unaided eye. *Nonetheless, the police officers would have engaged in a search had they entered his living room to observe what could be observed from the street.*" *Id.* at 167 (emphasis added).

In sum, the *Campbell* court concluded that the government's surreptitious use of a radio transmitter to track an individual is a search because it is form of surveillance that, if unchecked by constitutional requirements, would significantly impair the people's freedom from scrutiny. It would have a chilling effect on the exercise of individual liberties and would reduce individual privacy and freedom "to a compass inconsistent with the aims of a free and open society." Amsterdam, 58 Minn L Rev at 403.

III. *Campbell* controls the present case. Defendant's status as a government employee did not reduce her right to be free from surreptitious electronic tracking by the government.

The form of surveillance in the present case is the same as in *Campbell*. Government agents conducting a law enforcement investigation used a hidden radio transmitter to secretly track defendant as she drove on pubic roads. By using the transmitter, the agents were able to locate and continually track defendant within a large geographic area, even when they could not see her. And, they were able to do this from an airplane, which greatly reduced their risk of detection.

Despite the parallels between the present case and *Campbell*, the Court of Appeals majority held that the government's use of a radio transmitter to track defendant was not a search under Article I, section 9. *Meredith*, 184 Or App at 530. The majority announced that an individual does not have a privacy right in *work* activities that she exposes to public view:

> "To the extent that a person exposes activities to public view while working, that person necessarily foregoes any privacy interests as to those activities; that is particularly true regarding the use of a public vehicle on public land. For instance, the police may follow a person visually without violating Article I, section 9, when the vehicle is operated on a public highway." *Meredith*, 184 Or App at 530.

The Court of Appeals' rule and its resulting holding appear to be based on three facts: (1) that defendant did not own the truck, (2) that defendant was exposed to public view, and (3) that defendant was a government employee. But, as discussed below, none of these facts support a conclusion that defendant did not have a right to be free from surreptitious electronic tracking by the government.

A. Whether use of the radio transmitter constituted a trespass is irrelevant to whether it constituted a search under *Campbell*.

When attempting to distinguish the present case from *Campbell*, the Court of Appeals majority and the state emphasized that, because defendant did not own the truck to which the agents attached the radio transmitter, her property rights were not trespassed. The majority noted that, "[h]ere, unlike *Campbell*, there was no physical invasion or trespass of defendant's property interests." *Meredith*, 184 Or App at 528. Likewise, the state argued that, "the truck defendant drove did not belong to her; the law enforcement officers had consent from the truck's owners to attach the tracking device, and they committed no trespass by doing so." (Respondent's Br 5).

But, as the Court of Appeals majority implicitly acknowledged, a trespass is not a required element of an Article I, section 9, search. "[A]s the courts have uniformly recognized since *Katz*, a person does not lack a constitutionally protected privacy interest merely because the government's efforts to discover what a person says or does do not constitute a trespass." *Meredith*, 184 Or App at 534 (Kistler, J., dissenting). If the rule were

otherwise, *Katz* — which involved a listening device attached to a phone booth in which he had no property interest — would have been decided differently. *Id.*

Indeed, if a trespass was required, *Campbell* would have been decided differently. As mentioned above, in its *Campbell* opinion, the Court of Appeals held that the defendant's Article I, section 9, rights were violated because the trespassory attachment of the radio transmitter to the defendant's car was an illegal seizure. *Campbell*, 87 Or App at 419-20. This court affirmed, but on different grounds. *Campbell*, 306 Or at 173. It held that the use of the transmitter was an illegal search, regardless of whether there was a trespass of defendant's property interests. *Id.* This court specifically stated that its holding "[m]ade it unnecessary to decide whether the Court of Appeals correctly held that the attachment and monitoring of the transmitter was a 'seizure' under Article I, section 9." *Id.* Thus, the state's assertion that "trespassory nature of the placement of the tracking device without the car owner's knowledge or consent" was "of particular importance to the holding in *Campbell*" is incorrect. Whether the defendant's property rights had been trespassed by the attachment of the transmitter did not factor in this court's *Campbell* decision. Therefore, whether defendant's property rights were trespassed here is irrelevant to a determination of whether, under *Campbell*, her privacy rights were invaded by the monitoring of the transmitter.

B. The fact that, as in *Campbell*, defendant was on public roads when she was tracked does not mean that the tracking was not a search.

The Court of Appeals majority and the state also emphasized that defendant was "exposed to public view." The majority pointed out that defendant drove on public roads and was seen in an open forest clearing, and held that defendant did not have a privacy interest in work activities that she "exposed to public view." *Meredith*, 184 Or App at 530. According to the majority, use of the radio transmitter to track defendant was akin to simply following a person on a public highway. *Id.* Likewise, the state argued that "defendant's movements on

public property in plain view are not free from scrutiny or entitled to privacy protections." (Respondent's Br 7).

But, as this court clearly stated in *Campbell*, whether government surveillance is a search does not depend on whether the subject of the search was exposed to public view. The defendant in *Campbell* was exposed to public view; he was tracked while driving on public roads. Thus, for the purposes of whether the government's use of a radio transmitter was a search under *Campbell*, it does not matter that, in the present case, defendant was tracked while on public roads and in an open clearing.

C. Defendant's status as a government employee did not reduce her right to be free from surreptitious electronic tracking.

Under *Campbell*, a government act of surveillance can be a search even if the act of surveillance does not involve a trespass, and even if the subject of surveillance was exposed to public view. Therefore, the present case cannot be distinguished from *Campbell* on grounds that defendant did not own the truck, or on grounds that defendant was driving on public roads. The only possible way that the present case can be distinguished from *Campbell* is if defendant's government employment reduced the right she otherwise had to be free from surreptitious electronic tracking by the government. As the dissent observed, the majority's holding that the use of the transmitter was not a search "cannot be squared with the court's holding in *Campbell*, unless the defendant's status as a government employee somehow changes the analysis." *Meredith*, 184 Or App at 533 (Kistler, J., dissenting).

The Court of Appeals majority held that defendant's status as a government employee did, in fact, change the search analysis. *Meredith*, 184 Or App at 530.The majority held that defendant did not have any privacy interest in her public work activities, and that the

government could surreptitiously track her because the government, as her employer, "was entitled to know where its vehicle was at all times during the work day." *Id.*

But, the fact that the government employs individuals does not mean that the government may use hidden surveillance devices to monitor those individuals. For example, the government employs university professors, but that does not mean that the government may insert hidden transmitters into the professors' office keys in order to track their movements around campus.

Likewise, the fact that the government owns a piece of property does not mean that the government may use hidden surveillance devices to monitor the individuals who use the property. For example, the government owns library books, but that does not mean that the government may install hidden transmitters in the books to track library patrons. As another example, the government owns real property, from campsites to judicial chambers, but that does not mean that the government can install hidden cameras or listening devices to monitor the campers or judges.

Individuals do not lose their Article I, section 9 rights when they become government employees. Rather, as this court has recognized, "government employees retain their right to be free from unreasonable searches and seizures in the workplace." *Meredith*, 184 Or App at 534 (Kistler, J., dissenting) (citing *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 843 P2d 409 (1992). *See also O'Conner v. Ortega*, 480 US 709, 717, 107 S Ct 1492, 94 L Ed 2d 714 (1987) ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer"). Likewise, individuals do not lose their Article I, section 9, rights when they use government property.

However, the fact that the government employs an individual or allows an individual to use its property may reduce the individual's privacy rights against the government. *Meredith*, 184 Or App at 534 (Kistler, J., dissenting) ("the operational realities of the

workplace may limit the scope of an employee's privacy rights"). For example, if an individual is employed as a 911 operator, the government – acting as her employer – may record the telephone calls she makes at her work station. The privacy she would otherwise have against the government is reduced with regard to her work telephone conversations because of the operational realities of her job.

Generally, to determine the scope of an employee's privacy rights, one must consider the nature of the employer/employee relationship, much the same way one considers the nature of a landlord/tenant relationship when attempting to determine the tenant's privacy rights against the landlord. The scope of tenant's privacy rights depends on the nature of the landlord/tenant relationship, as evidenced by the type of rental, the rental agreement, the practices of the two parties, and relevant rules and statutes. *See, e.g., State v. Carsey*, 295 Or 32, 644 P2d 1085 (1983) (grandmother who owned house could not validly consent to search of grandson's room because, as a matter of practice, she did not go into the grandson's room or exercise control over it). Similarly, an employee's privacy rights against her employer depend on the nature of the employee/employer relationship, as evidenced by the type of employment, the employment contract, written policies, the practices of the two parties, and relevant rules and statutes. *Compare, e.g., United States v. Bunkers*, 521 F2d 1217, 1220-21 (9th Cir 1975) (postal worker did not have a reasonable expectation of privacy in her locker where postal regulations provided that lockers were subject to search by supervisors and inspectors) *with State v. Speights*, 557 F2d 362, 363-64 (3rd Cit 1977) (police officers had a reasonable expectation of privacy in their lockers where the police department's regulations did not provide that the lockers could be searched, and where the officers were permitted to store personal items in the locker and use their own locks).

For example, in the case of a 911 operator, the type of employment and, in all likelihood, the 911 agency's policies and practices would establish that the operator does not

have a right to privacy with regard to the telephone conversations she has at her work station. But, for example, this would not be the case for university professors and judges with regard to the telephone conversations they have in their offices.

In the present case, however, it is not necessary to examine the nature of the particular employee/employer relationship. This is because, as the dissent asserts, all government employees have a constitutionally protected right against surreptitious electronic surveillance in the workplace. *Meredith*, 184 Or App at 531 (Kistler, J., dissenting). "The operational realities of the workplace do not permit government employers to surreptitiously bug their employees' office phones or install hidden cameras in their offices to observe their activities during the day." *Id.* at 535. If the government has a legitimate work-related reason for electronically monitoring its employees, it must do so openly. Requiring government employees to go through the day wondering whether their actions and conversations are being electronically monitored is "inconsistent with the principles that underlie Article I, section 9." *Id.* at 536. It would have a chilling effect on the movements and communications of government employees, as well as those who come into contact with them.

Allowing surreptitious electronic surveillance of government employees, unchecked by constitutional requirements, would be "inconsistent with the aims of a free and open society." Amsterdam, 58 Minn L Rev at 403. Indeed, the freedom and openness of our society depends in part on the ability of government employees – including professors, judges, and elected representatives – to associate and communicate without the threat of surreptitious electronic surveillance. The threat of such surveillance could inhibit open conversations in university classrooms and judicial chambers, and between individuals and their elected representatives. It could discourage professors from voicing controversial opinions or associating with controversial colleagues. It could reduce the sense of privacy that enables judges, like juries, to engage in rigorous debates. And, it could dissuade

individuals from calling or meeting with their elected representatives or their employees, for fear that they too could be secretly recorded or tracked.

As any politician whose past recorded remarks have been reduced to a sound bite and used in an opponent's campaign commercial knows, recorded words or actions can be easily taken out of context and used against the person who said or did them. If government employees have to work under the threat of surreptitious electronic surveillance, they (and the individuals who come into contact with them) will worry that their words and actions are being recorded and collected and could be used against them later, perhaps improperly or even maliciously.

Thus, surreptitious electronic surveillance of government employees would have chilling effect on the exercise of individual rights and freedoms. If "engaged in wholly at the discretion of the government, it would "significantly impair 'the people's' freedom from scrutiny." *Campbell*, 306 Or at 171. Therefore, it is a search under Article I, section 9.

Even assuming *arguendo* that, in certain circumstances, the government may use surreptitious electronic surveillance to monitor its employees in a certain area, the government must first notify its employees of the possibility of such surveillance. For example, if a government bank or mint has a legitimate work-related reason for using hidden cameras, it must notify its employees, through posted signs or written policies, that they may be subject to such surveillance. The practice would be similar to posting signs at the entrances to courthouses and jails that notify entrants that they may be asked to submit to a search and, if they refuse, they will be asked to leave.

Furthermore, even assuming, that the operational realities of some government jobs justify the surreptitious electronic tracking of an employee, the operational realities of defendant's job did not. There is simply no reason to believe that defendant's right to be free from surreptitious radio tracking by the government, which she unquestionably had as a

private citizen, was limited by the fact of her USFS employment or her use of the USFS truck. There is no evidence that USFS had a policy permitting surreptitious tracking of its employees, or that USFS had a practice of doing so. Nor is there anything about the nature of defendant's job that would justify such a policy or practice. Defendant's job duties were to update the fire prevention signs, clean up campgrounds and rental cabins, and make public presentations. The nature of her job was not such that the government, acting as her employer, could subject her to surreptitious electronic surveillance.

Because defendant had a right to be free from surreptitious electronic tracking, and her right was not reduced by either her government employment or her use of a government truck, the surveillance in this case was a search under Article I, section 9.

IV. Use of the radio transmitter was an *unreasonable* search.

Because the government's use of a radio transmitter to track defendant was a search, it was subject to the reasonableness requirement of Article I, section 9. To be reasonable a search must be supported by a warrant, justified by an exception to the warrant requirement, or conducted pursuant to a properly authorized administrative scheme. *See Nelson v. Lane County*, 304 Or 97, 104-05, 743 P2d 692 (1987). If, as in the present case, a search is not supported by a warrant, the state bears the burden of proving that it was reasonable. ORS 133.693(4).

Here, the state asserted that, if the government's use of the radio transmitter is a search, it is justified by an exception to the warrant requirement, specifically: the employer's consent. But, as discussed above, defendant had a privacy right against her employer. Allowing the employer to consent to an invasion of the right would destroy the right. *Meredith*, 184 Or App at 536 (Kistler, J., dissenting) (citing *United States v. Taketa*, 923 F2d 665, 673 (9th Cir 1991) (where government employee had a privacy right in his office,

holding that the employer could give valid consent to a search of the office "would destroy the expectations of privacy in the workplace we have recognized as valid"). Thus, contrary to the state's assertion, the employer could not validly consent to the surreptitious electronic tracking of defendant. A third party can validly consent to a search only if it is the kind that the third party could conduct himself. Here, defendant's employer could not use a hidden radio transmitter to track defendant, and, therefore, he could not authorize the special agents to do.

Finally, the search was not a valid administrative search. To be a valid, an administrative search by a government employer must be conducted for a legitimate work-related purpose and pursuant to an administrative program that sufficiently limits the discretion of the employer. *See AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 83, 843 P2d 409 (1992) (rules authorizing the Department of Corrections to ask their employees to submit to searches of their persons and their personal property did not violate Article I, section 9 because they established "a fully described administrative program that is triggered by individualized suspicion"); *State v. Atkinson*, 298 Or 1, 10, 688 P2d 832 (1984) (inventory searches of impounded vehicles are constitutional if they are conducted pursuant to "a properly authorized administrative program, designed and systematically administered" to achieve the stated purpose and control the discretion the officer conducting the search).

In the present case, the search was conducted as part of a law enforcement investigation. As the trial court found, the investigation was not instituted for "purposes of employee misconduct." (Tr 142). Nor was it conducted according to a properly authorized administrative program designed and systematically administered to achieve a legitimate work-related purpose and to limit the discretion of the searchers. Indeed, there is no evidence that USFS had an administrative program for using radio transmitters to track its employees, much less a constitutionally adequate one.

In sum, use of the radio transmitter to surreptitiously track defendant was a warrantless search and the state failed to carry its burden of proving that it was reasonable under Article I, section 9. Therefore, the evidence resulting from the use of the transmitter should have been suppressed on defendant's motion.

V. Admission of the evidence resulting from the government's use of the radio transmitter was not a harmless error.

The erroneous admission of evidence resulting from the monitoring of the radio transmitter was not harmless. The test for harmless error in criminal cases is whether there is little likelihood that the error affected the verdict. *State v. Hansen*, 304 Or 169, 180-81, 743 P2d 157 (1987).

The state's case was entirely circumstantial. No one saw defendant light a fire. The state attempted to prove that defendant set the charged fires by attempting to show that she was in the area when each fire started. But, the only evidence that actually placed defendant *at* a fire location, prior to the fire's start, was the evidence resulting from the monitoring, specifically, the observations made by agents Baldwin and McConnell from the plane while they were tracking the truck.

The state relied heavily on this evidence. The prosecutor himself characterized it as the "key" to his case. (Tr 4239). From the observations, the prosecutor asked the jury to infer that defendant drove up Johnny Springs Road, got out of the truck, and started the fire. He asked the jury to use the agents' observations to convict defendant not only of the Johnny Springs fire, but, of all the fires:

> "And the whole thing makes sense when you consider Johnny Springs. Johnny Springs, if you will, is the key to this. We began with that and we end with that because it is the key. The whole thing makes sense. This line of circumstances pointing in one direction, one direction, one direction, put them all together and then you have that big pointer at the end that say pointing in one direction towards this defendant and her guilt." (Tr 4239).

Given that the evidence resulting from the monitoring was the "key" to the prosecutor's entire case, it cannot be said that it is there is little likelihood that the error affected the verdict.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this court reverse the decision of the Court of Appeals.

Respectfully Submitted,

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