

State v. [REDACTED]

Motions to Return Property Seized (3/15/14 & 5/3/14)

Motion for Release

Outline for Hearing

- I. Argument on Motion to Return Property Seized on March 15, 2014
(Now in possession of federal authorities --
Summarize positions on State Court authority to redirect funds & potential mootness.)
- II. Argument on Motion to Return Property Seized on May 3, 2014
(Now in possession of county authority --
County argues that ORS 131A.050(1) supersedes the process in ORS 133.633 that gave rise to the court's authority on Monday, and removed the court's continuing authority to decide this.
Questions:
 - a) Procedurally, can the county divest me of authority that arguably already attached when the motion hearing began on Monday by changing their mind about whether they intend to proceed with forfeiture after committing in writing to relinquish their forfeiture claim?
 - b) Statutorily, it appears that ORS 131A.050(1) cannot supersede ORS 133.633 if the seizure for forfeiture purposes was unconstitutional. Isn't the issue less about probable cause and more about the justification for seizing without a court order or warrant?
 - c) What is the county's theory about the constitutionality of this seizure, assuming probable cause existed?
- II. Argument on Motion for Release

Findings for Motion to Return Seized Property on May 3, 2014

1. The defendant was lodged in the Clackamas County jail on or about March 8, 2014. At the time he was lodged, the Inter Agency Task Force on narcotics instructed the jail personnel to flag the defendant's inmate data to prompt jail personnel to contact the ITF whenever bail money was tendered for the defendant.
2. I will take judicial notice that in Clackamas County, Clackamas County jail Community Service Officers are designated agents of the court for the purpose of receiving security money posted as bail. I will also take judicial notice that the policy of the Clackamas County Jail is that only cash will be accepted as security satisfactory to constitute a court ordered bail payment.
3. On March 10, 2014, Judge Robert Herndon set bail for this defendant in this case in the amount of \$250,000.00.
4. On March 15, 2014, a person attempted to post \$25,000 cash as bail for the defendant. However, the CSO acting as the agent of the court to receive that bail interrupted the act of receiving bail to notify the ITF that cash had been tendered for that purpose. Ultimately an officer with the ITF came to the jail and seized the cash for the county so that the state process of posting bail could not be completed.
5. On May 3, 2014, Jorge Macias came to the jail with \$25,000 cash that he told the CSO was bail money for the defendant. CSO Gerber began the processing of the cash as bail on behalf of the state court by filling out three forms, an IRS 8300 bail form, a jail bail form, and a dual control form. The CSO also interrupted the act of receiving bail for the state court to notify the ITF that she was doing so, and to invite an ITF officer to come look at the bail money as the ITF had instructed.

6. CSO Gerber was aware that she was receiving bail money as an arm of the court, and not as an employee of the sheriff. However, the call to ITF was made in her capacity as an employee of the Sheriff, and not on behalf of the court. CSO Gerber acknowledged in her testimony that she understands that her primary allegiance when collecting bail money is to the court, not the sheriff.
7. Deputy Michal Hibpshman went to the jail on behalf of the ITF in response to the call made by CSO Gerber. When he arrived at the jail, he contacted CSO Gerber in order to look at the cash Mr. Macias had tendered for the defendant's bail money. Deputy Hibpshman found the bundling of the money suspicious, in conjunction with the fact that it was being tendered as bail for a person arrested for dealing drugs in substantial quantities. He asked questions of Mr. Macias regarding the source of the cash. He called a K-9 unit to see whether a trained drug sniffing dog alerted on the cash. The K-9 did alert on the cash.
8. Deputy Hibpshman seized the cash. He testified that he believed he had a right to seize the cash without a court order or warrant because he was in a place he had a lawful right to be, he was looking right at the cash, and he had developed probable cause to believe the cash was proceeds of a crime ITF was investigating.
9. Because Deputy Hibpshman seized the cash, CSO Gerber was prevented from completing her duty as an agent of the state court to receive court ordered bail for the defendant.
10. No court order was sought to authorize seizure of the cash for forfeiture under ORS 131A. No warrant was sought to secure court authorization for seizure of the cash.

Conclusion

1. The County's argument is that ORS 131A.050(1) supersedes the process under ORS 133.633 because the County is proceeding under a Notice of Forfeiture within the timeframe allowed under forfeiture statutes.
2. Forfeiture statutes can only shift the procedure for making a claim to the cash if the forfeiture seizure was lawful.
3. The seizure of the cash was lawful if it was authorized under ORS 131A.065. That statute allows seizure without a court order if:
 - a. There is probable cause and a constitutional basis to seize it without a warrant.
 - b. The seizure is in the course of a constitutionally valid criminal investigative stop, arrest or search, and there is probable cause.
 - c. The property is directly or indirectly dangerous to the health or safety of any person; or
 - d. An owner consents to the seizure.
4. Based on my findings, the cash was seized from an agent of the state court, to whom it had already been entrusted by Mr. Macias. Any subsequent stop of Mr. Macias initiated after CSO Gerber notified ITF of the pendency of the bail transaction does not affect the analysis.
5. Further, the cash was in constructive possession of the state court through its agent, CSO Gerber, so it was not seized in the course of any arrest or search.
6. Because the property was in the possession of the state court's agent, it was not directly or indirectly dangerous to the health or safety of any person.
7. There was no evidence that any owner of the cash consented to a seizure for forfeiture purposes, they only consented to it being tendered to, and received by, a state agent to satisfy the state court bail order.
8. Deputy Hibshman essentially justified his seizure through the plain view exception to the warrant requirement, indirectly implicating the last remaining basis for seizure under ORS 131A.065(1)(a).

The plain view doctrine in Oregon is derived from the US Supreme Court decision in Texas v. Brown, 460 US 730, 740-2 (1983), and was summarized by the Oregon Court of Appeals in State v. Carter, 200 Or App 262, aff'd 342 Or 39 (2006) and State v. Currin, 258 Or App 715 (2013) as follows:

"An officer may seize an item if the officer can do so from a position where that officer is entitled to be and the incriminating character of the item to be seized is immediately apparent."

9. The fact that the state court has designated a jail CSO to act as its agent to collect bail for the clerk of the court, rather than having a court employee accept bail at a courthouse, or having another state office employee staff for that purpose does not mean that officers are entitled to interject themselves into the bail receiving process claiming a right to be in the jail when that process is executed.
10. Under the circumstances of this case, the officer was not entitled to view the cash that was in the possession and control of a state agent on behalf of the state court. The only reason he was able to accomplish such a viewing was by taking advantage of his position as a police colleague of the state agent and direct her as an inferior employee in the chain of command to show it to him. I conclude that Deputy Hlbshman was not in a place where he had a right to be.
11. Further, the nature of the cash, despite its bundling, did not have an incriminating character that made it immediately apparent that it was seizable contraband. I conclude that the plain view exception to the warrant requirement fails on both prongs.
12. Because the forfeiture process is so specifically laid out in a statutory scheme, I conclude that its provisions must be followed precisely or the forfeiture is not lawful. ORS 131A.065 requires constitutionality of a seizure before the forfeiture process can be implemented.
13. In this hearing, the county has not demonstrated that the seizure of the cash received by CSO Gerber on behalf of the state court was a constitutional seizure. Therefore, I conclude that ORS 131A.050(1) does not supersede the process under ORS 133.633.
14. I further find that the Motion for return or restoration of things seized under ORS 133.633 is well founded, and order that the cash seized on May 3, 2014 be returned forthwith to the possession of whichever state agent is currently on duty at the jail for completion of the bail posting process that was unlawfully interrupted on May 3, 2014. I also order that Mr. Macias be available to facilitate completion of the forms necessary to complete the bail posting process.
15. Based on these findings and conclusions, I find that Defendant's Motion for Release is moot.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

State of Oregon

v.

[Redacted]

ORDER

Case No: [Redacted]

This matter, coming before the Court for a Motion for Return of Cash Seized
on the 16th day of May, 2014; (May 3, 2014)

Claimant Clackamas County Not Appearing, Appearing in Person; and
 Appearing by attorney; Kimberly Ybarra
Scott Ciecko

Defendant/Respondent: Not Appearing, Appearing in Person; and
 Appearing by attorney; Graham Fisher

IT IS HEREBY ORDERED THAT:

Defendant's Motion for return or restoration of things seized under ORS 133.633 is well
founded, and granted.

Specifically, I order that the cash seized on May 3, 2014 be returned forthwith to the
possession of the state agent currently on duty at the jail for completion of the bail posting
process that was unlawfully interrupted on May 3, 2014.

I also order that Mr. Macias be available to facilitate completion of the forms necessary
to complete the bail posting process.

Upon completion of all necessary tasks associated with the posting and receipting of the
money as bail, and Mr. Macias execution of appropriate paperwork for security release, the
defendant is to be released on the bail posted.

Dated this 16th Day of May, 2014

Hon. Susie L. Nerby
Susie L. Nerby
Circuit Court Judge