



LINN COUNTY JUSTICE COURT DISTRICT 4A

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JAD LEMHOUSE
JUSTICE OF THE PEACE

May 28, 2015

Sen. Floyd Prozanski, Chair
Senate Judiciary Committee
900 Court St NE, S-415
Salem, OR, 97301

RE: HB 3399A Supplemental Testimony

Sen. Prozanski, Members of the Committee:

I offer this written testimony to supplement written testimony dated May 20, 2015 previously submitted to this Committee, which I hereby adopt and re-publish.

First I wish to express my deep regret that the matters presented in this bill were not addressed by a work group between sessions of the Legislature. Although the principal sponsor of the bill circulated an LC draft of the bill earlier in this session, none of the persons or entities affected by this bill had any knowledge or notice of any concerns this bill is intended to address nor had any knowledge or notice of the constituency expressing these concerns. There was therefore no opportunity for the kind of discussions leading to a consensual approach to resolve these concerns with a bill that solves problems, rather than creates them.

Without knowing what prompted this bill, what ills it was intended to address, without being included in the essential discussion leading to the writing of the bill, we have been relegated to responding to problems the bill will create, not the problems the bill is intended to resolve, whatever those problems might be.

What you are now considering is a bill that if enacted as presently written includes unfortunate provisions, Sections 1 & 4, with, of course, unintended consequences. Here are some of those unintended consequences:

- Local courts will have to make more extensive records than do “courts of record.”
- Because of the costs and complexity of the recording requirement, some local courts will no longer handle misdemeanor cases. Those cases will be channeled to the circuit courts, causing higher costs for circuit court operations, creating a need for more circuit judges and raising indigent defense costs.
- Because many of the misdemeanors previously filed in a justice court or a municipal court will not be prosecuted in circuit courts, the number of all crimes in the affected

communities will increase, the quality of life will diminish, and, the rule of law will recede into twilight.

- If the bill is enacted as presently written, some local courts will continue to handle misdemeanors, but will not be able to comply with the recording requirement by the date the bill becomes law—the procurement process takes time. Crimes will continue to be committed in those jurisdictions, but are those courts supposed to just stop all proceeding and await installation of a recording device?
- If the bill is enacted as presently written, some local courts will discontinue the prosecution of misdemeanors. But, on the effective date of the legislation criminal prosecutions will be underway in those courts. While it may be possible to transfer such matters from a justice court to a circuit court, there is not means, other than an appeal to transfer a misdemeanor crime to a circuit court.
- The effective date of Sections 1 & 4 should be no sooner than January 1, 2017.

A local "court of recording" will have far more extensive records than that of a "court of record" such as a circuit court. Generally, the recorder is "on" in a court of record only when proceedings are conducted in the courtroom. The way Sections 1 & 4 are written, the recorder is on everywhere, anywhere and anytime a proceeding is conducted. I have laid out those problems in the bullet points on page 1 of my written testimony of May 20, 2015. These are huge logistical and practical problems.

It is likely that a fair number of municipal courts and some justice courts will discontinue handling crimes because of the initial and continuing costs of recording proceedings on misdemeanors. Those cases will migrate, so to speak, to the circuit courts. The reality, of course, is that the District Attorneys will not file on a fair number of those quality of life crimes: theft, especially shoplifting, bad checks, trespass, vandalism (known as criminal mischief), disorderly conduct, harassment, and the list goes on. (A few years ago, such a list of crimes that would not be prosecuted by the Lane County District Attorney was actually published in the *Eugene Register-Guard*.)

If these quality of life cases are not prosecuted, what happens to the quality of life and the rule of law in the affected community?

The most efficient and effective way to deal with the complaint that local court judges won't allow a party to make a recording is to require that a court allow a party to make a recording. Requiring courts to allow recording is an entirely appropriate response to that complaint—there is symmetry and congruence between the complaint and the response to correct the perceived problem. There is simplicity and efficiency in that nothing is required of anyone until a party request a record, in which case the party is allowed to make a record.

Finally, an attorney from a Portland, Oregon law firm submitted some written testimony to this Committee about her experience in an un-named justice court. She complained of an evidentiary matter--a witness referring to a writing while testifying, some procedural issues

raised on a motion for judgment of acquittal--having to do with venue and the officer's authority to make the stop, and, a factual issue. Her statement does not contain sufficient factual detail to render an opinion on the factual issue or the outcome of the trial.

However, in this Court, she would have lost on the evidentiary matter. Rule 612 of the Oregon Evidence Code (OEC) specifically provides for the situation in which a witness refers to a writing *while* giving testimony to refresh recollection, and Rule 803(5) allows a witness to read a written statement of a past recollection recorded. I routinely overrule objections to a witness referring to a writing while offering testimony, subject to the provisions of OEC 612 or 803(5), whether the witness is reading directly from the written past recollection or merely referring to a writing from time to time while testifying to refresh recollection.

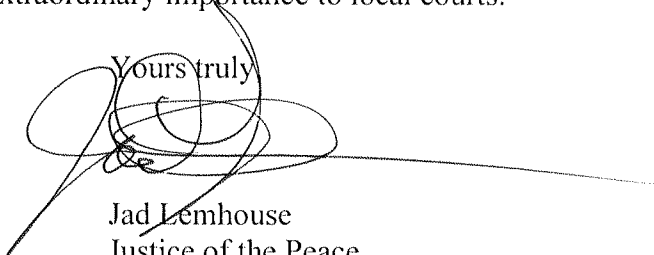
She would have lost on the venue issue. The Oregon Supreme Court addressed venue in criminal actions in *State v. Mills*, 354 Or 350 (2013); if venue is not raised as an issue by a defendant before trial through an appropriate pre-trial motion, then any challenge to venue is deemed waived. This case was decided 4 months before the ruling complained of was made by the justice court in February 2014, plenty of time for a simple pre-trial motion seeking change of venue.

She would also have lost on the "jurisdiction, wearing a badge, etc." None of those have anything to do with a "prima facie" case on a traffic offense. The prima facie case is made out by evidence that establishes the elements of traffic complaint set forth in ORS 153.048 and the offense charged under the Motor Vehicle Code. Unlike venue, a defendant may challenge the authority for the stop (uniform or badge) or jurisdiction through a pre-trial motion or at the trial of the matter. But, if a defendant defers a challenge to either jurisdiction or the stop until trial, it must be done through evidence obtained on cross examination during the prosecution's case in chief or introduced by the defendant during the defendant's case in chief, or both. Assuming an appropriate evidentiary foundation is made out; the defendant may then make a motion for judgment of acquittal.

Whether the subject of the case operated a motor vehicle in a manner that impeded or blocked the normal and reasonable flow of traffic cannot be determined from the advocate's letter.

Mr. Chairman, Members of the Committee, thank you for your courtesies and for the opportunity to present testimony on this matter of extraordinary importance to local courts.

Yours truly



Jad Lemhouse
Justice of the Peace

Hello Judge Lemhouse:

I created two options for each location. I'd like to set up a time to meet with you to go over the options and methodology.

Both options for each location included four wireless microphones, transmitters, receivers, and recording solutions.

Option One for each location incorporates an SD card recorder. The wireless microphones will be connected to the SD card recorder via the mixer. Each proceeding would be recorded to the SD card. The audio from these cards can then be downloaded and saved on a computer (computer not included). This is a lower cost option. Until we see the final rule, we won't know if this option will meet the criteria.

Option Two eliminates the SD card recorder and replaces it with "For The Record" software. In this case, the wireless microphones will be connected to a computer (computer not included) via the mixer. The "For The Record" software then manages the recordings. This is a higher cost alternative. While we will not know if this option will meet the criteria of the final rule, since this "For The Record" is used in courtrooms throughout the country for this purpose, I suspect it will work.

Price Range

Brownsville

Option One - \$5,370

Option Two - \$8,370

Harrisburg

Option One - \$5,370

Option Two - \$8,370

Lebanon

Option One - \$5,370

Option Two - \$8,370

I hope this helps! If you have questions, please feel free to call or email. Again, I'd like to schedule a time to meet with you and go over the specifics. I look forward to hearing from you. Best regards.

Erik

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