

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

|                  |   |                             |
|------------------|---|-----------------------------|
| STATE OF OREGON, | ) | Case No.98CR0139MA          |
|                  | ) |                             |
| Plaintiff,       | ) |                             |
|                  | ) | MEMORANDUM OF LAW           |
| v.               | ) | ON THE INSTALLATION AND USE |
|                  | ) | OF "TRAP AND TRACE DEVICES" |
| NEIL J. HAUSER,  | ) |                             |
|                  | ) |                             |
| Defendant.       | ) |                             |

I. Introduction

According to the sworn affidavit underlying the application for the search warrant in this case, OSP Det. George Roshak, he was told by an informant in January, 1998 that the informant had seen "business records" indicating that someone "associated with" the Oregon telephone number 382-6533, "possibly" Neil Hauser whose residence is at 19385 Comanche Circle, Bend, Oregon, had "made contact" with a supplier of equipment used to grow marijuana. This "contact" occurred 3 times between April 27, 1996 and May 1, 1996.

Also, according to the informant, four "additional" telephone calls<sup>1</sup> to the same business were made from Oregon telephone number 382-1453, which was listed<sup>2</sup> to Hauser Snowboards at 225 Franklin Avenue in Bend, Oregon.

According to Det. Roshak, the informant asked that the name of the marijuana equipment dealer be kept confidential **to keep the informant from being exposed** and to enable future development of information relating to "possible" marijuana grows.

Det. Roshak swore that in 1990 and 1991, this informant had provided Det. Roshak with

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<sup>1</sup>. The nature of the first-described "contacts" was not expounded, but this paragraph confirms that they were telephone calls.

<sup>2</sup>. The affidavit is not clear on whether the subscriber information came from the informant or Det. Roshak.

information leading directly to the seizure of more than 1600 marijuana plants, which information included the location of the grow, a telephone number and the names of suspects. Independent investigation later revealed that the informant in the 1991 case did not talk to Det. Roshak and was not an anonymous informant. She was named Anna Marie Brannon, and her identity was revealed in the affidavit that supported the search warrant<sup>3</sup> the execution of which produced the 1600 plant seizure.

Det. Roshak then swore that, according to members of the Portland, Oregon Police Bureau Drug and Vice Division (DVD) who Det. Roshak believes to be trustworthy, reliable and above reproach, this same confidential, reliable "source,"<sup>4</sup> during 1995, 1996 and 1997, did provide DVD with information similar to that provided to Det. Roshak. That information has led DVD to many marijuana growing sites and the aggregate seizure of more than 16,000 marijuana plants.

DVD told Det. Roshak that the supplier in question specializes in supplies for marijuana growers but has some legitimate business, that DVD members have followed customers to marijuana grows from the supplier's store on many occasions,<sup>5</sup> that the supplier has advertised in "High Times" magazine and that literature about the supplier has been found at the location of many marijuana grows.

During a hearing on a discovery motion, Det. Roshak testified 1) that the "store" (marijuana grower supply store) was the CRI, that the store was an "unwitting" CRI, that he did not receive the telephone call information from Officer Nathan Shropshire of DVD or any other

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<sup>3</sup>. This deprives the state of any claim to a privilege to withhold the informant's identity. ORS 40.275(4)(a).

<sup>4</sup>. The use of the term "source" here is extremely significant in light of what later developed.

<sup>5</sup>. American Agriculture in Portland sued the City of Portland and the Portland Police Bureau for doing exactly that in 1995, and the suit was settled by agreement. One of the terms of that agreement was that PPB would discontinue overt surveillance of American Agriculture's retail outlet.

policeman and that he would not name the officer who gave him all the information about the marijuana grower supply store because the DVD keeps the store under surveillance and the divulgence of those names might lead the store to discover the procedures being used.<sup>6</sup>

According to Neil Hauser, on or after June 3, 1998, Mr. Hauser had a telephone conversation with Officer Nathan Shropshire of the Portland Police Bureau, who confirmed on the telephone that:

1. Officer Shropshire had recently given the affiant in this case "help" with a couple of "busts" in the Bend, Oregon area - specifically, Officer Shropshire had given the affiant information regarding telephone numbers from which calls had been made to a "light shop" in Portland;
2. Portland Police have had a trace device installed on the business telephone of American Agriculture in Portland, Oregon since 1995 and that trace device keeps track of the telephone number of everyone who calls American Agriculture;
3. This trace device is authorized by a court order that gets renewed every 30 days. Officer Shropshire downloads the results every week. He checks the subscriber information for the numbers he gets against power company records, checks the age of the subscriber, type of residence and type of power used - **most or all of Shropshire's investigations are initiated in this manner;**
4. The information from this trace device is also transmitted to other law enforcement agencies. If Officer Shropshire knows someone in a particular area, he calls them, tells them about the source of his information and asks them not to use it in an affidavit.
5. American Agriculture does not know that the trace device is installed on their telephone.

Three days after the revelation that Mr. Hauser had talked to Officer Shropshire about these matters, he was indicted by the Deschutes County Grand Jury for impersonating a police officer. The "act" alleged to have been done while in character was the obtaining of investigative information. The only witnesses listed on the indictment were George Roshak and Nathan Shropshire.

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<sup>6</sup>. The store already knows all about it. Activities of DVD were the cause of Multnomah County Circuit Court Case No. 9510-07919.

In the above captioned case, the defense filed a Motion to Suppress and a Motion to Controvert outlining the above facts and some others, and a Motion, pursuant to ORS 136.580(2), for an order permitting it to subpoena documents in the control of Officer Shropshire or his superior into court before the date set for the hearing. That Motion described the nature of the documents it intended to subpoena as including records indicating telephone calls had occurred between the telephone numbers listed to Neil Hauser and the telephone number listed to American Agriculture,<sup>7</sup> copies of the application(s) for any trap and trace device the installation or operation of which produced any of the records relating to those specified telephone calls, copies of any notes, documents or affidavits included by reference in the specified application(s), copies of any communications to any other police agency respecting the specified telephone calls and copies of any documents reflecting any information about the telephone call between Neil Hauser and Nathan Shropshire which occurred on or after June 3, 1998.

Thereafter, the City of Portland filed a Motion for a Protective Order in this case, supported by the affidavit of Officer Nathan Shropshire. In that affidavit, Officer Shropshire admitted the telephone conversation with Mr. Hauser, stated that he thought Mr. Hauser was another policeman, stated that he told Mr. Hauser things that he would ordinarily only share with another law enforcement officer, stated that the information related to Mr. Hauser is used in "ongoing criminal investigations"<sup>8</sup> and argued that "it is critical that this information not be disseminated beyond what is necessary as evidence in the case against defendant (Hauser) for criminal impersonation." Officer Shropshire also indicated that he inadvertently revealed information which is "confidential" by court order,<sup>9</sup> and asked that the trial court in this case issue

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<sup>7</sup>. During their telephone conversation, Officer Shropshire told Mr. Hauser that he could check a telephone number against those in his database by simply entering that number and executing a "find" command. So, at least as of the time of the conversation, Officer Shropshire still had all the data he had downloaded from the Trap.

<sup>8</sup>. Thus, at the time the affidavit was signed, September 24, 1998, the trap was still in place and Officer Shropshire still had his database.

<sup>9</sup>. No such order, nor any excerpt from any such order, has been forthcoming.

a protective order which "restricts the use" of this information in the future. The Motion parrots this language. Neither document details what sort of "restriction" would suffice.

Nowhere does the city, the state or Officer Shropshire contend, or even imply, that anything alleged by Mr. Hauser is untrue.

This Memorandum accompanies the Memorandum in response to the Motion for a Protective Order. It addresses the legality of the trap and trace device.

## II. Trap and Trace Devices

ORS 165.657-ORS 165.673 control the use of "trap and trace" devices<sup>10</sup> (hereafter "trap" or "traps") and "pen registers."<sup>11</sup> The statutes were enacted as part of an overhaul of the statutory scheme for regulating interception of communications,<sup>12</sup> most of which appears in Oregon law at ORS 133.721 et seq., immediately after the search and seizure code.

As will be seen, the regulation and restriction of the interception of communications incorporates the search and seizure code, and the statutes controlling the installation and use of traps expressly incorporate the regulations and restrictions on interception of communications in general as well as certain search and seizure provisions. Traps, therefore, are seen as devices specifically used for the interception of certain kinds of communications.

## III. Legislative History

### A. Background

Application for legislation permitting the use of traps was made by the Oregon Department of Justice, the Oregon District Attorneys' Association, the Oregon State Police, Oregon Association of Chiefs of Police, and the Oregon State Sheriffs' Association. 1989 House Bill 2469 dated January 19, 1989. According to AAG Peter Shepherd, who submitted written

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<sup>10</sup>. A "trap and trace device" on a telephone line captures signals incoming to the telephone which signals identify the source of the call. ORS 165.657(4).

<sup>11</sup>. A "pen register" on a telephone line captures signals outgoing from the telephone which signals identify the number being called. ORS 165.657(2).

<sup>12</sup>. Chapter 983 Oregon Laws 1989.

testimony and testified in person before the Crime and Corrections Subcommittee of the House Judiciary Committee, the purpose of the act was to satisfy the federal statutes<sup>13</sup> which prohibit the use of such devices unless the state has an enabling statute. Exhibit G<sup>14</sup> to HB 2469, dated February 15, 1989.

Thus, the existence of a state enabling statute is the sine qua non to the legal installation of a trap device. Moreover, federal law respecting the interception of communications in general allows such interception under state law **only** "in conformity" with the applicable state statute. 18 USC § 2516(2).

#### B. Extensions

AAG Shepherd noted, in his written testimony, that the federal statute provides for an installation period of 60 days and permits "extensions" (emphasis added) upon supplemental application, which it does. 18 USC § 3123, in pertinent part, provides:

(c) Time Period and Extensions. - (1) An order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed sixty days. (2) Extensions of such an order may be granted, but only upon an application for an order under section 3122 of this title and upon the judicial finding required by subsection (a) of this section. The period of extension shall be for a period not to exceed sixty days.

But, to be legal, the use of a trap must still conform to state law. And the Oregon legislature did not adopt the language of the federal statute. ORS 165.667 establishes the requirements for orders authorizing the installation of traps. In pertinent part it provides:

(2) The order shall: \* \* \* (f) Authorize the installation and use of a pen register or a

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<sup>13</sup>. 18 USC §3121 provides in pertinent part: "(a) In General. - Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.). \* \* \*(c) Limitation. - A government agency authorized to install and use a pen register under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing."

<sup>14</sup>. This written testimony was submitted to the Senate Judiciary Committee and logged in as Exhibit M to HB 2469.

trap and trace device for a period not to exceed 30 days, which **may be extended by application and order for a period not to exceed an additional 30 days;** \* \* \* (Emphasis added).

The distinction between the language of the state statute and that of the federal statute in this regard is profound; the state law clearly permits only one extension. Authorization for installation of a trap device under the auspices of state law can be extended only "for a period not to exceed an additional 30 days." That could not possibly be any more clear.

The proposed legislation originally submitted to the legislature contained the 60 day duration from the federal statute. That was reduced to 30 days in the Senate at the behest of the Oregon Criminal Defense Lawyers' Association. A-Engrossed Amendments to HB 2469, Senate Judiciary Committee, dated June 14, 1989. Otherwise, the language in this subsection is exactly that which was included in the original proposed legislation.

AAG Shepherd spoke in favor of the legislation during committee hearings in both the House and the Senate, and his written testimony correctly analyzed the federal statute as permitting multiple extensions. He cannot have been unaware of the difference between the two statutes.

Not to be deterred by any mere statutory interference with their activities, Officer Shropshire and his confederates have, according to his conversation with Mr. Hauser, routinely obtained an extension of the judicial authorization for the trap on American Agriculture's telephone line for a period in excess of three years.<sup>15</sup> That means that at least 34 of the renewals have been outside what is permitted by the state statute, and have been violations of both state and federal law.<sup>16</sup>

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<sup>15</sup>. Officer Shropshire indicated to Mr. Hauser that the trap device went on American Agriculture's telephone line "before" 1995, but he did not say how much before 1995. Presumably, he first sought judicial approval of the device in 1995.

<sup>16</sup>. In addition to 18 USC § 2516(2) cited above, ORS 165.659 absolutely prohibits the use and/or installation of traps unless there has been compliance with in ORS 133.545, 133.575, 133.595, 133.617, 133.619, 133.721, 133.724, 133.729, 133.731, 133.735, 133.737, 133.739, 165.540 and 165.657 to 165.673.

In an affidavit in support of an application for a search warrant signed on July 20, 1998, Officer Shropshire swore that he had been a policeman for more than 15 years, that he had been on the "Marijuana Task Force" for three years, that he had been involved in the arrest of more than 500 persons for drug violations, that he has had numerous instructional classes on the subject of enforcement of the drug and narcotics laws provided by other Portland policemen, members of the Multnomah County District Attorney's Office, Oregon Narcotics Enforcement Association, the Western States Information Network and the United States Drug Enforcement Administration. The subject of trap devices must have come up during this training at some point, since according to his conversations with Mr. Hauser, most or all of Officer Shropshire's investigations are initiated based on information he obtains from the trap on American Agriculture's telephone line. Having sworn on a myriad of occasions to his knowledge and expertise, Officer Shropshire cannot now be heard to feign ignorance of the law.

#### B. What May Be Sought

Under the original, proposed statute, the application would necessarily 1) be in writing and under oath, 2) include the identity of the applicant and the identity of the law enforcement agency conducting the investigation, and 3) "contain a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." HB 2469, submitted to the House Judiciary Committee Subcommittee on Crime and Corrections on March 23, 1989, §18. This language precisely tracks the language in the federal statute. 18 USC 3122(b). It did not survive the legislative process in Oregon.

On June 14, 1989 the Senate Judiciary Committee proposed amendments to HB 2469 to include the language which is now in ORS 165.663:

\* \* \* The application shall:

- (1) Be in writing under oath;
- (2) Include the identity of the applicant and the identity of the law enforcement agency conducting the investigation; and
- (3) Contain a statement demonstrating that there is probable cause to believe that an individual is committing, has committed or is about to commit a particular felony of murder, kidnapping, arson, robbery, bribery, extortion or other crime dangerous to life and punishable as a felony, or a crime punishable as a felony



under ORS 475.992 or 475.995, or any conspiracy to commit any of those crimes, and that use of a pen register or trap and trace device **will yield evidence relevant to the crimes**. (Emphasis added).

Several differences are immediately apparent. The requirement of probable cause was intentionally imposed. Minutes of the Senate Committee on the Judiciary, June 14, 1989 page 10. The same is true of the requirements that the probable cause relate to certain specified crimes and that there be an individual target. Ibid, pages 10-11. In fact, the probable cause requirement was substituted for "reasonable grounds" language which appeared in the general interceptions of communications statute (ORS 133.724) prior to 1989.

What is significant for purposes of this section of the argument is that the use of traps **to obtain investigative information** was specifically and intentionally disallowed by an amendment passed by the Senate Judiciary Committee on June 14, 1989 in favor of a much more restrictive standard: A trap could only be legally used in Oregon if there was probable cause to believe that the trap would "yield evidence relevant to [the specified] crimes."

The Senate passed the amended version of HB 2469 on June 24, 1989, and the measure was returned to the House, which concurred in the Senate amendments and repassed the measure on June 27, 1989 and, on August 3, 1989, the Governor signed the bill into law.

"Relevant evidence" is a far cry from investigative leads. "Relevant evidence" is generally admissible at the trial. ORS 40.155. As will be seen, not only did Officer Shropshire and his colleagues never intend to use the trap on American Agriculture's telephone line to obtain "relevant evidence;" they intended that no one outside law enforcement would ever even know of the trap's existence.

The legal limitation on the justified use of traps to the purpose of obtaining "relevant evidence" was simply flouted and ignored in the case of the trap on the telephone line of American Agriculture. Indeed, the express purpose of that trap was the gathering of investigative information. Officer Shropshire admitted that to Mr. Hauser, he swore to it in his affidavit in support of the City of Portland's Motion for Protective Order and the Senior Deputy City

Attorney Mary Danford asserted it in the body of the Motion itself. City's Motion for Protective Order, page 2 lines 8-9.

The purpose of that Motion is to protect against "dissemination" of the information that Officer Shropshire gave Mr. Hauser. He said:

\* \* \* Well, I have a court order that allows me to do it, and every 30 days I re-up that court order. And so we get the information back, and that's when we start passing it off. and if it's in Bend and if it's in places where we're not going to get to, we pass it through, through DOJ, we'll pass them off. And if I know somebody in a particular area, I'll call them up and say "Hey, we have this one. This is how we got it. You try not to use it as an affidavit."

In other words, everyone is expected to keep the source of the information a secret. That is the purpose of the Motion for a Protective Order - to protect the secret.

This maintenance and protection of this secret is in open and express derogation of the discovery rights<sup>17</sup> of every criminal defendant who has been ensnared by Officer Shropshire's gillnet. As indicated above, the installation of a trap must conform to the legal limitations on the interception of communications in general. ORS 165.659. The "contents" of communication include "any information concerning the identity of the parties to such communication . . ." ORS 133.721(2). To "intercept" means to "acquire." ORS 133.721(5). In other words, the interception of a communication is a "seizure." *State v. Owens*, 302 Or 196, 207, 792 P2d 524 (1986); *State v. Peterson*, 114 Or App 126, 129, 834 P2d 488 (1992).

Second, contrary to prevailing Fourth Amendment jurisprudence, the installation of a trap is a "search" under the Oregon Constitution. Under Article I, section 9, a "search" is an intrusion by a governmental officer, agent, or employee into the protected privacy interest of an individual. See, e.g., *State v. Dixon/Digby*, 307 Or. 195, 766 P.2d 1015 (1988) (police entry into privately owned fields a search); *State v. Campbell*, 306 Or. 157, 170, 759 P.2d 1040 (1988) ("certain kinds of government scrutiny" constitute a search); *State v. Owens*, 302 Or. 196, 206, 729 P.2d

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<sup>17</sup>. As argued below, it also deprives them of rights secured to them by statute and both state and federal constitutions.

524 (1986) ("A 'search' occurs when a person's privacy interests are invaded").

It cannot be tenably argued that the strict limits imposed on the installation and use of trap and trace devices and pen registers, and the subjection of that installation and use to the general requirements for the issuance of search warrants as well as the limits on the interception of communications, do not create a privacy interest in the information targeted by such devices.

"[I]ndividual freedom from scrutiny is determined by social and legal norms of behavior, such as trespass laws and conventions against eavesdropping." *State v. Campbell*, supra, 306 Or at 170.

ORS 135.825 requires a prosecutor to disclose, to the defendant in a criminal case, "the occurrence of a search **or** seizure" and, if requested in writing, ". . . the circumstances of the search **or** seizure, . . ." (Emphasis added). It is precisely those occurrences and those circumstances which have been kept secret for more than three years, and which the City of Portland, incredibly, still seeks to keep secret.

But the secret is out.

### C. Requirement of an Individual Target

According to the statute as originally proposed, "Any police officer may apply to the circuit court in which judicial district the targeted telephone is located for an ex parte order or extension of an order authorizing the installation and use of a pen register or a trap and trace device." HB 2469, submitted to the House Judiciary Committee Subcommittee on Crime and Corrections on March 23, 1989, §18. The intended focus was, thus, a target telephone.

However, when the measure came out of the Senate Judiciary Committee meeting on June 14, 1989, it required that the application contain: "[A] Contain a statement demonstrating that there is probable cause to believe that an individual is committing, has committed or is about to commit a particular felony of murder, kidnapping, arson, robbery, bribery, extortion or other crime dangerous to life and punishable as a felony, or a crime punishable as a felony under ORS 475.992 or 475.995, or any conspiracy to commit any of those crimes, and that use of a pen register or trap and trace device will yield evidence relevant to the crimes."

That language became law in the case of traps. It had, for some time, been the law in the

case of intercepted communications in general (except that the "reasonable grounds" standard was sufficient until the enactment of Ch. 983 Or. Laws 1989). See ORS 133.724. And the installation and use of traps is subject to the provisions of ORS 133.724. ORS 165.659.

Under the statute providing for the order, the court must expressly find "that there is probable cause to believe that an individual is committing, has committed or is about to commit a particular felony of murder, kidnapping, arson, robbery, bribery, extortion or other crime dangerous to life and punishable as a felony, or a crime punishable as a felony under ORS 475.992 or 475.995, or any conspiracy to commit any of those crimes, and that use of a pen register or trap and trace device will yield evidence relevant to the crimes." ORS 165.667(1). No such language existed in the law as originally proposed. HB 2469, submitted to the House Judiciary Committee Subcommittee on Crime and Corrections on March 23, 1989, §19.

ORS 165.659 imposes the requirements of ORS 133.724 on the installation and use of traps. ORS 133.724(g) requires the application for an order to contain "[T]he identity of the person, if known, suspected of committing the crime and whose wire, electronic or oral communications are to be intercepted[.]"

It is inescapable that the focus of the trap, if it is to comply with state (and thus federal) law, cannot be a telephone. It must be an individual. It is not necessary that the identity of the individual be known. ORS 165.667(2)(b). It is, however, necessary that there be probable cause to believe that **someone** has committed, is committing or is about to commit one of the specified crimes **AND** that the trap will yield evidence "relevant" to that crime.

This reading of the statute is consistent with the limits placed on interception of communications in general, with searches and seizures in general, with the strict limit on the number of permissible extensions and with the limitation respecting the acquisition of relevant evidence. It is the only reading that effectuates all the particulars in the statutory scheme regulating traps, and it is the court's duty to effectuate all those particulars if possible. ORS 174.010.

Installation and use of traps is expressly subjected to the controls in ORS 133.545,

according to ORS 165.659. ORS 133.545 establishes the requirements for search warrants. Superimposed on those requirements is the requirement of individualized probable cause. Oregon Constitution, Art. I Section 9; *State v. Okeke*, 304 Or. 367, 373, 745 P.2d 418 (1987); Fourth Amendment to the Constitution of the United States; *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1981) .

This limitation on the police power, which is firmly and traditionally embedded in our search and seizure law at every level as well as expressly included in the statutory scheme for the interception of communications in general and the installation and use of traps in particular, was also simply disregarded and ignored by Officer Shropshire and his colleagues. That is the inescapable implication of the continued use of the device for a period of years, the revelation that Officer Shropshire initiates most or all of his investigations based on the information from the trap in question, and the dissemination of that information<sup>18</sup> to all and sundry other law enforcement agencies<sup>19</sup> and/or officers in the jurisdictions from which the telephone calls originate. According to what Officer Shropshire told Mr. Hauser, this was apparently done on a volunteer basis.

#### IV. Conclusion

The facts alleged by Neil Hauser respecting the long term use of a trap device on the telephone line used by American Agriculture must be taken as true. If those facts are true, the installation and use of the trap device, whether or not pursuant to court order, was statutorily and constitutionally impermissible on virtually every significant ground upon which permissibility might be tested.

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<sup>18</sup>. Apparently, this is done with the assistance of either the Oregon or US Department of Justice.

<sup>19</sup>. Some, apparently, out of state. ORS 165.667(2)(c) requires that the order specify "geographic limits" of the trap and trace order. Whether that requirement was observed remains to be seen.

