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

THE STATE OF OREGON, Plaintiff, vs. BRAIN P. CARR, Defendant.	Case No.: DA 2037182 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE

The State of Oregon, by and through the District Attorney of Multnomah County, hereby opposes the defendant's motion to set aside his arrest record.

The State relies on ORS 137.225 and the attached Memorandum of Law.

Oral argument is requested.

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

By
Travis T. Sewell OSB # 95169
Deputy District Attorney

Multnomah County District Attorney's Office, Portland, OR 97204 - (503) 988-3162

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

THE STATE OF OREGON, Plaintiff, vs. BRAIN P. CARR, Defendant.	Case No.: DA 2037182 MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS MOTION TO SET ASIDE

MEMORANDUM OF LAW

The Defendant seeks to set aside his 11/5/04 record of arrest for Violation of a Restraining Order in the above-entitled matter.

The State objects to defendant's motion on the grounds that this arrest is not eligible for expunction. In general, subsection 137.225(5) provides that only Class C felony, misdemeanor and violation convictions and arrests may be set aside. Contempt of Court is an "inherent judicial power" exercised by the court, and lies outside the scope of and separate from the offenses proscribed by 137.225(5). ORS 33.025. It is also not a violation, as it is punishable by incarceration, specifically excluded as a violation punishment. ORS 33.015, 33.045, 153.008.

Contempt of Court is not a criminal conviction so an arrest for VRO therefore can not be considered an arrest for a crime. Contempt of Court proceedings are set out in ORS 33.015 to 33.155. The court has authority to impose a remedial or punitive sanction of confinement. ORS 33.055 and 33.065. If punitive sanctions are sought, an accusatory instrument must be prepared (with some exceptions) by a city attorney, a district attorney, or the Attorney General. Pursuant to the punitive sanction provisions of ORS 33.065(5), the "accusatory instrument is subject to the

Multnomah County District Attorney's Office, Portland, OR 97204 - (503) 988-3162

same requirements and laws applicable to an accusatory instrument in a criminal proceeding" and a warrant can be issued to compel the appearance of the defendant.

An accused has no right to a jury trial, but must be afforded appointed counsel if he is indigent. Proof of contempt is beyond a reasonable doubt for imposition of either a remedial sanction of confinement or a punitive sanction. The multiple prosecution provisions of ORS 131.515 apply to criminal contempts. State v. Thompson, 294 Or 528 (1983).

The District Attorney's Office has consistently opposed motions under ORS 137.225 to set aside (expunge) contempt judgments or arrests for Violation of a Restraining Order (VRO). In 2003 Circuit Court Judge Elizabeth Welch, Chief Family Law Judge, undertook serious consideration of the issue and ultimately agreed with the state and denied the set aside motion (See Exhibit #1). Central to her ruling was that that a VRO was not a criminal conviction and that a violator of such an order "is not included in the classes of individuals described in ORS 137.225".

Judge Welch relied primarily on the Supreme Court decision of State ex rel Hathaway v. Hart, 300 Or 231 (1985). The Court of Appeals in Hathaway had concluded that contempt was a "criminal action" under ORS 131.005(6) for purposes of ORS 161.505, defining an offense, but that the criminal contempt proceeding of a VRO was not "a criminal prosecution." State ex rel Hathaway v. Hart, 70 Or App 541, 544 (1984).

The Supreme Court accepted the latter position in affirming the Court of Appeals and cited State v. State ex rel Dwyer v. Dwyer, 299 Or 108 (1985). However, the Supreme Court rejected the Court of Appeals' analysis that a VRO was a "criminal action" under ORS 131.005(6) but not a "criminal prosecution." It is neither. The Supreme Court concluded, "the

legislature intended to leave criminal contempts as unique proceedings." State ex rel Hathaway v. Hart, 300 Or at 238 (1985). More recently, the Court of Appeals also has held that contempt is not a crime but rather that "it is a unique and inherent power of a court to ensure compliance with its orders." State v Lam, 176 Or App 149,158 (2001).

Essentially, some contempt proceedings may have some of the trappings of a criminal prosecution and conviction but are not themselves actual prosecutions for criminal offenses. Defendant was not arrested for an offense contemplated by ORS 137.225. Thus, there is no authority for the court to set aside the defendant's record of arrest for this offense. This court's power to set aside arrest and conviction records derives from the statute. Springer v. State, 50 Or App 5, 621 P2d 1213 (1981), Sup. Ct. review denied. The court has no inherent power to set aside records of offenses not authorized by ORS 137.225. The defendant's motion should be denied.

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

By
Travis T. Sewell OSB # 95169
Deputy District Attorney