

**IN THE COURT OF APPEALS OF THE
STATE OF OREGON**

The State of Oregon
Plaintiff / Respondent

versus

Brian P. Carr
Defendant / Appellant

Case _____
Circuit 0601-30000
Clearing 0923389
DA 2037182-1

Narrative Statement of Hearing

Multnomah County Circuit Court, Room 512
1021 SW Fourth Avenue
Portland, Oregon 97204
April 13, 2006

Before: Honorable Julie E. Frantz

Appearances: Defendant / Petitioner
Brian P. Carr
11301 NE 7th St, Apt J5
Vancouver, WA 98684
360-607-0556

Plaintiff / Respondent:
Travis T. Sewell, OSB 95169
Multnomah County Deputy District Attorney
Multnomah County Courthouse, Room 600
1021 SW Fourth Avenue
Portland, Oregon 97204
503-988-3405

There was no court reporter for this hearing.

Prepared by the Appellant, Brian P. Carr from electronic audio record.

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9:03:50AM Opening

- 1 9:03:50AM Judge Frantz: Please be seated.
- 2 9:04:00AM Mr. Sewell: Your honor this time set for a set aside hearing in the matter of the State
3 of Oregon versus Brian Carr, DA case number 2037182. Travis Sewell for the state, Mr. Carr is
4 here, your honor, representing himself. It is his motion, so I will allow him to address the court
5 first, your honor, since he is the moving party and has the burden.
- 6 The state's position in this case is fairly simple. The arrest was for a restraining order matter
7 which it is the state's position is non-criminal. In expunction hearings it's the burden on the
8 Defendant to prove under sub section 5 of the statute that what the Defendant is seeking to
9 expunge would fit into a sub-section of that sub-division of the expunction statute and a arrest for
10 VRO is not mentioned in that statute.

9:04:50AM Defendant's Statement

- 11 9:04:50AM Judge Frantz: Mr. Carr.
- 12 9:04:52AM Mr. Carr: Yes, your honor, I guess I, ... normally this would be a fairly simple matter
13 but in this case I am asking this court to reverse previous decisions holding that domestic
14 disputes were not eligible under 137.225. As such I have submitted rather complete and
15 thorough papers because of the likelihood that it will be appealed. There are five legal questions
16 that I see are before the court.

1 The first is whether or not FAPA proceedings are eligible under 137.225. There is not a lot of
2 case law in this case. There is no compelling argument for either interpretation. That being said,
3 it seems most reasonable that since Oregon has declared FAPA proceedings to be non-criminal,
4 they likely did that to avoid the stigma so that there would be more reporting of domestic
5 violence and as such to increase the stigma by saying once it is on your criminal record it can
6 never go away is not a reasonable interpretation, but either interpretation could be valid.

7 There is another issue in that this restraining order was issued in Washington State under RCW
8 26.50 and Washington has clearly delineated domestic violence as a crime and the order itself
9 states that it is a crime. And so then I am also arguing that this should have been handled as a
10 criminal matter and as such would be eligible under 137.225.

11 9:06:25AM Judge Frantz: The restraining order was issued in Washington state, is that what you
12 are saying?

13 9:06:30AM Mr. Carr: That is correct.

14 9:06:31AM Judge Frantz: Yes.

15 9:06:32AM Mr. Carr: Then the third issue before the court is whether or not this court has
16 general due process jurisdiction in this matter. And I think if you reviewed the case history there
17 is no doubt that in the broadest sense the court does have jurisdiction, the real question, does it
18 apply in this case, and in that ca.... When you get to particulars there, the state legislature has
19 dictated that the state highway ... I forget the official title, the state department of ..., the state
20 highway ..., the state police, I forget their title, has authority for maintaining criminal records.
21 They have... and taking corrections.

22 They have delin... designated that the Portland Police, the contributing agency, must accept
23 corrections and the Portland Police Department says that corrections are done through 137.225
24 which appears to give this court jurisdiction over due process and corre..., making corrections to
25 the record. In particular, there are two aspects, so that is another question, does due process

1 apply in this case, which no compelling argument either way but reasonably it could be said so.

2 The fourth argument is was the order issued valid and sadly that is a Washington state issue
3 which has not been resolved as yet and it is under appeal with the Court of Appeals. I think it
4 was first heard on January 9th and they have until June 9th to resolve it. I asked them for an
5 early...

6 9:08:06AM Judge Frantz: I am sorry, can you repeat that.

7 9:08:13AM Mr. Carr: Was first assigned to a panel of the Court of Appeals on January 9th, by
8 tradition they have until June 9th to issue a decision I asked that they give an early decision on
9 one of the seventeen issues by April 6th which they have not but that is their prerogative and
10 within their jurisdiction.

11 9:08:31AM Judge Frantz: What I didn't hear was the beginning of that point which was what
12 was submitted for ... to the Court of Appeals?

13 9:08:41AM Mr. Carr: There were many issues concerning the order itself. One of the issues is
14 whether or not the...

15 9:08:44AM Judge Frantz: Which order?

16 9:08:46AM Mr. Carr: Ahh...

17 9:08:49AM Judge Frantz: I didn't hear the beginning of what you said on that issue so could you
18 just repeat what you said on that issue.

19 9:09:00AM Mr. Carr: There is the question as to whether or not the order itself, the Order for
20 Protection which was issued in Washington state has jurisdiction and the question there is, it was
21 issued by a Superior Court Commissioner which is stated in Washington that there will be
22 Superior Court Commissioners but they may not be more than than three in number but there are

1 more than three appointed and so then the question is since that was an appointment in violation
2 of the constitution of Washington and the legislature has clearly gone along in accepting that
3 numerical limit, then was the order valid. In Washington coun..., in Washington state that is
4 important because if it wasn't a valid, ... if the court did not have jurisdiction then I wasn't bound
5 to follow the order. If the court had jurisdiction but made the order in error I was still bound to
6 follow the order but if the court did not have jurisdiction then I did not have to follow the order.
7 And that is sadly a question before the court, but I do give indications of the Washington
8 constitution and the appropriate statute and the orders appointing four Superior Court
9 Commissioners and then

10 The fifth issue before the court is did the police have probable cause in making the arrest because
11 it is my contention that I was unaware of the presence of my wife at the time outside the
12 restaurant. I was permitted to be at the restaurant and so there was no reason to arrest me
13 because the order says I will not knowingly remain but there is no evidence that I knew of her
14 presence and that would get to a due process concern also because it was a false arrest and it
15 should be set aside also and that raises the other issue is... Is there a regular... Why was I
16 arrested when there was no probable cause and that raises the issue of sexual bias in the
17 implementation of arrests by the Portland Police Department.

9:11:10AM Plaintiff's Statement

18 9:11:10AM Judge Frantz: Mr. Sewell.

19 9:11:13AM Mr. Sewell: Your honor, just very briefly, I think that the only relevant issue before
20 the court is if this particular arrest qualifies for set aside and clearly under the statute it does not.
21 There is no mention of Restraining Orders being a type of arrest that could be expunged. As to
22 most of the Defendant's other arguments, I don't think they are relevant to this court. It is
23 completely irrelevant how the state of Washington views these matters, the issue before this court
24 is if an arrest by a law enforcement officer in this county can be expunged. The validity of the
25 restraining order itself is completely irrelevant. In looking at this case, one of the reasons that
26 our office chose not to proceed on this matter was indeed one of the reasons that the Defendant

1 brought to the court's attention. The issuing DA when looking at it, felt that we could not prove
2 this case based on the fact that we couldn't prove that the violation was willful. So the case
3 wasn't opened by our office, but again that would be completely irrelevant if the actual record of
4 the arrest should be set aside.

9:12:30AM Decision

5 9:12:30AM Judge Frantz: Mr. Carr this court is confined to the statutory requirements under
6 137.225 and is not legally entitled to look behind the arrest to determine whether the arrest had
7 probable cause or address the other points that you raised. The court must adhere to the statutory
8 language and criteria that is set out under ORS 137.225. It can not look to the Washington law
9 or any errors that you allege may have occurred in the process there. The cases have been cited
10 by the state are on point: State ex el ..., ex rel Hathaway versus Hart, and State versus ... ex ... ex
11 rel Dwyer versus Dwyer. The violation of a restraining order simply does not fall under ORS
12 137.225 as an action whether it be an arrest or otherwise that can be expunged. Contempt of
13 Court is not a criminal conviction so an arrest for VRO can not be considered an arrest for a
14 crime so the court denies your motion to set aside.

I certify under penalty of perjury under the laws of the state of Oregon that the foregoing is true
and correct narrative of the electronic audio record for this hearing.

Apr 21, 2006

Dated

Portland, OR

Location

Brian P. Carr

Signature of Defendant / Appellant

Brian Carr
11301 NE 7th St., Apt J5
Vancouver, WA 98684
360-607-0556

Plaintiff / Respondent:
Multnomah County District Attorney
Multnomah County Courthouse, Room 600
1021 SW Fourth Avenue
Portland, Oregon 97204