OREGON DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING

LEGAL UPDATE – NOV/DEC 2024

State v. Wallace, 373 Or 122 (2024)

- This was a **sexual abuse case involving a 26-year-old victim (J) who has an intellectual disability** due to fetal alcohol syndrome and brain trauma. Despite her adulthood J cannot live alone, shop for herself, manage transportation or finances, or socialize without support. Due to her disability J becomes easily overwhelmed, has a heightened risk of social vulnerability, and must always be accompanied by a trusted individual. The extent of J's knowledge of sexual concepts was primarily based on what she saw in movies. J's understanding of sexual and anatomical ideas was extremely limited; although she could name some sexual terms, she was unable to describe them conceptually.
- Defendant was 50 years old when he met J. He told J he was 30 and enticed her into going on dates with him, despite awareness of her mental limitations. The dates soon included sexual touching, which J was uncomfortable with, as well as defendant taking explicit images of J, a practice she was disturbed by and did not understand. Defendant's conduct escalated into forcible sexual acts with J, despite her confusion and protests. Defendant was arrested and ultimately convicted of multiple sex crimes, many of which were **charged under the theory of abusing a person who was "incapable of consent by reason of mental defect."** Defendant appealed his convictions, arguing that the state did not prove that the victim suffered from a "mental defect."
- The **ORS describes a "mental defect" as one that renders a person incapable of appraising the nature of their conduct, and therefore incapable of consent. "Appraising" one's conduct involves two inquiries: (1) does the person understand the essential qualities of the conduct? (i.e. that they are engaging in sexual activity) and (2) is the person capable of exercising judgment regarding whether to engage in such conduct?**

- Defendant argued that although it was clear that J had a mental disability and struggled with vocalizing her knowledge, she understood the basic nature of the conduct as being sexual and therefore was not mentally defective under ***State v. Reed* (2005).** In *Reed*, the Court held that the incapacity statute requires more than generalized proof of mental disability, it requires proof that the victim lacked the understanding that the conduct was sexual or that she could make the choice whether to consent or not. When this case was heard by the Court of Appeals, they agreed with defendant and reversed the conviction. The state appealed to the Supreme Court.
- The Supreme Court, fortunately, disagreed. The Court found that evidence of J's understanding of the nature of the conduct was minimal, at best. Additionally, even if she understood the conduct was sexual, the evidence reflected a victim who "not only failed to make a conscious decision whether to go along—that is, exercise judgment with regard to that conduct—but who also, due to an intellectual disability, was incapable of doing so."

State v. Leos-Garcia, 337 Or App 47 (2024)

- This was a **DUII** case. The defendant was called in as the suspect to a hit-and-run after leaving the scene of a crash. His vehicle was spotted parked in the driveway of his home, which sits on a corner lot. The driveway leads to the side door of the house, which is the door that defendant and guests/visitors typically use to approach the home (rather than the front door). When police arrived at defendant's house, they walked up the driveway, took a lap around the vehicle to look for any areas of damage, and noticed defendant was asleep in the driver seat. They woke defendant up, observed he was clearly intoxicated, and ultimately arrested him for DUII. **The defendant argued on appeal that the officers conducted an unlawful search by visually inspecting his vehicle in the driveway, which he claimed was a trespass, and he sought to have the DUII-related evidence suppressed.** The state argued that officers are allowed to walk up a person's driveway to try to contact them under long-established principles of implied consent.
- The court acknowledged the state's argument to be somewhat correct – in a connected, civil society there is a **presumption that homeowners impliedly consent to visitors and strangers approaching the door of a home, which can include walking up a driveway.** This presumption allows salespeople, trick-or-treaters, politicians and police to knock on doors in their community without fear of committing a trespass. This implied consent, however, can be limited in scope if

there are indications that the homeowner objects to such an intrusion (by posting a "No Soliciting" sign or having a gate-locked fence, for example). The question is whether the officer's actions complied with the social norms expected of regular visitors to the property; officers cannot exceed the scope of that implied consent merely because they are police.

- In this case, the court agreed with the defendant. **Although the officers had implied consent to walk up the driveway to get to the door, they exceeded that consent when they deviated from that purpose to walk around and inspect the suspect vehicle**. It was only via that inspection that the officers discovered defendant in the truck; thus, the contact with defendant and subsequent DUII investigation were a product of the unlawful intrusion. In the court's view, even if a reasonable visitor would walk up defendant's driveway, a reasonable visitor would not linger and examine evidence in the driveway.
- **Takeaway**: This case seems to be an expansion of prior caselaw limiting this kind of implied consent. Previous cases where evidence was suppressed involved officers moving or manipulating evidence in some way that was deemed a "search," such as touching the hood of a car to see if it was still warm or moving an item on a front porch to see what was underneath. In this case, merely changing their visual vantage point by walking around the vehicle was deemed enough to constitute a search.

State v. James, 336 Or App 55 (2024)

- This was a **child sex abuse case** that began in 2015 after two victims reported defendant had molested them on multiple occasions, including taking explicit images. Police applied for a **search warrant on defendant's home, to seize computers, digital storage devices, a camcorder defendant was known to use, and to take photos of the inside of the home**. Regarding the digital devices, police asked to seize devices "widely commercially available" in the early 1990s to mid-2000s. The warrant was granted, and while police were inside, they seized an external hard drive, a CD containing photos, a video camera, and a drawing created by one of the victims that had an incriminating message to defendant on it. Although the drawing was not included in their warrant request, it was observed and seized via plain view.
- Defendant's case was reversed on appeal after the Court decided ***State v. Mansor*** (2018) which significantly limited police in executing warrants for digital devices. When the case returned in 2021, the state opted to write a new warrant to search

the digital items that would be compliant with the requirements in *Mansor*. The warrant was granted, and the evidence was re-obtained. On appeal, defendant argued that both the 2015 and 2021 warrants were overly broad because they authorized the seizure of large categories of devices rather than specific ones. Defendant also argued that and that some items police took were not enumerated in the warrant and therefore were seized unlawfully, and that police had no probable cause to photograph his home considering the alleged abuse was historical.

- The court agreed partly with the state and partly with the defendant. The court found that there was probable cause that evidence would be found in defendant's residence and concluded that both the video camera and the drawing were lawfully seized under plain view. The court also agreed with the state that photos of the home's interior is a fundamentally acceptable practice any time a warrant is executed.
- The court agreed with defendant, however, **that the warrant's description of digital devices was overly broad because it authorized the seizure of entire categories of devices (such as "removable storage devices") that could encompass more items than probable cause supported**. Additionally, although police tried to limit the scope of their search by time frame of their manufacture, the investigation determined the abuse occurred from 1998-2005 and the warrant authorized the seizure of devices "widely commercially available" in the early 1990s to mid-2000s, far **outside the time frame of alleged abuse.** The case has once again been returned to the trial court level.

State v. Monaco, 336 Or App 684 (2024)

- This was a double **murder** case. The issue on appeal was whether the **admissions defendant made to investigators during his interview were the involuntary product of police coercion.**
- The defendant was in a contentious relationship with victim A. Defendant was abusive and controlling toward A and eventually she got a restraining order against him, although the two still saw each other in violation of the order. On the night of the murders, defendant and A were arguing at a bar and A attempted to leave. Defendant ordered A into his car, and she complied out of fear. The two went back to A's house, and while defendant was in the bathroom A escaped the residence. Hours later, A drove back home hoping defendant was gone; instead, defendant intentionally hit her car with his car. A drove away onto the interstate, where defendant chased her and struck her multiple times at about 75mph. A was able to

elude defendant but he began calling and texting her incessantly, threatening to light her couch on fire and kill himself. Shortly thereafter, A was alerted that her residence was on fire. Both of A's roommates, who defendant knew about, were killed in the fire as well as four animals living in the home. Defendant sent A texts telling her he was "so sorry," but that A was the person who "did this" and was responsible for ruining everyone's lives.

- Police located and arrested defendant a few days later. After getting him medically evaluated and giving him a chance to sleep, officers Mirandized him and began a custodial interview. Defendant initially denied being at the residence when the fire started and denied any violence toward A. Officers **confronted him with the evidence against him**, including the phone evidence and video footage of him fleeing the home moments before the fire erupted. Officers implored defendant to **tell the truth and ease his conscience** to help the victim families gain closure. They told defendant that being honest would "help him" and stated that **this was his chance to show the judge, jury, and prosecutor that he was an honest person**. Defendant then admitted lighting the couch on fire, which led to the victims' deaths.
- Defendant argued on appeal that the tactics used by the interrogating officers were improper inducements. Defendant also argued that the circumstances (a 4-hour interview where he was not permitted to make phone calls) was coercive.
- The court disagreed. Defendant was evaluated medically, allowed to sleep, and not interviewed until well after his behavior had calmed. He understood and verbally waived his Miranda rights and did not invoke them at any point during the conversation. Although some of the officers' statements were intended to persuade him into admissions, at no point did the officers ever imply that he would be given any specific benefit by confessing. Without more, **the questions asked were mere adjurations to tell the truth. Defendant's statements were therefore admissible**.

State v. McClain, 336 Or App 524 (2024)

- This was a **DUII** case. Police contacted the defendant after he ran his vehicle into a tree. He appeared impaired, showed signs of impairment on FSTs, and was arrested for DUII. The arresting officer drove defendant to the police station for a breath test, and sat with defendant while explaining Implied consent and the breath testing process to him. Their interaction before and during the breath test was video recorded, and defendant ultimately had a .10% BAC. **The officer attempted to download the video footage into evidence, but the file did not transfer properly, and this was only discovered after the retention period for the video had lapsed**.

Defendant asked for the breath test evidence to be excluded because without the video footage, he could not adequately cross-examine the officer about the interaction, including whether the defendant's visible impairment was consistent with the breath test result.

- The court agreed. Because defendant could have used the lost video to impeach or rebut the officer's testimony, the material was arguably favorable to him. The court concluded that allowing the breath test evidence to be heard despite the lack of video was a due process violation. **The takeaway: Make sure your camera footage uploads properly!**

State v. Curry, 336 Or App 72 (2024)

- This was a **child sex trafficking** case. The defendant was convicted of numerous charges for sexually abusing, explicitly photographing, and pimping out the 15-year-old victim on numerous occasions, including at defendant's home. During the police investigation, detectives applied for a search warrant on defendant's residence, where they intended to seize evidence described by the victim during her police interviews. The requests in the warrant included the search commands listed below, which defendant argued were nonspecific and overly broad. (Note: the remaining portions of the warrant, some of which defendant challenged, were upheld by the court.)
  1. Any document that identifies the occupants of the above-listed premises (including but not limited to bills, leases, checks, credit cards, drivers' licenses, and correspondence)
  2. To search for, seize, and examine any cell phones and their contents for any of the evidence items listed in this warrant
  3. Any other evidence of the crime of Using a Child in Display of Sexually Explicit Conduct
  4. To search for, seize, and examine any computers and their contents, including computer hard drives, thumb drives, and any other digital evidence storage devices for any evidence of the items listed in this warrant.
- The court agreed with defendant that the above commands were not sufficiently particular to withstand constitutional scrutiny. In general, the **specificity requirement** means that a warrant must be "as precise as the circumstances allow" to avoid undue "rummaging" through a person's protected property. Warrants must also not be **overbroad,** which means the search cannot extend beyond the scope justified by probable cause. **Essentially: officers need to be very specific**

about *what evidence* they intend to search or seize and may only ask to search for it in area where that evidence is *likely to be found* (more than a mere possibility). In this case, the request to seize "any document" that could identify an occupant is nonspecific because it could arguably apply to virtually any type of record. Similarly, a request to search for "any evidence of X crime" will always be seen as nonspecific because it could encompass virtually any item. The court found commands (2) and (4) above overly broad based on *State v. Cannon*, which established the rule that **where a warrant seeks to seize digital devices and search them for evidence, the affiant must have independent probable cause for each individual device seized**. Officers cannot wholesale seize and search "all devices" merely because they are capable of containing evidence; it must be more likely than not that evidence will be located on each identified device.

State v. Miller, 336 Or App 606 (2024)

- This was a **DUII** case. The defendant was involved in a vehicle crash and upon contact with police, was visibly injured and taken to the hospital for evaluation. The officer who made first contact did not initially note signs of impairment. Once defendant was at the hospital, she was given fentanyl for pain and her blood was drawn. The blood draw revealed that defendant had an alarmingly high BAC (.456%) and police were again called. Defendant was Mirandized, agreed to talk to police, and told them she had two glasses of wine. The officer asked if she would consent to a second blood draw, and defendant agreed. The follow up blood draw showed defendant's BAC was .309%.
- **Defendant appealed her DUII conviction, arguing that her Miranda waiver and consent to the second blood draw were invalid. In defendant's view, she was too intoxicated to have voluntarily waived her rights or agreed to another blood sample.** Fortunately, the court was not persuaded. Notably, the court found that although the officer read her Miranda rights, the circumstances of their conversation were not compelling and defendant was not in custody, so Miranda was not actually required at that time. If Miranda was not required, defendant's argument about voluntariness is moot. Regarding the blood draw, **based on both officers' ability to have a coherent conversation with defendant and the lack of any circumstances indicating mental incapacity, the court found her consent draw was valid.**

State v. Huerta-Contreras, 336 Or App 251 (2024)

- This is an **Unauthorized Use of a Vehicle** case. Police were patrolling in a high crime area late at night when they observed defendant sitting in the driver seat of a parked vehicle. Upon running the license plate of the vehicle, the officer discovered it had been reported stolen earlier that day. The primary officer called for a backup unit, and the two ordered defendant to exit the car and arrested him for UUV. **Defendant appealed, arguing that there was no probable cause to arrest him.**
- The court agreed. **The prove UUV, there must be evidence that the suspect was aware of a consciously disregarded a substantial and unjustifiable risk that they do not have the owner's permission to operate a vehicle**. In this case, the court found that the **totality of facts included (1) the time of night, (2) a high crime area, (3) defendant appeared to be the driver and sole occupant, and (4) the vehicle was reported stolen just hours prior.** The court concluded that these facts, even in their totality, do not meet the probable cause standard of "more likely than not."
- **The takeaway**: the state may have been able to develop more facts or conduct additional investigation in this case. If officers had contacted the suspect and asked investigative questions, researched the circumstances of the car theft more thoroughly, or noted any other indicia of mental state (like a punched-in ignition or furtive behavior), PC may have been found. But **merely being in the driver seat of a stolen vehicle is not enough to arrest a person for UUV.**

State v. Duffee, 336 Or App 763 (2024)

- Defendant was convicted of **PCS methamphetamine**. She appealed, arguing that the trial court should have suppressed evidence obtained during her traffic stop because the officers **lacked reasonable suspicion to stop her and unlawfully expanded the stop by asking her if her purse contained drugs.**
- Defendant was the passenger in a truck that was stopped for having no license plate and an expired, possibly forged, trip permit. The driver (defendant's boyfriend) did not have a license or insurance to show police, and defendant chimed in, stating that she had recently acquired the truck and was "working on" getting insurance. In light of the circumstances, the officer ran the truck's VIN to investigate whether it was stolen (it was).
- While waiting for the VIN record, the officer Mirandized defendant and questioned her about how she got the truck. Defendant gave some vague answers and asked whether she was under arrest, to which the officer responded that he was "still

trying to figure that out." The officer asked defendant if she had any drugs or weapons in her bag, which she denied. The officer told defendant he was trying to decide whether to cite or arrest her and again asked if she had drugs, which she denied. The officer arrested defendant for UUV and searched the truck as well as her purse, where he found meth.

- **The court found that the officer had reasonable suspicion of UUV based on the totality of the circumstances**. The court also found that although the officer questioned defendant about drugs, which is arguably outside the scope of the reason for the stop, those questions did not actually lead to the discovery of the evidence. Defendant denied that she had drugs, and the meth was discovered based on the officer's valid search incident to arrest for UUV. Even if the officer hadn't asked the additional questions, the evidence would have been obtained.

State v. McVay, 336 Or App 354 (2024) – NPO

- Defendant was convicted of **Manslaughter 1, DUII, and Reckless Endangering** for driving a logging truck into oncoming traffic while impaired and causing a collision that killed one of the victims. Defendant appealed the Manslaughter 1 conviction, arguing that there was insufficient **evidence that he acted recklessly with "extreme indifference to the value of human life,"** considering his BAC (three hours after the crash) was .045%.
- The court disagreed. **Extreme indifference means "unconcern in a very high degree, exceeding the ordinary, that an act might cause the death of a human being**." This analysis is based on the totality of circumstances.
- The state's evidence showed that defendant was driving 62mph in a 45mph zone around a curve, was knowingly driving the truck while its front brakes were disabled and while the truck's load exceeded the permissible weight limit. Moreover, defendant had a prior conviction for DUII during which he attended treatment courses on the dangers of drinking and driving. Defendant also knew that based on how much he drank the previous night that his BAC at the time of the crash was recklessly high. The court upheld the conviction.

State v. Cephus, 337 Or App 124 (2024) – NPO

- Defendant was convicted of **DUII** and appealed, arguing that the court should have suppressed evidence of the DUII investigation, because in her view the officers unlawfully expanded the scope of the initial traffic stop.

- Defendant was **stopped for having expired registration**. Officers had not seen any unsafe driving, nor did they smell alcohol upon contacting her. However, the arresting officer did note the following: (1) it was approximately 1:30 in the morning, (2) defendant said she was coming from a party, (3) there was a strong odor of perfume in the vehicle, (4) defendant took a cough drop prior to speaking with police, (5) she had bloodshot eyes, and (6) there was an open alcohol container in the car.
- In isolation, each of those facts would likely not have justified expansion of the traffics top, but in their totality the court determined there was sufficient evidence to support the officer's reasonable suspicion of DUII. The court upheld the conviction.

State v. Barrett, 337 Or App 127 (2024) – NPO

- Defendant was convicted **of Assault 3 and DUII**. He appealed, arguing that the **arresting officer improperly testified that the FSTs were "nationally standardized," a "nationally accepted method," and "an accurate indicator" of impairment.** Defendant relied on *State v. Eatinger* (2019) and *State v. Ortiz* (2023), cases in which the Court of Appeals prohibited officers from testifying that FSTs are "scientifically validate," the product of scientific research, or supported by studies proving their validity. In those cases, the court concluded that the state must lay foundation that the witness is a scientific expert before permitting such testimony.
- This time the court disagreed. The court drew a distinction between this case and *Eatinger* and *Ortiz* – in this case, the officer did not make any reference to scientific validity, scientific studies, or scientific research. **The absence of "science" in the officer's testimony removes it from the category of cases requiring expert foundation. In this case, the officer merely testified about his training and experience regarding the administration and general reliability of FSTs in DUII investigations, which was within his scope of knowledge** and didn't require expert foundation.