

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

STATE OF OREGON,)
) Case No.98CR0139MA
Plaintiff,) SECOND SUPPLEMENTARY
) MOTION TO SUPPRESS
vs.) Request for Evidentiary
) Hearing, Request for
NEIL J. HAUSER,) Specific Findings
) of Fact and Conclusions
Defendant.) of Law

COMES NOW the defendant NEIL J. HAUSER, through his attorney, FOSTER A. GLASS, and moves the court for an order suppressing any and all evidence related to him, of whatever kind or nature obtained through, due to or by means of the installation and use of a "trap and trace device" on the telephone line listed to American Agriculture in Portland, Oregon, or evidence derived therefrom.

This Motion is based on the Constitution of the State of Oregon, Article I Section 9, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and ORS 165.657 et seq., including but not limited to ORS 165.659 and the statutes expressly incorporated therein.

The defendant requires an evidentiary hearing on this Motion, and requests that the court make specific, written findings of fact and conclusions of law based on the evidence at that hearing.

FACTS

The facts upon which this Motion is based are set out at length in the defendant's Motion to Suppress, the defendant's Supplementary Motion to Suppress, the defendant's Response to the City of Portland's Motion for Protective Order and the defendant's Memorandum of Law on the Installation and Use of Trap and Trace Devices.

ARGUMENT

I. Introduction

Defendant's Memorandum of Law on the Installation and Use of Trap and Trace Devices is incorporated here in full by this reference. The constitutional implications of the installation and use of an illegal Trap and Trace Device are discussed therein.

For purposes of this argument, it is taken as established that the trap and trace device (hereafter "trap") installed and maintained on the telephone line of American Agriculture in Portland, Oregon by members of the Portland Police Bureau "Marijuana Task Force"¹ is established and maintained outside the limited permission provided for the installation and use of such devices by Oregon law. In a word, it is illegal.

It is also taken as established that the initial information that led the police to focus on Neil Hauser as a suspected marijuana grower came from the use of that device.

II. Use of Trap and Trace Is Interception of Communication

1989 Oregon Laws Chapter 983 made significant changes in the law concerning Interception of Communications, which begins in the code with ORS 133.721, authorized the installation and use of pen registers and traps, imposed general search warrant requirements and interception of communications requirements on that installation and use, and expressly prohibited the installation and use of traps and pen registers "[E]xcept as provided in this Act, . . ." 1989 Or Laws 983 § 16.

That section was codified as ORS 165.659, which provides:

Except as provided 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, no person may install or use a pen register or trap and trace device.

The first five statutes incorporated by ORS 165.659 control the requirements for, and the execution of, search warrants in general and mobile tracking devices. The balance of the incorporated statutes in Chapter 133 deal with the interception of communications. It is undeniable, therefore, that the installation and use of a trap is, as a matter of law, the interception

¹. See Attached affidavit of Nathan Shropshire

of a communication.

ORS 133.721 provides in pertinent part:

(1) "Aggrieved person" means a person who was a party to any wire, electronic or oral communication intercepted under ORS 133.724 or a person against whom the interception was directed.

(2) "Contents," when used with respect to any wire, electronic or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport or meaning of that communication.

* * * *

(5) "Intercept" means the acquisition, by listening or recording, of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

* * * *

(9) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception, whether furnished or operated by a public utility or privately owned or leased.

When read in light of the allegations of the affidavit underlying the search warrant in this case, Neil Hauser is clearly an "aggrieved person" and the information secured by the trap and relied on, at least in part, for the allegation of probable cause to search constitutes "contents" of a "wire communication" which was "intercepted"² under applicable law.

III. Suppression Mandated

The most significant statutory incorporation in the regulation of traps is ORS 133.735. In pertinent part it provides:

(1) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state, or a political subdivision thereof, may move to suppress the contents of any wire, electronic or oral communication intercepted under ORS 133.724,³ **or evidence derived therefrom**, on the grounds that:

(a) The communication was unlawfully intercepted;

². "Electronic, mechanical or other device" means any device or apparatus which can be used to intercept a wire, electronic or oral communication, * * * ORS 133.721(4).

³. ORS 133.734 was also incorporated in ORS 165.659

(b) The order of authorization or approval under which it was intercepted is insufficient on its face; or

(c) The interception was not made in conformity with the order of authorization or approval.

(2) Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire, electronic or oral communication, or evidence derived therefrom, shall be treated as having been unlawfully obtained. The judge, upon the filing of such motion by the aggrieved person, may in the judge's discretion make available to the aggrieved person or the person's counsel for inspection such portions of the intercepted communications or evidence derived therefrom as the judge determines to be in the interests of justice. (Emphasis added).

* * * *

Based on the legal analysis contained in defendant's Memorandum of Law on the Installation and Use of Trap and Trace Devices, defendant alleges that his wire communications with American Agriculture were unlawfully intercepted and that suppression of both the primary and derivative evidence of that interception is warranted on that ground alone.

The defense is not, at the time of the drafting of this Motion, privy to the order(s) authorizing the installation and use of the device that trapped those communications, nor the order(s) authorizing its installation and use. He reserves the right to supplement this Motion at a later time if it appears that even more statutory requirements have been ignored or flouted.

CONCLUSION

For the reason set out above, as well as the reasons contained in the other submissions of the defense, defendant requests that the court grant his Motion(s) to Suppress.

