
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,)	
)	Gilliam County Circuit Court
Plaintiff-Respondent,)	No. 050014CR
Petitioner on Review,)	
)	CA A128670 (Control)
vs.)	
)	SC S056073
GEORGE ALLEN HECKATHORNE,)	
)	
Defendant-Appellant,)	
Respondent on Review.)	
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STATE OF OREGON,)	Gilliam County Circuit Court
)	No. 050015CR
Plaintiff-Respondent,)	
Petitioner on Review,)	CA A128671
)	
vs.)	SC S056073
)	
CYRUS DALE HECKATHORNE,)	
)	
Defendant-Appellant,)	
Respondent on Review.)	

BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW,
GEORGE ALLEN HECKATHORNE AND
CYRUS DALE HECKATHORNE

Review of the decision of the Court of Appeals on
appeal from a judgment of the Circuit Court of Gilliam County
The Honorable JOHN V. KELLY, Judge

Opinion filed: February 27, 2008
Author of Opinion: Schuman, J.
Concurring Judges: Laundau, P.J., and Ortega, J.

Continued...

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RESPONDENTS' BRIEF ON THE MERITS

Legal Questions Presented

In determining whether a container announces its contents under Article I, section 9,¹ may a court consider the knowledge, training, and particular experience of the investigating officer and may a court consider the context in which the container is found? Does a person retain a privacy interest in the contents of a closed container when the container does not unequivocally announce all of its contents to the public?

Proposed Rule of Law

The question of whether a container announces its contents is a legal question that depends only on the nature of the container. The particular training and experience of an investigating officer is immaterial as are the context and the circumstances in which the container is found. A person's privacy interest in the contents of a container is not lost unless the container unequivocally announces all of its contents to the public.

Introduction and Summary of Argument

The Oregon Constitution guarantees people a privacy interest in their persons, houses, papers, and effects. Or Const, Art I, §9. That interest is protected by the requirement that the government either obtain a warrant or establish an exception to the warrant requirement prior to searching. Where an item is in plain view, there is no

¹ Article I, section 9, of the Oregon Constitution provides:

“No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

privacy interest and a police officer may observe the item without triggering the protections of Article I, section 9. In rare cases, an item hidden from view in a closed container will be considered in plain view. In order to be so considered, the container must, by its specific nature, unequivocally announce its contents. If the container does not announce all of its contents to the general population, the privacy interest remains in place and the government must satisfy the warrant requirement.

The state asks this court adopt a rule allowing a police officer to open a closed container whenever the officer is able to make an educated guess about the contents. Under the state's reasoning, whenever an officer has sufficient probable cause to believe a container holds contraband, his entry into the container should not be considered a search and, hence, he would not need to establish any exception to the warrant requirement. By so advocating, the state blurs the distinction between probable cause and plain view. No privacy interest protects containers that announce their contents because the contents are the equivalent of being in plain view. Thus, whether a container announces its contents is resolved by the specific characteristics of the container. The privacy interest is not defeated merely because an officer with specialized training and experience is able to predict, even with a high degree of certainty, the contents. For that reason, the officer's training and experience is immaterial as is the context in which the container is found. To conclude otherwise would place too much authority and discretion in the hands of law enforcement and would be contrary to the purpose of Article I, section 9. The Court of Appeals' analysis comports with that purpose and is not inconsistent with this court's opinions. This court should affirm the decision of the Court of Appeals.

ARGUMENT

On review, the state contends that Court of Appeals decisions applying *State v. Owens*, 302 Or 196, 729 P2d 524 (1986), and *State v. Herbert*, 302 Or 237, 729 P2d 547 (1986), to searches of closed containers unreasonably restrict those holdings. The state argues that *Owens* and *Herbert*, read together, stand for the proposition that an officer's training and experience along with attendant circumstances are factors in determining whether a container announces its contents. Further, according to the state, a container need not announce all of its contents. Rather, if a container announces any contraband, the entire privacy interest in the container has been extinguished. Finally, the state also complains that Court of Appeals' decisions on the issue are inconsistent. The state is incorrect. The corollary allowing for examination of containers that announce their contents applies to an exceptionally small class of containers. Also, the state has misconstrued *Herbert* and has untenably conflated the distinct legal notions of probable cause and plain view. Finally, although defendants agree that some of the decisions of the Court of Appeals have been inconsistent with each other and with the holdings of *Owens*, the decision in this case was correct.

I. The “announces its contents” rule has limited application.

The right to be free from unreasonable search and seizures under Article I, section 9, of the Oregon Constitution covers privacy interests as well as possessory interests. *Owens*, 302 Or at 206. A privacy interest is “an interest in freedom from particular forms of scrutiny.” *State v. Campbell*, 306 Or 157, 170, 759 P2d 1040 (1988). The privacy interests protected by Article I, section 9, are commonly

“circumscribed by the space in which they exist and, more particularly, by the barriers to public entry (physical and sensory) that define that private space.” *State v. Smith*, 327 Or 366, 373, 963 P2d 642 (1998). Whether a privacy interest is protected by Article I, section 9, is determined by “an objective test of whether the government’s conduct ‘would significantly impair an individual’s interest in freedom from scrutiny, *i.e.*, his privacy.’” *State v. Dixon/Digby*, 307 Or 195, 211, 766 P2d 1015 (1988) (analyzing privacy interests in unimproved land outside the curtilage of a home).” *State v. Wacker*, 317 Or 419, 425, 856 P2d 1029 (1993). An invasion of a privacy interest is a search. *Owens*, 302 Or at 206.

In order for a search to be a constitutionally permissible, the state must either obtain a warrant in advance or must establish an exception to the warrant requirement. *State v. Carter*, 342 Or 39, 43, 147 P3d 1151 (2007) (citing *Owens*, 302 Or at 206). Where, however, the act of observing an item does not result in an invasion of a privacy interest, the observation is not a search under Article I, section 9. *Wacker*, 317 Or at 425. In *Wacker*, this court noted:

“The threshold question in any Article I, section 9, search analysis is whether the police conduct at issue is sufficiently intrusive to be classified as a search. No search occurs unless the police invade a protected privacy interest. If the police conduct is not a search within the meaning of Article I, section 9, this court will not reach the issue of whether the conduct was unreasonable.”

Id. at 426 (citing *State v. Ainsworth*, 310 Or 613, 616, 801 P2d 749 (1990)). In *Ainsworth*, this court described the plain view doctrine as follows: “We hold that a police officer’s *unaided observation*, purposive or not, from a lawful vantage point is

not a search under Article I, section 9, of the Oregon Constitution.” 310 Or at 621 (emphasis added).

Application of the plain view doctrine becomes murkier where the item to be regarded is held in a container. In *Owens*, this court explained:

“When the police lawfully seize a container, they can thoroughly examine the container’s exterior without violating any privacy interest of the owner or the person from whom the container was seized. For example, the police can observe, feel, smell, shake and weigh it. Furthermore, not all containers found by the police during a search merit the same protection under Article I, section 9. Some containers, those *that by their very nature announce their contents* (such as by touch or smell) do not support a cognizable privacy interest under Article I, section 9. Transparent containers (such as clear plastic baggies or pill bottles) announce their contents. *The contents of transparent containers are visible virtually to the same extent as if the contents had been discovered in ‘plain view,’ outside the confines of any container.* Applying the doctrine of ‘plain view’ to transparent containers, we hold that no cognizable privacy interest inheres in their contents, and thus that transparent containers can be opened and their contents seized. No warrant is required for the opening and seizure of the contents of transparent containers or *containers that otherwise announce their contents.* Under the Oregon Constitution, a lawful seizure of a transparent container is a lawful seizure of its contents.”

302 Or at 206 (emphasis added). Under *Owens*, items in transparent containers are essentially in plain view, and no privacy interest exists therein. The court acknowledged, in *dicta*, the possibility that some opaque containers could announce their contents if the contents were virtually visible to the same extent had they been found in plain view. In such circumstances, no privacy interest would adhere to the container.

At the heart of the issue in this case is the dispute over how to determine when a container announces its contents. The state advocates for a test that would allow courts to consider a broad range of factors, many of which have nothing to do with the

container itself. Under the state’s interpretation, so long as a single person can look at a container and make a confident conclusion about one of the items within, then no privacy interest exists. The state’s conclusions are based on flawed understanding of the purpose of Article I, section 9.

By its express wording, the first clause of Article I, section 9, guarantees people the right to be secure in their persons, houses, papers, and effects. That clause contains no limitations. There is scant evidence of the intent of the framers of the Oregon Constitution in adopting the probable cause requirement found in the second clause, but it appears the concerns were similar to those of the framers of the Bill of Rights in the United States Constitution. As explained by Judge Deady,

“[Article I, section 9] is copied from the fourth amendment to the constitution of the United States, and was placed there on account of a well-known controversy concerning the legality of general warrants in England, shortly before the revolution, not so much to introduce new principles as to guard private rights already recognized by the common law.”

Sprigg v. Stump, 8 F 207, 213 (CCD Or 1881). The rule against exploratory searches is a “basic constitutional rule[.]” *State v. Hawkins*, 255 Or 39, 44, 463 P2d 858 (1970) (quoting *Stanley v. Georgia*, 394 US 557, 570, 89 S Ct 1243, 22 L Ed 2d 542 (1969)).

In keeping with the purpose of Article I, section 9, the determination of whether an intrusion constitutes a search is not a decision left to the discretion of police officers. “Magistrates [sic], rather than police officers, are to decide when, and to what extent, the privacy of the home is to be disturbed.” *State v. Chinn*, 231 Or 259, 265, 373 P2d 392 (1962) (citing *United States v. Lefkowitz*, 285 US 452, 454, 52

S Ct 420, 76 L Ed 877, 82 ALR 775 (1932)). The same applies to a person's privacy interest in their effects. *Hawkins*, 255 Or at 42 (search of the text of a diary found during execution of a search warrant was unlawful because "[i]t was a magistrate's, and not an officer's, duty to determine whether an invasion of this additional area of defendant's privacy was justified by the information inadvertently discovered"). This court has underscored that notion:

"It seems never to become superfluous to repeat that the requirement of a judicial warrant for a search or seizure is the rule and that authority to act on an officer's own assessment of probable cause without a warrant is justified only by one or another exception."

State v. Lowry, 295 Or 337, 346, 667 P2d 996 (1983). Thus, when deciding what information can be considered in determining whether a privacy interest protects the contents of a closed container, pains must be taken to ensure that the information is not dependent on the idiosyncrasies of the state agent who seeks to undertake the search. Instead, Article I, section 9, requires that the existence of a privacy interest either be so clear that it is not in any dispute or it must be determined by an impartial magistrate. In light of that, the set of containers that "by their very nature announce their contents," is necessarily very small.

In light of the foregoing, the difficulty with the state's argument becomes clear. The state conflates two distinct legal doctrines: plain view and probable cause. Those concepts have distinctively different meanings and purposes. The plain view doctrine allows a police officer to examine an item while observing from a lawful vantage point. The examination does not invade a privacy interest and is not a search. *Ainsworth*, 310 Or at 621. As such, the observation is not constrained by the

requirements of Article I, section 9. Probable cause, on the other hand, is an element by which the state can justify an invasion of the interest protected by Article I, section 9. It exists when the facts “must lead a reasonable person to believe that seizable things will probably be found in the location to be searched.” *State v. Anspach*, 298 Or 375, 380-81, 692 P2d 602 (1984).

The two concepts have different roles in analyzing police actions concerning closed containers. In evaluating situations like the one presented by this case, the initial consideration is whether the examination is a search under Article I, section 9. If it is, then the analysis turns to whether the search was constitutionally permissible, and the state may need to prove probable cause and an exception to the warrant requirement. If, on the other hand, the examination is not a search, the analysis ends because the protections afforded by Article I, section 9, are not implicated. The two possibilities (a search or a non-search) are mutually exclusive. Whether the police had probable cause is relevant if the examination is a search. It has no bearing on whether a privacy interest exists in a closed container. For that reason, it is inaccurate and somewhat misleading to cast the “announces its contents” rule in the rhetoric of probable cause and an officer’s subjective belief.

Whether an item is in plain view depends not on the observer’s belief but on the immutable circumstances of the item’s location. Either it is visible, or it is not. Similarly, whether a container announces its contents depends on the evident characteristics of the container. Certainly, facts that support a conclusion that a container announces its contents may be the same facts that support a police officer’s probable cause. Still, the two conclusions (plain view versus probable cause) are

legally distinct and carry different ramifications. The distinction is not merely academic. A police officer might be absolutely certain that he knows the contents of a closed container. He may rely on a variety of information in reaching his conclusion. If, however, the container does not by itself announce its contents, the officer must still obtain a warrant or satisfy an exception to the warrant requirement. To conclude otherwise would be to allow the state to dispense with that requirement whenever the officer has probable cause.

The state disagrees with the foregoing analysis, relying in large part on *Herbert* and the state's belief that *Herbert* formulated the "announces its contents" rule for opaque containers. It did not. There, police arrested the defendant on an outstanding warrant. The arresting officer allowed the defendant to go to his vehicle to retrieve some identification. The defendant got into the car, leaving the door partly open, and withdrew a one inch by one-half inch paperfold. The defendant then attempted to surreptitiously hide the paperfold in the truck. The officer, observing the defendant's actions, believed the paperfold contained contraband. He seized it and later opened the paperfold and field tested the contents, which turned out to be cocaine.

On review, this court framed the question presented as "whether the arresting police officer *lawfully seized a paperfold* that he had observed defendant remove from his clothing following defendant's arrest for a crime unrelated to criminal activity in drugs." *Id.* at 239 (emphasis added; footnote omitted). The court rejected the defendant's argument that the paperfold "could just as possibly have been used to

store or transport small items, such as unsnelled fishhooks, jewelry or radish seeds[.]”

Id. at 242. The court instead concluded:

“Some containers of illicit drugs may be so uniquely associated with the storage and transportation of controlled substances that their unique packaging alone might provide, to an officer with training and experience in the area of drug detection, probable cause to believe they contain a controlled substance.”

Id. The court refused to decide whether a paperfold was a container uniquely associated with the storage of controlled substance. It instead noted that the paperfold, when considered in the context in which it was discovered (*i.e.*, the fact that the defendant was about to be taken to jail, his furtive movements, and his attempt to distract and mislead the officer), provided a sufficient basis to “give the officer probable cause to believe the paperfold contained contraband.” *Id.* Thus, this court determined the officer had lawfully seized the paperfold.

Next, this court elected to address the defendant’s argument that the subsequent opening of the paperfold and testing the contents was an unlawful search.

The court concluded:

“We have stated that the officer had probable cause to seize the paperfold and that the officer believed that the paperfold contained contraband. Because the officer, based upon his experience, had probable cause to believe that the paperfold contained contraband, he had the right to search the paperfold for controlled substance and, therefore, had the right to open that container. Once the container was opened and the contraband discovered, he had the right to test it. *State v. Owens*, 302 Or 196, 729 P2d 524 (1986).”

Id. at 243.

The state and defendants no doubt disagree about the significance of that part of *Herbert*. The state appears to believe that an officer’s possession of probable cause

renders the contents in plain view and obviates the need to obtain a warrant, but that is an oversimplification. *Herbert* addressed two issues: the seizure of the paperfold, and the subsequent search of the contents. This court's acknowledgment that an officer's training and experience in drug detection may allow an officer to recognize certain containers as being uniquely associated with storage of controlled substances was pertinent to evaluating whether the officer had probable cause to *seize* the container. It had nothing to do with whether the container announced its contents, and this court specifically declined to address that question. *Herbert*, 302 Or at 242 (“[W]e are not here required to decide whether an opaque paperfold is such a unique container of illicit drugs.”).

Also, this court's conclusion that the officer possessed probable cause to seize the paperfold is a separate question from whether the officer had probable cause to search the contents. *State v. Tanner*, 304 Or 312, 316, 745 P2d 757 (1987) (“Searches and seizures are separate acts calling for separate analysis.”). In considering the search, this court's bare holding was that, because the officer had probable cause to seize, he had “the right to search the paperfold for controlled substance[.]” *Herbert*, 302 Or at 243. The court did not elaborate on its reasoning likely because it considered the search to be one allowable as a search incident to arrest. Police are allowed to conduct a search incident to a person's arrest when the search is reasonable in time, place, and scope and is necessary to discover evidence related to the crime for which the defendant is under arrest. *State v. Hoskinson*, 320 Or 83, 86, 879 P2d 180 (1994); *State v. Caraher*, 293 Or 741, 758-59, 653 P2d 942 (1982). In such situations, police are allowed to open closed containers. *Owens*, 302 Or at 201.

Although the officer in *Herbert* had initially arrested the defendant on an outstanding warrant, the officer had an additional basis to arrest the defendant upon seeing the paperfold. As a result, the officer could seize the paperfold and search it incident to the arrest. *Cara her*, 293 Or at 758-59.

That this court concluded the search in *Herbert* was a search incident to arrest is supported by its reliance on *Owens*. There, the officer's initial search of the defendant's purse was a lawful search incident to the defendant's arrest for theft. When the officer later observed an amber vial containing a powder, the officer developed probable cause to believe the defendant had committed a controlled substances offense. That, in turn, provided an additional basis for the officer to open the closed compacts in defendant's purse to search for controlled substances. As the court explained in *Owens*,

“Not infrequently, an officer will have probable cause to arrest a suspect for more than one offense. For example, in the course of an arrest for a traffic offense, evidence is sometimes seen in plain view which gives the officer probable cause to believe that another, more serious, crime has been committed or is being committed in his presence.”

302 Or at 203. The officer need not articulate the new ground for arrest, so long as he “formulates such a basis to himself at the time he acts.” *Id.* at 204. Because the search of the paperfold in *Herbert* was a search incident to arrest, that case is not properly considered as a part of the “announces its contents” jurisprudence. That is perhaps why this court in *Herbert* refused to decide whether the paperfold was a container that announced its contents.

In light of the foregoing, the state's reliance on *Herbert* is misplaced. *Herbert* did not stand for the proposition that police may search closed containers whenever

they possess probable cause to believe the container holds contraband. *Owens* remains the controlling authority, and the class of containers that announce their contents will be necessarily small.

II. A container must indisputably announce its entire contents to the world regardless of its context in order for the contents to be considered virtually in plain view.

The state argues that the Court of Appeals has unreasonably limited the range of containers that would announce their contents. Under the state's analysis, whenever one person is able to make a sound guess as to the contents of a closed container, even if that person is relying on specialized training and expertise and even if the container announces only one of its contents, all of the contents are in plain view and any privacy interest as to all of the contents is extinguished. That analysis is incorrect.

A. An officer's training and experience is not decisive.

The state contends that the Court of Appeals incorrectly applied *Owens* when it held that the opaque containers must announce their contents unequivocally to the world. That court stated:

“This review of what we might call ‘content announcement’ cases compels the conclusion that, although the Supreme Court and this court have recognized the theoretical possibility that an opaque container can ‘announce’ its contents ‘to the world,’ * * * such containers are extremely rare. * * * Although we do not now categorically foreclose the possibility that an unlabeled opaque closed container might announce its contents, we conclude that such a container must make that announcement unequivocally and ‘to the world,’ and not merely to those who have special expertise derived from training or personal experience. [*State v. Stock*, 209 Or App 7, 12, 146 P3d 393 (2006)] (Whether a container announces its contents is an

inquiry ‘independent of * * * the subjective knowledge and experience of the officer who found it.’).”

State v. Heckathorne, 218 Or App 283, 290, 179 P3d 693, *rev allowed*, 345 Or 158 (2008) (citations omitted). The state reasons that the foregoing reasoning is at odds with this court’s holding in *Herbert* because an officer’s training, experience, and any information personally known to the officer are pertinent considerations in evaluating whether a container announces its contents.

As discussed above, *Herbert* is inapposite. That aside, the primary difficulty with the state’s argument is that it is grounded on the assumption that whether a container announces its contents will vary depending on the circumstances and the observer. That is incorrect. Containers that announce their contents are the equivalent of an item being in plain view. People have no privacy right to items that are in plain view. Inherent in those premises is the notion that it is the exposure of an item to the world that extinguishes the privacy interest in the item. Although it has not expressly adopted that concept, this court has incorporated that understanding into opinions applying the plain view doctrine.

In *State v. Sargent*, 323 Or 455, 463 n 5, 918 P2d 819 (1996), which held that items discovered in plain view during service of an arrest warrant were not subject to suppression, the court noted, “Under the ‘plain view’ doctrine * * *, the intrusion must be valid and it must be *immediately apparent* that the items are crime evidence.” (Emphasis added.) In *Lowry*, 295 Or at 347, holding that the opening of a transparent container to test an unknown substance was an invasion of a privacy, the court noted that “the indisputable nature of the substance” did not “become evident to the

officers' in the course of the routine of the arrest as may happen when unlawful weapons, burglar tools * * * or other contraband is discovered in plain view in a traffic stop[.]” In *State v. Brown*, 301 Or 268, 286-87, 721 P2d 1357 (1986) (Linde, J., dissenting), addressing whether police must obtain a warrant before searching the trunk of a lawfully stopped automobile, Justice Linde explained, “[I]t has long been held that purposeful looking or listening alone does not make unlawful a warrantless search of what can be seen in plain view or overheard *without the aid of technical enhancement.*” (Emphasis added). This court said the same thing in *State v. Louis*, 296 Or 57, 672 P2d 708 (1983), where it considered whether the use of a telephoto lens to take photos of the defendant inside his home was a search:

“[N]ot everything that police officers see or hear one do in private quarters requires a search warrant. The question is when observation (or listening) becomes a ‘search’ within the legal meaning of that term. Persons may conduct themselves in otherwise protected areas in such a way that their words or acts can plainly be seen or heard outside without any special effort. One would not, for instance, expect police to obtain a search warrant to charge violation of a noise ordinance against sounds emanating from private premises. * * *

“Such a case may not be made out, however, *if objects or conduct in protected premises can be seen or overheard only by technologically enhanced efforts. A determined official effort to see or hear what is not plain to a less determined observer may become an official ‘search.’*”

Id. at 61 (emphasis added). Finally, in *Wacker*, this court considered whether police had invaded the defendant’s privacy when police used a starlight scope and a video camera to observe the defendant’s activities in a vehicle parked outside a tavern. The court concluded:

“Defendant here chose to carry out his activities in the parking lot of a tavern that was open for business. Patrons of the tavern were passing

regularly within a few feet of [the] car. Defendant also chose to carry out his activities in a car with its console or overhead light on. That light made the interior of the car and [the driver] visible to passersby, as well as to the officers who were stationed only 29 feet away. No privacy interests of defendant were invaded here and, thus, there was no search while the car was parked in the tavern's parking lot. *The open-to-the-public nature* of defendant's and [the driver's] location and activities in a lighted car in a tavern parking lot during business hours establishes that no government conduct significantly impaired defendant's privacy."

Id. at 426-27 (emphasis added). Thus, this court has repeatedly recognized that a privacy interest in an object extinguished only if the item is indisputably evident to the general public without the aid of technical enhancement.

That must be the conclusion in order for the purpose of Article I, section 9, to be satisfied. As discussed above, the "announces its contents" corollary was not meant to create a new class of items unprotected by Article I, section 9. It was intended to apply in those rare situations when an object, although unseen, is nonetheless obvious due to the very specific nature of its container. An officer's training and experience are relevant only to the determination of the existence of probable cause. Assuming the officer had probable cause, he would still need to establish an exception to the warrant requirement before opening the container and examining the contents.

B. The context in which a container is found is not a factor in determining whether the container announces its contents.

The state next argues that the context in which a container is found can be considered as a factor in determining whether the container announces its contents. In doing so, the state takes issue with decisions from the Court of Appeals in which that court declined to consider the container's context in determining whether the

container announced its contents. *See, e.g., State v. Stock*, 209 Or App 7, 12, 146 P3d 393 (2006). The state further contends that the Court of Appeals has been inconsistent on this point because it has allowed consideration of context in connection with transparent containers but not opaque containers. Finally, the state notes that human observation and recognition is heavily dependent on context. Again, the state's argument confuses the point.

The problem with analyzing the question this way is the same as in considering the officer's training. The sole question is whether a container announces its contents. That determination depends on the readily-evident characteristics of the container, which are constant regardless of the location of the container. Only containers that by their very nature betray the identity of their contents are the practical equivalent of finding the item in plain view. While it may be possible to draw hints as to the contents from the attendant circumstances, those hints do not determine whether this specific container announces its contents. Rather, the attendant circumstances, like the officers training, are factors to be considered in determining whether the officer has probable cause. Thus, they are relevant only in evaluating the lawfulness of a warrantless search. To allow contextual considerations is to tie an individual's privacy interest to the cleverness of the observer, which would frustrate the purpose of Article I, section 9.

The state uses the example of a salt shaker containing a white, granulated crystal. The state notes that the container announces it contains salt both as a result of the type of container and by its proximity to the pepper mill. Thus, the state reasons, the context is a relevant consideration in reaching a conclusion about the contents.

That argument is specious. If the container is transparent, then its contents are visible, and there is no privacy interest regardless of whether it is sugar, salt, or methamphetamine. The proximity to the pepper mill is irrelevant. If the container is opaque, then it is not possible to identify the contents. Unless it is evident to the world that the container must contain salt, the container does not announce its contents and the owner has a protected privacy interest in the contents. The fact that the salt is proximate to the pepper mill is merely something that can be relied on to form an opinion about whether the shaker contains salt or sugar. The context of a container is collateral information that is relevant only in establishing probable cause.

C. In order to extinguish the privacy interest in a closed container, the container must announce all of its contents.

The state next takes issue with the principle that “containers that announce their contents must do so in a way that asserts that contraband is their sole content to ensure that opening those containers will not reveal other unknown contents, thereby constituting a search.” *Heckathorne*, 218 Or App at 289. The Court of Appeals applied that same reasoning in *State v. Kruchek*, 156 Or App 617, 622-23, 969 P2d 386 (1998), *aff’d by an equally divided court*, 331 Or 664, 20 P3d 180 (2001), and the state takes issue with that decision as well. In *Kruchek*, a police officer stopped the defendant’s vehicle for a traffic infraction. After learning that the defendant’s operator’s license was suspended, the officer arranged for the vehicle to be towed. During the administrative inventory of the vehicle’s contents, the officer discovered a cooler and noted that the cooler exuded a smell of freshly cut marijuana. He opened the cooler, finding marijuana, scales and an automatic timer. *Id.* at 620. The trial

court denied the defendant's motion to suppress after concluding that the cooler announced its contents because the marijuana inside could be smelled from the outside. The Court of Appeals overturned that ruling, holding that the entry into the cooler was a warrantless search. That court rejected the argument that the container announced its contents because:

“The cooler in defendant's vehicle was an opaque container that could have contained any number of items, legal or illegal, and that happened to contain marijuana among its contents. The fact that the officer could smell marijuana in the cooler cannot, by itself, defeat the privacy interest that defendant had in the cooler. * * * *Owens* and its progeny require that that be the case. If [containers do not announce that contraband is their sole content], then opening the container would constitute a search, because it would open to scrutiny contents that were not then known.”

Id. at 621-22. In the footnote immediately following that passage, the court explained:

“The dissent claims that *State v. Herbert*, 302 Or 237, 729 P2d 547 (1986), holds to the contrary and that it controls this case. The dissent is mistaken. *Herbert* involved a principle quite different from the one at issue in *Owens*. *Owens* involved whether opening a container that the police had in their possession constituted a search. *Owens* held on its facts that it did not. *Owens*, 302 Or at 206-07. *Herbert*, in contrast, involved a situation in which opening the container did constitute a search, *Herbert*, 302 Or at 243, but it was justified by probable cause and exigent circumstances. *Herbert* simply has no application to this case, in which the state made no effort to establish that the search that occurred when the police opened the container was justified by exigent circumstances.

“If *Herbert* stood for the proposition that the police are free to search without a warrant or an exception to the warrant requirement a container that they have in their possession, then there was no reason for the court to go to the trouble that it did in *Owens* to establish when it is not a search to open such a container.”

Id. at 622 n2.

The state contends that the Court of Appeals' reasoning is contrary to the holdings of *Owens* and *Herbert* and that such a rule would require an almost impossible degree of certainty as to the contents of a container. The state is incorrect. For the reasons previously discussed, nothing in *Kruczek* or *Heckathorne* is inconsistent with *Owens*. Also, as explained above and by the Court of Appeals in *Kruczek*, *Herbert* is not on point. Furthermore, the state misapplies the Court of Appeals' reasoning. The state reads *Heckathorne* and *Kruczek* as unreasonably narrowing the range of situations that will allow officers to search closed containers without a warrant. It is not the Court of Appeals that has narrowed the range of options. Rather, the limits of the closed container rule have been constrained by the protections of Article 1, section 9, since the rule was recognized.

The state argues that the restrictions could lead to an absurdity by prohibiting the examination of a transparent container because the substance inside may conceal another item. Thus, the state contends, it would be virtually impossible to be certain that the entire privacy interest has been extinguished even when the container is transparent. That is incorrect. The possible permutations are quite few. The container is either transparent and the contents visible, or it is not. If it is transparent, and if the item is not contraband, police have no authority to seize it even though there is no privacy interest. It matters not, in that situation, whether something else is contained within the visible contents. If, alternatively, the item visible is contraband, the police may seize it and, because no privacy interest exists, open the container and further examine the contraband substance. *Owens*. If the visible substance contains another, hidden substance, there is no privacy right protecting the hidden substance.

Not only would a person not be reasonable in expecting to retain a privacy interest in an item stored within visible contraband,² but also it follows logically that, because visible contraband can be seized, no privacy right exists over items contained within. *Kruchek* and *Heckathorne* do not thwart the state's ability to seize and examine transparent containers containing contraband.

If, on the other hand, the container is opaque, a person's privacy interest is retained unless the container announces all of its contents. Again, the test set out by this court was that the container must be of the type that by its very nature it announces its contents. *Owens*. Where a container merely announces a content, no matter how convincing that announcement, if it does not announce all of its contents, the privacy interest as to the other contents has not been extinguished. For example, the cooler in *Kruchek* was not a container that by its nature announced its contents. It could have contained anything small enough to fit inside. To be certain, the cooler itself in fact announced nothing. Instead, the marijuana announced by its smell, which was detectable by smell because the container was not completely sealed. The container remained silent. While the smell gave police probable cause to obtain a warrant (or possibly a foundation for searching per an exception to the warrant requirement), it did not transmute the container's generic characteristics into a container that announced its contents.

² Unlike the Fourth Amendment to the United States Constitution, Article I, section 9, does not protect a person's reasonable expectation of privacy. Instead, it protects "the privacy to which one has a right." *State v. Campbell*, 306 Or 157, 164, 759 P2d 1040 (1988).

The Court of Appeals' interpretation is correct. In order to give meaning to the protection afforded by Article I, section 9, the state must be required to establish that its intrusion does not violate a person's privacy interest. The state can meet that test only if it can establish that all of the contents of a container are virtually in plain view. Otherwise, a privacy interest remains intact and the state must seek another lawful way to examine the contents.

D. The Court of Appeals decisions are largely consistent with one exception, which this court should disavow.

Finally, the state argues that the Court of Appeals has inconsistently applied the “announces its contents” rule of *Owens*. In particular, the state notes that the Court of Appeals has held that, where a person labels a video tape “kid porn”, the tape announces its contents even though the tape may contain images other than what the label indicates. *State v. Ready*, 148 Or App 149, 939 P2d 117, *rev den*, 326 Or 68 (1997). The state notes that a label on a video tape provides no assurance that the tape contains only the images the label describes. Defendant agrees that the holding from *Ready* is inconsistent with the holdings from *Kruchek* and this case. *Ready*, however, is also inconsistent with *Owens*, and its reasoning should be disavowed.

In *Ready*, police officers conducting a consent search of a home found a box of videotapes. The tapes had “hand-scribed titles as ‘kid porn from Larry — movies then stills’ and ‘Hot High and Horny — my porn from Larry.’” *Id.* at 152. The labels were plainly visible. The officers seized the tapes and, without obtaining a warrant, viewed them while still at the home. The Court of Appeals concluded:

“[N]o warrant is required for the examination of evidence that announces its contents. *State v. Owens*, 302 Or 196, 206, 729 P2d 524

(1986) * * *. The label of these items announced their contents as contraband.”

Id. at 156.

Defendants respectfully disagree with that reasoning. The tape did not announce its contents in the sense contemplated by *Owens*. By its nature, a video tape is simply incapable of announcing its contents. The contents of the tape were images and sounds that could be examined only through the use of a mechanical device. The label applied by the owner may be an admission by that person as to the contents, but the container itself continues to withhold its contents.

The point is a critical one. If labeling a tape is the equivalent to placing the images in plain view, then affixing a label to a tape would always eradicate any privacy interest in the tape. Suppose, for example, the owner of a tape has written “our wedding” on the label. By the state’s reasoning, the tape has announced its contents under *Owens*, and the owner has no privacy interest in it. Thus, an officer placing the tape in a machine and viewing the images will not have violated the owner’s privacy interest. Such a conclusion would defeat the purpose of Article I, section 9. The “kid porn” label in *Ready* was an admission that could have provided probable cause to obtain a warrant. It did not, however, transform the very nature of the tape into one that inherently announces its contents. The Court of Appeals’ conclusion that the tape announced its contents was in error. With the exception of *Ready*, the Court of Appeals has not created a nebulous standard for applying the rule of *Owens*. The restrictions recognized by that court have been no more restrictive than necessary to preserve the privacy interests guaranteed by the state constitution.

III. The Court of Appeals' decision was correct in this case.

Here, defendants had a privacy interest in the contents of the sealed blue canister. The contents were hidden from view and were undetectable. The container not only did not announce its contents as anhydrous ammonia; it did not announce its contents at all. The container could have contained any type of gas or indeed no gas at all. Although some things about the container (blue coloring, defendants' behavior, and other items found near the canister) led Undersheriff Bettencourt to believe the canister contained contraband, those were factors in determining whether probable cause existed. While it was possible for Bettencourt to have an informed opinion about the likely contents, the gas inside the canister was not in plain view. The canister was not one of a rare type of container that by its very nature announced its contents. As a result, the police invasion into the container to test the contents was a search. Under Article I, section 9, police were required to obtain a warrant prior to the search. The Court of Appeals correctly overruled the trial court's ruling denying defendants' motion to suppress.

CONCLUSION

For the foregoing reasons, this court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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