

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON

Plaintiff-Respondent,
Petitioner on Review,

v.

JOHN FREDERICK LUMAN,

Defendant-Appellant,
Respondent on Review.

Linn County Circuit
Court No. 04102244

CA A132197

SC S056470

BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, JOHN FREDERICK LUMAN

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Linn County
Honorable GLEN D. BAISINGER, Judge

Opinion Filed: June 25, 2008
Author of Opinion: Haselton, P.J.
Concurring Judges: Armstrong and Rosenblum, J.J.

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**BRIEF ON THE MERITS OF RESPONDENT ON REVIEW
JOHN FREDERICK LUMAN**

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

The state characterizes the questions presented as “important and unresolved” under Article I, section 9 of the Oregon Constitution.* The questions may be important, but when properly stated, they are not unresolved: this court has already resolved them, in defendant’s favor.

First Question Presented (specific to instant facts)

Does an unlabeled (or innocuously labeled) videotape “announce its contents” because a witness tells the police he has viewed a portion of its contents, and describes that portion?

First Question Presented (generally)

Does an opaque, closed container “announce its contents” because a witness tells the police he has viewed a portion of its contents, and describes that portion?

Defendant submits that the answer is “no.”

The state refers to “an opaque or closed container” in its formulation of the first question, to “a container” in its formulation of the second question, and to “an item” in its formulation of the third question. This attempt at generalization is perhaps due to this Court’s specific holding that an “unlabeled” videotape is an opaque (“not a transparent”), closed container that does not announce its contents. *State v. Munro*, 339 Or 545, 551, 124 P2d 1221 (2005), *reversing* 194 Or App 538, 96 P3d 348 (2004):

*Defendant’s arguments regarding the Fourth Amendment, the lack of foundation for the admission of the tape in question and the imposition of consecutive sentences were not addressed by the Court of Appeals. *State v. Luman*, 220 Or App 617, 622 n. 6, 188 P3d 372, *rev allowed*, 345 Or 381 (2008). This brief accordingly addresses only the issues raised and determined under Article I, section 9.

“[A]n unlabeled videotape is not a transparent container that announces its contents to anyone looking at the container. As the owner of the videotape, defendant had a possessory and a privacy interest in the content of the videotape protected by Article I, section 9.”

Defendant submits that the difference between an “unlabeled” videotape and an “innocuously labeled” videotape is not significant. Accordingly, the above holding provides an unambiguous negative answer to the first question presented, whether stated specifically or more generally.

This court’s holding in *State v. Munro, supra*, also disposes of the state’s subsidiary question: “After the private party sees what is inside the [opaque, closed] container and tells the police, does the container support a cognizable privacy interest under Article I, section 9?” Defendant submits the answer is “yes.”

First Proposed Rule of Law (specific to instant facts)

An unlabeled or innocuously labeled videotape is an opaque closed container that does not “announce its contents,” even if a witness tells the police he has seen a portion of its contents, and describes them.

First Proposed Rule of Law (generally stated)

An opaque closed container does not “announce its contents,” even if a witness tells the police he has seen a portion of its contents, and describes them.

Second Question Presented (generally, under facts in evidence)

Must the police obtain a warrant to open an opaque, closed container, if a private party tells the police he has seen all or part of its contents when he opened it, then closes it before he delivers it to the police?

Defendant submits the answer is “yes,” for the same reasons set forth above.

The state’s formulation of the Second Question as involving a police search that “reveals nothing more than or at least does not significantly expand” the

private search, has no application here, where the police search clearly did both. But even assuming facts not in evidence, so that the Second Question could be fairly so phrased, a warrant would still be required under Article I, section 9.

Second Proposed Rule of Law (assuming facts not in evidence)

Because an opaque closed container does not announce its contents, the police must obtain a warrant to open it, even if a witness tells the police he has seen a portion of its contents, describes them sufficiently to determine what he has (and has not) seen, and even if the police search does not go beyond what the witness claims to have seen.

Third Question Presented

When law enforcement officers have lawfully seized an opaque, closed container, or the item has been lawfully given to them, must the officers obtain a search warrant to open the container and view its contents?

Defendant submits that the answer is “yes.”

This court has repeatedly held, in a variety of factual contexts, that the lawful *seizure* of an opaque, closed container, without more, does not justify the *search* of it. Under this question, the state seeks nothing less than the reversal of the entire body of Oregon appellate cases requiring a warrant before a closed container may be opened, that is, searched, where there is no exigency.

Third Proposed Rule of Law

In the absence of an exigency or other exception to the requirement of a warrant, an opaque, closed container cannot be opened (searched) by the police without a warrant, simply because the container is in their lawful possession.

STATEMENT OF THE CASE

Defendant accepts the state's Statement of the Case. The state fairly summarizes the decision of the Court of Appeals being reviewed. Defendant submits that the Court of Appeals correctly analyzed the issues under Article I, section 9, and that its decision should be affirmed by this Court.

Summary of Argument

The viewing of the videotapes by the police, without a warrant, violated defendant's rights under Or Const Art I § 9 and US Const Amend 4.

The 20 videotapes in question were opaque "closed containers." The labels on all the videotapes were innocuous, including the two tapes labeled "master," and the videotapes did not otherwise "announce" their contents. In violation of defendant's workplace rules, his employees intermittently watched a portion of one of the videotapes. The employees gathered up the videotapes, invited the police to defendant's place of business and handed the police a black plastic garbage bag with the 20 videotapes inside, all without defendant's knowledge or permission. Four days after they received the tapes, the police "opened" those closed containers by viewing their contents, without seeking or obtaining a warrant.

Defendant did not consent to the viewing of the videotapes by anyone, nor to their removal and delivery to the police. He never waived his possessory or privacy rights in them. There is no claim of any exigency or other exception to the requirement that a warrant precede the search of a closed container. Thus, the warrantless viewing of the videotapes violated Article I, section 9.

Throughout this case, the state has ignored the plain meaning of when a closed container "announces its contents." *The closed container itself*, by its physical appearance and attributes, must "announce" its contents.

When an object is in “plain view,” there is no search, and thus, no need for a warrant. A “transparent” closed container “announces its contents,” which is the equivalent of plain view. An opaque closed container, however, remains opaque, regardless of how many witnesses claim to know its contents. Its contents are not in “plain view,” and a warrant is required before those contents can be examined.

A statement by a witness as to the contents of an opaque container may provide the police with probable cause to believe that the closed container contains evidence subject to seizure, and thus provide the basis for a search warrant, but such a statement in no way excuses the requirement that a warrant be obtained.

In the context of this case, the partial viewing of the contents of the videotape in question did not make that portion admissible, as contended by the state under its Second Question Proposed, nor does it excuse a warrant altogether, as contended under its Third Question Proposed.

The state raised only the First Question Proposed at trial. Neither the Second nor the Third Questions Proposed has been preserved for this Court.

ARGUMENT

A. The videotape in question did not announce its contents.

1. Article I, section 9 protects both possessory and privacy interests in videotapes.

The state begins its argument by claiming that in deciding the instant case, the Court of Appeals read this Court’s decision in *State v. Owens*, 302 Or 196, 729 P2d 524 (1986) too narrowly. The state argues at length (brief on the merits at 12-13) that limiting the “announce its contents” rule to containers that disclose their contents “by their very nature” was an “unduly cramped” view, supposedly in conflict with the “paperfold” case, *State v. Herbert*, 302 Or 237, 729 P2d 547 (1986).

The state's argument ignores the controlling case on point, *State v. Munro*, 339 Or 545, 124 P2d 1221 (2005), *reversing* 194 Or App 538, 96 P3d 348 (2004). In *Munro*, after citing *State v. Owens, supra*, 302 Or at 206, for the general rule that "Article I, section 9, protects both possessory and privacy interests in effects," this Court held specifically as follows regarding videotapes:

"[A]n unlabeled videotape is not a transparent container that announces its contents to anyone looking at the container. As the owner of the videotape, defendant had a possessory and a privacy interest in the content of the videotape protected by Article I, section 9."

339 Or at 551. The analysis is no different here, where the videotape in question was innocuously labeled "master," as opposed to being unlabeled altogether.

Contrary to the state's contention, this court does not have to refine its holding in *State v. Owens, supra*, because it has already done so, at least as to videotapes, the specific type of opaque, closed container involved here. Unless this court is prepared to abandon its decision in *State v. Munro, supra*, and hold instead that an unlabeled (or innocuously labeled) videotape is a transparent container that announces its contents, the state's first argument must fail.

2. Defendant retained both his possessory and privacy interests in the videotape in question.

State v. Galloway, 198 Or App 585, 109 P3d 383 (2005), and *State v. Howard*, 342 Or 635, 157 P3d 1189 (2007), illustrate why defendant had not lost his possessory interest in the videotape in question. In *State v. Galloway, supra*, defendant's garbage was searched by the police *before* it was taken away by the collection company. That search was held to violate defendant's rights under Article I, section 9. 198 Or App at 595. In *State v. Howard, supra*, defendants' garbage was searched by the police *after* the collection company had taken possession of it. That search was held to not be a violation of defendants' rights

under Article I, section 9, because defendants had “effectively abandoned” both their possessory and privacy interests in the property. 342 Or at 642.

In the instant case, the videotapes still belonged to defendant. His employees took them from him and handed them over to the police without his permission or consent. He had relinquished nothing, abandoned nothing, and should be held to have retained his possessory interest in the videotapes.

Further, even if it is held that defendant’s possessory interest in the videotapes was terminated by the unauthorized delivery of the videotapes to the police, defendant’s privacy interest remained. See decision below, *State v. Luman*, *supra*, 220 Or App at 626-627. The videotapes did not announce their contents, which could be determined only by viewing them. Such a viewing can only be justified by a warrant, and there was no warrant obtained here.

3. The present “bright line” rule should be retained.

The rule that absent an exigency, the police must obtain a warrant to open an opaque, closed container is an eminently workable, “bright line” rule, easy for law enforcement to understand and follow. Among the opaque, closed containers that cannot be lawfully opened without a warrant, despite the existence of probable cause to believe they contain contraband, are: “wallets, purses, cigarette cases and other personal effects,” *State v. Stock*, 209 Or App 7, 146 P3d 393 (2006); notebook, *State v. Barnham*, 136 Or App 167, 902 P2d 95 (1995), discussed at length in Appellant’s Brief at 18-20; folded piece of tinfoil, *State v. Fugate*, 210 Or App 8, 150 P3d 409 (2006); bubble container, *State v. Walker*, 173 Or App 46, 50, 20 P3d 834 (2001); “metal lock box” and “red purse accessory kit,” *State v. Swanson*, 187 Or App 477, 68 P3d 265 (2003); Dristan tin and brown paper bag, *State v. Martin*, 124 Or App 459, 863 P2d 1276 (1993).

Law enforcement has already been given ample notice that absent exigent circumstances, opening (that is, searching) *any* opaque, closed container without a warrant is fraught with peril.

Instead of seeking a warrant, the police in the instant case waited four days, then conducted their search of the videotape in question without one. Suppression should come as no surprise under those circumstances.

4. Closed container issues that are *not* before the Court in this appeal.

This does not mean that close questions do not arise regarding closed containers. It is just that this case does not present them.

For example, *State v. Heckathorne*, 218 Or App 283, 179 P3d 693, *review allowed*, 345 Or 158 (2008), involves questions under the plain view (or, rather, “plain smell”) exception to the requirement of a warrant. One issue in that case is whether a distinctive smell that emanates from an opaque, closed container is sufficient to allow a warrantless opening of the container, even though most people would not recognize the smell. In other words, must the “announcement” made by the opaque, closed container be unequivocal and understandable to the public at large, or is it sufficient if it can be recognized only by an expert? That is an interesting question, but its ultimate answer by this court will not affect the instant case. Here, the closed container makes no announcement at all, because “master” does not signify anything in particular to anyone, lay or expert.

Another case presenting a close question on “plain smell” was *State v. Kruchek*, 156 Or App 617 (1998), *affirmed* 331 Or 664 (2001). The Court of Appeals held that the distinctive odor of marijuana alone was insufficient to dispense with a warrant, because the container could have contained non-contraband effects, as well as marijuana. (See the discussion of the federal “single-purpose exception,”

under Part B, below.) This Court was equally divided, and affirmed without opinion. The instant case presents no such difficulty: the label “master” did not indicate anything about the contents of the videotape at all, partial *or* entire.

5. The “master” label issue has not been preserved.

The state, for the first time, argues in its brief on the merits (page 14) that the “master” label was itself an “announcement.” The argument runs thusly (emphasis mine): Since the witnesses knew [a portion of] what was on one of the tapes, the “master” label “*in effect*, labeled the tape ‘video of women, in a state of partial nudity, using the restroom at defendant’s business.’” The use of the words “in effect” by the state is telling: in addition to being unpreserved, the argument is specious at best.

The term “master,” in and of itself, does not signify *anything* about the contents of the videotape. The state’s “new” argument is simply another attempt to substitute *what a witness claims to know* about the contents of a closed container for *an announcement by the container itself* of what it contains, which is the only type of “announcement” that has any significance. *See, e.g., State v. Ready*, 148 Or App 149, 152, 939 P2d 117 (1997) (“kid porn from Larry—movies then stills”).

In his letter opinion at p.2, ER-28 to Appellant’s Brief, the trial judge recognized the fallacy of the state’s first argument, and rejected it succinctly:

“Here, most of the tapes simply had homemade stickers with the names of commercial movies written on them while two of them were labeled ‘Master.’ This by no means ‘announced’ that they contained the offensive material that was actually contained on the videos.”

This court should reject it as well, and hold, consistent with *State v. Munro, supra*, that the videotape in question was a closed, opaque container that did not announce its contents.

B. The police examination of the videotape in question went far beyond what the witnesses claimed to have seen of it before they delivered it and the other tapes to the police. Even if the police had not significantly expanded the private search, a warrant was still required.

1. The issue is unpreserved.

In the trial court, the state never argued that only a portion of the videotape in question was admissible. Further, the so-called “federal rule” it now advocates was never mentioned at trial. The state seeks to excuse this obvious difficulty by claiming (brief on the merits at 21-22) that “the trial court invited defendant to segregate the portions of the tape he believed were inadmissible from those that were not,” and that defendant declined the invitation. That is not a fair representation of the record below.

Here is the exchange in question (2/1/05 Tr. 36, emphasis supplied):

“THE COURT: *What about the tape they saw* [the tape in question]?”

MR. DUNFIELD: Well, the –

THE COURT: I mean, *they had opened that up*. And they told the police what was there.

MR. DUNFIELD: The private parties had viewed a portion of one of the tapes.

THE COURT: Right.

MR. DUNFIELD: That is correct.

THE COURT: Okay. How come – let’s assume you’re right [apparently meaning, that there were no exigent circumstances, and the tapes did not “announce their contents,” which counsel had just argued, 2/2/05 Tr. 35-36] – *how come that isn’t admissible, assuming Jones could identify that tape?*

MR. DUNFIELD: Because when the tapes are given to the police, when the police receive them, the material is not in plain view, you can’t look at it and tell it’s contraband.”

This is the only reference in the entire trial court record to the supposed “invitation” of the trial court to have defendant “segregate the portions of the tape

he believed were inadmissible from those that were not.” From the above, it can be seen that there was no such attempt on the trial judge’s part. He merely asked why “that” was admissible. The word “that,” in context, most reasonably refers to “that tape,” rather than “that portion of that tape.”

Counsel replied that “the material” was not in plain view, so that you couldn’t look at “it” and tell that “it” was contraband, which reply most reasonably refers to “that tape,” although it would have been equally correct as to the entire tape, or as to only a portion of it. The reply was responsive to the court’s question, and remains defendant’s position: the tape in question is inadmissible, both in its entirety, *and* as to the portion viewed by the employees, because its contents were not in plain view when the tape was turned over to the police.

The only basis made below in objection to suppression of all the tapes was that the videotapes “announced their contents.” See Response to Defendant’s Motion to Suppress (ER-22 to 25, appellant’s brief). The state never offered at trial to confine its testimony or evidence to the portion of the tape supposedly seen by the witnesses (assuming that portion could have been determined, see Part B. 2., immediately below).

Defendant submits that both the Second and Third Questions Presented are unpreserved. The state never sought a ruling on either question from the trial judge, and defendant had no duty to raise them for the state’s benefit. The state should not be allowed to raise issues now that it never mentioned below.

2. The examination of the videotapes by the police was far more extensive than that conducted by the employee witnesses.

The employee witnesses did not know which of the two “master” tapes they had seen. (The Court of Appeals did not need to reach the foundation issue that

was caused by that problem.) The employee witnesses did not view the tapes continuously, but intermittently (Trial Tr. 25). Asked a leading question, one witness “believed” he remembered seeing the first three persons depicted, but did not know who they were (Trial Tr. 24, lines 21-25). Further, there was only one person the witness even tentatively claimed to recognize (“it looked like it could have been [defendant’s] wife, but I’m not sure”) Trial Tr. 25-26. Two other witnesses believed they could identify defendant’s wife, but no other person, on the tape in question (Trial Tr. 84-85, 96-98).

The state attempts to gloss over the limited knowledge of the employee witnesses as to the content of the tape in question, and the much more detailed examination conducted by the police (see page 21-22 of brief on the merits). In fact, the police examined the tapes in great detail, and prior to trial, had at least one of the witnesses examine all of the tapes, including hours of footage that the witness had never seen before (Trial Tr. 26-27). Without their detailed viewing of the tapes, the police could not have identified the 11 persons depicted on the tape (one for each of the 11 counts of conviction), including the three who testified at trial (Trial Tr. 107-121). (Defendant’s wife, who may or may not have been depicted on the tape, asserted spousal privilege, and did not testify.) Only after viewing all the tapes, and conducting a further investigation based on that examination, did the police identify those trial witnesses.

3. It is not clear what the proposed “federal rule” is.

Assuming *arguendo* that the issue has been preserved, the “federal rule” advocated by the state has several problems, most notably, it is not at all clear what the federal rule is. The state contends that *United States v. Jacobsen*, 466 US 109, 104 S Ct 1652, 80 E Ed 2d (1984), settles the matter, but *Jacobsen* did not involve

videotapes, which have First Amendment implications not presented by the limited “field testing” of white powder. Under the Fourth Amendment, a greater “expectation of privacy” should attach to effects such as videotapes, which inherently involve expression, and thus the First Amendment, as opposed to packages of controlled substances, which do not have that dimension. Defendant’s rights under Article I, section 11 of the Oregon Constitution should likewise be protected. *Walter v. United States*, 447 US 649, 100 S Ct 2395, 65 L Ed 2d 410 (1980), remains the last word of the United States Supreme Court on videotapes, and as the parties acknowledge (appellant’s brief pages 20-25, respondent’s brief pages 11-14), the meaning of that decision is not easy to discern.

It can be questioned whether *Jacobsen, supra*, stands for anything beyond allowing very limited field testing of apparent controlled substances. In *United States v. Mulder*, 808 F2d 1346 (9th Cir 1987), the Ninth Circuit invalidated the warrantless chemical testing of tablets found in defendant’s hotel room by hotel employees, because (as in the instant case), the testing was much more extensive than a mere field test, and was done several days after seizure, as opposed to “on the spot.” Explicitly declining to “extend” *Jacobsen, supra*, the court held, 808 F2d at 1348 (emphasis supplied): “[T]his case does not involve a field test, but a series of tests conducted in a toxicology laboratory *several days after the tablets were seized.*” In the instant case, the police waited until four days after receipt of the videotape in question before viewing it, and examined not only it, but all the other videotapes, to a much greater extent than defendant’s employees had done.

Despite the supposed “federal rule” of *Jacobsen, supra*, the Ninth Circuit has also invalidated a warrantless search of a legally-seized closed container which the defendant himself acknowledged contained the object sought. In the case of

United States v. Gust, 405 F3d 797 (9th Cir 2005), the court invalidated the search of a purported “gun case,” *despite defendant’s admission that it contained a gun*, because the case could equally have been a *guitar* case. (The case’s appendices include photos of Fender guitar cases that are virtually indistinguishable from the Bushmaster gun case in question. 405 F3d at 806, 813-814.) Thus, the court held, the state failed to meet the “single-purpose container” exception to the requirement that a warrant must be obtained before opening a lawfully-seized closed container. 405 F3d at 799-803, examining United States Supreme Court and other federal precedent.

In the Ninth Circuit’s view, Mr. Gust’s statement about the contents of his own case did *not* convert the container from “closed” to “open” or “transparent.” Although no discussion of the “single-purpose container” exception by Oregon appellate courts could be found, it is consistent with Oregon cases on closed containers generally.

Further, the protections of the Oregon Constitution regarding closed containers have an analytical basis distinct from the “reasonable expectation of privacy” rationale used under the Fourth Amendment. Article I, section 9 protects both defendant’s possessory and privacy rights to the videotape in question. Here, defendant retained both. See discussion at pages 6-7, above.

This Court should decline to accept the purported “federal rule” for at least the following reasons: 1) the “federal rule” was never advocated for by the state at trial, so the issue is unpreserved; 2) until the United States Supreme Court revisits *Walter v. US, supra*, there is no certainty as to what the “federal rule” is, as to videotapes; 3) the protections afforded by Article I, section 9 to possessory and privacy rights are separate and distinct from the “reasonable expectation of privacy” guaranteed under

the Fourth Amendment; and 4) those interests are already protected by the Oregon “bright line” rule, above, which generally requires a warrant before any closed container can be opened by the police, probable cause notwithstanding.

4. Even if the “federal rule” were adopted, the tape should be suppressed.

Even if this Court were to adopt the “federal rule” contended for by the state, the videotape in question should remain suppressed, because neither half of the proposed rule is met. As is set forth in Part B. 2., above, the search *was* significantly more intrusive and extensive than the private search, and the police *did* learn much that could not have been learned from the private searchers’ testimony about what they saw.

C. Mere lawful *possession* of the videotape in question did not excuse the police from obtaining a warrant before *searching* it.

The state’s third argument (advanced for the first time in this Court, and thus unpreserved) is nothing less than an attempt to dispense with the need for *search* warrants in Oregon altogether (apparently, a warrant might still be required for the *seizure* of an “item”). According to the state:

“the rule of law must be that, when police have lawfully seized an item, or the item has been lawfully given to them, a search warrant is not required in order for the officers to view the contents of the item.”

Brief on the merits at 23. Defendant respectfully suggests that this Court should not undo decades of authority requiring warrants for both searches *and* seizures of closed containers, just because it is asked to do so.

This proposed radical change in the law of search and seizure in Oregon is said to be required by this Court’s decision in *State v. Munro, supra*, the only case cited by the state for its proposed rule. Defendant submits that the decision in *Munro* affords no basis for the state’s contention.

As is discussed under Part A, above, this Court in *Munro* held that an unlabeled videotape is an opaque closed container, and that the owner's possessory and privacy rights in it are to be protected. 339 Or at 551. It is true that this Court went on to hold that the viewing of the videotape in *Munro* was justified, but only because a search warrant authorized that viewing. It is the lack of a search warrant that so plainly distinguishes the instant case from *Munro*.

This point has been extensively briefed already, and was the basis upon which the Court of Appeals distinguished the instant case from *Munro*:

“[Munro’s] privacy interest was ‘destroyed by the authority of the warrant permitting the examination and exhibition of the contents of the videotape.’ [quoting this Court in *Munro*, 339 Or at 552] * * * Obviously, and decisively, there was no warrant here. . . .”

State v. Luman, supra, 220 Or App at 626.

To assert, as the state does at page 24 of its brief on the merits, that the absence of a search warrant “is a factual difference . . . [b]ut . . . not a significant legal difference” shows how far the state has strayed from basic principles of search and seizure law. Of course a warrant makes a significant legal difference, in this case as well as many others: the difference between a legal search and an illegal search. To dispense with a warrant any time the police are in lawful possession of any “item” would overturn nearly the entire body of Oregon cases requiring warrants before closed containers may be lawfully opened, probable cause notwithstanding.

Defendant urges instead that this Court continue to hold, consistent with *State v. Munro, supra* and the other Oregon appellate cases cited above, that in the absence of an exigency, Article I, section 9 requires that a warrant must precede the opening of any opaque closed container.

CONCLUSION

The Court of Appeals correctly held that the partial denial of Defendant's Motion to Suppress was error, under Article I, section 9. That decision should be affirmed, and the case remanded for further proceedings consistent with suppression of all the videotapes, as well as all evidence derived therefrom.

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