

Criminal Law
Statutory Interpretation

246 Or.App. 186
Court of Appeals of Oregon, In Banc.
STATE of Oregon, Plaintiff–Respondent,
v.
Shane Michael NEFF, Defendant–Appellant.

Facts

On November 4, 2008 Defendant (Neff) was pulled over by Officer Ou of the Eugene Police Department. The Officer informed Neff that a camera located in the police car was recording their conversation. At the same time Neff was also recording the discussion with his own personal device, which was concealed inside the driver’s door but underneath the window. Neff never informed the Officer that he was recording the encounter. Eventually the Officer realized that Neff was recording the encounter and arrested Neff and charged him with illegally obtaining contents of communication under Oregon Revised Statutes (ORS) 165.540(1)(c).

ORS 165.540(1)(c) states that a person may not “[obtain] or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained.”

Issue

Did Officer Ou’s statement, that the camera in his police car was recording the encounter between he and Neff, satisfy the requirement in 165.540(1)(c) that all participants be specifically informed that their conversation is being obtained?

What Happened at Trial

At trial the State and Neff offered two competing interpretations of the statute.

Neff’s Argument: Neff argued that “[N]otice is notice and the statute does not require specific people to give the notice. This conversation was being recorded because [a] specific warning had been given, and the simple fact that it was being recorded twice, I don’t see that the statute requires further notification.” According to Neff, everyone involved understood that the conversation between him and Officer Ou was being recorded (because the Officer had said so), and that there is nothing in the statute that requires him (Neff) to explain to the Officer that he is *also* recording the conversation.

State’s Argument: The intent of this statute is to prevent secretive tape recordings, and that is exactly what Neff did. Neff never informed Officer Ou that he was obtaining their conversation, and that is a clear violation of the statute.

The trial court agreed with the State. The court said that the intent of the statute is to “require persons recording the conversations of others to give [clear] warning to that effect.” The court further supported its conclusion by stating, “A person who records a conversation controls what is being recorded; they control where it begins and ends.” Just because two people are simultaneously recording a conversation does not mean that resulting recordings will be identical. Therefore each person operating a recording device must give notice to the other people in the conversation. This all goes back to the intent of the statute stated above, that the point of the statute is to ensure that each person recording a conversation give clear notice to other participants in the conversation that this is happening.

The court convicted the defendant of violating ORS 165.540(1)(c) and imposed a \$100.00 fine.

How did this case reach the Oregon Court of Appeals?

After the State finished making its case, Neff filed a *Motion For A Judgment Of Acquittal*. This asks that the judge immediately rule in favor of the defendant. The judge denied this motion, and eventually convicted Neff of violating 165.540(1)(c). Neff appealed his conviction by saying that the judge mistakenly denied his Motion. This allowed Neff to make his argument again, but this time in front of the Oregon Court of Appeals.

Steps of statutory interpretation

The Oregon Court of Appeals stated that the issue before the court is one of statutory interpretation and therefore must follow the three step process laid out by the Oregon Supreme Court in two important cases *PGE v Bureau of Labor and Industries*, and *State v Gaines*.

1. First, look at the text and context of the statute, and other court decisions related to this statute (case law) to determine the legislature’s intended meaning.
2. Second, if the meaning remains unclear, look at the legislative history of the statute. Legislative history can include any materials generated in the course of creating a statute. For example, sometimes transcripts of committee hearings can resolve what the legislature intended a statute to mean.
3. Third, if the meaning remains unclear, the court will use “maxims of statutory construction” to determine the meaning of a statute. The maxims are rules the court follows to determine the meaning of a statute.

Arguments

Both Neff and the State renewed their argument made during the original trial.

Neff’s Argument: Neff argued that “[N]otice is notice and the statute does not require specific people to give the notice. This conversation was being recorded because specific warning had been given, and the simple fact that it was being recorded twice, I don't see that the statute requires further notification.” According to Neff, everyone involved understood that the conversation between him and

Officer Ou was being recorded (because the Officer had said so), and that there is nothing in the statute that requires him (Neff) to explain to the Officer Ou that he is *also* recoding the conversation.

State's Argument: The intent of this statute is to prevent secretive tape recordings, and that is exactly what Neff did. Neff never informed Officer Ou that he was obtaining their conversation, and that is a clear violation of the statute.

Who Won?

Neff won on appeal. The court held that Officer Ou was informed the conversation was being recorded, and thus defendant's recording was not illegal.

How the Court Explained Its Decision

On review, the Oregon Court of Appeals held that under ORS 165.540(1)(c) when one person provides notice to a group that their conversation is being recorded, other participants in the conversation may record the conversation with their own device without providing further notice.

The court made reached this decision after walking through the steps of statutory interpretation explained above.

1. The court found that the "statutory text, context and case law interpreting ORS 165.540(1)(C) do not conclusively resolve" the meaning of the statute that the legislative history must be considered.
2. The court was unable to find any legislative history to clarify the meaning and intent of the statute.
3. Finally the court moved on "maxims of statutory construction." One such maxim is "where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue."

Using this maxim, the court reasons, "it is apparent that the legislature's concern in enacting [the statute] was to protect participants from having their conversations recorded without being informed that was occurring." In this case every participant knew that the conversation was being recorded, because Officer Ou said so, and because the statutory requirement of notice was fulfilled the charges against Neff should be dropped.

Application

1. Have students read the relevant language of ORS 165.540(1)(c) and ask them what they think it means. Use the following questions to help students form an opinion of the statute.
 - a. Is it legal for your friend to record a phone conversation with you without telling you?
 - b. Say your teacher tells the class that she is going to record that day's class discussion because so many students are out sick. You want to make your own recording of the class discussion. Do you also have to tell the class that you are also recording the discussion?

2. This opinion mainly focuses on statutory interpretation. The court, through each party, identifies two separate interpretations. What are they?
 - a. If all participants in the conversation are informed that their conversation is being obtained, it is ok for other parties in a conversation to record the conversation on their own device, without providing further notice.
 - b. Every participant in a conversation that seeks to record part of that conversation must provide notice to the group.
3. Which reading of the statute makes most sense to the students? Which argument is easier to make? Does that make it the correct argument?
4. Have students list reasons why they might want to record conversations with police officers.
 - a. Do those reasons still exist if you know the police officer is also recording the conversation?
5. Did students know that it is illegal to secretly record conversations in Oregon?
 - a. Why might this be a law?
 - b. Do they see a difference between secretly recording a conversation with a friend, and recording a conversation with a police officer who pulls you over?
 - c. Is it fair to apply a different standard to police officers than to private citizens? Why?
 - d. How do students feel about Neff? Are they sympathetic, did they want him to win? Did that affect how they read the statute?
6. What if Officer Ou was not recording the conversation on the camera in his patrol car?
 - a. Would Neff have broken the law?
7. So can you record any conversation you have with a police officer? → NO.
 - a. What if the police officer tells you that he's recording the conversation? → Yes.