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Crook County Circuit Court  
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Daniel J. Ahern  
Circuit Court Judge

George W. Neilson  
Presiding Judge

Gary Lee Williams  
Circuit Court Judge

February 19, 2010

## Twenty-Second Judicial District

Mr. Geoffrey Gokey  
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Redmond, OR 97756-0103

Ms. Daina Vitolins  
District Attorney  
300 NE Third Street  
Prineville, OR 97754

Re: State v Robert Gruntz  
Crook County Circuit Court Case No. 09FE0073

Dear Counsel:

This matter came before the Court on the 10<sup>th</sup> day of December, 2009. On that date the merits of two motions filed by Defendant were heard. This letter conveys the decision of the court. Between trials, the holidays, court operation issues and a new grandchild, I have been remiss in addressing this case. I apologize for my delay in ruling

Two separate search warrants were issued by the Honorable Gary L. Williams. The first warrant was issued on March 28, 2009 and the second was issued on March 31, 2009. Defendant seeks to: 1) controvert the affidavit filed in support of each warrant; and, 2) to suppress any evidence seized as a result of the warrants. The court will not recount all the details of the affidavits. Each affidavit, the related search warrants and returns are separately set forth in Administrative files MI090154 and MI090167. This court has reviewed the files, and with consent of the parties, taken judicial notice of each.

Defendant urges suppression based upon several grounds which include: 1) Specific information used by the affiant was the product of an illegal warrantless search and, therefore, can not be used by the issuing magistrate for a probable cause determination; 2) specific information used in the affidavit was stale and for that reason did not support a finding of probable cause for the search conduct in the case at bar; and 3) specific information provided in the affidavit was from unnamed informants and the affiant failed to include additional detail to support the credibility and reliability of the unnamed informant. In addition, Defendant seeks to challenge the good faith and accuracy of the statements made by the affiant, Deputy Theresa Plinski. The State disputes the grounds asserted by the Defendant. Also, the State asserts Defendant has no protected privacy interest at the time the premises were searched and property was seized under the warrant.

CROOK COUNTY  
FEB 22 2010  
DISTRICT ATTORNEY

## Issues

**Issue 1:** Does the Defendant, Mr. Gruntz have a protected privacy interest?

A search occurs when a government officer intrudes into a protected privacy interest of an individual. State v Rhodes 315 Or. 191 (1992) Article I, Section 9 protects both home and business premises. State v Rivas 100 Or App 620 (1990) Defendant Gruntz was not the owner of the parcel of real property that was searched and he had an ill defined relationship with the owners, Richie N. and Julie K. Stevens. He assisted : 1) in locating and acquiring the property; 2) investigating farming operations; 3) reporting on premises operations to the owner; 4) handled horse breeding records; 5) associated with the premises operator, Arlington Farms; and 6) in his role with Arlington Farms he assisted in the agricultural feed production program designed to support an in-house thoroughbred horse operation. This court concludes Defendant, Mr. Gruntz had a protected privacy interest because he had business relationship as the agent of the owner and as an operational advisor for Arlington Farms.

**Issue 2:** Was the warrantless entry conducted by the Deputies Plinski, Jurgens and Bottoms into the Powell Butte premises in the morning hours of March 27, 2009 unlawful?

Information obtained from an unlawful search or seizure must be excised from an affidavit unless the State can demonstrate the included information was attributable to a source independent of the unlawful conduct. State v. Johnson 335 Or 511 (2003) In the case at bar the State relies upon the doctrine of the consent for the March 27, 2009, entry into the Powell Butte premises and for the observations made at that time.

No warrant is necessary when consent to enter and search a premises has been voluntarily given by someone with authority and the search is within the scope of the given consent. Said another way, consent issues generally form around the concepts of voluntariness, authority and scope. This court concludes issue in the case at bar relates to the authority prong. The State is obligated to prove someone having authority to consent voluntarily gave the consent. State v Paulson 313 Or 346 (1992)

In the case at bar several entries were made by law enforcement were made onto the Powell Butte premises. The entries are categorized as: 1) The December entries; 2) The March entry; and, 3) The search warrant entries.

In December 2008 several entries were made into the Powell Butte premises. The initial December entry was made with the permission of Robert Albring III. (The Albrings described herein are father and son. The son, Albring III, was named as Albring Jr. in the affidavit. **For the purpose of this opinion** Albring III is “the son” and Albring Jr. is “the father”.) During the initial contact Deputy Plinski and other deputies learned the ranch manager was the father and he executed his duties at the direction of the owners. The second December entry made on December 22, 2008 and the entry was made with the authorized voluntary consent of the father. Therefore, all December 22 examinations, pictures, and observations were made with consent and were lawful. Defendant has not challenged the December entries, except for claiming December observations were stale at the time the March 2009 affidavits were tendered to the court,

On March 27, 2009 after the Deputies had been twice unsuccessful contacting the father at the Powell Butte premises, the Deputies made contact with the son at different premises on Copley Road. After a brief interview the officers asked for permission to go on the Powell Butte premises. The son advised Deputy Plinski “...he is not allowed to let anyone on the property...” and “...the owners have been very strict with him about who goes on the property...” Notwithstanding his comments after

additional conversation with the Deputies, the son got into his vehicle and led the Deputies onto the Powell Butte premises. He allowed the officers to enter into the barns and to conduct an examination of the premises. The premises was fenced and posted with "No Trespassing" signs. This act by the son was completed at a time when his authority to allow an entry had been withdrawn by the owners and operators of the premises. Consequently, this court concludes consent had been given by a person who did not possess actual or apparent authority. Those observations made and recorded in the search warrant affidavit were the product of an unlawful search and must be excised from the affidavit from "... We then followed Albring [III]..." through "...them if I had additional questions..." (in file MI090154) and from "...We then followed Albring [III] ..." through "...if I had and additional questions...". In addition, any pictures taken on the premises on March 27, 2009 must be excised.

Probable cause must be found within the four corners of the affidavit. State v Russell 293 Or 469 (1982) Consequently, this court must review the excised affidavit to determine if probable cause remains. However, this phase requires some additional analysis on each affidavit.

**Issue 3:** Did the affiant act in bad faith or provide inaccurate information in her affidavit?

A Defendant may file a motion to controvert the "good faith, accuracy and truthfulness" of an affiant. ORS 133.693 Defendant must tender an affidavit to set forth a substantial basis to question the good faith, accuracy and truthfulness of the affiant and has the burden of proving by a preponderance of evidence that the affiant engaged in the conduct. ORS 133.693 (2) and (3) Defendant asserts Deputy Plinski's opinion concerning the condition of horses on the Powell Butte premises in December 2008 was clearly distinct from that of the police retained veterinarian, Dr. Eric Sharpnack and that the affiant failed to include the veterinarian's report. Both the Deputy's and the veterinarian's viewpoint (including with the basis for their differing opinions) are adequately included within the affidavit through the incorporation of Deputy Chapman's report (See last 3 paragraphs of Affidavit- Exhibit C) The affidavit is neither inaccurate or completed in bad faith. The motion to controvert is denied.

**Issue 4:** Is the information within the affidavit regarding the December investigation stale?

Probable cause must exist at the time the warrant is authorized. Many factors go into an evaluation whether or not information is stale. The court must determine is whether the included information has probative value in light of all the information included in the affidavit. State v Arana 165 Or App (2000) The offense of Animal Neglect by definition requires proof of a failure to provide "minimum care". (ORS 167.325; ORS 167.330) It is distinct from Animal Abuse (ORS 167.315; ORS 167.320) which implies active mistreatment. The animal being cared for, the forms of failure to care and the duration of the failure must all be considered when evaluating whether probable cause exists that evidence of the criminal act of animal neglect may be found at the specific location. In the case at bar feeding patterns, horse health (i.e. weight, dental and hoof conditions, etc.) over a period of time are relevant to the inquiry. The condition of the herd and individual horses in December 2008 is probative of the standard of care in March of 2009. The information is not stale and the motion is denied.

**Issue 5:** Should the information of the unnamed informant be excised?

ORS 133.545 (4) provides:

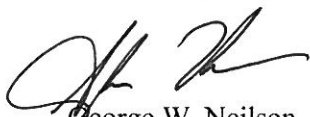
"...the affidavit shall set forth facts bearing on any unnamed informants reliability and shall disclose, as far as possible, the means the information was obtained..."

The means of the informant's information acquisition is easily answered. The informant personally observed a horse with a very large cut on her back leg on the 26<sup>th</sup> of March, 2009. The unnamed informant may be shown as credible by self establishment or that the information in the particular instance is reliable. State v Alvarez 308 Or 143 (1989) This court will assume without deciding that reliability has been established.

I reviewed the affidavit tendered to the issuing magistrate on Mach 28, 2009 without considering the excised materials. The affidavit fails to establish probable cause for the following reasons: 1) While December investigation does establish some greater attention to care and feeding is necessary, based upon the professional opinion of Dr. Sharpnack a case for animal neglect was not present; 2) The unnamed informant viewed the horses on March 26, 2009 and opined one horse exhibited a cut that needed attention, but this court has no basis to discern the informant's foundation of knowledge for the opinion that care was required; 3) The son expressed a concern that feeding patterns were weak, but failed to describe what, if any, impact was exhibited by the herd of horses on the Powell Butte Ranch. That lack of information is particularly significant considering the unnamed informant failed to report any concern regarding other horses (nearly 80 in number) on the premises. The evidence seized on March 28, 2009 is suppressed. Given this suppression the second affidavit is subject to similar short comings and the motion to suppress is granted as to both warrants.

Mr. Gokey, please prepare the proper order.

Very truly yours,



George W. Neilson  
Presiding Circuit Court Judge

GWN/ff