

SUPREME COURT OF OREGON

State v. Bray, 363 Or. 226

422 P.3d 250 (2018) · Decided July 5, 2018

SUMMARY

The Oregon Supreme Court considered whether due process required the state or trial court to obtain a defendant's witness's internet search records from Google under the Stored Communications Act. The court held that the trial court did not err in refusing to compel the state to seek additional legal process from Google and did not err in denying dismissal for prosecutorial misconduct. The court further addressed enforcement of a subpoena for the witness's computer, concluding that an ordinary trial subpoena must be enforced unless it is clear that the requested material has no potential use at trial.

CASE DETAILS

COURT	Supreme Court of Oregon
JURISDICTION	Oregon
DECIDED	July 5, 2018
DISPOSITION	vacated
PROCEDURAL POSTURE	Both parties petitioned for review of the Oregon Court of Appeals' decision. The Oregon Supreme Court affirmed the Court of Appeals, vacated the circuit court judgment of conviction, and remanded for enforcement and forensic examination of the victim's computer and further proceedings concerning a possible new trial.
STANDARD OF REVIEW	The court reviewed the legal interpretation and enforcement of Oregon's subpoena statute and the constitutional due-process and compulsory-process issues for legal error. It assessed the trial court's subpoena-enforcement ruling and harmlessness in light of the potential use of the evidence for cross-examination.
PRECEDENTIAL VALUE	precedential
PARTIES	State of Oregon, Thomas Harry Bray v. State of Oregon, Thomas Harry Bray

TOPICS

criminal procedure

evidence

sixth amendment

due process

statutory interpretation

PRACTICE AREAS

criminal procedure

evidence

constitutional law

statutory interpretation

digital privacy

QUESTIONS PRESENTED

1. Whether Oregon's criminal-discovery statute required the state to obtain the victim's Google internet-search records when Google would not disclose them without judicial process.
2. Whether due process required the trial court to compel the prosecutor to apply for a search warrant or Stored Communications Act order to obtain the victim's Google records.
3. Whether the state's delay in issuing a subpoena to Google required dismissal of the criminal charges for prosecutorial misconduct.
4. Whether ORS 136.580 required enforcement of the defendant's trial subpoena for the victim's computer and its digital contents.
5. What privacy protections and remedial procedure were required when forensic examination of a subpoenaed computer could expose irrelevant or privileged information.

HOLDINGS

1. The statute did not require the state to obtain and disclose the victim's Google internet-search records because the Stored Communications Act made the records confidential and Google could not disclose them to the state merely on request; judicial process was required.
2. Due process did not require the trial court to compel the district attorney to apply for a search warrant or Stored Communications Act order to obtain the records.
3. The trial court did not err in denying dismissal for prosecutorial misconduct because the defendant did not establish that the state's delay caused an irretrievable loss of evidence or otherwise deprived him of a fair trial.
4. Under ORS 136.580 and *State v. Cartwright*, a trial subpoena duces tecum must be enforced when the subpoenaed computer and its contents have any potential use in cross-examination, unless it is clear that the material has no potential use.
5. When enforcement of a trial subpoena requires forensic examination of a witness's computer, the court must prescribe reasonable limits on the examination and disclosure, protect privileged or statutorily confidential information, and consider in camera review where appropriate.

KEY QUOTATIONS

"when a party subpoenas a witness to produce material for cross-examination at trial, ORS 136.580 requires a court to order the production of the material unless it is clear that the material has "no potential use" for that purpose."

"When a party is entitled to enforcement of a trial subpoena duces tecum for a witness's computer and its digital contents, the court must ensure that the forensic examination is reasonable and that only the digital

information that was identified as potentially relevant to the cross-examination of that witness is disclosed to the parties and admitted.”

FACTUAL BACKGROUND

The defendant sought internet-search records held by Google that might show the victim had researched whether the encounter constituted rape. The trial court ordered the state to make whatever effort federal law allowed to obtain those records, but the state issued only a subpoena, which Google rejected absent a warrant or Stored Communications Act order. The victim also failed to bring her computer to trial and testified that she had erased its data; the defendant asserted that a forensic examination could reveal internet searches, journal entries, or evidence concerning when the computer was erased.

PROCEDURAL HISTORY

The circuit court denied the defendant's request that the state obtain Google's records of the victim's internet searches, denied his motion to dismiss for prosecutorial misconduct, and denied enforcement of his trial subpoena for the victim's computer. After a bench trial, the defendant was convicted. The Court of Appeals affirmed the rulings concerning Google's records and dismissal but vacated the convictions and remanded based on the refusal to enforce the computer subpoena. The Supreme Court affirmed the Court of Appeals' decision.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The circuit court must order the victim to produce her computer and subject it to a forensic examination, impose conditions protecting her privacy, prescribe the examination's contours and any protective orders, and permit the defendant to review the results and seek a hearing. At the hearing, the defendant must identify the evidence he would have offered and its purpose. The court must then either order a new trial or find that the inability to use the subpoenaed materials could not have affected the verdict and reinstate the convictions.

CASES CITED

- State v. Warren, 304 Or. 428, 746 P.2d 711 (1987)
- United States v. Agurs, 427 U.S. 97 (1976)
- Brady v. Maryland, 373 U.S. 83 (1963)
- Pennsylvania v. Ritchie, 480 U.S. 39 (1987)
- United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)
- Berger v. United States, 295 U.S. 78 (1935)
- California v. Trombetta, 467 U.S. 479 (1984)
- Arizona v. Youngblood, 488 U.S. 51 (1988)
- Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989)
- State v. Faunce, 251 Or. App. 58, 282 P.3d 960 (2012)

- State v. Cartwright, 336 Or. 408, 85 P.3d 305 (2004)
- United States v. Nixon, 418 U.S. 683 (1974)
- State v. Mansor, 363 Or. 185, 421 P.3d 323 (2018)
- United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976)
- United States v. Zolin, 491 U.S. 554 (1989)
- Frease v. Glazer, 330 Or. 364, 4 P.3d 56 (2000)
- Wardius v. Oregon, 412 U.S. 470 (1973)
- State v. Bray, 281 Or. App. 584, 383 P.3d 883 (2016)

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