 KeyCite Yellow Flag - Negative Treatment  
Declined to Follow by State v. Porelle, N.H., April 28, 2003

134 Or.App. 204  
Court of Appeals of Oregon.

STATE of Oregon, Appellant,  
v.  
Jeffrey Marion **NORRIS**–ROMINE, Respondent.

STATE of Oregon, Appellant,  
v.  
Patrick Joseph FINLEY, Respondent.

9422M; Q9400667M; Z9400670M,  
CA A83772 (Control); CA A83931.

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Argued and Submitted Feb. 6, 1995.


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Decided May 3, 1995.

**Synopsis**

Defendants charged with violating Oregon stalking protective orders challenged the stalking statutes as unconstitutionally vague. The Circuit Court, Jackson County, Mark Schiveley, J., and Circuit Court, Washington County, Donald R. Letourneau, J., dismissed the charges. The State appealed and the cases were consolidated. The Court of Appeals, Riggs, P.J., held that statutory term “legitimate purposes” in Oregon’s stalking statutes is unconstitutionally vague.

Affirmed.


West Headnotes (8)

[1] **Criminal Law**  Particular issues in general  
Trial courts’ rulings that the term “legitimate purpose” in Oregon’s stalking laws is unconstitutionally vague were reviewed for errors of law. U.S.C.A. Const.Amend. 14; Const. Art. 1, §§ 20, 21; ORS 163.730(7), 163.732, 163.735, 163.738, 163.747, 163.750.

7 Cases that cite this headnote

[2] **Constitutional Law**  Criminal Law

**Protection of Endangered**


**Persons**  Constitutional and statutory provisions

**Protection of Endangered**

**Persons**  Defenses

Protective order issuance statutes are in pari materia with protective order crimes statutes and term “legitimate purpose” in issuance statutes is incorporated into crimes statutes and subject to constitutional challenges by defendants charged with protective order crimes. ORS 163.735, 163.738, 163.747, 163.750.


1 Cases that cite this headnote

[3] **Constitutional Law**  Statutes

Under Oregon Constitution, criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct will render them liable to its penalties.


[4] **Constitutional Law**  Constitutional Prohibitions in General

**Constitutional Law**  Offenses

**Constitutional Law**  Certainty and definiteness in general

Criminal statute that does not provide adequate degree of certainty violates the privileges and immunities and the ex post facto clauses of the Oregon Constitution and due process clause of the Fourteenth Amendment of United States Constitution. U.S.C.A. Const.Amend. 14; Const. Art. 1, §§ 20, 21.

[5] **Constitutional Law**  Statutes in general

**Constitutional Law**  Particular Issues and Applications

Legislative history is not relevant in determining whether statute can survive facial challenge based on vagueness.

2 Cases that cite this headnote

[6] **Constitutional Law**  Statutes in general

Term that has no meaning to ordinary person without reference to legislative history cannot withstand vagueness challenge. U.S.C.A. Const.Amend. 14; Const. Art. 1, §§ 20, 21.

2 Cases that cite this headnote

[7] **Constitutional Law** 🔑 Vagueness on face or as applied

Criminal statutory term is unconstitutionally vague if person of ordinary intelligence cannot tell what the term means on its face because statute gives no guidance and permits ad hoc judgments of term's meaning. Const. Art. 1, §§ 20, 21.

[8] **Threats, Stalking, and Harassment** 🔑 Validity

Term "legitimate purpose" as used in Oregon's stalking statutes is unconstitutionally vague. U.S.C.A. Const.Amend. 14; Const. Art. 1, §§ 20, 21; ORS 163.730(7), 163.732, 163.735, 163.738, 163.747, 163.750.

6 Cases that cite this headnote

### Attorneys and Law Firms

**\*\*1222 \*205** Robert M. Atkinson, Asst. Atty. Gen., argued the cause for appellant. With him on the brief were Theodore R. Kulongoski, Atty. Gen., and Virginia L. Linder, Sol. Gen.

Andy **Simrin**, Deputy Public Defender, argued the cause for respondent Jeffrey Marion Norris–Romine. With him on the brief was Sally L. Avera, Public Defender.

John J. Tyner, argued the cause for respondent Patrick Joseph Finley. With him on the brief were Tyner & Associates.

Before RIGGS, P.J., and LANDAU and LEESON, JJ.

### Opinion

**\*206** RIGGS, Presiding Judge.

In these consolidated cases, the state appeals from the dismissal of accusatory instruments charging defendants

Finley and Norris–Romine with violations of stalking protective orders, ORS 163.747 and ORS 163.750. In each case, the ground for dismissal was that the statutory definition of the phrase "without legitimate purpose," as a component of the crime of stalking, is unconstitutionally vague. We affirm.

[1] Defendants were charged with violating stalking protective orders. A protective order may be issued either by a law enforcement officer or the court, upon the request of any person. ORS 163.744(1) provides:

"A person may initiate an action seeking an officer's stalking protective order by presenting a complaint to a law enforcement officer or to any law enforcement agency. The complaint shall be a sworn statement setting forth with particularity the conduct that is the basis for the complaint."

ORS 163.735 provides, in part:

"(1) Upon a complaint initiated as provided in ORS 163.744, a law enforcement officer shall issue an officer's stalking protective order to a person when the officer has probable cause to believe that:

"(a) *The person, without legitimate purpose, intentionally, knowingly or recklessly engages in repeated and unwanted contact with the other person or a member of that person's immediate family or household thereby alarming or coercing the other person;*

"(b) *It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and*

"(c) *The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim's immediate family or household.*" (Emphasis supplied.)

ORS 163.738 provides, in part:

"(3)(a) *The circuit court may enter, after personal or telephonic appearance by the petitioner, a court's stalking protective order if the court finds by a preponderance of the evidence that:*

**\*207** “(A) *The person, without legitimate purpose, intentionally, knowingly or recklessly engages in repeated and unwanted contact with the other person or a member of that person's immediate family or household thereby alarming or coercing the other person;*

“(B) It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and

**\*\*1223** “(C) The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim's immediate family or household.

“(b) In the order, the court shall specify the conduct from which the respondent is to refrain, which may include all contact listed in ORS 163.730. The order is of unlimited duration unless limited by law.” (Emphasis supplied.)

ORS 163.747 provides:

“(1) A person commits the crime of violating an officer's stalking protective order when:

“(a) The person has been served with an officer's stalking protective order as provided in ORS 163.735;

“(b) *The person, subsequent to the service of the order, has engaged intentionally, knowingly or recklessly in conduct prohibited by the order;* and

“(c) If the conduct is prohibited contact as defined in ORS 163.730(3)(d), (e), (f), (h) or (i), the subsequent conduct has created reasonable apprehension regarding the personal safety of a person protected by the order.

“(2)(a) Violating an officer's stalking protective order is a Class A misdemeanor.” (Emphasis supplied.)

ORS 163.750 provides:

“(1) A person commits the crime of violating a court's stalking protective order when:

“(a) The person has been served with a court's stalking protective order as provided in ORS 163.738;

“(b) *The person, subsequent to the service of the order, has engaged intentionally, knowingly or recklessly in conduct prohibited by the order;* and

“(c) If the conduct is prohibited contact as defined in ORS 163.730(3)(d), (e), (f), (h) or (i), the subsequent conduct has created reasonable apprehension regarding the personal safety of a person protected by the order.

**\*208** “(2)(a) Violating a court's stalking protective order is a Class A misdemeanor.” (Emphasis supplied.)

Finally, ORS 163.730 defines terms relevant to the stalking statutes. Under subsection (3):

“ ‘Contact’ includes but is not limited to:

“(a) Coming into the visual or physical presence of the other person;

“(b) Following the other person;

“(c) Walking outside the home, property, place of work or school of the other person or of a member of that person's family or household;

“(d) Sending or making written communications in any form to the other person;

“(e) Speaking with the other person by any means;

“(f) Communicating with the other person through a third person;

“(g) Committing a crime against the other person;

“(h) Communicating with a third person who has some relationship to the other person with the intent of affecting the third person's relationship with the other person;

“(i) Communicating with business or government entities with the intent of affecting some right or interest of the other person;

“(j) Damaging the other person's home, property, place of work or school; or

“(k) Delivering directly or through a third person any object to the home, property, place of work or school of the other person.”

ORS 163.730(7) provides:

“ ‘Legitimate purpose’ includes, but is not limited to, otherwise lawful contact

that is related to and occurs during a labor dispute as defined in ORS 662.010.”

Defendant Finley was charged under ORS 163.750 with violating a court's stalking protective order. Defendant Norris–Romine was charged under ORS 163.747 with violating a police officer's stalking protective order. Both contended in the trial courts that the term “legitimate purpose,” as defined in ORS 163.730(7) and as used in ORS 163.735 and ORS 163.738, is unconstitutionally vague. The trial courts \*209 agreed. We review the \*\*1224 trial courts' rulings for errors of law. ORS 135.630.

[2] Before a stalking protective order can be issued, there must be, in the case of an officer's protective order, probable cause to believe that the defendant acted “without legitimate purpose,” ORS 163.735, or in the case of a court's protective order, a finding that the person acted “without legitimate purpose,” ORS 163.738. Thus, although ORS 163.747 and ORS 163.750 do not explicitly mention “legitimate purpose,” a protective order, the violation of which those statutes criminalize, is predicated on a finding that a person has acted without a legitimate purpose. We conclude that ORS 163.735 and ORS 163.738 are *in pari materia* with ORS 163.747 and ORS 163.750, respectively, and that the term “legitimate purpose” as used therein is incorporated within the protective order crimes and is subject to constitutional challenge by defendants. *City of Eugene v. Miller*, 318 Or. 480, 484, 871 P.2d 454 (1994).<sup>1</sup>

[3] [4] Under the Oregon Constitution, a criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct will render them liable to its penalties. *State v. Graves*, 299 Or. 189, 195, 700 P.2d 244 (1985). A statute that does not provide an adequate degree of certainty and allows the judge or the jury to define the crime after the fact violates Article I, sections 20 and 21, of the Oregon Constitution,<sup>2</sup> as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Cornell/Pinnell*, 304 Or. 27, 30, 741 P.2d 501 (1987); *Graves*, 299 Or. at 195, 700 P.2d 244; *State v. Robertson*, 293 Or. 402, 408, 649 P.2d 569 (1982).

\*210 The state concedes that the term “legitimate purpose,” viewed in isolation, is not self-explanatory. It contends, however, that, when considered together, the statutory

definition and the legislative history define the term sufficiently. The state would have us “construe” the statute by reference to its the text, context and legislative history under *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993). It concedes that neither the text nor the context of the term nor its definition reveals what purposes, other than those related to a labor dispute, are legitimate. Nonetheless, it argues that the legislative history, as expressed in legislative discussions, eliminates any uncertainty about the meaning of the phrase.

[5] [6] Although the legislative history of a term might be relevant to determine the legislature's intended meaning for the term, we reject the state's suggestion that legislative committee discussions are relevant in determining whether the statute can survive a facial challenge based on vagueness. Such a challenge is not, in the strict sense, a matter of statutory construction. The correct inquiry, as set forth in the state's own brief, is whether the statute “is sufficiently explicit to inform persons of common intelligence of the conduct they must avoid.” Although a statute challenged for vagueness may sometimes be “saved by a judicial interpretation that gives it required definiteness,” *Robertson*, 293 Or. at 411, 649 P.2d 569, the statute itself must speak its meaning to the ordinary person. We cannot rely on the legislative history to provide a meaning that is not apparent from a reading of the statute in its context. A term that has no meaning to the ordinary person without reference to the legislative history cannot withstand a vagueness challenge.

[7] [8] We accept the state's concession that the statutes on their face do not tell a person of ordinary intelligence what is encompassed within the term “legitimate purpose.” Because they fail to do so, the statutes give no warning as to what conduct must be avoided. They provide no guidance \*\*1225 to the trier of fact and permit *ad hoc* judgments as to what is legitimate. We agree with the trial court that the term “legitimate purpose,” as used in the stalking statutes, ORS 163.730(7); ORS 163.732; ORS 163.735; ORS 163.738; and as *in pari materia* with ORS 163.747 and ORS 163.750, is \*211 unconstitutionally vague. We affirm the dismissal of the charges against defendants.<sup>3</sup>

Affirmed.

#### All Citations

134 Or.App. 204, 894 P.2d 1221

Footnotes

- 1 The state makes no contention that defendants are required to establish that the stalking statutes are vague *as applied*. The state acknowledges that the statutes are subject to challenge for vagueness *on their face* because they regulate expression. *State v. Butterfield*, 128 Or.App. 1, 874 P.2d 1339, *rev. den.* 319 Or. 625, 879 P.2d 1287 (1994).
- 2 Article I, section 20, provides:

“No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”

Article I, section 21, provides, in part:

“No *ex-post facto* law \* \* \* shall ever be passed \* \* \*.”

- 3 In view of our holding, we do not address whether the term “alarm,” as used in ORS 163.732, is vague or overbroad.