

1a

APPENDIX A

[Decided November 15, 2018]

CITY OF EUGENE, Plaintiff-Respondent,

v.

MICHAEL EDWARD GANNON,
Defendant-Appellant.

A161044

COURT OF APPEALS
OF THE STATE OF OREGON

Lane County Circuit Court
15CR10709, 15CR10710, 15CR10711, 15CR10712

Argued and submitted March 16, 2017

R. Curtis Conover, Judge.

Brian Michaels argued the cause and filed the
briefs for appellant.

Jens Schmidt argued the cause for respondent. Also
on the brief were Harrang Long Gary Rudnick P.C.
and Ben Miller.

Before Ortega, Presiding Judge, and Lagesen,
Judge, and Wilson, Senior Judge.

ORTEGA, P. J.

Affirmed.

ORTEGA, P. J.

Defendant was charged with four counts of criminal trespass in the second degree in violation of Eugene City Code (ECC) 4.807. [FN 1] He was found guilty on all counts in municipal court and appealed to the circuit court, where he was convicted of those crimes. [FN 2] On appeal, defendant raises three assignments of error. However, we reject defendant's second assignment of error without written discussion, writing only to address his first and third assignments, in which he asserts that the trial court erred in denying his motions for judgment of acquittal. Defendant received a notice of trespass after he was found sleeping in a locked University of Oregon (UO) building and, because he violated that notice, he received four citations for criminal trespass in the second degree, which resulted in the convictions at issue. He contends that the underlying notice was unlawful, as it did not provide due process to allow him to challenge its constitutionality and, as a result, the trial court should have granted his motions for judgment of acquittal. We conclude that, because defendant has not identified any constitutionally protected interest that was infringed by the notice of trespass, we cannot determine that any process was due in depriving him of that interest. Therefore, we affirm.

In reviewing a denial of a motion for judgment of acquittal, we view the evidence in the light most favorable to the city to determine whether a rational trier of fact could have found that it proved the elements of the crime. *State v. Barnes*, 232 Or App 70, 72, 220 P3d 1195 (2009).

Defendant was found asleep in a building on UO's main campus after it was closed and locked. An officer questioned defendant and, after concluding that he "had no authorized basis to be in the building at that time," issued a notice of trespass to defendant. The notice provided that defendant was excluded from campus buildings and any other property owned by UO (including streets, sidewalks, and parking lots) for 18 months, and that if he returned without prior approval from the UO chief of police or a designee, "he would be treated as a trespasser." The notice also stated that he could appeal that status to UO's chief of police. Through an attorney, defendant wrote a letter to the chief challenging the constitutionality of the notice of trespass, but the chief denied his appeal "on the basis that it was not supported by any factual basis that justified lifting the trespass." Defendant was not provided information on any procedure for appealing the chief's decision.

Soon after receiving the notice, defendant was allowed to enter UO's campus for an event, but only after receiving permission from the chief. However, on several occasions, he returned to campus while the notice was still in effect and without prior approval, and he received four separate citations for second-degree criminal trespass in violation of ECC

4.807. Charges were filed against defendant in municipal court, and he filed a motion to dismiss on the grounds that the underlying notice of trespass violated his due process rights and, as a result, provided no lawful basis for UO to exclude him from campus. The municipal court denied his motion, and defendant was found guilty of four counts of trespass. He appealed that decision to the circuit court and filed motions for judgment of acquittal on two occasions—after the city's case-in-chief and again at the end of presenting his case—arguing, as he did in municipal court, that the initial notice of trespass could not provide a lawful basis to exclude him from campus. The trial court denied the motions, upholding the convictions.

On appeal, defendant renews his argument that the underlying notice of exclusion violated his due process rights and could not be used to exclude him from the UO campus. Defendant contends that UO is a public forum and that he, like any member of the public, has a right to be there; the unavailability of process to challenge the constitutionality or legitimacy of the notice—that is, "no opportunity for an actual hearing or judicial review"—deprived him of his due process rights. Consequently, in defendant's view, the notice was unlawful, he could not have committed trespass by continuing to enter the campus in violation of the notice, and the trial court therefore erred in denying his motions for judgment of acquittal.

The city responds that defendant had no constitutionally protected interest in accessing the campus and, therefore, had "no due process rights with

respect to being excluded from the UO's property." Because we conclude that defendant has not identified a constitutionally protected interest that the notice impinged on, we cannot determine that any process was due in depriving him of that interest. [FN 3] Accordingly, we conclude that the trial court did not err in denying defendant's motions for judgment of acquittal.

Oregon's criminal trespass law provides that "[a] person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully *** in or upon premises." ORS 164.245(1). ORS 164.205(3)(c) defines "enter or remain unlawfully" for these purposes as "[t]o enter premises that are open to the public after being lawfully directed not to enter the premises." Defendant argues that the notice of exclusion was not lawful because he was not provided with any process by which to challenge it.

That alleged absence of process violated defendant's right to due process only if the exclusion order deprived defendant of a constitutionally protected liberty or property interest. *State v. Koenig*, 238 Or App 297, 310, 242 P3d 649 (2010), rev den, 349 Or 601 (2011) (affording a defendant due process rights where his "protected liberty interest in petitioning his government for redress of grievances *** was constrained by [a] notice of exclusion"). The notice of exclusion in this case provided that defendant was excluded from campus buildings and any other property owned by UO (including streets, sidewalks, and parking lots) for 18 months, and that if he returned without prior approval from the UO chief of

police or a designee, "he would be treated as a trespasser." Beyond arguing that UO is a public forum that may not exclude him from its campus, defendant has not identified a constitutionally protected interest that is affected by the notice.

Although UO is a publicly owned university, ORS 352.002(1), the public does not have unlimited access to its campus. As the Ninth Circuit Court of Appeals explained in *Souders v. Lucero*, 196 F3d 1040, 1044 (9th Cir 1999), cert den, 529 US 1067 (2000), while a university campus may be open to the public, "it does not follow that the University must allow all members of the public onto its premises regardless of their conduct." It noted that the United States Supreme Court has treated university campuses as "different from other public fora." *Id.* (citing *Widmar v. Vincent*, 454 US 263, 267 n 5, 102 S Ct 269, 70 L Ed 2d 440 (1981) (recognizing, in dicta, that a university differs in significant respects from other public forums because its mission is education and that the Court's decisions have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus facilities, nor has it held that a campus must make all of its facilities equally available to students and nonstudents alike or grant free access to all of its grounds or buildings).

In addressing a claim against Oregon State University (OSU) under 42 USC § 1983 (1982) challenging two exclusion orders, the Ninth Circuit observed in *Souders* that, "[n]ot only must a university have the power to foster an atmosphere and conditions in which its educational mission can be carried out, it

also has a duty to protect its students by imposing reasonable regulations on the conduct of those who come onto campus." Id. at 1045. The court concluded that OSU issued the exclusion orders in that case for the valid purpose of protecting its students and not for conduct protected by the constitution, holding that the non-student at issue had "not established a constitutionally protected interest in having access to the University." Id. at 1046.

We do not assume that the discretion of universities to limit public access to their property is unlimited. However, defendant in this case, who undisputedly is not a UO student, has not identified any constitutionally protected reason to be on UO property without prior permission. Indeed, the record indicates that, on one occasion, he was allowed onto the campus with prior permission. In the absence of an identified constitutionally protected interest that is affected by the notice, we have no basis for finding a violation of due process, and the trial court correctly denied the motions for judgment of acquittal.

Affirmed.

Footnotes:

1. Under ECC 4.807, "[a] person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully *** upon premises."

2. ORS chapter 164 contains Oregon's criminal

8a

trespass statute, ORS 164.245, which has the same language as ECC 4.807.

3. We reject without written discussion defendant's assertion that the 18-month ban preventing him from being on campus without prior permission was unconstitutional under Article I, section 16, of the Oregon Constitution.

CITY OF EUGENE Case Nos: 15CR10709,
 15CR10710, 15CR10711,
vs 15CR10712

/s/ R. Curtis Conover
R. Curtis Conover, Circuit Court Judge

APPENDIX C

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF LANE
125 E. 8th Ave. Eugene Oregon 97401

State of Oregon

Case No: 15CR10710

v.

GENERAL JUDGMENT

MICHAEL EDWARD
GANNON

Re: Citation #:

Defendant

Defendant was convicted this date on a ___ default for
failure to appear; ___ plea; X Court finding of guilty
on the violation of: Criminal Trespass in the Second
Degree - Violation

Driver's License# & State: OR-1142669

Commercial DL? ___ Yes X No

License Name: GANNON, MICHAEL EDWARD

Date of Birth: 01/14/44 Height:

Sex: Weight:

Address: PO BOX 10324 EUGENE, OR 97440

Offense Date: 04/24/2014

EMP: CMV: No HAZ: No

Com'l Pass Veh? (16 or more persons including the
driver): Yes ____

11a

Defendant is Passenger?: Yes ____
Defendant is NOT Registered owner of the
vehicle?: Yes ____
Vehicle Plate & State: Make: Model: Type:
Location: Time:

ORS/OAR#:
164.245
Convicted
Criminal Trespass in the Second Degree
Violation Class A
Convicted Speed: Designated Speed:
In School Zone? No In Work Zone? No

Original Date to Appear:

FINE ASSESSED: \$0.00.

Go to
<http://courts.oregon.gov/OJD/OnlineServices/ePay>
to pay online

Judgment Creditor: State of Oregon
Judgment Debtor: Defendant

Payment in full is due IMMEDIATELY. If payment is
not received within 30 days of this judgment,
additional costs and fees will be added and your
driver's license may be suspended.

Signed 12/9/2015

12/7/2015 /s/ R. Curtis Conover
Date R. Curtis Conover, Circuit Court Judge

12a

APPENDIX D

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF LANE
125 E. 8th Ave. Eugene Oregon 97401

State of Oregon

Case No: 15CR10711

v.

GENERAL JUDGMENT

MICHAEL EDWARD
GANNON

Re: Citation #:

Defendant

Defendant was convicted this date on a ___ default for
failure to appear; ___ plea; X Court finding of guilty
on the violation of: Criminal Trespass in the Second
Degree - Violation

Driver's License# & State: OR-1142669

Commercial DL? ___ Yes X No

License Name: GANNON, MICHAEL EDWARD

Date of Birth: 01/14/44 Height:

Sex: Weight:

Address: PO BOX 10324 EUGENE, OR 97440

Offense Date: 09/02/2014

EMP: CMV: No HAZ: No

Com'l Pass Veh? (16 or more persons including the
driver): Yes ___

Defendant is Passenger?: Yes ___

13a

Defendant is NOT Registered owner of the
vehicle?: Yes ____
Vehicle Plate & State: Make: Model: Type:
Location: Time:

ORS/OAR#:
164.245
Convicted
Criminal Trespass in the Second Degree
Violation Class A
Convicted Speed: Designated Speed:
In School Zone? No In Work Zone? No

Original Date to Appear:

FINE ASSESSED: \$0.00.

Go to
<http://courts.oregon.gov/OJD/OnlineServices/ePay>
to pay online

Judgment Creditor: State of Oregon
Judgment Debtor: Defendant

Payment in full is due IMMEDIATELY. If payment is
not received within 30 days of this judgment,
additional costs and fees will be added and your
driver's license may be suspended.

Signed 12/9/2015

12/7/2015 /s/ R. Curtis Conover
Date R. Curtis Conover, Circuit Court Judge

14a

APPENDIX E

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF LANE
125 E. 8th Ave. Eugene Oregon 97401

State of Oregon

Case No: 15CR10712

v.

GENERAL JUDGMENT

MICHAEL EDWARD
GANNON

Re: Citation #:

Defendant

Defendant was convicted this date on a ___ default for
failure to appear; ___ plea; X Court finding of guilty
on the violation of: Criminal Trespass in the Second
Degree - Violation

Driver's License# & State: OR-1142669

Commercial DL? ___ Yes X No

License Name: GANNON, MICHAEL EDWARD

Date of Birth: 01/14/44 Height:

Sex: Weight:

Address: PO BOX 10324 EUGENE, OR 97440

Offense Date: 09/04/2013

EMP: CMV: No HAZ: No

Com'l Pass Veh? (16 or more persons including the
driver): Yes ___

Defendant is Passenger?: Yes ___

15a

Defendant is NOT Registered owner of the
vehicle?: Yes ____
Vehicle Plate & State: Make: Model: Type:
Location: Time:

ORS/OAR#:
164.245
Convicted
Criminal Trespass in the Second Degree
Violation Class A
Convicted Speed: Designated Speed:
In School Zone? No In Work Zone? No

Original Date to Appear:

FINE ASSESSED: \$0.00.

Go to
<http://courts.oregon.gov/OJD/OnlineServices/ePay>
to pay online

Judgment Creditor: State of Oregon
Judgment Debtor: Defendant

Payment in full is due IMMEDIATELY. If payment is
not received within 30 days of this judgment,
additional costs and fees will be added and your
driver's license may be suspended.

Signed 12/9/2015

12/7/2015 /s/ R. Curtis Conover
Date R. Curtis Conover, Circuit Court Judge

16a

APPENDIX F

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF LANE
125 E. 8th Ave. Eugene Oregon 97401

State of Oregon

Case No: 15CR10709

v.

GENERAL JUDGMENT

MICHAEL EDWARD
GANNON

Re: Citation #:

Defendant

Defendant was convicted this date on a ___ default for
failure to appear; ___ plea; X Court finding of guilty
on the violation of: Criminal Trespass in the Second
Degree - Violation

Driver's License# & State: OR-1142669

Commercial DL? ___ Yes X No

License Name: GANNON, MICHAEL EDWARD

Date of Birth: 01/14/44 Height:

Sex: Weight:

Address: PO BOX 10324 EUGENE, OR 97440

Offense Date: 08/01/2014

EMP: CMV: No HAZ: No

Com'l Pass Veh? (16 or more persons including the
driver): Yes ___

Defendant is Passenger?: Yes ___

17a

Defendant is NOT Registered owner of the
vehicle?: Yes ____
Vehicle Plate & State: Make: Model: Type:
Location: Time:

ORS/OAR#:
164.245
Convicted
Criminal Trespass in the Second Degree
Violation Class A
Convicted Speed: Designated Speed:
In School Zone? No In Work Zone? No

Original Date to Appear:

FINE ASSESSED: \$0.00.

Go to
<http://courts.oregon.gov/OJD/OnlineServices/ePay>
to pay online

Judgment Creditor: State of Oregon
Judgment Debtor: Defendant

Payment in full is due IMMEDIATELY. If payment is
not received within 30 days of this judgment,
additional costs and fees will be added and your
driver's license may be suspended.

Signed 12/9/2015

12/7/2015 /s/ R. Curtis Conover
Date R. Curtis Conover, Circuit Court Judge

18a

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF
OREGON

CITY OF EUGENE,
Plaintiff-Respondent, Respondent on Review,

v.

MICHAEL EDWARD GANNON,
Defendant-Appellant, Petitioner on Review.

Court of Appeals
A161044

S066402

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and
orders that it be denied.

/s/ Martha L. Walters
MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
3/7/2019 10:38 a.m.

c: Ben Miller, Jens Schmidt, Brian L Michaels
lk

APPENDIX H

UNIVERSITY OF OREGON Case 14- 0737
Page 1 of 1

University of Oregon Trespass Notice

Pursuant to authority delegated by the President of the University of Oregon, you are hereby issued this Notice of Trespass as a result of the conduct described below.

In order to foster and ensure an environment conducive to the achievement of the educational, research, service, and cultural missions and objectives of the University of Oregon, it is necessary to maintain an environment that is free of disruption so that the business of the University may be appropriately competed. I have determined that your behavior and/or actions seriously disturbed the University environment and impeded the University's efforts to conduct its business. Your conduct does not reflect the behavior necessary for a University environment.

Trespassed Person Information:

Name: GANNON, MICHAEL EDWARD
Date of birth: 1/14/44
ID#: Height: 6' 2" Weight: 196
Location: 950 E. 13th

Allegation: Criminal Trespass 2 Summary: Mr.

20a

Gannon has received several warnings for criminal trespass. On 8-1-14 Mr. Gannon was observed on campus in violation of his trespass notice.

You may not enter upon the following property owned or controlled by the University or attend the following University events or activities for the following period:

SELECT ONE

- ☒ All property owned or controlled by the University
All University residence halls and apartments
All University events and activities
All University athletic events
Other

SELECT ONE

- ☒ For 18 months from the date of this Notice
Until this Notice is revoked in writing
Until _____ (enter date or event)
For one year from the date of this Notice
Until you have attended a meeting to be scheduled by the Office of the Dean of Students or UO Housing

Failure to comply promptly and fully with this Notice will subject you to legal consequences including, but not limited to, arrest and prosecution for trespassing. If you wish to appeal this Notice, you may write to the Chief of Police at University of Oregon Police Department, 2141 East 15th Avenue, Eugene, Oregon 97403-6220. Your written appeal must be received by

21a

the Chief of Police within 30 days of the receipt of this Trespass Notice. If you need to conduct business at the University of Oregon, you will need the prior written approval of the Chief of Police or designee and may call (541) 346-2919 from 8:00 a.m. to 5:00 p.m. Monday through Friday.

/s/ Carolyn McDermed
Carolyn McDermed, Chief of Police
University of Oregon Police Department

I HEREBY CERTIFY THAT I PERSONALLY
HANDED TO: Michael E. Gannon THE ORIGINAL
OF THIS NOTICE at 18:07 hours on 8/1/14.
Officer [illegible] Badge 303 Photo on file: Yes

White copy: recipient Pink copy: dispatch Green
copy: records Yellow copy: reports

University of Oregon Police Department 2141 East
15th Avenue, Eugene, OR 97403-6220 T 541-346-2919
F 541-346-0947 police.uoregon.edu

An equal-opportunity, affirmative-action institution
committed to cultural diversity and compliance with
the Americans with Disabilities Act. This publication
will be made available in accessible formats upon
request.© 2012 University of Oregon DES 0510-023i-
B10066

[Attachment – Graphic – Map of University of
Oregon campus, with this text on top right]

Other University of Oregon properties, including but

22a

not limited to:

Eugene, Oregon
Intercollegiate Athletic Facilities
Spencer View Family Housing

Portland, Oregon
White Stag Block

Bend, Oregon
Pine Mountain Observatory

Charleston, Oregon
Oregon Institute of Marine Biology

[graphic - Map of Eugene University of Oregon
campus]

APPENDIX I

UNIVERSITY OF OREGON

University of Oregon Trespass Notice

Name: GANNON, MICHAEL EDWARD

Height: 6-02 weight: 215 Scars, tattoos

On 2/17/14 you were involved in the following Incident on the University of Oregon campus near or in LAWRENCE HALL. I am issuing you this Trespass Notice pursuant to authority delegated by the President of the University of Oregon. Specifically, you were observed/engaged in/or were found on campus TRESPASS .

I am authorized to warn any person not to enter or remain on campus premises, to include McArthur Court, Matthew Knight Arena, Hayward Field, Autzen Stadium, P.K. Park, or any other property that is owned or controlled by the University of Oregon, or else be considered a trespasser under the Criminal Code of Oregon.

You are not a registered student of the University of Oregon, nor are you an employee. You are not on campus to conduct business with the institution, and you are disrupting and interfering with the mission of the University of Oregon. Therefore, you are subject to treatment as a trespasser. If you remain on campus after receiving this notification or if you henceforth

24a

appear on campus without prior approval of the Chief of Police or designee, it will be necessary to treat you as a trespasser, which means you will be subject to arrest and prosecution. If you wish to appeal this status, please write to the Chief of Police within ten days of receiving this Trespass Notice. If you need prior approval to conduct business at the University of Oregon, please contact the Chief of Police, University of Oregon Police Department. at (541) 346-5444 from 8:00 a.m. to 5:00 p.m. Monday to Friday. This Trespass Notice will remain in effect for eighteen months following the date of service indicated below.

/s/ Carolyn McDermid
Carolyn McDermid, Chief of Police
University of Oregon Police Department

I HEREBY CERTIFY THAT I PERSONALLY
HANDED TO: MICHAEL CANNON THE ORIGINAL
OF THIS NOTICE AT 0035 ON 02/17/14

SIGNED: [illegible] Davis 224
PRINTED NAME: Davis
UOPD Case 14-0159 EPD Seq. #
Photo on file: Yes TAKEN

White copy: recipient Pink copy: dispatch Green
copy: records Yellow copy: reports

UNIVERSITY OF OREGON POLICE DEPARTMENT
2141 East 15th Avenue, Eugene OR 97403-1230 T 541-
346-5444 F 541-346-0947 police.uoregon.edu

An equal-opportunity, affirmative-action institution

25a

committed to cultural diversity and compliance with the Americans with Disabilities Act. This publication will be made available in accessible formats upon request. • 2012 University of Oregon DES 0510-023i-C15131

APPENDIX J

UNIVERSITY OF OREGON

March 10, 2014

Mr. Michael Gannon
430 Gilbert Street
Eugene, Oregon 97402

Dear Mr. Gannon:

I am in receipt of a fax from Attorney Brian Michaels, dated February 26, 2014, appealing your Letter of Trespass (LOT) issued February 17, 2014. I have read the report generated by my staff and considered the circumstances that led to the LOT being issued.

You were trespassed from the University of Oregon campus after you were found sleeping in Lawrence Hall, a card access only building, at 00:35 hours. This was two and a half hours after the building was closed to the public. You could not provide a legitimate reason for being in the building and were unable or unwilling to provide the name of the student you were supposed to be meeting. In your appeal letter, you still do not explain why it was necessary for you to be in Lawrence Hall after hours, when the building was closed. Nor do you provide any other factual information that would justify lifting or amending the trespass you received. Instead, your appeal appears to assert that the University of Oregon lacks the authority to trespass

27a

you from its premises, and that trespassing you from campus is unconstitutional.

The University does not agree with the assertions outlined in your appeal. Accordingly, after careful consideration of your request I have determined that your appeal should be denied. If you come to any University of Oregon owned or controlled property within the next 18 months, you are subject to arrest for trespass.

Absent additional transgressions, you will be permitted to return to campus eighteen months from the date of the issuance of the LOT - August 17, 2015.

Sincerely,

/s/ Carolyn G. McDermid
Carolyn G. McDermid
Chief of Police
University of Oregon Police Department

cc: Attorney Brian Michaels
cc: University of Oregon General Counsel