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IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY OF SIERRA

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THE PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 Plaintiff, )  
 )  
 -vs- ) Case No.  
 ) CR03953  
 MICHAEL JOHN OSTERBRINK, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS  
November 25, 2019  
Downieville, California

Before Honorable Yvette Durant,  
Judge of the Superior Court

APPEARANCES:

For the People: SANDRA GROVEN,  
Sierra County District Attorney  
Post Office Box 457  
Downieville, CA 95936

For the Defendant: J. LON COOPER  
Sierra County Public Defender  
Post Office Box 682  
Nevada City, CA 95959

Reported by: Mark M. Maxey, CSR No. 3903

1 9:30 a.m. calendar, Sierra County Superior Court

2 ---o0o---

3 THE COURT: All right, we'll be back in session on  
4 People v. Michael John Osterbrink, CR03953. Everyone who  
5 was here previously is here again. We have Ms. Groven for  
6 the People. We have Warden Johnson; we have Mr. Cooper for  
7 and with Mr. Osterbrink.

8 The Court has heard and considered the testimony  
9 of the witnesses, the exhibits which were introduced and the  
10 arguments of counsel, including having the opportunity to  
11 observe firsthand the witness's testifying, including their  
12 demeanor, inflections, and expressions. The Court has also  
13 considered the arguments, as I said by counsel, which  
14 includes having reviewed the cases cited by counsel, both  
15 the People in their trial brief and here Mr. Cooper with the  
16 case he raised today.

17 And in this matter I decide as follows: I find  
18 that as to Count 1, Count 1 asserts a violation of Section  
19 1602(a). And here the People argue that all that is  
20 required is for them to show that Mr. Osterbrink did not  
21 notify the Department of his activities in advance. And --  
22 and I -- they don't deny this, but I'll say it in some  
23 different words, and then the next element would be that the  
24 disturbance that is asserted is substantial. So we really  
25 have these two prongs, was there notification? Here there  
26 is no dispute; there was not notification. And then, was  
27 the disturbance done by the defendant substantial in the  
28 fashion defined by the code section?

1           Defense argues that the statute is  
2           unconstitutionally vague because of the use of the term  
3           substantial and that substantial is not defined in the code.  
4           However, many words are not defined in the code, and the law  
5           tells us very clearly that when something is not defined  
6           specifically, it is to be given its ordinary use, its  
7           ordinary definition. And here defense has provided us that  
8           definition. Substantial, you know, not imaginary or  
9           illusory, important, considerable in quantity. So the Court  
10          gives substantial its plain and ordinary meaning as the  
11          Court is to do when a word is not otherwise legally defined  
12          by statute or by the Court. And now the People give us some  
13          guidance with some case law.

14                 And so I disagree that this use of the term  
15          substantial somehow makes the statute unconstitutionally  
16          vague. What came to my mind when that argument was made  
17          was, well, gosh, do you know how many cases, thousands upon  
18          thousands upon thousands of cases take place, trials take  
19          place in the state of California under the basic speed law.  
20          And that statute is not unconstitutionally vague, and yet it  
21          clearly requires the Court to determine whether or not  
22          someone's speed was unsafe for conditions. And many  
23          officers and defendants disagree on that. And that's kind  
24          of what happened here. Here, Mr. Osterbrink does not think  
25          that what he did was substantially causing any substantial  
26          disturbance to the streambed, and the People think it was.

27                 I would also say that when you look at the statute  
28          -- you have to look at 1602, and then you really have to

1 look at its counterpart of 1603, and particularly when you  
2 look at the cases cited by the People, all of those cases  
3 keep talking about 1603. They don't talk about 1602; they  
4 talk about 1603. But these statutes really work together.  
5 And 1602 is saying you've got to give us notice; you've got  
6 to give the department notice. And then, if it's going to  
7 be substantial, then the Department's going to, you know,  
8 give you a protocol.

9           And I think the existence of 1602 and 1603 -- you  
10 know, really the existence of 1603 is saying if you're not  
11 sure, come to us, notify us, and we'll talk about it, and  
12 we'll tell you if it's substantial or not. And if it is,  
13 then you're going to have to comply with 1603.

14           So did Mr. Osterbrink notify? No, he did not.  
15 Was there substantial disturbance? I think there was. I  
16 think that the evidence in this case was fairly clear. We  
17 had multiple photographs that show a substantial  
18 disturbance. We have testimony about whether it's  
19 Mr. Osterbrink saying about 20 rocks or, you know, 40 to 50  
20 rocks. I looked at the photos, and I really think the  
21 photos speak for themselves. And if you actually look at a  
22 photo, there are easily 50 rocks in one photo. That doesn't  
23 mean that they've all been disturbed. But when you first --  
24 at first blush you might think, Oh, maybe there's only 20 or  
25 30. No, there's well over 50 in most of them. And you can  
26 see the ground disturbed, you can see the dirt that is now  
27 fine and, for lack of a better term, just soft. You can see  
28 a boot print. And these prints were clearly made in dirt

1 that was freshly disturbed and in such an obvious print that  
2 if the dirt had not been freshly disturbed, that print would  
3 not be so clear.

4           So as to Count 1, I'll make a couple things clear.  
5 It starts out saying any entity. I think that entity in the  
6 code clearly includes a person, because a person is defined  
7 in the code in Section 67, and it's defined to include any  
8 natural person, any partnership, corporation, limited  
9 liability company, trust, or other type of association. So  
10 I just wanted to get that one out of the way. Then it says,  
11 shall not substantially -- and I've taken the words out that  
12 I think apply to this case -- shall not substantially use  
13 any material from the bed or bank of any stream where it may  
14 pass into any river or stream.

15           So that's the -- all of those words came from the  
16 statute. But if you understand what I did, I took the words  
17 out and ignored the ones that really didn't apply to this  
18 case. And that's what I find occurred here. So I'm going  
19 to find Mr. Osterbrink guilty on Count 1. I believe the  
20 People have met their burden of proof on Count 1.

21           As to Count 2, Count 2 deals with a different code  
22 section. It deals with Section 5650, subsection (a),  
23 sub-subsection (6). And here defense makes an argument, and  
24 they point to this Godfry case, Count 5, and say it's  
25 analogous. And I can see where you get that argument; I'm  
26 just not sure I totally agree with it. Count 5 deals with  
27 pollution. And it deals with a federal statute that very  
28 clearly talks about -- uses the word pollution, pollutant.

1 And to be honest, it does provide guidance. But I think the  
2 language of 5650 itself provides the best direction for the  
3 Court. 5650 states specifically, uses these terms, quote,  
4 deposit into, end quote. Quote, permit to pass into.  
5 Quote, place where it can pass into the waters.

6 So it uses these terms of depositing into,  
7 permitting something to pass into, or placing something  
8 where it can pass into the water. And then it says, any --  
9 quote, any substance or material deleterious to fish, plant  
10 life, et cetera, end quote. Well, "et cetera" isn't in  
11 there; that was my word. So here we're talking about fish  
12 and plant life, and so I use those two words.

13 But I do think that one can argue that the  
14 defendant deposited this silt and fine dirt, but I -- and  
15 that he allowed that to, you know, pass into the waters or  
16 could be passing into the waters when the water comes.

17 But I really think 5650, the intent of the  
18 Legislature there is to deal with situations where a  
19 defendant has deposited something new, a foreign substance.  
20 And usually, you know, we see this statute used when we're  
21 dealing with, you know, folks who are using maybe pesticides  
22 or something in or near a stream that could pass into the  
23 waters.

24 Here, there doesn't seem to be any dispute that  
25 this defendant did not add anything new. He took what was  
26 there and disturbed it in a way that certainly could be  
27 deleterious to fish and plant life. But I think that that  
28 situation in and of itself is covered in 1602. And I think

1 this 5650 is a different situation where he would need to  
2 have brought something new rather than just disturbing what  
3 was already there. So I'm going to find Mr. Osterbrink not  
4 guilty on Count 2.

5 So with that, I don't know if you want to waive  
6 time for sentencing or not. And --

7 MR. COOPER: Your Honor, in response to that  
8 query, he would like to wrap it up today if possible and be  
9 sentenced today.

10 THE COURT: Well, and I'm going to ask the People  
11 as well, because I'm not sure, there's been some talk in the  
12 trial brief at least, about a condition of probation being  
13 remediation -- and that might be my word I'm using; I might  
14 have used a different word -- restoration might be the word  
15 you used, I can't recall. So I don't know if the People  
16 need some time to prepare for that?

17 MS. GROVEN: I don't think so, your Honor. I  
18 think we can go ahead. And the People are not going to be  
19 requesting any sort of restoration or remediation.

20 THE COURT: Okay.

21 MR. COOPER: Thank you.

22 THE COURT: All right. Then with that, I think  
23 what I'll do is I'll hear first from the People.

24 MS. GROVEN: The People are not interested in any  
25 jail time. We would be satisfied with 12 months of summary  
26 court probation and the payment of a fine.

27 THE COURT: Okay. Do you want to be heard on the  
28 fine?

1 MS. GROVEN: We would submit to whatever the Court  
2 thinks.

3 THE COURT: Okay. Mr. Cooper.

4 MR. COOPER: We'd submit, standard fine, your  
5 Honor. Although -- I'm sorry.

6 THE COURT: And I'm assuming terms of summary  
7 court probation are obey all laws?

8 MS. GROVEN: That would be correct.

9 MR. COOPER: Yes, I'm sorry to backtrack. I just  
10 again want to say the People aren't asking for remediation  
11 or -- my client in good faith did attempt to the best of his  
12 ability to restore the condition of that dry creek bed to  
13 its original state the best that he could. So it wasn't  
14 like he just did his thing and said, "I'm out of here." So  
15 I hope that gets some consideration by the Court.

16 We'd submit it on that.

17 THE COURT: Thank you. And let me just say, too,  
18 I realize, you know, what Mr. Osterbrink does and was doing,  
19 you know, there are a lot of people in this neck of the  
20 woods that go out recreationally, mine. And, you know, the  
21 intent of the Court here is not to have a chilling effect on  
22 that. The intent and I think the intent of the statute  
23 itself is for folks to go through the proper process before  
24 they're going to do that. And it sounded to me from the  
25 evidence that was presented that oftentimes people provide  
26 the notification and they're told yeah, that's fine. Or  
27 maybe they're going to be told, you know, you can use these  
28 tools but not these other tools. And here Count 1, you



1 know, the issue is you can't just go and do what you think  
2 is right and do what you think might not be substantial,  
3 because it's not your decision to make. And so I -- I hope  
4 that it's taken that way. And, you know, I recognize that,  
5 you know, even when you look at these statutes here, I don't  
6 read them as -- as a statute that prohibit any and all  
7 activity. I read them as statutes that say, we are going to  
8 monitor, and we want to monitor any and all activity. But,  
9 you know, that doesn't mean we're going to tell you no all  
10 the time. And I think that's kind of what happened here.  
11 And I do believe that this defendant, you know, he didn't  
12 have, you know, criminal intent. He thought he was doing  
13 things the right way. But when all is said and done, I  
14 think, you know, by his own testimony what he did was pretty  
15 substantial and not de minimus. And then again just on  
16 Count 2, I just don't think it's the -- it's the correct  
17 code section for this set of facts.

18 All right, as to Count 1, Court imposes a base  
19 fine of \$200, a total fine of \$1,055, which includes a \$150  
20 restitution fund fine, a \$15 restitution fund find  
21 surcharge, a \$40 criminal conviction surcharge, a \$15 secret  
22 witness fee, a \$30 conviction assessment. Waive further  
23 articulation?

24 MR. COOPER: So waived.

25 THE COURT: Ms. Groven?

26 MS. GROVEN: People waive.

27 THE COURT: Thank you. So the total is \$1,055.

28 And Court further imposes 12 months of summary court

1 probation with the condition that Mr. Osterbrink obey all  
2 laws. Payment plan or --

3 MR. COOPER: Yes.

4 THE COURT: Okay, so I'll add \$35 to that. Court  
5 also imposes and stays a \$150 probation revocation fine.  
6 That is imposed and stayed, though. If there are no  
7 probation violations, then that is never actually owed.

8 So \$1,090. And what kind of monthly payments,  
9 Mr. Cooper?

10 MR. COOPER: \$40 a month, your Honor, is what he  
11 can do.

12 THE COURT: All right, payments of -- well --

13 MR. COOPER: A minimum of \$40 a month, which takes  
14 us over two years.

15 THE COURT: All right. Minimum payments of \$40 a  
16 month that will commence -- can we commence on  
17 December 15th?

18 MR. COOPER: Yes, December 15th, your Honor.

19 THE COURT: Due on or before the 15th of each  
20 month starting with December of 2019. To be paid -- again,  
21 it's a minimum of \$40 a month. If you want to pay more,  
22 Mr. Osterbrink, you are welcome to if you want to get it  
23 paid off sooner. And understand that probation is only  
24 12 months, but you're going to sign a payment contract that  
25 is going to advise you that if you fail to make payments,  
26 that can result in a misdemeanor charge.

27 THE DEFENDANT: Right.

28 THE COURT: So if anything happens with your

1 financial circumstances, Mr. Osterbrink, that you're unable  
2 to make those payments, you need to get your case on  
3 calendar to come talk about it.

4 THE DEFENDANT: I would.

5 THE COURT: Because if we just don't hear from  
6 you, I can issue a warrant, add a new charge, and we don't  
7 want to do that.

8 THE DEFENDANT: Right.

9 THE COURT: Then what I'll do is I'll put the  
10 matter on calendar. I guess I need -- look at you,  
11 Mary-Ann. So good. December 7th, 2021. And that will be  
12 at 10 a.m.

13 So, Mr. Osterbrink you'll have a court date, I  
14 order you to appear on December 7th, 2021, at 10 a.m. unless  
15 your fine has been paid in full. If your fine is paid in  
16 full which, if you've made all your payments it will be, you  
17 don't need to be in court in December of 2021.

18 THE DEFENDANT: December which date?

19 THE COURT: December 7th, 2021.

20 THE DEFENDANT: Oh.

21 THE COURT: In a little over two years.

22 THE DEFENDANT: Oh. Do I got to be back in court?

23 THE COURT: And actually, you know what, Mary-Ann  
24 -- just a moment.

25 THE DEFENDANT: I couldn't hear; my ears are  
26 plugged.

27 (The judge confers with the clerk.)

28 THE COURT: I'm changing that date,

1 Mr. Osterbrink. It's not December, because that doesn't  
2 give you enough time.

3 (The judge confers with the clerk.)

4 THE COURT: All right, May 10th, 2022, sir.

5 THE DEFENDANT: Okay.

6 THE COURT: That you should have paid it off in  
7 full by then. If not, you need to be in court on that date  
8 at 10 a.m.

9 THE DEFENDANT: Okay.

10 THE COURT: Then finally, Mr. Osterbrink, I need  
11 to advise you of your appeal rights. You have the right to  
12 appeal my decision. You must do so within 30 days. If you  
13 fail to do so, the decision will stand; you will have waived  
14 your appeal rights.

15 THE DEFENDANT: I'm fine.

16 THE COURT: Okay.

17 THE DEFENDANT: I'm fine.

18 THE COURT: All right. Any questions?

19 MR. COOPER: No, your Honor.

20 MS. GROVEN: No, your Honor. Thank you.

21 THE COURT: All right. I want to thank everyone  
22 for their time and their thoughtful presentation of the  
23 case. And best wishes for a Thanksgiving holiday.

24 MR. COOPER: Thank you.

25 (Whereupon the matter was concluded.)

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CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

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I, MARK M. MAXEY, hereby certify that I am a Certified Shorthand Reporter, and that I recorded verbatim, in shorthand writing, the following proceedings completely and correctly according to the best of my ability:

COURT: Sierra County Superior Court  
JUDGE: Hon. Yvette Durant  
ACTION: People vs. Michael John Osterbrink  
CASE NO.: CR03953

I further certify that my said shorthand reporting has been transcribed into typewriting, and that the preceding pages constitute an accurate and complete transcript of my shorthand writing to the best of my ability for the date specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Dated: December 7, 2019.

\_\_\_\_\_  
MARK M. MAXEY, CSR NO. 3903  
Certified Shorthand Reporter