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Oregon's rape shield law challenged before state Supreme Court

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By Maxine Bernstein, The Oregonian

Oregon's long-standing rape shield law that guards against the public review of a victim's sexual history is under attack in a case pending before the state Supreme Court.

A West Linn man accused of sexual assault and his attorney argue that the law violates the state constitution, which says "No court shall be secret." He wants to delve into his accuser's sexual history in open court.

But Meg Garvin, executive director of the National Crime Victim Law Institute at Lewis & Clark Law School, countered that altering the law would have a far-reaching, chilling effect and undercut decades of work aimed at protecting sexual victims.

"As soon as you make this hearing public" Garvin said, "all of the work of the last 40 years to bring rape into the light and to protect victims and encourage victims to come forward goes out the window."

Oregon's rape shield law, adopted by the Legislature in 1975 and amended two years later, says the court "shall order a hearing in camera" - meaning out of public view - to determine if a victim's past sexual behavior is admissible. Admissible evidence must relate to the victim's motive or bias, be necessary to rebut or explain the state's medical evidence, or help identify the alleged victim. It prohibits details on reputation or opinion regarding a victim's sexual history or manner of dress.

Attorney John Henry Hingson III represents Dean Ramiz MacBale, the owner of a Portland-area strip club accused of sexually assaulting a former female employee. Hingson last month argued before the Oregon Supreme Court that the rape shield law violates the state and federal constitutions, primarily because it mandates that such a hearing to determine what evidence, if any, about a victim's past sexual conduct can be entered at trial, be held outside of public view.

"It's the state's burden to prove there's justification for breaking the promise that 'No court shall be secret,' " Hingson argued before the justices last month, citing language from Oregon Constitution's Article 1, section 10.

Oregon Assistant Attorney General Michael A. Casper countered that the right to an open court is not absolute.

"This is an important case because the hearing protects the rights of sex assault victims from having to go through the degrading, humiliating experience of relating ultimately irrelevant facts about their sexual history in

open court," Casper told the justices.

To open the court could deter victims from reporting sexual assaults, he said. Further, the defendant is able to attend the closed hearing, and any details about the alleged victim's sexual history deemed admissible will still go to trial, Casper added.

Both sides are awaiting a ruling.

Garvin said she's not aware of a similar challenge to the rape shield law in Oregon or nationally. In an amicus brief filed in this case, she argued that opening such a hearing would violate the federal and state constitutional protections for victims, their right to privacy and to be treated with "due dignity, respect and fairness."

MacBale is charged with unlawful sexual penetration, sodomy, and two counts of second-degree sexual abuse, stemming from a Feb. 17, 2011, encounter with a female employee at the Dolphin 1 strip club he owns on McLoughlin Boulevard in Milwaukie.

The employee told police that her boss asked her to meet him at his office that morning. Once there, she said MacBale started to kiss her, which did not offend her because that was common. But then he unbuttoned her pants and sexually assaulted her, despite her pleas to stop and that he was hurting her, according to a probable cause affidavit. After, she said MacBale told her she needed to get to work if she wanted to keep her job. The woman did go to work, but went to OHSU hospital that night. MacBale's DNA was discovered on swabs taken from the woman, reports show.

MacBale first denied, but then admitted to an illicit sexual affair with the woman, yet said it was consensual. His attorney contends the woman is making false allegations against MacBale to "shake down" his client into paying her money, and as revenge for MacBale's attempt to end their relationship.

According to legal briefs, MacBale argues the woman "went into a jealous rage" when she saw some Dolphin dancers giving him lap dances, and begged him to divorce his wife and marry her. When he tried to "disentangle himself" from the sexual relationship, MacBale contends that the woman continued to pursue him.

MacBale, now going through a divorce and facing an IRS inquiry, wants to bring up the alleged victim's past -- including a rape allegation she had made against another acquaintance after she was indicted and accused of shooting that man in April 1997. The woman was convicted of second-degree assault with a firearm and unlawful use of a weapon and sentenced to 70 months in prison. No rape charges were filed against the acquaintance.

MacBale also wants to admit at trial his accuser's subsequent alleged three-way sex with an Oregon corrections employee and another inmate while she was in prison, according to court documents.

An investigation by the Oregon Department of Corrections and Oregon State police found that MacBale's accuser had sex with Christopher Randall, a former food services coordinator at Coffee Creek Correctional Facility. A fellow female inmate told investigators she had sex with Randall and MacBale's accuser in "threesomes in the

meat locker in the prison," according to court records.

Randall was convicted in 2004 of two counts of official misconduct for having sex with two inmates and sentenced to 45 days in jail with five years' probation.

Holding such a hearing in open court on his accuser's sexual past, Hingson argued, could influence someone to come forward with additional information in the case that could either help the state or his client, "which advances the ultimate goal of justice, and makes sure the horrible of horrors does not occur, namely the conviction of the innocent."

Clackamas County prosecutor Russell Amos, who first opposed Hingson's motion to hold the hearing in public, argued that the past sexual behavior of the victim involving a man from 14 years earlier and a corrections employee are not relevant to MacBale's case.

"The evidence is highly prejudicial, will confuse the jury, create embarrassment for the victim and cause undue delay," he wrote.

Before the state Supreme Court, Casper said he recognized that holding court hearings in public is important, but he argued that there's little gained by having the public hear irrelevant details about a victim's sexual history. He called the proceeding a "peripheral hearing" that serves a limited purpose and unlikely to have a significant effect on the trial.

Hingson cited two prior state Supreme Court rulings that threw out state laws that conflicted with the state constitution's ban on secret courts. One in 1980 required a juvenile proceeding not exclude the public, and another in 1987 prevented the state from holding a closed hearing to force a witness in a murder case to testify under immunity.

But Garvin argued that the state Supreme Court must weigh victims' rights laws included in the state's Constitution since. To invalidate Oregon's rape shield law and hold such an evidentiary hearing in public, she wrote, "would offend every notion of justice, fairness, due dignity and respect afforded victims by the law and policies of this state."

– Maxine Bernstein

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