

FILED: September 16, 2004

## IN THE SUPREME COURT OF THE STATE OF OREGON

TERRY YANCY,

Petitioner on Review,

v.

WILLIAM W. SHATZER,  
Portland City Code Hearings Officer;  
and CITY OF PORTLAND,

Respondents on Review.

(CC 0008-08313; CA A114776; SC S50280)

En Banc

On review from the Court of Appeals.\*

Argued and submitted May 6, 2004.

Thomas M. Christ, of Cosgrave Vergeer Kester LLP, Portland, argued the cause for petitioner on review. With him on the briefs were Ed Johnson and Marc Jolin, Oregon Law Center.

Harry Auerbach, Senior Deputy City Attorney, Portland, argued the cause and filed the briefs for respondents on review.

Roy Pulvers, of Lindsay, Hart, Neil & Weigler, LLP, Portland, filed a brief on behalf of *amicus curiae* Oregon State Bar.

Charles F. Hinkle, Portland, filed a brief on behalf of *amicus curiae* ACLU Foundation of Oregon, Inc.

DE MUNIZ, J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is vacated.

Balmer, J., specially concurred and filed an opinion, in which Riggs, J., joined.

\* Appeal from Multnomah County Circuit Court, Ellen F. Rosenblum, Judge. 185 Or App 740, 60 P3d 1156 (2003).

DE MUNIZ, J.

Portland police stopped petitioner Yancy for jaywalking. In the course of that contact, the police searched petitioner and discovered less than an ounce of marijuana. The police then issued petitioner a citation that excluded him from two Portland city parks for a period of 30

days. Petitioner timely appealed to the City of Portland Hearings Officer, which affirmed the exclusion. After the exclusion period had run, petitioner sought to challenge the exclusion citation by means of a writ of review in circuit court. The circuit court rejected petitioner's arguments on the merits. Petitioner appealed. The Court of Appeals observed that the case was moot, because the exclusion period had expired and ordered the circuit court to vacate its judgment and dismiss the matter as moot. *Yancy v. Shatzer*, 185 Or App 704, 705, 60 P3d 1156 (2003). Petitioner sought review in this court. We allowed review to consider whether Oregon courts have the power to consider disputes that, like the present one, are capable of repetition and yet evade review because they became moot at some point in the proceedings. Having considered the question, we conclude that our judicial power does not include the authority to adjudicate cases in which there is no existing controversy. We therefore affirm the decision of the Court of Appeals. On June 9, 2000, the Portland police stopped petitioner after he left Tom McCall Waterfront Park and proceeded across Front Avenue against a pedestrian "Don't Walk" signal. During that contact, the police searched petitioner and discovered less than an ounce of marijuana. Based on the discovery of the marijuana, the police issued petitioner a citation that excluded him from Waterfront Park and Ankeny Plaza. <sup>(1)</sup> Under the terms of the exclusion, which took effect immediately, petitioner would be subject to arrest for criminal trespass if he were to return to either park within 30 days.

On June 13, 2000, petitioner filed an appeal with the Code Hearings Officer. By June 21, 2000, the hearing date, almost half of the exclusion period had run. The hearings officer upheld the exclusion, citing petitioner's failure to obey the traffic signal.

On July 9, 2000, the exclusion period expired. On August 18, 2000, petitioner filed a petition for a writ of review in the circuit court raising various constitutional challenges to the ordinance. *See* ORS 34.020 (authorizing use of writ by circuit court to review proceedings before inferior tribunal). On September 9, 2000, the City of Portland filed a return to the writ of review, after which the parties briefed and argued the matter. The return addressed petitioner's constitutional arguments on their merits; it did not mention the fact that the 30-day exclusion period had run. On April 20, 2001, the circuit court issued an opinion in which it rejected petitioner's constitutional challenges.

Petitioner appealed to the Court of Appeals. In a per curiam opinion, the Court of Appeals concluded that, because the period of exclusion expired on July 9, 2000, the case was moot before the circuit court rendered its judgment. The Court of Appeals therefore remanded the matter to the circuit court with instructions to vacate the judgment and dismiss the writ of review. *Yancy*, 185 Or App at 705. We allowed petitioner's petition for review.

Since the adoption of the Oregon Constitution in 1857, this court, from time to time, has been required to determine whether a matter before it is one that is appropriate for judicial disposition. Historically, this court has described that undertaking as a determination whether a "justiciable controversy" exists. In that regard, this court has stated that "[a] controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests." *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982). Similarly, this court has observed that justiciability contemplates "that the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." *Brunnett v. PSRB*, 315 Or 402, 405, 848 P2d 1194 (1993). Encompassed within the broad question of justiciability are a constellation of related issues, including standing, ripeness, and mootness. For example, this court has recognized that, even if a case is otherwise justiciable, the court will dismiss it as moot if a "decision no longer will have a practical effect on or concerning the rights of the parties." *Id.* at 406. This

court also has observed that "[m]ootness is a species of justiciability, and a court of law exercising the judicial power of the state has authority to decide only justiciable controversies." *First Commerce of America, Inc. v. Nimbus Center Assoc.*, 329 Or 199, 206, 986 P2d 556 (1999).

Petitioner acknowledges the foregoing authorities, but points out that this court at times has appeared to recognize an exception to the rule against deciding moot cases. For example, in 1947, this court utilized such an exception in *Perry v. Oregon Liquor Commission*, 180 Or 495, 498-99, 177 P2d 406 (1947). In *Perry*, the Oregon Liquor Control Commission (OLCC) suspended a supper club's liquor license for 60 days. A circuit court held that the OLCC had overstepped its authority in suspending the license and reinstated it. The OLCC appealed to this court, but the club moved to dismiss the appeal, arguing that "the question as to the suspension of the license [is] a moot one--and therefore improper to consider" because the period of suspension already had expired. *Id.* at 498. The court denied the motion, indicating that the court would exercise its discretion to decide a moot question for the guidance of an official administrative agency, if the question involved the public welfare and was likely to arise again in the future. *Id.* at 498-99. In reaching that conclusion, the court did not examine the text and history of the Oregon Constitution, but relied on cases from other jurisdictions. *Id.* at 499. The court reversed the circuit court's decision to lift the suspension of the license. *Id.* at 500-01. Subsequently, this court has followed *Perry* on several occasions. See, e.g., *Stowe v. School District No. 8-C, Malheur County*, 240 Or 526, 528, 402 P2d 740 (1965); *Linklater v. Nyberg*, 234 Or 117, 120, 380 P2d 631 (1963); *Huffman v. Alexander*, 197 Or 283, 333, 253 P2d 289 (1953); *State ex rel Smith v. Smith*, 197 Or 96, 126, 252 P2d 550 (1953); *State ex rel Stadter v. Newbry*, 196 Or 331, 337, 248 P2d 840 (1952); *Oregon State Grange v. McKay*, 193 Or 627, 631, 239 P2d 834 (1952) (illustrating proposition). However, none of those cases purported to analyze this court's statement in *Perry* beyond citing it.

More recently, however, this court has rejected *Perry's* rationale for deciding moot cases. In *Kay v. David Douglas School Dist. No. 40*, 303 Or 574, 577, 738 P2d 1389 (1987), this court observed that no justiciable controversy existed between the parties when the circuit court entered judgment. Therefore, the court concluded, the case was moot and should have been dismissed. In *Mid-County Future Alternatives Comm. v. Metro Area Local Gov't Boundary Comm'n*, 304 Or 89, 92, 742 P2d 47 (1987), this court asserted that it would not decide moot, nonjusticiable cases, regardless of claims of public importance, "because of [the court's] regard for the constitution of this state, which separates the power and functions of the departments of government, Or Const, Art III, § 1, and vests in the courts only the 'judicial power.' Or Const, Art VII (Amend), § 1." A few years later, in *Barcik v. Kubiacyk*, 321 Or 174, 189, 895 P2d 765 (1995), this court reaffirmed the observations that it had made in *Mid-County*.

In summary, *Kay*, *Mid-County*, and *Barcik* indicate, at least in general terms, that the constitutional grant of governmental power to the judiciary is limited by the justiciability requirement. Although the decisions in *Mid-County* and *Barcik* express doubts about this court's constitutional authority to decide moot cases, this court has not undertaken a full constitutional analysis of that subject. This case presents the occasion to do so.

Two constitutional provisions, Article III, section 1, and Article VII (Amended), section 1, of the Oregon Constitution make reference to the judiciary. Article III, section 1, was adopted as part of Oregon's original constitution. That provision states:

"The powers of the Government shall be divided into three [separate]

departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

The phrase "judicial power" appears in Article VII (Amended), section 1, which provides that "[t]he judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law." Article VII (Amended), section 1, adopted by the people on November 8, 1910, superseded similar text set out in Article VII (Original), section 1, of the Oregon Constitution. That former section provided that "[t]he Judicial power of the State shall be vested in a [Supreme] Court, [Circuit] Courts, and County Courts, which shall be Courts of Record having general jurisdiction, to be defined, limited, and regulated by law in accordance with this Constitution." [\(2\)](#)

The text of Article III, section 1, prompts an initial observation. The scope of judicial power can be defined in two ways: by what it is and by what it is not. The judicial power is distinct from the executive power and the legislative power, and it resides in a department separate from the legislative and the executive departments. The judicial department may not exercise any of the functions of one of the other departments, unless the constitution expressly authorizes it to do so. However, standing alone, that constitutional limitation is of little assistance. That is, the concept of separation of powers suggests what judicial power is not, but, without further investigation, it does little to explain what judicial power is.

To make that determination, we must ascertain the intended scope of the "judicial power" described in Article VII (Amended), section 1. That provision does not define judicial power. Instead, Article VII (Amended), section 1, identifies the entities that exercise judicial power, namely, "one supreme court and \* \* \* such other courts as may from time to time be created by law." Article VII (Original) also merely identified the location of judicial power, establishing it in "a [Supreme] Court, [Circuit] Courts, and County Courts[.]" Like Article III, the text of Article VII (Amended), section 1, offers no other textual clues about the scope of the "judicial power." That lack of assistance notwithstanding, the present case requires us to determine the intended meaning of that term.

When "interpreting a constitutional provision adopted through the initiative petition," the court's "task is to discern the intent of the voters." [Stranahan v. Fred Meyer, Inc.](#), 331 Or 38, 56, 11 P3d 228 (2000) (citing *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993)). In determining that intent, the "best evidence [] is the text of the provision itself[]; however, the] context of the language of the ballot measure may also be considered." *Id.* "If the intent of the voters is not clear from the text and context of the initiated constitutional provision, the court turns to the history of the provision." *Id.* (citing *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994)).

As noted above, Oregon voters adopted Article VII (Amended) through the initiative process in 1910. In doing so, the phrase "judicial power" was repeated, without modification, from Article VII (Original) in 1910. The term was left undefined and unchanged, except for removal of the capitalization of the letter "J." In the new provision, the list of entities that would exercise judicial power was changed slightly, but that change does not reveal any particular intent as to the meaning of the phrase, "judicial power." Neither are we aware of any historical evidence that suggests that the voters intended to alter the meaning of the term "judicial power" from the meaning that the term enjoyed in 1857. Given the drafter's

decision to carry over the old term into the new amendment, and given the lack of any evidence from any source of which we are aware that, identical phrasing aside, something new and different was intended, we conclude that the voters intended no change to the substantive meaning of the term "judicial power" in their adoption of Article VII (Amended), section 1. *See generally State v. Conger*, 319 Or 484, 491-502, 878 P2d 1089 (1994) (to understand meaning of text set out in Article VII (Amended), section 5, court examined historical background of identical text in Article VII (Original)).

Because we conclude that the 1910 voters did not intend to change the meaning or scope of "judicial power" in Article VII (Amended), section 1, from what it was understood to include in 1857, we must inquire into the meaning and scope of "judicial power" when Article VII (Original) of the Oregon Constitution was adopted in 1857. When construing original provisions of the Oregon Constitution, this court ascertains and gives effect to the intent of the framers of the provisions at issue. *Stranahan*, 331 Or at 54-55. That intent is determined by (1) analyzing the text and context of the provisions, giving words the same meaning that the framers would have ascribed to them; (2) reviewing the historical circumstances that led to their creation; and (3) examining the case law interpreting those provisions. *Priest v. Pearce*, 314 Or 411, 416, 840 P 2d 65 (1992). This court's goal is to apply faithfully the principles embodied in those provisions to modern circumstances. *State v. Rogers*, 330 Or 282, 297, 4 P3d 1261 (2000).

As we observed previously, the meaning of "judicial power" is not clear from the text and context of Article VII (Original), section 1. We therefore turn to the historical circumstances surrounding the creation of that provision. In doing so, we necessarily, and briefly, address the history of the development of the Oregon judiciary and the judicial power associated with that branch of government. [\(3\)](#)

The creation of an Oregon judiciary is related to the death, on February 15, 1841, of Ewing Young, the "wealthiest American citizen" from the Pacific Northwest territory. Lawrence T. Harris, *A History of the Judiciary of Oregon*, in *Oregon Supreme Court Record* 73, 75 (Portland, Stevens-Ness 1938). Young had died intestate and had no known heirs. *Id.* Because Young's business had been such an important economic influence on the territory, the territory's inhabitants felt that they needed to devise a system to settle his affairs in an orderly fashion. *Id.* At a meeting involving "some of the inhabitants of the Willamette Valley," a "provisional government" was formed consisting of "a Governor, a supreme judge with probate powers, three justices of the peace, three constables, and an attorney general." *Id.*

Later, in May 1843, another public meeting was held to institute more formally the provisional government. *Id.* at 76. At that meeting, a legislative committee was formed, and, in July 1843, that committee presented a report intended to be "the first body of rules or regulations which made any approach to laws" of the Oregon Territory. *Id.* The report was adopted by vote of the inhabitants of the territory and vested the judicial power "in a supreme court consisting of a supreme judge and two justices of the peace, [and] a probate court \* \* \*." *Id.* at 76-77.

It was later determined that the original laws required reorganization, and, in July 1845, the inhabitants overwhelmingly adopted a new Organic Law. *Id.* at 79-80. Article I, section 8, provided that "[t]he judicial power shall be vested in a supreme court, and such inferior courts of law, equity and arbitration, as may by law, from time to time be established." Organic Law of the Provisional Government of Oregon (reprinted in General Laws of

































