

Oregon v. Branstetter

Oregon Court of Appeals

1 P.3d 451

March 22, 2000

Reversed by Oregon Supreme Court at end of PDF

Summary of Opinion

The State of Oregon seized 11 horses and one donkey from the defendant Branstetter's possession. It filed cruelty charges and temporarily placed the animals in the care of the local Humane Society. The first jury trial on cruelty charges ended in a mistrial when the jury was unable to agree on a verdict. Just before the second trial, the State filed a petition to forfeit the animals unless the defendant posted a bond to cover the cost of their care. When defendant failed to post bond, the trial court forfeited the animals to the ownership of the Humane Society that was caring for them. A few days later, a jury found the defendant not guilty of the cruelty charges.

He sought to appeal from the order of forfeiture, but the Court of Appeals in this opinion dismisses the appeal on the ground that it is not authorized by Oregon law under these circumstances—when the owner of forfeited animals is acquitted of all charges. There was a dissent. The Oregon Supreme Court has agreed to hear this case, so this opinion is not the end of the dispute.

Text of Opinion

Defendant appeals from a trial court order forfeiting his interest in eleven horses and a donkey because of his failure to post a bond to ensure payment of the expenses of caring for them. We hold that the order is not appealable and therefore dismiss the appeal. We also briefly respond to defendant's and the dissent's argument that the forfeiture was an excessive fine under Article I, section 16, of the Oregon Constitution.

After investigating allegations that defendant was not feeding or caring for the animals, a sheriff's deputy obtained a search warrant authorizing their impoundment. Defendant was then charged with 12 counts of misdemeanor animal neglect. Petitioner Pioneer Humane Society (Pioneer) took possession of the animals and boarded and fed them throughout the criminal proceedings. [FN1] The first trial ended in a mistrial when the jury was unable to reach a verdict. After the first trial, and before the second trial, Pioneer filed a petition in the criminal proceeding seeking forfeiture of the animals pursuant to ORS 167.347. [FN2] The state moved to amend Pioneer's petition so that the state would become a copetitioner. The court allowed Pioneer's and the state's petitions, rejecting defendant's constitutional and other arguments in opposition. It found that petitioners had made the probable cause showing that ORS 167.347(3)(a) requires and that Pioneer's cost for caring for the animals was \$2,700. It then ordered the animals forfeited to Pioneer unless defendant posted a bond for \$2,700 within 72 hours of the order. It subsequently denied defendant's motion to reconsider the bond requirement.

FN1. On appeal, defendant challenges neither the seizure of the animals nor their placement with Pioneer.

FN2. ORS 167.347 provides:

"(1) If any animal is impounded pursuant to ORS 167.345(2) and is being held by a county animal shelter or other animal care agency pending outcome of criminal action charging a violation of ORS 167.310 to 167.340, prior to final disposition of the criminal charge, the county or other animal care agency may file a petition in the criminal action requesting that the court issue an order forfeiting the animal to the county or other animal care agency prior to final disposition of the criminal charge. The petitioner shall serve a true copy of the petition upon the defendant and the district attorney.

"(2) Upon receipt of a petition pursuant to subsection (1) of this section, the court shall set a hearing on the petition. The hearing shall be conducted within 14 days of the filing of the petition, or as soon as practicable.

"(3)(a) At a hearing conducted pursuant to subsection (2) of this section, the petitioner shall have the burden of establishing probable cause to believe that the animal was subjected to abuse, neglect or abandonment in violation of ORS 167.310 to 167.340. If the court finds that probable cause exists, the court shall order immediate forfeiture of the animal to the petitioner, unless the defendant, within 72 hours of the hearing, posts a security deposit or bond with the court clerk in an amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the petitioner in caring for the animal from the date of initial impoundment to the date of trial.

"(b) Notwithstanding paragraph (a) of this subsection, a court may waive for good cause shown the requirement that the defendant post a security deposit or bond.

"(4) If a security deposit or bond has been posted in accordance with subsection (3) of this section, and the trial in the action is continued at a later date, any order of continuance shall require the defendant to post an additional security deposit or bond in an amount determined by the court that shall be sufficient to repay all additional reasonable costs anticipated to be incurred by the petitioner in caring for the animal until the new date of trial.

"(5) If a security deposit or bond has been posted in accordance with subsection (4) of this section, the petitioner may draw from that security deposit or bond the actual reasonable costs incurred by the petitioner in caring for the impounded animal from the date of initial impoundment to the date of final disposition of the animal in the criminal action.

"(6) The provisions of this section are in addition to, and not in lieu of, the provisions of ORS 167.350."

On the day of the second trial, the court entered an order forfeiting the animals on the ground that defendant had not posted a bond. Thereafter, the case went to trial. The jury found defendant not guilty of all charges, and the court entered a judgment of acquittal. Defendant appeals from the order forfeiting the animals. The state argues that the order is not appealable. We agree.

Defendant asserts that the order of forfeiture is appealable under ORS 138.040, which provides, in part, that "the defendant may appeal to the Court of Appeals from a judgment or order described under ORS 138.053 in a circuit court[.]" ORS 138.053(1) provides that a judgment or order in a criminal case is appealable only if it imposes a sentence on conviction, suspends imposition or execution of any part of a sentence, or makes a decision relating to probation. None of those events occurred here or could have occurred here. There can be no sentence, probation or other sanction after an acquittal. We are not aware of any other provision of ORS 138.010 to 138.310 that would allow an acquitted defendant to appeal.

The dissent argues, however, that this case is a special statutory proceeding that is appealable under ORS 19.205(4), which provides:

"An appeal may be taken from the circuit court in any special statutory proceeding under the same conditions, in the same manner and with like effect as from a judgment, decree or order entered in an action or suit, unless such appeal is expressly prohibited by the law authorizing such special statutory proceeding."

According to the dissent, the provisions of ORS 167.347 create a special statutory proceeding. The problem with the dissent's argument is that it fails to recognize that the essential nature of a special statutory proceeding is that it is separate from every other proceeding. Because ORS 167.347 establishes a process that the statute expressly makes a part of the underlying criminal case, it cannot be a special statutory proceeding.

The Supreme Court's primary discussion of ORS 19.205(4) (which at the time was numbered ORS 19.005(4)) is in *State v. Threet*, 294 Or. 1, 653 P.2d 960 (1982). The court emphasized that the distinguishing feature of a special statutory proceeding is that it be separate from any other proceeding. As examples it mentioned the writs of review and mandamus, habeas corpus, punishment for contempt, a proceeding under the Corrupt Practices Act to compel the disclosure of expenditures, and appeals of trial court decisions on review of administrative actions. 294 Or. at 4-5, 653 P.2d 960. On the other hand, an order denying a motion in the nature of *coram nobis* did not qualify, because the motion was part of a criminal proceeding. *Id.* at 6, 653 P.2d 960. In *Threet* itself, the court held that an order compelling a witness to testify before a grand jury was not an order in a special statutory proceeding and, thus, was not appealable.

Later cases continue to treat separateness as the defining characteristic of a special statutory proceeding. In *Garganese v. Dept. of Justice*, 318 Or. 181, 864 P.2d 364 (1993), the Supreme Court held that a proceeding challenging an administrative investigative demand under the Unlawful Trade Practices Act (UTPA) was a special statutory proceeding, because it was entirely distinct from any action prosecuting an alleged violation of the Act. The dissent relies on *Garganese* to support its argument that we have jurisdiction of this appeal. However, the decision in that case is both consistent with *Threet* and supports our dismissal of this appeal.

The authority for the administrative investigative demand at issue in *Garganese* came from ORS 646.618(1), which authorizes the Department of Justice (DOJ) to serve such a demand "upon any person who is believed to have information, documentary material or physical evidence relevant to" an alleged or suspected violation of the UTPA. The question was whether the procedure provided in ORS 646.618(2) for challenging that demand was separate from the procedure provided in ORS 646.632 for prosecuting a violation of the UTPA; if it was, it qualified as a special statutory proceeding for purposes of appellate jurisdiction. The Supreme Court noted that in *Threet* it had traced the history of special statutory proceedings and had concluded that "a necessary attribute of a special statutory

proceeding under [ORS 19.205(4)] is that it be a 'separate judicial proceeding with clearly defined parties.' " Garganese, 318 Or. at 185-86, 864 P.2d 364 (emphasis added). The court then discussed whether the procedure for challenging the DOJ's investigative demand was "a separate and distinct judicial proceeding, with clearly defined parties, that does not disrupt other judicial proceedings [.]" Id. at 186, 864 P.2d 364.

In deciding whether the case before it was a separate and distinct judicial proceeding, the court noted that the DOJ could serve an investigative demand on "any person" who it believed had evidence relevant to an alleged or suspected violation. Thus, a proceeding challenging an investigative demand may be entirely separate from an enforcement proceeding under ORS 646.632. DOJ's authority under ORS 646.618(1) is not limited to persons suspected of violating the act, and thus the recipient of an investigative demand will not necessarily be the target of the investigation.

"Because the existence of a proceeding under one of those statutes is not dependent on the existence of a proceeding under the other, we conclude that the two proceedings are separate and distinct." 318 Or. at 187, 864 P.2d 364. It noted that, when the DOJ was unsure whether there is evidence of a violation of the UTPA, a challenge to an investigative demand might delay an enforcement action, but it held that, because no enforcement action under ORS 646.632 had been filed, the challenge would not disrupt another judicial proceeding. Because the trial court's ruling on the investigative demand terminated the proceeding under ORS 646.618(2), its order was appealable under what is now ORS 19.205(4). Id. at 187-88, 864 P.2d 364. Garganese, thus, is simply an application of Threat to a statute that expressly contemplated separate proceedings.

The dissent also relies on *State v. K.P.*, 324 Or. 1, 921 P.2d 380 (1996), in which the defendant appealed from an order under ORS 137.225 that sealed the records of her arrest and conviction for theft except for police investigation reports. After rejecting two other possible statutory authorizations for appeal, the Supreme Court held that the order was appealable under what is now ORS 19.205(4). Its reasons for rejecting the two other possible sources of appellate jurisdiction are essential to understanding the relevance of *K.P.* to this case. The court first noted that a motion to set aside a criminal conviction or arrest was not in the nature of an action to punish a criminal violation but, instead, had a rehabilitative purpose. The motion was not, therefore, a criminal proceeding, and ORS chapter 138 did not govern an appeal. The court then rejected the defendant's suggestion that the case was appealable, under what is now ORS 19.205(2)(c), as an order affecting a substantial right, made in a proceeding after judgment. Instead, it held that the order was appealable under ORS 19.205(4) as coming from a special statutory proceeding. *K.P.*, 324 Or. at 4-6, 921 P.2d 380.

The foundation for the court's analysis in *K.P.*, thus, was that a motion under ORS 137.225 to set aside a conviction starts a new proceeding from the original prosecution; if it did not, one of the other statutes would have controlled the appealability of the decision. The court determined that the proceeding in question was not part of the criminal proceeding and was appealable for that reason. That is different from this case, in which the statute expressly provides that the forfeiture proceeding is part of the criminal case.

The final cases that the dissent discusses, *State v. Cunningham*, 161 Or.App. 345, 985 P.2d 827 (1999), and *State v. Curran*, 291 Or. 119, 628 P.2d 1198 (1981), both involve current ORS 19.205(2)(c). That statute does not apply in this case, because the court entered the order of forfeiture before the judgment of conviction. In any event, ORS 19.205(2)(c) is conceptually inconsistent with a special statutory proceeding under ORS 19.205(4). In *Cunningham*, we held that an order in a criminal case that denied the defendant's motion to seal certain records relating to defense expenses was appealable as a post-judgment order that affected a substantial right. We concluded that, although the motion was made in a criminal case, it was essentially civil in character and thus the civil appeals statute controlled. We did not discuss the possible applicability of ORS 19.205(4). Indeed, if the court's order was a post-

judgment order in the criminal case, it could not have been a judgment in a special statutory proceeding.

In *Cunningham* we relied in part on *Curran*, in which the defendant did not appeal from his conviction but instead appealed from a post-conviction punitive forfeiture that was imposed under former ORS 471.665 (1979). Under that statute, a court could order the sale of property used to transport contraband, pursuant to an order that it entered after the conviction of the person. Former ORS 471.665(1) (1979). The forfeiture apparently occurred on the entry of the order. In *Curran*, the court entered the order of sale over a month after it entered the judgment of conviction. As a result, the court noted, the appeal of the forfeiture was not an appeal from a judgment on conviction. Rather, the forfeiture was in the nature of a civil penalty, and the civil appeal statutes therefore applied. The court then concluded that the applicable statute was current ORS 19.205(2)(c), because the order was both final as to the forfeiture and came after judgment. Although it also noted that current ORS 19.205(4) was "arguably applicable," it had no reason to decide the issue. *Curran*, 291 Or. at 124- 27, 628 P.2d 1198.

Contrary to the dissent's suggestion, *Curran* supports our conclusion that we do not have jurisdiction over this case. The forfeiture in that case was not a separate proceeding. Rather, as the Supreme Court recognized, "the trial court was authorized to proceed with the matter of forfeiture without the necessity of resort by the district attorney to a new and separate cause [.]" 291 Or. at 126, 628 P.2d 1198. That conclusion is also inherent in the court's reliance on current ORS 19.205(2)(c) for its jurisdiction, because that statute requires that the order be made after judgment in the same case. The court decided *Curran* a year before it decided *Threet*, so when it suggested that current ORS 19.205(4) might also apply it did not have the benefit of the more careful consideration that it gave that statute in the later case. The emphasis in *Threet* and later cases on separateness as an essential element of a special statutory proceeding means that it is impossible to find jurisdiction of the same order or judgment under both subsections. If the order is appealable because it comes after judgment in the same case, it cannot be an order in a special (and thus separate) statutory proceeding. Thus, holding that one of these subsections applies necessarily means that the other does not.

We have followed *Threet* in more recent cases. Thus, in *Strother and Strother*, 130 Or.App. 624, 628, 883 P.2d 249 (1994), rev. den. 320 Or. 508, 888 P.2d 569 (1995), we followed *Threet* and held that a proceeding under the Abuse Prevention Act was a special statutory proceeding. In doing so, we emphasized that the proceeding involved clearly defined parties and was not part of any other judicial proceeding. In *State v. Gangi*, 66 Or.App. 582, 675 P.2d 181 (1984), we held that we had no jurisdiction over an appeal from an order continuing a case for five *295

years rather than placing the defendant under the jurisdiction of the Psychiatric Security Review Board or discharging him. We agreed with the state's reliance on an earlier case, which we held was consistent with *Threet*, to show that there was no special statutory proceeding.

The application of *Threet* and *Garganese* to this case is clear. The essential issue is whether the order of forfeiture occurred in a proceeding that was separate and distinct from the criminal case. The statute that authorizes the forfeiture also answers that question. ORS 167.347(1) provides that a county animal shelter or other animal care agency that is caring for an animal pending the outcome of a criminal animal neglect case "may file a petition in the criminal action " seeking to forfeit the animal to the agency. The court will then hold a hearing on the petition. If it finds that there is probable cause to believe that the animal was subject to abuse, neglect, or abandonment in violation of the criminal statutes, it shall order immediate forfeiture unless the defendant posts a bond within 72 hours in an amount sufficient to repay the costs of caring for the animal from the date of impoundment to the date of trial. ORS 167.347(3)(a). Although the purpose of the bond and forfeiture requirement is not punitive, the statute expressly provides that the entire procedure occurs within the criminal case.

Because it is not separate from that case, it cannot be a special statutory proceeding under ORS 19.205(4). Because it is not a special statutory proceeding, and because there is no other possible basis for appellate jurisdiction, we do not have jurisdiction over this appeal. [FN5]

FN5. This case illustrates the importance of the requirement that special statutory proceedings be separate from other judicial proceedings. If defendant were entitled under ORS 19.205(4) to appeal from the order that forfeited his interest in the animals, he would file his notice of appeal in his criminal case, as he did here, because that is the only case in which it could be filed. If he had done that before his second trial on the animal neglect charges, the filing of the notice would have deprived the trial court of jurisdiction to conduct that trial. See, e.g., ORS 19.270(1); ORS 138.083; *Macy v. Blatchford*, 154 Or.App. 313, 324, 961 P.2d 873, rev. allowed 328 Or. 194, 977 P.2d 1172 (1998). We would then have had to decide defendant's appeal from the forfeiture order before the case could have been returned to the trial court for trial of the criminal charges. The requirement that special statutory proceedings be separate to be appealable under ORS 19.205(4) avoids creating situations, such as the one described here, in which people could obtain appellate review of interlocutory orders. Tellingly, none of the cases on which the dissent relies involved a situation in which appellate review under ORS 19.205(4) would deprive a trial court or agency of jurisdiction to proceed with a pending matter. That is because none of them violated the separateness requirement, as a decision in favor of defendant on the jurisdictional issue in this case would.

Our decision that we have no jurisdiction over the appeal decides this case. However, we will respond briefly to the dissent's argument that the forfeiture was an excessive fine because of the disproportion between the cost of caring for the animals and their value. [FN6] The underlying problem with the dissent's conclusion is that the forfeiture was not a fine or any other form of punishment for defendant's alleged abuse of the animals. Because of defendant's acquittal, any fine for that offense would be excessive and beyond the trial court's authority. If defendant had been convicted of animal abuse, ORS 167.350 would have provided authority for the court to forfeit his rights in a mistreated animal. Such a punitive forfeiture, however, is not the purpose of ORS 167.347. Rather, the purpose of that statute is to ensure that the agency that takes care of allegedly abused or neglected animals pending the trial will be able to recover the expense of that care. That purpose is obvious from the structure of the statute.

FN6. As part of arguing that the forfeiture was an excessive fine, the dissent emphasizes that the forfeiture is part of the criminal action, not separate from it. In doing so, it shows that the forfeiture is not a special statutory proceeding and, thus, that we do not have jurisdiction over this appeal.

ORS 167.345 provides the background to ORS 167.347. Under that statute, if there is probable cause to believe that an animal is being abused, a peace officer, after obtaining a search warrant, may impound the animal. ORS 167.345(2). The court may then order the impounded animal held at an animal care facility. The statute requires the facility to provide adequate food and water and permits it to provide veterinary care. ORS 167.345(3). The purpose of ORS 167.347 is to establish the method of paying for the costs that the facility incurs in carrying out those responsibilities. Subsection (1) permits the agency, before final disposition of the criminal charge, to petition for a court order forfeiting the animal. Subsection (2) provides for a hearing on the petition. Under subsection (3), the agency has the burden of establishing probable cause that the animal was abused; if the agency meets that burden, the court shall order forfeiture unless the defendant posts a bond or security deposit within 72 hours.

Subsection (5) allows the agency to draw on the bond or security deposit to cover its actual reasonable costs. Finally, subsection (6) expressly provides that the statute is in addition to, not in lieu of, ORS 167.350, which provides for forfeiture as a penalty on conviction.

The essential point about ORS 167.347 is that the purpose for the forfeiture is to ensure payment to the agency, not to punish the defendant. Permitting the defendant to avoid the forfeiture by providing security for the agency's expenses--that is, to fulfill the defendant's obligation as owner of the animals to give them adequate care--is in itself inconsistent with the idea that the forfeiture is punitive. Under ORS 87.159, the agency has a lien on the animals in its care. It appears that ORS 167.347 provides an alternative, more efficient, method for protecting the agency. Because that method is not punishment for a crime, it is not unconstitutional on any ground that defendant raises. [FN7]

FN7. Defendant does not assert that there is any constitutional infirmity in the failure to provide in ORS 167.347 for sale rather than forfeiture of the animals, with the owner receiving the proceeds that exceed the costs of sale and the agency's expenses. Foreclosing a lien would normally require such a sale and disposition of the proceeds. See ORS 87.206.

Appeal dismissed.

EDMONDS, P.J., dissenting [lengthy opinion that there is a right to appeal in this situation has been omitted].

Oregon v. Branstetter

**Oregon Supreme Court
332 Or. 389, 29 P.3d 1121
August 16, 2001**

Summary of Opinion

In this case, twelve equines belonging to the defendant Branstetter were seized in the belief they were being neglected. Criminal charges were filed. As part of those charges, the humane society—in whose care the horses and donkey were placed--filed a petition to forfeit ownership of them. That petition was granted but later the defendant was found not guilty of the criminal neglect charges. When he sought to appeal the forfeiture order, the Court of Appeals said he could not do so because there is no provision in law to appeal from a criminal acquittal. See [Oregon v. Branstetter](#).

In this opinion, the Oregon Supreme Court disagrees with the decision of the Court of Appeals. It holds that an appeal can be taken despite the acquittal because the forfeiture qualifies as a special statutory proceeding and appeal is authorized for those proceedings. It sent the case back to the Court of Appeals for its to consider the defendant's appeal on its merits.

This opinion is of interest not for the narrow point of the appealability of the forfeiture order but because it explains the forfeiture procedures and their relationship to charges of criminal charges of animal neglect.

Text of Opinion

Defendant seeks review of a Court of Appeals decision dismissing, for lack of jurisdiction, his appeal from a trial court order that forfeited certain animals that he owned to an animal care agency. Although the trial court's forfeiture order was issued during, and had the same case number as, defendant's prosecution on charges of first-degree animal neglect, ORS 167.330, the forfeiture order was based on a different statute, ORS 167.347. That statute provides for forfeiture of animals that have been impounded pending final disposition of a criminal animal-neglect charge, and does not make the forfeiture contingent on the defendant being found guilty in the criminal case. The Court of Appeals concluded that the forfeiture proceeding and order were part of the criminal action against defendant and, therefore, could not be appealed, because that criminal action had ended in acquittal. *State v. Branstetter*, 166 Or.App. 286, 289-90, 1 P3d 451 (2000). We hold that the forfeiture order arose out of a "special statutory proceeding" and, thus, was appealable under ORS 19.205(4), a statute that authorizes appeals from such proceedings. We therefore remand the case to the Court of Appeals for consideration of the remaining assignments of error.

In January 1997, the Umatilla County Sheriff's Department received a complaint that defendant's animals--11 horses and one donkey--were being neglected. A deputy investigated the complaint, found evidence of neglect, and applied for a warrant to impound the animals, as provided in ORS 167.345(2). [FN2] A search warrant issued and the animals were impounded and placed into the care of the Pioneer Humane Society ("the humane society"). [FN3]

FN2. ORS 167.345(2) provides, in part:

"If there is probable cause to believe that any animal is being subjected to treatment in violation of ORS 167.315 to 167.340, a peace officer, after obtaining a search warrant in the manner authorized by law, may enter the premises where the animal is being held, provide food and water and impound such animal."

FN3. ORS 167.345(3) provides:

"A court may order an animal impounded under subsection (2) of this section to be held at any animal care facility in the state. A facility receiving the animal shall provide adequate food and water and may provide veterinary care."

Defendant was arrested and charged with 12 counts of first degree animal neglect. ORS 167.330. His first trial on those charges ended in a mistrial. Before defendant was tried again, the humane society filed a petition in the criminal action, as authorized by ORS 167.347(1), [FN4] seeking forfeiture of defendant's animals. The state moved to become a co-petitioner in the forfeiture matter; that motion was granted over defendant's objection.

FN4. ORS 167.347(1) provides:

"If any animal is impounded pursuant to ORS 167.345(2) and is being held by a county animal shelter or other animal care agency pending outcome of criminal action charging a violation of ORS 167.310 to 167.340, prior to final disposition of the criminal charge, the county or other animal care agency may file a petition in the criminal action requesting that the court issue an order forfeiting the animal to the county or other animal care agency prior to final

disposition of the criminal charge. The petitioner shall serve a true copy of the petition upon the defendant and the district attorney."

After a hearing respecting the forfeiture petition, ORS 167.347(2), [FN5] the court found that the petitioners had established probable cause to believe that the animals had been neglected in violation of ORS 167.330, and it ordered the animals forfeited unless defendant posted a \$2,700 bond (which the court found to be the amount expended by the humane society in caring for the animals from the date of impoundment until the date of the order). [FN6] When defendant failed to post the bond, the trial court entered an order of forfeiture. Thereafter, defendant was tried for the second time on the criminal animal-neglect charges. He was acquitted on all counts. The acquittals had no effect on the forfeiture order.

FN5. ORS 167.347(2) provides:

"Upon receipt of a petition pursuant to subsection (1) of this section, the court shall set a hearing on the petition. The hearing shall be conducted within 14 days of the filing of the petition, or as soon as practicable."

FN6. That standard, and the bond requirement, are set out in ORS 167.347(3) (a), which provides:

"At a hearing conducted pursuant to subsection (2) of this section, the petitioner shall have the burden of establishing probable cause to believe that the animal was subjected to abuse, neglect or abandonment in violation of ORS 167.310 to 167.340. If the court finds that probable cause exists, the court shall order immediate forfeiture of the animal to the petitioner, unless the defendant, within 72 hours of the hearing, posts a security deposit or bond with the court clerk in an amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the petitioner in caring for the animal from the date of initial impoundment to the date of trial."

After his acquittal, defendant filed a timely notice of appeal from the forfeiture order, attempting to challenge it on various constitutional grounds. However, the state argued in its respondent's brief in the Court of Appeals that the forfeiture order was unappealable and, specifically, that the jurisdictional statute on which defendant relied, ORS 138.053(1), was inapplicable, because it does not provide for an appeal from an acquittal.

A majority of a panel of the Court of Appeals agreed with the state and dismissed the appeal. In doing so, the Court of Appeals also rejected an alternative theory of appellate jurisdiction, viz., that the forfeiture order was appealable under ORS 19.205(4), because it arose out of a "special statutory proceeding." [FN7] After considering the case law surrounding ORS 19.205(4), the court concluded that, to qualify as a special statutory proceeding under that statute, a proceeding must be separate from any other proceeding. *Branstetter*, 166 Or.App. at 290. The court concluded that a forfeiture proceeding under ORS 167.347 could not fulfill the separateness requirement because, by the express wording of ORS 167.347, the petition that initiates a forfeiture proceeding must be filed "in the criminal action." *Id.* at 295. We allowed defendant's petition for review.

FN7. ORS 19.205(4) provides:

"An appeal may be taken from the circuit court in any special statutory

proceeding under the same conditions, in the same manner and with like effect as from a judgment, decree or order entered in an action or suit, unless such appeal is expressly prohibited by the law authorizing such special statutory proceeding."

Defendant contends that the Court of Appeals erred in determining that it was without jurisdiction to consider his appeal. Defendant acknowledges that the right to appeal is purely statutory, *State v. K.P.*, 324 Or 1, 4, 921 P.2d 380 (1996), but argues that the order at issue is appealable under one or both of the statutes that the Court of Appeals considered and dismissed as inapplicable.

Because the case was brought in the criminal proceeding, we first consider defendant's arguments with respect to ORS 138.053(1), which is a part of the criminal procedure code. That statute provides:

"This section establishes the judgments and orders that are subject to the appeal provisions and to the limitations on review under ORS 138.040 and 138.050. A judgment or order of a court, if the order is imposed after judgment, is subject to ORS 138.040 [which provides for appeal by a defendant] * * * if this disposition includes any of the following:

"(a) Imposes a sentence on conviction."

"(b) Suspends imposition or execution of any part of a sentence.

"(c) Extends a period of probation.

"(d) Imposes or modifies a condition of probation or of sentence suspension.

"(e) Imposes or executes a sentence upon revocation of probation or sentence suspension."

The issue need not detain us long. As noted, the Court of Appeals concluded that ORS 138.053(1) does not authorize an appeal from an acquittal. It reasoned:

"ORS 138.053(1) provides that a judgment or order in a criminal case is appealable only if it imposes a sentence on conviction, suspends imposition or execution of any part of a sentence, or makes a decision relating to probation. None of those events occurred here or could have occurred here or could have occurred here. There can be no sentence, probation or other sanction after an acquittal."

Branstetter, 166 Or at 289-90 (emphasis in original). We agree.

We turn to defendant's alternative theory--that the forfeiture order arose out of a "special statutory proceeding" and therefore is appealable under ORS 19.205(4). As noted, the Court of Appeals rejected that theory on the basis of case law that the Court of Appeals read to require that a special statutory proceeding cannot be a part of but, instead, must be separate from, any other proceeding. The Court of Appeals concluded that a forfeiture proceeding could not fulfill the separateness requirement, because the filing direction in ORS 167.347 expressly makes the proceeding part of another action.

In arguing the contrary view, defendant adopts the position articulated by the Court of Appeals' dissent--that it is erroneous to conclude that, simply because ORS 167.347 permits a petition for

forfeiture be filed in such action, the forfeiture proceeding provided in that statute is part of that action. Defendant (and the Court of Appeals' dissent) suggest that the fact that the forfeiture proceeding is essentially civil in nature, the fact that neither the outcome of the forfeiture proceeding nor the outcome of the criminal action has any effect on the other proceeding, the fact that there are differing standards of proof required for forfeiture as opposed to conviction in the criminal action, and the fact that the parties are different in the forfeiture proceeding and the civil action, all point to a conclusion that the forfeiture proceeding is separate from the criminal action and is a special statutory proceeding for purposes of the appellate review statutes.

The parties agree that, for purposes of ORS 19.205(4), a "special statutory proceeding" must be "separate" from any other proceeding. In fact, this court's case law establishes that "separateness" in some sense is a necessary attribute of a special statutory proceeding. See, e.g., *State v. Threet*, 294 Or 1, 5, 653 P.2d 960 (1982) (illustrating requirement). The parties part company, however, over how separateness is to be assessed. The state appears to argue that formal separateness, i.e., separate case names and numbers, is required. Consistent with that formalistic approach, the state suggests that the express authorization in ORS 167.347 that a forfeiture petition may be filed "in the criminal action" establishes the legislature's intent to create integrated, rather than separate, proceedings for all purposes. Defendant advocates for a more functional approach to the problem--one that looks at identity of issues and parties and at whether and how the proceeding at issue affects and is affected by the related proceeding.

We begin by noting that the state's approach is undermined significantly by the fact that, although ORS 167.347 permits a forfeiture proceeding to be filed before the outcome of the criminal case, it does not require such a filing. Furthermore, a separate statute, ORS 167.350, authorizes forfeiture "in addition to * * * any other sentence," when a defendant is found guilty of the underlying criminal act. We now turn to the cases that discuss and apply the requirement that special statutory proceedings be separate from every other proceeding. We begin with *Threet*, the case in which this court first articulated the separateness requirement.

The question in *Threet* was whether a circuit court order compelling witnesses to appear and testify before a grand jury was appealable under ORS 19.205(4) as the product of a "special statutory proceeding." Based on the historical use of that term in the cases and statutes, this court held that "separateness" is a necessary attribute of a special statutory proceeding and suggested that a reason for that requirement is that it avoids disruption of other judicial proceedings. *Threet*, 294 Or at 5. Applying the principles that it derived from earlier cases, the *Threet* court concluded that proceedings to compel grand jury testimony under ORS 136.617-.619 were not special statutory proceedings. The court specifically noted that such proceedings "only come into play when a witness refuses to testify or produce evidence on the ground of self-incrimination '[i]n any criminal proceeding before a court of record or in any proceeding before a grand jury.'" *Id.* at 7. The *Threet* court also noted that allowing appeals from such orders would disrupt and, at times, even abort grand jury proceedings. *Id.*

The majority below read *Threet* as dispositive with respect to the question whether ORS 19.205(4) applies to the forfeiture proceeding in the present case. We disagree. Although *Threet* repeatedly states that a special statutory proceeding must be "separate" and "distinct" from any other proceeding, it nowhere holds that the fact that a particular proceeding shares a case number with another proceeding necessarily removes that proceeding from the scope of ORS 19.205(4). In fact, the *Threet* opinion discusses separateness primarily in functional terms, i.e., in terms of whether a proceeding "depends" on another for its existence and whether an appeal from one proceeding will disrupt the other proceeding.

Neither is the actual holding in *Threet* inconsistent with defendant's position in the present case. In *Threet*, the proceeding to decide the motion to compel testimony arose out of, and purported to resolve,

a potentially problematic event in the criminal or grand jury proceeding, i.e., a witness's refusal to testify. There was a strong dependent relationship between the subject matter of the two proceedings and a strong logical reason for viewing them as inseparable for purposes of appeal.

By contrast, there is no necessary connection between the content of a forfeiture proceeding under ORS 167.347 and the criminal action in which, by statute, the forfeiture petition may be filed. Although a forfeiture proceeding under ORS 167.347 formally depends on a criminal action for its existence in that it can go forward only if a criminal action of a specified sort is pending, that kind of forfeiture proceeding does not arise out of the criminal action, resolve any controversy in the criminal action, or otherwise affect or depend on the substance of the criminal action. Threet does not control this case.

The same is true of the other major case that deals with the separateness requirement announced in Threet, *Garganese v. Dept. of Justice*, 318 Or 181, 864 P.2d 364 (1993). *Garganese* involved the Oregon Unlawful Trade Practices Act, ORS 646.605 et seq. The court there considered whether a proceeding under ORS 646.618(2) to challenge an investigative demand issued by the Department of Justice (department) was a "special statutory proceeding" within the meaning of ORS 19.205(4). The department argued that the proceeding was not sufficiently "separate and distinct" to qualify as a special statutory proceeding, because it was only a constituent part of a trade practices enforcement action under a related statute, ORS 646.632.

In analyzing the problem, the court noted that the department may serve investigative demands on persons other than those whom they suspect of violating the Unlawful Trade Practice Act and that challenges by such persons under ORS 646.618(2) necessarily would be separate and distinct from an enforcement proceeding against a suspect under ORS 646.632. The court then stated:

"Although the recipient of an investigate demand in many cases will be the target of the investigation, because proceedings under ORS 646.618(2) and 646.632 do not necessarily involve the same parties, that is not always the case under the statutory scheme. Because the existence of a proceeding under one of those statutes is not dependent on the existence of a proceeding under the other, we conclude that the two proceedings are separate and distinct."

Id. at 187. The court acknowledged that allowing rulings on investigative demands to be appealed might delay an enforcement action under ORS 646.632 when the prosecutor is using the demand to determine whether there is probable cause to proceed, but concluded that that fact does not preclude jurisdiction under ORS 19.205(4), because the appeal would not disrupt a judicial proceeding that actually was in progress. *Id.* at 187-88.

Garganese does not aid the state here. There was no question that the investigative and enforcement proceedings at issue in *Garganese* could be distinct. Instead, the issue was whether the investigative demand proceedings could be deemed to be "separate and distinct," when they generally had a strong functional connection to a larger enforcement action under ORS 646.632. However, the *Garganese* court concluded that the proceedings there were "separate and distinct," because there was no necessary substantive connection between them (they might, in fact, involve different parties). The court had no occasion to consider whether the result necessarily would be different when two proceedings were substantively unconnected, but nevertheless were linked by, for example, a common case number. In fact, we have been able to identify only one case from this court that appears to deal with circumstances analogous to those presented in this case. In *State v. K.P.*, a petitioner who had served a probationary sentence after a conviction on a charge of second-degree theft sought an order from the court that had entered her conviction setting aside the conviction and sealing the records that related to it, as authorized by ORS 137.225. The trial court granted the requested relief, but expressly excluded

police investigation reports from the list of records to be sealed. The petitioner appealed, arguing that the court was required to seal the police investigative reports along with the other records. K.P., 324 Or at 3-4.

When the case reached this court, the court first considered a threshold procedural issue, viz., whether the order setting aside the conviction and sealing the records was appealable. After considering and rejecting other possible statutory bases for appeal, the K.P. court concluded that the order was appealable under ORS 19.205(4). Id. at 6.

Although the K.P. opinion offered no explanation of its jurisdictional conclusion, that conclusion nonetheless is relevant to the present controversy, because of certain parallel factual circumstances. The petitioner in K.P. had filed her motion to set aside and seal records of her conviction under the same case name and numbers as the criminal action, and her motion was treated both by the trial court and this court as an extension of that criminal action.

Despite those facts, this court had no difficulty in concluding that the process for sealing the records was a "special statutory proceeding" and, presumably, that it was separate and distinct from the criminal action for purposes of ORS 19.205(4). K.P. thus indicates that the fact that a proceeding formally is part of another proceeding in the sense that it shares a common case number does not prevent such a proceeding from being "separate from any other proceeding" for purposes of ORS 19.205(4).

In the opinion below, the majority suggested that K.P. is distinguishable from the present case, because the K.P. court had concluded that the record-sealing proceeding in that case was a new proceeding and not part of the criminal proceeding. Branstetter, 166 Or.App. at 293. In the view of the Court of Appeals' majority, it would be impossible for a court to draw a similar conclusion with respect to the forfeiture proceeding at issue in this case, because the legislature expressly made the forfeiture proceeding part of a criminal action by requiring that the petition for forfeiture be filed in the criminal action.

The state as much as concedes that there is no evidence of a specific legislative intent to preclude appeals from forfeiture orders issued under ORS 167.347 by persons who are acquitted in the related criminal action. It even acknowledges that such an intent is unlikely, given that the legislature clearly has provided a right to appeal a forfeiture order to persons who are convicted in the criminal action. [FN12] We agree that when, as here, a person convicted of animal abuse nonetheless could appeal a resulting forfeiture, the suggestion that the legislature intentionally would withhold that same privilege from someone who was acquitted of the charges simply is not plausible. The state contends, nonetheless, that the legislature did intend to make the forfeiture proceeding part and parcel of the criminal action and that, as a necessary consequence of that choice, the forfeiture proceeding cannot be a special statutory proceeding for purposes of ORS 19.205(4).

FN12. When a defendant is convicted, forfeiture may be made a part of the sentence. ORS 167.350. As such, it could be appealed under ORS 138.040. The state acknowledges that, given that fact, one would expect a parallel right of appeal for defendants who are acquitted. The state suggests, however, that the legislature's failure to so provide was a drafting oversight, but one that this court has no authority to correct.

At bottom, the state's argument rests entirely on the fact that ORS 167.347 provides that an animal care agency's petition to forfeit an animal that has been impounded pending a criminal action may be filed "in the criminal action." The state argues--as it must--that that phrase, by itself, establishes a legislative intent that the forfeiture proceeding be treated as part of the criminal action for all purposes.

The phrase does not stand by itself, however. The statutory context clearly demonstrates that the forfeiture proceedings and the criminal action are not of a piece. We note specifically that ORS 167.347(3) sets out a burden of proof (probable cause) that would be incongruous (if not unconstitutional) as the legal standard for finding against a defendant in a criminal action. The participation as parties by entities other than the state, such as county animal shelters and other animal care agencies, is equally incompatible with the criminal proceedings. We think that it is clear from the wording of ORS 167.347 and its statutory context that the legislature did not consciously intend that a forfeiture proceeding under ORS 167.347 be deemed to be "part" of the criminal action. We conclude, as the court did in *K.P.*, that, despite a shared case name and number, the proceeding at issue is sufficiently separate and distinct from the criminal action to which it relates to qualify as a special statutory proceeding for purposes of ORS 19.205(4).

The opinion in the Court of Appeals raises one additional issue that we address. In a footnote, the Court of Appeals majority suggested that allowing forfeiture orders to be appealed as special statutory proceedings was undesirable, because it could deprive trial courts of jurisdiction to try the criminal cases in which the forfeiture proceeding occurs:

"If defendant were entitled under ORS 19.205(4) to appeal from the order that forfeited his interest in the animals, he would file his notice of appeal in his criminal case, as he did here, because that is the only case in which it could be filed. If he had done that before his second trial on the animal neglect charges, the filing of the notice would have deprived the trial court of jurisdiction to conduct that trial. See, e.g., ORS 19.270(1); ORS 138.083; *Macy v. Blatchford*, 154 Or.App. 313, 324, 961 P.2d 873, rev allowed 328 Or 194 (1998)."

Branstetter, 166 Or.App. at 295 n 5.

We disagree with that assessment. ORS 19.270(1), the first statute cited by the Court of Appeals, provides that "[t]he Supreme Court or the Court of Appeals has jurisdiction of the cause when the notice of appeal has been served and filed." The "cause" is not always the entire case. See *State ex rel Gattman v. Abraham*, 302 Or 301, 311, 729 P.2d 560 (1986) ("cause" was chosen by legislature because "it has a broad meaning and may include a case or proceeding or any part thereof depending upon the circumstances"). As the court there stated:

"ORS 19.033(1) [now ORS 19.270(1)] means that the appellate court has jurisdiction of the issue or matter on appeal, be it a case, action at law, suit in equity, cause of action, cause of suit, proceeding, or claim for relief. The purpose of the statute is to give the appellate court jurisdiction of the issue or subject matter of the appeal to the exclusion of the lower court except as provided in the statute. It was not the intention to oust the trial court of jurisdiction of those parts of the litigation which are not directly involved in the appeal."

Id. at 310-11 (citations and footnotes omitted).

Consonant with *Gattman*, we hold that, in an appeal from a final disposition in the particular kind of forfeiture proceeding that occurs pursuant to ORS 167.347, the "cause" being appealed is the special statutory proceeding. The criminal prosecution is not implicated in that appeal, and the appeal does not deprive the trial court of jurisdiction to proceed to trial on the criminal matter.

The decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for consideration of the remaining assignments of error.

