



# COURT OF APPEALS

## Media Release

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The Court of Appeals issued these opinions:

David Lee Cox v. Jeff Premo  
(A158581 - Marion County Circuit Court)

Irene Berg v. Lynn Edward Benton  
(A165572 - Multnomah County Circuit Court)

Linn County v. Kate Brown  
(A165655 - Linn County Circuit Court)

James B. De Young v. Kate Brown  
(A162584 - Clackamas County Circuit Court)

State of Oregon v. David Joel Barbero  
(A164307 - Tillamook County Circuit Court)

State of Oregon v. Albert Newell Williams  
(A161673 - Multnomah County Circuit Court)

State of Oregon v. Thomas Steven Slagle  
(A161733 - Lane County Circuit Court)

State of Oregon v. Josef Grant Taylor  
(A164113 - Crook County Circuit Court)

The Court of Appeals issued these *per curiam* opinions:

Carvel Gordon Dillard v. Steve Brown  
(A156060 - Marion County Circuit Court)

State of Oregon v. Mohammad M. Abulaziz  
(A164456 - Washington County Circuit Court)

State of Oregon v. Nancy Lazaryan Hutchison  
(A164785 - Curry County Circuit Court)

State of Oregon v. Eugenia Y. Starodubov  
(A165615 - Clackamas County Circuit Court)

State of Oregon v. Russell Wayne Deviney  
(A165859 - Clatsop County Circuit Court)  
State of Oregon v. Joshua Daniel Welch  
(A166193 - Lane County Circuit Court)  
State of Oregon v. Jacob Withee  
(A166223 - Beaverton Municipal Court)  
Department of Human Services v. A. B.  
(A169368 - Coos County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

State of Oregon v. Robert Dale Eckley  
(A165339 - Coos County Circuit Court)  
State of Oregon v. Dennis James Curry  
(A166040 - Multnomah County Circuit Court)  
Linh Thi Minh Tran v. Tri-County Metropolitan Transit District of Oregon (TRIMET)  
(A168361 - Multnomah County Circuit Court)

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**David Lee Cox v. Jeff Premo**

(Ortega, P. J.)

Petitioner, an inmate at Oregon State Penitentiary, was convicted of aggravated murder and possessing a weapon in a correctional institution, ORS 163.095(2)(b); ORS 166.275, and sentenced to death, for the fatal prison-yard stabbing of Davis, another inmate. Petitioner appeals the judgment of the post-conviction court rejecting claims of inadequate and ineffective assistance of trial counsel during the guilt and penalty phases, arguing that defense counsel failed to investigate the claims of a trial witness who testified that petitioner's killing of the victim was part of a murder-for-hire conspiracy involving the Lakota Club. Petitioner further argues that, had defense counsel investigated the murder-for-hire theory claims, defense counsel would have called witnesses who could have refuted the theory, and the failure to do so meant that defense counsel's representation was constitutionally inadequate and ineffective. Held: Reasonable defense counsel would have investigated the murder-for-hire theory and called a prison official familiar with the Lakota Club who would have refuted the testimony of the theory. Accordingly, because petitioner was prejudiced by defense counsel's failure to investigate and call the prison official as a witness, defense counsel's representation of petitioner was inadequate under Article I, section 11, of the Oregon Constitution. Reversed and remanded with instructions for post-conviction court to grant relief on aggravated murder conviction; otherwise affirmed.

**Irene Berg v. Lynn Edward Benton**

(Ortega, P. J.)

Defendant appeals a judgment awarding money damages to plaintiff, the personal representative of the Deborah Higbee estate, in a wrongful death action. In his criminal case, defendant was convicted of two counts of aggravated murder, one count of attempted murder, and two counts of conspiracy to commit murder. During the wrongful death proceeding, plaintiff filed a motion for partial summary judgment, asserting that liability and causation were established in defendant's criminal case and, therefore, issue

preclusion barred defendant from relitigating those issues in this civil case. Defendant filed a motion to postpone the court's ruling on plaintiff's motion, arguing that he intended to appeal his criminal conviction and, with his appeal pending, he did not have a fair and full opportunity to be heard on liability and causation. The trial court ultimately granted plaintiff's motion for partial summary judgment, resulting in a denial of defendant's motion for postponement. On appeal, defendant assigns error to both rulings. Held: Defendant did not establish a basis for avoiding summary judgment based on whether he had a full and fair opportunity to be heard on the issue sought to be precluded and likewise did not establish that the trial court acted outside the range of allowable discretion in denying the motion to postpone. Affirmed.

**Linn County v. Kate Brown**

(DeVore, J.)

Three counties challenge their obligation to provide their employees paid sick leave as required of many Oregon employers by ORS 653.601 to ORS 653.661. The counties contend that they are excused from the obligation under Article XI, section 15, of the Oregon Constitution, which provides that a local government is not required to comply with a state law that requires a local government to "establish a new program or provide an increased level of service for an existing program" when the state fails to provide adequate funding. The trial court agreed, granted the counties' motion for summary judgment, and entered a judgment that made rulings declaring the paid sick leave law to be an unfunded program. Held: Oregon's paid sick leave law is not a government program of services to others within the meaning of Article XI, section 15. Consequently, the trial court erred in granting the counties' motion and entering a declaratory judgment for the counties. Reversed and remanded.

**James B. De Young v. Kate Brown**

(DeHoog, P. J.)

Plaintiff, a former resident and city councilor of the City of Damascus, appeals a judgment declaring that the city validly disincorporated pursuant to Measure 93, which the voting residents of Damascus approved in a special election held in May 2016. Plaintiff argues, among other things, that the election failed to comply with ORS 221.610 and ORS 221.621, which govern municipal disincorporation. Defendants respond that (1) the appeal is moot because the challenged election has passed and the city cannot resume operations; (2) the election was not required to comply with those statutes; and (3) the legislature exempted the election from those statutes when it referred Measure 93 to the voters of Damascus. Held: The appeal is not moot. Defendants did not satisfy their burden of establishing that a decision from this court would have no practical consequences. On the merits, the Court of Appeals concluded that the passage of Measure 93 did not comply with ORS 221.610 and ORS 221.621, which currently provide the only means for a city to disincorporate, and the legislature did not effectively exempt Measure 93 from the requirements of those statutes or otherwise provide an alternative means of disincorporation. Reversed and remanded.

**State of Oregon v. David Joel Barbero**

(James, J.)

Defendant appeals from a judgment of conviction for driving under the influence of intoxicants. ORS 813.010. He assigns error to the trial court's denial of his requested jury instruction on confession and corroboration, Uniform Criminal Jury Instruction (UCrJI) 1050. On appeal, defendant argues that he was entitled to the instruction, despite the trial court's legal ruling denying defendant's motion for judgment of acquittal and its holding that defendant's statements were admissions and not confessions. In response, the

state asserts that the trial court's ruling on the legal question of whether defendant's various statements were admissions, and not confessions acknowledging guilt that needed to be corroborated under ORS 136.425(2), was correct and unchallenged on appeal. Further, the state contends that, following the trial court's legal ruling, there was no factfinding role for the jury on the issue, thus rendering the instruction improper. The trial court instructed the jury on admissions and voluntariness as well as the state's burden of proof. Held: Because the trial court determined as a matter of law that defendant's statements were not made for the purpose of acknowledging guilt, it could only have concluded that those statements were admissions and not confessions. ORS 136.425(2) requires corroboration only when the state relies on a confession. Without a confession, the trial court did not err when it determined that there was no basis for the instruction requiring corroboration. Affirmed.

**State of Oregon v. Albert Newell Williams**

(Powers, J.)

Defendant appeals from a judgment of conviction for possession of methamphetamine, ORS 475.894(1), asserting that the trial court erred by denying his motion to suppress. Defendant argues that, after the stopping officer developed reasonable suspicion that he had committed the crime of driving while under the influence of intoxicants (DUII), the officer unlawfully extended the stop by asking him whether he had alcohol or drugs in the car and by requesting consent to search his vehicle. Held: Because the presence of alcohol or a controlled substance in a vehicle is relevant evidence of the crime of DUII, questions regarding defendant's possession of alcohol and controlled substances were reasonably related to the DUII investigation. Accordingly, the trial court did not err in denying defendant's motion to suppress. Affirmed.

**State of Oregon v. Thomas Steven Slagle**

(Garrett, J. pro tempore)

Defendant appeals a judgment of conviction for 10 counts of first-degree encouraging child sexual abuse, ORS 163.684. His challenges are based on the assertion that the language of the charging instrument precluded the trial court from finding that there were multiple victims to his crimes. In three assignments of error, defendant argues that the trial court erred in determining that there were multiple victims and, consequently, imposing consecutive sentences. In nine other assignments, defendant contends that the trial court erred by failing to merge the 10 guilty verdicts into a single conviction. Held: The trial court did not err in finding that there were 10 victims to defendant's crimes; therefore, the trial court did not err in imposing 10 separate convictions and consecutive sentences. Affirmed.

**State of Oregon v. Josef Grant Taylor**

(Garrett, J. pro tempore)

Defendant appeals a supplemental judgment awarding restitution, assigning error to the trial court's imposition of restitution 331 days after the entry of the judgment of conviction. Defendant argues that the trial court's imposition of restitution more than 90 days after entry of the judgment violated ORS 137.106(1)(a) because the delay was not justified by good cause. Held: The trial court did not err in imposing restitution 331 days after the entry of the judgment of conviction. ORS 137.106(1)(a) requires only that the state present certain evidence to the court within 90 days; it imposes no time limit for the court to act on that evidence. Affirmed.

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