



COURT OF APPEALS

Media Release

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The Oregon Court of Appeals announced today that, as of November 1, 2019, the court will have two new Presiding Judges. Judge Joel DeVore will become the Presiding Judge of Department 4, and Judge Douglas Tookey will become the Presiding Judge of the Motions Department.

The Court of Appeals issued these opinions:

Department of Human Services v. K. S. W.
(A169905 - Washington County Circuit Court)
State of Oregon v. Herman Kenneth Reed
(A161030 - Multnomah County Circuit Court)
State of Oregon v. S. T.
(A164442 - Marion County Circuit Court)
State of Oregon v. Z. W. Y.
(A166276 - Marion County Circuit Court)
State of Oregon v. L. M.
(A166994 - Lane County Circuit Court)
State of Oregon v. Z. W. Y.
(A167562 - Marion County Circuit Court)
Barkers Five, LLC v. Land Conservation and Development Commission
(A167937 - Land Conservation and Development Commission)
State of Oregon v. David Michael Garrett
(A162521 - Jackson County Circuit Court)
State of Oregon v. Dennis Verne Dowty
(A163462 - Tillamook County Circuit Court)
State of Oregon v. Shawn Lee Baker
(A166529 - Polk County Circuit Court)

State of Oregon v. Talon Duane Ramoz
(A163802 - Jackson County Circuit Court)
State of Oregon v. Curtis Brooks Gillespie, Jr.
(A166256 - Marion County Circuit Court)
P. K. W. v. David Edward Steagall*
(A168943 - Linn County Circuit Court)

The Court of Appeals issued this *per curiam* opinion:

State of Oregon v. Basir Noorzai
(A167594 - Washington County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

State of Oregon v. Paul Newton
(A165475 - Lake County Circuit Court)
Jimmy Dewan Fears v. Brad Cain
(A166166 - Malheur County Circuit Court)
State of Oregon v. Martin Quintero
(A166171 - Jackson County Circuit Court)
Gary K. Herzog v. Brandon Kelly
(A166364 - Marion County Circuit Court)
State of Oregon v. Jacobe Charles Owens
(A166599 - Lane County Circuit Court)
State of Oregon v. Ronnie Lee, Jr.
(A166795 - Polk County Circuit Court)
State of Oregon v. Christopher Michael Raycraft
(A167009 - Clackamas County Circuit Court)
State of Oregon v. Ricky L. C. Howell
(A167041 - Lane County Circuit Court)
State of Oregon v. Kyle Richard Adams
(A167222 - Marion County Circuit Court)
State of Oregon v. Maximo Rodolfo Covernali
(A167241 - Lane County Circuit Court)
State of Oregon v. Michael Aaron Victorio, Jr.
(A167247 - Clackamas County Circuit Court)
State of Oregon v. Edwin Thomas Morning Owl
(A167478 - Umatilla County Circuit Court)

*The case title has been redacted in this media release and in the online version of the opinion, in compliance with 18 USC 2265(d)(3).

State of Oregon v. Mindy Joy Fuhrer
(A167482 - Coos County Circuit Court)
Cheryl A. Graham v. SAIF Corporation
(A167774 - Workers' Compensation Board)
State of Oregon v. H. L. W.
(A169198 - Marion County Circuit Court)
State of Oregon v. B. T.
(A169276 - Deschutes County Circuit Court)
P. H. v. Jay Joseph Ducey*
(A169524 - Jackson County Circuit Court)
Robert Hercenberger v. Kathy Proctor
(A169937 - Washington County Circuit Court)
Department of Human Services v. B. K. S.
(A170105 - Clackamas County Circuit Court)
Department of Human Services v. A. T.
(A170335 - Umatilla County Circuit Court)
Maureen L. Storey v. SAIF Corporation
(A170415 - Workers' Compensation Board)
Department of Human Services v. M. L. K.
(A170749 - Coos County Circuit Court)

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Department of Human Services v. K. S. W.

(Egan, C. J.)

Father appeals judgments establishing temporary guardianships over his two children who are enrolled members of the Confederated Tribes of the Siletz Indians. Father argues that the Department of Human Services (DHS) failed to prove, as is required under the Indian Child Welfare Act (ICWA), 25 USC §§ 1901-63, that it had made "active efforts" to provide services to prevent the breakup of the Indian family and that those efforts failed. DHS responds that the juvenile court had made the necessary "active efforts" findings when it changed the children's permanency plans from reunification to guardianship, and that it did not need to make the findings again when it established the guardianships. Held: The juvenile court did not err in establishing the guardianships over both children. Under Dept of Human Services v. J. G., 260 Or App 500, 317 P3d 936 (2017), the juvenile court was not required to make a new "active efforts" finding when it actually ordered the guardianships, because the court had made that finding at a prior permanency hearing where it approved the placements. Affirmed.

State of Oregon v. Herman Kenneth Reed

(Hadlock, P. J.)

Defendant appeals judgments of conviction for four sex crimes. On appeal, defendant assigns error to the trial court's denial of his motion to suppress statements he made while in police custody. Defendant contends

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that he equivocally invoked his right to counsel, while being questioned at a police station, when he asked a detective whether he needed a lawyer. Defendant argues that statements he made after asking that question should have been suppressed because the detective did not cease questioning or clarify whether defendant was invoking his right to counsel. Defendant argues also that statements he made later, after he unequivocally invoked his right to counsel, should have been suppressed because the police detective impermissibly reinitiated questioning by making a statement calculated to provoke an incriminating response. Held: First, defendant's question to the detective about whether he needed a lawyer was not an equivocal invocation of his right to counsel. Accordingly, the trial court did not err when it denied defendant's suppression motion with regard to the statements defendant made after asking that question. Second, any error the trial court may have committed in denying the motion to suppress the statements defendant made after he invoked his right to counsel was harmless in the context of this case. Affirmed.

State of Oregon v. S. T.

(Hadlock, P. J.)

Appellant in this civil commitment case appeals an order continuing his commitment to the Oregon State Hospital for an additional period not to exceed 180 days. On appeal, appellant asserts that the trial court erred in determining that he still has a mental illness and is in need of further treatment because his mental disorder makes him dangerous to others. Held: The record was sufficient to support a finding that appellant required commitment because he was likely to stop taking his medications if he were not hospitalized and would be a danger to others if not treated. Affirmed.

State of Oregon v. Z. W. Y.

(Hadlock, P. J.)

Appellant in this civil commitment case appeals an order continuing his commitment to the Oregon Health Authority for an additional period not to exceed 180 days. On appeal, appellant asserts that the trial court erred in determining that he was a danger to others because there was no evidence in the record that he had harmed or attempted to harm others in the past. Held: The record was insufficient to support a finding that appellant was highly likely to harm others if he were released. Reversed.

State of Oregon v. L. M.

(Hadlock, P. J.)

Appellant in this civil commitment case appeals an order continuing his commitment to the Oregon Health Authority for an additional period not to exceed 180 days. On appeal, appellant asserts that the trial court erred in determining that he was unable to provide for his basic needs because he had a history of resisting medical treatment. Held: The record was insufficient to support a finding that appellant's mental disorder left him unable to provide for his basic needs. Reversed.

State of Oregon v. Z. W. Y.

(Hadlock, P. J.)

Appellant in this civil commitment case appeals an order continuing his commitment to the Oregon Health Authority for an additional period not to exceed 180 days. On appeal, appellant asserts that the trial court erred in determining that he was a danger to others because there was insufficient evidence in the record that he has seriously harmed anyone in the past. Held: The record, which included evidence of angry delusions leading to violent behavior before appellant's commitment, was sufficient to support a finding that appellant was highly likely to harm others if he were released. Affirmed.

Barkers Five, LLC v. Land Conservation and Development Commission

(Hadlock, P. J.)

Petitioners seek judicial review of a 2018 order of the Land Conservation and Development Commission (LCDC), acknowledging the designation of urban and rural reserves that will guide growth in the Portland metropolitan area for the next several decades. The Court of Appeals had previously reversed and remanded LCDC's original acknowledgment order, following LCDC's review of Metro and Clackamas, Multnomah, and Washington counties' joint submittal, designating such reserves. *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014) (*Barkers Five*). On judicial review of LCDC's 2018 acknowledgment order, the Court of Appeals writes to address the contentions of various petitioners that LCDC's order is unlawful in substance because it approved a new joint remand submittal in which (1) Metro and Clackamas and Multnomah counties failed to properly analyze whether the designated urban and rural reserves satisfied the "best achieves standard" of OAR 660-027-0005(2); (2) those governments' determination that the designation meets the best achieves standard was not supported by substantial evidence; and (3) Metro and Multnomah County failed to reconsider all of the Multnomah County designations consistently with the court's remand instructions in *Barkers Five*. Held: LCDC did not err in determining that the new joint submittal demonstrated compliance with the best achieves standard, concluding both that Metro and Clackamas and Multnomah counties had applied the required factors to arrive at specific urban and rural reserves and designations and that, considered in its entirety, the overall designation satisfied the qualitative best achieves standard. Further, the Court of Appeals was not persuaded that LCDC failed to correctly apply the substantial evidence standard in assessing the substantial evidence arguments concerning the best achieves standard. Finally, nothing in *Barkers Five* required reconsideration of urban and rural reserve designations throughout Multnomah County. The Court of Appeals rejected petitioners' remaining arguments without discussion. Affirmed.

State of Oregon v. David Michael Garrett

(DeHoog, J.)

Defendant appeals judgments convicting him of first-degree theft, ORS 164.055, and supplying contraband, ORS 162.185. Defendant argues that the trial court erred by forcing him to represent himself at trial without a knowing and intentional waiver, thereby violating his statutory and constitutional rights to counsel. The state argues that the record reflects that defendant knowingly waived his right, because he had a sufficient understanding of the inherent risks of self-representation, and that defendant's repeated misconduct following an appropriate warning by the court established that his waiver was intentional. Held: The trial court did not err. In this case, the record reflects that defendant knowingly and intentionally waived his right to counsel. Affirmed.

State of Oregon v. Dennis Verne Dowty
(DeHoog, P. J.)

Defendant appeals a judgment revoking his probation, asserting that the trial court erred in (1) denying his motion to suppress statements that he made to his probation officer on the basis that the exclusionary rule of Article 1, section 12, of the Oregon Constitution does not apply in a probation-revocation hearing, and (2) revoking his probation based on his earlier stipulation to revocation upon his first nonfinancial violation of probation, rather than as an exercise of the court's discretion. Held: (1) The trial court's error, if any, in admitting defendant's statements did not prejudice defendant and therefore did not provide a basis for reversal. (2) Defendant failed to preserve his second assignment of error. Affirmed.

State of Oregon v. Shawn Lee Baker
(DeHoog, J.)

Defendant appeals from a judgment of conviction for first-degree theft, ORS 164.055, and unlawful entry into a motor vehicle, ORS 164.272. Defendant assigns error to the trial court's denial of his motion for judgment of acquittal on both counts. He argues that, because the state's case depended entirely on uncorroborated accomplice testimony, the evidence did not satisfy the independent evidence rule requirements of ORS 136.440(1) and was therefore insufficient to support either conviction. Held: The trial court erred when it denied defendant's motion for judgment of acquittal. Evidence in the record did not satisfy the independent evidence rule requirements of ORS 136.440(1) and was therefore insufficient to permit a reasonable factfinder to find, beyond a reasonable doubt, that defendant had committed the crimes with which he was charged. Reversed.

State of Oregon v. Talon Duane Ramoz
(Shorr, J.)

The state appeals from an order granting defendant a new trial under ORCP 64 B. Defendant was convicted at a jury trial of two counts of rape in the first degree and two counts of unlawful sexual penetration in the first degree. After the judgment of conviction was entered, defendant moved for a new trial under ORCP 64 B(1) on the basis that the jury instructions had omitted an element of the crime. During trial, defendant had stipulated to two of the four instructions he now claims as error and had not objected to any. The trial court granted defendant's motion for a new trial under ORCP 64 B(1), concluding that the instructional error was an irregularity in the proceeding of the court. The state appealed. Held: The trial court erred in granting defendant a new trial. A trial court's failure to instruct the jury properly, under the circumstances presented here, is not an irregularity in the proceedings of the court under ORCP 64 B(1). Reversed and remanded with instructions to reinstate the judgment.

State of Oregon v. Curtis Brooks Gillespie, Jr.
(Aoyagi, J.)

Defendant was charged by information with two crimes. During his first trial, two law enforcement officers who were scheduled to testify for the state were called away on law-enforcement business and failed to return from the lunch recess. The state moved for a mistrial, which the trial court granted, over defendant's objection. Defendant later moved to dismiss the information on double jeopardy grounds. The trial court denied the motion, and defendant was subsequently convicted in a second trial. On appeal of the judgment of conviction, defendant challenges the denial of his motion to dismiss, arguing that the mistrial was not justified

by manifest necessity and that retrying him therefore violated the double jeopardy protections in the Oregon and federal constitutions. The state concedes the error. Held: The Court of Appeals accepted the state's concession. The mistrial was not justified by manifest necessity where the trial court failed to adequately consider reasonable alternatives before declaring a mistrial. Reversed.

P. K. W. v. David Edward Steagall

(Mooney, J.)

Respondent appeals from an order that continued an ex parte restraining order following a contested hearing. Respondent argues that the trial court erred by continuing the restraining order because there was insufficient evidence in the record to support the restraining order as required by ORS 107.710(1). Held: The trial court did not err. The record contained sufficient evidence to support the trial court's findings and conclusions of law. Affirmed.

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