



COURT OF APPEALS

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July 01, 2020

The Court of Appeals issued these opinions:

Hazelynn K. Stomps v. Rob Persson
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State of Oregon v. Misty Dawn Bunch
(A164667 - Coos County Circuit Court)

State of Oregon v. Trinidad Alatorre
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Nicholas Kamps-Hughes v. City of Eugene
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State of Oregon v. Erich Boekelheide
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The Court of Appeals issued this *per curiam* opinion:

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(A163648 - Umatilla County Circuit Court)

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State of Oregon v. Robert Darnell Boyd
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Hazelynn K. Stomps v. Rob Persson

(Armstrong, P. J.)

Petitioner appeals a judgment rejecting her claims for post-conviction relief after her conviction for murder. She asserts that trial counsel who represented her at a hearing on a motion to suppress evidence that the police had obtained from a search of petitioner's house and property was inadequate and ineffective in failing to present evidence in support of counsel's theory that petitioner had been unable to give consent to the search. Held: Counsel exercised reasonable professional skill in calling an expert witness to provide an opinion as to the effects of medications on petitioner's ability to consent, and counsel's failure to obtain the desired testimony from that witness or through other means did not constitute inadequate assistance. But

even assuming that counsel was inadequate in failing to seek other testimony, petitioner has not shown that obtaining that testimony would have changed the trial court's ruling on the motion to suppress, which was necessary to establish prejudice. Affirmed.

State of Oregon v. Misty Dawn Bunch
(Armstrong, P. J.)

Defendant appeals from a judgment of conviction for possession of methamphetamine and heroin, assigning error to the trial court's denial of her motion to suppress evidence found after police seized and searched her purse. Held: The trial court erred in determining that police lawfully searched defendant's purse as "lost property," and also erred in concluding that defendant could not challenge the lawfulness of the search, because she had abandoned her interest in the purse and its contents. Reversed and remanded.

State of Oregon v. Trinidad Alatorre
(Armstrong, P. J.)

Defendant appeals his conviction for fourth-degree assault, assigning error to the trial court's denial of his motion to suppress evidence collected inside his home. The state concedes that the trial court erroneously concluded that it did not matter whether a third party had authority to consent to police entry into the home. The parties disagree, however, on the disposition. Held: The trial court erred in concluding that it did not matter whether the third party had authority to consent to the officers' entry, and remand is required under these circumstances, because the Court of Appeals cannot be confident that the error did not impede development of the record. Reversed and remanded.

Department of Human Services v. C. W.
(Armstrong, P. J.)

Parents appeal the judgments in which the juvenile court determined under ORS 419B.100(1)(c) that their children were within its jurisdiction. Parents contest that the circumstances leading to the removal of children from their home--mainly, persistent hunger, chronic school absenteeism, unsanitary and unsafe conditions in the home, and parents' volatility, mental health issues, and substance abuse--posed a risk of serious injury or loss to children. Parents also argue that, even if those circumstances were endangering, they were merely historical risks by the time that the juvenile court established jurisdiction over children. Held: Because the circumstances leading to removal of children were dangerous and parents had made insufficient progress to address their mental-health and substance abuse issues, the juvenile court did not err in its determination that children's circumstances presented a current risk of serious loss or injury to children that was likely to be realized if they were in parents' care. Affirmed.

State of Oregon v. H. K. D. S.
(Lagesen, J.)

In this delinquency proceeding, youth, age 12, was found to be within the juvenile court's delinquency jurisdiction for acts that, if committed by an adult, would constitute first-degree sexual abuse, ORS 163.427. That finding was based, in part, on evidence that seminal fluid containing DNA matching youth's was found on underwear belonging to youth's four-year-old stepsister. Officers made the DNA match after obtaining--without a warrant but with signed parental consent forms--a buccal swab from youth. Before the hearing,

youth moved to suppress the DNA evidence obtained through the buccal swab. He argued that the collection of the DNA was both an unconstitutional search and seizure under Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution because officers did not obtain a warrant and, in youth's view, no exception to the warrant requirement applied. In particular, youth contended that he did not consent to the search and, further, that the consent of third parties--in this case, his parents--cannot authorize officers to search a child's person in the context of a criminal investigation. The juvenile court denied youth's motion to suppress. On appeal, youth assigns error to that denial, renewing his arguments below. Held: The juvenile court erred in denying youth's motion to suppress the DNA evidence obtained by the buccal swab, and that error was not harmless. Youth merely acquiesced in the search and did not consent to it for purposes of Article I, section 9. Furthermore, under Article I, section 9, parental consent alone does not permit law enforcement to search the person of a child suspected of a crime for DNA. Reversed and remanded.

State of Oregon v. John Patrick Lynch
(Lagesen, P. J.)

Defendant stole a car and attempted to elude police. Ultimately, he crashed into and damaged a stairwell and guardrail owned by the City of Portland. This led to a number of charges against defendant, which he elected to resolve through a plea bargain. Under the plea agreement, the state agreed, among other things, to recommend restitution within 90 days. Within 90 days, the state sought, and the trial court awarded, restitution for the damaged car. Then, nearly two months after the expiration of the 90-day period, the state sought, and the court awarded, additional restitution to the city for damage to the stairwell and guardrail. On appeal, defendant contends that the court erred in awarding restitution to the city because he has a due process right to enforce the 90-day period specified in the plea agreement. The state counters that the 90-day limit is unenforceable because it violates the city's right under Article I, section 42, of the Oregon Constitution to receive prompt restitution from defendant for the damage he caused. Held: The trial court erred in awarding restitution to the city at the request of the state in contravention of the terms of the plea agreement. Defendants have a due process right to enforce against the state the material terms of their plea agreements, and the state violated a term of defendant's plea agreement by seeking restitution outside of the 90-day period. Enforcing the plea agreement against the state does not violate any right of the city under Article I, section 42, because the city does not have a right to have the state seek restitution on its behalf and may seek restitution on its own accord. Reversed and remanded for resentencing; otherwise affirmed.

Chong Ok Chang v. Eun Hee Chun
(Lagesen, P. J.)

In this tort action, plaintiffs appeal a general judgment and money award. In the first assignment of error, one plaintiff argues that the trial court erred in its dismissal of her claim for intentional infliction of emotional distress (IIED), because there was insufficient evidence to support a finding that she willfully violated the trial court's order. In the second assignment of error, another plaintiff contends that the trial court erred in concluding that Washington law required her to allege economic damages resulting from the property damage to state a claim for trespass. In response, defendants argue that allegations of noneconomic damages are insufficient. In the alternative, defendants contend that no reasonable factfinder could find that the plaintiff had a right to the exclusive possession of the property or that the lease was not a sham. In a third assignment of error, plaintiffs contend that the trial court erred in denying their motion for a new trial, arguing, in relevant part, that "the jury instruction became the law of the case." Finally, plaintiffs assign error to the award of costs and disbursements to defendants. Held: (1) The trial court erred in dismissing the IIED claim, because there was insufficient evidence to find that plaintiff acted willfully. (2) The trial court erred in

dismissing the trespass claims. Under Washington law, trespass is a strict liability tort and, therefore, a plaintiff can claim noneconomic damages that are proximately caused by the trespass. Furthermore, a reasonable factfinder could find that defendant did not repudiate the lease agreement and that the lease agreement was not a sham. (3) Denial of the motion for a new trial was proper because the jury instruction did not become the law of the case. (4) Because the trial court erred in dismissing the IIED and trespass claims, reversal of the awards of costs and disbursements is required. Reversed and remanded.

State of Oregon v. Juan Antonio Guzman-Vera
(Lagesen, P. J.)

Defendant appeals a judgment of punitive contempt for violating a restraining order issued under the Family Abuse Prevention Act (FAPA). In his first assignment of error, he contends that the trial court applied the wrong legal standard in finding him in contempt. The state responds that the court's finding of contempt was correct. Alternatively, the state argues that, when defendant was served with a restraining order, and consciously decided not to read that order, defendant disobeyed the restraining order. In his second assignment of error, defendant contends that the court plainly erred by requiring him to pay the cost of court-appointed counsel without determining defendant's ability to pay. Furthermore, defendant requested that the Court of Appeals exercise its discretion to correct the error. The state concedes that error and agrees with defendant that the court should exercise its discretion to correct it. Held: (1) The trial court did not err in determining that defendant willfully violated his restraining order. (2) The trial court did err when it imposed court-appointed attorney fees without any evidence in the record about defendant's ability to pay. Portion of judgment requiring defendant to pay attorney fees reversed; otherwise affirmed.

State of Oregon v. H. K. D. S.
(Tookey, J.)

In this juvenile delinquency case, youth appeals a dispositional judgment, ordering, among other things, that youth pay \$200 in fines. In the related case of *State v. H. K. D. S.*, ___ Or App ___, ___ P3d ___ (July 1, 2020), youth appealed the judgment that found youth to be within the jurisdiction of the juvenile court. In the opinion issued today in the appeal of the jurisdictional judgment, the Court of Appeals reversed and remanded the judgment that found youth to be within the jurisdiction of the juvenile court. Held: Because the judgment that found youth to be within the jurisdiction of the juvenile court has been reversed, resolution of the parties' arguments in this appeal of the dispositional judgment would not have any practical effect on the rights of the parties to this controversy. Appeal dismissed as moot.

Gary Stachlowski v. 1000 Broadway Building Limited Partnership
(Shorr, J.)

This appeal involves a dispute over fees assessed by defendant First Republic Bank (First Republic) when managing the 1000 Broadway Building in downtown Portland. Plaintiff is the trustee of a number of trusts that own a minority interest as limited partners in 1000 Broadway Building Limited Partnership (1000 Broadway Building LP), which in turn owns the 1000 Broadway Building. Plaintiff brought a derivative action on behalf of 1000 Broadway Building LP against First Republic for, among other claims, conversion, money had and received, and unjust enrichment, alleging that First Republic wrongfully exacted trustee fees and attorney fees from the limited partnership. Plaintiff filed a motion for summary judgment. First Republic opposed the motion for summary judgment and filed a petition to compel arbitration. 1000 Broadway Building LP, a nominal party to the litigation, joined that petition and made a procedural argument urging the court to

consider the petition to compel arbitration before considering plaintiff's motion for summary judgment. Later 1000 Broadway Building filed a reply brief that took a substantive position in support of First Republic's petition. The court denied First Republic's petition on the merits, determined that 1000 Broadway Building's subsequent joinder was both limited to procedural issues and now moot, and struck 1000 Broadway Building LP's reply brief. 1000 Broadway Building LP, but not First Republic, then filed an interlocutory appeal of that order. While that appeal was pending, the court granted plaintiff summary judgment on its conversion claim against First Republic. First Republic now appeals that summary judgment ruling, asserting that (1) the trial court lacked jurisdiction to rule on plaintiff's summary judgment motion while 1000 Broadway Building LP's interlocutory appeal was pending and (2) the court erred when it granted plaintiff's motion for summary judgment. Held: The trial court had jurisdiction to proceed to summary judgment. However, the court erred when it granted summary judgment to plaintiff on its conversion claim against First Republic, because there are disputed issues of material fact to be resolved by the factfinder. Reversed and remanded.

State of Oregon v. Samuel Ramirez
(James, J.)

Defendant appeals from a judgment of conviction of one count each of carrying a concealed weapon, ORS 166.240, unlawfully possessing methamphetamine, ORS 475.894, and providing false information to a police officer, ORS 162.385. Defendant entered a conditional guilty plea reserving his right to seek appellate review of the trial court's denial of his motion to suppress. On appeal, defendant assigns error to that denial, first arguing that the trial court incorrectly determined that handcuffing defendant--an act which led to the discovery of a knife sheathed under defendant's sleeve--was justified by the officer safety exception to the warrant requirement under Article I, section 9, of the Oregon Constitution. Second, defendant argues that even if his detention for officer safety concerns was lawful, the subsequent search of his backpack, in particular an Altoids tin located within his backpack, was not a lawful search incident to arrest. Held: The trial court's denial of defendant's motion to suppress evidence resulting from the unjustified handcuffing of defendant was error. The trial court did not err, however, in its denial of defendant's motion to suppress evidence resulting from the lawful search of the backpack. Because this case arises as a conditional plea, the Court of Appeals remanded to the trial court for further proceedings, where defendant may elect to withdraw his plea as to the charge of carrying a concealed weapon, or may elect to withdraw his plea to all charges. Reversed and remanded.

State of Oregon v. Rudolph Valentino Martinez
(Aoyagi, J.)

Defendant appeals a conviction for one count of unlawful possession of methamphetamine, ORS 475.894, challenging the denial of his motion to suppress. A police officer arrested defendant on a misdemeanor warrant and, incident to arrest, searched his person for weapons and means of escape. An opaque white plastic bag was protruding from defendant's jacket pocket. The officer removed the plastic bag, felt a "hard bulge" in the middle of it, and proceeded to unroll and open it. The bag contained a piece of foil with heroin residue and a glass pipe with methamphetamine residue. Before trial, defendant moved to suppress the evidence from the plastic bag, arguing that it was derived from an unlawful search and seizure under Article 1, section 9, of the Oregon Constitution. The trial court denied the motion. On appeal, defendant challenges the denial of his motion, and the state concedes that the trial court erred in failing to suppress the evidence from the plastic bag. Held: The trial court erred in denying defendant's motion to suppress the evidence from the plastic bag. Reversed and remanded.

Nicholas Kamps-Hughes v. City of Eugene

(Aoyagi, J.)

Kamps-Hughes requested zone verification from the City of Eugene with respect to his proposal to build a detached accessory dwelling unit (ADU) on his property, which already contains a single-family dwelling. The city issued a zone-verification decision that identified various Eugene Code provisions that it considers applicable to the proposal, effectively precluding Kamps-Hughes from building an ADU on his property. Kamps-Hughes appealed to the Land Use Board of Appeals (LUBA), contending that, under ORS 197.312(5)(a), the city may only impose "reasonable local regulations relating to siting and design" with respect to the development of an ADU on his property and that certain of the code standards cited by the city are not related to siting or design. As to four of the code standards, LUBA agreed with Kamps-Hughes and reversed. The city seeks judicial review, arguing that LUBA misconstrued ORS 197.312(5)(a) and that the four code standards relate to "siting" within the meaning of the statute. Held: LUBA did not err. Based on the text, context, and legislative purpose, "siting" as used in ORS 197.312(5)(a) refers to where ADUs are sited on lots, not to where ADUs are allowed within the city or a particular zone. Affirmed.

State of Oregon v. Erich Boekelheide

(Landau, S. J.)

Defendant appeals a judgment of conviction for felony driving under the influence of intoxicants, ORS 813.011. Defendant was riding his bicycle under the influence of intoxicants on a sidewalk. Without looking for oncoming traffic and ignoring a red light, he steered his bicycle into an intersection crosswalk and collided with an ambulance. Defendant was taken to the hospital where a blood draw revealed a blood alcohol level well above the legal limit to operate a vehicle. Defendant in his sole assignment of error challenges the legal sufficiency of the state's evidence. Defendant makes two arguments to support his assignment of error. First, relying on State v. Greene, 283 Or App 120, 388 P3d 1132 (2016), he asserts that a person crossing a street in a crosswalk on a bicycle is a pedestrian and not the operator of a vehicle for the purposes of the DUII statutes. He contends that a bicycle in a crosswalk is like a person in a wheelchair who, under Greene, is considered a pedestrian. Second, defendant contends that a cyclist has the same rights as a pedestrian when in a crosswalk. Thus, defendant argues that he had the right to ride through the crosswalk while intoxicated. The state responds that Greene is distinguishable because it rests on a statute that expressly defines the term "pedestrian" to include a person in a wheelchair and that there is no similar statute that applies to a person riding a bicycle. Furthermore, the state argues that a bicycle is a "vehicle" and subject to the same rules that govern vehicles on highways. Held: The trial court did not err in finding defendant guilty of DUII because an operator of a bicycle is not a pedestrian for the purposes of the DUII statutes. Furthermore, an operator of a bicycle does not have the same rights as a pedestrian when in a crosswalk. Affirmed.

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