



COURT OF APPEALS

Media Release

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The Court of Appeals issued these opinions:

Jeff Gist v. Zoan Management, Inc.
(A159509 - Multnomah County Circuit Court)

Brian Joseph Hardegger v. Brigitte Amsberry
(A165761 - Umatilla County Circuit Court)

State of Oregon v. Steven Levi Ryan
(A167593 - Marion County Circuit Court)

Drew Leonard Smith v. Board of Parole and Post-Prison Supervision
(A165436 - Board of Parole and Post-Prison Supervision)

Department of Human Services v. T. G. H.
(A172381 - Lincoln County Circuit Court)

H. M. H. v. Jeromy Jay Hess*
(A168659 - Linn County Circuit Court)

Lavont E. Baker v. Board of Parole and Post-Prison Supervision
(A168478 - Board of Parole and Post-Prison Supervision)

J. S. E. v. Robert James Cubic*
(A169863 - Josephine County Circuit Court)

State of Oregon v. Noy Kini
(A164357 - Multnomah 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 section 2265(d)(3).

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

State of Oregon v. Lois June Catron
(A167757 - Malheur County Circuit Court)
State of Oregon v. Dean Eric Parsons
(A167788 - Multnomah County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Gerald Owen v. Zorn Farms Inc.
(A168513 - Multnomah County Circuit Court)
State of Oregon v. Jeffrey Clinton Owen
(A169347 - Columbia County Circuit Court)
State of Oregon v. Michael Patrick Shannon
(A170352 - Umatilla County Circuit Court)
State of Oregon v. James Hubert Potts
(A170468 - Clackamas County Circuit Court)
State of Oregon v. Isai Guzmanramirez
(A170598 - Multnomah County Circuit Court)
State of Oregon v. Natalie Elizabeth Yell
(A170682 - Lane County Circuit Court)
Anthony Ostrowski v. Brandon Kelly
(A170752 - Marion County Circuit Court)
Lilly M. Spillman v. Tri-Met
(A170850 - Workers' Compensation Board)
State of Oregon v. Timothy Andrew Vela
(A170909 - Clackamas County Circuit Court)
State of Oregon v. Jacob Ryan Rogers
(A170911 - Douglas County Circuit Court)
State of Oregon v. Cuauhtemoc Rojas-Zepeda
(A171030 - Multnomah County Circuit Court)
State of Oregon v. Kyla Marie Byrd
(A171157 - Clackamas County Circuit Court)
State of Oregon v. Collin Jacob Ross
(A171240 - Washington County Circuit Court)
Jamie L. Watkins v. Providence Health & Services Oregon
(A171363 - Workers' Compensation Board)
State of Oregon v. Adrienne Marie Larsen
(A171404 - Baker County Circuit Court)
State of Oregon v. Vince Monroe Strong
(A171451 - Umatilla County Circuit Court)
State of Oregon v. Jeffrey Carl Engerseth
(A171646 - Josephine County Circuit Court)
Department of Human Services v. J. F.
(A171775 - Coos County Circuit Court)

Ernest Badilla v. Board of Parole and Post-Prison Supervision
(A172276 - Board of Parole and Post-Prison Supervision)
Jeffrey D. Halladay v. Board of Parole and Post-Prison Supervision
(A172297 - Board of Parole and Post-Prison Supervision)
Wells Fargo Bank, N. A. v. The Unknown Heirs and Devisees of Elmer V. Dunham
(A172533 - Clackamas County Circuit Court)
Department of Human Services v. C. L. K.
(A173366 - Coos County Circuit Court)
Department of Human Services v. S. G.
(A173470 - Douglas County Circuit Court)
Beaverton Business Owners, LLC v. City of Beaverton
(A173767 - Land Use Board of Appeals)

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Jeff Gist v. Zoan Management, Inc.
(DeVore, P. J.)

Defendants' petition to compel arbitration frustrated plaintiff's hope for class action wage claims. The trial court ordered the parties to arbitrate despite plaintiff's argument that the arbitration provisions were part of an unconscionable contract. On appeal, plaintiff argues that decision was in error, and contends that the arbitration provisions are unenforceable because the contract is procedurally and substantively unconscionable. The defendants disagree, adding that the issue is not reviewable. Held: The issue is reviewable, the arbitration provisions are enforceable, and substantive conflicts, if any, between plaintiff's wage claims and contract terms remain for resolution in arbitration. The trial court did not err in compelling the parties to arbitrate. Affirmed.

Brian Joseph Hardegger v. Brigitte Amsberry
(DeVore, P. J.)

In 2001, when petitioner was a youth, he committed felony murder. Under Measure 11, he was tried as an adult and received a mandatory sentence of life in prison, with a minimum of 25 years to be served before any possibility for release. In 2012, the United States Supreme Court held that a mandatory life sentence without parole is unconstitutionally disproportionate when imposed against a juvenile homicide offender without consideration of youth. *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). More recently, in *State v. Link*, 297 Or App 126, 441 P3d 664, rev allowed, 365 Or 556 (2019), the Court of Appeals held that, under *Miller*, the state cannot impose a life sentence with a 30-year minimum term without consideration of youth at the time of sentencing. Petitioner invokes those precedents in this successive petition for post-conviction relief. He appeals a judgment that dismissed his petition, challenging the post-conviction court's rulings (1) that his claim is procedurally barred under ORS 138.510 and ORS 138.550 and (2) that his sentence is constitutional. Held: As to the first ruling, the Court of Appeals accepted the superintendent's concession of error. As to the second, *Miller* and *Link* establish a rule that is retroactive and renders petitioner's sentence, in the manner imposed, impermissible. Reversed and remanded.

State of Oregon v. Steven Levi Ryan
(DeVore, J.)

Defendant, who is intellectually disabled, challenges his sentence following resentencing. The trial court originally had imposed a mandatory sentence of 75 months' imprisonment upon defendant's guilty plea to first-degree sexual abuse. The Oregon Supreme Court vacated and remanded for resentencing, concluding that the trial court erred under Article I, section 16, of the Oregon Constitution in failing to consider defendant's intellectual disability when determining whether the sentence was unconstitutionally disproportionate. *State v. Ryan*, 361 Or 602, 604, 396 P3d 867 (2017). On remand, the trial court imposed the same sentence, emphasizing evidence that defendant was neither incompetent to stand trial nor guilty except for insanity (GEI). Defendant appeals, arguing that the court again failed to consider intellectual disability in a broad sense when determining proportionality. Held: Although relevant, the standards for trial competency and GEI do not fully consider the spectrum of intellectual disability and how it may reduce, while not eliminate, criminal culpability or blameworthiness. Where the trial court has found a defendant seriously intellectually impaired, it must consider that intellectual disability in assessing the defendant's culpability in order to assure that the sentence is constitutionally proportionate. Sentence vacated and remanded for resentencing; otherwise affirmed.

Drew Leonard Smith v. Board of Parole and Post-Prison Supervision
(Tookey, J.)

Petitioner, who was convicted of first-degree assault, attempted murder, attempted first-degree rape, first-degree burglary, and first-degree sexual abuse for crimes that he committed in 1988, seeks judicial review of a 2016 order of the Board of Parole and Post-Prison Supervision (the board) that deferred his projected parole release date to December 2018. On June 20, 2018, while this case was pending, the board held a subsequent scheduled exit interview with petitioner and he was released on parole. The board filed a motion to dismiss this appeal as moot, contending that, "[w]hen an adult in custody * * * is no longer subject to detention under a challenged order deferring his or her release on parole, * * * the challenge becomes moot because there is no effective relief that may be granted against the order." Petitioner argues that the "board has failed to establish that petitioner's claim is moot because if petitioner prevails on appeal, he would likely have an earlier date at which his period of active supervision would end." Held: In light of the board's discretion over when petitioner's period of active parole supervision will be completed, even if petitioner was correct that the board should have released him on parole in 2016, that would not change the uncertainty of when petitioner would be discharged from active parole supervision. Because the board demonstrated that a reversal of its 2016 decision to defer petitioner's release on parole would not have the practical effect of changing petitioner's parole status from active to inactive at an earlier date, the board met its burden to demonstrate that petitioner's identified collateral consequence is legally insufficient and that the case is, therefore, moot. Petition for judicial review dismissed as moot.

Department of Human Services v. T. G. H.
(Tookey, J.)

Father appeals from a judgment of the Lincoln County juvenile court assuming jurisdiction over father's three children, who are Native American. Father contends that the court erred in rejecting his argument that DHS's jurisdictional petition is barred by issue preclusion as a result of an earlier jurisdictional proceeding in the Douglas County juvenile court in which the court had not assumed jurisdiction. Father also asserts that the court erred in denying his motion in limine to exclude from the court's consideration evidence that had previously been considered by the Douglas County juvenile court in evaluating the earlier jurisdictional petition. Father contends, in the alternative, that the evidence does not establish sufficient grounds for dependency jurisdiction. Held: The Lincoln County juvenile court did not err in rejecting father's contention

that DHS's jurisdictional petition is barred by issue preclusion, because the Lincoln County petition included new allegations that were based on new substantial material facts that were not considered by the Douglas County court. The trial court also did not err in denying father's motion in limine to exclude evidence that had been considered previously by the Douglas County court, because, in determining whether DHS had met its burden to establish the new allegations by clear and convincing evidence, the Lincoln County juvenile court was required to evaluate the totality of the circumstances, including the present effects of past events on the children's condition. Finally, the juvenile court's judgment assuming jurisdiction is supported by legally sufficient evidence in the record. Affirmed.

H. M. H. v. Jeromy Jay Hess
(Aoyagi, J.)

Under the Family Abuse Prevention Act (FAPA), petitioner obtained a restraining order against respondent, her soon-to-be-ex-husband, and the trial court continued that restraining order after a contested hearing. Respondent appeals, challenging the sufficiency of the evidence. Respondent admits that there is evidence that petitioner was the victim of abuse committed by him within 180 days preceding the filing of the petition, which is the first requirement for a FAPA restraining order. Specifically, respondent admits that there is evidence that he assaulted petitioner during an altercation about Christmas decorations on the day that he was moving out of the family home. Respondent argues, however, that the only evidence is that that event was an isolated incident in a lengthy marriage and that the evidence is insufficient to establish either of the other two requirements for a FAPA restraining order: that there is an imminent danger of further abuse to petitioner, and that respondent represents a credible threat to petitioner's physical safety. Held: The trial court erred in continuing the restraining order. On this record, the evidence was insufficient to establish that there is an imminent danger of further abuse to petitioner, obviating the need to reach the credible-threat issue. Reversed.

Lavont E. Baker v. Board of Parole and Post-Prison Supervision
(Mooney, J.)

Petitioner seeks judicial review of his classification by the Board of Parole and Post-Prison Supervision (board) as a Notification Level 3 (high risk) sex offender. To determine a person's sex offender registration requirements upon release from prison, the board uses the "Static-99R risk assessment" to calculate a final score corresponding with one of three sex offender registration levels. Petitioner challenges the board's application of the Static-99R assessment, arguing that it miscalculated his final score. He specifically argues that the board committed legal error and abused its discretion by misinterpreting the assessment's scoring rules, and that it made findings unsupported by substantial evidence. Held: The board did not err. The board did not misinterpret the Static-99R risk assessment's scoring rules, and each of its findings were supported by substantial evidence. Affirmed.

J. S. E. v. Robert James Cubic
(Mooney, J.)

This is an appeal from an order denying respondent's motion to terminate a stalking protective order (SPO) to which he had stipulated four and a half years earlier. Respondent assigns error to that denial, arguing that (1) he met his burden by the passage of time without SPO violations and his declaration that he desired no contact with petitioner and (2) petitioner's failure to offer any evidence at the hearing required dismissal. Held: The trial court did not err in denying respondent's motion to terminate the SPO. Respondent did not carry his burden because he did not address the concerns that underlay the issuance of the SPO or why a four-year period of compliance with a legal mandate would sufficiently abate those concerns. Affirmed.

State of Oregon v. Noy Kini
(Hadlock, J. pro tempore)

Defendant drove while intoxicated in April 2016, crashed his car, and suffered injuries that were treated at a hospital. In June 2016, defendant again drove while intoxicated. The state subsequently charged defendant with two counts of driving while under the influence of intoxicants (DUII) (one count for each of the two incidents) and two counts of reckless driving (again, one count for each of the two incidents). At trial, the court allowed the state to introduce hospital records that showed, among other things, results from a blood-ethanol test that was performed when defendant was treated after the April 2016 car crash. A jury found defendant guilty of both DUII counts and one count of reckless driving, and it found him not guilty of the other reckless-driving count. On appeal, defendant contends that the trial court violated his confrontation rights under the state and federal constitutions when it allowed the state to introduce the hospital records without showing that the declarants were unavailable. Held: Even assuming (without deciding) that some business records will not implicate the Article I, section 11, confrontation right, the hospital records in this case include the types of opinions, gratuitous facts, and exercises of judgment that make them "witness statements" for purposes of Article I, section 11. Accordingly, the trial court erred by admitting them in the absence of a showing of the declarants' unavailability. Moreover, that error was not harmless with respect to either Count 1 or Count 4 because there is more than a little likelihood that the error affected the jury's verdicts on those counts. Convictions on Count 1 and Count 4 reversed and remanded; otherwise affirmed.

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