



COURT OF APPEALS

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The Court of Appeals issued these opinions:

State of Oregon v. Travis Lee Brady
(A173201 - Washington County Circuit Court)

Andrew Louie v. Jasmine Cherise Kay Louie
(A174653 - Clackamas County Circuit Court)

State of Oregon v. Lynn Edward Benton
(A164057 - Clackamas County Circuit Court)

Phillips Sisson Industries, Inc. v. Tim Hysell
(A169634 - Marion County Circuit Court)

State of Oregon v. Deborah Lynn Reed
(A170999 - Lincoln County Circuit Court)

Richard E. Rudder v. William D. Hosack
(A171925 - Coos County Circuit Court)

C. J. v. Agustin Flores*
(A175234 - Multnomah County Circuit Court)

Lawson Reed Rankin v. Curtis L. Landers
(A175623 - Lincoln County Circuit Court)

Nancy Johnston Kaser v. Public Employees Retirement System
(A170559 - Marion County Circuit Court)

State of Oregon v. Earl Douglas Woods, Jr.
(A169997 - Yamhill County Circuit Court)

*This case title has been redacted in this media release and in the online version of the opinion, in compliance with 18 USC section 265(d)(3).

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

Shaun Everett Lowry v. Garrett Laney
(A171455 - Marion County Circuit Court)
State of Oregon v. Norman David Wicks, Jr.
(A172967 - Columbia County Circuit Court)
Manuel Hernandez-Nunez v. Tyler Blewett
(A174207 - Umatilla County Circuit Court)
State of Oregon v. M. R. G.-E.
(A174649 - Marion County Circuit Court)
Department of Human Services v. J. A. P.
(A175212 - Marion County Circuit Court)
Department of Human Services v. D. M. P.
(A175214 - Marion County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Shawn Brown v. Brad Cain
(A173203 - Malheur County Circuit Court)
Ron Adelsperger v. Elkside Development LLC
(A174502 - Coos County Circuit Court)
State of Oregon v. Antonio Trayvontae Montgomery
(A174949 - Multnomah County Circuit Court)
State of Oregon v. Derek Glenn Ogden
(A175226 - Yamhill County Circuit Court)
State of Oregon v. Kyle James Leroue
(A175871 - Clackamas County Circuit Court)
Brent Steven Sherman v. David M. Vandenberg
(A176128 - Lake County Circuit Court)
M. A.-S. v. Nouredine Dib*
(A176483 - Multnomah County Circuit Court)

* * * * *

State of Oregon v. Travis Lee Brady
(Lagesen, C. J.)

Defendant appeals a judgment of conviction--by a 10-2 jury--for one count of first-degree theft, ORS 164.055. Both parties agree that defendant is entitled to a reversal of the judgment because the jury was not unanimous. Defendant also appeals a denial of his motion for judgment of acquittal, contending that the evidence of his deal with the pawnshop is insufficient to permit a finding that he committed theft by "selling" a

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bicycle "knowing that the property was the subject of theft." The evidence at trial showed that defendant arranged for a drop loan from the pawnshop, that the period for reclaiming the bicycle had not expired when defendant was apprehended, and that defendant had a history of not reclaiming stolen property under similar arrangements. Held: The evidence at trial allowed a factfinder to infer that defendant disposed of the bicycle by giving it to the pawnshop in exchange for money, thereby engaging in the process of selling it, even if the sale had not yet been completed under the terms of the parties' transaction at the time defendant was apprehended. The lack of a unanimous jury verdict, however, required reversal and remand. Reversed and remanded.

Andrew Louie v. Jasmine Cherise Kay Louie
(Lagesen, C. J.)

The protected person's court-appointed guardian, who is her husband, appeals a limited judgment ordering payment of attorney fees to court-appointed counsel for the protected person. Although it is undisputed that the protected person has no funds or other assets of her own, pursuant to ORS 125.095, the probate court ordered guardian to pay appointed counsel's fees on a payment plan paralleling the schedule on which he was paying the attorney fees he incurred in his capacity as guardian. On appeal, guardian argues that the limited judgment must be set aside to the extent that it directs him, as husband, to pay the protected person's court-appointed counsel from his own funds. Held: Under ORS chapter 108, the property or money of one spouse is not the property or money of the other simply because they are married. The probate court erroneously relied on ORS 107.105, which does not provide legal authority for treating the separate funds of husband as wife's own funds for purposes of ORS 125.095. Reversed and remanded.

State of Oregon v. Lynn Edward Benton
(Ortega, P. J.)

Defendant appeals from a judgment of conviction for aggravated murder and attempted murder, raising 31 assignments of error. The Court of Appeals addressed three categories of claimed error and did not reach defendant's remaining assignments of error. Those three categories are (1) defendant's assignments of error to the trial court's denials of defendant's demurrers, motions to dismiss, and motions for judgment of acquittal based on an alleged variance in proof between the indictment and the evidence presented at trial, (2) defendant's assignments of error to the trial court's denial of his motion to suppress statements defendant made to a jailhouse informant on the ground that the informant was a state agent, and (3) defendant's assignment of error to the trial court's refusal to conduct an in camera review of the records of Dr. Guyton, who was hired by the attorney for the jailhouse informant to perform a psychological evaluation of him. Held: (1) The trial court did not err in denying defendant's demurrers, motions to dismiss, and motions for judgment of acquittal, because the alleged variances in proof were neither material nor prejudicial. (2) The jailhouse informant was acting as a state agent after July 2, 2015, triggering the state constitutional protections of the exclusionary rule. The trial court erred when it denied defendant's motion to suppress statements made by defendant to the informant after that date, requiring reversal and remand of defendant's convictions. (3) The trial court did not err in refusing to conduct an in camera review of Guyton's records, because defendant did not make a sufficient threshold showing for such a review. (4) Additionally, the attempted murder conviction was reversed for the trial court to enter a judgment reflecting its post-judgment dismissal of that count. Conviction on Count 8 reversed; conviction on Counts 1, 2, 6, and 7 reversed and remanded; otherwise affirmed.

Phillips Sisson Industries, Inc. v. Tim Hysell
(Shorr, J.)

Defendant appeals from a judgment in favor of plaintiffs, Clint Phillips and Phillips-Sisson Industries, Inc., that was entered following a bench trial. Among other arguments, defendant assigns error to the trial court's entry of "judgment against [defendant] personally on the theory that [certain] note payments [to defendant] were unlawful distributions under ORS 63.229." Held: The trial court erred by entering judgment for plaintiffs based on its conclusion that the challenged note payments were unlawful distributions under ORS 63.229. The note payments were not distributions as defined under the Oregon Limited Liability Company Act, and the trial court erred in instructing itself on that law. The court's error was not harmless. Vacated and remanded.

State of Oregon v. Deborah Lynn Reed
(Shorr, J.)

Defendant appeals from a judgment of conviction for various drug crimes, raising two assignments of error. In the first, defendant contends that the trial court erred in partially denying her motion to suppress statements that she made without Miranda warnings in violation of Article I, section 12, of the Oregon Constitution and evidence derived from that violation. In the second, she argues that the court erred in imposing a sentence of imprisonment that exceeded the statutory maximum. Held: Defendant was not in compelling circumstances when two officers questioned her for two minutes in the presence of her probation officer. The officers did not exert significant pressure on defendant and, given the probation officer's nonparticipation in the interview, his presence was not compelling under *State v. Dunlap*, 215 Or App 46, 57, 168 P3d 295 (2007). As to the second assignment of error, it was unpreserved, and the Court of Appeals declined to exercise its discretion to review it as plain error. Affirmed.

Richard E. Rudder v. William D. Hosack
(James, P. J.)

Plaintiffs, who bought a residential real property from defendants, sued to obtain a judicial declaration holding defendants liable for remedial action costs resulting from an underground leaking oil tank. On appeal, defendants challenge the trial court's judgment declaring them strictly liable for all remedial action costs attributable to or associated with the oil tank under ORS 465.255(1)(a), the court's grant of a directed verdict to plaintiffs on defendants' breach of contract counterclaim, and a supplemental judgment awarding attorney fees and costs to plaintiffs under the contract. Held: Based on the jury's findings, the trial court did not err in declaring defendants as the only statutorily liable parties under ORS 465.255(1)(a). Although any potentially liable person may bring a claim for contribution under ORS 465.257, the court could assign responsibility only to a party found to be liable under ORS 465.255. Therefore, the court did not err in allocating all liability to defendants. Further, the trial court did not err in granting a directed verdict on defendants' breach of contract counterclaim because the contract terms were unambiguous and did not support defendants' assertion that plaintiffs agreed to not file a lawsuit against defendants. Relatedly, ORS 465.255(5)(a) was inapplicable in the instant case because defendants did not have an "agreement to insure, hold harmless or indemnify" them with respect to the oil tank. Finally, because the court did not err in directing a verdict on defendants' breach of contract counterclaim, defendants' challenge to the supplemental judgment awarding plaintiffs' attorney fees and costs on that counterclaim necessarily failed. Affirmed.

C. J. v. Agustin Flores

(James, P. J.)

Petitioner obtained a sexual abuse protective order (SAPO) against respondent. After a contested hearing, the trial court continued the SAPO under ORS 163.763(2), finding that petitioner had been subject to sexual abuse by respondent and that she reasonably feared for her physical safety if a SAPO was not entered. Respondent appeals, challenging the sufficiency of the evidence supporting the SAPO. Held: The Court of Appeals noted that respondent erroneously identified the applicable standard of review as de novo, without acknowledging ORS 19.415(3)(b). Given that de novo review was not warranted, the court was therefore bound by the trial court's factual findings if they were supported by any evidence in the record, and it reviewed the trial court's legal conclusions for errors of law. *Henderson v. Byrne*, 311 Or App 415, 416, 487 P3d 869 (2021). In the light of that standard of review, the trial court did not err in continuing the SAPO. Affirmed.

Lawson Reed Rankin v. Curtis L. Landers

(James, P. J.)

Petitioner appeals a denial of a writ of habeas corpus, challenging, among other things, his pretrial detention without bail. The trial court dismissed the petition as meritless. Held: In *Rico-Villalobos v. Giusto*, 339 Or 197, 118 P3d 246 (2005), the Supreme Court recognized that habeas corpus is an appropriate vehicle to challenge pretrial detention. Applying that law, the Court of Appeals concluded that the petition was not properly dismissed as meritless because it did not fail to state a cognizable legal claim. Further, the dismissal was not harmless. Reversed and remanded.

Nancy Johnston Kaser v. Public Employees Retirement System

(Powers, J.)

In this appeal arising out of a challenge to a final order in an other than contested case, petitioner asserts that the trial court erred in affirming the determination by the Public Employees Retirement System (PERS) regarding the amount of petitioner's creditable service for purposes of her retirement benefits calculations. Petitioner argues that PERS erroneously interpreted ORS 238.450(4), which provides, in part, that PERS shall "determine the accuracy of the disputed information" provided to it by petitioner's employer. Petitioner contends that the statute requires PERS to take greater investigative measures than it took in this case. PERS responds that it did not err in interpreting the statute. Held: The text, context, and legislative history of ORS 238.450(4) contradict petitioner's view that the statute requires a more robust investigation than PERS undertook. Accordingly, PERS did not erroneously interpret ORS 238.450(4) and therefore the trial court did not err in upholding the agency's final order. Affirmed.

State of Oregon v. Earl Douglas Woods, Jr.

(DeVore, S. J.)

Defendant appeals a judgment of conviction for a number of criminal offenses, raising 16 unpreserved assignments of error. He contends, based on the Supreme Court's decisions in *State v. Haltom*, 366 Or 791, 472 P3d 246 (2020), and *State v. Simonov*, 358 Or 531, 368 P3d 11 (2016), that the trial court plainly erred in failing to instruct the jury that, as to charges of first-degree rape under ORS 163.375(1)(d) and first-degree sexual abuse under ORS 163.427(1)(a)(C), it was required to find that defendant knew that the alleged victims were incapable of consenting to the sexual conduct because of mental incapacitation or physical helplessness. He also contends that the trial court plainly erred in giving a nonunanimous jury instruction and

accepting nonunanimous guilty verdicts on several counts. Held: Given State v. Phelps, 141 Or App 555, 558, 902 P2d 1098 (1996), rev den, 324 Or 306 (1996)--which defendant did not argue should be overruled--any error in failing to instruct the jury that a culpable mental state of knowingly applied with respect to that element of the offenses was not plain; nothing in Haltom or Simonov displaced Phelps' conclusion that requiring proof that a defendant knew of the victim's incapacity would be inconsistent with the affirmative defense in ORS 163.325(3) and its legislative history. The trial court plainly erred in giving a nonunanimous jury instruction and in accepting nonunanimous verdicts on Counts 1, 2, 3, 4, 16, 27, 28, and 29; however, that error was not structural and, as to the counts for which the jury's verdict was unanimous, harmless beyond a reasonable doubt. Counts 1, 2, 3, 4, 16, 27, 28, and 29 reversed and remanded; remanded for resentencing; otherwise affirmed.

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