



COURT OF APPEALS

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The Court of Appeals issued these opinions:

State of Oregon v. Victor Javier Pichardo
(A150488 - Multnomah County Circuit Court)

State of Oregon v. Donovan Robert Carlton
(A150855 - Josephine County Circuit Court)

State of Oregon v. Mark Forrest Templeton
(A154982 - Umatilla County Circuit Court)

Federal National Mortgage Association v. Kevin D. Goodrich
(A150421 - Jackson County Circuit Court)

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(A155057 - Multnomah County Circuit Court)

State of Oregon v. Latoyia M. King
(A155697 - Marion County Circuit Court)

State of Oregon v. Bruce Patrick Roy
(A153812 - Lane County Circuit Court)

State of Oregon v. Adam Christopher Amsbary
(A155870 - Coos County Circuit Court)

Department of Human Services v. M. C.-C.
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State of Oregon v. Robert Scott Burkette
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State of Oregon v. William Edward Wasyluk, II
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State of Oregon v. Mitchell Dean Simonsen
(A155995 - Clatsop County Circuit Court)

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

State of Oregon v. Carlos Edward Adams
(A154942 - Multnomah County Circuit Court)
State of Oregon v. Christian Jair Perez-Morales
(A156226 - Washington County Circuit Court)
Jose Luis Gutierrez Santoscoy v. Driver and Motor Vehicle Services Division
(A156524 - Office of Administrative Hearings)

The Court of Appeals affirmed these cases without opinion:

Robin L. Giliberto and John P. Giliberto
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Barbara Mutnick and Jeffrey Mutnick
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Steven L. Stotler, Jr. v. Medford Police Officers' Association
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(A158957 - Workers' Compensation Board)
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(A159794 - Douglas County Circuit Court)
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(A160078 - Marion County Circuit Court)

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State of Oregon v. Victor Javier Pichardo
(Haselton, C. J.)

This case is before the Court of Appeals for a second time. Previously, the court reversed and remanded defendant's conviction for possession of heroin, concluding that the trial court had erred in denying defendant's motion to suppress evidence that derived from an unlawful seizure. *State v. Pichardo*, 263 Or App 1, 326 P3d 624, vac'd and rem'd, 356 Or 574, 342 P3d 87 (2014). The Supreme Court vacated that decision and remanded for reconsideration in light of its intervening decision in *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014), and its companion cases, which modified the analytical framework for deciding whether a person's voluntary consent to a search derived from a preceding police illegality. Held: Under the modified framework, the state failed to demonstrate that defendant's consent to search was not the product of police exploitation of the unlawful seizure. Accordingly, the Court of Appeals adhered to its prior decision. Reversed and remanded.

State of Oregon v. Donovan Robert Carlton
(Ortega, P. J.)

Defendant was convicted of three counts of first-degree sexual abuse, ORS 163.427, and was sentenced to life in prison without the possibility of release or parole, ORS 137.719(1). On appeal, defendant raises three assignments of error challenging his conviction and sentencing. The Court of Appeals writes to address only defendant's second assignment of error, in which he argues that the trial court erred by relying on two prior felony offenses from California to impose a presumptive "true life" sentence. Defendant contends that California Penal Code section 288 (CPC 288), the statute under which he was convicted in California, is not "comparable" to ORS 163.427 for sentencing purposes under ORS 137.719. Held: CPC 288 and ORS 163.427 are "comparable" for the purposes of ORS 137.719. Accordingly, the trial court did not err by imposing the sentence in this case. Affirmed.

State of Oregon v. Mark Forrest Templeton
(Ortega, P. J.)

In this case, defendant moved for post-conviction DNA testing under ORS 138.690 and 138.692 and petitioned the trial court for appointed counsel related to the DNA-testing motion under ORS 138.694. The trial court denied both the motion and the petition. In his first assignment of error, defendant contends that, because he met all of the statutory requirements set out in ORS 138.694, which provides for the appointment of counsel at state expense for assistance with a DNA-testing motion under ORS 138.692, the trial court erred in denying his petition for appointed counsel. The state responds that the DNA-testing statutory scheme mandates a two-step sequence that renders untimely defendant's petition for appointed counsel. In his second assignment, defendant challenges the trial court's denial of his motion for DNA testing. Held: Because defendant met the statutory requirements for appointed counsel and his petition was not untimely, the trial court erred in denying the petition. Order denying appointed counsel reversed and remanded; order denying DNA testing vacated and remanded.

Federal National Mortgage Association v. Kevin D. Goodrich
(Duncan, P. J.)

In this forcible entry and wrongful detainer (FED) action, plaintiff Federal National Mortgage Association appeals a judgment denying its claim to possession of property to which it obtained a deed after a nonjudicial foreclosure. The trial court ruled that the nonjudicial foreclosure was invalid--and plaintiff's claim of possession therefore failed--because Mortgage Electronic Registration Systems, Inc. (MERS), which had acted as a beneficiary of the foreclosed trust deed, is not a proper beneficiary under the Oregon Trust Deed Act (OTDA). While this case was pending on appeal, the Supreme Court decided *Brandrup v. ReconTrust Co.*, 353 Or 668, 303 P3d 301 (2013), and *Niday v. GMAC Mortgage, LLC*, 353 Or 648, 302 P3d 444 (2013), holding that MERS, which was neither a lender nor successor to a lender, was not a proper beneficiary under the OTDA. On appeal, plaintiff argues (1) that, regardless of whether MERS was a proper beneficiary, defendant could not challenge the validity of the trustee's deed in an FED action; (2) that there were no unrecorded assignments of the trust deed in this case, thereby distinguishing it from *Niday*; and (3) that *Niday* and *Brandrup* left open the possibility that MERS could act as the agent of the beneficiary. Held: Plaintiff's first argument--that defendant cannot challenge the validity of a completed foreclosure sale in an FED action--came too late, because it was not raised as a basis for reversal on appeal until plaintiff's reply brief. Plaintiff's second argument failed to meaningfully distinguish *Niday*, because plaintiff's claim of possession, as litigated in this case, depended on the validity of a recorded assignment from MERS, not the possible

existence or nonexistence of unrecorded assignments. And, even assuming that plaintiff's third argument, which was also raised late in the appeal, was properly before the Court of Appeals, there was no evidence in the record that MERS was acting as the agent of the original beneficiary. Affirmed.

Adam Joseph Southard and Kirsten Robine Larkins
(DeVore, P. J.)

In this consolidated appeal, mother appeals a judgment that dissolved her marriage to Southard and granted him custody of AR and two other children. Mother also appeals the court's order denying her motion under ORCP 71 to set aside the dissolution judgment for lack of a valid marriage to Southard. Mother challenges the court's authority to have awarded custody in a dissolution of an allegedly invalid marriage as if in an ordinary dissolution. Mother also argues that the court abused its discretion in awarding custody of AR to Southard when he was the legal but apparently not the biological father. Held: The trial court did not err in rendering its judgment of dissolution. The court had authority to issue the dissolution judgment and award custody because there was no timely evidence that the marriage was void. The court did not abuse its discretion in its determination of custody, and it did not err in denying mother's motion for relief from judgment. Affirmed.

State of Oregon v. Latoyia M. King
(DeVore, J.)

Defendant challenges the trial court's restitution award, contending that the court erred in awarding restitution after entry of the original judgment, because the court did not determine that there was "good cause" to exceed the 90-day period for determining the amount of restitution. She argues that the proper disposition of the case requires reversal of the amended judgment of restitution without a remand for resentencing. The state concedes that the trial court erred but contends that a remand for resentencing is the proper resolution of the case. The state argues that the trial court should be permitted to reconsider whether "good cause" existed at the time of the restitution hearing and properly impose restitution, or, in the alternative, that, on remand, the court may impose another sentencing package. Held: The trial court erred in imposing restitution without a determination that there was "good cause" to exceed the 90-day period for determining the amount of restitution. The state is not entitled to a remand for resentencing for a determination of whether good cause existed at the time of the restitution hearing. A remand for resentencing is proper, however, because the trial court may reconsider defendant's sentence and impose a compensatory fine to be paid to the victim. Award of restitution reversed; remanded for resentencing; otherwise affirmed.

State of Oregon v. Bruce Patrick Roy
(Lagesen, P. J.)

Defendant appeals a judgment of conviction of, among other things, first-degree burglary, ORS 164.225. On appeal, he challenges his burglary conviction, assigning error to the trial court's failure to provide the jury with a concurrence instruction. Defendant was charged by indictment, and the burglary count alleged that he had entered or remained in a building with the intent to commit the crime of coercion. The indictment also included two sentencing enhancement factors. While discussing jury instructions with the parties, the trial court mistook the sentencing enhancement factor as an allegation for an alternate theory--one of menacing--of how defendant committed the burglary. Based on that misunderstanding, the trial court provided the jury with a burglary instruction that effectively modified the theory of burglary included in the indictment--allowing it to find defendant guilty of burglary based on a theory of either coercion or menacing. However, the trial

court did not provide the jury with a concurrence instruction informing the jury that at least 10 jurors had to agree on the specific crime that defendant committed when he entered the building. Defendant affirmatively indicated to the court that he was fine with the instructions as given. Held: Defendant's error is unpreserved and, as a result of defendant's role in bringing about the alleged error, as well as the fact that any error did not seem likely to have affected the result of the proceeding, the Court of Appeals does not exercise its discretion to correct the error. Affirmed.

State of Oregon v. Adam Christopher Amsbary
(Lagesen, P. J.)

Defendant appeals a judgment of conviction of unlawful possession of methamphetamine, ORS 475.894. Defendant assigns error to the trial court's denial of his motion to suppress. He argues that the trial court erred when it determined that the investigating officer's warrantless seizure of a black nylon pouch containing methamphetamine was justified by the "officer safety" exception to the warrant requirement of Article I, section 9, of the Oregon Constitution and that, as a result, defendant was not entitled to suppression of the evidence of the pouch's contents. Held: The record does not permit a factual finding that the investigating officer subjectively believed that the pouch was, or contained, a weapon; therefore, the trial court erred in concluding that his warrantless seizure of the pouch was authorized by the "officer safety" exception to the warrant requirement and, thus, erred in concluding that the seizure did not violate Article I, section 9. Reversed and remanded.

Department of Human Services v. M. C.-C.
(Lagesen, P. J.)

Father, a foreign national, assigns error to the juvenile court's denial of his motion to dismiss this dependency proceeding. Father asserts that the juvenile court should have dismissed the case, on the ground that the court did not have personal jurisdiction over father, because DHS failed to serve the summons on father in the manner required by the Hague Service Convention, 20 UST 361. Held: Father waived his objections to the defects in service by participating in the dependency proceeding for more than two years without raising his objection to the sufficiency of service. Affirmed.

State of Oregon v. C. S.
(Garrett, J.)

Youth was found within the juvenile court's jurisdiction for committing acts that, if committed by an adult, would constitute three counts of menacing, ORS 163.190. Over a period of approximately three weeks, youth made statements to three of his classmates that they were going to die in various ways and that he would kill them. Youth spoke of using voodoo dolls, drugs, and black magic to harm the students. While passing his classmates in the school's hallways, youth would draw his finger across his throat and sometimes say "die" as he did so. Based on those actions, the juvenile court found youth within its jurisdiction for menacing. On appeal, youth contends that the evidence was legally insufficient to show that his words and conduct would have caused fear of "imminent serious physical injury" in an objectively reasonable person, as required by ORS 163.190. Held: The evidence was legally insufficient to demonstrate that youth's threats would have caused an objectively reasonable person to fear serious physical injury or death that was "imminent." None of youth's threats were "near at hand," "impending," or "menacingly near." Moreover, taken in context, youth's symbolic gesture of drawing his finger across his throat was an additional expression of his vague threats to inflict harm in the unspecified future. Judgment on Counts 1, 3, and 4 reversed;

otherwise affirmed.

State of Oregon v. Robert Scott Burkette

(Garrett, J.)

Defendant appeals a judgment of conviction for misdemeanor driving under the influence of intoxicants (DUI), ORS 813.010, and a probation violation judgment in another case based on that DUI conviction. He assigns error to the trial court's denial of his motion to dismiss his DUI case on speedy trial grounds under former ORS 135.747 (2011), repealed by Or Laws 2013, ch 431, § 1. Defendant also contends that, because the probation violation judgment was predicated on his DUI conviction, that judgment must be reversed and remanded. Held: The 21-month delay in bringing defendant to trial was unreasonable where more than five-and-one-half months of that delay was inadequately explained by the record. Because the same conduct that led to defendant's conviction for DUI also formed the basis for the entry of the probation violation judgment, that judgment must be reversed and remanded for reconsideration in light of the reversal of defendant's DUI conviction. In A155648, reversed and remanded for entry of judgment of dismissal. In A155627, reversed and remanded.

State of Oregon v. William Edward Wasyluk, II

(Flynn, J.)

Defendant appeals a judgment of conviction for two counts of strangulation constituting domestic violence, ORS 163.187. He assigns error to the trial court's denial of his motion for a mistrial. He argues that the trial court abused its discretion when it decided to give cautionary instructions, rather than grant the motion for mistrial, after the prosecutor repeatedly used the phrases "I think" and "I believe" when arguing the case to the jury. On appeal, he argues that the prosecutor's comments represent improper vouching and denied him a fair trial. Accordingly, he argues that the court was required to grant a mistrial. Held: The trial court did not abuse its discretion to deny defendant's motion for a mistrial. The record supports the trial court's assessment that the prosecutor's comments were unintentional. Further, the careful response of the trial court and both counsel made clear to the jury that the prosecutor's comments were not intended to be--and should not be considered by the jury to be--an indication of the prosecutor's personal opinion about the evidence. Affirmed.

State of Oregon v. Mitchell Dean Simonsen

(Flynn, J.)

Defendant appeals a judgment of conviction for unauthorized use of a vehicle (UUV), ORS 164.135, and assigns error to the trial court's failure to give jury instructions that would have allowed the jury to consider defendant's theory of defense. Defendant's theory was that the jury should find him not guilty of UUV--despite evidence that he took his mother's car after she told him not to--because he presented evidence that his father co-owned the car and had given defendant consent to use it. Defendant acknowledges that he did not ask the trial court to give different UUV instructions, but he argues that the Court of Appeals should exercise its discretion to correct what he contends is plain error. Held: The parties identify a reasonable dispute regarding whether the legislature intended the UUV statute to apply to use of a co-owned vehicle after only one owner has denied consent. Accordingly, the trial court did not commit plain error in its jury instructions. Affirmed.

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