



COURT OF APPEALS

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The Court of Appeals issued these opinions:

Patrick J. Mullen v. Meredith Corporation
(A149990 - Marion County Circuit Court)

Alisha Dawn Myers v. Kim Brockamp
(A151966 - Washington County Circuit Court)

State of Oregon v. Dennis James Davidson
(A150292 - Marion County Circuit Court)

State of Oregon v. Steven Sang Ho Rhee
(A154592 - Washington County Circuit Court)

State of Oregon v. Jean Luc Lamoreux
(A155361 - Washington County Circuit Court)

Edward F. McManus, III v. James Lee Auchincloss
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Vickie Lee Mitchell and Sidney Floyd Mitchell
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State of Oregon v. Angela Naygiver Lopez-Lopez
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State of Oregon v. Gregory Paskar
(A154885 - Lincoln County Circuit Court)

Kimberly Fossen v. Clackamas County
(A155792 - Clackamas County Circuit Court)

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

State of Oregon v. Tiberiu Anton
(A154883 - Lincoln County Circuit Court)

State of Oregon v. Adrian Ene
(A154884 - Lincoln County Circuit Court)
State of Oregon v. Anthony Ray Bradford
(A156606 - Multnomah County Circuit Court)
Ginny Lee Moyer and Paul Donald Moyer
(A156637 - Clackamas County Circuit Court)
Department of Human Services v. M. E. M.
(A158395 - Washington County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Domenicke Sanders v. Steve Franke
(A151517 - Umatilla County Circuit Court)
Cecil Jerome Hatchett v. State of Oregon
(A152063 - Multnomah County Circuit Court)
Cameron Jennings Dodson v. Rob Persson
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Perry L. Stayton v. Adrienne E. Page
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H. Julene Mallea v. Advisory Services & Investment, LLC
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Department of Human Services v. T. D.
(A158388 - Marion County Circuit Court)

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Patrick J. Mullen v. Meredith Corporation
(Ortega, P. J.)

Defendants appeal the trial court's denial of their special motion to strike plaintiffs' three tort claims--negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress--under ORS 31.150, Oregon's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute. Plaintiffs' claims arose out of a television news story about gunshots fired in the West Salem neighborhood where Mullen (plaintiff) and his wife (together, plaintiffs) lived. Plaintiffs sued defendants because plaintiff was shown for 3.4 seconds in a broadcast of the story, contrary to an agreement that plaintiff, a corrections officer, allegedly had made with defendants due to safety concerns. The trial court denied defendants' motion and entered a limited judgment based on its determination that defendants had failed to make the necessary prima facie showing that plaintiffs' claims "[arose] out of a statement, document or conduct described in [ORS 31.150(2)]." ORS 31.150(3). Held: Defendants established that plaintiffs' tort claims come within the reach of the statute. That is so because the news report constitutes conduct in furtherance of the exercise of the right of free speech in connection with an issue of public interest, ORS 31.150(2)(d), and the trial court incorrectly narrowed the initial inquiry to the portion of the news report plaintiffs allege was wrongful. With defendants having met their burden, the inquiry shifts to whether plaintiffs have established that there is a probability that they will prevail on their tort claims by presenting substantial evidence to support a prima facie case. ORS 31.150(3). Plaintiffs did not meet their burden. Plaintiffs have failed to demonstrate a probability of prevailing on their negligence claim: They have not alleged a physical injury or another legally protected interest apart from what arose under the terms of their contract with defendants and have not established a heightened duty independent of the contract. Further, plaintiffs cannot prevail on their negligent infliction of emotional distress claim because they have not demonstrated a special relationship between them and defendants. Finally, plaintiffs have not shown that they can prevail on their intentional infliction of emotional distress claim because the evidence that the news report was within defendants' control is insufficient to establish intent. Accordingly, the trial court erred in denying defendants' ORS 31.150 special motion to strike. Limited judgment reversed and remanded with instructions to grant defendants' ORS 31.150 special motion to strike.

Alisha Dawn Myers v. Kim Brockamp
(Ortega, P. J.)

Petitioner appeals from a judgment denying her petition for post-conviction relief. She first assigns error to the court's denial of her claim alleging that the criminal trial court judge coerced her into waiving her right to a jury trial, and additionally argues that the judgment fails to comply with ORS 138.640(1), as construed in *Datt v. Hill*, 347 Or 672, 676, 227 P3d 714 (2010). Held: The judgment fails to comply with ORS 138.640(1), and because of the judgment's deficiencies, the Court of Appeals did not reach petitioner's first assignment of error. Reversed and remanded.

State of Oregon v. Dennis James Davidson
(Sercombe, J.)

Defendant appeals a judgment of conviction for two counts of felony public indecency, arguing that his sentence--two consecutive terms of life in prison without the possibility of release--violates Article I, section 16, of the Oregon Constitution, which provides that "all penalties shall be proportioned to the offense." Certain recidivist sexual offenders are subject to a presumptive sentence of life imprisonment without the possibility of release, a "true life sentence." In particular, under ORS 137.719(1), an offender is subject to a presumptive true life sentence the third time the offender is sentenced for a felony sex crime. Public indecency is a felony sex crime if the offender has a prior conviction for public indecency (or another sex crime), and, upon an offender's fourth sentence for public indecency, the offender is subject to a presumptive true life sentence. After being convicted of public indecency for public masturbation on three occasions, defendant was convicted of two further public indecency charges and--at the age of 34--received a true life sentence. He contends that his sentence shocks the moral sense of reasonable people and, accordingly, is unconstitutional under the proportionality clause of the Oregon Constitution. The state contends that the life sentence is constitutional because it was imposed, not for any particular public indecency conviction, but for defendant's recidivism and lack of amenability to rehabilitation. Held: Defendant's true life sentence is constitutionally disproportionate under the circumstances of this case. First, comparing the severity of the penalty imposed with the gravity of the offenses committed by defendant suggests that defendant's true life sentence is disproportionate to his recidivist conduct. Even the most grave multiple incidents of public masturbation, without any evidence of other sexual offenses or physical force or compulsion, pale in comparison with other combinations of incidents that are subject to a true life sentence under ORS 137.719(1). Second, comparing the penalty imposed with the penalties for related offenses (and considering other sex crimes that do not subject recidivists to a true life sentence) suggests that defendant's true life sentence is disproportionate to his recidivist conduct. An offender who commits a much more serious and harmful combination of offenses is subject to a less severe penalty than that imposed on defendant. Third, although defendant has a long history of trouble with the law, his criminal history does not involve sexual offenses, conduct with sexual overtones, or sexual behavior involving forcible compulsion. In sum, five episodes of public indecency, when--as here--accompanied by no meaningful evidence of force or violence and no other forcibly violent sexually charged conduct, when compared with other recidivist penalties, do not constitute the kind of criminal history that can constitutionally justify incarcerating a person with no chance of release. Reversed and remanded for resentencing.

State of Oregon v. Steven Sang Ho Rhee
(Hadlock, J.)

Defendant appeals a judgment of conviction for multiple crimes including attempted first-degree robbery and unlawful use of a weapon (U UW). On appeal, defendant argues that the trial court should have merged his guilty verdicts for U UW and first-degree robbery into a single conviction because the elements of U UW are subsumed within the elements of attempted first-degree robbery as charged in this case. The state argues that the charges should not merge because a person may have attempted to commit first-degree robbery without ever possessing the weapon that would have been used in that crime, had it been completed. Defendant also contends that the trial court erred by ordering him to pay attorney fees. Held: The trial court did not err when it declined to merge the guilty verdict for attempted first-degree robbery and U UW because the elements of U UW are not subsumed within the elements of attempted first-degree robbery. Specifically, a person can take a substantial step toward committing first-degree robbery without ever possessing the dangerous weapon that he or she anticipates will be used to commit that crime. The Court of Appeals agreed with the state's concession that the trial court plainly erred when it ordered defendant to pay attorney fees

and exercised its discretion to correct the error. In Case Numbers C122744CR and C111435CR, portions of judgments requiring defendant to pay court-appointed attorney fees reversed; otherwise affirmed.

State of Oregon v. Jean Luc Lamoreux
(Hadlock, J.)

Defendant appeals a judgment of conviction for unlawful possession of methamphetamine and unlawful possession of heroin, and a judgment extending his probation in another case based on the new criminal conduct. On appeal, he challenges the trial court's denial of his motion to suppress evidence. Defendant argues that the police officer's search of his backpack and its contents exceeded the scope of defendant's consent to search his car. Held: Given the totality of the circumstances--including the wording of the officer's request to search and that a reasonable person in defendant's position would have understood that the officer intended to search for evidence of drug crimes--the officer did not exceed the scope of defendant's consent by searching his closed backpack. Affirmed.

Edward F. McManus, III v. James Lee Auchincloss
(Egan, J.)

Plaintiff appeals a limited judgment granting summary judgment in favor of defendant, who formerly employed plaintiff as a live-in personal assistant, on plaintiff's claims of wrongful discharge, intentional infliction of emotional distress (IIED), and conversion. Plaintiff argues that the trial court erred in granting summary judgment on his wrongful discharge claim because defendant terminated him for fulfilling an important public duty--reporting defendant's possession and display of child pornography to police--and that his conduct is protected by the common-law public duty exception to at-will employment. Defendant responds that the common-law public duty exception does not protect domestic workers, such as plaintiff. Plaintiff also argues that the trial court erred in granting summary judgment on his claims of IIED and conversion. Held: The trial court erred in granting summary judgment on plaintiff's claim of wrongful discharge because domestic workers are protected by the common-law public duty exception. The court also erred in granting summary judgment on plaintiff's claims of IIED and conversion because plaintiff presented evidence sufficient to support a reasonable finding that defendant's acts violated social norms beyond all tolerable bounds and that he exercised intentional control over plaintiff's possessions in a manner that seriously interfered with his right to control them. Reversed and remanded as to claims of wrongful discharge, IIED, and conversion; otherwise affirmed.

State of Oregon v. James Anthony Trujillo
(DeVore, J.)

Defendant appeals a judgment of conviction for driving under the influence of intoxicants and reckless driving. Defendant assigns error to the trial court's pretrial ruling admitting an expert's retrograde extrapolation testimony. He argues that retrograde extrapolation evidence is generally inadmissible under OEC 702 and that the proper foundation for validity of scientific evidence was not established in this case. Held: The trial court did not err in admitting the expert's testimony because, under OEC 702, retrograde extrapolation is generally admissible scientific evidence, and the expert in this case met the admissibility requirements. Affirmed.

Vickie Lee Mitchell and Sidney Floyd Mitchell
(Tookey, J.)

Husband appeals a general judgment of dissolution, challenging the trial court's division of husband's military retirement benefits, award of spousal support to wife, and order that husband maintain life insurance, naming

wife as beneficiary, for the continued support of wife in the event of husband's death. Held: (1) Husband's argument that the court's division of his military retirement benefits violated federal law was not preserved, and the trial court did not otherwise abuse its discretion in awarding wife 50 percent of husband's divisible retirement benefits; (2) the court erred when it did not consider husband's written agreement to contribute \$3,000 per year to a college fund for the parties' children when awarding spousal maintenance support to wife; and (3) because the court offered no explanation of how it chose the amount of life insurance that husband was ordered to maintain in wife's name, or why it denied his request to reduce the required amount as he paid his obligations, the court on remand should reconsider and rearticulate its decision regarding the amount of life insurance that would be adequate to cover husband's obligations in the event of husband's death. Portions of the judgment relating to spousal maintenance support and life insurance reversed and remanded for reconsideration; otherwise affirmed.

State of Oregon v. Angela Naygiver Lopez-Lopez

(Tookey, J.)

The state appeals a pretrial order granting defendant's motion to suppress evidence resulting from the warrantless testing of her breath, arguing that the evidence was admissible under both Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution, based on four independent exceptions to the warrant requirements: consent, exigency, search incident to arrest, and reasonableness. Held: Because defendant voluntarily consented to the testing of her breath, neither Article I, section 9, nor the Fourth Amendment requires suppression of the breath test evidence. Reversed and remanded.

State of Oregon v. Gregory Paskar

(Tookey, J.)

In this criminal case, one of three related cases that the Court of Appeals decided today, see *State v. Anton*, ___ Or App ___, ___ P3d ___ (June 17, 2015); *State v. Ene*, ___ Or App ___, ___ P3d ___ (June 17, 2015), the state appeals the trial court's order suppressing evidence. State police troopers discovered the evidence during an encounter with defendant and his codefendants, Anton and Ene, that took place 28 miles offshore from Newport while the three men were fishing. Held: Defendant and his codefendants were each charged with multiple crimes--each count punishable by up to one year in prison and a fine of \$6,250--based on the fishing-related evidence that the troopers found. When the troopers announced that they would inspect the men's halibut tags and ordered the men to get their tags out for the inspection, the troopers "embark[ed] on a search or seizure for evidence to be used for [criminal prosecutions]." *State v. Boyanovsky*, 304 Or 131, 134, 743 P2d 711 (1987). Under those circumstances, Article I, section 9, of the Oregon Constitution requires the troopers' actions to be supported by individualized suspicion of wrongdoing. Here, they were not. Accordingly, the trial court did not err in suppressing the evidence. Affirmed.

Kimberly Fossen v. Clackamas County

(Garrett, J.)

Clackamas County sheriff's deputies arrested and held plaintiff on a New York warrant. The sheriff's office learned later that evening that plaintiff's fingerprints did not match those of the New York suspect, but it did not release plaintiff until approximately 19 hours later. Plaintiff brought claims against defendant for negligence and "false arrest/false imprisonment." The trial court granted defendant's motion for summary judgment on the false arrest claim on the ground of quasi-judicial immunity, but allowed plaintiff to proceed on her theory of false imprisonment regarding the period of time after the deputies learned that they had the wrong person. The jury found defendant liable and awarded damages. On appeal, defendant argued principally that (1) its motion for a directed verdict should have been granted on the false imprisonment claim

because that claim was necessarily disposed of by the trial court's grant of summary judgment on the false arrest claim, and (2) defendant is immune from liability because plaintiff's confinement occurred pursuant to facially valid court orders. Held: The trial court did not err in denying the motion for directed verdict. Plaintiff articulated two distinct theories of false imprisonment: one based on the arrest itself, and one based on the continued detention after circumstances changed. The trial court's partial grant of summary judgment rejected the first theory but allowed the second to proceed. As for the privilege argument, the court orders, at most, immunized defendant from liability arising out of the arrest made pursuant to the New York warrant. No privilege or immunity shielded defendant from liability for continuing to hold plaintiff after defendant learned that no factual basis existed for doing so. Affirmed.

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