



COURT OF APPEALS

Media Release

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The Court of Appeals issued these opinions:

State of Oregon v. Joseph Worth, Jr.
(A147948 - Multnomah County Circuit Court)

State of Oregon v. Thomas Odell Adams
(A152382 - Lane County Circuit Court)

Randy A. Swank v. Terex Utilities, Inc.
(A152465 - Linn County Circuit Court)

State of Oregon v. Emanuel Castillo-Lima
(A152978 - Washington County Circuit Court)

State of Oregon v. D. Z.
(A157543 - Wasco County Circuit Court)

J. A. W. v. Employment Department*
(A148351 - Employment Appeals Board)

State of Oregon v. Jacob Franklin Vennell
(A151670 - Jackson County Circuit Court)

MT & M Gaming, Inc. v. City of Portland
(A154206 - Multnomah County Circuit Court)

Department of Human Services v. J. R.
(A158638 - Curry County Circuit Court)

State of Oregon v. Steven A. Austin
(A154061 - Douglas County Circuit Court)

State of Oregon v. Shawn Edwin Haugen
(A151535 - Josephine 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).

State of Oregon v. Darold Lee Morgan
(A155373 - Washington County Circuit Court)
State of Oregon v. Aaron William Belander
(A152171 - Wasco County Circuit Court)

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

State of Oregon v. Jeremy Kane Turner
(A155760 - Marion County Circuit Court)
State of Oregon v. Travis Leuty Barger
(A156126 - Washington County Circuit Court)
Stacie Philibert v. Dennis Dixon Kluser
(A156192 - Jefferson County Circuit Court)
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(A157495 - Lane County Circuit Court)
C. P. v. Nicholas Librande*
(A157880 - Marion County Circuit Court)
Department of Human Services v. R. N.
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The Court of Appeals affirmed these cases without opinion:

Eugene Louis Stacy v. Jeff Premo
(A153549 - Marion County Circuit Court)
Michael Steven Hodge v. Psychiatric Security Review Board
(A154568 - Psychiatric Security Review Board)
Fivea Sharipoff v. Heidi Steward
(A155991 - Washington County Circuit Court)
State of Oregon v. J. E. C.
(A156177 - Multnomah County Circuit Court)
Michael W. Jenkins v. Jeri Taylor
(A156712 - Umatilla County Circuit Court)
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(A157102 - Multnomah County Circuit Court)
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Melisa Schweier v. John Crawford
(A157415 - Coos County Circuit Court)
State of Oregon v. J. A.
(A157449 - Jefferson County Circuit Court)

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Aseffa Teshome v. Employment Department
(A157848 - Employment Department)
Jeffrey D. Halladay v. Department of Corrections
(A158667 - Marion County Circuit Court)
Department of Human Services v. N.S.
(A159101 - Washington County Circuit Court)
Department of Human Services v. J. D. O.
(A159224 - Marion County Circuit Court)

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State of Oregon v. Joseph Worth, Jr.
(Haselton, C. J.)

This case is before the Court of Appeals for a second time, following a retrial on remand. *State v. Worth*, 231 Or App 69, 218 P3d 166 (2009), rev den, 347 Or 718 (2010). Defendant appeals a judgment of conviction for first-degree kidnapping (Counts 1 and 2, merged), first-degree sexual abuse (Counts 4, 5, and 6, merged), first-degree unlawful penetration (Count 7), and second-degree assault (Count 8). Defendant raises diverse contentions, including an assertion that former jeopardy and double jeopardy provisions barred the retrial and convictions, as well as challenges to the denial of his motions for judgment of acquittal on the kidnapping charges, the admission and exclusion of evidence, and the imposition of sentence. Held: The Court of Appeals rejected all of defendant's assignments of error except for those relating to sentencing. It concluded that the trial court erred in calculating consecutive upwards departure sentences without adhering to the sentencing guidelines limitations on the length of those sentences. Specifically, the court held that OAR 213-008-0007(3), the "400%" rule, is, under certain circumstances, applicable to the determinate portion of a dangerous offender sentence. Remanded for resentencing; otherwise affirmed.

State of Oregon v. Thomas Odell Adams
(Armstrong, P. J.)

Defendant appeals a judgment of conviction for, among other things, interfering with a peace officer, ORS 162.247. He contends that the trial court erred by entering a judgment of conviction for that offense because no reasonable factfinder could find that defendant had prevented a peace officer from performing his duties with regard to another person, as charged in the indictment. Defendant concedes that he did not preserve his contention in the trial court but asserts that the error is plain and that the Court of Appeals should exercise its discretion to correct it. The state responds that the error is not plain, and, even if it is, that the Court of Appeals should not exercise its discretion to correct it. Held: The trial court plainly erred by entering a judgment of conviction on the charge, and the Court of Appeals exercised its discretion to correct the error. Conviction for interfering with a peace officer reversed; remanded for resentencing; otherwise affirmed.

Randy A. Swank v. Terex Utilities, Inc.
(Armstrong, P. J.)

Plaintiff appeals a judgment dismissing his complaint against a Texas corporation, Manitex, Inc., for lack of personal jurisdiction. Plaintiff was injured when the boom of the crane in which he was riding fell. Manitex had years earlier initiated a field campaign after it had learned of incidents where the same type of crane had come apart. Through the field campaign, Manitex sought to locate the affected cranes, require the owners to inspect the cranes, and sell retrofit kits to address the problem. Plaintiff alleged that Manitex had been

negligent when it failed to respond to plaintiff's employer's inquiry in response to the field campaign. Held: Plaintiff established that the trial court has personal jurisdiction over Manitex under ORCP 4 D because (1) plaintiff's claim alleged out-of-state acts or omissions of Manitex that caused his personal injury in Oregon, (2) plaintiff's claim arose from or was related to Manitex's field campaign activities, and (3) Manitex's field campaign activities were service and solicitation activities purposely directed at the locations where the affected cranes would be found, including Oregon. Reversed and remanded.

State of Oregon v. Emanuel Castillo-Lima
(Armstrong, P. J.)

Defendant appeals a judgment of conviction for possession of cocaine, ORS 475.884, contending that the trial court erred in denying his motion to suppress evidence found during a search incident to defendant's arrest. A police officer was investigating a fight when he heard yelling and saw defendant, whom he recognized as one of the participants in the fight. The officer, who could hear yelling nearby, ordered defendant at least 10 times to get down on the ground. Defendant eventually dropped to his knees and raised his arms, at which point the officer could see the butt of a gun in defendant's pants. The officer grabbed the gun and threw it behind them. The officer realized after grabbing the gun that it was fake. He and a backup officer handcuffed defendant, took him to a patrol car, and removed everything from defendant's pockets, revealing cocaine. The trial court concluded that the search of defendant's pockets was a reasonable officer-safety measure, which defendant challenges on appeal. Held: The trial court did not err in denying defendant's suppression motion because the precaution of emptying defendant's pockets to check for weapons or means of escape constituted a reasonable officer-safety measure under the facts of the case. Affirmed.

State of Oregon v. D. Z.
(Ortega, P. J.)

Appellant seeks reversal of a civil commitment order. The trial court's written order indicates that the basis for the commitment is a finding that appellant is a "person with a mental illness" as defined under ORS 426.005(1)(e)(C). At the commitment hearing, however, the parties' arguments and the evidence concerned commitment under ORS 426.005(1)(e)(B) for which the trial court made an oral ruling at the hearing that found that, because of appellant's mental disorder, she was unable to care for her basic needs and that those needs were not being met by others. Accordingly, the trial court's oral ruling and written order of commitment are inconsistent. Appellant argues that the court's decision is controlling and not its oral ruling made at the conclusion at the hearing, as stated by the Supreme Court in *State v. Swain/Goldsmith*, 267 Or 527, 517 P2d 684 (1974), and, thus, the order should be reversed because the record lacked evidence to support the court's written finding that she was a "person with a mental illness" as defined under ORS 426.005(1)(e)(C). Held: Although, generally, the written order of the trial court is controlling even though the record indicates that the court meant to rule otherwise, here, the check-the-box form signed by the trial court was plainly susceptible to error in that it listed only statutory subsection numbers without indicating which findings applied to each; checking the incorrect box is purely a scrivener's mistake, and, thus, the record can be examined to determine the trial court's intent. Vacated and remanded for entry of a corrected order of commitment.

J. A.W. v. Employment Department
(Nakamoto, J.)

On consolidated judicial review of two identical orders of the Employment Appeals Board (the EAB), petitioner challenges her disqualification from receipt of extended unemployment insurance benefits. Petitioner first started receiving regular unemployment insurance benefits in 2008, and, while litigating *J. A. W. v. Employment Dept.*, 237 Or App 520, 240 P3d 86 (2010), continued to file weekly claims for regular

benefits. After J. A. W. was decided, petitioner received all of her regular benefits and received a notice from the Employment Department about the potential availability of certain extensions of unemployment insurance benefits, including emergency unemployment compensation (EUC). When petitioner sought extended benefits, the Employment Department issued two administrative decisions denying petitioner's claim. Petitioner appealed, and, after a hearing, an administrative law judge (ALJ), in two separate decisions, determined that petitioner's claim was untimely and, therefore, petitioner was not entitled to EUC benefits. Petitioner appealed the ALJ's decisions to the EAB, and it concluded that petitioner was not entitled to receive extended benefits because petitioner's claims were untimely. Petitioner argues that the EAB incorrectly applied a number of statutes and administrative rules that govern claims for regular unemployment insurance benefits, without considering the statutes governing claims for extended unemployment insurance benefits. Held: The Employment Department and the EAB failed to consider the extended benefits statutes as they determined whether to apply the claims rules to bar petitioner's claims for EUC benefits as untimely. In A149597 and A149598, reversed and remanded; A148351 and A148359 dismissed as moot.

State of Oregon v. Jacob Franklin Vennell
(Nakamoto, J.)

Defendant appeals a judgment of conviction for possession of methamphetamine, ORS 475.894. When defendant exited a car during a lawful traffic stop, the police officer smelled a strong odor of marijuana emanating from defendant. Defendant consented to a search of his pockets, which revealed marijuana and methamphetamine paraphernalia. He contends that the trial court erred in denying his motion to suppress evidence, because the police lacked reasonable suspicion to stop him, and, therefore, his consent to search was invalid as the product of police exploitation of an unlawful seizure. Held: The trial court did not err in denying defendant's motion to suppress, because the strong odor of marijuana gave the officer reasonable suspicion to stop defendant when the officer asked for consent to search him, and defendant voluntarily consented to the search of his pockets. Affirmed.

MT & M Gaming, Inc. v. City of Portland
(Egan, J.)

In this declaratory judgment action, MT & M Gaming, Inc. (MT & M), a Washington corporation with no operations in Oregon, sought a declaration regarding Oregon gaming law. The trial court granted summary judgment to the City of Portland after concluding that MT & M lacked standing under the Uniform Declaratory Judgments Act, ORS 28.010 to 28.160. On appeal, MT & M argues that it has standing because it lost customers as a result of permits issued by the city to businesses in Portland, which MT & M contends are operating in violation of Oregon gaming law. The city responds that MT & M lacks standing because it failed to show that it has a legal interest in the application of Oregon law. Held: The trial court did not err because to have standing under the Uniform Declaratory Judgments Act, a plaintiff must show that its legally recognized interests are affected by the law that is the subject of the declaratory action, yet MT & M failed to show any connection between its legal interests and Oregon gaming law. Affirmed.

Department of Human Services v. J. R.
(Egan, J.)

Father appeals a jurisdictional judgment, arguing that the juvenile court erred in denying his motion to dismiss jurisdiction and terminate wardship. The juvenile court assumed jurisdiction based on allegations related to mother and the allegation that father failed to protect his two children from mother. It is undisputed that mother is unfit. On appeal, father argues that the evidence was insufficient to show that the children's present conditions and circumstances endanger their welfare under ORS 419B.100(1)(c). DHS responds that the evidence in the record supports such a finding because (1) father does not have sole legal custody of the

children; (2) the juvenile court expressly discredited mother's testimony, including her statement that she would not attempt to visit the children; and, (3) in the past, police declined to intervene on father's behalf without a court order when mother had physical custody of the children. Held: The trial court erred. Although father lacked sole custody, without evidence that father is presently unable to protect the children, the lack of custody order alone was insufficient to support jurisdiction. The additional facts did not provide a basis for concluding that father is presently unable to protect the children. Reversed.

State of Oregon v. Steven A. Austin

(DeVore, J.)

Defendant appeals a judgment of conviction for reckless driving and driving under the influence of intoxicants (DUII). Prior to trial, defendant waived in writing his right to a jury trial on the reckless driving charge and sought the trial court's consent. The prosecutor opposed defendant's waiver and urged that the jury should decide both counts. The trial court refused to allow defendant's waiver. Defendant assigns error to the trial court's refusal in light of *State v. Harrell/Wilson*, 353 Or 247, 297 P3d 461 (2013), which addressed a defendant's right to waive a jury and a court's consent to waiver. He argues that it is also necessary to reverse and remand his judgment of conviction for DUII, because evidence pertaining only to the reckless driving charge would have been inadmissible in a separate DUII trial. Held: Given the absence of findings in the record and the prosecutor's arguments, the count of reckless driving was remanded for the court to evaluate defendant's waiver under *Harrell/Wilson*. Defendant's conviction for DUII was not affected by the evidence on recklessness because the court had given a limiting instruction. Conviction for reckless driving vacated and remanded; otherwise affirmed.

State of Oregon v. Shawn Edwin Haugen

(Garrett, J.)

Defendant appeals his judgment conviction of one count of third-degree assault. He assigns error to the trial court's denial of his motion to suppress eyewitness identification evidence and denial of his motions in limine to exclude evidence pertaining to a gang, of which defendant was a member. On appeal, defendant argues that the eyewitness identification evidence was unreliable under *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012). Defendant also argues that the gang evidence was irrelevant, inadmissible character evidence, and unduly prejudicial. Held: The trial court did not err in admitting the eyewitness identification evidence because the evidence met the threshold requirements for admissibility under *Lawson/James*. The trial court did not err in admitting evidence of the gang's belief system because that evidence was relevant to prove defendant's gang-related motive for committing the assault and was not unduly prejudicial under *State v. Williams*, 357 Or 1, 346 P3d 455 (2015). The trial court erred in admitting gang-related evidence from a codefendant's home, as it was not relevant to proving defendant's motive for the assault. That error, however, was harmless. Affirmed.

State of Oregon v. Darold Lee Morgan

(Garrett, J.)

Defendant appeals a judgment of conviction for first-degree theft, ORS 164.055, second-degree theft, ORS 164.045, unlawful transportation of metal property, ORS 164.857, and second-degree criminal trespass, ORS 164.245. Defendant stole metal sprinklers from a plant nursery. At trial, the owner estimated the value of those sprinklers as "over \$1,000." The trial court awarded \$3,000 in restitution to the nursery without objection by defendant. On appeal, defendant argues that the trial court plainly erred in ordering an award of that amount. Held: The trial court plainly erred. The evidence at trial did not permit a rational inference that the nursery suffered \$3,000 in losses. Exercise of discretion to correct that plain error was appropriate because the amount of restitution awarded was substantial and the interests of justice weigh against requiring

a defendant to pay an obligation that is unsubstantiated by the record. Remanded for resentencing; otherwise affirmed.

State of Oregon v. Aaron William Belander
(Flynn, J.)

Defendant appeals a judgment of conviction for felon in possession of a weapon, assigning error to the trial court's denial of his motion to suppress evidence obtained during a warrantless search of his vehicle. Defendant argues that the search was not justified under the automobile exception to the warrant requirement because the vehicle was not mobile at the time that the police encountered it in connection with a crime. He contends that officers first encountered his mobile car in connection with a welfare check, and only later, after he had parked the car and walked away from it, did the officers begin to investigate the crime. Held: The trial court erred in denying defendant's motion to suppress. The automobile exception did not authorize the warrantless search of defendant's car because the car was not mobile when officers encountered it in connection with a crime. Reversed.

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