



COURT OF APPEALS

Media Release

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The Court of Appeals issued these opinions:

JoAnn Hall v. Taysia Speer
(A145014 - Multnomah County Circuit Court)

David Lynn Simonsen v. Jeff Premo
(A149229 - Marion County Circuit Court)

State of Oregon v. Edward F. Kreiss
(A149314 - Douglas County Circuit Court)

Tyrone Earl Walton v. Board of Parole and Post-Prison Supervision
(A151274 - Board of Parole and Post-Prison Supervision)

State of Oregon v. Alberto Mejia-Espinoza
(A151633 - Marion County Circuit Court)

State of Oregon v. Jonathon Wade Blasingame
(A152230 - Marion County Circuit Court)

State of Oregon v. Jeffrey James Clemons
(A149682 - Douglas County Circuit Court)

State of Oregon v. Robert Loren Crombie, Jr.
(A152462 - Clackamas County Circuit Court)

State of Oregon v. Walter Perry Lile
(A148884 - Curry County Circuit Court)

US Bank, NA v. Joseph L. Eckert
(A150030 - Clackamas County Circuit Court)

State of Oregon v. R. L. W.
(A154392 - Yamhill County Circuit Court)

Department of Human Services v. L. C.
(A157119 - Hood River County Circuit Court)

James R. McDonald v. Nancy MacDonald
(A149912 - Clackamas County Circuit Court)
P. M. H. v. William Logan Landolt*
(A151249 - Tillamook County Circuit Court)
State of Oregon v. Markell Monta Evans
(A151457 - Multnomah County Circuit Court)
State of Oregon v. D. E. B.
(A151785 - Umatilla County Circuit Court)
State of Oregon v. James Leroy Cook
(A155184 - Marion County Circuit Court)
Intel Corp. v. Tricia A. Batchler
(A152263 - Workers' Compensation Board)
Copeland Sand & Gravel, Inc. v. Estate of Angeline Dillard
(A154147 - Josephine County Circuit Court)

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

State of Oregon v. Roderick D. Frimpong
(A153398 - Multnomah County Circuit Court)
Sharon L. Anderson v. Parks and Recreation Department
(A155564 - Jackson County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Trevor Troy Walraven v. Jeff Premo
(A150453 - Marion County Circuit Court)
Ronnie Lee Legrand v. Joe Decamp
(A151515 - Jefferson County Circuit Court)
State of Oregon v. Gary A. Harrington
(A152096 - Jackson County Circuit Court)
Ronald William Fletcher v. Rick Angelozzi
(A153318 - Jefferson County Circuit Court)
Amy Zimmerman v. Employment Department
(A154283 - Employment Appeals Board)
State of Oregon v. Terry Lucky Price
(A154564 - Linn County Circuit Court)
State of Oregon v. Zachariah J. Smith
(A154911 - Lane County Circuit Court)
Reggie Pratt v. Mark Nooth
(A155016 - Malheur County Circuit Court)
State of Oregon v. Yaroslav Drofyak
(A155297 - Marion 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. Robert Steven Nelson
(A155492 - Marion County Circuit Court)
Department of Human Services v. O. M.
(A156926 - Multnomah County Circuit Court)
Department of Human Services v. B. J. T.
(A157240 - Douglas County Circuit Court)

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JoAnn Hall v. Taysia Speer

(Haselton, C. J.)

This case is on remand from the Oregon Supreme Court, which vacated the Court of Appeals' prior decision, *Hall v. Speer*, 244 Or App 392, 261 P3d 1259 (2011), and remanded for reconsideration in light of its decision in *Zimmerman v. Allstate Property and Casualty Ins.*, 354 Or 271, 311 P3d 497 (2013). *Hall v. Speer*, 354 Or 699, 319 P3d 696 (2014). On remand, the dispositive issue is whether plaintiff--who prevailed in an action against her insurer, defendant Allstate Insurance Company (Allstate), for underinsured motorist (UIM) benefits--provided Allstate with a "proof of loss" more than six months before Allstate accepted coverage and consented to binding arbitration, such that she is entitled to attorney fees under ORS 742.061. Held: The Court of Appeals rejected plaintiff's contention that her application for PIP benefits and medical release, coupled with the surgeon's report and her attorney's May 2007 letters to the Allstate adjusters, constituted proof of loss. Those circumstances--which did not even suggest to Allstate the possibility of a UIM claim--are materially indistinguishable from those in *Zimmerman* and, for that reason, were insufficient to trigger Allstate's obligation to investigate such a claim. Accordingly, the Court of Appeals concluded that the trial court did not err in concluding that plaintiff did not file a proof of loss more than six months before Allstate accepted coverage and consented to binding arbitration and, hence, did not err in denying plaintiff attorney fees. Affirmed.

David Lynn Simonsen v. Jeff Premo

(Haselton, C. J.)

Petitioner, who pleaded guilty to two counts of aggravated murder and was sentenced to death, appeals the dismissal of his petition for post-conviction relief. Petitioner argues, inter alia, that the post-conviction court erred in denying his allegation that criminal trial counsel were constitutionally inadequate in advising him to plead guilty to aggravated murder without securing, in return, a guarantee that the state would not seek the death penalty. Held: The Court of Appeals concluded that (1) advice to plead guilty to a capital crime without the prosecution agreeing to waive the death penalty does not, as a categorical matter, constitute inadequate assistance of counsel; (2) under the circumstances of the predicate criminal case, trial counsel's advice to plead guilty without a death penalty waiver did not amount to constitutionally inadequate assistance; and (3) petitioner's allegation that trial counsel failed to inform him of the details of the plea agreement and the possible consequences of pleading guilty contradicts the post-conviction court's extensive, well-supported factual findings, particularly those pertaining to credibility. Accordingly, the post-conviction court did not err in concluding that petitioner failed to establish that counsel were constitutionally inadequate with respect to the guilty plea. Affirmed.

State of Oregon v. Edward F. Kreiss
(Haselton, C. J.)

Defendant appeals a judgment of conviction, contending that the trial court erroneously awarded restitution under ORS 137.106 for amounts beyond what the victim could have recovered in a civil action. Held: Having recently rejected that contention in *State v. Ramos*, 267 Or App 164, ___ P3d ___ (2014), the Court of Appeals affirmed. Affirmed.

Tyrone Earl Walton v. Board of Parole and Post-Prison Supervision
(Haselton, C. J.)

Petitioner, who is serving consecutive life sentences for aggravated murder, petitions for judicial review of a parole board order issued in 2009 in which the board concluded that petitioner was not, at that time, eligible for a murder review hearing pursuant to ORS 163.105 (1985). Subsequently, in 2012, the board conducted a murder review hearing pursuant to that statute and determined that petitioner had not demonstrated that he was likely to be rehabilitated within a reasonable period of time, and declined to convert his life sentences and set a parole release date. Held: This judicial review proceeding is moot. Under ORS 163.105 (1985), a murder review hearing may be held after 20 years' imprisonment, at which the board, if it finds that the inmate is likely to be rehabilitated within a reasonable period of time, may convert the terms of confinement to life imprisonment with the possibility of parole. That decision, however, does not entitle the inmate to release on parole. Rather, the board then "employ[s] the matrix system" to set a release date, *Janowski/Fleming v. Board of Parole*, 349 Or 432, 446, 245 P3d 1270 (2010), and, prior to that release date, determines whether grounds exist for postponement of the scheduled release, *id.* at 459. Although the murder review hearing is necessarily the first step in this process, the date on which it is conducted does not affect the board's determinations in the later steps. Petition for judicial review dismissed as moot.

State of Oregon v. Alberto Mejia-Espinoza
(Haselton, C. J.)

Defendant appeals judgments of conviction for rape, unlawful sexual penetration, and sexual abuse, and raises nine assignments of error. In his ninth assignment of error, defendant raises an unpreserved challenge to the trial court's imposition of \$6,000 in court-appointed attorney fees. Held: The trial court committed plain error by imposing the court-appointed attorney fees, because the evidence was insufficient to support a finding that defendant was or might be able to pay them. The gravity of the error, and the fact that this is not a case where, had it been alerted to the issue, the trial court easily could have determined that defendant could or would be able to pay the fees, weigh in favor of the Court of Appeals exercising its discretion to correct the error. Portion of judgment requiring defendant to pay attorney fees reversed; otherwise affirmed.

State of Oregon v. Jonathion Wade Blasingame
(Haselton, C. J.)

Defendant appeals a judgment of conviction for delivery of marijuana. He asserts that the trial court erred when it instructed the jury on the charge of delivery of a controlled substance, because that instruction was an impermissible comment on the evidence. Held: Defendant did not raise an impermissible comment on the evidence argument to the trial court, and the policies underlying the preservation requirement would not be well served by considering, for the first time on appeal, that argument. Affirmed.

State of Oregon v. Jeffrey James Clemons
(Ortega, P. J.)

Defendant appeals his judgment of conviction for unlawful possession of methamphetamine. He assigns error to the trial court's denial of his motion to suppress evidence obtained during a traffic stop of a car in which he was a passenger. The trial court concluded that the police officer unlawfully extended the traffic stop as to the driver but that defendant had not been seized. Defendant argues that he was unlawfully seized under both Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution. Held: Defendant was unlawfully seized under the Fourth Amendment, and the discovery of the evidence was not sufficiently attenuated from the unlawful seizure. Reversed and remanded.

State of Oregon v. Robert Loren Crombie, Jr.
(Ortega, P. J.)

Defendant appeals a judgment holding him in contempt for violating a restraining order issued under the Family Abuse Protection Act (FAPA). He challenges the trial court's denial of his motion for judgment of acquittal, contending that the trial court erred in concluding that a document that he filed with the court in dissolution proceedings violated the FAPA order. Held: The trial court did not err in concluding that the document constituted a willful violation of the "no-contact" provision of the order and did not fall into an exception for documents filed with the court. Affirmed.

State of Oregon v. Walter Perry Lile
(Duncan, P. J.)

Defendant appeals a judgment of conviction for driving under the influence of intoxicants (DUII) and reckless driving. He claims that the trial court erred in denying his motion to suppress evidence of the results of an Intoxilyzer breath test because the evidence was obtained in violation of his right under Article I, section 11, of the Oregon Constitution, to a reasonable opportunity to obtain legal advice before deciding whether to submit to the test. Specifically, defendant contends that (1) by remaining within earshot while he spoke with his attorney's receptionist, the officer conducting the DUII investigation violated his right to consult privately with counsel and (2) as a result of the violation, the breath test results must be suppressed. Held: Article I, section 11, includes the right to privacy when communicating with an attorney, through the attorney's representative, for the purposes of obtaining legal advice before deciding whether to submit to a breath test. In this case, the officer violated defendant's right under Article I, section 11, by remaining within earshot while defendant was in a position to communicate confidentially with counsel through counsel's representative, the receptionist. Due to the violation, the trial court should have suppressed defendant's breath test results. Reversed and remanded.

US Bank, NA v. Joseph L. Eckert
(Duncan, P. J.)

Plaintiff-respondent US Bank, NA, petitions for reconsideration in US Bank, NA v. Eckert, 264 Or App 189, 331 P3d 1064 (2014), raising a statutory argument for the first time in its petition. Held: A petition for reconsideration is not the proper mechanism for making a new argument; therefore, plaintiff's argument on reconsideration is not properly before the Court of Appeals and the court will not address it. Reconsideration allowed, former opinion adhered to.

State of Oregon v. R. L. W.

(Duncan, P. J.)

Appellant appeals from an order committing him to the custody of the Oregon Department of Human Services pursuant to ORS 427.290, based on an intellectual disability, for a period not to exceed one year. The state concedes error. Held: There is clear and convincing evidence in the record to support the trial court's determination that, because of an intellectual disability, appellant is a danger to himself and others and is unable to take care of his personal needs. Accordingly, the Court of Appeals rejects the state's concession. Affirmed.

Department of Human Services v. L. C.

(Duncan, P. J.)

In this consolidated juvenile dependency case, mother appeals the juvenile court's judgment continuing jurisdiction over her three children. The juvenile court initially asserted jurisdiction over the children based on father's domestic violence and the family's homelessness. By the time of the review hearing--almost seven months after the court took jurisdiction--mother had moved herself and the children into a safe home and had demonstrated that she could parent the children well. Furthermore, mother had complied with the requirement not to have contact with father and had participated in domestic violence counseling and support groups. Mother and father had also expressed an intention to eventually reunite. On appeal, mother argues that the only remaining basis for jurisdiction at the time of the review hearing related to mother's failure to protect the children from domestic violence, and that DHS failed to present legally sufficient evidence that father's domestic violence would recur and that mother would again fail to protect the children, thus exposing them to a risk of serious loss or injury. Held: Given mother's actions after the court took jurisdiction, there was insufficient evidence to support a conclusion that the children were likely to be exposed to a nonspeculative, current risk of serious loss or injury. Therefore, the juvenile court erred in denying mother's motion to dismiss jurisdiction over her children. Reversed and remanded.

James R. McDonald v. Nancy MacDonald

(Hadlock, J.)

Petitioner, the trustee of a revocable trust, filed a petition asking the trial court to instruct him to pay approximately \$42,000 to his attorney for services that the attorney had rendered. The court issued a judgment directing petitioner to pay his attorney only \$20,000, in part because the extent to which the legal services had benefitted the trust was unclear. Petitioner appeals, contending that the court lacked discretion to reduce the fees and that the court erred in considering whether the attorney's efforts had benefitted any person or entity other than petitioner. Held: Neither of petitioner's arguments is preserved for appeal. Petitioner did not assert below that the trial court lacked authority to award anything less than the full amount of the fees. To the contrary, he suggested that the court should take into account certain statutory factors in determining what fees to award, including the extent to which the attorney's efforts had benefitted the trust. Affirmed.

P. M. H. v. William Logan Landolt

(Hadlock, J.)

Respondent appeals a judgment imposing a stalking protective order (SPO) against him. Petitioner was 13 years old at the time of the hearing. She may be respondent's biological child, but any parental rights respondent had were terminated in 2005. In 2007, respondent began attempting to give petitioner birthday gifts at her school. Petitioner's adoptive mother told respondent that he was to have no contact with her. She told petitioner that respondent had physically abused her biological mother and had introduced her to

drugs. Respondent continued to make contact, including by writing letters to petitioner in 2011 and sending her a birthday gift in 2012. Petitioner sought an SPO a few days after receiving that gift. She testified that she feared that respondent would "hurt" her and that she was "scared." On appeal, respondent contends that the evidence was insufficient to support the entry of the SPO. Held: The evidence did not support entry of the SPO. Petitioner's testimony did not establish that she feared for her personal safety or that of a family member. Nor does the record include evidence suggesting that respondent had taken any actions that could lead a reasonable person in petitioner's position to fear for her or her family's personal safety. There is no evidence suggesting that respondent wished to harm petitioner or a member of her family. Reversed.

State of Oregon v. Markell Monta Evans
(DeVore, P. J.)

Defendant appeals a judgment of conviction for first-degree burglary, arising from defendant's theft of the victim's purse in her apartment. He assigns error to the trial court's denial of his motion for a judgment of acquittal, arguing that the state did not prove that he had entered or remained unlawfully in the victim's apartment. Held: The trial court did not err in denying defendant's motion. The record contained sufficient evidence that defendant exceeded an express limitation to enter the victim's apartment for the purpose of using her bathroom and was therefore no longer licensed or privileged to remain therein. Affirmed.

State of Oregon v. D. E B.
(DeVore, J.)

Defendant appeals a judgment of conviction for strangulation, constituting domestic violence, after entering a guilty plea for the count, as charged. Defendant assigns error to the trial court's determination that the stipulated facts, as stated on his petition for entry of a guilty plea, were sufficient for a finding that his acts constituted domestic violence. Held: The judgment is not appealable on the grounds of ORS 138.040, because despite subsequent efforts to try the issue of "domestic violence," the trial court had already accepted an unqualified, written guilty plea to strangulation constituting domestic violence, and, despite the trial court's express misgivings about the process, the parties made no effort to withdraw the unqualified plea and then try the disputed issue. Appeal dismissed.

State of Oregon v. James Leroy Cook
(Lagesen, J.)

Defendant appeals a judgment of conviction, asserting only an unpreserved assignment of error regarding the trial court's imposition of attorney fees for his court-appointed lawyer. At sentencing, defense counsel suggested that the trial court reduce the amount of attorney fees to one-third of what the state had requested. The court imposed the full amount (\$4,800) but later, after off-the-record discussions, reduced that amount to \$2,460. On appeal, defendant argues that there is no evidence in the record to support any award of attorney fees. Held: Having implied to the trial court that some award of attorney fees was authorized and then having encouraged the trial court to award fees based on the parties' representations, defendant is not in a position to argue that the court lacked authority to award any attorney fees. And, even if defendant had not invited the error, the transcript does not conclusively establish what transpired during off-the-record discussions, and the Court of Appeals cannot entertain an unpreserved error that requires the court to speculate about what the parties might have accomplished while off the record. Affirmed.

Intel Corp. v. Tricia A. Batchler
(Garrett, J.)

This workers' compensation case involves a dispute over how long claimant is eligible to receive temporary disability compensation while participating in vocational training programs. Claimant has an accepted occupational disease claim for symptoms of pain in her hands and arms. She was found eligible to participate in a vocational training program to help her find suitable employment. Toward that end, claimant enrolled in an Authorized Training Program (ATP). After she completed that program, her claim was reopened to process newly-accepted conditions. Claimant was again found eligible for vocational training and enrolled in a new ATP. Employer, however, refused to provide claimant temporary disability compensation during the second ATP. Employer argued that, under ORS 656.340(12), claimant had used up her eligibility for that compensation during the first ATP. That statute establishes a maximum "period" of time during which a claimant can receive training-related temporary disability compensation. Claimant argues that, for the purposes of her eligibility for training-related temporary disability compensation, a new "period" began when she started the second ATP. Thus, she argues that she became newly eligible for that compensation at that time. The Workers' Compensation Board agreed with claimant. Employer sought review of that decision. Held: Claimant was entitled to training-related temporary disability compensation during the second ATP. The Court of Appeals reasoned that the provisions of ORS 656.340(12), which function as an exception to the provisions relating to vocational training in ORS 656.268(10), must be considered in the context of the entire statutory scheme. That scheme establishes that a claimant becomes newly eligible for training-related temporary disability compensation whenever a notice of claim closure is issued and she becomes "enrolled and actively engaged in training." Thus, claimant was newly eligible for those benefits when she began her second ATP. Affirmed.

Copeland Sand & Gravel, Inc. v. Estate of Angeline Dillard
(Flynn, J.)

Defendant appeals the trial court's judgment declaring that his mineral rights "do not include any rights to sand, gravel, or other rock or earth materials, in whatever form, used for construction purposes." Defendant contends that his mineral rights include "massive deposits of common rock, such as basalt rock," but concedes that he does not have rights to sand and gravel. Plaintiff argues that defendant does not have rights to rock that will be used for construction purposes. Held: The language at issue is ambiguous, and the parties agree there is no relevant extrinsic evidence of intent. The ambiguity is resolved according to the maxim that "[w]hen different constructions of a provision are otherwise equally proper, that construction is to be taken which is most favorable to the party in whose favor the provision was made," in this case, defendant. Judgment for plaintiff reversed and remanded as to the declaration regarding the scope of the mineral rights reservation; otherwise affirmed.

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