



COURT OF APPEALS

Media Release

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The Court of Appeals issued these opinions:

Javier Garcia-Navarro v. State of Oregon
(A158352 - Clackamas County Circuit Court)

Jerry Morgan v. Valley Property and Casualty Insurance Company
(A158506 - Klamath County Circuit Court)

Charles Wilda v. Steven D. Roe
(A162753 - Jefferson County Circuit Court)

State of Oregon v. Manuel Perez
(A165619 - Multnomah County Circuit Court)

State of Oregon v. Erik John Meiser
(A166534 - Clackamas County Circuit Court)

Baltazar Hernandez-Zurita v. State of Oregon
(A161593 - Washington County Circuit Court)

Department of Human Services v. J. M. T. M.
(A165749 - Lane County Circuit Court)

State of Oregon v. Cannon Terrell Hubbard
(A161146 - Clackamas County Circuit Court)

Department of Human Services v. N. J. V.
(A165484 - Deschutes County Circuit Court)

Charles Ciecko v. Department of Land Conservation and Development
(A156130)

State of Oregon v. Arianna Marie Stavenjord
(A161372 - Washington County Circuit Court)

State of Oregon v. Anthony Scott Steele
(A160415 - Grant County Circuit Court)

Landwatch Lane County v. Land Conservation and Development Commission
(A159121 - Land Conservation and Development Commission)

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

Jhosuamil Colon-Lebron v. Jeri Taylor
(A162249 - Umatilla County Circuit Court)
Vance Wallace Worden v. Jeff Premo
(A162389 - Marion County Circuit Court)
State of Oregon v. Juan Carlos Delgado
(A162736 - Klamath County Circuit Court)
Department of Human Services v. A. B.
(A165923 - Tillamook County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Ernest Alan Tracy v. Mark Nooth
(A160571 - Malheur County Circuit Court)
Benjamin Allen Tolle v. John Myrick
(A162138 - Umatilla County Circuit Court)
Shawn Richard Monro v. Mark Nooth
(A162177 - Malheur County Circuit Court)
Michael James Russum v. John Myrick
(A162232 - Umatilla County Circuit Court)
Alice Towery v. Weatherford, Thompson, Cowgill, Black & Schultz, PC
(A162602 - Linn County Circuit Court)
State of Oregon v. Francisco Antonio Nunez
(A162662 - Washington County Circuit Court)
Michael Himebaugh v. Brigitte Amsberry
(A163005 - Umatilla County Circuit Court)
State of Oregon v. Kerrian Rose Tullier
(A163559 - Douglas County Circuit Court)
State of Oregon v. William Offinga, Jr.
(A163596 - Tillamook County Circuit Court)
State of Oregon v. J. R.
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R. M. v. Yvette Marie Kinyon*
(A164295 - Washington County Circuit Court)
State of Oregon v. K. S.
(A164316 - Marion County Circuit Court)
Timothy C. Rote v. Linda L. Marshall
(A164406 - Clackamas County Circuit Court)
State of Oregon v. Aaron Joseph Emineth
(A165039 - Multnomah 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).

Theodore Sherbow v. Ryan Rutchland
(A165168 - Jackson County Circuit Court)
Robert Hercenberger v. Kathy Proctor
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(A165939 - Coos County Circuit Court)
Department of Human Services v. C. P. C.
(A166073 - Lincoln County Circuit Court)
Department of Human Services v. P. W.
(A166094 - Lake County Circuit Court)
Department of Human Services v. R. T.
(A166118 - Douglas County Circuit Court)

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Javier Garcia-Navarro v. State of Oregon
(Hadlock, J.)

Petitioner, who had lived for many years in the United States as a permanent legal resident, appeals from a judgment denying his petition for post-conviction relief. Petitioner pleaded guilty to crimes including unlawful delivery of methamphetamine. He subsequently pursued post-conviction relief on the ground that he received inadequate assistance of counsel because he was not properly advised of the immigration consequences that would follow a guilty plea to the drug charges. Petitioner asserted that he would not have pleaded guilty had he been properly advised of those consequences. Held: The post-conviction court erred when it concluded that the performance of petitioner's trial lawyer was not constitutionally deficient. Under *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010), a trial counsel's obligation is to advise clients that guilty pleas to almost any drug offense will result in "presumptively mandatory" deportation. 559 US at 369. Reversed and remanded.

Jerry Morgan v. Valley Property and Casualty Insurance Company
(DeVore, P. J.)

Plaintiffs petition for reconsideration of the Court of Appeals' opinion in *Morgan v. Valley Property and Casualty Ins. Co.*, 289 Or App 454, 410 P3d 327 (2017). Plaintiffs ask that, if the judgment must be reversed, plaintiffs' claim on their insurance policy should be remanded for trial on damages only. They also contend that the Court of Appeals erred in concluding that plaintiffs' inventory spreadsheet was inadmissible hearsay rather than a business record within the meaning of OEC 803(6). Held: The Court of Appeals allows reconsideration to clarify that the scope of a new trial on remand remains a matter that should be left to the discretion of the trial court who can better determine whether the issues of breach of contract or the affirmative defenses were affected by evidentiary error. The Court of Appeals, however, declines to revisit the merits of the prior decision. Reconsideration allowed; former opinion clarified and adhered to as clarified.

Charles Wilda v. Steven D. Roe
(DeVore, P. J.)

Defendant Roe appeals from a limited judgment that dismissed his third-party complaint that sought to implead two taverns into plaintiff Wilda's action against Roe for plaintiff's personal injury claim. Wilda alleged that Roe had spent the night drinking at a tavern, fallen asleep while driving, lost control of the pickup,

and negligently caused Wilda serious injuries. Roe admitted negligence and asserted a third-party complaint against two taverns. He alleged that the taverns had served him while he was visibly intoxicated and that if Wilda should recover against Roe, the taverns should contribute to payment of those damages in proportion to their share of fault. The taverns filed a motion to dismiss the third-party claim on the ground that ORS 471.565(1) broadly prohibits an intoxicated patron from bringing any cause of action, including third-party claims, against the server of alcohol, when the claim is based on service of alcoholic beverages. Held: The trial court erred in dismissing the third-party complaint and entering a limited judgment in favor of the taverns. ORS 471.565(1) does not prohibit a patron's third-party claim that seeks contribution for payment of the damages of the plaintiff injured by the intoxicated patron. Reversed and remanded.

State of Oregon v. Manuel Perez

(DeVore, P. J.)

Defendant petitions for reconsideration of this court's order by the Appellate Commissioner that dismissed, as untimely filed, his appeal of a judgment of conviction. He argues that a judgment of a post-conviction relief, entered on September 11, 2012, allowed him to file a late appeal of the judgment of conviction and did so without limiting the time in which to file the appeal. Held: The Court of Appeals allowed reconsideration and determined that the effect of the post-conviction relief (PCR) was to restore the original time in which to file a notice of appeal from the judgment of conviction. Accordingly, the statutory 30-day period in which to file a notice of appeal, provided by ORS 138.071(1), had elapsed by the time defendant filed his notice of appeal—nearly five years after the PCR judgment that allowed a late appeal. Reconsideration allowed; previous order adhered to.

State of Oregon v. Erik John Meiser

(DeVore, P. J.)

Defendant moves the Court of Appeals for determination of jurisdiction in his criminal appeal. Defendant timely filed a motion in arrest of judgment, which the trial court did not decide within 55 days after the date of judgment. Defendant thereafter filed a notice of appeal. Held: Defendant filed an effective notice of appeal and the court has jurisdiction to proceed with the appeal. ORS 136.535 (2003) effectively disconnected motions in arrest of judgment from the "deemed denied" provision of ORCP 64 F(1) made applicable by ORS 136.535 to motions for a new trial. In *State v. Starr*, 210 Or App 409, 150 P3d 1072 (2007), the court held that the "deemed denied" provision applied only to motions for new trial. ORS 136.535 (2009) effectively undid the ORS 136.535 (2003) amendment discussed in *Starr*, once again making motions in arrest of judgment in criminal cases subject to the "deemed denied" provision of ORCP 64 F(1). Motion to determine jurisdiction granted; jurisdiction determined; appeal to proceed.

Baltazar Hernandez-Zurita v. State of Oregon

(Lagesen, P. J.)

In 2009, petitioner pleaded guilty to one count of unlawful delivery of methamphetamine, and the federal government deported him to Mexico. Six years later, in 2015, he filed a petition for post-conviction relief in which he alleged that he received constitutionally inadequate assistance with regard to the plea. His petition admitted that it was untimely under the two-year limitation period in ORS 138.510(3) but asserted that it satisfied the "escape clause" of that statute, which permits a late filing if the grounds alleged in the petition "could not reasonably have been raised" within the limitation period. The delay, petitioner alleged, was attributable to the obstacles he faced in obtaining legal materials or legal counsel while in Mexico. The post-conviction court dismissed the petition, ruling that the grounds for relief in the petition were based on information that existed and was publicly available from the time that petitioner's conviction was entered and that, under controlling precedent, the fact that petitioner was unable to appreciate or acted reasonably in

failing to seek that information due to his personal circumstances was not sufficient to bring his petition within the escape clause. On appeal, petitioner contends that that precedent was wrongly decided and has been called into question by the Supreme Court's decision in *Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015). Held: *Verduzco* did not directly or indirectly overrule the line of Court of Appeals cases holding that the applicability of the escape clause in ORS 138.510(3) turns on whether the information pertinent to a petitioner's claims was available, and not on whether a petitioner's failure to access that information was reasonable; nor did petitioner demonstrate that those Court of Appeals cases were plainly wrong. Accordingly, the Court of Appeals adhered to the reasoning of those cases and held that petitioner failed to allege facts sufficient to bring his petition within the escape clause of ORS 138.510(3). Affirmed.

Department of Human Services v. J. M. T. M.

(Lagesen, P. J.)

Mother and her three children, who are wards of the juvenile court, appeal permanency judgments changing each child's permanency plan from reunification to adoption, assigning error to the juvenile court's finding that there were no compelling reasons not to proceed with terminating mother's parental rights. Held: The trial court erred by changing the children's plans to adoption. The party that proposes changing a permanency plan to adoption bears the burden of proving that there are no compelling reasons not to proceed with terminating the parent's parental rights. *Dept. of Human Services v. S. J. M.*, 283 Or App 367, 388 P3d 417, rev allowed, 361 Or 350 (2017). The Department of Human Services did not meet its burden; the evidence was insufficient to support the juvenile court's finding that there were no compelling reasons not to proceed with terminating mother's parental rights. Reversed and remanded.

State of Oregon v. Cannon Terrell Hubbard

(Garrett, J.)

The state appeals a corrected judgment of conviction for murder by abuse, ORS 163.115 (1995), assigning error to the trial court's removal of the phrase "life in prison" from defendant's original 1998 sentence as an "erroneous term in the judgment" under former ORS 138.083(1)(a), repealed by Or Laws 2017, ch 529, § 26. Defendant argues that the trial court did not err because a constitutional defect in ORS 163.115(5) (1995) made his sentence "erroneous" when it was imposed. The state asserts that the trial court lacked authority to "correct" the 1998 judgment because, under *State v. Haynes*, 168 Or App 565, 7 P3d 623, rev den, 331 Or 283 (2000), defendant's life sentence became lawful in 1999 after the legislature amended ORS 163.115(5) to cure the constitutional defect. Held: The trial court lacked authority to "correct" the judgment. The reasoning in *Haynes* controlled, and, therefore, defendant's life sentence became lawful after the 1999 amendment to ORS 163.115(5). Reversed and remanded.

Department of Human Services v. N. J. V.

(DeHoog, P. J.)

Mother and father separately appeal judgments establishing guardianships under ORS 419B.366 for their two children. Mother argues that the juvenile court abused its discretion when it denied her motion to continue the guardianship hearing to enable her to obtain and introduce the results of a mental health evaluation. Held: The Court of Appeals affirmed father's appeal without written discussion. As to mother's appeal, the juvenile court abused its discretion because it failed to make a record reflecting an exercise of discretion. That error was not harmless, because the court expressly considered the issues that the mental health evaluation would have addressed at the guardianship hearing. On mother's appeal, reversed and remanded; on father's appeal, affirmed.

Charles Ciecko v. Department of Land Conservation and Development
(James, J.)

Petitioners bring a direct challenge to the validity of a rule adopted by the Department of Land Conservation and Development, OAR 660-036-0005, which amends Part Five of the 1994 Territorial Sea Plan after recommendations by the Ocean Policy Advisory Council (OPAC). It is undisputed by the parties that the Land Conservation and Development Commission (the commission) modified OPAC's proposed amendments. Petitioners contend that the commission failed to comply with the applicable rulemaking procedures set out in ORS 196.471 when it adopted modified amendments to OAR 660-036-0005. Held: As prescribed in ORS 196.471(3), the commission was required to return the recommended amendments to OPAC for revision. The commission did not follow that procedure. Instead, the commission adopted modified and supplemented amendments, which it was not authorized to do and which did not comply with the applicable rulemaking procedures set out in ORS 196.471. Amendments to OAR 660-036-0005, effective October 7, 2013, held invalid.

State of Oregon v. Arianna Marie Stavenjord
(Aoyagi, J.)

Defendant was convicted of theft in the third degree, ORS 164.043. On appeal, she assigns error to the trial court's denial of her motion for judgment of acquittal, arguing that there was a variance between the charging document and the state's proof at trial as to the date of the crime. In its charging document, the state alleged that defendant committed the theft "on or about July 21." According to the evidence at trial, the theft occurred on July 19. Held: The trial court did not err when it denied defendant's motion for judgment of acquittal. Even if the difference between the approximate date in the charging instrument and the actual date proved at trial was a variance, it was neither material nor prejudicial. Affirmed.

State of Oregon v. Anthony Scott Steele
(Powers, J.)

Defendant appeals from a judgment of conviction for possession of methamphetamine, entered after a conditional guilty plea, arguing that the trial court erred by denying his motion to suppress methamphetamine evidence that was seized following his arrest. The trial court concluded that the evidence was admissible because it inevitably would have been discovered during the booking process conducted in accordance with the jail's inventory policy. On appeal, defendant argues that the inventory policy is unconstitutionally overbroad because it authorized the search of all closed containers and that--even though the evidence at issue was not in a closed container--that defect rendered the policy as a whole improperly promulgated and, thus, invalid as a basis of purported inevitable discovery. Held: The trial court erred in denying defendant's motion to suppress the methamphetamine evidence. On this record, the inventory policy was overbroad because it authorized the search of all closed containers regardless of whether they were likely to contain valuables. Reversed and remanded.

Landwatch Lane County v. Land Conservation and Development Commission
(Sercombe, S. J.)

This case concerns whether the Land Conservation and Development Commission (LCDC) erred in determining that there was not "good cause to proceed" to an enforcement hearing that petitioner had demanded against Lane County. See ORS 197.324(2)(b). The question on review is whether petitioner presented evidence of a "pattern of decision making" sufficient to obligate the commission to determine that there was "good cause to proceed" to an enforcement hearing. See OAR 660-045-0020(9), (10). Held:

LCDC's order was not unlawful in substance and was supported by substantial evidence in the whole record. Affirmed.

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