



COURT OF APPEALS

Media Release

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The Court of Appeals issued these opinions:

Olivia Chernaik v. Kate Brown
(A159826 - Lane County Circuit Court)
State of Oregon v. Thaddeus Lee Kilgore
(A165316 - Yamhill County Circuit Court)
State of Oregon v. David Alan Moles
(A161140 - Marion County Circuit Court)
Tony Nieto v. City of Talent
(A168939 - Land Use Board of Appeals)
State of Oregon v. Dustin Douglas Meyer
(A160912 - Multnomah County Circuit Court)
State of Oregon v. Micus Duane Ward
(A163157 - Washington County Circuit Court)

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

Catherine Mary Cox and James Edward Cox
(A163479 - Washington County Circuit Court)
State of Oregon v. Robert Thomas Rumley
(A164006 - Multnomah County Circuit Court)
State of Oregon v. Nate M. Fryer
(A164371 - Washington County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Richard W. Salmon v. Board of Parole and Post-Prison Supervision
(A160113 - Board of Parole and Post-Prison Supervision)
State of Oregon v. J. J. S.
(A163135 - Washington County Circuit Court)

David Raymond Durham v. Board of Parole and Post-Prison Supervision
(A163615 - Board of Parole and Post-Prison Supervision)

Konrad Casebeer v. Brandon Kelly
(A163896 - Marion County Circuit Court)

State of Oregon v. Christopher Joseph Bush, II
(A164238 - Washington County Circuit Court)

Jeffrey Mark Clark v. Brad Cain
(A164342 - Malheur County Circuit Court)

State of Oregon v. Toby Leland Cox
(A164537 - Marion County Circuit Court)

State of Oregon v. Kristal Lynn Salladay
(A164677 - Benton County Circuit Court)

Zaha Hassan and Sammy James Hassan
(A164691 - Multnomah County Circuit Court)

State of Oregon v. Sean Michael Burke
(A164733 - Clackamas County Circuit Court)

State of Oregon v. P. W.
(A164739 - Jackson County Circuit Court)

State of Oregon v. Orrin Kawiki Kealohi Soto
(A164803 - Tillamook County Circuit Court)

State of Oregon v. Cassandra Jean Dienstel
(A164814 - Lane County Circuit Court)

Kelly Jo Earl and Steven Wayne Earl
(A165041 - Clackamas County Circuit Court)

State of Oregon v. Andrew Frederic Pulcipher
(A165057 - Washington County Circuit Court)

State of Oregon v. Aleksandr Petrovich Khukhryanskiy
(A165083 - Multnomah County Circuit Court)

State of Oregon v. Joshua James Ayers
(A165136 - Lane County Circuit Court)

State of Oregon v. Paul Anthony Sutherland
(A165152 - Clackamas County Circuit Court)

State of Oregon v. Paul Anthony Sutherland
(A165250 - Clackamas County Circuit Court)

State of Oregon v. Jonathan Mayes
(A165251 - Multnomah County Circuit Court)

State of Oregon v. Wallace Theodore Simpson, Jr.
(A165352 - Multnomah County Circuit Court)

State of Oregon v. Michael Epstein
(A165430 - Linn County Circuit Court)

State of Oregon v. Patrick Ward
(A165465 - Lake County Circuit Court)

State of Oregon v. Charles Cass Cooley, III
(A165525 - Umatilla County Circuit Court)

State of Oregon v. Mark Anthony Richardson
(A165534 - Multnomah County Circuit Court)

State of Oregon v. Jeffrey Matthew Frazier
(A165535 - Lincoln County Circuit Court)

State of Oregon v. Karl David Cline
(A165561 - Columbia County Circuit Court)

State of Oregon v. Lisa Ann Burns
(A165649 - Lane County Circuit Court)

State of Oregon v. Jamie Cortez Hernandez
(A165671 - Marion County Circuit Court)

State of Oregon v. Jacob Justin Blair
(A165684 - Marion County Circuit Court)

DAWAFI Pension Trust v. Rex Benow Bounds
(A165739 - Jackson County Circuit Court)

Tracy Koblinski v. Oregon State Board of Nursing
(A165831 - Oregon State Board of Nursing)

State of Oregon v. M. K. K.
(A165836 - Deschutes County Circuit Court)

State of Oregon v. Jason David Bare
(A165904 - Washington County Circuit Court)

State of Oregon v. Larry Dwayne Rue, Jr.
(A165905 - Marion County Circuit Court)

State of Oregon v. Leslie Clyde Pearson
(A165926 - Lane County Circuit Court)

Rebecca Pulito v. Oregon State Board of Nursing
(A165993 - Oregon State Board of Nursing)

Jerome Durrell Akles v. Board of Parole and Post-Prison Supervision
(A165999 - Board of Parole and Post-Prison Supervision)

State of Oregon v. Victoria Lynn Knight
(A166025 - Jackson County Circuit Court)

State of Oregon v. Tyrell Bitsilly
(A166055 - Clackamas County Circuit Court)

State of Oregon v. Daniil Vitalievich Mikhailichenko
(A166096 - Marion County Circuit Court)

State of Oregon v. Jessica Lyndsey Marie Anderson
(A166388 - Clackamas County Circuit Court)

Gayle A. Reeves v. Jerry C. Reeves
(A166440 - Multnomah County Circuit Court)

K. E. B. v. John W. Bradley*
(A166477 - 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).

State of Oregon v. T. G.
(A166710 - Douglas County Circuit Court)
Ryan D. Mayenschein v. SAIF Corporation
(A166899 - Workers' Compensation Board)
Jon Charles Winchester, Jr. v. Steve Brown
(A167013 - Lake County Circuit Court)
State of Oregon v. N. H.
(A167213 - Marion County Circuit Court)
State of Oregon v. T. D.
(A167231 - Lane County Circuit Court)
Department of Human Services v. C. M. H.
(A167896 - Clackamas County Circuit Court)
S. A. S. v. Z. R. C.
(A168061 - Lane County Circuit Court)
Department of Human Services v. A. L.
(A168371 - Wasco County Circuit Court)
Yamhill Creek Solar, LLC v. Yamhill County
(A169191 - Land Use Board of Appeals)

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Olivia Chernaik v. Kate Brown

(Armstrong, P. J.)

Plaintiffs appeal a judgment dismissing their action against defendants the State of Oregon and Governor Kate Brown (collectively, the state). Plaintiffs sued for declaratory and equitable relief related to the state's alleged failure to take sufficient steps to protect the state's public-trust resources from the effects of climate change. The trial court denied plaintiffs' motion for partial summary judgment and granted the state's motion for summary judgment, concluding that (1) only submerged and submersible lands are resources encompassed by the common-law public-trust doctrine and (2) the state does not have a fiduciary obligation to protect public-trust resources from the effects of climate change. Based on those conclusions, the trial court entered a judgment dismissing plaintiffs' case. Held: The public-trust doctrine does not impose a fiduciary obligation on the state to take affirmative action to protect public-trust resources from the effects of climate change. Accordingly, the trial court did not err in its rulings on the parties' summary judgment motions. However, because the trial court dismissed the case, the judgment is vacated and remanded for the trial court to instead enter a judgment that declares the parties' rights. Vacated and remanded.

State of Oregon v. Thaddeus Lee Kilgore

(Armstrong, P. J.)

Defendant was convicted of various crimes in two separate cases and sentenced to probation. On appeal of the resulting judgments, he assigns error to the imposition of a special condition of probation in one of the cases that prohibits him from consuming or possessing marijuana. He contends that the condition violates ORS 137.542(2), which provides that the conditions of supervision of a person who holds a medical marijuana registry identification card must be imposed in the same manner as those related to prescription drugs. The state concedes that the trial court erred in imposing the condition without making the necessary factual determination. Held: Because the challenged special probation condition appeared for the first time in the

judgment, defendant did not have an opportunity to address whether he held a registry identification card, thus triggering ORS 137.542(2). Accordingly, the case must be remanded for resentencing for the trial court to make that determination and, if so, to modify the condition to comply with the statute. In Case No. 17CR22754, remanded for resentencing; otherwise affirmed. In Case No. 17CR04970, appeal dismissed as moot.

State of Oregon v. David Alan Moles

(DeVore, J.)

Defendant appeals a judgment of conviction for six counts of first-degree sexual abuse committed against a child under the age of 14. He assigns error to the trial court's denial of his motion in limine to exclude evidence that he had also abused the victim's mother when she was a child. According to defendant, the trial court erred in its assessment of the probative value of that evidence on each of the state's theories--i.e., to show defendant's sexual purpose, to prove intent under the doctrine of chances, and to explain why the victim's mother had asked the victim over the years whether she had been sexually abused--and, consequently, erroneously concluded under OEC 403 that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. Held: The trial court acted within its discretion to admit the evidence of defendant's abuse of the victim's mother to show that defendant acted with a sexual purpose with respect to the charged offenses. Any error that the trial court may have committed with regard to admitting the evidence for other purposes was harmless. Affirmed.

Tony Nieto v. City of Talent

(DeVore, J.)

Petitioners seek review of a referee's decision affirming the city's denial of their application for an expedited land division (ELD) and remanding the matter to be processed as a land use decision or limited land use decision. ORS 197.375. In their first two assignments of error, petitioners argue that the referee exceeded his statutory powers. In their third assignment of error, petitioners assert that the referee's decision is unconstitutional under the Takings Clause of the Fifth Amendment to the United States Constitution. Held: The referee acted within his statutorily defined authority in affirming the city's denial of ELD review and remanding petitioner's application for processing as a land use decision or limited land use decision. Any constitutional challenges regarding conditions of approval remain to be decided through that process. Affirmed.

State of Oregon v. Dustin Douglas Meyer

(Lagesen, P. J.)

The Supreme Court, in *State v. Meyer*, 363 Or 744, 430 P3d 561 (2018), remanded this case to the Court of Appeals for reconsideration in light of *State v. Fonte*, 363 Or 327, 422 P3d 202 (2018). Defendant challenges the denial of his motion for judgment of acquittal on the charge of attempted first-degree theft. This case arose out of a delivery of 17 boxes of merchandise to a North Face store. One box containing three garments went missing during that delivery. An hour later, defendant came into the North Face store with merchandise identical to the merchandise that was in the missing box and attempted to exchange the items. Defendant was convicted of one count of attempted first-degree theft. Held: In view of *Fonte*, the Court of Appeals concluded that the trial court erred when it denied defendant's motion for judgment of acquittal, because the return of property to its owner does not constitute disposing of the property by "selling" within the meaning of ORS 164.055(1)(c). Reversed.

State of Oregon v. Micus Duane Ward
(Shorr, J.)

Defendant appeals from a judgment of conviction for aggravated murder, ORS 163.095(2)(d), and felony murder, ORS 163.115(1)(b). Before trial, defendant, who has an intellectual disability, argued that he was not competent to stand trial; the trial court concluded that defendant was fit to proceed. Defendant then moved to suppress statements that he had made during two police interrogations, including statements from a second interrogation that defendant argued occurred after an invalid Miranda waiver; the trial court declined to suppress the statements from the second interrogation. Finally, defendant argued that, because of his intellectual disability, his life sentence without parole is unconstitutional under the Eighth Amendment to the United States Constitution; the trial court declined to impose a lesser sentence. On appeal, defendant assigns error to those adverse rulings. Held: The trial court did not err. First, the court adequately considered the appropriate competency factors, and its ultimate determination was supported by sufficient evidence in the record. Second, the evidence presented at the suppression hearing supported the court's conclusion that defendant voluntarily waived his Miranda rights notwithstanding any prior Miranda violation and the gap in time between the Miranda warnings and the challenged statements. Finally, defendant's sentence is not unconstitutional because the Eighth Amendment does not categorically prohibit true life sentences for intellectually disabled defendants. Affirmed.

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