

OREGON COURT OF APPEALS DECISIONS

NOVEMBER 2010

State v. Haines

Decided: 11/3/2010

Case No.: A140193

Sercombe, J. for the Court; Landau, P.J & Ortega J.

<http://www.publications.ojd.state.or.us/A140193.htm>

CRIMINAL LAW – A person incurs economic loss, and a compensatory fine is not inappropriate, when that person becomes subject to an economic obligation, regardless of whether an insurer or other third party ultimately pays or writes off those expenses.

Defendant was convicted of attempted sexual abuse. A trial court sentenced Defendant to a prison term and imposed a \$1,000 compensatory fine to be disbursed to the victim's mother for costs of counseling attributable to the crime. Defendant appealed, assigning error to the portion of the judgment ordering him to pay the fine. Defendant argued that there was no evidence in the record establishing that the victim suffered economic damages. The Court of Appeals ruled that it was not plain error for the trial court to impose a compensatory fine. The Court explained that a person incurs economic loss when they become subject to an economic obligation, such as medical expenses, regardless of whether an insurer or other third party ultimately pays or writes off those expenses.

Therefore, both the immediate victim of a crime and the insurer suffer economic damages for purposes of Oregon's compensatory fine statute. Affirmed.

[Summarized by Kevin M Moore]

State v. Fredricks

Decided: 11/3/2010

Case No.: A140764

Brewer, C.J. for the Court; Edmonds, S.J.

<http://www.publications.ojd.state.or.us/A140764.htm>

CRIMINAL PROCEDURE – Warrantless entry into a residence under the emergency aid doctrine is not authorized on the basis of a loud argument without sounds of struggle or other indications of violence.

Police responded to a verbal disturbance at Defendant's motel room. When Defendant answered the door, police officers asked him to step outside. After speaking with the woman in the room, the officers noticed the smell

of marijuana. The officers asked Defendant for permission to search the room. Defendant consented and the officers found controlled substances. Defendant appealed the trial court's decision that the warrantless search was valid. The state argued that the original warrantless police entry was justified under the emergency aid doctrine in ORS 133.033. To fall under the emergency aid doctrine, in part, a true emergency must exist and police must have reasonable grounds to believe there is an immediate need for assistance for the protection of life. State v. Follett 115 Or App 672, 680 (1992). The Court of Appeals held that evidence of a loud argument did not indicate that a life was in immediate danger or that an emergency existed. The Court held that police must have more than a loud argument with no sounds of physical struggle or indication of violence to fall under the emergency aid doctrine. Reversed.

[Summarized by Matthew J. Brewer]

State v. Bigelow

Decided: 11/3/2010

Case No.: A140304

Brewer, C.J. for the Court; Edmonds, S.J.

<http://www.publications.ojd.state.or.us/A140304.htm>

EVIDENCE - An argument on appeal that the admission of a medical expert's opinion was error on the grounds of improper foundation and was impermissible commenting on the defendant's testimony is not properly preserved when the objection at trial was that the opinion was speculation.

Defendant appealed convictions for criminal mistreatment and assault, arguing that the trial court erred in allowing expert testimony that the child victim suffered intentionally inflicted injuries. On appeal, Defendant argued that there was no foundational evidence to qualify the expert to determine that the injury was intentionally inflicted and, in the alternative, such an opinion improperly commented on the credibility of Defendant's statements as to how the injury occurred. The Court of Appeals found that Defendant's arguments were not reviewable because, at trial, Defendant only objected on the grounds that the expert's testimony was speculative. Thus, Defendant's arguments on appeal were not properly preserved in the trial record. The Court also held that, had the objections raised on appeal been raised at trial, the state could have laid a better basis to support preservation of the issues. Affirmed.

[Summarized by Nicholas Castellano]

State v. Carter

Decided: 11/03/2010

Case No.: A138008

Ortega, J. for the Court; Landau, P.J.; Carson, S.J.

<http://www.publications.ojd.state.or.us/A138008.htm>

EVIDENCE – A bench warrant qualifies as a public record, for the purposes of OEC 803(8) and defendant’s Sixth Amendment right to confrontation is not violated by the admission of a bench warrant into evidence.

Defendant appeals a conviction for reckless driving and failure to appear on a criminal citation. Defendant stipulated that she was issued a uniform criminal citation and complaint. At trial, the State utilized the warrant and complaint as evidence that defendant knowingly failed to appear. On appeal, defendant contends that the evidence offered did not prove that defendant acted knowingly, because it failed to demonstrate that there was notice of a required appearance in court. Also, defendant assigns error to the trial court’s decision to admit the warrant into evidence. The Court of Appeals held that defendant’s state of mind, and knowledge of the required court appearance, could be reasonably inferred from the evidence, whether or not defendant knew of the consequences that would follow a failure to appear. Next, the court held that a warrant, issued by the court for failure to appear, constitutes a public record, for the purposes of OEC 803(8), because it sets forth the activities of the court. Lastly, the court held that the warrant was not “testimonial” in nature, because even though it was utilized as evidence, it was not constructed for that reason. Thus, admission of the warrant did not violate defendant’s Sixth Amendment rights, and it was not error to admit it into evidence. Affirmed.

[Summarized by Aaron Benjamin Girata]

State ex Rel Juv. Dept. v. Z.D.B.

Decided: 11/3/2010

Case No.: A137189

Landau, P.J. for the Court; Shuman, J. & Oretga, J.

<http://www.publications.ojd.state.or.us/A137189.htm>

JUVENILE LAW – Restitution is appropriate when a juvenile defendant engages in a criminal activity which causes pecuniary damages, and when such criminal is a “but for” cause of the victim’s harm.

Z.D.B. (“Youth”) is a minor who was involved in an altercation with Victim. Victim claims Youth instigated an attack by gathering a group of people to harm the victim. Relying on Victim’s statement, the state sought restitution from Youth for Victim’s medical bills in the sum of

\$18,442.87. Youth admitted harassing and kicking Victim in the ribs, but denied responsibility for Victim's injuries. Youth claimed that, because he did not cause Victim's injuries, the juvenile court exceeded its authority when it imposed restitution under ORS 419C.450. The Court of Appeals examined both the statute and prior case law and held that 1) the statute does not require that specific losses be alleged and adjudicated as part of a juvenile court proceeding to award restitution and 2) the statute requires a criminal activity, pecuniary damages, and a causal "but for" relationship to award restitution. Moreover, the Court held that, under ORS 419C.450, a defendant does not need to be convicted of a crime or admit wrongdoing to be held liable for restitution. Affirmed.

[Summarized by Ryan Kunes]

State v. Newell

Decided: 11/3/2010

Case No.: A138850

Landau, P.J. for the Court; Schuman, J. & Ortega, J.

<http://www.publications.ojd.state.or.us/A138850.htm>

SENTENCING - The trial court did not err when it imposed consecutive incarceration sanctions on Defendant for multiple parole violations since Oregon's sentencing guidelines do not require the court to make factual findings underlying the violations, as is required for sentencing upon conviction.

Defendant pleaded guilty to four counts of encouraging child sex abuse in the second degree in 2006, and subsequently admitted to five violations of his parole in 2008. The trial court imposed consecutive incarceration sanctions on Defendant amounting to forty-eight months total, without making any findings of fact. Defendant claimed ORS 137.123 required the trial court to make factual findings before imposing consecutive sentences. The Court of Appeals did not agree with the state's argument that, to the extent the sentencing guidelines and the statute did not agree, the sentencing guidelines controlled because the sentencing guidelines have statutory force and are more recent than ORS 137.123. Instead, the Court held that the sentencing guidelines control because ORS 137.123 speaks to "sentencing" upon conviction, whereas the relevant sentencing guideline describes "incarceration sanction" upon violation of parole. Therefore, the trial court did not err when it imposed consecutive incarceration sanctions without making any findings of fact. Affirmed.

[Summarized by Tyler Reid]

State v. Thomas

Decided: 11/3/2010

Case No.: A142623

Brewer, C.J. for the Court; Edmonds, S.J.

<http://www.publications.ojd.state.or.us/A142623.htm>

SENTENCING – When a defendant is facing a “true life sentence” it is still judicially efficient to correct a plain clerical error regarding sentencing in anticipation that the defendant may seek future modification of the judgment.

Defendant was convicted on two counts of aggravated murder and two counts of conspiracy to commit aggravated murder. On the first appeal, the Court of Appeals vacated Defendant’s convictions and instructed the trial court to enter only a single conviction for aggravated murder. The trial court merged Defendant’s identical convictions but left the separate, concurrent sentences for each of the four original convictions. Defendant again appealed, claiming the trial court did not follow the remand instructions. The Court of Appeals held that the trial court did err in failing to merge the sentences. Although Defendant failed to preserve his argument, the Court agreed that the failure to merge was “plain error” because it appeared on the face of the record and there were no competing influences. The Court found that judicial efficiency weighed in favor of correcting this clerical error even though Defendant was facing a “true life sentence” because Defendant may seek future modification of the judgment against him. Affirmed in part, reversed in part.

[Summarized by Emily Reid]

State v. Wiese

Decided: 11/3/2010

Case No.: A138481

Ortega, J. for the Court; Landau, P.J. & Schuman, J.

<http://www.publications.ojd.state.or.us/A138481.htm>

SENTENCING – A sentence is disproportionate to the offense only if it shocks the moral sense of all reasonable persons as to what is right and proper under the circumstances.

Defendant was convicted of two counts of sodomy and one count of rape for sexually abusing his stepdaughter. The trial court imposed concurrent sentences of 300 months per count, which Defendant claimed constituted cruel and unusual punishment because the sentences were unusually disproportionate to the offenses. The Court of Appeals disagreed, and affirmed the sentence of the trial court. The Court found that although

Defendant had no prior convictions for sexual crimes, he did have convictions for other violent crimes, and this had a bearing on the appropriateness of the sentences. Similarly, the Court found that Defendant's comparison of the sentences for intentional murder and the crimes of which he was convicted was not appropriate, and there was substantial precedent for sentences similar to those imposed in this case.

[Summarized by Dane Rowinski]

State v. Evans

Decided: 11/10/2010

Case No.: A140381

Haselton, P.J. for the Court; Brewer, C.J; & Armstrong.

<http://www.publications.ojd.state.or.us/A140381.htm>

CRIMINAL PROCEDURE – Enhancement facts that are required to seek upwards sentences are not considered elements of the underlying criminal offense subject to a grand jury trial, since the Oregon Constitution does not treat enhancements as “elements” of the underlying criminal offense.

Defendant appeals from a conviction of burglary. At trial, the State notified Defendant as required under ORS 136.790 that it intended to rely on certain enhancement facts to seek an upward departure sentence. However, the State did not notify the court. Defendant took issue with the trial court on this fact, stating that without proper written notification to the court, the notification provided was merely “a written accusation” which must be filed with the trial court for the court to have jurisdiction. On appeal, Defendant argues that enhancement factors must be treated as elements of a crime and therefore must be decided by a grand jury and not the trial court judge. However, the Court of Appeals held that because the Oregon Constitution does not treat enhancements as “elements” of the underlying criminal offense, enhancement facts are relevant only to sentencing hearings, rather than to the guilt or innocence of the underlying offense determined by a grand jury. Affirmed.

[Summarized by Ryan Kunes]

State v. Gonzales

Decided 11/10/2010

Case No.: A138187

Rosenblum, P. J. for the Court; Brewer, C. J. & Deits, S. J.

<http://www.publications.ojd.state.or.us/A138187a.htm>

CRIMINAL PROCEDURE – The party who prevails at trial on a motion to suppress evidence after giving only one of multiple arguments of admissibility, but who is reversed on appeal, is not precluded from

raising the previously unraised arguments of admissibility on remand.

Defendant submitted a motion to suppress evidence, which the trial court denied. On appeal, the Court of Appeals held that the evidence was unlawfully obtained and remanded the case for a new hearing in which the evidence was to be suppressed. The State petitioned for reconsideration, arguing that the Court improperly narrowed the scope of remand, thereby prohibiting the State from making additional arguments about the admissibility of the evidence. On reconsideration, the Court noted that, because the State prevailed on its first argument, it was prevented from raising additional arguments at trial. The Court held that the State should therefore not be precluded from arguing these previously unheard arguments on remand. The Court rejected Defendant's argument that *State v. Parker*, 227 Or App 413, precludes the State from "taking a second bite at the apple." The Court distinguished *Parker* on the grounds that *Parker* involved the denial of the defendant's request to make an argument on remand which was previously made at trial. In this case, however, the State did not need to make, and in fact never made, the arguments at trial that it requests to make on remand. Opinion modified.

[Summarized by Kathleen Thomas]

State v. Johnson

Date Decided: 11/17/2010

Case No.: A138789

Schuman, P.J. for the Court; Wollheim, J. & Rosenblum, J.

<http://www.publications.ojd.state.or.us/A138789.htm>

CRIMINAL LAW – The statute governing interference with a peace officer, ORS 162.247, is not facially unconstitutional by allowing a jury to determine a legal question because the statute can be applied such that the jury determines only the predicate factual questions which the court then independently applies to a legal question to determine the legal effect.

Police officers responded to a call that led them to Defendant's house. At the house, Defendant physically resisted the officer despite the officer ordering Defendant to stop resisting. Defendant was convicted of interfering with a peace officer, which occurs when a person "refuses to obey a lawful order by the peace officer." On appeal, Defendant argued that the statute is facially unconstitutional because it requires a jury to determine the lawfulness of the peace officer's order, which is a legal question. The Court of Appeals rejected Defendant's argument, stating that a facial challenge to the constitutionality of a statute prevails only if there are no circumstances under which the statute can be constitutionally applied. The Court held that the statute could be applied constitutionally

if the prosecution presents only predicate factual questions to the jury, but the court then independently applies the jury's factual findings to the law to come to a legal conclusion. Affirmed.

[Summarized by Joseph Lavelle]

State v. Alexander

Decided: 11/17/2010

Case No.: A140307

Brewer, C. J. for the Court; Edmonds, S.J.

<http://www.publications.ojd.state.or.us/A140307.htm>

CRIMINAL PROCEDURE– Whether a person is constructively restrained for the purpose of being arrested is an inquiry that depends on the totality of the circumstances.

Defendant was seen running by a police officer and when the officer stopped defendant he was detained. The officer went to inform his dispatcher of the detention and defendant hit the officer and ran from the scene. Defendant contends that he was not in “custody” within the meaning of the statute. Under the statute, a person is in “custody” if a peace officer has the person in constructive restraint, in order to charge the person. The Court decided that here “constructive restraint” was imputed in law, even if not existent in fact. The totality of the circumstances have to be considered to determine if the meaning of “custody” was met for the charge of second degree escape and the evidence presented was sufficient to warrant proceeding to trial. The Court held that whether a person is constructively restrained for the purpose of being arrested is an inquiry that depends on the totality of the circumstances and enough evidence was present for a jury trial on the question making the denial of the motion for acquittal of the charges appropriate. Affirmed.

[Summarized by Jessica Johnson]

State v. Hartman

Decided: 11/17/2010

Case No.: A140036

Brewer, C.J. for the Court; Wollheim, P.J.; & Rosenblum, J.

<http://www.publications.ojd.state.or.us/A140036.htm>

CRIMINAL PROCEDURE – A warrant granted by a magistrate is insufficient when the affidavit uses unlawfully obtained evidence to establish probable cause.

Defendant was convicted for a variety of offenses in connection with two burglaries. Defendant argues the trial court erred in failing to suppress evidence. Specifically, Defendant claims the photograph of his boot linking him to the burglaries constituted a search that violated his rights under Article I, section 9 of the Oregon Constitution and the Fourth Amendment of the United States Constitution. While the trial court correctly stated the photograph of Defendant's boot was obtained unlawfully and without the photograph, the affidavit failed to provide probable cause for a warrant to search Defendant again, the Court of Appeals found the trial court erred in its ruling to admit the evidence under the Inevitable Discovery and Plain View exceptions to the Fourth Amendment. A suspect's property held for inventory purposes while incarcerated involves no search, so the Court rejected the State's argument that discovery of the boots was inevitable. Additionally, the plain view argument is inapplicable since the officer who saw the boots would not be the official conducting the inventory or investigation. The trial court's failure to uphold Defendant's motion to suppress is overturned since probable cause could not be established without the unlawfully obtained photograph. Reversed and Remanded.

[Summarized by Kimberly Morton]

State v. Ingram

Decided: 11/17/2010

Case No.: A139621

Ortega, J. for the Court; Landau, P.J. & Sercombe, J.

<http://www.publications.ojd.state.or.us/A139621.htm>

CRIMINAL PROCEDURE – For a Horizontal Gaze Nystagmus test to be admitted as evidence, the test must be administered properly, including following all protocols, by a qualified person, and the results must be accurately recorded.

Police stopped Defendant for suspected driving under the influence of intoxicants. The officer who administered the Horizontal Gaze Nystagmus (HGN) test did not make the required eight horizontal passes of the stimulus over Defendant's eyes. The officer also administered the stimulus at a level above that prescribed by protocol, and at an improper speed. The trial court admitted the HGN test. The Court of Appeals held the HGN test is scientific evidence which may be admitted as evidence after establishing that the test was properly administered, that the person administering the test was properly qualified, and that the results were recorded accurately. The Court held that, because the officer did not follow protocol for administering the HGN test, the results were not scientifically valid and the state failed to establish a foundation for admitting the test results. Because the evidence from the HGN test was

“quantitatively different from other evidence” presented at trial, its admittance was not a harmless error. Reversed and remanded.

[Summarized by Omar Nur]

State v. Lunacolorado

Decided: 11/17/2010

Case No.: A139805

Schuman, P.J., for the Court; Rosenblum, J. Concurrence, Wollheim, J.

<http://www.publications.ojd.state.or.us/A139805.htm>

CRIMINAL PROCEDURE – When a suspect requests an interpreter, and one is not provided, suppression of a subsequent confession may turn on whether there is sufficient evidence to support a finding that the suspect was capable of understanding English, and, therefore, capable of understanding the Miranda warnings.

Defendant was questioned regarding a violation of a restraining order. A police officer read Defendant his Miranda warnings and asked if Defendant understood. Defendant said he did not, and the officer reread the warnings, explaining each element. Defendant said he understood, but requested an interpreter. The police said none were available and proceeded to interrogate Defendant, ultimately eliciting a confession. At a suppression hearing, Defendant argued that the interrogation was improper because the police should have waited for an interpreter. The trial court denied Defendant’s motion to suppress, citing testimony from the victim about Defendant’s ability to speak and understand English. The Court of Appeals held that the trial court’s finding of fact would not be disturbed on appeal because there was sufficient evidence to support its implicit finding that Defendant understood the Miranda warnings. Justice Wollheim, in his concurring opinion, cautioned that the ability to understand and participate in a conversation in English and being able to fully understand legal proceedings should be considered. Affirmed.

[Summarized by William A. Chambers]

State v. Tabib

Decided: 11/17/2010

Case No.: A140965

Ortega, J. for the Court; Landau, P.J. & Sercombe, J.

<http://www.publications.ojd.state.or.us/A140965.htm>

CRIMINAL PROCEDURE - The trial court erred in suppressing evidence obtained after Sheriff’s deputies entered a residence without a warrant

because an objective basis for the deputies' belief that there was a true emergency existed, thereby justifying entry pursuant to the emergency aid doctrine.

Sheriff's Deputy Brewster responded to Defendant's residence after receiving a 9-1-1 call indicating sounds of someone being hit coming from the residence. After twenty minutes of knocking on the door and hearing some sounds of movement in the house, Brewster thought someone might be in danger, so he forced entry. Brewster found evidence of a crime following his entry. The trial judge suppressed the evidence, finding that Brewster's subjective belief that a true emergency existed was not objectively reasonable. On appeal, the Court of Appeals found Brewster's belief was objectively reasonable because the facts at the time he entered indicated physical violence inflicted on a person and because the potential victim and perpetrator were still in the house. Subsequent facts indicating that a true emergency did not exist were irrelevant. Since Brewster's belief that a true emergency existed was objectively reasonable, the entry was justified under the emergency aid doctrine. Reversed and remanded.

[Summarized by Tyler Reid]

State v. Wibbens

Decided: 11/17/2010

Case No.: A140035

Sercombe, J. for the Court; Landau, P.J. & Ortega, J.

<http://www.publications.ojd.state.or.us/A140035.htm>

EVIDENCE – Under the balancing test of State v. Johnson, admission of a hearsay statement critical to the state's case of violation of probation conditions violates the defendant's right to confrontation under the Due Process clause of the Fourteenth Amendment to the United States Constitution when the statement is based on sensory perception, is not sworn to under oath, does not fit a hearsay exception, is not corroborated, and when the state provides no explanation for the unavailability of the declarant.

Defendant was charged with using alcohol in violation of the conditions of his parole. The state's only evidence at the probation hearing was the testimony of a probation officer that a sheriff's deputy had said, over the phone, that Defendant smelled like alcohol and seemed intoxicated. The trial court admitted this testimony. On appeal, Defendant argued that the admission of the statement violated his right to confrontation under the Due Process clause of the Fourteenth Amendment to the United States Constitution. Using the balancing test of State v. Johnson, 221 Or App

394, the Court of Appeals held that, although the statement was indispensable to the state's case, all other factors weighed in favor of Defendant. First, the state gave no reason for why the deputy declarant could not be present. Second, the hearsay statement bore no indicia of reliability, as the deputy's statement was not sworn under oath, the statement was based on sensory perception and thus subject to errors of judgment, the statement did not fit a hearsay exception, and the statement was uncorroborated. Thus, the admission of the statement violated Defendant's right to confrontation. Reversed and remanded.

[Summarized by Kathleen Thomas]

Lamb v. Coursey

Decided: 11/17/2010

Case No.: A140795

Landau, P.J. for the Court; Ortega, J. & Sercombe, J.

<http://www.publications.ojd.state.or.us/A140795.htm>

POST-CONVICTION RELIEF – Criminal trial counsel is not constitutionally adequate if counsel failed to raise a valid statute of limitations defense against a charge of attempted rape.

Defendant was charged with two counts of sexual abuse and one count of attempted rape in the first degree. Defendant brought action for post-conviction relief on the grounds that his criminal trial counsel was inadequate for failing to raise a statute of limitations defense for the attempted rape charge. The State asserts that since there is no express statute of limitations for attempted rape, the statutory provision for rape in the first degree holds. The trial court found for the State but the Court of Appeals disagreed and found that legislative intent could not be interpreted to imply an inclusion for attempted crimes. The Court held that a reasonable lawyer would have raised the defense successfully and the defense would have had a tendency to affect the verdict. Reversed and remanded.

[Summarized by Chasen Cunitz]

Niehus v. Belleque

Decided: 11/17/2010

Case No.: A142493

Brewer, C.J. for the Court, and Edmonds S. J.

<http://www.publications.ojd.state.or.us/A142493.htm>

POST-CONVICTION RELIEF – Trial counsel acted reasonably when he failed to object to hearsay statements that he concluded were admissible under OEC

803(26).

Niehus was charged with first-degree kidnapping, second-degree assault, and unlawful use of a weapon for attacking his girlfriend (R). At trial, the officer who responded to the scene testified that on the night in question, R told the officer that Niehus had assaulted her, threatened her with a knife and when she left the apartment they shared, dragged her back inside. When R testified, she recanted her statement and said that she had lied to the officer about the assault and caused her own injuries in an effort to get Niehus in trouble. Other witnesses to the attack contradicted R's trial testimony. Niehus's attorney did not object to the officer's testimony regarding R's original statement. Niehus was convicted on all counts and the Court of Appeals affirmed. Niehus then sought post-conviction relief arguing that his attorney acted unreasonably when he failed to object to the officer's testimony. Trial counsel testified that he did not object to the hearsay statements because he concluded that they were admissible under OEC 803(26), which permits victim's reports of domestic violence that have sufficient indicia of reliability and are made to a peace officer. The post-conviction trial court denied relief and Niehus appealed. The Court of Appeals held that under the circumstances, trial counsel acted reasonably and R's later recantation did not defeat the reliability of her original statement to the officer. Affirmed.

[Summarized by Rena Jimenez-Blount]

Stahlman v. Mills

Decided: 11/17/2010

Case No.: A140450

Brewer, C.J. for the Court; Edmonds, S.J.

<http://www.publications.ojd.state.or.us/A140450.htm>

POST-CONVICTION RELIEF – Pursuant to the “escape clause” of ORS 138.510(3), a person’s reasonable failure to seek information is not relevant, if the information exists or is reasonably available.

Stahlman appeals a dismissal of a post-conviction action. Stahlman was incarcerated in a federal facility for 12 years. 11 years after entry of appellate judgment, Stahlman filed the post-conviction petition. Pursuant to ORS 138.510(3), the post-conviction court ordered Stahlman to show cause as to why the action was not filed within two years. Stahlman argued that due to the incarceration in a federal facility outside of Oregon, there was no access to Oregon statutes or case law, and the escape clause of ORS 138.510(3) should apply to extend the filing deadline. The post-conviction court rejected this argument. The Court of Appeals held that Stahlman had the right to access legal materials, under federal

regulations and Oregon administrative rules, and did not allege any effort to obtain these materials through the available administrative procedures. The Court reemphasized that the escape clause inquiry centers on whether the material “existed or was reasonably available to the petitioner”, and not on the reasonableness of a person’s failure to seek information. Affirmed.

[Summarized by Aaron Benjamin Girata]

Tatarinov v. Belleque

Decided: 11/17/2010

Case No.: A140859

Brewer, C.J. for the Court; Edmonds, S.J.

<http://www.publications.ojd.state.or.us/A140859.htm>

POST-CONVICTION RELIEF – A trial on stipulated facts is functionally different from a guilty plea for purposes of evaluating the constitutional adequacy of assistance of counsel.

Tatarinov appealed from a conviction on multiple counts of identity theft in a stipulated facts trial. Tatarinov argued that his defense counsel was constitutionally inadequate due to a failure to inform Tatarinov of the legal ramifications of a trial on stipulated facts and that the standard of review should be dictated by the standards applied to an inadequate counsel claim in relation to a guilty plea. The Court of Appeals found that the record supported a finding that Tatarinov was aware of the legal consequences of his actions and that a trial on stipulated facts, while similar to a guilty plea, still involves the judge acting as a finder of fact and that Tatarinov received adequate counsel. Affirmed.

[Summarized by Paul Binford]

Walton v. Board of Parole

Decided: 11/17/2010

Case No.: A142414

Landau, P.J. for the Court; Ortega, J.; & Sercombe, J.

<http://www.publications.ojd.state.or.us/A142414.htm>

POST-CONVICTION RELIEF – Upon determining that a defendant is likely to be rehabilitated after his minimum sentence and is therefore eligible for parole, the Board of Parole and Post-Prison Supervision is not required to set a firm release date under ORS 162.105, the statute originally governing the defendant’s sentence, but is allowed to follow ORS chapter 144’s procedure for setting a projected release date.

Defendant was convicted of aggravated murder and related charges in 1987 and sentenced under ORS 163.105 to life in prison with a minimum of 30 years without the possibility of parole. After 20 years, the Board of Parole and Post-Prison Supervision (“Board”) conducted a rehabilitation hearing, found that Defendant could likely be rehabilitated, and set a projected release date after his required 30 years. On appeal, Defendant argued that ORS 163.105 governs his sentence and not ORS 144.125, which was used by the Board, and so the Board was required to set a firm, rather than projected release date. ORS 163.105 allows a defendant to become eligible for parole but does not impose rules regarding how and when parole should be granted. The Court of Appeals held that ORS 163.105 controls only when in conflict with ORS chapter 144, which did not occur here. The Board was therefore not required to set a firm release date upon determining that Defendant is likely to be rehabilitated after his minimum sentence and is eligible for parole. Affirmed.

[Summarized by Emily Reid]

State v. Nguyen

Decided: 11/17/2010

Case No.: A138986

Ortega, J. for the Court; Landau, P.J. & Schuman, J.

<http://www.publications.ojd.state.or.us/A138986.htm>

STALKING PROTECTIVE ORDER – In a prosecution for violation of a stalking protective order, threatening messages sent to the victim must contain an unequivocal intent to carry out a threat of imminent and serious personal violence in order to be admissible.

Defendant was convicted of violating a stalking protective order. At trial, the state offered evidence in the form of two texts messages sent by Defendant to Victim. Defendant moved for a judgment of acquittal, which the trial court denied. After conviction, Defendant appealed, arguing that the text messages were protected speech under Article I, section 8 of the Oregon Constitution. The state argued that Defendant’s speech could be restrained in an effort to protect society and that the messages contained an imminent threat to the victim. The Court of Appeals reiterated the rule that, to survive a protected speech challenge, expressive conduct prohibited by a stalking protective order must contain an unequivocal threat objectively likely to be followed by an unlawful act. The Court agreed with Defendant, holding that the messages did not express an unequivocal intent to carry out the threats. Accordingly, the Court determined that the trial court erred in denying defendant’s motion for judgment of acquittal. Reversed.

[Summarized by Sean M Neary]

State v. Bentley

Decided: 11/23/2010

Case No.: A140594

BREWER, C.J., Haselton, P.J., Armstrong, J.

<http://www.publications.ojd.state.or.us/A140594.htm>

CRIMINAL LAW – Prior attendance in an alcohol treatment program as required as a condition of probation are considered “similar alcohol programs” under the Oregon DUII diversion statute.

Defendant was convicted of driving under the influence of intoxicants. Prior to trial, Defendant moved to enter diversion, which the trial court denied. Defendant appeals the denial of diversion, arguing that he was diversion eligible in that his prior alcohol treatment did not disqualify him from diversion. The State argued that Defendant is not eligible for diversion because of his prior participation in alcohol treatment. The State argued that since the treatment was a condition of probation, the treatment was court ordered, making Defendant ineligible for diversion. The Court agreed with the State, determining that Defendant entered alcohol treatment as part of probation to avoid severe adverse consequences. Accordingly, the Court affirmed the conviction and trial court’s decision denying Defendant entry into diversion.

[Summarized by Sean M Neary]

State v. Fish

Decided: 11/24/2010

Case No.: A139664

Brewer, C. J. for the Court; Haselton, P.J; & Armstrong J.

<http://www.publications.ojd.state.or.us/A139664.htm>

CRIMINAL LAW – Evidence of a threat made by a criminal defendant about a victim in an assault case does not constitute an “initial showing” of bias and is not harmless.

Defendant was convicted of assault and menacing. He appealed, arguing that the trial court erred in admitting evidence of a threatening statement he made about a victim during trial. The State argued that the challenged evidence was its “initial showing” of bias and therefore could not have been excluded irrespective of its prejudicial effect. The State additionally argued that the challenged evidence was “relatively innocuous.” The Court of Appeals ruled that the trial court erred in admitting the challenged evidence and further ruled that, despite the State’s assertions to the contrary, the erroneous admission of evidence

was not harmless. The Court explained that the challenged evidence did not constitute an “initial showing” of bias, the existence of which might otherwise have gone unnoticed by the jury. The Court also rejected as self-contradicting the State’s argument that the disputed evidence was unlikely to have affected the verdict. Reversed and remanded.

[Summarized by Kevin M Moore]

State v. Williams

Decided: 11/24/2010

Case No.: A141136

Haselton, P.J. for the Court; Brewer, C.J. & Armstrong, J.

<http://www.publications.ojd.state.or.us./A141136.htm>

CRIMINAL LAW – Reasonable minds may differ as to whether ORS 137.101 limits the amount of victim’s pecuniary damages to those demonstrated on the record.

Defendant appeals the trial court's imposition of a compensatory fine of \$150, under ORS 137.101. Defendant argues that the record did not establish that the victim incurred pecuniary loss of at least \$150. Defendant contends that the Court of Appeals should review that error as an error of law apparent on the face of the record. The Court of Appeals held that the error is not an error of law apparent on the face of the record, as reasonable minds may differ as to whether ORS 137.101 limits the amount of victim’s pecuniary damages to those demonstrated on the record. Affirmed.

[Summarized by Terisa Page]

State v. Levias

Decided: 11/24/2010

Case No.: A138429

Ortega, J. for the Court; Landau, P. J. & Schuman, J.

<http://www.publications.ojd.state.or.us./A138429.htm>

CRIMINAL PROCEDURE - When an officer approaches a person on a sidewalk late at night in a high-crime area and questions the person about criminal drug activity, when the officer’s patrol car’s overhead lights are flashing and when the officer calls for back up, a stop has occurred and such stop is unlawful if not based on a reasonable suspicion of criminal activity.

Defendant was convicted of possession of heroin and cocaine. An officer approached Defendant when Defendant was walking down the sidewalk in a high-crime area and asked if he had a crack pipe. Defendant said he did

not, but consented to a search. Defendant appealed his conviction, claiming the trial court improperly denied his motion to suppress. Defendant argued that the circumstances surrounding the encounter made it a stop under Article I, section 9 of the Oregon Constitution. The state argued that there was no stop, just a conversation, and that Defendant voluntarily consented to the search. The Court of Appeals held that Defendant was “stopped” because he subjectively believed that he was the under criminal investigation and therefore felt restricted in his freedom of movement, and because this subjective belief was objectively reasonable. The Court held that the stop was unlawful because it was not based on a reasonable suspicion of criminal activity. Thus, the trial court’s denial of Defendant’s motion to suppress was error. Reversed.

[Summarized by Alisa Ray]

State v. Roberts

Decided: 11/24/2010

Case No.: A136881

Haselton, P.J. for the Court; Brewer C.J. & Armstrong, J.

<http://www.publications.ojd.state.or.us/A136881.htm>

CRIMINAL PROCEDURE – When an individual who is not in custody evokes his right to speak with an attorney, police may later question the individual in custody without an attorney if they tell him his rights at the beginning of the questioning and he waives those rights.

Defendant was convicted on multiple counts of first degree kidnapping. During an encounter with police in the afternoon, Defendant was read his Miranda rights, told that he was not under arrest and did not have to speak with the police. At that time, Defendant invoked his right to speak with an attorney. Later in the day, Defendant was arrested, taken to the police station and re-read his rights. In a recorded interview, Defendant made inculpatory statements. Defendant appealed the trial court’s denial to suppress inculpatory statements was an error, because he had previously invoked his right to counsel. Defendant was not in custody when he originally invoked his right to counsel; he was not restrained, in familiar surroundings, told he was not under arrest and told he was free to leave. The Court of Appeals held that these factors establish that Defendant was not in custody or under compelling circumstances so the questioning at that time was not custodial interrogation so the police could interrogate when he was in custody when he waived his right. Reversed and Remanded on other grounds.

[Summarized by Matthew Brewer]

State v. Skaggs

Decided: 11/24/2010

Case No.: A139834

Brewer, C.J. for the Court; Haselton, P.J.; & Armstrong, J.

<http://www.publications.ojd.state.or.us/A139834.htm>

CRIMINAL PROCEDURE – The trial court did not err in denying Defendant's motion for acquittal on the sentencing departure factor that he had been persistently involved in similar criminal conduct of theft, even though he had not committed a theft for fourteen years.

Defendant was convicted of first-degree theft in 2008. At his sentencing hearing the State asked for a departure sentence based on Defendant's seven previous theft and burglary convictions, the most recent of which was in 1994. Defendant moved for acquittal on the sentencing departure and the trial court denied his motion. The Court found that persistency of criminal conduct is a factual issue that should be determined by the trier-of-fact. In making its determination, the trier-of-fact must establish either the continuance or recurrence of the particular criminal conduct. It does not need to establish both. The Court found that although Defendant's conduct was not continuous, a reasonable trier-of-fact could find that it was recurrent, notwithstanding the fourteen year lapse between convictions. Affirmed.

[Summarized by Tyler Reid]

Dept. of Human Services v. D.M.T.

Decided: 11/24/10

Case No.: A142473

Ortega, J. for the Court En Banc; Concurrence, Brewer, C.J.; Dissent,

Wollheim, J. & Sercombe, J.

<http://www.publications.ojd.state.or.us/A142473.htm>

JUVENILE LAW - Termination of parental rights under ORS 419B.504 is appropriate if, at the time of the termination proceeding, (1) the parent has engaged in conduct or is characterized by a condition seriously detrimental to child, (2) given this conduct or condition, it is improbable the child may be integrated into the parent's home within a reasonable time, and (3) termination is in the best interest of the child.

Father appealed a judgment terminating his parental rights to his son. Among other grounds, the juvenile court found that Father is unfit under ORS 419B.504 because of criminal conduct. The juvenile court found that, under the conditions of Father's post-prison supervision ("PPS"), Father would not have been permitted to have contact with his child. The Court of Appeals affirmed on three points. First, the Court held that, because Father was convicted of first-degree encouraging child sexual abuse and

was subject to a PPS condition restricting any contact with minors, the father is under a condition that is seriously detrimental to the child. Second, Father's condition is unlikely to change and will continue to prevent him from providing a stable home to the child within a reasonable period of time. Finally, the Court found that termination was the best interest of the child because, as a result of the child's strong bond with and stability under the care of his current care provider who wishes to adopt him, the child's mental health has improved. Affirmed.

[Summarized by Lauren Robertson]

State v. Moore

Decided: 11/24/2010

Case No.: A138866

Landau, P.J. for the Court; Schuman, J.; & Ortega, J.

<http://www.publications.ojd.state.or.us/A138866.htm>

POST-CONVICTION RELIEF – In a criminal case where the victim may be entitled to a civil remedy the court may impose a fine, part of which can go to compensate the victim, but has no authority to impose a separate compensatory fine.

Defendant was convicted of first-degree theft and unauthorized use of a vehicle. Defendant's car was stolen. His insurance company paid off his lien then listed itself as owner of the car. Later, Defendant contacted Infinity Insurance Company (Infinity), the sister company of his insurance company, claiming he again had the vehicle, and wanted the title in his name. Infinity complied, unaware the car had been stolen and paid off. Defendant refused to repay the lien amount or return the car. At trial, Infinity paid for several witnesses to travel to Oregon to testify. The trial court imposed a fine of \$100 and a separate \$1,455.36 compensatory fine payable to Infinity. When the court imposes a fine in a criminal case where the victim may a civil remedy, any portion of that fine can go to compensate the victim. The Court of Appeals held that the trial court could raise amount of the initial fine, but that it had no authority to impose a separate compensatory fine. Reversed and remanded for resentencing; otherwise affirmed.

[Summarized by Emily Reid]

State v. Medley

Decided: 11/24/2010

Case No.: A141363

Brewer, C.J. for the Court; Haselton, P.J.; Armstrong, J.

<http://www.publications.ojd.state.or.us/A141363.htm>

SENTENCING – Pursuant to ORS 161.067(1), Oregon’s “anti-merger” statute, the crimes of unlawful entry into a motor vehicle, ORS 164.272, and attempted first-degree theft, ORS 164.055(1), do not merge into a single conviction.

Defendant appeals a refusal of two convictions being merged. Defendant was convicted of attempted first-degree theft and unlawful entry into a motor vehicle. At sentencing, Defendant requested the convictions be merged. The trial court refused and Defendant assigns error to this refusal. Defendant challenged the ruling under the third requirement of ORS 161.067(1), that the “‘statutory provisions’ must require ‘proof of an element that the others do not.’” The Court of Appeals held that the entry element, of unlawful entry into a motor vehicle, is an element separate and distinct from any element of attempted first-degree theft. Additionally, the elements of value and intent to deprive another of property, of attempted first-degree theft, are not elements of unlawful entry into a motor vehicle. Ergo, the two statutes have different elements and merger was properly denied. Affirmed.

[Summarized by Aaron Benjamin Girata]