

**OREGON SUPREME COURT SUMMARIES
APRIL 2010**

State v. Lennon

Decided: 4/8/2010

Case No.: S057150

Linder, J. for the Court

<http://www.publications.ojd.state.or.us/S057150.htm>

CRIMINAL LAW ¶ **A sentencing court may impose a departure sentence by inferring a failure to deter from an extensive criminal record, and a finding of a separate malevolent quality is not necessary.**

Defendant was convicted of unlawful delivery of a controlled substance. Based on a presentence report cataloguing 37 offenses by Defendant over two decades without significant lapse of time between criminal conduct, the sentencing court imposed an 80 month durational departure sentence, finding Defendant had not been deterred from criminal activities.

Defendant appealed, the Court of Appeals reversed, the Supreme Court reversed and remanded and the Court of Appeals adhered to its prior decision. On appeal, the state argues that ¶failure to deter¶can be inferred from an extensive criminal record and the state need not prove a ¶malevolent quality.¶The Supreme Court held that a fact finder may infer from an extensive criminal history that past sanctions have not had a sufficient deterrent effect. Additionally, the Court held that a criminal record does not have to reflect a separate malevolent quality in the defendant in order to infer a failure to deter. The decision of the Court of Appeals is reversed. The circuit court judgment is affirmed.

[Summarized by Alisa Ray]

State v. Schoen

Decided: 4/14/2010

Case No.: S057652

Balmer, J. for the Court.

<http://www.publications.ojd.state.or.us/S057652.htm>

CRIMINAL LAW - ¶Tampering¶as defined in the criminal mischief statute requires conduct that alters, rearranges, or changes the effected property.

Defendant was lawfully arrested and placed in the back of a police car, but then began kicking the door. Defendant was convicted of, among other crimes, criminal mischief in the third degree. The State offered no

evidence regarding any damage caused by the Defendant. Defendant moved to acquit regarding the criminal mischief count, which the trial court denied. The appellate court affirmed the trial court's decision. Defendant appealed to the Supreme Court of Oregon arguing that he did not "tamper" within the meaning of the criminal mischief statute because he did not alter the existing condition of the property. The State argued that the statute prohibits any act in which a person improperly meddles with another person's property. The Supreme Court held that the word "tampering" as used in the criminal mischief statute requires conduct that alters, rearranges, or changes property. Since the State failed to introduce evidence that Defendant "tampered" with the car, the motion to acquit on the criminal mischief count should have been granted. Reversed and remanded.

[Summarized by Sean M. Neary]

OREGON COURT OF APPEALS SUMMARIES, APRIL 2010

State v. Garner

Case No.: A136585

<http://www.publications.ojd.state.or.us/A136585.htm>

AREA OF LAW: CRIMINAL LAW

Holding: (LANDAU, P.J.) The prosecutor's reference to defendant's refusal to perform field sobriety tests did not amount to the extreme prejudicial effect necessary to require a mistrial, even though the absence of field sobriety tests had been deemed inadmissible prior to trial.

Defendant was charged with driving under the influence of intoxicants (DUII). During pre-trial motions, the court ruled the evidence related to the absence of field sobriety tests were inadmissible. During her opening statement, the prosecutor told the jury that defendant refused to perform a sobriety test at the scene of the stop. Defendant moved for a mistrial and furthermore, argued that Article I, Section 12, of the Oregon Constitution barred a retrial as double jeopardy. The trial court found for the defendant and the State appealed. The issue on appeal was whether the trial court correctly precluded a retrial as a result of the prosecutor's misconduct being so prejudicial it was unable to be cured by other means short of mistrial. The Court of Appeals held that the trial court erred in dismissing the charge because the prejudicial effect of the prosecutor's comment did not require a mistrial. The harmful effect could have been cured by proper instructions or the prosecutor's clarification. Reversed and remanded.

[Summarized by April Denton]

State v. Alvarez

Case No.: A137300

<http://www.publications.ojd.state.or.us/A137300.htm>

AREA OF LAW: CRIMINAL PROCEDURE

HOLDING: (Opinion by SCHUMAN, P.J.) - Evidence obtained during a warrantless search pursuant to an unlawful seizure by law enforcement is inadmissible even if the suspect consents to the search.

Oregon State Troopers stopped defendant for a traffic violation, gave him a warning and told him that he was free to leave. After returning defendant's license, the officers asked permission to search the vehicle. Defendant consented and the officers recovered drug paraphernalia and methamphetamine residue. The trial court denied a motion to suppress the evidence. The Court of Appeals held that the evidence should have been suppressed since it was the result of a warrantless search following an unlawful seizure. Under Oregon law, a person is "seized" by law enforcement if he has a reasonable subjective belief that his freedom of movement is restricted. The Court held that while the original traffic stop was legal, the stop was unlawfully extended when the officers, without probable cause, asked for defendant's consent to the search the car. Because defendant's consent and the subsequent search were a result of the unlawful stop, the evidence should have been suppressed. Reversed and remanded.

[Summarized by Paul Binford]

State v. Daniels

Case No.: A136819

<http://www.publications.ojd.state.or.us/A136819.htm>

AREA OF LAW: CRIMINAL PROCEDURE

HOLDING: (Opinion by SCHUMAN, J.) - Knowledge from an affiant officer's training and experience can provide a sufficient basis for issuing a search warrant where that knowledge is neither obvious nor elaborately technical.

Defendant was convicted of encouraging child sexual abuse. After obtaining a search warrant, police officers found videos in defendant's home, which were used as evidence at trial. The trial court denied defendant's motion to suppress this evidence, finding that the affiant officer had sufficient

training and experience to believe that defendant would have retained possession of video evidence of the abuse had it ever been created. On appeal, defendant argued that the warrant lacked sufficient facts to justify the search. The Court of Appeals agreed with the trial court's findings the affiant officer's relative experience and training on matters related to child sexual abuse created probable cause because such abusers routinely keep such videos. The Court held that the affiant officer's knowledge provided sufficient facts upon which the magistrate could rely to issue the search warrant. Affirmed.

[Summarized by Nicholas Castellano]

State v. Deneen

Case No.: A137496

<http://www.publications.ojd.state.or.us/A137496.htm>

AREA OF LAW: CRIMINAL PROCEDURE

HOLDING: (Opinion by ORTEGA, J.) - A stop does not occur when, after an officer tells a suspect that he or she is free to go, the officer asks if he can speak again with the suspect and the suspect discloses criminal behavior to the officer.

Defendant was convicted of possession of methamphetamine. Officer Gandy stopped defendant for riding a bicycle at night without a light. Gandy gave defendant a warning, and then told him he was free to go. After defendant rode a block further, Gandy noticed defendant was acting nervous. Gandy asked to speak to defendant again and asked him if he had any drugs. Defendant then produced a bag of methamphetamine. The trial court denied defendant's motion to suppress, concluding that the subsequent contact was not an extension of the earlier stop. Defendant appealed. The Court of Appeals held that defendant was not unconstitutionally stopped when Gandy asked to speak with him after the initial stop, because this request would not support an objectively reasonable belief that Defendant was not free to go. Accordingly, the evidence was validly obtained. The Court also held that defendant's statement that he possessed drugs gave the officer reasonable suspicion to justify any subsequent stop. Affirmed.

[Summarized by Sean M. Neary]

State v. Klein

Case No.: A136435

<http://www.publications.ojd.state.or.us/A136435.htm>

AREA OF LAW: CRIMINAL PROCEDURE

HOLDING: (Opinion by Armstrong, J.) Regardless of the duration of the stop, an officer unconstitutionally extends a stop when he makes, without reasonable suspicion, an inquiry unrelated to the stop.

Defendant was convicted for possession of methamphetamine, following a traffic stop. Defendant was stopped for failing to use an arm signal to indicate a turn and riding his bicycle without reflective lights at night. The officer noticed defendant carrying a large ring of keys and, after running the warrant check, found that defendant was on probation for burglary. Prior to inquiring about the keys, the officer asked defendant if he had any drugs and if he would consent to a search. Defendant declined and then the officer asked him about the keys. The officer inquired again whether defendant had any drugs. Defendant responded that he had marijuana, "a little bit of shit," and raised his arm. The officer interpreted defendant's answer to be slang for methamphetamine and his gesture as consent to be searched. The entire encounter lasted less than the time it would take to complete a stop and issue a citation. At trial, defendant moved to suppress the drugs because he was illegally stopped and involuntarily searched. The trial court denied the motion and defendant was convicted upon stipulated facts. On appeal, defendant alleged that the trial court erred in admitting the drugs, because the stop and search was illegal. The Court of Appeals held that an officer unconstitutionally extends a stop when he makes, without reasonable suspicion, an inquiry unrelated to the stop, regardless of the duration of the stop. Accordingly, the trial court erred because the officer did not have reasonable suspicion to believe defendant possessed drugs and the questioning was not related to the stop. Reversed and remanded.

[Summarized By Mercedes Rhoden]

State v. Lovern

Case No.: A137247

<http://www.publications.ojd.state.or.us/A137247.htm>

AREA OF LAW: EVIDENCE

HOLDING: (Opinion by HASELTON, P. J.) "A physician's expert testimony at trial is irrelevant if the testimony did not tell the jury anything that it was not equally capable of determining on its own."

In May 2007, defendant's 12 year-old daughter (complainant) alerted authorities that defendant had sexually abused her. Defendant was arrested at the family's home. Immediately after the police left, complainant admitted to her mother that she had lied about being sexually abused by her father. A physician evaluated complainant and found no conclusive

evidence of sexual abuse. However, at trial, the physician testified that, in her expert opinion, complainant had been sexually abused. Defendant was convicted of 16 counts of sexual abuse in the first degree. On appeal, defendant argued that the physician's testimony was inadmissible because it was based solely on complainant's statements, with no corroborating physical evidence. The Court of Appeals held that because the physician's diagnosis was based upon the physician's assessment of the complainant's credibility, an area reserved for the jury, admission of the diagnosis was plain error. Reversed and remanded.

[Summarized by William A. Chambers]

State v. Merrimon

Case No.: A139106

<http://www.publications.ojd.state.or.us/A139106.htm>

AREA OF LAW: EVIDENCE

HOLDING: (Opinion by HASELTON, P.J.) "Where a defendant is charged with offenses that turn on the credibility of the complainant, the Court will have discretion to review and correct error for an erroneous admission of an expert's diagnosis due to the substantial danger such an assessment may prejudicially influence the jury.

Defendant was convicted of one count of sexual abuse in the first degree and one count of endangering the welfare of a minor. On appeal, defendant contends that the trial court should not have admitted testimony of a medical expert, who diagnosed the child's complaint as "highly concerning of sexual abuse," because that assessment was made without the confirmation of any physical evidence. The Court of Appeals initially found that it had discretion to correct plain error and that the absence of physical evidence in the medical expert's diagnosis satisfies the requirement for plain error. Although the State argued that the error was not sufficiently grave so as to warrant court discretion to correct such error, the Court disagreed because 1) the implicit conclusion of a credible expert creates a substantial risk that the jury will defer to the expert's conclusion; 2) the case turned on the minor's credibility, and therefore potential prejudice was likely to occur based on the diagnosis; and 3) the result of a retrial without the diagnosis is far from certain, although the State argues such retrial would result and that the Court should avoid unnecessary retrials. Accordingly, the Court held that an exercise of discretion must be used to correct the error in the present case. Reversed and remanded.

[Summarized by Elliot M.S. Yi]

State v. Rowland

Case No.: A140107

<http://www.publications.ojd.state.or.us/A140107.htm>

AREA OF LAW: SENTENCING

HOLDING: (Opinion by LANDAU, P.J.) ¶ A court must enter a guilty plea against a defendant who does not complete the obligations of a diversion agreement until after the diversion period ends.

Defendant was charged with DUII and reckless driving. Thereafter, defendant entered into a diversion agreement that would allow him to have the charges dismissed if he complied with all conditions of the agreement. The conditions of the diversion agreement included payment of the diversion filing fee, payment and attendance at an evaluation, and payment and attendance of a treatment program. Defendant failed to fully comply with the agreement until after the diversion period ended. The trial court found good cause for defendant's tardiness and dismissed the charges with prejudice. The State appealed and argued that under ORS 813.225(7)(b) the court was required by statute to enter a judgment of conviction. The Court of Appeals agreed with the State and ruled that the statute unequivocally provides that if the defendant does not complete the obligations required by the diversion agreement, then the court shall enter a guilty plea and sentence the defendant without exception. Reversed and remanded.

[Summarized by William Boaz]

State v. Harbick

Decided: 4/14/2010

Case No.: A136427

Roseblum, J. for the Court; Schuman, P.J.; and Wollheim, J.

<http://www.publications.ojd.state.or.us/A136427.htm>

CRIMINAL LAW ¶ A reviewing court will not reverse a finding of guilty except for insanity if the defendant did not raise an insanity defense if reversal would require the reviewing court to look outside the record and when the objection at trial was not sufficient to put the trial court on notice of a potential error.

Defendant was charged with first-degree criminal mischief and unlawful use of a weapon. After both on and off record discussions, the trial court found Defendant competent to proceed to trial. Defendant offered a letter in his defense, but did not raise a defense of insanity. The trial court found Defendant guilty except for insanity. Defendant objected to that finding, but without specifying to which finding he objected. On appeal,

Defendant argues that the trial court erred in finding him guilty except for insanity when he never raised an insanity defense. The Court of Appeals held that, to find the trial court had committed plain error of law, the Court would be impermissibly required to go outside the record to determine whether the trial court considered a defense that Defendant did not raise. The Court also held that the objection was not preserved on the record because the vague objection to "that finding" was not specific enough to put the trial court on notice of a potential error. Affirmed.

[Summarized by Kimberly Morton]

State v. Mayes

Decided: 4/14/2010

Case No.: A138206

Rosenblum, J. for the Court; Sercombe, P.J.; & Breithaupt, J.

<http://www.publications.ojd.state.or.us/A138206.htm>

CRIMINAL LAW ¶ **When a corrected judgment does not impose a different sentence on defendant, but merely corrects a clerical error, the court is under no obligation to empanel a jury or provide the defendant an opportunity to be heard.**

Defendant was convicted of second degree assault and felony murder. A first corrected sentencing judgment was entered, describing the assault sentence as "presumptive." A second corrected judgment was entered, describing the assault sentence as a departure sentence. Defendant appealed, claiming the second corrected judgment changed his second degree assault conviction from a "presumptive" sentence to a departure sentence without a jury and without allowing him to be personally heard at the judgment hearing. The Court of Appeals held the correction to be a clerical correction because the original "presumptive" sentence was actually a "departure" sentence that had been mislabeled in the judgment and first corrected judgment. Furthermore, the corrected judgment did not change the type and duration of the sentence. The Court also held that, because the change did not reflect an error of law, and because no new sentence was imposed, the court did not have to empanel a jury or provide Defendant the chance to be heard. Affirmed.

[Summarized by Jessica L. Johnson]

State v. Medina

Decided: 4/14/2010

Case No.: A13796

Schuman, P.J. for the Court; Brewer, C.J.; & Riggs, J.

<http://www.publications.ojd.state.or.us/A137956.htm>

CRIMINAL LAW ¶ **A court error in sentencing, not preserved in lower court, can still be remanded to the lower court, at the discretion of the Court when it is not certain that the trial court would impose the same aggregate sentencing on remand and when the interest of justice would be served by remand.**

Out of a single incident of road rage, Defendant was convicted of several crimes, five of which involved a firearm. The trial court sentenced Defendant to 60 months for two of the firearm convictions, to run concurrently with each other and consecutive to a 90 month sentence for attempted murder. On appeal, Defendant argues, and the state concedes, that the trial court erred because multiple minimum sentences cannot be imposed under Oregon law when a single trial results in convictions of more than one firearm felony. Although Defendant did not preserve the error at trial, he urged the Court of Appeals to consider the error ¶ plain error. ¶ The Court of Appeals held it could exercise its discretion in finding plain error because there was no indication from the trial that it would impose the same sentence on remand. The Court also held that this error could be corrected on with minimum expenditure of judicial time and resources and it was therefore in the interest of justice to remand. Reversed and remanded for resentencing.

[Summarized by Omar Nur]

State v. Petersen

Decided: 4/14/2010

Case No.: A137490

Brewer, C.J. for the court; Wollheim, P.J. and Breithaupt, J.

<http://www.publications.ojd.state.or.us/A137490.htm>

CRIMINAL LAW ¶ **A person may be convicted of first-degree official misconduct when they act with the ¶ intent to obtain a benefit ¶ whether or not that benefit is obtained.**

Defendant worked as a police dispatcher. Dispatcher's business calls are recorded. Defendant's husband called her on her dispatcher business line to report that another dog had attacked their dog, and that he had shot the animal with a blunt-tipped arrow that remained lodged in the dog. Defendant relayed this information to a Deputy in a manner that led him to presume the blunt-tipped arrow did not injure the attacking dog, which resulted in a slower initiation of an investigation because the Deputy thought he was responding to a ¶ nuisance call. ¶ Defendant's husband was convicted of dog abuse. Defendant was convicted of first-degree official misconduct and appealed on the grounds that no benefit was obtained. The Court of Appeals held that the intent to benefit, not attainment of benefit, is required by Oregon law. The Court of Appeals found the State

presented sufficient evidence that Defendant knowingly withheld the fact that the dog was injured, with the intent to mitigate her husband's culpability, thereby violating her duty to provide officers with complete information. Affirmed.

[Summarized by Aaron Benjamin Girata]

State v. Anthony

Decided: 4/14/2010

Case No.: A136945

Schuman, P.J. for the court; Wollheim, J. and Rosenblum J.

<http://www.publications.ojd.state.or.us/A136945.htm>

CRIMINAL PROCEDURE - On a case by case basis, hearsay evidence of a confession will be admitted on due process grounds if the corroboration requirement is satisfied through a detailed account related to the particulars that are peculiar to the crime in question.

Defendant was convicted of aggravated murder and felony murder based on acts committed in 1980, which the State charged him with in 2006. On appeal Defendant claimed that when the murders at issue were committed, the statute of limitations for aggravated murder was three years. Additionally, Defendant argued that the trial court erred in excluding a hearsay statement from a third party confessing to the murder. The Court of Appeals held that the legislature clearly intended an unlimited statute of limitations to apply to aggravated murder. The court reasoned that satisfaction of the corroboration requirement for hearsay evidence of a confession is a predicate for whether the evidence must be admitted on due process grounds, and must be evaluated on a case by case basis. The Court of Appeals further held that in light of the circumstances presented, the evidence was insufficient to warrant admission of the confession. Affirmed.

[Summarized by Lauren Robertson]

State v. Berringer

Decided: 4/14/2010

Case No.: A137186

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

<http://www.publications.ojd.state.or.us/A137186.htm>

CRIMINAL PROCEDURE - Probable cause exists when a law enforcement officer reasonably believes that, more likely than not, the suspect has committed an offense.

Defendant was pulled over for speeding by Deputy Sheriff Nashif. After

approaching the car, Nashif smelled marijuana and saw a digital scale in the car with marijuana residue on it. Upon questioning by Nashif, the Defendant produced a Physician's Statement from his doctor in California that recommended the Defendant use medical marijuana for his medical condition. Nashif then arrested the Defendant after searching the car and finding approximately two pounds of cannabis. At a pretrial hearing Defendant argued the evidence should be suppressed, because probable cause had dissipated upon Nashif's receipt of the Physician's Statement. Defendant further argued that under the Full Faith and Credit Clause and Privileges and Immunities Clause of the United States Constitution, his Physician Statement is valid in Oregon. The trial court denied Defendant's motion to suppress. Defendant pled guilty to unlawful possession of marijuana and reserved the right to appeal. On appeal, the Court held that Oregon could not enforce California's medical marijuana laws and that Oregon's medical marijuana laws did not violate Defendant's rights under the Full Faith and Credit and Privileges and Immunities Clause. Affirmed.

[Summarized by Ryan Kunes]

State v. Hays

Decided: 4/14/2010

Case No: A135729

Sercombe, J. for the Court; Brewer, C.J.; & vice Edmonds, P.J.

<http://www.publications.ojd.state.or.us/A135729.htm>

CRIMINAL PROCEDURE ¶ Results of a breath test obtained after consent was unlawfully obtained will not be suppressed when the arresting officer had probable cause to arrest and when the threat of dissipation of alcohol from the bloodstream may result in the loss of evidence.

Deputy Romans found Defendant sitting in the driver's seat, smelling of alcohol, with bloodshot, watery eyes, and a full beer can on the floor of his vehicle after a crash in a field. Romans administered the horizontal gaze nystagmus test and concluded that he had probable cause to arrest defendant for DUII. After Defendant declined to take any further tests, Romans stated he would obtain a search warrant for the blood and urine test; which prompted Defendant to consent to a breath test. On appeal of his conviction for DUII, Defendant claims the trial court erred in failing to suppress evidence of a chemical breath test, because his consent was unlawfully obtained. The Court of Appeals held that the need for a search warrant to obtain a chemical breath was excused because there was probable cause to arrest for DUII and because of exigent circumstances due to the immediate dissipation of alcohol from defendant's bloodstream. Therefore, the evidence was admissible even though Defendant's consent resulted from unlawful police actions. Affirmed.

[Summarized by Laura Franzen]

Smith v. Jester

Decided: 4/14/2010

Case No: A135360

Wollheim, P.J. for the court; Brewer, C.J.; & vice Edmonds, P.J.

<http://www.publications.ojd.state.or.us/A135360.htm>

JUVENILE LAW ¶ A circuit court does not have jurisdiction to consider a claim for relief under the post-conviction relief statutes from a juvenile jurisdictional judgment of the juvenile court.

Smith appealed a judgment of the Josephine County Circuit Court denying his ¶ Petition for Post-Conviction Relief.¶ The issue on appeal was whether the Josephine County Circuit Court had jurisdiction to consider a petition for post-conviction relief from a judgment of the juvenile court of Jackson County. The Court of Appeals held a circuit court can only review petitions by persons who are convicted of a crime and adjudication by a juvenile court is not a conviction of a crime or an offense.

Accordingly, the Court concluded that Smith was not convicted of a crime or offense; therefore, Josephine County Circuit Court did not have jurisdiction to consider the petition. Furthermore, pursuant to Oregon law, only the juvenile court can set aside or modify any order made by it. Vacated and remanded.

[Summarized by Jessica M. Nomie]

State v. Da Villa

Decided: 4/14/2010

Case No.: A136800

Wollheim, P.J. for the Court; Brewer, C.J., vice Edmonds P.J.

<http://www.publications.ojd.state.or.us/A136800.htm>

SENTENCING ¶ The Legislature may delegate authority to an administrative agency to develop sentencing guidelines where the legislature provided guiding standards and reserved the power to disapprove guidelines as it sees fit.

Defendant was convicted of murder and sentenced under the Uniform Sentencing Guidelines Grid Blocks. These guidelines were created by an administrative board that was appointed by the Legislature, to determine rules for sentencing. Defendant challenged the legislature's delegation to the administrative board as an unconstitutional assignment of power to the executive branch of government. The trial court agreed with Defendant and

altered his sentence. The State appealed the judgment. The Court of Appeals held that the guidelines were constitutional. The administrative board did not have power to enact the laws and was required to determine the sentencing guidelines within the parameters established by the legislature. As the legislature was still in control of approving the guidelines, there was no unconstitutional delegation of its authority to the executive branch of government. Reversed and Remanded for resentencing.

[Summarized by Kristen Bramble]

State v. Clay

Decided: 4/21/2010

Case No.: A126583

Haselton, P. J. for the Court; Armstrong, J, & Duncan, J.

<http://www.publications.ojd.state.or.us/A136583.htm>

CRIMINAL LAW ¶ Expert testimony diagnosing child abuse requires a physical examination and information beyond that which a jury could determine on their own.

Defendant appeals his conviction of two counts of sexual abuse in the first degree. Defendant allegedly abused ¶, ¶a juvenile, between 1998 and 2000. J told her family in 2006 and was evaluated at CARES, a child victim assessment center. At that time, J was interviewed, but not given a physical examination, because of the lapse in time since the alleged abuse. On appeal, Defendant argued the trial court erred when it admitted the expert diagnosis without the physical examination, because the evaluation was not based on CARES protocol and, therefore, was not scientific evidence. After Defendant's trial, the Oregon Supreme Court held in State v. Lovern and in State v. Merrimon that when an expert opinion tells the jury something they could determine alone, it is inadmissible. The Court of Appeals held that admission of the testimony without evidence from a physical examination was prejudicial and plain error. Reversed and remanded.

[Summarized by Stephanie Lind]

State v. Parker

Decided: 1/28/2010 ??

Case No.: A140048

Haselton, P. J. for the Court; Armstrong, J.; & Rosenblum, J.

<http://www.publications.ojd.state.or.us/A140048.htm>

CRIMINAL LAW ¶ To ¶participate¶in a diversion program under ORS 813.215(1)(e) requires one to take part by interactive involvement through sharing in an experience or activity with others, and does not include merely agreeing to enter into a program and failing to complete it.

Defendant, convicted of driving while under the influence of intoxicants, asserted that the trial court erred by finding him ineligible for diversion. On appeal, Defendant argued the trial court incorrectly found he had ¶participated¶in a rehabilitation treatment from a previous charge for possession of methamphetamine. Defendant claimed his agreement to enter into treatment, yet failure to show up for his appointments, does not qualify as ¶participation¶under the Oregon statute. The trial court found that merely agreeing to participate, regardless of follow-up, met the qualifications of ¶participation.¶The Court of Appeals held the term ¶participation¶requires interactive involvement, not just agreement and voluntary failure to complete the program. Under the Court's interpretation of ¶participation,¶Defendant qualified for diversion for his conviction of driving under the influence of intoxicants because he never engaged in interactive involvement with the diversion program. Reversed and Remanded.

[Summarized by Kimberly Morton]

State v. Maxie

Decided: 4/21/10

Case no.: A137338

Armstrong, J. for the Court; Haselton, P.J. & Deits, J.

<http://www.publications.ojd.state.or.us/A137338.htm>

CRIMINAL PROCEDURE ¶ An encounter between a police officer and a citizen does not amount to a ¶stop¶under the Oregon Constitution unless the citizen believes that his or her liberty or freedom of movement is restricted and that belief is objectively reasonable under the circumstances of the encounter.

Officer Pontius observed Defendant slumped in her car, parked along a residential street. Officer Pontius asked Defendant's for her driver's information. After finding her license was suspended, Officer Pontius obtained Defendant's consent to search her car, in which he found morphine and methamphetamine. The trial court denied Defendant's motion to suppress the evidence obtained from the search. On appeal, Defendant contends that Officer Pontius ¶stopped¶her without reasonable suspicion. The Court of Appeals held a ¶stop¶occurs under the Oregon Constitution when the person stopped believes that his or her liberty or freedom of movement has been restricted and this belief is objectively reasonable. The Court held that

Defendant's encounter was a "mere conversation" and not a "stop" because Officer Pontius did not instruct Defendant to remain in her car or wait for him to run a check on her information and therefore the evidence does not support a finding that a reasonable person would not have felt free to leave. Affirmed.

[Summarized by Ryan Kunes]

State v. Hamlett

Decided: 4/28/2010

Case No: A138809

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

<http://www.publications.ojd.state.or.us/A138809.htm>

CRIMINAL LAW- A required element of failure to perform the duties of a driver toward injured persons, ORS 811.705, is proof that the defendant was criminally negligent by failing to be aware of a substantial and unjustifiable risk that the other driver would be injured.

Defendant hit an oncoming motorcyclist's foot with his car as he turned left, but did not stop. Defendant was charged with failure to perform the duties of a driver toward injured persons under ORS 811.705. The trial court denied defendant's motion to include a jury instruction requiring the State to prove that he knew the motorcyclist was injured. The Court of Appeals held that, because ORS 811.705 is not in the criminal code, in order to dispense with culpable mental state, there must have been a clear legislative intent to do so. Because the statute's purpose of requiring a driver to render aid to another injured driver could not be effectuated without at least some awareness of injury, the legislature did not intend to preclude a culpable mental state. The Court held that ORS 811.705 requires proof that a person charged under the statute acted with criminal negligence, or failed to be aware of a substantial and unjustifiable risk that the other driver would be injured. Therefore, the state was not required to prove that Defendant knowingly failed to render aid to an injured driver. Affirmed

[Summarized by Kathleen Thomas]

State v. Lagrassa

Decided: 4/28/2010

Case No: A138223

Sercombe, P.J. for the court; Brewer, C.J. & Edmonds, P.J.

<http://www.publications.ojd.state.or.us/A138223.htm>

CRIMINAL LAW - A defendant is ineligible for diversion if he participated in a driving while under the influence of intoxicants diversion program or similar rehabilitation program within the previous 10 years.

Defendant appealed his conviction of one count of driving under the influence of intoxicants. The issue on appeal was whether the trial court erred when it refused Defendant's request to enter into a DUII diversion program. The Court of Appeals held that the trial court did not err because Defendant participated in a similar program within the previous 10 years. Accordingly, the Court of Appeals reasoned that participation in a drug and alcohol treatment program while on post-prison supervision is similar to a diversion program for purposes of the statute. The two programs are similar because they both are compelled by a government decision maker, they have the analogous function to diagnose and treat substance abuse and they both avoid the imposition of a more adverse consequence such as incarceration. Affirmed.

[Summarized by Jessica M. Nomie]

State v. Medinger

Decided: 4/28/2010

Case No.: A142025

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

<http://www.publications.ojd.state.or.us/A142025.htm>

CRIMINAL PROCEDURE ¶ When a person is handcuffed and placed in a police car after the concern for officer safety has passed, that person has been arrested and evidence obtained as a result of that arrest will be suppressed if the arrest is not supported by probable cause, and the government may not claim the evidence would have inevitably been discovered by an inventory search at an alcohol treatment facility.

A witness reported that a man wearing a gray hoodie and walking north on the road had just tipped over a vending machine at a hotel. After seeing Defendant walking south on the street wearing a gray hoodie, an officer handcuffed Defendant and drove him to the hotel, where the witness identified him. Another officer then arrested Defendant and discovered pay stubs belonging to two different people in his pockets. Defendant was charged with second degree burglary, identity theft, and third degree theft. The trial court granted Defendant's motion to suppress the evidence, finding he had been arrested without probable cause. On appeal, the state argued that Defendant had not been arrested and that the evidence would have been inevitably discovered by the inventory procedure at an alcohol treatment facility. The Court of Appeals held that Defendant was arrested once the officer handcuffed Defendant and placed him in the patrol car because the concern for officer safety required to justify the handcuffing had passed. Furthermore, because the treatment facility's inventory search was not adopted by politically accountable officials, inevitable discovery did not apply. Affirmed.

[Summarized by Dane Rowinski]

