

OREGON SUPREME COURT SUMMARIES, JUNE 2010

State v. Lupoli

Decided: 6/4/2010

Case No.: S056477

Gillette, J. for the Court; En Banc.

<http://www.publications.ojd.state.or.us/S056477.htm>

CRIMINAL LAW ¶ **An opinion given by a witness regarding the credibility of another witness in any matter, related or unrelated to the current litigation, is inadmissible.**

Defendant was convicted of sexual abuse and attempted sexual abuse of four separate young female victims in the daycare center of the fitness club in which he worked. The Court of Appeals affirmed without opinion. At trial, four experts gave testimony regarding whether the victims W, SO, and SM appeared to have been sexually abused. All of the experts testified that they found no physical evidence of sexual abuse, but that the interviews they conducted with the victims did confirm signs of such abuse. The Supreme Court found that although many individual pieces of the testimonies would have been admissible, overall the opinions given were all tied inextricably to whether or not the experts believed that the victims were telling the truth. Thus, the testimonies of the experts constituted ¶ vouching, ¶ which is inadmissible in Oregon. Separately, the Supreme Court found that a rational jury could not have found beyond a reasonable doubt that Defendant's actions constituted a substantial step toward sexual abuse of victim T. Reversed and remanded.

[Summarized by Dane Rowinski]

State v. Hamilton

Decided: 6/10/2010

Case No.: S057583

De Muniz, C.J. for the Court

<http://www.publications.ojd.state.or.us/S057583.htm>

CRIMINAL PROCEDURE: Separate counts and charges of robbery are properly counted for each person who is a victim of either actual physical force or threatened force during the course of a robbery, even if the robbery is unsuccessful.

Defendant petitioned for review of a Court of Appeals decision affirming convictions and sentences for multiple counts of robbery. Defendant argued that the Court of Appeals erred when it held that robbery is a crime

against a person and that each person again whom physical force or threatened force is used in the course of a robbery is a "victim" justifying multiple convictions and sentences. Defendant further argued the legislature intended robbery statutes to only cover victims actually robbed, not merely threatened by the act. The Supreme Court held that although the statute did not use the term "victim," the legislature intended to include as a "victim" anyone threatened during the course of the robbery by the force used, even if the robbery was unsuccessful. The Court held that each person threatened by Defendant was properly construed as a victim under the robbery statute. Affirmed.

[Summarized by Nicholas Castellano]

State ex rel. Juv. Dept. of Clackamas County v. M. A. D.

Decided: 6/10/2010

Case No.: S057403

Balmer, J. for the Court

<http://www.publications.ojd.state.or.us/S057403.htm>

CRIMINAL PROCEDURE - In response to the immediate risk created by the person's possession of the drugs, when school officials have a reasonable suspicion based on specific and articulable facts that a particular student possesses illegal drugs on school grounds they may search that student without first obtaining a warrant.

M. A. D. (Youth) was charged with committing an act that, if committed by an adult, would constitute delivery of a controlled substance. School officials discovered marijuana on Youth after a student told the assistant principal that Youth was selling drugs. The juvenile court found that the school officials did not have probable cause, but held that the search was nonetheless valid because school officials acted upon "reasonable grounds" for suspecting that Youth had drugs. The Court of Appeals reversed, holding that the search did not come into an exception to the warrant requirement and was inconsistent with Youth's privacy interests under Article I, section 9 of the Oregon Constitution. On appeal, the state argued that the "reasonable suspicion" standard applies when school officials search students for drugs at school. The Supreme Court held that an exception to the warrant requirement is appropriate in the school setting. Accordingly, the Court held, in response to the immediate risk created by the person's possession of the drugs, when school officials have a "reasonable suspicion" based on "specific and articulable facts" that a student possesses illegal drugs on school grounds, they may search that student without first obtaining a warrant. The decision of the Court of Appeals is reversed, and the judgment of the circuit court is affirmed.

[Summarized By Mercedes Rhoden]

OREGON COURT OF APPEALS, JUNE

State v. Alvarez-Amador

Decided: 6/2/2010

Case No.: A136807

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

<http://www.publications.ojd.state.or.us/A136807.htm>

CRIMINAL LAW ▯ **The trial court erred when it admitted the Social Security Administration's certification that the social security number provided by Defendant on his I-9 form was not his because the certification did not constitute an official record and was prepared in response to a request for information regarding defendant. This violated Defendant's Sixth Amendment right to be confronted by all witnesses against him.**

Defendant was convicted of identity theft after he provided his employer with a false social security number for his I-9 form. At trial, the state offered certification from the Social Security Administration (SSA) that the numbers the Defendant provided were not his. The Court of Appeals held the trial court did not err in denying Defendant's motion for acquittal on the grounds that the evidence did show he intended to defraud according to the legislature's intended meaning of the word "defraud." The Court also held the trial court erred by allowing the SSA certification into evidence. The Court held that under the recent federal Supreme Court ruling in *Melendez-Diaz v. Massachusetts*, the certification was not an authenticated record otherwise admissible. 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). It was instead created with the sole purpose for use against Defendant at trial. The Court held that this violated Defendant's Sixth Amendment Right to be confronted by all witnesses against him. Reversed and remanded.

[Summarized by Tyler Reid]

State v. Lepierre

Decided: 6/2/2010

Case No.: A139110

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

<http://www.publications.ojd.state.or.us/A139110.htm>

SENTENCING ▯ **A defendant convicted of two counts of first-degree burglary based on two different subsections of ORS 164.225 should receive only one conviction.**

Defendant pleaded guilty to, and was convicted of, two counts of first-degree burglary, two counts of first-degree unlawful sexual penetration, five counts of first-degree sex abuse, and one count of attempted first-degree rape based on his criminal activity after breaking into a neighbor's apartment. The trial judge explained the burglary counts were separated by different theories, but ruled the counts had merged for purposes of sentencing. Defendant's record indicates that he was convicted of two counts of first-degree burglary. The Court of Appeals reversed and remanded for resentencing based on the trial court's intent to enter two convictions where it should have only entered one. The Court reasoned that the language in this area of law is confusing, but the intent to enter multiple convictions was clear. Reversed and remanded as to Counts 1 and 2, otherwise affirmed.

[Summarized by Jeff Turnoy]

State v. Bittner

Case No.: A138319

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

<http://www.publications.ojd.state.or.us/A138319.htm>

CRIMINAL LAW In a criminal assault case, where a defendant seeks to compel victim to disclose the names of defendant's friends, defendant has the burden to make at least a plausible showing of how the testimony of the friends would be material and favorable to defendant's defense.

Defendant was charged for multiple assault-related offenses. At trial, the court denied Defendant's motion to compel the victim of the assaults to reveal the names of defendant's two friends. On appeal, defendant contends the denial of the motion violated his right to due process. The Court of Appeals, however, concluded that defendant did not prove that the friends would have given material evidence that would be favorable to his defense. The Court of Appeals reasoned that based on the evidence to prove defendant's guilt at the time the motion was made, and the defendant's conclusory argument, which did not satisfy the burden to show at least a plausible showing of how the witness testimony of the friends would be material and favorable to defendant's defense, the trial court did not err in their denial of the motion. Therefore, the Court of Appeals affirmed the trial court's denial of Defendant's motion to compel the victim to identify Defendant's friends. Affirmed.

[Summarized by Elliot M.S. Yi]

State v. Roesler

Decided: 6/09/2010

Case No.: A139127

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

<http://www.publications.ojd.state.or.us/A139127.htm>

CRIMINAL LAW - In order to prove that a defendant has a reasonable opportunity to consult with an attorney upon a DUII arrest, the State is required to show that the defendant is able to effectively use the telephone and telephone directory with the assistance of reading glasses or an officer's assistance in locating a number or dialing the telephone.

Defendant, arrested for DUII, and awaiting a breath test, was given a telephone, a phonebook, and 15 minutes to speak with an attorney. Defendant told officer that he needed his glasses, which remained in his impounded vehicle. Officer declined to assist Defendant with his request or to assist him in placing a call, and asked him to submit to the test. Defendant responded he would after speaking with an attorney, which the Officer took as a refusal to submit, resulting in a DUII conviction. At trial, Defendant moved to suppress his refusal to take the test based on denial of a reasonable opportunity to consult with an attorney beforehand. Motion denied, conviction upheld. On appeal, the Court held that whether Defendant requested his glasses before or after being given the opportunity to call was dispositive in determining whether he was denied a reasonable opportunity to obtain legal advice before testing pursuant to Art. I, § 11, of the Oregon Constitution, a right the violation of which warrants suppression of breath test results. Reversed and remanded. [Summarized by Wade Murff]

State v. Turner

Decided: 06/09/2010

Case No: A140117

Haselton, P.J. for the court; Armstrong, J. & Edmonds, C.J.

<http://www.publications.ojd.state.or.us/A140117.htm>

CRIMINAL LAW - In criminal trials, venue is a material allegation of the indictment that must be presented as an element of the crime and proven beyond a reasonable doubt.

Defendant was convicted of failing to report as a sex offender. Defendant appealed the trial court's denial of Defendant's motion for judgment of acquittal on the ground that the state failed to prove venue. At trial, evidence did not contain information regarding where the offense was committed. As of the day of indictment, Defendant's current address was not registered. Relying on the rule that venue is a material allegation that must be proved beyond a reasonable doubt, the Court of Appeals held that the state had not provided sufficient evidence to prove this material

element of its case. The Court also declined to reverse the rule requiring venue to be treated as a material allegation because the Court is bound by Supreme Court precedent. Reversed.

[Summarized by Jessica M. Nomie]

State v. Bevan

Decided: 6/09/2010

Case No.: A135890

Ortega, J. for the Court, dissent by Landau, P.J.

<http://www.publications.ojd.state.or.us/A135890.htm>

CRIMINAL PROCEDURE ¶ **The State failed to establish the scientific validity of the Vertical Gaze Nystagmus (VGN) test for determining whether one is under the influence of intoxicants. The admission was an error because under the circumstances, the VGN evidence could have affected the jury's verdict.**

On Appeal from a driving under the influence of intoxicants (DUII) conviction, defendant assigns error to the admission of scientific evidence. Defendant argued that testimony given by the police officer regarding the vertical gaze nystagmus (VGN) test, lacked scientific foundation. A VGN test shows when one has consumed more alcohol than his body normally takes. At issue on appeal was whether the scientific validity of the VGN test had been established and, if not, whether that error required reversal. The Court found that the State failed to show the scientific validity of the test, however, a reversal would require a showing that the likelihood of this error could have affected the verdict. Although there was other incriminating admissible evidence against the defendant, the Court may not reweigh the evidence. Furthermore, the prosecutor referred to the VGN testimony in both the opening and closing arguments, emphasizing the testimony for the jury. Under the circumstances, it's possible that the erroneous admission of the VGN evidence may have affected the jury's verdict. Reversed and remanded.

[Summarized by April Denton]

Holcomb v. Hill

Decided: 6/09/2010

Case No.: A137190

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

<http://www.publications.ojd.state.or.us/A137190.htm>

CRIMINAL PROCEDURE ¶ **Defense counsel who failed to investigate a potential source of evidence to rebut the state's evidence was inadequate, but because the evidence would not have been admissible, Defendant could not prove that counsel's inadequacy would have affected the outcome of the**

case and was therefore not entitled to post-conviction relief on the grounds of constitutionally deficient counsel.

The state appeals a judgment by the post-conviction court, which set aside Holcomb's convictions. Holcomb was convicted of multiple crimes. Holcomb appealed and the Court of Appeals affirmed Holcomb's convictions. Holcomb sought post-conviction relief claiming that at trial his counsel failed to exercise reasonable professional skill and judgment and, thus, he had received constitutionally deficient counsel. The post-conviction court agreed with Holcomb and set aside the convictions citing three deficiencies that occurred during the trial. On appeal, the state argues that the findings of deficiency made by the post-conviction court were erroneous and that the court erred in holding that those deficiencies affected the trial outcome. The Court of Appeals held that, while Petitioner's counsel was constitutionally deficient because counsel did not investigate possible evidence to rebut the state's evidence, the deficiency did not prejudice the outcome of the trial because it would not have been admissible. Reversed.

[Summarized by Aaron Benjamin Girata]

State v. Roth

Decided: 6/9/2010

Case No.: A138078

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

<http://www.publications.ojd.state.or.us/A138078.htm>

CRIMINAL PROCEDURE ¶ A trial court's denial of a motion to suppress evidence will not be overturned when the moving party does not explicitly or implicitly raise the objection at trial that he or she raises on appeal.

Defendant was charged with unlawful possession of a controlled substance and possession of a forged instrument. One month before trial, Defendant filed a motion to suppress the evidence as a product of a warrantless search, but did not file a supporting memorandum until the morning of trial. The trial court granted the state's motion to strike the motion to suppress and Defendant was convicted on a stipulated facts trial. On appeal, Defendant claimed that her motion without the memorandum provided sufficient notice of her claims to satisfy UTCR 4.060. The Court of Appeals held that Defendant did not preserve the error because Defendant was given a chance to respond to the state's motion but did not respond. In addition, Defendant did not explicitly or implicitly claim on the trial record that her motion satisfied UTCR 4.060. The Court also held that the trial court's dismissal of the motion, while an error of law, was not apparent on the face of the trial record because the motion did not give

explicit notice of the intended claim. Affirmed.

[Summarized by Kathleen Thomas]

State v. Stokke

Decided: 6/09/2010

Case No.: A134852

Armstrong, P.J. for the court; Brewer, C.J. & Carson S.J.

<http://www.publications.ojd.state.or.us/A134852a.htm>

CRIMINAL PROCEDURE - A person has no privacy rights in evidence seized by private parties, examined, and delivered to the police sufficient to protect against an unlawful search in violation of the Oregon Constitution.

Defendant was convicted of 7 counts of identity theft and one count of unlawful possession of a controlled substance based on evidence provided to police by a hotel employee after Defendant had left items in a hotel safe after checkout. Relying on the reasoning of *State v. Luman*, 347 Or 487 (2009), the Court of Appeals reversed, holding that the officer had conducted an unlawful search in violation of Article I, section 9 of the Oregon Constitution. The Supreme Court remanded after it reversed *Luman* and held that a person loses a privacy interest in property that has been seized, examined and delivered to a police officer by a private party. The Court of Appeals held that, because the facts of this case are materially indistinguishable from *Luman*, and therefore the Defendant did not have a protected privacy interest to the contents of the safe after the hotel employee gave them to the police. Affirmed.

[Summarized by Lauren Robertson]

State v. Davis

Decided: 6/23/2010

Case No.: A138704

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

<http://www.publications.ojd.state.or.us/A138704.htm>

CRIMINAL LAW - The state has the burden of proving the reasonableness of delay in bringing a defendant to trial when the delay is over one year for a misdemeanor or violation.

Defendant was charged with giving false information to police and failing to carry her driver's license on November 9, 2006. The case experienced many delays before the trial. The trial was ultimately held on April 18, 2008, at which time Defendant was convicted. Defendant moved to dismiss the case for unreasonable delay and lack of speedy trial. The trial court

denied the motion. Defendant appeals, arguing that the length of time between the charging instrument and trial, 17 months, is an unreasonable delay. The state argues that part of the delay is attributable to Defendant, and the remaining delay is reasonable. The Court of Appeals held the delay was unreasonable. The Court found that a portion of the delay attributable to Defendant was only 2 months. Since the remaining delay was over 1 year, and this being a misdemeanor case, the state had the burden of proving the reasonableness of the delay. However, the Court held that the state failed to demonstrate the reasonableness of the delay. Reversed and remanded.

[Summarized by Sean M. Neary]

State v. Potter

Decided: 6/23/2010

Case No.: A141927

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

<http://www.publications.ojd.state.or.us/A141927.htm>

CRIMINAL LAW ☐ **In bifurcated cases where evidence pertaining to the same criminal conduct is presented in both cases, a claim of former jeopardy will not be barred in the subsequent trial.**

Defendant charged with assault and contempt of court. Two weeks later, Defendant was convicted of an unrelated charge and sentenced to 60 days in jail. Defendant's attorney made a motion to set over the trial date, which would put the trial outside the 60-day trial deadline. Defendant refused to waive the 60-day deadline. The prosecutor bifurcated the contempt charge from the assault charges and trial was held within the 60-day deadline on the contempt charges only. Defendant was convicted and sentenced to six months in jail. Defendant then moved to dismiss the assault charges, arguing that the State presented evidence related to the same crime in the contempt trial in violation of former jeopardy. The trial court granted this motion and found that Defendant had not waived his right to a former jeopardy claim by not objecting to the State's bifurcation of the charges. The Court of Appeals held that Defendant's contempt and assault charges are a result of the same conduct and are based upon the same criminal episode. The Court also held that Defendant had not waived his right to assert a former jeopardy claim. Affirmed.

[Summarized by Terisa Page]

Fitzpatrick v. DMV

Decided: 6/23/2010

Case No.: A140092

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

<http://www.publications.ojd.state.or.us/A140092.htm>

CRIMINAL PROCEDURE ¶ Under the implied consent statutes, when a driver who is arrested for driving under the influence of intoxicants is asked to take a breath test, the burden is on the driver to clearly consent to the test, and anything less is considered a refusal.

Defendant was arrested for driving under the influence of intoxicants. The arresting officer asked her if she would take a breath test. Defendant generally cooperated but was confused as to the different consequences for refusing and failing the breath test. Defendant asked the officer a series of questions, and ultimately did not take the breath test. In accordance with state law, the department of motor vehicles (¶DMV¶) issued an order suspending Defendant's driver's license. Defendant first appealed to an administrative law court, which affirmed the DMV's order. Defendant then appealed to the circuit court, which reversed because Defendant never affirmatively refused to take the breath test. The Court of Appeals reversed the circuit court's decision, holding that the driver has the burden of articulating a clear assent and an officer is not required to obtain a clear refusal. The Court urged police officers to give an ultimatum so the decision for the arrested driver would be more clear, however, the Court held such an ultimatum is not required. Reversed.

[Summarized by Joseph L. Dunne]

State v. Nix

Decided: 06/23/2010

Case No.: A138483

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

<http://www.publications.ojd.state.or.us/A138483.htm>

CRIMINAL PROCEDURE ¶ A warrantless search is lawful upon arrest when the search is incident to the arrest, and there exists extrinsic evidence, even though there is a delay in time between the arrest and the search.

On November 30, 2007, police observed Defendant in what appeared to be a ¶hand-to-hand¶ transaction for drugs. Upon arrest, officers took the Defendant's cellular phone to the police department to be examined by an officer who specializes in examination of cellular phones. The trial court granted Defendant's motion to suppress evidence obtained from the phone because of the passage of time between arrest and when the contents of the phone were examined. On appeal, the State argues that extrinsic evidence justifies the search, and the search is lawful as incident to the arrest. The Court of Appeals held that a delay necessary and appropriate to ensure expert search and protect against inadvertent destruction of evidence, is reasonable for purposes of the incident to arrest exception. The search

need not relate to the crime Defendant is being arrested on so long as it relates to another crime. The warrantless search of Defendant's phone is justified in that it may reasonably contain evidence of the delivery of a controlled substance. Reversed and Remanded.

[Summarized by Omar Nur]

State v. Smith

Decided: 6/23/2010

Case No: A138276

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

<http://www.publications.ojd.state.or.us/A138276.htm>

CRIMINAL PROCEDURE ¶ If it is found by the totality of the circumstances a person is unlawfully stopped under Article I, section 9, of the Oregon Constitution they are entitled to suppression of the evidence obtained as a result of that unlawful stop.

Defendant was a passenger in a traffic stop. The car needed to be towed due to the driver's suspended license. Defendant was asked to step out of the car and if he had anything he "shouldn't" have. The officer did not tell Defendant why he was asking him to get out of the car. Defendant told the officer he had drugs in his possession and Defendant was arrested. At trial, Defendant made a motion to suppress evidence of the drugs and alleged that he had been unlawfully seized by the officer under Article I, section 9 of the Oregon Constitution. The trial court denied this motion and defendant was convicted of possession of a controlled substance. The Court of Appeals held that based on the totality of the circumstances Defendant's belief that he was not free to leave was reasonable. A stop is unlawful if a person in defendant's position could have believed that his liberty and freedom of movement had been restricted and that that belief was objectively reasonable under the circumstances. The Court of Appeals took into consideration the fact that although the officer had a lawful reason for asking Defendant to step out of the vehicle, he did not inform Defendant of that reason. Additionally, instead of proceeding with the traffic stop, the officer immediately questioned Defendant regarding contraband. Therefore, defendant was unlawfully stopped and entitled to suppression of the evidence obtained as a result. Reversed and remanded.

[Summarized by Laura Franzen]

Lasley v. Combined Transport, Inc.

Decided: 6/23/2010

Case No.: A137222

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

<http://www.publications.ojd.state.or.us/A137222a.htm>

EVIDENCE ▯ **Evidence of intoxication is relevant in an accident to show (1) the totality of the circumstances for determining the cause-in-fact and (2) a departure from a reasonable person's standard of care for determining apportionment of fault.**

Lasley died in a car accident after Combined Transport (CT), a trucking company, spilled a load of glass on the road causing a traffic jam, and an intoxicated driver, Clemmer, struck Lasley's vehicle. The trial court excluded evidence of Clemmer's intoxication as irrelevant. The Court of Appeals held the evidence was relevant to (1) determine whether CT's actions were a cause-in-fact of Lasley's injury and death; and (2) apportion fault between CT and Clemmer. On reconsideration, Lasley's estate argued that the Court confused the standards for apportionment and cause-in-fact. The Court of Appeals clarified that evidence of intoxication is relevant to the cause-in-fact and the apportionment of fault for separate reasons: (1) the jury must consider the totality of the circumstances in determining the cause-in-fact of the accident and (2) evidence of intoxication can indicate that a driver did not use the standard of care of a reasonable person which can impact apportionment of fault. Former opinion clarified and adhered to as clarified.

[Summarized by Stephanie Lind]

State v. Lewis

Decided: 6/23/2010

Case No: A139619

Haselton, P.J., for the Court; Armstrong, J., & Edmonds, S.J.

<http://www.publications.ojd.state.or.us/A139619.htm>

SENTENCING ▯ **The Court of Appeals vacated and remanded the sentence of the trial court requiring Lewis to pay a unitary assessment in each case before Lewis is released from incarceration because the trial court did not make a finding that Lewis had assets to pay all or part of these fines.**

Defendant appealed his convictions of third-degree assault in two separate cases. At sentencing, the trial court ordered Defendant pay the unitary assessment in each case before he is released from incarceration. Defendant appealed the trial court's order requiring payment of the unitary assessment during his incarceration. Specifically, Defendant contends the trial court failed to make an express finding concerning his ability to pay as required by ORS 161.675(1). The Court of Appeals held that although ORS 161.675(1) allows the trial court to order immediate payment of a unitary assessment, it also requires the trial court to make an express finding regarding an incarcerated defendant's ability to pay.

The Court of Appeals found that the trial court made no such finding. Vacated and remanded for resentencing, otherwise affirmed.

[Summarized by Jessica M. Nomie]

State v. Rainoldi

Decided: 6/30/2010

Case No.: A136377

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

<http://www.publications.ojd.state.or.us/A136377.htm>

CRIMINAL LAW ¶ Defendant's knowledge of his status as a felon is a material element of felon in possession which requires a culpable mental state because it is relevant to the harm that is sought to be prevented by the offense.

Defendant was convicted of attempted felon in possession of a firearm after he attempted to purchase a shotgun at a gun show. Defendant explained that he was previously convicted of felony forgery; however, the sentencing judge explained to him that the forgery conviction would be treated as a misdemeanor once Defendant completed probation in 2006. At trial, Defendant asked for a jury instruction requiring the jury to find that Defendant knew he was a felon at the time he attempted to purchase the shotgun in order to convict him of attempted felon in possession. The trial court denied the request. On appeal, Defendant assigns error to the trial court's failure to give such an instruction. The State responds that it is not required to prove a culpable mental state for the element of Defendant's status as a felon and relied on *State v. Van Norsdall*, 127 Or App 300, 973 P2d 345, rev den, 320 Or 131 (1994) in support of its position. The Court of Appeals noted that the felon in possession statute is outside the Oregon Criminal Code. However, unless the statute clearly indicates legislative intent to dispense with a scienter requirement, the offense is treated as within the criminal code and culpability is required for "each material element" that necessarily requires a culpable mental state. ORS 161.095(2). The Court found that the legislative history of the felon in possession statute does not support the conclusion that the legislature intended to dispense of a scienter requirement. Accordingly, the Court analyzed the issue whether the status of being a felon is a "material offense that necessarily requires a culpable state of mind." The Court overruled *Van Norsdall* and held that the defendant's knowledge of his status as a felon is a material element which requires a culpable mental state because it is relevant to the harm that is sought to be prevented by the offense. Reversed and remanded.

[Summarized by Mercedes Rhoden]

State v. Coffey

Decided: 6/30/2010

Case No.: A138460

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

<http://www.publications.ojd.state.or.us/A138460.htm>

CRIMINAL PROCEDURE - Search of the inside of a cowboy boot violated Article 1, Section 9, of the Oregon Constitution when, because the person wearing the cowboy boot was handcuffed, that person did not pose an immediate serious threat of physical injury to the officer or to others present.

Defendant pled guilty to possession of a controlled substance under ORS 475.894 based on evidence found when officers searched a cowboy boot that she was wearing. The search occurred during the execution of a warrant to search a residence that Defendant was visiting. The trial court denied Defendant's motion to suppress this evidence, concluding that the officer's actions did not exceed the scope of a reasonable frisk for officer safety reasons. Defendant appealed and the Court reversed and remanded, holding that, under the particular circumstances of the case, Defendant was handcuffed and did not pose an immediate threat of physical injury to the officer or others. As such, the collection of the evidence from the cowboy boot worn by Defendant violated Article 1, Section 9, of the Oregon Constitution. Reversed and remanded.

[Summarized by Lauren Robertson]

State v. Gardner

Decided: 6/30/2010

Case No.: A139006

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

<http://www.publications.ojd.state.or.us/A139006.htm>

CRIMINAL PROCEDURE ¶ When an officer asks a suspect whether they will submit to a breath test, this is a normal part of the arrest and custody and not an interrogation for purposes of Miranda.

Defendant was arrested for a DUII and at the police station was asked (without Miranda warning) to take a breath test and she refused because she "drank two glasses of wine" and was afraid to fail the test. The trial court held that Defendant's statements were inadmissible because Defendant was not given Miranda warnings. State appealed and Defendant cross-appealed stating there was not probable cause to arrest. The issue on appeal is whether the statement was made during an "interrogation." The Court of Appeals held that Defendant's statement was not made during

an interrogation for purposes of Miranda because requesting a breath test is part of normal booking procedures and therefore does not constitute an interrogation. The Court of Appeals further held that given the totality of the circumstances, the officer had probable cause to arrest Defendant. On appeal reversed and remanded. On cross-appeal, affirmed.

[Summarized by Jessica Johnson]