In the Supreme Court of the State of Oregon

State of Oregon, Plaintiff-Respondent, Respondent on Review v. **Robert Clate Makin,** Defendant-Appellant, Petitioner on Review	Washington County Circuit Court C100549CR A153309 S063440

Petitioner on Review's Amended Reply Brief

On petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Washington County, Honorable Rick Knapp, Judge.

Per Curiam opinion filed May 20, 2015, before Nakamoto, Presiding Judge, and Egan, Judge, and Wilson, Senior Judge.

Reconsideration denied June 29, 2015 by Nakamoto, Presiding Judge

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Reply Brief of Robert Clate Makin
Petitioner on Review

Mr. Makin was convicted of child neglect, ORS 163.547, on the theory that he possessed controlled substances with the intent to deliver them in the presence of his children.

As discussed in the prior briefing, the dispute in this court is whether ORS 163.547 applies only to completed deliveries, in which case he is not guilty, or to attempted, or "*Boyd*," deliveries, *see State v. Boyd,* 92 Or App 51 (1988), in which case he is.s

Both the statutory text and the legislative history establish that the statute does not apply to *Boyd* deliveries, and that a conviction for child neglect under ORS 163.547 requires proof that the defendant transferred a controlled substance to another person in the presence of a child. Because Mr. Makin did not do so, he should have been acquitted.

I. The expansive Chapter 475 definition of 'delivery' does not apply to a prosecution for child neglect under ORS 163.547.

ORS 163.547 criminalizes allowing a child to stay in a vehicle where controlled substances are being criminally delivered or manufactured.

As argued in the opening brief, Mr. Makin takes the view that only an actual, physical transfer will satisfy the terms of the statute.

The state argues that a "delivery" is defined, for purposes of ORS ch. 475, as including an attempted delivery, ORS 475.005(8), and so that definition applies to Chapter 163 as well. But that definition is, by its plain terms, only applicable to chapter 475. ORS 475.005.

The text does not support the state's argument. ORS 475.005(8) is limited to "criminal" deliveries so it won't apply doctors or pharmacists who deliver controlled substances lawfully. But the focus in this court is not whether Mr. Makin's conduct was 'criminal;' the question is whether he made a 'delivery.' Adding the term 'criminal' in ORS 163.547 is no reason to define the term 'delivery' any differently than its ordinary dictionary meeting.

II. Text supporting the state's interpretation was removed from the bill before it was enacted.

The first draft of the bill was divided into four sections. Section 1 provided that it was a Class B felony to "leave[] a child or allow [a] child to stay, in a structure or vehicle and in the immediate proximity where· controlled substances are criminally delivered or manufactured." Section 2 provided the crime-seriousness level. Section 3 created a Class C felony for allowing a child to stay "in a structure or vehicle and in the immediate proximity where controlled

substances are criminally possessed or consumed." A copy of the first draft bill appears at ER 17.[1]

The House issued an amended version on March 28, 1991. Section 1 of the bill added a new element; the manufacture or delivery had to be "for consideration or profit." Section 3 had been amended to forbid allowing a child to stay "in a vehicle or on premises where controlled substances are consumed in the presence of the child or are **criminally possessed with the intent to distribute in the presence of the child.**" (emphasis added.) A copy appears at ER 19.

That suggests either lack of awareness of the *Boyd* rule, a belief that the Chapter 475 definition of delivery (which was central to the *Boyd* holding) would not apply to ORS 163.547, or both. And, in any event, that language did not appear in the June 20 version of the bill, which became law. That language was removed with the June 11 amendments, and with the final June 20 version of the bill. ER 20, 21.

The bill's reach was discussed in March 12 work session of the House Committee on the Judiciary. Legislators had been concerned about the broad scope of the original version of the bill, and the March 28 amendments appear to have been intended to address that issue.

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[1] ER 1-16 is attached to the opening brief. ER 17 and above is attached to this brief.

[2] Counsel listened to the recording on a Panasonic Slim Line

The March 12 minutes appear at ER 18, and the February 12 minutes discuss the same issue. ER 6 *et seq.*

The discussion continued in a public hearing held by the Senate Committee on the Judiciary on May 29, 1991. Timothy Travis of the Juvenile Rights Project argued that

> "lines 14 and 15 of the bill are ambiguous, okay? I don't know what that means. I don't know if it means that you possess the controlled substances in order to distribute them in front of the children, or if you possess them in the presence of the children in order to distribute them later."

Tape Recording, Senate Committee on Judiciary hearing, May 29, 1991, Observed Cue Number 103 *et seq*, estimated Official Cue Number 70 *et seq.*[2] Mr. Travis was referring to language in then-Section 3: "are criminally possessed with the intent to distribute in the presence of the child." A copy of that version of the bill appears at ER 19.

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[2] Counsel listened to the recording on a Panasonic Slim Line cassette recorder, model no. RQ2102, which was provided for public use at Oregon State Archives. The cue numbers appearing in the official minutes are not the same as the cue numbers that counsel observed. In citing to the recording, counsel uses both his own Observed Cue Number, and an estimated Minutes Cue Number, determined by comparing the recording to the cue number in the official minutes.

Following that discussion, the bill was amended, and section 3 was removed. The next version of the bill appears at ER 20. Because, as argued in both the opening and respondent's brief in this court, the legislature was generally aware of the *Boyd* issue, removing that text demonstrates that the legislature did not intend to include *Boyd* deliveries. *See Owens v. Maass,* 323 Or 430, 442 (1996) (using pre-enactment changes to the statutory text to determine legislative intent.)

III. One legislator (a sponsor of the bill) and legislative counsel expressed a view consistent with Mr. Makin's argument in this court. No legislator expressed a view consistent with the state's argument in this court.

Briefs from both parties note that this issue was discussed in legislative hearings before the bill was enacted. In a hearing on this bill Representative Kevin Mannix said: "*Boyd* involves an attempt to deliver and looks at the quantity of drugs present. We are not looking at an attempt at delivery, we are talking about an actual delivery." Minutes, Senate Subcommittee on Crime and Corrections, February 19, 1991 at 17; ER 11 (statement of Rep. Kevin Mannix). Rep. Mannix was a sponsor of the bill. ER 17.

Legislative Counsel Ingrid Swensen said that the bill was intended to apply if a delivery or manufacture occurred while the child

was on the premises. Minutes, Senate Committee on Judiciary, June 11, 1991; ER 14. (Emphasis added.) Likewise, she said in the staff measure summary, "it would be necessary for the delivery or manufacture to take place in the presence of the child." Senate Committee on Judiciary, Staff Measure Summary, ER 16. If Ms. Swensen had believed that the bill would apply if possession-with-intent-to-deliver occurred in the child's presence, it seems likely that she would have said so more specifically, because the issue of *Boyd* deliveries had already been raised.

Boyd is unlikely to be common knowledge among legislators, as familiar as it is to criminal lawyers, judges, and the police officers who testified regarding the bill. As the state notes, at least some legislators were familiar with the *Boyd* decision. Rep. Mannix discussed it. Representative Tom Mason argued that "Basically, if you've got a lot of dope around, and they can throw in a few elements, that's constructive delivery. And *Boyd* has gutted delivery. So there isn't much left of delivery if there's enough dope around." Tape Recording, House Committee on Judiciary hearing, February 19, 1991, Observed Cue Number 174 *et seq*, estimated Official Cue Number 137

et seq.[3] But the state's assumption that the legislature was familiar with *Boyd* is unwarranted.

Police and prosecutors testified before the legislature about the bill, and were generally familiar with *Boyd* and in favor of an expansive statute. When Rep. Mannix said "We're not talking attempted delivery here, we're talking actual delivery," Mr. McIntyre responded that delivery was defined in Chapter 475 as "attempted, actual, and constructive" delivery." Minutes House Committee on Judiciary hearing, February 19, 1991 at 17 (attached to the opening brief as ER 11).

The state argues that Mr. McIntyre's statements provide legislative history in support of its argument. *See, e.g., Ram Technical Services, Inc. v. Koresko,* 346 Or 215, 234–35 (2009) (relying on testimony of the representative of the Oregon Law Commission, which proposed the legislation at issue). But the significance of Mr. McIntyre's statement is reduced by its opposition from Rep. Mannix's statement, a factor that this court has also considered ("At the * * * Subcommittee's public hearing on HB 2666, no member of the subcommittee questioned, challenged, or disagreed with [the witness's] reading of HB 2666.") *Zidell Marine Corp. v. W. Painting,*

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[3] It appears that Rep. Mason was arguing that *Boyd* made it too easy for prosecutors to prove delivery.

Inc., 322 Or 347, 358 (1995). The bill was discussed again at a public hearing on May 29, 1991. John Bradley of the Multnomah County District Attorney's office, testified about the narrow scope of the bill. "The conduct that this is going to get to is generally when the people deliver or they manufacture and the children are present. Now, what we've put in this bill to kind of temper a little bit is when we say manufacture for consideration or profit." Tape Recording, Senate Committee on Judiciary hearing, May 29, 1991, Observed Cue Number 204-207, estimated Official Cue Number 158-160.

Mr. Bradley further explained that: "I honestly believe that this will stop some people from further having kids around them when they're dealing with drugs or they're manufacturing drugs." Tape Recording, Senate Committee on Judiciary hearing, May 29, 1991, Observed Cue Number 233 estimated Official Cue Number 200. Mr. Bradley also explained: "the intent of this bill was to get people, that if they're gonna deal in these activities, to make sure they deal in these activities without children being around."

Tape Recording, Senate Committee on Judiciary hearing, May 29, 1991, Observed Cue Number 257, estimated Official Cue Number 220.

County Counsel Ingrid Swensen asked Mr. Bradley: "If you could prove possession with intent to deliver, don't you basically have

a delivery?" Mr. Bradley responded: "Yes, under current Oregon law."

Russ Spencer from the Oregon State Sheriff's Association explained that, even if manufacturing was not occurring in the presence of the children, chemicals used in manufacturing were present and dangerous. Tape Recording, Senate Committee on Judiciary Work Session, June 11, 1991, Tape 226, Observed Cue Number 295 *et seq*, estimated Official Cue Number 255.

In response to Mr. Spencer's comments, Senator Shoemaker asked if the offense would occur if a house were used for delivering or manufacturing, even if children were not present at the time. Chair Cohen responded "I think that is what is intended." Tape Recording, Senate Committee on Judiciary Work Session, June 11, 1991, Tape 226, Observed Cue Number 310 *et seq*, estimated Official Cue Number 270. Mr. Spencer said that there had been instances of "booby traps and shootouts," creating dangers for children. Tape Recording, Senate Committee on Judiciary Work Session, June 11, 1991, Tape 226, Observed Cue Number 312 *et seq*, estimated Official Cue Number 257.

Lt. John Brunelle of the Multnomah County Sheriff's Office argued that the premises were dangerous to children regardless of whether the children were present for drug crimes, Tape Recording,

Senate Committee on Judiciary Work Session, June 11, 1991, Tape 226, Observed Cue Number 320 *et seq*, estimated Official Cue Number 306. Senator Shoemaker asked him to clarify:

> "Sen. Shoemaker: Maybe what threw me was the language 'in the immediate proximity,' I thought that what you're getting at here is that you didn't want these things going on in the presence of the * * * children so they would be influenced and so forth. But if your idea is, is, what you, okay, I…I just had another picture of what …
>
> "Lt. Brunelle: Well, I would say both situations would apply, if you will. We're looking at an activity that would endanger that child. And that's all we're after here."

Tape Recording, Senate Committee on Judiciary Work Session, June 11, 1991, Tape 226, Observed Cue Number 339 *et seq*, estimated Official Cue Number 347.

From that history, the following things are clear:

At least some legislators were familiar with the rule underlying *Boyd.* As noted above, Rep. Mannix, who was clearly familiar with it, said that ORS 163.547 applied to "actual deliveries" and not "attempted deliveries."

As far as counsel can determine, no other legislator expressed a view one way or the other, although Sen. Shoemaker suggested that he thought the bill did not apply to *Boyd* deliveries, Rep. Mason expressed his view that *Boyd* has made it too easy to prove delivery of a

controlled substance, and legislative counsel Ingrid Swenson said that the bill would only apply if delivery occurred in the child's presence.

Prosecutors and police officers, appearing as witnesses, argued that he bill would apply in the case of *Boyd* deliveries, or when the manufacturing had occurred at a different time than when a child was present. They argued for an expansive reading of the bill in other ways, as well. Mr. Bradley, a Multnomah County prosecutor, vaguely urged an interpretation of the bill that applied to actual deliveries, not *Boyd* deliveries. But those statements of nonlegislators are entitled to little weight in light of the contrary statements of Rep. Mannix and Ms. Swensen, and those of Sen. Shoemaker and Rep. Mason.

And, finally, the original language of the bill, which would have expressly applied to *Boyd* deliveries, was removed by the legislature before the bill was passed.

Conclusion

The legislature discussed, briefly, whether the statute would apply to *Boyd* deliveries. Witnesses thought the statute would apply to *Boyd* deliveries. But the only legislator who expressed a view thought the statute would not apply to *Boyd* deliveries, and so did legislative counsel.

Accordingly, the legislative history is not a reason to avoid the straightforward application of the statutory text. Because ORS 163.547

applies when the defendant physically transfers drugs to another person in the presence of a child, and because Mr. Makin did not do so, this court should reverse.

Respectfully submitted,

/s/ Rankin Johnson IV
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Certificate of Service

I certify that I filed the enclosed brief with the State Court Administrator through the e-filing system on February 25, 2016. I served it on opposing counsel, Attorney General Ellen Rosenblum, through the e-filing system on February 25, 2016.

Respectfully submitted,

/s/ Rankin Johnson IV
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Certificate of Compliance with Brief Length and Type Size Requirements

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2,429 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Respectfully submitted,

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