

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 Brief on the Merits

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

Rankin Johnson IV, OSB No. 964903
Law Office of Rankin Johnson IV, LLC
208 SW First Ave, Ste 220
Portland, OR 97204
(503) 307-9560
rankin@briefwright.com

Ellen Rosenblum, OSB No. 753239
Attorney General
Jeff J. Payne, OSB No. 050102
Senior Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
(503) 378-4402
jeff.j.payne@doj.state.or.us

12/2015

Table of Contents

Introduction to Question Presented	1
Question Presented	1
Does proof of possession with intent to deliver also prove that controlled substances were “being criminally delivered and manufactured” in the car while the children were present?	1
Proposed Rule of Law.....	2
For purposes of ORS 163.547, “delivery” of a controlled substance refers to a physical transfer from one person to another, not an attempted or <i>Boyd</i> delivery.	2
Nature of the Proceeding and Judgment and Relief Sought.....	2
Summary of Facts	3
Summary of Argument.....	5
Argument	6
I. The text and context of ORS 163.547 establish that “deliver” means a physical transfer from one person to another.	7
II. The legislative history conclusively establishes that the legislature did not intend for ORS 163.547 to apply to possession with intent to deliver.....	12
III. Maxims of statutory construction establish that, for purposes of ORS 163.547, “deliver” means a physical transfer from one person to another.	16
Conclusion	17

Table of Authorities

State cases

<i>Doyle v. City of Medford</i> , 347 Or 564 (2010)	15
<i>Enertrol Power Monitoring Corp. v. State of Oregon</i> , 314 Or 78 (1992)	11
<i>Kaiser Cement & Gypsum Corp. v. State Tax Comm'n</i> , 250 Or 374 (1968)	16
<i>Keller v. Armstrong World Industries, Inc.</i> , 342 Or 23 (2006)	11
<i>PGE v. Bureau of Labor and Industries</i> , 317 Or 606 (1993)	6, 7, 11
<i>SAIF v. Drews</i> , 318 Or 1 (1993)	15
<i>State v. Boyd</i> , 92 Or App 51 (1988)	1, 5
<i>State v. Buck</i> , 200 Or 87 (1953)	11
<i>State v. Gaines</i> , 346 Or 160 (2009)	6, 7, 16
<i>State v. Hodges</i> , 254 Or 21 (1969)	16
<i>State v. Makin</i> , 271 Or App 374 (2015)	2, 3
<i>State v. Stoneman</i> , 323 Or 536 (1996)	16
<i>Weems/Roberts v. Board of Parole</i> , 347 Or 586 (2010)	11

State statutes and rules

ORS 163.547	1, 5, 6, 7, 16
ORS 475.005	6

Index to Excerpt of Record

Court of Appeals opinion	ER 1
Court of Appeals order denying reconsideration	ER 4
Minutes, House Subcommittee on Crime and Corrections, February 17 1991	ER 5
Minutes, Senate Committee on Judiciary, June 11, 1991	ER 13
Staff Measure Summary, HB 2545, June 11 1991	ER 16

BRIEF ON THE MERITS OF ROBERT CLATE MAKIN PETITIONER ON REVIEW

Introduction to Question Presented

ORS 163.547 provides: “A person having custody or control of a child under 16 years of age commits the crime of child neglect in the first degree if the person knowingly leaves the child, or allows the child to stay: * * * [i]n a vehicle **where controlled substances are being criminally delivered or manufactured.**” (Emphasis added.)

A person who attempts to deliver a controlled substance, such as by possessing a controlled substance with the intent to deliver, is guilty of the crime of delivery of a controlled substance. *See State v. Boyd*, 92 Or App 51 (1988).

The state proved that Mr. Makin permitted children to stay in a vehicle where he possessed a controlled substance that he intended to deliver.

Question Presented

Does proof of possession of a controlled substance with intent to deliver it also prove that controlled substances were “being criminally delivered and manufactured” in the car while the children were present?

Proposed Rule of Law

For purposes of ORS 163.547, “delivery” of a controlled substance refers to a physical transfer from one person to another, not an attempted or *Boyd* delivery.

Nature of the Proceeding and Judgment and Relief Sought

In this direct criminal appeal, Robert Clate Makin seeks review of his conviction for child neglect. Mr. Makin was convicted following a court trial of three counts of child neglect, which he challenges on appeal, and also delivery of methamphetamine, manufacturing methamphetamine, possession of methamphetamine, and possession of marijuana. The court imposed a downward departure sentence to probation.

The Court of Appeals vacated the conviction for manufacturing a controlled substance and remanded the case for resentencing. *State v. Makin*, 271 Or App 374 (2015) (*per curiam*). A copy appears at ER 1-3, and a copy of the order denying reconsideration appears at ER 4. The issues discussed in the Court of Appeals opinion are not at issue in this court.

In Mr. Makin’s view, the evidence was not sufficient for his convictions for child neglect. He seeks review of the trial court’s denial of his motion for judgment of acquittal, and he seeks an

acquittal as to each count of that offense. As noted above, the Court of Appeals has already ordered resentencing.

Summary of Facts

According to the Court of Appeals opinion, Mr. Makin was stopped for a traffic infraction. He had three young children in the car, along with methamphetamine, marijuana, and paraphernalia associated with the use and sale of controlled substances. *State v. Makin*, 271 Or App 374, 375 (2015). Although the Court of Appeals did not say so expressly, those facts support an inference that Mr. Makin intended to deliver a controlled substance.

In the trial court the parties discussed, and the trial court decided, whether Mr. Makin was guilty of child neglect by virtue of possessing methamphetamine with the intent to deliver it.

In closing argument of the bench trial, defense counsel argued:

“Additionally, the way that the State has charged the Child Neglect in the First Degree counts is, ‘Having custody or control of a child under 16 years of age and unlawfully and knowingly leaving said child and allowing said child to stay in a vehicle where controlled substances were being criminally delivered and manufactured for consideration and profit.’

“And, if you look to the statute it says, you know, ‘In a vehicle where controlled substances are being criminally delivered or manufactured.’ * * *

“The way the statute is written is in an active tense, ‘are being are being criminally delivered or manufactured.’ * * *

Possession is not included in the statute, only delivery and manufacture.

“And the State has put on no evidence that Mr. Makin was in the process of a delivery in that case. * * * Mr. Makin * * * told the police officers that he keeps the drugs away from his fiancée, he doesn't keep them in the house because he doesn't want anyone to know what he -- what he was doing, so he has them in the car.

“So I analogized this to a carpenter, let's say you're a carpenter for a living. You keep your tools in your truck, and on the weekend you have your kids with you in the car while you drive to the amusement park or the grocery store. Does that mean that your kids are present with you while you're at work? It absolutely does not mean the kids are present while you're at work. They're just in the car where the stuff -- where the items, your tools, are being kept.

Tr. 189-192.

In response, the prosecutor argued that possession with intent to deliver was sufficient for conviction of child neglect:

Judge, just briefly regarding the Child Neglect. I mean, I think that the definitions of Delivery and Manufacture under the controlled substance as related to the other charges here can be used as well for Child Neglect.

Tr. 192.

The court decided that possession with intent to deliver was sufficient as to the child neglect charges:

“The children were in the vehicle. And the issue is whether or not there was a delivery or manufacture. And, again, [defense counsel] dealt with that issue. And it's an

interesting legal issue on the manufacturing, and I really don't have to get there because I do find that this was a Possession With an Intent to Deliver, so it was a Delivery, and the children were in the car, while he possessed these with the intent to deliver at some point.

Tr. 195-196.

Summary of Argument

The state proved that Mr. Makin possessed controlled substances in his car in the presence of his children. But the state did not prove that Mr. Makin manufactured or delivered controlled substances in the presence of the children.

ORS 163.547 provides: “A person having custody or control of a child under 16 years of age commits the crime of child neglect in the first degree if the person knowingly leaves the child, or allows the child to stay: * * * [i]n a vehicle **where controlled substances are being criminally delivered or manufactured.**” (Emphasis added.)

In convicting Mr. Makin, the court reasoned that, by possessing with the intent to deliver, Mr. Makin had delivered controlled substances. *See State v. Boyd*, 92 Or App 51 (1988). As *Boyd* held, under the drug code, “deliver” means the “actual, constructive, or attempted delivery” of a controlled substance. ORS 475.005(8). That is why Mr. Makin could have been guilty of delivery of a controlled substance with no evidence of a physical delivery. But ORS 163.547 is

not in the drug code, and, as counsel argued, “The way [ORS 163.547] is written is in an active tense, ‘are being are being criminally delivered or manufactured.’” If the legislature had wanted to criminalize possessing drugs near a child, it could have done so, just as it could have applied the ORS 475.005 drug-code definition to ORS 163.547.

The legislature did neither, and, because the ORS 475.005 is in the drug code rather than the criminal code, it does not provide context for interpreting ORS 163.547. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993); *State v. Gaines*, 346 Or 160 (2009). Accordingly, because there is no evidence that Mr. Makin actually delivered near a child, he was not guilty of child neglect.

Argument

Mr. Makin was convicted of child neglect on the theory that, in the presence of a child, Mr. Makin possessed a controlled substance with the intent to deliver it.

In order to be guilty, Mr. Makin had to “deliver” a controlled substance in the presence of a child. The question before the court is whether, by possessing a controlled substance with intent to deliver, Mr. Makin “delivered” drugs for purposes of the statute.

In holding otherwise, the trial court considered a specialized definition of “deliver” applicable to the drug code. But, because that statute is on a different subject, in a different chapter, and was passed

at a different time, this court's statutory-construction methodology from *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993) and *State v. Gaines*, 346 Or 160 (2009) calls for using the dictionary definition, rather than the drug code definition.

Under that familiar methodology, the statute's text and context is considered first, followed by legislative history, and finally canons of statutory construction, all to discern the legislature's intent. Because the statutory text establishes that "deliver" means a physical transfer from one person to another, and because the legislative history reinforces that conclusion, this court should hold that evidence of possession with intent to delivery does not satisfy the 'delivery' element of ORS 163.547.

I. The text and context of ORS 163.547 establish that "deliver" means a physical transfer from one person to another.

Mr. Makin was convicted of child neglect in the first degree, which applies when a child is present for some sorts of drug offenses. Under the plain language of the statute, the statute is violated when a child is present for an actual, physical transfer of controlled substances, but the statute is not violated when the defendant possesses a controlled substance with the intent to deliver them in the future. That is clear from the statutory text and context.

The text of ORS 163.547 provides that “deliver” refers to a physical transfer from one person to another.

ORS 163.547 provides in part:

“Child neglect in the first degree

“(1)(a) A person having custody or control of a child under 16 years of age commits the crime of child neglect in the first degree if the person knowingly leaves the child, or allows the child to stay [i]n a vehicle **where controlled substances are being criminally delivered or manufactured[.]**”

(Emphasis added).

ORS 475.752¹ provides in part: “[With exceptions not relevant to this case] it is unlawful for any person to manufacture or deliver a controlled substance.”

ORS 163.547 does not refer simply to “delivery.” The statutory phrase is “where controlled substances are being delivered or manufactured.” The phrase “are being delivered” describes an active, physical delivery, not a passive possession with an intended future delivery.

Words of common usage, such as ‘delivery,’ are typically given their “plain, natural, and ordinary meaning.” *PGE* at 611 (citations omitted.) “Deliver” means “GIVE, TRANSFER : yield possession or

¹ ORS 475.752 was previously numbered as ORS 475.840 (2011) and ORS 475.992(2005).

control of : make or hand over : make delivery of : COMMIT, SURRENDER, RESIGN.” *Webster's Third New Int'l Dictionary* 597 (unabridged ed. 2002) (second definition). “Delivery” means:

“**2 a** : the act of delivering up or over : transfer of the body or substance of a thing: SURRENDER ⟨an agreement to make ~ of the bonds⟩ **b** : the physical and legal transfer of a shipment from consignor to carrier, between carriers, and from transport agency to consignee **c** : the act of putting property into the legal possession of another ⟨the ~ of a fort⟩ ⟨~ of hostages⟩ whether involving the actual transfer of the physical control of the object from one to the other or being constructively effected in various other ways (as by the handing over of something symbolical of the thing sought to be delivered) **d** : an act or instance of delivery ⟨we are prepared to make daily *deliveries*⟩ : something delivered at one time or in one unit ⟨each ~ will include five gross of assorted novelties⟩ **e** : a truck or other vehicle used for delivering merchandise esp. to retail customers **f** : an organization that engages to deliver goods (as retail parcels) within a local area.”

Webster's Third New Int'l Dictionary 597 (unabridged ed. 2002).

Those definitions all relate to a physical act of delivery, or use “delivery” as an adjective referring to a physical act. Even sense C, about legal transfer, refers to the physical transfer of a symbolic object to effect a delivery. None relate to a future, hypothetical, or uncompleted delivery, and none of those definitions include what Mr. Makin did.

In holding otherwise, the trial court applied a definition of “deliver” from the drug code. ORS 475.005 provides in part: “As used in ORS 475.005 to 475.285 and 475.752 to 475.980, unless the context requires otherwise: (8) ‘Deliver’ or ‘delivery’ means the actual, constructive or attempted transfer * * * from one person to another of a controlled substance * * *”

An attempt to deliver a controlled substance, when charged as a completed delivery of a controlled substance, is sometimes called a ‘*Boyd* delivery,’ after *State v. Boyd*, 92 Or App 51 (1988).² The issue in this case is not whether possession with intent to deliver is the completed offense of delivery of a controlled substance, but, rather, whether possession with intent to deliver satisfies the “where controlled substances are being criminally delivered” element of the offense of child neglect. And it does not. In addition to the active phrasing from ORS 163.547 and the clear dictionary meaning of the words ‘deliver’ and ‘delivery,’ ORS 475.005’s definition is expressly limited to chapter 475.

Further, the Chapter 475 definition does not provide context for ORS 163.547 under this court’s cases. Context “includes other

² For brevity, counsel will use the term ‘*Boyd* delivery’ to refer to the delivery of a controlled substance by possessing a controlled substance with the intent to deliver it.

provisions of the same statute and other related statutes.” *PGE*, 317 Or at 611. Similarly, statutory provisions on the same subject, *in pari materia*, are construed together. ORS 174.010; *State v. Buck*, 200 Or 87, 93 (1953).

ORS 163.547 is part of the criminal code, and is intended to protect children. ORS 475.005 is part of the drug code and provides definitions for that chapter. They were not passed at or near the same time. Because those are different subject areas, in different chapters, passed at different times, they are not *in pari materia*, and one does not provide context for the other. *C.f.*, *Weems/Roberts v. Board of Parole*, 347 Or 586, 595 (2010) (multiple statutes from the same chapter, all relating to setting post-prison supervision conditions provide context for one another); *Keller v. Armstrong World Industries, Inc.*, 342 Or 23, 35 (2006) (one statute of limitations provides context for the interpretation of another.)

And, as noted above, ORS 475.005 is expressly limited to the drug code. Accordingly, it is not relevant as to the interpretation of ORS 163.547. *See Enertrol Power Monitoring Corp. v. State of Oregon*, 314 Or 78, 84 (1992) (“The legislature’s definition of a term made applicable to one portion of the statute does not control on the meaning of the term in another portion of the statutes.”)

Even if the drug code definition applied to this case, it would not affect the outcome. The *actus reus* of child neglect has two components; it must be a delivery of a controlled substance, and it must be unlawful. Whether the act is “unlawful” might be determined with reference to the drug code, which creates controlled-substance offenses and various exceptions. But there is no basis to look to ORS 475.005(8) or elsewhere in the drug code to determine whether the act is a “delivery.” Because that is a word of common usage, its common dictionary definition controls the outcome of this case.

II. The legislative history conclusively establishes that the legislature did not intend for ORS 163.547 to apply to possession with intent to deliver.

ORS 163.547 was introduced as HB 2545 (1991), which created the offense of child neglect in the first degree. The then-existing offense of child neglect became child neglect in the second degree. From the beginning, legislators were aware of the difference between an actual delivery and a *Boyd* delivery, and discussed whether to include only the former in the new statute. “*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.”³ Minutes, Senate Subcommittee on Crime and Corrections, February 19, 1991 at 17. (statement of Rep. Kevin Mannix). The February 19 minutes appear at ER 5-12.

Following the February 19 meeting, the bill was amended and reintroduced on March 12, 1991. Minutes, Senate Committee on Judiciary, March 12, 1991 (statement of Rep. Tom Mason). Rep. Mason explained that the amendment had been to “[g]et * * * around concern about controlled substances and people living in the vicinity.” *Id.* at 8. That version of the bill applied if a person left a child, or permitted a child to stay, “in a structure or vehicle and in the immediate proximity where controlled substances are criminally possessed with the intent to distribute or consumed in the presence of the said child.” Senate Committee on Judiciary, March 12, 1991, Exhibit E (Draft of bill submitted by of Rep. Tom Mason).

The bill was discussed at a public hearing on May 29, 1991. Then-Multnomah County District Attorney John Bradley explained “[t]he bill will get to people delivering or manufacturing when children are present.” Minutes, Senate Committee on Judiciary, Public Hearing, May 29, 1991.

³ This is quoted directly from the minutes, but the minutes themselves are paraphrased.

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.”

The bill was changed by June 11, however. The June 11 version of the bill includes language close to what was ultimately adopted - it applied when children were permitted to remain “* * * [i]n a vehicle where controlled substances are being criminally delivered or manufactured for consideration or profit.”

In discussions about the bill in the Senate Judiciary Committee, Ms. Swensen explained the changes to the bill:

“This bill would create two classes of child neglect. Existing would become second degree and would remain unchanged. The new class would be a B Felony offense which would occur when a person who had custody or control of a child under 16; permitted, allowed or knowingly left a child in a vehicle or on premises where controlled substances are being criminally delivered or manufactured for consideration or profit.

“The amendments would limit the application to having children in the immediate proximity of the manufacture or delivery. It also excludes public places. Sections 2 & 3 of the bill have been deleted.

“SEN. SHOEMAKER: Is it intended that in section 1 of HB 2545 that the criminal delivery or manufacture occur while the child is on the premises or in a certain proximity?”

“SWENSON: I am sure that was the intent.”

Minutes, Senate Committee on Judiciary, June 11, 1991. (Emphasis added.) A copy of the minutes appears at ER 13-15. The staff measure summary, prepared by legislative counsel Ingrid Swensen, likewise says:

“Amendments approved by the committee added a requirement that in order for a person to be guilty of Child Neglect in the First Degree as a result of leaving a child in a vehicle, 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. A copy appears at ER 16. Statements of legislative counsel are helpful in determining legislative intent. *Doyle v. City of Medford*, 347 Or 564, 576 (2010) (applying rule.)

The legislative history demonstrates that the legislature did not intend that ORS 163.547 would apply to a *Boyd* delivery. *See, e.g., SAIF v. Drews*, 318 Or 1 (1993) (statement of legislator before legislative committee about intended meaning of specific wording.)

Similarly, the change in the statutory text between February (“in the immediate proximity where controlled substances are criminally possessed with the intent to distribute or consumed in the presence of the said child”) and June (“in a vehicle where controlled substances are being criminally delivered or manufactured for consideration or profit”) was a deliberate legislative choice to exclude *Boyd* deliveries

from the scope of the statute. And legislative amendments are evidence of legislative intent. *E.g., Kaiser Cement & Gypsum Corp. v. State Tax Comm'n*, 250 Or 374, 378-79 (1968) (applying rule to an amendment to an enacted statute).

III. Maxims of statutory construction establish that, for purposes of ORS 163.547, “deliver” means a physical transfer from one person to another.

If text and context do not resolve any remaining statutory ambiguity, a reviewing court can consider maxims of statutory construction. *E.g., Gaines*, 346 Or at 165.

One such maxim is that a court will try to interpret a statute to avoid constitutional invalidity. *State v. Stoneman*, 323 Or 536, 540 (1996). Vague criminal statutes may constitute an unconstitutional delegation of legislative authority to a judge or jury, and may constitute ex post facto laws. *State v. Hodges*, 254 Or 21 (1969). Even if there is some ambiguity in whether the ORS 475.005 definition applies to ORS 163.547, expanding ORS 163.547 in that way would create a vagueness issue where none existed before, and would not give fair warning as to what conduct is forbidden.

Conclusion

Mr. Makin possessed drugs in the presence of his children, but he did not deliver them. Accordingly, he is not guilty of first-degree child neglect. This court should reverse the contrary Court of Appeals decision.

Respectfully submitted,

/s/ Rankin Johnson IV
Rankin Johnson IV, OSB No. 96490

Certificate of Service

I certify that I filed the enclosed brief with the State Court Administrator through the e-filing system on December 4, 2015. I served it on opposing counsel, Attorney General Ellen Rosenblum, through the e-filing system on December 4, 2015.

Respectfully submitted,

/s/ Rankin Johnson IV
Rankin Johnson IV, OSB No. 96490

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 petition (as described in ORAP 5.05(2)(a)) is 3,544 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,

/s/ Rankin Johnson IV
Rankin Johnson IV, OSB No. 96490