
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

ANTHONY JAMES LAZARIDES,

Defendant-Appellant
Petitioner on Review.

Malheur County Circuit Court
Case No. 12114997C

CA A155380

S063282

PETITIONER ON REVIEW'S REPLY BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals on an appeal
from a judgment of the Circuit Court for Malheur County
Honorable Lung S. Hung, Judge

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TABLE OF CONTENTS

PETITIONER’S REPLY BRIEF ON THE MERITS	1
STATEMENT OF THE CASE	1
ARGUMENT	2
I. Defendant was not on abscond status when the court dismissed his appeal.	4
II. ORAP 8.05(3) limits the inherent authority of the court to dismiss an appeal when a defendant absconds.....	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases

<i>Far W. Landscaping, Inc. v. Modern Merch., Inc.</i> , 287 Or 653, 601 P2d 1237 (1979).....	7
<i>Kentner v. Gulf Ins. Co.</i> , 298 Or 69, 689 P2d 955 (1984).....	6
<i>Peek v. Thompson</i> , 160 Or App 260, 980 P2d 178 (1999), <i>rev dismissed</i> , 329 Or 553 (1999)	8
<i>Pruett v. Pruett</i> , 185 Or App 669, 60 P3d 1094 (2003)	7
<i>State ex rel Juv Dept of Mult Co v. Linder</i> , 142 Or App 527, 922 P2d 691 (1996).....	7
<i>State v. Ford</i> , 205 Or App 506, 134 P3d 959 (2006)	5
<i>State v. Kuznetsov</i> , 345 Or 479, 199 P3d 311, 315 (2008).....	7

TABLE OF AUTHORITIES CONT'D

Cases Cont'd

<i>State v. Lundahl</i> , 130 Or App 385, 882 P2d 644 (1994)	7
<i>State v. Moss</i> , 352 Or 46, 279 P3d 200 (2012)	7, 8
<i>State v. Robbins</i> , 345 Or 28, 188 P3d 262 (2008)	6, 7
<i>State v. Schneider</i> , 204 Or App 710, 131 P3d 842 (2006)	6
<i>State v. Smith</i> , 312 Or 561, 822 P2d 1193 (1992)	6
<i>State v. Sterner</i> , 124 Or App 439, 862 P2d 1321 (1993)	7
<i>Vance v. Teplick</i> , 219 Or App 542, 183 P3d 229 (2008)	4

Statutes

ORS 19.033(2)	8
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Other Authorities

ORAP 6.25(a)	3
ORAP 6.25(e)	3
ORAP 7.55(4)(a)	3
ORAP 8.05(3)	1-3, 6-8

PETITIONER'S REPLY BRIEF ON THE MERITS

STATEMENT OF THE CASE

Summary of Argument

The state concedes that the Court of Appeals erred when it dismissed defendant's appeal pursuant to ORAP 8.05(3). Resp Br 7-8. Nevertheless, it argues that the order denying reconsideration of the erroneous dismissal order was correct because (1) the state provided the court with evidence to support the erroneous order of dismissal after the court issued that order and (2) the court retains inherent authority to dismiss an appeal when the defendant absconds--regardless of the limitations imposed by ORAP 8.05(3). The state is incorrect on both counts.

The state had the burden of presenting evidence that defendant had returned to abscond status after defendant presented evidence that he was no longer on abscond status. The state failed to carry its burden. At the time the court dismissed defendant's appeal, the information before it was that defendant was no longer on abscond status. Not until defendant sought reconsideration did the state present evidence purporting to show that defendant was on abscond status when the court dismissed his appeal. That evidence was not

relevant to whether, at the time it decided the motion to dismiss, the court had information that defendant had returned to abscond status.

Even if the court could consider that late-submitted evidence on reconsideration, that evidence does not show that defendant was on abscond status when the court decided the motion to dismiss. That evidence showed that, on the day *after* the court decided the motion, defendant's supervising officer requested an arrest warrant for defendant. The evidence further showed that on the date the court decided the motion, defendant had only failed to report one time. Failing to report one time does not constitute abscond for purposes of ORAP 8.05(3).

Finally, the state argued that the court has inherent authority to dismiss an appeal when a defendant absconds. Although the appellate courts have inherent authority to dismiss an appeal when a defendant absconds, that authority was circumscribed by ORAP 8.05(3).

ARGUMENT

Defendant argues that the Court of Appeals had no authority to dismiss his appeal because he was not on abscond status when the court decided the state's motion to dismiss. App Br 15-17. The state agrees with defendant that, under ORAP 8.05(3), the court does not have the authority to dismiss an appeal if the defendant is no longer on abscond status when the court decides the

motion to dismiss. Resp Br 7. The state further agrees with defendant that, at the time the court decided the motion to dismiss, the information before the court was that defendant was no longer on abscond status. Finally, the state concedes that the Court of Appeals' Order of Dismissal was erroneous. Resp Br 7-8.

Nevertheless, the state argues that the dismissal was appropriate. The state first argues that information before the court when it denied reconsideration allowed the court to deny reconsideration.¹ The state then argues that even if ORAP 8.05(3) did not authorize the court to dismiss defendant's appeal, the court has inherent authority to dismiss an appeal when a defendant has absconded. Resp Br 13-15. The state is incorrect on both accounts.

¹ In so arguing, the state asserts that defendant's argument creates a tension between ORAP 8.05(3) and ORAP 6.25(a) and 7.55(4)(a). Resp Br 9-10. However, the state's argument on this point begins from a faulty premise: that defendant's basis for seeking reconsideration was a "claim of factual error in the decision." ORAP 6.25(a). Defendant's basis for reconsideration was that the court "erred in construing or applying the law." ORAP 6.25(e).

Specifically, the basis for reconsideration was that the court misapplied ORAP 8.05(3) when it dismissed his appeal because he was no longer on abscond status when the court decided the motion. Because the issue was a question of law (whether the court misinterpreted its authority under ORAP 8.05(3)) and not fact (whether defendant was on abscond status), the purported tension between the rules does not exist.

I. Defendant was not on abscond status when the court dismissed his appeal.

The state argues that, at the time the court denied reconsideration, it had submitted additional evidence to support the dismissal. That evidence, the state argues, informed the court that defendant was, in fact, on abscond status when it ordered dismissal.

As defendant argues in his opening brief, the state had the burden of informing the court that defendant was again on abscond status. The state failed to provide that information to the court until it responded to defendant's petition for reconsideration. The question is whether, based on the information before the court at the time it considered the motion, defendant was on abscond status. The state concedes that the information before the court when it dismissed the appeal was that defendant was not on abscond status. As a result, the court should have reinstated defendant's appeal on reconsideration. *See Vance v. Teplick*, 219 Or App 542, 544, 183 P3d 229 (2008) (evidence not part of the appellate record will not be entertained for the first time on reconsideration).

Even if the court can consider evidence that was not before it when it dismissed the appeal, that evidence does not support a finding that defendant was on abscond status when it dismissed the appeal.

On February 25, 2015, the Court of Appeals dismissed defendant's

appeal. On February 26, 2015, defendant's supervising officer requested an arrest warrant. The Board of Parole and Post-Prison Supervision (board) issued an arrest warrant on that date. However, "[t]he mere existence of an unserved warrant does not establish that a person has absconded." *State v. Ford*, 205 Or App 506, 513, 134 P3d 959 (2006). Regardless, the court had already dismissed defendant's appeal when the warrant was issued. Thus, the record does not support a finding that defendant was on abscond status on February 25, 2015.

Furthermore, the state is incorrect that defendant had failed to report to his supervising officer three times in the weeks prior to February 25, 2015. Resp Br 11. As defendant acknowledged in his brief, he had failed to report to his supervising officer one time between the time he was release after a sanction and February 25, 2015. On February 9, 2015, defendant called his supervising officer to report that he was experiencing car trouble and would not be able to make the appointment that day. His supervising officer rescheduled that appointment to February 12, 2015. On that date, defendant called again to report that he had a medical issue and would not be able to make it to his appointment that day. His supervising officer rescheduled the appointment to February 24, 2015. On that date, defendant did not call his supervising officer, show up for his appointment. At best, the evidence before the court when it denied reconsideration showed that defendant failed to report one time. As this

court has explained, failing to attend one meeting does not evince the intent to evade the legal process of a court by hiding within or secretly leaving its jurisdiction. *State v. Robbins*, 345 Or 28, 36, 188 P3d 262 (2008). On the first two occasions, defendant did, in fact, report to his supervising officer by telephone. On each of those dates, his supervising officer rescheduled the appointment. The record contains no evidence that defendant's supervising officer threatened to sanction him on those dates or informed defendant that he would consider those dates as failures to report.

II. ORAP 8.05(3) limits the inherent authority of the court to dismiss an appeal when a defendant absconds.

Relying on *State v. Smith*, 312 Or 561, 822 P2d 1193 (1992), the state, for the first time, argues that the court has inherent authority to dismiss an appeal regardless of the limits in ORAP 8.05(3).² Resp Br 13-14. Notably, that decision was issued the year before the adoption of ORAP 8.05(3). *See*

² Because the state presents this argument for the first time here, this court should not consider it. *See Kentner v. Gulf Ins. Co.*, 298 Or 69, 73, 689 P2d 955 (1984) (arguments not previously raised will not be considered on review); *State v. Schneider*, 204 Or App 710, 714, 131 P3d 842 (2006) (purpose of the rule requiring a party to present consistent arguments is to prevent piecemeal litigation, to keep a party from shifting positions, to promote finality of appellate court decisions, and to conserve judicial resources).

Here the state first argued that defendant had not surrendered when he returned to custody. On reconsideration, the state argued that defendant was on abscond status when the court dismissed his appeal. Now, the state argues that the appellate courts have inherent authority to dismiss an appeal when a defendant absconds.

Robbins, 345 Or at 34-36. (highlighting cases decided before the adoption of ORAP 8.05(3) that dismissed an appeal for abscond based on a court’s inherent authority). Thus, at the time this court decided *Smith*, the ORAPs contained no rule regarding when a court may dismiss an appeal on the ground that the defendant absconded.³

It is a “long-established legal principle” that “appellate courts possess inherent authority to dismiss a defendant’s appeal if that defendant has absconded from the court’s jurisdiction.” *State v. Moss*, 352 Or 46, 51, 279 P3d 200 (2012). It is also well-settled law in Oregon that a court’s inherent authority can be limited by legislative enactment. *See State v. Kuznetsov*, 345 Or 479, 487, 199 P3d 311, 315 (2008) (absent some legislative or constitutional impediment, courts possess inherent authority to issue those rulings necessary to decide the issues before them); *Far W. Landscaping, Inc. v. Modern Merch., Inc.*, 287 Or 653, 659, 601 P2d 1237, 1240 (1979) (noting that trial courts have inherent authority to vacate or amend their judgments but concluding that “in

³ In a footnote, the state lists a number of cases in which the Court of Appeals recognized its inherent authority to dismiss an appeal when the defendant absconds. Resp Br n 7. *State v. Sterner*, 124 Or App 439, 862 P2d 1321 (1993), arose before the adoption of ORAP 8.05(3); *State ex rel Juv Dept of Mult Co v. Linder*, 142 Or App 527, 922 P2d 691 (1996) and *Pruett v. Pruett*, 185 Or App 669, 60 P3d 1094 (2003) were not governed by ORAP 8.05(3); and in *State v. Lundahl*, 130 Or App 385, 882 P2d 644 (1994), the court noted that since *Sterner*, the appellate courts had adopted ORAP 8.05(3), but because the abscond occurred prior to the adoption of the rule, relied on its inherent authority to dismiss.

the face of [ORS 19.033(2)] the trial court has no authority to set aside one judgment and enter another for the sole purpose of extending the time for appeal. Such action would be in direct contradiction of the statute.”).⁴ It follows that a court may limit its inherent authority by rule.

Although the court had inherent authority to dismiss an appeal when a defendant absconded, the appellate courts adopted ORAP 8.05(3) which circumscribed that authority by limiting the court’s discretion to dismiss an appeal to cases where the defendant is on abscond status when the court decides the motion to dismiss. ORAP 8.05(3) (“If the court determines that the appellant is on escape or abscond status at the time the court decides the motion, the court may dismiss the appeal or judicial review.”).⁵ Therefore, whether the Court of Appeals had inherent authority to dismiss an appeal when

⁴ Similarly, the Court of Appeals has held that an agency can limit its statutory authority by administrative rule. *Peek v. Thompson*, 160 Or App 260, 265, 980 P2d 178 (1999), *rev dismissed*, 329 Or 553 (1999) (An administrative rule “may limit what an agency would otherwise be able to do.”).

⁵ If the state is correct that an appellate court retains its inherent authority to dismiss, then ORAP 8.05(3) would be mere window dressing. That is so because the limits set out in that rule would not actually limit the appellate courts. Additionally, if the state is correct, then Justice Durham’s concurrence in *Moss* and the subsequent amendment to ORAP 8.05(3) were for no purpose. Finally, the state’s interpretation raises significant Due Process notice issues because the rule provides notice as to when a court may dismiss an appeal for purposes of abscond but, according to the state, the parameters of ORAP 8.05(3) ultimately have no effect.

a defendant absconded is not material to the analysis, because the court has circumscribed that authority by rule.

Because defendant was not on abscond status when the Court of Appeals dismissed his appeal, the order dismissing his appeal was in error.

CONCLUSION

For the reasons presented in his brief on the merits and this reply brief, defendant asks this court to vacate the Court of Appeals' February 25, 2015, order dismissing his appeal and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 9.17(2)(c) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)(i)(A)) is 4, 392 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner on Review's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 27, 2015.

I further certify that I directed the Petitioner on Review's Brief on the Merits to be served upon Paul Smith attorney for Respondent on Review, on August 27, 2015, by having the document personally delivered to:

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