

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 No. 12114997C

CA A155380

SC S063282

BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Malheur County
Honorable LUNG S. HUNG, Judge

Order of Dismissal Issued: February 25, 2015,
by Appellate Commissioner, James W. Nass
Order Denying Reconsideration Issued: April 30, 2015,
by Rick T. Haselton, Chief Judge

Continued...

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
MARC D. BROWN #030825
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: marc.d.brown@state.or.us

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
ROBERT M. WILSEY #085116
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: robert.wilsey@doj.state.or.us

Attorneys for Respondent on Review

TABLE OF CONTENTS

INTRODUCTION	1
QUESTION PRESENTED AND PROPOSED RULE OF LAW	1
Question Presented	1
Proposed Rule of Law	2
STATEMENT OF FACTS	2
A. The state filed a motion to dismiss defendant’s appeal, informing the court that defendant had absconded and become a fugitive from justice.	2
B. While the Appellate Commissioner considered the state’s motion, defendant failed to report to his probation officer three more times.	3
C. Based on the briefing before him, the Appellate Commissioner granted the state’s motion and dismissed defendant’s appeal.	4
D. The Court of Appeals denied defendant’s petition for reconsideration.	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
A. On reconsideration, the court properly exercised its discretion pursuant to ORAP 8.05(3) and dismissed this case on the basis of updated evidence regarding defendant’s abscond status.	7
B. Defendant was absconding while the state’s motion to dismiss was pending.	11
C. The Court of Appeals also had inherent authority to dismiss defendant’s appeal on the basis of updated information regarding defendant’s abscond status.	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>City of Portland v. Parchen</i> , 113 Or 209, 231 P 980 (1925).....	14
<i>Pruett v. Pruett</i> , 185 Or App 669, 60 P3d 1094, rev den, 335 Or 443 (2003)	14
<i>State ex rel Juv. Dept. of Mult. Co. v. Linder</i> , 142 Or App 527, 922 P2d 691 (1996)	14
<i>State v. Broom</i> , 121 Or 202, 253 P 1044 (1927).....	13
<i>State v. Lazarides</i> , 357 Or 595, __ P3d __ (2015).....	6
<i>State v. Lundahl</i> , 130 Or App 385, 882 P2d 644 (1994)	14
<i>State v. Moss</i> , 352 Or 46, 279 P3d 200 (2012).....	13
<i>State v. Robbins</i> , 345 Or 28, 188 P3d 262 (2008).....	11, 12, 13
<i>State v. Smith</i> , 312 Or 561, 822 P2d 1193 (1992).....	12, 13, 14
<i>State v. Sterner</i> , 124 Or App 439, 862 P2d 1321 (1993), rev den, 318 Or 583 (1994)	14

Other Authorities

ORAP 6.25	4, 9
ORAP 6.25(a)	6, 10
ORAP 7.55(4).....	4
ORAP 7.55(4)(a).....	4, 6, 9, 10
ORAP 8.05(3).....	1, 2, 6, 7, 8, 9, 10, 11, 13, 14

**BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, STATE OF OREGON**

INTRODUCTION

Under ORAP 8.05(3), when a criminal defendant “absconds” from custody or supervision while his case is on appeal, the court “may dismiss the appeal.” At the instigation of the parties, the Appellate Commissioner dismissed this case under *former* ORAP 8.05(3), concluding that defendant had absconded and had not voluntarily surrendered. Under the current version of ORAP 8.05(3), that decision was erroneous: based on the information the Commissioner had before him at the time he decided the motion—which showed that defendant, who had previously absconded, had since been arrested—the Commissioner should have concluded that defendant was no longer on abscond status and denied the motion to dismiss. But the information the Commissioner had before him when he decided the motion was not up to date. In fact, at the time the Commissioner decided the motion, defendant had absconded *again*. Based on that new information, the Court of Appeals correctly denied reconsideration and dismissed the case.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

When a party seeks reconsideration of an order dismissing an appeal under ORAP 8.05(3), does that rule bar the court from considering evidence of

the appellant's conduct during the pendency of the motion to dismiss, even if that evidence was not before the court (or the Appellate Commissioner) when it originally ruled on the motion?

Proposed Rule of Law

No, when an appellant seeks reconsideration of an order of the Appellate Commissioner dismissing his or her appeal pursuant to ORAP 8.05(3), nothing in that rule bars the court from considering evidence of the defendant's conduct during the pendency of the motion to dismiss, even if the commissioner did not consider that evidence when initially ordering the dismissal.

STATEMENT OF FACTS

A. The state filed a motion to dismiss defendant's appeal, informing the court that defendant had absconded and become a fugitive from justice.

On January 16, 2015, the state moved to dismiss defendant's appeal because he had absconded from supervision and was a fugitive from justice. (ER 1).¹ In support of that motion, the state informed the court that defendant twice had failed to report to his probation officer, and that the Board of Parole and Post-Prison Supervision had issued a warrant for defendant's arrest. (ER 2-3).

¹ The state refers to defendant's excerpt of record in his brief on the merits to this court.

On January 29, 2015, defendant filed a response to the state's motion. (ER 27). Defendant informed the court that he had "returned to custody," and asserted that he was no longer on abscond status because he was, as of that date, lodged in the Yamhill County Jail with a scheduled release date of February 5, 2015. (ER 29). Defendant argued that because he had shown that he had returned to custody, the burden had shifted to the state to show that he had not "surrendered." (ER 29).

On February 11, 2015, the state filed a reply to defendant's response. The state attached a custody report dated January 22, 2015, showing that defendant had been arrested on that date pursuant to an arrest warrant for a probation violation. (ER 32). Accordingly, the state asserted that defendant's appeal should be dismissed because he had not voluntarily surrendered to authorities. (ER 32).

B. While the Appellate Commissioner considered the state's motion, defendant failed to report to his probation officer three more times.

Meanwhile, defendant was released from the Yamhill County Jail on February 5, 2015, and he was ordered to report to his probation officer on February 9. (ER 45). On February 9, defendant failed to report to his probation officer and he was ordered to report again on February 12. (ER 45). On February 12, defendant again failed to report to his probation officer, and he was ordered to report again on February 24. (ER 45). On February 24, 2015,

defendant yet again failed to report to his probation officer, and a warrant was issued for his arrest on February 26, 2015. (ER 44-45).

C. Based on the briefing before him, the Appellate Commissioner granted the state's motion and dismissed defendant's appeal.

On February 25, 2015, the Appellate Commissioner dismissed defendant's appeal. (ER 39). The commissioner concluded, on the basis of the evidence contained in the state's reply, that defendant "did not voluntarily surrender." (ER 39). Notably, the commissioner did not have any evidence of defendant's continuing failures to report to his probation officer in February. Rather, the only information before the commissioner was that defendant had been arrested in January with a scheduled release date of February 5.

D. The Court of Appeals denied defendant's petition for reconsideration.

On February 25, 2015, defendant petitioned the Court of Appeals for reconsideration of the Appellate Commissioner's order pursuant to ORAP 6.25.² (ER 41). Defendant asserted that the commissioner erred by concluding that he was on "abscond status" at the time he decided the motion, because, at

² Defendant's motion cited ORAP 6.25 as pertinent rule providing for reconsideration. (ER 41). However, the rule providing for reconsideration of orders of the appellate commissioner is ORAP 7.55(4). That discrepancy is immaterial here, however, because ORAP 7.55(4)(a) provides that "[a] party may seek reconsideration of a decision of the appellate commissioner as provided by ORAP 6.25," with two exceptions that are not at issue in this case.

that time, defendant “had been taken into custody and was no longer on escape or abscond status.” (ER 42).

March 3, 2015, the state filed a response to the petition for reconsideration. In it, the state informed the court that defendant repeatedly had failed to report to his probation officer after his release from the Yamhill County Jail on February 5, 2015, and that a warrant had been issued for defendant’s arrest on February 26, 2015. (ER 43).

On March 18, 2015, defendant filed a reply, informing the court that he was, by then, back in custody. (ER 47). The inmate roster defendant attached to his reply reflected that he had been arrested on March 17, 2015, for a “post prison sup[ervision] sanction.” (ER 49). Defendant asked the court to reinstate his appeal because he was no longer absconding. (ER 47).

On April 30, 2015, the Court of Appeals, in an order issued by the Chief Judge, denied defendant’s petition for reconsideration. (ER 50). The court concluded, on the basis of the evidence proffered by the state in its response, that “after his re-release from custody, defendant again failed to report to his supervising officer, thereby and evidencing his intent to abscond from supervision.” (ER 50 n 1). The court rejected defendant’s argument to the contrary, explaining that his having been caught and arrested pursuant to an arrest warrant did “not indicate the kind of respect for the judicial process that justifies the court’s expenditure of its limited resources” to consider defendant’s

appeal. (ER 50). This court then allowed review. *State v. Lazarides*, 357 Or 595, __ P3d __ (2015).

SUMMARY OF ARGUMENT

The Court of Appeals properly denied defendant's petition for reconsideration, because, as of February 25, 2015, the time the Appellate Commissioner decided the motion, defendant was absconding. The evidence in the record before the court when it decided defendant's petition for reconsideration reflected that defendant repeatedly had failed to report to his probation officer and, thus, had failed to make himself available for probation. This court previously has held that a defendant's repeated failures to make himself or herself available for probation falls within the definition of "abscond" in ORAP 8.05(3). Accordingly, the Court of Appeals properly denied defendant's petition for reconsideration because, at the time the commissioner dismissed the appeal, defendant was, indeed, absconding.

Nothing in the text of ORAP 8.05(3) barred the Court of Appeals from considering, when it decided defendant's petition for reconsideration, evidence of defendant's conduct between January 16, 2015, and February 24, 2015, while the state's motion to dismiss was pending. Defendant's assertion that ORAP 8.05(3) bars the court from considering such evidence is not supported by the rule's text, would create tension between the rule and ORAPs 6.25(a) and 7.55(4)(a), and would be inconsistent with the spirit of the rule. Alternatively,

if the Court of Appeals erred by considering new evidence on reconsideration, this court nonetheless should affirm because dismissal of defendant's appeal was a permissible exercise of the Court of Appeals' inherent authority.

ARGUMENT

The issue in this abscond case is whether the Court of Appeals had authority on reconsideration to dismiss the appeal on the basis of information that the Appellate Commissioner did not have before him at the time he decided the motion. As explained below, the Court of Appeals had authority to do so both under ORAP 8.05(3) and under the court's inherent authority.

A. On reconsideration, the court properly exercised its discretion pursuant to ORAP 8.05(3) and dismissed this case on the basis of updated evidence regarding defendant's abscond status.

As an initial matter, the state agrees with defendant that the Court of Appeals lacks discretion to dismiss an appeal pursuant to ORAP 8.05(3) if, when it decides the motion, an appellant has been returned to custody. (Pet Br 14). The state further agrees with defendant that, under that construction of ORAP 8.05(3) the reasoning in the Appellate Commissioner's February 25, 2015, order dismissing defendant's appeal was erroneous. At that point, the only evidence before the commissioner was that defendant was not on abscond

status because he had been arrested and lodged in jail, with a scheduled release date of February 5, 2015. (ER 31).³

However, when the Court of Appeals decided defendant's petition for reconsideration, it had updated evidence regarding defendant's conduct between January 16, 2015 and February 24, 2015. That evidence showed that, at the time the commissioner had decided the motion to dismiss, defendant had again absconded by failing to report to his probation officer three more times. For that reason, the court properly exercised its discretion pursuant to ORAP 8.05(3) and dismissed this case.

ORAP 8.05(3) provides, in part:

If a defendant in a criminal case * * * on appeal of an adverse decision, escapes or absconds from custody or supervision, the respondent on appeal may move for dismissal of the appeal. 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. If the court has not been advised otherwise, the court may infer that the appellant remains on escape or abscond status when the court considers and decides the motion.

Nothing in the text of that rule prohibits the court on reconsideration from considering updated evidence of an appellant's previous abscond status—that

³ The commissioner dismissed defendant's appeal because defendant "did not voluntarily surrender." (ER 39). That phrase was contained in *former* ORAP 8.05(3), but is not in the current version of that rule and the commissioner's reliance on that rule was incorrect. To be sure, the commissioner's reliance on that text from the former rule was understandable, given that both the state and defendant relied upon that text in briefing to the commissioner. *See* (ER 1); (ER 27).

is, nothing in the rule prevents the court from considering new evidence about what the appellant's abscond status was at the time the motion to dismiss was decided.

In arguing to the contrary, defendant asserts that the phrase “at the time the court decides the motion” establishes a temporal limit on the evidence the court can consider. (Pet Br 16). But that phrase does not purport to limit the *evidence* a court can consider in making its determination on reconsideration; instead, it specifies the point in time at which an appellant's conduct is assessed. Stated another way, whether or not an appellant is on escape or abscond status is determined *as of* the time the court decides the motion. Here, that point in time was February 25, 2015— the date the commissioner dismissed defendant's appeal.⁴

Defendant's proposed temporal limitation would create tension between ORAP 8.05(3) and ORAPs 6.25(a) and 7.55(4)(a), the rules providing a mechanism for seeking reconsideration of the commissioner's decision. One of the grounds on which a party may seek reconsideration is “a claim of factual

⁴ The use of the definite term “the” in ORAP 8.05(3) reflects an intent that the “motion” referred to is the motion to dismiss under the rule. Thus, the phrase “at the time the court decides the motion” cannot be read to refer to the later time at which the court may decide a petition for reconsideration. Accordingly, when deciding a petition for reconsideration of an ORAP 8.05(3) order, the Court of Appeals properly may consider evidence of a defendant's conduct up to, but not after, the time the court decided the motion.

error in the decision.” ORAP 6.25(a).⁵ And that is what happened here: defendant sought reconsideration on the ground that the court had erred by determining that he was on abscond status at the time it decided the motion. (ER 42). In response, the state asserted that defendant “remains on abscond status,” and provided updated evidence demonstrating that defendant repeatedly had failed to report to his probation officer in the three weeks immediately prior to the court deciding the motion. (ER 43, 44-45). Defendant’s proposed construction of ORAP 8.05(3) would require the court to ignore that updated evidence. Because ORAP 8.05(3) requires the court to make the factual determination whether a defendant is absconding at the time it decides the motion, the rule should not be construed to prohibit the court from considering newly proffered evidence demonstrating a factual error in its decision.⁶

⁵ The same ground may be raised in a petition for reconsideration of a decision of the Appellate Commissioner. ORAP 7.55(4)(a).

⁶ Defendant’s proposed temporal limitation also would deprive absconding appellants who return to custody, but neglect to immediately inform the court of their return, of an opportunity to successfully petition for reconsideration. Defendant’s construction of ORAP 8.05(3) essentially freezes the record at the moment an appellant files his or her response to the state’s motion to dismiss. (Pet Br 15). If, for example, an appellant were to inform the court in his response to a state’s motion to dismiss that he is absconding but then, while the court has his motion under advisement, he were to return to custody but fail to so inform the court before the court decides the motion, defendant’s construction of ORAP 8.05(3) would require the court on reconsideration to ignore that fact and dismiss the appellant’s appeal. That cannot be how the drafters of ORAP 8.05(3) intended the rule to operate.

B. Defendant was absconding while the state’s motion to dismiss was pending.

In light of the updated evidence that the Court of Appeals had of defendant’s abscond status, the court properly denied defendant’s petition for reconsideration. The evidence in the record before the court on reconsideration reflected that, as of the time the commissioner decided the motion on February 25, defendant was absconding. Defendant first failed to report on February 9; he contacted his probation officer and claimed that his vehicle had broken down. (ER 45). Defendant again failed to report on February 12; he again contacted his probation officer and claimed that he had been told by a doctor to rest. (ER 45). On February 24, defendant failed to report for a third time and also failed to contact his probation officer. (ER 45). The next day, a warrant was issued for his arrest. (ER 44). Those facts support the Court of Appeals’ determination that, as of the time the court decided the motion, defendant was absconding.

In *State v. Robbins*, 345 Or 28, 188 P3d 262 (2008), this court construed the term “abscond” in ORAP 8.05(3) to require “a showing of some kind of conscious intent to evade or avoid legal process.” *Id.* at 34. As pertinent here, this court held that in order to determine whether a defendant has absconded from supervision, “appellate courts must consider whether the defendant’s acts show the intent that inheres in the definition of ‘abscond’—not simply that the

defendant failed to attend *one* meeting with a probation officer or could not be located for a *brief* period of time, but that the defendant sought to ‘evade the legal process of a court[.]’” *Id.* at 36 (Emphases added; internal citations omitted). The “legal process” that a defendant must seek to evade includes “mak[ing] himself available for probation.” *Id.* citing *State v. Smith*, 312 Or 561, 564, 822 P2d 1193 (1992).

Here, defendant did more than merely miss one meeting with his probation officer, as the defendant in *Robbins* had done. *See Robbins*, 345 Or at 30. Before the state filed its motion to dismiss, defendant twice failed to report to his probation officer, resulting in a warrant being issued for his arrest. (ER 2, 16). Later, while the state’s motion to dismiss was under advisement, defendant failed to report to his probation officer three more times. (ER 45). To be sure, on February 9 and February 12 defendant contacted his probation officer and provided excuses for his failure to report. (ER 45). But defendant had offered no explanation for his failures to report prior to the state’s motion to dismiss. (ER 16). And defendant also offered no explanation for his February 24 failure to report. (ER 45). That pattern of repeated, unexplained failures to report casts doubt on the validity of defendant’s excuses for his February 9 and February 12 failures.

In short, on reconsideration the Court of Appeals had before it a record of defendant’s repeated failures to report to his probation officer. Those repeated

failures fall within this court’s definition of the term “abscond” in *Robbins*, because they demonstrate that defendant sought to evade the legal process of the court by failing to make himself available for probation. *Robbins*, 345 Or at 36; *Smith*, 312 Or at 564. Accordingly, the Chief Judge of the Court of Appeals properly denied reconsideration because, as of the time the commissioner decided the state’s motion to dismiss; *viz.*, February 25, 2015, defendant was absconding.

C. The Court of Appeals also had inherent authority to dismiss defendant’s appeal on the basis of updated information regarding defendant’s abscond status.

If defendant is correct that ORAP 8.05(3) does not provide authority on reconsideration to dismiss an appeal based on new evidence of his conduct while the motion to dismiss was under advisement, this court should nevertheless affirm because dismissal of defendant’s appeal was a permissible exercise of the Court of Appeals’s inherent authority.

This court repeatedly has recognized the inherent authority of appellate courts to dismiss appeals where a defendant has absconded. *See State v. Moss*, 352 Or 46, 53-57, 279 P3d 200 (2012) (describing case law); *Smith*, 312 Or at 563 (same); *see also State v. Broom*, 121 Or 202, 209, 253 P 1044 (1927) (warning that allowing an appeal where a defendant has fled the jurisdiction would permit such defendants to “go unwhipped of justice[.]”); *City of Portland*

v. *Parchen*, 113 Or 209, 231 P 980 (1925) (well established that courts will not hear an appeal while a defendant is fleeing from justice).⁷

In *Smith*, for example, the defendant was convicted and placed on probation. 312 Or at 563. After the Court of Appeals affirmed his conviction, this court granted review. *Id.* The state then notified this court that a circuit court judge had issued an order to show cause why the defendant's probation should not be revoked for failing to remain under the supervision and control of the probation department, in particular, by "fail[ing] to truthfully report monthly at times and in a manner specified by the Probation Department." *Id.* The state also informed the court that a bench warrant had been issued for the defendant's arrest, and that it considered him to be a fugitive from justice. *Id.* After canvassing its prior decisions treating the inherent authority appellate courts to dismiss appeals, this court concluded that:

No persuasive reason has been given why this court should proceed to decide the merits of this criminal case after defendant has failed to make himself available for probation supervision as required by the trial court on his conviction. Although defendant's absconding from probation does not deny this court the power to

⁷ The Court of Appeals also has recognized its inherent authority in this respect. *State v. Sterner*, 124 Or App 439, 441, 862 P2d 1321 (1993), *rev den*, 318 Or 583 (1994); *see also State v. Lundahl*, 130 Or App 385, 387, 882 P2d 644 (1994) (same); *State ex rel Juv. Dept. of Mult. Co. v. Linder*, 142 Or App 527, 531, 922 P2d 691 (1996)(exercising discretion to dismiss appeal in case not governed by ORAP 8.05(3)); *Pruett v. Pruett*, 185 Or App 669, 677-678, 60 P3d 1094, *rev den*, 335 Or 443 (2003)(same).

review his case, we, in our discretion, decline to call upon the resources of this court for a review of his case.

Id. at 564.

So too here. As detailed above, defendant absconded by repeatedly failing to make himself available for probation supervision as required by the trial court. Accordingly, the Chief Judge of the Court of Appeals did not abuse his discretion by dismissing defendant's appeal.

CONCLUSION

This court should affirm the decision of the Chief Judge of the Court of Appeals.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
PAUL L. SMITH
Deputy Solicitor General

/s/ Robert M. Wilsey

ROBERT M. WILSEY #085116
Assistant Attorney General
robert.wilsey@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 8, 2015, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Marc D. Brown, attorneys for appellant, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,560 words. I further 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(2)(b).

/s/ Robert M. Wilsey

ROBERT M. WILSEY #085116

Assistant Attorney General

robert.wilsey@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon