40th Annual Appellate Update

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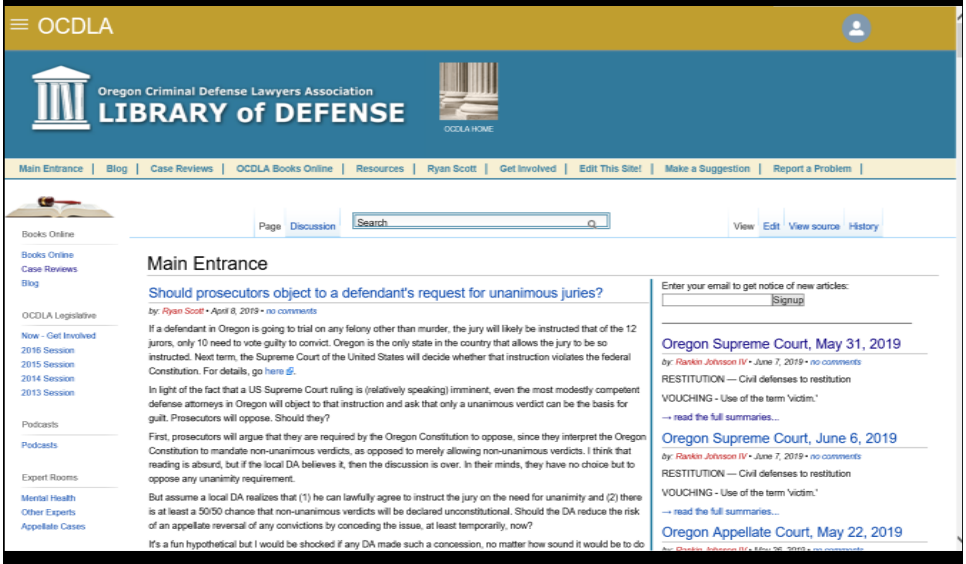
Salem, Oregon

Justice Chris Garrett

Judge Josephine "Jodie" H. Mooney



Ramos v. Louisiana, 18-5924

Dick v. Oregon, 18-9130

Question Presented: Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

Ramos v. Louisiana, 18-5924

Dick v. Oregon, 18-9130

PRACTICE TIPS:

- Always ask for a unanimous jury instruction
- Always except to the nonunanimous instruction
- Always poll the jury
- Always object to the validity of a nonunanimous verdict

Garza v. Idaho, 139 S Ct 738 (2019)

"Accordingly where, as here, an attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions, prejudice is presumed "with no further showing from the defendant of the merits of his underlying claims."

Garza v. Idaho, 139 S Ct 738 (2019)

PRACTICE TIP: If your client indicates that he wants to appeal his conviction or sentence, refer the case to OPDS. Even if your client pleaded guilty, stipulated to the sentence, and stipulated that he was waiving his right to appeal. OPDS will sort it out.

Juvenile Sentencing

State v. Allen, 294 Or App 301, 432 P3d 250 (2018)

"The court's statement in *Kinkel* that the transience of youth 'justifies a constitutional distinction between permissible punishment for a juvenile and an adult whose crimes are otherwise identical,' signals to us that the court regards the 'transience of youth' as a factor that must be considered under the Eighth Amendment in addressing the constitutional proportionality of a mandatory minimum sentence like the one imposed on defendant."

Juvenile Sentencing

State v. Allen, 294 Or App 301, 432 P3d 250 (2018)

PRACTICE TIP: Any time a juvenile who has been waived to criminal court and is facing a "mandatory sentence" pursuant to ORS 137.707 or ORS 163.105, the sentencing court must hold an "*Allen* hearing" to determine if the sentence amounts to cruel and unusual punishment as applied to this defendant.

Juvenile Sentencing

State v. Link, 297 Or App 126, __ P3d __ (April 17, 2019)

"Taken together, the several statutes that comprise the Oregon scheme for imposition of the severe sentence options for aggravated murder on a juvenile defendant fail the procedural obligation—the affirmative duty—to assess the role of youth at the time of sentencing in determining the constitutionally proportionate sentence. As such, we conclude that the application of ORS 163.105 as written, to a juvenile defendant, violates the Eighth Amendment."

Juvenile Sentencing

White v. Premo, 365 Or 1, __ P3d __ (May 31, 2019)

- The statutory bar against subsequent post-conviction relief petitions does not apply to a *Miller/Montgomery* claim.
- The *Miller/Montgomery* analysis applies to *de facto* life sentences

Juvenile Sentencing

White v. Premo, 365 Or 1, __ P3d __ (May 31, 2019)

- The statutory bar against subsequent post-conviction relief petitions does not apply to a *Miller/Montgomery* claim.
- The *Miller/Montgomery* analysis applies to *de facto* life sentences

PRACTICE TIP: Every juvenile (except for Kip Kinkel) with an arguable *de facto* life sentence should file a new petition for post-conviction relief seeking resentencing.

Vouching

State v. Sperou, 365 Or 1, __ P3d __ (June 6, 2019)

"We granted review to address two questions: whether the trial court erred in admitting the testimony of the six other women who described being abused by defendant, and whether the trial court erred in allowing SC and those other women to be described as 'victims' by the prosecutor and state's witnesses."

Vouching

State v. Sperou, 365 Or 1, __ P3d __ (June 6, 2019)

"In short, we agree with defendant that, under our reasoning in *Lupoli*, the use of the term 'victim' to refer to the complaining witness or other witnesses, in circumstances where the accusers' own testimony is the only evidence that the alleged criminal conduct occurred, conveys the speaker's belief that the accusers are credible."

Vouching

State v. Sperou, 365 Or 1, __ P3d __ (June 6, 2019)

"We also agree with defendant's contention that, where a defendant denies that any crime occurred, references to the complaining witness as a 'victim' may undermine the presumption of defendant's innocence because it assumes defendant's guilt, a fact that is necessarily not proved until the jury finds the defendant guilty."

Vouching

State v. Sperou, 365 Or 1, __ P3d __ (June 6, 2019)

"However, a defendant's valid reasons for resolving such concerns before trial do not create an entitlement to more relief than is legally appropriate. Here, defendant's pretrial motion failed to appreciate, much less alert the trial court to, the considerations distinguishing a prosecutor's legitimate use of the term "victim" from uses that are improper. As such, the trial court was not required to prohibit the use of a word that, we have explained, may be used appropriately depending on context."

Vouching

State v. Sperou, 365 Or 1, __ P3d __ (June 6, 2019)

PRACTICE TIPS:

- Always move pretrial to preclude the prosecutor and witnesses from referring to the complaining witness as "the victim."
- During trial, if the prosecutor refers to the complaining witness as "the victim," object and move for a mistrial.

Restitution

State v. Gutierrez-Medina, 365 Or 79, __ P3d __ (June 6, 2019)

"We allowed review to consider whether the trial court erred in refusing to apply the civil law defense of comparative fault to reduce the amount of economic damages that defendant would be required to pay as restitution."

Restitution

State v. Gutierrez-Medina, 365 Or 79, __ P3d __ (June 6, 2019)

"Thus, under the common law, if a defendant's conduct could be characterized as 'wanton,' then the plaintiff's contributory negligence was no defense. That is the line that the legislature carried forward when it created the defense of comparative fault: if the defendant's conduct was at least 'wanton,' comparative fault is no defense."

Restitution

State v. Gutierrez-Medina, 365 Or 79, __ P3d __ (June 6, 2019)

"As part of his plea of guilty to assault in the third degree, ORS 163.165(1)(a), defendant admitted that he

> 'recklessly caused serious physical injury to [the victim] by means of a motor vehicle, a dangerous weapon, which [he] drove on a public road under the influence of intoxicants.'

That admission establishes a degree of culpability that, in a hypothetical civil action, would fall within the category of 'wanton misconduct,' for which the injured person's negligence provides no defense."

Restitution

State v. Gutierrez-Medina, 365 Or 79, __ P3d __ (June 6, 2019)

PRACTICE TIPS:

- If a statute provides for criminal culpability for a criminal negligence state of mind, then comparative fault applies.
- Request a jury to determine restitution. Under *Gutierrez-Medina*, it seems like the court is aligning the procedures with a civil action. Art I, sec 17.

Interrogation

State v. Jackson, 364 Or 1, 430 P3d 1067 (2018)

- A defendant's confession is inadmissible unless the state presents sufficient evidence to prove that it was not made under the influence of fear produced by threats.
- The voluntariness of a confession depends on whether or not, in the totality of the circumstances, a defendant's free will was overborne and his or her capacity for self-determination was critically impaired.
- Confessions are initially deemed to be involuntary and that the state has the burden to overcome that presumption by offering evidence affirmatively establishing that the confession was voluntary.

Interrogation

State v. Jackson, 364 Or 1, 430 P3d 1067 (2018)

Question: Whether the state met its burden to prove that defendant's free will was not overborne and his capacity for self-determination was not critically impaired, and that he made his statements without inducement from fear or promises.

Interrogation

State v. Jackson, 364 Or 1, 430 P3d 1067 (2018)

Under the totality of the circumstances, a court considers the techniques used and the person upon whom the techniques are used.

"We agree with defendant that a defendant's mental condition is a factor that must be considered, as part of the totality of the circumstances, in determining whether a defendant's confession was voluntary."

Interrogation

State v. Jackson, 364 Or 1, 430 P3d 1067 (2018)

PRACTICE TIPS:

- If the police conducted an interrogation, obtain the video recording, if one exists, and have a transcript produced
- Look at the techniques used, especially the Reid Technique
- Submit academic papers on the topic of the effects of coercive techniques on a suspect
- Refer to the Central Park 5 and other actual innocent cases
- Put evidence of the defendant's mental and physical state at the time of the interrogation into the record (both transitory and long term)
- Challenge the interrogation for every juvenile defendant

Theft by Receiving by Selling

State v. Fonte, 363 Or 327, 422 P3d 202 (2018)

Does a defendant commit the crime of theft in the first degree under ORS 164.055(1)(c), theft by receiving committed by selling, when the defendant took an item from the store's sales floor, approached a store employee at a cash register, and, giving the impression that he had previously purchased the item, "returned" it for cash?

Theft by Receiving by Selling

State v. Fonte, 363 Or 327, 422 P3d 202 (2018)

A person commits the crime of "theft by receiving" when the person "receives, retains, conceals or disposes of property of another knowing or having good reason to know that the property was subject of theft." ORS 164.095(1).

Theft by Receiving by Selling

State v. Fonte, 363 Or 327, 422 P3d 202 (2018)

"We conclude that the legislature did not intend theft by receiving committed by selling to include a theft, such as that committed in this case, that is both committed by an initial thief and committed by fraudulently returning property to its owner in accordance with the owner's return policy rather than by selling that property to a third party in the market for stolen goods."

Theft by Receiving by Selling

State v. Fonte, 363 Or 327, 422 P3d 202 (2018)

Justice Kistler, concurring:

"Defendant did not commit a theft of the jeans until he returned them for cash; that is, picking the jeans up off the shelf and taking them to the store clerk did not constitute theft even if defendant had an intent to appropriate them. It was not until defendant acted inconsistently with the store's superior interest in the jeans by returning them for cash that he committed theft in violation of ORS 164.015(1)."

Failure to Appear

State v. McColly, 364 Or 464, 435 P3d 715 (2018)

What is the meaning of the term "released from custody" in the context of failure to appear?

Failure to Appear

State v. McColly, 364 Or 464, 435 P3d 715 (2018)

ORS 162.195, makes it a crime to knowingly fail to appear
"after * * * *[h]aving by court order been released from custody* or a correctional facility under a release agreement or security release upon the condition that the person will subsequently appear personally in connection with a charge against the person of having committed a misdemeanor[.]" (Emphasis added)

Failure to Appear

State v. McColly, 364 Or 464, 435 P3d 715 (2018)

> "To establish that defendant had been 'released from custody' for purposes of second-degree failure to appear, ORS 162.195(1)(a), the state was required to prove (1) the imposition of actual or constructive restraint by a peace officer, pursuant to an arrest or court order, amounting to 'custody,' ORS 162.135(4); and, then, (2) that defendant had been released from that custody, by court order, under a release agreement and upon an appearance condition."