

This summary of Oregon appellate case law addresses four topics: the availability of and general standards for appellate review, standards and allowable grounds for departure, constitutional requirements for proof of facts permitting upward departure under *Blakely v. Washington*, and other important appellate sentencing decisions.

## 1. Availability of and General Standards for Appellate Review.

Appellate review of a felony sentence at the request of the defendant or the state is available when the sentencing court pronounces a sentence that falls outside of the presumptive guidelines range, when a sentence within the presumptive range involves an error in calculation of crime severity level or criminal history category, or when the sentencing court fails to comply with a minimum sentence or other requirement of law.<sup>1</sup> Review is precluded if the case falls within one of the grid “border boxes” (grid cells in which the recommended sentence is imprisonment but the court may impose either prison or probation with neither being deemed a departure),<sup>2</sup> or if the sentence was imposed pursuant to a “stipulated sentencing agreement between the state and the defendant which the sentencing court approves on the record.”<sup>3</sup> In addition, a defendant appealing his or her sentence must first make a showing of a colorable claim of error if: a) the sentence resulted from a plea of guilty or no contest; b) defendant is appealing revocation of probation or a suspended sentence, or extension of the term or conditions of release; or c) the contested sentence was entered in a resentencing ordered by an appellate or post-conviction appeal court.<sup>4</sup> The “colorable claim” requirement was added to “allow[] early dismissal of a nonmeritorious appeal.”<sup>5</sup>

Trial court findings on issues of sentencing law and policy are reviewed de novo, as questions of law, whereas substantial deference is given to the lower court’s factual findings and the application of legal rules to those facts.<sup>6</sup>

## 2. Standards and Allowable Grounds for Departure.

### a. Standards of Review

A sentencing court has discretion to impose a departure sentence, provided the departure is based on substantial and compelling reasons stated on the record and supported by evidence in the record.<sup>7</sup> Even where a basis to depart exists, the court retains discretion not to depart; thus, appellate review of a departure sentence is limited to whether the factual basis and reasons given by the sentencing court appropriately support a departure, not the *decision* to depart.<sup>8</sup> Application of the substantial and compelling standard on appeal has two components:

- 1) The Evidentiary Test: Are the facts stated by the sentencing judge in justification of the departure supported by the record?
- 2) The Law Test: Are the reasons stated on the record for the departure adequate to justify a sentence outside the standard range (...are they consistent with the purposes of the sentencing guidelines rules)?<sup>9</sup>

When a sentencing court imposes both a dispositional and durational departure sentence, the sentencing court must state on the record the substantial and compelling reasons justifying the dispositional departure and independently state the substantial and compelling reasons for the further durational departure on the record.<sup>10</sup>

### b. Allowable Grounds for Departure

The Oregon legislature provided a list of *non-exhaustive* factors a court may consider in imposing a departure sentence.<sup>11</sup> Oregon Courts are free to consider a non-listed factor in support of a departure, provided that such a factor furthers the purposes of the guidelines.<sup>12</sup> “The premise underlying the guidelines is that the grid block sentence presumptively accomplishes the purposes.... It follows that substantial and compelling reasons must be exceptional circumstances that overcome that presumption.”<sup>13</sup>

Oregon Courts have rejected departures entered on the following listed grounds:

- Significantly greater-than-typical degree of harm (listed aggravating factor J), where the harm or loss did not have “a direct link to [the] defendant’s acts;”<sup>14</sup>
- Permanent injury to the victim (factor I), where co-offenders rather than the defendant actually harmed the victim;”<sup>15</sup> and
- “Persistent involvement in similar offenses or repetitive assaults” (factor D), where the principal feature in common between the former and current offenses was defendant’s intoxication, and the prior crimes occurred thirteen years earlier.<sup>16</sup>

As for unlisted grounds for departure,<sup>17</sup> the Oregon Supreme Court has held that upward durational departures may be based on a finding that the defendant’s extensive criminal record of prior incarcerations and other sanctions “should have, but did not, deter the defendant from committing his new offense or offenses.”<sup>18</sup> The Court of Appeals has held that defendant’s supervision status at the time of the current offense may constitute grounds for upward durational departure, and so may the defendant’s lack of amenability to supervision demonstrated by repeated parole and probation violations.<sup>19</sup> That court has also held that an offender’s lack of any attempt to rehabilitate himself, despite having several opportunities to do so, can constitute grounds for upward durational and dispositional departure.<sup>20</sup> A sentencing court may consider the defendant’s conduct after commission of the current offense in determining whether there are substantial and compelling reasons to depart upwards.<sup>21</sup>

The Oregon Court of Appeals has held that punishment or just deserts cannot by itself function as a factor justifying a departure.<sup>22</sup> “Although a court might refer to the principle in explaining why a presumptive sentence would not accomplish the purposes of the guidelines ... appropriate punishment is not an aggravating factor.”<sup>23</sup>

### 3. Constitutional Requirements for Proof of Facts Permitting Upward Departure (*Blakely v. Washington* issues)

In *State v. Dilts*, the prosecution conceded, and the Oregon Supreme Court agreed, that Oregon’s guidelines are not materially different from the Washington state guidelines system struck down in *Blakely*. Oregon’s recommended guidelines ranges are legally binding in the same way as the Washington guidelines; accordingly, the Supreme Court held that judicial finding of a contested fact required to impose an upward durational departure violated the defendant’s right to trial by jury.<sup>24</sup> In *Dilts* the prosecution further argued that the court should uphold the defendant’s sentence by severing and invalidating only the guidelines provision rendering the recommended guidelines range mandatory (legally binding on judges) in the absence of departure; however, the court declined to sever that provision because it found no defect in the provision itself – a mandatory guidelines range suffers no constitutional defect provided that the facts needed to depart above that range are either admitted by the defendant or found by the jury.<sup>25</sup>

However, in *State v. Upton*, the Supreme Court held that, once aggravating facts have been found by the jury, *Blakely* permits the judge to determine whether those facts meet the statutory standard of “substantial and compelling reasons” justifying departure.<sup>26</sup>

In several cases Oregon courts have narrowly construed the *Blakely* exception for “the fact of a prior conviction.” The exception does not apply to prior juvenile adjudications, nor to the listed aggravating factor of “persistent involvement in similar offenses.”<sup>27</sup>

As to juvenile adjudications, the court further held that although Oregon juvenile court proceedings do not include trial by jury, juvenile adjudications are sufficiently reliable to be used to enhance adult sentences.<sup>28</sup> But the court went on to hold that defendant did not sufficiently admit his prior juvenile adjudications when he noted them in his guilty plea petition; an admission of aggravating facts under *Blakely* must be made “for the purpose of dispensing with proof of a fact in issue,” and must meet the standards required for waiver of important trial rights, that is, “an intentional relinquishment or abandonment of a known right or privilege.”<sup>29</sup>

However, the Supreme Court applied a standard less exacting than waiver in *State v. Gornick*, holding that “plain error” rules apply to defendants sentenced before *Blakely* was decided, and that, since the defendant did not raise any constitutional objection to the trial court’s finding of aggravating facts justifying upward departure, any constitutional error by the trial court did not appear “on the face of the record” so there was no plain error.<sup>30</sup>

In *State v. Sawatzky*, the Oregon Supreme Court answered an issue left open in *Blakely* and held that sentence-enhancing facts need not be alleged in the indictment.<sup>31</sup> Although such facts are deemed to be the functional equivalent of crime elements for purposes of jury trial and reasonable doubt requirements, the constitution only requires that the defendant be given “timely notice that the state intends to prove certain aggravating or enhancing factors necessary for [an upward departure],” and then be afforded a proper opportunity to exercise his jury trial and reasonable doubt rights with regard to proof of such facts.<sup>32</sup>

Imposition of consecutive sentences on multiple current offenses can also raise potential *Blakely* issues if such sentences require the sentencing court to find certain facts. In *State v. Ice*, the defendant was convicted of multiple counts of burglary and child sex abuse. Under the applicable Oregon statute the trial court could not impose consecutive sentences unless it made certain factual findings, and the Oregon Supreme Court held that such findings are subject to the federal constitutional requirements of *Blakely*.<sup>33</sup> The United States Supreme Court reversed the Oregon Supreme Court on this point, reasoning that *Blakely* was designed only to protect the jury’s traditional province to determine offense facts that increase the maximum authorized punishment, and that, both at common law and in modern times, judges have had the authority to impose consecutive sentences without involvement of the jury.<sup>34</sup> Although the Oregon Supreme Court’s decision in *Ice* was overruled on federal constitutional grounds, the court’s further decision under the Oregon constitution remains in force: the imposition of consecutive sentences based on judge-found facts does not violate the defendant’s state constitutional right to jury trial.<sup>35</sup>

## 4. Other Important Appellate Sentencing Decisions

Several appellate decisions have upheld the Oregon guidelines against state constitutional challenges. In *State v. Spinney*, the Oregon Court of Appeals held that the guidelines do not unduly interfere with judicial functions in violation of principles of separation of powers under the Oregon Constitution, since judges retain discretion to sentence within the guidelines ranges and may also depart in appropriate cases.<sup>36</sup> *Spinney* also upheld the guidelines against claims that they violated two state constitutional provisions governing criminal sentences. The court first held that the constitutional requirement that punishment “be founded on the principles of reformation, and not of vindictive justice” did not prevent the legislature from recognizing, as one of the primary purposes of guidelines sentencing, “punishment that is appropriate to the offense.”<sup>37</sup> The court also held that the requirement that penalties be “proportioned to the offense” was not violated by guidelines rules enhancing penalties based on the offender’s criminal history; in the court’s view, the constitutional provision permits sentences to be proportioned to the offender, as well as to the offense.<sup>38</sup>

In *State v. Davilla*, the Court of Appeals held that the Oregon Assembly did not improperly delegate its powers to the Sentencing Guidelines Board when it gave the board authority to develop sentencing guidelines and implement them as administrative rules. The Court determined that by providing standards directing the board’s design and implementation of the Guidelines, and by reserving final control and approval power over the creation and amendment of the Guidelines, the Oregon Assembly “ensured that its policy directives would be, in fact, followed by the board in defining and implementing the legislature’s broad statutory standards.”<sup>39</sup>

As noted above, in *State v. Ice*, the Oregon Supreme Court held that judicial fact findings permitting imposition of consecutive sentences did not violate the defendant’s jury trial rights under the Oregon Constitution.<sup>40</sup> That ruling survives the U.S. Supreme Court’s reversal of the Oregon court’s decision on federal grounds; therefore, such judicial fact finding violates neither the state nor the federal constitution.

## ENDNOTES

<sup>1</sup> See Or. Rev. Stat. §§ 138.105(8), 138.115(6) (2018). However, in certain circumstances the court is permitted by statute to impose a sentence less than a statutory mandatory minimum; the defendant may appeal to raise a claim that the court failed to apply this provision. *State v. Arnold*, 164 P.3d 334, 340 (Or. Ct. App. 2007). See also *State v. Martin*, 887 P.2d 782, 784 (Or. 1994) (holding that a sentence that falls within the presumptive sentencing range is not reviewable by the Court of Appeals).

<sup>2</sup> Or. Rev. Stat. §§ 138.105(8)(a), 138.115(6)(a) (2018).

<sup>3</sup> Or. Rev. Stat. §§ 138.105(9), 138.115(7) (2018). *State v. Adams*, 847 P.2d 397 (Or. 1993) (holding that the cited statute precludes a claim on appeal that the stipulated sentencing guidelines grid block was incorrect and that the sentence thus constituted a departure not supported by the necessary trial court findings).

<sup>4</sup> Or. Rev. Stat. § 138.085 (2018).

<sup>5</sup> *State v. Brewer*, 320 P.3d 620, footnote 2 (Or. Ct. App. 2014). *Brewer* contrasted issues of “appealability... whether an appeal can be taken at all” with issues of “reviewability... which issues can be considered on appeal” *Id.* at 622. The court determined that Or. Rev. Stat. § 138.222(7) governs issues of appealability, whereas § 138.222(4) governs issues of reviewability. *Id.* at 624. Appealability is limited by the language in § 138.222(7) that the claim of error must be “based on the sentence;” this means a claim related either to the terms of the sentence itself, or to a procedural or other legal error “that had some likelihood of affecting the terms of the sentence.” *State v. Clements*, 333 P.3d 1177, 1182, 1185 (Or. Ct. App. 2014). See also *State v. Nix*, 345 P.3d 416 (Or. 2015) (affirming the distinction between appealability and reviewability issues, and holding that all subsections of § 138.222 only apply to felony cases even though some sections do not expressly mention felonies or exclude misdemeanors). Note that § 138.222 is now repealed, but the language from § 138.222(4) is now found in Or. Rev. Stat. §§ 138.105(8)(c), 138.115(6)(c), and the language from § 138.222(7) is now found in § Or. Rev. Stat. § 138.085.

<sup>6</sup> *State v. Allred*, 995 P.2d 1210, 1212 (Or. Ct. App. 2008); Or. Rev. Stat. §§ 138.105, 138.115 (2018).

<sup>7</sup> Or. Admin. R. § 213-008-0001 (2018); *State v. Waage*, 981 P.2d 333, 334 (Or. Ct. App. 1999). See also Or. Rev. Stat. §§ 138.105(8)(b), 138.115(6)(b) (2018) (an appeal of a departure sentence is limited to whether the sentencing court’s findings of fact and reasons justify a departure).

<sup>8</sup> *State v. Wilson*, 826 P.2d 1010, 1011 (Or. Ct. App. 1992). See also Or. Admin. R. 213-008-0001 (2018) (noting court’s discretion to depart if substantial and compelling reasons exist to impose a departure); Or. Rev. Stat. §§ 138.105(8)(c), 138.115(6)(c) (2018) (stating limited grounds for appeal from a sentence within the presumptive range).

<sup>9</sup> *Wilson*, 826 P.2d at 1013 (quoting Oregon Sentencing Guidelines Implementation Manual 124 (1989)). The court in *Wilson* also stated that the purposes of the Oregon guidelines “are primarily to punish offenders appropriately and to ensure the security of the public.” *Id.* at 1012. The court further noted that “Washington and Minnesota guidelines sentencing appellate decisions function as guidance in interpreting the Oregon provision,” *Id.* at 1013 n5. The leading Washington case cited by the court holds that facts supporting departure will be upheld unless clearly erroneous, whereas reasons for departure must meet the standard for departure as a matter of law. *State v. Nordby*, 723 P.2d 1117, 1119 (Wash. 1986).

<sup>10</sup> *State v. Ferrell*, 933 P.2d 973, 975–976 (Or. Ct. App. 1997).

<sup>11</sup> Or. Admin. R. § 213-008-0002 (2018).

<sup>12</sup> *Wilson*, 826 P.2d at 1012.

<sup>13</sup> *Id.*

<sup>14</sup> *State v. Ambrose*, 844 P.2d 227, 228 (Or. Ct. App. 1992). See also *Allred*, 995 P.2d at 1012-14 (possibility that the offender whose evasion of police defendant aided might commit further crimes while at large could not qualify as greater-than-typical harm, for two reasons: 1) it was not harm that actually occurred because of defendant’s crime, and 2) it did not increase the specific kind of harm that the charged offense, hindering prosecution, was designed to prevent).

<sup>15</sup> *State v. Wolff*, 27 P.3d 145, 147 (Or. Ct. App. 2001).

<sup>16</sup> *State v. Clark*, 833 P.2d 1341, 1342 (Or. Ct. App. 1992). See also *State v. Rodriguez*, 833 P.2d 1343, 1344 (Or. Ct. App. 1992) (holding that one prior conviction will not support upward departure sentence based on “persistent involvement” in similar offenses even though the prior and current convictions were for the same crime and occurred close together in time, and stating, “Defendant’s one prior conviction suggests an emerging pattern; it does not establish it.”)

<sup>17</sup> There appear to be few if any reported decisions recognizing (or rejecting) additional unlisted grounds that would support a mitigated departure. Perhaps this is because most such departures are agreed to as part of plea bargaining.

<sup>18</sup> *State v. Lennon*, 229 P.3d 589, 594 (Or. 2010).

<sup>19</sup> *State v. Loud*, 942 P.2d 814, 818–19 (Or. Ct. App. 1997).

<sup>20</sup> *State v. Fanning*, 208 P.3d 530, 532 (Or. Ct. App. 2009).

<sup>21</sup> *State v. Bennet*, 277 P.3d 586, 587 (Or. Ct. App. 2012) (upholding upward departure based on defendant’s commission of burglary after the escape for which he was being sentenced).

<sup>22</sup> *Clark*, 833 P.2d at 1343.

<sup>23</sup> *Id.*

<sup>24</sup> *State v. Dilts*, 103 P.3d 95, 97–99 (Or. 2004).

<sup>25</sup> *Id.* at 99–100.

<sup>26</sup> *State v. Upton*, 125 P.3d 713, 718 (Or. 2005). The statutory departure standard is found in Or. Rev. Stat. § 137.671 (2018).

<sup>27</sup> See *State v. Harris*, 118 P.3d 236, 246 (Or. 2005) (juvenile adjudications); *State v. Bray*, 160 P.3d 983 (Or. 2007) (persistent involvement in similar offenses). See also *State v. Perez*, 102 P.3d 705, 709–10 (Or. Ct. App. 2004) (holding that defendant’s supervision status at the time he committed the current offense does not fall within the prior-conviction exception to *Blakely*.) This decision was reversed on plain error grounds without addressing the Court of Appeals’ decision on the merits of defendant’s *Blakely* claim. *State v. Perez*, 131 P.3d 168 (Or. 2006).

<sup>28</sup> *Harris*, 118 P.3d at 245.

<sup>29</sup> *Id.* at 244-45.

<sup>30</sup> *State v. Gornick*, 130 P.3d 780 (Or. 2006).

<sup>31</sup> *State v. Sawatzky*, 125 P.3d 722, 727 (Or. 2005).

<sup>32</sup> *Id.*

<sup>33</sup> *State v. Ice*, 170 P.3d 1049, 1058 (Or. 2007).

<sup>34</sup> *Oregon v. Ice*, 555 U.S. 160, 168 (2007).

<sup>35</sup> *State v. Ice*, 170 P.3d at 1056.

<sup>36</sup> *State v. Spinney*, 820 P.2d 854, 856–57 (Or. Ct. App. 1991). Improper mixing of the three branches of government was also avoided by the provision that the Sentencing Guidelines Board tasked with drafting the guidelines, although operating within a broadly-representative body called the Criminal Justice Council, was deemed to be an executive branch agency and excluded Council members from the legislative and judicial branches. Laird C. Kirkpatrick, *Mandatory Felony Sentencing Guidelines: The Oregon Model*, 25 U.C. Davis L. Rev. 695, 699 (1992).

<sup>37</sup> *Spinney*, 820 P.2d at 855–56.

<sup>38</sup> *Id.* at 856.

<sup>39</sup> *State v. Davila*, 230 P.3d 22, 27 (Or. Ct. App. 2010).

<sup>40</sup> *State v. Ice*, 170 P.3d at 1056.