
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

PETER A. FONTE,

Defendant-Appellant,
Petitioner on Review.

Multnomah County Circuit Court
Case No. 16CR01505

CA A161939

SC S065012

BRIEF ON THE MERITS OF *AMICUS CURIAE*
OREGON JUSTICE RESOURCE CENTER

On Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Multnomah County
Honorable Leslie M. Roberts, Judge

Affirmed Without Opinion: May 17, 2017
Before: Sercombe, Presiding Judge, and DeHoog, Judge,
and Haselton, Senior Judge

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BRIEF ON THE MERITS OF *AMICUS CURIAE*
OREGON JUSTICE RESOURCE CENTER

INTEREST OF *AMICUS CURIAE*

The Oregon Justice Resource Center (ORJC) is a Portland-based, non-profit organization founded in 2011. OJRC works to promote civil rights and improve legal representation to traditionally underserved communities. OJRC serves this mission by focusing on the principle that our criminal justice system should be founded on fairness, accountability, and evidence-based practices. OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and practice areas.¹

OJRC wishes to be heard by this court, because property crime convictions and sentences disproportionately affect the indigent and women. This court's interpretation of ORS 164.055 will affect the application of disproportioned sentences for property crimes on those populations.

SUMMARY OF THE ARGUMENT

Amicus respectfully submits that, in providing the interpretation of ORS 164.055 that will govern this case and all others like it, this court should consider that the statute has resulted in disproportionately excessive sentences that fail to

¹ OJRC wishes to recognize law student Sara Bieri for her research contributions to this brief.

further the legislative goal in allowing for such sentences. And it should consider that those disproportionate sentences impact the indigent and women more than other populations. In order to combat disproportioned sentences and inequality in the imposition of property crime convictions and sentences, this court should accept petitioner's proposed rule of law that a person does not commit felony theft by receiving by selling through conducting a fraudulent merchandise return to the merchandise seller. It further urges this court to reverse the Court of Appeals decision and reverse defendant's convictions of first-degree theft.

ARGUMENT

The conduct for which the state prosecuted defendant in this case was twice taking a pair of jeans, valued at less than \$200, from a Nordstrom store's shelf and returning them to the store's cashier for a cash refund without first purchasing them. The conduct constituted a fraudulent return, which, as highlighted in defendant's brief on the merits, plainly meets the elements of the misdemeanor crime of second-degree theft by deception under ORS 164.045. However, the state charged defendant with and defendant was convicted of two counts of felony first-degree theft by receiving by selling under ORS 164.055.

At present, a prosecutor has discretion to charge conduct like defendant's as a felony. This court should eliminate that choice by accepting defendant's proposed rule for three reasons: (1) convicting defendants of felony theft for

committing fraudulent merchandise returns regardless of the merchandise value permits sentences that are disproportioned to the criminal conduct; (2) convicting defendants of felony theft for the conduct does not further the legislative goal of crime deterrence; and (3) convicting defendants of felony theft for the conduct contributes to inequality in the justice system.

I. Convicting defendants of felony theft for committing fraudulent merchandise returns regardless of the merchandise value permits sentences that are disproportioned to the criminal conduct.

The state can charge a fraudulent return of merchandise to a store owner as theft by deception as defined in ORS 164.085.² Under that charge, a defendant would be guilty of misdemeanor theft if the merchandise was valued less than \$1,000, or felony theft if the merchandise is worth at least \$1,000. ORS 164.043;

² ORS 164.085 provides in pertinent part:

“A person, who obtains property of another thereby, commits theft by deception when, with intent to defraud, the person:

“(a) Creates or confirms another’s false impression of law, value, intention or other state of mind that the actor does not believe to be true;

“(b) Fails to correct a false impression that the person previously created or confirmed;

“(c) Prevents another from acquiring information pertinent to the disposition of property involved;

“(d) Sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

“(e) Promises performance that the person does not intend to perform or knows will not be performed.”

ORS 164.045; ORS 164.055. However, currently, the state also can charge the same conduct as felony theft by receiving by selling regardless of the merchandise's value. ORS 164.055(1)(c).

That there are two possible convictions for the same conduct means that there are two different possible sanctions for the same conduct. Felony sentences permit longer incarceration terms and higher financial penalties than misdemeanor sentences. *See* ORS 161.605 (providing maximum sentences for felonies); ORS 161.615 (providing maximum sentences for misdemeanors). And felony theft convictions implicate the mandatory minimum sentencing scheme, while misdemeanor theft convictions do not. ORS 137.700. Further, ORS 137.717 provides presumptive sentences for certain property offenders. Relevant to this case, ORS 137.717 mandates a presumptive prison sentence of 18 months³ when a defendant is convicted of first-degree theft. ORS 137.717(1)(b). Thus, a conviction for first-degree theft by receiving by selling can trigger the mandatory minimum sentence regardless of the stolen property's value. In contrast, a conviction for theft by deception will only trigger the mandatory minimum sentence if the stolen property's value is over \$1,000.

³ A judge can sentence a defendant to less than 18 months only if the parties stipulate to lesser sentence or the judge finds that certain conditions are met. ORS 137.717(6).

Generally, criminal sentences must be proportioned to the offense. Or Const, Art I, § 16. In determining whether a sentence is proportioned to a crime, this court considers the gravity of the crime, penalties imposed for other related crimes, and the defendant's criminal history. *State v. Rodriguez/Buck*, 347 Or 46, 58, 217 P3d 659 (2009). The gravity in a theft is rooted in the value of the stolen property. *See* ORS 164.043-ORS 164.055 (with limited exception, dividing theft into degrees according to the value of the stolen property). When the same conduct resulting in the same harm—less than \$1,000—permits two drastically different sentences—misdemeanor sentencing or felony sentencing under a mandatory minimum sentencing scheme, the sentencing is disproportioned to the criminal conduct. Petitioner's proposed rule of law, providing that a defendant does not commit first-degree theft by fraudulently returning stolen merchandise to a store owner unless the merchandise is worth more than \$1,000, would prevent the imposition of disproportioned sentences by treating theft by receiving the same as theft by deception.

II. Convicting defendants of felony theft for committing fraudulent merchandise returns does not further the legislative goal of deterrence.

The legislature's goal in implementing minimum sentences for property offenders was to protect society from those criminals who do not reform through treatment by increasing their punishment. *See* Oregon Voter's Pamphlet 2008, 27 (explaining the purpose of Ballot Measure 57, which included increased

punishments for repeat property offenders under ORS 137.717).⁴ That goal underlies the legislature's general goal of preventing crime. *Id.* But research suggests that mere punitive measures are insufficient to deter most property crime offenders.

Repeated property crime is more than an individual moral failing. It results from underlying social and public health conditions, including addiction, poverty, abuse, mental illness, and trauma:

⁴ **"SECTION 1. The Legislative Assembly finds and declares that:**
"(1) The manufacturing and dealing of methamphetamine, heroin, cocaine and ecstasy are especially damaging to our community.
"(2) Many Oregonians are addicted to these drugs. *Some of these drug-addicted persons present a danger to public safety by committing crimes to feed their addictions.*
"(3) In order to reduce the risk of future criminal activity, these drug-addicted offenders need the opportunity to change their behavior through effective drug treatment.
"(4) Sections 2 to 5 and 6 of this 2008 Act and the amendments to ORS 137.717 and 164.162 by sections 7 and 10 of this 2008 Act increase the punishment for offenders who commit high-level or repeat drug and property crimes.
"(5) Section 8 of this 2008 Act increases the availability of treatment for drug-addicted offenders.
"(6) Section 9 of this 2008 At requires swift and certain punishment for offenders who refuse or fail to successfully complete treatment as a condition of probation, parole or post-prison supervision."

“Property crimes are often driven by underlying social and public health issues such as poverty, abuse, trauma, and drug addiction. The latter is a continual behavior that occurs despite problematic consequences. Some drugs are sold on the black market, an unregulated and cash-based market. Given this context, it is unsurprising that the ‘repeat property offender’ is far more common than the one-time property offender.”

Julia Yoshimoto, *Unlocking Measure 57*, Oregon Justice Resource Center (2017),

<http://www.herstoryoregon.org/measure-57-and-property-crime-sentencing/>.

Substance abuse, in particular, is a significant underlying cause of property crime. Oregon Voter’s Pamphlet 2008, 27; Anna Beahm, *Judge: Substance Abuse Drives Property Crimes, Repeat Offenses*, DecaturDaily.com (Sept 24, 2017), http://www.decaturdaily.com/news/morgan_county/decaturo/judge-substance-abuse-drives-property-crimes-repeat-offenses/article_76150ef1-d063-5add-a81f-3e73c2d566f4.html. A 2004 nationwide survey found that 30% of state prisoners convicted of property crimes committed their offense to obtain money for drugs. *Drugs and Crime Facts*, Bureau of Justice Statistics, <https://www.bjs.gov/content/dcf/duc.cfm#stfdprison> (last visited Nov 6, 2017). It also found that 39% of state prisoners convicted of property crimes were under the influence of drugs when they were arrested. *Id.*

Given the connection between drug use and property crime, arguments against elevated punitive measures for drug crimes may also apply against elevated punitive measures for property offenses.

Research suggests that, as a general matter, the deterrent effect of mandatory minimum sentencing is “modest at best.” Jeremy Travis et. al., *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Nat’l Research Council, 139-40 (2014). There is increasing empirical evidence that harsh sentencing practices do not serve common objectives like deterrence,⁵ yet the dominant paradigms have been resistant to this evidence.⁶ Mirko Bagaric et. al., *Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 Hofstra L Rev 785, 786 (2017).

⁵ “The most pressing and important issue relating to sentencing law and practice is its continued disregard of expert knowledge and empirical evidence. Sentencing is the area of law where there is the greatest gap between practice and what knowledge tells us can be achieved.” Mirko Bagaric et. al., *Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 Hofstra L Rev 785, 786 (2017).

⁶ For an example of a judicial viewpoint embracing the need for change, and a related discussion of poverty and crime, see *United States v. Aguilar*, 133 F Supp 3d 468, 481 (E.D.N.Y. 2015), where the court declined to deport or impose prison time on the defendant convicted of document forgery and cited Bagaric, *supra* note 5, in support of the assertion that “[s]plitting families with resulting impoverishment may increase the risks of future criminality of the children.” The court said deterrence was served by a more lenient sentence, and noted, “In view of the excessive incarceration rates in the recent past and their unnecessary, deleterious effects on individuals sentenced, society and our economy, justifiable parsimony in incarceration is prized.” Bagaric, 45 Hofstra L Rev at 786.

In the context of drug sentencing, the deterrent effect is even more questionable. Gabor Maté, *In The Realm of Hungry Ghosts: Close Encounters With Addiction*, 311 (1st ed. 2008). In fact, available research indicates that the harsh penalties imposed by the “War on Drugs” did not reduce drug crime over three decades. Travis, Nat’l Research Council, at 154 (“[E]xisting research seems to indicate that there is little apparent relationship between severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little in the variance of individual drug use.” (internal citation omitted)).

The extent to which drug abuse affects decision-making capability is debated among researchers. Mark Osler & Thea Johnson, *Why Not Treat Drug Crimes as White-Collar Crimes?* 61 *Wayne L Rev* 1, 20, n 136 (2015) (citing Linda Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 *U Pa LJ & Soc Change* 233, 246–50 (2011)); see also Jon E. Grant, *Impulsive Action and Impulsive Choice Across Substance and Behavioral Addictions: Cause or Consequence?* (2014), <https://www.ncbi.nlm.nih.gov/pubmed/24864028> (exploring the overlap between impulsive behavior disorders and substance addiction and finding that “acute consumption of drugs with abuse potential is capable of modulating impulsive choice and action”). However, it is generally accepted that a person who is under

the direct influence of drugs or alcohol has a reduced ability to discern and assess the risks of his actions. Osler & Johnson, 61 Wayne L Rev at 20.

Maté argues that the effect of addiction on decision-making goes much deeper than the immediate effect of a drug. The cerebral cortex contains portions of the brain that govern rational thinking and, when working properly, inhibit the person from taking action on every impulse. Addiction damages the cortex and the ability to evaluate actions and regulate behavior through a phenomenon Maté calls “brain lock.” Maté, at 309-10.

There are two steps to “brain lock.” First, in individuals who later abuse drugs, traumatic early influences shape the brain towards reward-seeking maladaptive habits “when the child’s needs for emotional nourishment were frustrated and denied.” *Id.* The maladaptive habits are maintained by brain circuit patterns, and over time the cortex becomes “hobbled.” *Id.* According to brain researcher Dr. Jaak Panksepp, “Those habit structures are so incredibly robust, and once they form in the nervous system, they will guide behavior without free choice.” *Id.* Thus, even before the addiction takes hold, the decision-making parts of the brain are dysfunctional. *Id.* Second, drug use over time further damages the cortex, and thereby further damages the capacity to make decisions and exercise willpower over impulses. *Id.* at 302. Maté asserts that this dysfunction in brain

chemistry has a profound impact on the person's freedom to choose their actions even when they are not under the direct influence of a substance:

“The men and women I work with have had every possible negative consequence visited upon them. They have lost their jobs, their homes, their spouses, their children, and their teeth; they have been jailed and beaten, abused and raped; they have suffered HIV infection and hepatitis and infections of the heart valves and of the backbone; they have had multiple pneumonias and abscesses and sores of every sort. They have seen close friends dies young of overdose and disease. They are far from naïve about the seriousness of the matter and require no more convincing or coercing. And yet they will not, unless something transforms their perspective on life, abandon their compulsion to use drugs.”

Id. at 312. As a result, Maté concludes, potential negative consequences for drug use and for drug-related crimes, which include property crimes, have little deterrent effect. *Id.*

In light of the causes of property crimes, punitive measures, such as elevated charges and mandatory minimum sentencing, do little to accomplish the legislative goal of deterrence. Thus, it is hardly surprising that property offenses have higher recidivism rates than other crime types.⁷ *Recidivism*, National Institute of Justice,

⁷ A 2005 Bureau of Justice study showed that property offenders have higher recidivism rates than other crime types: “Property offenders were the most likely to be rearrested, with 82.1% of released property offenders arrested for a new crime compared with 76.9% of drug offenders, 73.6% of public order offenders and 71.3% of violent offenders.” *Recidivism*, National Institute of Justice, <https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx> (last visited Nov 6, 2017).

<https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx> (last visited Nov 6, 2017). Similarly, a “repeat property offender” is more common than a one-time property offender. Yoshimoto, *Unlocking Measure 57*. Elevating conduct that is otherwise misdemeanor theft to a felony does not further the legislative goal of deterrence.

III. Convicting defendants of felony theft for committing fraudulent merchandise returns contributes to the inequality in the criminal justice system.

Two groups are more likely impacted by the mandatory minimum sentencing scheme for property offenses—the indigent and women. Convicting defendants of theft in a way that implicates the mandatory minimum sentencing scheme through charging conduct as first-degree theft will prolong the disparate impact of the mandatory minimum sentencing scheme on those two groups.

A. Indigent defendants are more likely to have prior convictions and, therefore, more likely impacted by the mandatory minimum sentencing scheme.

Low-income people are overrepresented in the criminal justice system. The reasons are complex, but one factor is the limitation of choice and lack of resources imposed by poverty, which “can foster frustration and rebellion.” See Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 *Law & Ineq* 1, 10-14 (2015). Most people living below the poverty line are effectively excluded from any reasonable chance to move beyond a state of day-to-

day survival. *See generally* Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 U Chi Legal F 43, 44 (2010) (identifying systemic injustice as a main cause of individual impoverishment).

This concept helps explain why defendants who are poor are more likely to have prior convictions than other offenders. *See, e.g.*, Michael Stamm, *Between A Rock and Discriminatory Place: How Sentencing Guidelines and Mandatory Minimums Should Be Employed to Reduce Poverty Discrimination in the Criminal Justice System*, 24 Geo J On Poverty L & Pol’y 399, 410 (2017); *see also* Bagaric 33 Law & Ineq at 1–4, 50 (exploring the relationship between economic deprivation and crime).

Because indigent defendants are more likely to have prior convictions, they are more likely to be sentenced under mandatory minimum sentencing schemes. *See* Green, 2010 U Chi Legal F at 44. Worse, some researchers argue, mandatory minimum sentencing functions as discrimination against the poor.⁸ Stamm, 24 Geo J On Poverty L & Pol’y at 410. As Professor Mikro Bagaric points out, given the likelihood that a defendant sentenced under a mandatory minimum sentencing scheme will be indigent, the current system effectively treats poverty as an

⁸In his note, Stamm goes further and argues that legislative choices about *which crimes* to punish with mandatory minimum sentences is evidence of bias, “whether explicit or implicit,” against the poor. Stamm, 24 Geo J On Poverty L & Pol’y at 410.

aggravating factor in sentencing. *Id.* This is particularly troubling when minimum sentences are imposed for recurring nonviolent drug and property crime, because those types of crimes are closely linked with the pain and difficulty of economic disadvantage to begin with. *See* Bagaric, 33 *Law & Ineq* at 50.

B. Women have been disproportionately affected by the mandatory minimum sentencing scheme for property crimes.

Incarcerated women are more likely than men to be in prison for a property crime conviction. In 2015, 28% of incarcerated women nationwide were sentenced for a property crime, compared to 18% of incarcerated men. E. Ann Carson & Elizabeth Anderson, Bureau of Justice Statistics, *Prisoners in 2015* at 14, Table 9 (2016), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5869>. “Over the past twenty years, the incarceration rate of women in Oregon has tripled, despite Oregon’s crime rate being at 30-year lows and the arrest rate for women having decreased in the last two decades by 36-40%.” *See* Yoshimoto, *Unlocking Measure 57*. “In 2016, 47% of prison intakes at [Oregon’s only women’s prison Coffee Creek Correctional Facility] were for property crimes. Three of the four most common offenses, comprising nearly 31% of all women intakes were theft in the first degree, identity theft, and unauthorized use of a vehicle.” *Id.* As of September 1, 2017, of the 1,292 women incarcerated at Coffee Creek, 493 were sentenced for a property crime. Oregon Dep’t of Corrections Inmate Population Profile (Sept 1, 2017),

http://www.oregon.gov/doc/RESRCH/docs/inmate_profile.pdf. Almost half the women incarcerated in Oregon have been sentenced for a property crime, indicating that women are being significantly impacted by mandatory minimum sentences for repeat property convictions.

CONCLUSION

For the foregoing reasons, OJRC urges this court to accept petitioner's proposed rule of law that a person does not commit felony theft by receiving by selling through conducting a fraudulent merchandise return to the merchandise seller. It further urges this court to reverse the Court of Appeals decision and reverse defendant's convictions of first-degree theft.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief on the merits of *amicus curiae* complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,335 words.

Type size

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).

/s/ Crystal Maloney

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CERTIFICATE OF FILING AND SERVICE

I certify that on November 9, 2017, I filed the original of this BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on November 9, 2017, I served a copy of the BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system or via conventional e-mail service:

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