

FILED: November 9, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

TIFFANY LEE SAVASTANO,
Defendant-Appellant.

Washington County Circuit Court
C081586CR

A141053

Thomas W. Kohl, Judge.

On respondent's petition for reconsideration filed August 10, 2011, and appellant's response to petition for reconsideration filed August 15, 2011. Opinion filed June 22, 2011. 243 Or App 584, 260 P3d 529.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Jennifer S. Lloyd, Attorney-in-Charge, Criminal Appeals, for petition.

Peter Gartlan, Chief Defender, and Ernest G. Lannett, Chief Deputy Defender, Office of Public Defense Services, for response.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

PER CURIAM

Reconsideration allowed; former opinion clarified and adhered to as clarified.

1 PER CURIAM

2 The state petitions for reconsideration of our opinion in [State v. Savastano](#),
3 243 Or App 584, 260 P3d 529 (2011), urging us to clarify our disposition. We grant the
4 state's petition, clarify the disposition (on the assumption, which we do not necessarily
5 adopt, that clarification is necessary), and adhere to our former ruling.

6 In *Savastano*,

7 "[d]efendant was accused of embezzling hundreds of thousands of
8 dollars from her employer in numerous individual theft transactions over a
9 16-month period in 2005 and 2006. The district attorney charged her with
10 10 counts of first-degree aggravated theft, ORS 164.057, and six counts of
11 first-degree theft, ORS 164.055 (2007). Each count represented the thefts
12 that occurred within a named month. The counts charging aggravated theft
13 alleged that, in a particular month, defendant stole money 'with a total value
14 of \$10,000 and more,' while the counts charging theft alleged that, in a
15 particular month, the amount was '\$750 and more.' The prosecutor
16 explained that he decided to aggregate the thefts as he did in this case in
17 order to provide 'a clear organizational outline for the jury.' Defendant
18 appeals from a judgment of conviction entered after conditional guilty
19 pleas, arguing that the prosecution did not have a consistent, systematic
20 policy regarding aggregation and, for that reason, the aggregation in this
21 case violated Article I, section 20, of the Oregon Constitution. The state
22 contends that the prosecutor's decision was within his discretion. We agree
23 with defendant, and we therefore reverse and remand."

24 243 Or App at 586 (footnotes omitted). We explained that, pursuant to ORS 164.115(5),

25 "The value of single theft transactions may be added together if the
26 thefts were committed:

27 "* * * * *

28 "(b) Against the same victim, or two or more persons who are joint
29 owners, within a 180-day period."

30 *Savastano*, 243 Or App at 586-87. We concluded that the decision of whether to

31 aggregate, and how, should have been made in accord with a systematic policy and that

1 defendant had demonstrated that no such policy existed. *Id.* at 588-90. We therefore
2 concluded,

3 "[T]he court should have granted defendant's motion to dismiss.
4 Defendant moved in the alternative to compel the prosecution to aggregate
5 the various theft transactions into six-month counts. We do not require that
6 outcome. We require only consistent, systematic criteria, and that those
7 criteria be permissible.

8 "Reversed and remanded."

9 *Id.* at 590 (footnote omitted). In its petition for reconsideration, the state argues that our
10 opinion could be read to require the trial court, on remand, to dismiss the charges against
11 defendant. That outcome, the state maintains, is not required; possibly, the state could
12 persuade the trial court that a less drastic remedy was available. Our opinion, the state
13 continues, should therefore be modified to accommodate that possibility.

14 In their briefs to this court, neither party argued for or against any particular
15 remedy, and our disposition of the case--"Reversed and remanded"--was not intended to
16 dictate one. That is an issue for the trial court to decide on remand. To forestall any
17 further confusion, however, we now make explicit that the disposition of our earlier
18 opinion is a reversal and remand for further proceedings consistent with this opinion.

19 Reconsideration allowed; former opinion clarified and adhered to as
20 clarified.