

FILED: December 21, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOHN LEE MCLAUGHLIN,
Defendant-Appellant.

Multnomah County Circuit Court
080733272

A142664

Michael J. McShane, Judge.

On appellant's petition for reconsideration filed May 31, 2011, and respondent's response to petition for reconsideration filed October 5, 2011. Opinion filed May 25, 2011. 243 Or App 214, 258 P3d 1241. Opinion on reconsideration filed August 3, 2011. 244 Or App 691, 260 P3d 814.

Peter Gartlan, Chief Defender, and Marc D. Brown, Deputy Public Defender, Office of Public Defense Services, for petition.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Samuel A. Kubernick, Assistant Attorney General, for response.

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

NAKAMOTO, J.

Opinion on reconsideration, 244 Or App 691, 260 P3d 814 (2011), withdrawn; original opinion and disposition, 243 Or App 214, 258 P3d 1241 (2011), adhered to; remanded for resentencing.

1 NAKAMOTO, J.

2 Based on renewed briefing that the state has submitted regarding the proper
3 disposition in this case, we withdraw our opinion on reconsideration in State v.
4 McLaughlin, 244 Or App 691, 260 P3d 814 (2011) (*McLaughlin II*). We write to explain
5 the basis for our decision.

6 In our original opinion in this case, State v. McLaughlin, 243 Or App 214,
7 258 P3d 1241 (2011), we rejected defendant's challenge to his conviction for first-degree
8 theft but vacated the supplemental judgment of restitution because the prosecution did not
9 present the minimum required notice of the nature and amount of restitution to the court
10 and defendant at or before sentencing. We also remanded for resentencing. *Id.* at 221.

11 Defendant then filed a petition for reconsideration electronically, arguing
12 that, under State v. Tippetts, 239 Or App 429, 244 P3d 891 (2010); State v.
13 Canady/Calhoun, 225 Or App 299, 201 P3d 225 (2009); and State v. Biscotti, 219 Or
14 App 296, 182 P3d 269 (2008), we should not remand for resentencing because the trial
15 court no longer had the authority to impose restitution. The state did not file any
16 opposition. We concluded, based on defendant's authorities, that "[we] draw a distinction
17 between cases overturning the restitution judgment outright and those remanding for
18 resentencing based on whether the trial court still retains authority to impose restitution."
19 *McLaughlin II*, 244 Or App at 692. And, because the prosecution failed to timely present
20 evidence of the nature and amount of restitution, the trial court now "has no basis and
21 does not retain authority to impose restitution[.]" *Id.* We allowed the petition and
22 changed the disposition to "judgment awarding restitution reversed[.]" *Id.*

1 Thereafter, the state sought leave to file a late response to the petition for
2 reconsideration, because it had not received the usual electronic notice from the court that
3 we had accepted the petition for filing. We granted the state's motion.

4 The state urges us to withdraw our opinion on reconsideration and thereby
5 again remand the case for resentencing. The state now argues that this case is
6 distinguishable from *Canady/Calhoun* and *Biscotti* and makes an argument that does not
7 appear to have been raised in those cases. The state argues, among other things, that
8 based on ORS 138.222(5)(a), we must remand because, although restitution is no longer
9 an option at sentencing, the sentencing court may wish to impose a compensatory fine
10 under ORS 137.101 that would be paid to the victim. Although we reject the other
11 arguments that the state asserts, we agree that, under the circumstances, ORS
12 138.222(5)(a) requires that we remand for resentencing.

13 Under ORS 138.222(5)(a), if an appellate court "determines that the
14 sentencing court, in imposing a sentence in the case, *committed an error that requires*
15 *resentencing*, the appellate court shall remand the entire case for resentencing. The
16 sentencing court may impose a new sentence for any conviction in the remanded case."
17 (Emphasis added.) A compensatory fine would be similar to restitution because the court
18 can order the clerk of the court to pay over a compensatory fine or some portion of it to a
19 victim. In part, ORS 137.101 provides:

20 "(1) Whenever the court imposes a fine as penalty for the
21 commission of a crime resulting in injury for which the person injured by
22 the act constituting the crime has a remedy by civil action, unless the issue
23 of punitive damages has been previously decided on a civil case arising out
24 of the same act and transaction, the court may order that the defendant pay

1 any portion of the fine separately to the clerk of the court as compensatory
2 fines in the case. The clerk shall pay over to the injured victim or victims,
3 as directed in the court's order, moneys paid to the court as compensatory
4 fines under this subsection. This section shall be liberally construed in
5 favor of victims."

6 The trial court's original sentence indicated its desire to have defendant compensate the
7 victim, although the court was mistaken that it could award restitution at the time of
8 sentencing. In light of the possible compensatory fine and ORS 138.222(5)(a), we must
9 permit the court to reconsider its sentence. *Cf. State v. Williams*, 148 Or App 93, 939 P2d
10 93 (1997) (rejecting the state's argument that, although an award of restitution could not
11 be re-imposed, we should remand under ORS 138.222(5) because the trial court might
12 resentence the defendant with a simple fine, when there was no discernable "sentencing
13 plan or scheme under which the trial court would have imposed a fine").

14 Opinion on reconsideration, 244 Or App 691, 260 P3d 814 (2011),
15 withdrawn; original opinion and disposition, 243 Or App 214, 258 P3d 1241 (2011),
16 adhered to; remanded for resentencing.