

FILED: February 12, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JEREMY DEAN GRUVER,
Defendant-Appellant.

Lincoln County Circuit Court
100255

A146586

Sheryl Bachart, Judge.

On appellant's amended petition for reconsideration filed October 16, 2013. Opinion filed September 18, 2013. 258 Or App 549, 310 P3d 728.

Peter Gartlan, Chief Defender, and Kristin A. Carveth, Deputy Public Defender, Office of Public Defense Services, for petition.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Schuman, Senior Judge.

SCHUMAN, S. J.

Reconsideration allowed; former disposition withdrawn; convictions for second- and third-degree escape reversed.

1 SCHUMAN, S. J.

2 Defendant, who was serving a sentence in the Lincoln County jail, was
3 assigned to work at the local animal shelter cleaning kennels and feeding animals. After
4 he walked away from the shelter, he was charged with and convicted of escape in the
5 second degree under ORS 162.155(1)(c) (escape from a "correctional facility") and
6 escape in the third degree under ORS 162.145(1) (escape from "custody"). On appeal,
7 defendant argued that leaving the shelter was neither of those crimes but was instead a
8 violation of a different statute, ORS 162.175, which criminalizes "unauthorized
9 departure." We agreed with defendant, reversed his convictions on the escape charges,
10 and remanded for entry of a judgment of conviction for unauthorized departure under
11 ORS 162.175. *State v. Gruver*, 258 Or App 549, 310 P3d 728 (2013).

12 In a petition for reconsideration, defendant now argues that our disposition
13 was wrong. He contends that, notwithstanding his concession that his conduct
14 constituted unauthorized departure under ORS 162.175, he was not actually charged with
15 that crime. Hence, he argues, we erred in remanding for entry of a judgment of
16 conviction for that uncharged offense. *See State v. Delaportilla*, 250 Or App 25, 29, 279
17 P3d 824, *rev den*, 352 Or 666 (state's petition), *and rev den*, 353 Or 127 (defendant's
18 petition) (2012) ("A court cannot convict on a charge for which the defendant was not
19 indicted unless the conviction is for an offense that is a lesser-included offense 'within the
20 offense charged in the indictment.'" (quoting *State v. Cook*, 163 Or App 578, 581, 989
21 P2d 474 (1999))); *State v. Barrie*, 227 Or App 378, 381, 206 P3d 256 (2009) ("It is a

1 basic component of a defendant's fundamental right to due process that a court may not
2 find him guilty of a crime for which he has not received notice or an opportunity to
3 prepare a defense.").

4 We agree with defendant that the crime of unauthorized departure is not a
5 lesser-included offense in this case. *See Delaportilla*, 250 Or App at 29 ("One offense is
6 a lesser-included offense of another only when the elements of the former are subsumed
7 in the latter or the facts alleged in the charging instrument expressly include conduct that
8 describes the elements of the lesser-included offense[.]"). The indictment does not allege
9 facts that expressly satisfy the elements of unauthorized departure.¹ Nor are the elements
10 of unauthorized departure necessarily subsumed in second- or third-degree escape. That
11 is, a person can commit second- or third-degree escape (unlawful departure of a person
12 from a correctional facility or custody) without also committing unauthorized departure
13 (defined under ORS 162.135 (8) as failing to return "after any form of temporary release
14 or transitional leave from a correctional facility"). Thus, we grant defendant's petition for
15 reconsideration and modify our disposition accordingly. *See State v. Cadger*, 259 Or
16 App 30, 312 P3d 559 (2013) (reversing, without remanding for entry of a lesser-included

¹ The charging instrument in this case provided as follows:

"COUNT 1: ESCAPE IN THE SECOND DEGREE (ORS 162.155 F/C) The defendant, on or about January 10, 2010, in Lincoln County, Oregon, did unlawfully and knowingly escape from a correctional facility.

"COUNT 2: ESCAPE IN THE THIRD DEGREE (ORS 162.145 M/A) The defendant, on or about January 10, 2010, in Lincoln County, Oregon, did unlawfully and knowingly escape from custody."

1 offense, where the defendant successfully argued that he was on a "form of temporary
2 release" and should have been charged with unauthorized departure rather than second-
3 degree escape).²

4 Reconsideration allowed; former disposition withdrawn; convictions for
5 second- and third-degree escape reversed.

² Defendant concedes that our original disposition tracked the Supreme Court's disposition in *State v. Manley*, 326 Or 204, 951 P2d 686 (1997), in which the defendant argued that he was erroneously convicted of second-degree escape rather than unauthorized departure. Defendant argues that *Manley* is not controlling here because the question whether unauthorized departure is a lesser-included offense of the crime of escape was not litigated in *Manley*. Defendant is correct. In *Manley*, the defendant "argued from the beginning of th[e] case, both to the trial court and to the Court of Appeals, that *he should be convicted* only of that less serious offense [of unauthorized departure]." 326 Or at 212 (emphasis added). Defendant, by contrast, has never argued that he should be *convicted* of unauthorized departure, but only that he should have been *charged* with that crime.