

**FILED: May 22, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

GORDON DEAN WALKER,  
Petitioner-Appellant,

v.

STATE OF OREGON,  
Defendant-Respondent.

Clackamas County Circuit Court  
CV09080165

A147043

Deanne L. Darling, Judge.

Submitted on April 23, 2013.

Erin Galli and Chilton & Galli, LLC, filed the brief for appellant.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Ryan Kahn, Assistant Attorney General, filed the brief for respondent.

Before Haselton, Chief Judge, and Brewer, Judge pro tempore.

HASELTON, C. J.

Reversed and remanded.

1 HASELTON, C. J.

2 Petitioner appeals from a judgment denying his petition for post-conviction  
3 relief. Petitioner first asserts that the post-conviction court abused its discretion in  
4 resolving his request for appointment of new counsel on the day of trial. We reject that  
5 argument without discussion. Petitioner also asserts that the judgment denying post-  
6 conviction relief does not comply with ORS 138.640(1) because it does not make the  
7 findings required by that statute, as interpreted in *Datt v. Hill*, 347 Or 672, 685, 227 P3d  
8 714 (2010). Petitioner asserts that that deficiency constitutes an "error of law apparent on  
9 the record," ORAP 5.45(1), and that we should exercise our discretion pursuant to *Ailes*  
10 *v. Portland Meadows, Inc.*, 312 Or 376, 382 n 6, 823 P2d 956 (1991), to review and  
11 correct that error. Defendant remonstrates that the asserted error is not "plain error" and,  
12 in all events, we should not exercise our *Ailes* discretion. For the reasons that follow, we  
13 conclude that, (1) because the asserted error in the judgment was not susceptible to  
14 preservation, *see Peeples v. Lampert*, 345 Or 209, 220, 191 P3d 637 (2008), the "plain  
15 error" construct, including the constraints on review of purported plain error, are  
16 inapposite here; and (2) the judgment did not comport with the requisites of ORS  
17 138.640, as elucidated in *Datt*. Accordingly, we reverse and remand.

18 Under ORS 138.640(1), a judgment granting or denying post-conviction  
19 relief "must clearly state the grounds on which the cause was determined, and whether a  
20 state or federal question was presented and decided." In *Datt*, the Supreme Court  
21 expounded on that statutory mandate:

1            "[A] judgment denying claims for post-conviction relief must, at a  
2            minimum: (1) identify the claims for relief that the court considered and  
3            make separate rulings on each claim; (2) declare, with regard to each claim,  
4            whether the denial is based on a petitioner's failure to utilize or follow  
5            available state procedures or a failure to establish the merits of the claim;  
6            and (3) make the legal bases for denial of relief apparent."

7    347 Or at 685.

8            Here, the typed portion of the judgment denying post-conviction relief  
9    states, in pertinent part:

10           "The Court considered both state and federal constitutional questions. All  
11           questions were presented and decided.

12           "The Court having considered all evidence before it and, based on  
13           the Court's comments on the record, Findings of Fact and Conclusions of  
14           Law separately entered[.]"

15    The judgment thereafter contains a handwritten notation: "As no findings were  
16    requested, none will be signed." Thus, there were no "Findings of Fact and Conclusions  
17    of Law separately entered."

18           As noted, petitioner asserts that the judgment does not comport with the  
19    requisites of ORS 138.640(1), as amplified in *Datt*. Both parties assume that, because  
20    petitioner did not raise that objection before the trial court, our review is subject to the  
21    constraints of the "plain error" exception to the preservation requirement, as prescribed in  
22    *State v. Brown*, 310 Or 347, 355-56, 800 P2d 259 (1990), and *Ailes*.

23           The parties' mutual, threshold assumption in that regard is incorrect. The  
24    dictates of preservation do not apply--and, hence, the "plain error" construct is  
25    inapposite--where a party has no practical ability to object to the purported error before

1 entry of judgment. *See, e.g., Peeples*, 345 Or at 220 ("In some circumstances, the  
2 preservation requirement gives way entirely, as when a party has no practical ability to  
3 raise an issue."); *State v. Wilson*, 245 Or App 365, 368, 263 P3d 1107 (2011) (holding  
4 that preservation was not required because the appellant had no opportunity to object to  
5 restitution award contained in judgment until it was entered); *State ex rel DHS v. M. A.*  
6 *(A139693)*, 227 Or App 172, 182, 205 P3d 36 (2009) (the appellant did not need to  
7 preserve issue concerning judgment's lack of statutorily required findings because she  
8 had no practical ability to raise the issue until after the court entered the judgment).

9           Those principles control here. Until the post-conviction court issued its  
10 judgment, petitioner had no reason to know that it would not include findings comports  
11 with ORS 138.640(1).<sup>1</sup> Thus, the issue on appeal, uncomplicated by reference to *Brown*  
12 or *Ailes*, is straightforward: Did the judgment include findings sufficient to satisfy ORS  
13 138.640(1), as elucidated in *Datt*? The judgment is fatally deficient in that regard.  
14 Accordingly, we must reverse and remand for the court to enter a judgment that includes  
15 findings complying with ORS 138.640(1).

16           Reversed and remanded.

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<sup>1</sup> There is no indication in the record, for example, that a proposed form of post-conviction relief judgment as ultimately entered was circulated to petitioner, affording him a practical opportunity to object.