

**FILED: February 06, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Appellant,

v.

BRANDON REX ROBERTS,  
Defendant-Respondent.

Lane County Circuit Court  
200717429

A148465

Mary Ann Bearden, Judge.

Argued and submitted on July 30, 2012.

Christina M. Hutchins, Senior Assistant Attorney General, argued the cause for appellant. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

George W. Kelly argued the cause and filed the brief for respondent.

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

NAKAMOTO, J.

Reversed.

1                    NAKAMOTO, J.

2                    This is a state's appeal from an order of a circuit court expunging  
3 defendant's conviction for unlawful delivery of marijuana, a misdemeanor. The state  
4 asserts that defendant was not entitled to have the conviction set aside because, within the  
5 10-year period preceding his initiation of expunction, defendant had been convicted of a  
6 municipal violation (urinating in public). We agree with the state and reverse.

7                    The facts are straightforward and undisputed. On October 9, 2007,  
8 defendant pleaded guilty to, and was convicted of, unlawful delivery of marijuana, an  
9 offense that had been charged as a Class B felony but was reduced by plea agreement to a  
10 misdemeanor. On January 21, 2010, defendant entered a plea of "no contest" to public  
11 urination, a violation of the Eugene municipal code, and paid a fine of \$100. In a letter to  
12 the municipal court, he explained that he was working in Arizona and could not attend a  
13 trial in Eugene.

14                    On October 14, 2010, defendant filed his motion to set aside the marijuana  
15 conviction. The state opposed the motion, because defendant had been convicted of the  
16 public urination violation within the 10-year period preceding the filing of his motion.  
17 Without explanation, the trial court rejected the state's argument that defendant was  
18 ineligible to have his conviction set aside as a result of the public urination violation and  
19 granted defendant's motion by order entered April 4, 2011, setting aside defendant's  
20 conviction and ordering that his records be sealed. This appeal followed.

21                    Under ORS 137.225(1)(a),

1                    "[a]t any time after the lapse of three years from the date of  
2                    pronouncement of judgment, any defendant who has fully complied with  
3                    and performed the sentence of the court and whose conviction is described  
4                    in subsection (5) of this section by motion may apply to the court where the  
5                    conviction was entered for entry of an order setting aside the conviction[.]"

6                    Defendant's misdemeanor conviction for unlawful delivery of marijuana is a conviction  
7                    for which expunction is authorized under ORS 137.225(5)(e).

8                    Nonetheless, pursuant to ORS 137.225(6)(b), the provisions allowing a  
9                    person to apply for expunction do not apply to

10                    "*[a] person convicted*, within the 10-year period immediately preceding the  
11                    filing of the motion pursuant to subsection (1) of this section, *of any other*  
12                    *offense*, excluding motor vehicle violations, whether or not the other  
13                    conviction is for conduct associated with the same criminal episode that  
14                    caused the arrest or conviction that is sought to be set aside."

15                    (Emphasis added.) In the state's view, defendant's municipal code violation is "any other  
16                    offense" that precludes expunction.

17                    The state notes that an "offense" is defined in ORS 161.505 as  
18                    "conduct for which a sentence to a term of imprisonment or to a fine is  
19                    provided by any law of this state or by any law or ordinance of a political  
20                    subdivision of this state. An offense is either a crime, as described in ORS  
21                    161.515, or a violation, as described in ORS 153.008."

22                    Thus, an "offense" includes violations. Under ORS 153.008(1)(c), an offense is a  
23                    violation if

24                    "[t]he offense is created by an ordinance of a county, city, district or  
25                    other political subdivision of this state with authority to create offenses, and  
26                    the ordinance provides that violation of the ordinance is punishable by a  
27                    fine but does not provide that the offense is punishable by a term of  
28                    imprisonment. The ordinance may provide for punishment in addition to a  
29                    fine as long as the punishment does not include a term of imprisonment."

30                    It is not disputed that defendant's municipal offense was a violation as described in ORS

1 153.008(1)(c). We reject defendant's policy-based argument that we should not give  
2 effect to ORS 137.225(6)(b) as written because it "makes no sense" to prohibit  
3 expunction when the defendant commits a relatively insignificant offense but to allow  
4 expunction when the defendant commits a serious traffic violation. That is an argument  
5 that must be taken up with the legislature.

6           The remaining question on appeal is whether defendant was "convicted" as  
7 that term is used in ORS 137.225(6)(b) by virtue of the judgment entered following his  
8 no contest plea to a municipal violation. Defendant contended at trial and contends on  
9 appeal that a no contest plea "would seem not to result in a 'conviction.'" In support of  
10 the trial court's ruling, defendant cites provisions of ORS chapter 153 that defendant  
11 contends, when read together, implicitly require the conclusion that a judgment entered  
12 after a no contest plea to a violation is something other than a conviction.

13           Defendant notes that, under ORS 153.061(3)(b), a defendant may enter a  
14 plea of no contest to a violation by "delivering to the court the summons, a check or  
15 money order in the amount of the base fine set forth in the summons, and a statement of  
16 matters in explanation or mitigation of the violation charged," and the delivery of the  
17 statement "constitutes a waiver of trial and consent to the entry of a judgment forfeiting  
18 the base fine \* \* \*." Defendant further points out that when there is a trial or a guilty  
19 plea, the court enters a judgment, ORS 153.099(1) and (3), but when a defendant enters a  
20 plea of no contest, then the court "shall make a decision," ORS 153.099(2). Thus,  
21 defendant's view is that his no contest plea to the violation may have resulted in a

1 "judgment forfeiting the base fine," or maybe a "decision," but not a "conviction."<sup>1</sup>

2 Defendant reasons:

3 "In effect, the statutes are designed to create a speedy and fair resolution of  
4 the defendant's alleged offense. That resolution--a judgment forfeiting the  
5 base fine--potentially gives both sides a 'win': The state or municipality,  
6 which believes the defendant likely committed an offense, receives a  
7 payment from the defendant that should help deter him from repeating such  
8 behavior and warn other transgressors that the law cannot be ignored; the  
9 defendant is allowed to cap the money he will pay and to claim that he  
10 remains unconvicted; and both sides avoid the expense and trouble of going  
11 to trial."

12 Defendant's statutory construction argument is undermined by ORS  
13 135.345, which provides that "[a] judgment following entry of a no contest plea is a  
14 conviction of the offense to which the plea is entered." Nevertheless, defendant argues,  
15 ORS 135.345 applies only to crimes, not violations. He notes that a defendant who  
16 pleads no contest to a crime is afforded various rights that a criminal defendant who  
17 pleads guilty is afforded, such as having the court inform the defendant of rights that he  
18 or she is waiving and determine that the plea is voluntary and intelligently made and has  
19 a factual basis. *See* ORS 135.335, 135.385, 135.390, 135.395. On the other hand, in  
20 defendant's view, a defendant who pleads no contest to a violation has in effect chosen  
21 "to accept something akin to a diversion" because the defendant avoids appearing by  
22 choosing to pay the base fine.

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<sup>1</sup> Defendant further points out that, in violation cases, when a defendant has entered a no contest plea, the court nonetheless has discretion under ORS 153.061(7) to require that a trial be held if the court determines that the base fine is not adequate. If the defendant appears and enters a plea of no contest, and no trial is otherwise required, then, according to defendant, that means that the judgment entered on a no contest plea to a violation is merely a "decision" and not a judgment of conviction.

1                   Although ORS chapter 153 does not contain a provision similar to ORS  
2 135.345, ORS 153.030(1) provides that, "[e]xcept as specifically provided in this chapter,  
3 the criminal procedure laws of this state applicable to crimes also apply to violations."  
4 And, as we have observed in the past, a person "adjudicated guilty of a violation is  
5 'convicted' of that violation in the same sense that a person charged and found guilty of  
6 criminal conduct is 'convicted' of a crime." *Washington Cty. Police Assn. v. Washington*  
7 *Cty.*, 181 Or App 448, 454 n 3, 45 P3d 515 (2002), *rev'd on other grounds*, 335 Or 198,  
8 63 P3d 1167 (2003). *See also City of Lowell v. Wilson*, 197 Or App 291, 293, 302, 105  
9 P3d 856, *rev den*, 399 Or 406 (2005) (referring to "convictions" entered after the  
10 defendant's no contest pleas to municipal code violations). We conclude that, pursuant to  
11 ORS 135.345 and ORS 153.030(1), defendant's no contest plea to the violation of public  
12 urination resulted in a "conviction" of an offense within the 10 years preceding  
13 defendant's motion to expunge his marijuana conviction. *See State v. Greenlick*, 210 Or  
14 App 662, 667, 152 P3d 971 (2007) (stating that "criminal procedure" in ORS 153.030(1)  
15 refers to "rules governing the mechanisms under which crimes are investigated,  
16 prosecuted, adjudicated, and punished" and holding that the statutory speedy trial scheme  
17 in ORS chapter 135 is part of the code of criminal procedures and that ORS 135.747, one  
18 of the speedy trial provisions, is a "criminal procedure law"). Accordingly, the trial court  
19 should have denied defendant's motion to set aside his marijuana conviction.

20                   Reversed.