

**FILED: July 9, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

ROBERT STEVEN CROSS,  
Defendant-Appellant.

Multnomah County Circuit Court  
091234965, 120130446

A153468 (Control)  
A153469

Eric J. Bergstrom, Judge.

Submitted on May 29, 2014.

Peter Gartlan, Chief Defender, and Jedediah Peterson, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Matthew J. Preusch, Assistant Attorney General, filed the brief for respondent.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Lagesen, Judge.

LAGESEN, J.

Affirmed.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent

- No costs allowed.  
 Costs allowed, payable by  
 Costs allowed, to abide the outcome on remand, payable by
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1           LAGESEN, J.

2           The issue on this appeal is whether the trial court was required to find  
3 "substantial and compelling reasons" under ORS 137.750 to deny defendant eligibility for  
4 alternative incarceration programs (AIPs) and early release under ORS 421.508.<sup>1</sup> We  
5 conclude that it was not, because ORS 137.751, not ORS 137.750, governs eligibility for  
6 AIPs, and ORS 137.751 does not require a trial court to find "substantial and compelling  
7 reasons" to deny eligibility for AIPs.

8           Defendant was on probation. He failed to comply with the terms of that  
9 probation by, in the words of the trial court, presenting "positive U. A.'s, resisting arrest,  
10 [and] faking medical issues."<sup>2</sup> As a result of those violations, the trial court revoked  
11 defendant's probation and sentenced him to a net of 60 months' incarceration, to be

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<sup>1</sup> AIPs are prison programs that the Department of Corrections (DOC) offers to select offenders. As DOC rules explain, an AIP is a "highly structured corrections program that includes intensive interventions, rigorous personal responsibility and accountability, physical labor, and service to the community." OAR 291-062-0110(1). AIPs have two phases: (1) a 180-day residential phase, and (2) a 90-day "non-prison/transitional leave" phase. Offenders who complete a full AIP are eligible for sentence reductions. Oregon Department of Corrections, Issue Brief - 2013, *Alternative Incarceration Programs* (May 23, 2013).

In referring to a trial court's determination regarding "eligibility for AIPs" and "AIP eligibility," we refer to the trial court's decision under ORS 137.751 as to whether an offender is eligible for early release under ORS 421.508(4) following the successful completion of an AIP. Ultimately, the DOC determines which offenders can participate in AIPs. ORS 421.508(1)(a). However, absent a trial court's determination under ORS 137.751 of eligibility for release under ORS 421.508(4), an offender is not eligible for early release as a result of participation in an AIP. *Id.*

<sup>2</sup> The record reflects that defendant faked a heart attack to avoid submitting a required urine sample.

1 followed by 36 months' post-prison supervision. The trial court denied defendant AIP  
2 eligibility on the ground that defendant's probation history demonstrated that defendant  
3 was not a "good fit" for an AIP and that defendant did not have "any chance of  
4 completing the program." In so doing, the trial court rejected defendant's contention that  
5 it was required to find "substantial and compelling reasons" to deny AIP eligibility to  
6 defendant. On appeal, defendant assigns error to the trial court's determination that he  
7 was not eligible for AIPs, arguing that ORS 137.750(1) required the trial court to find  
8 "substantial and compelling reasons" to deny eligibility, and that the trial court erred by  
9 not making those findings. We review for legal error the trial court's determination that it  
10 was not required to find "substantial and compelling reasons" to deny eligibility for AIPs,  
11 and affirm.

12           Had defendant committed his offenses before January 1, 2009, he would be  
13 correct about what findings the trial court needed to make to deny AIP eligibility. Before  
14 that date, ORS 137.750(1) (1997), *amended by Or Laws 2008, ch 35, § 2 (Spec Sess)*,  
15 governed the determination of whether a defendant was eligible for AIPs, among other  
16 things. It provided:

17           "When a court sentences a defendant to a term of incarceration upon  
18 conviction of a crime, the court shall order on the record in open court as  
19 part of the sentence imposed that the defendant may be considered by the  
20 executing or releasing authority for any form of temporary leave from  
21 custody, reduction in sentence, work release, *alternative incarceration*  
22 *program* or program of conditional or supervised release authorized by law  
23 for which the defendant is otherwise eligible at the time of sentencing,  
24 *unless the court finds on the record in open court substantial and*  
25 *compelling reasons to order that the defendant not be considered for such*  
26 *leave, release or programs."*

1 ORS 137.750(1) (1997) (emphases added). That is, the statute *required* a trial court to  
2 order a defendant's eligibility for, among other things, AIPs, *unless* the trial court found  
3 "substantial and compelling reasons" to deny eligibility.

4 In 2008, the legislature changed the process for determining eligibility for  
5 AIPs by passing House Bill (HB) 3638.<sup>3</sup> That measure (1) amended ORS 137.750 to  
6 eliminate all references to AIPs<sup>4</sup> and (2) enacted ORS 137.751 to govern AIP eligibility  
7 going forward. *See* Or Laws 2008, ch 35, § 2 (Spec Sess) (removing references to AIPs  
8 in ORS 137.750); Or Laws 2008, ch 35, § 1 (Spec Sess) (enacting ORS 137.751). The  
9 newly-enacted statute provides, in relevant part:

10 " (1) When a court sentences a defendant to a term of incarceration  
11 that exceeds one year, *the defendant may request a determination of the*  
12 *defendant's eligibility for release on post-prison supervision under ORS*  
13 *421.508 (4).*<sup>[5]</sup> The court *shall order* in the judgment that the Department

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<sup>3</sup> Defendant is not the only one to have overlooked this statutory change in procedure. *See State v. Goodenough*, \_\_\_ Or App \_\_\_, \_\_\_ P3d \_\_\_ (Jul 9, 2014).

<sup>4</sup> As amended, that statute now reads, in relevant part:

"When a court sentences a defendant to a term of incarceration upon conviction of a crime, the court shall order on the record in open court as part of the sentence imposed that the defendant may be considered by the executing or releasing authority for any form of temporary leave from custody, reduction in sentence, work release, ~~alternative incarceration program~~ or program of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing, unless the court finds on the record in open court substantial and compelling reasons to order that the defendant not be considered for such leave, release or ~~programs~~ **program**."

ORS 137.750(1) (strikethrough indicates omissions; bold text indicates additions).

<sup>5</sup> ORS 421.508(4) permits the DOC to release an offender on post-provision supervision after successful completion of a "special alternative incarceration program,"

1 of Corrections may release the defendant on post-prison supervision under  
2 ORS 421.508 (4) *only if, after a hearing, the court finds that:*

3 "(a) The defendant meets the eligibility requirements of subsections  
4 (2) and (3) of this section;

5 "(b) The defendant was not on probation, parole or post-prison  
6 supervision for an offense listed in ORS 137.712 (4) or 811.705 (2)(b) at  
7 the time of the commission of the current crime of conviction;

8 "(c) The defendant has not previously been released on post-prison  
9 supervision under ORS 421.508 (4);

10 "(d) The harm or loss caused by the crime is not greater than usual  
11 for that type of crime;

12 "(e) The crime was not part of an organized criminal operation; and

13 "(f) After considering the nature of the offense and the harm to the  
14 victim, the defendant's successful completion of the program would:

15 "(A) Increase public safety;

16 "(B) Enhance the likelihood that the defendant would be  
17 rehabilitated; and

18 "(C) Not unduly reduce the appropriate punishment."

19 ORS 137.751(1) (emphases added).

20 As a result of the passage of HB 3638, ORS 137.750(1) no longer governs a  
21 trial court's determination of a defendant's eligibility for AIPs; ORS 137.751(1) does.  
22 And, under that statute, a trial court is no longer obligated to consider a defendant's  
23 eligibility for AIPs at the time of sentencing; instead, it is up to the defendant to  
24 affirmatively request such consideration. *See* ORS 137.751(1) (providing that "the

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ORS 421.502(3), if (1) the trial court entered an order under ORS 137.751, and (2) the offender served at least a one-year term of incarceration.

1 defendant *may request* a determination of the defendant's eligibility for release on post-  
2 prison supervision" (emphasis added)). Additionally, the state no longer must prove--and  
3 a trial court no longer must find--"substantial and compelling reasons" to deny eligibility;  
4 rather, the burden is on the defendant to show that the specified eligibility requirements  
5 are met. If the court agrees, it must make findings with respect to those statutory  
6 requirements. *See* ORS 137.751(1)(a)-(f) (specifying requisite findings for an order of  
7 eligibility). As one proponent of the measure, the public safety advisor to then-Governor  
8 Kulongoski, explained to legislators:

9            "It's very clear that we are *reversing the presumption which is now*  
10            *on the state* to prove by clear and compelling circumstances that the  
11            defendant should not be eligible. What we're doing in section one is saying  
12            that *the burden is the defendant's to articulate why they should be*  
13            *considered* and, with respect to those findings that the court needs to make,  
14            if all of the other eligibility requirements are met, that's going to be an issue  
15            of judicial discretion."<sup>6</sup>

16 Testimony, House Committee on Judiciary, HB 3638, Feb 15, 2008 (statement of Joe  
17 O'Leary) (emphases added).

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<sup>6</sup> The staff measure summaries for HB 3638, although not officially adopted or endorsed by committee members, reflect the same interpretation of the bill. One summary indicated that the changes would "[r]everse[ ] the current presumption that an offender is eligible for the AIP program so that the court must make a finding that the offender be considered for the program." Staff Measure Summary for HB 3638-B, Joint Committee on Ways and Means, HB 3638, Feb 19, 2008, 1. Instead, "[t]he defendant who is sentenced to more than one year in prison must request that the court consider the defendant's eligibility for early release from prison upon the defendant's successful completion of [the] DOC's AIP program." *Id.*; *see also* Staff Measure Summary for HB 3638 A, House Committee on Judiciary, HB 3638, Feb 15, 2008, 1 (the bill would "[r]equire[ ] a defendant sentenced to more than one year in prison to request that the court consider the defendant's eligibility for early release from prison upon the defendant's successful completion of the [DOC's] alternative incarceration program").

1                    Again, as a result of these legislative changes, a trial court is no longer  
2 required to find "substantial and compelling reasons" to deny eligibility for AIPs. For  
3 that reason, the trial court in this case correctly concluded that it was not required to find  
4 "substantial and compelling reasons" to deny defendant's eligibility for AIPs, and did not  
5 err by denying eligibility for AIPs without making such findings.

6                    Affirmed.