IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of B. H. C.,
a Youth.

STATE OF OREGON,
Respondent,

v.

B. H. C.,
Appellant.

Union County Circuit Court
5251J;
Petition Number 5251J02;
A159484 (Control)

In the Matter of B. H. C.,
a Youth.

STATE OF OREGON,
Respondent,

v.

B. H. C.,
Appellant.

Union County Circuit Court
5251J;
Petition Number 5251J03;
A159485

In the Matter of B. H. C.,
a Youth.

STATE OF OREGON,
Respondent,

v.

B. H. C.,
Appellant.

Union County Circuit Court
5251J;
Petition Number 5251J01;
A159512

Russell B. West, Judge.

Submitted January 31, 2017.

Angela Sherbo filed the briefs for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jeff J. Payne, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Egan, Judge, and Lagesen, Judge.

LAGESEN, J.

Reversed and remanded with directions to strike Condition 26; otherwise affirmed.

LAGESEN, J.

The primary issue presented in this appeal is whether a condition of probation imposed by the juvenile court is within the court's authority under the juvenile code. Since 1979, the juvenile code has authorized juvenile courts to sanction juvenile probationers with detention for their probation violations. *See* ORS 419C.453(1).[1] The condition at issue, in effect, delegates that authority to the juvenile department in some circumstances, eliminating the participation of the court. The question for us is whether the legislature, in giving juvenile courts the authority to punish probation violations with detention, intended to permit juvenile courts to give that authority to the juvenile department, thereby eliminating court involvement. We conclude that it did not. For that reason, we reverse and remand to the juvenile court to strike that condition of probation, but otherwise affirm.

I. BACKGROUND

The facts relevant to the issues on appeal are largely procedural and not disputed. This is a consolidated appeal from judgments in three separate delinquency cases involving youth. In those cases, youth admitted to conduct

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[1] ORS 419C.453(1)(b) states:

> "Pursuant to a hearing, the juvenile court may order a youth offender placed in a detention facility for a specific period of time not to exceed eight days, in addition to time already spent in the facility, unless a program plan that is in conformance with standards established by the Youth Development Council has been filed with and approved by the council in which case the youth offender may be held in detention for a maximum of 30 days in addition to time already spent in the facility, when:
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> "(b) The youth offender has been placed on formal probation for an act that would be a crime if committed by an adult, and has been found to have violated a condition of that probation."

As we will discuss further, in 1979, the legislature enacted the first provisions authorizing the juvenile court to punish juvenile probationers with detention as a two-year measure. Or Laws 1979, ch 337, §§ 2, 4, 5. Then, in 1981, the legislature amended *former* ORS 419.507 to add the provisions authorizing detention of juvenile probationers to that statute. Or Laws 1981, ch 648, § 2. In 1993, the legislature comprehensively restructured the juvenile code, repealing *former* ORS 419.507. Or Laws 1993, ch 33, § 373. As part of the restructuring, the legislature placed the provisions authorizing the use of detention to punish juvenile probationers in ORS 419C.453, where they remain. Or Laws 1993, ch 33, § 231.

that, if committed by an adult, would constitute two counts of theft in the second degree, ORS 164.045; one count of unlawful possession of methamphetamine, ORS 475.894; and one count of criminal mischief in the second degree, ORS 164.354. Based on youth's admissions, the juvenile court determined that youth was within the jurisdiction of the court and placed youth on probation for a period of time not to exceed five years. The court imposed a number of conditions of probation in each case, including two conditions that are the focus of this appeal.

The first condition—Condition 26—authorizes the juvenile department to sanction youth with detention for up to eight days for probation violations admitted by youth:

> "The Court is authorizing the use of 30 days of detention to be used by the Juvenile Department at their discretion. The Juvenile Department is authorized to utilize up to 8 days without further order of the court on a given violation if the youth admits to the Juvenile Department that the probation violation has occurred, and the youth consents to the sanction. If the youth does not admit that a violation has occurred, or does not consent to the sanction, but the Juvenile Department has probable cause to believe a violation has occurred, the Juvenile Department may detain the youth and request a hearing before the Court which shall be held as soon as is practicable."

As the terms of the condition state, the juvenile department may do so without either a judicial determination that youth violated a condition of probation or a judicial determination that detention is an appropriate sanction under the circumstances.

The second condition—Condition 31—authorizes the juvenile department to electronically monitor youth. It may or may not require youth to pay for that monitoring. It states that youth is "[s]ubject to Electronic Monitoring (suspended) at the discretion of the Juvenile Department. If utilized, youth will be responsible for payment of $__ per day."[2]

[2] As noted, this is a consolidated appeal from three judgments. In one of the judgments, the space for specifying how much youth must pay for electronic monitoring is blank.

Youth objected to both conditions. Youth's view was that both conditions delegated to the juvenile department the authority to make decisions that the juvenile code required be made by the juvenile court.[3] The juvenile court rejected that argument and imposed the challenged conditions.

On appeal, youth assigns error to the imposition of each of those conditions. With respect to the first condition, she contends, as she did below, that it represents an unlawful delegation of the court's authority under ORS 419C.453 to adjudicate probation violations and sanction a youth with detention. Youth argues that the terms of the statute demonstrate that the legislature intended the juvenile court, not the juvenile department, to adjudicate probation violations and make any decision regarding the use of detention as a sanction for a probation violation. As to the second condition, youth again argues that the condition represents an unlawful delegation of the juvenile court's authority. In addition, youth makes new arguments about that condition: that the juvenile code does not authorize the use of electronic monitoring at all, that the juvenile court erred by requiring youth to pay for the cost of monitoring, and that, in all events, the condition is unauthorized because the court did not place sufficient limitations on how the department may use electronic monitoring.

The state makes several different responsive arguments. It first contends that youth's challenges to the two conditions of probation are not ripe for our review. The state asserts that it is speculative as to whether youth will violate the conditions of probation, whether the juvenile department will impose detention as a sanction, whether the juvenile department will employ electronic monitoring, and whether it will require youth to pay for any such monitoring. Consequently, according to the state, we lack jurisdiction to consider youth's challenges at this point in time and may not consider them unless and until the conditions are enforced

[3] Youth's lawyer explained that he was raising the same objection to the conditions that he had raised in other cases, and it appears from the record that the participants in the proceeding understood what he meant. As noted above, the issues presented in this appeal are the same as those raised in several other appeals in delinquency cases from Union County, and the issues presented here are commonly being raised in delinquency cases in Union County.

against youth. As to the merits, the state recognizes that no statute specifically authorizes either challenged condition. However, it argues that, to the extent that youth has preserved the issues that she raises on appeal, the challenged provisions are generally consistent with various other provisions of the juvenile code and asks that we infer from those provisions that the challenged conditions are authorized.

II. ANALYSIS

A. *Ripeness*

To begin, we reject the state's ripeness argument. We do so for two distinct reasons. First, the terms of each challenged condition indicate that each will be enforced by the juvenile department, without court involvement. That means that there will be no obvious way for youth to obtain appellate review of the challenged conditions if youth waits until the time of enforcement because the enforcement of the conditions will not result in an appealable judicial order. Second, even if there were a mechanism for youth to challenge the conditions at the time of enforcement, we previously have held that a youth *must* raise any challenge to a probation condition on appeal from the order imposing it. *State ex rel Juv. Dept. v. Rial*, 181 Or App 249, 254, 46 P3d 217 (2002). In *Rial*, we considered whether a youth could challenge a condition of probation requiring sex offender treatment on appeal from an order revoking his probation for failing to satisfy that condition. *Id.* We concluded that he could not, holding that the "proper time" for youth to have raised that challenge was on appeal from the order imposing that condition. *Id.* In view of the fact that this is youth's only apparent opportunity to challenge the conditions and our holding in *Rial*, we conclude that youth's challenges are ripe for our review.

B. *Condition 26*

We turn to the question whether Condition 26 is a lawful condition of juvenile probation. As noted, that condition authorizes the juvenile department to sanction youth with up to eight days of detention if youth admits to the juvenile department that youth has committed a probation violation:

> "The Court is authorizing the use of 30 days of detention to be used by the Juvenile Department at their discretion. The Juvenile Department is authorized to utilize up to 8 days without further order of the court on a given violation if the youth admits to the Juvenile Department that the probation violation has occurred, and the youth consents to the sanction. If the youth does not admit that a violation has occurred, or does not consent to the sanction, but the Juvenile Department has probable cause to believe a violation has occurred, the Juvenile Department may detain the youth and request a hearing before the Court which shall be held as soon as is practicable."

Under the terms of the condition, the juvenile department may do so without involvement of the court; that is, without a judicial determination that a probation violation has occurred and without a judicial determination as to whether detention is an appropriate sanction for youth's conduct and, if so, what period of detention is appropriate.

Youth argues that it is that aspect of the condition—the absence of judicial involvement—that makes it unlawful. Youth observes that nothing in the juvenile code explicitly empowers the juvenile department to adjudicate probation violations and impose sanctions for them and that, to the contrary, ORS 419C.453, by its terms, requires a decision to impose detention for a probation violation to be made by the juvenile court, following a hearing. Said another way, in youth's view, Condition 26 is unlawful because it conflicts with ORS 419C.453(1)(b) in two different ways: (1) by disregarding the statutory requirement that the juvenile court make the decision whether to impose detention for a probation violation; and (2) by disregarding the statutory requirement that the juvenile court hold a hearing in order to determine whether a youth has committed a probation violation and, if so, the appropriate sanction. The state does not seriously dispute that the procedure contemplated by Condition 26 is not the procedure contemplated by ORS 419C.453 for the use of detention to punish probation violations by youths,[4] but argues that it is generally consistent,

[4] The state does argue that the provision is "consistent" with the process in ORS 419C.453 because a youth can trigger a hearing process by either denying the probation violation or not consenting to the sanction. But the state does not dispute that the condition allows for the imposition of punitive detention without

as a policy matter, with a number of other provisions of the juvenile code.

As framed by the parties' arguments, the issue before us "presents a question of statutory construction, which we review for errors of law." *State ex rel Juv. Dept. v. Tyree*, 177 Or App 187, 189, 33 P3d 729 (2001) (citing *State ex rel Juv. Dept. v. Dreyer*, 328 Or 332, 337-38, 976 P2d 1123 (1999)). Specifically, does ORS 419C.453 permit the use of detention to punish probation violations by youth offenders in the manner authorized by Condition 26? To answer that question, we examine the text of ORS 419C.453 in context, taking into account any relevant legislative history, *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009), and conclude that the answer is no.

We start with the relevant text of ORS 419C.453. It plainly contemplates that the decision to punish a youth probationer with detention must be made by the juvenile court following a hearing:

> "*Pursuant to a hearing, the juvenile court may order a youth offender placed in a detention facility for a specific period of time not to exceed eight days*, in addition to time already spent in the facility, unless a program plan that is in conformance with standards established by the Youth Development Council has been filed with and approved by the council in which case the youth offender may be held in detention for a maximum of 30 days in addition to time already spent in the facility, when:
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> "* * * * *
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> "(b) The youth offender has been placed on formal probation for an act that would be a crime if committed by an adult, and *has been found to have violated a condition of that probation*."

ORS 419C.453(1)(b) (emphases added). The fact that the legislature explicitly spelled out the process by which a youth

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any court involvement and, therefore, is not strictly consistent with the requirements of ORS 419C.453. The question for us is whether, in granting juvenile courts the authority to punish probation violations with punitive detention, the legislature intended to allow for the imposition of punitive detention through a process other than the one spelled out in ORS 419C.453, including a process such as that contemplated by Condition 26, under which a youth does not necessarily receive a court hearing unless the youth does something to trigger it.

could be sanctioned with detention for a probation violation, and did not suggest any permissible alternative process for determining whether a youth should be punished with detention, indicates that the legislature intended for ORS 419C.453 to be the exclusive process for determining when a youth should be punished with detention for a probation violation. Condition 26, which provides for a different process, thus conflicts with the legislature's intentions on its face.

Context does not suggest otherwise. We recognize, as the state argues, that Condition 26 is not necessarily inconsistent with the overarching purposes of the juvenile code, and also that it could represent an effective way to advance the objectives of the juvenile code, at least in some circumstances. However, we see nothing in the other provisions of the juvenile code on which the state relies—or any other provisions, for that matter—that indicates that the *legislature* intended to authorize the use of detention to punish a youth for a probation violation through any process other than the one specified in ORS 419C.453. If anything, the statutes identified by the state point to a contrary conclusion.

For example, the state suggests that ORS 419C.446(2), which generally governs the imposition of conditions of juvenile probation, indicates that Condition 26 is permissible. That provision states:

> "*The court may specify particular requirements to be observed during the probation consistent with recognized juvenile court practice*, including but not limited to restrictions on visitation by the youth offender's parents, restrictions on the youth offender's associates, occupation and activities, restrictions on and requirements to be observed by the person having the youth offender's legal custody, requirements for visitation by and consultation with a juvenile counselor or other suitable counselor, requirements to make restitution under ORS 419C.450, *requirements of a period of detention under ORS 419C.453*, requirements to pay a fine under ORS 419C.459, requirements to pay a supervision fee under ORS 419C.449, requirements to perform community service under ORS 419C.462, or service for the victim under ORS 419C.465, or requirements to submit to blood or buccal testing under ORS 419C.473."

(Emphases added.) However, the legislature's specific reference to "a period of detention *under ORS 419C.453*" indicates that the legislature's intention that conditions of probation allowing for the detention of a youth operate in a manner that otherwise comports with ORS 419C.453. (Emphasis added.) That is, from the words of ORS 419C.446, it appears to us that the legislature intended that any detention would be imposed through the process specified by ORS 419C.453, and that conditions of probation could then address any additional requirements for a period of detention otherwise imposed under ORS 419C.453. Given its wording, we are unable to infer that the legislature intended for ORS 419C.446 to supplant the process for imposing detention otherwise required by ORS 419C.453.

The state also directs our attention to ORS 419C.145(1)(d) and (2). Those provisions authorize the juvenile court or its "authorized representative"[5] to approve the preadjudication detention of a youth if the court or the authorized representative determines that there is probable cause to believe that the youth has committed a probation violation:

> "(1) A youth may be held or placed in detention before adjudication on the merits if one or more of the following circumstances exists:
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> "(d) The youth is currently on probation imposed as a consequence of the youth previously having been found to be within the jurisdiction of the court under ORS 419C.005, and there is probable cause to believe the youth has violated one or more of the conditions of that probation[.]
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> "*****
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> "(2) A youth detained under subsection (1) of this section must be released to the custody of a parent or other responsible person, released upon the youth's own recognizance or placed in shelter care unless the court or its

[5] ORS 419C.109 authorizes a juvenile court to "designate a person to effect disposition of a youth taken into custody or brought before the court" in specified circumstances. Pertinent to the issue before us, the statute does not, by its terms, provide that such a designated person may authorize detention as punishment for a probation violation, and the state does not suggest otherwise.

> authorized representative makes written findings that there is probable cause to believe that the youth may be detained under subsection (1) of this section, that describe why it is in the best interests of the youth to be placed in detention and that one or more of the following circumstances are present:
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> "(a) No means less restrictive of the youth's liberty gives reasonable assurance that the youth will attend the adjudicative hearing; or
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> "(b) The youth's behavior endangers the physical welfare of the youth, the victim or another person, or endangers the community."

Again, however, those provisions point to the opposite inference from the one advanced by the state. ORS 419C.145 specifically provides that certain decisions regarding the detention of a youth can be delegated to the court's "authorized representative." That demonstrates that, when the legislature intends to permit the juvenile court to delegate the authority to make a decision about a youth's detention to someone outside of the court, it makes that intention explicit. The legislature's omission of a similar provision expressly authorizing the delegation of the juvenile court's authority under ORS 419C.453 suggests that the legislature did not intend to authorize the delegation of that authority reflected in Condition 26. *See, e.g.*, *State v. Bailey*, 346 Or 551, 562, 213 P3d 1240 (2009) ("Generally, when the legislature includes an express provision in one statute and omits the provision from another related statute, we assume that the omission was deliberate."). If, as is the case with decisions about preadjudication detention of youths, the legislature intended to authorize the juvenile court to allow someone else to make decisions about detention for the purpose of punishing probation violations, the legislature would have said so.

Finally, the legislative history of ORS 419C.453 makes clear that Condition 26 is inconsistent with the legislature's intentions to authorize the use of detention to punish juveniles for probation violations. The legislative history shows that, in authorizing the use of detention to punish probation violations by juveniles, the legislature intended that the decision whether to use detention as punishment

would be one that was made by the juvenile court after a hearing, and that the involvement of the court was central to the legislature's decision to authorize the use of detention at all.

As noted earlier, the legislature first gave juvenile courts the authority to punish probation violations with detention in 1979 by enacting Senate Bill (SB) 106 (1979) as a temporary measure. Or Laws 1979, ch 337, §§ 2, 4, 5.[6] SB 106 was introduced on a recommendation from the Governor's Task Force on Juvenile Corrections, which issued a report in 1978. Lee Penny, the Project Director from the Task Force, testified that the measure was intended to give juvenile court judges a more effective "middle ground" way to sanction probation violations without having to go so far as to revoke probation, remove the youth from the community, and place the child in a "training school." Tape Recording, Senate Committee on Judiciary, SB 106, Jan 11, 1979, Tape 1, Side 1 (statement of Lee Penny); Tape Recording, Senate Committee on Judiciary, SB 106, Jan 25, 1979, Tape 5, Side 2 (statement of Lee Penny). That alternative, Representative Gardner and Representative Lombard later explained, was necessary to help "shock," *i.e.*, punish the child, and hopefully avoid the need for more serious detention later down the road. Tape Recording, House Committee on Judiciary, SB 106, May 24, 1979, Tape 73, Side 2 (discussion between Rep Kip Lombard and Rep Gardner).

The decision to authorize the use of detention to punish probation violations was controversial. Legislators and

[6] The bill provided:

"Section 2. Subject to section 4 of this 1979 Act, the juvenile court may order a child age 14 or over placed in a detention facility for children for a specific period of time not to exceed eight days, in addition to time already spent in such a facility, when:

"(1) The child has been found to be within the jurisdiction of the juvenile court by reason of having committed an act which would be a crime if committed by an adult; or

"(2) The child described in subsection (1) of this section has been found to have violated a condition of probation.

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"Section 4. A child may be placed in a detention facility for children as authorized by section 2 of this 1979 Act only as the result of a court hearing.

"Section 5. Sections 2 to 4 of this Act are repealed on June 30, 1981."

constituents questioned the propriety of ever using detention to punish children. *See* Minutes, Senate Committee on Judiciary, SB 106, Feb 12, 1979, 9 (discussion of whether anyone on the committee thought the bill was a "good idea"); Testimony, Senate Committee on Judiciary, SB 106, Jan 25, 1979, Ex B (statement of Muriel Goldman, Citizens for Children) (explaining that "SB 106 was among the more controversial bills discussed by the [Governor's Task Force on Juvenile Corrections]"). Ultimately, as the legislative minutes reflect, the decision to authorize the use of detention to punish youth for probation violations represented a "compromise" between those who disfavored any youth detention and those who wanted judges to have the detention option. Minutes, House Committee on Judiciary, SB 106, May 24, 1979, 12 (reflecting Rep Tom Mason's view of the bill). Central to that compromise, from what we can discern, was that the decision to use detention to punish a youth would be made by a juvenile court following a hearing. *See* Minutes, Senate Committee on Judiciary, SB 106, Feb 12, 1979, 15-16. In other words, the legislative history reveals that the policy choice to allow for the punitive detention of juveniles for probation violations was a significant one. The legislature did not make the decision lightly, and did so only with the understanding that juvenile judges would play a pivotal role in deciding when and how a probation violation should be punished with detention.

Two years later, the legislature enacted House Bill (HB) 3139 (1981), to make the provisions of SB 106 permanent, with a few minor changes. Or Laws 1981, ch 648, § 2. The legislative history of HB 3139 reflects that legislators and constituents had the same concerns about the use of detention to punish juveniles for probation violations that they had had two years earlier. *See* Minutes, House Committee on Judiciary, HB 3139, Apr 20, 1981, 23-25; Testimony, House Committee on Judiciary, HB 3139, Apr 20, 1981, Ex A (statement of Jeanne Gross, Juvenile Rights Project). That a court would be supervising the use of any detention for punitive purposes again appears to have been central to the legislature's understanding of the measure and approval of it. Tape Recording, House Committee on Judiciary, Subcommittee 3, HB 3139, Apr 20, 1981, Tape

284, Side B (testimony of George Brown). That is, the legislature's intention, as it was in 1979, was to give juvenile court *judges* a more effective tool for addressing probation violations by youths, with the understanding that it would be *judges* making the determinations about whether or how detention should be used punitively. When Judge Norblad testified in support of the bill, he specifically used the example of how the bill would allow a juvenile court judge to send a child who violated a probation condition to detention to punish the child, as an alternative to revoking probation and sending a child to training school. Tape Recording, House Committee on Judiciary, Subcommittee 3, HB 3139, Apr 20, 1981, Tape 283, Side B (testimony of Judge Albin Norblad). George Brown, from the Jackson County Juvenile Department, agreed with Judge Norblad's explanation of the measure and also emphasized the role of the court in ensuring the propriety of any detention. Tape Recording, House Committee on Judiciary, Subcommittee 3, Apr 20, 1981, Tape 284, Side B (testimony of George Brown).

The 1979 and 1981 legislative history, as a whole, suggests to us that the legislature has not authorized detention to punish a youth for a probation violation, except in the manner specifically provided by statute. Given the concerns as to whether punitive detention should be authorized at all, it is reasonable to think that the legislature intended to authorize the use of detention only so long as it strictly comported with the statutory limitations.[7]

In view of the foregoing, we conclude that Condition 26 is invalid. The text, context, and legislative history of ORS 419C.453 all indicate that the legislature intended to authorize the use of detention to punish a youth for a probation violation only in the manner provided for by that statute. Condition 26 does not comport with ORS 419C.453 because it authorizes someone other than the juvenile court to decide whether detention should be used to punish a probation violation, and because it authorizes that decision to

[7] We recognize that the statutory provisions authorizing juvenile courts to use detention to punish juvenile probation violators have been modified since 1979 and 1981. However, none of those modifications suggest to us that the legislature intended to change the scope of the permissible use of detention from what it was at the time that the legislature originally authorized its use.

be made without a hearing before the court. The juvenile court therefore erred in imposing it.

C. *Condition 31*

Finally, we consider and reject youth's challenges to Condition 31, requiring electronic monitoring. As the state correctly observes, most of youth's arguments were not presented to the trial court and we reject them as unpreserved.[8] As to the argument that youth did raise below—that the juvenile court erred in giving the juvenile department the discretion as to whether to use the electronic monitoring that the juvenile court had authorized—we reject it on its merits. Assuming without deciding that the juvenile code authorizes a juvenile court to impose a requirement of electronic monitoring, we see nothing in the juvenile code that would prohibit the court from giving the juvenile department the discretion to not employ that monitoring. Rather, absent a conflict with another provision of the juvenile code, we are confident that a condition granting discretion to the juvenile department to determine whether to employ the electronic monitoring that the court has expressly authorized falls within the court's authority to craft conditions of probation under ORS 419C.446(2). Youth has identified no such conflict here.

Reversed and remanded with directions to strike Condition 26; otherwise affirmed.

[8] As we observed earlier, the juvenile court left blank in one of the cases the space for designating an amount that youth would be obligated to pay for monitoring. In view of that omission, we do not understand the judgment to require youth to pay any amount for the cost of monitoring in that case.