

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

MICHAEL A. LUJAN,
Petitioner-Appellant,

v.

John MYRICK,
Superintendent,
Two Rivers Correctional Institution,
Defendant-Respondent.

Umatilla County Circuit Court
CV140794; A160525

Rick J. McCormick, Senior Judge.

Argued and submitted August 29, 2017.

Kenneth A. Kreuzscher argued the cause and filed the briefs for appellant.

Rolf C. Moan, Assistant Attorney General, argued the cause for respondent. With him on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Ortega, Presiding Judge, and Garrett, Judge, and Powers, Judge.

ORTEGA, P. J.

Reversed and remanded with instructions for post-conviction court to grant petitioner relief on Claims 3, 5, and 6; otherwise affirmed.

ORTEGA, P. J.

In this post-conviction case, petitioner appeals a judgment that granted him limited relief on some of his claims by ordering that the judgment revoking his probation be amended to allow for Alternative Incarceration Programs (AIP) during the imposed 72-month imprisonment sentence. He argues that the post-conviction court erred because AIP eligibility is prohibited for the crime for which he was sentenced (second-degree robbery) and that, consequently, the relief granted has not mitigated the prejudice he suffered. On appeal, he asks us to reverse the post-conviction judgment and vacate his underlying convictions by allowing him to withdraw his guilty plea or, alternatively, to grant “such relief as may be proper and just.” ORS 138.520.¹ The superintendent of the correctional institution where petitioner is incarcerated (the defendant in the post-conviction proceeding) concedes that the post-conviction court erred but asserts that vacating petitioner’s convictions is not appropriate because “proper and just” relief can be accomplished by means other than the one urged by petitioner. We accept the superintendent’s concession and conclude that the appropriate disposition is to remand to the post-conviction court to fashion the appropriate relief.²

Petitioner pleaded guilty to one count each of first-degree burglary and second-degree robbery. The sentencing court imposed five months’ imprisonment and 36 months’ supervised probation with the additional provision that, if petitioner’s sentence were revoked, he would be sentenced to 72 months’ imprisonment. During the plea and sentencing hearing, the state represented that petitioner would be eligible for Alternative Incarceration Programs (AIP) if probation were revoked. Petitioner later violated the terms of his probation and his probation was revoked. The court revoking

¹ ORS 138.520 provides:

“The relief which a court may grant or order under ORS 138.510 to 138.680 shall include release, new trial, modification of sentence, and such other relief as may be proper and just. The court may also make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody and release on security.”

² We reject without written discussion petitioner’s assignment of error raised in his *pro se* brief.

petitioner's probation, however, sentenced petitioner to 72 months' imprisonment on the first-degree burglary conviction, concurrent with the robbery sentence, without eligibility for AIP.

Petitioner sought post-conviction relief, alleging, as relevant to his appeal, that his probation-revocation counsel provided inadequate assistance at the revocation hearing (Claim 3), that the revocation judgment that did not provide for AIP was a breach of the plea agreement (Claim 5), and that his guilty plea was not a knowing and intelligent decision because he understood that he would be eligible for AIP at the plea hearing (Claim 6). During the post-conviction proceedings, the superintendent conceded that petitioner was entitled to relief on Claims 3, 5, and 6. The superintendent suggested to the post-conviction court that the proper relief was to amend the judgment to make petitioner eligible for AIP but not allow petitioner to withdraw his plea. The post-conviction court accepted the superintendent's concession and, contrary to petitioner's request to withdraw the plea, amended the probation-revocation judgment to read:

"The defendant **may** be considered by the executing or releasing authority for any form of reduction in sentence, temporary leave from custody, work release, or program of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing. The defendant **may** be considered by the executing or releasing authority for any form of alternative incarceration program."

(Underscoring and boldface in judgment.)

As noted, petitioner asserts on appeal that the post-conviction court erred because ordering the amendment of the probation revocation judgment to allow for AIP did not provide him with relief. That is, he contends that the judgment as amended is unlawful and will not be given effect by the Department of Corrections (the department).³ That is because, under ORS 421.508 and OAR 291-062-0130(3), the department is responsible for determining which inmates

³ In his brief on appeal, petitioner asserts that the department has refused to abide by the amended term as ordered by the post-conviction judgment and, accordingly, has not provided AIP.

are eligible to participate in AIP. Under OAR 291-062-0130(3), for crimes committed on or after January 1, 2009, an inmate is not eligible for AIP if the sentence is for a crime listed in ORS 137.700. Second-degree robbery, ORS 164.405, is one of the crimes listed in ORS 137.700. In petitioner's view, under ORS 421.508 and OAR 291-062-0130(3), the department will not give effect to the amendment ordered by the post-conviction court. Consequently, petitioner asks us to reverse the post-conviction judgment and his underlying convictions by allowing him to withdraw his guilty plea or, alternatively, grant "such relief as may be proper and just." ORS 138.520.

The superintendent concedes that the relief the post-conviction court ordered is deficient and that we should remand to the post-conviction court, but disagrees that the proper remedy is to allow petitioner to withdraw his guilty plea and have his convictions vacated. The superintendent's view is that petitioner's requested relief conflicts with the approach taken by the Supreme Court in *Hinton v. Hill*, 342 Or 222, 149 P3d 1205 (2006). In *Hinton*, the petitioner entered a plea to six counts of sexual abuse with the understanding that her sentence would not be longer than 226 months' incarceration. *Id.* at 224. The signed plea petition stated that the maximum period of incarceration to which petitioner could be sentenced was 226 months despite the fact that the maximum lawful sentence was 496 months. After being sentenced to 366 months of incarceration, the petitioner sought post-conviction relief, claiming constitutionally inadequate and ineffective assistance of counsel because her attorney had failed to inform her correctly about the maximum possible sentence under her plea agreement. There was no dispute that the petitioner was entitled to post-conviction relief, but there was a dispute as to whether "the post-conviction court may cure the violation of petitioner's constitutional rights with a remedy other than vacating petitioner's no contest pleas." *Id.* at 226. The court rejected the petitioner's contention that she should be placed in the position that she was in before she entered the flawed plea. Rather, the court reasoned that under ORS 138.520, which provides that a post-conviction court may grant relief by "release, new trial, modification of sentence, and *such*

other relief as may be proper and just,” the “post-conviction court has broad authority to fashion a remedy to correct the actual prejudice suffered by a criminal defendant.” *Id.* at 231. Accordingly, the court concluded that it was appropriate for the post-conviction court to remand to the criminal trial court with instructions to either decrease the petitioner’s sentence from 366 to 226 months’ incarceration or to allow the petitioner to withdraw her plea. *Id.*

In this case, the superintendent asserts that, under *Hinton*, the appropriate relief is not to reverse petitioner’s underlying convictions and allow him to withdraw his plea, but to remand to the post-conviction court to fashion a remedy that cures petitioner’s actual prejudice.⁴ We agree. We therefore remand to the post-conviction court to allow it to fashion relief that cures the actual prejudice—lack of AIP—and we instruct that allowing petitioner to withdraw his plea and vacating petitioner’s conviction is required only in the event that the actual prejudice cannot be cured otherwise.

Reversed and remanded with instructions for post-conviction court to grant petitioner relief on Claims 3, 5, and 6; otherwise affirmed.

⁴ The superintendent suggests a remedy that, it argues, is not contrary to the agreement petitioner reached with the state during his plea proceedings. The superintendent suggests that the post-conviction court could order a modification of the revocation judgment such that petitioner’s probation is revoked on the first-degree burglary conviction only and impose a 72-month sentence on that conviction. According to the superintendent, that proposed modification would have the effect of rendering the three-year probationary sentence on the second-degree robbery conviction as completed. As a result, petitioner would no longer be serving an incarceration sentence for second-degree robbery and, because first-degree burglary is not one of the crimes listed under ORS 137.700, petitioner would be eligible for AIP. Accordingly, petitioner would receive the plea benefit for which he bargained. The viability of that relief, however, is to be resolved by the post-conviction court.