

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

NANG KHAN ZAMNO,
aka Nang Khanzam Zamno,
Defendant-Appellant.

Multnomah County Circuit Court
17CR17694; A166737

John A. Wittmayer, Judge.

Submitted August 1, 2019.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Rond Chananudech, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Kirsten M. Naito, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Mooney, Judge.

PER CURIAM

Portion of judgment requiring defendant to pay a \$2,260 DUII fine vacated; remanded for resentencing; otherwise affirmed.

PER CURIAM

Defendant appeals a judgment of conviction for felony driving under the influence of intoxicants (DUII), ORS 813.010 and ORS 813.011, and reckless driving, ORS 811.140. He first contends that the trial court erred in denying his motion to suppress evidence; we reject that assignment of error without discussion. In his second assignment of error, he contends that the court erred in imposing a \$2,260 DUII fine in the judgment when, at sentencing, the court orally imposed a DUII fine of \$2,000. As the state acknowledges, defendant was not required to preserve his claim of error in these circumstances. *State v. Lewis*, 236 Or App 49, 52, 234 P3d 152, *rev den*, 349 Or 172 (2010) (preservation not required where error challenged on appeal appeared for the first time in the judgment). Moreover, the state concedes that the trial court erred in imposing in the judgment a fine that exceeded by \$260 the amount announced at the sentencing hearing.

We agree and accept the state's concession. *State v. Tison*, 292 Or App 369, 374, 424 P3d 823, *rev den*, 363 Or 744 (2018) (concluding that trial court erred in similar circumstances because additional monetary amount was imposed outside the presence of defendant); *see also State v. Coghill*, 298 Or App 818, 819, ___ P3d ___ (2019) (same). The parties, however, dispute the proper remedy: defendant requests that we simply reverse the portion of the judgment requiring payment of the additional \$260; the state, on the other hand, contends that, under *Tison*, we must vacate the fine and remand for resentencing. Although *Tison* does not govern our disposition in this case, we nonetheless agree with the state that the case must be remanded for resentencing.

In *Tison*, after concluding that the trial court committed an analogous sentencing error, we vacated the portions of the judgments imposing the DUII fine and remanded for resentencing. 292 Or App at 374-75; *see also Coghill*, 298 Or App at 819-20 (same). However, in those cases, because the defendants were convicted of *misdemeanors*, the remedy was controlled by *former* ORS 138.040 (2015), rather than *former* ORS 138.222 (2015), which governs felony sentencing

(and therefore applies in this case).¹ *Tison*, 292 Or App at 373; *Coghill*, 298 Or App at 819. Still, we reach essentially the same result under *former* ORS 138.222(5)(a) (2015), which requires us to “remand the entire case for resentencing” if we determine that the sentencing court “committed an error that requires resentencing.” This is such a case. *See, e.g., State v. Loudermilk*, 288 Or App 88, 90, 405 P3d 195 (2017) (remanding for resentencing in felony case where trial court committed plain error in imposing \$2,000 mandatory minimum DUII fine). Accordingly, we vacate the portion of the judgment imposing the DUII fine, remand for resentencing, and otherwise affirm.

Portion of judgment requiring defendant to pay a \$2,260 DUII fine vacated; remanded for resentencing; otherwise affirmed.

¹ Both ORS 138.040 and ORS 138.222 were repealed in 2017 as part of a comprehensive restructuring of the laws governing criminal appeals. *See* Senate Bill (SB) 896 (2017); Or Laws 2017, ch 529, § 26. Because the judgment in this case was entered before January 1, 2018, the effective date of SB 896, the former statutes apply.