

**FILED: December 27, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

THEARONE GILES,  
Defendant-Appellant.

Multnomah County Circuit Court  
990836510

A146167

Kenneth R. Walker, Judge.

Argued and submitted on January 17, 2012.

Kenneth A. Kreuscher argued the cause for appellant. With him on the briefs was Portland Law Collective, LLP.

Timothy A. Sylwester, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

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

WOLLHEIM, J.

Sentence for murder reversed and remanded with instructions to impose a sentence of 300 months' imprisonment followed by post-prison supervision for life; otherwise affirmed.

1                   WOLLHEIM, J.

2                   This case stems from a murder committed on August 26, 1999. This is the  
3 third time the case has been before this court. Defendant was charged with murder,  
4 *former* ORS 163.115(5) (1997), and felon in possession of a firearm, ORS 166.270. In  
5 2001, a jury convicted defendant on both counts. In defendant's first appeal, this court  
6 considered defendant's unpreserved error on sentencing. We affirmed defendant's  
7 convictions and remanded for resentencing. [\*State v. Giles\*](#), 199 Or App 404, 113 P2d 436  
8 (2005) (*Giles I*). The Supreme Court vacated our opinion and remanded the case to this  
9 court for reconsideration in light of two Supreme Court opinions. *State v. Giles*, 345 Or  
10 315, 195 P3d 63 (2008) (*Giles II*). On remand, this court again exercised its discretion  
11 and reached defendant's unpreserved argument regarding sentencing. [\*State v. Giles\*](#), 227  
12 Or App 5, 204 P3d 868 (2009) (*Giles III*). On remand from this court, the trial court  
13 resented defendant. On the murder count, the court imposed a sentence of life  
14 imprisonment with the possibility of parole or release after serving a 300-month  
15 mandatory minimum sentence. On the felon in possession of a firearm count, the court  
16 sentenced defendant to 18 months, to run concurrently with defendant's sentence on the  
17 murder conviction. In this appeal, defendant does not challenge the felon-in-possession  
18 sentence or the 300-month mandatory minimum sentence or the term of post-prison  
19 supervision for life on the murder count. He contends, however, that the sentence of "life  
20 imprisonment" for murder is a violation of the *ex post facto* provisions of the state and  
21 federal constitutions. He requests that this court remand the case for resentencing with  
22 instructions not to impose a sentence of "life imprisonment." This case requires us to

1 consider the continuing effect, if any, of a statute that has been declared unconstitutional.

2 Pursuant to *former* ORS 163.115(5)(a) (1997), from 1995 until February  
3 17, 1999, the statutory punishment for murder was imprisonment for life, with a  
4 "minimum" sentence of 300 months. However, the Board of Parole and Post-Prison  
5 Supervision (board) had no authority to consider for parole an offender who had served  
6 the minimum sentence of 300 months. Thus, the sentence was, in effect, a "true life"  
7 sentence, because there was no possibility of parole. In [\*State v. McLain\*](#), 158 Or App  
8 419, 426, 974 P2d 727 (1999), decided February 17, 1999, this court concluded that the  
9 true life sentence under ORS 163.115(5)(a) was unconstitutionally disproportional under  
10 Article I, section 16, of the Oregon Constitution, because it provided a greater penalty for  
11 murder than that provided for the greater crime of aggravated murder, which allowed for  
12 the possibility of parole. We held that the "true-life" provision of ORS 163.115(5)(a) was  
13 "constitutionally flawed." We concluded that, under then-existing versions of ORS  
14 137.700(a)(A) and ORS 163.115(5)(b), the proper sentence for the defendant's crime of  
15 murder was a mandatory determinate sentence of 300 months' imprisonment (25 years)  
16 followed by a lifetime of post-prison supervision in accordance with OAR 213-005-004  
17 (1996).<sup>1</sup>

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<sup>1</sup> We held:

"We agree [with the parties] that the proper sentence is the 25-year mandatory minimum sentence required by ORS 137.700(a)(A) and ORS 163.115(5)(b), followed by post-prison supervision for life in accordance with ORS 213-005-0004."

158 Or App at 427.

1           On October 23, 1999, the Legislative Assembly amended ORS 163.115(5)  
2 to correct the disproportionality of the murder sentencing scheme by providing a  
3 punishment of a mandatory minimum of 300 months' imprisonment, plus the *possibility*  
4 of parole, that is, the life-with-possibility-of-parole sentence. The statute as amended  
5 applied to any person who had been convicted of murder under ORS 163.115, regardless  
6 of the date the crime was committed. Or Laws 1999, ch 782, § 2.

7           We have referred to the time period between February 17, 1999, when this  
8 court held the "true life" version of ORS 163.115(5) to be unconstitutional, and October  
9 23, 1999, when the amended, life-with-possibility-of-parole, version of the statute  
10 became effective, as the "*McLain* window." *See, e.g., State v. Davis*, 216 Or App 456,  
11 465, 174 P3d 1022 (2007). Defendant committed his offense on August 26, 1999, during  
12 the *McLain* window. He was convicted on September 20, 2001, after the effective date of  
13 the amendment to ORS 163.115(5). After the April 2010 resentencing hearing, the trial  
14 court imposed the life-with-possibility-of-parole sentence provided in ORS 163.115(5),  
15 as amended October 23, 1999.

16           Defendant contends on appeal that, because he committed his offense *after*  
17 this court's decision of February 17, 1999, but *before* the legislature's amendment of the  
18 statute, for purposes of *ex post facto* analysis, his current sentence must be compared to  
19 the sentence that this court said applied at the time he committed the offense on August  
20 26, 1999, *i.e.*, a determinate sentence of a mandatory 300 months' imprisonment (25  
21 years) followed by a lifetime term of post-prison supervision. *McLain*, 158 Or App at  
22 427. Defendant asserts that application of the life-with-possibility-of-parole sentence is

1 indisputably more severe than the sentence that this court held was applicable and,  
2 therefore, the sentence imposed at resentencing was a violation of state and federal *ex*  
3 *post facto* protections.

4           The state contends otherwise. Relying on [State v. Haynes](#), 168 Or App  
5 565, 568, 7 P3d 623, *rev den*, 331 Or 283, (2000), the state asserts that the "benchmark"  
6 sentence against which the life-with-possibility-of-parole sentence imposed under  
7 amended ORS 163.115(5) is to be compared is the former "true life" version of ORS  
8 163.115(5). That is the version of the statute that the state contends was "in force" when  
9 defendant committed his offense, despite this court's decision in *McLain*. Because the  
10 "true life" sentence to which defendant was subject under the former version of ORS  
11 163.115(5) was more onerous than the sentence to which he is currently subjected, the  
12 state contends that there is no *ex post facto* violation.

13           In *Haynes*, the defendant, who was convicted of murder, committed the  
14 crime underlying his conviction in 1997, when the former "true life" version of ORS  
15 163.115(5) was in effect. He was convicted and sentenced under the amended version of  
16 ORS 163.115(5) to "imprisonment for life" with a minimum sentence of 300 months and  
17 the possibility of parole. The defendant challenged his sentence, contending that the new  
18 legislation could not apply to him without running afoul of the constitutional prohibition  
19 against *ex post facto* laws. Or Const, Art I, § 21. We rejected the defendant's challenge.  
20 We held that the legislature's amendment of ORS 163.115(5)(a) had corrected the  
21 proportionality problem at issue in *McLain*. Citing [State v. Grimes](#), 163 Or App 340, 986  
22 P2d 1290 (1999), we said that, because the amended statute and the life-with-possibility-

1 of-parole sentence was "ameliorative," and did not increase the quantum of punishment  
2 from what had been required at the time the defendant had committed his crimes, there  
3 was no *ex post facto* violation in applying the amended version of the statute retroactively  
4 to replace the statute in effect at the time the crime was committed. 168 Or App at 568.<sup>2</sup>

5 Citing *Haynes*, the state contends that, because the statute "in force" when  
6 defendant committed his offense was the former unconstitutional version of ORS  
7 163.115(5), which imposed a "true life" sentence, the amended life-with-possibility-of-  
8 parole sentence is ameliorative and, as we held in *Haynes*, can be applied retroactively  
9 without violation of *ex post facto* prohibitions.

10 In answer to defendant's contention that the applicable benchmark sentence  
11 at the time of the offense for purposes of *ex post facto* analysis was the sentence that this  
12 court applied in *McLain*, the state asserts that *McLain* did not establish or apply a  
13 sentence in lieu of the constitutionally defective statute. Rather, the state contends,  
14 *McLain* held only that Article I, section 16, precluded application of that portion of the

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<sup>2</sup> In *Haynes*, we said:

"In this case, the statute in force at the time defendant committed the crime mandated an 'imprisonment for life' sentence on a conviction of murder. Under the current statute, defendant faces the possibility of parole upon completion of the minimum term. Plainly the statute is ameliorative, and its application to defendant presents no *ex post facto* violation."

*Haynes*, 168 Or App at 568.

1 statutory sentence that prevented a person convicted of murder from being paroled until  
2 the legislature amended the statute to provide parole or release on terms that were equal  
3 to or less onerous than those that applied to a conviction for aggravated murder. The  
4 state asserts that "[t]his court's decision in *McLain* did not mean that ORS 163.115(5)(a)  
5 legally ceased to exist and that [defendant] could not fairly have been on 'notice' for  
6 purposes of the *ex post facto* clauses that he would be subject to a life sentence if he  
7 committed murder." In the state's view, the former version of ORS 163.115(5), with its  
8 "potential" constitutional defects, continued to exist until the legislature fixed it in  
9 October 1999, and defendant was on notice of the potential life imprisonment punishment  
10 under that statute.

11           In response to defendant's contention that the effect of *McLain* was that the  
12 murder sentencing provisions of ORS 163.115(5) could not be applied at all, the state  
13 asserts that, when a constitutional defect can be remedied retroactively, a statute is only  
14 *potentially* unconstitutional and remains "in force" until it is amended. This is especially  
15 so, in the state's view, when the sentence under challenge would become disproportional  
16 only after the defendant had served the mandatory 25 years of imprisonment and had no  
17 possibility of parole. The legislature's amendment authorized the board to parole a  
18 defendant after 25 years; accordingly, this defendant was never subjected to the statute's  
19 potential disproportionality problem. Therefore, the amendment was "ameliorative," in  
20 the sense that the sentence under the amended statute is less onerous than the potential  
21 sentence under the original statute; accordingly, the state asserts, there is no *ex post facto*  
22 violation in applying it retroactively.

1 Defendant has the better argument. We held in *McLain* that the former  
2 version of ORS 163.115(5)(a) was "constitutionally flawed" because of its  
3 disproportionality with the offense of aggravated murder. We expressly considered in  
4 *McLain* whether the statute could nonetheless be constitutionally construed, but  
5 determined that that was not possible without rendering the statute meaningless. 158 Or  
6 App at 426-27. When this court determined that the former version of ORS  
7 163.115(5)(a) was unconstitutional, that statutory provision could no longer be applied.  
8 See *Cannon v. Gladden*, 203 Or 629, 632-33, 281 P2d 233 (1955) (effect of declaring  
9 sentencing statute unconstitutional under Article I, section 16, is that "life imprisonment"  
10 portion of statute is "nul and void."); *State v. Shumway*, 291 Or 153, 164, 630 P2d 796  
11 (1981) (unconstitutional provision is "invalid and cannot be applied"). In light of the  
12 inapplicability of ORS 163.115(5), we determined, in *McLain*, that the proper sentence  
13 was that required by other statutes--a 25-year mandatory minimum as provided in ORS  
14 137.700(a)(A) and ORS 163.115(5)(b), followed by post-prison supervision for life in  
15 accordance with OAR 213-005-0004. Contrary to the state's contention, the disposition  
16 in *McLain* was not merely a case-specific result; rather, it identified and was predicated  
17 on the only sentence that could lawfully have been imposed as of that time (*i.e.*, before  
18 the enactment of the 1999 amendments). We conclude that that was the only sentence to  
19 which defendant could lawfully have been subjected as of the time he committed the  
20 murder, and because the 1999 amendments prescribe a sentence that is patently harsher  
21 than that prescribed by *McLain*, the application of the 1999-amended scheme to  
22 defendant violates *ex post facto* protections.



1           When defendant committed his offense, ORS 163.115(5) had not yet been  
2 amended to correct its disproportionality; thus, ORS 163.115(5) was inapplicable, and the  
3 same provisions that this court held in *McLain* applied to sentencing for murder applied  
4 to him. Those provisions required that a person convicted of murder serve a 300-month  
5 term of imprisonment followed by post-prison supervision for life. Under the amended  
6 version of ORS 163.115(5)(a), defendant would be entitled to only the *possibility* of  
7 parole after serving a 300-month minimum. Accordingly, as applied to defendant, the  
8 amended version of ORS 163.115(5) would be an *ex post facto* violation. We therefore  
9 reverse defendant's murder sentence and remand for imposition of a sentence of 300  
10 months' imprisonment followed by post-prison supervision for life.<sup>3</sup>

11           Sentence for murder reversed and remanded with instructions to impose a  
12 sentence of 300 months' imprisonment followed by post-prison supervision for life;  
13 otherwise affirmed.

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1. <sup>3</sup> Defendant has already served his sentence for felon in possession of a  
firearm, so there is no need to remand for resentencing on that conviction.