

Filed: November 10, 2011

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Respondent on Review,

v.

VLADIMIR VLADIMIROVICH GLUSHKO,

Petitioner on Review.

(CC 209903037; CA A142224; SC S059136 (Control))

STATE OF OREGON,

Respondent on Review,

v.

HAROLD VERNON LITTLE,

Petitioner on Review.

(CC 981756M, 990259M; CA A141888, A141889; SC S059137)
(Consolidated for argument and opinion)

En Banc

On review from the Court of Appeals.*

Argued and submitted September 20, 2011.

Zachary L. Mazer, Deputy Public Defender, Salem, argued the cause and filed the brief for petitioners on review. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Rolf C. Moan, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

LANDAU, J.

The decisions of the Court of Appeals and the judgments of the circuit courts are affirmed.

*Appeal from Lane County Circuit Court, Cynthia D. Carlson, Judge. 240 Or App 464, 248 P3d 451 (2011).

Appeal from Josephine County Circuit Court, Pat Wolke, Judge. 240 Or App 464, 248 P3d 451 (2011).

1 LANDAU, J.

2 ORS 135.747 provides that,

3 "[i]f a defendant charged with a crime, whose trial has not been
4 postponed upon the application of the defendant or by the consent of the
5 defendant, is not brought to trial within a reasonable period of time, the
6 court shall order the accusatory instrument to be dismissed."

7 The issue in these two cases is whether defendants' failures to appear at scheduled
8 hearings amount to "consent" to a delay in proceedings within the meaning of that statute,
9 and, if not, whether any delays caused by such failures to appear were nevertheless
10 reasonable. We conclude that a mere failure to appear does not constitute consent within
11 the meaning of ORS 135.747, but that, under the circumstances of these cases, the delays
12 were reasonable.

13 I. BACKGROUND

14 The relevant facts of each of the two cases are few and undisputed.

15 A. *State v. Glushko*

16 On February 22, 1999, the state charged defendant Glushko by information
17 with one count of attempt to elude, one count of reckless driving, and one count of
18 driving under the influence of intoxicants (DUII). A grand jury indicted defendant with
19 those charges on March 5, 1999. A few weeks later, on March 26, 1999, defendant was
20 arraigned and entered a "not guilty" plea. On April 30, 1999, defendant entered into a
21 diversion agreement as to the DUII charge. As part of his diversion agreement, defendant
22 signed an agreement and waiver form, in which he acknowledged that

23 "[t]he court will terminate this diversion agreement if the court finds
24 that you have violated the terms of the diversion agreement or that you

1 were not eligible for diversion to begin with. The court will make this
2 determination at a hearing where you can 'show cause' why you should not
3 be removed from the diversion program. * * * **Notice of such hearings will**
4 **be sent to you by regular mail.** If you fail to appear in court as directed
5 by the mailed notice, the court will terminate the diversion agreement and
6 prosecution of the offense will be resumed."

7 (Boldface in original.) As part of the diversion agreement, defendant was also required to
8 keep the court informed of his mailing address, which he originally disclosed as a
9 residence in Citrus Heights, California.

10 On June 11, 1999, defendant changed his pleas as to the first two counts,
11 attempt to elude and reckless driving, to guilty. Five days later, the trial court sentenced
12 defendant to 18 months' probation.

13 On June 25, 1999, the trial court received notice that defendant failed to
14 attend a victim impact panel, which was a requirement of his diversion program. The
15 trial court ordered defendant to appear on July 12 to determine whether his diversion
16 program should be revoked. Defendant attended that hearing, and the trial court decided
17 to allow defendant to continue his diversion program on the condition that defendant
18 attend a victim impact panel in California within 60 days.

19 On May 12, 2000, the trial court, having received information that
20 defendant had failed to complete another required treatment program, again ordered
21 defendant to appear on June 2, 2000, to show cause why his diversion program should
22 not be revoked. The order stated that "[i]f defendant fails to appear as ordered, a bench
23 warrant shall be issued for his arrest." Defendant failed to appear at that hearing. Shortly
24 after that, on June 6, 2000, the trial court terminated defendant's diversion, ordered that

1 the prosecution should resume, and issued a warrant for defendant's arrest.

2 Eight-and-a-half years later, on November 5, 2008, an officer executed the
3 arrest warrant. An initial hearing was held of November 14, 2008, during which the trial
4 court appointed an attorney for defendant. On November 25, 2008, defendant moved to
5 dismiss the DUII charge for failure to comply with the statutory speedy trial requirement,
6 ORS 135.747. The trial court denied the motion. Ultimately, defendant was found guilty
7 of DUII after a jury trial on April 1, 2009.

8 B. *State v. Little*

9 On December 18, 1998, defendant Little was cited for driving under the
10 influence of intoxicants (DUII) and ordered to appear on January 5, 1999, for
11 arraignment. Defendant did so, and at that time, the trial court entered a release order,
12 which required defendant to appear the following week on January 12. That hearing was
13 rescheduled for January 19. Defendant did not appear, and the trial court issued an arrest
14 warrant.

15 On February 19, 1999, defendant was, again, arrested for DUII. The trial
16 court entered a conditional release agreement and order, requiring defendant to appear on
17 February 23. Defendant signed the agreement, acknowledging that he had read the
18 agreement and understood the terms contained in the agreement. As relevant to our
19 analysis, the agreement provided that

20 "[f]or any failure to appear as required before a judge or other
21 judicial officer, a warrant for arrest may be issued and [defendant] shall be
22 subject to prosecution as per the following penalties: forfeiture of security
23 as per security subsection; **Felony charge:** fine not to exceed \$100,000
24 and five (5) years imprisonment; **Misdemeanor charge:** fine not to exceed

1 \$2,500 and one (1) year imprisonment."

2 (Boldface in original.) Defendant also wrote on the form that his current address was on
3 Hilltop Lane in Josephine County. That address, however, was the address of a friend
4 who defendant was visiting; defendant actually resided in California.

5 Defendant failed to appear at the hearing on February 23, and the trial court
6 issued an arrest warrant. In 2002, defendant moved to Milwaukie, Oregon. Since then,
7 defendant has maintained a residence in Oregon, maintained employment with several
8 businesses in the state, and applied for and received an Oregon identification card and, a
9 few years later, an Oregon driver's license. In 2008, defendant applied for employment
10 that required an FBI background check. The potential employer notified defendant that
11 there were two pending charges and an outstanding warrant for defendant's arrest in
12 Josephine County.

13 On August 8, 2008, defendant called the Josephine County clerk's office
14 and scheduled an appearance date to resolve the outstanding warrant. On August 13,
15 defendant appeared before the trial court. At that time, defendant received court-
16 appointed counsel, and was released on condition that he attend all future court hearings.

17 On March 3, 2009, defendant moved to dismiss all charges, asserting his
18 statutory right to a speedy trial. After a hearing on March 17, the trial court denied the
19 motion. The following day, defendant entered a conditional guilty plea, reserving the
20 right to appeal the denial of his motion to dismiss.

21 C. *Proceedings Before the Court of Appeals*

22 Both defendants appealed, arguing that the trial courts erred in denying

1 their motions to dismiss. Defendants noted that, under ORS 135.747,

2 "if a defendant charged with a crime, whose trial has not been
3 postponed upon the application of the defendant or by the consent of the
4 defendant, is not brought to trial within a reasonable period of time, the
5 court shall order the accusatory instrument to be dismissed."

6 Both argued that whether or not they were deprived of their statutory right
7 to a speedy trial "hinge[d]" on the delay between the date the trial court issued the arrest
8 warrant and the date the warrant was executed. In defendant Glushko's case, the delay
9 amounted to 101 months (approximately eight and a half years). In defendant Little's
10 case, the delay was 114 months (approximately nine and a half years).

11 Defendant Glushko argued that

12 "a defendant's express consent to delay is required before that delay is
13 counted against him, and a defendant's failure to appear does not constitute
14 express consent to delay. Thus, the * * * delay in this case was not
15 attributable to defendant * * * [and] warrants dismissal, because no
16 evidence in the record indicates that the delay was reasonable."

17 Defendant Little argued likewise that he did not "expressly consent to any of that delay,
18 and the state must justify the delay to render it reasonable. As the state failed to justify
19 the delay in this case, the trial court erred by denying defendant's motion[] to dismiss."

20 The Court of Appeals affirmed both cases without an opinion. *State v.*
21 *Glushko*, 240 Or App 464, 248 P3d 451 (2011), *State v. Little*, 240 Or App 464, 248 P3d
22 451 (2011). Both defendants petitioned this court for review. We accepted review and
23 consolidated the cases to consider whether the failure to appear at a hearing was
24 "consent" to delay, as used in ORS 135.747 and, if it was not, whether the delay was
25 reasonable nonetheless.

1 D. *Parties' Arguments Before This Court*

2 On review, defendants argue that failure to appear at a hearing is neither
3 "an active request for delay in trial" nor "an open, clear, and unambiguous agreement to
4 delay." In order to qualify as "consent," defendants contend, one must express
5 "agreement to *a request for delay by someone else.*" (Emphasis added.) Thus, in order
6 for a defendant to "consent" to delay, the state must first request the defendant's consent,
7 and then the defendant must provide "express consent" (*i.e.*, consent which is "expressed
8 openly, clearly, and unambiguously").

9 In any event, defendants assert, the delays in bringing their cases to trial --
10 101 months in defendant Glushko's case and 114 months in defendant Little's -- were
11 unreasonable because, in both cases, the state easily could have executed the warrants at
12 an earlier time. Defendant Glushko notes that, during the six months following his
13 failure to appear, he was still on probation for other charges. Arguably, he asserts, the
14 state could have arrested him by notifying his probation officer of his failure to appear.
15 Defendant Little similarly suggests that the state could have contacted him at two
16 different points in time: (1) the state could have called his friend's phone number that he
17 listed on his release agreement, obtained his California address, and notified him of the
18 outstanding arrest warrant; or (2) the state could have arrested him once he moved to
19 Oregon and provided his current address to the Department of Motor Vehicles.

20 The state responds that, in both cases, defendants' failure to appear was
21 consent to any resulting delay. The state asserts that conduct that "imply[s] a willingness
22 to submit to a particular course of action" is consent and that, in this case, "defendants'

1 conduct entitled the trial courts to conclude that they consented to an indefinitely delayed
2 trial." Additionally, the state argues that, even if defendants' failures to appear were not
3 consent to the resulting delays, their conduct in not attending a hearing for which they
4 were legally required to attend renders any delay caused by their failures to appear
5 reasonable.

6 II. ANALYSIS

7 As this court explained in [State v. Davids](#), 339 Or 96, 100-01, 116 P3d 894
8 (2005), review of a trial court's decision on a motion to dismiss brought under ORS
9 135.747 entails a two-step analysis. First, we must determine the relevant amount of
10 delay by subtracting from the total delay any periods of delay that defendant requested or
11 consented to. Second, we then determine whether that delay is reasonable. In this case,
12 the parties' arguments implicate both of those analytical steps, namely, whether a failure
13 to appear at a hearing that a defendant is required to attend amounts to "consent" to a
14 postponement within the meaning of ORS 135.747; and second, if not, whether delay
15 occasioned by such a failure to appear renders any delay that results reasonable within the
16 meaning of that statute.

17 A. *Consent*

18 We necessarily begin with the issue of consent, because it determines the
19 amount of delay that is then subject to the reasonableness analysis that the statute
20 requires. The issue is one of statutory interpretation. As such, we strive to ascertain the
21 meaning of the statute most likely intended by the legislature that adopted it, by
22 examining the statute's text, in context, and where appropriate, relevant legislative history

1 and canons of statutory construction. *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042
2 (2009).

3 What is now ORS 135.747 had its genesis in the territorial code, which
4 provided:

5 "If a defendant indicted for a public offen[s]e, whose trial has not
6 been postponed upon his application, be not brought to trial at the next term
7 of the court in which the indictment is triable, after it is found, the court
8 shall order the indictment to be dismissed, unless good cause to the
9 contrary be shown."

10 The Laws of the Territory of Oregon, ch XXXVI, § 29 (1854). The wording of the
11 provision was most likely based on the nearly identical Iowa speedy trial statute, Iowa
12 Code of 1851, ch 200, § 3249. *See* Charles H. Carey, *General History of Oregon* 475-77
13 (3rd ed 1971).

14 As originally framed, Oregon's territorial speedy trial statute required a case
15 to be brought to trial at the next term of court -- at the time, trial courts did not sit
16 continuously, but in limited terms -- subject to two exceptions: first, if the failure to
17 bring defendant to trial was caused by his "application" that the case be "postponed";
18 second, if the failure to bring the case to trial within the next term was occasioned by
19 delays other than defendant's application for a postponement, but that were nevertheless
20 justified by "good cause." The territorial speedy trial statute said nothing about a
21 defendant's consent to delays in bringing a case to trial.

22 The matter of consent was first introduced to the statute in 1864, when the
23 legislature adopted the Deady Code. As amended, the speedy trial statute provided, with
24 the relevant new wording in italics:

1 "If a defendant, indicted for a crime, whose trial has not been
2 postponed upon his application *or by his consent*, be not brought to trial at
3 the next term of the court in which the indictment is triable, after it is
4 found, the court must order the indictment to be dismissed, unless good
5 cause to the contrary be shown."

6 General Laws of Oregon, Crim Code, ch XXXI, § 320, p 496 (Deady 1845-1864)
7 (emphasis added).

8 There is no direct evidence of what the legislature intended by its decision
9 to insert the words "or by his consent" into the statute. The placement of the additional
10 words in a phrase set off by commas -- "whose trial has not been postponed upon his
11 application or by his consent" -- suggests that a defendant's consent relates to an
12 application for postponement; that is, the wording suggests that the failure to hold a trial
13 within the next term is occasioned either by a defendant's own application for a
14 postponement or by defendant's consent to an application made by someone else,
15 presumably, the state.

16 That suggestion is consistent with the meaning of the noun "consent" as it
17 most likely would have been understood at the time. *Webster's* defined consent as

18 "Agreement of the mind to what is proposed or stated by another ;
19 accord ; hence, a yielding of the mind or will to that which is proposed[.]

20 "We generally use this word in cases where power, rights and claims
21 are concerned. We give consent, when we yield that which we have a right
22 to withhold[.] * * * Consent often amounts to permission."

23 Noah Webster, 1 *An American Dictionary of the English Language* (1828) (reprint 1970)
24 (emphasis in original). "Consent" is thus generally part of a bilateral sequence of events
25 in which there is a response "to what is proposed or stated by another." *Id.* *Bouvier's*

1 dictionary similarly defined "consent" as "[a]n agreement to something proposed, and
2 differs from assent." John Bouvier, *1 A Law Dictionary Adapted to the Constitution and*
3 *Laws of the United States of America* 277 (9th ed 1860). Again, the definition refers to
4 consent as a response to a proposal. In the context of the original version of ORS
5 135.747, the only relevant proposal to which a defendant would consent would be an
6 application for a postponement filed by the state.

7 That reading of the statute is consistent with other, related provisions. Also
8 part of the original Deady Code were statutes detailing the procedure for obtaining a
9 postponement of trial. What is now ORS 136.070 provided:

10 "When an indictment is at issue upon a question of fact, and before
11 the same is called for trial, the court may, upon sufficient cause shown by
12 the affidavit of the defendant, or the statement of the district attorney, direct
13 the trial to be postponed to another day in the same term or to another
14 term[.]"

15 General Laws of Oregon, Crim Code, ch XIV, § 145, p 465 (Deady 1845-1864).

16 Correspondingly, what is now ORS 136.080 provided:

17 "When an application is made for the postponement of a trial, the
18 court may, in its discretion and in the furtherance of justice, require as a
19 condition precedent to granting the same, that the party applying therefor
20 consent that the deposition of a witness or witnesses may be taken and read
21 on the trial of the case, and unless such consent be given, may refuse to
22 allow such postponement for any cause."

23 General Laws of Oregon, Crim Code, ch XIV, § 146, p 465 (Deady 1845-1864).

24 Consistently with what we have suggested is most likely the intended meaning of ORS
25 135.747, those two statutes contemplate either the state or the defendant making "an
26 application" for the proceedings to be "postponed" to "another term." In that context, it

1 becomes likely that, when the legislature referred to a defendant's "consent" in ORS
2 135.747, it meant consent to an application for postponement filed by the state.

3 That reading of ORS 135.747 appears to be borne out by the case law
4 construing it. From early on, this court's cases refer to "consent" in reference to a
5 defendant's express agreement to a state's application for a postponement, while other
6 considerations such as a defendant's failure to appear are taken into account in
7 determining whether there was "good cause" for the failure to bring a case to trial in the
8 time required. In treating failure to appear in that fashion, the Oregon cases aligned with
9 case law construing the statutes on which the Oregon law was based. *See, e.g., The State*
10 *of Iowa v. Arthur*, 21 Iowa 322, 324 (1866) (holding that the court had "no doubt" that
11 "good cause" was shown to justify delays that resulted from the defendant's failure to
12 appear).

13 In *State v. Moss*, 92 Or 449, 460-61, 181 P 347 (1919), for example, the
14 court drew a distinction between delays occasioned "with the express consent and
15 approval of the defendant" and those caused when defendant "absented himself from
16 court and stayed away." Similarly, in *State v. Swain*, 147 Or 207, 211, 31 P2d 745, *on*
17 *reh'g*, 32 P2d 773 (1934), the defendant was charged by information with the unlawful
18 sale of securities. He was shortly after extradited to California, where he was charged
19 and convicted of other offenses. *Id.* After completing his sentence in California, he
20 simply remained there for over a year before returning to Oregon, where he was promptly
21 arrested and tried on the pending charge. He moved to dismiss the charges on statutory
22 speedy trial grounds. The trial court found that the defendant's failure to return to the

1 state apparently for the purpose of avoiding prosecution amounted to good cause for the
2 delay in bringing the case to trial. *Id.* at 213-14. This court affirmed, explaining that
3 "[d]elays, due to the defendant's fault, as, for instance, his absence from the state in order
4 to escape trial, afford no basis for dismissal of the charge" under the speedy trial statute.
5 *Id.* at 214. The court did not mention the subject of consent.

6 In contrast, in *State v. Chadwick*, 150 Or 645, 650, 47 P2d 232 (1935), the
7 court directly addressed the meaning of the reference to "consent" in the speedy trial
8 statute, and concluded that it referred to express agreement to a proposed postponement.
9 In that case, the defendant was indicted but not tried until four terms of court had passed.
10 *Id.* at 647. Two terms passed because of the defendant's own motions for continuances.
11 *Id.* The other two terms, however, passed without a motion "for continuance nor did the
12 defendant expressly consent to a continuance at that time." *Id.* The trial court held that,
13 during those two terms, the defendant had given "tacit consent" to the delays because he
14 had not objected to them. *Id.* at 650. This court rejected the trial court's reasoning,
15 explaining that, "where the statute refers to the consent of defendant, it means his express
16 consent." *Id.* To similar effect is *State of Oregon v. Kuhnhausen*, 201 Or 478, 494, 266
17 P2d 698, *on reh'g*, 272 P2d 225 (1954), in which this court explained that, "[w]hen
18 'consent' of a defendant to a continuance for trial is claimed, an express consent, as
19 distinguished from an implied consent, must be shown."

20 By the mid-twentieth century, trial courts no longer sat in limited terms
21 and, instead, operated continuously. In response to that development in court
22 administration, in 1959, the legislature amended the speedy trial statute to eliminate the

1 requirement that a defendant be brought to trial "at the next term of the court" unless
2 "good cause" is shown and substituted the requirement that trial occur "within a
3 reasonable period of time." Nothing in the text or the legislative history of those
4 amendments suggests that the legislature intended to alter the substance of the speedy
5 trial guarantee. *See generally* [State v. Johnson](#), 339 Or 69, 80-81 & n 7, 116 P3d 879
6 (2005) ("[T]he legislature's clear overall purpose in enacting the [1959] amendments was
7 to remove references to term-based scheduling. There is no hint anywhere in the statute
8 that the legislature had any other purpose in mind.").

9 Consistently with that reading of the 1959 amendments, this court's more
10 recent cases have continued to interpret the reference to a defendant's "consent" under
11 ORS 135.747 as the pre-amendment cases had done; that is, the court has continued to
12 conclude that the statute requires express consent to a request for a postponement. [State](#)
13 [v. Adams](#), 339 Or 104, 116 P3d 898 (2005), is exemplary. In that case, the state argued
14 that the defendant had consented to the state's request for a five-month postponement by
15 not objecting to the state's request. *Id.* at 109. Indeed, in *Adams*, the state advanced
16 precisely the same argument that it puts forth in this case, namely, that "a defendant who
17 fails to appear, fails to object to delay, and objects to acceleration of his trial date,
18 implicitly consents to delay" under ORS 135.747. Brief on the Merits of Petitioner on
19 Review at 23, *Adams*, 339 Or 104 (S51598). The court, citing *Chadwick*, rejected that
20 argument, explaining:

21 "Before this court, the state continues to press its theory that, for
22 purposes of ORS 135.747, 'consent' includes a mere failure to object. This
23 court's cases are, however, contrary to that position. *See, e.g., State v.*

1 *Chadwick*, 150 Or 645, 650, 47 P2d 232 (1935) ("where the statute refers to
2 the consent of defendant, it means his express consent").

3 "* * * In cases like the present one, a lack of objection is just (and
4 only) that: a lack of objection. It conveys no message that the defendant
5 either joins in the motion or waives any rights that he has that are affected
6 by the motion. * * * [A] recital by the state that defense counsel has 'no
7 objection' is insufficient to place a defendant's express consent on the
8 record, as *Chadwick* requires."

9 *Adams*, 339 Or at 109.

10 In this case, the state reprises its contention from *Adams* that "consent" to
11 postponement under ORS 135.747 should not be limited to express consent in response to
12 a request for postponement and, instead, should be understood to embrace implicit
13 consent to delays on the basis of a defendant's conduct, such as a failure to appear. In
14 support, the state marshals two arguments not advanced in *Adams*, one based on what it
15 suggests is the ordinary meaning of the statute's terms and the other based on this court's
16 prior cases.

17 The state's textual argument is that the ordinary meaning of the term
18 "consent," as it would have been understood in 1864, embraces implied consent based on
19 a person's conduct. The state relies on Samuel Johnson's 1765 dictionary, which defines
20 the verb "consent" to mean, among other things, "to allow." Samuel Johnson, 1 *A*
21 *Dictionary of the English Language* (3d ed 1765). The state then notes that Johnson
22 defines the verb "allow" to mean, among other things, "to permit." *Id.* Because one may
23 "permit" either expressly or implicitly, the state reasons, it follows that consent under the
24 speedy trial statute may be inferred by conduct such as failing to appear at a hearing.

25 We are not persuaded. Assuming for the sake of argument the relevance of

1 a mid-eighteenth century dictionary of British English, the fact is that the state ignores
2 the definitions of the *noun* "consent" that is used in ORS 135.747 and instead focuses on
3 definitions of the *verb* term of the word "consent." As we explained in [State v. Bray](#), 342
4 Or 711, 719 n 6, 160 P3d 983 (2007), when consulting dictionaries for the ordinary
5 meanings of statutory terms, it is important to examine the definition of the part of speech
6 actually used in the statute at issue. Moreover, the state is unduly selective in list of
7 definitions. Johnson, for example, defined "consent" to mean not just "to allow," but also
8 "to agree," which he then defined to mean, among other things, "to grant; to yield to,"
9 which -- necessarily entailing a proposition to which another grants or yields -- is more in
10 keeping with the interpretation that this court has employed. Johnson, 1 *A Dictionary of*
11 *the English Language*. But most important, statutes are not interpreted by culling
12 dictionaries for favorable definitions. As we recently explained in [State v. Cloutier](#), 351
13 Or 68, 96, ___ P3d ___ (2011), "[i]n construing statutes, we do not simply consult
14 dictionaries and interpret words in a vacuum. Dictionaries, after all, do not tell us what
15 words mean, only what words *can* mean, depending on their context and the particular
16 manner in which they are used." (Emphasis in original.)

17 In the alternative, the state suggests that, at least by 1959, when the
18 legislature amended ORS 135.747, "consent" would have been understood to embrace
19 both express and implied acquiescence. In support of that contention, the state
20 principally relies on the *Oxford English Dictionary*, the 1933 edition of which defined the
21 term to refer to, among other things, "acquiescence in what another * * * desires." 2 *The*
22 *Oxford English Dictionary* 851 (James A. H. Murray et al eds., 1933). The state then

1 notes that the same dictionary defines the term "acquiescence" to include "silent or
2 passive assent to, or compliance with, * * * measures." 1 *The Oxford English Dictionary*
3 at 85.

4 Again, the state's textual argument is not persuasive. To begin with, the
5 1959 legislature's intentions are not controlling. As we have noted, it was the 1864
6 legislature that introduced the phrasing at issue in this case, and the 1959 amendments
7 did not alter that phrasing. Cf. [*Mastriano v. Board of Parole*](#), 342 Or 684, 693-96, 159
8 P3d 1151 (2007) (stating that, when amendments to a statute worked no change to
9 wording at issue, legislative views about the portions not amended are not pertinent).
10 Indeed, as this court explained in *Johnson*, those 1959 amendments were intended only to
11 eliminate references to term-based scheduling. 339 Or at 80-81.

12 Aside from that -- and, again, assuming the relevance of a dictionary of
13 British usage as evidence of what the Oregon legislature most likely intended -- the fact
14 is that there is more to the definitions than what the state quotes. The state omits from its
15 quotations of the definitions of "consent" and "acquiescence" important qualifiers,
16 substituting ellipses in their place. The definition of "consent" actually is "voluntary
17 agreement to or acquiescence *in what another proposes* or desires; compliance,
18 concurrence, permission." 2 *The Oxford English Dictionary* at 851 (emphasis added).
19 Similarly, the definition of "acquiescence" is "silent or passive assent to, or compliance
20 with, *proposals* or measures." 1 *The Oxford English Dictionary* at 85 (emphasis added).
21 Thus, even assuming that "consent" could be understood to include implicit
22 acquiescence, it refers to such acquiescence to something that someone else proposes or

1 desires. In the context of ORS 135.747, then, consent would refer to acquiescence in
2 what another party -- the state -- has requested; that is, a postponement.

3 The state also claims support from three of this court's decisions: *State v.*
4 *Crosby*, 217 Or 393, 342 P2d 831 (1959); *State v. Robinson*, 217 Or 612, 343 P2d 886
5 (1959); and *State v. Jackson*, 228 Or 371, 365 P2d 294 (1961). The state reads those
6 decisions to embody the broad proposition that -- notwithstanding the holdings in
7 *Chadwick*, *Kuhnhausen*, and *Adams* to the contrary -- "consent" under ORS 135.747 does
8 not necessarily require *express* consent to a requested delay. To the contrary, the state
9 contends, those later cases show that a defendant may implicitly consent to delays that
10 necessarily result from his or her conduct, such as failing to appear at a scheduled
11 hearing. As a result, the state concludes, *Chadwick*, *Kuhnhausen*, and *Adams* should be
12 confined to their particular facts, if not overruled.

13 There is, we must acknowledge, wording in at least one of the three cases
14 that is not entirely consistent with the definition of "consent" that this court adopted in
15 *Chadwick* and later cases. Even so, none of the cases on which the state relies can fairly
16 be read to stand for the broader proposition that it claims from them.

17 In *Crosby*, the defendant filed a demurrer, which the trial court then
18 delayed 10 terms of court to decide. 217 Or at 395-96. When the trial court overruled
19 the demurrer and set the case for trial, the defendant moved to dismiss under the speedy
20 trial statute. The trial court denied the motion, and this court reversed. The court
21 explained that, by filing the demurrer, "the defendant, in effect, consented to a
22 postponement." *Id.* at 404. The court hastened to add that not all of the delay that

1 followed the filing of the motion could be attributed to the defendant and then concluded
2 that, under the circumstances, 10 terms was unreasonable. *Id.* at 405.

3 The court's use of the term "consent" is not precisely consistent with what it
4 had held in *Chadwick*, that is, express consent to a requested postponement. It is clear,
5 however, that the court did not believe that it was retreating from its earlier holding in
6 *Chadwick*. The court, in fact, mentioned *Chadwick* and discussed it. *Crosby*, 217 Or at
7 397-99. The court said nothing about "consent" under the speedy trial statute referring to
8 a defendant's agreement to delays implicit in the defendant's conduct. It merely stated
9 that, when a defendant *expressly asks* the court to rule on a motion that necessarily entails
10 some delay, that express request is, "in effect," express consent to that delay. *Id.* at 404.
11 What the court likely meant was that filing a motion that necessarily entails delay is, "in
12 effect," a request for postponement for a reasonable period of time to rule on the motion.
13 But, at all events, the decision cannot fairly be read to stand for the broad proposition that
14 consent may embrace acquiescence to an open-ended postponement implied from a
15 defendant's conduct.

16 *Robinson* also involved a defendant who filed a demurrer against the
17 indictment, resulting in the trial's postponement until the following term of court. 217 Or
18 at 620. The defendant argued that the indictment should have been dismissed on
19 statutory speedy trial grounds. This court disagreed, noting that, by expressly asking the
20 court to stop proceedings to consider and rule on his motion, "[t]he delay thus created
21 falls within the term of [ORS 135.747] which is, 'has not been postponed upon his
22 application or by his consent.'" *Id.* at 623-24. Thus, *Robinson* could be read to suggest

1 that, by requesting the court to rule on the demurrer, defendant, in effect, applied for a
2 postponement for a reasonable period of time to rule on the motion. Or, it could be read
3 to mean, as the court suggested in *Crosby*, that the filing of the demurrer amounted to
4 express consent to such a delay. Either way, however, the decision cannot fairly be read
5 to have retreated from *Chadwick* and announced in its place an interpretation of the
6 speedy trial statute that recognized that consent to delays could be implied from his or her
7 conduct.

8 *Jackson* did not involve the issue of consent at all. In that case, the
9 defendant's repeated requests for new counsel resulted in significant delays in setting the
10 case for trial. 228 Or at 378-81. When he moved to dismiss on statutory speedy trial
11 grounds, the trial court denied the motion, and this court affirmed. *Id.* at 375-76. The
12 court explained that the controlling question was whether the delay in bringing the
13 defendant to trial was "reasonable" within the meaning of the speedy trial statute. *Id.* at
14 377. "[T]he question of reasonable time," the court stated, "cannot be determined without
15 inquiring into the question whether there was good cause for delay." *Id.* In response to
16 that question, the court said that the delay was substantially a product of the defendant's
17 own repeated requests for the appointment of new counsel; that, the court concluded,
18 amounted to good cause for the delays. *Id.* at 381. *Jackson* thus provides no support for
19 the state's suggestion that a defendant's conduct may give rise to an inference that the
20 defendant consented to any delay that was a product of that conduct. Under *Jackson*,
21 such conduct is simply taken into account in determining whether there was good cause
22 for the delay.

1 In asserting the contrary, the state characterizes *Jackson* as stating that
2 whether the delay resulting from the defendant's conduct "was 'reasonable' was 'not the
3 question.'" What *Jackson* actually said, however, was that whether the delay that resulted
4 from the defendant's requests "would be considered a reasonable time *under other*
5 *circumstances than those which the record discloses* is not the question," which is an
6 entirely different point. 228 Or at 378 (emphasis added).

7 In summary, based on the text, context, and historical origins of ORS
8 135.747, we hold that a defendant gives "consent" to a delay only when the defendant
9 expressly agrees to a postponement requested by the state or the court. Returning to the
10 facts of this case, it is clear that the delays at issue were not a product of postponements
11 that defendants requested or postponements that the state or the court requested and to
12 which defendants agreed. That conclusion, however, is not the end of the matter. Even
13 if, as in this case, defendants did not apply for or consent to the delays in question,
14 dismissal is required only if the state fails to bring defendants to trial "within a reasonable
15 period of time." ORS 135.747.

16 B. *Reasonableness of Delay*

17 We turn to the question whether the delays in bringing defendants to trial in
18 the cases before us were reasonable within the meaning of ORS 135.747. In *Johnson*,
19 this court explained that whether a time period is "reasonable" under that statute requires
20 an examination of "all the attendant circumstances" of the delay. 339 Or at 88. In
21 particular, "*the circumstances that cause the delay* generally will determine whether the
22 delay (and thus, the overall time period for bringing the defendant to trial) is reasonable."

1 *Id.* (emphasis added). We review the question whether the delay in bringing a defendant
2 to trial was "reasonable" within the meaning of ORS 135.747 as a matter of law. *Id.* at
3 87.

4 As our previous discussion of the case law makes clear, from very early on,
5 this court has concluded that delays occasioned by a defendant's failure to appear
6 constitute good cause for the delays. *See, e.g., State v. Thompson*, 240 Or 468, 470, 402
7 P2d 243 (1965) (because the defendant "was continuously absent from the state," his
8 argument that he was denied a speedy trial due to the resulting delay was "without
9 merit"); *Swain*, 147 Or at 214-15 ("Delays, due to the defendant's fault, as, for instance,
10 his absence from the state in order to escape trial, afford no basis for dismissal of the
11 charge [under the speedy trial statute.]"); *Moss*, 92 Or at 460-61 (dismissal not required
12 when the defendant "absented himself from court and stayed away for the remainder of
13 the term").

14 In this case, there is no question but that both defendants caused the delays
15 in bringing their cases to trial by their failures to appear. Both had notice that they were
16 legally obligated to appear. Moreover, both were informed -- defendant Glushko in the
17 order requiring personal appearance and defendant Little in his release agreement -- that
18 failure to appear would result in a warrant for their arrest being issued. With knowledge
19 of the legal requirement to appear and the consequences that would result from failure to
20 appear, both defendants did not attend their respective hearings. As a result of their
21 failures to appear, the state suspended the prosecutions, the court issued warrants for their
22 arrest, and the cases were not tried until more than eight years later.

1 Defendants assert that, notwithstanding their failures to appear, the delays
2 in their cases were unreasonable because the state could have made a greater effort to
3 locate them and return them to custody. Specifically, defendant Glushko asserts that,
4 because he was on probation for two other charges for at least six months after he failed
5 to appear at the hearing, the state easily could have executed the warrant for his arrest,
6 because he was still in the "constructive custody" of the state. Defendant Little, for his
7 part, argues that the state could have tracked him down by using the contact information
8 he provided on his release agreement or, a few years later, when he applied for and
9 received an Oregon identification card.

10 The fact that the state may or may not have been able to take additional
11 steps to track down defendants is not the point when, as in this case, defendants were
12 entirely in control of the amount of delay that followed their failures to appear. *Cf.*
13 *Johnson*, 339 Or at 88-89 (state-caused delay, such as resource deficiencies and trial
14 court scheduling decisions, is relevant to reasonableness analysis under ORS 135.747).
15 Both knew about their obligations to appear, as we have noted, and both knew that failing
16 to do so would result in the issuance of warrants for their arrests. Both were well aware
17 of the fact that their failures to appear delayed the prosecution of the cases against them.
18 As this court explained in *Jackson*, a court is not required to dismiss a case when a
19 defendant, "by his conduct bring[s] about the very delay in the prosecution of a criminal
20 case which he afterwards claims to be a violation of his right to a speedy trial." 228 Or at
21 381.

22 In summary, we conclude that, although defendants did not consent to the

1 delays that occurred in each of their cases as a result of their failures to appear, the delays
2 were nonetheless reasonable. The trial court therefore did not err in denying defendants'
3 motions to dismiss on statutory speedy trial grounds.

4 The decisions of the Court of Appeals and the judgments of the circuit
5 courts are affirmed.