**Recent cases before the Oregon Supreme Court (2019)**

**State v. Lien/Wilverding, 364 Or 750, 441 P3d 185 (2019).**

*State v. Lien/Wilverding* involved two people, Lien and Wilverding, who lived together. The police believed that Lien and Wilverding were involved in drug activity, so the police asked their garbage company, which was a private company, to set their trash aside when the company came to collect it so that the police could search it. The garbage company did so, and the police discovered evidence of drugs. Lien and Wilverding were charged with drug-related offenses, and before trial, they moved to suppress the evidence that the police found in their trash. They argued that the search violated their constitutional right to be free from unreasonable search and seizure under Article I, section 9, of the Oregon Constitution because, even though they had placed their trash on the curb for collection, they did not believe that their trash company would set it aside for the police to search. When the company did so, they argued, they violated customer privacy. And, because the company was acting on behalf of the police, the police violated their privacy when they requested that the trash be set aside. The trial court disagreed, and they were convicted of drug offenses.

They appealed to the Court of Appeals, and when the Court of Appeals affirmed their convictions, they asked our court to accept review. We did, and the issue in that case was whether individuals have a privacy interest in the contents of their trash.

We agreed. We noted that Article I, section 9, of the Oregon Constitution protects an individual's privacy interests. Therefore, the first question we had to address was whether the Lien and Wilverding had a privacy interest in their trash. To answer that question, we considered general social norms of behavior. We reasoned that most Oregonians would believe it is improper for others, such as curious neighbors, ex-spouses, employers, opponents in a lawsuit, journalists, or government officials, to go through someone else's trash to learn information. We concluded, therefore, that an individual has a protected privacy interest in the contents of their trash.

After we determined that Lien and Wilverding had a privacy interest in their trash, we asked whether they had lost that interest when they left their trash in a can for collection by the garbage company. The state argued that, under our case law, if an individual does not own or control a piece of property, their rights are not violated when police search that property. The state pointed out that our prior cases had stated that a person retains no constitutionally protected privacy interests in property that the person has intended to abandon permanently. Although that is true, we explained that we could not ignore one important fact in this case -- that Lien and Wilverding had placed their trash in a can for collection by the garbage collection company with the understanding that it would be mixed with other trash and disposed of normally. However, when the garbage company picked up the bin of trash on the day in question, it was acting as an agent of the police. We held, therefore, that when the garbage company collected the trash for the police, and the police then searched the trash without a warrant, that search violated Article I, section 9, of the Oregon Constitution. Because the search violated the Oregon Constitution, the evidence of drug activity found in the garbage should have been suppressed.

**State v. Arreola-Botello, 365 Or 695, \_\_ P3d \_\_ (2019).**

In *State v. Arreola-Botello*, we decided another case under Article I, section 9, of the Oregon Constitution.

*Arreola-Botello* involved a question about the permissible scope of a traffic stop under the Oregon Constitution. A traffic stop is a seizure under Article I, section 9, of the Oregon Constitution. In this case, the defendant was stopped after an officer observed him commit a traffic infraction. However, during the stop, while the defendant was looking for his vehicle registration information, the officer asked him whether he had any drugs, guns, or other weapons in the car, and asked for consent to search the car. The defendant said yes, and when the officer searched the vehicle, the officer found drugs.

The defendant was charged with a drug offense. Before trial, the defendant asked the trial court to suppress the evidence found during the search of the vehicle. The defendant argued that the search violated his Article I, section 9, right to be free from an unreasonable seizure. The defendant argued that when the officer asked the defendant questions about guns and drugs in the vehicle and requested consent to search the vehicle, the seizure became unconstitutional because the officer's questions were not related to the offense for which he was stopped. The trial court disagreed. Under Court of Appeals case law, the officer was permitted to ask questions that were unrelated to the purpose of the stop during an "unavoidable lull" in the stop. And, because the defendant was searching for his registration, the officer's questions about guns and drugs and request for consent to search the vehicle occurred during an unavoidable lull and were permissible inquiries. The Court of Appeals affirmed, and we accepted review.

We concluded that the officer's seizure of the defendant was contrary to Article I, section 9. We reasoned that the purpose of a stop is what delineates the permissible scope of the stop, and that, without some independent constitutional basis, a traffic stop cannot be turned into a full-fledged criminal investigation. We concluded that, under Article I, section 9, of the Oregon Constitution, all investigatory activities during a traffic stop, including investigative questioning, must be reasonably related to the purpose of that stop or be supported by an independent constitutional justification. For example, if an officer stops an individual for failing to signal a turn but, after approaching the vehicle, sees that the individual is intoxicated, the officer may still inquire into whether the individual is driving while intoxicated because the officer, at that point, will have reasonable suspicion of DUII. However, in this case, the officer's questions were not permissible because the officer did not have reasonable suspicion that the defendant had committed any crimes. Therefore, we concluded that the trial court should have suppressed the evidence the officer found during the search of defendant's vehicle.

**White v. Premo, 365 Or 1, 443 P3d 596 (2019).**

Another case, decided earlier this year, was *White v. Premo*. *White* was a post-conviction case. Post-conviction procedures allow an individual who has been convicted of a crime to challenge his or her conviction or sentence in court. Post-conviction cases are separate cases from the original criminal case, and usually happen after an individual has already tried to appeal his or her conviction in the original proceeding. One of the claims that is commonly made in post-conviction proceedings is that an individual's criminal defense attorney was constitutionally ineffective or inadequate, and therefore, the individual should get a new trial with a constitutionally adequate attorney.[[1]](#footnote-1)

Although *White* was a post-conviction case, it did not, however, involve a claim for ineffective assistance of counsel. Instead, the case involved a question of whether the sentence imposed was unconstitutional -- which is another ground for post-conviction relief. In *White*, a set of twins -- the White brothers -- who challenged the sentences they received after they were convicted of murder committed when they were 15 years old. The brothers challenged their sentence under the Eighth Amendment to the United States Constitution.

The Eighth Amendment prohibits a state, in cases involving juvenile offenders, from imposing life sentences without the possibility of parole except in very rare circumstances. Instead, juvenile offenders must be provided with a "meaningful opportunity to obtain release." The reason for the rule is that children and teenagers' brains are still developing, and we as a society are unprepared to conclude that someone who is still a teenager is not capable of rehabilitation.

We were asked to apply that rule, and the reasons for the rule, to the White twins' case. The White twins were convicted as juveniles and they were sentenced to serve 800-month sentences. The first question we had to determine was whether an 800-month sentence falls under the rule prohibiting life sentences without the possibility of parole. If you do the math, 800 months is about 66 and a half years. The twins would be 81 years old when they were released. We concluded that the 800-month sentence was equivalent to a life sentence without the possibility of parole because the twins did not have a "meaningful opportunity to obtain release."

The second question we had to determine was whether the trial court had taken into account how children are different when it imposed 800-month sentences. Such sentences can be imposed only in rare cases where the traits that led to the commission of a homicide are fixed or irreparable, rather than a result of the "transience of youth." In 2018, we determined that Kipland Kinkel's life sentence was permissible because his crimes were not attributable to the transience of youth. But here, the sentencing court did not find that the twins' crimes were a result of traits that were fixed or irreparable when it imposed 800-month sentences and, therefore, we reversed the sentences. The state has petitioned the United States Supreme Court for certiorari, and that case is still pending before that Court.

**Kramer v. City of Lake Oswego, 365 Or 422, 446 P3d 1 (2019).**

This case involved a challenge to the City of Lake Oswego's ordinances which prohibited persons from entering the Lake from the only three parks on the lake that were open to the public; only those who owned land on Lake Oswego were permitted to access Lake Oswego for recreational purposes.

The plaintiffs challenged that ordinance under the public trust doctrine. Under the public trust doctrine, the state holds title to submerged and submersible lands underlying navigable waters in trust for the benefit of the public.

In *Kramer*, the plaintiffs argued that, because the public trust doctrine requires the state to protect waters for the benefit of the public, the public trust doctrine also requires the state to allow the public access to those waters to enjoy those benefits. After examining our prior cases on the public trust doctrine, we held that the doctrine includes a right to access public water from abutting public land, and that any rule that interferes with the right to access must be reasonable. Applying that rule to the Lake Oswego ordinances, we concluded that the rule that restricted public access to a small swimming area from a private park on the lake was not unreasonable. However, regarding the rules prohibiting access from two other public parks, we determined that the case had to be remanded to the trial court so that the parties could present evidence about whether those rules were reasonable.

Through the classroom law project, we recently heard argument at David Douglas High School in Portland for another public trust case *-- Olivia Chernaik v. Kate Brown*. In that case, we must decide whether the public trust doctrine imposes a duty on the state to protect Oregon waters from the effects of climate change.

**Schutz v. La Costita III, Inc., 364 Or 536, 436 P3d 776 (2019).**

In *Schutz*, we were asked to determine whether a woman's employer, her coworker, or the restaurant who had served the woman alcohol were liable to the woman for injuries which she incurred during an auto accident. The woman worked at a construction firm and had attended an after-work gathering at La Costita, which is a restaurant and bar. The woman attended the gathering after being invited by her manager, who was also the son of the construction firm's owner. The woman said that she felt pressured to attend and, during the gathering, she felt pressured to drink. Unfortunately, the woman became severely intoxicated, and while driving home that night, drove the wrong way down the interstate. She was severely injured in a car accident.

The woman filed suit against the construction firm, the firm's owner's son, and the restaurant, La Costita. She argued that the son had negligently organized and supervised the work gathering, had negligently pressured her into attending the gathering, and negligent in failing to warn her about the excessive amounts of alcohol that would be consumed at the gathering. She argued that the construction firm was vicariously liable for the son's negligent actions. And, finally, she argued that the restaurant had been negligent in serving her alcohol after it was apparent that she was intoxicated.

The issue in the case involved a statute which grants immunity from liability to licensed alcohol servers or social hosts for injuries patrons or guests sustain as a result of voluntary intoxication. Under that statute, the Court of Appeals determined that the restaurant, La Costita, was immune from liability for its service of alcohol. However, we still had to determine whether that statute granted immunity to the construction firm and the firm's owner's son. The defendants argued that it did, because the firm's son was acting as a social host on the night in question.

We disagreed. We noted that the woman had not alleged that the firm's son had acted negligently as a social host; instead, she had alleged that the son had acted negligently as her work supervisor. Therefore, the statute did not grant the son or the construction firm immunity from liability because the statute did not cover negligent acts by employers. We noted, however, that that did not mean that the woman had won her case. She still needed to prove that the son and the construction firm had actually acted negligently and that those negligent actions were the cause of her injuries.

1. For fans of the podcast called "Serial," this is the claim that Adnan Syed is making with regard to his original trial counsel. He argued in the Maryland Supreme Court that his attorney was constitutionally ineffective for failing to investigate a witness's statements that she had seen Syed in the library at the time the police stated the murder occurred. Oregon has laws that allow these types of claims too. [↑](#footnote-ref-1)