

CHAPTER VIII  
APPELLATE REVIEW

- A. Arithmetical and Clerical Errors.....159
- B. The State's Right to Appeal a Sentence.....160
- C. The Statutory Right to Appeal a Guidelines Sentence.....160

## VIII. APPELLATE REVIEW

The 1989 Legislative Assembly established a number of special provisions for sentence appeals under the guidelines system. Because the guidelines system will involve a number of numerical calculations, the legislature established a process by which a sentencing court may make arithmetic or clerical corrections to a sentence up to sixty days after the entry of judgment of conviction. It also established for the first time in Oregon history the state's right to appeal a sentence. Most importantly, the legislature described in detail the type of sentencing issues that may be raised on appeal and those that may not be appealed. Section 21, Chapter 790, Oregon Laws 1989.

This chapter describes these new appellate review provisions and illustrates their proper application within guidelines system.

### A. ARITHMETICAL AND CLERICAL ERRORS

Statutory Provision-Section 20, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 138.083):

The sentencing court shall retain authority irrespective of any notice of appeal for 60 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors.

#### Statutory Summary

The legislature created a mechanism to correct arithmetic or clerical errors in the calculation of a sentence under the new sentencing guidelines without appellate court intervention. This new statutory provision extends the sentencing court's jurisdiction to make such corrections for 60 days after the entry of judgment of conviction.

As indicated in Chapter III, the sentencing judge will ensure that a sentencing report will be sent to the Oregon Criminal Justice Council in each case. This requirement serves two purposes. First, it will allow the Council to establish a database on sentencing practices. It will also provide an opportunity for Council staff to review the sentencing computations in each case. When an arithmetic or clerical error is discovered, staff will notify the sentencing court. If the sentencing judge agrees that an error has occurred, the judge may correct the sentence before the issue is taken to the Oregon Court of Appeals.

## B. THE STATE'S RIGHT TO APPEAL A SENTENCE

Statutory Provision-ORS 138.060 (as amended Section 21a, Chapter 790, Oregon Laws 1989):

The state may take an appeal from the circuit court or the district court to the Court of Appeals from:

- (1) An order made prior to trial dismissing or setting aside the accusatory instrument;
- (2) An order arresting the judgment;
- (3) An order made prior to trial suppressing evidence;
- (4) An order made prior to trial for the return or restoration of things seized; or
- (5) A judgment of conviction based on the sentence as provided in section 21 of this 1989 Act.

### Statutory Summary

As noted above, the state has the right to appeal a sentence under the guidelines system. The scope of that appeal right is defined by Section 21, Chapter 790, Oregon Laws 1989.

## C. THE STATUTORY RIGHT TO APPEAL A GUIDELINES SENTENCE

The right to appeal a sentence under the guidelines system has been clearly defined by statute. Section 21, Chapter 790, Oregon Laws 1989. The most significant aspect of this statute is the requirement for substantive review of sentences. While the scope of review with respect to guidelines sentences has been significantly broadened, the statute also includes some very clear limitations on the type of sentences and issues that may be appealed.

Statutory Provision-Section 21, Chapter 790, Oregon Laws 1989 (anticipated codification citation ORS 138.222):

- (1) Notwithstanding the provisions of ORS 138.040 and 138.050, a sentence imposed for a judgment of conviction entered for a felony committed on or after November 1, 1989, may be reviewed only as provided by this section.
- (2) On appeal from a judgment of conviction entered for a felony committed on or after November 1, 1989, the appellate court shall not review:
  - (a) Any sentence that is within the presumptive sentence prescribed by the rules of the State Sentencing Guidelines Board.
  - (b) A sentence of probation when the rules of the State Sentencing Guidelines Board prescribe a presumptive sentence of

imprisonment but allow a sentence of probation without departure.

(c) A sentence of imprisonment when the rules of the State Sentencing Guidelines Board prescribe a presumptive sentence of imprisonment but allow a sentence of probation without departure.

(d) Any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record.

(e) Except as authorized in subsections (3) and (4) of this section, any other issue related to sentencing.

(3) In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the rules of the State Sentencing Guidelines Board, sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure from the sentence prescribed by the rules of the State Sentencing Guidelines Board:

(a) Are supported by the evidence in the record; and

(b) Constitute substantial and compelling reasons for departure.

(4) In any appeal, the appellate court may review a claim that:

(a) The sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence; or

(b) The sentencing court erred in ranking the crime seriousness classification of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.

(5) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing.

(6) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed and may issue a written opinion in any other case when the appellate court believes that a written opinion will provide guidance to sentencing judges and others in implementing the sentencing guidelines adopted by the State Sentencing Guidelines Board provided that the appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal.

(7) Either the state or the defendant may appeal a judgment of conviction based on the sentence for a felony committed on or after November 1, 1989, to the Court of Appeals subject to the limitations of this 1989 Act.

#### Statutory Summary

Subsection (1) limits the scope of appellate review for sentences under the guidelines system to the issues described in this statute.

Subsection (2) precludes appellate review in the following situations:

- a. If the sentencing court imposes a sentence consistent with the presumptive sentence under the guidelines, the sentence imposed may not be appealed.
- b. If the sentencing court exercises its discretion under the optional probationary rule (OAR 253-05-006), the court's decision to impose a prison term or a probationary term will not be subject to appeal if the offender is eligible for either sentence.
- c. If the sentence is the result of a plea agreement which was accepted by the sentencing court, the resulting sentence may not be appealed.
- d. No other sentencing issue may be appealed unless expressly permitted by subsection (3) or (4).

Subsection (3). If the sentence represents a departure from the guidelines (OAR 253-08-001 to 253-08-007), only the following issues may be raised on appeal:

- (1) are the reasons for the departure supported by the evidence in the record; and
- (2) do the reasons for the departure constitute "substantial and compelling" reasons for a departure from the guidelines?

Whenever a departure sentence is imposed, the sentencing judge must provide the "substantial and compelling reasons" for the departure. OAR 253-08-001. The need to identify the reasons for a departure on the record was established by the 1987 Legislative Assembly and affirmed by the 1989 Legislative Assembly. The original guidelines enabling legislation included the following statement: "The court may impose a sentence outside the presumptive sentence or sentence range ...for a specific offense if it finds, considering the purposes of this Act, there are substantial and compelling reasons justifying a deviation from the presumptive sentence." Subsection (1), Section 6, Chapter 619, Oregon Laws 1987.

The 1989 Legislative Assembly clearly established that the "substantial and compelling" appellate review standard was a substantive review standard. During a hearing on this provision of the legislation before the Senate Judiciary Committee, the following statement was entered into the record:

It is our intent that if an appellate court is called upon to inquire into a deviation [departure sentence], then it would look at the facts stated by the sentencing judge to see whether or not there is sufficient justification for the departure. Furthermore, the reason stated on the record were

adequate to justify a sentence outside the standard range and consistent with the guidelines rule. I think that is test that ought to apply. Minutes: Senate Judiciary Committee, 1989 Oregon Legislative Assembly, June 2, 1989, at 19-20 (statement of Sen. Dick Springer).

Consequently, the appellate review standard for departure sentences will include an evidentiary component and a legal component:

- 1) The Evidentiary Test: Are the facts stated by the sentencing judge in justification of the departure supported by the record?
- 2) The Law Test: Are the reasons stated on the record for the departure adequate to justify a sentence outside the standard range (e.g., are they consistent with the purposes of the sentencing guidelines rules)?

Subsection (4). In all cases, the following claims may be raised on appeal:

- a. the sentencing court failed to comply with the requirements of law in imposing or failing to impose a sentence; or
- b. the sentencing court erred in making the proper crime seriousness or criminal history classification.

While the sentencing judge's classification of criminal history may be appealed pursuant to subsection (4), this provision must be read in light of ORS 137.079(4)(f) (as amended by Section 8, Chapter 790, Oregon Laws 1989). This subsection provides for the following:

Except as provided in section 21 of this 1989 Act, the court's decision on issues relating to a defendant's criminal history shall not be reviewable on appeal.

In order to read these two provisions consistently, one must assume that the new language in ORS 137.079 relates to issues related to the existence or non-existence of a prior conviction. From this perspective, subsection (4) of the new appellate review statute would apply only after the sentencing judge had determined that a prior conviction exists. Once the sentencing judge has determined that the prior conviction exists, the judge's classification of the conviction (i.e., person/non-person; adult conviction/juvenile adjudication) may be challenged as provided by subsection (4) of the new appellate review statute.

Subsection (5). Upon a sentence appeal, the appellate court may reverse or affirm the sentence. If it determines that the trial court's findings do not support a departure, the appellate court

must remand the case for resentencing.

Subsection (6). If the trial court is reversed, the appellate court must issue a written opinion. If the trial court is not reversed, a written opinion is optional at the discretion of the appellate court. This subsection also provides that appellate courts may establish rules for the summary disposition of cases without merit.

Subsection (7). The state and defendant have the right of to appeal a judgment of conviction based upon a sentence imposed pursuant to the sentencing guidelines.