

FILED: November 2, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

TITUS ALBERT WHITE,
Defendant-Appellant.

Jackson County Circuit Court
093166MI

A144392

Lisa C. Greif, Judge.

Argued and submitted on August 31, 2011.

Marc D. Brown argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Cecil A. Reniche-Smith argued the cause for respondent. With her on the brief was John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Ortega, Presiding Judge, and Brewer, Chief Judge, and Sercombe, Judge.*

BREWER, C. J.

Appeal from the supplemental judgment imposing restitution dismissed for lack of jurisdiction; otherwise affirmed.

*Brewer, C. J., *vice* Rosenblum, S. J.

1 BREWER, C. J.

2 Defendant, who was convicted of fourth-degree assault, ORS 163.160, and
3 harassment, ORS 166.065, argues on appeal that the trial court committed plain error in
4 imposing restitution and asks this court to "vacate the restitution order." The state
5 responds that the trial court properly imposed restitution, and it also argues that, in light
6 of the Supreme Court's decision in [State v. Fowler](#), 350 Or 133, 252 P3d 302 (2011), this
7 court lacks jurisdiction to consider defendant's argument because defendant failed to
8 timely appeal from the supplemental judgment imposing restitution. As explained below,
9 we agree with the state, and therefore dismiss the appeal from the supplemental judgment
10 for lack of jurisdiction and otherwise affirm.

11 The pertinent facts are all procedural. The trial court entered a judgment of
12 conviction on December 10, 2009, that contained a monetary award of various costs and
13 fees, none of which are at issue on appeal. Citing ORS 137.106, the judgment further
14 provided that, as a condition of probation, defendant would be required to pay restitution
15 in an amount "to be determined." Defendant timely appealed from that judgment. On
16 February 24, 2010, the trial court entered a supplemental judgment imposing restitution.
17 On July 14, 2010, defendant filed an amended notice of appeal from the February 24
18 judgment, asserting that, because appellate counsel became aware of the supplemental
19 judgment on June 30, 2010, the notice of appeal was timely filed under ORS 138.071(4).¹

¹ ORS 138.071 provides, in pertinent part:

"(1) Except as provided in this section, a notice of appeal must be

1 In *Fowler*, the court rejected an argument that an appeal from a
2 supplemental judgment was timely under ORS 138.071(4) because it was filed within 30
3 days of when appellate counsel (rather than trial counsel and the defendant herself)
4 received notice that the judgment had been entered. The court's conclusion in *Fowler*
5 applies to supplemental judgments imposing restitution. [*State v. Mullins*](#), 245 Or App
6 505, ___ P3d ___ (2011).

7 In light of the holdings in *Fowler* and *Mullins*, defendant's appeal from the
8 supplemental judgment in this case was untimely. Defendant makes several arguments in
9 support of his position that this court has jurisdiction, two of which we address below.
10 We reject defendant's remaining arguments without discussion. First, defendant has
11 suggested that his appeal from the general judgment of conviction sufficed to place the
12 restitution issue properly before this court, because that judgment, although not imposing
13 restitution, stated that defendant would be required to pay restitution in an amount to be
14 determined as a condition of probation. That argument requires only brief discussion.
15 ORS 138.240 provides that we "may reverse, affirm or modify the judgment or order
16 appealed from." As noted above, in this case, defendant seeks relief from the

served and filed not later than 30 days after the judgment or order appealed
from was entered in the register.

"* * * * *

"(4) If the trial court enters a corrected or a supplemental judgment
under ORS 138.083, a notice of appeal from the corrected or supplemental
judgment must be filed not later than 30 days after the defendant receives
notice that the judgment has been entered."

1 supplemental judgment of restitution, which was not the judgment of conviction from
2 which he timely appealed. *See generally* [State v. Robinson](#), 158 Or App 494, 498, 974
3 P2d 713 (1999) (rejecting contention that an unappealed subsequent order entered by the
4 trial court could be "set aside" by this court, noting that "we are limited under ORS
5 138.240 to actions taken on orders 'appealed from'").

6 Second, defendant suggests that *Fowler* is limited to a very narrow set of
7 facts and applies only in cases in which the record demonstrates that the trial court told a
8 defendant that an amended judgment would be entered and, according to defendant, "the
9 fact that a supplemental judgment would be issued was a certainty." We question
10 defendant's assertion that the present case is factually distinguishable in that respect
11 because, as explained above, the initial judgment indicated that defendant "shall" pay
12 restitution in an amount to be determined and referenced ORS 137.106, which, in turn,
13 specifies the procedures by which a court goes about determining restitution and entering
14 a supplemental judgment.² Most of defendant's arguments along these lines are that, in
15 the normal course, criminal defense counsel receives unsigned copies of restitution
16 judgments before their entry, but in order to determine the actual date of entry, counsel
17 must check with the court or access the court's computerized database. We conclude,
18 however, that that is not something that distinguishes this case from *Fowler*, but rather is,
19 in essence, the same as one of the arguments the court rejected in *Fowler*. *See* 350 Or at

² Moreover, the trial court orally explained to defendant at sentencing that he would be required to pay restitution in an amount to be determined within 90 days.

1 139 ("The trial court notified both defendant and her trial counsel at the * * * hearing that
2 it would impose * * * costs in a supplemental judgment. In the absence of circumstances
3 not present in this case, defendant's failure to check the status of the judgment does not
4 excuse her subsequent failure to file a timely notice of appeal from the supplemental
5 judgment.").

6 Appeal from supplemental judgment imposing restitution dismissed for
7 lack of jurisdiction; otherwise affirmed.