



Legislative Testimony

Oregon Criminal Defense Lawyers Association

April 25, 2013

The Honorable Jeff Barker, Co-Chair
The Honorable Chris Garrett, Vice-Chair
The Honorable Wayne Krieger, Vice-Chair
House Judiciary Committee, Members

RE: Senate Bill 39 – testimony in support

Dear Chair Barker, Vice-Chairs and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments in support of Senate Bill 39.

Senate Bill 39 clarifies a trial court’s authority to issue a stay of sentence pending appeal. A “stay” of execution of a sentence is an order issued by the trial court that temporarily suspends the defendant’s obligation to serve the sentence while the appellate process is underway. That authority is currently codified in ORS 138.135 (1) but it lacks clarity¹ and trial courts, prosecutors and defense counsel don’t understand it. Senate Bill clarifies the authority of the trial court, imposes time constraints, identifies the factors that must be considered, and otherwise promotes clarity where confusion currently exists.

Why would a trial court want to stay execution of a sentence? Trial courts are usually very aware when their legal rulings at trial are outcome-determinative; that is, but for the legal ruling, the defendant may not have been convicted or may not be sentenced to time in custody. In instances of close judgment calls on matters of law, this can mean the

¹ Current ORS 138.135 (1) states:

A sentence of confinement shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is released on security under ORS 135.230 to 135.290. If a defendant is not released on security and elects not to commence service of the sentence pending appeal, the defendant shall be held in custody at the institution designed in the judgment without execution of sentence, except as provided in OSR 135.145.

difference between going to prison and remaining free. Examples include rulings on motions to suppress evidence, rulings on admissibility of evidence, statutory interpretation of new crimes, and other determinations of novel issues of law. The federal courts allow release pending appeal with relative frequency. Federal Rules of Appellate Procedure 9 (b).

Does SB 39 expand the trial court's authority? Senate Bill 39 does not expand the trial court's authority, nor does it mandate the use of that authority. Rather, it preserves a trial court's discretion to use the authority, sets forth the time frame for the use of that authority, identifies the factors that the court shall consider, and the conditions of release that may be imposed.

Time frame: Section 1 Sub-section (1) clarifies that the motion to request a stay pending appeal must be filed in the trial court no later than the filing of a notice of appeal, unless the court finds good cause for a later date. It further clarifies that the trial court retains jurisdiction to resolve the motion irrespective of the notice of appeal having been filed.

Factors for consideration: Section 1 Sub-section (2) lists the factors that a court shall consider in exercising its discretion to issue a stay. These include not only factors of public safety risk, such as the nature of the offense and the defendant's criminal history, but also consideration of the health of the defendant. If the sentence requires the defendant to serve a term of incarceration, further consideration must be given to the strength or weakness of the case on appeal and the likelihood that the appellate courts will grant relief.

Obviously, if a trial court has little doubt but that its rulings will be affirmed on appeal, it would unlikely issue a stay. Often, however, trial courts are doubtful of the likelihood that the appellate courts will agree with its rulings, and are willing to grant a stay in the appropriate case until the doubt is resolved.

Conditions of release during the stay: Section 1 Sub-section (3) allows a court to establish the necessary conditions of release while the appeal is being executed. This can include posting monetary sureties with the court, and requiring the defendant to submit to an examination of assets and to refrain from dissipating his assets. At a minimum, the trial court must impose an order that the defendant duly prosecute the appeal, appear at such time and place as the court may direct, and not depart the state without leave of the court.

Considerations of justice: In addition to promoting clarity, Senate Bill 39 promotes an important aspect of affording meaningful appellate relief for those defendants who are sentenced to less than 24 months in custody. Due to extreme case congestion in the Court of Appeals, it regularly takes at least two years at a minimum for the Court of Appeals to issue an opinion. When that opinion is favorable to the defendant, the State can, and usually does petition for review by the Oregon Supreme Court, usually seeking several extensions of time before doing so. In the event the Supreme Court accepts review, it usually takes at least another year for the briefing cycle, appellate argument and opinion to issue. Hence, for defendants sentenced to less than 24 months in custody,

OCDLA testimony in support
Senate Bill 39
April 25 2013

there is virtually no meaningful appellate remedy if they must commence serving their sentence immediately.

Senate Bill 39 promotes clarity to practitioners, guidance to trial courts, and relief in instances where justice so requires. OCDLA urges your support.

Thank you for your consideration of these comments.

Respectfully submitted,

Gail L. Meyer, JD
Legislative Representative
Oregon Criminal Defense Lawyers Association
glmlobby@nwlinc.com