IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
ANDY SIMRIN,
Defendant-Appellant.
Marion County Circuit Court
12C45116; A156472

Debra K. Vogt, Judge.

Argued and submitted March 8, 2016.

Lawrence Matasar argued the cause and filed the brief for appellant.

Jamie K. Contreras, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

EGAN, J.

Reversed and remanded for entry of an order setting aside defendant's record of arrest pursuant to ORS 137.225(1)(b).

EGAN, J.

Defendant appeals from the trial court's denial of his motion to set aside the record of his arrest for contempt of court under ORS 137.225(1)(b) (2013).[1] Defendant assigns error to the trial court's denial of his motion, challenging the trial court's conclusion that ORS 137.225(1)(b) does not apply to defendant.[2] We agree with defendant that the statute does apply to him, and we reverse and remand for the trial court to enter an order setting aside defendant's record of arrest for contempt.[3]

Because defendant's appeal turns on the proper meaning and application of ORS 137.225(1)(b), a matter of statutory interpretation, we review for errors of law. *State v. Branam*, 220 Or App 255, 258, 185 P3d 557, *rev den*, 345 Or 301 (2008).

The pertinent facts are undisputed. Defendant, an attorney, was issued a citation in lieu of arrest for contempt of court for disobeying an order of the Marion County Circuit Court. The citation form stated that defendant was cited for a "crime" and had committed the "offense" of contempt of court. He was charged by information with five counts of contempt of court under ORS 33.015. The charging instrument stated that defendant was accused of the "crimes" of contempt, labeled each count as a "U Misdemeanor," and stated that "Def[endant] needs to be printed." In the charging instrument, the state sought monetary fines and a period of incarceration of up to six months for each charge. The contempt charges were ultimately dismissed.

Thereafter, defendant moved under ORS 137.225 for the trial court to set aside the record of his arrest. The

[1] ORS 137.225(1)(b) was amended in 2017. Or Laws 2017, ch 338, § 1. Throughout this opinion, we refer to the 2013 version of the statute, which was in effect at the time of defendant's motion.

[2] ORS 137.225(1)(b) provides, in relevant part, that "at any time after *** a dismissal of the charge," an "arrested person may apply to the court that would have jurisdiction over the crime for which the person was arrested, for entry of an order setting aside the record of the arrest."

[3] Oregon law distinguishes between contempt of court for which only remedial sanctions are sought, *see* ORS 33.015(4); ORS 33.055, and contempt of court in which punitive sanctions are sought, *see* ORS 33.015(3); ORS 33.065. All references in this opinion to "contempt" are to contempt of court in which a punitive sanction was sought.

state objected, arguing that ORS 137.225 applies only to criminal arrests and does not authorize a court to set aside records relating to a contempt charge because contempt is not a crime. The trial court denied defendant's motion, concluding "that the provisions of ORS 137.225 do not apply to the proceedings herein." As noted, defendant challenges that conclusion on appeal.

Thus, the question we must answer is whether the trial court's conclusion was correct that the record of defendant's arrest for contempt cannot be set aside under ORS 137.225(1)(b). In relevant part, ORS 137.225(1)(b) provides:

> "At any time after the lapse of one year from the date of any arrest, if no accusatory instrument was filed, or at any time after an acquittal or a dismissal of the charge, the arrested person may apply to the court that would have jurisdiction over the crime for which the person was arrested, for entry of an order setting aside the record of the arrest."

To determine the proper meaning and application of a statute, our task is to discern the meaning most likely intended by the legislature, ORS 174.020, based on an analysis of the statute's text, context, and any legislative history that we find pertinent to the analysis, *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

Defendant argues that ORS 137.225(1)(b) applies to arrests for contempt and that his motion to set aside should have been granted because he was "arrested" for contempt, "charged" with the crime of contempt, and those contempt charges were then dismissed exactly as provided for in paragraph (1)(b). The state counters that the word "crime" in the statute's statement of which court may set aside the record makes it clear that the legislature did not intend to allow persons charged with contempt to set aside their records because contempt is not a "crime." We agree that, to determine whether ORS 137.225(1)(b) allows defendant to have his arrest record set aside, we must particularly consider those three words—arrest, charge, and crime—in our analysis. The statute does not provide definitions for any of those words. Therefore, we look at both the plain meaning of the words and the context of their use to determine

their meaning. *State v. Spainhower*, 251 Or App 25, 28, 283 P3d 361 (2012) ("When particular terms are not statutorily defined, we give them their plain, natural, and ordinary meaning unless the context indicates that the legislature intended some other meaning.").

First, ORS 137.225(1)(b) allows certain persons who have been arrested to set aside the record of their arrest. An arrest can mean "[a] seizure or forcible restraint, esp. by legal authority" or "[t]he taking or keeping of a person in custody by legal authority." *Black's Law Dictionary* 130 (10th ed 2014); *see also Webster's Third New Int'l Dictionary* 121 (unabridged ed 2002) ("to take or keep in custody by authority of law"). But it also, more specifically, means "the apprehension of someone for the purpose of securing the administration of the law, esp. of bringing that person before a court." *Black's* at 130. The state argues that a person charged with contempt is not "arrested" because ORS 133.005(1), unrelated to ORS 137.225(1)(b), defines arrest as "plac[ing] a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense," which, according to the state, does not include contempt. That argument is not well taken, especially in light of the fact that the charging instrument purported to charge defendant with a criminal offense. Here, defendant was issued a citation in lieu of arrest that notified defendant that he had committed an offense and was expected to appear in court. That citation placed defendant under constructive restraint in that he was expected to return to court to face charges against him for contempt.

Additionally, other statutes related to contempt refer to arrests for contempt. *See, e.g.*, ORS 33.075(2) (stating that "[a] person against whom a complaint has been issued under ORS 33.065 [for punitive contempt sanctions] may be cited to appear in lieu of custody as provided in ORS 133.055," which allows for police officers to cite in lieu of custodial arrest for all misdemeanors and some felonies); ORS 133.381 (describing the procedure "[w]hen a peace officer arrests a person pursuant to ORS 133.310(3) or pursuant to a warrant issued under ORS 33.075 by a court or judicial officer for the arrest of a person charged with contempt

for violating an order"). Both custodial arrest and a citation aim to secure the administration of justice and bring the person before a court. Moreover, police officers have the discretion to either cite or take into physical custody persons, including for contempt. We are unpersuaded that the legislature intended to allow the discretionary act of a police officer to determine whether a person can have a record of arrest set aside. Consequently, we conclude that defendant was "arrested" within the meaning of ORS 137.225(1)(b).[4]

Second, we address briefly the statute's use of the word "charge." Not only does ORS 137.225(1)(b) provide for the setting aside of arrest records in cases that result in no charges being filed, but the statute also provides for the setting aside of arrest records after an accusatory instrument is dismissed or a person is acquitted of charges in cases where charges *were* filed. Contempt is a "charge" that is initiated by an accusatory instrument the same way a crime is charged. *See, e.g.*, *Spainhower*, 251 Or App at 28 ("Contempt, unless committed within the immediate view and presence of the court, is charged by accusatory instrument."); ORS 33.065(5) (contempt proceeding for punitive sanctions may be initiated by an "accusatory instrument subject to the same requirements and laws applicable to an accusatory instrument in a criminal proceeding").

Third, we consider the meaning of the word "crime" as used in ORS 137.225(1)(b). The statute provides, in relevant part, that "at any time after an acquittal or a dismissal

[4] Additionally, in 2017, the legislature amended ORS 137.225(1)(b) to specifically state that persons who are cited in lieu of arrest may also set aside the record of their arrest. Or Laws 2017, ch 338, § 1. "Senate Bill 497A adds 'criminal citation' and 'criminal charge' as records that can be expunged by a court. In doing so, SB 497A clarifies that an individual did not have to be taken into custody in order to be eligible to have their record expunged." Staff Measure Summary, Senate Committee on Judiciary, SB 497A. The legislative history of the amendment shows that it was not intended to change the statute, but, rather, its purpose was to clarify that ORS 137.225(1)(b) allows a defendant to set aside the record of a citation as well as a record of physical arrest. Although those changes do not control the result in this case, it arguably confirms what we have already otherwise concluded—that the statute at the time of defendant's arrest was not intended to distinguish between arrest by physical restraint or custody and a citation. *See* *State v. Cloutier*, 351 Or 68, 104, 261 P3d 1234 (2011) (subsequent "legislative history, at best, arguably confirms what we have determined to be the intended meaning of [the statute] based on its text, context, and earlier enactment history").

of the charge, the arrested person may apply to the court that would have jurisdiction over the crime for which the person was arrested." Defendant contends that his record of arrest clearly shows that he was arrested and charged with a crime. The state argues that defendant may not have his record set aside under that statute because contempt, in general, is not a crime.

We have, as the state points out, said that contempt is not a crime. *See, e.g.*, *State v. Coughlin*, 258 Or App 882, 888, 311 P3d 988 (2013) (reasoning that contempt is not a crime and, therefore, a person found in contempt was not "convicted" for purposes of ORS 137.225(6)(b)); *State v. Reynolds*, 239 Or App 313, 316, 243 P3d 496 (2010) (holding that a trial court erred when it entered a criminal judgment of "conviction" after finding the defendant in contempt because contempt is not a crime). We have, however, also concluded that a statute's use of the word "crime" to qualify the statute's applicability may include a contempt charge. *See, e.g.*, *State v. Straughan (A147718)*, 263 Or App 225, 240-41, 327 P3d 1172 (2014) (concluding that defendant charged with contempt was included under the protection of a speedy trial statute that provided that an accusatory instrument must be dismissed if "a defendant charged with a crime *** is not brought to trial within a reasonable period of time." (Construing *former* ORS 135.747 (2011), *repealed by* Or Laws 2013, ch 431, § 1.)). In this case, however, we do not need to determine whether the legislature intended to include charges of contempt under ORS 137.225(1)(b) because defendant was arrested for an offense and charged with crimes.

As noted, the citation alleged that defendant had committed the "offense" of contempt of court.[5] The information purported to charge defendant with five counts of the "U-Misdemeanor" crime of contempt of court. In this case, defendant was arrested for and charged with five crimes. The reason for the mislabeling of defendant's charges as misdemeanor crimes is unknown and irrelevant. And the

[5] ORS 161.505 provides that "[a]n offense is conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law or ordinance of a political subdivision of this state. An offense is either a crime *** or a violation." "A crime is an offense for which a sentence of imprisonment is authorized," and a "[a] crime is either a felony or a misdemeanor." ORS 161.515.

text, context, and legislative history of the statute provide no reason to believe that defendant's record is excluded from the application of ORS 137.225(1)(b) because contempt is not actually a crime.

Paragraph (1)(b) uses the noun phrase "the crime for which the person was arrested" to explain which court may set aside a person's arrest record. The word "crime" does not appear to be aimed at limiting the ability of a person who has, for whatever reason, been arrested for and charged with crimes that are not actually crimes. There is no reason to believe that the legislature would have contemplated that occurrence nor that it sought to exclude persons with records like defendant's from using ORS 137.225(1)(b) to clear their records. In fact, the context and legislative history support the opposite conclusion.

The paragraph allows for the record of "any arrest," without qualification, to be set aside after one year if no accusatory instrument was filed. It is unlikely that the legislature intended to place a limitation on the phrase "any arrest" through its use of the word "crime" in the provision explaining which courts may set aside records, which comes much later in the paragraph. It is also unlikely that that provision was intended to exclude arrests that led to mistakenly-filed criminal charges but would allow for the records of any other arrests that did not lead to charges being filed to be set aside.

We have previously determined that ORS 137.225 "is intended to remove the stigma associated with conviction of a crime and to give the individual another chance, so to speak, unencumbered by that stigma. It thereby removes a cloud from the efforts of those persons to find employment and social acceptance and otherwise to bury the past." *State v. Gwyther*, 57 Or App 34, 37, 643 P2d 1296 (1982) (citation omitted). The legislature, in 1983, added paragraph (1)(b) to ORS 137.225, thereby allowing "arrested persons" to have the record of their arrests set aside. The legislative history shows that paragraph (1)(b) was added to afford persons who had been arrested, but not convicted, the same ability to clear the past and remove the stigma of accusation as it had previously afforded persons convicted of some crimes.

See Exhibit I, Senate Judiciary Committee, SB 741, May 17, 1983 (written statement of Mark D. Donahue, accompanying his proposed draft of the bill) (quoting purpose of ORS 137.225 from *Gwyther* and stating that proposed amendment to the statute aimed "to give an equal 'Fresh Start' to those who are arrested but not convicted").

Here, defendant was cited in lieu of arrest for the "offense" of contempt of court. The state mistakenly charged defendant with five counts of the "misdemeanor" of contempt and asked the trial court to impose an order of incarceration upon defendant for up to six months for each of the five charges of contempt. A public record exists that the state has formally accused defendant of acts of contempt that are labeled as misdemeanor crimes. That record stigmatizes defendant in the same way that any other record of criminal charges stigmatizes criminal defendants. Nothing in the statute leads us to believe that the legislature intended for persons who have mistakenly been charged with crimes to be excluded from the purview of the statute. Indeed, the statute appears aimed to include people like defendant—those whose record contains the stigma of having been formally accused of crimes by the state but who were not convicted of those crimes. The addition of the word "crime" does nothing to exclude defendant. For the foregoing reasons, the trial court erred when it concluded that ORS 137.225(1)(b) did not apply to defendant's record of arrest for contempt and when it denied defendant's motion to set aside the record of his arrest for contempt under that statute.

Reversed and remanded for entry of an order setting aside defendant's record of arrest pursuant to ORS 137.225(1)(b).