

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

GREGORY LOUDERMILK, JR.,
Defendant-Appellant.

Klamath County Circuit Court
1400343CR; A161571

Marci Warner Adkisson, Judge.

Submitted August 30, 2017.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Erin J. Snyder Severe, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Joanna L. Jenkins, Assistant Attorney General, filed the brief for respondent.

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

PER CURIAM

Reversed and remanded for resentencing.

PER CURIAM

Defendant appeals a judgment of conviction for driving under the influence of intoxicants (DUII), ORS 813.010, ORS 813.011. In an unpreserved assignment of error, defendant argues that the trial court plainly erred by imposing a \$2,000 fine for defendant's third DUII conviction because the court erroneously believed that the fine was mandatory rather than discretionary, under ORS 813.010(6). The state concedes that the trial court plainly erred, and argues that the proper remedy is to remand for resentencing to allow the trial court to exercise its discretion in imposing a fine. We accept the state's concession, and agree that the appropriate remedy is to remand the case for resentencing.¹

ORS 813.010(6) instructs the trial court to impose mandatory fines on certain persons convicted of DUII:

"In addition to any other sentence that may be imposed, the court shall impose one or more of the following fines on a person convicted of driving while under the influence of intoxicants as follows:

"(a) For a person's first conviction, a minimum of \$1,000.

"(b) For a person's second conviction, a minimum of \$1,500.

"(c) For a person's third or subsequent conviction, a minimum of \$2,000 if the person is not sentenced to a term of imprisonment."

(Emphases added.) If a person is convicted of a third DUII and is also sentenced to a term of imprisonment, that person is not subject to the \$2,000 mandatory minimum fine; however, the trial court retains the authority to impose an otherwise lawful discretionary fine. *See, e.g., State v. Frier*, 264 Or App 541, 549-50, 333 P3d 1093 (2014) (remanding for resentencing where it was unclear whether the court imposed a \$2,000 fine as a mandatory fine under ORS 813.010(6)(c) or as a discretionary fine under ORS 161.635(1)(a)).

¹ In a second unpreserved assignment of error, defendant argues that the trial court plainly erred by instructing the jury that 9-carboxy tetrahydrocannabinol (THC) is a "controlled substance" as a matter of law. We reject that assignment of error without written discussion.

Here, defendant was convicted of DUII for a third time and sentenced to a term of 90 days' incarceration. Thus, he was not subject to the mandatory minimum \$2,000 fine set forth in ORS 813.010(6)(c). However, as the state concedes, the trial court erroneously believed that the \$2,000 fine it imposed was mandatory: "It's a statutory fine that I have to impose." Thus, the court's imposition of the fine without exercising discretion was plainly erroneous. Furthermore, considering the gravity of the error and the ends of justice, we conclude that it is appropriate to exercise our discretion to correct the error by remanding the case for resentencing and allowing the trial court to exercise its discretion regarding the imposition of fines.

Reversed and remanded for resentencing.