

137.712 Exceptions to ORS 137.700 and 137.707.

(1)(a) Notwithstanding ORS 137.700 and 137.707, when a person is convicted of manslaughter in the second degree as defined in ORS 163.125, assault in the second degree as defined in ORS 163.175 (1)(b), kidnapping in the second degree as defined in ORS 163.225, rape in the second degree as defined in ORS 163.365, sodomy in the second degree as defined in ORS 163.395, unlawful sexual penetration in the second degree as defined in ORS 163.408, sexual abuse in the first degree as defined in ORS 163.427 (1)(a)(A) or robbery in the second degree as defined in ORS 164.405, the court may impose a sentence according to the rules of the Oregon Criminal Justice Commission that is less than the minimum sentence that otherwise may be required by ORS 137.700 or 137.707 if the court, on the record at sentencing, makes the findings set forth in subsection (2) of this section and finds that a substantial and compelling reason under the rules of the Oregon Criminal Justice Commission justifies the lesser sentence. When the court imposes a sentence under this subsection, the person is eligible for a reduction in the sentence as provided in ORS 421.121 and any other statute.

(b) In order to make a dispositional departure under this section, the court must make the following additional findings on the record:

(A) There exists a substantial and compelling reason not relied upon in paragraph (a) of this subsection;

(B) A sentence of probation will be more effective than a prison term in reducing the risk of offender recidivism; and

(C) A sentence of probation will better serve to protect society.

(2) A conviction is subject to subsection (1) of this section only if the sentencing court finds on the record by a preponderance of the evidence:

(a) If the conviction is for manslaughter in the second degree:

(A) That the defendant is the mother or father of the victim;

(B) That the death of the victim was the result of an injury or illness that was not caused by the defendant;

(C) That the defendant treated the injury or illness solely by spiritual treatment in accordance with the religious beliefs or practices of the defendant and based on a good faith belief that spiritual treatment would bring about the victim's recovery from the injury or illness;

(D) That no other person previously under the defendant's care has died or sustained significant physical injury as a result of or despite the use of spiritual treatment, regardless of whether the spiritual treatment was used alone or in conjunction with medical care; and

(E) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section or for criminal mistreatment in the second degree.

(b) If the conviction is for assault in the second degree:

(A) That the victim was not physically injured by means of a deadly weapon;

(B) That the victim did not suffer a significant physical injury; and

(C) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section.

(c) If the conviction is for kidnapping in the second degree:

(A) That the victim was at least 12 years of age at the time the crime was committed; and

(B) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section.

(d) If the conviction is for robbery in the second degree:

(A) That the victim did not suffer a significant physical injury;

(B) That, if the defendant represented by words or conduct that the defendant was armed with a dangerous weapon, the representation did not reasonably put the victim in fear of imminent significant physical injury;

(C) That, if the defendant represented by words or conduct that the defendant was armed with a deadly weapon, the representation did not reasonably put the victim in fear of imminent physical injury; and

(D) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section.

(e) If the conviction is for rape in the second degree, sodomy in the second degree or sexual abuse in the first degree:

(A) That the victim was at least 12 years of age, but under 14 years of age, at the time of the offense;

(B) That the defendant does not have a prior conviction for a crime listed in subsection (4) of this section;

(C) That the defendant has not been previously found to be within the jurisdiction of a juvenile court for an act that would have been a felony sexual offense if the act had been committed by an adult;

(D) That the defendant was no more than five years older than the victim at the time of the offense;

(E) That the offense did not involve sexual contact with any minor other than the victim; and

(F) That the victim's lack of consent was due solely to incapacity to consent by reason of being under 18 years of age at the time of the offense.

(f) If the conviction is for unlawful sexual penetration in the second degree:

(A) That the victim was 12 years of age or older at the time of the offense;

(B) That the defendant does not have a prior conviction for a crime listed in subsection (4) of this section;

(C) That the defendant has not been previously found to be within the jurisdiction of a juvenile court for an act that would have been a felony sexual offense if the act had been committed by an adult;

(D) That the defendant was no more than five years older than the victim at the time of the offense;

(E) That the offense did not involve sexual contact with any minor other than the victim;

(F) That the victim's lack of consent was due solely to incapacity to consent by reason of being under 18 years of age at the time of the offense; and

(G) That the object used to commit the unlawful sexual penetration was the hand or any part thereof of the defendant.

(3) In making the findings required by subsections (1) and (2) of this section, the court may consider any evidence presented at trial and may receive and consider any additional relevant information offered by either party at sentencing.

(4) The crimes to which subsection (2)(a)(E), (b)(C), (c)(B), (d)(D), (e)(B) and (f)(B) of this section refer are:

(a) A crime listed in ORS 137.700 (2) or 137.707 (4);

(b) Escape in the first degree, as defined in ORS 162.165;

(c) Aggravated murder, as defined in ORS 163.095;

(d) Criminally negligent homicide, as defined in ORS 163.145;

(e) Assault in the third degree, as defined in ORS 163.165;

(f) Criminal mistreatment in the first degree, as defined in ORS 163.205 (1)(b)(A);

(g) Rape in the third degree, as defined in ORS 163.355;

(h) Sodomy in the third degree, as defined in ORS 163.385;

(i) Sexual abuse in the second degree, as defined in ORS 163.425;

(j) Stalking, as defined in ORS 163.732;

(k) Burglary in the first degree, as defined in ORS 164.225, when it is classified as a person felony under the rules of the Oregon Criminal Justice Commission;

(L) Arson in the first degree, as defined in ORS 164.325;

(m) Robbery in the third degree, as defined in ORS 164.395;

(n) Intimidation in the first degree, as defined in ORS 166.165;

(o) Promoting prostitution, as defined in ORS 167.012; and

(p) An attempt or solicitation to commit any Class A or B felony listed in paragraphs (a) to (L) of this subsection.

(5) Notwithstanding ORS 137.545 (5)(b), if a person sentenced to probation under this section violates a condition of probation by committing a new crime, the court shall revoke the probation and impose the presumptive sentence of imprisonment under the rules of the Oregon Criminal Justice Commission.

(6) As used in this section:

(a) "Conviction" includes, but is not limited to:

(A) A juvenile court adjudication finding a person within the court's jurisdiction under ORS 419C.005, if the person was at least 15 years of age at the time the person committed the offense that brought the person within the jurisdiction of the juvenile court. "Conviction" does not include a juvenile court adjudication described in this subparagraph if the person successfully asserted the defense set forth in ORS 419C.522.

(B) A conviction in another jurisdiction for a crime that if committed in this state would constitute a crime listed in subsection (4) of this section.

(b) "Previous conviction" means a conviction that was entered prior to imposing sentence on the current crime provided that the prior conviction is based on a crime committed in a separate criminal episode. "Previous conviction" does not include a conviction for a Class C felony, including an attempt or solicitation to commit a Class B felony, or a misdemeanor, unless the conviction was entered within the 10-year period immediately preceding the date on which the current crime was committed.

(c) "Significant physical injury" means a physical injury that:

(A) Creates a risk of death that is not a remote risk;

(B) Causes a serious and temporary disfigurement;

(C) Causes a protracted disfigurement; or

(D) Causes a prolonged impairment of health or the function of any bodily organ. [1997 c.852 §1; 1999 c.614 §3; 1999 c.954 §2; 2001 c.851 §5; 2005 c.843 §22]

Note: 137.712 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 137 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.