

Oregon Court of Appeals

Allen v. Miller

350 Or. App. 373 (2026) · No. A185685 · Decided June 10, 2026

SUMMARY

The Oregon Court of Appeals affirmed the denial of post-conviction relief sought by Marcellus Ramon Allen after his murder conviction at a second trial. The court held that trial counsel performed deficiently by asserting in opening statement that phone records would establish Allen was not with a codefendant, without verifying the records, but that Allen failed to show prejudice given the substantial evidence of guilt. The court also held that counsel was not constitutionally deficient for failing to preserve a propensity-evidence objection in the context of counsel’s tactical decisions concerning gang-affiliation and other-shooting evidence.

CASE DETAILS

|                       |                                                                                                                                                                                                     |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Oregon Court of Appeals                                                                                                                                                                             |
| WRITING FOR THE COURT | Tookey, P. J.; Tookey, Presiding Judge; Kamins, Judge; Jacquot, Judge                                                                                                                               |
| JURISDICTION          | Oregon Court of Appeals                                                                                                                                                                             |
| DECIDED               | June 10, 2026                                                                                                                                                                                       |
| DOCKET                | A185685                                                                                                                                                                                             |
| DISPOSITION           | affirmed                                                                                                                                                                                            |
| PROCEDURAL POSTURE    | Petitioner appealed a judgment of the Malheur County Circuit Court denying post-conviction relief after his second murder trial. He alleged inadequate and ineffective assistance of trial counsel. |
| STANDARD OF REVIEW    | The court reviews denial of post-conviction relief for errors of law and is bound by supported historical findings of fact.                                                                         |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                      |
| PARTIES               | Marcellus Ramon Allen, Petitioner-Appellant v. Jamie Miller, Superintendent, Snake River Correctional Institution, Defendant-Respondent                                                             |

TOPICS

- post-conviction relief
- ineffective assistance
- right to counsel
- evidence
- appellate procedure

## PRACTICE AREAS

post-conviction relief

criminal procedure

ineffective assistance of counsel

evidence

appellate procedure

## QUESTIONS PRESENTED

1. Whether trial counsel provided constitutionally inadequate assistance by stating during opening argument that phone records would show Allen was not with Lomax at the time of the shooting without verifying the records.
2. Whether Allen was prejudiced by counsel's inaccurate phone-record representation in light of the evidence presented at the second trial.
3. Whether trial counsel provided inadequate assistance by failing to object to gang-affiliation evidence and evidence concerning prior shootings involving the .380-caliber handgun as impermissible propensity evidence.
4. Whether Allen was prejudiced by counsel's failure to preserve or make those propensity-evidence objections.

## HOLDINGS

1. Trial counsel's performance fell below the constitutional standard because counsel made factual claims about what the phone records would show without verifying that the records supported those claims.
2. Allen failed to establish prejudice because the inaccurate phone-record representation could not have tended to affect the outcome in light of the extensive evidence of his participation in the murder.
3. Counsel was not constitutionally deficient because the prior-shooting evidence was not other-acts evidence by Allen within the meaning of OEC 404(4); it was offered to show how Allen gained access to the handgun.
4. Counsel was not deficient because the decision to stipulate to some gang-related facts while objecting to other gang evidence as cumulative or prejudicial was a reasonable trial strategy.
5. Allen failed to establish prejudice because he did not show that the proposed objections would have succeeded, and the jury was instructed not to use gang evidence as propensity evidence.

## KEY QUOTATIONS

*"We think it was unreasonable for trial counsel to make those claims without having checked whether the phone records supported them." (379)*

*"Nevertheless, turning to the second element of a claim of inadequate assistance, we conclude that the post-conviction court did not err in determining that petitioner failed to show prejudice." (380)*

*"We must bear in mind that, at his second trial, petitioner did not deny that he drove with two other persons who were gang members to the victim's house; instead, he sought to create a reasonable doubt about whether he participated in shooting the victim." (388)*

*"As a matter of law, we presume that the jurors followed those instructions absent an overwhelming probability that they were unable to do so." (389)*

## FACTUAL BACKGROUND

The victim was shot nine times with three different guns by three shooters. The prosecution presented evidence placing Allen with the other two alleged shooters before and after the murder, including testimony that all three men went to the victim's home, returned shortly after gunshots, and were found in an apartment containing the three guns used in the killing. Other evidence connected Allen to the shooting, including his clothing, ammunition matching one of the guns, gang relationships, and an offer to pay an inmate to kill a witness. At Allen's second trial, counsel incorrectly represented during opening statement that phone records would show Allen was not with codefendant Lomax at the time of the shooting.

## PROCEDURAL HISTORY

Allen was convicted of murder at a 2014 joint trial, but the Oregon Court of Appeals reversed and remanded because the trial court failed to suppress evidence obtained through an overbroad cell-phone search warrant. After a second trial in 2018, Allen was again convicted, and the Court of Appeals affirmed. Allen then sought post-conviction relief based on counsel's inaccurate opening-statement representation about phone records and counsel's failure to preserve a challenge to gang and other-shootings evidence as impermissible propensity evidence. The post-conviction court denied relief, and the Oregon Court of Appeals affirmed.

## DISPOSITION

affirmed

## CASES CITED

- Derschon v. Belleque, 252 Or. App. 465, 466, 474, 476-77, 287 P.3d 1189 (2012), rev. denied, 353 Or. 208 (2013)
- Gorham v. Thompson, 332 Or. 560, 567, 34 P.3d 161 (2001)
- State v. Allen, 288 Or. App. 244, 249, 406 P.3d 89 (2017)
- State v. Allen, 311 Or. App. 454, 455-59, 462-63, 489 P.3d 1075, rev. denied, 368 Or. 702 (2021)
- Antoine v. Taylor, 368 Or. 760, 767, 499 P.3d 48 (2021)
- Johnson v. Premo, 361 Or. 688, 699, 702, 399 P.3d 431 (2017)
- Smith v. Kelly, 318 Or. App. 567, 568-69, 508 P.3d 77 (2022), rev. denied, 370 Or. 822 (2023)
- Green v. Franke, 357 Or. 301, 312, 322, 350 P.3d 188 (2015)
- Rudnitskyy v. State of Oregon, 303 Or. App. 549, 556, 464 P.3d 471 (2020)
- Myers v. Neal, 975 F.3d 611, 621 (7th Cir. 2020), cert. denied, 141 S. Ct. 2507, 209 L. Ed. 2d 540 (2021)
- Farmer v. Premo, 363 Or. 679, 690, 427 P.3d 170 (2018)
- Mitchell v. State of Oregon, 300 Or. App. 504, 515-16, 454 P.3d 805 (2019)
- Moser v. Lampert, 200 Or. App. 78, 83, 112 P.3d 482 (2005), rev. denied, 339 Or. 406 (2005)
- Hale v. Belleque, 255 Or. App. 653, 660, 298 P.3d 596, adhered to on reconsideration, 258 Or. App. 587, 312 P.3d 533 (2013), rev. denied, 354 Or. 597 (2013)
- Logan v. State of Oregon, 259 Or. App. 319, 327, 313 P.3d 1128 (2013), rev. denied, 355 Or. 142 (2014)

- State v. Langley, 363 Or. 482, 526, 424 P.3d 688 (2018), adhered to as modified on reconsideration, 365 Or. 418, 446 P.3d 542 (2019), cert. denied, 141 S. Ct. 138, 207 L. Ed. 2d 1081 (2020)
- Zyst v. Kelly, 338 Or. App. 597, 607, 566 P.3d 1121, rev. denied, 374 Or. 188 (2025)

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