SUPREME COURT NO. 102382-1

NO. 38853-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON JAHR,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR DOUGLAS COUNTY

The Honorable Brian C. Huber, Judge

PETITION FOR REVIEW

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WASHINGTON CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Brandon Jahr asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. Brandon Jahr, COA No. 38853-1-III, filed on July 13, 2023, and the Order Denying Motion for Reconsideration, filed on August 17, 2023, attached as appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court acted outside its authority in modifying petitioner's sentence approximately one year after it was entered to add a period of community custody not previously imposed?

2 Whether the appellate court's decision affirming the sentence modification conflicts with this Court's decision in State v. Hubbard, 1 Wn.3d 439, 527 P.3d 1152 (2023)? RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

Pursuant to a plea agreement, Jahr pled guilty to one count of felony violation of a no contact order. RP (1/11/21) 19. Sentencing occurred the same day right after the plea. Id.

Pursuant to the plea agreement, the prosecutor asked for an exceptional sentence below the standard range of 36 months of incarceration. RP 22. The prosecutor indicated the state was not asking for community custody. RP 22. In keeping with the prosecutor's recommendation, the court imposed 36 months of incarceration and no community custody. RP 28-30. The court signed the judgment and sentence reflecting said sentence. CP 18-31.

Later, in February and March 2021, the department of Corrections (DOC or the department) contacted the prosecutor asserting a 12-month term of community custody was required. CP 196. The prosecutor

subsequently obtained an ex parte order – without notice to Jahr or an opportunity to respond – amending the order to include the 12-month term. CP 197.

After Jahr learned of the prosecutor's actions, the prosecutor agreed to have the order vacated, recognizing it was entered in violation of Jahr's due process rights. CP 91-92; RP 62. The Superior Court vacated the order on October 6, 2021. CP 90-94.

The court heard the state's subsequent motion to amend the judgment and sentence to add the 12 months of community custody on January 10, 2022. RP 61. The prosecutor stated his failure to request it at the initial sentencing was an oversight. RP 62-63.

Jahr pointed out the court had discretion not to impose community custody as part of the exceptional sentence. RP 65, 67; CP 6. The court imposed the 12-month term, reasoning the statute required it. RP 71.

On appeal, Jahr argued the court did not have authority to amend the judgment and sentence. Brief of Appellant (BOA) at 12-15 (citing State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989)). The Court of Appeals disagreed:

> This contention also misses the mark. Mr. Jahr is correct that a trial court has no *inherent* authority to modify a sentence postjudgment. But the trial court here did not purport to exercise its inherent authority. It properly purported to correct an error of law in Mr. Jahr's sentence, a process explicitly contemplated by statute and court rule. *See* RCW 9.94A.585(7); RAP 16.18(b); CrR 7.8(b); *see also* State v. Harkness, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (noting that while trial courts have "no *inherent* authority" to modify a sentence postjudgment, courts do have "limited statutory authority" to do so (emphasis added).

Appendix A at 6-7.

The appellate Court also disagreed with Jahr's additional argument there was nothing incorrect about his sentence pre-amendment, since the exceptional sentence provisions apply to community custody terms as well as

incarceration time. BOA at 15-19 (citing State v. Hudnall, 116 Wn. App. 190, 64 P.3d 687 (2003)); Appendix A at 7-8.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN STATE v. HUBBARD.

The Court of Appeals upheld the trial court's amendment to the judgment and sentence reasoning criminal court rule CrR 7.8 granted the court authority to modify the judgment and sentence. Appendix A at 6-7. This Court recently rejected the same argument in Hubbard.

In 2005, Hubbard pled guilty to first degree rape of a child with a domestic violence allegation; the victim was his then stepdaughter. Hubbard was initially granted a SSOSA at sentencing. His prison sentence was suspended and he was placed on community custody under DOC supervision.

Appendix H to the judgment and sentence set forth a number of court-imposed community custody conditions, such as no contact with minors without the prior approval of his community corrections officer. Hubbard, 527 P.3d at 1154-55.

Hubbard's SSOSA was revoked in 2006 due to community custody violations. As a result, the trial court imposed the previously suspended sentence of 123 months to life confinement, and included all the other terms and conditions of the judgment and sentence previously entered, including the community custody conditions in Appendix H. Hubbard, at 1155.

Nine years later, Hubbard was released by the indeterminate sentencing review board. The order of release provided Hubbard would be on community custody for the statutory maximum, life. Hubbard's community custody included the conditions listed in the judgment and sentence, as well as any later imposed conditions by his

CCO and the ISRB. Id.

Following his release, Hubbard married and his wife became pregnant. In December 2020, Hubbard asked the superior court to modify the conditions of his judgment and sentence to allow unsupervised contact with his daughter. The state objected the court had no authority to modify community custody. Hubbard replied that CrR 7.8(b)(5) – the same court rule relied upon by the appellate court here to uphold the amendment in Jahr's case – granted the court authority to modify community custody. Id. at 1155.

Relying on Shove, this Court disagreed:

> Pursuant to Shove, Hubbard's court-imposed community custody conditions cannot be modified unless there is an SRA provision that allows modification. There is none. Accordingly, we hold that the trial court did not have inherent or statutory authority to modify Hubbard's community custody condition, and that it abused its discretion in doing so.

Hubbard, at 1158.

Just as criminal court rule CrR 7.8(b) does not give

the authority to the trial court to modify conditions of community custody, it does not give the trial court authority to add community custody. CrR 7.8 is not an *SRA provision*. "'SRA sentences may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences.'" Hubbard, at 1156 (quoting Shove, 113 Wn.2d at 89)). Without express statutory authority, "'[a]fter final judgment and sentencing, the court loses jurisdiction to the DOC.'" Id. (quoting State v. Harkness, 145 Wn. App. 678, 685 P.3d 1182 (2008)).

The Court of Appeals' reliance on CrR 7.8 to justify what the lower court did here conflicts with Hubbard. This Court should accept review. RAP 13.4(b)(1).

Similarly incorrect was the appellate court's reliance on RCW 9.94A.585(7). That statute grants DOC authority to petition to the Court of Appeals to correct a sentence it believes contains an error of law. While it requires DOC to make an effort to have the error rectified at the trial court

level, that does not mean the trial court has authority to correct all errors. For instance, CrR 7.8(a) allows the trial court to fix "clerical mistakes." For instance, had the trial court imposed community custody but failed to include it on the judgment and sentence, such might qualify as a clerical mistake that could be fixed by the trial court. But that is not what happened here. The court did not order community custody.

RAP 16.18(b) essentially says the same thing as RCW 9.9A.585 and ergo, likewise is not a grant of authority to the trial court.

Finally, the Court of Appeals' reliance on Harkness is peculiar. Division One in Harkness held the trial court lacked authority to modify the defendant's sentence post-judgment to a DOSA because there was no SRA provision allowing for such a modification. Harkness, 145 Wn. App. at 685-86. In that vein, there is no SRA provision allowing the court to modify a final judgment to add a term of

community custody, either. Harnkess therefore supports Jahr's position.

Moreover, contrary to the Court of Appeals decision, the initial sentence – without community custody – was not erroneous. Hudnall, 116 Wn. App. 190, 197, 64 P.3d 687 (2003) (When a statute authorizes community custody, trial courts may impose community custody terms longer or shorter than the amount set by statute as long as the overall sentence does not exceed the statutory maximum). According to the appellate court, however, "[t]his argument is unavailing" because:

> Mr. Jahr is correct that trial courts may sometimes impose a term of community custody that deviates from the duration prescribed by statute. But here, the trial court did not impose an exceptionally short or long erm of community custody. Rather, it imposed no community custody at all, ignoring the legislature's clear mandate.

Appendix A at 7.

By the appellate court's logic, a term of "0" months of

community custody would pass muster whereas a term of "no" community custody does not. Such is a distinction without a difference and surely not contemplated by the legislature.

F. CONCLUSION

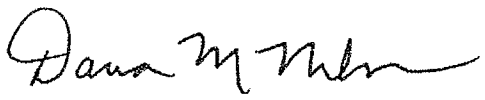
For the reasons stated above, this Court should accept review. RAP 13.4(b)(1).

This document contains 1,582 words in 14-point font, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 12th day of September, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX A

FILED
JULY 13, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. BRANDON JAMES JAHR, Appellant.	)))))))))	No. 38853-1-III UNPUBLISHED OPINION

PENNELL, J. — Brandon Jahr appeals a trial court order amending his judgment and sentence to include a statutorily-required term of community custody. We affirm.

FACTS

The State charged Brandon Jahr with one count of felony violation of a no-contact order. Due to his offender score, the standard range for this charge was exactly 60 months. In exchange for a guilty plea, the State offered to drop other charges and to recommend an exceptional downward sentence of 36 months' confinement. Mr. Jahr accepted this deal. He signed a statement on plea of guilty explaining he understood the State would recommend 36 months' confinement and 12 months' community custody.

At his plea hearing, Mr. Jahr affirmed he had reviewed all the provisions of this document in detail before signing it, agreed that he had had an opportunity to ask his attorney questions about the contents of the statement, and expressly affirmed that the plea agreement included a term of community custody.

After the court accepted Mr. Jahr's plea, the prosecutor orally recommended 36 months' confinement and *no* community custody. The prosecutor informed the court that the State was not requesting community custody because it believed Mr. Jahr's crime did not carry a term of community custody. The trial court imposed the parties' agreed-upon sentence of 36 months' confinement and heeded the prosecutor's recommendation, declining to set a term of community custody.

In the following months, the Department of Corrections (DOC) informed local prosecutors that Mr. Jahr's conviction required 12 months of community custody because it was a "'crime against persons.'" Clerk's Papers at 196 (quoting RCW 9.94A.701(3)). In March 2021, the State successfully moved ex parte for an order purporting to amend Mr. Jahr's sentence to include 12 months of community custody as required by statute. Mr. Jahr was never notified of the State's initial motion to amend his sentence. When Mr. Jahr learned of the State's efforts to amend his sentence, he objected and stated his desire to withdraw his plea.

Because Mr. Jahr had been provided no advance notice or chance to respond, the trial court granted the State's motion to vacate the order amending Mr. Jahr's sentence. The trial court then appointed counsel for Mr. Jahr and set a briefing schedule on the State's renewed motion to amend the sentence and Mr. Jahr's previously filed pro se motions to withdraw his guilty plea.

The court then held a hearing on the State's renewed motion to amend Mr. Jahr's sentence. The prosecutor asked the court to amend Mr. Jahr's sentence in line with the statutory mandate and explained the representation at sentencing, that community custody was inapplicable, "was an oversight on my part. That was an error." Rep. of Proc. (RP) (Jan. 10, 2022) at 63. Mr. Jahr's counsel responded that the court had "leeway" to impose no community custody because it had entered an exceptional sentence. *Id.* at 65.

The trial court granted the State's motion to amend Mr. Jahr's sentence. The court reasoned that community custody was mandatory in Mr. Jahr's case based on the relevant statute's use of the word "shall." *Id.* at 69 (quoting RCW 9.94A.701(3)(a)). The court also rejected the idea Mr. Jahr did not receive the benefit of his bargain, because Mr. Jahr had affirmed at the plea hearing that he understood the prosecution would recommend community custody.

The trial court also denied Mr. Jahr's motion to withdraw his plea, again reasoning "Mr. Jahr knew full well that what he was agreeing to involved a period of community custody" based on his explicit statements at the plea and sentencing hearing. RP (Apr. 11, 2022) at 105-06.

The court memorialized both rulings in written orders. Mr. Jahr timely appeals from both the order denying the motion to withdraw the plea and order granting the motion to amend the judgment and sentence. In his briefing to this court, Mr. Jahr has narrowed his appeal to the court's order amending the judgment and sentence.

ANALYSIS

We review the correction of an erroneous sentence for abuse of discretion. *See State v. McAninch*, 189 Wn. App. 619, 623, 358 P.3d 448 (2015). A trial court abuses its discretion if its decision is based on untenable grounds or reasons or is otherwise manifestly unreasonable. *See id.*

Pursuant to his plea, Mr. Jahr was convicted of violating a domestic violence no-contact order, criminalized under former RCW 26.50.110(1)(a)(i) (2019). This is a "crime against persons." *See* RCW 9.94A.411(2)(a). As such, the trial court was required to sentence Mr. Jahr to one year of community custody. *See* RCW 9.94A.701(3)(a) ("A court *shall*, in addition to the other terms of the sentence, sentence an offender to

community custody for one year when the court sentences the person . . . for . . . [a]ny crime against persons under RCW 9.94A.411." (emphasis added)). Given this legal landscape, the trial court clearly erred when it followed the prosecutor's mistaken advice that community custody did not apply.

The rules of criminal procedure allow either "party" to file a motion with the trial court to "relieve" the parties "from a final judgment" for several reasons, including "[m]istakes", "inadvertence", or "[a]ny other reason justifying relief." CrR 7.8(b)(1), (5). Thus, the State properly moved for—and the court properly granted—an amendment to Mr. Jahr's sentence because the prosecutor had inadvertently misled the court as to the applicability of community custody, which was in fact mandatory for the crime to which Mr. Jahr pleaded guilty. *See McAninch*, 189 Wn. App. at 623 ("A trial court has jurisdiction under CrR 7.8 to correct an erroneous sentence." (citing *State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996))).

Mr. Jahr argues the State's efforts to amend his sentence were untimely because the State's renewed motion was more than 90 days after the DOC became aware of his sentence. This argument fails. As an initial matter, the State's initial ex parte efforts to amend Mr. Jahr's sentence took place well within 90 days of his sentencing. And the

State's renewed motion came just five days after the trial court vacated its initial order amending the sentence.

More crucially, both the statute and court rule imposing a 90-day deadline pertain to postsentence review petitions addressed directly to this court. *See* RCW 9.94A.585(7); RAP 16.18(b). When a party petitions the trial court for amendment of a sentence, by contrast, such a motion need only be "made within a reasonable time," and if the reason for amending the judgment is a mistake or inadvertence, the motion must be made within one year of the judgment. CrR 7.8(b); *see also* RCW 9.94A.585(7) (contemplating that when an offender's sentence contains an "error[ ] of law," the DOC shall make "reasonable efforts to resolve the dispute *at the superior court level*" before petitioning this court (emphasis added)); RAP 16.18(a), (d) (similar). The State's efforts to correct Mr. Jahr's erroneous sentence were timely under CrR 7.8, the court rule properly governing this situation.

Mr. Jahr argues the trial court lacked jurisdiction because trial courts have no "inherent authority" to modify a sentence postjudgment. *State v. Murray*, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003) (citing *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)). This contention also misses the mark. Mr. Jahr is correct that a trial court has no *inherent* authority to modify a sentence postjudgment. But the trial court here did not

purport to exercise its inherent authority. It properly purported to correct an error of law in Mr. Jahr's sentence, a process explicitly contemplated by statute and court rule. *See* RCW 9.94A.585(7); RAP 16.18(b); CrR 7.8(b); *see also State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (noting that while trial courts have "no *inherent* authority" to modify a sentence postjudgment, courts do have "limited *statutory* authority" to do so (emphasis added)).

Mr. Jahr also contends his original sentence was not erroneous in the first place, because the trial court had discretion to impose an exceptional sentence excluding community custody. *See In re Postsentence Review of Smith*, 139 Wn. App. 600, 603, 161 P.3d 483 (2007) ("[T]rial courts may impose exceptional terms of community custody."); *see also State v. Hudnall*, 116 Wn. App. 190, 197, 64 P.3d 687 (2003) ("[W]hen a statute authorizes community custody, trial courts may impose community custody terms longer or shorter than the amount set by statute as long as the overall sentence does not exceed the statutory maximum."). This argument is unavailing.

Mr. Jahr is correct that trial courts may sometimes impose a term of community custody that deviates from the duration prescribed by statute. But here, the trial court did not impose an exceptionally short or long term of community custody. Rather, it imposed no community custody at all, ignoring the legislature's clear mandate.

See RCW 9.94A.701(3)(a) ("A court *shall* . . . sentence an offender to community custody . . . ."). Furthermore, the court's decision to forego community custody was not based on the desire to impose an exceptional sentence, it was grounded in a mistaken understanding of the law. This is precisely the type of scenario that the court was permitted to remedy under CrR 7.8.

CONCLUSION

The order amending judgment and sentence is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

APPENDIX B

FILED
AUGUST 17, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 38853-1-III
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
BRANDON JAMES JAHR,	)	
	)	
Appellant.	)	

THE COURT has considered appellant Brandon Jahr's motion for reconsideration of this court's July 13, 2023, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Fearing and Lawrence-Berrey

FOR THE COURT:

George Fearing

GEORGE B. FEARING
Chief Judge

NIELSEN KOCH & GRANNIS P.L.L.C.

September 13, 2023 - 2:55 PM

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