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Court of Appeals  
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State of Washington  
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NO. 50329-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TODD ROGERS,

Appellant.

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

The Honorable Stephanie Arends, Judge

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BRIEF OF APPELLANT

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CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant a resentencing hearing and instead entering a *nunc pro tunc* order to correct appellant's judgment and sentence. CP 49-50.

Issue Pertaining to Assignment of Error

Appellant filed a CrR 7.8 motion asserting his judgment and sentence was facially invalid because the combined terms of the standard range sentence, firearm enhancement and community custody for his second degree manslaughter conviction exceeded the statutory ten-year maximum. The prosecution agreed, and a hearing was held as a result. When the error in the original judgment and sentence was the result of judicial error instead of a mere clerical mistake, did the trial court err in entering a *nunc pro tunc* order modifying the judgment and sentence to the original date of sentencing when judicial errors can never be corrected *nunc pro tunc*, but instead require a formal resentencing?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural History

In June 2006, the Pierce County Prosecutor charged appellant Todd Rogers with first degree premeditated murder, first degree unlawful possession of a firearm, and second degree intentional murder or, in the alternative, second degree felony murder predicated on second degree assault. CP 79-81. Rogers pleaded guilty to the firearm possession charge, and took the other two charges to trial, where he presented a self-defense/justifiable homicide claim. CP 84-87; Rogers, Slip op at 3.

A jury convicted Rogers of premeditated first degree murder, but could not reach a verdict as to the second degree murder charge. Rogers, Slip Op. at 3. Rogers subsequently entered a Newton/Alford<sup>2</sup> plea to the lesser offense of second degree manslaughter, which included a firearm allegation as well. CP 91-98; Rogers, Slip Op at 3.

Rogers was sentenced April 20, 2007. CP 104-117. As to premeditated murder, the court imposed 416 months, an additional 60

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<sup>1</sup> A detailed description of what led to the charges is set forth in this Court's unpublished decision in State v. Rogers, 149 Wash. App. 1036 (No. 36241-4-II, Slip Op. filed March 31, 2009), cited herein as "Rogers, Slip Op at \_\_\_."

<sup>2</sup> So named because of the state and federal cases establishing the validity of these inherently ambiguous pleas. See North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).

months for the associated firearm enhancement, and 24-48 months of community custody. CP 108-09. For the unlawful firearm possession, Rogers was sentenced to 48 months. CP 108. For the second degree manslaughter, Rogers was sentenced to 89 months, an additional 36 months for the firearm enhancement, and 18-36 months of community custody. CP 108-09. All base sentences were ordered served concurrently, but the firearm enhancements were ordered to be served consecutively. CP 108-09.

Rogers' judgment and sentence was affirmed on appeal. Rogers, supra. The mandate for the direct appeal was signed on October 2, 2009, and filed October 30, 2009. CP 122-37. Roger did not challenge any aspect of his sentence on direct appeal.

On February 24, 2017, Rogers filed a pro se "Motion for Relief from Judgment CrR 7.8(b)(5)." CP 2-9. Rogers argued he was entitled to be resentenced because the original sentencing court had exceeded its authority by imposing a sentence for his second degree manslaughter conviction that exceeds the statutory maximum. CP 8. The trial court directed the prosecution to file a response by March 17, 2017. CP 10-11.

Instead, the prosecution sent the court and Rogers a letter dated March 17, 2017, in which it concedes the manslaughter sentence imposed

in unlawful. CP 15. The prosecution also suggested Rogers merely appear by phone for the correction process. Id.

Rogers objected to the prosecution's letter, particularly the part about him only appearing by phone, noting he had a right to be present at resentencing, and to counsel. CP 13-14. The trial court entered an order on April 3, 2017, for Rogers to be transferred from the Department of Corrections so that he could attend the hearing scheduled for April 28, 2017, before the Honorable Stephanie Arends (the trial judge, Honorable Frederick W. Fleming, is deceased). CP 18-21; RP<sup>3</sup> 4.

At the April 28<sup>th</sup> hearing, the prosecution asked the court to impose the original 89-month sentence Judge Fleming imposed for the second degree manslaughter conviction, reduce the firearm enhancement from 36 to 31 months, and eliminate all associated community custody, which would be a sentence within the 120-month statutory maximum. RP 4. Without defense objection, the trial court imposes the sentence recommended by the prosecution. RP 5-6.

The prosecution then informed for the court that it had received a motion from Rogers noting the original sentencing court had failed to assess his ability to pay before imposing \$2800 in LFOs. RP 6-7; see CP

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<sup>3</sup> There is a single volume of verbatim report of proceedings referenced as "RP."

22-26 (pro se “Motion to Vacate Sentence (LFO’s[sic]) CrR 7.8”). The prosecution claimed consideration of LFOs was not before the court at the hearing and urged the court to transfer Rogers’ motion to this Court as a personal restraint petition. RP 7. In response, defense counsel noted Rogers had cited cases that hold a resentencing is required if the prior sentence imposed exceeded the court’s sentencing authority, and argued he was correct and therefore should be able to challenge the LFOs now. RP 8-9.

The court rejected defense counsel’s argument and instead entered an order transferring the motion to this Court as a personal restraint petition on the basis that the issue raised is “time-barred under RCW 10.73.090.” CP 51-52.

Rogers submitted another pro se motion at the April 28<sup>th</sup> hearing, asking for the opportunity to raise a claim he was denied his right to a public trial. CP 33-45. Rogers argued that because the sentencing judge erred by imposing an unauthorized sentence, he was entitled to resentencing, at which he should be allowed to challenge the LFOs imposed. RP 13-14.

The court disagreed, stating it was correcting the judgment and sentence “*nunc pro tunc* . . . back to 2007.” RP 14. The court then entered such an order, from which Rogers appeals. CP 49-50, 55.

C. ARGUMENT

REMAND IS REQUIRED FOR RESENTENCING BECAUSE THE ORIGINAL SENTENCE EXCEEDED THE TRIAL COURT'S SENTENCING AUTHORITY.

Judge Arend failed to recognize what procedure was required to properly address Rogers' "Motion for Relief from Judgment CrR 7.8(b)(5)" in light of the prosecution's concession of error, and what led to that error. CP 2-9, 15. When properly assessed, it is clear Rogers was entitled to a resentencing hearing because the original sentencing court imposed a legally erroneous sentence by exceeding the statutory maximum for the offense. CP 8. This was not a scrivener's or clerical error, but instead a violation of the original sentencing judge's sentencing authority. Under such circumstances, a *nunc pro tunc* order is inappropriate and instead requires resentencing.

First, the court erred in treating the issue before it as a mere "correction" of a "scrivener's" or "clerical" error. Under CrR 7.8(a), a court has the authority to correct an erroneous sentence even after a direct appeal where that error is "clerical" and arises from "oversight or omission." See State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997); see State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000). But an error is not subject to such "correction" if it is "judicial," rather than "clerical." See State v. Smissaert, 103 Wn.2d 636, 640-41, 694 P.2d

654 (1985). Instead, where there is judicial error, the court's amendment of a judgment and sentence to correct that error is considered substantive, not clerical and amounts to a resentencing. Id.

To determine whether an error is "clerical" or "judicial," this Court applies the test used in determining the same issue under CR 60(a), the civil rule governing amendment of judgments. State v. Rooth, 129 Wn. App. 761, 770-71, 121 P.3d 755 (2005). Under that rule, the question is "whether the judgment, as amended, embodies the trial court's intention," as expressed in the original record. Presidential Estates Apartment Associates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If so, as this Court noted in Rooth, "then the amended judgment merely corrects the language to reflect the court's intention or adds the language the court inadvertently omitted." Rooth, 129 Wn. App. at 770; see also State v. Hendrickson, 165 Wn.2d 474, 198 P.3d 1029, cert. denied, 557 U.S. 940, 129 S. Ct. 2873, 174 L. Ed. 2d 585 (2009) ("where the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting," it is a clerical error which may be corrected *nunc pro tunc*). If not, then the error is "judicial" and not subject to "correction" under CrR 7.8. See State v. Snapp, 119 Wn. App. 614, 626, 82 P.3d 252, review denied, 152 Wn.2d 1028 (2004). Instead, the court engages in substantive resentencing when

it “corrects” a judicial error. See Smissaert, 103 Wn.2d at 640. Put another way, regardless of whether it is later deemed in error, an intentional act” of the trial court is not “clerical” and cannot be corrected as such. State v. Klump, 80 Wn. App. 391, 396, 909 P.2d 317 (1996).

Thus, in Snapp, where the sentencing court specifically discussed the need to impose a treatment condition and a no contact order but simply neglected to include those orders in the judgment and sentence, those omissions were “clerical” errors which could be corrected by the court under CrR 7.8(a). 119 Wn. App. at 626. In contrast, where the sentencing court sentenced the defendant based upon verdicts which had a clerical error in them and the record showed that the court intended to enter the sentence even though that sentence was later found to be in error, that was not “clerical error” but instead “judicial” error. Rooth, 129 Wn. App. at 71. Because “[n]othing in the record” indicated that the court had intended to enter a different order than the one it had entered, the error was not “clerical” but judicial. Id. In short, as this Court noted in Rooth, “an intentional act of the court, even if in error, cannot be corrected” under CrR 7.8. Rooth, 129 Wn. App. at 770-71, quoting, Wilson v. Henkle, 45 Wn. App. 162, 167, 724 P.2d 1069 (1986).

Here, the judgment and sentence error identified by Rogers’ motion was not “clerical,” but instead “judicial.” At the original

sentencing, the trial court imposed the sentence contemplated by the parties in the plea agreement; 125 months of incarceration, followed by 18-36 months of community custody. CP 94 (plea statement to second degree manslaughter); CP 108-09 (judgment and sentence). But as both the plea statement and judgment and sentence correctly indicate, the statutory maximum sentence for second degree manslaughter, a Class B felony, is 10 years (120 months). CP 91-92, 106; RCW 9A.20.021(b); RCW 9A.32.070(2).

A trial court may only impose a sentence that is authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). "When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." Id. at 522.

The court lacked statutory authority to impose a combined sentence of confinement and community custody that exceeded the statutory maximum. Because original sentencing court imposed just such a sentence --143-161 months for Rogers' manslaughter conviction-- it imposed a sentence in excess of its authority. This constitutes "judicial error," so there should have been a resentencing hearing rather than the

mere entry of a *nunc pro tunc* order. Smisaert, 103 Wn.2d at 640-41.

This Court should therefore remand of resentencing.

D. CONCLUSION

For the reasons stated, this Court should reverse and remand for resentencing.

DATED this 2<sup>nd</sup> day of February, 2018.

Respectfully submitted,  
NIELSEN, BROMAN & KOCH, PLLC



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CHRISTOPHER H. GIBSON  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

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