

FILED  
Court of Appeals  
Division II  
State of Washington  
3/28/2018 10:39 AM  
NO. 50329-8

---

---

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TODD DWAYNE ROGERS, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

No. 06-1-02460-7

---

**Brief of Respondent**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Did the court properly enter a *nunc pro tunc* order correcting defendant's Judgment and Sentence when the original Judgment and Sentence contained a clerical error inaccurately reflecting the trial court's intention? ..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 5

    1. THE COURT PROPERLY ENTERED A *NUNC PRO TUNC* ORDER CORRECTING DEFENDANT'S JUDGMENT AND SENTENCE BECAUSE THE ORIGINAL JUDGMENT AND SENTENCE CONTAINED A CLERICAL ERROR INACCURATELY REFLECTING THE TRIAL COURT'S INTENTION..... 5

D. CONCLUSION..... 10

## Table of Authorities

### State Cases

<i>In re Marriage of Getz</i> , 57 Wn. App. 602, 604, 789 P.2d 331 (1990).....	6
<i>Presidential Estates Apartment Assocs. v. Barrett</i> , 129 Wn.2d 320, 326, 917 P.2d 100 (1996).....	5
<i>State v. Hendrickson</i> , 165 Wn.2d 474, 479, 198 P.3d 1029 (2009).....	5, 6
<i>State v. Morales</i> , 196 Wn. App. 106, 117, 383 P.3d 539 (2016) .....	6
<i>State v. Rooth</i> , 128 Wn. App. 761, 121 P.3d 755 (2005).....	6, 8, 9
<i>State v. Snapp</i> , 119 Wn. App. 614, 626, 82 P.3d 252 (2004) .....	5, 7, 8

### Statutes

RCW 9A.20.021(1)(b) .....	9
---------------------------	---

### Rules and Regulations

CR 60(a).....	5
CrR 4.7(d) .....	4
CrR 7.8.....	5
CrR 7.8(b)(5).....	2, 4

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly enter a *nunc pro tunc* order correcting defendant's Judgment and Sentence when the original Judgment and Sentence contained a clerical error inaccurately reflecting the trial court's intention?

B. STATEMENT OF THE CASE.

On June 2, 2006, the State charged Todd Dwayne Rogers, hereinafter "defendant," with one count of first degree premeditated murder while armed with a firearm, one count of second degree murder while armed with a firearm, and one count of first degree unlawful possession of a firearm. CP 79-81. Defendant pleaded guilty to unlawful possession of a firearm and took the other two counts to trial. *State v. Rogers*, 149 Wn. App. 1036 \*3.<sup>1</sup> A jury convicted defendant of premeditated first degree murder but failed to reach a verdict on second degree murder. *Id.* Defendant subsequently pleaded guilty to second degree manslaughter. *Id.*

---

<sup>1</sup> Both parties rely on the facts set forth in the unpublished opinion for this case. The appellate court cause number for the direct appeal is 36241-4.

Defendant was sentenced on April 20, 2007. CP 104-117. As to the first degree premeditated murder count, the court imposed 416 months confinement, 60 additional months for the firearm enhancement, and 24-48 months of community custody. *Id.* As to the second degree manslaughter count, the court sentenced defendant to 89 months confinement, 36 additional months for the firearm enhancement, and 18-36 months community custody. *Id.* And as to the unlawful possession of a firearm count, the court imposed 48 months. *Id.* The court ordered defendant's sentences to be served concurrently, except for the firearm enhancements, which the court ordered to be served consecutively. *Id.* Defendant's judgment and sentence was affirmed on appeal. **Rogers**, 149 Wn. App. 1036.

On February 24, 2017, defendant filed a motion for relief from judgment under CrR 7.8(b)(5). CP 2-9. Defendant argued he was entitled to a "resentencing hearing" because his sentence for the second degree manslaughter conviction exceeded the statutory maximum. *Id.* The State agreed an error was made on defendant's sentencing paperwork and requested a hearing on the matter. CP 13-16.

The hearing was held on April 28, 2017, before the Honorable Stephanie Arend. 04/28/17 RP 1.<sup>2</sup> The trial judge, Honorable Fredrick W. Fleming, is deceased. 04/28/17 RP 4. The State proposed a motion and order correcting the Judgment and Sentence as to count II, second degree manslaughter. *Id.* The proposed order reduced the firearm enhancement from 36 months to 31 months, struck the 18-36 months of community custody, and kept the 89 months confinement the same for a total of 120 months. *Id.* Defendant agreed with the State's calculation as being in compliance with the statutory maximum. RP 5. The court entered an order correcting the judgement and sentence as proposed by the State *nunc pro tunc*. CP 51-52.

Defendant also filed a motion regarding the trial court's failure to consider his ability to pay when imposing legal financial obligations. RP 6-7. The court determined the issue was time-barred and transferred it to the Court of Appeals, Division II, to be considered as a personal restraint petition. CP 51-52.

---

<sup>2</sup> The Verbatim Report of Proceedings are contained in two folders. The trial transcripts are contained under the Court of Appeals Cause No. 36241-4-II. The transcripts from the hearing to correct defendant's judgment and sentence are contained under Court of Appeals Cause No. 50329-8-II. All transcripts contain the same Superior Court Cause No. 06-1-02460-7. The Verbatim Report of Proceedings (RP) are referred to by date and page number.

At the hearing, defendant requested to be heard on the record. RP 11. Defendant requested to file a CrR 4.7(d) motion ordering the State to provide defendant a transcript of this hearing, a CrR 7.8(b)(5) motion for relief from judgment, and a declaration in support of his CrR 7.8(b)(5) motion. *Id.* Defendant asked the court to make a ruling on defendant's motions. RP 13. The court responded it would look at the motions, and if it determined they were time-barred, they would be transferred to the Court of Appeals as a personal restraint petition. *Id.*

Defendant responded that the "one-year time bar begins anew with the entry of the post-appeal Judgment and Sentence ... petitioner may challenge any error made by the trial court within one year from the date the judge's decision was imposed." RP 13-14. The court agreed on the law but stated "I'm not your trial court. Judge Fleming was your trial court. This case was tried in 2007." RP 14. The court explained that the order correcting defendant's Judgment and Sentence does not affect the original date the Judgment and Sentence was entered in 2007. *Id.* The order was entered *nunc pro tunc*. *Id.* Thus, the time bar did not begin anew with the court's entry of the corrected Judgment and Sentence. Defendant now appeals the court's order, arguing he is entitled to a full resentencing hearing. Brief of Appellant at 6.

C. ARGUMENT.

1. THE COURT PROPERLY ENTERED A *NUNC PRO TUNC* ORDER CORRECTING DEFENDANT'S JUDGMENT AND SENTENCE BECAUSE THE ORIGINAL JUDGMENT AND SENTENCE CONTAINED A CLERICAL ERROR INACCURATELY REFLECTING THE TRIAL COURT'S INTENTION.

Under CrR 7.8, “[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” A *nunc pro tunc* order is generally appropriate to correct ministerial or clerical errors, but not judicial errors. *State v. Hendrickson*, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009). The same test is used to determine whether a clerical error exists under CrR 7.8 as is used to determine a clerical error under CR 60(a). *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252 (2004).

“In deciding whether an error is ‘judicial’ or ‘clerical,’ a reviewing court must ask itself whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial.” *Hendrickson*, 165 Wn.2d at 479 (citing *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). “If it does, then the amended judgment merely corrects the language to reflect the court’s intention or

adds the language the court inadvertently omitted. If it does not, then the error is judicial and the court cannot amend the judgment and sentence.” *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005).

A judicial error is an error that involves an intentional act of the court. *In re Marriage of Getz*, 57 Wn. App. 602, 604, 789 P.2d 331 (1990). On the other hand, clerical errors are those that do not embody the intention of the trial court as expressed in the record. *State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539 (2016). “These errors allow for amended judgments to correct language that did not correctly convey the court’s intention[.]” *Id.*

“A trial court misuses its *nunc pro tunc* power and abuses its discretion when it uses such an order to change its mind or rectify a mistake of law. But 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, a *nunc pro tunc* order stands as a means of translating the court’s intention into an order.” *Hendrickson*, 165 Wn.2d at 479.

The trial court here intended to sentence, and believed it was sentencing, defendant to a statutory maximum sentence. This was demonstrated at defendant’s original sentencing hearing, where the trial court stated:

I am going to sentence you in Count I to the high end which is the 416 months, plus the 60 months for the firearm, plus the 36 months in Count II that have to run consecutive, for a total of 400 -- 512 months, **which is the highest end and the maximum**; Counts II and III will run consecutive, concurrent, concurrent with each other and with Count I.

04/20/07 RP 1572 (emphasis added). The court also advised defendant of his right to appeal his sentence if it was outside the standard range.

04/20/07 RP 1574-75. The record shows that the trial court intended to sentence defendant to the statutory maximum. Although the trial court erroneously sentenced defendant above the statutory maximum, it did not do so intentionally. Thus, the error was not judicial but rather clerical, based on a miscalculation of the number of months needed to reach the statutory maximum. The court corrected defendant's judgment and sentence to reflect its original intention of sentencing defendant to the statutory maximum.

Defendant attempts to distinguish this case from *State v. Snapp*, 119 Wn. App. 614, 82 P.3d 252 (2004), where the sentencing court discussed, on the record, its intent to impose a treatment condition and no-contact order but neglected to do so in the judgment and sentence. The court in *Snapp* held that "[b]ecause the record establishes the court's original intention to include this provision, its omission was a clerical error and the trial court had the authority to correct the judgment and

sentence document to reflect its original intention.” *Id.* at 627. Here, the sentencing court specifically stated, on the record, its intent to sentence defendant to the statutory maximum. 04/20/07 RP 1572. But by a mere miscalculation of the number of months needed to reach the statutory maximum, the sentencing court erroneously sentenced defendant above it. CP 102-117. By amending the judgment and sentence to accurately reflect the sentence the trial court intended to impose, the court properly corrected defendant’s judgment and sentence *nunc pro tunc*.

This case is not like *State v. Rooth*, where the sentencing court intentionally sentenced defendant to an erroneous sentence, and nothing in the record indicated that it intended to do otherwise. 128 Wn. App. 761, 121 P.3d 755 (2005). The trial court there sentenced defendant according to the jury’s verdicts. *Id.* at 771. The State thereafter alleged that the verdicts were incorrect because of a clerical error. *Id.* However, “[n]othing in the record indicate[d] that the trial court intended to sentence defendant in accord with the information.” *Id.* Rather, the court intentionally sentenced defendant in accordance with the erroneous verdicts. *Id.* Thus, because the sentence the court imposed in the judgment mirrored its stated intent at the sentencing hearing, the error in *Rooth* was judicial and not clerical. *Id.*

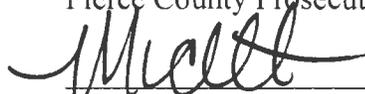
But the record here shows that the trial court intended to impose a sentence inconsistent with the one it imposed in the judgment and sentence. The trial court intended to sentence defendant to the statutory maximum. 04/20/07 RP 1572. The statutory maximum for second degree manslaughter is 120 months. RCW 9A.20.021(1)(b). However, the trial court sentenced defendant to a total of 143-161 months. CP 102-117. This sentence included 89 months confinement, an additional 36 months for the firearm enhancement, and 18-36 months community custody. *Id.* The trial court neglected to assess the total number of months imposed to determine whether the sentence complied with the statutory maximum of 120 months. The court later corrected the judgment and sentence by reducing the firearm enhancement to 31 months and eliminating the community custody provision. CP 51-52. Defendant's corrected sentence now embodies the trial court's original intention of sentencing defendant to the statutory maximum of 120 months for second degree manslaughter. Thus, by amending the judgment and sentence to reflect the trial court's intention, the court did not abuse its discretion. *Rooth*, 129 Wn. App. at 770.

D. CONCLUSION.

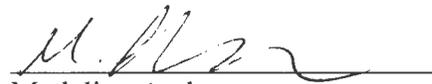
Because the court properly amended defendant's judgment and sentence to accurately reflect the trial court's intention, the court did not abuse its discretion by entering the order *nunc pro tunc*. The State respectfully requests this Court affirm defendant's corrected judgment and sentence.

DATED: March 27, 2018.

MARK LINDQUIST  
Pierce County Prosecuting Attorney



MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724



Madeline Anderson  
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.28.18 Theresa Kar  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**March 28, 2018 - 10:39 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50329-8  
**Appellate Court Case Title:** State of Washington, Respondent v Todd Dwayne Rogers, Appellant  
**Superior Court Case Number:** 06-1-02460-7

**The following documents have been uploaded:**

- 503298\_Briefs\_20180328103808D2031374\_4244.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Rogers Response Brief.pdf*

**A copy of the uploaded files will be sent to:**

- Sloanej@nwattorney.net
- nielsene@nwattorney.net

**Comments:**

---

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

**Filing on Behalf of:** Michelle Hyer - Email: PCpatcecf@co.pierce.wa.us (Alternate Email: )

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7400

**Note: The Filing Id is 20180328103808D2031374**