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Court of Appeals
Division II
State of Washington
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NO. 50500-2-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM BRYAN,

Appellant.

RESPONDENT'S BRIEF

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Representing Respondent**

**HALL OF JUSTICE
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TABLE OF CONTENTS

	PAGE
I. ISSUE	1
II. SHORT ANSWER.....	1
III. STATEMENT OF FACTS.....	1
IV. ARGUMENT	2
A. THE TRIAL COURT PROPELY CONDUCTED A RESENTENCING HEARING.	2
V. CONCLUSION	5

TABLE OF AUTHORITIES

	Page
Cases	
<i>Brooks v. Rhay</i> , 92 Wn.2d 876, 602 P.2d 356, 356 (1979)	3
<i>Dill v. Cranor</i> , 39 Wn.2d 444, 235 P.2d 1006 (1951)	4
<i>In re Pers. Restraint of Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	3
<i>In re Pers. Restraint of Smalls</i> , 182 Wn. App. 381, 335 P.3d 949, 954 (2014).....	3
<i>In re Pers. Restraint of Snively</i> , 180 Wn.2d 28, 320 P.3d 1107 (2014).....	3
<i>State v. Conover</i> , 183 Wn.2d 706, 355 P.3d 1093 (2015)	2, 4
<i>State v. Pringle</i> , 83 Wn.2d 188, 517 P.2d 192 (1973)	4
Statutes	
RCW 10.73.090, .100, .130, and .140.....	3
Rules	
CrR 7.8(b)	3

I. ISSUE

1. Did the trial court err when it conducted a full resentencing hearing?

II. SHORT ANSWER

1. No. The trial court properly conducted a full resentencing hearing.

III. STATEMENT OF FACTS

On March 19, 2015, the Appellant entered pleas of guilty to two counts of Delivery of a Controlled Substance with School Bus Stop Enhancement, one count of Delivery of a Controlled Substance, and two counts of Possession of a Controlled Substance with Intent to Deliver.¹ RP 4-9. The State requested a sentence of 120 months. RP 10. Believing that the two school bus stop enhancements were required to run consecutively, the State's requested sentence for counts I and II had a base sentence of 72 months and two 24 month enhancements. RP 10; 13. The Appellant required a Prison DOSA sentence. RP 16.

Prior to imposing the sentence, the trial court ordered a pre-sentence investigation. RP 22. Sentencing was continued to April 23, 2015. RP 23. Agreeing with the State's rationale, the trial court imposed 72 months and two consecutive 24 months enhancements, for a total of 120 months. RP 25.

¹ Cowlitz County Superior Court cause #14-1-01338-5. The Appellant also entered a plea of guilty to once count of Possession of a Controlled Substance in a separate cause #.

On January 26, 2017, the Appellant filed a Motion to Clarify and/or Correct Judgment & Sentence. CP 26. The motion was heard on April 10, 2017. The Appellant argued that under *State v. Conover*², the trial court exceeded its authority when it imposed the two 24-month enhancements consecutively. The Appellant classified this error as a ministerial and requested the trial court simply reduce his sentence to 96 months. RP 40. The State argued that a full resentencing hearing was required. RP 42; 44-45. The trial court agreed with the State and concluded that a full resentencing hearing was needed. RP 45.

The Appellant's resentencing hearing occurred on May 8, 2017. The State again requested the trial court impose 120 months. RP 50. Following the *Conover* decision, the State's recommendation had a base sentence for counts I and II of 96 months and two concurrent 24-months school bus stop enhancements. RP 51. The Appellant renewed his request for a Prison DOSA. RP 51-56. The trial court imposed 120 months. RP 56-57. The Appellant then filed this appeal.

IV. ARGUMENT

A. THE TRIAL COURT PROPELY CONDUCTED A RESENTENCING HEARING.

On motion and upon such terms are as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

² 183 Wn.2d 706, 355 P.3d 1093 (2015)

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or take, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under subsection (b) does not affect the finality of the judgment or suspend its operation.

CrR 7.8(b).

“A judgment and sentence is facially invalid if the trial court lacked the authority to impose the challenged sentence.” *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014) (quoting *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136, 267 P.3d 324 (2011)). “A petitioner whose judgment and sentence is facially invalid may obtain relief by showing that this facial invalidity had a practical effect on his sentence.” *In re Pers. Restraint of Smalls*, 182 Wn. App. 381, 391, 335 P.3d 949, 954 (2014). “It has been the consistent holding of this court that the existence of an erroneous sentence requires resentencing. *Brooks v. Rhay*, 92 Wn.2d 876, 877, 602 P.2d 356, 356 (1979) (citing *Dill v. Cranor*,

39 Wn.2d 444, 235 P.2d 1006 (1951); *State v. Pringle*, 83 Wn.2d 188, 517 P.2d 192 (1973)).

In this matter, following *Conover*, the trial court exceeded its authority by imposing the two 24-months school bus stop enhancements consecutively. Thus, the sentence that was imposed was erroneous and the Appellant's judgment and sentence was facially invalid. The trial court was well within its authority to conduct a resentencing hearing to correct the invalidity.

A review of the record shows quite clearly that the trial court intended on imposing a 120-month sentence:

...I gave you a sentence that I thought was appropriate at the time based on the history you had...I thought it was appropriate, and the way I did it was the way I did it in order to get there, so I'm inclined to make the change for the 96 plus 24. So that's what I'll do. So I'm not going to change the sentence essentially. It is what it is, and then we'll just change the paperwork to match it.

RP at 56-57. The error did not lie with the sentence; rather, the manner in which the 120-month sentence was reached was error. Both of the Appellant's sentences fell within the standard ranges for his convictions. The trial court was made aware of the error in how the total number of months was calculated and corrected it at the resentencing hearing. It is illogical to conclude that a trial court is prevented from following through

with its original intentions upon being made aware of a misunderstanding of the applicable law. Therefore, the Appellant's appeal must be denied.

V. CONCLUSION

For the above stated reasons, the Appellant's appeal should be denied.

Respectfully submitted this 24 day of April, 2018.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 24th, 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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