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Court of Appeals  
Division III  
State of Washington

NO. 34886-5

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CURTIS LEE SMITH,

Appellant.

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Appeal from Walla Walla County Superior Court  
Honorable John W. Lohrmann  
No. 16-1-00167-7

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OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION

Defendant appeals the trial court's amendment of his judgment and sentence which added additional provisions to his probation that were not in the original judgment and sentence. The court found that the failure to include a certain appendix containing these provisions was a "clerical mistake" or "excusable neglect" pursuant to CrR 7.8. The court erred in doing so because if it was an error at all, it was judicial error:

(1) It was not a clerical mistake. The court's original intent as to which probation provisions to impose was clearly stated by the judge on the record, and therefore the original sentence, and not the amended sentence, embodied the court's intent. This was not an inadvertent, clerical mistake because the court intentionally and specifically ordered the provisions of his probation. It was therefore a judicial error, and as such the sentence was not subject to amendment.

(2) This Appellate Court, sitting in Division III, clearly stated in *Quintero Morelos* (infra) that a criminal judgment and sentence can "never" be amended on the basis of 'excusable neglect' if the amendment is in the State's favor. Therefore, controlling caselaw unequivocally forbid the amendment on this basis.

## II. ASSIGNMENTS OF ERROR

The sentencing court erred when it amended the defendant's judgment and sentence to include additional provisions of probation either on the basis of clerical mistake or excusable neglect. Neither of those bases are grounds for amending a sentence to include additional punishment.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the sentencing court's omission of some optional provisions of probation the State later decided it wanted to add constituted a "clerical mistake" pursuant to CrR 7.8.

2. Whether the sentencing court's omission of some optional provisions of probation constituted excusable neglect; and whether excusable neglect is ever grounds for amending a sentence to include additional punishment against a defendant.

### **IV. STATEMENT OF CASE**

Defendant Curtis Lee Smith ("Smith") pled guilty in Walla Walla County on July 12, 2016, to an amended charge of Child Molestation 1st Degree. A pre-sentence report was ordered and after its completion, Smith was sentenced on October 13, 2016. At the sentencing hearing, Smith was granted a Sexual Offender Sentencing Alternative (SOSSA) pursuant to RCW 9.94A.670.

However, a SOSSA Felony Judgment and Sentence pattern form (WPF CR 84.0400 SOSA) was not used by the court that day. Instead, the court utilized what appears to be an *ad hoc* judgment and sentence composed by the prosecutor's office.

The SOSSA statute lists a number of required provisions which were correctly included in the judgment and sentence in what the State delineated as Section 4.3. However, the final section of the SOSSA statute includes a list of *optional* additional crime-related provisions a court "may" impose. See, RCW 9.94A.670 (6). These provisions appear to have been delineated

in Section 4.3(g) of the State's sentence titled "Crime-related prohibitions and other requirements." There, it states that such conditions "are attached, in Appendix F."

The court made this mention of that fact at sentencing:

THE COURT: All right. There is a, there is a number of crime-related prohibitions. They are set forth in the appendices. Actually, I don't see a 4.2 in here.

MS. MULHERN: No. We have attached appendix F.

THE COURT: Okay. It is included in appendix F?

MS. MULHERN: Yes.

THE COURT: All right. I'll change that in the form then; it still says 4.2. All right. And I am signing the appendix F. It indicates that you will be subject to polygraph examination as directed, subject to urine testing, not to use, possess or consume alcohol, or frequent bars, taverns or liquor stores, no contact with any minors, supervised contact with your biological children -- should put sons.

MS. MULHERN: Yes, correct.

THE COURT: Because there is not going to be any contact with Mikala. Get a written substance abuse evaluation from a qualified provider, complete all treatment recommendations. You are going to have to notify your corrections officer of any romantic relationships, that sort of thing as well.

Do you understand all these conditions?

THE DEFENDANT: I do, Your Honor.

See, RP 43.

A few days later, the State discovered that their Appendix F did not contain all the *optional* provisions that the pattern form's paragraph 4.2 does. The State filed a motion asking the Court to amend the judgment and sentence, on the basis that it was merely a clerical mistake. Defense counsel

timely objected, submitting briefing that if it was an error at all, it was a judicial error and not a clerical mistake, the latter not being subject to amendment.

At the hearing on the motion, the Court made a finding that it was a clerical error and amended the judgment and sentence. Smith appealed.

## V. LAW

### A. Court Rules Related to “Mistakes”.

RULE CrR 7.8 states:

#### RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical 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. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

[...]

(5) Any other reason justifying relief from the operation of the judgment.

### B. Standard of Review in General.

A motion to vacate a judgment is the discretion of the trial court, and its decision should be overturned on appeal only if it plainly appears that it has abused that discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573

P.2d 1302 (1978). That includes motions made under CrR 7.8. *State v. Gomez–Florencio*, 88 Wn.App. 254, 258, 945 P.2d 228 (1997). A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

**C. Standard of Review Requiring Lenity to Defendant.**

CrR 7.8(b)(1) allows the court to relieve a party from a final judgment on the basis of “excusable neglect ... in obtaining a judgment or order.” A definition for excusable neglect is not provided. Whether and how a court rule is applied is a question of law, which an appellate court reviews *de novo*. *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003). Appellate courts apply standards of statutory construction to court rules and interpret them as if they were statutes. *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 146, 102 P.3d 151 (2004). If the language of a criminal rule is susceptible to more than one meaning, the rule of lenity requires that an appellate court strictly construe it against the State and in favor of the accused. *State v. Gore*, 101 Wn.2d 481, 485–86, 681 P.2d 227 (1984). The question of what constitutes excusable neglect under the rule is strictly construed against the State and in favor of the defendant. *State v. Quintero Morelos*, 133 Wn.App. 591, 596 137 P.3d 114, 117 (2006).

**D. Clerical Mistakes Versus Judicial Error.**

*Presidential Estates* is the controlling Supreme Court case on this issue:

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. *Marchel v. Bunger*, 13 Wash.App. 81, 84, 533 P.2d 406, review denied, 85 Wash.2d 1012 (1975). If the answer to that question is yes, it logically follows that the error is clerical in that the amended judgment merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment. If the answer to that question is no, however, the error is not clerical, and, therefore, must be judicial. Thus, even though a trial court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record.

[...]

We reach that conclusion because that rule allows a trial court to grant relief from judgments only for clerical mistakes. It does not permit correction of judicial errors. *In re Marriage of Stern*, 68 Wash.App. 922, 927, 846 P.2d 1387 (1993); *In re Marriage of Getz*, 57 Wash.App. 602, 604, 789 P.2d 331 (1990).

See, *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100, 103 (1996)

The analysis is generally the same for the criminal version of the rule as it is for the civil:

Washington courts have also used this distinction in interpreting CR 60's companion criminal rule, CrR 7.8(a). *State v. Snapp*, 119 Wash.App. 614, 626–27, 82 P.3d 252 (2004).

See, *State v. Hendrickson*, 165 Wn.2d 474, 479 198 P.3d 1029, 1032 (2009).

#### **Example of clerical mistakes:**

Failure to include a condition of treatment in a judgment was a clerical error because “the trial court reviewed the clerk's minutes for June 22, 2001, and found that the treatment program was intended to be included.” *Snapp* at 259 and 627

A sentencing court's failure to cite to the correct statute in a judgment and sentence, but finding of all of the necessary grounds for the crime on the record, was a clerical error. *State v. C.E.J.*, 147 Wash.App. 1041 (Not reported in P.3d) (2008)

**Examples of judicial errors:**

A trial court committed judicial error because it did not 'unintentionally fail' to include a provision in a judgment, because "at the time the trial court issued its original judgment, it was keenly aware of the importance of the issue" *Presidential* at 327 and 104.

Striking DOSA language from amended judgment and sentence was a judicial error and not clerical change. *State v Davis*, 160 Wash.App. 471, 248 P.3d 121 (2011)

**E. Excusable Neglect "Never" Grounds for Amending Sentences.**

This Appellate Court, sitting in Division III, ruled unequivocally that excusable neglect is never grounds for amending a judgment and sentence if that amendment is in the State's favor:

The State relies on *Gomez-Florencio* for the proposition that CrR 7.8 does not empower the court to change a sentence under any circumstances. There, we held that the excusable neglect provision in CrR 7.8(b)(1) did not authorize the court to revisit the sentence. That case is easily distinguishable. In *Gomez-Florencio*, the State was trying to increase a sentence after it belatedly discovered additional criminal history. *Gomez-Florencio*, 88 Wash.App. at 259, 945 P.2d 228. But there the excusable neglect provision was not interpreted in the State's favor. Nor will it ever be. The rule of lenity has no comparable principle in favor of the State because the State has no liberty deprivation at stake. See *In re Carson*, 84 Wash.2d 969, 973, 530 P.2d 331 (1975)

See, *Quintero Morelos* at 597.

## VI. ARGUMENT

Here, the court erred when it amended the judgment and sentence either under CrR 7.8 (a) clerical mistakes or (b) excusable neglect.

### A. Clerical Mistakes.

First, the court erred under CrR 7.8(a) because the original judgment and sentence was clearly not a clerical mistake- if error at all, it was a judicial error. The intent of the court was crystal clear – the judge stated orally on the record what provisions he was imposing against Appellant Smith (see RP 43, *supra*). There was no ambiguity in his intent. He knowingly recognized that the so-called Appendix 4.2 was not present, acknowledged that the provisions were in Appendix F, then added his own conditions. The amended judgment and sentence therefore *does not* “embody the original intent” of the court because it contains provisions different and additional than the original, either as written or as expressed orally by the court. This is the very opposite of a clerical mistake, and if it is error, it is clear judicial error. As a judicial error, the sentence originally imposed is not amendable and the court therefore erred when it clearly did so.

### B. Excusable Neglect.

Second, the court also erred under a theory of excusable neglect, CrR 7.8(b), because caselaw is clear that a judgment and sentence is never amendable under this court rule if it does so in the State’s favor.

*Quintero Morelos* above is unambiguously dispositive on this point. This appellate court was clear that excusable neglect will “never” be the

basis of amending a criminal judgment and sentence which imposes more punishment on a defendant. Here, additional provisions are contained in the amended appendix that were not there before, including the onerous requirements that he seek and maintain DOC-approved employment, and not leave Walla Walla County. Therefore, under the requirement of lenity to the defendant, no amendment can ever be made to the sentence under an excusable neglect theory. The court erred.

#### **VII. CONCLUSION**

The amended judgment and sentence should be vacated and the original judgment and sentence imposed.

Respectfully submitted this 1st day of May, 2017.

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and mailed a copy of the Defendant on May 2, 2017, as follows:

Curtis Smith  
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I declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

Dated May 1, 2017, South Bend, Washington.

/s/ Tamron Clevenger  
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