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

NO. 45306-1-II

CLALLAM COUNTY CAUSE NO. 98-1-00191-6

STATE OF WASHINGTON,

Respondent,

vs.

WILLAM CAIETTI III

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

Federal Cases

Constitutional Provisions

Statutes

Regulations and Rules

I. Counterstatement of the Issues

ISSUE ONE

When a person commits an offense while committed to a county jail or a state correctional facility, does a later reviewing court have authority to correct the oversight or omission without creating double jeopardy, even where the defendant claims an interest in finality?

II. Statement of the Case

The State accepts the statement of facts as presented by Mr. Caietti.

III. Summary of Argument

Mr. Caietti has not excepted to any findings of the trial court nor to the reviewing court's authority to proceed under CrR 7.8 (a). The reviewing court had authority to correct the omission and impose a correct sentence because the previous sentence was erroneous and invalid. Because the sentence was erroneous, Mr. Caietti has no reasonable expectation of finality.

IV. Argument

Standard of Review: A trial court's sentencing decision is reviewed *de novo. See, e.g., State v. Tili,* 248 Wn.2d 350, 358, 60 P.3d 1192 (2003) ("We review a sentencing court's calculation of an offender score *de novo.* ")

Analysis:

1. The reviewing court's findings are verities on appeal.

Mr. Caietti has not assigned error to any of the reviewing court's findings of fact. Unchallenged findings of fact will not be reviewed on appeal and will be treated as verities. *State v. Acrey,* 148 Wn.2d 728, 745, 64 P.3d 594 (2003). The remaining issue is whether the trial court's conclusions follow from the findings. *State v. Brown,* --- Wn.App. ---, 312 P.3d 1017, 1021 (2013).

2. The reviewing court utilized the correct legal process to address the omission in the 1998 judgment and sentence.

Mr. Caietti has not challenged the reviewing court's authority to address the sentencing issue pursuant to CrR 7.8 (a). CrR 7.8 (a) reads in pertinent part:

> (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.

(emphasis added). The State believes that CrR 7.8 (a) is the appropriate vehicle to modify a judgment and sentence in two

situations: First, where a clerical mistake has occurred. Second, where errors therein arise from oversight or omission. Based on the analysis the State will provide, the reviewing court utilized the appropriate process because the failure to fill in the section related to concurrent / consecutive in 1998 was a mere oversight.

3. Mr. Caietti has not obtained an interest in finality because the sentence he allegedly received (termed a concurrent sentence) was erroneous, invalid and illegal.

Mr. Caietti argues the trial court erred in imposing a correct consecutive sentence in place of an erroneous concurrent sentence, claiming he has a double jeopardy[1] interest in finality. His argument is not well founded. Mr. Caietti has no interest in finality because the sentence he received[2] is

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[1] Throughout the State's response, the term "double jeopardy" will apply to both U.S. Const., amend. V and Wn.Const. art, I, § 9.

[2] The State does not accept that he received a concurrent sentence. The check boxes in and of themselves should carry no significance because, First, RCW 9.94A.589(2) (a) (formerly 9.94A.400 (2)(a)) requires the sentences to run consecutively because the trial court correctly held that the offense occurred while was incarcerated on another offense, and, Second, RCW 9.94A.535 (formerly RCW 9.94A.390) requires the sentencing court to provide "substantial and compelling reasons" to depart from the guidelines. Creation of a concurrent sentence required the sentencing court to set out a statement of reasons for a downward exception to the statutory penalty, which the court did not do. At most, Mr. Caietti's judgment and sentence was simply unclear that it was a consecutive sentence.

erroneous, i.e., not valid.

Mr. Caietti does not argue that he should have received a concurrent sentence when he was sentenced in 1998 to seventy four months (CP 98) for Assault in the Second Degree (CP 94) while incarcerated in a state correctional facility (CP 95). In fact, no claim has been made at either the trial court or the appellate level that Mr. Caietti was entitled to receive a sentence concurrent with the Spokane conviction. Because he has not argued his concurrent sentence was correct, the argument is waived. *State v. Johnson,* --- Wn.2d ---, 315 P.3d 1090, 1101 (2014). Mr. Caietti's sole contention is that resentencing him created double jeopardy because he had a reasonable expectation of finality in his illegal sentence. Mr. Caeitti points to 1998 incomplete judgment and sentence, which fails to state the sentence is consecutive to the Spokane conviction (CP 98). He also points out that, by his calculations he has already served the concurrent sentence, and argues he is entitled to repose. Mr. Caietti cites mainly to *State v. Hardesty,*

129 Wn.2d 303, 915 P.2d 1080 (1996) for support. *Hardesty* does state at page 315 that double jeopardy analysis does not focus on the legality or illegality of the sentence under the sentencing statute, but instead on the defendant's expectation of finality. However, the court continues that a person who obtains a sentence reviewable pursuant to CrR 7.8 and subject to correction has no reasonable expectation of finality. His reliance on *Hardesty* is misplaced because *Hardesty* held "[a] court has jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires, under CrR 7.8." *State v. Hardesty,* 129 Wn.2d at 315, 915 P.2d 1080.

The Supreme Court's decision in *Hardesty* addressed a decision from Division III, Court of Appeals[3], which the Supreme Court interpreted to uphold a facially valid sentence "even where there is fraud or perjury." *State v. Hardesty,* 129 Wn.2d at 309, 915 P.2d 1080. The Supreme Court vacated the

[3] *State v. Hardesty,* 78 Wn.App. 593, 599-600, 897 P.2d 1282 (1995), which held that a defendant who has completed a sentence valid on its face has an interest in finality, even when he "provides false information to obtain favorable treatment,..."

Court of Appeals' decision after reviewing state and federal decisions discussing finality as it applies to sentencing and double jeopardy. It addressed Mr. Hardesty's claim of finality:

> Although Hardesty served his sentence and rejoined civil society for approximately a year before the State sought to increase the sentence and return Hardesty to prison, we hold Hardesty had no expectation of finality in a sentence obtained by fraud some two years earlier. The State may proceed under CrR 7.8 to seek vacation of a judgment procured by fraud.

State v. Hardesty, 129 Wn.2d at 316, 915 P.2d 1080. It then determined that the trial court erred when it resentenced Mr. Hardesty without fully developing whether Mr. Hardesty had defrauded the trial court. *State v. Hardesty,* 129 Wn.2d at 319, 915 P.2d 1080. In short, *State v. Hardesty, supra,* did not create an exception permitting a defendant to avoid resentencing because he or she had completed the sentence. The court clearly posited that CrR 7.8 permitted a reviewing court to determine whether the prior sentence was erroneous, even if the sentence had already been served and must be increased. The Supreme Court cited to *United States v. DiFrancesco,* 449 U.S. 117, 132-36, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) to conclude "there is

no per se rule against increasing an allegedly erroneous sentence." *State v. Hardesty,* 129 Wn.2d at 310, 915 P.2d 1080.

Further, Mr. Caietti was present in court when the sentencing judge stated his sentence was to run consecutive to the Spokane conviction. He is charged with the knowledge that his sentence is incorrect and is subject to correction. *United States v. Kane,* 876 F.2d 734, 737 (9th Cir. 1989). He therefore cannot claim he is entitled to finality. *Id.* at 732. The reviewing court correctly held that:

> "The defendant was present at his own sentencing under the 1998 Clallam cause and was aware of the consecutive nature of his sentence."

In *Hardesty,* the Supreme Court reiterated prior decisions holding that the trial court had jurisdiction to resentence a person because of an invalid sentence, an "erroneously imposed" sentence, or an "erroneous and invalid sentence." *State v. Hardesty,* 129 Wn.2d at 313 and 315, 915 P.2d 1080, citing to *State v. Pascal,* 108 Wn.2d 125, 736 P.2d 1065 (1987), *State v. Freitag,* 127 Wn.2d 141, 896 P.2d 1254, *amended by* --

- Wn.2d ---, 905 P.2d 355 (1995), *State v. Pringle,* 83 Wn.2d 188, 517 P.2d 192 (1973), and *State ex rel. Sharf v. Municipal Ct.,* 56 Wn.2d 589, 354 P.2d 692 (1960). Review of these decisions and the federal decisions cited therein will show the reviewing court was well within its authority to resentence Mr. Caietti to a consecutive sentence.

In *State v. Pascal, supra,* the court reviewed decisions of the United States Supreme Court regarding resentencing. The court discussed *United States v. DiFrancesco,* 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), which essentially held that the guarantee against double jeopardy did not protect against resentencing except where the defendant – and society – had a strong interest in finality. *State v. Pascal,* 108 Wn.2d 132-33, 736 P.2d 1065. *Pascal* also cited to *Bozza v. United States,* 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947) to hold "a defendant may have his or her sentence increased if the original sentence was erroneous and hence, invalid." *State v. Pascal,* 108 Wn.2d 133, 736 P.2d 1065.

Bozza v. United States, supra, upheld resentencing a defendant twice in a five hour period, first with a sentence that did not encompass the minimum necessary sentence and then later with a sentence that met the minimum. *Id.,* at 165-66, 67 S.Ct. 645. The United States Supreme Court very succinctly pointed out that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner" and "[i]f this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all." *Id.,* at 166, 67 S.Ct. 645. Although *DiFrancesco* later determined that a defendant may develop an interest in the finality of a sentence, the Washington State Supreme Court held that a defendant can never develop an interest in finality of an erroneous sentence, but only "a correct judgment and sentence that was valid at the time it was pronounced." *State v. Pascal,* 108 Wn.2d at 134, 736 P.2d 1065.

State v. Freitag, 127 Wn.2d 141, 896 P.2d 1254 (1995), is important because it emphasizes a reviewing court's authority to correct a sentence that may appear valid on its face. In *Freitag,* the defendant received an exceptional sentence downward in violation of RCW 9.94A.030 (36)(a)'s mandate that jail time cannot be converted to community service for violent offenses. *Id,* at 144, n. 1, 896 P.2d 1254. Like the present case, the sentencing court failed to impose a sentence required under the SRA. The Supreme Court reversed and remanded for further proceedings because the exceptional sentence did not comply with statutory standards.

This case is important to the analysis because it shows the authority of a court to review and correct a sentence that violates the SRA. The sentence in Mr. Caietti's case did not comply in all aspects with the SRA because the form did not indicate the sentences were consecutive. In *Freitag,* the downward sentence was not correct and the Supreme Court reversed it, even after it had been affirmed by the Court of

Appeals. *State v. Freitag,* 78 Wn.App. 133, 873 P.2d 548 (1994). The reviewing court in Mr. Caietti's case had authority to modify the judgment and sentence. More importantly, the reviewing court had an obligation to modify it.

A further reason exists to apply the reasoning of *Freitag* to the present case. In *Freitag,* the sentence included two different problems: First, the sentence violated 9.94A.030 (36)(a)'s mandate that jail time cannot be converted to community service for violent offenses. Second, the sentence included downward exceptions not accepted by the Supreme Court. In the present case, the 1998 sentence was not valid because it failed to meet the requirements of RCW 9.94A.400 (2)(a). The law required a consecutive sentence because the sentencing court found "[t]he offense in Count(s) 1 was committed in a county jail or state correctional facility" (CP 95). Also, as explained in footnote 1, a concurrent sentence under these facts would require an explanation of the downward sentence but the sentencing court did not create a statement of

reasons justifying a downward sentence. On the other hand, the language in the 1998 judgment and sentence stating that "[t]he offense in Count(s) 1 was committed in a county jail or state correctional facility" (CP 95), provides clearly that the court intended to impose a consecutive sentence.

State v. Pringle, 83 Wn.2d 188, 517 P.2d 192 (1973), is important because it distinguishes between a valid sentence and an erroneous sentence, and the authority of the reviewing court to correct the judgment and sentence. The court stated that no double jeopardy issue existed because "[w]e are not remanding this case to the trial court for the purpose of increasing a Valid sentence, but rather we are sending the defendant back for the correction of an Erroneous and invalid sentence." *Id.,* 83 Wn.2d at 194, 517 P.2d 192. As applied to this case, *Pringle* shows why Mr. Caietti's reliance on *State v. Hardesty, supra,* is misplaced: to create an expectation of finality and therefore create a double jeopardy issue, the sentence must be Valid. An Erroneous sentence is not protected by double jeopardy.

State ex rel. Sharf v. Municipal Ct., 56 Wn.2d 589, 354 P.2d 692 (1960) only holds that a court loses jurisdiction over a defendant once the defendant complies with a sentence that is not erroneous. The analysis in the case is puzzling, given that United States Supreme Court decisions had clearly established that a sentencing court does not lose jurisdiction over a defendant if the judgment and sentence is erroneous. *See, e.g., Bozza v. United States, supra.* The most that can be said for the decision is "fulfillment of a *correct* sentence divest[s] the court of the power to impose a greater sentence." *State v. Hardesty,* 129 Wn.2d at 315, 915 P.2d 1080.

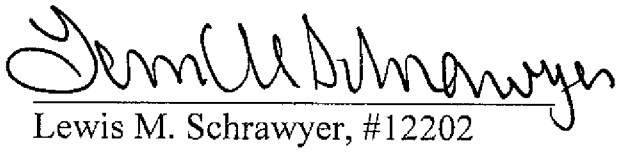
CONCLUSION

Although it may appear harsh because Mr. Caietti expected to be released in less than eight years, Mr. Caietti merely received the sentence he should have received in 1998. The reviewing court did not err when it modified his judgment and sentence to correct the omission made in 1998. Mr. Caetti now has a valid sentence. The State requests that the appellate

court affirm the reviewing court's modification to the 1998 judgment and sentence.

Respectfully submitted this February 7, 2014.

WILLIAM B. PAYNE, Prosecutor



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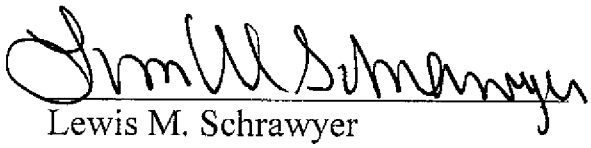

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