

No. 40310-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

TROY WILLIAMS,

Appellant.

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STATE OF WASHINGTON
BY *KRS*
DEPUTY

COURT OF APPEALS
WASHINGTON

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

The Honorable Rosanne Buckner, Judge

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A. ASSIGNMENTS OF ERROR

1. The superior court erred in treating its amendment of a judgment and sentence more than 10 years after it was first entered as a “correction” of a scrivener’s error when the amendment was instead a substantive change to the original sentence.

2. The superior court erred in imposing an exceptional sentence for the first time more than 10 years after it determined that a standard range sentence was proper.

3. The superior court violated former RCW 9.94A.400 (1998) and former RCW 9.94A.120(17) (1998) in imposing the new exceptional sentence.

4. The prosecutor violated the plea agreement and appellant Troy Williams is entitled to his choice of remedy.

5. Williams was deprived of his Article I, § 22, and Sixth Amendment rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In 1999, the sentencing court imposed a standard range sentence, ordering it to run concurrently with the sentence imposed in another case after being informed that the sentence could only be ordered to run consecutively if the court imposed an exceptional sentence. Later, in the other case, the court entered a conflicting order, mandating that the sentences in the two cases run consecutive to each other. In 2009, the Department of Corrections asked for clarification of the conflict. At further proceedings, the court treated the issue as simply one of “correction” of the judgment and sentence in this case. It thus amended

the judgment and sentence so that the sentences in this case and the other case were now required to run consecutively, without making any findings that any aggravating factors applied to support this new exceptional sentence.

1. A “scrivener’s error” only occurs when a trial court’s order does not accurately reflect the court’s intent as expressed when the order was originally entered. If an order reflects the court’s intent but the order is otherwise improper, that is instead a “judicial” error which is not subject to summary correction but instead must be corrected through resentencing.

In this case, at the original sentencing hearing, the court engaged in discussion about whether it was required to order the sentence to run concurrently with the sentence in the other case. After the prosecutor informed the court that it only had the authority to order the sentences to run consecutive if it imposed exceptional sentences, the court then entered the order of concurrent sentences. It also deleted a provision it had “checked” which would have ordered consecutive sentences. Later the same day, however, in the other case, it entered a conflicting order mandating that the sentences should run consecutive.

Was the “concurrent” language in the original judgment and sentence a “scrivener’s error” where the document clearly reflected the intent of the trial court at the time it was originally entered?

Did the trial court err in summarily amending the standard-range sentence without holding a full, fair resentencing?

Further, was counsel prejudicially ineffective in first asking for

time to secure the record in order to determine the court's original intent and then utterly failing to present that record to the court even though it would have shown that the error was "judicial" and thus a full resentencing was required?

2. Under former RCW 9.94A.400 (1998) and former RCW 9.94A.120(17) (1998), for the relevant offenses, the sentencing court was required to order the sentences to run concurrently unless the court found that exceptional sentences were warranted. Further, under former RCW 9.94A.390 (1998), there were specific findings the court had to make to impose an exceptional sentence and certain procedures which had to be followed. At the original sentencing for this case, the court specifically declined to impose an exceptional sentence and ordered the sentence to run concurrently. More than ten years later, the court amended the judgment and sentence so that it now ordered the sentences to run consecutively, even though the court did not make any findings that any aggravating factors applied in this case or that an exceptional sentence was warranted under this cause number.

Did the trial court err and violate former RCW 9.94A.390 (1998), former RCW 9.94A.400 (1998) and former RCW 9.94A.120 (1998) in imposing an exceptional sentence in this case even though the original sentence was within the standard range and the court made none of the required findings to support imposition of an exceptional sentence?

Was counsel again prejudicially ineffective in failing to adequately represent his client by being unprepared - and absent - for the resentencing and thus failing to raise any of these issues?

3. Williams entered Newton/Alford¹ pleas in exchange for, *inter alia*, the prosecution's promise to recommend that the sentences run concurrent, not consecutive. At the resentencing hearings, the prosecutor repeatedly advocated for consecutive sentences. Is Williams entitled to his choice of remedy for this flagrant breach of the plea agreements? Further, should new counsel be appointed in order to ensure that Williams receives the effective assistance of counsel to which he was entitled?

C. STATEMENT OF THE CASE

1. Procedural Facts

On June 8, 1998, appellant Troy Williams was charged in Pierce County under cause number 98-1-02549-4 with mutilating human remains and with two alternative counts of second-degree murder, both with deadly weapon enhancements. CP 37-39; RCW 9.94A.125, RCW 9.94A.310, RCW 9.94A.370, RCW 9A.32.050(1)(a), RCW 9A.32.050(1)(b), RCW 68.50.150.

On August 24, 1998, Williams was charged under a separate cause number, 98-1-03656-9, with two counts of intimidating a witness, one charged with a deadly weapon enhancement, as well as one count of second-degree assault, also charged with a deadly weapon enhancement. CP 1-4; RCW 9A.36.021, RCW 9A.72.110, RCW 9.94A.125, RCW 9.94A.310, RCW 9.94A.370.

On November 12, 1998, Williams entered Newton/Alford pleas in

¹So 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).

both cause numbers before the Honorable Judge Rosanne Buckner. CP 8-13, 43-48; 1RP 3-4.² For the 9-4 cause number, the charges were amended to first-degree murder and unlawful mutilation, while the 6-9 cause number was amended to second-degree assault. CP 96-100, 103. In separate hearings before Judge Buckner, both held on December 17, 1998, Williams was sentenced to serve a standard range sentence of 57 months for the 6-9 cause number, while the court imposed an exceptional sentence of 600 months for the 9-4 cause number. 2RP 1-9, 3RP 1-22; CP 14-24, 49-60, 87-92.

Williams appealed the exceptional sentence on the 9-4 cause number and, on January 19, 2001, this Court affirmed, although it agreed with Williams that several of the aggravating factors were not proper. CP 70-80.

On August 24, 2009, the Department of Corrections (DOC), requested clarification of the sentences, noting that the judgment and sentence in this case, the 6-9 cause number, indicated the sentences were to run concurrently but the judgment and sentence for the other case, the 9-4 cause number, said "consecutive." CP 81-83. After hearings before

²The verbatim report of proceedings consists of five volumes, which will be referred to as follows:

the volume containing the chronologically paginated proceedings of November 12, 1998, and December 11, 2009, as "1RP;"
the volume containing the sentencing proceedings on the assault, dated December 17, 1998, as "2RP;"
the volume containing the sentencing proceedings of December 17, 1998, on the murder cause number, as "3RP;"
the volume transferred from appeal No. 24239-7-II, containing the proceedings of February 11, 1999, as "4RP;" and
the proceedings of January 8, 2010 (mistakenly indicated on the front cover as "July 8, 2010," as "5RP."

Judge Buckner on December 11, 2009, and January 8, 2010, the judge ordered the “amendment” of the judgment and sentence under the 6-9 cause number, removing the provision for concurrent sentences and adding that the sentences were to run consecutively. CP 27-28.

Williams appealed and this pleading follows. See CP 31-34.

2. Allegations regarding the crimes

For the murder case, the 9-4 cause number, the murder was alleged to have occurred on May 30, 1998, when Williams and his brother, Christopher, beat David Wood to death. See CP 40-48. The alleged mutilation occurred five days later, when they disposed of the body by cutting it up. Id.

For the assault case, the 6-9 cause number, the assault was alleged to have occurred on August 20, 1998, with a victim named Franklin Morris. See CP 5-6, 8-13.

3. Overview of facts relevant to the issues on appeal

a. Entry of the Alford/Newton pleas

In December of 1998, when the parties appeared before Judge Buckner for entry of the pleas, the prosecutor told the court that the two cases, the assault cause number (6-9) and the murder cause number (9-4), were being disposed of at the same time in a “negotiated settlement.” 1RP 4. The prosecutor informed that judge that Williams was entering Newton/Alford pleas maintaining his innocence but accepting that there was a substantial likelihood he would be found guilty if he went to trial and was entering the pleas in order to take advantage of the prosecution’s offers for a particular “recommendation.” 1RP 5, 7.

That recommendation, which the judge herself related to Williams, was for the top of the standard range in both cases, with a consecutive term for the deadly weapon enhancement in the murder cause number. 1RP 17-18. In addition, the prosecutor agreed to recommend that the time for the 9-4 cause number and the time for the 6-8 cause number run concurrently, save for the time for the enhancement. 1RP 17-18, 21.

Specifically, for the 6-9 cause number, the assault, the court told Williams that the prosecutor's recommendation

which is by agreement or stipulation with you and your attorney to the top of standard range for this count, which is 57 months in prison. It would be concurrent with the charges of murder and mutilation of human remains.

1RP 21 (emphasis added).

In the written Statement of Defendant on Plea of Guilty for the 6-9 cause number, the second-degree assault, the parties agreed as follows:

The prosecuting attorney will make the following recommendation to the judge:

The parties stipulate to the top of the standard range for count I, 57 months. To run concurrent with charges from cause #98-1-02549-4.

CP 10. The Statement of Defendant on Plea of Guilty for the murder cause number, 9-4, provided that the parties agreed to the top of the standard range for the murder and mutilation counts, with both running concurrent and the enhancement to run consecutively. CP 43-48. There was no separate mention of the 6-9 cause number. Id.

b. Sentencing proceedings

In separate proceedings on December 17, 1998, Judge Buckner

imposed sentences in both the 6-9 and 9-4 cause numbers. 2RP 1-2.

When the parties first appeared that day, the prosecutor asked if the court wanted to handle the sentencing procedures for both cause numbers together, and the court then asked if the defense would like to proceed “first on the assault.” 2RP 1-2. Counsel agreed and then told the court that the agreed stipulation for the sentence on the case was that “Williams receive 57 months on this charge and that that would run concurrent with any time he’s serving on cause 98-1-02549-4, which is the first degree murder charge.” 2RP 3 (emphasis added). Counsel also argued that the facts relating to the assault cause number “do not support the court going beyond the agreement that’s been reached by the parties” because there were no “egregious factors.” 2RP 3.

After some further proceedings, the court ultimately said that it would “accept the recommendation” for Williams to serve a standard-range sentence of 57 months in custody for the assault - the high end of the range. 2RP 7. A discussion ensued about whether Williams should get credit for time served, with counsel for Williams ultimately saying “if the court’s ruling that the time is running concurrent, I don’t see that really being an issue.” 2RP 7.

At that point, the court asked if it was required by law to run the sentence in the assault cause number concurrent with whatever was going to be imposed in the murder cause number. 2RP 8. The prosecutor responded, “[t]hat’s correct, unless the court finds an exceptional sentence.” 2RP 8. The court then apparently lined out a provision it had selected for consecutive sentences, changing it to an order for concurrent

sentences and saying “I’ve filled that in.” 2RP 8; CP 21.

Later that day, the parties appeared again, apparently after the sentencing for Williams’ codefendant and brother on his charges for the murder. 3RP 1, 13. The prosecutor argued for a sentence of 450 months for the murder, the top of the standard range, and for 12 months for the mutilation charge, as well as 24 months consecutive for the deadly weapon enhancement. 3RP 2. In addition, he said, “we also ask that under the standard ranges, the sentence should run concurrently with the sentence previously imposed” in the assault case. 3RP 2-3.

Instead of imposing a standard range sentence in the murder cause number, however, the court imposed a sentence of 600 months in custody for the murder, saying that it believed that the murder “was an act of deliberate cruelty to the victim.” 3RP 19. After the court said it would be “adjourned at this time,” before the judge left the courtroom, the prosecutor asked “is that concurrent or consecutive with the sentence imposed on the assault in the second degree?” 3RP 20. The court said, “consecutive. So, you need to make sure you have that in the paperwork.” 3RP 20.

The written findings of fact and conclusions of law for the murder case, the 9-4 cause number, imposed an exceptional sentence based upon the following “aggravating factors:” 1) unscored prior misdemeanor history, 2) prior scored felony convictions, including the assault, 3) the victim’s particular vulnerability, 4) the “deliberate and unusual” means of committing the crime, and 5) Williams’ lack of remorse. CP 87-92. At the hearing on the entry of those findings, the only cause number

discussed was the 9-4 cause number, and the only facts mentioned were those relating to the murder charges. 4RP 69-79.

Williams appealed and, in 2001, this Court held that the record did not support the “particular vulnerability” and “unscored misdemeanor” aggravating factors, nor did it support one of the findings about the victim being alive when the mutilation was discussed. See CP 70-80. The Court nevertheless upheld the 600 month sentence based on the belief the trial court would have imposed the same sentence even without those factors. See CP 70-80; State v. Williams, 2001 WL 76233.³

The consecutive/concurrent nature of the sentences was not discussed in the appeal. Id.

c. The resentencing

On August 24, 2009, a “correctional records technician” at the Department of Corrections (DOC) filed a letter in Pierce County in only the murder/mutilation case, the 9-4 cause number. CP 81-83. In the letter, the technician asked for “clarification” of the judgment and sentences on both the murder and assault cause numbers, noting the discrepancy between them regarding whether the sentences were to run concurrently or consecutively. CP 81-83.

As a result of the DOC request, the parties appeared before Judge Buckner on December 11, 2009, to discuss the issue. 1RP 24. The same prosecutor who had negotiated the agreements in both cases told the court

³Pursuant to RAP 10.4(h), unpublished opinions may not be cited as authority. They may, however, be cited in the same case involving the same parties for the purposes of establishing relevant facts. See State v. Seek, 109 Wn. App. 876, 878 n. 1, 37 P.3d 339 (2002).

that there was “an error” in the assault case, the 6-9 cause number, because the judgment and sentence in that case indicated that the two causes were to run concurrently. 1RP 25. The prosecutor noted that the judgment and sentence in the murder case, the 9-4 cause number, clearly said that the sentences were to be served consecutively, as did the findings and conclusions in the murder case. 1RP 25. As a result, the prosecutor declared, the parties were “simply before the court at this time to clear up the scrivener’s error.” 1RP 25.

Counsel for Williams told the court that he had some memory of the case but that his files had been “archived.” 1RP 26. He also said that he thought he might need to be a witness because “Mr. Williams may take a position that’s different than what the state is proposing” about what had occurred. 1RP 26. Counsel asked the court for time to “try and see if we can sort this out,” so he could get his file and the relevant information. 1RP 26. After again arguing that the cases should be ordered to run consecutively, the prosecutor objected to a continuance, but the court did not have the files from both cause numbers, so it continued the matter. 1RP 27.

On January 8, 2010, nearly a month later, the parties appeared again before Judge Buckner and the prosecutor again argued that there was “obviously” a “scrivener’s error” in the judgment and sentence in the 6-9 case, the assault, where it indicated concurrent sentences. 5RP 2. Indeed, the prosecutor told the court that it had “declared an exceptional sentence and sentenced the defendant on these two cases consecutively” at the original proceedings, arguing it should do so again. 5RP 2.

Counsel for Williams was not able to dispute that characterization because he had not shown up for the hearing. 5RP 3. Instead, he had another attorney “stand in” for him. 5RP 3. That attorney said he had looked at the findings and conclusions entered in the murder case and it appeared there was an exceptional sentence entered in that case but that there were no similar findings and conclusions for the assault case. 5RP 3. He questioned why, if the court had, in fact, imposed an exceptional sentence in the assault cause number in order to order the two causes to run consecutively, there were no findings and conclusions to support that sentence. 5RP 4.

At that point, the prosecutor declared that there had been such findings and conclusions but they had just not been “scanned” into the record. 5RP 4. The prosecutor did not, however, produce any copies of the alleged findings and conclusions on the assault cause number, which he said had been entered. 5RP 4.

Because stand-in counsel was not the attorney who had represented Williams in the plea and sentencing process, he admitted, he did not know “what was negotiated for,” “what the bargain was,” or what was agreed for in the case. 5RP 4. He said that, while it seemed the court had possibly ordered consecutive sentences, he did not really know “enough about what happened that day” to really know. 5RP 4-5. He argued that, since the court had already imposed an upward departure on the murder cause number, and Williams was already serving 52 years in custody for that cause, “[t]he additional four years consecutive in the assault. . . seems like overkill.” 5RP 5.

At that point, the prosecutor objected, arguing that the case was not before the court for resentencing but rather that the court had already “imposed . . . exceptional sentences and ordered consecutive sentences” and the parties were only there for a correction of the documents. 5RP 5. The prosecutor again cited on the findings and conclusions in the murder case as evidence of that “fact.” 5RP 5. Although admitting that he could not recall what he had agreed to in the plea process, the prosecutor declared that he was sure of “what the court ordered,” arguing that stand-in counsel was essentially asking the court to “modify the sentence” instead of just correction of a scrivener’s error. 5RP 5.

The prosecutor conceded that he did not have the transcripts of the relevant plea and sentencing hearings. 5RP 6. He nevertheless declared that the findings in the murder case were clear so no transcripts were necessary in order to know what the court had meant to order. 5RP 6.

In deciding to “correct” the assault judgment and sentence by changing it to order that the sentence on that case was to run consecutive to the sentences imposed in the murder case, Judge Buckner relied on the written findings and conclusions in the murder case, the 9-4 cause number. 5RP 6-7. She noted that “the last page” of those findings stated that the sentences imposed under that cause number were to “run concurrently with each other” but “consecutive to the assault second degree under the cause number ending in 56-9.” 5RP 6-7.

As a result of those findings, Judge Buckner decided that she had “made a scrivener’s error” when she had ordered, on the assault judgment and sentence, that the sentence in that case was to run concurrently with

the sentences in the murder case. 5RP 6-7. The judge then entered an order in the assault cause number, drafted by the prosecutor, which “corrected” the judgment and sentence for the assault case, the 6-9 cause number, changing it so that the standard range for the assault was to run consecutive, rather than concurrent, to the sentences imposed in the 9-4 cause number, the murder case. 5RP 8; CP 27-28.

D. ARGUMENT

1. THE COURT ERRED IN RESENTENCING WILLIAMS AND IMPOSING AN EXCEPTIONAL SENTENCE IN THIS CASE WITHOUT COMPLYING WITH THE REQUIREMENTS OF THE RELEVANT STATUTES AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

The trial court erred in “correcting” the judgment and sentence in this case, the assault cause number, and reversal is required.

First, the court erred in treating the issues before it as 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. Smislaert, 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, ___ U.S. ___, 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 thus 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 to be 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 stark 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).

In this case, the full record of the plea and sentencing hearings makes it clear that the error identified by DOC was not “clerical” but was instead “judicial.” At the sentencing for the assault cause number, after the prosecutor recommended that the 57-month standard range sentence be served concurrent to any sentence in the murder case, the court said it would “accept the recommendation.” 2RP 5-7. And indeed, the court specifically addressed the consecutive/concurrent issue, asking if it was required by law to impose concurrent sentences and being told that the only way the court could order the sentences under the separate cause numbers to run consecutively was if exceptional sentences were imposed. 2RP 8. The court then intentionally wrote in the requirement for the sentences to run concurrent, noting that action on the record. 2RP 8.

those omissions were “clerical” errors which could be corrected by the court under CrR 7.8(a). 119 Wn. App. at 626. In stark 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.

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Indeed, Judge Buckner had apparently checked the “box” on the document for the sentences to run consecutive but lined that out, wrote her initials and then checked the “box” for concurrent sentences. See CP 18-19.

Thus, the record is clear. Judge Buckner specifically intended to order that the sentences run concurrent at the time she so ordered in this - the assault - case. She did not state an intent to order the sentences to run consecutive and then mistakenly indicate to the contrary on the document; she wrote what she intended at the time. The fact that she later entered a conflicting order in the murder case does not change the fact that the order contained in the assault judgment and sentence was an accurate reflection of her intent. As such, the “error” in sentencing was not “clerical” or a “scrivener’s” error which could be summarily corrected by the court under CrR 7.8 but instead “judicial” error which required a full, fair resentencing.

The sentencing court’s cursory treatment of what amounted to a resentencing as if it was merely a correction of a “scrivener’s error” was therefore in error, because full resentencing, with all its panoply of procedures, was required. See Smissaert, 103 Wn.2d at 640-41. Indeed, in general, resentencing is what is contemplated when DOC asks for amendment to a sentence under RCW 9.94A.210(7); see In re Chatman, 59 Wn. App. 258, 264, 796 P.2d 755 (1990).

The court’s improper treatment of the issue before it was not, of course, solely the mistake of the court. Instead, both the prosecutor and counsel contributed to that error by failing to secure and provide to the court the necessary record of the sentencing proceedings. Certainly the

transcripts of those proceedings would have answered the question of what, in fact, the court had intended when it entered the original judgment and sentence. See 2RP 1-9. Had either party sought and presented the transcript, the court would have been reminded that it had intended concurrent sentences and thus that the issue before it was not one of mere “clerical” correction but instead a full resentencing based upon conflicting sentences.⁴

The court’s error in treating the case as merely involving “scrivener’s error” was the cause of further errors. First, because the court thought it was simply correcting a mistaken notation, it did not give Williams’ arguments about the propriety of showing leniency any consideration. See, e.g., 5RP 5-7.

Further, the court’s erroneous belief that it was merely engaging in “correction” led it to not only deprive Mr. Williams of the rights he had as part of resentencing but also to impose what amounted to an improper, unwarranted and new exceptional sentence.

But despite the prosecutor’s unsupported claims in 2009 and 2010, in fact, in the original sentencing, Judge Buckner specifically *declined* to order an exceptional sentence for the assault. 2RP 8; CP 21. And she did so in full awareness that her decision meant that the terms imposed for the assault cause number and the one imposed in the murder cause number would therefore run concurrent. RP 8. Indeed, the judgment and sentence

⁴Counsel’s failures in this regard were ineffective assistance, as argued *infra*. In addition, the prosecutor’s acts were violations of the plea agreement which provide separate grounds for reversal. See *infra*.

number at the sentencing on the murder cause number, save for the court's parting declaration to order the sentence on the murder cause to run consecutive to the other cause. 3RP 1-21. There was no mention of the judge that she thought the assault sentence should now be changed or anything like that. 3RP 1-21. And at the hearing on the entry of the findings in the murder case, all of counsel's arguments, the prosecutor's responses and the court's rulings were about whether the aggravating factors were proper given the facts of the murder and the mutilation - without discussion of the assault at all. 4RP 69-71.

Thus, for example, counsel argued that the misdemeanor history was not the "kind" that would support "the grounds for an exceptional sentence in a murder case or in a mutilation of human remains case." 4RP 71. There was sparring about whether the victim of the murder - a different person than the victim of the assault - was "particularly vulnerable," and whether the murder and mutilation involved "deliberate cruelty" or whether the conduct alleged to be such cruelty inhered in the crimes. 4RP 71-76. Finally, the "lack of remorse" factor was discussed, again only relating to the murder and mutilation charges. 4RP 71-79.

In addition to the evidence from the hearings, the documents entered in the case also make it clear that Judge Buckner intended - and imposed - a standard-range sentence in the assault cause number and an exceptional sentence in the murder cause number. There was no notation for an exceptional sentence made on the assault judgment and sentence; indeed, the section indicating such a sentence was being ordered was left blank. CP 16-24. Nor were any written findings and conclusions

supporting an exceptional sentence in the assault case were ever entered, despite the prosecutor's claim, ten years later, that they had existed.

Notably, the existence of such findings was never mentioned when the parties appeared to discuss and enter findings on the exceptional sentence in the murder case, even though that would have been the obvious, logical time for presentation of and any discussion about similar findings for the assault case, if they existed. 4RP 60-79.

All of the evidence from the original sentencing, including the written documents, thus make it clear that Judge Buckner only intended to impose an exceptional sentence in the murder case number but intended - and imposed - only a standard range sentence in the separate cause number for the assault.

As a result, it was the murder cause number and not the assault cause number which should have been changed, to reflect that the sentences on the two causes would run concurrently. Under the statutes applicable at the time of the crimes, when a court imposes sentence on several current offenses which are not both "serious violent" crimes, the sentences imposed "shall be served concurrently." Former RCW 9.94A.400(1)(a) (1998). Any departure from that presumption "is an exceptional sentence," which must be imposed "under the exceptional sentence" provisions of the Sentencing Reform Act (SRA). Former RCW 9.94A.400(1)(a) (1998); former RCW 9.94A.120(17)(1998). Because the court did not find an exceptional sentence warranted in the assault case, and did not impose such a sentence, concurrent sentences were mandated, regardless whether the court decided to impose a longer, exceptional

sentence in the murder case.

Ultimately, the court's "correction" of the judgment and sentence in this case was improper because it converted the previous standard-range sentence into an exceptional sentence without following any of the statutory mandates for entering such a sentence. Although Williams' Sixth Amendment rights are not involved because the exceptional sentence for the assault involved only imposing consecutive terms, see Oregon v. Ice, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), nevertheless, Mr. Williams was still entitled to certain protections under due process and the relevant statutes. He was entitled to have any exceptional sentence based on valid aggravating factors applicable to the offense. Former RCW 9.94A.210(4) (1998); see State v. McClure, 64 Wn. App. 528, 530, 827 P.2d 290 (1992). He was entitled to be free from an exceptional sentence unless the sentencing court found that the aggravating factors were a "substantial and compelling" reason to depart from the presumptive norm of concurrent sentences. Former RCW 9.94A.390 (1998). He was also entitled to have the court enter written findings and conclusions in support of any exceptional sentence. See, e.g., McClure, 64 Wn. App. at 530; State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986).

None of that happened in this case. Indeed, Judge Buckner did not seem to even acknowledge that she was converting a standard-range sentence to an exceptional sentence by her "correction." 5RP 1-7. But even if she thought that she had originally intended to enter exceptional sentences in both the assault and murder cases, the conflicting evidence

on that point such as the lack of any indication of an exceptional sentence in the assault judgment and sentence and the lack of any written findings and conclusions to support such a sentence should have given the court pause and caused further inquiry. Given the questions raised by the record, the court could have - and should have - ordered the transcripts of the sentencing hearings so that it could then have had the answers.

Notably, the court is not the only party to the case which could have taken those basic steps. Counsel could have - and should have - gotten the transcripts and presented them to the court on his client's behalf. Indeed, in requesting the continuance at the first resentencing hearing, counsel specifically said he needed the time to get his file and that the continuance was required of him in his "role as an advocate." IRP 27. After nearly a month, however, he not only had not secured the file and transcript to present to the court, he did not even appear on his client's behalf, instead sending a "stand in" attorney who did not have the required evidence, either.

These failures were ineffective assistance, in violation of Williams' rights. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective

standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Here, counsel's failures led the court to improperly "correct" Williams' sentence in this case to increase Williams' time in prison. Had counsel sought and presented the transcript from the sentencing in this case, Judge Buckner then would have known not only that she intentionally ordered the assault sentence to run concurrent with the murder but also that she did not order an exceptional sentence and her "correction" of the sentence was in fact a resentencing. The court would then have been required to amend the relevant documents to order concurrent sentences, because it surely could not now impose an exceptional sentence, ten years after the original standard range sentence was imposed and well after that decision became final. Further, there could be no "tactical" reason for counsel to fail to get the record which would have supported his client and prevented the court from increasing the time his client would serve. Indeed, counsel himself noted the need for additional evidence, asking for a continuance in order to secure, at a minimum, the relevant file. See 1RP 27.

The sentencing court erred in "correcting" the sentence, thus resentencing Williams to an exceptional sentence when a standard-range sentence had been imposed. Further, counsel was ineffective in his handling of this situation. That ineffectiveness clearly prejudiced

Williams, who is now required to serve a sentence which is 57 months longer. Reversal is required.

2. THE PROSECUTION VIOLATED THE PLEA AGREEMENT AND WILLIAMS IS THEREFORE ENTITLED TO HIS CHOICE OF REMEDY

Reversal is also required to allow Williams his choice of whether to withdraw his pleas or have specific performance, i.e., have the prosecutor advocate for what was agreed in the plea agreements before a different judge.

Both the state and federal constitutions grant defendants in criminal cases many important rights regarding trials, such as the right cross-examine and confront witnesses, the right to present evidence in their defense, the right to have the state prove its case beyond a reasonable doubt, and the right to trial by jury. See In re James, 96 Wn.2d 847, 849, 640 P.2d 18 (1982). As a result, when a defendant enters into a plea agreement with the prosecution, he is giving up important rights and, in exchange, receives certain promises from the state. See, e.g., State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999). One of these promises, guaranteed as part of due process, is that the prosecutor will act in good faith and with fairness in upholding the plea agreement. See State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997).

Indeed, a plea agreement is a binding contract on the parties once it is entered. State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988). If a prosecutor breaches the terms of that contract, both the state and federal due process clauses mandate that the conviction gained by the

prosecution as a result of the contract be reversed and the defendant given the choice of whether to withdraw the plea based on that breach or specifically enforce the agreement. See Sledge, 133 Wn.2d at 846.

In this case, Williams should be given the choice of remedy, because the prosecutor repeatedly breached the plea agreement by advocating that the court impose consecutive sentences.

As a threshold matter, this issue is properly before the Court, even though counsel failed to raise it below. First, counsel's failure to raise is cause for reversal based upon his further ineffectiveness. Second, as this Court has repeatedly held, the prosecutor's breach of a plea agreement is an issue of constitutional magnitude which may be raised for the first time on appeal as a manifest constitutional error under RAP 2.5(a)(3). See State v. Williams, 103 Wn. App. 231, 234-35, 11 P.3d 878 (2000), review denied, 143 Wn.2d 1011 (2001); State v. VanBuren, 101 Wn. App. 206, 211, 2 P.3d 991, review denied, 142 Wn.2d 1015 (2000).

On review, this Court should reverse. While a prosecutor need not be overly enthusiastic about a specific recommendation based on a plea, he nevertheless must not violate the integrity of the plea bargaining process by engaging in conduct which either explicitly or implicitly circumvents the agreement. See State v. Xavier, 117 Wn. App. 196, 199, 69 P.2d 901 (2003). The prosecutor's motivations or justifications in their actions are irrelevant, and the Court applies an objective standard in order to determine whether the state breached a plea agreement. Van Buren, 101 Wn. App. at 236. The standard is to determine if "the prosecutor contradicts, by words or conduct," the agreed-upon recommendation.

Jerde, 93 Wn. App. at 780. The entire sentencing record is examined.

Williams, 103 Wn. App. at 236.

Here, in order to get Williams to enter the pleas in both this case and the murder case, the prosecutor specifically agreed to recommend that the sentences on both cause numbers should run concurrent. 1RP 21, 2RP 3, 3RP 2-3; CP 10. At both the 2009 and 2010 hearings on DOC's request, however, the prosecutor repeatedly argued that the court should impose consecutive sentences. 1RP 25, 27, 5RP 2-3, 5. Indeed, the prosecutor engaged in this advocacy even though he admittedly did not recall whether it was a violation of the plea agreement to do so, conceding that he did not recall what he had agreed to recommend. 5RP 5-6.

Further it is irrelevant that his "reason" for urging the exceptional sentence was that he thought the court had previously imposed one. Jerde, 93 Wn. App. at 780. Not only is his motivation not the issue in determining whether there has been a breach, but also his motivation was unsupported by the record, which clearly indicated that no such sentence had been entered by the court. Objectively speaking, the prosecutor's advocacy on resentencing that a new exceptional sentence be imposed was a violation of the prosecutor's agreement to recommend a standard-range sentence in each case, including that the sentences run concurrently. As a result, Williams is entitled to his choice of relief. See State v. Harrison, 148 Wn.2d 550, 557, 61 P.2d 1104 (2003).

Notably, the same prosecutor entered into an agreement with Williams' codefendant to recommend a standard range sentence but breached that, too. See Williams, 103 Wn. App. at 236.

It must be remembered that Williams did not enter a “straight” plea but instead entered an Alford/Newton plea in this case. Such pleas are, by their very nature, inherently equivocal. See Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). Indeed, such pleas are subject to greater scrutiny than an average plea because they do not involve admissions of guilt but rather a defendant’s “cost-benefit” analysis of what is best for him, based upon her understanding of the options he has available at the time. See State v. D.T.M., 78 Wn App. 216, 220, 896 P.2d 108 (1995). In such circumstances, a material breach by the prosecutor such as the one committed here is especially troubling because it has a strong likelihood to counterbalance and upset the delicate balance in which the defendant engaged in agreeing to enter the pleas in the first place.

Just as at the original sentencing, here the prosecutor was again placed in the position of giving the court his sentencing recommendation. In order to get Williams to enter his plea, the prosecutor had to specifically agree to advocate for a concurrent sentence in both cases. And while the prosecutor’s “advocacy” was tepid at best at the original sentencing hearings, that lack of enthusiasm was at least not the wholesale, repeated and pervasive arguments against the agreed-upon recommendation made at the hearings below. The prosecutor clearly, unmistakably and repeatedly violated the plea agreement and Mr. Williams is entitled to his choice of remedies on remand. This Court should so hold.

Finally, reversal is also required based on counsel’s failures, again,

to represent his client effectively. Again, had counsel made even a cursory review of the documents in the case, he would have seen that the prosecutor had agreed, as part of the plea, to recommend only that the court impose concurrent sentences. Certainly counsel's notes would have indicated that the prosecutor had agreed to recommend only concurrent sentences. But even without his notes - which he had asked for time to get - and even without the transcripts of the plea hearing and sentencings - which counsel certainly could have ordered - the Statement of Defendant/Plea form itself makes the prosecutor's obligation clear. See CP 10. And had counsel noted that point, he would have known that the prosecutor's advocacy for consecutive sentencing was, in fact, a material breach of the plea agreement which entitled Williams to his choice of remedy. Counsel not only apparently failed to give the relevant, available documents even cursory review, he failed to secure the relevant transcript on his client's behalf and the result was that the prosecutor was allowed to breach the agreement and advocate for consecutive sentences, which the sentencing court then imposed. And then he failed to appear at the crucial hearing on his client's behalf. On remand for new proceedings to allow Williams to choose his remedy, new counsel should be appointed in order to ensure that Williams is given the constitutionally adequate assistance to which he is entitled in determining what remedy to pursue: withdrawal of his pleas or specific enforcement of the agreement, with the resentencing in front of a different judge. See Harrison, 148 Wn.2d at 557. This Court should so hold and should reverse.

E. CONCLUSION

The sentencing court erred in treating its resentencing of Williams as a “correction” when it was clearly a resentencing. Further, the “correction” amounted to imposition of a new, improper exceptional sentence, in violation of Williams’ statutory rights, and counsel was ineffective in failing to secure even the basic record necessary to establish the relevant facts on his client’s behalf. In addition, the prosecutor’s advocacy for a consecutive sentence rather than the concurrent sentences agreed for in the plea was a breach of the agreement which entitles Williams to his choice of remedy. On remand, new counsel should be appointed, because of counsel’s ineffectiveness.

DATED this 6th day of December, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON

BY _____
DEPUTY

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Troy Williams, DOC 720253, Airway Heights Corr. Center,
P.O. Box 1809, Airway Heights, WA. 99001.

DATED this 6th day of December, 2010.



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