

NO. 47391-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANDREW CHRISTOPHER WATKINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 87-1-02347-0

BRIEF OF RESPONDENT

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

1. Is this an appealable issue when it fails to meet any of the criteria necessary under RAP 2.2(a)?
2. Did the trial court correctly refuse to nunc pro tunc the effective date of defendant's certificate of discharge to an earlier, unknown date when it concluded that defendant had not proven he had been officially discharged prior to December 13, 1990?
3. Should the Court decline review of this issue when the record is unclear about the actual date the superior court received notice that defendant completed the terms of the sentence?

B. STATEMENT OF THE CASE.

On October 12, 1987, Andre Christopher Watkins AKA Andrew Christopher Watkins AKA Undra Christopher Watkins (hereinafter "defendant") was charged by information with assault in the second degree, rape in the first degree, and assault in the second degree. CP 2-4. On February 10, 1988, defendant pled guilty to rape in the third degree. CP 306-311. Defendant was sentenced to 9 months in jail and ordered to pay \$505.00 in legal financial obligations. CP 287-295.

Judge Cohoe signed a certificate and order of discharge on December 13, 1990. CP 384. This order was filed in the clerk's office on December 17, 1990. CP 384.

On May 15, 2014, defendant filed a motion for a certificate of discharge in Superior Court. CP 580-94. Judge Hogan granted his motion for a certificate of discharge on June 3, 2014. CP 595. Defendant filed a motion seeking clarification of the effective date of the order. CP 596-600.

Judge Hogan heard defendant's motion seeking clarification. June 2 & 20, 2014 RP 8. Due to the age of the case, the file was in archives. Judge Hogan set the matter over to have the file taken out of archives. June 2 & 20, 2014 RP 17. In reviewing the entire archived file, Judge Hogan discovered that Judge Cohoe had previously signed a certificate of discharge for defendant in this matter. Judge Hogan vacated her previous order on July 1, 2014. CP 601.

On August 4, 2014, defendant filed a new motion requesting a nunc pro tunc order to correct a "clerical mistake" in his certificate of discharge; defendant argued that the effective date should be October 13, 1989. CP 602-10. After hearing defendant's motion, Judge Nevin denied the motion because he was not satisfied that defendant was officially discharged prior to December 13, 1990 based on the evidence provided by defendant. CP 611-12, August 15, 2014 RP 6. Defendant filed a notice of appeal as to the denial of this motion. CP 613.

C. ARGUMENT.

1. THE DENIAL OF A MOTION TO NUNC PRO TUNC THE DATE ON A CERTIFICATE OF DISCHARGE IS NOT AN APPEALABLE ISSUE.

Whether a particular decision is appealable is governed exclusively by the provisions of the Rules of Appellate Procedure (“RAP”). *Allyn V. Asher*, 132 Wn. App. 371, 377, 131 P.3d 339 (2006). Pursuant to RAP 2.2(a), only certain decisions of the superior court are appealable. In this case it appears that RAP 2.2(13) is the only subsection that might possibly allow for an appeal of the trial court’s denial of defendant’s motion to nunc pro tunc the effective date of his certificate of discharge from December 17, 1990 to October 13, 1989.¹

Under RAP 2.2(13), defendant may appeal “any final order made after judgment that affects a substantial right.” The final order must affect a right other than those adjudicated by the earlier final judgment. *State v. Campbell*, 112 Wn.2d 186, 190, 770 P.2d 620 (1989) citing *Seattle-First Nat. Bank v. Marshall*, 16 Wn. App. 503, 557 P.2d 352 (1976). First, defendant fails to demonstrate how changing the effective date on his

¹ Commissioner Barse ruled that defendant may appeal “his motion to correct a clerical error in his judgment.” With all due respect to Commissioner Barse, defendant’s motion is to change the effective date on his certificate of discharge, not his judgment. In addition, this is not a clerical error. An error is clerical only if the judgment, as amended, embodies the trial’s court’s intention, as expressed in the record at trial. *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100, 103-04 (1996). This is a disputed date and defendant has provided no record showing what Judge Cohoe’s intention was in December of 1990.

certificate of discharge, which was granted over twenty-three years ago, from December 17, 1990 to October 13, 1989, affects a substantial right. Second, defendant fails to show that this substantial right was not adjudicated by the earlier final judgement. If there is no prejudicial denial of a substantial right, then the order cannot be reviewed. *See e.g., Seattle-First Nat. Bank v. Marshall*, 16 Wn. App. 503, 508, 557 P.2d 352 (1976). Defendant has not shown that he is entitled to an appeal on this issue and this case should be dismissed.

Additionally, pursuant to RAP 2.3(a), defendant may seek discretionary review of any act of the superior court not appealable as a matter of right. However, pursuant to RAP 2.3(b), there are certain considerations that affect whether the Court will grant review. In this case, defendant cannot show that the trial court committed an obvious error. Two different judges ruled against defendant's motion as the record does not show that the superior court was notified defendant was eligible for a certificate of discharge any earlier than December 13, 1990. This alleged error in the effective date does not alter the status quo or limit defendant's freedom, nor has the superior court so far departed from the usual course of proceedings to warrant review by the Court. The Court should not grant discretionary review on this matter because this issue does not meet RAP 2.3(b).

2. THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO NUNC PRO TUNC THE CERTIFICATE OF DISCHARGE TO AN EARLIER, UNKNOWN DATE.

The Court reviews a trial court's exercise of its authority to enter a nunc pro tunc order for abuse of discretion. *State v. Hendrickson*, 165 Wn.2d 474, 478, 198 P.3d 1029, 1031-32 (2009). An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

A nunc pro tunc order “may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken.” *Hendrickson*, 165 Wn.2d at 478, (quoting *State v. Ryan*, 146 Wash. 114, 117, 261 P. 775 (1927) (quoting 15 Ruling Case Law 622–23 (1917))). A nunc pro tunc order is generally appropriate to correct ministerial or clerical errors, not judicial errors. *Id.* at 479.

Defendant argues that the trial court should have received notice of his completed sentence earlier than December 13, 1990. Brief of Appellant, 9. Even assuming arguendo that defendant is correct, this does not mean defendant is entitled to relief via a nunc pro tunc order. As *Hendrickson* articulates, a nunc pro tunc order cannot be used to correct a previous error in the record. The trial court did not make a clerical error in signing his certificate of discharge on December 13, 1990 because the trial court previously had a report from DOC that defendant was not compliant

with his sentence. CP 458. The trial court noted this in its decision to deny defendant's motion:

The Court: But the proof you provided does not satisfy the court you were officially discharged any earlier than December of 1990. And the document that you have here on the special report, and this is dated November of 1989, and it makes reference to an outstanding bench warrant with the directive that you be brought before the court to discuss your failures. Then it says if you bail out, then the court can authorize the preparation of an Order of Discharge

MR. WATKINS: Correct.

THE COURT: This is subsequent to the October date that you're seeking and it reflects that you were not in total compliance with the court's obligations at that time, ergo, there is no way you would be discharged in October of 1989.

August 8, 2015 RP 6-7.

The trial court correctly denied defendant's motion to nunc pro tunc the certificate of discharge. Defendant is incorrect in his argument that the trial court should have been notified earlier, and the record does not support his position. Additionally, it would have been an improper use of a nunc pro tunc order under *Hendrickson*. Defendant has not shown that the trial court abused its discretion in denying defendant's motion when the record does not show a date earlier than December 13, 1990 for when the trial court was notified that defendant completed the terms of his sentence. As the trial court did not abuse its discretion in denying

defendant's motion, this Court should uphold the trial court's decision denying defendant's motion.

3. EVEN IF THE COURT ABUSED ITS DISCRETION, THE RECORD IS INSUFFICIENT FOR REVIEW OF THE ISSUE.

An insufficient record on appeal generally precludes review of an alleged error. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). The record must be sufficient to allow review of the issue. *State v. Sublett*, 156 Wn. App. 160, 186, 231 P.3d 231 (2010). A party seeking review has the burden of perfecting the record so that the court has before it all evidence relevant to the issue on appeal. *State ex rel. Dean by Mottet v. Dean*, 56 Wn.App. 377, 382, 783 P.2d 1099 (1989).

RCW 9.94A.637(1) mandates that the court issue a certificate of discharge when it receives notice that the offender has completed all of the requirements of his or her sentence. *State v. Johnson*, 148 Wn. App. 33, 38, 197 P.3d 1221 (2008). The effective date of the certificate of discharge must be the date the court received notice that the terms of the sentence were satisfied. *Id.* at 39.

In this case, even if the trial court was incorrect about signing a nunc pro tunc order to correct the defendant's certificate of discharge, there is no record of when the trial court originally received notice that the terms of defendant's sentence were satisfied prior to Judge Cohoe signing

the certificate of discharge on December 13, 1990. This is undisputed by defendant during the motion before Judge Hogan:

When the Defendant reviewed the record of the case of 87-102347-0 **the record is uncertain** as far as when the Department of Corrections sent the Court at that time the discharge application for the Certificate of Discharge.

June 2, 20, 2014 RP 12, (emphasis added). Defendant reiterates this later in the hearing:

But **the record is unclear** as far as when the Department of Corrections sent the notice to the Court.

June 2, 20, 2014 RP 14 (emphasis added).

Because there is no record of when the trial court received notice, defendant proposes two different, possible effective dates for his certificate of discharge. Brief of Appellant, 9. Neither of these dates are the actual date that the trial court received notice that the terms of defendant's sentence were satisfied. As the actual date in question cannot be determined from the record, both of defendant's proposed dates are speculative at best.

In *Johnson*, the Court eventually found that “the record before this court does not establish when the trial court received notice of his compliance with the sentence” and remanded for a factual determination of the issue. *Johnson*, 148 Wn. App. at 39. The problem with ordering a reference hearing, as the Court did in *Johnson*, is the age of the record in

the case at bar. Defendant has already had two hearings on the issue and admitted he could not ascertain the date. Defendant now has had an appellate attorney comb through the record and has still failed to find proof of the date. There is no reasonable likelihood that defendant could prove this date in a hearing. As the record is unclear, and there is no reason to believe a reference hearing would resolve the issue, the Court should decline to remand this issue back to superior court. The Court should dismiss this appeal because the record is insufficient for the Court to decide the issue differently than the trial court.

D. CONCLUSION.

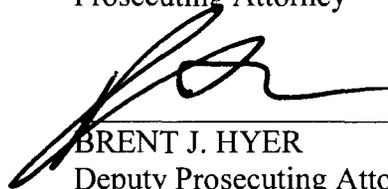
The Court should decline to hear this appeal as it does not fall under any of the criteria required by RAP 2.2(a). If the Court does not dismiss the appeal, the trial court did not abuse its discretion in denying defendant's motion for a nunc pro tunc order to change the effective date

of his certificate of discharge to a date not supported by the record.

Additionally, the record is not sufficiently clear to resolve the issue.

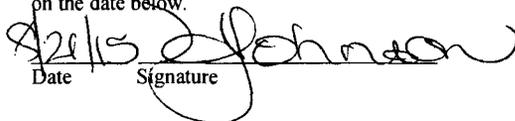
DATED: August 21, 2015

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