

RECEIVED *vs*
SUPREME COURT
STATE OF WASHINGTON *E*
Jun 12, 2014, 4:53 pm
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL *b/h*

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER N. MAYNARD,

Petitioners

NO. 89786-7

SECOND STATEMENT
OF ADDITIONAL
AUTHORITIES

COMES NOW amicus curiae, Washington Association of Prosecuting Attorneys (WAPA), by and through its attorney, Pamela B. Loginsky, respectfully requests that the Court consider the following additional authority pursuant to RAP 10.8:

I. Regarding nunc pro tunc orders.

State v. Hendrickson, 165 Wn.2d 474, 478-79, 198 P.3d 1029, cert. denied, 129 S. Ct. 2873 (2009):

A nunc pro tunc order allows a court to date a record reflecting its action back to the time the action in fact occurred. See Black's Law Dictionary 1100 (8th ed. 2004). . . .

“A retroactive entry is proper only to rectify the record as to acts which did occur, not as to acts which should have occurred.” *Id.* at 641. A nunc pro tunc order “records judicial acts done at a former time which were not then carried into the record.” *State v. Petrich*, 94 Wn.2d 291, 296, 616 P.2d 1219 (1980). 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.” *State v. Ryan*, 146 Wash. 114, 117, 261 P. 775 (1927) (quoting 15 Ruling Case Law 622-23 (1917)). Thus, for example, a nunc pro tunc order is not appropriate to reopen a matter that was previously closed in order to resolve substantive issues differently. *Barros v. Barros*, 26 Wn. App.



363, 613 P.2d 547 (1980) (vacating a nunc pro tunc order, reasoning that a court could not alter a property distribution order between spouses to change an allegedly improper distribution). Instead, a nunc pro tunc order is generally appropriate to correct only ministerial or clerical errors, not judicial errors. *Ryan*, 146 Wash. at 116; *see also Smitsaert*, 103 Wn.2d at 641. A clerical or ministerial error is one made by a clerk or other judicial or ministerial officer in writing or keeping records. *Ryan*, 146 Wash. at 116.

While our case law is scant as to what differentiates a clerical error from a judicial error in the nunc pro tunc context, we have considered the distinction in discussions regarding the court rules governing relief from judgment. “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.” *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996) (considering CR 60). Washington courts have also used this distinction in interpreting CR 60’s companion criminal rule, CrR 7.8(a). *State v. Snapp*, 119 Wn. App. 614, 626-27, 82 P.3d 252 (2004).

We apply this distinction to acts involving nunc pro tunc orders. A trial court misuses its nunc pro tunc power and abuses its discretion when it uses such an order to change its mind or rectify a mistake of law.

II. Regarding CrR 8.3(b).

State v. Puapuaga, 164 Wn.2d 515, 520, 192 P.3d 360 (2008) (“Two things must be shown before a court can order dismissal of charges under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct. Second, a defendant must show prejudice affecting the defendant’s right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).” [Footnotes omitted.]

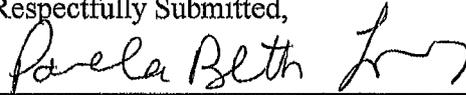
State v. Thomas, 95 Wn. App. 730, 739, 976 P.2d 1264 (1999), *review denied*, 139 Wn.2d 1017 (2000) (“Dismissal of charges under CrR 8.3(b) requires

a showing of arbitrary action or governmental misconduct. Inadequacy of representation by defense counsel does not satisfy this requirement.” [Footnotes omitted.]

State v. Rohrich, 110 Wn. App. 832, 43 P.3d 32 (2002), *rev'd on other grounds*, 149 Wn.2d 647, 655-56, 71 P.3d 638 (2003) (only prejudice to a defendant's ability to have a fair trial will support the dismissal of charges under CrR 8.3(b); inability to plea bargain or to potentially serve sentences concurrently will not support a dismissal).

DATED June 12, 2014.

Respectfully Submitted,



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PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein. On June 12, 2014, I e-mailed a copy of the document to which this proof of service is appended to:

Todd Dowell at TDowell@co.kitsap.wa.us

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George Yeannakis at george.yeannakis@teamchild.org

Signed under the penalty of perjury under the laws of the state of Washington
this 12th day of June, 2014, at Olympia, Washington.



Pamela B. Loginsky, WSBA #18096
Staff Attorney

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; jahays@3equitycourt.com; SkaliskyL@co.cowlitz.wa.us; Todd Dowell; stearns@defensenet.org; suzanne-elliott@msn.com; george.yeannakis@teamchild.org
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Subject: State v. Christopher Maynard, No. 89786-7

Dear Clerk and Counsel:

Attached for filing is WAPA's second statement of additional authorities. Please let me know if you should encounter any difficulty in opening this document.

Sincerely,

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