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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MIKEL THOMAS DILLON, Appellant.	2 CA-CR 2012-0051 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071285

Honorable Scott Rash, Judge

APPEAL DISMISSED

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V Á S Q U E Z, Presiding Judge.

¶1 Mikel Dillon appeals from the trial court's February 2012 order clarifying his prison sentences imposed in March 2008. For the reasons stated below, we dismiss the appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 After a jury trial, Dillon was convicted of three counts of theft of a means of transportation; two counts of third-degree burglary; and one count each of criminal damage, aggravated assault, possession of a prohibited weapon, theft by control of stolen property, theft of a credit card, conducting a "chop shop," and possession of burglary tools. The trial court sentenced him to a combination of concurrent and consecutive, presumptive prison terms.[1] At the sentencing hearing in March 2008, the court explained:

> I am ordering that Counts 1, 2, 3, 5, 7, 9, 10, 11, and 12 all run concurrent with each other.
>
> I am ordering that Counts 4, 8, and 6 run concurrent with each other, and consecutive to Counts 1, 2, 3, 5, 7, 9, 10, and 12, and will also be concurrent with Count 11 because that time is longer.
>
> So you are looking at basically 22-1/2 years.

[1]The trial court ordered the following terms: 15.75 years for Count 11; 11.25 years for Counts 1, 4, and 8; 10.5 years for Count 5; ten years for Counts 2, 6, and 7; five years for Counts 3 and 10; and 3.75 years for Counts 9 and 12.

We affirmed Dillon's convictions and sentences on appeal.[2] *State v. Dillon*, No. 2 CA-CR 2008-0091 (memorandum decision filed Apr. 28, 2009).

¶3 In November 2011, the state filed a motion requesting the trial court clarify Dillon's sentences by giving the Arizona Department of Corrections (ADOC) guidance in determining the total length of his combined prison terms and amending the sentencing minute entry to reflect that Count 5 is a dangerous-nature offense. ADOC apparently had calculated Dillon's total sentence as 15.75 years based on its understanding that all of the prison terms were concurrent. ADOC joined the state's motion, and Dillon filed an opposition, contending that the court "ha[d] no authority to change the sentence" because the time to challenge it had passed. At a hearing on February 13, 2012, the court granted the state's motion, ordering that "the total sentence of incarceration for [Dillon] is 22.5 years not 15.75 years" and instructing ADOC to "make said correction." The order also amended the sentencing minute entry to reflect that Count 5 is a dangerous-nature offense. Dillon filed a notice of appeal from that order on February 22, 2012.

¶4 ADOC filed another motion for clarification on March 15, 2012, requesting that the trial court indicate how the 22.5-year sentence was calculated. On March 22, 2012, the court issued an order, amending its February 2012 minute entry and March 2008 sentencing order as follows: "Counts 4, 6 and 8 are to be served consecutively to Counts 1, 2, 3, 5, 7, 9, 10 and 12; Count 11 is to be served concurrently with all counts."

[2]Although we found what appeared to be a sentencing error on Count 3, supplemental briefing established that the trial court already had corrected the error. *State v. Dillon*, 2 CA-CR 2008-0091, ¶¶ 3-4 (memorandum decision filed Apr. 28, 2009).

Discussion

¶5 Dillon appeals from "the judgment of guilt and sentence . . . entered in the Superior Court, Pima County, on the 13th day of February, 2012."[3] Although he contends we have jurisdiction pursuant to A.R.S. § 13-4033,[4] the state challenges that assertion. Notwithstanding any arguments by the parties, this court has an independent duty to review its jurisdiction and, if jurisdiction is lacking, to dismiss the appeal. *See State v. Poli*, 161 Ariz. 151, 153, 776 P.2d 1077, 1079 (App. 1989); *State v. Celaya*, 213 Ariz. 282, ¶ 7, 141 P.3d 762, 763 (App. 2006).

¶6 Our jurisdiction is derived wholly from statute. *Celaya*, 213 Ariz. 282, ¶ 3, 141 P.3d at 762; *State v. Wilson*, 207 Ariz. 12, ¶ 4, 82 P.3d 797, 799 (App. 2004); *see also* Ariz. Const. art. VI, § 9. Section 13-4033(A) provides that a defendant may appeal from:

> 1. A final judgment of conviction or verdict of guilty except insane.

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[3]Dillon also filed a notice of appeal from the trial court's March 22, 2012 order. But the filing of a timely notice of appeal deprives the trial court of jurisdiction in all matters not in furtherance of the appeal. *State v. Rendel*, 18 Ariz. App. 201, 205, 501 P.2d 42, 46 (1972); *State v. O'Connor*, 171 Ariz. 19, 21-22, 827 P.2d 480, 482-83 (App. 1992). The court's March 2012 order was not in furtherance of the appeal because it modified the language of the order that is the subject of the appeal. *Cf. Eyman v. Cumbo*, 99 Ariz. 8, 10-11, 405 P.2d 889, 891 (1965) (trial court cannot entertain writ of habeas corpus that raises same issues as pending appeal). And because Dillon filed a notice of appeal on February 22, 2012, the court lacked jurisdiction when it entered the March order. We therefore limit our review to the February 2012 order.

[4]Dillon also cites A.R.S §§ 12-120.21 and 13-4031 as bases for our jurisdiction. These statutes, however, allow a party to appeal only as otherwise permitted or prescribed by law. *See State v. Celaya*, 213 Ariz. 282, ¶ 5, 141 P.3d 762, 763 (App. 2006) (describing statutes as "general provisions for this court's jurisdiction" limited by § 13-4033).

> 2. An order denying a motion for a new trial.
>
> 3. An order made after judgment affecting the substantial rights of the party.
>
> 4. A sentence on the grounds that it is illegal or excessive.

Although Dillon does not specify under which subsection his appeal is based, we presume he is appealing pursuant to § 13-4033(A)(3), from an "order made after judgment affecting [his] substantial rights."[5]

¶7 A post-judgment order that merely clarifies a defendant's sentence is not appealable under § 13-4033(A)(3) because any effect on the defendant's rights occurred when the sentence first was imposed. *See State v. Gessner*, 128 Ariz. 487, 488-89, 626 P.2d 1119, 1120-21 (App. 1981). However, if a post-judgment order actually changes or modifies a defendant's sentence, the defendant presumably would have the right to appeal pursuant to § 13-4033(A)(3). *See State v. Jimenez*, 188 Ariz. 342, 345, 935 P.2d 920, 923 (App. 1996). We thus must determine if the trial court's February 2012 order modified or merely clarified the March 2008 sentence. In doing so, we necessarily reach the merits of Dillon's argument, despite ultimately concluding that we lack jurisdiction over this appeal.

[5]For the reasons explained below, the trial court's February 13, 2012 order does not constitute a final judgment or a new sentence. Consequently, Dillon could not timely appeal based on § 13-4033(A)(1) or (4). *See* Ariz. R. Crim. P. 31.3 (notice of appeal must be filed within twenty days after entry of judgment and sentence); *State v. Berry*, 133 Ariz. 264, 266, 650 P.2d 1246, 1248 (App. 1982) (timely filed notice of appeal essential to our jurisdiction).

¶8 Dillon contends the trial court modified the March 2008 sentencing order by changing the total length of his sentence from 15.75 to 22.5 years and by designating Count 5 as a dangerous-nature offense. And, because his sentences were lawfully imposed in March 2008, he argues the court lacked jurisdiction to modify them. He further maintains that the court's modifications "violate[] the constitutional proscription against double jeopardy." In response, the state argues the court merely clarified Dillon's sentences in light of ADOC's calculation error. To resolve this issue, we must first determine what sentence was imposed in March 2008.

¶9 The March 2008 sentencing minute entry reflects that Counts 1, 2, 3, 5, 7, 9, 10, 11, and 12 all would run concurrently; Count 4 would run concurrently with Counts 6, 8, and 11 and consecutively to Counts 1, 2, 3, 5, 7, 9, 10, and 12; and Count 11 would run concurrently with all counts. Because the trial court ordered Count 11 to run concurrently with Counts 1, 2, 3, 5, 7, 9, 10, and 12 and also concurrently with Counts 4, 6, and 8, Dillon contends that his total sentence is 15.75 years—the sentence imposed for Count 11 and longest term imposed—because all the terms must run concurrently. The state counters that "had the trial court intended that all of [Dillon's] sentences run concurrently in one large 'group,' it would have said so straightforwardly instead of strangely splitting the sentences into two groups, making one group consecutive to the other, and then 'pinning' them together by means of" the sentence for Count 11. The state also argues that, even assuming the sentencing minute entry is ambiguous, the court's oral pronouncement of the sentence "unambiguously" confirms that Dillon's total

sentence is 22.5 years "and explains the arrangement of concurrent and consecutive sentences."

¶10 "Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record." *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). And, where such reference resolves the apparent discrepancy, "the oral pronouncement of sentence controls" over the written judgment. *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983); *see also* Ariz. R. Crim. P. 26.16(a) (judgment and sentence complete and valid at time of oral pronouncement in open court). Where a discrepancy "cannot be resolved by reference to the record," however, "a remand for clarification of sentence is appropriate." *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (emphasis omitted).

¶11 Here, a discrepancy between the sentencing minute entry and oral pronouncement arguably exists. As evidenced by ADOC's confusion, the minute entry could be interpreted as running all of Dillon's prison terms concurrently as of the same date. However, as the state suggests, the trial court's oral pronouncement makes clear that was not its intent. The court stated:

> I am ordering that Counts 1, 2, 3, 5, 7, 9, 10, 11, and 12 all run concurrent with each other [first group].
>
> I am ordering that Counts 4, 8, and 6 run concurrent with each other [second group], and consecutive to Counts 1, 2, 3, 5, 7, 9, 10, and 12, and will also be concurrent with Count 11 because that time is longer.

The court intended to run the counts in the first group concurrently; the counts in the second group concurrently; and the first and second groups consecutively to each other. With the exception of the prison term for Count 11, the prison term for Count 1, 11.25 years, is the longest of the sentences in the first group, and the same is true for Count 4 in the second group. This arrangement resulted in a total sentence of 22.5 years, which is consistent with the court's statement that Dillon was "looking at basically 22-1/2 years." As for Count 11, by also ordering it to be served concurrently with the second group, as the state points out, this necessarily means that the 15.75-year prison term for Count 11 would run concurrently with the first group for 11.25 years and then concurrently with the second group for the remaining 4.5 years of the term imposed for Count 11.[6] Moreover, as the state also points out, if the court had intended to run all counts concurrently, it easily could have said so rather than splitting the counts into two groups. Having established that Dillon received a 22.5-year sentence in March 2008, we can turn now to the order that is the subject of this appeal.

¶12 In its February 2012 order, the trial court stated "the total sentence of incarceration for [Dillon] is 22.5 years not 15.75 years and [ADOC] is notified to make said correction." Because the court had imposed a 22.5-year sentence in March 2008, this subsequent order confirming that Dillon's total sentence was 22.5 years was nothing more than a clarification. *Cf. State v. Lujan*, 136 Ariz. 326, 329, 666 P.2d 71, 74 (1983)

[6]Notably, all the parties, except ADOC, appear to have been operating under the assumption that Dillon received a total of 22.5 years in prison. In the first appeal, Dillon's counsel and the state acknowledged the 22.5-year sentence in their briefs, and we did as well in our memorandum decision. *Dillon*, 2 CA-CR 2008-0091, ¶ 1.

(sentence not modified at subsequent proceeding where defendant given identical prison term).

¶13 Likewise, the trial court's order amending the March 2008 sentencing minute entry to classify Count 5 as a dangerous-nature offense was a correction clarifying its original intent. Although the sentencing minute entry indicated that Count 5 was "nondangerous," the jury specifically found that it was a dangerous-nature offense and, at sentencing, the court orally pronounced it as such. The court had authority to correct its minute entry, designating Count 5 as a dangerous-nature offense. *Cf. Hanson*, 138 Ariz. at 304-05, 674 P.2d at 858-59 (based on oral pronouncement, court could amend minute entry to show offenses as repetitive). And this is the type of clerical error that Rule 24.4, Ariz. R. Crim. P., permits courts to correct at any time. *See Hanson*, 138 Ariz. at 304, 674 P.2d at 858; *Lujan*, 136 Ariz. at 329, 666 P.2d at 74.

¶14 Returning to the question of our jurisdiction, Dillon's appeal does not fall under § 13-4033(A)(3) because the trial court's February 2012 order was nothing more than a clarification of the sentence imposed in March 2008. *See Gessner*, 128 Ariz. at 488-89, 626 P.2d at 1120-21. We therefore lack jurisdiction over this appeal.

Disposition

¶15 For the reasons stated above, this appeal is dismissed for lack of jurisdiction.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge