# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>RUSSELL LEWIS O'BRIEN,<br><br>Appellant. | No. 41719-7-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Penoyar, C.J. — Russell O'Brien appeals the trial court's order denying his motion to correct his judgment and sentence. He argues that the trial court erroneously concluded that his judgment and sentence did not contain a mistake. In the alternative, he asserts that his plea was involuntary and, thus, he should be allowed to withdraw it. O'Brien also submits a statement of additional grounds (SAG).[1] We affirm.

FACTS

In June 2006, O'Brien pleaded guilty to cause numbers 05-1-06126-1, 05-1-05591-1, and 05-1-05727-2; the trial court subsequently sentenced him under the Drug Offender Sentencing Alternative (DOSA). O'Brien's DOSA sentence was revoked, and in October 2007, the State charged O'Brien, under a new cause number, with two counts of second degree burglary and one count of attempted second degree burglary.

In December 2007, pursuant to plea negotiations, the State filed an amended information reducing the charge to one count of second degree burglary. The plea agreement between the State and O'Brien reads:

> The prosecuting attorney will make the following recommendation to the

[1] RAP 10.10.

> judge: 60 months in custody credit for 60 days served $200 costs, $500 [crime victim penalty assessment] CVPA, $100 DNA sample $400 [district attorney's] DAs recoupment, restitution concurrent with 05-1-06126-1, 05-1-05591-1, and 05-1-05727-2.

Clerk's Papers (CP) at 9.

O'Brien pleaded guilty to one count of second degree burglary. At the plea hearing, the trial court asked O'Brien: "At sentencing the prosecutor is going to be recommending 60 months in custody, as well as the legal financial obligations concurrent with three other cause numbers, you understand that?" CP at 74. O'Brien responded, "Yes, ma'am." CP at 74.

At sentencing, the prosecutor asked the sentencing court

> to impose 60 months in prison. Credit for time served is 60 days. Legal financial obligations of $500 crime victim penalty assessment; $200 costs; $100 DNA testing fee. Restitution to all victims, and I believe that there was a [DOSA] that was revoked, Your Honor, so the restitution would be concurrent with the restitution that was ordered in the [DOSA] revocation.

CP at 75.

O'Brien did not object to the prosecutor's recommendation but asked the sentencing court for drug addiction treatment and to "keep any discretionary fines and costs as low as possible." CP at 76.

On December 17, 2007, the trial court sentenced O'Brien to 60 months' confinement. The judgment and sentence reads: "The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced." CP at 21. "Concurrent with: 05-1-06126-1, 05-1-05591-1, 05-1-05727-2" is handwritten next to the portion of the sentence addressing "RESTITUTION." CP at 19.

In February 2008, O'Brien wrote a letter to the superior court "to inform [the trial court]

that [t]he Department of Corrections . . . [was] not following the current time that I was sentenced to by your Honor." CP at 30. The trial court sent O'Brien a letter informing him that "the Court does not act on ex-parte letters" and, thus, his letter had been forwarded to the attorneys of record. CP at 29.

In November 2009, O'Brien filed a pro se CrR 7.8 motion for relief from judgment or order. CP at 35-36. On February 8, 2010, O'Brien moved, pro se, for a hearing without oral argument on his motion for relief from his judgment. In March, he wrote a letter to the superior court, inquiring about the status of his motion.

On November 3, O'Brien, through counsel, filed a "motion to correct" the December 2007 judgment and sentence. CP at 49. O'Brien argued that, based on the record,

> it is clear the State and Defense negotiated a sentencing recommendation of 60 months to run concurrently with those of the revoked DOSA. The State and Defense both anticipated the sentences running concurrently. There is no evidence either party knowingly recommended a sentence not allowed by law. The parties were mistaken as to the applicable law.

CP at 50.

At the hearing on O'Brien's motion, his original defense counsel stated, "The discussions that I had with my client were that the State would recommend that the sentences run concurrently. The sentence in this case would run concurrently with the sentences on three other cause numbers." Report of Proceedings (RP) at 3. Defense counsel asserted:

> [T]he State's reading would not be logical that we would recommend only restitution run concurrent, especially with different cause numbers several years apart. And so nowhere does it mention that the sentences should run consecutively. It's not logical that only restitution would run concurrently, and you know, candidly, Your Honor, you know how quickly things happened up on the fifth floor several years ago.

RP at 8.

The prosecutor, who was not originally assigned to the case, responded that a mutual mistake did not occur because the record did not mention that the sentence should run concurrently with the revoked DOSA sentence. The prosecutor acknowledged that the State may have offered to recommend that the sentences run concurrent; however, the prosecutor asserted that it is the trial court that "ultimately ordered the sentence." RP at 7.

The trial court denied the motion, reasoning that "I think that if by operation of law the sentence could not be run concurrent with a revoked DOSA, and it was clear at the time of the sentencing that he had a revoked DOSA, then this was the proper sentence, and it was not concurrent with the revoked DOSA. It was consecutive." RP at 9. O'Brien appeals "the order denying [his] motion to modify judgment and sentence." CP at 104.

## ANALYSIS

### I. Motion to Correct Judgment and Sentence

O'Brien contends that the trial court erred by declining to correct the judgment and run O'Brien's sentence concurrent with his revoked DOSA sentence. We disagree.

#### A. Standard of Review

We review a ruling on a CrR 7.8 motion for an abuse of discretion. *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997). A trial court abuses its discretion when it exercises its discretion in a manner that is manifestly unreasonable or based on untenable grounds. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

#### B. Relief from Judgment or Order

The State contends that the judgment did not contain a mistake, as the record "does not support defendant's claim that the State agreed to recommend concurrent sentencing" and "[t]he sentencing court did not take any of the steps necessary to impose an exceptional sentence such as that suggested by defendant." Resp't's Br. at 5, 8.

Under CrR 7.8(a), "[c]lerical 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." "[W]henever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms." RCW 9.94A.589(2)(a). The sentencing court may impose a sentence outside the standard sentence range when there are "substantial and compelling reasons justifying an exceptional sentence;" however, in that instance, "the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence." RCW 9.94A.535.

Here, as the State points out, the record does not support O'Brien's contention that the State recommended concurrent sentencing. At sentencing, the prosecutor asked the sentencing court

> to impose 60 months in prison. Credit for time served is 60 days. Legal financial obligations of $500 crime victim penalty assessment; $200 costs; $100 DNA testing fee. Restitution to all victims, and I believe that there was a [DOSA] that was revoked, Your Honor, so the restitution would be concurrent with the restitution that was ordered in the [DOSA] revocation.

CP at 75. The judgment and sentence reflected the prosecutor's request that restitution run concurrent with the revoked DOSA's restitution: "[c]oncurrent with: 05-1-06126-1, 05-1-05591-

1, 05-1-05727-2" is handwritten next to the portion of the sentence addressing "RESTITUTION." CP at 19.

Further, the record does not indicate that the trial court intended to impose an exceptional sentence. At the time of O'Brien's sentencing hearing, he was sentenced to another term of confinement; thus, under RCW 9.94A.545, the sentencing court had to enter written findings of fact and conclusions of law to impose an exceptional sentence. The trial court did not take steps to impose an exceptional sentence. As the trial court noted at the hearing on O'Brien's motion to correct his judgment and sentence, O'Brien's sentence was the "proper sentence." RP at 9. We hold that the trial court did not err by denying O'Brien's motion to correct his judgment and sentence.

II. Voluntariness of Plea

O'Brien argues, in the alternative, that his plea was involuntary and, thus, he should be allowed to withdraw his plea or enforce his bargain at a new sentencing hearing. The State contends that the only ruling before us is the trial court's denial of O'Brien's CrR 7.8 motion. We agree with the State.

"The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal." RAP 2.4(a). RAP 2.4(c) states:

> Except as provided in rule 2.4(b),[2] the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely post-trial motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5

[2] RAP 2.4(b) states, "The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review."

(new trial).

Here, O'Brien appealed only "the order denying [his] motion to modify judgment and sentence." CP at 104. Thus, the question on appeal is whether the trial court abused its discretion by denying the motion to correct the judgment. The voluntariness of his plea relates to the underlying judgment, not the order denying his motion to modify his judgment and sentence. To the extent that O'Brien is arguing that the trial court should have granted his motion on the basis of "[a]ny other reason justifying relief from the operation of the judgment" under CrR 7.8(b)(5), he failed to make the motion within one year after the judgment was entered, as CrR 7.8 and RCW 10.73.090 require.

III. Statement of Additional Grounds

In his SAG, O'Brien argues that there is an error in his judgment and sentence, repeating an argument that appellate counsel addresses in this appeal. We do not address arguments that simply repeat or paraphrase arguments presented in the appellate counsel's brief. *State v. Johnston*, 100 Wn. App. 126, 132, 996 P.2d 629 (2000).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Johanson, J.