

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JESSE ALAN GEARHART,)
)
Petitioner,)
)
v.)
)
HON. JOSEPH R. GEORGINI, Judge of)
the Superior Court of the State of)
Arizona, in and for the County of Pinal,)
)
Respondent,)
)
and)
)
THE STATE OF ARIZONA, by and)
through the Pinal County Attorney; and)
ERICA ABBISS,)
)
Real Parties in Interest.)
_____)

2 CA-SA 2008-0085
DEPARTMENT B
MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

SPECIAL ACTION PROCEEDING

Pinal County Cause No. CR200602077

JURISDICTION ACCEPTED; RELIEF GRANTED

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B R A M M E R, Judge.

¶1 In this special action, petitioner Jesse Gearhart, the defendant in the underlying criminal proceeding, claims the respondent judge exceeded his jurisdiction and legal authority by modifying Gearhart’s sentence on November 26, 2008,¹ after he had been released from jail on October 8, 2008. Because Gearhart has no equally plain, speedy, or adequate remedy by appeal and because we conclude the respondent judge has “proceeded . . . without or in excess of [his] jurisdiction or legal authority,” we accept jurisdiction of this special action and grant relief. Ariz. R. P. Spec. Actions 1(a) and 3(b); *see Pickett v. Boykin*, 118 Ariz. 261, 262, 576 P.2d 120, 121 (1978) (special action proper remedy to allow defendant serving jail time as condition of probation trusty status and double credit allowance under A.R.S. § 31-144). Neither of the real parties in interest (the State of Arizona or the

¹Although the minute entry ruling was dated November 26, 2008, it was filed on December 1, 2008.

mother of the two minor victims, hereinafter “the victims”²), opposes our acceptance of jurisdiction in this special action proceeding.

¶2 Gearhart pled guilty to two counts of aggravated assault, class six felonies. On April 9, 2008, the respondent judge suspended the imposition of sentence and placed Gearhart on supervised probation for three years, ordering that he “be incarcerated in the Pinal County Jail for a period of 365 DAYS commencing 04/09/2008 with credit for 1 day[] served” as a condition of his probation. (Emphasis omitted.) The order also provided that Gearhart begin making a court-ordered, \$125 monthly payment “by the 1ST day of each month, commencing MAY 1, 2009.” (Emphasis omitted.) An employee of the Victim’s Rights Section of the Pinal County Sheriff’s Office sent a letter dated April 12, 2008, to counsel for the victims stating that “[t]he earliest release date for the defendant in this case will be October 8, 2008 if given 2 for 1 or April 8, 2009 if serving straight time.”

¶3 Gearhart apparently worked as a trusty during his incarceration, rendering him eligible for credit toward his jail term pursuant to A.R.S. § 31-144(A). That statute provides that

[a] prisoner . . . working . . . as a trusty outside the jail . . . shall be allowed double time while so employed and each day he is so employed shall be counted as two days in computing time on his sentence except in cases in which a specific release date is set forth in the commitment.

²See A.R.S. § 13-4437(A) and Ariz. R. P. Spec. Actions 2(a)(2).

Id. Gearhart’s sentencing minute entry contained no express provision regarding a flat-time jail term, nor did it provide a specific release date. Gearhart was released on October 8, 2008, after having served 181 days of his 365-day jail term. Almost three weeks after Gearhart was released, counsel for the victims filed a motion for clarification of sentence and motion to revoke release, claiming the Pinal County Sheriff’s Office had informed her Gearhart had been released early due to overcrowding at the prison, arguing his release violated the victims’ constitutional rights and public policy. On November 26, 2008, seven weeks after Gearhart’s release, the respondent judge conducted a hearing on the victims’ motion and ruled as follows:

The issue today is has the sentence been served? And I sentenced you on April 9th to a year in jail as part of a term of your probation. That’s exactly what my intent was. And if my minute entry, court order, wasn’t specific enough, it will be today.

You’ll be given credit for 181 days['] credit [for] time served. You have 184 days remaining. You’ll be remanded to the custody of the sheriff’s department today to serve the remaining 184 days as part of your one year flat time initial term of incarceration in Pinal County [J]ail.

....

[T]he request to stay this sentence is denied.

Mr. Gearhart, I don’t see this as a resentencing. I see this as a clarification of the sentence that originated on April 9th, 2008. The sentence—that sentence in its entirety is affirmed with the clarification of the flat time incarceration.

On December 23, 2008, this court granted Gearhart's request to stay the respondent judge's order. Gearhart was released from custody pending our consideration of this special action petition.

¶4 Gearhart argues the respondent judge unlawfully modified the sentence originally imposed when it imposed a flat-time provision at the later hearing and thereby precluded Gearhart from receiving double credit pursuant to § 31-144(A). He contends § 31-144(A) had placed the respondent judge on notice that he was eligible for double-time credit, particularly in the absence of a specific release date in the sentencing minute entry. The victims counter that, because the sentencing minute entry required Gearhart to begin paying court-ordered fees one year after the date of sentencing, the respondent judge had intended to impose a flat-time jail term, rendering Gearhart ineligible to receive benefits provided in § 31-144(A). *See In re Webb*, 150 Ariz. 293, 294, 723 P.2d 642, 643 (1986) (§ 31-144(A) prevents award of double-time credit to prisoners sentenced to flat time as condition of probation).

¶5 We agree with Gearhart. The presence of language in the sentencing minute entry regarding the payment of fees has no bearing on the actual date Gearhart was to be released. Although we do not question the respondent judge's assertion that he had intended to impose a flat-time jail term, the sentencing minute entry contained no language ordering that to occur.

¶6 With the exception of the circumstances set forth in Rule 24, Ariz. R. Crim. P., a trial court “has no inherent power to change a sentence already lawfully imposed.” *State v. Filipov*, 118 Ariz. 319, 326, 576 P.2d 507, 514 (App. 1977). Rule 24.3 empowers a court to “correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant’s appeal, if any, is perfected.” The state contends that, although the original sentence was lawful “in the sense that it was within the statutorily imposed perimeters for the crimes Petitioner pled to,” it was unlawful because it did not reflect the respondent judge’s intent to impose a flat-time jail term as a condition of probation. Relying on *State v. Glasscock*, 168 Ariz. 265, 812 P.2d 1083 (App. 1990), the state argues the respondent judge was entitled to clarify its sentence, as it ostensibly did in its November ruling. In *Glasscock*, Division One of this court found that Rule 24.3 permitted the trial court to clarify a sentence that it had imposed in an unlawful manner, that is, without due regard to the applicable sentencing statute. *Id.* at 267, 812 P.2d at 1085. Despite the unambiguous language in Rule 24.3, the state nonetheless argues the respondent judge properly “corrected a timely-discovered mistake and clarified the sentence to reflect the courts [sic] original and true sentencing intent.”

¶7 However, Rule 24.3 does not apply here as it did in *Glasscock*. There is nothing in the record before us suggesting that the original sentence imposed was either unlawful or imposed in an unlawful manner. Contrary to the state’s suggestion, a sentence is not rendered unlawful merely because it does not reflect a judge’s intent. *See State v.*

Thomas, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984) (fact that sentences imposed did not reflect court’s intent to impose maximum term did not make sentences illegal). The respondent judge had no jurisdiction to modify the sentence pursuant to Rule 24.3, the only ground under which he arguably could have done so. *See State v. Falkner*, 112 Ariz. 372, 374, 542 P.2d 404, 406 (1975) (trial court without inherent power to modify sentence; jurisdiction in post-trial motion to modify sentence limited to grounds specified in applicable rules). “Rule 24.3 was not intended to give trial courts a chance to second guess themselves.” *State v. House*, 169 Ariz. 572, 574, 821 P.2d 233, 235 (App. 1991). Gearhart thus argues, and we agree, that in the absence of any ambiguity in the original sentencing minute entry, a remand, or a finding that the sentence was illegal, the respondent judge acted “wholly without jurisdiction” when it modified his sentence.

¶8 Moreover, even assuming arguendo that the respondent judge had proper grounds to modify the sentence pursuant to Rule 24.3, he entered the challenged order more than seven months after Gearhart was sentenced, well beyond the sixty-day time limit set forth in Rule 24.3. Therefore, the judge lacked jurisdiction to modify Gearhart’s sentence for that reason as well.

¶9 We likewise reject the state’s suggestion that Rule 24.4, which permits a court to correct clerical mistakes at any time, applies here. There simply is no evidence of a clerical mistake in the record before us. *But see State v. Lujan*, 136 Ariz. 326, 329, 666 P.2d 71, 74 (1983) (clarification of record to assure it reflected identical sentence previously given

proper under Rule 24.4). Moreover, merely because the respondent judge was trying to clarify, rather than modify, the original sentence does not mean the court can do so when the change is an unlawful one. Although we agree with the victims that the respondent judge does not appear to have acted vindictively when he modified Gearhart's sentence, that is not relevant to the issue before us. For the same reason, we do not address the state's argument, raised in its response to the petition, that the victims were not given timely notice of Gearhart's release from confinement. *See* A.R.S. § 13-4413.

¶10 Accordingly, because the respondent judge modified an otherwise lawful sentence that was lawfully imposed, and because he did so beyond the time limit of Rule 24.3, the respondent judge acted in excess of his jurisdiction. We therefore accept jurisdiction of Gearhart's special action petition and vacate the respondent judge's order dated November 26, 2008, that remanded Gearhart to the Pinal County Jail to serve an additional 184 days.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

JOSEPH W. HOWARD, Judge