

FILED: August 06, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

LARRY NOBLES, aka Henry Jackson,
Defendant-Appellant.

Multnomah County Circuit Court
930936079

A152397

Julie E. Frantz, Judge.

Argued and submitted on June 23, 2014.

Robin A. Jones, Senior Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Timothy A. Sylwester, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

PER CURIAM

Second amended judgment vacated; remanded for further proceedings.

1 PER CURIAM

2 In 1994, defendant pleaded no contest to a murder charge and was
3 sentenced to 144 months in prison followed by a life term of post-prison supervision
4 (PPS). Defendant moved the trial court to reduce the PPS term to three years; the court
5 granted that motion and entered an amended judgment so providing. Two days later, the
6 trial court, acting *sua sponte* and with no notice to either party, issued another amended
7 judgment, reversing its decision to reduce defendant's PPS term to three years and
8 reinstating the lifetime PPS term of the original judgment.¹ Defendant appeals that
9 second amended judgment. Citing state statutes along with the state and federal
10 constitutions, he assigns error to the trial court's decision to modify his sentence without
11 providing him prior notice or an opportunity to be heard. He also assigns error to the
12 substance of the trial court's decision, contending that, as a matter of state sentencing law,
13 three years was the appropriate term of PPS for his conviction. Because we conclude that
14 defendant's first assignment of error is well taken, we do not reach his second.

15 The trial court purported to issue the second amended judgment under ORS
16 138.083:

17 "(1)(a) The sentencing court retains authority irrespective of any
18 notice of appeal after entry of judgment of conviction to modify its
19 judgment and sentence to correct any arithmetic or clerical errors or to
20 delete or modify any erroneous term in the judgment. The court may
21 correct the judgment either on the motion of one of the parties or on the
22 court's own motion after written notice to all the parties."

¹ That judgment was titled "Amended Amended Judgment of Conviction and Sentence." We refer to it as the second amended judgment.

1 As we noted in *State v. Whitlock*, 187 Or App 265, 269, 65 P3d 1114, *rev den*, 336 Or 17
2 (2003), the trial court's "authority" under ORS 138.083(1)(a) "must be invoked either on
3 the motion of one of the parties or on the court's own motion *after written notice to all*
4 *the parties.*" (Internal quotation marks omitted; emphasis in *Whitlock*). See *State v.*
5 *Gilbert*, 248 Or App 657, 661, 274 P3d 223 (2012) (noting that ORS 138.083(1)(a) states
6 a legislatively created exception to the common-law rule that the trial court "loses
7 jurisdiction" over the case once a defendant begins serving his or her sentence). The
8 court provided no notice to the parties before issuing, *sua sponte*, the second amended
9 judgment; written notice, however, was an explicit prerequisite to the trial court's
10 authority to act under ORS 138.083. Not having provided that notice, the trial court
11 lacked the authority to amend the amended judgment.

12 Our conclusion on that point obviates any need for us to address defendant's
13 constitutional arguments concerning his right to be present at sentence-modification
14 proceedings or to address his contentions regarding the appropriate length of his PPS
15 term. The state contends that the lifetime PPS term was mandated by law; that is an
16 argument that may appropriately be made to the trial court on remand.

17 Second amended judgment vacated; remanded for further proceedings.