IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
DEREK TYLER JOHNSON,
Defendant-Appellant.

Multnomah County Circuit Court
14CR24944; A159018

Adrienne C. Nelson, Judge.

Argued and submitted May 24, 2016.

Kyle Krohn, Deputy Public Defender, argued the cause for appellant. With him on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before DeVore, Presiding Judge, and DeHoog, Judge, and James, Judge.*

DEHOOG, J.

Reversed and remanded.

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* DeHoog, J., *vice* Flynn, J. pro tempore; James, J., *vice* Duncan, J. pro tempore.

DEHOOG, J.

Defendant appeals a judgment of conviction entered following a no contest plea. He assigns error to the trial court's sentencing order directing that he "may not be considered" for certain early release programs enumerated in ORS 137.750(1). Although defendant raises multiple arguments regarding the order, we address only whether the trial court erred by departing from the tentative plea agreement to which it had agreed without giving defendant an opportunity to withdraw his plea, as required under ORS 135.432(3). Because we agree with defendant that the trial court erroneously departed from the agreement without adhering to the statutory requirements for doing so, we reverse and remand.

The relevant facts are procedural. After reaching a negotiated settlement, defendant entered a written plea of no contest to four counts of an indictment. Defendant's plea petition included a notation of "936" next to the recommended sentence for Counts 1 and 2.[1] In its colloquy with defendant, the trial court stated, "Counsel ha[ve] spoken to me in chambers. I told them that I would agree to the offer and do the sentencing as everyone had expected." After reiterating, "As I stated earlier, I'm going to follow the recommendation," the trial court pronounced sentence on each count as follows:

> "Count 1, his natural gridblock is a 9B, but this is going to be a downward durational from his gridblock sentence of 61 to 65 months down to 50 months prison, credit for time served, *Senate Bill 936 credit*. Understanding there was no AIP.[2]
>
> "* * * * *
>
> "Three years of post prison supervision.

[1] As we discuss below, "936" credits or programs are terms often used in reference to Senate Bill 936 (1997), which implemented provisions of a victim rights initiative approved by voters in November 1996. Among other things, Senate Bill 936 included the provision later codified as ORS 137.750(1). Or Laws 1997, ch 313, § 14.

[2] "AIP" refers to alternative incarceration programs. ORS 137.751(1) governs a trial court's determination of a defendant's eligibility for AIP. *State v. Goodenough*, 264 Or App 211, 214, 331 P3d 1076, *rev den*, 356 Or 400 (2014). Defendant's eligibility for AIP is not at issue in this case.

> "For Count 2, Robbery in the Third Degree, he is a 5B on the gridblock, and he's going to be getting the upper portion of the gridblock of 14 months prison, credit for time serv[ed], *Senate Bill 936 credits*, concurrent time to Count 1. And there will be a two-year period of post prison supervision.
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> "For Count 3, the only misdemeanor, we're going to suspend imposition of sentence ***. We're going to give him 12 months jail with credit for time served, *Senate Bill 936 credits* concurrent to Counts 1 and 2.
>
> "And for Count 4, the Burglary in the First Degree, it merges with Count 1 by stipulation."

(Emphases added.) Accordingly, "936" was written on the Temporary Sentencing Order that the trial court filed on the day of sentencing. That order did not expressly indicate, however, whether defendant could be considered for any form of temporary leave, release, or reduction in sentence as enumerated in ORS 137.750(1).[3] The day after the hearing, the trial court filed an Amended Temporary Sentencing Order. On that order, the court drew arrows connecting its notation of "936" to checked boxes indicating that defendant was not to be considered for reductions under ORS 137.750(1) other than "Good Time." Unlike the court's first order, neither defense counsel nor the state initialed the amended order. The judgment, entered March 6, 2015, reflected the second order, stating that, as to Counts 1 and 2, defendant "may not be considered by the executing or releasing authority for any form of Conditional or Supervised Release Program, Temporary Leave From Custody, Work Release. The Defendant IS eligible for Reduction in Sentence (Good Time)." (Capitalization in original.)

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[3] ORS 137.750(1) provides:

> "When a court sentences a defendant to a term of incarceration upon conviction of a crime, the court shall order on the record in open court as part of the sentence imposed that the defendant may be considered by the executing or releasing authority for any form of temporary leave from custody, reduction in sentence, work release or program of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing, unless the court finds on the record in open court substantial and compelling reasons to order that the defendant not be considered for such leave, release or program."

Defendant assigns error to the trial court's order prohibiting his consideration for the various programs enumerated in ORS 137.750(1). According to defendant, the eligibility for "936 credits" was part of his agreement with the state; because the trial court concurred in that agreement under ORS 135.432(2), it was required to comply with ORS 135.432(3) if it later chose to depart from its terms. That is, defendant contends, the court was required to give him the option of withdrawing his no contest plea before imposing a different sentence. The state responds that defendant's argument is premised on an assumption that the record does not support: that the parties' and the court's understanding was that defendant would be eligible for the programs listed under ORS 137.750(1). Although it acknowledges the references to "936 credits" in the plea petition and on the record, the state asserts that, because that term was never further explained, it may well have referred only to eligibility for earned-time credits (good time), which the judgment appropriately reflects. It follows, the state reasons, that defendant's sentence "result[ed] from a stipulated sentencing agreement" and therefore his claim of error is not reviewable. *See* ORS 138.222 (2)(d) (precluding review of "[a]ny sentence resulting from a stipulated sentencing agreement between the state and the defendant which the sentencing court approves on the record").

Before considering those arguments, we briefly address the state's contention that defendant failed to preserve his arguments and that the issues that he raises on appeal do not warrant "plain error" review under ORAP 5.45(1). Although it is true that defendant did not raise his argument under ORS 135.432(3) before the trial court, the court's alleged error was not apparent until after the court had entered the amended sentencing order. Defendant had no opportunity to object to the terms of that order. The amended order was not entered in open court, and there is no indication that defendant was made aware of its content before the court incorporated its terms into the judgment. Under those circumstances, preservation is not required. *State v. Baskette*, 254 Or App 751, 753, 295 P3d 177 (2013) (citing *Peeples v. Lampert*, 345 Or 209, 220, 191 P3d 637

(2008) ("In some circumstances, the preservation requirement gives way entirely, as when a party has no practical ability to raise an issue.")).

Turning to the merits, we review a claim of sentencing error for errors of law. *State v. Capri*, 248 Or App 391, 394, 273 P3d 290 (2012) (citing ORS 138.222(4)). A trial court's participation in plea negotiations is governed by statute. *See* ORS 135.432. If the parties have reached a tentative plea agreement with the expectation of a reduction in charge or a sentencing concession, the trial court may allow them to share that agreement with the court before the defendant enters a negotiated plea. ORS 135.432(2). The court may then indicate whether it concurs in the proposed disposition. *Id.* The trial court's participation in those discussions does not bind it to the terms of the resulting plea agreement, and the court may independently decide whether to impose the negotiated sentence. ORS 135.432(4). If, however, a trial court concurs in the proposed disposition, then later decides to depart from the agreed-upon sentence, the court must notify the defendant of that decision and allow the defendant "a reasonable period of time in which to either affirm or withdraw a plea of guilty or no contest." ORS 135.432(3).

In this case, the trial court's statements at sentencing reflect its earlier agreement to the proposed disposition as contemplated by ORS 135.432(2). The court stated at the outset that it agreed with the proposed disposition, which it had discussed with counsel in chambers. The court later reiterated that it would impose the stipulated sentence. Because the trial court had previously concurred in the plea agreement, ORS 135.432(3) required it to impose the stipulated sentence or to allow defendant to withdraw his plea.

As noted, the state argues that the trial court did not err because it did not demonstrably depart from the parties' agreement. Accordingly, the court was not obligated to give defendant an opportunity to withdraw his plea. The state's premise is that it is unclear what was meant by the phrase "936 credits," which, the state contends, is

not defined by statute, rule, case law, or anything in the record. We disagree. In several cases, we have described "936" credits or programs as the various programs listed under ORS 137.750(1). *See, e.g.*, *State v. Goodenough*, 264 Or App 211, 213 n 3, 331 P3d 1076, *rev den*, 356 Or 400 (2014) (explaining that "936 credits," or "936 programs," "refers to the early-release and sentence-reduction programs authorized by Senate Bill (SB) 936 (1997)"); *State v. Ivie*, 213 Or App 198, 200-01, 159 P3d 1257 (2007) (explaining that, under ORS 137.750, a sentencing court must order that the defendant be considered for any of the enumerated release programs, "sometimes referred to as 'Senate Bill (SB) 936 credits,'" unless the court makes required findings); *State v. Schaefer*, 201 Or App 409, 410, 118 P3d 849 (2005) (stating that sentencing court denied defendant "'936 credits,' that is, consideration for early release and sentence reductions under ORS 137.750 and ORS 137.752"); *State v. Jackson*, 201 Or App 407, 408, 118 P3d 849 (2005) (same). Thus, contrary to the state's suggestion, the phrase "936 credits" has a clear, commonly understood meaning. Our decisions provide strong support for defendant's contention that the "Senate Bill 936 credits" that were part of the parties' agreement included not only good-time credits, but all of the programs enumerated in ORS 137.750(1). Because nothing in the record suggests the understanding that defendant would not be eligible for those programs, the trial court could only have understood that he would be eligible. And, because the sentence that the trial court ultimately imposed did not reflect that eligibility, it did not conform to the negotiations in which the trial court had concurred.

As we have explained, if a trial court concurs in a tentative plea agreement involving sentencing concessions but later departs from the terms of that agreement, it must provide the defendant a reasonable opportunity to affirm or withdraw the defendant's plea. ORS 135.432(3). Here, the trial court concurred in the plea agreement, but when it entered its amended order after the sentencing hearing, it departed from that agreement without providing defendant an opportunity to affirm or withdraw his plea. That was

error. Accordingly, we reverse and remand for defendant to be given that opportunity.[4]

Reversed and remanded.

[4] Our conclusion that the trial court departed from the parties' stipulated plea agreement necessarily disposes of the state's argument that defendant's claim of error is not reviewable. *See Capri*, 248 Or App at 395-96 (stating that ORS 138.222(2)(d) was not intended to "preclude review of a portion of a sentence that was not agreed to between the state and a defendant in a stipulated sentencing agreement").