

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

MICHAEL W. JENKINS,
Plaintiff-Appellant,

v.

Brigitte AMSBERRY,
Superintendent,
Two Rivers Correctional Institution,
Defendant-Respondent.

Umatilla County Circuit Court
17CV08341; A164513

Eva J. Temple, Judge.

Submitted September 1, 2017.

Jed Peterson filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Dustin Buehler, Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

PER CURIAM

Reversed and remanded.

PER CURIAM

Petitioner appeals a judgment dismissing his petition for a writ of habeas corpus. The trial court dismissed the petition on the ground that the claim that petitioner asserted had been resolved against him in a prior appeal. ORS 34.330(5)(b) (prohibiting habeas corpus relief where a petitioner “seeks judicial review of a final order of the [Board of Parole and Post-Prison Supervision (board)] under ORS 144.335” but the Court of Appeals “[o]therwise disposes of the judicial review on the merits of the petitioner’s issues on judicial review”). Petitioner contends that the court erred in dismissing his petition on that basis. The superintendent concedes that the trial court so erred. We agree, accept the concession, and reverse and remand for further proceedings.

Petitioner filed a petition for a writ of habeas corpus, arguing that the board had violated petitioner’s statutory and constitutional rights when it “resummed” petitioner’s prison terms in 1997, after the board had previously “unsummed” those terms in 1988 and 1990.¹ In a motion to deny the petition, the superintendent mistakenly construed petitioner’s claim as arising from the board’s 1988 and 1990 unsumming orders, rather than from the alleged 1997 resumming order. The superintendent claimed that the habeas petition was barred by ORS 34.330(5)(b) because we had previously disposed of plaintiff’s claim in a prior appeal. See *Jenkins v. Board of Parole*, 125 Or App 87, 864 P2d 1352 (1993), *rev den*, 318 Or 351 (1994). The trial court denied the petition as meritless and entered a general judgment dismissing the petition without prejudice, presumably relying on the superintendent’s argument.

The state concedes that, because the trial court’s judgment appears to be based on a misunderstanding of the allegations in the habeas petition, and because it is not clear from the record whether ORS 34.330 bars a challenge under habeas corpus to the alleged 1997 resumming order, the

¹ “Summing” refers to the board’s practice of adding consecutive prison terms together; “unsumming” refers to its determination that consecutive sentences are not appropriate, thus allowing terms to run concurrently. *Corgain v. Board of Parole*, 213 Or App 407, 420 n 5, 162 P3d 990 (2007).

proper disposition of the appeal is to reverse and remand for further proceedings. We agree.

Reversed and remanded.