IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
NATHAN RICHARD TAYLOR,
Defendant-Appellant.
Columbia County Circuit Court
131059; A164186

Cathleen B. Callahan, Judge.

Argued and submitted October 5, 2018.

Rond Chananudech, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Jacob Brown, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

JAMES, J.

Reversed and remanded for resentencing; otherwise affirmed.

Lagesen, P. J., concurring.

JAMES, J.

Defendant appeals from a judgment revoking his probation and imposing a period of 36 months' incarceration as a revocation sanction. The parties agree that under OAR 213-010-0002(2), when a sentencing court revokes a departure term of probation, the maximum revocation sanction is the defendant's presumptive maximum. Defendant was categorized in the sentencing guidelines grid block as a 6F for Count 1, and a 6C for Count 4. As to Count 1 (6F), the presumptive sentence was probation and the maximum sanction upon revocation from a presumptive probationary sentence is six months. OAR 213-010-0002(1). As to Count 4 (6C), the maximum presumptive sentence is 18 months, and accordingly the maximum revocation sanction is 18 months. On appeal, defendant acknowledges that he failed to object to the 36-month revocation sanction, but asks us to exercise discretion to reach the issue as plain error. The state concedes the error, but argues that circumstances present in this case weigh against the exercise of discretion to correct the error. We exercise our discretion to correct the error, and, accordingly, reverse and remand.

In April 2014, defendant pleaded guilty to two counts of third-degree assault and stipulated to several aggravating sentencing factors. The state asked the court to impose an upward dispositional departure sentence of 18 months' incarceration on Count 1, and a consecutive upward durational departure sentence of 27 months' incarceration on Count 4, for a total aggregate sentence of 45 months' incarceration. Defendant asked the sentencing court to "give[] him th[e] chance," or "carrot," of a probation sentence only, with the "stick" of a "prison sentence" "hanging over his head."

The court determined that aggravating factors justified consecutive upward departure sentences of 18 months' incarceration on Count 1 and 36 months' incarceration on Count 4, for a total aggregate sentence of 54 months' incarceration. The court further determined, however, that defendant was amenable to treatment, and it imposed a probation sentence. However, the court indicated that defendant would serve "18 months [with Department of Corrections]

DOC if probation is revoked." On Count 4, the court specified "[d]efendant to serve 36 months DOC if probation is revoked, consecutive to 18 months on Count 1, this case." Defendant did not appeal from that judgment.

In January 2015, the state alleged a probation violation and requested that probation be revoked, and the 54-month incarcerative term be imposed. Defendant's probation officer recommended a 20-day sanction. At the hearing defendant referred to the "enormous" prison sentence "hanging over his head." The trial court revoked defendant's probation on Count 1 and imposed a revocation sanction of 18 months of incarceration. It continued defendant's probation on Count 4. For the purposes of this appeal, the parties agree that the 18-month revocation sanction was unlawful under OAR 213-010-0002(1). Nevertheless, defendant did not object at the time.

In December 2016 the state moved for a show-cause hearing why defendant's probation for Count 4 should not be revoked, alleging that defendant violated the conditions of probation by failing to submit to a urine test and failing to report as directed. Following defendant's stipulation to the probation violation, the trial court revoked probation for Count 4 and imposed 36 months of prison with two years of post-prison supervision (PPS). Defendant did not object at the time, but he now appeals the ensuing judgment.

This court reviews the scope of a trial court's authority to impose a probation revocation sanction for legal error. *State v. Denson*, 280 Or App 225, 231, 380 P3d 1170 (2016). In approaching issues raised as plain error, this court applies the two-step process articulated in *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991). First, we must determine that a claim of error satisfies the requirements for "plain error." That is, it must be *legal* error—apparent, obvious, and not reasonably in dispute—that appears on the face of the record, and the facts constituting the error must be irrefutable. *Id.* at 381-82.

Second, even when the first step of *Ailes* is met, we are not obligated to correct an error. And when we do so, we must articulate our reasons for doing so:

> "[T]he appellate court must exercise its discretion to consider or not to consider the error, and if the court chooses to consider the error, the court must articulate its reasons for doing so. This is not a requirement of mere form. A court's decision to recognize unpreserved or unraised error in this manner should be made with utmost caution. Such an action is contrary to the strong policies requiring preservation and raising of error."

Id. at 382 (citation omitted).

Ailes identified a nonexclusive list of criteria that guide the appellate courts' discretion to consider "plain error":

> "In future applications of this rule, in deciding whether to exercise its discretion to consider an error of law apparent on the face of the record, among the factors that a court may consider are: the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way * * *."

Ailes, 312 Or at 382 n 6. As we have noted, *Ailes*'s second step acts as a "baffle" on free-wheeling consideration of "plain error." *State v. Jury*, 185 Or App 132, 138-39, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003). The criteria we must apply ensures that review of plain error will be the exception, and not the rule. *Id.* at 138-39.

Applying that framework to this case, we agree with the parties that the first step of *Ailes* is met in this case. The error here is legal, obvious, and apparent on the face of the record. There is no dispute that a court's authority to impose a criminal sentence derives from the legislature, and that sentencing—its mechanisms, authorities, and restrictions—are statutory. A court's authority to sentence a defendant on a probation revocation is therefore limited by what the legislature permits.

ORS 137.545(5)(b) provides that if a defendant fails to comply with the conditions of probation, a court may revoke probation and impose sanctions provided by the Oregon Criminal Justice Commission. The Oregon Criminal Justice Commission promulgated rules and sentencing guidelines in

chapter 213 of the Oregon Administrative Rules. Pertinent in this case, OAR 213-010-0002(2) applies to probation revocations and provides, in part:

> "For those offenders whose probationary sentence was *** a departure from a presumptive prison sentence *** the sentence upon revocation shall be a prison term up to the maximum presumptive prison term which could have been imposed initially ***."

Thus, "once a probationary sentence is executed, 'OAR 213-010-0002 limits the revocation sanctions to those that flow from the gridblock used at the time of sentencing.'" *State v. Bolf*, 217 Or App 606, 609, 176 P3d 1287 (2008) (quoting *State v. Hoffmeister*, 164 Or App 192, 196, 990 P2d 910 (1999)). Thus, despite the fact that the trial court *desired* to keep the "hammer" of a sizeable revocation sanction over defendant, the court lacked that *authority*.

We turn then to whether we should exercise our discretion to correct the error. In urging us not to, the state primarily argues that defendant's failure to object should be viewed as a tactical decision. In general, an error that "was the product of a tactical or strategic choice" on the part of a defendant "decisively militates against an exercise of *Ailes* discretion." *State ex rel Juv. Dept. v. S. P.*, 218 Or App 131, 142, 178 P3d 318 (2008), *aff'd*, 346 Or 592, 215 P3d 847 (2009). In this case, we would find that argument more persuasive if this were an appeal from the original judgment, or the revocation on Count 1. In both of those instances one could conceive of a tactical reason for defendant to acquiesce. At the time of original sentencing defendant risked the trial court changing its mind and not departing to probation. And at the first revocation, defendant risked the court revoking on both counts. But by the time of the last and final count of probation remaining, we struggle to find a plausible tactical reason for defendant not to object to an admittedly unlawful sentence. Ultimately, we are unpersuaded that the errors that occurred over the course of all of defendant's sentencings were tactical decisions, as opposed to simple mistakes.

Next, this is a criminal case, where the error affects a liberty interest. And in this case, the error is consequential. Defendant already served a revocation sentence that

the parties agree was six months longer than permissible on Count 1. Now, defendant will serve another 18 months beyond the lawful limit on Count 4. The gravity of the error to defendant is significant.

Finally, as we have repeatedly noted, the state has no valid interest in having defendant serve an unlawful sentence. *See, e.g.*, *State v. Hall*, 256 Or App 518, 519, 301 P3d 438, *rev den*, 354 Or 148 (2013); *State v. Gutierrez*, 243 Or App 285, 288, 259 P3d 951 (2011); *State v. Wierson*, 216 Or App 318, 319, 172 P3d 281 (2007). Our observations on that point extend beyond "the state" as party in this matter, but to the state broadly—as the collective citizenry of Oregon. As discussed, sentencing is set by the legislature, and part of the legislative decision-making in that arena is the allocation of finite state resources. Resource constraints require the legislature to prioritize certain criminal justice matters as a greater priority use of those finite resources than others. The legislature has made that policy choice in deciding that monies to be spent on probation revocation sanctions are limited to a maximum presumptive grid block sentence—a value also set by the legislature. When a sentence exceeds that which a statute provides for, it necessarily interferes with the legislative allocation of scarce state resources. While resources are not *per se* dispositive on our consideration of plain error sentencing matters, we approach the issue mindful of those concerns.

In conclusion, we find that the ends of justice militate in favor of the exercise of discretion in this case.

Reversed and remanded for resentencing; otherwise affirmed.

LAGESEN, P. J., concurring.

When the trial court revoked defendant's probation and ordered him to serve 36 months' incarceration, it did exactly what the original sentencing judgment instructed: "Defendant to serve 36 months DOC if probation is revoked." Although defendant did not object to the court's imposition of the term of incarceration specified in the judgment, the state and defendant both agree that, under our decision in *State v. Hoffmeister*, 164 Or App 192, 990 P2d 910 (1999),

the trial court plainly erred by adhering to the terms of the judgment, rather than imposing the 18-month term of incarceration contemplated under OAR 213-010-0002(2). Apart from confirming the correctness of the state's concession, the only question for us is whether to exercise our discretion under ORAP 5.45(1) to correct the error. Although I ultimately agree with my colleagues in the majority that we should, I write separately for two reasons. First, the anodyne description of the underlying facts contained in the majority opinion fails to capture fully the competing considerations at play in this case. Those considerations, in my view, warrant a fuller explanation of our decision to exercise our ORAP 5.45(1) discretion. Second, my reasons for concluding that we should exercise that discretion are different from those of my colleagues.

To understand why this case presents a challenging discretionary call requires an understanding of how, precisely, defendant has ended up serving the term of incarceration that he now challenges. In particular, it requires an understanding of how the sentencing court's decision to grant defendant's request for probation—a lenient sentence under the circumstances—was contingent upon the trial court's understanding that defendant would serve a significant prison term if he failed to comply with the requirements of that probation.

The victim of defendant's assaults was a two-year-old girl in his care. Defendant was 27 years old at the time. A doctor who examined her at the hospital found many bruises over the child's body: two bruises on her forehead, bruises in front and back of her left ear, bruises on her left cheek and on her chin, a bruise over her right cheek, a bruise on her right arm, and multiple bruises on her buttocks. At the time of his arrest, defendant admitted to slapping the child in the face and spanking her, and acknowledged that he was responsible for at least some of the bruises on her face, as well as the bruises on her buttocks. In pleading guilty to two counts of assault, defendant admitted not only that he intentionally injured the child, he also stipulated that the assaults involved aggravating circumstances, including that he "was deliberately cruel to the victim by acts charged in the indictment and other acts not charged," and also that he

knew that the victim was particularly vulnerable because "she was one or two years of age, which increased the threat of harm" to her.

The state asked the trial court to sentence defendant to a total of 45 months' incarceration, including a 27-month term of incarceration on the assault count for which defendant currently is serving time. Defendant urged the court to impose probation. The court saw things differently than either party. It determined that defendant's conduct warranted the maximum possible term of incarceration allowed with permissible upward dispositional and durational departures: 54 months. But, there were reasons to give defendant a chance to avoid prison completely: "I would rather have him operating a business and able to afford treatment now rather than going to prison, losing his income and his ability to earn money and not be able to afford treatment later." Accordingly, the court explained that it would sentence defendant to probation for both assaults, subject to defendant serving a total of 54 months' incarceration if probation was revoked, including 36 months' incarceration on the conviction on which defendant currently is incarcerated, and 18 months' incarceration on the other conviction. The court warned defendant that, if he failed to comply with the terms of probation, he would be serving the 54-month sentence:

> "Because if you can't take this seriously at this point after going through the process that you've gone through in the last year, if you can't take this seriously enough to be at every single group, domestic violence group, and every single probation appointment, then we're not getting the message through to you and you should do the prison time.
>
> "The only reason you're being given this chance is because I believe that you will be a greater threat to a child in the future if you just go to prison without an opportunity to do this."

Although the state questioned whether the court's proposed sentence was permissible and, in particular, whether the court could lawfully "aggravate and mitigate on the same sentence order," defendant's lawyer reassured the court that

she was "not aware of any administrative rule that prohibits" the arrangement contemplated by the court.

Rather than heeding the trial court's warning, defendant, within a matter of months, stopped reporting to his probation officer and did not complete the programs that the court had contemplated that he would. For that reason, the court revoked defendant's probation on one of his two convictions and imposed the 18-month term of incarceration that the original sentencing judgment specified was to be imposed upon revocation of probation on that count. The court reiterated that defendant's underlying crimes warranted the full 54 months of incarceration, but that it still thought that defendant would benefit from treatment and, for that reason, it continued defendant's probation on the other count.

Defendant completed the term of incarceration and, upon his release, complied with the terms of his probation for approximately 10 months, at which point he committed the probation violations that led to the imposition of the term of incarceration that defendant is challenging in this appeal. At the probation violation hearing, defendant's probation officer told the court that, notwithstanding the "suspended sentence," he recommended that defendant be sanctioned with 30 days' incarceration. The probation officer explained that defendant was a "good worker," but had become dependent on opioids that he was "using to function during the day at work." The probation officer thought that a 30-day period of incarceration would give defendant "some clarity of mind" so that he would be ready to obtain treatment for his opioid addiction upon his release. The court rejected that recommendation and imposed the 36-month term of incarceration contemplated by the original sentencing judgment.

It is against this backdrop that defendant asks us to exercise our discretion to correct the court's error, and it is this backdrop that makes the question whether to do so a difficult one.

On the one hand, defendant bears a great deal of responsibility for the trial court's imposition of the 36-month term of incarceration. At his original sentencing, defendant

encouraged the court to sentence him in that manner. Defendant did not question the court's authority to do so at the time. Instead, defendant's counsel told the court that she was not aware that the arrangement contemplated by the court would be prohibited by any administrative rule. In addition, defendant affirmatively benefited from the court's mistake of law. Rather than receiving the term of incarceration that the court concluded was warranted by defendant's assault of a child, defendant received a lenient sentence of probation. Although, ultimately, defendant did not succeed on probation, the fact that he had the opportunity to avoid incarceration completely at the outset of the case appears to be attributable to the court's belief that it could require defendant to serve the whole 54 months of incarceration if defendant failed on probation. Finally, defendant's generally lackluster performance on probation cuts in favor of requiring him to serve the full term of incarceration he would have faced had defendant pointed out to the trial court at his initial sentencing that it could not do what it wanted to do.

On the other hand, it is undisputed that, under *Hoffmeister*, the 36-month term of incarceration contemplated by the original sentencing court is unlawful. If we were to decline to correct the error, then defendant would be deprived of his liberty for approximately one more year simply because his lawyer did not raise the issue below; had defendant's lawyer raised the issue in the probation-revocation proceeding below, we would have no choice but to reverse. That is so notwithstanding the considerations that weigh against defendant in the ORAP 5.45(1) discretionary calculus. Additionally, when the 18 months that defendant served when his probation was revoked the first time is added to the approximately 22 months he has served on the term of incarceration at issue on appeal, defendant has served approximately 40 months in prison for his assaults—just five months short of the amount of time the state advocated would be an appropriate sentence for defendant's conduct. This suggests that a reversal would not impair the state's legitimate interest in ensuring that defendant serve an appropriate punishment for his crime. In other words, defendant's role in persuading the court to sentence him in the erroneous way that it did does not mean, on the facts of

this case, that defendant has evaded a fair term of incarceration for his offenses. Finally, defendant's probation officer's assessment of defendant's amenability to treatment also weighs in favor of correcting the error so that defendant can obtain the treatment that the record strongly indicates that he needs.

It is for these latter reasons that I conclude that we should exercise our ORAP 5.45(1) discretion to correct the plain error in this case, notwithstanding the considerations pointing the other direction. In reaching this conclusion, however, I am not persuaded, as my colleagues in the majority are, that the fact that defendant's sentence is unlawful tips the balance in favor of defendant under the circumstances of this case. For one, the Supreme Court expressly has cautioned us against relying too heavily on that factor alone. *State v. Fults*, 343 Or 515, 522-23, 173 P3d 822 (2007). Here, given defendant's role in persuading the court to impose the sentence that it did at the outset of the case, that factor warrants little weight. Beyond that, I disagree with my colleagues in the majority that the legislature has signaled to us a policy choice that we should exercise our discretion to correct unlawful sentences on plain-error review. Quite the contrary, the fact that the legislature has excluded certain unlawful sentences from appellate review completely belies the notion of any such policy choice. *See, e.g.*, ORS 138.105(9); *State v. Silsby*, 282 Or App 104, 112-13, 386 P3d 172 (2016), *rev den*, 360 Or 752 (2017) (discussing limits on review of stipulated sentences imposed by *former* ORS 138.222 (2015), *repealed by* Or Laws 2017, ch 529, § 26).

I respectfully concur in the decision to reverse and remand for the reasons explained.