

**FILED: December 14, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

WILLIAM MERRILL ESTEY, JR.,  
Defendant-Appellant.

Yamhill County Circuit Court  
CR97060

A144297

John L. Collins, Judge.

Argued and submitted on September 14, 2011.

Marc D. Brown, Deputy Public Defender, argued the cause for appellant. With him on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Brewer, Chief Judge, and Gillette, Senior Judge.

BREWER, C. J.

Affirmed.

1 BREWER, C. J.

2 Defendant appeals an amended judgment sentencing him to 225 months'  
3 incarceration, arguing that the trial court lacked authority to enter that judgment under  
4 ORS 138.083, because the original judgment did not contain any erroneous terms or  
5 factual errors.<sup>1</sup> We affirm.<sup>2</sup>

6 In 1997, defendant was convicted of 20 counts of first-degree sexual abuse  
7 and was sentenced to 75 months' incarceration for each count. The sentencing court  
8 orally ordered defendant to serve certain sentences consecutively for a total of 225  
9 months. The court's written judgment, however, provided for consecutive sentences that  
10 totaled only 150 months.

11 In August 2009, after defendant had served 145 months of his sentence, the  
12 district attorney sent a letter asking the trial court to amend the judgment to conform  
13 defendant's sentence to the oral pronouncement of 225 months' incarceration. After a  
14 hearing, the court granted the state's request and entered an amended judgment that  
15 conformed to the court's oral pronouncement. Defendant appeals from the amended  
16 judgment.

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<sup>1</sup> ORS 138.083 provides, in pertinent part:

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

<sup>2</sup> We reject defendant's second assignment of error without discussion.

1           On appeal, defendant asserts that ORS 138.083(1)(a) does not authorize a  
2 trial court to enter an amended judgment merely to conform the judgment to the  
3 sentencing court's oral pronouncement. To do so, defendant argues, would violate the  
4 "long-standing principle" of the finality of judgments in criminal cases and would be  
5 contrary to our recent decision in [State v. Johnson](#), 242 Or App 279, 255 P3d 547, *rev*  
6 *den*, 350 Or 530 (2011). We disagree.

7           In *Johnson*, the defendant had been convicted of two counts of murder,  
8 felon in possession of a firearm, and manufacture of a controlled substance. The  
9 sentencing court imposed sentences on those convictions consecutively to a sentence that  
10 had been imposed on an assault conviction in another case. *Id.* at 281. We reversed and  
11 remanded for a new trial; the defendant then pleaded guilty to manslaughter and  
12 manufacture of a controlled substance. The state and the defendant stipulated that the  
13 defendant would receive a 120-month prison sentence on the manslaughter count and a  
14 45-month sentence on the other offense, the latter to be served consecutively to the  
15 former. *Id.* The trial court accepted the defendant's plea and sentenced him according to  
16 the stipulation; the court later entered a judgment reflecting the sentences ordered at the  
17 hearing. *Id.* at 282. Subsequently, the state filed a motion to correct the judgment under  
18 ORS 138.083 to provide that the defendant's new sentences be imposed consecutively to  
19 the sentence on the defendant's prior assault conviction, as the original judgment had  
20 provided. The trial court granted that motion and entered an amended judgment so  
21 providing. *Id.* at 282-83.

1                   On appeal, the defendant argued that ORS 138.083 did not authorize the  
2 entry of the amended judgment, and we agreed. We explained that,

3                   "[a]s noted, ORS 138.083(1)(a) authorizes a court to 'correct any  
4 arithmetic or clerical errors or to delete or modify any erroneous term in the  
5 judgment.' There is no question in this case that the judgment did not  
6 contain any arithmetic or clerical errors. We also conclude that it did not  
7 include any 'erroneous term.' As defendant points out, the trial court was  
8 not required to impose consecutive sentences, so there is no legal error, and  
9 the judgment conforms to the sentence that the court pronounced orally, so  
10 there is no factual error. Thus, ORS 138.083(1)(a) did not furnish authority  
11 for the court to modify the judgment."

12 *Id.* at 285 (footnote omitted). At the same time, we rejected the state's argument that the  
13 trial court had "inherent authority" to enter the amended judgment, relying on the  
14 common-law rule "that, once a valid sentence is executed--that is, once a defendant  
15 begins serving it--the trial court loses jurisdiction over the case and, thus, power to  
16 modify the sentence." *Id.* We noted that ORS 138.083 provides an exception to that  
17 common-law rule, and it authorizes a court to correct a judgment that contains erroneous  
18 terms, factual errors, arithmetic errors or clerical errors. *Id.* Because the stipulated  
19 sentencing judgment did not contain any errors falling within the categories set out by  
20 ORS 138.083, we concluded that the trial court had lacked the authority to enter the  
21 amended judgment. *Id.* at 286.

22                   *Johnson* is distinguishable from the circumstances in this case because,  
23 here, the original written judgment did contain a "factual error": it failed to reflect the  
24 sentencing court's oral imposition of the sentence on one of the counts consecutively to  
25 the sentences on two others, resulting in a total of 225 months' incarceration. Thus, ORS

1 138.083 did apply here. *See also* [State v. Easton](#), 204 Or App 1, 5-6, 126 P3d 1256, *rev*  
2 *den*, 340 Or 673 (2006), (affirming the entry of an amended judgment under ORS  
3 138.083 when the sentencing court's written judgment failed to include a consecutive  
4 sentence that the court had orally pronounced).

5 Affirmed.