IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TROY FITZGERALD WILLIAMS, Appellant.	No. 40310-2-II UNPUBLISHED OPINION

Van Deren, J. — Troy Williams appeals from the trial court's nunc pro tunc order amending his sentence on a second degree assault conviction under Pierce County Superior Court cause number 98-1-03656-9, stating that the sentence was to run consecutively to his sentence on murder, mutilation, and deadly weapons enhancement convictions under Pierce County Superior Court cause number 98-1-02549-4. He argues that (1) the State breached its plea agreement with him by arguing that the trial court intended to impose consecutive sentences in the two cases; (2) the trial court improperly entered a nunc pro tunc order under CrR 7.8(a) because it corrected a judicial, not a clerical, mistake; and (3) he received ineffective assistance of counsel at the CrR 7.8(a) hearing in January 2010. We hold that the State did not violate the plea agreement and that Williams did not receive ineffective assistance of counsel, but that the trial court abused its discretion when it entered the nunc pro tunc order to correct a judicial mistake. We reverse and

vacate the nunc pro tunc order. We further hold that no remand is necessary for resentencing because the sentence imposed on cause number 98-1-02549-4—the murder, mutilation, and deadly weapon convictions—controls and that the trial court ordered the sentence on cause number 98-1-02549-4 to run consecutively to the sentence on cause number 98-1-03656-9—the assault conviction. We remand with instructions to the Department of Corrections to run the sentences consecutively. *See In re Pers. Restraint of Caley*, 56 Wn. App. 853, 858, 785 P.2d 1151 (1990).

FACTS

On June 18, 1998, the State charged Williams by amended information, under cause number 98-1-02549-4,with first degree murder with a deadly weapon enhancement committed on or about May 30, 1998, (count 1), and with mutilation of human remains committed on or about June 4, 1998 (count 2). While Williams was in jail pending trial in the murder case, he assaulted another inmate who was scheduled to testify as a witness against him in the murder case. The State charged Williams by amended information under cause number 98-1-03656-9 with second degree assault committed on or about August 20, 1998.

On November 12, 1998, Williams pleaded guilty under cause number 98-1-02549-4 to first degree murder with a deadly weapon enhancement and to mutilation of human remains. The agreed prosecutor's sentence recommendation did not mention whether the sentence should run concurrently with or consecutively to any sentence imposed under 98-1-03656-9. On the same day, Williams entered a *Newton*[1] plea under cause number 98-1-03656-9 to second degree assault. As part of the *Newton* plea, the parties agreed that the prosecutor would recommend 57 months

[1] *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

to run concurrently with his sentence under cause number 98-1-02549-4.

At sentencing, the prosecutor informed the trial court that both the murder and the assault cases were before it. The trial court first sentenced Williams for second degree assault under cause number 98-1-03656-9. Defense counsel[2] informed the trial court that the State had agreed to recommend that Williams' sentence on the assault should run concurrently with any sentence imposed under cause number 98-1-02549-4. At the hearing's conclusion, the following exchange occurred:

> [The State]: Actually, in terms of credit for time served, I would ask that the defendant receive no credit for time served as he's been in custody on the other referral since his arrest on that charge.
>
> . . . .
>
> [Defense counsel]: Frankly, your honor, the time — if the court's ruling that the time is running concurrent[ly], I don't see that really being an issue.
>
> The Court: Is that required by law that it be concurrent?
>
> . . . .
>
> [The State]: That's correct, unless the court finds an exceptional sentence.
>
> The Court: I've filled that in.

Report of Proceedings (RP) (Dec. 17, 1998, pages 1-9) (98-1-03656-9)[3] at 7-8 (some capitalization omitted). The trial court imposed a standard range sentence of 57 months on the assault and specified in the judgment and sentence that the "sentence shall be . . . concurrent . . . with the sentence imposed in" cause number 98-1-02549-4. Clerk's Papers (CP) at 21.

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[2] Different attorneys represented Williams at sentencing under each cause number due to a conflict of interest.

[3] The record contains two separate transcripts for Williams' sentencing hearings under the different cause numbers. The individual cover sheets that both cite to cause number 98-1-03656-9, and they are only distinguished by the number of pages they contain. For clarity, we refer to them respectively as "RP (Dec. 17, 1998, pages 1-9) (98-1-03656-9)" and "RP (Dec. 17, 1998, pages 1-21) (98-1-02549-4)."

After completing the sentencing on the assault charge, the trial court[4] turned to sentencing Williams on his convictions for first degree murder, mutilation of human remains, and deadly weapon enhancement charges under cause number 98-1-02549-4. The State did not recommend an exceptional sentence and stated that, "under the standard ranges, the sentence should run concurrently with the sentence previously imposed." RP (Dec. 17, 1998, pages 1-21) (98-1-02549-4) at 3 (capitalization omitted). After finding aggravating factors existed, the trial court imposed an exceptional sentence of 600 months for first degree murder, a standard range sentence of 12 months for mutilation of human remains, and 24 months for a deadly weapon enhancement. At the hearing's conclusion, the State asked, "Is that concurrent or consecutive with the sentence imposed on the assault in the second degree?" and the trial court replied, "Consecutive. So, you need to make sure you have that in the paperwork." RP (Dec. 17, 1998, pages 1-21) (98-1-02549-4) at 20 (some capitalization omitted). The trial court entered written findings of fact and conclusions of law and a judgment and sentence stating that Williams' sentence would run consecutively to the sentence imposed under cause number 98-1-03656-9. Williams unsuccessfully appealed his exceptional sentence to this court based on an alleged lack of substantial evidence to support it. *State v. Williams*, noted at 104 Wn. App. 1015 (2001).

On August 20, 2009, the Department of Corrections (DOC) asked the trial court and the prosecutor for clarification of whether Williams' sentences under cause numbers 98-1-03656-9 and 98-1-02549-4 should run concurrently or consecutively. The DOC letter observed that Williams' judgment and sentence under cause number 98-1-03656-9—the assault conviction—stated that that sentence would run concurrently to his sentence under cause number

[4] The same trial court judge sentenced Williams under both cause numbers at separate hearings.

98-1-02549-4—the murder, mutilation, and deadly weapon enhancement convictions—but his judgment and sentence under cause number 98-1-02549-4 stated that that sentence would run consecutively to his sentence under cause number 98-1-03656-9 for the assault.

At a hearing on December 11, 2009, the State explained that the trial court had imposed an exceptional sentence under cause number 98-1-02549-4, the murder and mutilation case, and that "[t]he judgment and sentence in [that] case very clearly sets out that the sentences [we]re to be consecutive to the other cause." RP (Nov. 12, 1998) at 25. It further stated,

> On the other cause, the [98-1-0]3656[-9] cause . . . there is an error on the [judgment and sentence] and it says that it's to be concurrent with the murder case. So we are simply before the court at this time to clear up the scrivener's error, as the court very clearly ordered that the two [sentences] be served consecutively.

RP (Nov. 12, 1998) at 25. Defense counsel, who had also represented Williams at sentencing for his assault conviction, requested a continuance because, although he had some memory of the case, his case files had been archived and it would take some time to locate them. The trial court indicated it had only the case file for cause number 98-1-03656-9 before it and granted a continuance.

At a January 8, 2010, hearing, the State repeated its argument that the trial court sentenced the two cases on the same day, that it imposed an exceptional sentence under cause number 98-1-02549-4, that "one [judgment and sentence] stated that [the sentence] was to be consecutive to the other case and the other [judgment and sentence] said it was to be served concurrently with the other [sentence]," and that "there was obviously a scrivener's error in terms of the [judgment and sentence] that said that the terms were to be concurrent. The [f]indings of [f]act and [c]onclusions of [l]aw that the [trial c]ourt entered under [cause number 98-1-02549-4]

clearly set[] out that these two sentences were to be consecutive." RP (Jan. 8, 2010) at 2-3.

New defense counsel represented Williams because his original attorney, who had attended his earlier sentencing in 1998 and who also had attended the December 11, 2009 hearing, was unable to appear. Williams' counsel stated that he had "peruse[d]" findings of fact and conclusions of law entered under cause number 98-1-02549-4 but that no findings and conclusions under cause number 98-1-03656-9 were in that latter case's file. RP (Jan. 8, 2010) at 3. He stated that it "seem[ed] that the [trial c]ourt approved the consecutive sentences," but that he did not know "what was negotiated for" and did not "know enough about what transpired that day," referring to the sentencing in 1998. RP (Jan. 8, 2010) at 4. He argued that the trial court should amend the judgment and sentence under cause number 98-1-02549-4

> to indicate that the sentences are to be run concurrent with each other since there's already an upward departure on overall time in prison, and [Williams wa]s looking at 52 years . . . on . . . cause number [98-1-025]49-4. The additional four years consecutive under cause number 98-1-03656-9] seems like overkill, and it seems like maybe that wasn't what anybody intended at the time the paperwork was completed.

RP (Jan. 8, 2010) at 4-5.

The trial court reviewed its findings and conclusions entered under cause number 98-1-02549-4. The court observed that it had imposed an exceptional sentence and that the findings and conclusions clearly stated that the sentence would "run . . . consecutive[ly] to the assault second degree under [cause number 98-1-03656-9]." RP (Jan. 8, 2010) at 7. The trial court stated, "[I]t's clear to me that I made a scrivener's error on sentencing him for the assault second degree, and it should have been consecutive . . . rather than concurrent." RP (Jan. 8, 2010) at 7. It entered a nunc pro tunc order correcting the judgment and sentence under cause number 98-1-

03656-9 to read, "Standard range sentence shall be consecutive with the sentence imposed in Cause No. 98-1-02549-4." CP at 28. Williams appeals.

ANALYSIS

I. Plea Agreement

Williams argues that the State breached its plea agreement under cause number 98-1-03656-9, in which it agreed to recommend a sentence running concurrently with the one imposed in cause number 98-1-02549-4,[5] by subsequently arguing at the December 11, 2009, and January 8, 2010, hearings that the trial court had intended to impose a consecutive sentence in one or both cases. The State responds that it did not breach the plea agreement by candidly informing the trial court of what its intentions were when it originally sentenced Williams in 1998.

A plea agreement is a contract between the defendant and the State and, thus, does not bind the trial court. *State v. Sledge*, 133 Wn.2d 828, 839 n.6, 947 P.2d 1199 (1997). "Because a plea agreement is a contract, issues concerning the interpretation of a plea agreement are questions of law reviewed de novo." *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). To determine whether a prosecutor has breached the terms of a plea agreement, we review the sentencing record as a whole using an objective standard. *State v. Carreno–Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006).

A prosecutor fulfills the State's duty under a plea agreement by making the promised sentencing recommendation. *Sledge*, 133 Wn.2d at 840. Although the State need not make the recommendation enthusiastically, it has a corollary duty "not to undercut the terms of the agreement explicitly or by conduct evidencing intent to circumvent the terms of the plea

[5] Williams argues that the State agreed to recommend concurrent sentences under both cause numbers. But this statement is not supported by the record.

agreement." *Sledge*, 133 Wn.2d at 840-41. "The State's duty under the plea bargain extends to resentencing, at which it must make the same recommendation before the new sentencing [court]." *State v. Arko*, 52 Wn. App. 130, 132, 758 P.2d 522 (1988). At the same time, a prosecutor owes duties as an officer of the court to participate in the sentencing proceedings, to answer the court's questions candidly in accordance with the duty of candor toward the tribunal and, consistent with RCW 9.94A.460, not to hold back relevant information regarding the plea agreement. *Sledge*, 133 Wn.2d at 840.

Division One's opinion in *Arko* is instructive. In *Arko*, the State agreed to and did recommend a standard range sentence in exchange for Arko's guilty plea but the trial court imposed an exceptional sentence. 52 Wn. App. at 131. Arko appealed the exceptional sentence, arguing that the trial court did not offer sufficient reasons supporting it, and the State filed a brief supporting the trial court's imposition of the exceptional sentence. *Arko*, 52 Wn. App. at 131. Arko moved to strike the State's brief, arguing that it violated the plea agreement. *Arko*, 52 Wn. App. at 132. Division One disagreed, reasoning:

> [T]he State fulfilled its obligation under the plea bargain when it advocated for a sentence within the standard range. Once it did so, it had met the terms of its agreement and was not obliged to do more. After sentencing[,] the State's obligation is to become an advocate for the court's position and[,] thus[,] to argue in favor of the sentence imposed to the extent that such arguments are supportable.

Arko, 52 Wn. App. at 133-34.

As in *Arko*, here the State fulfilled its obligation under the plea agreement when it recommended (albeit erroneously, as we discuss below) a concurrent sentence at sentencing under cause number 98-1-03656-9 and stated at sentencing under cause number 98-1-02549-4 that, "under the standard ranges, the sentence should run concurrently with the sentence previously

imposed." RP (Dec. 17, 1998, pages 1-21) (98-1-02549-4) at 3 (capitalization omitted).

Subsequently, the two cases returned to the trial court for clarification requested by the DOC, not resentencing. At that point, the State's obligation was to advocate for the trial court's position and intent at sentencing as reflected by the record, regardless of whether the trial court's intent differed from the State's recommendation. By doing so, the State did not violate the plea agreement, and Williams' claim fails.

II. Nunc Pro Tunc Order

Williams argues that the trial court abused its discretion in entering a nunc pro tunc order amending his sentence under cause number 98-1-03656-9 to run consecutively to, instead of concurrently with, his subsequent sentence under cause number 98-1-02549-4. He argues that the nunc pro tunc order does not reflect the trial court's intent at sentencing in 1998 and that it constitutes an imposition of an exceptional sentence without the required findings of fact and conclusions of law. The State responds that the trial court properly entered the nunc pro tunc order because it intended to enter consecutive sentences in both cases and that the trial court properly relied on the findings and conclusions entered in cause number 98-1-02549-4 to support retroactive imposition of a consecutive sentence in cause number 98-1-03656-9 with the nunc pro tunc order. In so arguing, both parties ignore that the trial court had no authority to order either a concurrent or consecutive sentence in cause number 98-1-03656-9. *In re Pers. Restraint of Long*, 117 Wn.2d 292, 305, 815 P.2d 257 (1991).

A nunc pro tunc order allows a trial court to clarify retroactively an earlier action or order and to make such clarification applicable to the original action or order. *State v. Hendrickson*, 165 Wn.2d 474, 478, 198 P.3d 1029, *cert. denied*, 129 S. Ct. 2873 (2009). We review a trial

court's entry of a nunc pro tunc order for abuse of discretion. *Hendrickson*, 165 Wn.2d at 478. A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

CrR 7.8(a) provides in pertinent part, "Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." An error is clerical when the amended order expresses the trial court's actual intention as reflected in the record. *Hendrickson*, 165 Wn.2d at 479. Where the record demonstrates the trial court's intention to take a particular action and its belief that it was taking that action, only to have that action thwarted by inartful drafting, it properly enters a nunc pro tunc order to reflect that intention. *Hendrickson*, 165 Wn.2d at 479. But "[a] trial court misuses its nunc pro tunc power and abuses its discretion when it uses such an order" to correct a judicial error, such as changing its mind or rectifying a mistake of law. *Hendrickson*, 165 Wn.2d at 479.

First, we review the trial court's sentencing authority under the statutes applicable to Williams' 1998 convictions. Former RCW 9.94A.400(3)[6] (1996)[7] provided:

> Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

[6] Recodified as RCW 9.94A.589, pursuant to Laws of 2001, chapter 10, section 6.

[7] Former RCW 9.94A.400 (1996) applied to Williams' convictions under cause number 98-1-02549-4 for the May 30, 1998 first degree murder and deadly weapons enhancement and the June 4, 1998 mutilation of human remains. Former RCW 9.94A.400 (1998) applied to Williams' conviction under cause number 98-1-03656-9 for the August 20, 1998, second degree assault. Because the two statutes are substantively identical, however, we cite only to former RCW 9.94A.400(1996) for clarity.

Consecutive sentences imposed under former RCW 9.94A.400(3) are not exceptional sentences requiring entry of supporting written findings of fact and conclusions of law. *State v. Linderman*, 54 Wn. App. 137, 139-40, 772 P.2d 1025 (1989); *see also Long*, 117 Wn.2d at 302 (trial courts need not specify the reasons for imposing a consecutive sentence under former RCW 9.94A.400(3)); *State v. Kern*, 55 Wn. App. 803, 806, 780 P.2d 916 (1989) (stating the same). The trial court has "unfettered discretion" to impose a concurrent or consecutive sentence under former RCW 9.94A.400(3). *Long*, 117 Wn.2d at 305.

Here, the trial court properly imposed a consecutive sentence under cause number 98-1-02549-4 for the murder, mutilation, and deadly weapon enhancement convictions. When Williams committed those offenses on May 30 and June 4, 1998, he was not "under sentence of a felony." Former RCW 9.94A.400(3). But when the trial court sentenced him on those convictions, it expressly found aggravating factors existed and imposed an exceptional sentence. Moreover, it had already sentenced him on second degree assault under cause number 98-1-03656-9. The trial court then properly exercised its discretion under former RCW 9.94A.400(3) and ordered that the sentence on the murder, mutilation, and deadly weapon enhancement convictions under cause number 98-1-02549-4 run consecutively to the previously imposed sentence under cause number 98-1-03656-9.[8]

But when the trial court first sentenced Williams under cause number 98-1-03656-9 for

[8] We note that the trial court did impose an exceptional sentence by ordering a sentence above the standard range under cause number 98-1-02549-4 and entered written findings of fact and conclusions of law. Former RCW 9.94A.120(2), (3) (1996) (recodified as RCW 9.94A.505, pursuant to Laws of 2001, chapter 10, section 6). We reiterate, however, that no written justification was required merely for imposing a consecutive sentence under cause number 98-1-02549-4's circumstances. Former RCW 9.94A.400(3).

the assault conviction, it had no authority to determine whether that sentence would run concurrently with or consecutively to a future sentence. "A sentencing court has no authority to determine whether a current sentence shall run consecutively to or concurrently with a sentence yet to be imposed in the future." *Long*, 117 Wn.2d at 305.

The record reflects that the prosecutor incorrectly answered the trial court's query about whether the trial court was required to impose a concurrent sentence on the assault conviction when it was going to sentence on the murder, mutilation, and deadly weapon enhancement convictions shortly thereafter:

> The Court: Is that required by law that it be concurrent?
> . . . .
> [THE STATE]: That's correct, unless the court finds an exceptional sentence.
> The Court: I've filled that in.

RP (Dec. 17, 1998, pages 1-9) (98-1-03656-9) at 7-8 (some capitalization omitted). Thus, the judgment and sentence in cause number 98-1-03656-9 contained a judicial error, i.e., a mistake of law, that the court could not properly correct with a nunc pro tunc order. *Hendrickson*, 165 Wn.2d at 479. The trial court could not originally or retroactively order either a concurrent or a consecutive sentence under cause number 98-1-03656-9.[9] *See Long*, 117 Wn.2d at 305. Accordingly, it abused its discretion by entering the nunc pro tunc order.

But, even given this abuse of discretion, resentencing is unnecessary in this case. The

[9] Even assuming otherwise, no other authority supported the trial court imposing a consecutive sentence under cause number 98-1-03656-9. When the trial court originally sentenced him under that cause number, he had yet to be sentenced under cause number 98-1-02549-4. Thus, former RCW 9.94A.400(3) did not apply and the trial court would have had to enter findings and conclusions to support a consecutive (and, thus, exceptional) sentence under cause number 98-1-03656-9, which it did not do. In short, because of the timing of the two sentencing hearings, the trial court had authority to run the sentence under cause number 98-1-02549-4 consecutive to the sentence under cause number 98-1-03656-9, but not vice versa.

record reflects the trial court's intent that the sentences on the murder, mutilation, and deadly weapon enhancement convictions run consecutively to the assault sentence. As we discussed above, the trial court properly imposed a consecutive sentence in cause number 98-1-02549-4. That sentence controls over the conflicting earlier sentence in cause number 98-1-03656-9 because "[t]he latest sentence always prevails in its own concurrent or consecutive instruction relative to prior sentences," and "[a] prior sentencing judge cannot usurp the concurrent/consecutive sentencing discretion of a judge who later imposes another sentence." *Long*, 117 Wn.2d at 305.

Under *Long*, the sentence imposed on cause number 98-1-02549-4 is the only sentence that could have been imposed as either a consecutive or a concurrent sentence and the trial court ordered that sentence to run consecutively to the assault sentence. It controls. Williams must first serve the assault sentence and then the sentence on cause number 98-1-02549-4.[10] Accordingly, we vacate the nunc pro tunc order.

III. Ineffective Assistance of Counsel

[10] Williams argues that the proper remedy is to remand for resentencing on the assault conviction. Such a remand, he claims, benefits him because his resentencing would follow the sentencing in cause number 98-1-02549-4 and the trial court would be compelled to run the new sentence for the assault conviction concurrent with the sentence on the murder and mutilation convictions and the deadly weapon enhancement, thus collapsing the time served on the former conviction into the time served on the latter convictions. But Williams also argues that the concurrent sentence would be mandated by the trial court's 1998 concurrent sentence determination. But if the 1998 sentence on the assault conviction is vacated and remanded for resentencing, the trial court could impose a consecutive sentence based on its unfettered discretion under former RCW 9.94A.400(3) because the assault conviction would now be sentenced after the first degree murder, mutilation of human remains, and deadly weapons enhancement convictions. *Long*, 117 Wn.2d at 305. Moreover, even under former RCW 9.94A.400(1)(a), there would be no presumption of concurrent sentences since he would not be sentenced at the same time as cause number 98-1-02549-4. At best, under former RCW 9.94A.400(1)(a), there would be the presumption of a standard range sentence for the assault conviction, which the trial court imposed in 1998.

Williams argues that his counsel was ineffective because his counsel at the January 8, 2010 hearing failed to provide the trial court with transcripts of Williams' 1998 sentencing hearings.[11] He claims prejudice based on his argument that the trial court would have modified the 1998 sentences so that they both ran concurrently if the trial court had read the 1998 transcripts. He also argues that his counsel was ineffective for failing to argue that the State had breached its 1998 plea agreement with him. He requests new counsel on remand.

We review claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. *McFarland*, 127 Wn.2d at 334-35. We strongly presume that counsel is effective and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 336.

To demonstrate prejudice, the defendant must show a reasonable probability exists that, absent trial counsel's inadequate performance, the proceeding would have resulted in a different outcome. *McFarland*, 127 Wn.2d at 335. A failure to demonstrate either deficient performance or prejudice defeats an ineffective assistance claim. *See McFarland*, 127 Wn.2d at 334-35; *see also Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Assuming without deciding that Williams could demonstrate defense counsel's deficient performance, he fails to demonstrate prejudice. Although the trial court did not consider the

[11] Williams states that the challenged trial court proceedings do not implicate Sixth Amendment rights under the United States Constitution. But he cites only cases decided under the Sixth Amendment and our state constitution's article 1, section 22 in support of a right to effective counsel.

sentencing transcripts before entering the nunc pro tunc order, it did consider the written findings of fact and conclusions of law it entered under cause number 98-1-02549-4. Those findings and conclusions clearly show the trial court's intent to run the sentences on the murder, mutilation, and deadly weapon enhancement convictions consecutive to the sentence on the assault conviction under cause number 98-1-03656-9. Access to the sentencing transcripts may have clarified what happened during sentencing on cause number 98-1-03656-9, but it is speculation, given the findings and conclusions supporting an exceptional sentence under cause number 98-1-02549-4 and the trial court's authority under former RCW 9.94A.400(3), that the trial court would have modified both sentences so that they ran concurrently.

Furthermore, the trial court had no authority to impose either a concurrent or consecutive sentence in anticipation of a future sentencing when it sentenced Williams in 1998 under cause number 98-1-03656-9. And, as we discussed above, due to the timing of a resentencing Williams would not necessarily be entitled to a concurrent sentence under cause number 98-1-03656-9.[12] Thus, we hold that Williams' counsel was not ineffective.

We hold that the State did not violate the plea agreement and that Williams did not receive ineffective assistance of counsel, but that the trial court abused its discretion when it entered the nunc pro tunc order to correct a judicial mistake. We reverse and vacate the nunc pro

[12] *See* page 13 n.9.

tunc order and clarify that the sentences run consecutively. We remand to DOC to run the two sentences consecutively.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Worswick, J.