IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ABRAHAM E. HENRY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11833 Trial Court Nos. 4FA-06-2364 CR & 4FA-07-410 CR MEMORANDUM OPINION No. 6261 — December 16, 2015

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Bethany Harbison, Judge.

Appearances: Abraham E. Henry, pro se, Fairbanks. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

In 2007, Abraham E. Henry pleaded no contest to first-degree vehicle theft and felony DUI pursuant to a plea agreement that also resolved a pending petition to revoke probation in an earlier 2006 case. The State later filed several additional petitions to revoke his probation, and Henry ultimately received the balance of his suspended time in both cases.

In 2013, Henry filed a pro se "motion for clarification" in the superior court, asserting that the Department of Corrections had miscalculated his time accounting on the petitions to revoke and had erroneously run his suspended time consecutively in conflict with the judgment. Henry also claimed that the sentence he received in the 2007 case was different from the sentence that he had agreed to at the change of plea hearing, and that the sentence was therefore illegal. Lastly, Henry asserted that he was entitled to *Nygren* credit for time he spent at a residential treatment center.

The superior court dismissed Henry's claims without prejudice, finding that Henry had failed to provide the court with the information it needed to resolve the *Nygren* issue and that the other claims were best resolved through an application for post-conviction relief.

Henry now appeals to this Court, arguing that his claims should have been resolved on the record before the court. We agree with Henry that his time accounting claim was meritorious, and that it should have been resolved on the current record. However, because the Department of Corrections has since corrected the error, this claim is now moot.

We otherwise agree with the superior court that the remainder of Henry's claims are either without merit or cannot be resolved on the current record. Accordingly, we affirm the superior court's rulings on these claims.

Why we conclude that Henry's time accounting claim was meritorious but is now moot because the Department of Corrections corrected the error during the pendency of this appeal

As noted above, Henry pleaded no contest to first-degree vehicle theft and felony DUI in 2007. At sentencing, Henry received 4 years with 2 years suspended on each count, with all but 6 months of the active imprisonment to be served concurrently. In other words, he received a composite term of 2½ years to serve and 2 years suspended in the 2007 case.

However, when Henry's probation in the 2007 case was later revoked, the Department of Corrections erroneously calculated the suspended time on the two counts as though they had been imposed consecutively, rather than concurrently. Henry tried to resolve this error through the Department of Corrections' internal time accounting grievance procedures but was repeatedly told (incorrectly) that because his original written judgment did not explicitly state that the suspended time was concurrent, the time necessarily ran consecutively. (In fact, under Alaska law, it is the oral judgment that controls whether a sentence has been imposed consecutively or concurrently.[1])

Following his failed attempts with the Department of Corrections' internal time accounting grievance procedures, Henry filed a "motion for clarification [of his judgment]" in the superior court, requesting that the superior court direct the Department of Corrections to run the suspended time in his 2007 case concurrently, as required by the oral judgment. The superior court dismissed this motion, ruling that Henry needed to re-file his time accounting claim as an application for post-conviction relief under Criminal Rule 35.1(g) because it could not be resolved on the current record.

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[1] *See Baker v. State*, 110 P.3d 996, 1002 (Alaska App. 2005); *Graybill v. State*, 822 P.2d 1386, 1388) (Alaska App. 1991); *Figueroa v. State*, 689 P.2d 512, 514 (Alaska App. 1984).

Henry appealed, and while this appeal was pending, the Department of Corrections finally realized its error and corrected its earlier mistake. The State has provided us with the corrected time accounting sheet in Henry's case, and it now shows that the suspended time is being run concurrently and in accordance with the original judgment. Therefore, Henry's time accounting claim, although meritorious, is now moot.

Why we agree with the superior court that Henry's claim regarding his plea agreement cannot be resolved on the current record

Henry argues that the superior court should have corrected his 2007 sentence because it was not consistent with the plea agreement that was put on the record at the initial change of plea hearing.

At the change of plea hearing, the prosecutor and the defense attorney described the plea agreement as follows: a sentence of 4 years with 2 years suspended (2 years to serve) on each count in the 2007 case, to be run concurrently, and 1 year to serve for the petition to revoke probation in the 2006 case (which was all the suspended time remaining in the 2006 case).

However, at Henry's sentencing hearing two months later, a different defense attorney and different prosecutor (the original defense attorney and prosecutor were apparently unavailable) described the plea agreement as follows: 4 years with 2 years suspended on each count in the 2007 case, with all but 6 months of the active imprisonment to run concurrently, and 6 months to serve in the 2006 case (leaving 6 months still suspended in the 2006 case).

At the time, Henry did not object to this description of his plea agreement. Nor did he alert the court to the difference between this description and the previous description put on the record at the change of plea hearing. The superior court

subsequently imposed a sentence consistent with the plea agreement described at sentencing.

The difference between the two descriptions is minor but nevertheless significant. Under both descriptions of the plea agreement, the composite time to serve is the same — 3 years to serve. But the composite suspended time is different. Under the description of the agreement at Henry's change of plea hearing, Henry faced only 2 years of suspended time on any future petition to revoke probation. However, under the second description (and under the sentence ultimately imposed), Henry faced 2 ½ years of suspended time (2 years in the 2007 case and 6 months in the 2006 case).

Henry argues that the discrepancy between the sentence imposed and the initial description of the plea agreement makes his sentence "illegal" within the meaning of Alaska Criminal Rule 35(a), the rule that permits a court to correct an illegal sentence at any time.[2]

We have previously construed the term "illegal sentence" narrowly to apply only "to sentences which the judgment of conviction did not authorize."[3] We have also identified three kinds of illegal sentences a court may correct under Rule 35(a): (1) sentences contrary to applicable statute; (2) written judgments not conforming to the oral pronouncement of a sentence; and (3) sentences ambiguous with respect to the time and manner in which they are to be served.[4]

Henry argues that the second category applies in his case. But, in Henry's case, there is no conflict between the written judgment and the court's oral pronouncement of the sentence at the sentencing hearing; nor is there any conflict

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[2] Alaska R. Crim. P. 35(a).

[3] *Bishop v. Anchorage*, 685 P.2d 103, 105 (Alaska App. 1984).

[4] *Id.*

between the written judgment and the oral pronouncement of sentence and the plea agreement as it was described at the sentencing hearing. Instead, the problem is that the attorneys' description of the plea agreement at the sentencing hearing differs from the earlier description of the plea agreement at the initial change of plea hearing.

We note that there is case law from other jurisdictions that might support Henry's contention that his sentence is illegal for purposes of Criminal Rule 35(a), if Henry can show that the parties agreed only to the plea agreement described at the change of plea hearing. In *United States v. Rico*, for example, the Second Circuit held that when a defendant receives a sentence that differs from the agreed-upon sentence, the sentence is an illegal sentence that can be corrected under Federal Criminal Rule 35.[5]

But here, the current record is ambiguous as to whether Henry's ultimate sentence was the agreed-upon sentence. Henry claims that the attorneys at the sentencing hearing made a mistake and failed to put the correct plea agreement on the record at sentencing. But it is certainly possible that, in between the change of plea hearing and the sentencing, the parties agreed to change the agreement and the agreement at sentencing therefore represented the sentence actually agreed to by the parties.

Therefore, as the superior court correctly recognized, resolving these matters requires further development of the record and likely an evidentiary hearing.

The superior court did not err in dismissing without prejudice Henry's request for Nygren credit

On November 12, 2008, the trial court revoked Henry's probation in the 2007 case and ordered Henry to report to the Oxford House treatment program in Fairbanks for a "minimum of six months" upon release from custody. The record does

[5] *United States v. Rico*, 902 F.2d 1065, 1068-69 (2nd Cir. 1990).

not indicate when, or for how long, Henry participated in this residential treatment program. The record also does not indicate whether Henry received credit for this time in another case.

The superior court denied Henry's request for *Nygren* credit without prejudice, finding that he had failed to meet the requirements of AS 12.55.027, the statute that now governs *Nygren* credit.[6]

On appeal, Henry argues that AS 12.55.027 does not govern his claim for *Nygren* credit because the statute did not go into effect until *after* he was sentenced in the 2007 case. This is incorrect, even assuming that the date of Henry's original sentencing is the relevant date (rather than the date of the revocation, which is when the Oxford House requirement was first imposed). Although Henry changed his plea in June 2007, he was not sentenced until August 17, 2007 — seven weeks after AS 12.55.127 went into effect on July 1, 2007.

Henry also argues that he tried to obtain the necessary information from Oxford House, but that Oxford House did not respond to any of his inquiries because of his prisoner status. If Henry chooses to pursue this claim again without the assistance of counsel, and these problems persist, Henry should enlist the trial court's assistance in securing the necessary information from Oxford House.[7]

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[6] This credit is still informally known as "*Nygren*" credit even though it is now governed by AS 12.55.027, because *Nygren v. State*, 658 P.2d 141 (Alaska App. 1983) is the court decision that first acknowledged a defendant's right to sentencing credit for time spent in treatment under jail-like conditions.

[7] *See generally Wagner v. Wagner*, P.3d 170, 173-74 (Alaska 2013) ("The superior court has a duty to inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish") (internal quotations omitted).

Henry's other arguments on appeal

Henry raises two other claims on appeal. First, he argues that the superior court erred in denying his request to appear in person at the oral argument on his motion. We conclude that Henry has not shown that he was entitled to appear in person to argue his motion for clarification.[8] Nor has he shown that he was prejudiced by having to argue his motion telephonically.

Second, Henry argues that Alaska Criminal Rule 50(a) was repeatedly violated in his case because four different prosecutors and four different public defenders appeared in his case without filing separate formal written appearances with the court. But the entity representing Henry — the Public Defender Agency — never changed throughout his representation. And although individual public defenders will sometimes file formal written appearances with the court for administrative purposes, all assistant public defenders are authorized to appear in court as agents of the Public Defender Agency. Likewise, all assistant district attorneys are authorized to appear on behalf of the State in a criminal prosecution, with or without a formal written appearance.

Conclusion

With the exception of the time-accounting claim that is now moot, we AFFIRM the judgment of the superior court.

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[8] *See*, Alaska R. Crim. P. 38(c)(3) ("The defendant's presence is not required at a hearing on reduction of sentence under Rule 35(a)."); *Jones v. State*, 284 P.3d 853, 860 (Alaska App. 2012) (a defendant must be transported to a post-conviction evidentiary hearing only when he "intends to testify at the hearing and the outcome of the hearing may turn on the defendant's credibility as a witness.").