

IN CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

STATE OF OREGON;)
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Plaintiff,)
)
v.)
)
CRAIG S. SURLS)
)
Defendant.)

Case No. 910733417

OPINION AND ORDER
CORRECTING THE JUDGMENT

FILED
JULY 14 2016
CIRCUIT COURT
MULTNOMAH COUNTY
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JIM JUDICIAL DEPT

This matter comes before this court on the State's motion to correct the judgment in this case pursuant to ORS 136.083. On April 8, 2016, the court held a hearing on the motion at which defendant was present and represented by counsel.

On a warm morning on July 16, 1991, the defendant and his partner Jacqueline Kelly drove in search for a home to burglarize for drug money. Eventually, the defendant saw an open home door and told Ms. Kelly to stop the car.

The defendant entered the house and called out to see if anyone was home. The 66-year-old Donald Marquez answered, and allowed the defendant to use his phone. The defendant ultimately pulled a knife and

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stabbed Mr. Marquez three times in his chest before ripping the wallet out of the victim's pocket.

After emerging from the house, Ms. Kelly saw defendant running back to the car with blood splatter on his clothing and shoes and told Ms. Kelly to drive away. The defendant stated he "had to cut" the victim and declared "That stupid old man, why did he have to resist for only \$25."

At his own home, the defendant changed and Ms. Kelly put the bloody clothing and a six-inch paring knife in a garbage bag. After using the victim's money for drugs, the defendant dumped the bag of clothes in a random garbage can. Six days later on July 22, 1991 Ms. Kelly came forward and reported the events to police who arrested the defendant after a foot pursuit.

The state charged defendant with three counts of Aggravated Murder, ORS 163.095, each based on a different theory. Count one alleged an aggravated felony theory predicated on burglary, ORS 163.095(2)(d); ORS 163.115(1)(b)(C). Count two alleged an aggravated felony theory predicated on robbery, ORS 163.095(2)(d); ORS 163.115(1)(b)(G). Count three alleged the murder was committed to conceal the identity of the perpetrator of the burglary, ORS 163.095(2)(e). In addition, the state charged count

four – burglary in the first degree, ORS 164.225, and count five, robbery in the first degree, ORS 164.415.

At trial, defendant admitting burglarizing, robbing, and killing the victim, but contended the death was not intentional. The jury returned a guilty verdict on the lesser-included offenses on all the aggravated murder counts. The conviction on count one was for felony murder based on burglary. The conviction on count two was for felony murder based on robbery. The conviction on count three was for murder.

Even a cursory review of the final judgment entered in this case shows the document to be incomplete. Nevertheless, the state neither sought to correct the judgment, nor took an appeal. The defendant did file a notice of appeal, but then voluntarily dismissed the appeal prior to briefing.

Following that dismissal no action occurred on this case, and defendant completed his sentence on March 1, 2014. At that point he began serving a sentence for supplying contraband in Marion Co. Case No. 96C20055. Then upon completion of that sentence on March 26, 2015, defendant began serving a sentence on another supplying contraband change in Marion Co. Case No. 98C41728. That sentence is set to complete on April 19, 2016.

Now, nearly a quarter of a century later, the state seeks to correct the judgment in this case. Specifically, the state asserts that the judgment is

erroneous in two respects: (1) that the final judgment fails to reflect that defendant should be subject to a lifetime term of post-prison supervision and (2) that the final judgment fails to reflect that the sentencing court intended the 72-month term of incarceration on defendant's conviction for count five – robbery in the first degree, to run consecutive to the 269-month term of incarceration on count one – felony murder.

Defendant contends that this court lacks authority to modify the judgment both because the sentence has been executed as well as fully served. Alternatively, defendant contends that not only should the sentence on the robbery conviction not be consecutive, but that conviction should have merged either with defendant's burglary conviction in count four, or with the felony murder conviction based on robbery in count two.

At the outset, defendant's claim that this court lacks authority to correct the judgment in this case is unavailing. ORS 136.083 provides that a court:

“[S]hall retain authority irrespective of any notice of appeal after entry of judgment 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 authority to modify a judgment to correct an erroneous term exists regardless of whether the sentence has been executed. *State v. Easton*, 204 Or App 1, 5, 126 P3d 1256, *rev den*, 340 Or 673 (2006). Similarly, the

authority exists even when the sentence has been fully served. *State v. Donner*, 230 Or App 465, 468, 215 P3d 928 (2009).

Turning to the issue of post-prison supervision, the final judgment is silent as to any term of supervision. This court finds, based on a review of the trial court record, including the temporary sentencing order and the sentencing transcript that the sentencing court orally imposed a supervision term of three years. Therefore, this court finds that the absence of a term of supervision in the final judgment is factually erroneous. The state contends, however, that in addition to being factually erroneous, the term of supervision is legally erroneous in that lifetime supervision was the only lawful term of supervision for a conviction of murder.

The relevant statutory and administrative frameworks are those in place in 1991, at the time of defendant's conviction. At that time, OAR 253-05-004 (1989) specified:

"The term of post-prison supervision for an offender serving a life sentence pursuant to ORS 163.105 or ORS 163.115 shall be for the remainder of the offender's life, unless the Board finds a shorter term appropriate. In no case shall the term of supervision be less than three years."

Under that framework, the plain text of the statute states that it is not defendant's conviction for murder that triggered a lifetime supervision period, but whether defendant received a *life sentence*. Defendant contends

he did not receive a life sentence, but a determinate guidelines sentence.

Defendant is incorrect.

In *State v. Morgan*, 316 Or 553, 559, 856 P2d 612 (1993), the Oregon Supreme Court held that:

“The likely legislative intention is that the period of post-prison supervision for persons convicted of murder remains as before, with the exception that the State Board of Parole and Post-Prison Supervision could, if it ‘finds a shorter term [of post-prison supervision] appropriate,’ shorten the term of supervision to not less than three years. Under that result, even though one convicted of murder can no longer be sentenced to ‘imprisonment for life’ (other than as a departure sentence), one convicted of murder can be sentenced to imprisonment for the fixed terms specified in paragraphs (b) and (c), with post-prison supervision thereafter for life.”

Morgan, 316 Or at 560.

Subsequent to *Morgan*, the Oregon Court of Appeals repeatedly vacated a number of life sentences and remanded for imposition of determinate terms followed by post-prison supervision for life. *See, e.g., State v. Zelinka*, 130 Or App 464, 478, 882 P2d 624 (1994), *rev den* 320 Or 508, 888 P2d 569 (1995); *State v. Hostetter*, 125 Or App 491, 493, 865 P2d 485, *rev den*, 318 Or 583, 873 P2d 321 (1994); and *State v. Stewart*, 123 Or App 432, 433, 859 P2d 1200, *rev den*, 318 Or 246, 867 P2d 1385 (1993).

Although the term of incarceration imposed on defendant was calculated under the guidelines, a “sentence,” under the guidelines, comprises both a term of incarceration and a term of post-prison supervision.

See State v. Hopson, 220 Or App 366, 373, 186 P3d 317 (2008) (“Post-prison supervision is part of a sentence.”); *Lattymyer v. Thompson*, 170 Or App 160, 163, 12 P3d 535 (2000), *rev den*, 332 Or 56 (2001) (same).

Consistently with *Morgan*, “a “life sentence,” as that term was used in OAR 253–05–004 (1989), means a term of incarceration followed by PPS for life. As the Court of Appeals has noted, “[n]o other sentence was permissible at the time.” *Jones v. Bd. of Parole & Post-Prison Supervision*, 231 Or App 256, 261, 218 P3d 904 (2009) *overruled on other grounds by*, *Hostetter v. Bd. of Parole & Post-Prison Supervision*, 255 Or App 328, 296 P3d 664 (2013).

The careful reader may recognize that the above analysis, deriving from Supreme Court precedent and subsequent interpretations and application by the Court of Appeals, could politely be described as circular. It is. That circularity is a product of *Morgan*’s pronouncement, without explanation, that lifetime post-prison supervision applies to all murder convictions regardless of the sentence imposed. If *Morgan* engaged in the traditional statutory analysis of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 171–73, 206 P3d 1042 (2009), focusing on the text, context, and history of the rules at issue, such analysis does not appear in the opinion.

Instead, *Morgan* states, in a conclusory manner, what the “likely legislative intention” was. *Morgan*, 316 Or at 560.

Whatever quibbles are to be had with *Morgan’s* methodology, however, it is controlling on this court. Therefore, in this case, that the final judgment reflects no post-prison supervision is both factually and legally erroneous. The judgment should have reflected the only lawful option available to the sentencing court – lifetime post-prison supervision.

ORS 136.083 grants the court considerable discretion in determining whether to correct judgment terms. *State v. Lewallen*, 262 Or App 51, 57 (2014). A court is not required to correct a sentence even if there is an erroneous term. *State v. Larrance*, 270 Or App 431, 438 (2015), citing *State v. Harding*, 225 Or App at 389. A court’s decision to deny modification of a judgment is not an appealable order. *State v. Larrance*, 270 Or App at 438. The purpose of the broad grant of discretion is to give judges jurisdiction to make corrections without “opening the floodgates.” *Id.*

Here, the nature and severity of the offense, and the interest of public safety weigh in favor of this court exercising discretion to correct the judgment. This court will therefore enter a corrected judgment in this matter indicating a lifetime post-prison supervision period on count one.

This court turns now to the state’s second claim that the sentences in this case were intended to run consecutively. Normally, a written judgment controls over an oral pronouncement. *See e.g., State v. Swain/Goldsmith*, 267 Or 527, 530, 517 P2d 684 (1974); *State v. Mossman*, 75 Or App 385, 388, 706 P2d 203 (1985); *State v. French*, 208 Or App 652, 655, 145 P3d 305, 307 (2006). However, when a written judgment fails to reflect an aspect of a sentence that the court orally imposed, that is an “erroneous term” properly corrected by a motion under ORS 136.083. *State v. Estey*, 247 Or App 25, 29, 268 P3d 772 (2011); *State v. Gilbert*, 248 Or App 657, 662, 274 P3d 223 (2012).

In this case, a review of the sentencing transcript makes it clear that the sentencing court orally imposed a 72-month sentence on count five to run consecutive to the 269-month sentence imposed on count one. The record establishes that the final judgment is therefore factually erroneous in this respect. The inquiry does not end there, however.

Having previously decided to exercise authority to correct the judgment in this case with respect to post-prison supervision, it is incumbent upon this court to ensure the judgment is legally correct in all respects. Therefore, before deciding whether consecutive sentences are proper, this

court must first determine if the convictions in this case should properly merge, thus rendering errors concerning consecutive sentences moot.

Merger is governed by statute. The applicable statute in this case is *former* ORS 161.062(1). That statute, which does not differ from the current statute in any meaningful way affecting the decision in this case, stated:

“When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations.”

In approaching questions of merger, the Oregon Supreme Court has set forth the analysis:

“The following questions must be answered in the affirmative: (1) Did defendant engage in acts that are “the same conduct or criminal episode,” (2) did defendant's acts violate two or more “statutory provisions,” and (3) does each statutory “provision” require “proof of an element that the others do not.”

State v. Crotsley, 308 Or 272, 278, 779 P2d 600 (1989).

In this case, the record makes clear, and the parties do not seriously dispute, that the defendant engaged in acts that are the same conduct or criminal episode. The second and third questions, however, require more discussion. If *either* of those conjunctive requirements is not satisfied, the convictions must merge. *State v. Walraven*, 214 Or App 645, 649, 167 P3d 1003 (2007). And for ease of explanation, this court begins with question three.

The anti-merger statute requires that each statutory provision require proof of an element that the others do not. In essence, this provision requires that convictions that are true “lesser included offenses” of another shall merge into the greater offense.

In the context of felony murder, the underlying felony contains no element that is not present in the felony murder statute, it is therefore a true lesser-included offense, and a court errs in not merging the two. *State v. Burnell*, 129 Or App 105, 109, 877 P2d 1228 (1994) (“Burglary is included as one of the underlying felonies in the felony murder statute * * * [b]ecause burglary in the first degree contains no elements that differ from the felony murder statute, it is a true lesser included offense of the burglary felony murder count. The court erred in not merging the burglary count with the burglary-based felony murder count.”)

The state asserts that *Burnell* is no longer controlling in light of *State v. Barrett*, 331 Or 27, 36, fn. 4, 10 P3d 901 (2000). The tension between *Burnell* and *Barrett* exists, and has been noted by the Court of Appeals. See *State v. O'Donnell*, 192 Or App 234, 255, fn 13, 85 P3d 323 (2004). But it is far from clear that *Barrett* disavowed decades of merger law, as the state posits. Regardless however, if *Barrett* fatally undermines *Burnell* is not a

question for this court. At this time, *Burnell* remains binding authority, and this court must follow it.

In this case, the conviction for burglary in count four merges with the conviction for felony murder based on burglary in count one. Similarly, the conviction for robbery in count five merges with the conviction for felony murder based on robbery in count two.

Turning now to the second question, this court must determine if defendant's acts violated two or more statutory provisions. That analysis is guided by *Barrett*. There, the Court held that, in the context of aggravated murder, "[t]he aggravating factors constitute no more than different theories under which murder becomes subject to the enhanced penalties for aggravated murder. That defendant's conduct in intentionally murdering the victim in this case was 'aggravated' by 'any,' *i.e.*, one or more, act surrounding that conduct does not convert that conduct into more than one separately punishable offense. *Barrett*, 331 Or at 36.

Applying *Barrett*, the Court of Appeals later concluded that in the context of the murder statute, intentional murder, and murder by abuse were not two or more statutory provisions, and therefore properly merge:

"The foregoing discussion strongly suggests that the legislature envisioned murder by abuse as an alternative theory for the crime of murder, one that would be especially useful where intentional homicide could not be proven. Accordingly, we conclude from our

examination of statutory text, context, and history, that ORS 163.115(1)(a) and (c) are part of a single ‘statutory provision’ within the meaning of *former* ORS 161.062(1). Therefore, the trial court erred by declining to merge defendant's convictions for murder and murder by abuse into a single conviction.”

State v. Beason, 170 Or App 414, 432, 12 P3d 560 (2000).

Like *Beason*, this case involves two subsections of the murder statute, intentional murder, 163.115(1)(a) and felony murder 163.115(1)(b). The state concedes that intentional murder and felony murder merge. *See State’s Post Hearing Supplemental Authority* at 4. That concession is well taken.

Although *Beason* did not address felony murder, the Court of Appeals noted:

“When all is said and done concerning the text and context of ORS 163.115(1), it seems likely that the legislature intended for all of the variants of murder to constitute a single punishable offense.

Beason, 170 Or App at 431.

That statement is supported by the history of the felony murder statute. As discussed by the Court of Appeals in *Blair*, the original purpose of felony murder was not to differentiate a distinct harm separate from intentional murder. Rather, it served a more evidentiary purpose:

“Those holdings comported with the overarching purpose of the felony murder rule—that is, ‘to relieve the state of the burden of proving premeditation or malice whenever the victim's death [was] caused by the killer while the killer [was] committing another felony.’ *Branch*, 244 Or at 99–100, 415 P2d 766. Consistently with that purpose, even deaths that were caused accidentally during the

commission or attempt to commit a felony constituted murder under the felony murder rule. *See, e.g., State v. Wilson*, 182 Or 681, 691–92, 189 P2d 403 (1948) (holding that the accidental discharge of the defendant's gun during the commission of a robbery constituted first-degree murder under the felony murder rule).

State v. Blair, 230 Or App 36, 46, 214 P3d 47 (2009), *aff'd*, 348 Or 72 (2010). Nothing in the 1971 criminal code revisions suggest that the Legislature sought to alter that fundamental purpose. *Id.* at 53.

Therefore, it seems likely that were it confronted by the issue, the Court of Appeals would conclude that intentional murder, ORS 163.115(1)(a) and felony murder ORS 163.115(1)(b) are part of a single statutory provision and therefore merge.

The foregoing analysis dictates that all five counts in this case merge into a single conviction for murder, a violation of ORS 163.115. As such this court need not address the legality of the sentencing court's imposition of consecutive sentences, and expressly declines to make any factual findings regarding whether the record reflects findings to support an imposition of consecutive sentences.

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CONCLUSION

This court exercises discretion to correct the judgment in this case to reflect entry of a single count of conviction: Murder, ORS 163.115 for which a sentence of 269 months incarceration is imposed, and lifetime post-prison supervision.

IT IS SO ORDERED this 14 day of April, 2016.



The Honorable Bronson D. James
Circuit Court Judge