# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED JEROME GILBERT,

Defendant-Appellant.

UNPUBLISHED
December 10, 2020

Nos. 351500; 351501; 351502; 351503; 351505; 351507
Wayne Circuit Court
LC Nos. 2017-008708-01-FH; 2017-008709-01-FH; 2017-008710-01-FH; 2017-008711-01-FH; 2017-008712-01-FH; 2018-001431-01-FH

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

In this consolidated appeal, defendant Fred Jerome Gilbert appeals from amended judgments of sentence, which reflected that Gilbert was required to serve his new sentences consecutive to any sentence imposed for a parole violation. We vacate and remand for further proceedings consistent with this opinion.

## I. BACKGROUND

Gilbert was charged in six separate cases with breaking and entering with intent to commit a felony or larceny, MCL 750.110. Gilbert was on parole when he committed the crimes.

In January 2018, Gilbert pleaded guilty to five counts of breaking and entering with intent to commit a felony or larceny, with a fourth-offense habitual offender enhancement, MCL 769.12. Pursuant to a plea agreement, Gilbert was sentenced to four years' probation with the first year to be served in the Wayne County Jail. Gilbert was also required to pay restitution to the victims. During the February 2018 sentencing hearing, the trial court noted that Gilbert was not eligible for

jail credit because he was on parole at the time the crimes were committed. The February 2018 judgments of sentence for the five convictions each stated, in relevant part:

> CONCURRENT WITH [NEW CASES]. [GILBERT] SHALL NOT RECEIVE ANY JAIL CREDIT SINCE HE WAS ON PAROLE AT THE TIME OF THE OFFENSE. THIS SENTENCE WOULD BE CONSECUTIVE TO ANY IMPRISONMENT ORDERED FOR THE PAROLE VIOLATION.

In March 2018, Gilbert pleaded guilty to a separate, sixth charge of breaking and entering with intent to commit a felony or larceny.[1] Consistent with his earlier sentencing, Gilbert was sentenced to four years' probation, with the first year to be served in the Wayne County Jail. Gilbert was ordered to pay restitution. The March 2018 judgment of sentence stated, in relevant part:

> NOT ELIGIBLE FOR JAIL CREDIT DUE TO PAROLE STATUS AT THE TIME OF THE OFFENSE.

In late 2018, Gilbert completed his one-year sentences and was released from jail. A probation violation warrant was issued in December 2018 after Gilbert absconded from probation. The warrant was later amended to reflect that Gilbert had committed another criminal act. Gilbert pleaded guilty to violating the terms of his probation in all six of the cases. After a May 14, 2019 sentencing hearing, the trial court revoked Gilbert's probation. In Docket No. 351507, the trial court sentenced Gilbert to 23 months to 10 years' imprisonment. In the remaining dockets, the trial court sentenced Gilbert to 6 to 20 years' imprisonment. The May 14, 2019 judgments of sentence for the convictions indicated that Gilbert's sentences were "to run concurrent" with each other. However, the judgments of sentence did not indicate that Gilbert was to serve the sentences consecutive to any parole sentence. The judgments of sentence granted Gilbert credit for time served in relation to the new convictions.

On June 11, 2019, the trial court sua sponte amended Gilbert's judgments of sentence.[2] The amended judgments of sentence each provided as follows:

> [GILBERT'S] PROBATION [IS] REVOKED; [GILBERT] SENTENCED TO A TERM OF INCARCERATION. SENTENCE TO RUN CONCURRENT WITH [GILBERT'S NEW CASES]. HOWEVER, THIS SENTENCE WOULD RUN CONSECUTIVE TO ANY SENTENCE IMPOSED FOR PAROLE VIOLATION AS [GILBERT] WAS ON PAROLE DURING THE ORIGINAL OFFENSE DATE. AMENDMENT REFLECTS THAT SENTENCE IS TO RUN CONSECUTIVE TO ANY SENTENCE FOR PAROLE VIOLATION. THE

[1] The sentence enhancement was withdrawn in this case.

[2] The parties agree that the May 14, 2019 judgments of sentence were amended after the trial court received a letter from the Michigan Department of Corrections. The letter is not contained in the lower court record.

OMISSION OF THIS FACT WAS A CLERICAL ERROR AS IT WAS NOTED ON [GILBERT'S] ORIGINAL JOS.

Gilbert filed delayed applications for leave to appeal in this Court, and this Court granted leave. See *People v Gilbert*, unpublished order of the Court of Appeals, entered January 2, 2020 (Docket Nos. 351500, 351501, 351502, 351503, 351505, 351507).[3]

## II. ANALYSIS

Gilbert argues that the trial court erred by sua sponte amending the judgments of sentence to reflect that Gilbert's new sentences are consecutive to any sentence imposed for a parole violation.

This issue is not preserved because Gilbert failed to file a motion in the trial court or in this Court challenging the trial court's amendment. *People v Clark*, 315 Mich App 219, 223-224; 888 NW2d 309 (2016). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error has affected a defendant's substantial rights when there is "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

"[A]ny corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules." *People v Holder*, 483 Mich 168, 176; 767 NW2d 423 (2009). "This Court reviews de novo questions of law, including the interpretation and application of our court rules." *People v Howell*, 300 Mich App 638, 644; 834 NW2d 923 (2013). "We interpret court rules using the same principles that govern the interpretation of statutes. If the plain and ordinary meaning of a court rule's language is clear, judicial construction is not necessary." *Id*. at 644-645 (quotation marks and citation omitted). "When interpreting a court rule, [this Court] generally give[s] words their plain and ordinary meanings." *Id*. at 646.

MCR 6.435 indicates when and how the trial court may correct an error in a judgment of sentence:

> **(A) Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
>
> **(B) Substantive Mistakes.** After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

[3] In a separate order, this Court consolidated Docket Nos. 351500, 351501, 351502, 351503, 351505, and 351507. *People v Gilbert*, unpublished order of the Court of Appeals, entered January 2, 2020 (Docket Nos. 351500, 351501, 351502, 351503, 351505, and 351507).

Thus, under this court rule, a trial court may not modify a judgment of sentence that contains a substantive mistake after it has entered a judgment of sentence. MCR 6.435(B). However, "a court may correct a clerical mistake on its own initiative at any time, including after a judgment [is] entered." *People v Comer*, 500 Mich 278, 293; 901 NW2d 553 (2017). The question before us is whether the trial court's amended judgments of sentence corrected a clerical mistake or a substantive mistake.

MCR 6.435(A) indicates that "[c]lerical mistakes in judgments" can arise "from oversight or omission[.]" Although MCR 6.435(A) does not define "omission," this Court in *Howell* had an opportunity to define it in the context of MCR 6.435(A). *Howell*, 300 Mich App at 646. As noted in *Howell*, "omission" has been defined as "something left out, not done, or neglected," and "omit" has been defined as "to leave out; fail to include." *Id*. Because the word "oversight" has not been interpreted in case law, it is appropriate to "consider a dictionary definition to assist our interpretation." *Id*. According to the dictionary definition, the term "oversight" means an "unintentional failure to notice or consider." *Random House Webster's College Dictionary* (1997). Thus, clerical mistakes are errors arising from an "unintentional failure to notice or consider" something, from leaving something out, or from neglecting to do something.

Additionally, the staff comment to MCR 6.435 provides some guidance for distinguishing between clerical and substantive mistakes:[4]

> Subrule (A) repeats verbatim the civil clerical mistakes rule, MCR 2.612(A)(1). Under this rule the court may correct an inadvertent error or omission in the record, or in an order or judgment. The correction can be made by the court at any time subject to the limitation in subrule (D) pertaining to cases on appeal. The court, in its discretion, may give the parties prior notice.
>
> Subrule (B) is new and pertains to mistakes relating not to the accuracy of the record, but rather, to the correctness of the conclusions and decisions reflected in the record. Substantive mistake refers to a conclusion or decision that is erroneous because it was based on a mistaken belief in the facts or the applicable law. Unlike clerical mistakes under subrule (A), the court's ability to correct substantive mistakes pursuant to subrule (B) ends with the entry of the judgment. See 6.427. This limitation does not, however, prohibit a party aggrieved by a substantive mistake from obtaining relief by using available postconviction procedures.
>
> The following examples illustrate the distinction between the two foregoing provisions. A prison sentence entered on a judgment that is erroneous because the judge misspoke or the clerk made a typing error is correctable under subrule (A). A prison sentence entered on a judgment that is erroneous because the judge relied on mistaken facts (for example, confused codefendants) or made a mistake of law

[4] Although staff comments to Michigan Court Rules are not binding authority, they are illustrative. *People v Williams*, 483 Mich 226, 237-239; 769 NW2d 605 (2009).

> (for example, unintentionally imposed a sentence in violation of the *Tanner* rule) is a substantive mistake and is correctable by the judge under subrule (B) until the judge signs the judgment, but not afterwards. In the latter event, however, the defendant may obtain relief by filing a postconviction motion. See 6.429. [MCR 6.435, 1989 Staff Comment.]

We conclude that the trial court did not rely on mistaken facts or a mistake of law when sentencing Gilbert. As relevant to this appeal, MCL 769.1h(1) requires the trial court to specify whether a defendant's "sentence is to run consecutively or concurrently with any other sentence the defendant is or will be serving, as provided by law." MCL 768.7a(2) provides that

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole . . . , the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment for the previous offense.

"Thus, consecutive sentencing is mandatory when someone commits a crime while on parole." *Howell*, 300 Mich App at 647 (quotation marks and citation omitted).

In this case, the PSIR that was prepared before Gilbert was sentenced in relation to the probation violations referenced multiple times that Gilbert was on parole when the original breaking and entering offenses were committed. The PSIR also reflected that Gilbert was currently in violation of his parole. However, the agent who prepared the PSIR did not indicate that consecutive sentencing was mandatory under MCL 768.7a(2). At a May 13, 2019 sentencing hearing, the trial court noted that Gilbert was "on parole for several felony offenses," and the hearing was adjourned to the following day because of concerns that documentation submitted by Gilbert to support that he was gainfully employed was not authentic. At the May 14, 2019 sentencing hearing, it was noted that the probation department had determined that Gilbert had falsified employment documents. The sentencing proceedings then commenced. The trial court asked the parties if they had any additions or corrections to the presentence investigation report ("PSIR"). Neither the prosecutor nor defense counsel challenged the fact that Gilbert had been on parole at all relevant times. The trial court ultimately revoked Gilbert's probation and sentenced Gilbert as described above. Although the trial court initially described Gilbert's sentences as running consecutive with each other, after briefly going off the record, the trial court corrected the record.

> *Trial Court*: I was just notified that I have interchanged the words "consecutive" and "concurrent." That is a mistake. All of them will be consecutive with each other.
>
> *Mr. Gilbert*: I have life?[5]

[5] The trial court noted on the record that the statutory maximum was life imprisonment.

> *Trial Court*: No, no, no, I'm getting my C's wrong. All of them run concurrent. All of them run concurrent. I am not stacking these.
>
> All of them are concurrent with one another. And when I said "consecutive" I misspoke. All of them are concurrent with one another, five of them 6 to 20 [years], and the other one 23 [months] to 10 [years], are concurrent.
>
> *Defense Counsel*: With 366 [days of] credit for all six?
>
> *Trial Court*: With that credit amount for all six. And I apologize for the multiple C's. All of them are concurrent with one another.
>
> That's the decision that was the intent of the Court and I am self-correcting the transcript.

The trial court's May 14, 2019 judgments of sentence did not indicate that Gilbert was required to serve his new sentences consecutive to any sentence imposed for a parole violation. The judgments of sentence also did not address Gilbert's status as a parolee. The judgments of sentence granted Gilbert credit for time served. Thereafter, on June 11, 2019, the trial court sua sponte amended the judgments of sentence. The amended judgments of sentence each provided as follows:

> [GILBERT'S] PROBATION REVOKED; [GILBERT] SENTENCED TO A TERM OF INCARCERATION. SENTENCE TO RUN CONCURRENT WITH [GILBERT'S NEW CASES]. HOWEVER, THIS SENTENCE WOULD RUN CONSECUTIVE TO ANY SENTENCE IMPOSED FOR PAROLE VIOLATION AS [GILBERT] WAS ON PAROLE DURING THE ORIGINAL OFFENSE DATE. AMENDMENT REFLECTS THAT SENTENCE IS TO RUN CONSECUTIVE TO ANY SENTENCE FOR PAROLE VIOLATION. THE OMISSION OF THIS FACT WAS A CLERICAL ERROR AS IT WAS NOTED ON [GILBERT'S] ORIGINAL JOS.

The circumstances in this case are similar to those found in *Howell*, 300 Mich App at 646-647. In *Howell*, the defendant was charged with a myriad of crimes while he was on parole. *Id*. at 640. The defendant ultimately entered into two plea agreements with the prosecutor, but neither agreement addressed the defendant's status as a parolee. *Id*. at 640-641. Two judgments of sentence were entered after the defendant was sentenced. *Id*. at 641-642. The original judgments of sentence did not reflect that the defendant's "new sentences were to be served consecutively with the sentence from which he was on parole," and one of the judgments of sentence granted the defendant jail credit "for time served." *Id*. However, the trial court later amended the judgments of sentence to reflect that the defendant's new sentences were "consecutive to parole." *Id*. at 643. The defendant appealed, and this Court affirmed. *Id*. at 640, 644.

In doing so, this Court acknowledged that the trial court "entirely failed to" specify that the defendant's "new sentences were to be served consecutively with the sentence from which he was on parole[.]" *Id*. at 646. However, the *Howell* Court found that the trial court's original error merely constituted an "omission" within the meaning of MCR 6.425(A), and not a reconsideration or "mistake of facts or law" within the meaning of MCR 6.425(B). *Howell*, 300 Mich App at 647-

648. The Court noted that the trial court did not reconsider or correct any previous action and that the trial court did not operate "under the mistaken belief that [the defendant] was not actually on parole." *Id*. at 648. This Court concluded that it was enough that the PSIR mentioned the defendant's parolee status[6] and that "the trial court recognized his status as a parolee at the sentencing hearing." *Id*. Based on this, the *Howell* Court "conclude[d] that our court rules allowed the trial court to amend [the defendant's] judgments of sentence to reflect that he was to serve his new sentences consecutively to the sentence from which he was on parole at the time he committed the new offenses." *Id*.

In this case, like *Howell*, the trial court did not specifically indicate on the record that it was obligated to sentence Gilbert in accordance with MCL 768.7a. Although the PSIR did not indicate that Gilbert's new sentences were required to run consecutive to his parole sentence, the PSIR recognized that Gilbert was on parole at all relevant times. The trial court acknowledged on the record that Gilbert was on parole, and Gilbert was sentenced the next day. Moreover, when sentencing Gilbert in Docket Nos. 351500, 351501, 351502, 351503, and 351505 in February 2018, the trial court noted that Gilbert was on parole at the time the crimes were committed. The judgments of sentence for the five convictions each stated, in relevant part:

> CONCURRENT WITH [NEW CASES]. [GILBERT] SHALL NOT RECEIVE ANY JAIL CREDIT SINCE HE WAS ON PAROLE AT THE TIME OF THE OFFENSE. THIS SENTENCE WOULD BE CONSECUTIVE TO ANY IMPRISONMENT ORDERED FOR THE PAROLE VIOLATION.

Thus, the trial court clearly recognized that, under MCL 768.7a(2), "consecutive sentencing is mandatory when someone commits a crime while on parole," *Howell*, 300 Mich App at 647 (quotation marks and citation omitted). Additionally, in Docket No. 351507, the trial court's March 2018 judgment of sentence reflected that Gilbert was on parole at the time of that offense.

Furthermore, like in *Howell*, the trial court did not reconsider or correct any previous action. Nor did the trial court operate "under the mistaken belief that [the defendant] was not actually on parole." Rather, the trial court's failure to address whether Gilbert was required to serve his new sentences consecutive to any sentence imposed for a parole violation was an omission or oversight—i.e., something that the trial court left out or failed to include—in the May 14, 2019 judgments of sentence. See *Howell*, 300 Mich App at 646. Accordingly, the trial court did not commit plain error when it sua sponte amended the May 14, 2019 judgments of sentence because it was correcting a clerical error.[7]

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[6] The defendant's PSIR indicated that, "because he was a parolee when he committed the offenses, he must serve the new sentences consecutively to the sentence from which he was on parole." *Howell*, 300 Mich App at 641.

[7] Gilbert argues that, "where a court fails to mention lifetime electronic monitoring or consecutive sentencing at any point during the sentencing hearing, the imposition of either is a substantive amendment under the Court Rules." In so arguing, Gilbert cites *Comer*, 500 Mich at 293.

Next, Gilbert argues that the trial court did not have authority to amend the judgments of sentence without first providing the parties with notice and an opportunity to be heard. MCR 6.429(A) states:

> The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

Thus, in relevant part, a trial court has discretion to correct an invalid sentence (1) "on its own initiative after giving the parties an opportunity to be heard, or" (2) on the motion of either party.[8] "An invalid sentence refers to any error or defect in the sentence or sentencing procedure that entitles a defendant to be resentenced, or to have the sentence changed." *People v Catanzarite*, 211 Mich App 573, 583; 536 NW2d 570 (1995).

In this case, there is no dispute that a motion was not filed by either party. Rather, the trial court sua sponte modified the judgments of sentence after receiving a letter from the Michigan Department of Corrections. Because the trial court failed to provide "the parties with an opportunity to be heard," the trial court plainly erred.

With respect to whether Gilbert's substantial rights were affected, "consecutive sentencing is mandatory when someone commits a crime while on parole." *Howell*, 300 Mich App at 647 (quotation marks and citation omitted). Because "[i]t is axiomatic that conversion of concurrent sentences to consecutive sentences will have a significant effect on the length of time a defendant will be incarcerated," it reasonably follows that due-process considerations require that a defendant have a meaningful opportunity to address the court before such sentences are imposed. See *People v Thomas*, 223 Mich App 9, 16; 566 NW2d 13 (1997).

In this case, Gilbert did not receive "due consideration" of the fact that he was required to serve his new sentences consecutively to any sentence imposed for a parole violation under MCL 768.7a(2). See *Thomas*, 223 Mich App at 16 ("a defendant facing the specter of a cumulative term of imprisonment is at a minimum entitled to due consideration of the relationship between the proposed consecutive sentence and any other period of incarceration the defendant may be subject

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However, the parties in *Comer* did "not contend that the failure to sentence [the] defendant to lifetime electronic monitoring was a clerical mistake" given that "the original sentencing judge said nothing about lifetime electronic monitoring at the initial sentencing." *Id*. Rather, "the parties recognize[d] . . . that failure to impose lifetime electronic monitoring was a substantive mistake, which is in the province of MCR 6.435(B)." Gilbert also cites *People v Worthington*, 503 Mich 863, 863; 917 NW2d 397 (2018). However, *Worthington* did not address MCR 6.435(A). *Worthington*, 503 Mich at 397-398 (VIVIANO, J., concurring).

[8] "[T]he term 'may' is typically permissive[.]" *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). " '[O]r' is a disjunctive term, indicating a choice between two alternatives[.]" *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010).

to.") (citation omitted). Although everyone should have been aware that Gilbert was on parole at all relevant times, there was no discussion of the effect of his parole status at the May 14, 2019 sentencing. Consequently, the trial court should have afforded the parties an "opportunity to be heard," MCR 6.429(A), so that the trial court could "consider the effect of consecutive sentencing in conjunction with [presentence] information and remarks when fashioning an appropriate sentence." *Thomas*, 223 Mich App at 16. Because the trial court did not do so before entering the amended judgment of sentence, we conclude that Gilbert's substantial rights were affected. Consequently, it is necessary to vacate the June 11, 2019 amended judgments of sentence and remand to the trial court for resentencing. See *id*. at 17.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Thomas C. Cameron

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 10, 2020 |
| v | Nos. 351500; 351501; 351502; 351503; 351505; 351507<br>Wayne Circuit Court |
| FRED JEROME GILBERT,<br><br><br><br><br><br>Defendant-Appellant. | LC Nos. 2017-008708-01-FH; 2017-008709-01-FH; 2017-008710-01-FH; 2017-008711-01-FH; 2017-008712-01-FH; 2018-001431-01-FH |

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

LETICA, P.J., (*concurring*).

I agree that Gilbert is entitled to resentencing under MCR 6.429(A)[1] because the trial court

[1] MCR 6.429(A) provides:

> **Authority to Modify Sentence.** The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

sua sponte corrected its invalid sentence to impose consecutive terms under MCL 768.7a(2)[2] in these cases without giving the parties an opportunity to be heard.

Contrary to the majority's contention that Gilbert failed to preserve his current claims, I conclude that Gilbert's challenges are preserved because he had no opportunity to object to the sentencing court's sua sponte actions. See e.g., *People v Holder*, 483 Mich 168, 171-172; 767 NW2d 423 (2009). Compare MCR 6.429(C).[3]

"MCL 768.7a(2) requires consecutive sentencing for felonies committed while on parole . . . ." *People v Beard*, 327 Mich App 702, 707; 935 NW2d 118 (2019). Moreover, a defendant who commits a crime while on parole is not entitled to sentencing credit on his new offense. See MCL 769.11b; *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009).

Consequently, the sentencing court's failure here to impose a statutorily mandated punishment required under MCL 768.7a(2) renders Gilbert's post-probation-violation sentences invalid. See *People v Comer*, 500 Mich 278, 292; 901 NW2d 553 (2017). Therefore, we must decide whether omitting mention of the mandatory consecutive sentence required under MCL 768.7a(2) in the original judgment of sentence was a clerical mistake, correctable by the court sua sponte under MCR 6.435(A).[4]

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[2] MCL 768.7a(2) states:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

[3] MCR 6.429(C) provides:

> **Preservation of Issues Concerning Sentencing Guidelines Scoring and Information Considered in Sentencing.** A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

[4] MCR 6.435 provides:

> **(A) Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.

Consistent with *Comer*, our Supreme Court has previously described a sentencing court's sua sponte imposition of a mandatory consecutive sentence on a parolee after a defendant's in-court sentencing proceeding as a substantive correction under MCR 6.429(A). *People v Worthington*, 503 Mich 863; 917 NW2d 397 (2018) ("In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term [lifetime electronic monitoring] is a substantive correction that a trial court may make on its own initiative only before judgment is entered. And, in this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for consecutive sentencing under MCL 768.7a(2)."); *People v Warrick*, 501 Mich 920; 903 NW2d 552 (2017) (same); *People v Luke*, 501 Mich 895; 901 NW2d 892 (2017) (same). After *Comer*, MCR 6.429(A) was amended to give the trial court the ability to "correct an invalid sentence, on its own initiative," but only "after giving the parties an opportunity to be heard . . . ."

In *Comer*, the Supreme Court further rejected the contention that omitting a statutorily mandated sentence condition was a clerical mistake. 500 Mich at 293. The Court explained:

> [T]he parties do not contend that the failure to sentence [the] defendant to lifetime electronic monitoring was a clerical mistake. Nor could they—the original sentencing judge said nothing about lifetime electronic monitoring at the initial sentencing. *Id.*

The Court's language seems to suggest that if the sentencing court had clearly stated that the judgment of sentence was to include a specific term and that term was not included in the judgment of sentence because of a clerical omission, the sentencing court could correct such an error on its own initiative at any time under MCR 6.435(A). *Comer*, 500 Mich at 293. See also *Worthington*, 503 Mich at 863 (VIVIANO, J., concurring; ZAHRA, J., dissenting).

In this case, although the sentencing court mentioned that Gilbert was on parole, it never indicated that it intended to impose a consecutive sentence for that reason. Moreover, although Gilbert's presentence investigation report mentions that Gilbert was on parole when he committed these felonies, it fails to reflect that a consecutive sentence was statutorily required under MCL 768.7a(2). To the contrary, in sentencing Gilbert after he violated his probation, the court was emphatic that the sentences imposed were concurrent, at least with each other, and the May 2019

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> **(B) Substantive Mistakes.** After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.
>
> **(C) Correction of Record.** If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected.
>
> **(D) Correction During Appeal.** If a claim of appeal has been filed or leave to appeal granted in the case, corrections under this rule are subject to MCR 7.208(A) and (B).

judgments of sentence reflect that, if the box authorizing consecutive sentencing is not checked, "the sentence is concurrent[.]" See also MCL 769.1h(1) ("A judgment of sentence committing an individual to the jurisdiction of the department of corrections shall specify whether the sentence is to run consecutively to or concurrently with any other sentence the defendant is or will be serving as provided by law."). In these cases, that box was not checked.

The prosecution relies on *People v Howell*, 300 Mich App 638; 834 NW2d 923 (2013), to support its view that this case involves a clerical error or omission that the court could sua sponte correct under MCR 6.435(A). Although the majority accepts this argument, I find *Howell* is factually distinguishable. In *Howell*, "[t]he trial court recognized on the record at the sentencing hearing that Howell was on parole, *and* Howell's presentence investigation report indicated that Howell's new sentences were to run consecutively to his parole sentence." 300 Mich App at 647 (emphasis added). As just discussed, that is not true in these cases. Instead, it was only after the sentencing court received a letter from the Department of Corrections that it presumably looked back to its earlier judgments of sentence and recognized that it had imposed consecutive sentences when it sentenced Gilbert to probation more than a year earlier in five of these matters.[5] But, when sentencing Gilbert after he violated his probationary sentences, the sentencing court specifically eschewed consecutive sentences in favor of concurrent ones. And, as already discussed, the available initial May 2019 judgments of sentence reflect that, if the box authorizing consecutive sentencing was not checked, "the sentence is concurrent[.]"

According to the 1989 Staff Comment to MCR 6.435(A),[6] a court may correct "an inadvertent error or omission in the record, or in an order or judgment." The purpose of this rule "is to make the lower court record and judgment accurately reflect what was done and decided at the trial level." *Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998) (discussing MCR 2.612(A)(1), which is identical to MCR 6.435(A)) (citation and quotation marks omitted). On this record, I cannot conclude that the sentencing court's imposition of concurrent sentences was a mere clerical mistake or an error arising from oversight or omission under MCR 6.435(A). To the contrary, adding the mandatory consecutive sentence was an impermissible substantive change under MCR 6.435(B).[7] See *Worthington*, 503 Mich at 863; *Warrick*, 501 Mich at 920; *Luke*, 501 Mich at 895; *Comer*, 500 Mich at 293-294.

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[5] In this regard, the sentencing court was mistaken about the March 2018 judgment of sentence and June 2018 amended judgment of sentence in Docket No. 2018-001431-01-FH. Neither of those earlier judgments of sentence reflected a consecutive sentence was required due to Gilbert's status as a parolee. Instead, the court merely recognized that Gilbert would not receive sentencing credit because he was on parole when he committed the charged felony. MCL 769.11b; *Idziak*, 484 Mich at 552.

[6] Although a staff comment to a court rule is not binding authority, it may be persuasive. *Comer*, 500 at 298 n 48.

[7] I recognize that this seems a burdensome task in light of the mandatory nature of the consecutive sentence at issue, but it is the result that MCR 6.429(A) and MCR 6.435(B) compel, see e.g., *Comer*, 500 Mich at 293-294, where the court's omission was not a clerical one under MCR 6.435(A).

Nevertheless, I agree with the majority that the trial court improperly imposed mandatory consecutive sentences without affording the parties an opportunity to be heard under MCR 6.429(A). Accordingly, I agree that the amended judgments of sentence must be vacated and these matters remanded for further proceedings.

/s/ Anica Letica