**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2008-0403, State of New Hampshire v. James Smart, the court on March 31, 2009, issued the following order:**

The defendant, James Smart, appeals an order of the trial court amending his sentencing order. He argues that the trial court did not commit a scrivener's error and therefore did not have the authority to subsequently amend his sentence. We affirm.

A sentencing court retains jurisdiction of a defendant's sentence where there is a clerical error or the sentence is illegal and void. State v. Fletcher, 158 N.H. __, __ (decided January 8, 2009). Due process requires a sentencing court to clearly communicate to a defendant the exact nature of the sentence as well as the extent to which the court retains discretion to modify it or impose it at a later date. State v. Stern, 150 N.H. 705, 713 (2004). To determine whether an amended sentence offends due process, we have considered the following factors: "(1) the lapse of time between the mistake and attempted increase in sentence; (2) whether the defendant contributed to the mistake; (3) the reasonableness of the defendant's intervening expectations; (4) the prejudice to the defendant from the change; and (5) the diligence of the State in seeking the change." Id. at 714.

The defendant was sentenced on May 29, 2007, on a negotiated capped plea agreement. The mittimus issued as a result of the sentencing hearing stated that he was sentenced to not more than 4 years nor less than 2 years. It further stated: "This sentence is to be served as follows: Stand committed. Commencing May 29, 2007. The sentence is consecutive to parole violation defendant is currently serving. Pretrial confinement credit: 184 days." At oral argument, defense counsel conceded that the mittimus was internally inconsistent; if the sentence resulting from the plea agreement began that day, it could not be consecutive to the time the defendant was serving for a parole violation.

The defendant contends that our case law addressing sentence modification can be divided into two categories: errors of expression and errors of judgment. He defines an error of expression as one in which "the sentencing court makes a mistake in expressing the sentence" or when "the sentencing court pronounces an illegal sentence." He further posits that an "error in judgment occurs when the trial court changes that original sentence to conform with a new intent."

Analogizing his case to State v. Fletcher, he argues that the trial court committed an error in judgment and therefore could not later amend his sentence. We do not find his analogy to Fletcher apt. In Fletcher, the defendant was sentenced to the State Prison; after he was committed, the State became aware that he was eligible for good time credit pursuant to a statute that was in effect at the time he committed the offenses. The State then moved to amend the sentences, arguing that the State, probation department and trial court were acting under a mistake of law at the time of sentencing. The trial court amended the sentences to reflect its original intent. On appeal, we held that a mistake of law does not create a valid ground for a sentence amendment if the mistake does not result in an invalid sentence. Fletcher, 158 N.H. at __.

In this case, both parties agree that the sentence imposed in May 2007 was internally inconsistent and that it was clear at the sentencing hearing that the trial judge expected that the defendant would begin serving time on the plea after serving his sentence on the parole violation. The inherent uncertainty of the length of the defendant's sentence was discussed on the record. Given these facts, we conclude that the trial court retained jurisdiction to correct the defendant's sentence.

We turn then to whether the amended sentence violated due process. The time between the sentencing hearing and the State's request to modify the sentence was less than one month. Although we do not conclude, as the State argues, that the defendant contributed to the sentencing error, this factor alone does not compel a finding that due process was violated. This is particularly true where the trial court engaged in an extensive colloquy at sentencing and made clear its intention that the sentence to be imposed was consecutive to any the defendant was required to serve as a result of his parole violation. Nor do we find that the amended sentence prejudiced the defendant given both the extensive colloquy and that he was already incarcerated. Finally, the State sought modification as soon as it became aware of the inconsistency. Accordingly, we conclude that the trial court did not violate the defendant's due process rights by amending the sentencing order. See State v. Stern, 150 N.H. at 714-15; Dewitt v. Ventetoulo, 6 F.3d 32, 34-36 (1st Cir. 1993).

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,**
**Clerk**