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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0066**

State of Minnesota,
Respondent,

vs.

Ernest Carter,
Appellant.

**Filed March 25, 2019
Reversed and remanded
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CR-16-1791

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, F. Richard Gallo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Rodenberg,
Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant challenges the district court's denial of his petition to correct a sentence not authorized by law, arguing that the court lacked the authority to withdraw its sentence after sentencing him. We reverse and remand.

FACTS

On January 16, 2016, Minneapolis police officers initiated a traffic stop and, during the stop, appellant Earnest Carter admitted that he possessed a handgun. Based on Carter's criminal history, which includes a third-degree-assault conviction, respondent State of Minnesota charged Carter with felon-in-possession of a firearm (felon-in-possession). On April 5, Carter filed a petition to enter into a guilty plea in exchange for a 60-month sentence, and he pleaded guilty at a plea hearing on the same day. The district court found Carter guilty of felon-in-possession, and released him to be with his newborn child on "pretty strict conditions," including a requirement that he "appear for sentencing."

At the scheduled May 20, 2016 sentencing hearing (first sentencing hearing), the district court denied Carter's motion to delay sentencing so that he could assist his family in moving. The court entered a conviction on Carter's guilty plea, and sentenced him to 60 months in prison. Relevant to this appeal, Carter then asked the court to further delay sentencing, and it granted his request, stating: "And I'm withdrawing the sentence that I just pronounced, and the sentencing will be continued until Monday the 23rd . . . It will be exactly what we talked about today as long as you show up." Carter did not appear at the May 23 hearing (second sentencing hearing). At a May 27 rescheduled sentencing hearing

(third sentencing hearing), the state moved to increase Carter's sentence due to his failure to appear at the second sentencing hearing, and the court sentenced him to 66 months. In its warrant of commitment order, the court memorialized its sentence of 66 months, and listed the third sentencing hearing, May 27, 2016, as the date of sentencing.

On October 5, 2018, Carter filed a motion to correct his sentence, alleging that the 66-month sentence resulted in a "second sentence" that the district court was not authorized to impose. The court denied Carter's motion, concluding that there was "no basis in the record to correct [Carter's] sentence."

This appeal follows.

D E C I S I O N

Carter challenges his sentence, arguing that it amounts to a sentence unauthorized by law because the district court lacked the authority to resentence him. A court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. "For a sentence to be unauthorized, it must be contrary to law or applicable statutes." *State v. Overweg*, 922 N.W.2d 179, 182 (Minn. 2019) (quotation omitted). This court reviews a district court's denial of a motion to correct a sentence for an abuse of discretion. *Id.*

Carter argues that the district court executed his sentence upon its oral pronouncement of a 60-month sentence at the first sentencing hearing, thereby relieving the court of any authority to withdraw and then modify his sentence, except for those reasons permitted under the rules of criminal procedure. The state concedes this issue, and concedes that it is outcome determinative, arguing that we should issue an expedited order

reversing and remanding the case for imposition of the original 60-month sentence. We agree.

“Whereas the power to define and to fix the punishment for crimes is vested in the legislature, the imposition of the sentence within the limits prescribed by the legislature is purely a judicial function.” *State v. Ford*, 539 N.W.2d 214, 230 (Minn. 1995) (quotation omitted). Once a district court executes a sentence, it has “no authority to modify a sentence.” *Id.* at 231 (concluding that district court erred by delegating authority to modify sentence to Department of Corrections). “The [district] court’s discretion to sentence is built into the statutes authorizing sentencing. That discretion vanishes once the sentence is executed.” *Reesman v. State*, 449 N.W.2d 489, 490 (Minn. App. 1989).

In *State v. Staloch*, the district court orally pronounced a sentence for a DWI violation, but made no mention of probation; eight months later, defendant was again arrested for DWI, pleaded guilty, and the court revoked his probation and sentenced him to 30 days in jail. 643 N.W.2d 329, 330 (Minn. App. 2002). This court concluded that because the district court did not orally pronounce probation as part of the defendant’s sentence, and its oral pronouncement was not ambiguous, the oral pronouncement controlled over the sentencing order, which included probation. *Id.* at 331. We stated that only when an “orally pronounced sentence is ambiguous,” does this court look to the written-commitment order. *Id.* (quotation omitted). We rejected the state’s argument that the court’s failure to mention probation amounted to a clerical error because “the oral pronouncement controls,” and the fact “that the district court may have intended to grant a conditional stay is of no import where the actual sentence pronounced is clear.” *Id.* at 332;

see Minn. R. Crim. P. 27.03, subds. 9, 10 (stating that a district court “may modify a sentence during a stay of execution or imposition of sentence if the court does not increase the period of confinement,” and it may correct “[c]lerical mistakes . . . arising from oversight or omission”).

Similarly here, the district court’s oral sentence at the first sentencing hearing is unambiguously clear: “Ernest Carter, you’ve been convicted of that crime, therefore you are committed to the custody of the Commissioner of Corrections for a total of 60 months.” Because a sentence is “executed” upon a court’s oral pronouncement, Carter received an executed 60-month sentence upon the court’s oral pronouncement of such. That the court may have intended to withdraw, withhold, or stay sentencing until Carter had an additional opportunity to assist his family, “is of no import” because the court’s actual sentence was clear. *Staloch*, 643 N.W.2d at 332; cf. *State v. Weisberg*, 473 N.W.2d 381, 382-83 (Minn. App. 1991) (concluding that district court erred by revoking probation where the defendant was orally warned not to gamble, but the court failed to adequately state what legal conduct would result in revocation), *review denied* (Minn. Oct. 11, 1991); *Tauer v. State*, 451 N.W.2d 649, 651 (Minn. App. 1990) (concluding that the district court did not err where it modified a sentence based on a clerical error arising from defense counsel’s statements at the sentencing hearing), *review denied* (Minn. Mar. 16, 1990).

The modification of an additional six months to Carter’s sentence amounts to a sentence not authorized by law. See *Staloch*, 643 N.W.2d at 332 (stating that a district court “cannot later impose a more severe sentence under the guise of making a clerical correction”). The fact that the district court’s sentencing order here contradicts its orally-

pronounced sentence does not save its error. *See id.* at 331 (stating that “the purpose of the written order” is to “help clarify an ambiguous oral sentence by providing evidence of what was said from the bench”) (quotation omitted). We conclude that the district court abused its discretion by attempting to withdraw its original 60-month sentence and then imposing a higher sentence based on Carter’s failure to show up to the second sentencing hearing. *See* Minn. R. Crim. P. 27.03, subd. 9 (“The court may modify a sentence during a stay of execution or imposition of sentence if the court does not increase the period of confinement); *see also* *Reesman*, 449 N.W.2d at 490 (“A court which modifies a sentence for reasons other than those permitted by statute is not performing a judicial function.”). We therefore reverse the district court’s denial of Carter’s motion, and remand for modification of Carter’s sentence to the originally-pronounced 60 months.

Reversed and remanded.