

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001142-MR

DEITRICH WEBSTER

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE CLARENCE A. WOODALL, III, JUDGE  
ACTION NO. 02-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND WINE, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Deitrich Webster appeals *pro se* from an order of the Caldwell Circuit Court entered on May 21, 2009, denying his motion for relief under Kentucky Rules of Civil Procedure (CR) 60.01. After considering the record and briefs, we affirm.

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<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On December 12, 2001, Webster and Stephen Bryant robbed McGregor Jewelers, in Princeton, Kentucky. During the robbery, the owner of the store was struck with a hammer. On June 4, 2002, the Caldwell County grand jury indicted both Webster and Bryant on the charges of complicity to first-degree robbery and complicity to first-degree assault. On January 16, 2003, in exchange for the Commonwealth's offer of ten years' imprisonment on each count of the indictment to run consecutively for a total of twenty years, Webster pled guilty to all counts of the indictment. He was sentenced in accordance with the Commonwealth's recommendation on March 6, 2003. The trial court expressly determined that, "[t]hese are violent offenses by statute."

On June 26, 2003, Webster moved the trial court to vacate his sentence pursuant to CR 60.02. He claimed that his conviction violated the rule against double jeopardy. The trial court denied his motion on November 22, 2004.

On March 6, 2006, Webster filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion in the Caldwell Circuit Court in which he alleged ineffective assistance of counsel. The court denied his motion on April 17, 2006. On August 17, 2007, our Court affirmed the court's denial of Webster's RCr 11.42 motion.<sup>2</sup>

On February 5, 2009, Webster filed another motion to vacate his sentence pursuant to CR 60.02. Once again, this motion alleged that Webster's

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<sup>2</sup> *Webster v. Commonwealth*, 2007 WL 2343769 (Ky. App. 2007) (2006-CA-001102-MR). This is a non-published opinion.

convictions violated double jeopardy. On March 6, 2009, the trial court denied his motion.

On May 8, 2009, Webster moved the trial court to correct a clerical error under CR 60.01. Webster claimed that the trial court mistakenly sentenced him under the violent offender statute, which adversely affected his parole eligibility. On May 21, 2009, the trial court denied his CR 60.01 motion without a hearing. This appeal follows.

CR 60.01 provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

The alleged mistake of which Webster complains is not a clerical error under CR 60.01 but if there is error, it would be considered a substantive error. Relief under CR 60.01 is not available because that rule only allows courts to correct clerical mistakes. *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000).

Whether a mistake is a clerical error or a substantive error turns on whether the error “was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel, or by the judge.” *Buchanan v. West Kentucky Coal Co.*, 218 Ky. 259, 291 S.W. 32, 35 (1927); *Hutson v. Commonwealth*, 215 S.W.3d 708 (Ky. App. 2006). The March

6, 2003, sentencing order specifically stated that the charges of first-degree robbery and first-degree assault were statutorily violent offenses. Webster's designation as a violent offender was not a clerical oversight or typographical error but a result of legal analysis. Therefore, CR 60.01 does not provide Webster an avenue for post-conviction relief.

Since the alleged error reflects a substantive decision, Webster could have and should have raised the issue in his previous RCr 11.42 or CR 60.02 motions. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983).

Accordingly, we affirm the Caldwell Circuit Court's order denying Webster's CR 60.01 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Deitrich Webster, *pro se*  
Fredonia, Kentucky

BRIEF FOR APPELLEE:

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