

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000791-MR

MICHAEL CUMMINS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 04-CR-00094

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,<sup>1</sup> SENIOR JUDGE.

LAMBERT, JUDGE: Michael Cummins has appealed from an order of the Franklin Circuit Court denying his motion to alter, amend, or vacate an earlier order finding him liable to assault victim Joshua Hulker for restitution in the

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<sup>1</sup> Senior Judge Michael L. Henry 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.

amount of \$40,727.79. Because we agree with Cummins that the circuit court did not have jurisdiction to enter the order imposing that amount of restitution, we reverse and remand.

The procedural history of this case is rather convoluted, as it concerns two separate indictments. In addition, our ability to discern the events that transpired at the circuit court level is somewhat hampered by an incomplete record. With this in mind, we shall attempt to set forth the events as they appear in the record and supplemental record before us.

In May 2004, Cummins was indicted along with two co-defendants by the Franklin County grand jury (No. 04-CR-00080-002). He and co-defendant Larry Cook, Jr., were indicted on a charge of first-degree burglary for entering the home of Lloyd Gaines in November 2002 and causing him physical injury. A third co-defendant, Steve Cox, was charged with complicity to first-degree burglary. In June 2004, Cummins and co-defendant Brandon Landrum were indicted on a separate charge of second-degree assault related to an attack on Joshua Hulker (No. 04-CR-00094-001). It appears from discussion in the video record that the assault charge went to trial before Judge Graham, but the trial ended in a hung jury.

The burglary and assault charges, together, ultimately became the basis for the Commonwealth's offer on a plea of guilty. The supplemental record contains the written offer, which was filed in the record on April 27, 2006:

1. Charges:

Indictment No. 04-CR-00080-002

Burglary in the First Degree    Penalty: 10-20 years  
Class B Felony  
KRS 511.020  
UOR 22021

Indictment No. 04-CR-00094-001  
Assault in the Second Degree    Penalty: 5-10 years  
Class C Felony  
KRS 508.020  
UOR 13160

2. Amended Charges: Amend Indictment No. 04-CR-00080-002 to KRS 511.030, Burglary in the 2<sup>nd</sup> Degree, Class C Felony, UOR 22022, Penalty 5-10 years. Amend Indictment No. 04-CR-00094-001 to KRS 508.030 Assault-Fourth Degree, Class A Misdemeanor, UOR 00430, 12 months.

3. Facts of the Case: In Indictment No. 04-CR-00080-002, the defendant forcibly entered a residence in Franklin [C]ounty Kentucky with the intent to commit a crime. In Indictment No. 04-CR-00094-001, the defendant assaulted Joshua Hulker with a stick or club.

4. Recommendations on a Plea of Guilty (Plea Agreement):

The Defendant shall be sentenced to five (5) years incarceration in the state corrections system on Indictment No. 04-CR-00080-002 and 12 months incarceration on Indictment No. 04-CR-00094-001, the sentences to run concurrently for a total sentence of Five (5) years.

The Commonwealth shall take no position on probation so long as he be jointly and severally liable, along with his co-defendants to make restitution to the victim in Indictment No. 04-CR-00080-002, Lloyd D. Gaines, Jr., to cover the costs of medical expenses and loss of personal property taken in the amount of \$6,877.23 and for any future medical expenses incurred as a result of the offense. *Further, that he be jointly and severally liable, along with his co-defendant to make*

*restitution to the victim in Indictment No. 04-CR-00094-001, Joshua Hulker, to cover the costs of medical expenses in the amount of \$1,600.00 representing unreimbursed expenses disallowed by the Crime Victims Compensation Board. [Emphasis added.]*

5. Reason for amended charges: Evidentiary considerations and saves the Commonwealth the expense of a trial.

6. Offered this the 20<sup>th</sup> day of March, 2006.

The circuit court (now with Judge Crittenden presiding) held a guilty plea hearing on April 21, 2006. At that time, the court and the parties discussed the Commonwealth's offer and its agreement to take no position on probation if Cummins agreed to pay restitution to the respective victims. In the course of this discussion, the court mentioned the amount of restitution owed in each case pursuant to the offer. Specifically related to the assault case, the circuit court stated that terms of the offer included the requirement that Cummins be jointly and severally liability to Joshua Hulker in the amount of \$1600.00. The court then asked Cummins if that was what had been communicated to him, and Cummins answered that it was. Cummins also indicated that he understood the meaning of joint and several liability. The circuit court accepted Cummins's plea and entered an order to this effect. In the order, the circuit court included a recitation of the Commonwealth's recommended sentence, but did not include the \$1600.00 amount. Rather, the order stated that he would "be jointly and severally liable, along with his co-defendant to make restitution to the victim in Indictment No. 04-

CR-00094-001, Joshua Hulker, to cover the costs of medical expenses disallowed by the Crime Victims Compensation Board.”

The circuit court held a sentencing hearing on June 23, 2006. During the hearing, Cummins requested probation and stated that he had agreed to pay restitution if the court probated his sentence. The Commonwealth, as it did in the offer, indicated that it would not object to probation if timely restitution payments were made. At the conclusion of the hearing, the circuit court sentenced Cummins in accordance with the plea agreement and probated the five-year sentence for a total of five years or until restitution was completed. It indicated that the liability for restitution was joint and several and that Cummins and his co-defendant would be liable to Joshua Hulker for medical expenses disallowed by the Crime Victims Compensation Board.

Judge Crittenden signed the judgment in No. 04-CR-00094-001, which was entered the following day on June 29, 2006. The judgment properly stated that Cummins’s twelve-month prison term on the assault conviction was probated, but inaccurately ordered him to pay restitution in the amount of \$6,877.23, which was the amount due on the burglary conviction. The order of probation was entered the same day, which similarly and incorrectly ordered Cummins to make restitution to Lloyd Gains in the amount of \$6,877.23.

On July 21, 2006, the circuit court (now with Judge McNamara presiding) entered a *sua sponte* order correcting a “clerical error” in the order of probation: “[A]s a condition of probation the Defendant be jointly and severally

liable, along with his co-defendant to make restitution to the victim in Indictment No. 04-CR-00094-001, Joshua Hulker, to cover the costs of medical expenses disallowed by the Crime Victims Compensation Board.” Two subsequent orders entered in 2006 and 2007 directed Cummins to have no contact with Joshua Hulker or any member of his family and addressed Joshua Hulker’s immediate need for \$1700.00 to pay for surgery to correct injuries to his jaw. The court noted that Cummins had already paid \$550.00 in restitution and ordered him to pay an additional \$300.00. The video record indicates that Cummins’s co-defendant was also responsible for paying a portion of the ordered funds.

On April 2, 2008, the Commonwealth filed a motion to correct a clerical error, requesting that the court set the amount of restitution due at \$40,727.79, which represented the outstanding medical expenses Joshua Hulker had incurred due to the assault. The motion set forth that in accordance with the plea agreement, both Cummins and his co-defendant were to pay restitution for medical expenses as a condition of their probation. The Commonwealth then stated that Joshua Hulker was continuing to receive medical treatment, including surgical care, for the injuries he sustained. The circuit court held a hearing on the motion, at which both Cummins and his co-defendant objected. They argued that they had agreed to pay \$1600.00 in restitution, not in excess of \$40,000.00, and that the error raised by the Commonwealth’s motion was not a clerical error.

On May 5, 2008, the circuit court entered an order ruling on the Commonwealth’s motion as follows:

## ORDER CLARIFYING

This matter is before the Court upon the Commonwealth's motion for the Court to correct a clerical error in the Defendant's restitution record. The Court, having considered the record, having heard the arguments of counsel, and being otherwise sufficiently advised, issues the following Opinion and Order:

### **Defendant Brandon W. Landrum**

(1) On August 6, 2004, Defendant Landrum was arraigned on one charge of Assault in the Second Degree, a Class C Felony. That case was styled 04-CR-00094(2).

(2) On March 23, 2006, Defendant Landrum entered a plea of guilty to an amended charge of Assault in the Fourth Degree, a Class A Misdemeanor. On that date, Defendant Landrum was sentenced to imprisonment for twelve (12) months, suspended for twelve (12) months on the condition that he pay the victim, Joshua Hulker, the amount of \$850 in restitution along with certain other conditions for release.

(3) Defendant's Landrum's posted bond in the amount of \$500 was applied to his restitution requirement and since that time Defendant Landrum has fulfilled his obligatory payments and completed the remainder of his probationary terms and is no longer on probation.

(4) As such, Defendant Landrum does not owe the Victim, Mr. Hulker, any further restitution.

### **Defendant Michael S. Cummins**

(5) On May 12, 2004, the Defendant, Cummins, was indicted by the Franklin County Grand Jury of: (a) Burglary in the First Degree, a Class B Felony; and (b) Complicity to Burglary in the First Degree, a Class B Felony committed on November 6<sup>th</sup>, 2002. That case was styled 04-CR-00080(2).

(6) On August 6, 2004, Defendant Cummins was arraigned on one charge of Assault in the Second Degree, a Class C Felony. That case was styled 04-CR-00094(1).

(7) On April 21, 2006, Defendant Cummins plead [sic] guilty to Burglary in the Second Degree, a Class C Felony under Indictment No. 04-CR-00080(2) and to Assault in the Fourth Degree, a Class A Misdemeanor under Indictment No. 04-CR-00094(1).

(8) The Defendant was sentenced on April 23, 2006. For the offense of Burglary in the Second Degree (Indictment No. 04-CR-00080(2)), Cummins was sentenced to a term of imprisonment of five (5) years to be probated for a term of five (5) years. For the offense of Assault in the Second [sic] Degree (Indictment No. 04-CR-00094(1)), Cummins was sentenced to a term of imprisonment for one (1) year to be probated for a term of five (5) years. Both sentences and probation terms were to run concurrently for a total of five (5) years imprisonment, probated for five (5) years.

(9) In addition to standard probation conditions such as drug testing and court costs, Defendant Cummins was ordered to pay restitution to the victims of his crime.

(10) For the crime of Burglary in the Second Degree (Indictment No. 04-CR-00080(1)), Cummins was ordered to pay Mr. Lloyd D. Gaines, Jr. \$6,877.23 to cover the cost of medical expenses and loss of personal property taken during the commission of the crime. Defendant Cummins is jointly and severally liable for the restitution amounts. Defendant Cummins' co-defendants have not resolved their cases, and as such, Mr. Gaines is currently responsible for the full restitution amount. Court records indicate that Defendant Cummins currently owes Mr. Gaines \$6,097.09 in restitution.

(11) For the crime of Assault in the Second [sic] Degree (Indictment No. 04-CR-00094(1)), Defendant Cummins was ordered to pay Mr. Joshua Hulker any cost for medical treatment related to his injuries.



(12) This Court's Division 1, June 29, 2006 Order of Probation omitted the probationary condition of restitution payment to Mr. Hulker. As a result, this Court entered its Order Correcting Order of Probation, *Sua Sponte* on July 21, 2006. That Order clarified that "as a condition of probation, the Defendant be jointly and severally liable, along with his co-defendant to make restitution to the victim in Indictment No. 04-CR-00094-001, Joshua Hulker, to cover the costs of medical expenses disallowed by the Crime Victims Compensation Board.

(13) Defendant Cummins was ordered to pay restitution for the two victims at a rate of \$500 [sic] per month. Defendant Cummins failed to make the scheduled payments and Mr. Hulker only received \$550 from Defendant Cummins.

(14) The Commonwealth moved on December 1, 2006 for revocation of Defendant Cummins' probation as a result of his failure to make proper restitution payments as ordered by this Court. The Court denied the motion for revocation, but ordered that the Defendant pay Mr. Hulker \$300 immediately in order to facilitate payment for a surgery necessitated by his violence. At that time, the Court also ordered that restitution be commenced immediately and that Defendant Cummins make \$50 monthly payments. The Court also ordered that the restitution amount should be paid to Mr. Gaines first, and after his balance was paid, to Mr. Hulker.

(15) Following the show cause hearing, Mr. Hulker received \$300 from Defendant Cummins. Defendant Cummins' last restitution payment in the amount of \$100 was made in January, 2008. No further payments have been made. This motion was brought before the Court following Mr. Hulker's [sic] non-compliance.

(16) This Court makes the following findings as related to the conditions of Defendant Cummins' probation:

(a) Defendant Cummins is liable for restitution in the amount of \$6,097.09 to Mr. Lloyd Gaines, Jr.

(b) Defendant Cummins is liable to Mr. Joshua Hulker for the cost of medical expenses related to his injuries sustained during the commission of his crime.

(c) Defendant Cummins' obligation to Mr. Hulker is reduced by \$850 (paid by Defendant Landrum in completion of his obligation) and \$25,000 (paid by the Crime Victims' Compensation Board).

(d) As of today's date, Defendant Cummins is liable for restitution in the amount of \$40,727.79 to Mr. Hulker.

This Court takes notice that its previous order of \$50 payments per month towards Defendant Cummins' restitution obligation will extend the obligation for an indefinite period of time and will not be effective in making his victims whole again. As such, this Court orders that Defendant Cummins shall make \$500 payments per month beginning June 1, 2008 and shall continue until such time that his obligations are met. The Franklin Circuit Clerk shall distribute \$250 to each Mr. Gaines and Mr. Hulker until such time as Mr. Gaines' restitution is paid in full and then Mr. Hulker shall receive \$500 payments monthly.

In addition, this Court extends Defendant Cummins' probation an additional five (5) years from this date. Should Mr. Hulker incur future medical expenses, the Commonwealth is to bring the bills to the Court's attention and the restitution amounts shall be adjusted accordingly.

Cummins's retained counsel filed a motion to alter, amend, or vacate the above order, requesting an opportunity to be heard on the amount of restitution he was legally obligated to pay and the amount of his monthly payment. Shortly thereafter, Cummins's counsel withdrew, and Cummins filed an affidavit of

indigence and request for appointment of counsel. The circuit court appointed counsel to represent Cummins and allowed her time to file a memorandum. In the memorandum, Cummins argued that his due process rights were violated by the entry of the May 5, 2008, order as he was not given notice of the order or the opportunity to be heard; that his contract with the Commonwealth was violated in that the amount of restitution due was set out as \$1600.00 in the plea agreement and it did not contemplate the payment of future medical expenses; and that the circuit court lost jurisdiction to amend its judgment ten days after its entry. This motion was argued before the court on August 20, 2008, when another new attorney for Cummins addressed the language in the plea agreement concerning the \$1600.00 in restitution. Several months later, the Commonwealth filed a response to Cummins's motion. The response contains a lengthy recitation of facts, many of which are not otherwise contained in the certified record, including the videotaped record, or supported by any affidavit or other documentary evidence.

On April 6, 2009, the circuit court denied Cummins's motion and affirmed the May 5, 2008, order. This appeal now follows.

In his brief, Cummins raises the same arguments that he made in his motion to alter, amend, or vacate. Namely, that the circuit court abused its discretion by entering the restitution order two years after it had lost jurisdiction over the case; that the Commonwealth breached its contract with him, which violated his due process rights; and that the circuit court violated his due process rights when it failed to give him notice and an opportunity to be heard at a

restitution hearing. The Commonwealth disputes each of these arguments in its brief.

For his first argument, Cummins asserts that the circuit court lacked jurisdiction to enter the May 5, 2008, order clarifying, as that order was entered nearly two years after the judgment became final. The Commonwealth argues that the circuit court had continuing jurisdiction to modify the terms of Cummins's probation pursuant to KRS 533.020. Because resolution of this issue concerns a question of law, we review this matter *de novo*. *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999).

Cummins describes three situations where a court may properly act post judgment. On its own motion or by motion of a party, a court has ten days to amend a judgment pursuant to Kentucky Rules of Civil Procedure (CR) 52.02 or to order a new trial pursuant to CR 59.04. Neither situation applies to this case. A court is also permitted to amend a clerical error pursuant to CR 60.01 or Kentucky Rules of Criminal Procedure (RCr) 10.10. The question, then, is whether the error corrected by the order on appeal may be considered a clerical error. We hold that it may not.

RCr 10.10 provides, in pertinent part, as follows:

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 on its own initiative or on the motion of any party and after such notice, if any, as the court orders.

The Supreme Court has addressed the application of RCr 10.10, specifically the difference between a clerical error and a judicial error. In *Cardwell v. Commonwealth*, 12 S.W.3d 672 (Ky. 2000), the Court reviewed a situation where the written judgment did not reflect that sentences were to be served consecutively, when at the sentencing hearing it was clearly the trial court's intention. The Court stated:

[T]he distinction between clerical error and judicial error does not turn on whether the correction of the error results in a substantive change in the judgment. Rather, the distinction 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 Company*, Ky., 218 Ky. 259, 291 S.W. 32, 35 (1927). “A clerical error involves an error or mistake made by a clerk or other judicial or ministerial officer in writing or keeping records. . . .” 46 Am.Jur.2d, Judgments § 167. The omission in the original judgment of a provision that Cardwell's sentence was to run consecutive with his previous sentence was a mistake made in reducing the oral judgment to writing. The omission was not the product of judicial reasoning and determination. It was a clerical error.

*Id.* at 674-75.

However, in *Viers v. Commonwealth*, 52 S.W.3d 527 (Ky. 2001), the Supreme Court reversed an amended judgment entered by the trial court that stripped the defendant of jail-time credit for time he spent serving a federal sentence. The Court held that the error was a judicial one because it was inconsistent with the oral judgment the trial court rendered at sentencing. It explained:

On review, the question of whether an error is “judicial” or “clerical” turns on whether the amended judgment embodies the trial court’s oral judgment as expressed in the record. *See Presidential Estates Apartment Associates v. Barrett*, 129 Wash.2d 320, 917 P.2d 100, 103 (1996). If it does, then the error is clerical in that the amended judgment either corrects language that is inconsistent with the oral judgment, or supplies language that was inadvertently omitted from the oral judgment. *See id.* at 104. But if it does not, then the error must be judicial.

*Id.* at 529.

Turning to the present case, we hold that the circuit court’s entry of the order clarifying represented a correction of a judicial error as in *Viers*, not a clerical one.<sup>2</sup> We disagree with the Commonwealth’s assertion that the clerical error arose from the clerk’s mistake in noting that Cummins had completed his restitution payments. On the contrary, the order clarifying created an additional penalty not addressed when the guilty plea and sentencing hearings were held. The Commonwealth’s written offer and the discussion at the guilty plea hearing clearly reflect that Cummins accepted the plea based on the requirement that he pay restitution to Joshua Hulker in the amount of \$1600.00, the specific amount disallowed by the Crime Victims Compensation Board. Despite what the Commonwealth argued below and in its brief, there is nothing in the record to reflect that Cummins owed any additional restitution once he had satisfied the payment of that amount. Unsupported statements by the Commonwealth in its

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<sup>2</sup> We note that the circuit court previously entered an order amending the order of probation to properly reflect the correct victim and restitution details. That action did constitute the correction of a clerical error.

motion to clarify as to what allegedly took place earlier certainly do not constitute proof that any additional amounts were due. While this result may appear harsh to victim Joshua Hulker, the Commonwealth opted to make the offer as it did. Therefore, the order requiring Cummins to pay an additional \$40,727.79 in restitution to Joshua Hulker constitutes reversible error, as it did not reflect the circuit court's original judgment.

The Commonwealth goes on to argue that the circuit court is statutorily authorized to modify or enlarge the conditions of probation, citing KRS 533.020. While that is true, the circuit court was not permitted to increase the amount of restitution due by almost \$40,000.00. As Cummins points out, KRS 533.030(3) requires that restitution be determined upon the imposition of the sentence of probation, removing the amount from a condition of probation that is subject to modification or enlargement.

Based upon our holding that the circuit court committed reversible error by ordering Cummins to pay additional restitution, we need not address the remaining arguments.

For the foregoing reasons, the Franklin Circuit Court's May 5, 2008, order clarifying and April 6, 2009, order denying the motion to alter, amend, or vacate are hereby reversed, and this matter is remanded with directions that the order clarifying be vacated and that the record reflect that Cummins has satisfied his restitution to Joshua Hulker.

TAYLOR, CHIEF JUDGE, CONCURS.

OPINION.

HENRY, SENIOR JUDGE, DISSENTING: I respectfully dissent. I cannot find in KRS 533.030 language which in the majority's view so tightly ties a trial court's hands when ordering restitution. Nor can I find a case of our Court or the Kentucky Supreme Court interpreting the statute in such a narrow fashion with the lone exception of one unpublished opinion of the Supreme Court in which a badly fragmented Court, citing as its sole authority a 1939 case which preceded KRS 533.030 by decades and never mentioned restitution, made a finding similar to that put forth here. Justice Scott dissented in that case, and like Justice Scott I note that the statute specifically provides for restitution for a victim's medical expenses "in the full amount of the damages." The only statutory limit on restitution I can find is \$100,000 in the case of medical expenses, and there is no proof that the expenses in this case approached that amount. It is to me incredible that Cummins entered this plea without knowing that he would be required to pay Joshua Hulker's medical expenses to the extent that they exceeded the amount of Crime Victims' Compensation. Clearly, Cummins's trial counsel bargained for a favorable plea deal based upon his paying Gaines' and Hulker's expenses, and now it looks as though he will be relieved of even that responsibility. I do not believe that the General Assembly intended KRS 533.030 to say that thugs may break in and beat a person about the head and face so severely that surgery is required, and



the criminals cannot be required to pay the victim's damages if those damages cannot be fully ascertained at the time of sentencing. Therefore, I dissent.

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