

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

NO. 2010-CA-000329-MR

JOHN EARL LAY

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT  
HONORABLE DANIEL BALLOU, JUDGE  
ACTION NO. 09-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING

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BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

CAPERTON, JUDGE: John Lay appeals from the February 17, 2010, order amending his final judgment and sentence 176 days after his final judgment was entered; said order addressed the omission of Lay's requirement to register with the sex offender registry. After a thorough review of the parties' arguments, the

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

record, and the applicable law, we agree with Lay that the trial court acted without jurisdiction in amending the final judgment. Accordingly we vacate said order.<sup>2</sup>

On January 26, 2009, a McCreary County Grand Jury indicted Lay on one count of First Degree Sexual Abuse. On August 25, 2009, the Commonwealth offered to amend the charge down to Second Degree Sexual Abuse and recommended a twelve month sentence. As Lay had already served six months, the Commonwealth offered to conditionally discharge the remaining six months for two years. Lay entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S.N.C. 1970) that same day. During the plea colloquy, the court made the following exchange with the Commonwealth:

Judge: I'm not real familiar with sex offender registry and all that. Is that something he needs to do?

Commonwealth: He does not have to be evaluated, Your Honor, because it's a misdemeanor.

Defense Counsel: Right.

Commonwealth: I think the Court can go ahead and sentence him.

Judge: Okay.

V. R. 8/25/09 at 3:01 PM.

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<sup>2</sup> However, we do not believe that the trial court's omission from the final judgment of Lay's duty to register as a sex offender nor the trial court's unsuccessful efforts to cure said omission with its order amending the final judgment relieve Lay from his statutory duty to register. KRS 17.520 clearly imparts a duty on Lay to register, albeit, the court failed to properly notify him of this duty in his final judgment and sentence. *See also* KRS 17.500 and 17.510. Moreover, sex offender registration laws do not "punish sex offenders," they serve only a "regulatory purpose." *Bray v. Commonwealth*, 203 S.W.3d 160, 164 (Ky.App.2006) (citing *Hyatt v. Commonwealth*, 72 S.W.3d 566, 571 (Ky. 2002)).

As such, we find that Lay's duty to register is independent of his sentence and the court's obligation to inform Lay of his duty to register is a courtesy to the defendant. *See also* *Carpenter v. Com.*, 231 S.W.3d 134, 137 (Ky. App. 2007), wherein this Court noted that "the registration requirement was not a matter within the control of the Commonwealth. Because the General Assembly directed that registration is mandatory in cases in which the victim is a minor, neither the Commonwealth nor the trial court had authority to relieve Carpenter of the requirement."

A final judgment and sentence was entered the same day, August 25, 2009, and Lay was conditionally discharged for two years. Said judgment did not include a statement that Lay would have to register as a sex offender.

On January 11, 2010, the Commonwealth filed a motion to amend Lay's final judgment to address his requirement to register as a sex offender. On January 15, 2010, Lay's attorney filed an objection to the Commonwealth's motion and argued that the court did not have jurisdiction to amend the final judgment more than 10 days after entry of said judgment given that no clerical error had occurred. On February 17, 2010, the court entered an order amending the final judgment and required Lay to register as a sex offender for twenty years. It is from this order that Lay now appeals.

On appeal, Lay presents one argument, namely, that the trial court's order should be reversed because the court lacked jurisdiction to amend his final judgment which contained a judicial error rather than a clerical error. The Commonwealth responds that any error by the trial court in amending the final judgment is harmless. With these arguments in mind we now turn to our applicable law.

At the outset we note that whether the trial court acted outside its jurisdiction in amending the judgment of conviction and sentence is a question of law, which we review *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001).

Generally, a trial court loses jurisdiction over a defendant's case ten days after the entry of a final judgment. *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979) and CR 59.05. *See also McMurray v. Com.*, 682 S.W.2d 794, 795 (Ky.App. 1985). RCr 10.10 provides an exception and permits a trial court jurisdiction to correct clerical mistakes in final judgments more than ten days after the entry of said judgment. However, “whether RCr 10.10 applies depends on whether the trial court's failure to mention restitution in its initial judgment of conviction and sentence was a clerical mistake that arose from oversight or omission.” *Brown v. Commonwealth*, 326 S.W.3d 469, 471-472 (Ky.App. 2010).

As noted by the *Brown* Court:

[T]he 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.

*Brown* at 472 (citing *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000)).

In the case *sub judice* it is clear from the video record that the omission from the final judgment of the notice to Lay, to register as a sex offender does not constitute clerical error; said error was the deliberate result of judicial reasoning and determination. As such, RCr 10.10 does not apply and the trial court lost jurisdiction to amend Lay’s final judgment after ten days from its entry. *See McMurray, supra*.

We do not find the Commonwealth's argument that the trial court's actions without jurisdiction amount to harmless error under RCr 9.24<sup>3</sup> given that "[s]ubject matter jurisdiction may be raised at any time and cannot be consented to, agreed to, or waived by the parties." *Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky.1997).

In light of the aforementioned, we vacate the February 17, 2010, order.<sup>4</sup>

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter  
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BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Jason B. Moore  
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<sup>3</sup>RCr states:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

<sup>4</sup> We reiterate that Lay would still be required to register. *See* n.2, *supra*.