

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002434-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 96-CR-000226

JOHNNY LEE COLEMAN

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: BUCKINGHAM, KNOX, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The Commonwealth of Kentucky appeals from an order of the Pike Circuit Court entered on September 17, 1997, sustaining Johnny Lee Coleman's (Coleman) motion to set aside a previous order denying his motion for shock probation. After review of the record and the arguments of counsel, we vacate and remand for further proceedings.

In March 1997, Coleman was found guilty of rape in the third degree. In April 1997, the trial court sentenced Coleman to serve eighteen months in prison consistent with the sentencing recommendation of the jury. On May 6, 1997, Coleman filed a

motion for shock probation pursuant to KRS 439.265, which the trial court summarily denied.

On June 11, 1997, Coleman filed a second motion for shock probation. On June 24, 1997, the trial court issued a one-line order summarily granting the motion for shock probation. On July 16, 1997, the trial court issued an order outlining the conditions of shock probation. In the order, the trial court placed Coleman on probation for a period of two years under the supervision of the Division of Probation and Parole and required him to enroll in and complete a sexual treatment program.

On July 29, 1997, the trial judge issued, sua sponte, an order entitled Order of Correction that stated the previous order granting shock probation was entered into the court record in error. The trial judge ordered that the previous order granting shock probation be set aside and that the motion for shock probation be denied.

In August 1997, Coleman filed a motion to set aside the July 29 order based on the trial court's alleged lack of jurisdiction to issue the order setting aside the previous grant of shock probation. The Commonwealth filed a response to Coleman's motion arguing that the trial court had authority to issue the July 29 order in order to correct a "clerical mistake" under CR 60.01. On September 17, 1997, the trial court granted Coleman's motion to set aside the July 29 order and reinstated the conditions of shock probation. The Commonwealth appealed.

The Commonwealth argues that the July 29 Order of Correction was valid under CR 60.01. It contends that the trial

court's September 17 order granting Coleman's motion to set aside the Order of Correction was based on an erroneous belief by the trial judge that he did not have jurisdiction to issue the Order of Correction. The Commonwealth refers to a calendar entry for June 20, 1997¹, that indicates the motion for shock probation was denied in support of the position that the original order granting shock probation was a clerical error.

Meanwhile on appeal, Coleman reiterates the argument that the trial court lost jurisdiction to alter, amend, or vacate the initial grant of shock probation evidenced in its orders of June 24, 1997 and July 16, 1997. Coleman asserts that the trial court no longer had jurisdiction to alter the "final judgment" granting shock probation because the Order of Correction was entered beyond the ten-day period following entry of the orders. See Commonwealth v. Marcum, Ky., 873 S.W.2d 207 (1994); CR 59.05.

The main issue on appeal is whether the initial June 24, 1997 order granting shock probation was subject to correction because it contained a "clerical mistake." While the Commonwealth relies on CR 60.01, the more applicable rule would appear to be RCr 10.10, which deals with clerical mistakes in criminal cases. Nevertheless, the language in both rules is identical, and therefore we shall look to cases under both rules in deciding this appeal. RCr 10.10 provides as follows:

¹ Coleman's second motion for shock probation was presented to the trial court at its motion hour on June 20, 1997, and the judge signed the order granting the motion on that date. However, the order was not officially entered into the court record until June 24, 1997.

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. During the pendency of an appeal, such mistakes may be so corrected before the appeal is perfected in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

As the language of the rule indicates, clerical mistakes involve errors of "oversight or omission," rather than judicial errors of law or attempts to relitigate a case. See McMillen v. Commonwealth, Ky. App., 717 S.W.2d 508, 509 (1986) (involving RCr 10.10); Prichard v. Bank Josephine, Ky. App., 723 S.W.2d 883, 885 (1987) (involving CR 60.01); Potter v. Eli Lilly and Co., Ky., 926 S.W.2d 449, 452 (1996) (CR 60.01 limited to clerical mistakes rather than substantive changes). Unfortunately Kentucky case law does not provide a clear definition of "clerical mistake." For guidance, we will look to federal case law construing the federal rules of procedure because the language of the Kentucky rules, RCr 10.10 and CR 60.02, is nearly identical to and based on Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 36 and Federal Rule of Civil Procedure (Fed. R. Civ. P.) 60(a). See, e.g., Jude v. Morwood Sawmill, Inc., Ky. App., 726 S.W.2d 324 (1987) (relying on federal case law in construing CR 60.01).

The test for determining whether there is a correctable clerical mistake, as opposed to an uncorrectable modification of a final judgment, is to examine the order to see if the error involves a situation in which the court states, writes, or records something that was not intended. If so, it is

correctable under the procedural rules dealing with clerical mistakes. However, if the correction merely involves an error that was intended at the time, the rules for modification of a final judgment must be observed. See, e.g., Allied Materials Corp. v. Superior Products Co., Inc., 620 F. 2d 224, 225-26 (10th Cir. 1980) (involving Fed. R. Civ. P. 60(a)). With respect to Fed. R. Crim. P. 36, the Court in United States v. Crecelius, 751 F. Supp. 1035, 1037 (D.R.I. 1990), stated:

The actual line of demarcation appears to be between variances that involve only a failure to accurately reflect the clearly expressed intent of the sentencing Court and those that stem from substantive errors that render the sentence incorrect or illegal. Mistakes of the former type may be corrected pursuant to Rule 36 as long as the correction more accurately embodies what the record shows to be the Court's intent.

See also Burton v. Johnson, 975 F. 2d 690, 694 (10th Cir. 1992), cert. denied, 507 U.S. 1043, 113 S. Ct. 1879, 123 L. Ed. 2d 497 (1993) (trial court cannot "clarify judgment under Rule 60(a) to reflect new and subsequent intent because it perceives its original judgment to be incorrect"). A trial court may not amend an order or judgment on grounds of a clerical mistake merely to change that which was done intentionally even though it was later discovered to be wrong. McNickle v. Bankers Life and Cas. Co., 888 F. 2d 678 (10th Cir. 1989).

In the case at bar, the record is ambiguous as to whether the June 24 order granting shock probation qualifies as a clerical mistake. Although the Order of Correction states that the initial order was entered "in error," the trial judge issued an order setting out the terms and conditions of the shock

probation nearly a month after the initial order. The September 17 order granting Coleman's motion to set aside the Order of Correction and reinstating the order granting shock probation does not explain the reason for the trial court's action. Further, the calendar entry for June 20, 1997, suggests that the trial judge intended to deny the motion for shock probation. In addition to allowing a court to correct a clerical mistake, a court may invoke the procedural rules "to resolve an ambiguity in its original order to more clearly reflect its contemporaneous intent and ensure that the court's purpose is fully implemented." Burton v. Johnson, 975 F. 2d at 694.

Given the ambiguity in the current record concerning the trial judge's actual contemporaneous intent with respect to the motion for shock probation and his apparent belief that he lacked jurisdiction to amend or correct the initial order, we will vacate the order setting aside the Order of Correction and remand for further findings. The trial court should reconsider the motion to set aside and make findings on its original intent with respect to the June 24 order on the motion for shock probation. If the trial judge should find a "clerical mistake," he should explain how and why the order did not reflect his original intent.

For the above-stated reasons, we vacate the order of the Pike Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

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