

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000230-MR
and NO. 1998-CA-000570-MR

KRISTI RAY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 94-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: BARBER¹, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Kristi Ray, brings this consolidated appeal from both the trial court's denial of her CR 60.02(e) motion to set aside an order which vacated an earlier order granting shock probation and from the trial court's denial of her RCr 11.42 motion to vacate the judgment on the basis of ineffective assistance of counsel. We affirm on both appeals.

Kristi Ray was indicted on charges of first-degree burglary and theft by unlawful taking over \$300.00. After

¹Judge Barber was substituted for Judge Gardner due to Judge Gardner's departure from the Court.

initially entering a not guilty plea at the arraignment, she agreed to enter a guilty plea to the amended charge of third-degree burglary. The trial court accepted the plea, and on January 10, 1997, sentenced her to incarceration for a term of three years. On February 10, 1997, she moved for shock probation, and on February 14, 1997, the motion for shock probation was granted. On February 25, 1997, the trial court entered a new order which set aside the order of February 14 granting shock probation because the order of February 14 "was entered in error." On December 17, 1997, Kristi Ray filed a CR 60.02(e) motion to set aside the order which vacated the order granting shock probation. The CR 60.02 motion was denied on January 13, 1998. On December 19, 1997, Kristi Ray filed a motion to vacate, correct or set aside her sentence pursuant to RCr 11.42, citing alleged instances of ineffective assistance of counsel. On March 2, 1998, following an evidentiary hearing, the trial court denied the RCr 11.42 motion. The denial of each motion was appealed, and the appeals were consolidated by order of this Court on March 31, 1998.

With regard to the various orders concerning shock probation, Kristi Ray argues that under CR 60.02(e), the trial court's order of February 25 setting aside shock probation was void under CR 59.05 which states, "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." CR 59.05 is applicable to criminal cases under McMurray v. Commonwealth, Ky. App., 682 S.W.2d 794 (1985). Kristi Ray contends, therefore, that she is entitled to shock probation per

the order entered February 14 because the February 25 order was void. On the other hand, the trial court, in its findings of fact and conclusions of law, indicated that the February 25 order merely corrected a clerical error in the February 14 order, and appellant was not entitled to shock probation. RCr 10.10 and CR 60.01 state in relevant part, "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" Kristi Ray contends that this was not a clerical error, and CR 60.01 cannot be used to correct mistakes that attack the party's fundamental right to a judgment at the time it was entered, citing Jude v. Morwood Sawmill, Inc., Ky. App., 726 S.W.2d 324 (1987). In Jude, two defendants were named in a lawsuit, but the singular word "defendant" appeared in the judgment. The trial court later amended the judgment to read "defendants" (plural), claiming the "s" had been left off in the original judgment through clerical error. This Court concluded that changing the judgment to include an additional defendant was not a clerical error because it affected Harrison Jude's fundamental right to judgment at the time it was entered. Id.

The record in our case indicates that the motion for shock probation was filed on February 10, 1997, and an order was prepared and entered on February 14, 1997, granting the same. Kristi Ray's attorney, or his office, was notified orally that the order was entered in error and would be corrected. On February 19, 1997, the Commonwealth Attorney, unaware that the order was entered in error, filed a motion for a hearing on additional terms and conditions of shock probation. On the same

date, Kristi's attorney moved the court to reconsider its decision denying Kristi Ray shock probation. Both motions were filed within ten days, but the correct order denying the motion for shock was not entered until February 25, 1997, which was more than ten days after the order became final. Thus, the question before the court is whether or not the trial court had the authority to amend the original judgment as a correction of a clerical mistake after the judgment had become final.

Our Supreme Court had the same issue before it in Cardwell v. Commonwealth, Ky., _____ S.W.3d _____ (2000). In Cardwell, the jury convicted the defendant of second-degree manslaughter and fourth-degree assault with recommended sentences of ten years and one year, respectively. The judge stated on the record that the sentences were to be served concurrently, but consecutively with a previously suspended sentence of five years, for a total time of fifteen years to be served. The court's written judgment and sentence, however, made no mention of either concurrent or consecutive sentences. The Department of Corrections calculated the defendant's release date on a ten-year total sentence (all concurrent) in accordance with KRS 532.110(2) which states that if the judgment is silent, then the sentences run concurrently.

Eight months after the original judgment, the trial court issued an "Amended Judgment And Sentence" to correct, or to add the language that the five-year suspended sentence was to be served consecutive to the ten-year sentence. The Department of Corrections recalculated the defendant's release date and the

defendant appealed, contending there was a substantial change in the judgment, not just a mere clerical correction.

The Cardwell Court explained that "the 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.'" Cardwell, _____ S.W.3d at _____, quoting Buchanan v. West Kentucky Coal Company, Ky., 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. . . ." Cardwell, _____ S.W.3d at _____, quoting 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.

We believe the error in Kristi Ray's case was also a clerical error. Her attorney was notified before the order became final that there was a mistake. Her attorney even filed a timely motion, along with the Commonwealth, to reconsider, which confirms that the attorney had timely notice of the error and the entry of a corrected judgment was a mere clerical correction, and thus will stand.

With regard to the RCr 11.42 motion, Kristi Ray argues that her counsel was ineffective due to the facts that her

original attorney accepted a position with the Commonwealth Attorney's office, and the new attorney did not request a hearing on the potential conflict of interest; further, that counsel was ineffective because he argued for home incarceration, a punishment that was statutorily impermissible; and that he failed to file a motion contesting the February 25 order of the court. We disagree with Kristi Ray's contentions and affirm the decision of the trial court to deny the RCr 11.42 motion.

To sustain an allegation of ineffective assistance of counsel, there must be a showing of deficient performance on the part of trial counsel, and there must be a finding of prejudice resulting from the deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), accord, Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990).

A review of the record in the case at bar and the findings of the court following an evidentiary hearing on the RCr 11.42 motion establishes that Kristi Ray was aware that her original attorney had moved to the Commonwealth Attorney's office. Kristi Ray expressed no reservations about the situation at a bench conference during the proceedings. Furthermore, her former attorney did not participate in the prosecution of this case in any way. The court also found that Kristi Ray had knowingly and voluntarily entered a plea of guilty. Also counsel had moved the court to reconsider the order of February 25 and to consider converting the remainder of the appellant's sentence to home incarceration. After an evidentiary hearing on the RCr 11.42 motion, the court simply found the testimony of counsel to

be more credible. Because there was an evidentiary hearing in this case, our sole issue on appeal is whether the court below acted erroneously in finding the appellant received effective assistance of counsel. Ivey v. Commonwealth, Ky. App., 655 S.W.2d 506 (1983). In this case, there is no basis to conclude the trial court acted erroneously in determining Kristi Ray had received effective assistance of counsel.

For the foregoing reasons, the Judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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