

**Commonwealth Of Kentucky
Court Of Appeals**

NO. 2000-CA-001864-MR

JOSEPH DARNELL CARR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 98-CR-01176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: KNOPF, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: Joseph Darnell Carr appeals from an order of the Fayette Circuit Court imposing upon him a sentence of three years' conditional discharge pursuant to KRS 532.043. Having determined that the trial court's failure to include the conditional discharge in the final judgment was a clerical error, we affirm the order of the trial court imposing the additional sentence.

On November 16, 1998, appellant was indicted by the Fayette County Grand Jury on two counts of second-degree rape, resulting from acts committed on September 4, 1998. On July 16, 1999, appellant pled guilty to the amended charge of one count of

third-degree rape, with the Commonwealth recommending a sentence of one year and dismissal of the second count. A sentencing hearing was scheduled for August 20, 1999, rescheduled for October 8, 1999, and rescheduled again for November 5, 1999. On October 25, 1999, appellant filed a motion to declare KRS 17.500 et seq. and KRS 532.043 unconstitutional. KRS 532.043 states, in pertinent part:

(1) In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510 . . . shall be subject to a period of conditional discharge following release from:

(a) Incarceration upon expiration of sentence; or

(b) Completion of parole.

(2) The period of conditional discharge shall be three (3) years.

At the November 5, 1999 hearing, the court stated that it had not yet had the opportunity to read the Commonwealth's response to appellant's motion, and was therefore postponing appellant's sentencing until November 12, 1999, at which time the court would rule on the motion. The sentencing hearing was held on November 12, 1999. At the hearing, the court stated that it was sentencing the appellant to one year, as recommended, but made no mention of the three-year conditional discharge required by KRS 532.043. The record indicates that the court did not rule on appellant's motion regarding KRS 17.500 et seq. and KRS 532.043 at the November 12, 1999 hearing. On November 17, 1999, the court entered its final judgment and sentence of imprisonment, finding appellant guilty of the amended charge of

third-degree rape, and dismissing the second count. In the final judgment, the court sentenced appellant to one year's imprisonment, but did not sentence appellant to the three years' conditional discharge required by KRS 532.043. Additionally on November 17, 1999, the court entered an order denying appellant's motion to declare KRS 17.500 et seq. and KRS 532.043 unconstitutional.

In a letter dated July 6, 2000, the Department of Corrections informed the Fayette Circuit Court that appellant was scheduled for release on October 28, 2000, but that appellant had not been sentenced to the three years of conditional discharge provided for by KRS 532.043. Subsequently, on July 12, 2000, the court entered an order stating that appellant was "additionally sentenced to a period of conditional discharge of three (3) years following his release (a) from incarceration upon expiration of his sentence of imprisonment or (b) from completion of parole." On August 2, 2000, appellant filed a notice of appeal from the July 12, 2000 order.

Appellant contends that the trial court had no authority on July 12, 2000, to amend its original judgment, entered November 17, 1999, to add a three-year term of conditional discharge to appellant's sentence which was not included in the original judgment. In general, a trial court loses control of its judgment 10 days after its entry. McMurray v. Commonwealth, Ky. App., 682 S.W.2d 794, 795 (1985); RCr 10.10. However, RCr 10.10 provides that "[c]lerical 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 . . .” “The language of RCr 10.10 strongly implies that its application is limited only to clerical errors and omissions, not judicial ones.” McMillen v. Commonwealth, Ky. App., 717 S.W.2d 508, 509 (1986). Recently, in Cardwell v. Commonwealth, Ky., 12 S.W.3d 672, 674 (2000), the Kentucky Supreme Court discussed the distinction between clerical and judicial error:

[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 correction of 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.

Our review of the record indicates that the court’s omission from the November 17, 2000, final judgment of the three-year period of conditional discharge mandated by KRS 532.043 was not the deliberate result of judicial reasoning and determination. Cardwell, 12 S.W.3d at 674-675. Appellant, the Commonwealth, and the court were clearly aware that, having been convicted of third-degree rape, KRS 510.060, appellant was subject to the provisions of KRS 532.043. This is evidenced by appellant’s motion, filed prior to the sentencing hearing, to have KRS 532.043 (and KRS 17.500 et seq.) declared unconstitutional, in which motion appellant acknowledged that KRS

532.043 required that felony sex offenders be subjected to three years' conditional discharge following release from incarceration or parole. In order to have time to properly consider the motion, the court postponed the sentencing hearing until November 12, 2000. On the same date as the court entered final judgment, November 17, 2000, it also denied appellant's motion to declare KRS 532.043 (and KRS 17.500 et seq.) unconstitutional. Accordingly, we view the court's failure to include the three years' conditional discharge in the final judgment as an omission constituting a clerical error.

Appellant contends that it is possible that the court left out the conditional discharge intentionally because the court specifically stated that it was not sentencing appellant as "an eligible sex offender" since he would not have time to complete the sexual offender program at the institution. We disagree. The trial court did not have the discretion to sentence appellant contrary to KRS 532.043, which mandates that appellant, having been convicted under KRS Chapter 510, be sentenced to three years' conditional discharge. See Cardwell, 12 S.W.3d at 677. Rather, we believe that the trial court was referring by this statement to KRS 439.340(11) which requires that an individual designated as an "eligible sexual offender" complete the Sexual Offender Treatment Program before he can be granted parole. See Garland v. Commonwealth, Ky. App., 997 S.W.2d 487 (1999). An "eligible sexual offender" is defined in KRS 197.410, which states, in pertinent part:

- (1) A person is considered to be a "sexual offender" as used in this chapter when he:

(a) Has been adjudicated guilty of any felony described in KRS Chapter 510;

. . . .

(2) A sexual offender becomes an "eligible sexual offender" when the sentencing court or department officials, or both, determine that the offender:

(a) Has demonstrated evidence of a mental, emotional, or behavioral disorder, but not active psychosis or mental retardation; and

(b) Is likely to benefit from the program.

The court explained at the sentencing hearing that the length of the Sex Offender Treatment Program requires that an offender be serving at least a two-and-a-half year sentence in order to have time to complete the program. As appellant's sentence was only one year, the court could not designate him as an "eligible sex offender," as he could not get into or have time to complete the program.

For the aforementioned reasons, the trial court's July 12, 2000 order sentencing appellant to a three-year period of conditional discharge is affirmed.

ALL CONCUR.

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