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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000710-MR

JOSHUA MACHNIAK — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 05-CR-00098

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Joshua Machniak appeals from an order of the Letcher Circuit Court revoking his probated three-year sentence and sentencing him in lieu thereof to 20 years' imprisonment pursuant to his plea agreement with the Commonwealth. We affirm.

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[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Machniak was indicted by a Letcher County grand jury for numerous criminal offenses. He entered into a plea agreement with the Commonwealth, pleaded guilty to the offenses, and was sentenced on 12 Class D felony counts to three years' imprisonment on each count, with the sentences to run concurrently with each other for a total sentence of three years.[2] Pursuant to the agreement, the sentence was probated for a three-year period on various conditions.

Further, the plea agreement, which had been signed by Machniak and his attorney, provided that "[a]ll sentences are to be served concurrently with one another unless probation is revoked in which case all sentences are to be served consecutively with one another." When the court sentenced Machniak to three years in prison on each felony count with all sentences to run concurrently and probated the sentence for three years, the trial judge stated: "if these are revoked, then the felony charges will run consecutively to one another; that means one to begin after the completion of the other. You understand that, sir?" Machniak responded that he understood, and there was no objection from his attorney. Thereafter, on June 12, 2006, the final judgment was entered sentencing Machniak to three years in prison on each of the 12 felony counts, with the sentences all to run concurrently with each other and to be probated for three years. No mention was made in the judgment that the felony sentences would run consecutively to each other if he violated the terms of his probation.

Machniak thereafter violated the terms of his probation. On February 7, 2007, the court entered an order revoking Machniak's probation and sentencing him to

[2] Sentences on all misdemeanor counts were ordered to run concurrently with the sentences on the felony counts.

20 years' imprisonment pursuant to the terms of the plea agreement.[3] Although neither Machniak nor his attorney objected,[4] his appeal herein followed.

Machniak argues that the court erred in sentencing him to 20 years in prison rather that the three-year sentence stated in the judgment. He asserts that the written judgment sentencing him to three years made no mention of a greater sentence should he later violate the terms of his probation. While he acknowledges that the trial judge told him when he was sentenced that he would receive consecutive sentences should he later violate his probation, he maintains that the rule in Kentucky is that when there is an inconsistency between the oral statements of the presiding judge and the written order or judgment, the written order or judgment prevails. To support his argument, he cites Kentucky Rules of Civil Procedure (CR) 54.01; Kentucky Rules of Criminal Procedure (RCr 13.04); *Commonwealth v. Taber*, 941 S.W.2d 463, 464 (Ky. 1997); *Commonwealth v. Hicks*, 869 S.W.2d 35, 37-38 (Ky. 1994). He also cites *Craven v. Commonwealth*, 2006-WL 1650968 (rendered June 15, 2006), an unpublished opinion of the Kentucky Supreme Court.

Cardwell v. Commonwealth, 12 S.W.3d 672 (Ky. 2000), is particularly relevant to this case. In *Cardwell*, the appellant had been sentenced to five years' imprisonment and was thereafter sentenced to 10 years' imprisonment in another case. When the appellant was sentenced in the latter case, the court specifically ordered the

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[3] In its order, the court essentially sentenced Machniak to three years on each of 12 counts to run consecutively with each other, but the total sentence was capped at a maximum of 20 years pursuant to Kentucky Revised Statutes (KRS) 532.080(6)(b).

[4] *See Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky. 1998) ("Sentencing is jurisdictional").

10-year sentence to run consecutively with the previous five-year sentence. However, the written judgment made no mention that the sentences should run consecutively.

Later, without notice to the appellant or his attorney and after time had passed to alter, amend, or vacate the judgment, the trial court entered an order amending the final judgment and ordering that the appellant's 10-year sentence run consecutively with the previous five-year sentence. On appeal, the Kentucky Supreme Court, in a 4-3 decision, affirmed the trial court and held that the court had the authority to enter the order amending the sentence pursuant to RCr 10.10, which gives court the authority to amend judgments to correct clerical errors at any time.

First, we acknowledge that Machniak is correct that the general rule in Kentucky is that when there is an inconsistency between the oral statements of the trial court and a written order or judgment, the written order or judgment controls. *See Taber*, *supra*; *Hicks*, *supra*. The three dissenting justices in *Cardwell* raised the same point in that case. However, the majority rejected that position by holding that the written judgment could be amended to reflect the omission relating to consecutive sentences because it was a clerical error subject to correction pursuant to RCr 10.10.[5]

As *Cardwell* relates to this case, we likewise conclude that the trial court's failure to state language in the written judgment concerning consecutive sentences was a clerical error. *See also Viers v. Commonwealth*, 52 S.W.3d 527, 528-29 (Ky. 2001) ("*Cardwell* merely holds that the incorrect reduction of an oral judgment to writing is a clerical error, which can be corrected under RCr 10.10 when the record unmistakably reveals what the oral judgment was"). The trial court here clearly intended to include a

[5] The dissenting justices in *Cardwell* disagreed and asserted that the error was a judicial one and not a clerical one.

provision in the final judgment that Machniak would receive consecutive sentences if he were to violate the terms of his probation, as evidenced by his colloquy with Machniak on this issue at the final sentencing hearing. While the court never actually entered an amended judgment in this case, we believe the order revoking probation was sufficient to do so. Therefore, pursuant to *Cardwell* and under the facts of this case, we reject Machniak's argument that the written order takes precedence over the oral statements of the trial court.

Machniak's second argument is that his being sentenced to 20 years after previously being sentenced to three years for the same offenses constitutes a violation of the double jeopardy clauses of the U.S. Constitution and the Kentucky Constitution. He first cites *Hord v. Commonwealth*, 450 S.W.2d 530 (Ky. 1970). In *Hord*, the appellant was sentenced to one year in prison, and the sentence was probated. After the appellant violated his probation and his probation was revoked, the court sentenced him to two years in prison. On appeal, the Kentucky Supreme Court concluded that the two-year sentence violated principles of double jeopardy and reversed the two-year sentence and directed that the one-year sentence be reinstated. *Id.* at 531-32.

The Kentucky Supreme Court in the *Cardwell* case also addressed the double jeopardy issue. The court stated that "[t]he application of the double jeopardy clause to increase a prisoner's sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence." *Id.* at 675, *citing United States v. Fogel*, 829 F.2d 77, 87 (D.C.Cir. 1987). The *Cardwell* court stated this principle another way: "jeopardy only attaches to a sentence if the defendant has a legitimate expectation in the finality of that sentence." *Id.* In *Fogel*, the court stated that "[i]f,

however, there is some circumstance which undermines the legitimacy of that expectation, then a court may permissibly increase the sentence." *Fogel*, *supra*.

Pursuant to *Cardwell*, we perceive no double jeopardy violation. Machniak had no legitimate expectation in the finality of the three-year sentence. He knew when he was sentenced initially that his sentence was subject to his not violating the terms of his probation. He was told that by the trial court, and he had agreed to that in writing in his plea agreement with the Commonwealth. Machniak clearly knew that if he violated the terms of his probation, it was subject to being revoked and his sentences were subject to being ordered to run consecutively rather than concurrently.

Finally, in connection with his second argument, Machniak argues that the trial court's changing his sentence from three years to 20 years is contrary to the requirement of *Commonwealth v. Tiryung*, 709 S.W.2d 454 (Ky. 1996). In *Tiryung*, the Court held as follows:

> Although the offense which constitutes violation of probation and grounds for revocation may be a new criminal offense calling for punishment in its own right, it is not grounds for providing a greater punishment for the original offense which was probated. . . . The trial court is precluded from adding "weight of subsequent offenses . . . to the penalty of the former offense."

Id. at 456, *citing Wilson v. Commonwealth*, 577 S.W.2d 618, 620 (Ky.App. 1979). Ordinarily, increasing a sentence in order to exact more punishment because of a probation violation would be barred under *Tiryung*. Here, however, Machniak's sentence was part of his plea agreement with the Commonwealth. Therefore, he is bound by it.

The order of the Letcher Circuit Court revoking Machniak's probation and sentencing him to 20 years in prison is affirmed.[6]

ALL CONCUR.

BRIEF FOR APPELLANT:

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[6] We have addressed only the arguments raised by Machniak in this appeal. We have not addressed any other argument that might have validity concerning whether the trial court had the authority to sentence Machniak in the unique manner that it did.