

RENDERED: DECEMBER 12, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2006-CA-002459-MR

RICHARD LEROY WINSTEAD

APPELLANT

v.  
APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 05-CR-00718

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND STUMBO, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: Richard Lee Winstead appeals from an order of the Daviess Circuit Court granting the Commonwealth's motion to vacate Winstead's judgment of conviction and sentence for escape in which the trial court erroneously gave Winstead credit for 234 days toward the escape conviction and from the subsequent amended judgment in which the trial court nullified the 234-day credit.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On appeal, Winstead argues that when the trial court erroneously gave him the 234-day credit, it committed a judicial error which could not be corrected after more than ten days passed once the judgment was entered. Finding that Winstead's sentence was illegal and that the trial court had a duty to correct the sentence, we affirm.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Winstead was convicted of burglary in the third degree and sentenced to two years' incarceration in late 1999 in Daviess Circuit Court. Thereafter, Winstead was granted probation. Over one year later, Winstead was arrested for violating his probation. Instead of revoking Winstead's probation, the trial court sentenced Winstead to serve ninety days in the Daviess County Detention Center. In addition, the trial court also granted Winstead the privilege of work release. However, four days after receiving work release, Winstead escaped and did not return to the Daviess County Detention Center.

After escaping, Winstead fled the Commonwealth; years later, he was discovered in Kansas. In December 2005, a Daviess County Grand Jury indicted and charged Winstead with one count of escape in the second degree and with being a persistent felony offender (PFO) in the second degree. Subsequently, Winstead pleaded guilty to the escape charge. At sentencing, the trial court sentenced Winstead to serve one year in prison. The trial court ordered Winstead's sentence for escape to run concurrently with a contemporaneous conviction for flagrant non-support but specifically ordered the escape sentence to run

consecutively with any prior felony sentence. However, the trial court gave Winstead credit for 234 days served toward the escape sentence.

Over a month later, the Commonwealth filed a motion, pursuant to CR<sup>2</sup> 60.02, asking the trial court to vacate Winstead's sentence. In the Commonwealth's motion, it averred that the trial court had mistakenly given Winstead the 234-day credit, time that Winstead had actually served on his prior burglary sentence. The Commonwealth argued that the trial court should vacate that part of the judgment of conviction and sentence that gave Winstead the 234-day credit.

In response to the Commonwealth's motion, Winstead relied on *Viers v. Commonwealth*, 52 S.W.3d 527 (Ky. 2001), and *McMillen v. Commonwealth*, 717 S.W.2d 508 (Ky. App. 1986), and argued that the trial court had made a judicial error. According to Winstead, judicial errors must be corrected within ten days from the entry of the judgment of conviction and cannot be corrected after ten days pursuant to either CR 60.02 or RCr<sup>3</sup> 10.10.

After Winstead filed his response, the trial court granted the Commonwealth's motion. The trial court determined that both *Viers* and *McMillen* were distinguishable from Winstead's case. The trial court noted that KRS 532.110(3) prohibited concurrent sentencing for a conviction for escape, and it held that the part of the judgment which gave Winstead the 234-day credit directly

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<sup>2</sup> Kentucky Rule of Civil Procedure.

<sup>3</sup> Kentucky Rule of Criminal Procedure.

contradicted this prohibition. The trial court concluded that KRS 532.110(3) divested it of the discretion to order Winstead's escape sentence to run concurrently with his prior felony sentence. Additionally, the trial court concluded that by deleting the 234-day credit, it was merely bringing Winstead's sentence into accord with the controlling law.

## **II. STANDARD OF REVIEW**

When considering a trial court's decision regarding a motion pursuant to CR 60.02, we will not disturb the trial court's decision absent an abuse of its discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *see also Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). A trial court has abused its discretion if its decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

### III. ANALYSIS

Relying on *Viers*, Winstead avers that a trial court's errors come in two varieties: clerical and judicial. 52 S.W.3d at 528. If there is an inconsistency between a trial court's oral pronouncement and its original written judgment and the court amends the judgment to correctly reflect the oral pronouncement, then the error was clerical and the trial court may amend the judgment and correct the error.

*Id.* However, if the original written judgment correctly reflects the oral pronouncement and the court subsequently amends the judgment to correct an error that occurred in the rendering of the judgment, then the error was a judicial error and the trial court may not correct the error. *Id.*

According to Winstead, the trial court stated in its oral pronouncement that he was entitled to the 234-day credit towards the escape sentence and the original written judgment correctly reflected this oral pronouncement. Thus, Winstead argues that the error in question was judicial rather than clerical and, relying on *McMillen*, 717 S.W.2d at 509, he reasons that a motion pursuant to CR 60.02 could not form the basis to correct this judicial error because more than ten days had elapsed after the entry of the judgment containing the error.

After researching the issues in this present appeal, we did not find any cases that were factually and legally on point. However, *State v. Burkhart*, a case decided by the Supreme Court of Tennessee bears a striking similarity to the case at hand. 566 S.W.2d 871 (Tenn. 1978). In *Burkhart*, the respondent was originally convicted for burglary in the first degree and sentenced to serve between twelve

and one-half years and fifteen years in prison; however, he thereafter escaped. *Id.* at 872. After being recaptured, the respondent was charged with escape, and he pleaded guilty to that charge in exchange for a one-year sentence. *Id.* At the respondent's sentencing the trial court gave him credit for the time he spent in jail since his recapture, which effectively ran his sentence for escape concurrently with his sentence for burglary. *Id.* At the time of respondent's sentencing, a criminal defendant, who had been convicted for escape, could not commence serving his sentence for escape until the expiration of the original, underlying sentence. *Id.*, quoting TENN. CODE ANN. § 39-3802.<sup>4</sup>

In resolving the issue of whether the trial court could correct the respondent's sentence to conform with the law, the Supreme Court of Tennessee held that the respondent's judgment of conviction for escape directly contradicted the language found in TENN. CODE ANN. § 39-3802. Consequently, the

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<sup>4</sup> The pertinent part of TENN. CODE ANN. § 39-3802 read at the time:

If any inmate . . . shall escape or attempt to escape, he shall be indicted for an escape, and on conviction, be punished by imprisonment in the penitentiary for a term of one (1) to five (5) years to commence from and after the expiration of the original term.

Tennessee's current statute, TENN. CODE ANN. § 39-16-605, regarding escape reads in pertinent part:

It is an offense for any lawfully confined person arrested for, charged with, or found guilty of a civil or criminal offense to escape from a penal institution, as defined in § 39-16-601.

Any sentence received for a violation of this section shall be ordered to be served consecutively to the sentence being served or sentence received for the charge for which the person was being held at the time of the escape.

*Burkhart* Court determined that the judgment was a nullity. *Id.* at 873. The *Burkhart* Court also recognized that a trial court could correct an illegal sentence at any time, even after the sentence was final. *Id.* Furthermore, the *Burkhart* Court held that not only did the trial court have the authority to correct the illegal sentence but also determined that the trial court had the duty to correct it as soon as it learned of the sentence's illegality. *Id.*

In comparison to the facts in *Burkhart*, in *Viers*, the appellant was convicted in Bullitt Circuit Court of a drug trafficking charge and for being a persistent felony offender and was sentenced to twenty years. *Viers*, 52 S.W.3d at 528. At sentencing, the appellant's pre-sentence investigation report erroneously stated that he was entitled to a 981-day credit. However, this credit reflected time the appellant had served for a federal sentence. *Id.* at 528-529. The trial court relied upon this erroneous report and applied the 981-day credit to the appellant's trafficking sentence. *Id.* at 528. Upon motion of the Commonwealth, the trial court amended the appellant's sentence over three years later, stripping the appellant of the 981-day credit. *Id.* at 529. In resolving the Commonwealth's motion, the trial court determined that pursuant to KRS 532.120(3)<sup>5</sup> it did not have

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<sup>5</sup> At the time this statute read:

Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time served in prison.

the authority to give the appellant credit for time spent serving a federal sentence.

*Id.* In resolving *Viers*, the Supreme Court of Kentucky held that the trial court had committed a judicial error by giving the appellant the 981-days credit. And, because the Court determined that this error was judicial, the trial court did not have authority to correct it. *Id.*

In the present case, Winstead was convicted of escape in the second degree, and the trial court sentenced Winstead to one year in the state penitentiary for the escape conviction. In the trial court's written judgment of conviction and sentence, the trial court specifically ordered that Winstead's escape sentence was to run "consecutively with any other penitentiary sentence the defendant is currently serving." However, the trial court also credited Winstead with 234 days toward his escape sentence. This credit was only applicable to Winstead's sentence for burglary.<sup>6</sup> By doing so, the trial court created an inconsistency in the written judgment and sentence that effectively ran Winstead's escape sentence concurrently with his previous burglary sentence. Factually, we find that *Viers* is distinguishable from the present case.

Additionally, the pertinent part of KRS 532.110(3), the statute that is the crux of this appeal, reads: "The sentence imposed upon any person convicted of an escape or attempted escape offense shall run consecutively with any other sentence which the defendant must serve." According to our Supreme Court, this

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<sup>6</sup> Winstead does not claim that he was entitled to receive this credit towards his sentence for escape.

statute unequivocally mandates consecutive sentencing for an escape charge. *Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky. 1997). We can find no meaningful distinction between KRS 532.110(3) and TENN. CODE ANN. § 39-3802 in *Burkhart*. Both statutes require consecutive sentencing for escape convictions.

Unlike the case at hand, in *Viers*, the mandate of KRS 532.110(3) was not an issue because the appellant in that case was neither charged with nor convicted of escape. Consequently, the resolution of this appeal does not turn upon whether the Daviess Circuit Court committed a judicial error as opposed to a clerical error, as in *Viers*; instead, the resolution of this case turns upon whether Winstead's sentence was illegal, as in *Burkhart*. Like the sentence in *Burkhart* that contradicted TENN. CODE ANN. § 39-3802, Winstead's sentence was in direct violation of the mandate of KRS 532.110(3) that sentences for escape must be served consecutively; thus, we conclude that Winstead's sentence, like the sentence in *Burkhart*, was not only illegal but also void.

The courts of the Commonwealth have recognized for over two decades that sentencing is jurisdictional. *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985); *see also Cummings v. Commonwealth*, 226 S.W.3d 62, 66 (Ky. 2007); *Gaither*, 963 S.W.2d at 622; *Commonwealth v. Tiriyung*, 709 S.W.2d 454, 457 (Ky. 1986). It has also been recognized that a court may address defects in jurisdiction at any time. *Commonwealth v. Groves*, 209 S.W.3d 492, 496 (Ky. App. 2006); *see also Gaither*, 963 S.W.2d at 622. But, in addition to these

principles of jurisprudence, the Supreme Court of Kentucky has determined that if a trial court has imposed an illegal sentence following a guilty plea, then that sentence “**must** be corrected to conform to the law.” *Neace v. Commonwealth*, 978 S.W.2d 319, 322 (Ky. 1998) (emphasis added). And, most importantly for this appeal, the Supreme Court determined that the trial court may correct an illegal sentence at any time. *Id.*; *see also Skiles v. Commonwealth*, 757 S.W.2d 212, 215 (Ky. App. 1988).

*Viers* being distinguishable, we find the rationale of *Burkhart* highly persuasive. Winstead's sentence in this case contained an inconsistency, violating the mandate found in KRS 532.110(3) that sentences for escape must be served consecutively. This rendered Winstead's sentence both illegal and void. Furthermore, given the holdings in *Wellman*, *Tiryung*, *Gaither*, *Cummings*, *Neace* and *Skiles*, we conclude that the trial court retained the authority to correct Winstead's illegal sentence at anytime. And, given the holdings of *Neace* and *Skiles*, we inevitably determine the trial court was required to amend Winstead's illegal sentence despite the fact that over ten days had passed since the entry of his judgment and sentence because, according to *Neace* and *Skiles*, such illegal sentences must be corrected. Thus, the trial court did not abuse its discretion when it granted the Commonwealth's CR 60.02 motion and amended Winstead's sentence to conform with the requirement of KRS 532.110(3).

Finally, we recognize that the doctrine of finality of judgments is a central and basic tenet of our legal system and that, once a legal matter has been

resolved, it is important that the matter come to an end. Ordinarily, once a judgment becomes final it should remain final. However, this rule is not without exceptions and, under limited circumstances such as fraud or mistake or for any other very persuasive reason, a court may disturb a final judgment. *Keefe v. O.K. Precision Tool & Die Co.*, 566 S.W.2d 804, 805 (Ky. App. 1978). The illegality of Winstead's sentence is one of those very persuasive reasons for amending the final judgment. Additionally, the trial court had no choice but to correct the sentence's illegality even though more than ten days had elapsed since the judgment had been entered.

The order of the Daviess Circuit Court granting the Commonwealth's motion and the amended judgment of conviction and sentence are affirmed.

HENRY, SENIOR JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent from the majority opinion. It is my opinion that the trial court lost the power to amend this judgment long before the motion filed by the Commonwealth was heard.

Pursuant to a plea agreement, Appellant pled guilty to second-degree escape on July 28, 2006, and was sentenced on August 23, 2006. Under the plea agreement, the PFO charge was dismissed and Appellant was to serve one year in prison to run consecutively with any sentence he was currently serving, namely the

sentence for the 1999 conviction. Judgment was entered accordingly, but Appellant was erroneously credited with 234 days for time spent in custody prior to the sentencing. This figure came from a pre-sentence investigation report and reflected the time from the date of the serving of the warrant (January 2, 2006) to the date of his conviction on escape (August 23, 2006). Since Appellant was already serving jail time for the 1999 burglary conviction, the practical effect of giving him 234 days of credit against the 2006 conviction is to defeat the consecutive sentence portion of the agreement. On October 2, 2006, the Commonwealth moved pursuant to CR 60.02 to vacate the judgment and amend it to delete the jail time credit. Over Appellant's objection, the lower court granted the motion and this appeal followed.

Appellant argues that the cases of *Viers v. Commonwealth*, 52 S.W.3d 527 (Ky. 2001), and *McMillen v. Commonwealth*, 717 S.W.2d 508 (Ky. App. 1986), are directly on point and stand for the position that a judicial error cannot be corrected by a CR 60.02 motion. In *Viers*, a defendant was convicted of first-degree trafficking in a controlled substance and second-degree PFO. He was sentenced to twenty years imprisonment. The judgment credited Viers with 981 days of prior jail time. Three and one-half years later, the trial court entered an amended judgment that stripped Viers of his jail time credit.

*Viers* challenged the loss, but the trial court concluded that it could amend the judgment because that the jail time credit was a clerical error. *Viers*

appealed, but the Court of Appeals affirmed. The Kentucky Supreme Court reversed, stating:

On review, the question of whether an error is “judicial” or “clerical” turns on whether the amended judgment embodies the trial court’s oral judgment as expressed in the record. If it does, then the error is clerical in that the amended judgment either corrects language that is inconsistent with the oral judgment, or supplies language that was inadvertently omitted from the oral judgment. But if it does not, then the error must be judicial. In this case, the amended judgment does not embody or reflect the oral judgment of the trial court as revealed in the record.

Rendering a judgment based on incomplete or false information is not a clerical error. “An error in the rendition of judgment is judicial error.” In this case, the record clearly shows that the original written judgment--rather than the amended judgment--accurately reflects the oral judgment as rendered. “An incorrectly rendered judgment cannot be altered when the written judgment precisely reflects the incorrect rendition.” (Citations omitted).

*Viers* at 529. As in *Viers*, the 234 days of jail time credit was orally set forth by the trial court during the sentencing hearing and reflected in the written judgment. As such, this is clearly an instance of judicial error caused by erroneous information provided to the court by a pre-sentencing report.

In *McMillen*, a previous panel of this Court stated specifically that “relief under CR 60.02 is not available for judicial errors or mistakes.” *McMillen* at 509. Appellant additionally cites more recent cases in which this Court has reaffirmed this principle. *See Martin v. Commonwealth*, 2004 WL 2260495 (Ky.

App. 2004); *Crick v. Commonwealth*, 2003 WL 21361560 (Ky. App. 2003); and *Albritton v. Commonwealth*, 2003 WL 1227572 (Ky. App. 2003).

The majority tries to distinguish the case at bar from the holding in *Viers*. While *Viers* stands for the idea that judicial errors cannot be corrected if the oral judgment and written judgment accurately reflect one another, the trial court and Commonwealth argue that there is an additional element to this case which should allow the correction. They argue that the granting of 234 days jail time credit, which in essence caused the escape conviction to run concurrently with the 1999 burglary conviction, is contrary to statutory law. KRS 532.110(3) states:

Notwithstanding any provision in this section to the contrary, if a person is convicted of an offense that is committed while he is imprisoned in a penal or reformatory institution, during an escape from imprisonment, or while he awaits imprisonment, the sentence imposed for that offense may be added to the portion of the term which remained unserved at the time of the commission of the offense. The sentence imposed upon any person convicted of an escape or attempted escape offense **shall run consecutively** with any other sentence which the defendant must serve. (Emphasis added).

This statute makes it mandatory for a trial court to run an escape sentence consecutively with any other sentence the defendant must serve. We agree that KRS 532.110(3) should have been applied to the case at bar. This is what should have happened in this case and what the Commonwealth sought with its CR 60.02 motion. The Commonwealth argued, and the trial court agreed, that the granting of the 234 days jail time credit causes the 1999 sentence and escape sentence to run

concurrently. As such, the court found that the judgment as it originally stood was illegal due to the mandatory language in KRS 532.110(3) and could therefore be corrected by a CR 60.02 motion.

While the Commonwealth puts forth a compelling argument, we find that the *Viers* and *McMillen* cases are controlling on this matter. This was clearly an instance of judicial error as described in *Viers*, and while *Duncan* may hold that CR 60.02 motions can correct judicial errors in the granting of jail time credits, we are bound by the opinion of our Supreme Court on this issue. Since CR 60.02 cannot be used to correct judicial errors, the Commonwealth's motion to amend should have been denied.

Research into this case, as it relates to certain judicial errors, is not in harmony. Specifically, there is a conflict in the law surrounding judicial errors which result in an illegal outcome and which are not amended or vacated prior to the CR 52.02 or CR 59.05 ten-day limitation. CR 52.02 states:

Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

CR 59.05 states that “[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.” These two rules make it mandatory for any change in a judgment be made within 10 days after said judgment is entered. Case law is

conflicting on the issue of whether or not this 10-day limitation applies even to judgments which do not conform with statutory requirements. This conflict will be illustrated by the two cases described below.

The unpublished case of *Yocum v. Commonwealth*, 2004 WL 1418188 (Ky. App. 2004), involved a defendant who was sentenced to two years in prison for carrying a concealed deadly weapon and possession of a handgun by a convicted felon. The final judgment and sentencing was entered on June 28, 2002. In late September, 2002, the Department of Corrections notified the Commonwealth Attorney in the case that the minimum sentence allowed by statute for possession of a handgun by a convicted felon was five years. On November 15, 2002, the Commonwealth made a motion to clarify the sentence and in March, 2003, the circuit court entered an order vacating the sentence of two years on the grounds that it was unlawful, and re-sentenced him to five years.

Yocum appealed arguing that the circuit court lost jurisdiction to vacate the original sentence after the 10-day deadline set forth in CR 59.05 had passed. A panel of this Court stated that the 10-day limit did not apply when an erroneous sentence imposed by a circuit court was unlawful. *Id.* at 3. Since the original sentence fell outside the prescribed statutory range, the sentence was unlawful and could be corrected “at any time.” *Id.*

On the other side of the argument is the unpublished case of *Butts v. Commonwealth*, 2004 WL 260290 (Ky. App. 2004). On October 18, 2002, Butts entered a guilty plea to multiple charges of first-degree possession of a controlled

substance and two possession of drug paraphernalia charges. Butts was to serve five years for each of the controlled substance charges and one year for each of the paraphernalia charges. At the sentencing hearing, held November 15, 2002, and in the written judgment, entered November 22, 2002, the judge ordered the sentences to run concurrently.

On December 11, 2002, the Commonwealth moved to amend the judgment relying on KRS 533.060(3) which states:

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

This statute is relevant because Butts was initially indicted on April 9, 2002, and while awaiting trial on those charges, was arrested again on July 29, 2002. When applied to Butts' case, the statute directed the trial court to run the July charges consecutively with the April charges. On December 22, 2002, the trial court amended the judgment and ran the sentences consecutively.

Butts moved the trial court pursuant to CR 60.02(e) to reinstate his original sentence, arguing that it had lost jurisdiction to amend the judgment. The trial court denied the motion and Butts appealed. A panel of this Court held that regardless of the judicial error, once the judgment became final, the circuit court and the Commonwealth had 10 days to amend the sentence. Since neither did so within the 10-day period, the sentence could not be amended. As with *Yocum*, the

original sentence was contrary to mandatory statutory guidelines, but unlike *Yocum*, the *Butts* court decided the 10-day limitation was dispositive of the issue and reinstated the original sentence.

I would reverse the circuit court and reinstate the jail credit originally awarded appellant herein.

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