

RENDERED: AUGUST 10, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-001005-MR

ROY MCKINNON

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT  
HONORABLE CLARENCE A. WOODALL, III, JUDGE  
ACTION NO. 06-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION REVERSING AND REMANDING

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BEFORE: STUMBO AND TAYLOR, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Roy McKinnon appeals from an April 30, 2010 order of the Livingston Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 10.10 motion to correct a clerical mistake in an earlier judgment.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

For reasons that follow, we conclude that this denial was erroneous and therefore reverse and remand for further proceedings consistent with this opinion.

On March 19, 2009, Appellant pleaded guilty to sundry criminal offenses, including possession of a controlled substance. On that same day, an agreed order was entered in which the circuit court directed that \$5,900 in cash previously seized from Appellant at the time of his arrest be released to Appellant's counsel following sentencing. However, by judgment entered October 27, 2009, the circuit court sentenced Appellant to seven years' imprisonment and ordered that "all funds and evidence seized are hereby forfeited[.]" These funds included the \$5,900 that was supposed to be released to Appellant's counsel.

Appellant filed a motion for return of personal property on March 4, 2010, in which he argued that the \$5,900 should be released to his counsel in compliance with the agreed order of March 19, 2009. By order entered April 2, 2010, the circuit court denied the motion. In that order, the circuit court stated:

It is true that an Agreed Order Returning Personal Property was entered March 19, 2009. Unfortunately, by the Final Sentencing date of October 21, 2009, neither party reminded the Court of that Order and the Final Judgment and Sentence entered October 27, 2009, provides in pertinent part:

All contraband, including weapons, held shall be destroyed by the proper investigative agency and all funds and evidence seized are hereby forfeited pursuant to KRS 218A *et seq.*

Based upon that language, the funds were forfeited to the Kentucky State Police and the Court does not believe that the funds could or should be "unforfeited."

Thereafter, Appellant filed a motion to correct a clerical mistake pursuant to RCr 10.10. Appellant maintained that the judgment of October 27, 2009 contained a clerical mistake, *i.e.*, language requiring the forfeiture of money that had previously been ordered returned to him. The circuit court denied the motion, stating:

While it is true that this Court could make a “correction” under RCr 10.10, as pointed out by defense counsel, the funds were properly subject to seizure pursuant to KRS 218A and they were in fact forfeited to the Kentucky State Police as the investigative agency.

It is the Court’s belief that the funds were properly forfeited, despite the Agreed Order entered March 19, 2009.

This appeal followed.

Appellant contends on appeal that the circuit court erroneously denied his RCr 10.10 motion to correct a clerical mistake in the judgment of October 27, 2009. In particular, Appellant argues that it was a clerical mistake for the judgment to order the forfeiture of the \$5,900 seized from him since an earlier agreed order provided that the money would be released to his trial counsel following sentencing. The circuit court apparently agreed that the error could be corrected under RCr 10.10, but it declined to do so because “neither party reminded the Court” at final sentencing of the agreed order to release the funds to Appellant’s counsel and because the funds were otherwise statutorily subject to

seizure. Appellant maintains that the circuit court erred by failing to correct the judgment and to order the release of the funds to his trial counsel.

RCr 10.10 provides, in relevant part, 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 on its own initiative or on the motion of any party and after such notice, if any, as the court orders.” RCr 10.10 may only be used to correct “clerical” errors – not “judicial” errors. *Winstead v. Commonwealth*, 327 S.W.3d 479, 487 (Ky. 2010). An error is considered a clerical error, rather than a judicial error, if it was not “the deliberate result of judicial reasoning and determination[.]” *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000), quoting *Buchanan v. West Ky. Coal Co.*, 218 Ky. 259, 291 S.W. 32, 35 (1927).

As noted above, a prior agreed order provided for payment of the \$5,900 cash to Appellant’s counsel. However, at sentencing a few months later, the circuit court’s final judgment provided that those funds be forfeited to the Kentucky State Police. These orders are irreconcilable. In its order denying the motion to correct the final judgment, the circuit court did not indicate a change of heart or a deliberate judicial determination that the prior agreed order should not be given effect. Instead, the parties were blamed for not having reminded the court of the prior order. The court concluded that “the funds were forfeited to the Kentucky State Police and the Court does not believe that the funds could or should be ‘unforfeited.’” From this language, one may infer that if the court had been

reminded of the prior order, its terms would have been observed. Moreover, the court recognized in its order of April 30, 2010 that it could make a correction in this case pursuant to RCr 10.10, but it declined to do so.

Under these circumstances, RCr 10.10 is an available vehicle to correct the inadvertent disregard of the prior agreed order. The circuit court erred in refusing to employ it. RCr 10.10 provides that “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[.]” By the circuit court’s subsequent order, blame seems to be placed on the parties for not having given a timely reminder of the prior order, an “omission or oversight.” Simply put, this decision was erroneous. The error in question was obviously the result of oversight and was easily correctible. A correction was also clearly necessitated by the earlier agreed order.

Thus, for the foregoing reasons, the order of the Livingston Circuit Court is reversed and the matter remanded with instructions to correct the clerical error in the judgment of October 27, 2009 and to return the \$5,900 in cash to Appellant’s counsel per the agreed order of March 19, 2009.

STUMBO, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent. RCr 10.10 provides:

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.

Thereunder, a court may correct a clerical error at any time; however, RCr 10.10 does not permit a court to correct a judicial error. The distinction between a clerical error and judicial error is pivotal to resolution of this appeal.

It is well-established that “a judgment based on incomplete or false information is not a clerical error” but rather constitutes a judicial error per RCr 10.10. *Viers v. Com.*, 52 S.W.3d 527, 529 (Ky. 2001). In this case, the October 27, 2009, judgment ordering forfeiture of all funds seized from appellant was based upon “incomplete” information as the circuit court apparently was unaware of its previously entered agreed order wherein the court directed the return of the \$5,900. Such error constitutes a judicial error which is not amenable to correction per RCr 10.10. I can find nothing in this record to support the position of the majority that had the circuit court been “reminded” of the earlier agreed order, its final judgment in this case would have reached a different result. Likewise, nothing in this record reflects that a clerical error has occurred. Our courts speak through their written orders. The March 19, 2009, order was interlocutory and not final and was clearly superseded by the final judgment entered October 27, 2009, in my opinion.

For these reasons, the circuit court properly denied appellant's RCr

10.10 motion to correct clerical error. I would affirm.

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