

RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001451-MR

EDWARD H. HINKEBEIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 04-CR-001866

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: The issue before us is whether the Jefferson Circuit Court's opinion and order requiring the appellant, Edward H. Hinkebein, Jr., to pay

¹ 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 Statute (KRS) 21.580.

restitution is invalid because it fails to comply with KRS 532.033. For the following reasons, we vacate and remand.

Facts and Procedure

On May 23, 2005, Hinkebein entered an *Alford*² plea of guilty to second-degree burglary, fourth-degree assault, first-degree criminal mischief, fleeing/evading police, first-degree wanton endangerment, third-degree criminal mischief, and operating a motor vehicle under the influence. The criminal charges stemmed from an incident on March 18, 2004, in which Hinkebein broke a glass security door attempting to enter a residence. The broken glass injured the victim, Hinkebein's ex-wife. As a result, the Commonwealth's "Offer on a Plea of Guilty" included the condition that Hinkebein pay the victim restitution. On May 24, 2005, the circuit court entered an order accepting Hinkebein's guilty plea. The circuit court's order noted that Hinkebein agreed to pay restitution, but deferred sentencing to a later date.

On July 1, 2005, the circuit court sentenced Hinkebein to five years' probation. The circuit court's probation order imposed numerous conditions upon Hinkebein, but did not require him to pay restitution. The parties claim the restitution requirement was purposefully left out of the circuit court's sentencing order because Hinkebein and the victim entered into a civil settlement agreement in which Hinkebein agreed to pay the victim \$25,000 in restitution. Thereafter, Hinkebein paid the victim most, but not all, of the agreed upon restitution.

² *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

In 2009, Hinkebein was arrested in Indiana for driving under the influence. Because of the new criminal charges, the Commonwealth sought to revoke Hinkebein's probation. Additionally, on May 24, 2010, the Commonwealth filed a motion to modify and extend Hinkebein's conditions of probation until he fully paid restitution to the victim. On June 23, 2010, the circuit court held a hearing to discuss the revocation and restitution issues. At the hearing, the Commonwealth explained that Hinkebein had originally agreed to pay restitution as a part of his plea agreement with the Commonwealth, but the restitution requirement was not included in the court's probation order. At the conclusion of the hearing, the circuit court denied the Commonwealth's motion to revoke Hinkebein's probation, but deferred ruling on the restitution issue.

Following a subsequent hearing on June 29, 2010, the last day of Hinkebein's probationary period, the circuit court entered an order granting the Commonwealth's motion to impose restitution as a condition of probation. The circuit court's order also required the Commonwealth to tender an appropriate restitution order to the circuit court for execution, and extended Hinkebein's probation until he paid the restitution in full. Hinkebein promptly appealed.

Standard of Review

Whether the circuit court's order complies with KRS 532.033 "is a matter of statutory interpretation and consequently a question of law." *Hardin Co. Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001); *Hill v. Thompson*, 297 S.W.3d

892 (Ky. App. 2009). Accordingly, we apply a *de novo* standard of review.

Brown v. Commonwealth, 326 S.W.3d 469, 472 (Ky. App. 2010).

Analysis

Hinkebein argues the circuit court's June 29, 2010 order amending his probationary terms and requiring him to pay restitution is void. Specifically, Hinkenbein asserts the order fails to comply with KRS 532.033(3), which requires the trial judge to "set the amount of restitution to be paid." Hinkenbein further contends that he has satisfactorily completed his probationary period and, because the circuit court's order is void, he is entitled to a final discharge of the Judgment.

KRS 532.033 provides in pertinent part:

When a judge orders restitution, the judge shall:

- (1) Order the restitution to be paid to a specific person or organization through the circuit clerk, who shall disburse the moneys as ordered by the court;
- (2) Be responsible for overseeing the collection of restitution;
- (3) Set the amount of restitution paid;
- (4) Set the amount and frequency of each restitution payment or require the payment to be made in a lump sum[.]

In *Rollins v. Commonwealth*, this Court unequivocally concluded that a restitution order is not valid if it fails to comply with KRS 532.033. *Rollins v. Commonwealth*, 294 S.W.3d 463, 466 (Ky. App. 2009). In *Rollins*, Rollins pleaded guilty to multiple criminal charges and was ordered to pay restitution with

“the amount of full restitution to be determined” at a later time. *Id.* at 464. After Rollins served out his seven-year imprisonment sentence, the Commonwealth moved the trial court to set the restitution amount. Rollins argued that, ten days after entry of the final judgment, the trial court lost jurisdiction to modify its judgment, including the ability to calculate the amount of restitution owed. The court rejected Rollins’s argument, finding the final judgment “specifically left the amount of restitution ‘to be determined’ which was sufficient to allow the court to set restitution at a later date.” *Id.* at 465. On appeal, this Court found that, despite the clear mandate in KRS 532.033(3) that the trial judge calculate the amount of restitution to be paid by the defendant, the trial court “failed to set the amount of restitution or the amount and frequency of payments.” *Id.* As a result, this Court concluded “the final judgment did not succeed in creating a valid restitution order” and vacated the trial court’s order. *Id.*; *see also Brown v. Commonwealth*, 326 S.W.3d 469, 474 (Ky. App. 2010) (finding that, even if the trial court had jurisdiction to modify the defendant’s sentence, the trial court did not create a “valid restitution order” because the order did not “specify the amount to be paid as required by KRS 532.033(3)”).

In the case *sub judice*, the circuit court’s order requiring Hinkebein to pay restitution and extending Hinkebein’s probation failed to comply with KRS 532.033. Specifically, the circuit court’s order does not specify the amount or to whom the restitution is to be paid, does not set the frequency of payment, and does not include any monitoring provisions to ensure Hinkebein complies with the

order. *See* KRS 532.033(1) – (3). Instead, the circuit court asked the Commonwealth to tender an appropriate restitution order. As in *Rollins*, the circuit court effectively left the amount of restitution to be determined at a later date. Though the Commonwealth tendered an alleged restitution form to the court on July 20, 2010, this document was never adopted or signed by the circuit court.³ Kentucky Rules of Civil Procedure (CR) 58(1) (“Before a judgment or order may be entered in a trial court it shall be signed by the judge”); Kentucky Rules of Criminal Procedure (RCr) 11.04(3); *White v. Commonwealth*, 481 S.W.2d 656, 657 (Ky. 1972) (“There can be no judgment without the signature of a judge[.]”). Consequently, the circuit court committed reversible error when it failed to comply with KRS 532.033. *Rollins*, 294 S.W.3d at 466; *Brown*, 326 S.W.3d at 474. The circuit court’s June 29, 2010 order is invalid. *See Rollins*, 294 S.W.3d at 466; *Brown*, 326 S.W.3d at 474.

The Commonwealth contends the error asserted by Hinkebein is unpreserved because he failed to present it to the circuit court. We disagree. It is true that an appellate court reviews only “those claims that are preserved by proper objection, and only when the trial court is given the opportunity to rule on the alleged error.” *Williams v. Commonwealth*, 233 S.W.3d 206, 211 (Ky. App. 2007). When the purported error arises post-judgment, preservation of the error may occur

³ As an aside, even if the order submitted by the Commonwealth on July 20, 2010 had been signed by the trial judge and entered into the record, the order still fails as a restitution order because Hinkebein’s probation expired on June 30, 2010. *See* KRS 533.020(1) (permitting a trial court to “modify or enlarge” probationary conditions “at any time *prior to the expiration or termination of the period of probation*”) (emphasis supplied).

by filing, *inter alia*, a motion to alter, amend, or vacate the judgment or order pursuant to CR 59.05.⁴ In this case, however, judgment was entered on July 1, 2005, and the time for filing a CR 59 motion lapsed ten days thereafter. In accordance with KRS 533.020, the circuit court retained limited jurisdiction until June 30, 2010; but, even that limited jurisdiction was eliminated thereafter. Beginning June 30, 2010, the circuit court lost all jurisdiction, including the ability to modify its orders.

In this case, the Commonwealth presented the circuit court with a limited window of time to enter an order modifying Hinkebein's terms of probation, but failed to provide the circuit court with the information it needed to comply with KRS 532.033. The circuit court did all it could do under those circumstances, granting the modification but implicitly giving the Commonwealth until midnight of June 30, 2010, to "tender an appropriate restitution Order to the Court for execution and [then] the Defendant's probation shall be extended until that restitution is paid in full." When the Commonwealth failed to tender that appropriate order prior to the lapse of the circuit court's jurisdiction, the order conditionally granting the Commonwealth's motion to impose restitution as a condition of Hinkebein's probation became a nullity.

Conclusion

⁴ "When [Kentucky's] criminal rules do not supersede our civil rules or are not inconsistent with them, our civil rules apply." *McMurray v. Commonwealth*, 682 S.W.2d 794, 795 (Ky. App. 1985). Accordingly, CR 59.05 is applicable to criminal cases. *Crane v. Commonwealth*, 833 S.W.2d 813, 818 (Ky. 1992).

For the foregoing reasons, we vacate and remand the Jefferson Circuit Court's "Memorandum Opinion and Order" dated June 29, 2010.

ALL CONCUR.

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