

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000081-MR

DONALD A. ROBINSON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NOS. 05-CR-003269; 05-CR-003650; 06-CR-000716; 09-CR-003116;
09-CR-003622

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Donald Robinson appeals from Findings of Fact, Conclusions of Law and order of the Jefferson Circuit Court, which vacated a sentencing order and amended the original judgment of conviction. On appeal,

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 Statutes (KRS) 21.580.

Robinson argues that the court was without jurisdiction to take such action more than ten days after judgment.

In 2009, Robinson was indicted by a Jefferson County grand jury for Theft of a Mail Matter, Theft by Deception over \$500, Operating a Motor Vehicle on a Suspended License, and Failure of a Non-Owner Operator to Maintain Required Insurance.

Robinson accepted a plea deal offer of five years to serve on Theft of a Mail Matter and twelve months to serve on Theft by Deception over \$500, with a dismissal of the two misdemeanor charges. As Robinson was on probation at the time, the plea agreement recommended revocation of Robinson's probation in three other cases, resulting in a total of twelve years of imprisonment, which the Commonwealth recommended run consecutively with his plea sentence, for a total of seventeen years of imprisonment. The plea agreement noted that Robinson had 605 days of jail-time credit.

Judgment was entered by the court on March 26, 2010. Five months later, the Commonwealth moved to have the 605 days of credit recalculated, because Probation and Parole reported that Robinson only had 170 days of credit. At the hearing on the motion, the Commonwealth's Attorney present took responsibility for the error and admitted he wrote the plea offer to state that Robinson was entitled to 605 days of credit.

Before the recalculation was entered, Robinson moved the court for Findings of Fact and Conclusions of Law. The court did so and vacated the

sentencing order and amended the original judgment. Robinson argues that the court lost jurisdiction ten days after entry of the judgment, and thus, was without jurisdiction to enter the Findings of Fact and Conclusions of Law.

Winstead v. Commonwealth, 327 S.W.3d 479 (Ky. 2010) is dispositive.² In *Winstead*, the Kentucky Supreme Court held that an error in awarding jail-time credit against a sentence is a judicial error, rather than a clerical error, and thus, may not be corrected more than ten days after judgment. *Id.* at 486. *See also*, Kentucky Rules of Civil Procedure (CR) 59.05.

Accordingly, we vacate the amended order and remand to the Jefferson Circuit Court with instructions for the court to reinstate the original judgment of conviction awarding Robinson 605 days of jail-time credit.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cicely J. Lambert
Assistant Appellate Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky

² The Commonwealth does not disagree that *Winstead* is dispositive.