

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000475-MR

RICHARD VERNON MCKINZIE

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 08-CR-00129

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Richard Vernon McKinzie appeals from the Trigg Circuit Court's order denying his motion for sentencing credit, requesting that his time spent on pretrial home incarceration be counted as jail-time credit. For the following reasons, we affirm.

McKinzie was indicted in November 2008 for several counts of sexual abuse and criminal abuse against his daughters and the daughters of his paramour.

In January 2009, the circuit court entered an order setting out bond conditions: Edmond and Diane Burks would post a 10% cash deposit and serve as surety for the remainder, and McKinzie was ordered to reside either in barracks on base at Fort Campbell or with the Burks, both under conditions of “house arrest.” The conditions mirrored KRS¹ 532.220, the statute governing conditions of home incarceration, and required that McKinzie remain either in his barracks or the Burks’ home unless working or traveling to and from his job, or attending medical treatment, an approved educational program, regularly scheduled services at a place of worship, or a meeting with his attorney.

In September 2009, the Burks made a motion to be removed as surety and for their bond to be returned. When the circuit court granted the Burks’ motion, the court did not require McKinzie to return to jail; instead, he was ordered to remain on pretrial release without posting bond, subject to all of the conditions of home incarceration previously set. McKinzie remained on home incarceration at Fort Campbell until September 14, 2011 when he was sentenced to nine years for three counts of Sexual Abuse, First Degree, pursuant to a plea agreement. In total, McKinzie spent 965 days on home incarceration.

On February 5, 2015, McKinzie made a “Motion for Sentencing Credit” in which he asked the court for 965 days of sentencing credit for his time on home incarceration, arguing that he was “in custody” during that time and was therefore entitled to credit under KRS 532.210(3). The circuit court denied

¹ Kentucky Revised Statutes.

McKinzie's motion, stating that KRS 532.210 had not been amended to specifically grant sentencing credit for time spent on pretrial home incarceration until July 12, 2012, and since McKinzie had been sentenced prior to that date, he was not entitled to any credit. From that order, McKinzie appeals.

First, the Commonwealth argues that McKinzie is procedurally barred from requesting sentencing credit because he failed to do so until almost three years after final judgment was entered in his case. Generally, a trial court loses the ability to amend its judgment ten days after the entry of that judgment; if a party believes the trial court's jail-time calculation to be erroneous, that party may timely raise that issue on direct appeal, with an exception for clerical errors. *Winstead v. Commonwealth*, 327 S.W.3d 479, 485-86 (Ky. 2010). "[T]he 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." *Id.* at 486. Here, no clerical error, or any error differing from the order as intended by the record, is alleged.

In this instance, we agree with the Commonwealth that the trial court was procedurally barred from granting McKinzie's motion for sentencing credit. Any error alleged concerning sentencing credit for McKinzie's time on home incarceration is judicial in nature, and therefore should have been raised before the trial court within ten days of entry of the final judgment or on direct appeal. Although the trial court addressed the merits of McKinzie's request, it should have

dismissed the motion as untimely. This, however, is harmless error given the ultimate result. *See* RCr² 9.24.

Accordingly, the Trigg Circuit Court's order denying McKinzie's motion for sentencing credit is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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² Kentucky Rules of Criminal Procedure.