

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000369-MR

DAVID NUNN

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 13-CR-00191

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: David Nunn appeals from an Order of the Hardin Circuit Court denying his Motion to Alter or Amend or Vacate Judgment brought pursuant to Kentucky Rule of Civil Procedure (CR) 59.05. Nunn sought to amend a previous Order Amending Judgment entered by the court which clarified that Nunn

was convicted of Possession of a Handgun by a Convicted Felon. For the reasons set forth below, we affirm.

BACKGROUND

On March 21, 2013, Nunn was indicted on fifteen counts involving various offenses. One count, Possession of a Handgun by a Convicted Felon (Kentucky Revised Statute (KRS) 527.040), stated: “when he, having been convicted of a felony, possessed or transported a handgun.” At the end of a trial conducted between September 30 and October 2, 2013, the jury found Nunn guilty of Possession of a Handgun, Second-Degree Fleeing or Evading Police, and being a Persistent Felony Offender in the First Degree (PFO I). The jury recommended a total sentence of twenty years in prison. On November 5, 2013, the circuit court conducted a sentencing hearing where the court stated it was imposing a sentence consistent with the jury verdict. On November 13, 2013, the circuit court entered a Trial Verdict and Judgment reflecting the jury’s verdict. The same day, the circuit court entered a Judgment and Order Imposing Sentence, imposing a sentence of twenty years for Possession of a Firearm by a Convicted Felon, Second-Degree Fleeing or Evading Police, and being a PFO I. The circuit court’s judgement was affirmed by the Kentucky Supreme Court on direct appeal. *See Nunn v.*

Commonwealth, 461 S.W.3d 741 (Ky. 2015).¹

¹ The Supreme Court stated that Nunn was appealing from “a judgment of the Hardin Circuit Court sentencing him to twenty years' imprisonment for the crimes of fleeing and evading in the second-degree, being a felon in possession of a handgun, and being a persistent felony offender in the first-degree.” *Id.* at 744.

On November 18, 2016, the Department of Corrections (DOC) submitted a letter to the circuit court seeking clarification of Nunn's conviction noting that the Judgment and Order Imposing Sentence stated that the circuit court accepted the jury's verdict of guilty to Possession of a Firearm by a Convicted Felon, while the Trial Verdict and Judgment indicated that Nunn had been convicted of Possession of a Handgun by a Convicted Felon.² After receiving the DOC's letter, the circuit court notified Nunn, who filed a Brief to the court challenging the court's authority to amend the final judgment. On January 18, 2017, the circuit court entered an Order Amending Judgment modifying the final judgment pursuant to Kentucky Rule of Criminal Procedure (RCr) 10.10, the clerical error rule, to reflect that Nunn had been convicted of Possession of a Handgun by a Convicted Felon. On January 30, 2017, Nunn filed a Motion for Amendment Under CR 52.02 and CR 59.05 to Alter, Amend or Vacate Judgment requesting the circuit court to reconsider and vacate its order amending the final judgment. On February 2, 2017, the circuit court denied the motion to vacate. This appeal followed.

ANALYSIS

On appeal, Nunn contends that the circuit court lost jurisdiction to amend the final judgment ten days after entry of the judgment. *See, e.g., Winstead v. Commonwealth*, 327 S.W.3d 479, 485-86 (Ky. 2010); *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979). Whether the trial court acted

² The inquiry apparently was initiated in order to determine Nunn's parole eligibility status.

outside its jurisdiction in amending the judgment of conviction and sentence is a question of law, which the appellate court reviews *de novo*. *Brown v. Commonwealth*, 326 S.W.3d 469, 471 (Ky. App. 2010).

Nunn acknowledges that RCr 10.10 is an exception to the general ten-day limitation for amendment of judgments. 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.

The courts have indicated that only “clerical” errors are subject to correction under the rule, as opposed to “judicial” errors. In *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000), the Court stated “the distinction between clerical error and judicial error does not turn on whether the correction of the error results in a substantive change in the judgment. Rather, the distinction turns on whether the error ‘was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel, or by the judge.’” (quoting *Buchanan v. West Kentucky Coal Company*, 218 Ky. 259, 291 S.W. 32, 35 (1927)). *See also Brown, supra*. A judicial error has also been described as “the result of erroneous judgment or a misapplied judicial or quasi judicial discretion.” *Fagan v. Commonwealth*, 374 S.W.3d 274, 279 (Ky. 2012) (quoting *Buchanan*, 291 S.W. at 35).

In *Machniak v. Commonwealth*, 351 S.W.3d 648, 654 (Ky. 2011), the

Court further addressed the difference between a clerical and judicial error stating:

We declare more formally that which the Court in *Cardwell* implied, i.e., a discrepancy between a trial court's intended sentence and the final judgment is a clerical error where the intended sentence was explicitly expressed by the trial court and fully made known to the parties, and such is readily apparent from the record of the sentencing hearing, with no credible evidence to the contrary. Sentencing is a significant occurrence, as it is when the defendant learns the extent to which he has lost his liberty and the Commonwealth learns what punishment will be imposed. In an ideal world, the written judgment would accurately reflect the appropriate punishment determined by the judge for the crime committed, but unfortunately reality does not always conform to the ideal. Judges have a solemn duty to dispense justice fairly, in accordance with the law, and to maintain the integrity of the justice system so as to merit and hold fast the public's faith in that system. Binding parties to an unintended and mistaken judgment that either delivers an undeserved windfall or imposes an inequitable punishment serves neither party and undermines our system of justice. (Footnote omitted).

In this case, the circuit court's final judgment is inconsistent with the Indictment, the actual trial verdict reflecting the jury instructions, the Trial Verdict and Judgment, the evidence presented at trial, and the understanding of the parties. The discrepancy is somewhat understandable given the nature of the statute setting out the offenses of Possession of a Firearm by a Convicted Felon and Possession of a Handgun by a Convicted Felon. KRS 527.040 provides in relevant part:

- (1) A person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in

which he was convicted, in any state or federal court[.]

...

- (2) Possession of a firearm by a convicted felon is a Class D felony unless the firearm possessed is a handgun in which case it is a Class C felony.

The offense of possession of a handgun by a convicted felon is essentially a subsection of the offense of possession of a firearm by a convicted felon, albeit with a higher felony classification and possible sentence.³

In this case, the jury verdict stated: “We, the Jury, find the Defendant guilty of Possession of a Firearm by a Convicted Felon under Instruction No. 4, and further believe from the evidence beyond a reasonable doubt that the firearm possessed by the defendant on or about the 3rd day of February, 2013, was a pistol or revolver, or other firearm originally designed to be fired by the use of a single hand.” The jury further fixed Nunn’s punishment at ten years “under Count II for the offense of Possession of a Handgun by a Convicted Felon, and twenty years for being a PFO I in lieu of the punishment for Possession of a Handgun by a Convicted Felon.”⁴ There was no evidence at trial involving any other firearm, other than a handgun, that was seized when Nunn was arrested.

Based on a review of the record, the failure of the circuit court to more specifically identify the possession offense in the final judgment as involving

³ KRS 527.010, which provides the definitions of terms for Chapter 527, states: “(4) ‘Firearm’ means any weapon which will expel a projectile by the action of an explosive; (5) ‘Handgun’ means any pistol or revolver originally designed to be fired by the use of a single hand, or any other firearm originally designed to be fired by the use of a single hand.”

⁴ The sentencing range for a Class C felony is not less than five years nor more than ten years; and for a Class D felony is not less than one year nor more than five years. KRS 532.060.

a “handgun” as opposed to the more generic term “firearm” was a clerical error under RCr 10.10. The inconsistency in the final judgment was not a “deliberate result of judicial reasoning” or misapplied judicial discretion based on an intent of the circuit court to reflect a conviction for possession of a firearm, rather than possession of a handgun. The reference to possession of a firearm in the final judgment was not a “judicial” error, but rather was an inadvertent “clerical” error or mistake subject to correction by the circuit court under RCr 10.10. The circuit court stated at the sentencing hearing that he was following the verdict of the jury. Thus, we conclude that the circuit court did not err in amending the final judgment and denying Nunn’s motion to vacate the order amending the judgment.

For the foregoing reasons, we affirm the judgment of the Hardin Circuit Court.

ALL CONCUR.

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