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Supreme Court of Kentucky

2008-SC-000352-DG
2009-SC-000317-TG
2009-SC-000342-TG

JOSHUA MACHNIAK — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NOS. 2007-CA-000710-MR AND 2009-CA-001012-MR
LETCHER CIRCUIT COURT NO. 05-CR-00098

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE VENTERS

REVERSING AND REMANDING

Appellant, Joshua Machniak, appeals from an opinion of the Court of Appeals which affirmed an order of the Letcher Circuit Court revoking a probated three-year sentence and sentencing him instead to twenty years' imprisonment. Although it was not reflected in the Judgment and Sentence On Plea Of Guilty, the twenty-year sentence was consistent with Appellant's plea agreement. We granted discretionary review to determine whether the plea agreement in this case was consistent with the applicable statutes, and whether a plea agreement which called for alternate sentences based on whether Appellant violated his probation is a violation of double jeopardy. Because we find that the plea agreement violated the statutory requirements of KRS 532.110(1), and KRS 532.030 as interpreted in *Commonwealth v. Tiryung*,

709 S.W.2d 454 (Ky. 1996), we vacate the judgment entered thereon, and remand the case to the Letcher Circuit Court for proceedings consistent with this opinion.

RELEVANT FACTS

Appellant was indicted by the Letcher County Grand Jury on twenty-nine counts, including twelve Class D felonies.[1] The Commonwealth offered Appellant a plea agreement under which it would recommend concurrent three-year sentences on all twelve felonies, to be probated for three years, in return for a guilty plea to all charges. If, however, Appellant's probation was revoked, the twelve three-year sentences would run consecutively. The written offer clearly stated that "all sentences are to be served concurrently with one another unless probation is revoked in which case all sentences are to be served consecutively with one another." With advice of counsel, Appellant accepted. On April 12, 2006, Appellant pled guilty in open court.

At the sentencing hearing on May 24, 2006, the trial court sentenced Appellant to a total prison sentence of three years, probated for a period of three years in accordance with the plea agreement. After announcing the sentence, the trial judge stated that if probation was revoked, "then the felony

[1] These charges included six counts of third-degree burglary, three counts of theft over three hundred dollars, three counts of theft under three hundred dollars, two counts of first-degree criminal mischief, four counts of third-degree criminal mischief, one count of third-degree assault, one count of resisting arrest, one count of second-degree fleeing or evading the police, one count of disorderly conduct, one count of public intoxication, two counts of third-degree criminal trespass, one count of third-degree possession of a controlled substance, one count of possession of less than eight ounces of marijuana, one count of possession of drug paraphernalia, and one count of possession of a controlled substance not in a proper container.

charges will run consecutively to one another. That means one to begin after completion of the other. You understand that, sir?" Appellant answered "yes."

However, the written judgment and sentencing order entered by the trial court failed to provide that the felony sentences would all run consecutively if Appellant violated the terms of his probation. The written judgment and sentencing order only stated that Appellant was "sentenced to imprisonment for a maximum term of three years probated three years." A separate "order of probation" was signed by the trial court and entered the same day, reciting the conditions that Appellant would have to abide by during the probationary period. That order, also, contains no reference to the agreement that upon revocation of probation, the felony sentences would be changed from concurrent sentences to consecutive sentences. Both orders became final. The judgment and sentencing order was never corrected or amended to add the omitted term of the plea agreement.

Appellant subsequently violated the terms of his probation. On February 7, 2007, the trial judge entered an order revoking Appellant's probation and sentencing him to imprisonment for twenty years, pursuant to the plea agreement.[2] Appellant appealed the revocation and the imposition of the "enhanced" sentence to the Court of Appeals.

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[2] We note that the trial court sentenced Appellant to three years on each of the twelve Class D felony counts to run consecutively which would lead to a total sentence of thirty-six years. However, the trial judge capped Appellant's total sentence at a maximum of twenty years per KRS 532.110(c) and KRS 532.080(6)(b).

The Court of Appeals affirmed the order of probation revocation. The Court of Appeals held that the trial court's failure to include the language concerning the consecutive sentences was simply a clerical error. In its view, pursuant to RCr 10.10 and *Caldwell v. Commonwealth*, 12 S.W.3d 672 (Ky. 2000) the order of probation revocation was an acceptable means for curing the erroneous judgment. The Court of Appeals also dismissed Appellant's double jeopardy argument, finding that he had no legitimate expectation in the finality of the sentence because the underlying judgment was subject to his compliance with the terms of his probation. The Court of Appeals also disagreed with Appellant's contention that, by "changing" his sentence from three years to a total of twenty years, the trial court violated *Tiryung*, 709 S.W.2d 454. It reasoned that the escalated punishment was an original part of his plea agreement, to which Appellant had voluntarily bound himself.

For the reasons set forth below, we now reverse the Court of Appeals.

ANALYSIS

When a conflict exists between oral statements of the presiding judge and an order or judgment reduced to writing, the written order or judgment prevails. *Commonwealth v. Taber*, 941 S.W.2d 463, 464 (Ky. 1997); *Commonwealth v. Hicks*, 869 S.W.2d 35, 37-38 (Ky. 1994). However, the entry of an amended judgment to correct the final judgment is permissible under RCr 10.10 as long as the error being corrected was a *clerical* error. *Cardwell,* 12 S.W.3d at 675. A judicial error, however, is not subject to correction through

an amended judgment. *Viers v. Commonwealth*, 52 S.W.3d 527, 529 (Ky. 2001).

We agree with the Court of Appeals that omitting from the final judgment the stipulation that the concurrent sentences would be altered to run consecutively in the event of a probation revocation, is clearly the kind of error identified in *Cardwell* as clerical, and thus correctable. We note, however, that while the trial judge had the authority to correct the error, he never did so. The omission was never cured by the entry of an amended final judgment. The order of probation revocation imposed a sentence not reflected in the original judgment. Thus, the inconsistency between the final judgment fixing the sentence and the sentence imposed in the revocation order persists.

The trial judge should have formally amended the judgment to reflect the sentencing arrangement he had intended to impose. The Court of Appeals believed that the order of probation revocation was sufficient to amend the judgment per *Caldwell*. While we do not agree, the issue is purely academic because the trial judge still has the authority to correct the original judgment sentence.[3] Our disapproval of the sentence imposed goes beyond the question of whether the probation revocation order suitably cured the erroneous judgment. As further explained below, we reverse the Court of Appeals because the dual sentences provided for in the plea agreement, which the trial court orally imposed and presumably intended to include in the final judgment,

[3] RCr 10.10 provides that clerical mistakes in judgments may be corrected by the trial court "at any time," and during appeal with leave of the appellate court.

violate KRS 532.030 and KRS 532.110(1). Thus, even if the clerical error was properly corrected, the result would be a final sentence that we cannot uphold.

At the sentencing hearing, the trial court accepted the plea agreement between the Commonwealth and Appellant, and orally imposed the set of two sentencing alternatives described above: twelve three-year prison sentences, to be served concurrently, but probated for three years; if probation is revoked, twelve three-year prison sentences to be served consecutively.

KRS 532.030(3) provides in pertinent part:

> When a person is convicted of an offense other than a capital offense or Class A felony, he shall have his punishment fixed at:
>
> (a) A term of imprisonment authorized by this chapter[.]

KRS 532.110(1) provides in pertinent part:

> When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime . . . the multiple sentences shall run concurrently *or* consecutively *as the court shall determine at the time of sentence[.]*
>
> (emphasis added)

In *Tiryung*, 709 S.W.2d 454, at sentencing, the trial court placed a defendant on probation without fixing the term of imprisonment to be served in lieu of probation. We reversed, holding that, "The language of KRS 532.030 is mandatory. Upon conviction, a person 'shall have his punishment fixed' at death, imprisonment or fine, as may be appropriate depending on the offense committed." *Id.* at 455. In that statutory context, "fixed" means "rendered

stable or permanent," "definitely and permanently placed," and "not fluctuating or varying; definite." Random House Webster's College Dictionary 504 (1991). Given the dual sentencing alternatives imposed by the trial court, it is clear that the punishment was not "fixed" as the statute requires.

The sentencing arrangement which the court and the parties attempted to implement here is an even more explicit violation of KRS 532.110(1). That statute unequivocally requires that the trial judge "determine at the time of sentence" whether the prison terms shall be served concurrently or consecutively. The statute does not allow the trial judge the option of deferring that determination to a later date, or conditioning the decision on the happening of some future event. Arguably, the dual sentencing arrangement imposed on Appellant avoids some of the mischief that concerned this Court in *Tiryung,* where the length of the prison sentence was not fixed in any way at the time of judgment.[4] However, it does not avoid conflict with the mandate of KRS 532.110(1).

The Court of Appeals held that Appellant was bound to the twenty-year sentence because it was consistent with his plea agreement. We rejected a similar argument in *McClanahan v. Commonwealth,* 308 S.W.3d 694 (Ky.

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[4] "To hold otherwise openly invites the trial court to impose a punishment greater than that appropriate for the initial offense because of the subsequent offense which precipitates the revocation of probation. Although the offense which constitutes violation of probation and grounds for revocation may be a new criminal offense calling for punishment in its own right, it is not grounds for providing a greater punishment for the original offense which was probated. The new offense should be separately punished. The trial court is precluded from adding the "weight of subsequent offenses . . . to the penalty of the former offense." *Tiryung,* 709 S.W.2d at 456.

2010), where we declined to enforce a plea agreement that called for a sentence that violated the maximum punishment established by KRS 532.110(c). There, we held "[b]ecause the plea agreement involved here contravenes KRS 532.110(1)(c) and KRS 532.080(6)(b), it is a contract which our courts may not enforce." *Id.* at 701. We hold now that KRS 532.110(1) is due that same measure of respect. The trial court's discretion to fix multiple terms of imprisonment to run either concurrently or consecutively *must* be exercised when the sentence is fixed. The parties cannot by agreement authorize the trial court to do other than what the statute requires.[5]

The Commonwealth argues in support of enforcing the plea agreement in this case that "these kinds of pleas" are very useful in promoting the settlement of cases on the heavy criminal dockets of our circuit courts. We are told "it's a little more enticing to defendants to say your sentence is three years," as opposed to twenty years. The Commonwealth contends, "The reality is that twenty years sounds like a big number." Notwithstanding the plea agreement's conflict with KRS 532.110(1), we reject the use of such plea agreements as marketing devices to encourage defendants to plead guilty.

First, we note that the three year sentences "to be served concurrently," as stated in the written plea agreement, are purely illusory. Under the agreement, the only sentences that run "concurrently" are those that would never be served. No sentence would be served at all unless probation is

[5] KRS 532.110(2) resolves the question that would arise when the trial court declines to exercise its discretion at the time of sentence. The sentences run concurrently.

revoked, and then the sentence is not three years; it is twenty years. Second, we believe that packaging plea agreements with the allure of a non-existent minimal sentence, so that defendants find them "enticing" is antithetical to the objective of a knowing and intelligent guilty plea. If there was ever a moment in a person's life that requires a level-headed and realistic understanding of the consequences, it would be when pleading guilty to crimes requiring a twenty-year prison sentence. We do not suggest that Appellant was misled or that he did not understand his plea agreement. We simply announce that we will not condone a plea agreement strategy that purposefully detracts from the candor required for such a serious occasion, and disguises the true consequences of a guilty plea behind the mask of an illusory sentence.

We recognize that part of the allure of this kind of plea agreement is that, while on probation, a defendant may benefit by the perception, among prospective employers and others, that his crimes merited only a three-year sentence, as opposed to a twenty-year sentence. We find little comfort in that kind of advantage because it simply foists the illusory aspect of the three-year sentence upon an unsuspecting public.[6]

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[6] This is not to say that a defendant could not be presented with two distinct options: one to say he may take three years on twelve counts to run concurrently without probation, and the other to say that he may take twenty years consecutively (as capped by KRS 532.110) with probation. If the defendant knowingly and willingly chooses the latter, then the final judgment, would, of course, "fix" the sentence at a twenty year sentence. We in no way criticize this normal give and take of the plea bargaining process.

Because the sentencing arrangement imposed pursuant to the plea agreement[7] violates KRS 532.030 by failing to "fix" the sentence and violates KRS 532.110(1) by failing to determine at the time of sentence the concurrent or consecutive nature of the sentences, we reverse the opinion of the Court of Appeals and vacate the judgment of the Letcher Circuit Court. Because we base our decision on purely statutory grounds, and recognize the "long-observed principle" that constitutional adjudication should be avoided unless strictly necessary for a decision in the case[8], we decline to address Appellant's double jeopardy and other constitutional claims.

CONCLUSION

For the reason set forth above, the opinion of the Court of Appeals is reversed, and this matter is remanded to the Letcher Circuit Court for further proceedings consistent with this opinion.

Minton, C.J., Abramson, Cunningham, and Schroder, JJ., concur. Noble, J., concurs in result only by separate opinion. Scott, J., dissents by separate opinion.

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[7] For purposes of this opinion, we consider the sentence imposed to be the intended sentence included in the plea agreement and announced at the sentencing hearing, rather than the one reflected in the erroneous judgment.

[8] *Spees v. Kentucky Legal Aid*, 274 S.W.3d 447,449 (Ky. 2009) (citing *Stephenson v. Woodward*, 182 S.W.3d 162, 168 (Ky. 2005)).

NOBLE, J., CONCURRING IN RESULT ONLY: I concur in result with Justice Venters' Opinion. However, the error here is too serious to be merely "clerical." The Commonwealth had ample opportunity to ask that the sentence be modified to reflect the term it really wanted, but did not do so. Instead, the sentence refers to a fixed term of three years, with three years probation. In the usual scenario, if a defendant has his probation revoked, the sentence imposed is the one set at sentencing. Failing to modify the sentence here locks in that sentence; it does not give the court a "do-over." This sentencing happened outside the timeframe allowed for modification, and it is therefore the only sentence that may be imposed on Appellant.

SCOTT, J., DISSENTING: I agreed with the majority in *McClanahan v. Commonwealth*, 308 S.W.3d 654 (Ky. 2010) because the "hammer" clause in that plea agreement was implemented by the trial judge without the exercise of any discretion as is required by KRS 532.010(1), 533.010(2), 532.050(1), KRS 532.110(1), and RCr 11.02, and the sentence—due to the defendant's violation of the agreement—resulted in an unlawful sentence. *McClanahan*, however, dealt with the consequences of the defendant's violation of the plea agreement, *Id.* at 696-97, while here, we are dealing with a defendant's violation of the court's actual sentence.[1] And here, the majority reverses, essentially because the trial court fixed the sentence in such a way that the defendant would

[1] The majority agrees that the failure to include the alternative sentence in the judgment (if probation were violated) was a clerical error, subject to correction by the trial court via RCr 10.10 and *Caldwell v. Commonwealth*, 62 S.W.3d 672 (Ky. 2000).

control whether the sentences would be consecutive or concurrent and served in an institution or fully probated. Thus, I must dissent.

I do so because trial courts need as many tools as possible within the statutory guidelines for sentencing the multitude of differing defendants which come before them. Some of these tools (sentencing scenarios) work for some, while others are needed for those more hardened or recalcitrant. Their object, however, when used in connection with probation or conditional discharge, is the same—construct a sentencing package within the statutory guidelines that will assist the defendant in controlling his conduct in such a manner that probation or conditional discharge will work for that particular defendant, assuming probation or conditional discharge is a viable alternative sentence for the defendant. Trial courts don't always have to use them, but having them—or threatening their use—can be a useful tool in the successful rehabilitation of an individual.

Here, Appellant was charged with twenty-nine separate crimes: six counts of third-degree burglary, three counts of theft over three hundred dollars, three counts of theft under three hundred dollars, two counts of first-degree criminal mischief, four counts of third-degree criminal mischief, once count of third-degree assault, one count of resisting arrest, one count of second-degree fleeing or evading the police, one count of public intoxication, two counts of third-degree criminal trespass, one count of third-degree possession of a controlled substance, one count of possession of less than eight

ounces of marijuana, one count of possession of drug paraphernalia, and, finally, one count of possession of a controlled substance not in a proper container.

He was probated on June 12, 2006, and his probation was revoked on February 7, 2007—but only after he had violated his probation numerous times. The last was on October 19, 2006, when he was arrested for public intoxication, second-degree possession of a controlled substance, second-degree escape, menacing, criminal mischief, third-degree criminal trespass, alcohol intoxication (first and second offense), and second-degree disorderly conduct.[2] A urinalysis taken the next day found traces of marijuana, cocaine, hydrocodone, and hydromorphone in his system. Upon revocation, the trial court, with one adjustment, implemented the twenty-year sentence.

In reversing the trial court's sentence, the majority now forbids alternative sentences dependent upon a defendant's compliance with the terms of probation or conditional discharge, holding that KRS 532.030 requires the sentence to be "fixed" *at the time of sentencing* and that KRS 532.110(1) requires the trial judge to "determine *at the time of sentence* whether the prison terms shall be served concurrently or consecutively." (Emphasis added).

As to KRS 532.030, I see no reason to hold that the sentence here was *not* fixed at the time of sentencing. In fact, it was. If he complied with the terms of probation, his sentence was three years, if he did not, it would be

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[2] He had been previously arrested on July 12, 2006 for alcohol intoxication and possession of a controlled substance.

twenty! All of this *was fixed* at the sentencing and as Appellant was charged with, and pled to, *twenty-nine different charges*, twenty years was a permissible sentence. The fact that the Court lowered Appellant's sentence to three years probation provided he stay clean and sober, keep out of people's homes and buildings, and leave them alone, was a bonus for him and one to which he did not object—that is, until he went about his merry criminal ways.

As to the concurrency issue, KRS 532.110(1) says that "the multiple sentences shall run concurrently or consecutively *as the court shall determine* at the time of sentence." (Emphasis added). Again, the trial court did settle this issue at the time of sentencing. It was to be run concurrently if he complied, but consecutively if he did not. What I cannot read into the statute is that it has to be one way or the other at the time of sentencing and must remain so, notwithstanding the multitude of contingencies yet to occur.

It just seems to me, we are reading something into the statute that the legislature did not intend. Moreover, in so doing, we are unnecessarily restricting sentencing tools our trial courts need to inhibit conduct against public safety, while at the same time inhibiting contingencies that could assist other defendants in mending their ways. For these reasons, I respectfully dissent.

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