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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002316-MR

JEFFERY D. GIVEN — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 08-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER,[1] AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Appellant, Jeffery D. Given, appeals from an order granting the Commonwealth's motion to correct his sentence. He argues: (1) that the sentencing error was a judicial rather than a clerical error, which cannot be corrected more than ten days after the judgment became final; and (2) that his

[1] Judge Michelle M. Keller concurred in this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

sentence of ten years of imprisonment is illegal and should be modified to a term of months. We affirm.

On June 4, 2008, Given was indicted in Woodford Circuit Court on the following charges: (1) Operating a Motor Vehicle While Under the Influence (DUI), Fourth Offense, Class D Felony; (2) Driving on a DUI Suspended License, Fourth Offense, While Driving Under the Influence, Class D Felony; (3) Speeding; and (4) Being a First-Degree Persistent Felony Offender (PFO). The Commonwealth presented Given with a written offer on a plea of guilty, which consisted of: (1) a recommended sentence of one year of imprisonment on the fourth offense DUI charge, enhanced to ten years of imprisonment by the PFO charge; (2) a sentence of one year of imprisonment on the fourth offense driving while on a DUI suspended license while driving under the influence, to run concurrently with the ten-year sentence; and (3) the speeding charge merged with the other counts. Given signed the written offer on a plea of guilty containing these stated terms. Given also signed a written guilty plea reflecting the terms of the agreement.

The trial court conducted a plea colloquy on December 22, 2008. During the hearing, Given's counsel stated that he believed the charge of driving while on a DUI suspended license should have been a third offense rather than a fourth offense as indicted. The Commonwealth stated that it had no objection to the

amendment because the charge would remain a felony. During the colloquy, Given stated that he was pleading guilty to fourth offense DUI, third offense driving while on a DUI suspended license while under the influence, and first-degree PFO. The trial court's docket sheet for December 22, 2008, correctly reflected the amendment of fourth offense driving while on a DUI suspended license to third offense. However, following sentencing on February 4, 2009, the docket incorrectly stated that the fourth offense DUI was amended to third offense and incorrectly restored the amended third offense driving while on a DUI suspended license to fourth offense. The judgment entered reflected the incorrect amendment of fourth offense DUI to third offense. The trial court sentenced Given to eleven years of imprisonment (including a one-year sentence from a separate indictment) in accordance with the agreement and probated the sentence for five years, with six additional months of home incarceration.

In 2011, the Commonwealth filed a motion to revoke Given's probation after he received a new misdemeanor conviction. At this time, Given discovered the incorrect amendment and argued that a misdemeanor third offense DUI could not be enhanced by PFO and that his ten-year sentence was illegal and should be modified to a term of months. The Commonwealth then filed a motion to correct the judgment pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.10. The trial court granted the motion to correct the judgment concluding that the incorrect amendment was a clerical, rather than a judicial, error in an order entered on November 23, 2011. This appeal followed.

Given argues that the trial court erred by concluding that the amendment was a clerical error. He further argues that his ten-year sentence is illegal and should be modified to a term of months.

RCr 10.10 provides in pertinent part:

> Clerical mistakes in judgments . . . 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.

In *Machniak v. Commonwealth*, 351 S.W.3d 648, 654 (Ky. 2011), our Supreme Court stated:

> 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 the present case, we conclude that the amendment of the fourth offense DUI charge to third offense was a clerical error. The Commonwealth's offer on a plea of guilty explicitly stated that Given would plead guilty to fourth offense DUI, a Class D felony. Given signed this document and acknowledged that he understood its terms. Given signed a written guilty plea also stating his intention to plead guilty to fourth offense DUI, a Class D felony. During the plea colloquy, Given stated in open court that he knowingly and voluntarily was pleading guilty to fourth offense DUI and third offense driving while on a DUI suspended license as amended by agreement. The intended plea agreement was made explicitly known to Given and there is no credible evidence to the contrary. Therefore, we conclude that the trial court properly granted the motion to correct the judgment under RCr 10.10 and properly denied the motion to modify the sentence to a term of months.

Accordingly, the judgment of the Woodford Circuit Court is affirmed.

ALL CONCUR.

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