

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000940-MR

ERIC WAYNE GLOVER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 13-CR-001178, 14-CR-001083, AND 14-CR-002191

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, D. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, D., JUDGE: Eric Glover appeals the entry of a second amended judgment of conviction entered by the Jefferson Circuit Court. He asks this Court to review whether the trial court exceeded its jurisdiction by amending the judgment nearly two years after initial entry. He also requests that this Court determine whether contract principles preclude the Commonwealth from seeking

the amendment. After reviewing the record, we affirm the trial court's second amended judgment.

I. FACTUAL AND PROCEDURAL HISTORY

Glover is currently serving a sentence of 18 years in a correctional institution. He entered unconditional guilty pleas on two different indictments in Jefferson Circuit Court.

In the first indictment, 13-CR-001178, he entered a guilty plea on the following charges: use of a minor under 16 years old in a sexual performance, use of a minor in a sexual performance, two counts of sexual abuse in the first degree, and one count of misdemeanor indecent exposure. The victim in this case was his biological daughter. He received sentences of eight years each on the sexual performance charges, and five years each on the sexual abuse charges. He received 90 days for the misdemeanor. The sentences for these convictions were to run concurrently with each other, but consecutively to the sentence imposed in the other indictment.

In the second indictment, 14-CR-001083, he entered guilty pleas to the following charges: attempted rape in the first degree, and four counts of incest. The victim in this indictment was his step-daughter, whom he had raised since age two. The attempted rape allegation included that the victim was ten years old at the time of the offense. He received concurrent ten-year sentences on each of these charges, which were to run consecutively to the eight-year sentence imposed in the other case.

The initial judgment was entered on September 9, 2014. The judgment stated that his offenses were such that he would be considered a violent offender. In addition to the 18 years to serve, the trial court also mandated he complete sex offender treatment, and register for life on the sex offender registry.

The first amended judgment was entered on December 9, 2014. Therein, the judgment clarified that Glover was to be considered a sex offender in addition to a violent offender, and added the imposition of the statutory period of conditional release pursuant to KRS 532.043. Glover does not take issue with this amendment, conceding in his brief to this Court that the trial court had advised him of these requirements during the original sentencing hearing, and this amendment was intended to rectify a clerical error in the written judgment.

Glover does, however, take issue with the second amended judgment, which was entered at the Commonwealth's request on May 25, 2016. The change in the second amended judgment as opposed to the first amended judgment is significant: it changes the most serious count, attempted rape in the first degree, to the enhanced charge of attempted rape in the first degree of a victim under 12 years of age. This amendment did not change the length of the sentence imposed for that count (ten years), but it did elevate the charge from a Class C felony to a Class B felony.

The instant appeal followed, wherein Glover challenges the trial court's jurisdiction to amend the judgment a second time, and the Commonwealth's ability to request the amendment.

II. ANALYSIS

1. THE CIRCUIT COURT'S JURISDICTION TO AMEND THE JUDGMENT A SECOND TIME

Glover argues that the trial court lacked jurisdiction to amend his sentence. Per Civil Rule (“CR”) 59.05, motions to alter, amend, or vacate final judgments must be made within ten days. CR 59.05. This rule applies equally to both civil and criminal actions. *McMurray v. Commonwealth*, 682 S.W.2d 794 (Ky. App. 1985). In most instances, the trial court loses jurisdiction after that time period lapses, but in criminal cases, Rule of Criminal Procedure (“RCr”) 10.10 provides an exception for correcting clerical errors. “Clerical mistakes in judgments... arising from oversight or omission may be corrected by the court at any time or on motion of any party[.]” RCr 10.10. However, the Kentucky Supreme Court has cautioned us that “[t]his exception should only apply where the circumstances are clear that the mistake is a clerical error.” *Fagan v. Commonwealth*, 374 S.W.3d 274, 280 (Ky. 2012).

The Kentucky Supreme Court has attempted to delineate and define which errors are “clerical,” and which are “judicial.” Clerical errors are those instances where the written judgment differs from the oral pronouncement of the sentence on the record. *Viers v. Commonwealth*, 52 S.W.3d 527, 529 (Ky. 2001). All other errors are judicial. *Id.* The Supreme Court defined “judicial errors” in the following terms: judicial errors are the “deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel, or

by the judge.” *Machniak v. Commonwealth*, 351 S.W.3d 648, 653 (Ky. 2011) (quoting *Buchanan v. West Ky. Coal Co.*, 218 Ky. 259, 291 S.W. 32 (1927)).

The Commonwealth contends this error was clerical, alleging that even as it tendered a plea offer on first-degree attempted rape without the age-of-victim enhancement language, that the intent was for Glover to plead guilty to a ten-year sentence on the Class B version of the offense, not the Class C version. The age-of-victim enhancement is noticeably absent in the initial written judgment, and in the amended written judgment. However, not only did the trial court recite the fact that the victim was ten years old at the time of the offense during the initial sentencing colloquy, the written offer states the offense to which Glover was entering the plea was a “Class B felony 10 to 20 years,” and, significantly, Glover had actual knowledge of the victim’s age due to his familial relationship to her.

The trial court’s recitation of the facts during the plea colloquy leads us to conclude this is a merely clerical error. The record evinces a simple scrivener’s error as contemplated in *Viers*, or as exemplified in the first amended judgment in this very action. The trial court retained jurisdiction to correct this error by way of the second amended judgment.

2. GLOVER’S CONTRACT LAW ARGUMENT

Glover made an argument, sounding in contract law, that the Commonwealth should not be permitted to repudiate the terms of the plea agreement. Generally, the acceptance of a plea offer creates a binding contract between the Commonwealth and a criminal defendant, subject to the approval of

the trial court. *Elmore v. Commonwealth*, 236 S.W.3d 623, 626 (Ky. App. 2007) (citing *Hensley v. Commonwealth*, 217 S.W.3d 885 (Ky. App. 2007)). Glover urges this Court to vacate the second amended judgment on the basis that any ambiguity in the plea agreement should be resolved against the Commonwealth, as the drafter, like any other contract. *B. Perini & Sons v. Southern Ry. Co.*, 239 S.W.2d 964, 966 (Ky. 1951).

However, review of the Commonwealth's written offer on a plea of guilty in Indictment No. 14-CR-001083 clearly lists "Criminal Attempted Rape I" as a "Class B felony" with a range of 10 to 20 years. This document was signed by the Assistant Commonwealth's Attorney, Glover's defense counsel, and Glover himself, on September 5, 2014. There is no ambiguity in this contract, nor can it be argued that the Commonwealth is attempting to repudiate the terms of the agreement. That Glover will not receive a certain benefit to which he did not agree cannot form a basis for vacating the second amended judgment.

III. CONCLUSION

The exception found in RCr 10.10 applies here. *Fagan, supra*. We must therefore conclude that the error was clerical, and consequently that the trial court acted within its jurisdiction in issuing the second amended judgment. The record contains no indication that the Commonwealth attempted to accomplish anything other than to enforce the sentence as agreed by seeking the second amendment. Therefore, we affirm the trial court's entry of the second amended judgment.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Department of Public Advocacy
Frankfort, Kentucky

Steven Jared Buck
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear,
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky