Commonwealth of Kentucky
Supreme Court

No. 2008-SC-352, 2009-SC-317 & 2009-SC-342

JOSHUA MACHNIAK — **APPELLANT**

v.

On Discretionary Review from the Court of Appeals (2009-CA-1012)
Appeal from Letcher Circuit Court
Hon. Samuel T. Wright, Judge
Indictment No. 05-CR-00098

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed October 9, 2009, to Hon. Samuel T. Wright, Judge, 205 Courthouse, 156 Main Street, Whitesburg, KY, 41858; and via electronic mail to Hon. Edison G. Banks, II, Commonwealth's Attorney, 48 East Main St., Whitesburg, KY, 41858; via state messenger mail to Hon. J. Brandon Pigg, Assistant Public Advocate, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

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INTRODUCTION

On May 19, 2005, Joshua Machniak was indicted for 29 separate offenses, twelve of which were felonies. The trial court sentenced Machniak to a total sentence of three years probated for three years provided that Machniak's probation was not revoked; in the event that Machniak's probation was revoked, Machniak agreed he would then receive an increased consecutive sentence (with a 20 year cap). Machniak ultimately received the agreed upon 20 year sentence after his probation was revoked due to probation violations. The Court of Appeals affirmed the sentence; this Court has granted Machniak's request for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the party's briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On May 19, 2005, Joshua Machniak was indicted by a Letcher County grand jury on 29 separate charges. The 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. Transcript of Record, hereinafter TR I of I, 3-9.

On April 13, 2006, the Commonwealth made an offer on a plea of guilt. TR I of I, 104-107. In exchange for a plea of guilt, the Commonwealth recommended, *inter alia,* three years to serve on each of the felony counts: Counts one through nine, thirteen and fourteen, and count nineteen. TR I of I , 105-106. The Commonwealth's offer clearly stated ***"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."*** TR I of I, 106. Machniak signed the Commonwealth's offer on March 23, 2006. TR I of I, 107. On April 13, 2006, Machniak's motion to enter the guilty plea was filed. TR I of I, 108. He signed that document as well. TR I of I, 108 (back of page). See attached offer on a plea of guilt and motion to enter a plea of guilt, attached as Exhibits 1 and 2, respectively.

On April 12, 2006, Machniak pleaded guilty in open court. VR: 4/12/06; 15:20:00 - 15:24:50. During the plea colloquy, Machniak stated to the court that he had no

mental disease and was not impaired or under the influence of any substance. VR: 4/12/06; 15:21:19. Machniak also indicated to the court that he fully understood his motion to enter a guilty plea and had no questions about any part of it. VR: 4/12/06; 15:21:48. Machniak indicated he had voluntarily signed the motion to enter the guilty plea. He said he had read the Commonwealth's offer and understood it. Id. Machniak then admitted that he had committed each of the 29 crimes as charged in the indictment. VR: 4/12/06; 15:22:45; 15:23:56. Machniak's sentencing hearing was set for May 24, 2006.

At the sentencing hearing on May 24, 2006, the trial court sentenced Machniak to a total sentence of three years probated for a period of three years. VR: 5/24/06; 10:45:42. After pronouncing the sentence, the trial court stated, "If these are revoked, then the felony charges will run consecutively to one another; that means one to begin after completion of the other. You understand that sir?" Machniak replied, "Yes, sir." VR: 5/24/06; 10:46:56. The trial court further added that it wanted to make it clear to Machniak that Machniak's charges were very serious, that Machniak had been given a major break, and that Machniak should not violate the law again. VR: 5/24/06; 10:47:30: See attached judgment and sentence on a plea of guilty, attached as Exhibit 3. TR I of I, 115-121. The judgment did not reduce to writing the fact that Machniak had agreed to a consecutive or 20 year sentence upon revocation.

On June 12, 2006, the trial court entered an order of probation and stated in that order that "rendition of judgment is withheld and the defendant is placed on probation under the supervision of the Division of Probation and Parole for a period of three years subject to the defendant's compliance with the following conditions. . . ." The conditions included Mahniak refraining from violating the law in any respect. TR I of I, 122. The conditions also compelled Machniak to comply with the regulations of the Division of Probation and Parole, directions of

the probation officer, and any special conditions established by the court. Id.

On October 5, 2006, the Commonwealth filed a motion to revoke Machniak's probation. TR I of I, 128. The motion to revoke stated that Machniak had pled guilty in Letcher District court on September 18, 2006 to charges of alcohol intoxication and possession of a controlled substance. Id. Machniak's case was set for a revocation hearing on October 11, 2006. During the October 11th hearing, Machniak's attorney told the court that the County Attorney had promised Machniak he would not be revoked (on the district court charges). VR: 10/11/06; 11:34:10. The revocation hearing was rescheduled to another day so that the County Attorney could be contacted. VR: 10/25/06; 3:42:03. The trial court reset the hearing for October 25, 2006, in order to allow counsel time to investigate the issue. VR: 10/11/06; 11:34:58.

On October 25, 2006, the trial court noted the assistant county attorney had indicated that there would be no revocation regarding the district court probation. VR: 10/25/06; 3:41:05. Trial defense counsel conceded that he had misunderstood the situation and noted that the assistant county attorney could not speak for the Commonwealth's attorney. VR: 10/25/06; 3:41:22. Trial defense counsel stated that he was mistaken thinking that Machniak would not be revoked in circuit court. Id. The revocation hearing was rescheduled for December 19, 2006.

On December 11, 2006, Commonwealth filed a second motion to revoke Machniak's probation. TR I of I, 133. This motion indicated that the grounds for revoking Machniak's probation were: use of four controlled substances on October 20, 2006, including marijuana, cocaine, hydrocodone, and hydromorphone.

Machniak's revocation hearing was ultimately held on December 19, 2006. Machniak's probation officer testified that Machniak had been arrested a couple of times since he had been on probation. VR: 12/19 /06; 1:31:28. Machniak's latest arrest had been on October

19, 2006; he had been arrested for public intoxication, second degree possession of a controlled substance, second degree escape, menacing, third degree criminal mischief, third degree criminal trespass, alcohol intoxication (first and second offenses), and second degree disorderly conduct. VR: 12/19/06; 1:32:07. The probation officer collected a urine sample on October the 20, 2006. The sample was sent to the lab and Machniak was found to have used marijuana, cocaine, hydrocodone and hydromorphone. VR: 12/19/06; 1:32:41.

Machniak testified that he had pled guilty on September 18, 2006, to alcohol intoxication and possession of a controlled substance for charges incurred on July 12, 2006. VR: 12/19/06; 1:38:30; 1:34:10. Machniak testified that the Assistant County Attorney had said that they would run it "concurrently" with his circuit court probation. VR: 12/19/06; 1:38:56. Machniak admitted on, cross-examination, he had pled guilty to charges that had occurred in July and that he had been re-arrested in October. He admitted to having used marijuana, cocaine, hydrocodone and hydromorphone a couple of days before his October arrest. VR: 12/19/06; 1:39:29.

As a result of the evidence presented at the hearing, the trial court found that Machniak had violated the conditions of his probation (due to his use of controlled substances) and sentenced him to a total of three years on the charges to run consecutively to each other (excluding the misdemeanor charges). VR: 12/19/06; 1:46:19; 1:48:40; TR I of I, 138. The trial court explained that even though the twelve felonies would run consecutively with each other, Machniak's sentence could not exceed 20 years and that, therefore, Machniak's sentence would be 20 years. VR: 12/19/06; 1:49:40. There was no objection from defense counsel. The trial court asked Machniak if he had any questions and Machniak replied, "No, sir." VR: 12/19/06; 1:50:25. On February 7, 2007, the trial court entered an order revoking Machniak's probation.

TR I of I, 138-139.

Machniak subsequently appealed to the Kentucky Court of Appeals. In an unanimous not-to-be-published opinion rendered on April 18, 2008, the Court of Appeals affirmed Machniak's 20 year sentence. Machniak then requested, and this Court granted, discretionary review.

ARGUMENT

I.

THE SENTENCE ORALLY PRONOUNCED BY THE TRIAL COURT IS THE LEGALLY BINDING SENTENCE AND ANY PRONOUNCEMENT OF JUDGMENT CONTRARY TO THE ORAL PRONOUNCEMENT IS INVALID.

Machniak argues that the trial court erred when it sentenced him to 20 years following the probation revocation hearing. Machniak argues this, in spite of the fact that he had agreed to a consecutive year sentence and the trial court indicated, at the sentencing hearing, that if Machniak violated the conditions of his probation, he would be sentenced to consecutive terms rather than concurrent terms.[1] The trial court sentenced Machniak in conformance with his plea agreement: in his plea agreement, Machniak accepted the Commonwealth's offer of three years on each felonty to run concurrently should he be probated, and in the event of probation revocation, the three years on each felony would run consecutively. During the sentencing hearing, the trial court made clear its intent to follow the plea agreement and Machniak understood the plea agreement. VR: 5/24/006; 10:46:56. Although the written judgment of the trial court, upon sentencing, due to a clerical error, omitted Machniak's agreement to serve

[1]Machniak concedes the issue is not preserved.

consecutive terms in prison, this Court has previously stated that the trial court has the authority to correct its judgment pursuant to RCr 10.10.[2] Cardwell v. Commonwealth, 12 S.W.3d 672, 674-675 (Ky. 2000). All parties clearly intended that Machniak would serve consecutive terms in the event of probation revocation. Machniak is bound by his agreement. The Letcher Circuit Court properly sentenced Machniak to consecutive terms totaling 20 years.

As noted in the Commonwealth's Counterstatement of the Case, Machniak was indicted on 29 separate charges, twelve of which were felonies. On April 13, 2006, the Commonwealth offered the following in exchange for a plea of guilt: the Commonwealth recommended, *inter alia*, three years to serve on each of the felony counts. The Commonwealth's offer also stated: "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." TR, 106. Machniak accepted the Commonwealth's offer on March 23, 2006. On April 12, 2006, Machniak pled guilty in open court and told the trial court he fully understood his motion to enter a guilty plea and had no questions about any part of it. He had voluntarily signed the motion to enter the guilty plea. He told the trial court he had read the Commonwealth's offer and understood it. He further admitted he had committed each of the 29 crimes as charged in the indictment. See Commonwealth's Counterstatement of the Case. On April 13, 2006, Machniak's motion to enter the guilty plea was filed. TR, 108.

On May 24, 2006, the trial court sentenced Machniak in conformance with the plea agreement. The trial court stated, "If these are revoked, then the felony charges will run

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[2]RCr 10.10 states, in relevant part, "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 . . . ."

consecutively to one another; that means one to begin after completion of the other. You understand that sir?" Machniak replied, "Yes, sir." The trial court reminded Machniak that his charges were very serious, that he had been given a major break, and that he should not violate the law again. See Commonwealth's Counterstatement of the Case. The trial court placed Machniak on probation and sentenced him to a total of three years (sentences to run concurrently) probated for three years. The conditions of his probation required Machniak to refrain from violating the law in any respect and to comply with all conditions of probation. See Commonwealth's Counterstatement of the Case.

Approximately seven months later, on December 19, 2006, the trial court revoked Machniak's probation, finding that Machniak had violated the conditions of his probation. The trial court explained that the three year sentences on each of the felony convictions would run consecutively to each other. The trial court further explained that the sentence would be capped at 20 years. There was no objection from defense counsel. When the trial court asked Machniak if he had any questions Machniak replied, "No, sir." The trial court entered an order revoking Machniak's probation. See Commonwealth's Counterstatement of the Case.

Machniak now argues that the trial court erred in sentencing him to 20 years in prison rather that the three year sentence stated in the initial written judgment. He bases his claim on the fact that the written judgment sentencing him to concurrent three year sentences did not mention the greater or consecutive sentences should he later violate the conditions of his probation. This Court, in Cardwell v. Commonwealth, 12 S.W.3d 672 (Ky. 2000), discussed the omission in the original judgment of a provision that Cardwell's sentence was to run consecutively with his previous sentence. Cardwell was present in open court when the trial judge pronounced the fact that Cardwell's sentence would run consecutively to the previous

sentence. Cardwell, discussed the distinction between clerical error and judicial error, noting that 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.'" Cardwell, *supra*, at 674. "A clerical error involves an error or mistake made by a clerk or other judicial or ministerial officer in writing or keeping records . . . ." Id. The Cardwell Court found that the omission in Cardwell's written judgment was a clerical error. Making that determination, this Court stated the following:

> That this is the correct result can be demonstrated by briefly examining the reverse situation in which a trial court orally sentences a defendant to a term that is to be served *concurrently* with another sentence. However, due to a clerical error, the written judgment specifies that the defendant's sentence is to be served *consecutive* to the other sentence. It would be fundamentally unfair to declare that, in such a situation, the written judgment controlled the oral judgment, and, thus, the written judgment was not subject to correction under RCr 10.10. Since the rule makes no distinction between correction of errors that favor a defendant and those that work to a defendant's detriment, it should be applicable in either case.

Cardwell, *supra*, at 675.

In Machniak's case, as in Cardwell, Machniak was present in court when the trial court indicated its intent to follow the plea agreement and sentence Machniak to consecutive three year terms (rather than concurrent three year terms) should Machniak's probation be revoked. The omission in Machniak's written judgment was not "the deliberate result of judicial reasoning and determination," as evidenced by the record both at the guilty plea, the sentencing hearing, and the revocation hearing. See Commonwealth's Counterstatement of the Case. The omission was a simple clerical error and the probation revocation order sentencing Machniak to consecutive terms was, in essence, the corrected judgment. Pursuant to RCr 10.10 the trial court

clearly had the authority to correct the omission in the judgment to conform with the intent of the trial court, the Commonwealth, and Machniak himself.

A number of other state courts and federal circuit courts support the principle that when a conflict exists between a court's unambiguous oral pronouncement of sentence and a written judgment, the oral pronouncement, as correctly reported, must control. See State v. Rodrigues, ____ P.3d ____, 2009 WL 3048413 (Utah, Sept. 25, 2009)(not yet final)(to ascertain the clerical nature of the mistake, under rule allowing court to correct clerical errors at any time, the Supreme Court looked to the record to harmonize the intent of the court with the written judgment); State v. Hendrckson, 198 P.3d 1029 (Wash. 2009)(trial court did not abuse its discretion in entering a *nunc pro tunc* order to correct a clerical error and to make the record "speak the truth."); *also see* Bean v. Commonwealth, 2009 WL 413727 (Ky. App. Feb. 20, 2009)(final)(*citing* Presidential Estates Apartment Associates v. Barrett, 917 P.2d 100, 103 (Wash. 1996); State v. Thomas, 290 S.W.3d 129, (Mo. App. S.D. 2009)(holding that "The failure to memorialize accurately the decisions of the trial court as it was announced in open court was clearly a clerical error."); State v. Timbana, 186 P.3d 635 (Idaho 2008)(the sentence orally pronounced by the court controls when there is any disparity between it and the written judgment of conviction); Ledbetter v. State, 129 P.3d 671 (Nev. 2006)(remand was required for purpose of correcting clerical errors in written judgment of conviction where written judgment differed substantially from oral pronouncement of sentence and sentence set forth in written judgment was incorrect.); Willey v. State, 712 N.E.2d 434 (Ind. 1999)(trial court's issuance of a written sentencing order in prosecution for felony murder and related crimes, which order was at odds with oral pronouncement at sentencing hearing, required remand for correction of clerical error where trial court's comments at sentencing clearly indicated the correct basis for sentencing.);

State v. Lane, 957 P.2d 9 (Mont. 1998)(sentence pronounced from bench in presence of defendant is the legally effective sentence and valid, final judgment; correction of clerical error was appropriate to correct written judgment to conform to oral pronouncement of sentence.); State v. Brydon, 454 A.2d 1385 (Me. 1983)(where there is discrepancy between the oral pronouncement of sentence and the written judgment in commitment, the oral pronouncement of sentence controls); Moore v. State, 456 S.W.2d 878 (Tex. Cr. App. 1969)(clerical error in judgment may be corrected by the court which rendered it under its inherent powers.)

In State v. Lane, 957 P.2d 9 (Mont. 1998), the Supreme Court of Montana noted that there was no need for a defendant to be present when a written judgment and commitment is handed down because, in most cases the judgment mirrors what was orally pronounced at the sentencing hearing. Id., at 14. The Court went on to state if the written judgment conflicts with the oral pronouncement of sentence and is the legally effective sentence, the defendant has been sentenced *in absentia*, violating his statutory right to be present. The Court noted that cases holding that an oral sentence can be altered or amended by a subsequent written sentence imposed out of the presence of a defendant contradicts Montana's statutory scheme and is unconstitutional and directly opposes federal authority. Id. "The only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant." Id., at 15, *citing*, United States v. Munoz-Dela Rosa, 495 F.2d 253, 256 (9th Cir. 1974) and United States v. Villano, 816 F.2d 1448, 1451-52 & n. 5 (10th Cir. 1987)(*en banc*). "It is the words pronounced by the judge at sentencing, not the words reduced to writing in the judge's Judgment/Commitment Order, that constitute the legal sentence. Id., at 15. In further support of this proposition, the Lane Court cites to the following circuits: United States v. Roberts, 933 F.2d 517, 519 n. 1 (7th Cir. 1991)(the transcript of the sentencing proceeding generally takes

precedence over the judgment order); United States v. Weir, 724 F.2d 94, 95 (8th Cir. 1984)(*per curiam*)(the oral sentence and not the written order constitutes the actual judgment of the court.); United States v. Lewis, 626 F.2d 940, 953 (D.C. Cir. 1980)(the oral sentence constitutes the judgment of the court and is the authority for execution of the court's sentence.); United States v. Marquez, 506 F.2d 620, 622 (2nd Cir. 1974)(the written judgment and commitment are nothing more than mere evidence of the sentence imposed orally by the judge). See Lane, at 15, fn.1.

The Lane Court states, "Sentencing should be conducted with the judge and defendant facing one another and not in secret. It is incumbent upon the sentencing judge to chose his words carefully so that the defendant is aware of his sentence when he leaves the courtroom." Id., at 16. In this case, the trial court explained to Machniak that his charges were serious and that in the event Machniak violated the conditions of his probation, his three year sentence on each of the (twelve) felony charges would run consecutively rather than concurrently. Machniak clearly told the court that he understood the consequences of a probation violation. See Commonwealth's Counterstatement of the Case.

The Lane Court also noted that a substantial number of federal circuit courts and state supreme courts subscribe to the principle that when a conflict exists between a court's unambiguous oral pronouncement of sentence and a written judgment, the oral pronouncement, as correctly recorded, must control. See Lane, at 16, fn. 2, *citing* to United States v. Chasmer, 952 F.2d 50, 52 (3rd Cir. 1991)("we will follow the firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when the two conflict."); United States v. Khoury, 901 F.2d 975, 977 (11th Cir. 1990)(oral sentence controls where there is a discrepancy between the orally imposed sentence and the written order of judgment); United States v. Makres, 851 F.2d 1016, 1017 (7th

Cir. 1988)("[t]he oral sentence prevails over a conflicting written sentencing order . . . ."); Johnson v. Mabry, 602 F.2d 167, 170 (8th Cir. 1979)(oral sentence pronounced by the sentencing judge constitutes the judgment); United States v. Kindrick, 576 F.2d 675, 677 (5th Cir. 1978)(any variance between the oral and written versions of the same sentence will be resolved in favor of the oral sentence."); United States v. Marquez, 506 F.2d 620 (2nd Cir. 1974); Whittlesey v. State, 626 P.2d 1066, 1068 (Alaska 1981)("the written judgment should conform to the oral sentence. The latter ordinarily controls."); State v. Hutchinson, 593 A.2d 666, 667 (Me. 1991)(oral pronouncement of sentence controls where a discrepancy exists between the oral pronouncement and the written judgment); Sampson v. State, 506 N.W.2d 722, 726-27 (N.D. 1993)(oral pronouncement controls where there is a direct conflict between the oral pronouncement of sentence and written judgment); State v. O'Rourke, 463 A.2d 1328, 1332 (R.I. 1983) ("[g]enerally when a discrepancy exists between an unambiguous oral pronouncement and a written judgment, the oral pronouncement will control."); State v. Ford, 328 N.W.2d 263 (S.D. 1982); State v. Perry, 401 N.W.2d 748, 758 (Wis. 1987)("where a conflict exists between a court's oral pronouncement of sentence and the written judgment, the oral pronouncement controls."); Christensen v. State, 854 P.2d 675 (Wyo. 1993).

The Lane Court also noted that while a court may correct clerical errors to make the record "speak the truth as to what was actually decided," the error must be apparent on the face of the record in order to insure that the correction does not change what was originally intended. Id., at 17. Thus the sentence orally pronounced from the bench in the presence of Machniak "speaks the truth" and is the legally effective sentence and valid, final judgment.

In addition, it should be pointed out that Machniak accepted the Commonwealth's offer in exchange for a plea of guilt to 29 criminal charges. As part of that plea agreement,

Machniak agreed that the three year sentence on each of his felonies would run consecutively should his probation be revoked. "[I]f the offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, than the agreement becomes binding and enforceable. Constitutional as well as contractual rights become involved." Commonwealth v. Reyes, 764 S.W.2d 62, 65 (Ky. 1989). In other words, a plea agreement is a binding contract. If the trial judge knows of the agreement and concurs in it, he will not be permitted to repudiate it any more than would the Commonwealth's Attorney. Id., at 66. The trial court in this case clearly understood the terms of the plea agreement between the Commonwealth and Machniak and clearly intended to enforce the terms of the agreement. "Courts have recognized that accepted plea bargains are binding contracts between the government and defendants." Hensley v. Commonwealth, 217 S.W.3d 885, 887 (Ky. App. 2007).

Machniak cites to Commonwealth v. Tabor, 941 S.W.2d 463, 464 (Ky. 1997) and Commonwealth v. Hicks, 869 S.W.2d 35, 37-38 (Ky. 1994), and the unpublished case of Craven v. Commonwealth, 2006 WL 1650968 (Ky. June 15, 2006), for the proposition that, when there is an inconsistency between oral statements of the presiding judge and a written judgment, the written judgment prevails. First, these cases are factually distinguishable in that Machniak, unlike the other defendants agreed to the later court imposed sentence. In this case, Machniak agreed to a total concurrent sentence of three years if probated and he agreed to a consecutive sentence if ordered to serve. TR, 104-107. Furthermore, Tabor and Hicks are not sentencing cases and therefore are not applicable to correction of a clerical error pursuant to RCr 10.10. Tabor and Hicks involve involuntary dismissal of the charges and the application of CR 41.02(3). Involuntary dismissals in CR 41.02, are not relevant in Machniak's case.

Craven, *supra*, is also distinguishable from Machniak's case. In Craven, this Court held that the imposition of mandatory court costs and fees, in the final judgment, was not a component of the plea agreement and did not alter or amend the conditions of the plea agreement. The Craven Court held that consideration and imposition of court costs and legal representation fees are mandatory obligations of the trial court prescribed by statute. Id., at slip opinion, page 2. This Court further concluded that imposition of such mandatory costs and fees after rendition of the oral pronouncement of judgment did not constitute the vindictive imposition of greater punishment envisioned in Hord v. Commonwealth, 450 S.W.2d 530, 531 (Ky. 1970). In Machniak's case, the amount of time he would serve in prison was very much a component of the plea agreement agreed to by all parties concerned. The sentence was no surprise to Machniak, as evidenced by the fact that there was no objection to the 20 year sentence by either Machniak or his attorney, upon revocation of his probation.

Machniak also cites to Viers v. Commonwealth, 52 S.W.3d 527 (Ky. 2001), in further support of his proposition that the written order was the final judgment. The Viers, case is also distinguishable from this case in that Viers did not involve a clerical error. Viers, at 528-529. Viers noted that the error in that case was far removed from the error in Cardwell, *supra*.

As stated above, Machniak moved to enter a guilty plea and signed the document. TR, 108. During the plea colloquy, Machniak indicated to the trial court that he fully understood his motion to enter a guilty plea and he had no questions about any part of the guilty plea. He further admitted that he had read and understood the Commonwealth's offer and that he voluntarily signed it. VR: 4/12/06; 15:21:48.

Subsequently, on May 24, 2006, during the sentencing hearing, the trial court read through each of the 29 counts, read each sentence, and explained that the sentences would be

probated for a total sentence of three years. VR: 5/24/06; 10:45:42. The trial court further explained, "If these sentences are revoked, then the felony charges will run consecutive to one another; that means one to begin after completion of the other. You understand that sir?" VR, 5/24/06; 10:46:56. Machniak responded, "Yes, sir." Id.

Then, at Machniak's revocation hearing, the trial court revoked Machniak's three year probationary sentence and sentenced him to serve as agreed, running the sentences consecutively with each other. VR: 12/19/06; 1:48:40. The trial court explained that the sentences could not exceed 20 years, and thus that would be the maximum sentence. VR: 12/19/06; 1:49:40. The trial court asked Machniak if he had any questions. VR: 12/19/06; 1:50:25. Machniak clearly responded, "No, sir." Id. There was no objection from trial defense counsel.

It is obvious as to why trial defense counsel did not object to the sentence. Machniak had clearly agreed to a consecutive (or maximum of 20 years) sentence if he was to serve the time, or, in the alternative, he agreed to a three year sentence if he were probated. Machniak received the benefit of the doubt from the court when the court sentenced him to a mere three years, probated for three years, in exchange for pleas of guilt in a 29 count indictment. Machniak, however, chose not to abide by the conditions of his probation, and thereby, in essence, chose the maximum sentence. The fact that the written judgment was silent on the fact that the three year sentences would be served consecutively upon revocation was a "fortuitous and undeserved windfall" for Machniak. Cardwell v. Commonwealth, 12 S.W.3d, 672, 675 (Ky. 2000). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Id. Machniak should not be allowed, now, to go behind his agreement and ask for a three year sentence. Due to the fact that Machniak

agreed to an increased sentence upon having to serve his time, the judgment of the circuit court should be affirmed.

II.

THE TRIAL COURT IMPOSED THE SENTENCE THAT WAS ORALLY PRONOUNCED AT THE TIME OF MACHNIAK'S SENTENCING; THEREFORE, MACHNIAK WAS NOT ENTITLED TO RECEIVE A SENTENCE OTHER THAN THAT PRONOUNCED AT THE SENTENCING HEARING AND, AGAIN, AT THE PROBATION REVOCATION HEARING.

Machniak argues that the 20 year sentence, which he agreed to, violated his protection against double jeopardy. Machniak, as in the previous issue, concedes that the issue is not preserved for review; he claims, however, that the issue is palpable error pursuant to RCr 10.26. Machniak, however, has not been placed in jeopardy twice. "The application of the double jeopardy clause to increase a prisoner's sentence turns on the extent of the legitimacy of a defendant's expectation of finality in that sentence." Cardwell v. Commonwealth, 12 S.W.3d 672, 675 (Ky. 2000), *citing* United States v. Fogel, 829 F.2d 77, 87 (D.C. Cir. 1987). "In other words, jeopardy only attaches to a sentence if the defendant has a legitimate expectation of the finality of that sentence." Cardwell, at 675. Therefore, the question that must be answered is whether Machniak had a legitimate expectation in the finality of his sentence. Under the facts of this case, he clearly did not have a legitimate expectation of finality.

Machniak was present in open court when the trial court sentenced Machniak to a total sentence of three years, probated for a period of three years. The trial court also stated, "If these are revoked, then the felony charges will run consecutively to one another; that means one to begin after completion of the other. You understand that sir?" Machniak replied, "Yes, sir." VR: 5/24/06; 10:46:56. The fact that the written judgment was silent that the sentence was to be

served consecutively upon probation revocation, came as a "fortuitous and undeserved windfall" for Machniak. Cardwell, at 675. "The omission in the written judgment cannot serve to create the *legitimate* expectation that the error was beyond correction. 'The constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.'" Cardwell, at 675, citing to Bozza v. Unites States, 330 U.S. 160, at 166-67 (1947). The double jeopardy clause "only proscribes resentencing where the defendant has developed a legitimate expectation of finality in his original sentence." State v. Rodrigues, ____ P.3d ____, 2009 WL 3045413 (Utah Sept. 25, 2009), at slip opinion page 7, *quoting* Pasquarille v. United States, 130 F.3d 1220, 1222 (6th Cir. 1997). Rodrigues noted that other jurisdictions have held that correction of a clerical error does not violate principles of double jeopardy when there is no legitimate expectation of finality in the sentence. See Rodrigues, at slip opinion page 7, *citing* to Gallinat v. State, 941 So.2d 1237, 1238-42 (Fla. Dist. Ct. App. 2006); and People v. Minaya, 445 N.Y.S.2d 690 (N.Y. 1981).

The trial court in this case intended to sentence Machniak to consecutive sentences if Machniak violated the conditions of his probation in accordance with the plea agreement. Machniak had no legitimate expectation of finality in the written judgment because it did not reflect what he had agreed to in the plea agreement. Because Machniak had no legitimate expectation of finality, the order sentencing him to consecutive sentencing does not violate protections against multiple punishments guaranteed under the double jeopardy clause. Rodrigues, at slip opinion, page 8.

Machniak cites to Hord v. Commonwealth, 450 S.W.2d 530 (Ky. 1970), for the proposition that an increase in sentence upon probation violation violates double jeopardy. As pointed out in Cardwell, however, Hord is inapplicable. In Hord, Hord pled guilty and received a

one year sentence, probated. Subsequently, his probation was revoked and the trial court re-sentenced him to two years imprisonment. In Hord, the defendant agreed to the lesser sentence but not, like Machniak, to the greater sentence. In addition, the Cardwell court pointed out that "the specter of vindictiveness" was present in Hord; Machniak makes no claim, nor does the record support, vindictiveness.

Other states support the fact that double jeopardy does not apply to barr the correction of a written judgment when the judgment is corrected to conform to the judgment it originally intended. State v. Lane, 957 P.2d 9, 19 (Mont. 1998); also see, State v. Owens, 748 P.2d 473, 474 (Mont. 1988), holding that no double jeopardy violation occurred when the court simply clarified its earlier sentence to conform with what it originally intended. The fact that the error, in this case, is apparent on the face of the record, insures that the correction did not, in effect, set aside the judgment actually rendered nor did it change what is actually intended. Id.

In United States v. DiFrancesco, 499 U.S. 117 (1980), the United States Supreme Court determined that considerations of double jeopardy do not accord a criminal sentence, once pronounced, the same constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. DiFrancesco, at 132. "Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." Id., at 133. The Court held that its decisions in the sentencing area clearly established that a sentence does not have the qualities of constitutional finality that attend an acquittal. Id. at 134. DiFrancesco points to Bozza v. United States, 330 U.S. 160 (1947), where the defendant had been convicted of a crime carrying a mandatory minimum sentence of both a fine and imprisonment. The trial court sentenced the defendant only to imprisonment. Later, however, on the same day, the judge recalled the defendant and imposed both the fine and imprisonment. The United States Supreme Court held

there was no double jeopardy violation stating, "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." DiFrancesco, at 135 citing Bozza, *supra*, at 166-67. The United States Supreme Court held that what the judge had done did not twice put the petitioner in jeopardy for the same offense." DiFrancesco, at 135, citing Bozza, at 167. The DiFrancesco Court went on to note that, "The Double Jeopardy Clause does not provide the defendant with a right to know at any specific moment in time what the exact limit of his punishment will turn out to be." DiFrancesco, at 137. "Congress has established many types of criminal sanctions under which the defendant is unaware of the precise extent of his punishment for significant periods of time, or even for life, yet these sanctions have not been considered to be violative of the Clause." Id. Thus, "There is no double jeopardy protection against revocation of probation and the imposition of imprisonment." Id. Machniak, like DiFrancesco, was aware, at the original sentencing, that a longer term of imprisonment might later be imposed; "his legitimate expectations are not defeated if the sentence is increased on appeal any more than are the expectations of the defendant who is placed on probation or parole that is later revoked." Id. at 137. Given that Machniak could have had no legitimate expectation of the finality of his sentence, double jeopardy does not barr imposition of the sentence which Machniak had previously agreed to at his sentencing hearing.

III.

THE TRIAL COURT IMPOSED THE SENTENCE PREVIOUSLY AGREED UPON BETWEEN MACHNIAK AND THE COMMONWEALTH IN THE NEGOTIATED PLEA AGREEMENT; NOTHING IN THE RECORD SUGGESTS ANY ADDITIONAL PUNISHMENT WAS PROVIDED BECAUSE OF THE SUBSEQUENT OFFENSE.

Machniak complains that the 20 year sentence imposed by the trial court demonstrates that it was the trial court's intent to exact a much more severe punishment on him due to his probation violation. In support of his claim that the trial court was trying to more severely punish the original conduct or that the court was trying to punish the conduct causing the revocation, Machniak, cites to Commonwealth v. Tiryung, 709 S.W.2d 454 (Ky. 1986). Tiryung notes that an offense which constitutes a probation violation, and thus grounds for revocation, may be a new criminal offense calling for punishment in its own right, but it is not grounds for providing greater punishment for the original offense which was probated. Tiryung, at 456. The Court noted that upon revoking Tiryung, the trial court had imposed the sentence previously agreed on between Tiryung and the Commonwealth in the plea agreement. The Tiryung Court further noted that nothing in the record suggested that additional punishment was provided because of Tiryung's subsequent offense; on the contrary, the court was presented with a defendant who failed to object when the court postponed fixing his initial sentence in order to grant him probation and, who now, having violated his probation sought to profit from having failed to object. Machniak is in the same posture as Tiryung. Upon revocation the trial court merely imposed the sentence previously agreed upon between Machniak and the Commonwealth. Nothing in the record indicated that the trial court provided additional punishment beyond what he agreed to because of Machniak's probation violations. In addition,

Machniak, like Tiryung, failed to object when the trial court postponed fixing his sentence in order to grant him probation and after having violated his probation, Machniak has sought to profit from having failed to object. Machniak has lost the right to complain after the fact absent circumstances showing he was prejudiced by the delay in sentencing.

At the time of his plea, and as discussed at the sentencing, Machniak agreed to either a three year term probated for three years, or a consecutive, maximum sentence of 20 years if to serve. The fact that Machniak ultimately chose the longer term of years as his penalty, does not mean that he was placed in double jeopardy for the same offenses. Because there is no double jeopardy, there is no palpable error.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals decision and affirm the judgment and sentence of the Letcher Circuit Court.

Respectfully submitted,

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