

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000103-MR

TERRY WAYNE TYLER

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 87-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Terry Wayne Tyler, *pro se*, appeals from a Henderson Circuit Court order denying Tyler's motion to correct judgment pursuant to CR 60.01. We affirm.

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<sup>1</sup> Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In April 1987, a Henderson County jury convicted Tyler of third-degree burglary, first-degree robbery, and being a second-degree persistent felony offender (PFO). The jury recommended an enhanced sentence of ten years' imprisonment for burglary and life imprisonment for robbery. The trial court sentenced Tyler accordingly.

The procedural history of Tyler's case is lengthy. This Court previously summarized the history of this case in an unpublished decision, *Tyler v. Commonwealth*, 2000-CA-001872-MR and 2000-CA-002019-MR, (Jan. 25, 2002):

In 1987, Tyler appealed his conviction directly. On March 3, 1988, the Kentucky Supreme Court affirmed Tyler's conviction in an unpublished opinion. In August 1988, Tyler filed a *pro se* motion pursuant to RCr 11.42 to vacate the circuit court's April 27, 1987 judgment. The Henderson Circuit Court denied his RCr 11.42 motion. In an attempt to appeal this denial, Tyler filed a motion for belated appeal with the circuit court, who lacked jurisdiction, and filed a similar motion with this court. On March 3, 1989, Tyler filed *pro se* a motion pursuant to CR 60.02 seeking a new trial on the alleged grounds of newly discovered evidence and perjured testimony. On April 17, 1989, he filed another *pro se* motion pursuant to CR 60.02 seeking relief from the circuit court's denial of his RCr 11.42 motion.

On June 22, 1989, the Henderson Circuit Court denied Tyler's two CR 60.02 motions, and Tyler failed to appeal this denial. Then on September 5, 1989, this Court denied Tyler's motion for belated appeal regarding the denial of his RCr 11.42 motion.

On April 26, 1990, Tyler filed his third motion pursuant to CR 60.02 claiming ineffective assistance of counsel. The circuit court denied this third CR 60.02 motion on May 29, 1990, and Tyler appealed to this court which affirmed the Henderson Circuit Court on February 8, 1991.

Next, on September 13, 1993, Tyler filed a *pro se* motion pursuant to KRS 532.070 to modify his sentence, which motion the circuit court denied on October 21, 1993. Tyler appealed the denial of his KRS 532.070 motion, and on October 11, 1995, this Court affirmed the Henderson Circuit

Court holding that Tyler's motion was untimely and his claims lacked merit.

On July 17, 1998, Tyler filed yet another motion pursuant to CR 60.02, claiming that an improper jury instruction was presented to the jury during the penalty phase. After the Commonwealth failed to respond, Tyler filed a motion for default judgment regarding his fourth CR 60.02 motion. On September 17, 1998, the Henderson Circuit Court denied both motions and concluded that Tyler's fourth CR 60.02 motion was untimely, and the relief he sought was not available pursuant to CR 60.02. Tyler appealed this denial. This Court again affirmed the circuit court and held that Tyler's motion was untimely. The issues should have been presented on direct appeal or in an RCr 11.42 motion and did not warrant relief pursuant to CR 60.02.

Finally, Tyler filed yet another motion pursuant to KRS 532.070 to modify his sentence. He claimed that an improper jury instruction had been presented to the jury during the penalty phase and that the Henderson Circuit Court still had jurisdiction to modify his sentence, although more than ten days had passed since the judgment against Tyler was entered. As stated above, on July 19, 2000, the circuit court denied Tyler's second motion to modify his sentence. On July 28, 2000, Tyler filed a motion with the Henderson Circuit Court requesting the circuit court issue findings of facts and conclusions of law regarding its denial. . . . [O]n August 3, 2000, the circuit court denied Tyler's motion for findings of facts and conclusions of law. Subsequently, Tyler appealed both denials to this court.

This Court affirmed the trial court in the above-referenced unpublished opinion.

Thereafter, in May 2004, Tyler, *pro se*, filed another RCr 11.42 motion with the Henderson Circuit Court. The court denied the motion as untimely, and this Court affirmed. *Tyler v. Commonwealth*, 2004-CA-001666-MR (June 3, 2005).

In November 2006, Tyler filed a motion pursuant to CR 60.01 asking the Henderson Circuit Court to vacate his PFO conviction due to a constitutional error in the penalty-phase jury instructions. The court denied Tyler's motion on December 16, 2006.

The court acknowledged that Tyler had raised this issue in previous motions and held that CR 60.01 did not afford relief for substantive legal errors. This appeal followed.

Tyler seeks relief from his conviction pursuant to CR 60.01. The rule states in 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 of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Tyler argues the improper jury instruction constituted an “oversight or omission” pursuant to CR 60.01, and the trial court must vacate his PFO conviction to correct the error. We disagree.

CR 60.01 allows the court to correct clerical mistakes, not substantive legal errors. *See Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000). Here, the trial court’s judgment clearly reflected the verdict of the jury. There is no clerical error in the judgment; rather, Tyler asserts a substantive legal argument attacking his conviction based on the validity of the jury instructions. As there is no clerical mistake at issue, Tyler’s argument is not properly before us pursuant to CR 60.01.

Even if this issue were before us on collateral attack pursuant to RCr 11.42 or CR 60.02, review would be foreclosed because Tyler could have raised the issue on direct appeal. *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983). Likewise, Tyler has previously raised similar arguments in other post-conviction motions.

For the reasons stated herein, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Terry Wayne Tyler, *Pro Se*  
Beattyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky