

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Francis O’Neill, :
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 Petitioner :
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 v. :
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 Commonwealth of Pennsylvania :
 Pennsylvania Department of :
 Corrections, : No. 17 M.D. 2011
 Respondent : Submitted: September 2, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE PELLEGRINI

FILED: September 29, 2011

Before this Court is the preliminary objection in the nature of a demurrer filed by the Department of Corrections (Department) to the *pro se* amended petition for review in the nature of mandamus filed by Francis O’Neill (O’Neill), an inmate currently incarcerated at the State Correctional Institution (SCI) at Huntingdon, to have the Department recalculate his sentence. O’Neill asserts that the Department incorrectly recorded his sentences on his convictions to be served consecutively rather than concurrently in violation of his sentencing order. For the reasons that follow, we grant the Department’s preliminary objection.

The facts as related in the petition for review are as follows. In 1981, O'Neill was sentenced by the Court of Common Pleas of Philadelphia County (trial court) for his conviction of the charges of third degree murder, criminal conspiracy and three counts of aggravated assault. A copy of the actual sentencing order was not attached to the petition but in support of his argument, O'Neill attached to his petition a certified document from Michelle Ursone, clerk of the trial court's appeals unit, which purports to be a true and correct copy of O'Neill's docket entries regarding his criminal case. According to O'Neill's petition, this certified document demonstrates that his sentence was to run *concurrently*. O'Neill asks that the Department be mandated to recalculate his sentence so that his convictions are served concurrently, which will reduce his sentence from the minimum 25 to 50 years imprisonment that he would have to serve if the sentences were served consecutively.

The Department filed a preliminary objection in the nature of a demurrer alleging that it properly calculated O'Neill's sentence. In support of this argument, the Department attached the DC-300B Form filed in O'Neill's criminal case which indicates that his sentence is to run consecutively. The Department also attached a letter received from the Honorable Gary Glazer of the Court of Common Pleas of Philadelphia County. Judge Glazer was not O'Neill's sentencing judge but wrote to indicate that he believed the trial court intended for the sentence to run consecutively and that the docket summary O'Neill relied upon was erroneously prepared. Finally, the Department attached the unsworn declaration of Andrea Wakefield, Inmate Records Supervisor at SCI Huntingdon, stating that the DC-300B Form and correspondence from Judge Glazer were produced from O'Neill's file and kept in the course of the regularly conducted activities of the Department. The Department's demurrer also cites *McCray v.*

Pennsylvania Department of Corrections, 582 Pa. 440, 450, 872 A.2d 1127, 1133 (2005), for the proposition that because the Department is part of the executive branch, it “lacks the power to adjudicate the legality of a sentence or to add or delete sentencing conditions.” Therefore, the Department argues that O’Neill’s petition must be dismissed because he does not have a clear right to relief. O’Neill filed a response in opposition to the Department’s preliminary objection. The matter has been briefed¹ and is now ripe for our review.

Initially, we note that in ruling on preliminary objections in the nature of a demurrer, we must admit as true all well-pled allegations and material facts averred in the petition and any inferences reasonably deduced therefrom. *Weaver v. Franklin County*, 918 A.2d 194, 199 n.6 (Pa. Cmwlth. 2007). It is well established that a demurrer should only be sustained in cases that are clear and free from doubt and only where it appears with certainty that the law will not permit recovery. *Danysh v. Department of Corrections*, 845 A.2d 260, 263 (Pa. Cmwlth. 2004). However, it is equally clear that when considering a demurrer, a court must limit itself to matters contained within the complaint itself. *Stilp v. Commonwealth*, 910 A.2d 775, 791 (Pa. Cmwlth. 2006). A demurrer which avers the existence of facts not readily apparent from the face of the challenged pleading is considered an improper speaking demurrer and is not permitted.² *Smith v.*

¹ On August 18, 2011, this Court issued a per curiam order striking O’Neill’s brief for failure to comply with our previous order.

² There is a limited exception to the rule against speaking demurrers. However, this exception only allows a defendant to file a document in support of his demurrer when a plaintiff has specifically averred the existence of that written document and has premised his cause of action upon the document. *Barndt v. Department of Corrections*, 902 A.2d 589, 591 n.2 (Pa. Cmwlth. 2006). None of the documents supplied by the Department were mentioned in O’Neill’s petition for review.

Pennsylvania Employees Benefit Trust Fund, 894 A.2d 874, 877 n.3 (Pa. Cmwlth. 2006) (citing *Martin v. Department of Transportation*, 556 A.2d 969 (Pa. Cmwlth. 1989)).

While the Department's demurrer alleges that it properly calculated O'Neill's sentence, it improperly refers to matters not contained within the petition for review and, therefore, is an improper speaking demurrer. However, based upon the certified docket entry O'Neill attached to his petition for review, the Department correctly calculated his sentence.

According to the certified docket entries, O'Neill's sentence was ordered as follows:

Sentence as to aggravated assault, Bill #866 – no less than 5 years nor more than 10 years to run *concurrently* to Bill #873.

Sentence as to criminal conspiracy, Bill #870 – no less than 5 years nor more than 10 years to run *consecutively* to Bill #871.

Sentence as to third degree murder, Bill #871 – no less than 10 years nor more than 20 years to run *consecutively* to any sentence now serving.

Sentence as to aggravated assault, Bill #873 – no less than 5 years nor more than 10 years to run *consecutively* to Bill #870.

Sentence as to aggravated assault, Bill #876 – no less than 5 years nor more than 10 years to run *consecutively* to Bill #866.

(Attachment A to Petition for Review). The certified docket entries demonstrate that the only portions of O'Neill's sentence which were to run concurrently were those regarding two of his aggravated assault charges; the rest of his sentence was to run consecutively. Based on those docket entries attached to O'Neill's petition, the Department correctly calculated his sentence as requiring him to serve a minimum of 25 years and a maximum of 50 years in prison.

Accordingly, the Department's preliminary objection in the nature of a demurrer is sustained, and O'Neill's petition for review is dismissed.

DAN PELLEGRINI, Judge

