

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Albert Baxter,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Corrections, and Party,	:	
M. Granland,	:	No. 439 M.D. 2009
	:	
Respondents	:	Submitted: February 12, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: March 18, 2010

Albert Baxter (Petitioner) filed a petition for review, pro se, in this Court's original jurisdiction, seeking a writ of mandamus to compel the Pennsylvania Department of Corrections (Department) to recalculate his sentence to provide credit for his allegedly illegal re-sentencing. The Department filed a preliminary objection in the form of a demurrer pursuant to Pa. R.C.P. No. 1028(a)(4) for legal insufficiency of the pleadings. For the reasons that follow, we sustain the Department's preliminary objection.

Petitioner is an inmate currently incarcerated in the State Correctional Institution at Huntingdon. On September 19, 2002, Petitioner pled guilty to charges of possession with intent to sell drugs, and was sentenced by Judge Leslie Fleisher to a two to four year term followed by five years probation. At the time of the

September 19, 2002 sentencing, Petitioner was already serving a two to four year sentence followed by three years probation which had been imposed by Judge Sandy Byrd. On March 10, 2007, Petitioner claims he violated Judge Byrd's probation.

On November 7, 2007, Judge Fleisher terminated Petitioner's probation and re-sentenced him to a two to four year term on the sentence she previously imposed. Petitioner claims that Judge Fleisher's sentence is illegal because he believed that he had served Judge Fleisher's sentence and was no longer on probation in November of 2007; thus, according to Petitioner, he is being punished again for the same crime. Petitioner seeks a writ of mandamus directing the Department to recalculate his sentence to provide "credit" toward his sentence. The Department maintains that Petitioner is actually asking to strike the two to four year sentence imposed on November 7, 2007. The Department filed its preliminary objection stating that it does not have the authority to determine whether the sentence was proper, it only has the ability to carry out the terms imposed by a trial court.

In ruling upon a preliminary objection in the nature of a demurrer, all well-pleaded allegations of material fact and all inferences reasonably deducible therefrom must be accepted as true. The court, however, need not accept conclusions of law, unwarranted inferences, argumentative allegations, or expressions of opinion. A demurrer must be sustained where it is clear and free from doubt that the law will not permit recovery under the alleged facts.

Bright v. Pennsylvania Bd. of Prob. and Parole, 831 A.2d 775, 777 (Pa. Cmwlth. 2003) (citations omitted). "Mandamus can only be used to compel performance of a ministerial duty and will not be granted in doubtful cases." *Doxsey v. Commonwealth*, 674 A.2d 1173, 1174 (Pa. Cmwlth. 1996). "[M]andamus will lie only where the petitioning party demonstrates its clear right to relief, a

correspondingly clear duty on the part of the party against whom mandamus is sought, and the want of any other adequate remedy.” *Id.*

It appears from the trial court docket listings (CP-51-CR-0507871-2001) that Petitioner filed a motion for modification *nunc pro tunc* on October 27, 2009. Clearly, modification of the sentence by the trial court would be the appropriate remedy if one is to be afforded, as opposed to a mandamus against the Department. “In a situation where, because a sentence is illegal, a prisoner does not receive the benefit of his plea bargain, the proper avenue [is generally] to seek relief in the sentencing court.” *Fajohn v. Dep’t of Corr.*, 547 Pa. 649, 651, 692 A.2d 1067, 1068 (1997) (stating: “The question we must decide is whether, when a sentencing judge issues a clearly illegal order, mandamus will lie against the Department of Corrections to compel it to honor that order. We hold that it will not”).

Furthermore, the law is clear that, “[t]he Department is an executive branch agency that is charged with faithfully implementing sentences imposed by the courts. As part of the executive branch, the Department lacks the power to adjudicate the legality of a sentence or to add or delete sentencing conditions.” *McCray v. Pennsylvania Dep’t of Corr.*, 582 Pa. 440, 450, 872 A.2d 1127, 1133 (2005). It is not up to the Department to determine whether Judge Fleisher’s sentence is “illegal” as Petitioner claims. Its only duty, in the present case, is to implement the imposed sentence, which it did. Therefore, we sustain the Department’s preliminary objection and dismiss Petitioner’s petition for review for legal insufficiency pursuant to Pa. R.C.P. No. 1028(a)(4).

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 18th day of March, 2010, the Pennsylvania Department of Corrections' preliminary objection for legal insufficiency of a pleading is sustained and Albert Baxter's petition for review is dismissed.

JOHNNY J. BUTLER, Judge