[J-177-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH V. PENNSYLVANIA,	: No. 22 EAP 2004
	:
Appellee	: Appeal from the Judgment of the Superior
	: Court entered on November 18, 2003 at
	: No. 1586 EDA 2002, reversing the
v.	: Judgment of Sentence of the Court of
	: Common Pleas of Philadelphia County,
	: Criminal Division, entered on April 9, 2002
CHRISTOPHER HOLMES,	: at 1287 March Term, 1996
	:
Appellant	: 837 A.2d 501
	:
	: ARGUED: October 18, 2004
	: RESUBMITTED: November 21, 2006
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COMMONWEALTH V. PENNSYLVANIA,	: No. 24 EAP 2004
	:
Appellant	: Appeal from the Judgment of the Superior
	: Court entered on August 22, 2003 at No.
	: 3194 EDA 2002, affirming the order of the
v.	: Court of Common Pleas of Philadelphia
	: County, Criminal Division, entered on
	: October 10, 2002 at 9106-2342-44 1/1
RUFUS WHITFIELD,	:
	: ARGUED: October 18, 2004
Appellee	: RESUBMITTED: November 21, 2006
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	:
	:
	:

CONCURRING OPINION

MADAME JUSTICE BALDWIN **DECIDED: October 16, 2007**

I join the well-reasoned majority opinion in full with regard to Appellant Christopher Holmes. I also join the opinion with regard to Appellee Rufus Whitfield, but do so with

reluctance. I write separately to express my concern regarding the single, and I believe critical, fact that distinguishes Whitfield's case from Holmes'. In Whitfield's situation, the case was on appeal, subject to the Superior Court's jurisdiction, when the trial court modified its order. See Majority Opinion, at 10. Holmes' case was not on appeal at that time. Therefore, his case was not subject to another court's jurisdiction at the time of the trial court's action. See Majority Opinion, at 4. In my opinion, in the circumstance where a case is on appeal and is thus under the appellate court's jurisdiction, the trial court is divested of all power, express or inherent, to modify its orders, no matter how patent and obvious. Jurisdiction, in this sense, is an all-or-nothing proposition. I recognize that this Court's decision in Commonwealth v. Klein, 566 Pa. 396, 781 A.2d 1133 (2001), reads otherwise.

In Klein, a jury found Maurice Klein guilty of simple assault, recklessly endangering another person, and accidents involving death or personal injury. Id. at 398, 781 A.2d at 1133. At sentencing, there was a dispute over how many days Klein had spent in jail prior to trial. The pre-sentence report indicated that he had spent thirty-three days in jail, while defense counsel informed the court that he had only spent one day in jail. Despite the admission of defense counsel, the trial court nonetheless credited Klein for thirty-three days of time served.[1] Id. at 398, 781 A.2d at 1134.

On June 25, 1999, the York County prison officials contacted the trial court and clarified that Klein had indeed only served a single day in jail and was then released. The trial court issued an order requiring Klein to appear five days later for re-sentencing. However, between the date the order was issued and the date scheduled for re-sentencing, Klein filed a notice of appeal from the original sentencing order with the Pennsylvania

[1] Klein was sentenced to serve the time served (thirty-three days) to twelve months in prison.

Superior Court. Id. The second sentencing hearing nevertheless went forward. At that hearing, Klein challenged the trial court's authority to modify the sentence, alleging that the trial court was without jurisdiction as the case was then on appeal. The trial court rejected Klein's argument and modified the order to reflect the accurate amount of time served before trial. Id. at 399, 781 A.2d at 1134.

On appeal, the Superior Court found that the June 25, 1999 order implicitly vacated the original sentencing order, as the court left no doubt that it would be re-sentencing Klein at the hearing. As such, the court further concluded that Klein improperly filed an appeal from the original sentencing order, which it held had been vacated. Id. This Court granted allowance of appeal and held that the June 25, 1999 order did not implicitly vacate the original sentencing order. First, we noted that this Court has never held that an order can be implicitly vacated. Id. at 400, 781 A.2d at 1135. Secondly, we found that the June 25, 1999 order did not vacate the previous order, but merely ordered Klein to appear for another sentencing hearing. Id. Thus, Klein's Notice of Appeal was properly filed.

Since we held that the sentencing order was not vacated, we were left to determine whether the trial court had jurisdiction to modify that order. In addressing this question, the following conflict became apparent:

> The law is clear that a court may modify or rescind any order within 30 days after its entry, if no appeal has been taken. 42 Pa.C.S. § 5505; Pa.R.A.P. 1701(a). Thus, where a Notice of Appeal has been filed, the trial court cannot act further in the matter. However, this rule must be read in conjunction with a court's inherent powers "to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or supply defects or omissions in the record, even after the lapse of the term."

Id. at 400, 781 A.2d at 1135 (quoting Commonwealth v. Cole, 437 Pa. 288, 292, 263 A.2d 339, 341 (1970)). In Cole, this Court held that a trial court has the inherent power to correct

errors on the record that were "obvious and patent" even where the action was taken beyond the thirty-day statutory limit to modify orders. Cole, 437 Pa. at 292, 263 A.2d at 341. The Klein Court held the court's inherent powers, as described in Cole, permitted the trial court to modify the original sentencing order beyond the thirty day time limit codified in 42 Pa.C.S. § 5505, despite the fact that the case was properly on appeal. Klein, 566 Pa. at 401, 781 A.2d at 1135.

Given the opportunity, I would overrule Klein. However, where, as here, this Court is without the benefit of full briefing and argument from the parties, the jurisprudentially sound course of action is to wait for another day to address the extant viability of Klein. The conflict seemingly resolved in Klein was already discussed in Cole and decided in Commonwealth v. Tabb, 417 Pa. 13, 207 A.2d 884 (1965). Yet, the Klein Court neglected to discuss Tabb, or attempt to overrule it.

In Cole, the trial court granted both a new trial and a motion in arrest of judgment, and later amended its order to grant only the motion for a new trial three and one half months after the original order. On review, we held that since the result of granting both motions was so clearly antagonistic, the error must be considered patent and obvious. Where that is the case, the trial court's inherent and long-standing powers include the power to correct such mistakes. Cole, 437 Pa. at 292, 263 A.2d at 341. Cole argued that the trial court did not have jurisdiction, citing Tabb. However, this Court rejected that argument by distinguishing Tabb on the grounds that, in Tabb, the trial court was without jurisdiction because an appeal had been perfected. Cole, 437 Pa. at 292, 263 A.2d at 341. Cole had not perfected an appeal. Thus, Tabb was held to be inapplicable and the trial court's inherent powers provided an acceptable basis for its action.

The Klein Court, without discussion of the Tabb principle, simply resolved the conflict in favor of the trial court's long-standing powers. However, equally long-standing is the principle that once a case is properly on appeal, subject to the respective appellate court's

jurisdiction, the trial court is divested of all powers, express or inherent, unless otherwise provided by a law or rule. See Hardwood v. Bruhn, 313 Pa. 337, 170 A. 144 (1934). If the Tabb/Hardwood rule is not upheld, it will be left to the each trial court to individually interpret its inherent powers when a case is on appeal. Pennsylvania Rule of Appellate Procedure 1701(b) enumerates the powers inherently held by the trial court after an appeal has been perfected. Under this rule, a trial court may:

> (1) Take such action as may be necessary to preserve the status quo, correct formal errors in papers relating to the matter, cause the record to be transcribed, approved, filed and transmitted, grant leave to appeal in forma pauperis, grant supersedeas, and take other action permitted or required by these rules or other ancillary to the appeal or petition for review proceeding.
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> (2) Enforce any order entered in the matter, unless the effect of that order has been superseded as prescribed in this chapter.
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> (3) Grant reconsideration of the order which is the subject of the appeal or petition, if:
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> > (i) an application for reconsideration of the order is filed In the trial court or other governmental unit within the time provided or prescribed by law: and
> >
> > (ii) an order expressly granting reconsideration of such prior order is filed in the trial court or other governmental unit within the time prescribed by these rules for filing a notice of appeal or petition for review of a quasijudicial order with respect to such order, or within any shorter time provided or prescribed by law for the granting of reconsideration.
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> A timely order granting reconsideration under this paragraph shall render inoperative any such notice of appeal or petition for review of a quasijudicial order theretofore or thereafter filed or docketed with respect to the prior order. The petitioning party shall and any party may file a praecipe with the

> prothonotary of any court in which such an inoperative notice or petition is filed or docketed and the prothonotary shall note on the docket that such notice or petition has been stricken under this rule. Where a timely order of reconsideration is entered under this paragraph, the time for filing a notice of appeal or petition for review begins to run anew after the entry of the decision on reconsideration, whether or not that decision amounts to a reaffirmation of the prior determination of the trial court or other governmental unit. No additional fees shall be required for the filing of the new notice of appeal or petition for review.
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> (4) Authorize the taking of depositions or the preservation of testimony where required in the interest of justice.
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> (5) Take any action directed or authorized on application by the appellate court.
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> (6) Proceed further in any matter in which a nonappealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order.

Pa.R.A.P. 1701(b).

Whitfield's case was properly on appeal. The majority correctly applies Klein, as we are not asked by the parties to reconsider the conflict detailed above. Therefore, I hesitate to advocate overruling Klein in this case without the benefit of full briefing and argument by the parties before the entire Court. In the appropriate case, however, I perceive that Klein could not control. I am compelled, by the current state of the law, to join the majority opinion with regard to Whitfield, although I do so reluctantly.