IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leon Mathis, Jr.,	:	
Petitioner	:	
	:	
v.	:	No. 53 M.D. 2008
	:	Submitted: August 22, 2008
Commonwealth of Pennsylvania,	:	
Department of Corrections,	:	
Jerry T. Leathers, Cindy L. Gates,	:	
Court of Common Pleas of Erie	:	
County, Pennsylvania,	:	
Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: October 24, 2008

Before this Court is a *pro se* petition for review addressed to our original jurisdiction filed by inmate Leon Mathis, Jr., who seeks a writ of mandamus. Mathis requests this Court to determine that the Department of Corrections (Department) and the Court of Common Pleas of Erie County (trial court) (collectively "Respondents") have improperly revised his sentence in violation of Section 5505 of the Judicial Code, 42 Pa. C.S. §5505. Respondents have filed preliminary objections in the nature of a demurrer. Because Mathis has failed to establish a clear legal right to relief, we will sustain Respondents' preliminary objections and dismiss the petition for review.[1]

[1] Mathis also requests appointment of counsel to represent him before this Court. Because we sustain Respondents' preliminary objections, Mathis's request for appointment of counsel is moot.

Mathis is an inmate at the State Regional Correctional Facility at Mercer (SRCF-Mercer). On or about April 12, 2005, Mathis was committed to serve two consecutive six-month sentences for failure to pay child support. On June 10, 2005, Mathis was ordered to serve a 36 to 96 month sentence for his drug trafficking conviction. In sentencing Mathis for his criminal conviction, the trial court directed the Department to credit his incarceration from April 12, 2005, to June 10, 2005, towards his criminal conviction. However, the trial court did not state whether Mathis's criminal sentence was to run consecutively to, or concurrently with, the two domestic relations sentences.[2]

In a letter of August 9, 2005, Warren E. Ulsh, Jr., Corrections Records Supervisor for the Department, requested clarification from the trial court pursuant to Pennsylvania Rule of Criminal Procedure 705, which provides that "when a sentence is imposed on a defendant who is sentenced for another offense, the judge shall state whether the sentence shall run concurrently or consecutively." Pa. R. Crim. P. 705(B). While awaiting the direction of the trial court, the Department tentatively computed Mathis's civil and criminal sentences to run concurrently and stated in its letter to the trial court that the tentative sentence computation would become permanent if the Department did not receive clarification within sixty days.

Ulsh sent a second letter, also dated August 9, 2005, advising the trial court that Mathis had already received credit toward his domestic relations sentences for the period of time served from April 12, 2005, to June 10, 2005. The Department pointed out that, based on *Doxsey v. Commonwealth*, 674 A.2d 1173

[2] It appears that the trial court was unaware that Mathis's incarceration was for something other than his criminal drug trafficking charges.

(Pa. Cmwlth. 1996), it could not give Mathis duplicate credit for time served in satisfaction of two separate and distinct sentences.[3]

In response, the trial court sent a letter to Ulsh on August 15, 2005. It stated in relevant part:

> I am in receipt of your correspondence of August 9, 2005 regarding the above-named inmate. Please be advised that Mr. Mathis' sentence at this docket number should be served consecutively to any period of incarceration he was serving on his civil commitment for failure to pay child support.
>
> I also believe that you are correct with regard to the credit issue and Mr. Mathis is entitled to credit against this sentence of 23 days representing the period he was incarcerated after the date of arrest on these charges until the date he was released on bond. The credit period set forth in the commitment is incorrect.

Corrections Respondents' Preliminary Objections, Exhibit A.

Mathis filed a petition with the trial court requesting that his criminal and civil commitment sentences run concurrently. The trial court instructed him to reassert his claim through a petition for writ of mandamus filed in this Court, and Mathis did so. Presently, Mathis seeks mandamus relief in the form of an order directing Respondents to run his sentences concurrently. For the reasons set forth below, we hold that Mathis is not entitled to such relief.[4]

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[3] This Court held in *Doxsey* that a sentencing court's order directing that an inmate receive duplicate credit was an illegal act which the Department could not be compelled to obey. *Doxsey*, 674 A.2d at 1175.

[4] Mathis asks this Court to order Respondents to provide him with a copy of the trial court's August 15 letter advising the Department that Mathis's drug sentence should run consecutive to his domestic relations sentences. Because copies of all of the relevant correspondence, including the August 15 letter, were attached as exhibits to Respondents' preliminary objections, Mathis's request is moot.

Mandamus is an extraordinary writ, designed to compel a public official's performance of a ministerial act, and may issue only where (1) the petitioner has a clear legal right to enforce the performance of an act, (2) the defendant has a corresponding duty to perform the act and (3) the petitioner has no other adequate and appropriate remedy. *Silo v. Commonwealth*, 886 A.2d 1193, 1195 (Pa. Cmwlth. 2005). When a petitioner seeks a writ of mandamus, "his threshold burden is to establish a clear legal right to relief." *Garber v. Department of Corrections*, 851 A.2d 222, 225 (Pa. Cmwlth. 2004). Mathis cannot satisfy this threshold burden.

Mathis contends that the trial court acted improperly when it clarified his sentence as requested by the Department. Section 5505 of the Judicial Code authorizes a court to modify a sentence. It states:

> Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa. C.S. §5505. The corollary to this rule is that a trial court may not modify a criminal sentence after expiration of this 30-day period. In *City of Philadelphia Police Department v. Civil Service Commission of City of Philadelphia*, 702 A.2d 878, 880 (Pa. Cmwlth. 1997), this Court stated that

> [a] tribunal loses jurisdiction to change an order once it becomes final; otherwise, nothing would ever be settled. Absent a specific rule or statute, the only exception is to correct obvious technical mistakes (*e.g.*, wrong dates) but no substantive changes can be made.

Id. (internal citations omitted). Mathis argues that the trial court was divested of jurisdiction to modify his sentencing order 30 days after it was entered, or July 10,

2005; therefore, the trial court did not have jurisdiction to provide the clarification requested by the Department in August 2005.

In their preliminary objections, Respondents assert that Mathis does not state a cause of action in his petition.[5] Respondents maintain that the Department complied with the trial court's directive to run the sentences consecutively.[6] Accordingly, Respondents contend that Mathis has not established either a right on his part to have the sentences conformed to run concurrently or a duty on the part of the Department to run the sentences concurrently.

In *Barndt v. Department of Corrections*, 902 A.2d 589 (Pa. Cmwlth. 2006), the Department requested that the sentencing judge clarify the terms of an inmate's sentence with respect to credit for time the inmate had served on a previously imposed federal sentence. The trial court advised the Department that the inmate should not receive the duplicative credit. Before this Court, the inmate contended that the exchange of correspondence between the Department and the trial court was a "decision making process." *Id.* at 596. This Court disagreed, stating that the

> sentencing phase of a defendant's trial is plainly distinguishable from [the Department's] attempts to apply, and to clarify if so

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[5] "Preliminary objections in the nature of a demurrer are deemed to admit all well-pleaded material facts and any inferences reasonably deduced therefrom, but not the complaint's legal conclusions and averments." *Danysh v. Department of Corrections*, 845 A.2d 260, 262 (Pa. Cmwlth. 2004). In order to sustain preliminary objections, it must appear with certainty that the facts pleaded are legally insufficient to establish a right to relief. *Werner v. Zazyczny*, 545 Pa. 570, 578, 681 A.2d 1331, 1335 (1996). "[A]ny doubt should be resolved by a refusal to sustain them." *Newsuan v. Department of Corrections*, 853 A.2d 409, 411 (Pa. Cmwlth. 2004).

[6] "The 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. Department of Corrections*, 582 Pa. 440, 450, 872 A.2d 1127, 1133 (2005).

> needed prior to applying, the sentencing court's order, due to the sentencing court's actual imposition of a sentence as opposed to [the Department's] sole function to execute the terms of that sentence.

Id. at 597.

Mathis argues that the trial court's August 15 letter functioned as a modification of his sentence outside of the trial court's thirty-day jurisdictional window for altering sentencing orders. While Mathis is correct that Section 5505 of the Judicial Code divests a trial court of jurisdiction to modify a sentencing order after thirty days, the principle is irrelevant here. As *Barndt* established, an attempt by the Department to obtain clarification from the sentencing judge regarding the application of a defendant's sentencing terms is distinct from a change to the sentence itself. This Court aptly identified the clarification attempt as "[the Department's] mere administrative application of a previously adjudicated sentence."[7] *Id.*

In this case, the trial court did not order Mathis's sentences to be served concurrently and then later modify the order in his August 15 letter to direct that they be served consecutively.[8] The sole purpose of the August 15 letter was to

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[7] The Department's letters to Judge Bozza were written in August 2005, prior to this Court's decision in *Oakman v. Department of Corrections*, 903 A.2d 106 (Pa. Cmwlth. 2006). In that case, as in the present case, the Department sent a letter to the sentencing judge because it believed the inmate's sentence was illegal. Prior to *Oakman*, the Department would run the sentence in what it believed to be a legal manner until it heard otherwise from the judge. *Id.* at 109. However, after the *Oakman* decision established that the trial court's order is to be strictly obeyed, the Department now honors the judge's sentence as imposed, even if it believes the sentence may be illegal, unless the judge tells it not to do so.

[8] Mathis did not provide a copy of the trial court's sentencing order, nor did he clearly argue that the trial court's clarification altered the original sentencing order. Rather, Mathis apparently believes that because the sentencing structure that the Department employed while awaiting clarification from the trial court showed the sentences were to run concurrently, the trial court's

(Footnote continued on the next page . . .)

clarify how the Department should apply the sentence that had already been imposed. As such, it was not a modification or alteration of Mathis's sentence, and the thirty-day limitations period is not applicable.[9]

For the foregoing reasons, we hold that Mathis does not have a clear legal right to compel Respondents to have his sentences to run concurrently. The preliminary objections of Respondents are sustained, and Mathis's petition for review is dismissed.

MARY HANNAH LEAVITT, Judge

Judge Pellegrini concurs in the result only.

(continued . . .)

clarification of its commitment order is a modification of the original sentencing order. Petition for Review ¶ 4. This belief is clearly erroneous. To the contrary, the Department clearly stated in its letter to the trial court that it calculated Mathis's sentences to run concurrently in the interim for purely administrative reasons:

> The Department of Corrections is unable to accurately compute [Mathis's] permanent sentence until we are advised whether the sentences imposed are to run consecutively or concurrently. In order to proceed with the classification process, the Department of Corrections has, therefore, tentatively computed [Mathis's] sentence structure as if the sentences imposed were to run concurrently. It is, therefore, respectfully requested that the Department of Corrections be advised whether the sentences imposed are to run consecutively or concurrently. If the Department of Corrections does not receive further clarification within the next sixty (60) days, this tentative sentence computation will become permanent.

Respondents' Preliminary Objections, Exhibit A.

[9] Although the issue is not before us in this case, we note that Mathis and others similarly situated are not without a remedy. This Court established in *Barndt* that inmates can exercise their due process rights by filing a motion *nunc pro tunc* with the trial court for reconsideration, modification, or clarification of the original sentencing order. 902 A.2d at 597.

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Commonwealth of Pennsylvania, Department of Corrections, Jerry T. Leathers, Cindy L. Gates, Court of Common Pleas of Erie County, Pennsylvania, Respondents	:	

ORDER

AND NOW, this 24th day of October, 2008, Respondents' preliminary objections are SUSTAINED, and the petition for review filed by Mathis is hereby DISMISSED.

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MARY HANNAH LEAVITT, Judge