**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>SAMUEL ELBERT POWELL,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 759, 760, 761 WDA 2013 |

Appeal from the Orders entered April 4, 2013,
in the Court of Common Pleas of Westmoreland County,
Criminal Division, at No(s): CP-65-CR-0002580-1988,
CP-65-CR-0001558-1989 and CP-65-CR-0001559-1989

BEFORE: BOWES, ALLEN, and LAZARUS, JJ.

MEMORANDUM BY ALLEN, J.: **FILED DECEMBER 13, 2013**

Samuel Elbert Powell ("Appellant") appeals from the orders which corrected the prior sentencing orders entered on January 22, 1990. We affirm.

The pertinent facts and procedural history are as follows: On November 30, 1988, Trooper Kevin Graham of the Pennsylvania State Police was contacted by the Westmoreland County Children's Bureau to investigate a report of sexual abuse against an eight-year-old girl ("victim"). N.T., 10/30/89, at 5-6. A physician at Latrobe Hospital examined the victim and found a very large laceration in the inner wall of the victim's vagina, which required suturing to stop the bleeding. *Id*. at 8; N.T., 1/22/90, at 32. The victim informed the police that for "as long as she could remember,"

Appellant had sexually abused her, forcing her to perform oral sex, tying her down, and performing sexual acts on her himself, and with a dog. N.T., 10/30/89, at 11-13. Appellant was arrested and charged with a multitude of offenses. On October 30, 1989, Appellant pled guilty to the following:

At Docket No. 2580-1988 (2580 c 88): Count 1 - Attempted Rape; Count 2 - Attempted Statutory Rape; Count 3 - Corruption of Minors; and Count 4 - Indecent Assault.

At Docket No. 1558-1989 (1558 c 1989): Count 1 - Involuntary Deviate Sexual Intercourse; Count 2 - Indecent Assault; Count 3 - Indecent Exposure; Count 4 - Corruption of Minors; Count 5 - Incest; Count 6 - Endangering the Welfare of Children; Count 7 - Involuntary Deviate Sexual Intercourse; Count 8 - Corruption of Minors; Count 9 - Endangering the Welfare of Children; Count 10 - Unlawful Restraint; Count 11 - Corruption of Minors; Count 12 - Endangering the Welfare of Children; and Count 13 - Sexual Abuse of Children.

At Docket No. 1559-1989 (1559 c 1989): Count 1 - Involuntary Deviate Sexual Intercourse; Count 2 – Rape; Count 3 - Statutory Rape; Count 4 - Indecent Assault; Count 5 - Indecent Exposure; Count 6 - Corruption of Minors; Count 7 - Incest; and Count 8 - Endangering the Welfare of Children.

On January 22, 1990, The Honorable Gilfert M. Mihalich conducted a sentencing hearing and pronounced his sentence on the record. That same

day, Judge Mihalich entered three written sentencing orders, one at each docket. The sentencing orders, which were typed forms and completed in handwriting, read in pertinent part:

**DOCKET NO. 2580 C 1988:**

**ORDER OF COURT / SENTENCE**

NOW 1-22, 1990 THE DEFENDANT IS ...

* * *

CT 1 INCARCERATED FOR A PERIOD OF NOT LESS THAN 3 yrs NOR MORE THAN 6 yrs.

No sentence at Ct 2, it merges with Ct 1. At Ct 3, 1 to 2 yrs. with Bureau of Correction, concurrent to sentence at Ct 1. At Ct 4, 1 to 2 yrs with [Bureau of Corrections], concurrent to sentence at Ct 1.

**DOCKET NO. 1558-1989:**

**ORDER OF COURT / SENTENCE**

NOW 1-22, 1990 THE DEFENDANT IS ...

* * *

CT 1 INCARCERATED FOR A PERIOD OF NOT LESS THAN 7 yrs NOR MORE THAN 14 yrs, consecutive to all sentences @ 2580 c 88

There is no sentence at Cts 2,3,5, they merge with Ct 1. Incarceration at Ct 4, 1 to 2 yrs., concurrent with sentence at Ct 1, with the Bur of Corr. At Ct 6, Incarceration 1 to 2 yrs., concurrent with sentence at Ct 1, with the Bur of Corr. At Ct 7, Incarceration of 7 to 14 yrs., consecutive to sentence at Ct. 1, with Bur of Corr. At Ct 8, 1½ to 3 yrs, consecutive to sentence at Ct 7, with Bur of Corr. At Ct 9, 1½ to 3 yrs., consecutive to sentence at Ct 8, with the Bur of

Corr. At Cts 10 11 12, 1 to 2 years inc at each, concurrent with sent at Ct 1 with Bur of Corr. At count 13, 3 to 6 yrs, consecutive to sentence at Ct 8 with Bur of Corrections. There is no further sentence at Cts 2,3,5, as they merge with Ct 1 for purpose of sentencing.

**DOCKET NO. 1559 C 1989:**

**ORDER OF COURT / SENTENCE**

NOW 1/22, 1990 THE DEFENDANT IS ...

* * *

CT 1 INCARCERATED FOR A PERIOD OF NOT LESS THAN 7 yrs NOR MORE THAN 14 yrs, consecutive to incarceration at Ct 1, at 1558 c 89

* * *

Cts 2,3 Nolle Prosse. No sentence at Cts 4,5 - they merge with Ct 1. At Ct 6, 1 to 2 yrs, with Bureau of Corr., concurrent to sentence at Ct 1. At Ct 7, no sentence, it merges with Ct 1. At Count 8, 1 to 2 yrs, concurrent with sentence at Ct 1.

Trial Court Orders, 1/22/90.

On January 24, 1990, Appellant filed a Petition for Modification of Sentence which Judge Mihalich denied. Appellant appealed to the Superior Court, which quashed the appeal on November 13, 1990. Appellant petitioned for reinstatement of his right to file a direct appeal *nunc pro tunc*, which the trial court granted on July 8, 1991. Appellant filed a notice of appeal, and on March 18, 1992, the Superior Court affirmed the judgment of

sentence. ***Commonwealth v. Powell***, 610 A.2d 67 (Pa. Super. 1992) (unpublished).[1]

This past year, the Commonwealth became aware that the Department of Corrections was considering Appellant for release on parole. On January 18, 2013, the Commonwealth filed a "Motion to Correct Sentencing Order", asserting that Appellant had not yet served his minimum sentence. The Commonwealth asserted that the January 22, 1990 sentencing orders contained clerical errors, and did not conform to the oral sentence pronounced by the trial court at the sentencing hearing, resulting in the Department of Corrections' improper calculation of Appellant's minimum and maximum sentences. Accordingly, the Commonwealth requested that the trial court correct the January 22, 1990 orders to accurately reflect Appellant's 30 to 60 year sentence.

On March 23, 2013, The Honorable John E. Blahovec conducted a hearing on the Commonwealth's motion.[2] Judge Blahovec granted the Commonwealth's motion on April 4, 2013, concluding that the handwritten orders did not accurately reflect the sentence imposed by Judge Mihalich. Accordingly, Judge Blahovec entered three orders amending the January 22,

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[1] The length of Appellant's sentence was not at issue in his direct appeal, although this Court in its memorandum observed that "A sentence totaling thirty to sixty years imprisonment was imposed." ***Id***. at 1.

[2] Judge Mihalich has since retired.

1990 sentencing orders. The April 4, 2013 orders provide in pertinent part as follows:

**Docket No. 1558 C 1989**

The sentence imposed at Count 13 is amended as follows:

3 to 6 years consecutive to sentence at Count **9**

Trial Court Order, 4/4/13 (emphasis in original).

**Docket No. 1559 C 1989**

The Sentencing Order dated January 22, 1990 is amended as follows with regard to the sentence of incarceration imposed at Count One:

> Defendant is incarcerated at the Bureau of Corrections for a period of not less than 7 years nor more than 14 years. ***"This sentence is to run consecutive, that means to follow, the sentence imposed at 1558 C 1989."*** (quoting Judge Mihalich at page 51 of the transcript)

Trial Court Order, 4/4/13 (emphasis added).

**Docket No. 2580 C 1988**
**Docket No. 1558 C 1989**
**Docket No. 1559 C 1989**

[T]he ***aggregate sentence*** imposed on the Defendant on January 22, 1990, is ***not less than 30 nor more than 60 years***. This is in accordance with the clear intention of the Sentencing Judge Gilfert M. Mihalich expressed in the Transcript of the Sentencing Hearing. The Pennsylvania Department of Corrections is directed to amend their records accordingly.

Trial Court Order, 4/4/13 (emphasis added).

Appellant filed notices of appeal on May 6, 2013. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises a single issue for our review:

> WHETHER THE CORRECTED AND AMENDED SENTENCES WHICH THE TRIAL COURT IMPOSED ON THE APPELLANT ON APRIL 4, 2013 IN THE ABOVE-CAPTIONED CASES CONSTITUTED ILLEGAL SENTENCES, FOR THE REASONS THAT THE TRIAL COURT DID NOT ENTER THE ORDERS OF COURT CORRECTING AND/OR AMENDING THE APPELLANT'S SENTENCES UNTIL APPROXIMATELY TWENTY-THREE (23) YEARS AFTER THE DATE OF IMPOSITION OF THE ORIGINAL SENTENCES, AND THE COMMONWEALTH DID NOT FILE A TIMELY POST-SENTENCE MOTION TO MODIFY THE WRITTEN TERMS OF THE ORIGINAL SENTENCING ORDERS WHICH WERE ENTERED ON JANUARY 22, 1990.

Appellant's Brief at 9.

On appeal, Appellant argues that given the discrepancies between the trial court's sentencing orders at Docket No. 1558-1989 and 1559-1989, and the trial court's oral pronouncement of sentence on the record at the sentencing hearing, the written sentencing order is controlling. Appellant maintains that, in accordance with the written sentencing order, his aggregate sentence is less than 30 to 60 years.[3] The Commonwealth

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[3] According to the parties' briefs, Appellant's interpretation of the sentencing orders would yield an aggregate sentence of either 20 to 40 years, 22 to 44 years, or 28½ to 57 years for all charges at all dockets. The manner in which these calculations are arrived at is unclear.

However, our independent analysis reveals that Appellant's sentence would be 20 to 40 years if Count 13 at Docket No. 1558-1989 is consecutive to Count 8 at Docket No. 1558-1989, and Count 1 of Docket No. 1559-1989

*(Footnote Continued Next Page)*

counters that the written sentencing order contains a clear clerical error, and the court had "an inherent authority to correct obvious and patent errors." Commonwealth Brief at 7. The Commonwealth maintains that Appellant's aggregate sentence is 30 to 60 years.

The portion of the sentencing transcript where the trial court stated Appellant's sentence on the record reads:

> [At No. 1558 of 1989] Count thirteen ... a period [of incarceration] of not less than three years and not more than six years, and this is to run consecutive, that means to follow, the sentence imposed ***at count eight***.
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> * * *
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> At No. 1559 c of 1989, count one, the charge is involuntary deviate sexual intercourse. It's the sentence of this Court that you pay the costs of prosecution, be

*(Footnote Continued)* ––––––––––––––––––––––

is consecutive only to Count 1 of Docket No. 1558-1989, and concurrent to all other charges.

Appellant's sentence would be 28½ to 57 years if Count 13 at Docket No. 1558 is consecutive to Count 8 at Docket No. 1558-1989, and Count 1 at Docket No. 1559-1989 is consecutive to the entire sentence at Docket No. 1558-1989.

Appellant's sentence would be 30 to 60 years if Count 13 at Docket No. 1558 is consecutive to Count 9 at Docket No. 1558-1989, and Count 1 at Docket No. 1559-1989 is consecutive to the entire sentence at Docket No. 1558-1989.

Both Appellant's Brief and the Commonwealth Brief state that the Department of Corrections originally calculated Appellant's sentence to be 22 to 44 years. The record does not reflect, nor are we able to discern from record before us, how the Department of Corrections arrived at this 22 to 44 year sentence.

> committed to the Bureau of Corrections for confinement in an appropriate institution for a period of not less than fourteen years -- not less than seven years and not more than fourteen years – that is ***not less than seven years and not more than fourteen years. This sentence is to run consecutive, that means to follow, the sentence imposed at 1558 of 1989***.
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> The Court has imposed sentences wherein ***the minimum sentence of all the charges and sentences totals thirty years, and the maximum sentence totals sixty years***. In view of the serious nature of the defendant's acts, any lesser sentence would mitigate the seriousness of the crimes and the seriousness of the defendant's acts.

N.T., 1/22/90, at 50-51, 53 (emphasis added).

As both Appellant and the Commonwealth acknowledge, at Docket No. 1559-1989, the oral sentence is not identical to the handwritten sentencing order. The written order sentences Appellant to 7 to 14 years, "consecutive to incarceration ***at Ct 1, at 1558 c 89***". The oral sentence prescribes a sentence of 7 to 14 years "***to run consecutive, that means to follow, the sentence imposed at 1558 of 1989.***"

Appellant argues that the written order prevails, and that the sentence at Docket No. 1559-1989 of 7 to 14 years is ***consecutive only to Count 1*** of Docket No. 1558-1989. The Commonwealth maintains that at Docket No. 1559-1989 the trial court intended to sentence Appellant to 7 to 14 years ***consecutive to all counts*** imposed at Docket No. 1558-1989.

According to Appellant's interpretation, since the 7 to 14 year sentence at Docket No. 1559-1989 is consecutive ***only to Count 1*** of Docket No.

1558-1989, it is concurrent to all other counts at all other dockets, and therefore the combined sentence for all charges at all docket numbers is less than 30 to 60 years. According to the Commonwealth, however, the 7 to 14 years at Docket No. 1559 is ***consecutive to all counts*** imposed at Docket No. 1558-1989, yielding a combined sentence, at all docket numbers, of 30 to 60 years.

The trial court agreed with the Commonwealth. The trial court explained that at Docket No. 1559-1989, "the scrivener made a clerical error on the written Order at 1559 c 1989 by making the sentence at Count One 'consecutive to incarceration at Count One at 1558 C 1989'" and that such an error, which was obvious on the face of the transcript, was within the authority of the court to correct. Trial Court Opinion, 4/4/13, at 6. Accordingly, the trial court corrected Judge Mihalich's order to reflect his stated intent, making Count 1 at Docket No. 1559-1558 consecutive to ***all counts*** at Docket No. 1558-1989, as indicated in the sentencing transcript.

Additionally, Appellant and the Commonwealth dispute the sentence at Count 13 of Docket No. 1558-1989. The oral sentence at Count 13 of Docket No. 1558-1989 is identical to the written sentence at Count 13 of Docket No. 1558-1989, in that both sentence Appellant to 3 to 6 years consecutive to ***Count 8***. Appellant thus argues that at Docket No. 1558, the record is clear that Count 13 is ***consecutive only to Count 8,*** and concurrent with all other sentences. According to this interpretation, Count

13 and Count 9 would run concurrent to each other, such that the aggregate sentence for all charges at all docket numbers would be less than 30 to 60 years.

The Commonwealth emphasizes, however, that the trial court stated unequivocally on the record that the combined sentence for all counts at all dockets was 30 to 60 years. The Commonwealth argues that Appellant's interpretation, which yields an aggregate sentence of less than 30 to 60 years, vitiates Judge Mihalich's stated aggregate sentence. The Commonwealth stresses that the sentencing court's intended aggregate sentence of 30 to 60 years can only be reached if Count 13 of Docket No. 1558-1989 sentences Appellant to 3 to 6 years consecutive to ***Count 9***, not Count 8. *See* Commonwealth Brief at 11.

The trial court agreed with the Commonwealth. The trial court explained that at Count 13 of Docket No. 1558-1989, "clearly [Judge Mihalich intended the sentence to run consecutive to Count Nine which would be in accordance with his entire sentencing scheme and total the 30 to 60 year sentence he clearly intended to impose." Trial Court Opinion, 4/4/13, at 6. Accordingly, the trial court amended Judge Mihalich's order to reflect this change.

In ***Commonwealth v. Borrin***, --- A.3d ----, 2013 WL 5927624 (Pa. 2013) (opinion announcing the judgment of the court), our Supreme Court recently addressed the circumstances under which a trial court may make

corrections to a sentencing order. In ***Borrin***, the defendant was sentenced in 2006. On that day, the trial court pronounced the defendant's sentence on the record, and reduced the sentence to writing. However, the written order and the pronounced sentence contained discrepancies. Three years later, the trial court granted the Commonwealth's petition to clarify sentence, and in 2009, issued a modified order to reflect the sentencing court's intentions. The defendant appealed, and in a unanimous *en banc* opinion, this Court in ***Commonwealth v. Borrin***, 12 A.3d 466 (Pa. Super. 2011) (*en banc*), reversed the 2009 order and remanded for reinstatement of the 2006 order. On appeal, the Pennsylvania Supreme Court affirmed in a divided opinion. ***Commonwealth v. Borrin***, --- A.3d ----, 2013 WL 5927624 (Pa. 2013).

Addressing the Commonwealth's claims, our Supreme Court explained that "in Pennsylvania, the text of the sentencing order, and not the statements a trial court makes about a defendant's sentence, is determinative of the court's sentencing intentions and the sentence imposed." ***Borrin***, at 6. Accordingly, "the signed sentencing order, if legal, controls over oral statements of the sentencing judge not incorporated into the signed judgment of sentence." ***Id***. (citations and internal quotations omitted). However, the plurality then recognized that a trial court has "the inherent power to correct errors in its records or orders so they speak 'the

truth,' and thereby reflect what actually took place in judicial proceedings." ***Id***. The Supreme Court explained:

> We have set a high bar for differentiating between errors that may be corrected under the inherent powers of trial courts, and those that may not, describing correctible errors as those determined to be 'patent and obvious mistakes'. The term 'clerical error' has been long used by our courts to describe an omission or a statement in the record or an order shown to be inconsistent with what in fact occurred in a case, and, thus, subject to repair.
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> [A] trial court's inherent power of correction encompasses not only those patent and obvious errors that appear on the face of an order, but extends to such errors that emerge upon consideration of information in the contemporaneous record.
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> * * *
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> At the same time ... the inherent power of trial courts to correct orders is a limited power because it [is] the 'obviousness' of the illegal and erroneous nature of the sentences reflected in the trial courts' orders rather than the illegality itself that triggered the courts' authority.

***Borrin***, --- A.3d ----, 2013 WL 5927624 at 7 (citations and internal quotations omitted). Upon review of the record in ***Borrin***, the plurality concluded that the trial court did not have inherent power to correct its previous order, explaining that the trial court's pronounced sentence was "open to competing interpretations and is, therefore ambiguous." ***Id.*** at 8. On the basis that the trial court's pronounced sentence was ambiguous and thus did not contain a "patent and obvious error" to correct, the plurality affirmed the *en banc* decision of this Court.

Because the Supreme Court's "Opinion Announcing the Judgment of the Court" in ***Borrin*** was not precedential, we look for further guidance to the unanimous *en banc* opinion of this Court in ***Borrin***. In ***Borrin***, we reiterated the general rule that "a trial court has the inherent, common-law authority to correct 'clear clerical errors' in its orders. A trial court maintains this authority even after the expiration of the 30 day time limitation set forth in 42 Pa.C.S.A. § 5505 for the modification of orders." ***Borrin***, 12 A.3d at 472 (citations omitted). We explained: "an alleged error must qualify as a clear clerical error (or a patent and obvious mistake) in order to be amenable to correction. ... [I]t is the obviousness of the illegality, rather than the illegality itself that triggers the court's inherent powers." ***Id.*** at 473 (citations omitted).

We formulated the following rule, restated by our Supreme Court, to determine whether the trial court had the "inherent authority" to correct its orders:

> If the trial court's intention to impose a certain sentence on [the defendant] was obvious on the face of the sentencing transcript, but its written order did not conform to its clearly stated sentencing intention, then it could exercise its inherent power to correct what constituted a clear clerical error [in the original sentencing order]. If, on the other hand, the trial court's stated intentions during the sentencing hearing were ambiguous, there was no clear error in the [original sentencing] order for the trial court to correct.

***Commonwealth v. Borrin***, --- A.3d ----, 2013 WL 5927624 *citing* ***Borrin***, 12 A.3d at 473–74.

In the present case, we agree with the trial court that "there is no ambiguity to [Judge Mihalich's] words." Trial Court Opinion, 4/4/13, at 6. Here, the "intention to impose a certain sentence" of 30 to 60 years was "obvious on the face of the sentencing transcript, but [Judge Mihalich's] written order did not conform to [his] clearly stated sentencing intention." ***See Borrin, supra***. Accordingly, the trial court did not err in exercising its inherent power to correct what constituted patent and obvious errors in the January 22, 1990 sentencing orders.

With regard to the sentence at Count 1 of Docket No. 1559-1989, Judge Mihalich unambiguously pronounced in the sentencing transcript that the sentence of 7 to 14 years was "to run consecutive, that means to follow, the sentence imposed at 1558 of 1989." N.T., 1/22/90, at 51. Although the written sentencing order states that the 7 to 14 years is "consecutive to incarceration at Ct 1, at 1558 c 89", the transcript is not open to competing interpretations; nothing in the transcript indicates that the 7 to 14 years is consecutive only to the Count 1 portion of Docket No. 1558-1989. Rather, the transcript clearly states that the 7 to 14 years is to run consecutive to "the sentence imposed at 1558 of 1989" ***in its entirety***, without apportionment. *Id*. Given that the pronounced sentence is unambiguous, we conclude that the written order contained a clear clerical error that was within the trial court's inherent power to correct. Moreover, our analysis comports with the trial court's unambiguous pronouncement that the

aggregate sentence for all charges at all dockets totaled 30 to 60 years. Appellant's interpretation that the 7 to 14 years at Docket No. 1559-1989 is consecutive ***only to Count 1*** of Docket No. 1558-1989, would disrupt this sentencing scheme by imposing an aggregate sentence of less than 30 to 60 years, which, by the clear wording of the transcript, Judge Mihalich did not intend.

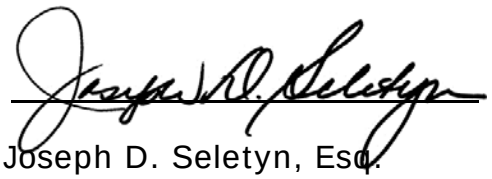
Turning next to Count 13 at Docket No. 1558-1989, we conclude that Judge Mihalich committed a "patent and obvious mistake" which was in the trial court's inherent power to correct. Although both the pronounced sentence and the written sentence state that Count 13 at Docket No. 1558-1989 is consecutive to Count 8, such a sentence, on its face, would not yield a sentence of 30 to 60 years. Rather, we conclude that Judge Mihalich made a technical error, which is obvious from the sentencing transcript where Judge Mihalich without ambiguity stated "the minimum sentence of all the charges and sentences totals thirty years, and the maximum sentence totals sixty years." N.T., 1/22/90 at 53. Accordingly, we affirm the trial court order correcting the sentence to make Count 13 at Docket No. 1558-1989 consecutive to Count 9, rather than Count 8, to achieve an aggregate sentence, for all charges at all dockets, of 30 to 60 years of imprisonment.

For the foregoing reasons, we conclude that the trial court acted in accordance with its inherent authority to correct the clear clerical errors and

patent and obvious mistakes in the January 22, 1990 sentencing orders. We therefore affirm the trial court orders entered on April 4, 2013.

Orders affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013