

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
LOUIS VAN REESE,	:	No. 760 WDA 2012
	:	
Appellant	:	

Appeal from the Order, April 4, 2012,  
in the Court of Common Pleas of Allegheny County  
Criminal Division at Nos. CP-02-CR-0005061-2002,  
CP-02-CR-0005062-2002

BEFORE: FORD ELLIOTT, P.J.E., OTT AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: January 14, 2014

Appellant appeals the order denying his Defendant's Motion for Imposition of Sentence. We affirm.

On December 16, 2004, a jury convicted appellant of three counts of attempted homicide, three counts of aggravated assault, two counts of driving under the influence, and one count of eluding police. Appellant's convictions related to an incident in Pittsburgh on December 11, 2001. Appellant became embroiled in an altercation with a man and two women at Club Classic. After the trio left Club Classic, appellant followed them in his vehicle, pulling alongside their vehicle on Washington Boulevard and unleashing a torrent of gunshots at them. The male victim was wounded in the head causing him to crash the vehicle. The driving under the influence

and eluding police charges resulted from appellant's subsequent apprehension by police later that evening.

On April 6, 2005, appellant was sentenced to an aggregate term of 25 to 60 years' imprisonment. On April 18, 2005, appellant filed a timely post-sentence motion.<sup>1</sup> In response, on that same date, the trial court entered an order purporting to vacate appellant's judgment of sentence "pending hearing on motion for new trial and modification of sentencing." Subsequently, the trial court did not review appellant's post-sentence motion. On September 12, 2005, the clerk of courts entered an order deeming the post-sentence motion denied by operation of law.

Appellant filed a timely notice of appeal on October 5, 2005. On May 8, 2007, this court affirmed the judgment of sentence. ***Commonwealth v. Van Reese***, 929 A.2d 248 (Pa.Super. 2007). On May 29, 2008, appellant filed a counseled petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. An amended petition was filed June 3, 2009, but was subsequently denied on July 24, 2009. On February 10, 2011, this court affirmed that decision, and on

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<sup>1</sup> The motion was timely because the tenth and final day for filing a post-sentence motion, April 16, 2005, fell on a Saturday. Consequently, that day, as well as Sunday, April 17, 2005, are not included in the computation of time. 1 Pa.C.S.A. § 1908.

August 4, 2011, our supreme court denied appeal. **Commonwealth v. [Van] Reese**, 24 A.3d 452 (Pa.Super. 2011), **appeal denied**, 611 Pa. 655, 26 A.3d 483 (2011).

On November 7, 2011, appellant filed the instant, counseled Defendant's Motion for Imposition of Sentence, wherein appellant contended that he had not been lawfully sentenced because his original sentence had been vacated and never re-imposed. On April 4, 2012, the trial court denied appellant's motion and this timely appeal followed.

We must first determine what status to accord appellant's underlying motion. At its essence, appellant's claim is that he is being improperly confined without entry of a judgment of sentence. As such, appellant's petition would properly lie as a petition for writ of **habeas corpus**. **See** 42 Pa.C.S.A. §§ 6501-6505. Where the relief requested pursuant to a petition for writ of **habeas corpus** is available under the PCRA, that statute subsumes the writ of **habeas corpus**. 42 Pa.C.S.A. § 9542. Since the relief requested here, imposition of sentence, is not contemplated under the PCRA, we will treat appellant's motion as a petition for writ of **habeas corpus**.

Ordinarily, an appellate court will review a grant or denial of a petition for writ of **habeas corpus** for abuse of discretion, **see, e.g., Commonwealth v. Reese**, 774 A.2d 1255, 1261 (Pa.Super. 2001), but for questions of law, our standard of review is de novo, and our scope of review is plenary. **See Buffalo Township v. Jones**, 571 Pa. 637, 644 n. 4, 813 A.2d 659, 664 n. 4 (2002).

***Commonwealth v. Stafford***, 29 A.3d 800, 802 (Pa.Super. 2011), quoting ***Commonwealth v. Judge***, 591 Pa. 126, 916 A.2d 511, 521 (2007). Presently, we are confronted with a question of law.

The trial court ruled that its order vacating the original judgment of sentence was a legal nullity because under the Rules of Criminal Procedure, the trial court is not permitted to vacate the judgment of sentence pursuant to a post-sentence motion:

**Rule 720. Post-Sentence Procedures; Appeal**

**(B) Optional Post-Sentence Motion.**

- (3) *Time Limits for Decision on Motion.* The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this paragraph.

Pa.R.Crim.P., Rule 720(B)(3), 42 Pa.C.S.A.

Appellant counters by contending that the trial court validly vacated its judgment of sentence under the following statute:

**§ 5505. Modification of orders**

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.A. § 5505.

Appellant notes that while the Pennsylvania Constitution provides that the supreme court shall have the authority to prescribe the general rules

governing the practice of the courts, such as the Rules of Criminal Procedure, the supreme court cannot impose rules that affect the right of the General Assembly to determine the jurisdiction of the courts:

- (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignments and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

Constitution of the Commonwealth of Pennsylvania, Article V, Section 10(c).

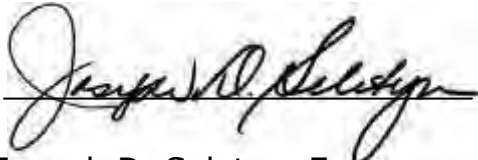
We agree with the trial court that the order vacating sentence was a legal nullity. Moreover, we find that the trial court's order vacating appellant's sentence was directly conditioned upon the trial court reviewing appellant's post-sentence motion. Thus, where the trial court never took up review of the post-sentence motion, vacatur would never have taken effect and appellant's original sentence remained in effect.

J. S65002/13

Moreover, appellant has acted throughout the history of this case as if that is exactly the way the order operated. Appellant has pursued both a direct appeal and relief under the PCRA without once questioning whether judgment of sentence had been imposed. Furthermore, to rule otherwise and direct the trial court to re-impose sentence would raise some very difficult questions such as whether appellant was entitled to a new direct appeal where he has already had one, and whether such an appeal should be limited to issues arising from the new sentence only. Instead, we find that the trial court's order vacating the sentence was a legal nullity.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 1/14/2014