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

COMMONWEALTH OF 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
	:
COMMONWEALTH OF 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

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: October 16, 2007**

I disagree with the majority's conclusion that the trial court had jurisdiction to vacate, sua sponte, sentences in cases more than 30 days after their imposition, and I respectfully dissent from the expansion of the exceptions to the clear language of 42 Pa.C.S. § 5505.

As the majority notes, a claim concerning the illegality of a sentence is non-waivable. See Commonwealth v. Andrews, 768 A.2d 309, 312 (Pa. 2001) (citing Commonwealth v. Vasquez, 744 A.2d 1280, 1283 (Pa. 2000)); see also Commonwealth v. Johnson, 669 A.2d 315, 321 (Pa. 1995). A defendant does not have to preserve the issue for review by filing a post-sentence motion or a direct appeal, as is ordinarily required. See Pa.R.A.P. 302(a) (issues not raised in lower court are waived and cannot be raised for first time on appeal).

However, we are not talking about waiver by the accused-- the present question is jurisdiction of the court:

> Jurisdiction is the predicate upon which a consideration of the merits must rest. Where the jurisdiction of the court has been lost …, the attractiveness of an argument on the merits is of no moment because the tribunal is without the power to grant the requested relief.

Robinson v. Commonwealth, Pennsylvania Board of Probation and Parole, 582 A.2d 857, 860 (Pa. 1990) (citations omitted); see also Johnson, at 321 (term "jurisdictional" defined by plain meaning: "the power, right, or authority to interpret and apply the law …") (quoting Webster's Ninth New Collegiate Dictionary 655 (1986)).

Jurisdiction of court is not established by the courts; it is established by the constitution and the legislature. Section 5505 plainly states that a trial court has jurisdiction to modify a sentence within 30 days after its imposition, 42 Pa.C.S. § 5505; failure of the court to act within that period will usually result in loss of jurisdiction to modify the sentence. See Commonwealth v. Bogden, 528 A.2d 168, 169-70 (Pa. Super. 1987). Holmes, however, argues that Pennsylvania's appellate courts have "consistently held [a trial] court may afford relief 'at any time' where it has issued an illegal or erroneous sentence, notwithstanding the otherwise applicable [30]-day time limit in [ ] § 5505." Holmes's Brief, at 9. Whitfield likewise claims "[w]hen statutory

jurisdictional requirements are balanced directly against the inherent power of a court to correct an obvious and patent error, the jurisdictional requirements inevitably give way." Whitfield's Brief, at 10.

The majority, as did the Superior Court, relies on Commonwealth v. Cole, 263 A.2d 339 (Pa. 1970) and Commonwealth v. Klein, 781 A.2d 1133 (Pa. 2001), in concluding the trial court had inherent power to modify Holmes's and Whitfield's sentences; however, these cases are readily distinguishable.

In Cole, the trial court entered an order granting the defendant's motions for both a new trial and an arrest of judgment; clearly this was inconsistent, as an arrest of judgment precludes a new trial. Three and one-half months later, the trial court modified this patent inconsistency, granted a new trial, and dismissed the motion in arrest of judgment.

On appeal, the defendant argued since the 30-day statutory period for modification of the order had elapsed, the trial court lacked the power to amend or correct its previous order. This Court rejected this argument, noting:

> In the instant case, the [initial] order…was patently erroneous. The grant of a new trial and the grant of the motion in arrest of judgment were so clearly antagonistic that even the most casual reading of the order would disclose the irreconcilable nature thereof. To grant a new trial and a motion in arrest of judgment simultaneously was contrary to common sense; if the motion in arrest of judgment was proper, Cole could not be tried again whereas, if the new trial was proper, the motion would have to fail. What the court did was simply to correct…a mistake which was plain on the face of the order…. "The power 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, is inherent in courts of justice…." The 1959 statute [[1]] was

[1] The Act of June 1, 1959, P.L. 342, No. 70, § 1, 12 P.S. § 1032, was the precursor to § 5505, and provided a court had jurisdiction to "alter, modify, suspend, reinstate, terminate, amend or rescind" its order for 30 days after its entry. Id.

> never intended to eliminate the inherent power of a court to correct obvious and patent mistakes in its orders, judgments and decrees…. Both before and since the passage of this statute, a court retains its inherent power to correct any patent mistakes in its orders.

Cole, at 341 (citations omitted; footnote added; emphasis in original).

Thus, unlike the present cases, the error in the order in Cole was patent and obvious on the face of the order itself; accordingly, corrections made outside the 30-day period were allowed. In the present case, although the Superior Court characterized the error in sentence as a "patent illegality," Commonwealth v. Whitfield, 3194 EDA 2002, unpublished memorandum at 4 (Pa. Super. 2003), the order on its face did not reveal that the sentence had been imposed for violation of a probationary sentence that had expired. The order, on its face, is simply not contradictory or illegal; rather, any illegality relies on other facts. Accordingly, Cole is inapposite.

In Klein, the trial court sentenced the defendant to time served to 12 months imprisonment. The pre-sentence investigation report mistakenly reflected the defendant had served 33 days in prison; he had actually served one day. Two days after sentencing, learning of this error, the court directed the defendant to appear for resentencing June 30, 1999; the court did not vacate the order of sentence. On June 28, 1999, the defendant appealed, challenging his underlying convictions. On June 30, 1999, as scheduled, the trial court resentenced the defendant to one to 12 months imprisonment, crediting the time served as one day.[2] With respect to the trial court's modification of its sentencing order after the defendant had filed a notice of appeal, we concluded:

---

[2] The Superior Court quashed the defendant's appeal from the first sentencing order, holding the order was implicitly vacated when the trial court scheduled resentencing for June 30, and therefore, the defendant's appeal from the first order was improper. This Court held the order scheduling resentencing did not implicitly vacate the initial sentencing order, and the defendant's appeal was proper. Klein, at 1135.

> While normally a court would not be permitted to take such action once it was divested of jurisdiction pursuant to § 5505, we find that under the limited circumstances of this case, the court could take further action in this matter since it was merely correcting a patent defect or mistake in the record.

Id. (citing Cole). Accordingly, we remanded to the Superior Court for consideration of the other issues raised by the defendant in his appeal.

Klein, which was specifically and expressly limited to its facts, is likewise distinguishable. The error in Klein was a miscalculation in the nature of a clerical mistake. This Court noted the judge's action was "essentially issuing the same sentence" while "correcting a patent defect or mistake in the record." Id., at 1135. The errors in the present cases were neither clerical nor patent; thus, they require redress through direct or collateral appellate review.

A mistake patent on the face of the order is qualitatively different than a mistake in the facts underlying the sentencing scheme. Whether this sentence followed violation of parole or probation is not patent on the face of the order. The sentencing order on its face is not illegal-- it is only illegal because of matters not appearing on its face. This is not a ministerial amendment or correction of a clerical mistake.

Indeed, the majority notes "one need only look to the Quarter Session notes in the record to see the mistake," Majority Slip Op., at 15, reflecting that it is not a patent mistake-- it is a mistake which requires inquiry into the record, far beyond the face of the order. There is nothing in such a scenario that reinvests the sentencing court with jurisdiction. If we are to make exceptions to this most basic of concepts, jurisdiction, these exceptions should be limited. The defendants may be entitled to relief, but they must pursue it in a court with jurisdiction. The sua sponte modification of sentences, without so much as a motion filed in any court, much less one with jurisdiction, is a proposition we should avoid.

The PCRA specifically provides that "[t]he imposition of a sentence greater than the lawful maximum" is grounds for relief, 42 Pa.C.S. § 9543(a)(2)(vii); thus, an illegal sentence is to be challenged collaterally. Furthermore, the PCRA states:

> This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis.

Id., § 9542 (emphasis added); see also Commonwealth v. Ahlborn, 699 A.2d 718, 721 (Pa. 1997) (PCRA provides sole means for obtaining state collateral relief). In cases where no direct appeal is taken, the PCRA is the sole means for reinstating the right to a direct appeal nunc pro tunc. See Commonwealth v. Hall, 771 A.2d 1232, 1235-36 (Pa. 2001); Commonwealth v. Lantzy, 736 A.2d 564, 569-70 (Pa. 1999). Outside of this process, there is no relief available for a defendant serving an illegal sentence; although the issue of illegality cannot be waived, no trial court has jurisdiction to review it after the 30-day period unless (1) a direct appeal is filed and the appellate court then remands the matter to the trial court, see Vasquez, or (2) the matter is raised in a timely PCRA petition.

In cases where a direct appeal has been filed, the trial court is divested of jurisdiction, Pa.R.A.P. 1701(a), which then lies solely with the appellate court. Any sentencing concerns not raised by the parties can be brought to the appellate court's attention by the trial court. The appellate court can then vacate the sentence or remand the matter to the trial court for resentencing. See Vasquez, at 1284 ("When a trial court imposes a sentence outside of the legal parameters prescribed by the applicable

statute, the sentence is illegal and should be remanded for correction.") (emphasis added).

The process whereby a trial court may hear challenges to the legality of a sentence has been delineated by this Court in the Rules of Criminal Procedure[3] and by the legislature in the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After a sentence has been imposed, a defendant has ten days to file an optional post-sentence motion, Pa.R.Crim.P. 708(D), 720(A); if no post-sentence motion is filed, the defendant has 30 days from the date of sentencing to file a direct appeal. Id., 720(A)(3). Corresponding with § 5505, a trial court has jurisdiction to modify a sentence until a direct appeal is filed. See Pa.R.A.P. 1701(a) (after appeal is taken, trial court may no longer proceed further in matter). If no direct appeal is filed within 30 days, the trial court loses jurisdiction and the defendant must seek collateral relief if he wishes to have his sentence reviewed. See Pa.R.Crim.P. 901, comment (rules pertaining to post-conviction collateral proceedings are intended to require that, in single proceeding, defendant must raise and judge must dispose of all grounds for relief available after conviction and exhaustion of appellate process, either by affirmance or by failure to take timely appeal) (emphasis added).

[3] Holmes argues the official comments to Pa.R.Crim.P. 708 and Pa.R.Crim.P. 720 refer to a "court's inherent powers to correct an illegal sentence…at any time…," Pa.R.Crim.P. 708, comment; id., 720, comment (emphasis added), thus supporting his argument that a trial court never loses jurisdiction to modify an illegal sentence. However, Holmes takes this phrase out of context by quoting only a portion of it; in its entirety, it reads: "at any time before appeal or upon remand by the appellate court." Id. (emphasis added). Thus, because the appeal period is 30 days, Pa.R.Crim.P. 720(A), the trial court only has jurisdiction to modify an order during that time, unless the appellate court remands for modification or resentencing after appeal.

Holmes did not file a motion to modify sentence or a direct appeal; furthermore, he failed to file a timely PCRA petition.[4] Thus, he chose to forego the only means available to correct his illegal sentence. See Commonwealth v. Lyons, 830 A.2d 663, 665 (Pa. Cmwlth. 2003) (offender may request modification of sentence by: (1) motion for modification of sentence under Pa.R.Crim.P. 720; (2) direct appeal; (3) PCRA petition; or (4) petition to amend order of mandatory restitution made during sentencing hearing). Holmes failed to avail himself of the first three means, and the fourth is inapplicable here.

Because § 5505 requires adherence to a time frame in order for a trial court to have jurisdiction to modify a sentence, I would hold the trial court in this case, by acting outside of the 30-day period, lacked jurisdiction to modify its original sentencing order. Accordingly, I would affirm the order of the Superior Court reversing the order of the trial court and reinstating Holmes's original sentence imposed May 21, 2001.

---

[4] A PCRA petition must be filed within one year of the date the judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). A judgment of sentence becomes final at the conclusion of direct review, including discretionary review in this Court or the United States Supreme Court, or at the expiration of time for seeking such review. Id., § 9545(b)(3). The sentence Holmes wished to challenge was imposed May 21, 2001; it became final 30 days later, when the time to file a direct appeal expired. Thus, having failed to file a petition within this period, Holmes cannot obtain relief under the PCRA. Contrary to the Superior Court's conclusion that Holmes could challenge the legality of his sentence in a collateral proceeding, Holmes, at 504, such avenue of relief is now foreclosed to him.

The Commonwealth avers in its brief that while Holmes's Petition for Allowance of Appeal was pending before this Court, he filed a PCRA petition February 3, 2004, and, although the Commonwealth moved to dismiss the petition as untimely, the PCRA court continued the matter until August 27, 2004. Commonwealth's Brief for Appellee, at 6 n.2.

Whitfield filed a direct appeal after the trial court denied his motion to vacate his sentence; this divested the trial court of jurisdiction. Upon realizing its error, the proper course for the trial court would have been to bring its mistake to the Superior Court's attention; the Superior Court could have vacated the sentence on direct appeal. In acting outside the 30-day period, while a direct appeal was pending, the trial court lacked jurisdiction to modify the September 26, 2001 sentence.[5] Accordingly, I would reverse the order of the Superior Court affirming the trial court's order vacating Whitfield's September 26, 2001 sentence.

Mr. Chief Justice Cappy joins this dissenting opinion.

[5] There is the possibility Whitfield may have been influenced by the trial court to withdraw his appeal after the court amended his sentence; if so, then the trial court's unauthorized action in vacating Whitfield's sentence would have lulled Whitfield into forgoing direct and collateral review, allowing the time period for filing a PCRA petition to expire. Thus, the governmental interference exception to the PCRA's one-year time-bar may apply. See 42 Pa.C.S. § 9545(b)(1)(i) (failure to raise claim previously was result of interference by governmental officials with presentation of claim). Because it is unclear from the record what the circumstances leading to Whitfield's withdrawal of his direct appeal were, remand for consideration of such circumstances would be appropriate.