IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 752 CR 2010
	:	
JOSEPH JOHN PAUKER,	:	
Defendant	:	

Criminal Law – Final Judgment of Sentence - Authority to Modify after Thirty Days - 42 Pa.C.S.A. § 5505 - Challenge to Discretionary Aspect of Sentence

1. Section 5505 of the Judicial Code prohibits the rendering of a new or different sentence thirty days or more after the entry of the original sentence.
2. Section 5505 of the Judicial Code does not prohibit a trial court through exercise of its inherent, common-law judicial authority from clarifying or correcting a written sentencing order, even though thirty or more days have passed since its entry.
3. A written sentencing order which is ambiguous on its face may be later clarified by the trial court by examining the text of the order itself and construing it in its entirety according to established canons of construction.
4. A written sentencing order which is shown to contain a clear clerical mistake, one which is patently and obviously at odds with the sentence actually imposed and announced in open court, as made evident by review of the sentencing transcript, may be later corrected by the trial court to conform to the actual sentence imposed.
5. A sentence within the standard guideline range is presumptively valid and will not be overturned, unless the defendant demonstrates that application of the guidelines is clearly unreasonable pursuant to 42 Pa.C.S.A. § 9781 (c)(2).

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 752 CR 2010
	:	
JOSEPH JOHN PAUKER,	:	
Defendant	:	

Gary F. Dobias, Esquire — Counsel for Commonwealth
District Attorney

Kent D. Watkins, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – March 20, 2014

As a general rule, a final judgment of sentence, once given, may not be changed by the trial court thirty days or more after its imposition. Whether this limitation applies to the oral pronouncement of the sentence in open court or to the written order subsequently prepared and filed, and if to the written order, whether this rule bars its amendment more than thirty days after its entry in those circumstances where it incorrectly recites the sentence as decreed, are issues now before us.

PROCEDURAL AND FACTUAL BACKGROUND

On November 13, 2012, Defendant entered a plea to one count of possession with intent to deliver a controlled substance,[1] a felony offense. That same day, we sentenced Defendant to no less

[1] 35 P.S. § 780-113 (a) (30).

than one nor more than three years' incarceration in a state correctional institution, followed by one year of probation. (N.T. 11/13/12, pp. 23-24). Notwithstanding the sentence actually announced in court, the written order of sentence dated November 13, 2012, and filed on November 15, 2012, did not include the one-year probationary term. When this was brought to the court's attention, a new written order was prepared and filed on January 2, 2013. This corrected order included the one-year period of probation as part of the sentence.

Defendant objected to the amendment of the written order by filing a *pro se* Motion to Modify and Reduce Sentence on January 31, 2013. In this Motion, Defendant asked that the term of incarceration be reduced and also asked that the period of probation be removed.[2] Because this Motion was filed more than thirty days after the sentencing date of November 13, 2012, we treated Defendant's Motion as a request for PCRA relief and immediately appointed PCRA counsel.[3]

---

[2] Previously, on November 16, 2012, Defendant filed a counseled Petition for Reconsideration of the Sentence in which Defendant acknowledged that the sentence pronounced at the sentencing hearing was for a period of imprisonment of one to three years followed by one year probation, but asked that the term of incarceration be reduced to one to two years. (Petition for Reconsideration, paragraph 4). This Petition was denied by order dated November 16, 2012.

[3] In Commonwealth v. Green, 862 A.2d 613 (Pa. Super. 2004), *appeal denied*, 882 A.2d 477 (Pa. 2005), the Court held that a written post-sentence motion must be filed no later than ten days after the date of imposition of sentence regardless of the date the sentence was entered on the docket. Accordingly, even though Defendant filed a timely Petition for Reconsideration on November 16, 2012, which we denied that same date, both the time to file either a post-sentence motion or a direct appeal had already lapsed by the time Defendant filed his

On March 1, 2013, PCRA counsel filed an Amended Motion in which Defendant challenged the Amended Order of Sentence filed on January 2, 2013, as violating the time restraints imposed by 42 Pa.C.S.A. § 5505. At a hearing held on February 28, 2014, to address Defendant's request for PCRA relief, no evidence was taken, both the Defendant and Commonwealth agreeing that the two issues before the court - the timeliness of the January 2, 2013 written order of sentence and the propriety of the period of incarceration – did not require the taking of additional evidence.

DISCUSSION

Section 5505 of the Judicial Code provides:

> 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. This section, as construed by our courts, prohibits the rendering of a new or different sentence thirty days or more after the entry of the original sentence. Commonwealth v. Borrin, 12 A.3d 466, 476 (Pa. Super. 2011), *aff'd*, 80 A.3d 1219 (Pa. 2013). However, two instances have been recognized where the

---

pro se Motion to Modify and Reduce Sentence. *See also* Commonwealth v. Lamonda, 52 A.3d 365, 371 (Pa. Super. 2012) (noting that "[i]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings," otherwise they are waived), *appeal denied*, 75 A.3d 1281 (Pa. 2013).

trial court is permitted to clarify or correct a written sentencing order, even though thirty days has passed from its entry. Both reflect a legitimate exercise of the court's inherent judicial authority.[4]

The first instance, not applicable here, is where the written sentencing order is ambiguous on its face, that is, is susceptible to two or more reasonable but different interpretations. Commonwealth v. Borrin, 80 A.3d 1219, 1229 (Pa. 2013). When this occurs, the court has the inherent authority to issue an amended order clarifying its intent. *Id.* at 1227 (noting that in clarifying a written order it had issued, the trial court should have focused on the text of the order itself and construed it in its entirety according to established canons of construction). This exception applies only to an ambiguity on the face of the written sentencing order, not in the verbal pronouncement of that sentence, which if ambiguous when stated, but clear in the written order which follows, no longer requires further clarification. Borrin, 12 A.3d at 473.

The second exception, which does apply, is where the sentence actually imposed and announced in court was clear and unambiguous,

[4] "[T]he inherent power to correct errors does not extend to reconsideration of a court's exercise of sentencing discretion. A court may not vacate a sentencing order merely because it later considers a sentence too harsh or too lenient." Commonwealth v. Holmes, 933 A.2d 57, 66 (Pa. 2007).

but was incorrectly recited in the written order.[5] In those circumstances where the discrepancy between what was stated in court and what is provided for in the written order manifests a patent and obvious mistake in the written order, a clear clerical error exists, one which the court has the authority, if not the duty, to correct once the error is brought to its attention. *See* Commonwealth v. Rusic, 79 A. 140, 141 (Pa. 1911) (acknowledging a trial court's inherent authority to amend its record so as to make it conform to the truth).[6]

The transcript of the sentencing hearing prepared by the court stenographer, as well as a review of the official court recording made at the time of sentencing, show clearly that Defendant's sentence included a one-year probationary tail. (N.T. 11/13/12, pp. 23-24). This probationary term was erroneously omitted from

[5] In Commonwealth v. Borrin, the Pennsylvania Superior Court observed that once a sentence as stated in the sentencing order has been fully served, double jeopardy prohibits a court from correcting errors in the written order which have the effect of increasing the sentence, even though a comparison of the written order with the sentence actually imposed in court discloses a patent and obvious error in the written order. 12 A.3d 466, 472 (Pa. Super. 2011). As this observation was unnecessary to the Court's decision, it was clear *dicta*, which the Pennsylvania Supreme Court on appeal declined to address. Commonwealth v. Borrin, 80 A.3d 1219, 1225 n.10 (Pa. 2013). Likewise, principles of double jeopardy are inapplicable in the instant matter, since Defendant had not served even his minimum sentence at the time the amended order was entered.

[6] "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." Borrin, 80 A.3d at 1227. *See also* Commonwealth v. Kubiac, 550 A.2d 219, 231 (Pa. Super. 1988) ("[A]n oral sentence which is on the record, written incorrectly by the clerk of courts, and then corrected by the trial judge, is [ ] a clerical error."), *appeal denied*, 563 A.2d 496 (Pa. 1989).

the written order prepared by the clerk's office[7] and filed on November 15, 2012. As to this omission, we properly exercised our inherent power to correct the error in the written order such that it spoke "the truth" and accurately reflected what in fact took place in open court at the time of sentencing. Borrin, 80 A.3d at 1227.

As to the duration of Defendant's period of confinement, the standard range applicable to Defendant's circumstances under the sentencing guidelines is twelve to eighteen months. (N.T. 11/13/12, p. 8). The minimum end of the one to three year sentence Defendant received was within this range and is therefore presumptively valid. Commonwealth v. Ventura, 975 A.2d 1128, 1135 (Pa. Super. 2009), *appeal denied*, 987 A.2d 161 (Pa. 2009). To rebut this presumption requires that Defendant prove the application of the guidelines to his situation was clearly unreasonable pursuant to 42 Pa.C.S.A. § 9781 (c)(2).[8] This

[7] It is the practice in Carbon County for a representative of the Clerk of Courts' office to attend sentencing hearings and prepare the written order of sentence to be signed by the court.

[8] Section 9781 (c) of the Judicial Code provides:

> (c) Determination on appeal.--The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
>
> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
>
> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
>
> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
>
> In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

Defendant did not do. *See also* Commonwealth v. Lamonda, 52 A.3d 365, 371 (Pa. Super. 2012) ("where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code"), *appeal denied*, 75 A.3d 1281 (Pa. 2013).

Moreover, at the time Defendant committed the offense for which he was sentenced, he was on parole in Lehigh County after being convicted of driving under the influence and possession of drugs. Because Defendant's current offense was a violation of the terms of his parole, as an aggravating factor it was within our discretion to have sentenced Defendant to an aggravated sentence.[9]

CONCLUSION

Both the Commonwealth and the Defendant have a right to expect that the sentence imposed on the Defendant at the time of sentencing is the sentence served. Where the sentence a defendant receives in open court is clear from the face of the sentencing transcript, but the written order does not conform with this sentence, the court has the inherent, common-law authority to

42 Pa.C.S.A. § 9781 (c).

[9] The stipulation entered by the Commonwealth and Defendant prior to Defendant's sentencing included a provision that the Commonwealth requested a standard range sentence of twelve to twenty-four months. *See* Stipulation dated August 27, 2012 and filed August 30, 2012. When questioned at the time of sentencing, both the Commonwealth and Defendant acknowledged that this request by the Commonwealth was not a plea agreement and that the court was not bound by it. (N.T. 11/13/12, pp. 11, 22).

correct patent and obvious errors in the written order. Borrin, 12 A.3d at 473. ("[F]or a trial court to exercise its inherent authority and enter an order correcting a defendant's written sentence to conform with the terms of the sentencing hearing, the trial court's intention to impose a certain sentence must be obvious on the face of the sentencing transcript."). As such, we properly acted in entering the Amended Order of Sentence on January 2, 2013, to accurately reflect the sentence Defendant in fact received. Further, Defendant has failed to present a substantial question that we abused our discretion in the imposition of this sentence.

BY THE COURT:

_____

P.J.