VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of March, 2019.

Present: All the Justices

Ivar Marbu Cox, Appellant,

against Record No. 171380
Court of Appeals No. 1788-16-4

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the Court of Appeals.

Ivar Marbu Cox ("Cox") pled guilty to driving while intoxicated, second offense, possession of marijuana and felony hit and run. At his sentencing hearing, Cox testified that the 225 days he had been incarcerated made him realize how bad his alcohol problem was and he informed the trial court that, upon release, he hoped to enter a program to help him with his sobriety. The trial court then sentenced Cox to twelve months for the driving while intoxicated charge, thirty days for the possession charge, and five years, with two years suspended, for the hit and run charge. The trial court further ordered that the sentences run concurrently.

The trial court then stated:

> The Court will reconsider the sentence if you find an in-house treatment program after you have served one full year in the adult detention center. The DOC is going to pick you up in the next 30 days, 45 days, so I think there's time to accomplish that.

On April 21, 2016, the trial court entered an order memorializing the sentence it imposed (the "sentencing order"). The sentencing order explicitly stated: "The Court will reconsider the

sentence after serv[ing] One (1) Year in the Virginia Department of Corrections, if the Defendant finds an inpatient program to attend."*

On June 15, 2016, Cox filed a motion to reconsider his sentence. In his motion, Cox stated that he "will have been incarcerated for One (1) year on July 31, 2016." He further claimed that he had been accepted into a residential rehabilitation program. Cox asked the court to modify his sentence and allow him to attend the rehabilitation program. The trial court denied the motion, noting that Cox had not yet served one year of his sentence and that Cox had failed to provide any documentation showing that he had been accepted into a rehabilitation program.

Cox filed a second motion to reconsider his sentence on August 30, 2016, after he had completed a year of his sentence. At the time he filed his second motion to reconsider, Cox had been transferred to the Virginia Department of Corrections ("VDOC"). In his second motion to reconsider, Cox again asked the trial court to modify his sentence and allow him to attend the rehabilitation program.

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* The Commonwealth contends that this language is a scrivener's error. It insists that the trial court could not have intended to retain the authority to modify Cox's sentence after he was transferred to the Virginia Department of Corrections ("VDOC") because the trial court is presumed to know the law and the law states that a court loses jurisdiction to reconsider a sentence more than twenty-one days after a sentencing order is entered when a prisoner has been transferred to the VDOC. *See* Code § 19.2-303; *In re: Dep't of Corrections*, 222 Va. 454, 463 (1981). This matter was remanded to the trial court to determine whether the sentencing order contained a scrivener's error.

On remand, the trial court acknowledged that it was aware that it lost jurisdiction to modify Cox's sentence once he was transferred to the VDOC. However, when the Commonwealth suggested that it was "clear" that the trial court had intended to reference the adult detention center instead of the VDOC, the trial court explicitly stated "No, it's not." The trial court concluded that it was not going to change any language in the sentencing order.

Although the trial court declined to rule on whether the sentencing order contained a scrivener's error, its response to the Commonwealth's suggested amendment in conjunction with its decision to leave the language of the sentencing order unchanged creates the necessary implication that the order contained no such error. Accordingly, the sentencing order will be interpreted as written.

The trial court denied Cox's second motion, ruling that it no longer had jurisdiction to modify his sentence due to his transfer to the VDOC. According to the trial court, the sentencing order did not "expressly retain jurisdiction regarding sentencing." The trial court explained that the sentencing order "merely provided [Cox] the opportunity to possibly have his sentence reconsidered if certain conditions were met."

Cox appealed the trial court's ruling to the Court of Appeals, arguing that the sentencing order was not a final order because the trial court had retained jurisdiction to modify his sentence after he was transferred to the VDOC. The Court of Appeals determined that the sentencing order was a final order and, therefore, the trial court lacked jurisdiction to modify Cox's sentence once he was transferred to the VDOC.

Cox appealed the Court of Appeals' ruling. In his appeal, Cox again argues that the sentencing order was not a final order. Additionally, Cox raises the alternative argument that the sentencing order is void ab initio because the reconsideration provision is ultra vires.

Rule 1:1 establishes that "[a]ll final judgments, orders, and decrees . . . shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Code § 19.2-303 provides an exception to Rule 1:1, granting a trial court the authority to modify or suspend the unserved portion of a sentence "any time before a person is transferred" to the VDOC, even if more than twenty-one days have passed since entry of the sentencing order. However, once the person is transferred to the VDOC, that authority is lost. *In re: Dep't of Corrections*, 222 Va. 454, 463 (1981).

In the present case, the written order appears to state that the trial court reserved jurisdiction to act on Cox's sentence after he served a year in the VDOC. However, as the trial court lacked the authority to modify or suspend Cox's sentence once he was transferred to the

VDOC, "'the character of the judgment was not such as the [c]ourt had the power to render.'" *Rawls v. Commonwealth*, 278 Va. 213, 221 (2009) (quoting *Anthony v. Kasey*, 83 Va. 338, 340 (1887)). Further, the presence of an ultra vires provision in a sentencing order renders the entire sentencing order void ab initio. *Burrell v. Commonwealth*, 283 Va. 474, 480 (2012), (recognizing that an "ultra vires provision in the sentencing order results in the entire sentencing order being void ab initio."). Accordingly, the sentencing order is a nullity and is therefore vacated, and the case is remanded to Court of Appeals with instructions to remand the case to the trial court for sentencing.

This order shall be certified to the Court of Appeals and the Circuit Court of Loudoun County.

A Copy,

Teste:

Clerk