VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
vs.	)	Case No. FE-2001-100070
	)	
ELBERT COBURN	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Before the Court is a *Motion to Vacate Void Sentence,* filed *pro se* by Elbert Coburn ("Defendant"). For the reasons stated below, the Motion is DENIED for lack of subject matter jurisdiction.[1]

FACTS

The instant motion arises out of the Defendant's sentencing on October 26, 2001, in FE-2001-100070.[2] The basis for the Defendant's motion is that the Court did not also impose and suspend an

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[1] A court "always has jurisdiction to determine whether it has subject matter jurisdiction." *Morrison v. Bestler*, 239 Va. 166, 170 (1990).

[2] On October 26, 2001, the trial court sentenced the Defendant in two different robbery-related cases: FE-2001-100070, which is the sentencing now being challenged by the Defendant, and FE-2001-99390, which is not before the Court today. On August 28, 2001, the Defendant entered pleas in both cases before the trial court and both cases were addressed in the same Pre-Sentence Investigations Report and in the calculation of the Sentencing Guidelines. The "Total Time to Serve" listed in the Final Disposition section of the Sentencing Guidelines Cover Sheet – "Life Sentence + 35 years" – was the combined time to serve in the two cases. In FE-2001-99390, the Defendant was charged in a three-count indictment with Abduction (Count I), Robbery (Count II), and Use of a Firearm in the Commission of a Felony (Count III), with an offense date for all three counts of December 19, 2000. The Defendant pled guilty to Robbery and Use of a Firearm in the Commission of a Felony, and the Abduction count was *nolle prossed* as part of the plea agreement. The Court sentenced the Defendant to incarceration for 30 years on Count II and incarceration for five years on Count III. In FE-2001-100070, the Defendant was charged with Robbery, with an offense date of October 15, 2000, and pled guilty to Robbery and was sentenced to incarceration for life. The Defendant filed appeals in both cases, which were denied. *See Elbert Coburn v. Commonwealth of Virginia*, Record No. 3268-01-4 (April 24, 2002). It is the Defendant's life sentence which is the subject of the instant motion.

additional term of incarceration for the purpose of post-release supervision, pursuant to Virginia Code § 18.2-10 and § 19.2-295.2.

LAW REGARDING POST-RELEASE CONFINEMENT AND SUPERVISION TERMS

Virginia Code § 19.2-295.2(A) states, in pertinent part:

> At the time the court imposes sentence upon a conviction for any felony offense committed (i) on or after January 1, 1995, the court may, and (ii) on or after July 1, 2000, shall, in addition to any other punishment imposed if such other punishment includes an active term of incarceration in a state or local correctional facility, except in cases in which orders a suspended term of confinement of at least six months, impose a term of incarceration, in addition to the active term, of not less than six months nor more than three years, as the court may determine. Such additional term shall be suspended and the defendant shall be ordered to be placed under postrelease supervision upon release from the active term of incarceration.

Virginia Code § 18.2-10(g) contains similar language:

> For any felony offense committed (i) on or after January 1, 1995, the court may, and (ii) on or after July 1, 2000, shall, except in cases in which the court orders a suspended term of confinement of at least six months, impose an additional term of incarceration of not less than six months nor more than three years, which shall be suspended conditioned upon successful completion of a period of post-release supervision pursuant to §19.2-295.2 and compliance with such other terms as the sentencing court may require.

The two statutes work "in conjunction," and are "designed to operate together." *Eggleston v. Commonwealth*, 2017 Va. App. LEXIS 235,*8-9 (Va. Ct. App. Sept. 12, 2017). [3]

INSTANT MOTION

The felony offense that resulted in the Defendant's life sentence occurred several months *after* July 1, 2000. Therefore, the sentence should have included imposition and suspension of an additional term of

[3] Virginia Code § 19.2-295.2 and § 18.2-10 were amended in the 2000 Session of the General Assembly to add the "shall" language regarding felony offenses committed on or after July 1, 2000.

"not less than six months nor more than three years" and an order of post-release supervision.[4] It did not, and on this basis the Defendant asserts that the sentence is void *ab initio* and should be set aside pursuant to Virginia Code § 8.01-428(A)(ii).[5]

COMMONWEALTH'S RESPONSE

The Commonwealth agrees that the Court did not impose an additional period of suspended incarceration and post-release supervision as required by § 18.2-10(g) and § 19.2-295.2(A). The Commonwealth states that "[t]he appropriate remedy in this matter, should the court find it has jurisdiction to grant the Defendant's Motion, is to correct the order, extending the Defendant's life sentence to allow for the mandatory period of suspended time and supervision as stated by the Virginia Supreme Court in *Thomas v. Commonwealth*, 296 Va. 301 [2018]."[6]

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[4] In *Henderson v. Commonwealth*, 77 Va. App. 250 (2023), the Court of Appeals of Virginia addressed the meaning of the word "shall" when applied to an action to be taken by a private litigant, as contrasted with a public official or public body. The Court held that, as applied to private litigants, the word "shall" was mandatory, not directory. In contrast, the Court stated that "[w]hen a statute uses *shall* to call for action by a public official or public body, our Supreme Court and this Court have generally read the *shall* as directory (*should* or *will*), not mandatory (*must*), unless the context suggests otherwise." *Id.*, at 254 (*emphasis in original*). While this Court has not been able to find appellate case law in Virginia that explicitly addresses the "shall" dichotomy in the context of Virginia Code § 19.2-295.2 and § 18.2-10, there is controlling appellate case law establishing that the obligation to impose a period of post-release confinement (suspended) and post-release supervision is, in fact, mandatory. *See Wright v. Commonwealth,* 275 Va. 77, 81 (2008) ("The provision of these two statutes [referring to Virginia Code § 19.2-295.2 and § 18.2-10] are mandatory."); *Alston v. Commonwealth*, 274 Va. 759, 769-770 (2007) (§ 19.2-295.2 "unequivocally directs" the circuit court to impose the term of post release supervision, and further describes the obligation as "a mandate" and "a clear and unmistakable requirement."); *Thomas v. Commonwealth*, 296 Va. 301, 306-07 (2018) (using mandatory terms like "must," "requires," and "obligation" to describe the Court's duty to impose a period of post-release confinement (suspended) and supervision);and *Eggleston v. Commonwealth*, 2017 Va. App. LEXIS 235,*15 (Va. Ct. App. Sept. 12, 2017) ("… the statutes include a mandatory duty on the court to impose such terms….").

[5] Virginia Code §8.01-428(A)(ii) states, in pertinent part: "[T]he court may set aside *a judgment by default or a decree pro confesso* upon the following grounds: … (ii) a void judgment …." (emphasis added). However, this case involves neither a default judgment nor a decree pro confesso. Therefore, § 8.01-428(A)(ii) does not provide the Court jurisdiction to hear this matter.

[6] The Commonwealth suggests that § 8.01-428(B) might provide the Court jurisdiction to add post-release confinement and supervision to the Defendant's life sentence. There is no question that § 8.01-428(B) *is* applicable to criminal proceedings. *See, e.g., Lamb v. Commonwealth*, 222 Va. 161, 165 (1981). However, § 8.01-428(B) is – by its express terms – limited to the correction of "[c]lerical mistakes," and there is no basis for this Court to conclude that a clerical error occurred in the instant case. Therefore, § 8.01-428(B) would not be applicable. *See, e.g., D'Alessandro v. Commonwealth*, 15 Va. App. 163, 169 (1992).

ANALYSIS

The Defendant was sentenced on October 26, 2001, and the sentencing order was signed by the trial court on October 30, 2001. That sentencing order constitutes the final order in the case,[7] and it is from that date – October 30, 2001 – that the 21-day time period, during which the Court retained jurisdiction over the case pursuant to Rule 1:1(a) of the Rules of the Supreme Court of Virginia, began to run.[8]

Given that more than 22 years has elapsed since the final order was entered in this case, the Court long ago lost subject matter jurisdiction – at least "[a]bsent a statutory exception." *Revell-Walgorski v. Commonwealth,* 2023 Va. App. LEXIS 589,*4 (Va. Ct. App. Sept. 5, 2023). Virginia Code § 8.01-428(A)(ii) and § 8.01-428(B) *are* statutory exceptions, but neither statute applies in the instant case. That leaves one jurisdictional possibility: this is the Defendant's contention that the sentencing order issued on October 30, 2001, is void *ab initio*.[9]

For the following reasons, the Court's sentencing order of October 30, 2001, was not void *ab initio*:

First, a sentencing order that imposes a sentence on a defendant properly before the court is only void *ab initio* if the court imposes a sentence "in violation of a prescribed statutory range of punishment," as occurred in *Rawls v. Commonwealth*, 278 Va. 213, 221 (2009).. [10]

Second, the sentencing order in the instant case was not "imposed in violation of a prescribed statutory range of punishment." As the Court of Appeals of Virginia stated in denying the Defendant's Petition for Appeal in 2002: "The sentences imposed by the trial judge were within the ranges set by the legislature." *Coburn v. Commonwealth of Virginia*, Record No. 3268-01-4 (April 24, 2002).

Third, the Court of Appeals of Virginia has previously addressed a situation strikingly similar to the instant case – and concluded that the sentencing order issued by the trial court was not void *ab initio*. *See*

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[7] "In a criminal case, the final order is the sentencing order." *Dobson v. Commonwealth,* 76 Va. App. 524, 528 (2023) (quoting *Johnson v. Commonwealth*, 72 Va. App. 587, 596 (2020).)

[8] *See* Rule 1.1(a) of the Rules of the Supreme Court of Virginia, which states in part: "All final judgments, orders, and decrees, irrespective of terms of court, remain under the control of the trial court and may be modified, vacated, or suspended for twenty-one days after the date of entry, *and no longer*." (Emphasis Added).

[9] A void *ab initio* order may be attacked *at any time* and is not subject to the limitations of Rule 1.1(a). And a motion to vacate – such as that filed by the Defendant – is "an appropriate procedural device to challenge a void conviction." *Rawls v. Commonwealth*, 278 Va. 213, 217 (2009) (citations omitted). "A circuit court may correct a void or unlawful sentence at any time." *Id.* at 218.

[10] The Supreme Court of Virginia, in *Rawls*, adopted the following rule: "We hold that a sentence imposed in violation of a prescribed statutory range of punishment is void *ab initio* because 'the character of the judgment was not such as the [C]ourt had the power to render.'" *Rawls*, 278 Va. at 221 (quoting *Anthony v. Kasey*, 83 Va. 338, 340 (1887).

Eggleston v. Commonwealth, 2017 Va. App. LEXIS 235 (Va. Ct. App. Sept. 12, 2017). In *Eggleston*, the trial court imposed a period of post-release supervision without imposing a period of suspended post-release confinement, as required by statute.[11] The sentence imposed was "within the prescribed statutory range, and the court erred merely in the way that it structured the post-release component." *Id.*, at *14. The Court held as follows: "The error, therefore, is not jurisdictional, and the sentencing order was voidable, not void *ab initio*...The court lacked authority more than twenty-one days after entry of the unappealed order to graft onto it a term of post-release confinement." *Id.*.[12]

So, too, here the trial court's error was not jurisdictional. Although the Court's Sentencing Order may have been voidable, it was not void *ab initio*. Therefore, it was not subject to modification beyond the twenty-one days provided by Rule 1:1(a).

Having determined that the Court's sentencing order was not void *ab initio*, and having further concluded that there is no other basis for the Court to exercise subject matter jurisdiction in this case, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Revell-Walgorski v. Commonwealth*, 2023 Va. App. LEXIS 589, *6 (Va. Ct. App. Sept. 5, 2023) (quoting *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 50 (2018).

WHEREFORE, the Defendant's Motion to Vacate is DISMISSED.

SO ORDERED, this 4 Day of April, 2024.

[redacted]
JUDGE RANDY I. BELLOWS

[11] The Court of Appeals of Virginia stated: "In order for the post-release supervision of Code § 19.2-295.2(A) to be effective, it must be 'concurrent with a coordinate term of suspension of [post-release confinement]' ordered pursuant to Code § 18.2-10." *Id.*, at 9. (citation omitted). "Post-release supervision, like probation, is 'meaningless if no sentence remain[s] for the court to impose if the defendant violate[s its] terms.'" *Id.* at *10 (quoting *Hartless v. Commonwealth*, 29 Va. App. 172, 175 (1999). While it is true that in the instant case, the trial court imposed neither a period of post-release suspended confinement nor a period of post-release supervision, the effect was the same as in *Eggleston*: an effective period of post-relief supervision was not imposed.

[12] The Court of Appeals of Virginia explained the distinction between a void *ab initio* order and an order that was "merely voidable," stating that it "turns on the key distinction 'between a court lacking jurisdiction to act upon a matter and the court, while properly having jurisdiction, nonetheless erring in its judgment.'" *Id.*, at *13 (quoting *Kelley v. Stamos*, 285 Va. 68, 75 (2013). Here, the Court certainly had jurisdiction to sentence the Defendant; its failure to impose a period of suspended post-release confinement and post-release supervision was an error but, as the Court noted in *Eggleston*, "a circuit court 'has 'jurisdiction to err'." *Id.* (quoting *Jones v. Commonwealth*, 293 Va. 29, 47 (2017).)