

IN THE
SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 1870 WDA 2017 and 737 WDA 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

TYNECIA MILTON-BIVINS,
Appellant

BRIEF FOR APPELLANT

Appeal from the Order of Sentence entered on November 16, 2017, at CC 8439-2005, by the Honorable Lester G. Nauhaus, Court of Common Pleas of the Fifth Judicial District of Pennsylvania at Appellant's Probation Violation hearing and Appeal from the Order of Sentence entered on April 20, 2018, at CC 2010-7609 and 2015-4177 by the Honorable Beth A. Lazzara, Court of Common Pleas of the Fifth Judicial District of Pennsylvania at Appellant's Probation Violation hearing. Superior Court granted Consent Motion for Consolidation on November 15, 2018.

Counsel of Record:

MELISSA R. RUGGIERO, ESQUIRE
Attorney At Law
State I.D.# 94710

Allegheny County Office of Conflict Counsel
1405 Allegheny Building
Pittsburgh, PA 15219
(412) 350-4850

TABLE OF CONTENTS

| | <u>PAGE(S)</u> |
|--|----------------|
| TABLE OF CASES..... | ii, iii |
| TABLE OF STATUTES..... | iv |
| STATEMENT OF JURISDICTION..... | 1 |
| ORDERS IN QUESTION..... | 2 |
| STATEMENT OF QUESTIONS INVOLVED..... | 3 |
| STATEMENT OF THE SCOPE AND STANDARD OF REVIEW..... | 4 |
| STATEMENT OF THE CASE..... | 5 |
| I. PROCEDURAL HISTORY..... | 5 |
| II. FACTUAL HISTORY..... | 11 |
| SUMMARY OF ARGUMENT..... | 13 |
| RULE 2119(f) STATEMENT..... | 15 |
| ARGUMENT..... | 18 |
| CONCLUSION..... | 34 |
| APPELLANT’S 1925(b) STATEMENT..... | A-1 |
| OPINIONS OF THE LOWER COURT..... | B-1 |
| ORDER OF CONSOLIDATION..... | C-1 |
| IN FORMA PAUPERIS ORDER..... | D-1 |
| PROOF OF SERVICE..... | E-1 |

TABLE OF CASES

| | <u>Page(s)</u> |
|---|----------------|
| <u>Bacik v. Commonwealth</u> , 434 A.2d 860 (Pa. Commw. Ct. 1981)..... | 22 |
| <u>Bearden v. Georgia</u> , 103 S.Ct. 2064 (1983)..... | 21, 22, 23 |
| <u>Commonwealth v. Ballard</u> , 814 A.2d 1242 (Pa. Super. Ct. 2003)..... | 23 |
| <u>Commonwealth v. Cannon</u> , 954 A.2d 1222 (Pa. Super. Ct. 2008)..... | 25 |
| <u>Commonwealth v. Caple</u> , 121 A.3d 511 (Pa. Super. Ct. 2015)..... | 29, 30 |
| <u>Commonwealth v. Carver</u> , 923 A.2d 495 (Pa. Super. Ct. 2007)..... | 29 |
| <u>Commonwealth v. Colon</u> , 102 A.3d 1033 (Pa. Super. 2014)..... | 4, 31 |
| <u>Commonwealth v. Dorsey</u> , 476 A.2d 1308 (Pa. Super. Ct. 1984)..... | 23, 24 |
| <u>Commonwealth v. Eggers</u> , 742 A.2d 174 (Pa. Super. Ct. 1999)..... | 21, 23, 25 |
| <u>Comm. Ex. Rel. Parrish v. Cliff</u> , 304 A.2d 158 (Pa. 1973)..... | 20 |
| <u>Comm. Ex Rel. Powell v. Rosenberry</u> , 645 A.2d 1328 (Pa. Super. Ct.1994)..... | 21 |
| <u>Commonwealth v. Gilmore</u> , 347 A.2d 425, (Pa. 1975)..... | 4 |
| <u>Commonwealth v. Golson</u> , 189 A.3d 994, 1000 (Pa. Super. Ct. 2018)..... | 24 |
| <u>Commonwealth v. Infante</u> , 888 A.2d 783, (Pa. 2005)..... | 4 |
| <u>Commonwealth v. Jones</u> , 640 A.2d 914, 919–20 (Super. Ct. 1994)..... | 30 |
| <u>Commonwealth v. Kalichak</u> , 943 A.2d 285 (Pa. Super. Ct. 2008)..... | 15, 16 |
| <u>Commonwealth v. Losch</u> , 535 A.2d 115 (Pa. Super. Ct. 1987)..... | 29 |
| <u>Commonwealth v. Luketic</u> , 162 A.3d 1149 (Pa. Super. Ct. 2017)..... | 17, 33 |
| <u>Commonwealth v. Mauk</u> , 185 A.3d 406 (Pa. Super. Ct. 2018)..... | 23, 24 |
| <u>Commonwealth v. Rodda</u> , 723 A.2d 212 (Pa. Super. Ct. 1999)..... | 15, 31 |
| <u>Commonwealth v. Smetana</u> , 191 A.3d 867 (Pa. Super. Ct. 2018)..... | 28 |
| <u>Commonwealth v. Twitty</u> , 876 A.2d 433 (Pa. Super. Ct. 2005)..... | 15 |
| <u>Commonwealth v. Veon</u> , 150 A.3d 435 (Pa. 2016)..... | 13, 18, 19 |
| <u>Griffin v. Illinois</u> , 76 S.Ct. 585 (1956)..... | 20 |

Tate v. Short, 91 S.Ct. 668 (1971).....20
Williams v. Illinois, 90 S.Ct. 2018 (1970).....20

TABLE OF STATUTES

| | <u>Page(s)</u> |
|---------------------------|-----------------------|
| 18 Pa. C.S. §1106..... | 13, 18, 19, 22 |
| 18 Pa. C.S. §11.103..... | 19 |
| 42 Pa. C.S. §742 | 1 |
| 42 Pa. C.S. §3502..... | 28 |
| 42 Pa. C.S. §9721..... | 14, 16, 31 |
| 204 Pa. Code §29.405..... | 28 |
| Pa.R.Crim.P. 708..... | 6 |
| Pa.R.A.P. 302(a)..... | 18 |
| Pa.R.A.P. 341..... | 1 |
| Pa.R.A.P. 2119(f)..... | 15 |

STATEMENT OF JURISDICTION

The Superior Court has jurisdiction over this matter pursuant to 42 Pa.C.S. § 742 as an appeal from the Judgment of Sentence imposed by the Court of Common Pleas of the Fifth Judicial District of Pennsylvania. The Judgment of Sentence is a final order under Pa.R.A.P. 341(b).

ORDERS IN QUESTION

This is an appeal from the Order of Sentence entered on November 16, 2017, at CP-02-CR-0008439-2005, by the Honorable Lester G. Nauhaus of the Court of Common Pleas of the Fifth Judicial District of Pennsylvania and an appeal from the Order of Sentence entered on April 20, 2018, at CP-02-CR-0007609-2010 and CP-02-CR-0004177-2015 by the Honorable Beth A. Lazzara of the Court of Common Pleas of the Fifth Judicial District of Pennsylvania. Both orders follow probation violation hearings where the Honorable Lester G. Nauhaus and the Honorable Beth A. Lazzara revoked Appellant's probation and resentenced Appellant. The orders in question follow.

Commonwealth of Pennsylvania
v.
Tyniecia Lataun Milton-bivins

IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-02-CR-0008439-2005
DATE OF ARREST:
OTN: K 217659-1
SID: 227-11-35-1
DOB: 05/02/1972

ORDER OF SENTENCE - PROBATION VIOLATION

AND NOW, this 16th day of November, 2017, the defendant having been previously convicted in the above captioned case, and the defendant's original probation/parole on this case having been revoked, a new sentence is imposed. The defendant is to pay all applicable violation fees and costs unless otherwise noted below. A new sentence is hereby imposed by this Court as follows:

Count 1 - 18 § 3922 §§ A1 - Theft By Decep-False Impression (F3)

To be confined for a minimum period of 3 Year(s) 6 Month(s) and a maximum period of 7 Year(s) at SCI Muncy.
This sentence shall commence on 11/16/2017.

RECIDIVISM RISK REDUCTION INCENTIVE (RRRI): 0 Year(s), 35 Month(s), 0 Day(s).

Count 2 - 18 § 3922 §§ A1 - Theft By Decep-False Impression (F3)

A determination of guilty without further penalty.

Count 3 - 18 § 903 §§ A1 - Criminal Conspiracy Engaging (F)

To be confined for a minimum period of 3 Year(s) 6 Month(s) and a maximum period of 7 Year(s) at SCI Muncy.

Count 4 - 18 § 903 §§ A1 - Criminal Conspiracy Engaging (F)

A determination of guilty without further penalty.

Count 5 - 18 § 903 §§ A1 - Criminal Conspiracy Engaging (F)

A determination of guilty without further penalty.

Count 6 - 18 § 903 §§ A1 - Criminal Conspiracy Engaging (F)

A determination of guilty without further penalty.

Count 7 - 18 § 903 §§ A1 - Criminal Conspiracy Engaging (F)

A determination of guilty without further penalty.

LINKED SENTENCES:

Link 1

CP-02-CR-0008439-2005 - Seq. No. 3 (18§ 903 §§ A1) - Confinement is Consecutive to
CP-02-CR-0008439-2005 - Seq. No. 1 (18§ 3922 §§ A1) - Confinement

Commonwealth of Pennsylvania
v.
Tyniece Lataun Milton-bivins

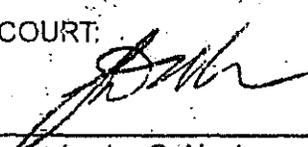
Order of Sentence - Probation Violation

Docket No: CP-02-CR-0008439-2005

The defendant shall receive credit for time served as follows:

| Confinement Location | Start Date | End Date | Days Credit |
|-----------------------|------------|------------|-------------|
| Allegheny County Jail | 08/29/2016 | 12/16/2016 | 110 |
| Allegheny County Jail | 07/10/2017 | 07/14/2017 | 5 |
| Allegheny County Jail | 07/18/2017 | 11/16/2017 | 122 |
| Total | | | 237 |

BY THE COURT:



Senior Judge Lester G. Nauhaus

Commonwealth of Pennsylvania
 v.
 Tyniecia Bivins

IN THE COURT OF COMMON PLEAS OF ALLEGHENY
 COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-02-CR-0007609-2010
 DATE OF ARREST:
 OTN: S 026224-2
 SID: 227-11-35-1
 DOB: 05/02/1972

ORDER OF SENTENCE - PROBATION VIOLATION

AND NOW, this 20th day of April, 2018, the defendant having been previously convicted in the above captioned case, and the defendant's original probation/parole on this case having been revoked, a new sentence is imposed. The defendant is to pay all applicable violation fees and costs unless otherwise noted below. A new sentence is hereby imposed by this Court as follows:

Count 1 - 62 § 481 §§ A - Fraud Obt Foodstamps/Assistance (F3)

To be confined for a minimum period of 3 Year(s) 6 Month(s) and a maximum period of 7 Year(s) at SCI Muncy.
 This sentence shall commence on 04/20/2018.

RECIDIVISM RISK REDUCTION INCENTIVE (RRRI): 0 Year(s), 35 Month(s), 0 Day(s).

LINKED SENTENCES:
 Link 1
 CP-02-CR-0007609-2010 - Seq. No. 1 (62§ 481 §§ A) - Confinement is Concurrent with
 CP-02-CR-0008439-2005 - Seq. No. 1 (18§ 3922 §§ A1) - Confinement

The defendant shall receive credit for time served as follows:

| Confinement Location | Start Date | End Date | Days Credit |
|-----------------------|------------|------------|-------------|
| Allegheny County Jail | 02/10/2017 | 02/23/2017 | 14 |
| Allegheny County Jail | 07/05/2017 | 07/09/2017 | 5 |
| Total | | | 19 |

04/20/2018

BY THE COURT:



 Judge Beth A. Lazzara

Commonwealth of Pennsylvania
v.
Tyniecia Bivins

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA**

CRIMINAL DIVISION

DOCKET NO: CP-02-CR-0004177-2015
DATE OF ARREST: 10/27/2014
OTN: G 694201-4
SID: 227-11-35-1
DOB: 05/02/1972

ORDER OF SENTENCE - PROBATION VIOLATION

AND NOW, this 20th day of April, 2018, the defendant having been previously convicted in the above captioned case, and the defendant's original probation/parole on this case having been revoked, a new sentence is imposed. The defendant is to pay all applicable violation fees and costs unless otherwise noted below. A new sentence is hereby imposed by this Court as follows:

Count 1 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (F3)

To be confined for a minimum period of 3 Year(s) 6 Month(s) and a maximum period of 7 Year(s) at SCI Muncy.
This sentence shall commence on 04/20/2018.

RECIDIVISM RISK REDUCTION INCENTIVE (RRRI): 0 Year(s), 35 Month(s), 0 Day(s).

Count 2 - 35 § 780-113 §§ A16 - Int Poss Contr Subst By Per Not Reg (M)

A determination of guilty without further penalty.

Count 3 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (F3)

A determination of guilty without further penalty.

Count 4 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (F3)

A determination of guilty without further penalty.

Count 5 - 35 § 780-113 §§ A16 - Int Poss Contr Subst By Per Not Reg (M)

A determination of guilty without further penalty.

Count 6 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (F3)

A determination of guilty without further penalty.

Count 7 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (F3)

A determination of guilty without further penalty.

Count 8 - 35 § 780-113 §§ A16 - Int Poss Contr Subst By Per Not Reg (M)

A determination of guilty without further penalty.

Count 9 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (F3)

A determination of guilty without further penalty.

Count 10 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (F3)

A determination of guilty without further penalty.

Commonwealth of Pennsylvania

v.

Tyniece Bivins

Order of Sentence - Probation Violation

Docket No: CP-02-CR-0004177-2015

Count 11 - 18 § 3926 §§ A4 - Theft Of Services-Acquisition Of Services (M1)

A determination of guilty without further penalty.

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (F3)

Offense Disposition: Charge Changed

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (F3)

Offense Disposition: Charge Changed

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (F3)

Offense Disposition: Charge Changed

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (F3)

Offense Disposition: Charge Changed

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (F3)

Offense Disposition: Charge Changed

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (F3)

Offense Disposition: Charge Changed

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (F3)

Offense Disposition: Charge Changed

Count 99,999 - 18 § 3926 §§ B - Diversion Of Services (M1)

Offense Disposition: Charge Changed

LINKED SENTENCES:

Link 1

CP-02-CR-0004177-2015 - Seq. No. 1 (18§ 3926 §§ A4) - Confinement is Concurrent with

CP-02-CR-0007609-2010 - Seq. No. 1 (62§ 481 §§ A) - Confinement is Concurrent with

CP-02-CR-0008439-2005 - Seq. No. 1 (18§ 3922 §§ A1) - Confinement

The defendant shall receive credit for time served as follows:

| Confinement Location | Start Date | End Date | Days Credit |
|-----------------------|------------|------------|-------------|
| Allegheny County Jail | 03/23/2015 | 04/02/2015 | 11 |
| Allegheny County Jail | 12/17/2016 | 02/23/2017 | 69 |
| Allegheny County Jail | 07/05/2017 | 07/09/2017 | 5 |
| Total | | | 85 |

BY THE COURT:

Judge Beth A. Lazzara

04/20/2018

STATEMENT OF QUESTIONS INVOLVED

- Were the trial courts' sentences illegal because corporations and the Commonwealth are not victims under the restitution statute, 18 Pa.C.S. §1106, and therefore Ms. Bivins does not lawfully owe any restitution?

Not answered by the trial courts.

- Were the trial courts' sentences illegal because it failed to consider Ms. Bivins ability to pay restitution?

Answered in the negative by the trial courts.

- Were the trial courts' sentences an abuse of its discretion because it failed to consider the relevant sentencing criteria for Ms. Bivins?

Answered in the negative by the trial courts.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the sentence imposed following revocation. Commonwealth v. Infante, 888 A.2d 783, 790 (Pa. 2005); Commonwealth v. Gilmore, 347 A.2d 425, 427 (Pa. 1975).

Revocation of a probation sentence is a matter within the sound discretion of the trial court and the trial court's decision “will not be disturbed on appeal in the absence of an error of law or an abuse of discretion.” Commonwealth v. Colon, 102 A.3d 1033, 1041 (Pa. Super. Ct. 2014).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. 1870 WDA 2017

On March 13, 2006, Ms. Bivins plead guilty at criminal information CP-02-CR-8439-2005 before the Honorable Lester G. Nauhaus to the charges as follows: two (2) counts of Theft by Deception (18 Pa.C.S.A. §3922 §§A1) and five (5) counts of Criminal Conspiracy (18 Pa.C.S.A. §903 §§A1). Docket Entry 4.

On the same day, Ms. Bivins was sentenced to seven (7) years of probation for each Theft by Deception charge and to seven (7) years of probation for one of the Criminal Conspiracy charges for an aggregate sentence of twenty-one (21) years of probation. Id. Ms. Bivins was also ordered to pay twenty-four thousand thirty-seven (\$24,037) dollars in restitution. Id. This was the only condition set by the trial court.

A Probation Violation Hearing was held on December 16, 2016. This hearing resulted from Ms. Bivins failing to make restitution payments. At the hearing, the Honorable Lester G. Nauhaus agreed to continue probation on the condition that Ms. Bivins make monthly payments of fifty (\$50) dollars and comply with Justice Related Services. Transcript Docket Entry 2 (CC# 2005-8439) at 8. The trial court did not inquire into Ms. Bivins's financial resources and ability to pay the restitution. Id.

On October 5, 2017, a Probation Violation hearing was held before the Honorable Lester G. Nauhaus as a result of Ms. Bivins making irregular restitution payments and one positive drug test. However, the Probation Violation hearing was continued upon defense counsel request for a continuance to further prepare. Transcript Docket Entry 3 (CC# 2005-8439) at 8-9. On November 16, 2017 another Probation Violation Hearing was held before the Honorable Lester G. Nauhaus. Finding that Ms. Bivins had violated the terms of her probation, the trial court sentenced her to 3 ½ to 7 (three and one-half to seven) years of incarceration at Count 1 Theft by Deception (18 Pa.C.S.A. §3922 §§A1) and Count 3 Criminal Conspiracy (18 Pa.C.S.A. §903 §§A1) to run consecutive or an aggregate sentence of 7 to 14 (seven to fourteen) years of incarceration. Docket Entry 14. The trial court did not inquire into Ms. Bivins's financial resources and ability to pay the restitution. Transcript Docket Entry 3 and 4 (CC# 2005-8439).

Ms. Bivins, still represented by the Allegheny County Office of the Public Defender, filed a post-sentence motion for modification of her sentence on November 27, 2017. Docket Entry 15. The trial court denied the motion on December 20, 2017.¹ Docket Entry 20. On December 14, 2017 a timely Notice of Appeal was filed by the Office of the Public Defender. Docket Entry 19.² On January

¹ The Order prepared by the Office of the Public Defender was stamped "Denied" by the trial court. Although the signed Order indicates the motion was granted.

² In probation revocation cases, "[t]he filing of a motion to modify sentence will not toll the 30-day appeal period." Pa.R.Crim.P. 708(E). "Under this rule, the mere filing of a motion to modify

10, 2018, the trial court ordered Ms. Bivins to file a Concise Statement of Errors pursuant to Pa. R.A.P. 1925(b) by January 31, 2018. The Office of the Public Defender then filed a motion to withdraw as counsel on January 19, 2018, and this Honorable Court remanded the matter for a Grazier Hearing on January 26, 2018. Docket Entry 24. Pursuant to Pa.R.A.P. 1925(b), Office of the Public Defender filed a 1925(b) Statement of Errors to be Complained of on Appeal on January 30, 2018. Docket Entry 25. The Honorable Lester G. Nauhaus conducted the Grazier Hearing on February 23, 2018 at which he stated he would appoint the Allegheny County Office of Conflict Counsel, and the court issued an order to that effect on March 1, 2018. Docket Entry 27.

Attorney Melissa Ruggiero, counsel herein, filed a Petition for Extension of Time in which to file a 1925(b) Statement on March 14, 2018, which the trial court granted on March 15, 2018. Docket Entry 29; Docket Entry 30. On April 13, 2018 Attorney Ruggiero filed a notice stating the previously filed 1925(b) Statement would not be modified, followed by a notice to adopt the previous 1925(b) Statement on April 17, 2018. Docket Entry 31; Docket Entry 32. On May 8, 2018, the Honorable Lester G. Nauhaus issued an opinion in accordance with Pa.R.A.P. 1925(a). Docket Entry 1 Opinion.

sentence does not affect the running of the 30-day period for filing a timely notice of appeal. Any appeal must be filed within the 30-day appeal period unless the sentencing court within 30 days of the imposition of sentence expressly grants reconsideration or vacates the sentence.” Pa.R.Crim.P. 708, Comment (citations omitted).

On August 13, 2018 Attorney Ruggiero filed an Application for Remand to amend the 1925(b) Statement. This Honorable Court granted the request for remand on August 21, 2018. On August 31, 2018 an Amended Concise Statement of Errors to be Complained of on Appeal was filed. An Amended Opinion was issued by the Honorable Lester G. Nauhaus on October 17, 2018.

B. 737 WDA 2018

On September 19, 2011, Ms. Bivins pled guilty at CP-02-CR-0007609-2010 to one (1) count of Fraud Obtaining Food stamps/Assistance (62 Pa.C.S. § 481 §§ A) and the Honorable Beth A. Lazzara sentenced Ms. Bivins to 7 years' probation and to pay restitution to the Commonwealth in the amount of forty-seven thousand seven hundred six dollars and fifty cents (\$47,706.50). Docket Entry 4.

On November 4, 2015, Ms. Bivins pled guilty at CP-02-CR-0004177-2015 to eight (8) counts of Theft Of Services-Acquisition of Services (18 Pa.C.S. § 3926 §§ A(4)) and three (3) counts of possession of controlled substance (35 Pa.C.S. § 780-113 §§ A(16)) and the Honorable Beth A. Lazzara sentenced defendant to five (5) years' probation and to undergo a drug and alcohol evaluation with treatment if required, to pay restitution in the amount of ten thousand (\$10,000) dollars to UPMC, and to make regular payments of \$100.00 per month on the balance of restitution owed. Docket Entry 5.

On February 10, 2017, at a probation violation hearing for the above cases Ms. Bivins was sentenced to 7 years' probation, to comply with the Justice Related Service Plan, defendant to make regular payments of \$100.00 total per month on the balance of restitution owed between docket numbers CP-02-CR-0007609-2010 and CP-02-CR-0004177-2015. Docket Entry 10.

On April 20, 2018, Ms. Bivins proceeded to a probation violation hearing. At the conclusion of the hearing, the Honorable Beth A. Lazzara (1) found that Ms. Bivins violated the terms of her probation; (2) revoked her probation; and (3) re-sentenced her to three and a half (3 ½) years to seven (7) years of incarceration. Confinement is concurrent with sentence by the Honorable Lester G. Nauhaus of seven (7) to fourteen (14) years of incarceration at criminal docket number CP-02-CR-0008439-2005. Docket Entry 12. The trial court did not inquire into Ms. Bivins's financial resources and ability to pay the restitution. Transcript Docket Entry 2 (CC#2010-7609).

Timely post sentence motions were filed on April 30, 2018. Docket Entry 20. An order denying Ms. Bivins post sentence motions was filed on May 17, 2018. Docket Entry 22. Ms. Bivins filed a timely notice of appeal May 18, 2018. Docket Entry 23. The Honorable Beth A. Lazzara entered an order on May 30, 2018 directing counsel to file a concise statement of errors to be complained of on appeal pursuant to Pa.R.A.P. 1925(b) by June 21, 2018. Docket Entry 25. Counsel herein

filed the 1925(b) Statement of Errors to be Complained of on Appeal on June 22, 2018. Docket Entry 26. On the same date, Motion to reinstate appellate rights nunc pro tunc was filed. Docket Entry 27. The Honorable Beth A. Lazzara granted said motion on July 3, 2018. Docket Entry 28. The Trial Court issued an opinion in accordance with Pa.R.A.P. 1925(a) on September 13, 2018. Docket Entry 1 Opinion.

On September 24, 2018, Counsel herein filed an Application for Remand to amend the 1925(b) Statement. This Honorable Court granted the request for remand on September 26, 2018. On October 9, 2018, an Amended Concise Statement of Errors to be Complained of an Appeal was filed. An Amended Opinion was issued by the trial court on November 2, 2018.

C. 1870 WDA 2017 and 737 WDA 2018

On November 6, 2018 a Consent Motion for Consolidation pursuant to Pa.R.App.P. 513 stipulated to by Attorney Michael W. Streily, Esquire of the Allegheny County Office of the District Attorney was filed by counsel for the Appellant to consolidate 1870 WDA 2017 and 737 WDA 2018 because both of Ms. Bivins' cases involve the same questions. This Honorable Court granted the Consent Motion for Consolidation on November 15, 2018. This appeal follows.

II. FACTUAL HISTORY

As is described above, Ms. Bivins has pled guilty to and admitted her responsibility in three cases. In CP-02-CR-8439-2005, she defrauded three banks by writing checks on a closed Citizens Bank account and depositing them at National City, Dollar Bank, and Standard Bank. Docket Entry 1 (CC# 2005-8439). As a result, she was ordered to pay \$24,037 in restitution and was given a 21-years of probation. Docket Entry 4 (CC# 2005-8439). In CP-02-CR-0007609-2010, Ms. Bivins obtained \$47,706.50 in Subsidized Child Care Benefits by misrepresenting information concerning her employment status to Child Care Information Services of Allegheny County. Docket Entry 1 (CC# 2010-7609). And in CP-02-CR-0004177-2015, she presented herself under an alias at different UPMC Emergency Departments complaining of pain, which allowed her to receive medical services and some pain medication. Docket Entry 1 (CC# 2015-4177). She was ordered to pay \$10,000 in restitution to UPMC. Docket Entry 5 (CC# 2015-4177).

Although the record regarding Ms. Bivins's financial resources is not well-developed—a central problem in this case—the record does show hints at her limited financial resources. According to a 2016 transcript, Ms. Bivins struggles with disabilities including mental health disabilities, and as a result she receives a “fixed income” in the form of “social security disability.” Transcript Docket Entry 2 (CC# 2005-8439) at 4. This Court can take judicial notice that Supplemental Security

Income (“SSI”) pays \$750 per month, for a total of \$9,000 per year.³ At the April 20, 2018 hearing, Ms. Bivins’s attorney explained that due to injuries she “has pins in her feet and can’t be on her feet.” Transcript Docket Entry 2 (CC# 2010-7609) at 5. Ms. Bivins also has two minor children. Id. at 7. This Court can also take judicial notice that the 2018 Federal Poverty Guidelines for a household size of three is \$20,780, of which her social security benefits would be less than half.⁴

While Ms. Bivins owes more than \$70,000 in restitution, court records also reflect that she has made at least some effort to pay over the past six years. The docket sheet for CP-02-CR-0008439-2005 shows that she made 5 payments between 2012-2015 that totaled \$70.⁵ The docket sheet in CP-02-CR-0007609-2010 shows that she made 22 payments between 2012-2017 for a total of \$440. Finally, the docket sheet in CP-02-CR-0004177-2015 shows that she made 4 payments in 2017 for a total of \$110. All told, Ms. Bivins has made 31 payments totaling \$620.

³ “Supplemental Security Income (SSI) in Pennsylvania,” Social Security Administration (2018), <https://www.ssa.gov/pubs/EN-05-11150.pdf>.

⁴ 83 Fed. Reg. 12 at 2643. <https://www.govinfo.gov/content/pkg/FR-2018-01-18/pdf/2018-00814.pdf>

⁵ Nothing in the record explains how payments are divided or if the defendant has any choice on which case the payments go towards when she goes to the clerk’s office with money to make payments.

SUMMARY OF ARGUMENT

The sentences are illegal because they ignore our Supreme Court's decision in Commonwealth v. Veon, 150 A.3d 435, 450 (Pa. 2016) that corporations and the Commonwealth are not victims under the restitution statute 18 Pa.C.S. §1106. As a result, as a matter of law, Ms. Bivins owes no restitution.

The trial courts' finding that Ms. Bivins violated the terms of her probation, and the courts' decisions to revoke that probation and sentence her to incarceration for failure to make restitution payments was illegal. Before a court may find that a defendant violated the terms of her probation for not paying fines, costs, or restitution, it must conduct an inquiry into the defendant's ability to pay. Failure to do so violates the defendant's constitutional rights and repeated decisions by this Court and the United States Supreme Court by essentially imprisoning a person because she cannot pay. Here, both trial courts admit that they did not conduct such an inquiry, and from the record, it is apparent the reason for the Violation Hearing in which Ms. Bivins' probation was revoked was because she had failed to pay the ordered restitution.

The courts' actions not only violated Ms. Bivens's fundamental constitutional rights, they also violated Pennsylvania law that flatly prohibits incarcerating indigent defendants who cannot pay restitution. 18 Pa.C.S. § 1106(c)(2)(iii) is explicit that a

court “Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.”

Moreover, the trial courts abused their sentencing discretion because it failed to consider the relevant sentencing criteria, including the protection to the public, the gravity of the underlying offenses and violation, and the character, personal history, and rehabilitative needs of the defendant, as required by 42 Pa.C.S. §9721(b).

For these reasons, this Court should reverse the ruling of the trial court and instruct the trial court to hold a new *Gagnon II* hearing to determine whether Ms. Bivins had the ability to pay restitution in this matter. The Court should also order that Ms. Bivins be released from prison until the new *Gagnon II* hearing.

**STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE
OF APPEAL PURSUANT TO RULE 2119(f)**

Two requirements must be met before a challenge to the discretionary aspects of the judgment of a probation-revocation sentence will be heard on the merits. Commonwealth v. Kalichak, 943 A.2d 285, 289 (Pa. Super. Ct. 2008) *citing* Commonwealth v. Malovich, 903 A.2d 1247, 1250; 42 Pa.C.S. § 9781(b). Specifically, the appellant must set forth in his or her brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence. Id.; Pa.R.A.P. 2119(f). In that statement, he or she must show that there is a substantial question that the sentence imposed is not appropriate under the sentencing code. Id.; Pa.R.A.P. 2119(f).

The appellant “must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons for partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa. Super. Ct. 1999) (*en banc*) (quotation marks and citations omitted). This court has defined an abuse of discretion as “not merely an error of judgment, but...rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable...” Commonwealth v. Twitty, 876 A.2d 433, 437 (Pa. Super. Ct. 2005).

Ms. Bivins contends that both trial courts' sentences were an abuse of discretion because both trial courts failed to consider the relevant sentencing criteria, including protection of the public, the gravity of the underlying offenses and violation, and the character, personal history, and rehabilitative needs of the defendant, as required by 42 Pa.C.S. § 9721(b). The Appellant contends that the sentences were unreasonable because both trial courts imposed a manifestly excessive sentence.

Ms. Bivins also argues that this misapplication of the law raises a substantial question to be heard on the merits. “[A]n appellant may demonstrate the existence of a substantial question by advancing a colorable argument that the sentencing court’s actions were inconsistent with a specific provision of the sentencing code or violated a fundamental norm of the sentencing process. Kalichak, 943 A.2d at 289-290.

Ms. Bivins contends that both trial courts erred when it failed to impose a sentence that was consistent with the Sentencing Code. Specifically, the Appellant avers that both trial courts abused their discretion because they failed to consider the relevant sentencing criteria as required by 42 Pa.C.S. § 9721(b). This Honorable Court has recognized that such a sentence can be the basis for a claim of abuse of discretion when the trial court does not consider the protection of the public, the gravity of the offense in relation to its impact on the victim and the community, and

the rehabilitative needs of the defendant. Commonwealth v. Luketic, 162 A.3d 1149,1160-61 (Pa. Super. Ct. 2017). Furthermore, without considering individualized factors this Court has recognized that the sentence should be vacated. Id. at 1163.

ARGUMENT

I. THE SENTENCE IS ILLEGAL BECAUSE CORPORATIONS AND THE COMMONWEALTH ARE NOT VICTIMS UNDER THE RESTITUTION STATUTE AND NO RESTITUTION SHOULD BE OWED BY MS. BIVINS

Ms. Bivins does not owe restitution to any individuals. Instead, she owes restitution to three banks,⁶ the Commonwealth,⁷ and UPMC.⁸ As a matter of law, such a sentence is illegal because at the time Ms. Bivins committed these offenses and was sentenced (both on her original sentence and later due to nonpayment) corporations and the Commonwealth were not victims under the restitution statute and no restitution.⁹ She cannot and does not lawfully owe any restitution. It is an illegal sentence and this issue has not been waived.¹⁰

Our Supreme Court explained in Commonwealth v. Veon, 150 A.3d 435 at 454 (Pa. 2016) that the definition of “victim” as used by 18 Pa.C.S. § 1106 is limited

⁶ CP-02-CR-8439-2005. Docket Entry 5.

⁷ CP-02-CR-0007609-2010. Docket Entry 5.

⁸ CP-02-CR-0004177-2015. Docket Entry 5.

⁹ 18 Pa.C.S. § 1106 was amended on October 24, 2018 by Act 145 (2018) which expanded the definition of victims to include “any affected government agency” and “any other business entity”. 2018 Pa.Legis.Serv. Act 2018-145 (S.B. 897) (Purdon’s). The Legislature presumably acted in response to Commonwealth v. Veon, 150 A.3d 435 (Pa. 2016) but this law was not in effect when Ms. Bivins was ordered to pay restitution and does not apply.

¹⁰ Generally, an appellant cannot raise new legal theories for the first time on appeal. Pa.R.A.P. 302(a); Commonwealth v. Golson, 189 A.3d 994, 1000 (Pa. Super. Ct. 2018) (citations omitted). Nevertheless, because Appellant’s claim presents a challenge to the legality of her sentence, it is not waived, even though it is raised for the first time in her appellate brief. Id. citing Commonwealth v. Barnes, 151 A.3d 121, 122 (2016). Legality of sentence claims are not subject to traditional waiver doctrine. Id. citing Commonwealth v. Wolfe, 140 A.3d 651, 660 (2016).

to “‘persons’ as commonly understood.” In reaching this conclusion, the Court looked at 18 Pa. C.S. § 1106(h), which defined “victim” as falling under the definition of “section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175)”—codified at 18 Pa.C.S. § 11.103. *Id.* at 449. The Court’s analysis showed that the definition was limited to “‘a direct victim,’ *i.e.*, an ‘individual’ who has suffered injury, death, or loss of earnings; or a ‘child,’ ‘parent,’ ‘guardian,’ or ‘family member.’ Every relevant noun unequivocally describes a human being, not a government agency, and nowhere else is there a relevant definition that persuades us to broaden the common understanding of these words.” *Id.* at 454. The Court’s decision left no ambiguity: government agencies and corporations are not “victims” within the meaning of § 1106.

Veon is indistinguishable from this case. *Id.* National City Bank, Dollar Bank, Standard Bank, Office of Inspector General and UPMC, themselves, cannot be a victim under Section 11.103. Furthermore, these entities received no compensation from another Commonwealth agency in these cases. They are simply not victims under 18 Pa.C.S. § 1106. As a result, Ms. Bivens owes them no restitution. And any nonpayment of a restitution obligation that she does not have cannot result in her violating the terms of her probation or incarceration.

II. THE TRIAL COURTS FAILED TO CONSIDER MS. BIVINS ABILITY TO PAY RESTITUTION

A. Trial courts must inquire into the reasons for nonpayment prior to finding a violation and punishing a defendant.

It is well established that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Griffin v. Illinois, 76 S.Ct. 585, 591 (1956). To that end, numerous United States Supreme Court cases have afforded protections to indigent defendants in order to prevent the infliction of further punishment that would have been solely predicated on the defendant’s lackluster financial status. See e.g. Griffin, 76 S.Ct at 590-591 (holding that not providing an indigent defendant with a copy of his trial transcript at public expense violated the Equal Protection Clause); Williams v. Illinois, 90 S.Ct. 2018 (1970) (an indigent defendant’s imprisonment may not extend beyond the statutory maximum period simply because the defendant defaults on a court-ordered payment); Tate v. Short, 91 S.Ct. 668 (1971) (Constitution prohibits imposing a sentence as a fine and then automatically converting that sentence into a term of imprisonment solely based on the defendant’s inability to pay that fine forthwith.)

The Commonwealth of Pennsylvania has also long afforded similar protections to indigent defendants. See e.g. Commonwealth Ex. Rel. Parrish v. Cliff, 304 A.2d 158 (Pa. 1973) (“appellants must be given the opportunity to establish that they are unable to pay...[u]pon a showing of indigency, the appellants should be

allowed to make payments in reasonable installments.”); Commonwealth v. Eggers, 742 A.2d 174, 176 (Pa. Super. Ct. 1999) (“Despite evidence of Appellant's obvious indigence the lower court made no judicial inquiry into the ability to pay and reasons for Appellant's failure to make payment. Also disregarded was an inquiry into whether the failure to pay was willful, and if willful, whether alternatives to incarceration were proper.”); Commonwealth Ex Rel. Powell v. Rosenberry, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994) (“There is no indication in the record that Powell has willfully refused to pay his fine . . . We do not imprison the poor solely for their inability to pay fines.”).

Ms. Bivins’ probation revocations and sentences of incarceration by the Honorable Lester G. Nauhaus and the Honorable Beth A. Lazzara were based on her failure to make restitution payments. See Transcript Docket Entry 4 (CC# 2005-8439) at 5, 10; Transcript Docket Entry 2 (CC# 2010-7609) at 9-11. In the seminal case of Bearden v. Georgia, 103 S.Ct. 2064 (1983), the United States Supreme Court addressed this very situation. The Court was asked to answer the question of whether revoking an indigent defendant’s probation for failure to pay a fine or restitution violated the Fourteenth Amendment. Id. at 2066-2067. In answering that question, the Court held “in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay.” Id. at 2073. The basis of such an inquiry was to determine if a defendant could not pay despite

sufficient bona fide efforts or if the defendant was willfully refusing to pay. Id. at 2073. If a defendant is unable to pay despite sufficient bona fide efforts, the Court stated that alternative measures of punishment other than imprisonment must be considered. Id. at 2073.

Pennsylvania law provides even more protections than the constitutional floor set by Bearden. While indigent defendants can, under limited circumstances, be incarcerated despite their inability to pay fines or restitution, 18 Pa.C.S. § 1106(c)(2)(iii) is explicit that a court “[s]hall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.” Thus, upon a finding of indigence, no defendant in Pennsylvania can be incarcerated due to nonpayment of restitution. This is not an aberration—Pennsylvania law has long provided the same protection for nonpayment of fines and costs. As the Commonwealth Court has explained, the Rules of Criminal Procedure “preclude[] the possibility of imprisonment ever being imposed upon one whose indigency is established.” Bacik v. Commonwealth, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (describing then-Pa.R.Crim.P. 65, which contained identical language to the current Pa.R.Crim.P. 706 and applied to summary offenses).

To protect these important rights and avoid the jailing of indigent defendants, this Honorable Court has repeatedly interpreted Bearden to require the revocation court to conduct the aforementioned inquiry into the defendant’s failure to pay, and

then make findings pertaining to the willfulness of the omission. Commonwealth v. Eggers, 742 A.2d 174 (Pa. Super. Ct. 1999). Further, this Honorable Court has also stated, in accordance with Bearden, that if the revocation court finds a defendant could not pay despite sufficient bona fide efforts to acquire the financial resources to pay, the revocation court should then consider alternatives to incarceration. Id. at 176.

Additionally, in furtherance of Bearden, this Honorable Court has reversed revocations of probation because the revocation court failed to undertake the required inquiry into the defendant's ability to pay—even when the defendant himself has failed to raise inability to pay as a defense. See Commonwealth v. Dorsey, 476 A.2d 1308 (Pa. Super. Ct. 1984); Commonwealth v. Ballard, 814 A.2d 1242 (Pa. Super. Ct. 2003). Such an inquiry is also not something that a revocation court must conduct one time and ignore at subsequent hearings, should any occur. Rather, every time a defendant appears for a failure to pay a fine or restitution, the court must conduct the inquiry, because it is entirely possible that the defendant's financial situation may have changed. Commonwealth v. Mauk, 185 A.3d 406 (Pa. Super. Ct. 2018). Furthermore, under this Court's clear instruction in Dorsey, a defendant can stand silent at a revocation proceeding and not say a word about his financial resources, yet a court would still violate his rights by not at least asking him questions about how much money he makes and how much it costs for him to

house and feed himself and his family. Dorsey, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984).

Here, the Honorable Lester G. Nauhaus and the Honorable Beth A. Lazzara conducted no such inquiry into Ms. Bivins' ability to pay the restitution, her financial resources, or whether her failure to pay was willful or the result of circumstances beyond her control. Instead, the focus of the hearings was how long Ms. Bivins had been on probation and the amount of restitution she still had to pay. Transcript Docket Entry 4 (CC# 2005-8439); Transcript Docket Entry 2 (CC# 2010-7609). From the transcripts, one can easily discern that both trial courts were frustrated with the lack of progress Ms. Bivins was making. But the courts did not even know basic information about Ms. Bivens's financial resources. For example, the courts cannot answer *any* questions such as: (1) Was Ms. Bivens working?; (2) How much income did Ms. Bivens have each month?; (3) What were the sources of her income?; (4) How many children does Ms. Bivens have and what are their ages?; (5) Does Ms. Bivens receive food stamps?; and (6) Is there any money left over at the end of the month?

The law is clear: both trial courts were *required* to conduct the inquiry into Ms. Bivins' failure to make any payments. Mauk, 185 A.3d at 411. They did not, and thus the courts lacked evidence to find that Ms. Bivens violated the conditions of her supervision.

B. The evidence on the record indicates Ms. Bivins had no ability to pay.

An inquiry into Ms. Bivins' ability to pay was warranted not only because it is legally required, but also because Ms. Bivins' circumstances indicate that she was indigent and would struggle with such a high amount of restitution. This Honorable Court has held that a trial court establishes indigence similarly to how it determines a defendant may proceed in forma pauperis. Commonwealth v. Cannon, 954 A.2d 1222 (Pa. Super. Ct. 2008). To that end, this Honorable Court has stated that trial courts have considerable discretion in determining indigence, and may consider factors such as a defendant's assets, present or past salary, property owned, debts, and persons dependent for support, among others. Id. at 1226.

In the instant case, Ms. Bivins was first represented by the Allegheny County Office of the Public Defender, which means she met the financial requirements for court-appointed counsel. While not necessarily dispositive, that alone suggests that she is indigent. See Eggers, 742 A.2d at 176 n.1 (receiving public assistance and the services of the public defender's office "invite the presumption of indigence.") The fact that Ms. Bivins was represented by court-appointed counsel after the Office of the Public Defender withdrew, which occurred after representing Ms. Bivins for over a year, also demonstrates her indigent financial situation. Furthermore, at the December 16, 2016 Probation Violation Hearing, the Honorable Lester G. Nauhaus was informed that Ms. Bivins was on a fixed income, collects disability through

Social Security, and is afflicted with disabilities as well as mental health issues. Transcript Docket Entry 2 at 4. Perhaps the most obvious sign of the trial court's acknowledgement of Ms. Bivins financial situation was stated at Ms. Bivins guilty plea on March 13, 2006. Judge Nauhaus stated, "Defendant to understand that as soon as the restitution is paid off, I'll take her off probation. *I'm not hopeful.*" Transcript Docket Entry 1 at 14 (emphasis added). This evidence of Ms. Bivins' indigency demonstrates why the law requires the trial court to conduct an inquiry into the defendant's ability to pay ordered restitution before it may revoke the defendant's probation for the lack of payment.

C. The dispositive reason Ms. Bivins's probation was revoked and she was given a seven-year jail sentence is because she did not pay restitution.

While it may be argued that the revocation of Ms. Bivin's probation by the Honorable Lester G. Nauhaus was based on her positive urine sample in violation of Justice Related Services' zero tolerance policy, the record simply does not support such a claim. The probation violation hearing before the Honorable Beth A. Lazzara, on April 20, 2018 the trial court made no mention of her positive urine sample. Transcript Docket Entry 2 (CC# 2010-7609). The Honorable Lester G. Nauhaus repeatedly stated that Ms. Bivins was placed on probation in order for her to pay the restitution. Transcript Docket Entry 1 (CC# 2005-8439) at 14; Transcript Docket Entry 2(CC# 2005-8439) at 2-3; Transcript Docket Entry 4 (CC# 2005-8439) at 2,

5. At no time before the Probation Violation Hearing on November 16, 2017 did the Honorable Lester G. Nauhaus mention Justice Related Services, and when that condition of probation became an issue, it was dismissed by Ms. Bivins' own probation officer, Kenneth Walls. Transcript Docket Entry 4(CC# 2005-8439) at 10. Specifically, Probation Officer Walls told the Honorable Lester Nauhaus that "[Ms. Bivins] is not here for anything else. December 16, 2016, she agreed to pay the restitution. She did not do that. That is why she is here. She is not here for anything else." Id. at 10. Based on these statements, it is clear that the purpose of the Probation Violation Hearing was to address the lack of restitution payments. To that end, the Honorable Lester G. Nauhaus was required by law to conduct an inquiry to assess Ms. Bivins' ability to pay the restitution, the financial resources available to Ms. Bivins that could be used towards paying the restitution, and whether the non-payment of restitution was willful. No such inquiry was conducted.

The determination by the Honorable Lester G. Nauhaus that Ms. Bivins never paid anything is not supported by the record Docket Entry 1 Opinion at 2, 4, 5; Amended Opinion 10/17/18 at 2-4; Transcript Docket Entry 4 (CC# 2005-8439) at 2-4. The docket sheet for CP-02-CR-0008439-2005 shows that Ms. Bivins made five payments from 2012 to 2015 totaling seventy (\$70) dollars. The trial court's amended opinion stated that Ms. Bivins had a thousand dollars on her before she was detained in the probation office. Amended Opinion 10/17/18 at 6. There was

no inquiry at the probation violation hearing if in fact the thousand dollars was Ms. Bivins. Transcript Docket Entry 4 (CC# 2005-8439) at 4-5. Per Smetana, if the funds are not the defendant's those funds cannot be imputed to her. Commonwealth v. Smetana, 191 A.3d 867, 873 (Pa. Super. Ct. 2018).

The docket sheet for CP-02-CR-0007609-2010 shows that she made twenty-two (22) payments from 2012 to 2017 for a total of four-hundred forty (\$440) dollars. The docket sheet for CP-02-CR-0004177-2015 shows that she made four (4) payments in 2017 for a total of \$110. To note, not all of the payments that Ms. Bivins made is reflected in the totals of what she paid, particularly at case CP-02-CR-0007609-2010. There may have been some administrative error. However, the docket for 2010 cases does list that Ms. Bivins made thirty-one payments worth six hundred twenty (\$620) dollars in the six years before her probation violation. This is not the fault of Ms. Bivins. Pursuant to the court's regulation in 204 Pa. Code §29.405 costs, fines and fees under 42 Pa.C.S. § 3502(a) requires that private debt collectors take all of their money first, followed by costs for the Crime Victim Compensation Fund and Victim Witness Services Fund and only then do the payments get split 50% restitution and 50% other costs. While the payments made are not a significant amount—a reflection of her poverty—Ms. Bivins did in fact make payments.

D. Because Ms. Bivens was unlawfully sentenced due to nonpayment of restitution, the Court must vacate her sentence.

In the Honorable Lester G. Nauhaus revised opinion, the trial court tries to justify Ms. Bivins' sentence because of the positive urine test. Trial Court Opinion October 17, 2018 at 4, 6. However, there is no question that non-payment of restitution formed at least part – and it seems, the majority – of the reason for the finding of the violation and sentencing. Trial Court Opinion October 17, 2018; Trial Court Opinion November 2, 2018.

Probation or parole may be revoked for a legitimate technical violation, such as the willful failure to maintain a job, use of drugs or alcohol, or the failure to report to the probation or parole officer. Commonwealth v. Carver, 923 A.2d 495, 496 (Pa. Super. Ct. 2007). A technical violation may support sentence of incarceration if flagrant and indicating an inability to reform. Id. However, when a sentence is vacated and the case is remanded to the sentencing court for resentencing, the sentencing judge should start afresh. Commonwealth v. Caple, 121 A.3d 511, 524 (Pa. Super. Ct. 2015); Commonwealth v. Losch, 535 A.2d 115 (Pa. Super. Ct. 1987). “Reimposing a judgment of sentence should not be a mechanical exercise.” Id. 535 A.2d at 122. “Given the important nature of the interests involved, the judge at the second sentencing hearing should reassess the penalty to be imposed on the defendant-especially where defense counsel comes forward with relevant evidence which was not previously available.” Id. Thus, [appellee's] conduct since the prior

sentencing hearing is relevant at resentencing. *Id.* 535 A.2d at 123. “The sentencing judge must take note of this new evidence and reevaluate whether the jail term which [appellee] received is a just and appropriate punishment.” Commonwealth v. Jones, 640 A.2d 914, 919–20 (Spuer. Ct. 1994); *See also* Commonwealth v. Caple, 121 A.3d 511, 524 (Pa. Super. Ct. 2015).

It cannot be that a trial court can punish a defendant for two reasons, one of them illegal, and then the sentence stands on the other reasons alone. If a defendant were convicted of both burglary and assault, but the burglary conviction was overturned, the Court would of course remand for resentencing only on the assault conviction. This is no different. Ms. Bivins was punished for two technical violations, but only one of them was lawful. As a result, the Court must vacate the entire sentence and remand.

III. THE TRIAL COURTS ERRED BY REVOKING MS. BIVINS' PROBATION AND SENTENCING MS. BIVINS TO INCARCERATION BECAUSE IT FAILED TO CONSIDER THE RELEVANT SENTENCING CRITERIA

Ms. Bivins next claims that the Honorable Lester G. Nauhaus' revocation of probation and new sentence of seven (7) to (14) fourteen years and the Honorable Beth A. Lazzara's sentence of three and a half (3 ½) years to seven (7) years of incarceration was an abuse of discretion because both trial courts failed to consider the relevant sentencing criteria, including the protection of the public, the gravity of

the underlying offenses and violation, and the character, personal history, and rehabilitative needs of the defendant, as required by 42 Pa.C.S. §9721(b).

Revocation of a probation sentence is a matter within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion.” Commonwealth v. Colon, 102 A.3d 1033, 1041 (Pa. Super. Ct. 2014) (citing Commonwealth v. Perreault, 930 A.2d 553, 558 (Pa. Super. Ct. 2007)). Section 9271(b) provides in pertinent part as follows:

[T]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa.C.S. §9721(b)

In order to establish that the sentencing court abused its discretion, Appellant “must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons for partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa. Super. Ct. 1999) (*en banc*) (quotation marks and citations omitted.)

Both trial courts revoked Ms. Bivins’ probation at Ms. Bivins’ probation violation hearings. The Honorable Lester Nauhaus sentenced Ms. Bivins to seven (7) to (14) fourteen years and the Honorable Beth Lazzara’s sentence of three and a half (3 ½) years to seven (7) years of incarceration. Docket Entry 14 (CC# 2005-

8439); Docket Entry 19 (CC# 2010-7609). Ms. Bivins contends that the sentences were unreasonable because both trial courts imposed a manifestly excessive sentence.

Both trial courts abused their discretion because they failed to consider the relevant sentencing criteria as required by 42 Pa.C.S. §9721(b). Specifically, the trial courts failed to take into consideration that none of the crimes that defendant pled guilty to involve physical harm. What Ms. Bivins did was wrong, but the harm to banks, UPMC, and the state are less than it would be to individuals.

Both trial courts also failed to consider that Ms. Bivins mental illnesses which reduce or restricts her earning capacity. Additionally, both trial courts failed to consider that Ms. Bivins was willing to abide by the service plan by Justice Related Services and that she was an active participant in outpatient psychiatric treatment. At the probation violation hearing before the Honorable Lester G. Nauhaus on November 16, 2017 Justice Service Representative stated that Ms. Bivins “went to all her treatment appointments. She regularly met with her probation officer...[s]o for all intents and purposes for our record when it comes to at least the treatment aspect of it, she did complete everything she was supposed to, Your Honor.” Transcript Docket 4 (CC# 2005-8439) at 6-7. Instead of the Honorable Lester G. Nauhaus considering that Ms. Bivins was an active participant in outpatient psychiatric treatment he replied that Ms. Bivins failed one drug test. The Honorable

Beth A. Lazzara also failed to consider Ms. Bivins was actively going to treatment. Trial Court Opinion 9/13/18 at 9. The trial courts also failed to consider that the violations were technical.

This Honorable Court has recognized that a sentence can be the basis for a claim of abuse of discretion when the trial court does not consider the protection of the public, the gravity of the offense in relation to its impact on the victim and the community, and the rehabilitative needs of the defendant. Commonwealth v. Luketic, 162 A.3d 1149,1160-61 (Pa. Super. Ct. 2017). Furthermore, without considering individualized factors this Court has recognized that the sentence should be vacated. Id. at 1163.

Furthermore, as mentioned above in Section II of the Argument, Ms. Bivins ability to pay and how much she could afford in payments was not evaluated.

CONCLUSION

For the above reasons, this Court should reverse the rulings of the trial courts and instruct the trial courts to hold new *Gagnon II* hearings to determine whether Ms. Bivins had the ability to pay restitution in this matter. The Court should also order that Ms. Bivins be released from prison until the new *Gagnon II* hearing.

Respectfully submitted:


Melissa R. Ruggiero, Esquire

APPELLANT'S
1925 (B) STATEMENTS

FILED

2018 AUG 31 AM 11:04



COPY

DEPT OF COURT RECORDS
CRIMINAL DIVISION
ALLEGHENY COUNTY, PA

IN THE COURT OF COMMON PLEAS FOR
THE FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
ALLEGHENY COUNTY - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

VS.

TYNECIA MILTON-BIVINS,
Defendant.

CP-02-CR-0008439-2005

AMENDED CONCISE
STATEMENT OF ERRORS TO
BE COMPLAINED OF ON
APPEAL

Filed on behalf of the defendant,
Ms. Tynecia Milton-Bivins

Filed before the
Honorable Lester G. Nauhaus
Courtroom 326

Counsel of record for this party:
Melissa R. Ruggiero, Esquire
STATE I.D. # 94710

Office of Conflict Counsel
429 Forbes Avenue, Suite 1405
Pittsburgh, Pennsylvania 15219
Phone: 412 - 350 - 4850

NON-RECORDED
MET

18 AUG 31 AM 11:07

RECORDED

18 AUG 31 AM 10:57

IN THE COURT OF COMMON PLEAS FOR
THE FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
ALLEGHENY COUNTY - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

VS.

TYNECIA MILTON-BIVINS,
Defendant.

CP-02-CR-0008439-2005

**AMENDED CONCISE STATEMENT OF ERRORS TO BE COMPLAINED OF ON
APPEAL**

AND NOW here comes the defendant, Tynecia Milton-Bivins, by and through her Attorney Melissa R. Ruggiero of the Allegheny County Office of Conflict Counsel and respectfully avers the following in support of the within notice:

1. The defendant is currently serving seven (7) to fourteen (14) years' incarceration a result of a sentence imposed by this Honorable Court on November 16, 2017.
2. On August 13, 2018 within counsel filed a Motion for Remand with the Superior Court to remand this case to this Honorable Court with permission to file an amended concise statement of the matters complained of on appeal and consolidate this matter with appellant's second case at 737 WDA 2018.
3. On August 21, 2018, the Superior Court granted counsel's request for remand to amend the Concise Statement of Errors Complained of on Appeal.
4. The defendant contends that the revoking and re-sentencing her to seven (7) to fourteen (14) years' of incarceration based on her not paying restitution was illegal and/or an abuse of discretion. The defendant plans to raise the following:

a. The trial court abused its sentencing discretion because it failed to consider the relevant sentencing criteria, including the protection of the public, the gravity of the underlying offenses and violation, and the character, personal history, and rehabilitative needs of the defendant, as required by 42 Pa.C.S.A. §9721(b). Specifically,

- i. None of the crimes that defendant pled guilty to involve physical harm. Counsel concedes the crimes committed are wrong, but the harm to banks are less than it would have been to individuals;
- ii. Defendant suffers from mental illnesses which reduces or restricts her earning capacity;
- iii. Defendant was willing to abide by the service plan by Justice Related Services;
- iv. Defendant was an active participant in outpatient psychiatric treatment;
- v. Defendant's ability to pay is limited due to her mental illnesses;
- vi. Defendant's ability to pay and how much she could afford in payments was not evaluated; and
- vii. The violations were technical.

- b. The revocation and re-sentencing was illegal because this Honorable Court did not give the defendant an opportunity to establish inability to pay.¹

WHEREFORE, the defendant respectfully requests that this Honorable Court enter an order vacating its previous revocation and re-sentencing order and conduct a hearing giving the defendant the opportunity to establish her inability to pay and re-sentence her to probation.

Respectfully submitted,



Melissa R. Ruggiero, Esquire

¹ Counsel asserts the Pennsylvania Superior Court's recent decisions in Commonwealth v. Mauk, 2018 WL 1959744 (Pa. Super. Ct. 2018), Commonwealth v. Diaz, 2018 WL 3060310 (Pa. Super. Ct. 2018), and Commonwealth v. Smetana, 2018 WL 3060428 (Pa. Super. Ct. 2018) address this emphasis and raise substantial questions about the conduct of trial courts in determining a defendant's ability to pay.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Office of Conflict Counsel

Signature: Melissa R. Ruggiero

Name: Melissa R. Ruggiero

Attorney No.: 94710

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving upon the persons and in the manner indicated below. The manner of service satisfies the requirements of Pa.R.Crim.P. 575.

Department of Court Records – Criminal Division
114 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

Mr. Tom McCaffrey, Court Administrator
114 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

The Honorable Lester G. Nauhaus
821 City-County Building
414 Grant Street
Pittsburgh, Pennsylvania 15219
(via hand delivery)

The District Attorney's Office – DDA Michael Streily
401 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

Date: 8-31-18

/s/ Melissa A. Ferguson

2010 OCT -9 PM 2: 35

DEPT. OF CRIMINAL RECORDS
CRIMINAL DIVISION
ALLEGHENY COUNTY, PA

RECEIVED

COPY

IN THE COURT OF COMMON PLEAS FOR
THE FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
ALLEGHENY COUNTY - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

VS.

TYNIECIA BIVINS,
Defendant.

CP-02-CR-0007609-2010

CP-02-CR-0004177-2015

**AMENDED CONCISE
STATEMENT OF ERRORS TO
BE COMPLAINED OF ON
APPEAL**

Filed on behalf of the defendant,
Ms. Tyniecia Milton-Bivins

Filed before the
Honorable Beth A. Lazzara
Courtroom 510

Counsel of record for this party:
Melissa R. Ruggiero, Esquire
STATE I.D. # 94710

Allegheny County
Office of Conflict Counsel
429 Forbes Avenue, Suite 1405
Pittsburgh, Pennsylvania 15219
Phone: 412 - 350 - 4850

RECEIVED
CRIMINAL DIVISION
ALLEGHENY COUNTY, PA

18 OCT -9 PM 2:46

IN THE COURT OF COMMON PLEAS FOR
THE FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
ALLEGHENY COUNTY - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

VS.

TYNECIA BIVINS,
Defendant.

CP-02-CR-0007609-2010

CP-02-CR-0004177-2015

AMENDED CONCISE STATEMENT OF ERRORS TO BE COMPLAINED OF ON
APPEAL

AND NOW here comes the defendant, Tyniece Bivins, by and through her Attorney Melissa R. Ruggiero of the Allegheny County Office of Conflict Counsel and respectfully avers the following in support of the within notice:

1. The defendant is currently serving three and a half (3 ½) to seven (7) years of incarceration as a result of a sentence imposed by this Honorable Court on April 20, 2018 at the above captioned cases. The defendant's aggregate sentence of three and a half (3 ½) to seven (7) years of incarceration was ordered to run concurrently with the defendant's aggregate sentence of seven (7) to fourteen (14) years of incarceration imposed by the Honorable Lester G. Nauhaus on November 16, 2017 following a probation violation hearing at criminal docket number CP-02-CR-0008439-2005. This information is on appeal at 1870 WDA 2017.
2. On September 24, 2018 within counsel filed a Motion for Remand with the Superior Court to remand this case to this Honorable Court with permission to file an amended concise statement of the matters complained of on appeal and consolidate this matter with appellant's second case at 1870 WDA 2017.

3. On September 26, 2018, the Superior Court granted counsel's request for remand to amend the Concise Statement of Errors Complained of on Appeal.
4. The defendant contends that the revoking and re-sentencing her to three and half (3 ½) to seven (7) years of incarceration based on her not paying restitution was illegal and/or an abuse of discretion. The defendant plans to raise the following:
 - a. The trial court abused its sentencing discretion because it failed to consider the relevant sentencing criteria, including the protection of the public, the gravity of the underlying offenses and violation, and the character, personal history, and rehabilitative needs of the defendant, as required by 42 Pa.C.S.A. §9721(b). Specifically,
 - i. None of the crimes that defendant pled guilty to involve physical harm. Counsel concedes the crimes committed are wrong, but the harm to UPMC and the state are less than it would have been to individuals;
 - ii. Defendant suffers from mental illnesses which reduces or restricts her earning capacity;
 - iii. Defendant was willing to abide by the service plan by Justice Related Services;
 - iv. Defendant was an active participant in outpatient psychiatric treatment;
 - v. Defendant's ability to pay is limited due to her mental illnesses;
 - vi. Defendant's ability to pay and how much she could afford in payments was not evaluated; and
 - vii. The violations were technical.

b. The revocation and re-sentencing was illegal because this Honorable Court did not give the defendant an opportunity to establish inability to pay.¹

WHEREFORE, the defendant respectfully requests that this Honorable Court enter an order vacating its previous revocation and re-sentencing order and conduct a hearing giving the defendant the opportunity to establish her inability to pay and re-sentence her to probation.

Respectfully submitted,



Melissa R. Ruggiero, Esquire

¹ Counsel asserts the Pennsylvania Superior Court's recent decisions in Commonwealth v. Mauk, 185 A.3d 406 (Pa. Super. 2018), Commonwealth v. Diaz, 2018 WL 3060310 (Pa. Super. 2018), and Commonwealth v. Smetana, 2018 WL 3060428 (Pa. Super. 2018) address this emphasis and raise substantial questions about the conduct of trial courts in determining a defendant's ability to pay. In light of these recent decisions and in the interest of judicial economy counsel respectfully requests that this Honorable Court permit defendant to raise and argue this issue.

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving upon the persons and in the manner indicated below. The manner of service satisfies the requirements of Pa.R.Crim.P. 575.

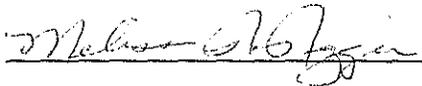
Department of Court Records – Criminal Division
114 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

Mr. Tom McCaffrey, Court Administrator
114 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

The Honorable Beth A. Lazzara
510 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

The District Attorney's Office – DDA Michael Streily
401 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

Date: 10-9-18

1/s/ 

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Office of Conflict Counsel

Signature: Melissa R. Ruggiero

Name: Melissa R. Ruggiero

Attorney No.: 94710

OPINIONS
OF THE LOWER COURT

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

CC CP-02-CR-0008439-2005

v.

TYNIECIA MILTON-BIVINS
Defendant

Superior Court Docket # 1870 WDA 2017

OPINION

Honorable Lester G. Nauhaus

COUNSEL OF RECORD

For the Commonwealth:

Michael Streily, Esquire
Office of the District Attorney
401 Allegheny County Courthouse

INTER-OFFICE

For the Defendant:

Melissa Ruggiero, Esquire
Office of Conflict Counsel
429 Forbes Ave, Suite 1405

INTER-OFFICE

FILED

2018 MAY -8 PM 12: 20

DEPT. OF COURT RECORDS
CRIMINAL DIVISION
ALLEGHENY COUNTY, PA

ORIGINAL

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

CC CP-02-CR-0008439-2005

v.

TYNIECIA MILTON-BIVINS
Defendant

Superior Court Docket # 1870 WDA 2017

O P I N I O N

Nauhaus, S.J.

May
April 7, 2018

On March 13, 2006, the Defendant pled guilty to two counts of Theft by Deception and five counts of Criminal Conspiracy. On the same date this Court sentenced Defendant to seven years of probation for each of the first three counts, to run consecutively, for an aggregate sentence of 21 years of probation. Defendant was also Ordered to pay \$24,000 restitution. There was no further penalty imposed for the remaining counts.

Defendant was scheduled for a probation violation hearing on September 23, 2016, because she had not paid any restitution. The hearing was rescheduled for December 5, 2016. Probation was continued with the arrangement that Defendant would pay \$50.00 monthly in restitution and comply with Justice Related Services zero tolerance plan.

A probation violation hearing occurred before this Court on November 16, 2017, because the Defendant failed to make any of the \$50.00 monthly payments and had at

least one drug test that was positive for cocaine and her whereabouts had been unknown.

During the probation violation hearing, this Court explained that Defendant had been sentenced to lengthy probation rather than incarceration to enable her to pay the restitution that this Court had ordered. (Transcript of November 16, 2017, Probation Violation Hearing (hereinafter referred to as "PVH") at 2). However the Defendant failed to pay any of the restitution, including any of the \$50.00 monthly payments that had been arranged at the violation hearing of December 5, 2016. (PVH at 4). Therefore, this Court found that Defendant had violated the terms of her probation and resented her to incarceration for 3½ - 7 years for each of counts one, two and three, with counts one and two to run consecutive and count three to run concurrent. The aggregate sentence imposed by this court was 7 to 14 years of incarceration. On November 27, 2017, the Defendant filed a post-sentence motion for modification of sentence, which this Court denied. The Defendant filed an appeal to the Pennsylvania Superior Court on December 14, 2017.

On January 10, 2018, this Court Ordered Defendant to file a 1925(b) Statement of Errors Complained of on Appeal, on or before January 31, 2018. The Office of the Public Defender filed a 1925(b) Statement on behalf of the Defendant on January 30, 2018.

On January 19, 2018, the Office of the Public Defender filed an Application to Withdraw as Counsel with the Pennsylvania Superior Court. On January 26, 2018, the Superior Court remanded the matter to the trial court to conduct a Grazier Hearing. On February 27, 2018, this Court entered an Order permitting the Public Defender to

withdraw and appointing the Office of Conflict Counsel to represent the Defendant. Additionally, the Office of Conflict Counsel was Ordered to file a 1925(b) Statement within 21 days. Conflict Counsel requested an extension and on March 15, 2018, this Court granted an extension of 30 days to file a 1925(b) Statement. On April 13, 2018, Conflict Counsel filed a Notice of Intention Not to Modify Concise Statement of Errors to be Complained of on Appeal. On April 17, 2017, Conflict Counsel filed a Notice to Adopt the 1925(b) Statement that was filed on January 30, 2018. The issue raised in Defendant's 1925(b) Statement is as follows:

In revoking and re-sentencing Ms. Bivins to an aggregate sentence of 7 to 14 years' incarceration, the trial court abused its sentencing discretion because it imposed a sentence of total confinement without considering the protection of the public, the gravity of the underlying violations, and the character, personal history, and rehabilitative needs of Ms. Bivins, in violation of 42 Pa.C.S.A. §9721 (b). In that regard, Ms. Bivins' violations were completely technical in nature, she suffers from mental illness, she was willing to abide by her service plan provided by Justice Related Services, and she was an active participant in outpatient psychiatric treatment.

The defendant challenges the discretionary aspects of her sentence. Pursuant to 42 PaC.S.. §9771, the sentencing alternatives available to the court upon revocation are the same as were available at the time of the initial sentence, with due consideration given to the time spent on probation. Furthermore, a sentence of total confinement upon revocation is appropriate where (1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicates that it is likely that she will commit

another crime if she is not imprisoned; or (3) such a sentence is essential to vindicate the authority of the court.

Here, in 2006, this Court sentenced the Defendant to probation and Ordered restitution of \$24,000. The Defendant had failed to make a single payment over ten years later, on December 5, 2016. Rather than impose incarceration at that probation violation hearing, probation was continued and the Defendant was provided a payment plan of \$50 per month and a zero tolerance Justice Related Service plan.

Almost a year later, on November 16, 2017, the Defendant appeared for another probation violation hearing. She had failed to make any payments towards her restitution despite her agreement to pay \$50 per month towards restitution. She also had tested positive for controlled substances.

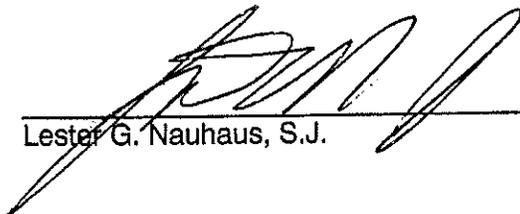
In contrast to when the initial sentence is imposed, a probation violation sentence is not cabined by the requirement in 42 Pa.C.S. §9721(b), that confinement should be consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the Defendant. The sentencing guidelines do not apply. *Commonwealth v. Pasture*, 630 Pa. 440, 107 A.3d 21, 27 (2014). The rules and procedures that apply to initial sentencing differ when the defendant reappears after a violation of the mercy they had received in the form of a sentence of probation. Here, this Court was lenient on the Defendant when imposing the initial sentence. The sentencing alternatives available to the court for resentencing upon probation revocation are the same as were available at the time of the initial sentence, limited only by the maximum sentence allowed. *Commonwealth v. Pasture, Id.*

A sentence of total confinement was appropriate here to vindicate the authority of the court. This Court disclosed its reasons for imposing the probation violation sentence, in compliance with 42 Pa.C.S. §9721(b). The Defendant failed to make any payments towards restitution in over 10 years, even after she had been provided a lenient arrangement to make monthly payments of \$50 in December of 2016.

It was within this Court's discretion to impose the probation violation sentence of 7 to 14 years incarceration, considering this Court's prior experience with the Defendant and awareness of the circumstances of her probation violation. The probation violation sentence did not exceed the maximum sentence allowed, nor was it manifestly excessive, unreasonable or an abuse of discretion.

Judgment of sentence should be affirmed for the reasons contained herein.

By The Court:



Lester G. Nauhaus, S.J.

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

CC CP-02-CR-0008439-2005

v.

TYNIECIA MILTON-BIVINS

Superior Court Docket # 1870 WDA 2017

Defendant

CRIMINAL
Criminal Division
Court Record-
2017

OPINION

Honorable Lester G. Nauhaus

COUNSEL OF RECORD

For the Commonwealth:

Michael Streily, Esquire
Office of the District Attorney
401 Allegheny County Courthouse

INTER-OFFICE

For the Defendant:

Melissa Ruggiero, Esquire
Office of Conflict Counsel
429 Forbes Ave, Suite 1405

INTER-OFFICE

2016 OCT 12 PM 12:30
CRIMINAL DIVISION
ALLEGHENY COUNTY, PA

ORIGINAL

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

CC CP-02-CR-0008439-2005

v.

TYNECIA MILTON-BIVINS
Defendant

Superior Court Docket # 1870 WDA 2017

O P I N I O N

Nauhaus, S.J.

October 11, 2018

On March 13, 2006, the Defendant pled guilty to two counts of Theft by Deception and five counts of Criminal Conspiracy. On the same date this Court sentenced Defendant to seven years of probation for each of the first three counts, to run consecutively, for an aggregate sentence of 21 years of probation. Defendant was also Ordered to pay \$24,000 restitution. There was no further penalty imposed for the remaining counts.

Defendant was scheduled for a probation violation hearing on September 23, 2016, because she had not paid any restitution. The hearing was rescheduled for December 5, 2016. Probation was continued with the arrangement that Defendant would pay \$50.00 monthly in restitution and comply with Justice Related Services zero tolerance plan.

A probation violation hearing occurred before this Court on November 16, 2017, because the Defendant failed to make any of the \$50.00 monthly payments and had at

least one drug test that was positive for cocaine and her whereabouts had been unknown.

During the probation violation hearing, this Court explained that Defendant had been sentenced to lengthy probation rather than incarceration to enable her to pay the restitution that this Court had ordered. (Transcript of November 16, 2017, Probation Violation Hearing (hereinafter referred to as "PVH") at 2). However the Defendant failed to pay any of the restitution, including any of the \$50.00 monthly payments that had been arranged at the violation hearing of December 5, 2016. (PVH at 4). Therefore, this Court found that Defendant had violated the terms of her probation and resented her to incarceration for 3½ - 7 years for counts one, two, and three, with counts one and two to run consecutive and count three to run concurrent. The aggregate sentence imposed by this court was 7 to 14 years of incarceration. On November 27, 2017, the Defendant filed a post-sentence motion for modification of sentence, which this Court denied. The Defendant filed an appeal to the Pennsylvania Superior Court on December 14, 2017.

On January 10, 2018, this Court Ordered Defendant to file a 1925(b) Statement of Errors Complained of on Appeal, on or before January 31, 2018. The Office of the Public Defender filed a 1925(b) Statement on behalf of the Defendant on January 30, 2018.

On January 19, 2018, the Office of the Public Defender filed an Application to Withdraw as Counsel with the Pennsylvania Superior Court. On January 26, 2018, the Superior Court remanded the matter to the trial court to conduct a Grazier Hearing. On February 27, 2018, this Court entered an Order permitting the Public Defender to

withdraw and appointing the Office of Conflict Counsel to represent the Defendant. Additionally, the Office of Conflict Counsel was Ordered to file a 1925(b) Statement within 21 days. Conflict Counsel requested an extension and on March 15, 2018, this Court granted an extension of 30 days to file a 1925(b) Statement. On April 13, 2018, Conflict Counsel filed a Notice of Intention Not to Modify Concise Statement of Errors to be Complained of on Appeal. On April 17, 2017, Conflict Counsel filed a Notice to Adopt the 1925(b) Statement that was filed on January 30, 2018. This Court filed an opinion on May 8, 2018.

While this case was pending before the Superior Court of Pennsylvania, the defendant requested an opportunity to remand to amend the 1925(b) Statement and this request was granted on August 21, 2018. Counsel filed their Amended Concise Statement of Errors to be Complained of on Appeal on August 31, 2018.

The first issue raised by Defendant challenges the discretionary aspects of her sentence. Pursuant to 42 Pa.C.S. §9771, the sentencing alternatives available to the court upon revocation are the same as were available at the time of the initial sentence, with due consideration given to the time spent on probation. Furthermore, a sentence of total confinement upon revocation is appropriate where (1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicates that it is likely that she will commit another crime if she is not imprisoned; or (3) such a sentence is essential to vindicate the authority of the court.

Here, in 2006, this Court sentenced the Defendant to probation and Ordered restitution of \$24,000. As of December 5, 2016, over ten years later, the Defendant had failed to make a single payment. Rather than impose incarceration at that probation

violation hearing, probation was continued and the Defendant was provided a payment plan of \$50 per month and a zero tolerance Justice Related Service plan.

Almost a year later, on November 16, 2017, the Defendant appeared for another probation violation hearing. She had still failed to make any payments towards her restitution despite her agreement to pay \$50 per month towards restitution. She also had tested positive for controlled substances.

In contrast to when the initial sentence is imposed, a probation violation sentence is not cabined by the requirement in 42 Pa.C.S. §9721(b), that confinement should be consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the Defendant. The sentencing guidelines do not apply. *Commonwealth v. Pasture*, 630 Pa. 440, 107 A.3d 21, 27 (2014). The rules and procedures that apply to initial sentencing differ when the defendant reappears after a violation of the mercy they had received in the form of a sentence of probation. Here, this Court was lenient on the Defendant when imposing the initial sentence. The sentencing alternatives available to the court for resentencing upon probation revocation are the same as were available at the time of the initial sentence, limited only by the maximum sentence allowed. *Commonwealth v. Pasture, Id.*

A sentence of total confinement was appropriate here to vindicate the authority of the court and because Defendant's substance abuse makes it likely that she will commit another crime. This Court disclosed its reasons for imposing the probation violation sentence, in compliance with 42 Pa.C.S. §9721(b). The Defendant failed to make any payments towards restitution in over 10 years, even after she had been provided a lenient arrangement to make monthly payments of \$50 in December of 2016.

It was within this Court's discretion to impose the probation violation sentence of 7 to 14 years incarceration, considering this Court's prior experience with the Defendant and awareness of the circumstances of her probation violation. The probation violation sentence did not exceed the maximum sentence allowed, nor was it manifestly excessive, unreasonable or an abuse of discretion.

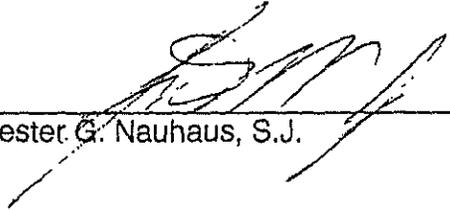
The other issue raised by Defendant is that the revocation and re-sentencing was illegal because this Court failed to give Defendant an opportunity to establish inability to pay. As support for his argument, Defendant cites *Commonwealth v. Mauk*, 185 A.3d 406 (Pa.Super. 2018), *Commonwealth v. Diaz*, ___ A.3d ___, 2018 Pa.Super. 175, 2018 WL 3060310 (Pa.Super.2018), and *Commonwealth v. Smetana*, ___ A.3d ___, 2018 Pa.Super. 176, 2018 WL 3060428. (Pa.Super.2018). In these cases the appellate courts have concluded that the lower courts erred by finding a defendant in contempt for failure to pay court costs, fines, or restitution and imposing incarceration without first holding a hearing to ascertain whether the defendant has willfully refused to pay or has the means to pay. The cases cited by Defendant make clear that before an individual is imprisoned for contempt a hearing must be held to determine whether the defendant had the means to pay before imposing incarceration. In a probation revocation proceeding for failure to pay restitution, the court must determine defendant's reasons for not paying, and whether the defendant has made an effort to acquire the funds to pay. *Commonwealth v. Mauk*, 185 A.3d 406, *Supra*, citing *Bearden v. Georgia*, 461 U.S. 660, 672, 103 S.Ct. 2064, 2073, 76 L.Ed.2d 221 (1983).

This Court acknowledges that there was no hearing held in the instant matter to determine whether Defendant had the ability to pay. However, during the probation

violation hearing it was established that Defendant had a thousand dollars on her before she was detained in the probation office. (PVH at 4). Thus Defendant had the funds to make some effort towards restitution. Moreover, probation was not revoked solely due to Defendant's failure to pay restitution. She also tested positive for cocaine. (PVH at 3). A sentence of total confinement was appropriate here to vindicate the authority of the court prevent Defendant from committing another crime.

Judgment of sentence should be affirmed for the reasons contained herein.

By The Court:



Lester G. Nauhaus, S.J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

CC Nos. 2010-7609
2015-4177

v.

TYNECIA BIVINS,

Defendant.

OPINION

BETH A. LAZZARA, JUDGE
Court of Common Pleas

Copies Sent To:

Mike W. Strelly, Esq.
Office of the District Attorney
401 Courthouse
Pittsburgh, PA 15219

Melissa R. Ruggiero, Esq.
Office of Conflict Counsel
429 Forbes Avenue
Suite 1405
Pittsburgh, PA 15219

STATE OF PENNSYLVANIA
COUNTY OF ALLEGHENY

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

vs.

CC Nos. 2010-7609; 2015-4177

TYNICIA BIVINS,

Defendant.

OPINION

This is a direct appeal from the judgment of sentence entered on April 20, 2018, following a probation violation hearing held that day. After finding that the Defendant was in violation of the terms of her probation, the court revoked the Defendant's probation at the above-captioned cases and re-sentenced her to a period of three and a half (3 ½) to seven (7) years of incarceration at Count One (1) of CC# 2015-4177. No further penalty was imposed at Counts Two (2) through Eleven (11) of that information. The Defendant also was re-sentenced at CC# 2010-7609 to a period of three and a half (3 ½) to seven (7) years of incarceration, which was ordered to run concurrently with the sentence imposed at CC# 2015-4177. The Defendant was found to be RRRR Eligible at each case number. The Defendant received 85 days of credit for time served at CC# 2015-4177, and 19 days of credit for time served at CC# 2010-7609. The Defendant's aggregate sentence of 3 ½ to 7 years of incarceration was ordered to run concurrently with the Defendant's aggregate sentence of seven (7) to fourteen (14) years of

incarceration imposed by the Honorable Lester G. Nauhaus on November 16, 2017 following a probation violation hearing at CC# 2005-8439.

A timely post-sentence motion seeking a modification of the Defendant's sentence was filed on April 30, 2018. On May 17, 2018, the court denied the post-sentence motion.¹ A timely Notice of Appeal was filed on May 21, 2018. The Defendant was directed to file a Concise Statement of Errors Complained of on Appeal ("Concise Statement") pursuant to Pa.R.A.P. 1925(b) by June 21, 2018.

On June 22, 2018, Counsel filed the Concise Statement², raising only one (1) issue for review. Specifically, the Defendant alleges that:

- a. In revoking and re-sentencing Ms. Bivins to an aggregate sentence of three and a half (3 ½) years to seven (7) years of incarceration, the trial court abused its sentencing discretion because it failed to consider relevant sentencing criteria, including the protection of the public, the gravity of the underlying offenses and violation, and the character, personal history, and rehabilitative needs of defendant, as required by 42 Pa.C.S.A. § 9721(b). Specifically,
 - i. None of the crimes that defendant pled guilty to involve physical harm. Counsel concedes the crimes committed are wrong, but the harm to UPMC and the state are less than it would have been to individuals;

¹ Notwithstanding the written request for a hearing made in the post-sentence motion, Counsel subsequently waived a hearing on the motion on May 16, 2018, and informed the court that she rested on the arguments made in the post-sentence motion.

² Counsel conceded that she missed the filing deadline by one (1) day. She filed a "Motion to Restore Appellate Rights Nunc Pro Tunc" at the same time she filed the Concise Statement. In the interest of judicial economy, the court granted the motion on July 2, 2018.

- ii. Defendant suffers from mental illnesses;
- iii. Defendant was willing to abide by the service plan provided by Justice Related Services;
- iv. Defendant was an active participant in outpatient psychiatric treatment;
- v. Defendant's ability to pay is limited due to her mental illnesses;
- vi. Defendant's ability to pay and how much she could afford in payments was not evaluated; and
- vii. The violations were technical.

(Concise Statement, pp. 2-3).

The Defendant's allegation of error on appeal is without merit. The court respectfully requests that the Defendant's sentence be upheld for the reasons that follow.

I. DISCUSSION

This court did not abuse its discretion when it imposed an aggregate sentence of three and a half (3 ½) to seven (7) years of imprisonment for the Defendant's probation violations.

The imposition of sentence following the revocation of probation "is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal." Commonwealth v. Smith, 669 A.2d 1008, 1011 (Pa. Super. 1996). An abuse of discretion is more than an error in judgment; a sentencing court has not abused its discretion "unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will."

Commonwealth v. Smith, 673 A.2d 893, 895 (Pa. 1996). "In determining whether a

sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion." Mouzon, *supra*, at 1128. This deferential standard of review acknowledges that the sentencing court is "in the best position to view the defendant's character, displays of remorse, defiance, indifference, and the overall effect and nature of the crime." Commonwealth v. Allen, 24 A.3d 1058, 1065 (Pa. Super. 2011) (internal citations omitted).

The Defendant's sentencing argument seeks to challenge the discretionary aspects of sentencing. The court notes that "[t]he right to appeal a discretionary aspect of sentence is not absolute." Commonwealth v. Martin, 727 A.2d 1136, 1143 (Pa. Super. 1999). A defendant "challenging the discretionary aspects of [the] sentence must invoke [appellate] jurisdiction by satisfying a four-part test." Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010). In applying the four-part test, the appellate court analyzes

(1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [708]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa. C. S. A. § 9781(b).

Id. at 170. "The determination of whether there is a substantial question is made on a case-by-case basis, and [the appellate court] will grant the appeal only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary

to the fundamental norms which underlie the sentencing process.” Commonwealth v. Haynes, 125 A.3d 800, 807 (Pa. Super. 2015).

In challenging her revocation sentence, the Defendant essentially claims that this court did not adequately consider certain mitigating factors. Our courts have “held on numerous occasions that a claim of inadequate consideration of [mitigating] factors does not raise a substantial question for [] review.” Haynes, supra, at 807; Commonwealth v. Buterbaugh, 91 A.3d 1247, 1266 (Pa. Super. 2014). This court respectfully requests that the reviewing court find that the Defendant has failed to raise a substantial question for review of her sentence. The Defendant’s standard range sentences were consistent with the sentencing provisions of the Sentencing Code, and they did not conflict with the fundamental norms that underlie the sentencing process. However, should the reviewing court conclude that there exists a substantial question as to the appropriateness of the sentence, the aggregate sentence imposed was justified by the totality of the circumstances in this case.

At the time of her original sentencing, the Defendant faced a recommended guideline range that called for several months of incarceration at the above-captioned case numbers. The standard range sentence at CC# 2010-7609 was three (3) to fourteen (14) months of incarceration for the Defendant’s Welfare Fraud conviction, a third-degree felony. However, at her sentencing on September 19, 2011, the court accepted the Phoenix docket plea offer and imposed a seven (7) year term of probation

in order to provide the Defendant with sufficient time and opportunity to pay the \$47,706.50 in restitution owed to the Office of Inspector General.

Approximately two and a half years (2 ½) after her sentencing, the Defendant committed eleven (11) new theft and drug-related offenses, which led to the filing of the criminal information at CC# 2015-4177. On November 4, 2015, the Defendant pled guilty to eight (8) counts of Theft of Services (18 Pa. C.S.A. §3926(a)(4)) and three (3) counts of Possession of Controlled Substance (35 Pa. C.S.A. §780-113(a)(16)). The standard range guideline sentence for seven (7) out of the eight (8) theft convictions was twelve (12) to eighteen (18) months of incarceration at each count.

The Defendant was informed of the court's discretion to impose consecutive prison sentences at each count. The Defendant also was informed of the court's inclination to impose a lengthy prison sentence given the Defendant's overall behavior and the fact that she had not made any substantial restitution payments on her 2010 case. (Sentencing Transcript, 11/4/15, "ST 11/15", pp. 5-6, 11, 13-16). However, in light of the fact that the victim's desired outcome was for the Defendant to maintain an ability to make restitution payments towards the \$10,000 owed in the 2015 case, the court deviated well below the recommended guideline ranges, sentencing the Defendant to five (5) years of probation at Counts One (1), Three (3), Four (4), Six (6), Seven (7), Nine (9) and Ten (10). The probationary terms were ordered to run concurrently with one another, and no further penalty was imposed at the remaining

counts of conviction. Court costs were imposed. The Defendant also was ordered to undergo a drug and alcohol evaluation and to successfully complete any and all treatment requirements.

The Defendant was further ordered to pay \$100 per month towards the \$10,000 in restitution owed to UPMC. The court made clear at the time of sentencing that the sentence of probation was being imposed for the sake of the victim, so that the Defendant could maintain employment for purposes of making restitution payments. (ST 11/15 at 5, 11-13, 15-17). The Defendant represented to the court that she would be returning to work in "approximately two months" and that she would be earning "\$35 an hour" and that she would "dedicate most of that to the restitution" she owed. (ST 11/15 at 12). Stated differently, the Defendant admitted to having a financial ability to make the restitution payments. The court explicitly warned the Defendant that, if she failed to make the required restitution payments, a warrant would be issued for her arrest and a re-sentencing hearing would take place. (ST 11/15 at 18). The court concluded the hearing by reminding the Defendant of the following: "[y]ou have the means and ability to make your victims whole and you just haven't been doing it. So it stops now and you better start doing it. Is that clear?" (ST 11/15 at 18-19). The Defendant did not dispute the court's statement and simply replied, "Yes, ma'am." (ST 11/15 at 19).

On February 10, 2017, a probation violation hearing was held at the above-captioned cases. (Probation Violation Hearing 1 Transcript, 2/10/17 ("PV1"), pp. 2-18). The court found the Defendant to be in violation of her terms of probation because (1) she had failed to make the required monthly restitution payments in both of her cases; (2) she failed to report to probation as directed; and (3) she failed to complete her drug and alcohol evaluation. (PV1, pp. 6). The court threatened the Defendant with state prison in light of her violations, as well as the court's discovery that the Defendant had lied to the court about her education and employment. The court also confronted the Defendant with the lies she had told to Judge Nauhaus about what this court had planned for her. (PV1, p. 3, 6) The court was greatly troubled by the Defendant's behavior and her failure to abide by the terms of her probation, especially given that the sole reason that she was shown such leniency in her sentence was so that she would be able to make restitution to her victims. (PV1, pp. 6-8). Despite her total non-compliance with the terms of her probation, the court decided to provide the Defendant with yet another opportunity to comply with the terms of her probation, again with the aim of trying to make her victims whole. (PV1, p. 5).

Accordingly, the court revoked the Defendant's probation and imposed a new seven (7) year term of probation at each case number, which probationary terms were ordered to run concurrently with one another. (PV1, p.11, 18). The Defendant also was placed on a Zero Tolerance policy with her probation, and she was specifically warned that this was her last opportunity to comply. (PV1, pp. 4-5, 8-10, 13, 16-18). She was ordered to make monthly payments of \$100 towards the joint balance of the \$57,396.05

in restitution owed at the above-captioned cases. (PV1, pp.12, 16). The Defendant also was ordered to comply with a Justice Related Service Plan presented on her behalf, and she was ordered to undergo drug and mental health treatment. (PV1, pp. 12-15). At no point during the hearing did the Defendant dispute her ability to make the restitution payments as ordered. (PV 1 at pp. 2-18).

Against this factual backdrop, the Defendant cannot show that this court abused its discretion in imposing a sentence of 3 ½ to 7 years of imprisonment after revoking her probation on April 20, 2018. The Defendant was shown a tremendous amount of patience and leniency over the last seven (7) years. This court substantially deviated from the guidelines multiple times in order to provide the Defendant with a meaningful amount of time and opportunity to make restitution payments and to maintain employment in order to further that end. The court also attempted to offer rehabilitative tools for her to address any mental health and/or drug and alcohol issues. Despite these opportunities provided by this court, the Defendant failed to make any genuine attempt at rehabilitation or complying with the terms of her probation. Instead, she outright lied to this court and attempted to manipulate both this court and Judge Nauhaus, despite the effort made by both courts to work with her.

As noted by this court during the April 20, 2018 probation violation hearing, the Defendant previously had been warned numerous times that she was not being compliant and that she needed to make the required restitution payments. (Probation

Violating Hearing, "PV2", 4/20/18, pp. 6, 9-10). The Defendant failed to heed any of those warnings despite being offered multiple opportunities to do so. At the April 20, 2018 hearing, the court even noted that it would have appreciated *any* effort on her part to make even small monthly contributions towards restitution, even if they were as little as "five, ten, twenty dollars a month." (PV2, pp. 9-10). While the Defendant made a few restitution payments over the course of her seven (7) years of probation, she had not made any restitution payments since June 6, 2017, and she still owed \$47,266.05 towards the \$47,396.05 owed at CC# 2010-7609 and \$9,950.00 towards the \$10,000 owed at CC# 2015-4177. Significantly, the Defendant never objected to her financial ability to contribute to restitution, and she even conceded that she had the means to make payments, but that she was simply choosing not to do so. (Sentencing Transcript, 11/4/15, pp. 18-19).

In sum, while the court considered the mitigating factors outlined in the Defendant's Concise Statement, the Defendant's behavior while on probation, and her failure to comply with the terms of her probation despite repeated warnings and multiple opportunities to do so, warranted a modest period of incarceration. In fact, this court considers its concurrent sentences of 3 ½ to 7 years to be generous given the court's ability to impose consecutive sentences.

For all the reasons just stated, the Defendant cannot meet her burden of showing that her revocation sentences were an abuse of discretion. The sentences did not

exceed the statutory maximum sentence; they were not manifestly unreasonable under the circumstances; and they were essential to vindicate the authority of the court. See 42 Pa. C.S.A § 9771(c)(3) ("The court shall not impose a sentence of total confinement upon revocation [of probation] unless it finds that . . . such a sentence is essential to vindicate the authority of the court."). Accordingly, this court respectfully requests that its sentences be upheld.

II. CONCLUSION

The Defendant's contentions of error on appeal are without merit. Based on the foregoing, the court did not abuse its discretion in imposing an aggregate sentence of 3 ½ to 7 years of incarceration for the Defendant's probation violations. Accordingly, this court respectfully requests that its sentences in these cases be upheld.

BY THE COURT:


_____, J.
BETH A. LAZZARA, JUDGE

8/22/18

DATE

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

vs.

CC Nos. 2010-7609; 2015-4177

TYNECIA BIVINS,

Defendant.

ORIGINAL
Criminal Division
Dept. Of Court Records
Allegheny County, PA

OPINION FOLLOWING REMAND ORDER DATED SEPTEMBER 26, 2018

On September 26, 2018, the Superior Court of Pennsylvania granted the Defendant's request to file an Amended Concise Statement of Errors Complained of on Appeal. On October 9, 2018, the Defendant filed her Amended Concise Statement and raised two (2) allegations of error on appeal. The first issue alleged that this court "abused its sentencing discretion because it failed to consider the relevant sentencing criteria, including the protection of the public, the gravity of the underlying offenses and violation, and the character, personal history, and rehabilitative needs of the defendant, as required by 42 PA.C.S.A. §9721(b)." (Amended Concise Statement, filed 10/9/18). This contention was raised in the Defendant's original Concise Statement filed on June 22, 2018, and it was addressed in detail in the Trial Court Opinion issued by this court on August 22, 2018.

FILED
2018 NOV -1 PM 1:50
CRIMINAL DIVISION
ALLEGHENY COUNTY, PA

The Defendant's second allegation of error challenges the legality of the probation revocation and resentencing on the grounds that this court failed to provide the Defendant with "an opportunity to establish an inability to pay." (Amended Concise Statement). In support of her argument, the Defendant cites to the cases of Commonwealth v. Mauk, 185 A.3d 406 (Pa. Super. 2018); Commonwealth v. Diaz, 2018 WL 3060310 (Pa. Super. 2018); and Commonwealth v. Smetana, 2018 WL 3060428 (Pa. Super. 2018). The Defendant's claim has no merit.

Initially, the court notes that the cases relied upon by the Defendant are readily distinguishable from the facts at hand, as the cases involve criminal contempt hearings and sentences of imprisonment resulting *solely* from the failure to pay fines, costs, and/or restitution. The court emphatically reiterates that the Defendant's probation was not revoked solely on the basis of her failure to pay restitution, but rather on the basis of her overall conduct during her time with this court. Compare Mauk, *supra*, at 411 (discussing Bearden v. Georgia, 461 U.S. 660, 668 (1983) ("[A] court may not constitutionally imprison someone for nonpayment of court costs and fines **alone**.")) (emphasis added).

As recounted in the Trial Court Opinion, the Defendant was only 2 ½ years into a 7 year term of probation with this court for her fraud conviction at CC# 2010-7609, a case for which she owed \$47, 706.50 in restitution, when she committed eleven (11) new theft and drug-related offenses, which led to the charges at CC# 2015-4177.

Nevertheless, the court showed her substantial leniency at her November 4, 2015 sentencing hearing when it imposed another five (5) year term of probation for the new crimes she committed at CC# 2015-4177. The lenient sentence was crafted specifically so that the Defendant could continue her attempts to make restitution to her victims.

While the court did not hold a separate hearing to determine the Defendant's ability to pay restitution, any inability to pay was never raised or brought to this court's attention at that time. To the contrary, the Defendant made affirmative representations to this court during that November 4, 2015 sentencing hearing that *she had the means and ability to make the restitution payments as required*. Through her attorney, she communicated that she soon would be returning to work and that she would be making \$35 an hour. (Sentencing Transcript, 11/4/15, p. 12). She informed the court that she would be dedicating "most" of her salary to the total amount of restitution she owed. (Sentencing Transcript, 11/4/15, p. 12). She never objected to her financial ability to make restitution, and she conceded that she had the means to make such payments and that she was simply choosing not to do so. (Sentencing Transcript, 11/4/15, p. 18-19).

At the probation violation hearing held on February 10, 2017, the Defendant had not only failed to make the required payments, she also had failed to comply with this court's order to complete a drug and alcohol evaluation, and she had failed to report to probation as directed. (Probation Violation Hearing, 2/10/17, p. 6). The court also had

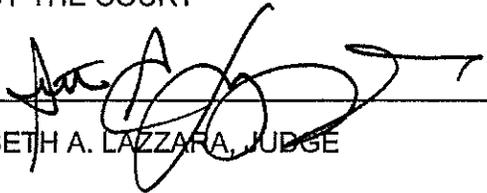
learned that the Defendant had lied to the court about her education and employment. However, despite her non-compliance with her probation, the court again provided the Defendant with another opportunity to come into compliance by revoking her probation and imposing a new seven (7) year term of probation at each case number, which were ordered to run concurrently. At no point did the Defendant ever suggest or imply that she would be unable to make the \$100 court-ordered restitution payment every month. (Probation Violation Hearing, 2/10/17, pp. 2-18).

At the April 20, 2018 probation violation hearing, the court explicitly noted that it would have appreciated *any* effort to make even the smallest restitution payments every month. The Defendant's failure to contribute as little as \$5 a month showed that she was unwilling, **and not unable**, to comply with the terms of her probation. (Probation Violation Hearing, 4/20/18, pp. 9-10). She had not made a single restitution payment since 2017. (*Id.* at 9-10). Had the Defendant made even nominal monthly payments, the Defendant would not have suffered the same fate. However, given her overall conduct during her time on probation with this court, the revocation of probation and a sentence of total confinement was appropriate to vindicate the authority of the court.

Accordingly, because the Defendant's probation revocation was not based solely on her inability to pay restitution, and because any financial inability to make payments was never made an issue before this court prior to her April 20, 2018 probation violation

hearing, the Defendant's revocation sentence was not unlawful, and this contention should be rejected on appeal.

BY THE COURT


_____, J.
BETH A. LAZZARA, JUDGE

11/1/18

ORDER OF CONSOLIDATION

**IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA : No. 737 WDA 2018

v. :

TYNIECIA BIVINS :

Appellant :

COMMONWEALTH OF PENNSYLVANIA : No. 1870 WDA 2017

v. :

TYNIECIA LATAUN MILTON-BIVINS :

Appellant :

ORDER

AND NOW, as the above-captioned matters have been consolidated, the separate briefing schedules are **VACATED** and Appellant's brief for the consolidated cases shall be due in this Court no later than December 17, 2018.

PER CURIAM

IN FORMA PAUPERIS ORDER

IN THE FIFTH JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY
CRIMINAL DIVISION

ADMINISTRATIVE ORDER, IN RE:) No. AD-18 1 CR
INDIGENT DEFENDANTS)

ORDER OF COURT

AND NOW, to-wit, this 3rd day of January, 2018, it is hereby ORDERED,
ADJUDGED and DECREED that all filing fees, subpoenas and cost of transcripts
for the above-captioned individuals are waived as these individuals are indigent.
This Order shall take effect forthwith.

BY THE COURT:



DAVID R. CASHMAN

FILED
10 JAN 03 PM 02:44
CLERK OF COURT

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH)
OF PENNSYLVANIA,)
)
Appellee)
)
vs.) No. 1870 WDA 2017 and
) No. 737 WDA 2018
TYNIECIA MILTON-BIVINS,)
Appellant)

PROOF OF SERVICE

I hereby certify that a true and correct copy of the within Brief for Appellant
has been served upon opposing counsel:

Michael W. Streily, Esquire
Assistant District Attorney
401 Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA 15219-2489

By: Melissa D. Ogden

Date: Dec 17, 2018