

IN THE  
SUPERIOR COURT OF PENNSYLVANIA  
WESTERN DISTRICT

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**No. 1870 WDA 2017 and 737 WDA 2018**

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COMMONWEALTH OF PENNSYLVANIA,  
Appellee

v.

TYNECIA MILTON-BIVINS,  
Appellant

**REPLY BRIEF FOR APPELLANT**

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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.

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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**

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## ARGUMENT

### **I. THE COMMONWEALTH HAS ACKNOWLEDGED PART OF THE REASON MS. BIVINS' PROBATION WAS REVOKED WAS BECAUSE OF HER FAILURE TO PAY**

In its brief to this Honorable Court, the Commonwealth has acknowledged that part of the reason Ms. Bivins' probation was revoked was because of her failure to pay restitution. Consequently, the Commonwealth has admitted part of Ms. Bivins' sentence was illegal because of the failure to inquire about her ability to pay prior to the revocations. As previously stated, Ms. Bivins' situation is comparable to that of a defendant sentenced for a burglary conviction and an assault conviction, whose burglary conviction was overturned. (Brief for Appellant at 30). Like this hypothetical defendant needing to be resentenced for the assault, Ms. Bivins must be resentenced due to the fact that part of the revocation was based on a failure to pay, absent any inquiry into Ms. Bivins' ability to do so.

The Commonwealth argues that the Honorable Lester Nauhaus did not revoke probation merely because of Ms. Bivins' failure to pay restitution, but that the revocation was because of the failed drug test and Ms. Bivins' failure to adhere to the terms of her probation. (Brief for Appellee at 31) (emphasis added). While this may be true, by the Commonwealth's own admission Ms. Bivins' failure to pay was part of the reason her probation was revoked. Additionally, payment of restitution was part of the probation, with the understanding that once it was paid, Ms. Bivins

would be taken off of probation. Transcript Docket Entry 1 at 14. The Commonwealth has also made a similar admission regarding the Honorable Beth Lazzara: “Regardless, the record is clear that like Judge Nauhaus, Judge Lazzara did not sentence appellant solely due to her failure to pay restitution alone and that the court was much more concerned with appellant’s patterns of misrepresentations to the court.” (Brief for Appellee at 33) (emphasis added). Again, while there may have been other reasons to revoke Ms. Bivins’ probation, it is clear that failure to pay restitution was one reason. Equally clear is the requirement established by this Court that the revocation court must inquire into the defendant’s failure to pay, and make findings that pertain to the willingness of the non-payments. See e.g. Commonwealth v. Eggers, 742 A.2d 174 (Pa. Super. Ct. 1999). Neither the Honorable Lester Nauhaus nor the Honorable Beth Lazzara conducted such an inquiry.

The Commonwealth also rests on the opinion of the Honorable Beth Lazzara to show why Ms. Bivins’ ability to pay was not considered at the revocation hearing conducted on April 20, 2018. The Honorable Beth Lazzara’s opinion stated that an inquiry into Ms. Bivins’ ability to pay was not conducted because the inability to pay was never raised or brought to her attention. (Brief for Appellee at 34) (Opinion of Judge Lazzara at 3-4). This is simply a misstatement of the law. As Appellant noted in her brief, an inquiry into a defendant’s failure to pay is not something that a revocation court must conduct once and ignore at subsequent hearings that stem

from a failure to make payments. (Brief for Appellant at 23). Rather, “[e]very time a defendant appears for ‘failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay,’” because a defendant’s financial circumstances may have changed over time. Commonwealth v. Mauk, 185 A.3d 406 (Pa. Super. Ct. 2018) (quoting Bearden v. Georgia, 103 S. Ct. 2064 (1983)). This is true *even if* the defendant fails to raise inability to pay as a defense. As this Court explained in Commonwealth v. Dorsey, 476 A.2d 1308, 1311 (Pa. Super. Ct. 1984), even when the defendant fails to “offer any evidence concerning his indigency,” a trial court unconstitutionally revokes probation if it does not “inquire into the reasons for appellant's failure to pay or . . . make any findings pertaining to the willfulness of appellant's omission as required by *Bearden*.” In other words, the binding case law is unambiguous that the trial court has an obligation to affirmatively inquire into the reasons for nonpayment.

Therefore, while Ms. Bivins’ probation was revoked for reasons other than failure to pay restitution, it is clear that failure to pay restitution was one of the reasons for the revocation. Since failure to pay was an issue, the Honorable Lester Nauhaus and the Honorable Beth Lazzara were constitutionally required to conduct an inquiry into Ms. Bivins’ failure to pay. This is an inquiry that must be done each and every time failure to pay is an issue, but no such inquiry was conducted here. As a result,

the revocation of Ms. Bivins' sentence and an imposition of a period of incarceration constitutes an illegal sentence.

**II. THERE WAS NEVER AN INQUIRY INTO WHETHER MS. BIVINS OWNED THE ONE THOUSAND DOLLARS FOUND ON HER PERSON AND WHETHER IT COULD HAVE BE USED TO PAY HER RESTITUTION**

While it is true that Ms. Bivins had one thousand dollars on her person before she was detained in the probation office, the lack of any inquiry into whether she owned that money makes it impossible to use that money as proof of a willful failure to pay. This Court has stated that Pennsylvania law requires the trial court to find that the defendant alone has the financial ability to pay any outstanding fines and costs. Commonwealth v. Smetana, 191 A.3d 867 (Pa. Super. Ct. 2018). This Court has also held that inquiries about a defendant's ability to borrow money from family or friends is not sufficient for a finding that a defendant alone possesses the necessary financial resources. Id. at 873.

Without an inquiry into where Ms. Bivins obtained the money or whether the money was an indication of a possible change in Ms. Bivins' financial circumstances, one can only speculate as to how she obtained the money. All the Honorable Lester Nauhaus said regarding the money was: "Most recently, before she was detained, she's in the probation office, she's positive for cocaine, and she has a thousand dollars on her person, a thousand dollars. Here we are today. Where is the money? Why didn't she just take the thousand dollars and put it on the

restitution? She's made no effort." Transcript Docket Entry 4 (CC# 2005-8439) at 4. Without asking Ms. Bivins where she obtained the money or even if she owned the money, the Honorable Lester Nauhaus concluded it belonged to Ms. Bivins and that the presence of the money was further proof of a willful failure to make restitution payments. Without any inquiry, it is simply impossible to know where the money came from or whether Ms. Bivins' possession of it was proof of a willful failure to pay restitution. To conclude that Ms. Bivins owned the money is to speculate. As this Court is aware, speculation is not proof.

### **III. IN ORDER TO DETERMINE A DEFENDANT'S ABILITY TO PAY THE TRIAL COURT MUST MAKE DETAILED FINDINGS REGARDING THE DEFENDANT'S LIFE CIRCUMSTANCES**

It is well established that when a court evaluates a defendant's ability to pay fines and costs, the court must look at the defendant's entire financial picture and life circumstances. Mauk, 185 A.3d at 411. Additionally, the court should not look exclusively at the defendant's present income and expenses, but it should also consider all of the relevant facts and circumstances, both financial and personal. Stein Enterprises Inc. v. Golla, 426 A.2d 1129, 1132 (Pa. 1981). Such relevant facts include day-to-day expenses, transportation costs, health insurance, and the use of assets such as an automobile. See e.g. Amrhein v. Armhein, 903 A.2d 17, 22 (Pa.



Super. Ct. 2006); Crosby Square Apartments v. Henson, 666 A.2d 737, 738-39 (Pa. Super Ct. 1995); Schoepple v. Schoepple, 361 A.2d 665, 667 (Pa. Super. Ct. 1976).<sup>1</sup>

As the Appellant has suggested, both the Honorable Lester Nauhaus and the Honorable Beth Lazzara lacked basic information regarding Ms. Bivins' financial resources such as whether she was employed, what her monthly income was, what the sources of her income were, or whether there was any money left over for her use after paying for daily living expenses. (Brief for Appellant at 24). There were also indications that Ms. Bivins would possibly have trouble making payments, such as her being represented by the Office of the Public Defender, her being on a fixed income, her collection of disability payments through Social Security, and her mental health issues. Transcript Docket Entry 2 at 4; Eggers, 742 A.2d at 176. These facts should have prompted a more thorough inquiry into Ms. Bivins' financial situation to ensure that payments could be made on time and in amounts that were manageable. In fact, the Honorable Lester Nauhaus expressed his doubts about Ms. Bivins' ability to pay the restitution, stating he was "not hopeful" that the restitution payments would be made. Transcript Docket Entry 1 at 14. This should have

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<sup>1</sup> While these are *in forma pauperis* cases ("IFP"), this Court has repeatedly explained in a series of criminal cases that "trial courts must look to the 'established processes for assessing indigency'" through the IFP standards when assessing a defendant's financial status. Commonwealth v. Cannon, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008). This is because of the "dearth of case law" in criminal cases, compared with the "well-established principles governing indigency in civil cases." Commonwealth v. Lepre, 18 A.3d 1225, 1226-27 (Pa. Super. Ct. 2011) (applying IFP standards to waive appeal costs). As a result, the standards they set forth govern whether a defendant is indigent and unable to pay.

clarified the need for a deeper inquiry into Ms. Bivins' financial resources than what was already done. Further, such detailed inquiries should have occurred each time failure to make payments became an issue. Mauk, 185 A.3d at 411.

There were multiple instances in this case where it was evident Ms. Bivins could not make payments, which should have triggered such a thorough inquiry. For example, the Honorable Beth Lazzara noted "[Ms. Bivins] had not made a single restitution payment since 2017. Had [she] made even nominal monthly payments, [she] would not have suffered the same fate." (Opinion of Judge Lazzara at 3-4). With such a lengthy amount of time between payments, the need for an inquiry into Ms. Bivins' financial abilities should have been obvious. However, no inquiry was conducted, so Ms. Bivins' financial resources were never fully determined.

### **CONCLUSION**

For the above reasons, this Court should reverse the rulings of the trial courts and instruct the trial courts to conduct 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

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 ) 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

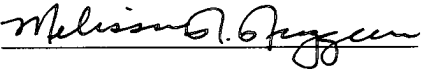
By: Melissa A. Gajjar

Date: March 1, 2019

*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: 

Name: Melissa R. Ruggiero

Attorney No.: 94710