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IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

V.

BRUCE BATES,
Appellant.

COMMONWEALTH'S BRIEF FOR APPELLEE

Defense Appeal from the Judgment of Sentence Imposed on June 28, 2022, by the Court of Common Pleas of Delaware County, Trial Division, Criminal Section, at No. CP-23-CR-0006975-2011.

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Did the trial court have the discretion to revoke defendant's parole for failure to pay more than $5,000 of restitution?

(Answered in the affirmative by the court below.)[1]

II. Was the trial court required to assess defendant's ability to pay before revoking his parole for failure to pay restitution?

(Not addressed by the court below.)

III. Did the trial court err by not granting defendant credit for time spent at liberty on parole?

(Not addressed by the court below.)

IV. Is defendant entitled to relief on his claim challenging his 2019 revocation of parole where that claim goes beyond the scope of this appeal?

(Answered in the negative by the court below.)

[1] Defendant's first two claims raise similar issues. For clarity and convenience, the Commonwealth will address those claims together.

COUNTER-STATEMENT OF THE CASE

Defendant entered a guilty plea to theft in 2012 in exchange for a negotiated sentence. He was found in violation of his parole six times and re-paroled. He now appeals from that sixth revocation and raises multiple claims challenging the trial court's authority to revoke his parole. He also challenges the adequacy of a colloquy conducted in 2019 – three years before the revocation now on appeal.

Upon further reflection, the Commonwealth agrees that the trial court should have assessed defendant's ability to pay restitution before revoking his parole. The Commonwealth does not oppose remanding the case on that basis. However, defendant's remaining claims do not entitle him to relief.

The Theft

On May 7, 2012, defendant entered a guilty plea to theft by unlawful taking after he stole jewelry from victim Theresa Carbone (N.T. 5/7/12, 3-4, 6) The Honorable Ann A. Osborne sentenced defendant to a negotiated term of time served to 23 months in prison, with immediate parole, and ordered him to pay $5,600 in restitution (Docket No. CP-23-CR-0006975-2011).

Prior Revocations of Parole

In 2014, defendant agreed that he had violated his parole (N.T. 7/24/14, 3). Accordingly, a judge revoked his parole and sentenced him to back time,

with immediate parole. The sentencing order reiterated that defendant must pay restitution (Sentencing Order, 7/25/14). A civil judgment was entered for the outstanding restitution six days later.

A judge revoked defendant's parole again in 2016 after defendant agreed that he had violated two rules of his parole. The judge sentenced defendant to back time, with immediate parole, and ordered him again to pay restitution (N.T. 9/14/16, 3-5).

Four months later, defendant admitted to his parole officer that he had smoked marijuana. A drug test confirmed the violation. After he failed to report to his parole officer two months later, the parole officer recommended that defendant's parole be revoked (Request for Bench Warrant, 1). She noted that defendant still owed $5,595 in restitution, and "hadn't made any payments since October 31, 2014" (id. at 2). Defendant agreed that he had violated his parole. Accordingly, in 2017, a judge revoked defendant's parole and sentenced him to back time, with immediate parole to an inpatient treatment facility. The judge also reiterated that defendant must pay restitution (N.T. 7/19/17, 3, 5-6).

Defendant was found in violation of his parole again on January 29, 2019, for failure to pay restitution. Since he appeared without counsel, the hearing officer confirmed that defendant: (1) understood his right to be

represented by counsel; (2) understood that he would be resentenced if he was found in violation of parole; and (3) still wished to proceed *pro se* (N.T. 1/29/19, 3).

Defendant agreed that he had not paid restitution. Since defendant would be "supervised until all this restitution is paid," the hearing officer confirmed that he had "solid employment" for the past 13 months and asked defendant what monthly payments he could afford given the supervision fees he was also paying to York County. He cautioned that defendant would have "bigger problems" if a judge later concluded that he was willfully failing to pay restitution. However, in absence of that willfulness, the hearing officer recommended that defendant be kept on parole just "to give [him] a chance to pay[.]" Based on that recommendation, a judge sentenced defendant to back time, with immediate parole (N.T. 1/29/19, 3-4).

In 2020, defendant still had not fully paid restitution. Accordingly, a judge revoked his parole and sentenced him to back time, with immediate parole. The sentencing order stated that defendant's case would close when restitution was fully paid (N.T. 10/16/20, 3, 5; Sentencing Order, 10/16/20).

Sixth Revocation of Parole

Defendant appeared for a sixth violation of parole hearing on April 26, 2022, and stipulated that he had not fully paid restitution. At that time, he still

owed $5,126 in restitution[2] and had last made a payment in October of 2021. Defense counsel explained that defendant had been injured in December of 2021. He was on temporary disability due to that injury in February. Because his lack of employment prevented him from paying restitution, he requested that his parole be terminated. The Honorable Dominic F. Pileggi continued the case to give the parties a chance to present case law. After hearing further argument, Judge Pileggi concluded that he did not have the authority to terminate defendant's parole and "wouldn't exercise" that authority even if he did (N.T. 4/26/22, 4-5, 18; 5/12/22, 23).

At that listing, defendant raised an objection, against the advice of counsel, to the timing of his revocation hearing. His case was continued again to give the parties a chance to develop a record on that claim (N.T. 5/12/22, 14-15, 21). Finally, on June 28, 2022, the Honorable George A. Pagano revoked defendant's parole and sentenced him to back time, with immediate parole (N.T. 6/28/22, 9). Defendant filed a motion for reconsideration, which was denied. This appeal followed.

[2] Although defendant also owed money in fines and court costs, the Commonwealth took no issue with defendant's failure to pay those funds (N.T. 5/12/22, 6).

SUMMARY OF ARGUMENT

I. Defendant claims that contempt is the only permissible way for a trial court to enforce nonpayment of restitution. But his argument disregards the plain language of the restitution statute, which permits trial judges to find defendants failing to pay restitution to be in violation of their parole. The decision in Commonwealth v. Bolds, 272 A.3d 463 (Pa. Super. 2022) (non-precedential), that defendant now relies upon is not precedential. And since Bolds was issued, another panel deviated from that decision, finding that the entry of a civil judgment did *not* preclude a trial court from finding the defendant in violation of probation or parole. Commonwealth v. Marshall, 2023 WL 5097263 (Pa. Super. 2023) (non-precedential).

II. At the revocation hearing, the Commonwealth argued that defendant's ability to pay was relevant only if the Commonwealth was seeking a prison sentence. Nevertheless, upon further reflection, the Commonwealth believes that it was mistaken. While the restitution statute does preclude courts only from ordering "*incarceration* of a defendant for failure to pay restitution" absent willfulness, 18 Pa.C.S. § 1106(c)(2)(iii) (emphasis added), this Court's own precedent requires a finding of willfulness prior to revoking parole. Under that language, it is the prospect of revocation, not the sentence, that triggers an inquiry. Therefore, the Commonwealth does

not oppose remanding defendant's case for the trial court to assess his ability to pay.

III. Nevertheless, in the interest of thoroughness, the Commonwealth notes that defendant was not entitled to credit for time spent on parole. The statute governing revocation of parole specifies that offenders "shall be given no credit for the time at liberty on parole." 61 Pa.C.S. § 6138(a)(2), and this Court has repeatedly confirmed that standard. Defendant's sentencing claim is therefore meritless.

IV. Defendant's claim challenging his 2019 revocation proceedings goes beyond the scope of the appeal. Considering the claim now would allow him to improperly circumvent the timeliness restrictions of the PCRA.

His decision to present that claim for the first time in his Rule 1925(b) statement also precludes review. It is well settled in Pennsylvania that "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

ARGUMENT

I. The trial court had the discretion to revoke defendant's parole based on his failure to pay restitution.

Defendant's first two claims challenge the trial court's authority to revoke his parole. He argues that the only "proper enforcement mechanism for nonpayment of restitution is to hold contempt proceedings" (Brief for Appellant, 26). He cites an unpublished decision in Commonwealth v. Bolds, 272 A.3d 463 (Pa. Super. 2022) (non-precedential) (terminating parole where a civil judgment had been entered for the outstanding restitution), to support that theory (Brief for Appellant, 24). But his argument disregards the plain language of the restitution statute, which permits trial judges to find defendants failing to pay restitution to be in violation of their parole. Accordingly, while the Commonwealth does agree, for the reasons explained in Section II, that revoking parole in defendant's case was premature, the Commonwealth maintains that trial courts do have the statutory authority to revoke parole for failure to pay restitution, regardless of whether or not a civil judgment been entered in the case.

Statutory Authority

Under the restitution statute, an offender's compliance with restitution "may be made a condition of" his parole. 18 Pa.C.S. § 1106(b). When an

offender fails to pay restitution, the statute instructs courts to "order a hearing to determine if the offender is in contempt of court *or he has violated his probation or parole*." 18 Pa.C.S. § 1106(f) (emphasis added). Thus, the statute allows trial courts to find people failing to pay restitution, like defendant, to be in violation of their parole. Defendant cites this same statute to support his argument that contempt is the only "proper enforcement mechanism for nonpayment of restitution" (Brief for Appellant, 26). But accepting his argument would require this Court to ignore the second half of subsection (f), which explicitly permits revocation of parole.

Here, defendant agreed to pay $5,600 in restitution as part of his negotiated guilty plea (Sentencing Order, 5/7/12). When his parole was revoked in 2020, the resentencing order made it clear that he was on parole to finish paying restitution (Sentencing Order, 10/16/20). However, in 2022, he still owed $5,126 in restitution (N.T. 4/26/22, 4). He agreed that his failure to pay violated the terms of his parole (id. at 3) ("I'll stipulate to the violation"). Accordingly, setting aside the issue of defendant's ability to pay, the trial court did have the authority under the Section 1106 to find someone in defendant's position to be in violation of their parole.[3]

[3] Defendant also argues that terminating his parole would still give the Commonwealth the benefit of its bargain because restitution would remain

Defendant's reliance on Commonwealth v. Griffiths, 15 A.3d 73 (Pa. Super. 2010), is misplaced. Griffiths had stopped paying restitution after his sentence ended, so the trial court eventually found him in contempt of court. Id. at 75. Defendant now cites Griffiths for the proposition that trial courts may enforce restitution orders through contempt (Brief for Appellant, 28). That is undisputed. However, from there, he leaps to the assumption that the option of contempt deprives trial courts of any power to revoke parole (id. at 29). Griffiths does not support that theory. Because Griffiths was not serving any form of a sentence when he stopped paying, the lower court had no available option but to enforce payment via contempt. Despite defendant's protestation to the contrary, that is markedly different from holding that where a defendant is still serving a sentence, enforcement through parole is prohibited. Thus, Griffiths is consistent with the plain language of Section 1106(f), allowing trial courts to find that a defendant who failed to pay restitution has "violated his probation or parole." 18 Pa.C.S. § 1106(f).[4]

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enforceable as a civil judgment (Brief for Appellant, 30). But the trial court disagreed (Trial Court Opinion, 5-6). Given the inherent challenges of enforcing an order civilly (an order negotiated to be enforced criminally), this was not an abuse of discretion. See Commonwealth v. Reed, 285 A.3d 334, 337 (Pa. Super. 2022) (the decision of whether or not to revoke parole is "a matter for the court's discretion").

[4] Griffiths was "sentenced under the pre-1998 version of 18 Pa.C.S. § 1106[,]" not the version applicable to defendant. Id. at 76.

Commonwealth v. James, 771 A.2d 33 (Pa. Super. 2001), is likewise inapposite. James dealt with a prior version of Section 1106, which limited the length of time a defendant could be ordered to pay restitution. Under that prior version of the statute, "the period of time during which the offender must pay" restitution could "not exceed the maximum imprisonment to which he could have been sentenced." James, 771 A.2d at 36 n.3 (citation omitted). The newer, amended statute that applies to defendant deleted those time limits. Griffiths, 15 A.3d at 78. "Now, an order of restitution is enforceable until paid." Id.

James is also factually distinguishable. In that case, James had stopped paying restitution while he was on parole. Id. at 34. Accordingly, "the Commonwealth filed a petition to have [James] held in contempt[.]" Id. The next year, the trial court found that James' failure to pay restitution violated his probation. Id. On appeal, this Court remanded the case.[5] But there, it was "the manner in which the Commonwealth and the trial court treated" James' first failure to pay restitution that justified a remand. Id. Since the Commonwealth had treated James' first failure to pay restitution as a contempt issue, not a parole violation, this Court concluded that "the original

[5] Although James was published, the Commonwealth notes that the portion of the opinion defendant relies upon was a mere summary of the *unpublished* direct appeal opinion, which undermines its precedential value.

order of restitution was not a condition of probation" or parole. Id. That is not the case here. The Commonwealth and the trial court have consistently treated defendant's failure to fully pay restitution as a violation of his parole, and defendant has previously stipulated to the same (N.T. 7/19/17, 3; 10/16/20, 4; 4/26/22, 3). Therefore, even if James had been interpreting the same version of the statute at issue here, it would not preclude the trial court from revoking defendant's parole.

Commonwealth v. Bolds

Defendant also claims that the unpublished decision in Bolds precluded the trial court from revoking his parole (Brief for Appellant, 26). But Bolds is not precedential, so the trial court was not bound by that decision and neither is this Court. In Bolds, the appellant's parole, like defendant's, had been revoked due to her failure to fully pay restitution. On appeal, the panel discharged Bolds from her sentence because a civil judgment had been entered against Bolds for the outstanding restitution. Bolds, 272 A.3d at *1. To support that decision, the panel cited 42 Pa.C.S. § 9728(a)(1), which states that a sentence requiring restitution "shall . . . be a judgment in favor of the probation department[.]" Bolds, 272 A.3d at *1. However, nothing in that

statute precludes trial judges from finding defendants failing to pay restitution to be in violation of their parole.[6]

And the sole case citing Bolds since it was issued declined to adopt its holding. Commonwealth v. Marshall, 2023 WL 5097263 (Pa. Super. 2023) (non-precedential) (rejecting argument that Bolds "entitled [Marshall] to termination of his probation regardless of whether he had the ability to pay," even though, just like in Bolds, a civil judgment had been entered against Marshall for the restitution). In Marshall, a panel remanded the case for an ability-to-pay hearing (the remedy proposed by the Commonwealth in Section II). If the trial court found that Marshall did not have the ability to pay, then the panel held that the petition for revocation should be dismissed. Id. at *4. However, if Marshall *did* have the ability to pay, then the trial court would

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[6] The Bolds panel also cited to Com. ex rel. Powell v. Rosenberry, 645 A.2d 1328 (Pa. Super. 1994). But, as explained further in Section III, the facts in *Rosenberry* bear little resemblance defendant's case. There, the trial court did *not* revoke Roseberry's parole. Instead, it simply extended parole to avoid a formal revocation. Id. at 1329. By the time the case reached this Court, Rosenberry's parole had already been terminated, so the issue was moot. Id. at 1330.

That is not the case here. Defendant, unlike Rosenberry, is still on parole due to the outstanding restitution. Although a civil judgment was entered against defendant in 2014 for the outstanding restitution, paying restitution is also a condition of his parole. There is nothing in Rosenberry that addresses this issue. Accordingly, the entry of a civil judgment does not moot defendant's admitted violation of parole.

have the discretion to either: (1) "find that Marshall has violated a condition of probation and extend probation to insure payment of restitution"; or (2) "decline to do so" and instead collect restitution civilly through 42 Pa.C.S. § 9728. Id.

The trial court chose the former here. While Marshall is itself non-precedential, that decision nevertheless undermines the persuasive value of Bolds. Accordingly, while the Commonwealth agrees, for the reasons explained below, that defendant's case should be remanded, this Court should reject the argument that contempt is the only "proper enforcement mechanism for nonpayment of restitution" and disavow the reasoning of Bolds (Brief for Appellant, 26).

II. The Commonwealth agrees that the trial court was required to assess defendant's ability to pay before revoking his parole.

Defendant alternatively argues that the trial court could revoke his parole only "if it first made a determination on the record that he willfully failed to make payments" (Brief for Appellant, 32). The Commonwealth opposed this argument at the revocation hearing, arguing that defendant's ability to pay was relevant only if the Commonwealth was seeking incarceration (N.T. 4/26/22, 6). Nevertheless, upon further reflection, the Commonwealth believes that it was mistaken. While the statute the

Commonwealth cited below does speak only of incarceration (id.), this Court's own precedent is broader. Based on that case law, the Commonwealth agrees that the trial court was required to assess defendant's ability to pay before revoking his parole, and defendant's case should be remanded on that basis.

In Bearden v. Georgia, 461 U.S. 660 (1983), the Supreme Court criticized the practice of "imprisoning a defendant solely because of his lack of financial resources." Id. at 661. As a condition of probation, a judge had ordered Bearden to pay $750 in fines and restitution. Id. at 663. Bearden borrowed money to pay the first $200 that he owed, but was laid off from his job one month later and could not find other work. Id. His inability to pay resulted in a prison sentence. Id.

To avoid that inequity, the Supreme Court laid out a framework for trial judges to follow at revocation proceedings for failure to pay restitution. Before resorting to a prison sentence, a trial judge should: (1) "inquire into the reasons for the failure to pay"; and (2) consider alternatives to incarceration. Id. at 672; see also id. ("Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."). Thus, the crux of Bearden is "that a sentencing court's decision to

incarcerate a person for failure to pay a fine or restitution raises constitutional concerns." Taylor M. v. Varela, 2022 WL 2560253, at *5 (C.D. Cal. 2011) (Wilner, M.J.) (emphasis in original).

Section 1106 echoes this sentiment. That statute precludes courts from ordering "*incarceration* of a defendant for failure to pay restitution if the failure results from the offender's inability to pay." 18 Pa.C.S. § 1106(c)(2)(iii) (emphasis added).

However, this Court's precedent interprets Bearden more broadly. This Court has repeatedly described Bearden as requiring a finding of willfulness "[p]rior to revoking probation" or parole for failure to pay restitution. Commonwealth v. Allshouse, 969 A.2d 1236, 1242 (Pa. Super. 2009); Commonwealth v. Ballard, 814 A.2d 1242, 1247 (Pa. Super. 2003); see also Commonwealth v. Eggers, 742 A.2d 174, 175-76 (Pa. Super. 1999) (Bearden "has been interpreted by this court as requiring the revocation court to inquire into the reasons for a defendant's failure to pay and to make findings pertaining to the willfulness of the party's omission"); Commonwealth v. Dorsey, 476 A.2d 1308, 1312 (Pa. Super. 1984) ("in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the

reasons for the failure to pay") (citation and emphasis omitted).[7] Under this language, it is the prospect of revocation, not the sentence, that triggers an ability-to-pay inquiry. See Marshall, 2023 WL 5097263 at *2 (finding that the trial court erred in revoking Marshall's probation for failure to pay restitution without assessing his ability to pay, even where Marshall was re-sentenced to probation).

The trial court, at the Commonwealth's urging, did not account for defendant's ability to pay. At the time of the hearing, defendant had no income. His counsel explained that defendant had been injured in December of 2021, and put on temporary disability later due to that injury (N.T. 4/26/22, 5). Nevertheless, with no evidence of willfulness, defendant's parole was revoked. The Commonwealth agrees that defendant is entitled to relief on this basis. His case should be remanded to give the trial court an opportunity to assess his ability to pay. See Marshall, 2023 WL 5097263, at *3 (explaining that the appropriate remedy is to "remand[] for a new hearing rather than

[7] One exception is Reed. There, this Court did not mention Bearden. This Court instead relied on Pa.R.Crim.P. 706(A), which precludes courts from imprisoning a defendant "for failure to pay a fines or costs" absent evidence that "the defendant is financially able to pay the fine or costs." Unlike defendant, Reed had not been re-paroled. It was therefore unnecessary for the Reed Court to assess the implications of Bearden because Rule 706 conclusively resolved Reed's claim. See Reed, 285 A.3d at 338 n.6 (limiting review to the sentencing aspect of Reed's claim).

vacat[e] the revocation with no further proceedings"); Eggers, 742 A.2d at 176 (remanding the case for a new revocation hearing).

On remand, the Commonwealth will not oppose terminating defendant's parole if the trial court finds that defendant is unable to pay restitution. Based on the information presented by the defendant during the 2022 revocation hearings – information that the Commonwealth has no reason to doubt – it is unlikely the trial court will find defendant able to pay.

III. Defendant was not entitled to credit for time spent on parole.

Defendant also argues that his sentence is illegal because the trial court failed to give him credit for the time he spent on parole (Brief for Appellant, 38). Although granting defendant relief on the preceding claim would effectively moot this argument, the Commonwealth notes, in the interest of thoroughness, that defendant's argument is meritless. It is well settled in Pennsylvania that offenders are not entitled to credit for time spent on parole.

Defendant's crime was graded as a first-degree misdemeanor. This meant that his crime carried a statutory maximum penalty of five years in prison. 18 Pa.C.S. § 106(b)(6). However, he was immediately paroled (Sentencing Order, 5/7/12). He now attempts to broaden the reach of Section 106 by claiming that it permits "five years of *supervision*" (Brief for Appellant, 38) (emphasis added), but the statute does not use that term.

Instead, Section 106 discusses only the maximum term of "imprisonment." 18 Pa.C.S. § 106(b)(6).

He was not entitled to credit for time spent on parole. Under 61 Pa.C.S. § 6138(a)(2), if an offender's parole is revoked, "the offender shall be recommitted to serve the remainder of the term which the offender would have been compelled to serve had the parole not been granted." The statute specifies that the offender "*shall be given no credit for the time at liberty on parole*." 61 Pa.C.S. § 6138(a)(2) (emphasis added); accord Com. ex rel. Haun v. Cavell, 154 A.2d 257, 260 (Pa. Super. 1959) (The 'remainder of the term' refers to the portion of the sentence actually left on the date of the release on parole . . . and not on the date of violation of the parole."). Although Section 6138 facially governs the Parole Board, this Court has applied the same statute to a trial judge revoking parole. Commonwealth v. Rosario, 2020 WL 1889121, at *1 n.4 (Pa. Super. 2020) (non-precedential)[8] ("In resentencing Appellant for his parole violation, the trial court was limited to recommitting him 'to serve the remainder of the term which Appellant would have been compelled to serve had the parole not been granted.'") (quoting 61 Pa.C.S. § 6138(a)(2)) (brackets omitted); see also Commonwealth v. Carter, 485 A.2d

[8] "Non-precedential decisions filed after May 1, 2019, may be cited for their persuasive value[.]" 210 Pa. Code § 65.37(b).

802, 805 n.2 (Pa. Super. 1984) (an order revoking parole "d[oes] not impose a new sentence"; it requires the defendant, "rather, to serve the balance of a valid sentence previously imposed").

Indeed, this Court has repeatedly resisted the notion that defendants are entitled to credit for time spent out of prison on probation or parole. Commonwealth v. Crump, 995 A.2d 1280, 1284-85 (Pa. Super. 2010) (when revoking probation, the court "need not credit the defendant with any time spent on probation"; a revocation sentence is illegal only if it exceeds the statutory maximum "when factoring in the *incarcerated* time already served") (emphasis added); Commonwealth v. Birney, 910 A.2d 739, 741 (Pa. Super. 2006) (even "time spent subject to electronic monitoring at home is not time spent 'in custody' for purposes of credit toward a prison sentence"); Commonwealth v. Fair, 497 A.2d 643, 645 (Pa. Super. 1985) ("the defendant, when found in violation of parole, is not entitled as of right to credit for time spent on parole without violation"); see also Commonwealth v. Reed, 285 A.3d 334, 339 n.7 (Pa. Super. 2022) ("upon revocation of parole, the VOP court's sentencing choices are recommitment to back-time or immediate re-parole").

Although it has been eleven years since defendant entered his guilty plea, very little of that time was spent in prison. In 2012, when he entered his

guilty plea, he was immediately paroled after serving only 32 days in prison (Sentencing Order, 5/7/12). Each time he was subsequently found in violation of parole, he was sentenced to back time and reparoled (Sentencing Orders, 7/25/14, 9/14/16, 1/29/19, 10/16/20, 6/28/22),[9] in accordance with Section 6138(a)(2). His sentence was therefore legal.

Contrary to defendant's argument, Commonwealth v. Michenfelder, 408 A.2d 860 (Pa. Super. 1979), is inapposite. There, this Court interpreted a prior parole statute that was repealed in 2009, 61 Pa.C.S. § 331.21a, before defendant entered his guilty plea. Under the old statute, the Parole Board was required to "give parolees credit for street time where parole [was] revoked as a result of merely technical violations." Michenfelder, 408 A.2d at 861. However, offenders, like defendant, who were sentenced to less than two years in prison fell under the jurisdiction of the trial court, not the parole board. Id. (citing 61 Pa.C.S. § 331.17 (repealed in 2009)). Michenfelder held that those offenders were "*not* entitled to credit for street time, even where parole revocation result from technical violations." Id. at 861-62 (emphasis added). Instead, the decision of whether or not to grant credit for street time was left to the trial court's discretion. Id. at 862.

[9] The sole exception was in 2017, when the trial court paroled defendant to an inpatient drug and alcohol treatment facility (Sentencing Order, 7/19/17).

Even if that case did control here, it would not make defendant's sentence illegal. Under Michenfelder, defendant would not be entitled to credit for the time he spent on parole. Instead, the decision of whether or not to grant him credit for that time would be within the discretion of the trial court. Defendant's claim challenging the *legality* of his sentence should therefore be rejected.

Defendant also cites Com. ex rel. Powell v. Rosenberry, 645 A.2d 1328 (Pa. Super. 1994), for the proposition that the trial court illegally extended his parole (Brief for Appellant, 40). But the routine revocation here bears little resemblance to the unusual tactic taken by the trial judge in Rosenberry. There, Powell had not finished paying his fines and court costs when his parole ended. Rosenberry, 645 A.2d at 1329. Powell was given two options: (1) appearing for a violation of parole hearing; or (2) stipulating out of court to an extension of his parole. Id. He chose the latter. Accordingly, the trial judge did not revoke Powell's parole. Instead, the trial judge simply "issued an order extending Powell's parole" by two years. Id. Since the trial judge had long since lost jurisdiction to modify its original sentencing order, this Court granted Powell relief. Id. at 1330 ("In this Commonwealth, if no appeal has been taken, a common pleas court has jurisdiction to modify or rescind any order for a 30 day period after the order in question has been entered."). Thus,

it was the manner in which the parole order was issued, not the simple fact that Powell was paroled, that made his sentence illegal.

The lower court issued no such belated order here. Instead, the lower court revoked defendant's parole and sentenced him to back time, with immediate parole, in accordance with this Court's precedent. See Reed, 285 A.3d ay 339 n.7 ("upon revocation of parole, the VOP court's sentencing choices are recommitment to back-time *or immediate re-parole*") (emphasis added). Defendant's misinterpretation of Rosenberry should be disregarded.

IV. Defendant's claim challenging his waiver of counsel in 2019 is unreviewable.

When the lower court revoked defendant's parole in 2022 – the order now on appeal – defendant was represented by counsel. He nevertheless claims that he did not knowingly and intelligently waive his right to counsel during a prior revocation hearing in 2019 (Brief for Appellant, 41). This claim goes beyond the scope of the appeal and is therefore unreviewable.

"[T]he scope of review in an appeal following a sentence imposed after revocation is limited to the validity of the revocation proceedings" and the sentence imposed following that revocation. Commonwealth v. Infante, 888 A.2d 783, 790 (Pa. 2005). This Court's decision in Commonwealth v. Christian, 448 A.2d 623 (Pa. Super. 1982), is instructive. There, Christian appealed after his second revocation of probation. Id. at 623. On appeal, he

was precluded from attacking the validity of his original guilty plea or counsel's ineffectiveness regarding that plea. Id. at 624; see also Commonwealth v. Beasley, 570 A.2d 1336, 1338 (Pa. Super. 1990) ("examination of the underlying conviction and sentence" following revocation of probation is "incorrect").

There is no meaningful distinction between reviewing an original conviction and reviewing a prior revocation order. Both ask this Court to look beyond the order on appeal and review an alleged error that could have been appealed earlier. Therefore, defendant's claim is unreviewable. Defendant does not challenge his present revocation of parole. There was no need to colloquy defendant regarding his right to counsel in 2022 because he was represented by counsel throughout those proceedings. Instead, he challenges a colloquy that occurred three years earlier, during a *prior* revocation of parole. Because his claim does not relate to the present revocation order at all, his collateral attack on the 2019 proceedings is beyond the scope of the appeal. See Commonwealth v. Callendar, 2022 WL 1053276 (Pa. Super. 2022) (non-precedential) (declining to review trial court's decision to set monthly payments at $60 at a previous ability-to-pay hearing where Callendar did not appeal that 2019 decision).

Considering defendant's claim now would allow him to improperly circumvent the PCRA. In Pennsylvania, the PCRA is the only vehicle for challenging due process violations once a defendant's judgment of sentence becomes final. See Commonwealth v. Hall, 771 A.2d 1232, 1235 (Pa. 2001) ("claims that could be brought under the PCRA **must** be brought under the Act") (emphasis in original); Commonwealth v. McLaughlin, 240 A.3d 980, 983 (Pa. Super. 2020) ("Due process violations are cognizable under the PCRA"). Under the PCRA, all petitions must be filed within one year of the date on which the judgment became final unless one of the three statutory exceptions set forth in the statute applies. Commonwealth v. Fahy, 737 A.2d 214, 218 (Pa. 1999).

Here, defendant's judgment of sentence for his 2019 violation of parole became final on February 28, 2019, when the period for seeking direct review expired. See 42 Pa.C.S. § 9545(b)(3). Thus, under the PCRA, he had until February 28, 2020, to file a petition raising his current claim. Instead, he raised an objection for the first time more than two years later, making his claim untimely.

His decision to present that claim for the first time in his Rule 1925(b) statement also precludes review. It is well settled in Pennsylvania that "[i]ssues not raised in the trial court are waived and cannot be raised for the

first time on appeal." Pa.R.A.P. 302(a). Defendant did not raise an objection in 2019 to the adequacy of the colloquy (N.T. 1/29/19, 3-9). Nor did he present the issue to the lower court in 2022 – at the four hearings that took place that year or in his post-sentence motion (N.T. 4/26/22, 5/12/22, 5/27/22, 6/28/22; Post-Sentence Motion, 3-8). Instead, he raised the claim for the first time in his Rule 1925(b) statement, after the lower court had lost any "jurisdiction to act further on the case." Commonwealth v. Pearson, 685 A.2d 551, 557 (Pa. Super. 1996) (en banc).

Defendant does not directly acknowledge the procedural defects of his claim. Instead, he attempts to duck around the issue by claiming that the absence of counsel in 2019 made that sentence, and any subsequent sentences, illegal (Brief for Appellant, 41). But even assuming, *arguendo*, that defendant did not knowingly and intelligently waive his right to counsel, that would mean that his due process rights were violated, not that his sentence was illegal. By defendant's argument, no argument could be waived because any error that occurred during a proceeding would implicate the legality of the defendant's sentence. That, of course, is not the law.

Defendant's reliance on Commonwealth v. Milhomme, 35 A.3d 1219 (Pa. Super. 2011), is therefore misplaced. There, a trial judge found Milhomme in violation of probation and imposed a new sentence. Id. at 1220.

However, on appeal, this Court found that Milhomme's original sentence had been illegal. Id. at 1222. "Because the original sentence was illegal," this Court concluded that "the recent probation revocation sentence [was] also illegal." Id. Logically, Milhomme could not have violated the terms of a sentence that should have never been imposed.

That is not what occurred here. The lower court imposed a legal sentence on defendant in 2019. Defendant's waiver of counsel claim does not challenge that sentence; it challenges the propriety of a colloquy that occurred at the start of the hearing before he had been found in violation of parole. If he sought to challenge that colloquy, he should have filed a timely PCRA petition raising that claim. This appeal from a revocation hearing three years later is not the proper forum to review it.

CONCLUSION

For the foregoing reasons, and those stated in the lower court's opinion, the Commonwealth requests that this Court affirm the judgment of sentence.

Respectfully submitted,

/s/ Kelly Wear

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