

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

EDA 2021

NO. 163

COMMONWEALTH OF PENNSYLVANIA

VS.

SHANAE BOLDS,
Appellant

BRIEF FOR APPELLANT

Appeal From the Judgment Of Sentence Of The Court Of Common Pleas Of Delaware County, Order Entered December 16, 2020, Imposed On Information No. CP-23-CR-0004160-2014.

EMILY MIRSKY, Assistant Defender
Chief, Appeals Division
CHRISTOPHER WELSH, Defender

Delaware County Office of the Public Defender
220 N. Jackson St.
Media, PA 19063
Identification No. 89661
(610) 891-4100

April, 2021

TABLE OF CONTENTS

	PAGE
I. <u>STATEMENT OF JURISDICTION</u>	1
II. <u>STATEMENT OF SCOPE AND STANDARD OF REVIEW</u>	2
III. <u>STATEMENT OF QUESTIONS INVOLVED</u>	3
IV. <u>STATEMENT OF THE CASE</u>	5
V. <u>SUMMARY OF ARGUMENT</u>	10
VI. <u>ARGUMENT</u>	13
1. BECAUSE RESTITUTION WAS ORDERED AS A CONDITION OF APPELLANT’S DIRECT SENTENCE AND NOT AS A CONDITION OF PAROLE, THEN SHE COULD NOT BE FOUND IN VIOLATION OF PAROLE FOR NONPAYMENT, SUCH THAT EACH OF APPELLANT’S FOUR REVOCATION SENTENCES CONSTITUTED AN ILLEGAL SENTENCE.	14
2. EVEN IF RESTITUTION WAS MADE A CONDITION OF APPELLANT’S PAROLE, EACH OF APPELLANT’S FOUR REVOCATION SENTENCES CONSTITUTED AN ILLEGAL SENTENCE BECAUSE THE TRIAL COURT NEVER MADE ANY FINDING AT ANY REVOCATION HEARING THAT ANY NONPAYMENT WAS WILLFUL, AND SHE WAS IN COMPLIANCE WITH HER MONTHLY PAYMENTS AS ORDERED BY THE COURT.	19
3. APPELLANT’S DECEMBER 16, 2020 REVOCATION SENTENCE, ORDERING PAYMENT OF RESTITUTION BEYOND THE STATUTORY MAXIMUM SENTENCE FOR THE UNDERLYING OFFENSE AND FAILING TO GIVE	28

CREDIT FOR ALMOST SEVEN YEARS OF “STREET TIME” ON PAROLE, DEPRIVED HER OF HER STATE AND FEDERAL DUE PROCESS AND CONSTITUTED AN ILLEGAL SENTENCE.

4. APPELLANT WAS DENIED HER STATE AND FEDERAL DUE PROCESS RIGHTS WHEN AN UNCOUNSELED PAROLE VIOLATION HEARING WAS ALLOWED TO PROCEED ON AUGUST 18, 2017 AND JANUARY 11, 2019 IN THE ABSENCE OF A KNOWING AND INTELLIGENT WAIVER, SUCH THAT THE RESULTANT REVOCATION SENTENCES CONSTITUTED ILLEGAL SENTENCES. 32

VII. CONCLUSION 37

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Commonwealth ex rel. Powell v. Rosenberry</i> , 645 A.2d 1328 (Pa. Super. 1994).....	21, 31, 32
<i>Commonwealth ex rel. Wright v. Hendrick</i> , 312 A.2d 402 (Pa. 1973)	27
<i>Commonwealth v. Catt</i> , 944 A.2d 1158 (Pa. Super. 2010).....	2
<i>Commonwealth v. Crump</i> , 995 A.2d 1280 (Pa. Super. 2010).....	2
<i>Commonwealth v. Diaz</i> , 191 A.3d 850 (Pa. Super. 2018).....	26
<i>Commonwealth v. Dorsey</i> , 476 A.2d 1308 (Pa. Super. 1984).....	22
<i>Commonwealth v. Foster</i> , 214 A.3d 1240 (Pa.2019)	17, 18
<i>Commonwealth v. Griffiths</i> , 15 A.3d 73 (Pa. Super. 2010).....	18, 19
<i>Commonwealth v. Houtz</i> , 856 A.2d 119 (Pa. Super. 2004).....	34
<i>Commonwealth v. Hughes</i> , 986 A.2d 159 (Pa. Super. 2009).....	2
<i>Commonwealth v. Infante</i> , 888 A.2d 783 (Pa. 2005)	2
<i>Commonwealth v. James</i> , 771 A.2d 33 (Pa. Super. 2001).....	18, 19
<i>Commonwealth v. Mauk</i> , 185 A.3d 406 (Pa. Super. 2018).....	26
<i>Commonwealth v. Michenfelder</i> , 408 A.2d 860 (Pa. Super. 1979).....	30
<i>Commonwealth v. Milhomme</i> , 35 A.3d 1219 (Pa. Super. 2011).....	2, 13, 20, 30, 33, 37
<i>Commonwealth v. Monica</i> , 597 A.2d 600 (Pa. 1991)	32
<i>Commonwealth v. Murphy</i> , 214 A.3d 675 (Pa. Super. 2019).....	32, 34, 37
<i>Commonwealth v. Robinson</i> , 970 A.2d 455 (Pa. Super. 2009) (<i>en banc</i>).....	34

<i>Commonwealth v. Williams</i> , 920 A.2d 887 (Pa. Super. 2007).....	2, 30
<i>Hudak v. Board of Probation and Parole</i> , 757 A.2d 439 (Pa. Commw. 2000)	21
<i>Lawson v. Board of Probation and Parole</i> , 524 A.2d 1053 (Pa. Commw. 1987)	22
<i>Miller v. Board of Probation and Parole</i> , 784 A.2d 246 (Pa. Commw. 2001)	21
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	26

Statutes

18 Pa.C.S. 1106(c)(2)(ii).....	13
18 Pa.C.S. §1106.....	12, 14, 17
18 Pa.C.S. §1106(b)	17, 20
18 Pa.C.S. § 106(b)(4)	5, 29
18 Pa.C.S. § 1106(a)	14, 17, 18, 20
18 Pa.C.S. § 1106(f).....	9, 10, 12,14, 18, 19, 32, 37
42 Pa.C.S. § 5505.....	31
42 Pa.C.S. § 9728.....	21, 32
42 Pa.C.S.A. §742.....	1

Rules

Pa.R.Crim.P. 121.....	11, 33, 34
Pa.R.Crim.P. 708(B)(1).....	33

Other Authorities

P.L. 586	
----------------	--

I. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from the judgment of sentence of the Delaware Court of Common Pleas is established by Section 2 of the Judiciary Act of 1976, P.L. 586, No. 142, §2, 42 Pa.C.S.A. §742.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

“[T]he 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. . . .” *Commonwealth v. Infante*, 888 A.2d 783, 790 (Pa. 2005).

This appeal challenges the legality of revocations sentences based solely on failure to pay restitution. “A claim that implicates the fundamental legal authority of the court to impose a particular sentence constitutes a challenge to the legality of the sentence.” *Commonwealth v. Catt*, 944 A.2d 1158, 1160 (Pa. Super. 2010) (*en banc*). The determination as to whether the trial court imposed an illegal sentence is a question of law and the standard of review is plenary. *Commonwealth v. Hughes*, 986 A.2d 159, 160 (Pa. Super. 2009); *Commonwealth v. Infante*, 888 A.2d 783, 790 (Pa. 2005); *Commonwealth v. Crump*, 995 A.2d 1280, 1283 (Pa. Super. 2010). A challenge to the legality of sentence is non-waivable. *Commonwealth v. Williams*, 920 A.2d 887, 888 (Pa. Super. 2007); *Commonwealth v. Milhomme*, 35 A.3d 1219, 1221 (Pa. Super. 2011).

III. STATEMENT OF QUESTIONS INVOLVED

1. Whether each of appellant's four revocation sentences constituted an illegal sentence where restitution was ordered as a condition of appellant's direct sentence and not as a condition of parole, such that she could not be found in violation of parole for nonpayment?

(Answered in the negative by the court below).

2. Even if restitution was made a condition of appellant's parole, did each of appellant's four revocation sentences constitute an illegal sentence because the trial court never made any finding at any revocation hearing that any nonpayment was willful, and appellant was in compliance with her monthly payments as ordered by the court?

(Not addressed by the court below, finding the issue to be moot.)

3. Whether appellant's December 16, 2020 revocation sentence, which ordered payment of restitution beyond the statutory maximum sentence for the underlying offense and failed to give credit for almost seven years of "street time" spent on parole, deprived her of her state and federal due process rights and constituted an illegal sentence?

(Not raised in the court below.)

4. Whether appellant was denied her state and federal due process rights when an uncounseled revocation hearing was allowed to proceed on August 18, 2017 and January 11, 2019 in the absence of a knowing and intelligent waiver, such that the resultant revocation sentences constituted illegal sentences?

(Not raised in the court below.)

IV. STATEMENT OF THE CASE

On November 18, 2014, appellant, Shanae Bolds, entered into a negotiated guilty plea on docket number CP-23-CR-0004160-2014 and was convicted of receiving stolen property (graded as a felony of the third degree). The statutory maximum sentence allowable by law is seven (7) years for this offense. 18 Pa.C.S. § 106(b)(4). At the time of the plea, she was sentenced to time served to 23 months of incarceration with immediate parole and was ordered to pay restitution in the amount of \$1,556.84 to Ann Huben, \$8,255.20 to Standard Fire Insurance Company, \$306.05 to William Richan and \$300.00 to the Victims Compensation Assistance Program. The total amount of restitution owed was \$10,418.09 and liability was ordered to be joint and several with two co-defendants (N.T. 11/18/14, at 3-4, 9). Ms. Bolds was also ordered to pay court costs. No payment plan was established. Had she never been found in violation of her parole, she would have completed her sentence by October 18, 2016.

On April 14, 2016, Ms. Bolds appeared for a revocation hearing before a Master, not a Common Pleas Judge (N.T. 4/15/16, at 3). Counsel was present (*id.*). She stipulated that she was in violation of her parole and the Master found her in violation of parole. The violation seems to be solely due to failure to pay restitution, though no payment plan had been established at the original sentencing. The basis of the alleged violation was not placed on the record, nor was any information

regarding any failure to make payments (*id.*). She was sentenced to her back time of 477 days with immediate parole and was ordered to make monthly payments towards restitution first.

On August 18, 2017, Ms. Bolds appeared for a revocation hearing, again before a Master (N.T.8/18/17, at 3). She proceeded without counsel after the following colloquy:

THE COURT: Thank you. Ms. Bolds you understand you have the right to be represented by Counsel at this hearing?

MS. BOLDS: Yes.

THE COURT: And you understand if we find you in violation we may resentence you today technically?

MS. BOLDS: Yes.

THE COURT: Knowing that is it your desire to proceed without Counsel today?

MS. BOLDS: Yes.

THE COURT: And are you willing to proceed before myself instead of a Judge this morning?

MS. BOLDS: Yes.

(N.T. 8/18/17, at 3). The Master found her in violation of parole. It seems as though she was found in violation solely for failing to pay her restitution (*id.* at 3-4), though no reasons for the violation were placed on the record, nor were the alleged violations. When Ms. Bolds asked questions regarding her outstanding balance, the Master told her to speak to her counsel (*id.* at 4-5). She was sentenced to her back time of 477 days with immediate parole and was ordered to make monthly payments towards restitution first.

On January 11, 2019, Ms. Bolds again appeared for a revocation hearing before a Master and was not represented by counsel after a colloquy much like the one cited above (N.T. 1/11/19, at 3-4). The Master again found her in violation of parole, seemingly solely for failing to pay her restitution and sentenced her to her back time of 477 days with immediate parole. She was ordered to make monthly payments towards restitution first. Ms. Bolds testified that she had been giving her probation officer \$40.00 per month, but that she had recently received a receipt stating that she had only paid \$30.00, which was incorrect (*id.* at 4). The Commonwealth stated that the records showed she had paid \$155.00 in total, but Ms. Bolds testified that she had definitely paid more than that (*id.* at 4-6). Nobody was able to explain this discrepancy, nor did the Master reduce her outstanding payments to reflect this discrepancy (*id.* at 6). Despite testimony that she was making monthly payments as ordered by the court, the Master found her in violation of parole.

On December 16, 2020, Ms. Bolds requested to appear before a Common Pleas Judge, as opposed to the Master, for another revocation hearing (N.T. 12/16/20, at 3-4).¹ Once again, the only alleged violation was nonpayment of restitution (*id.* at 11-12). Ms. Bolds' probation officer testified that Ms. Bolds had

¹ At the December 20, 2020 hearing, the Commonwealth represented that Ms. Bolds was present on behalf of two common pleas dockets. This was incorrect. The Commonwealth had *nolle prossed* docket number CP-23-CR-0004156-2014, cited by the Commonwealth, at the initial guilty plea hearing on November 18, 2014 (N.T. 11/18/14, at 4).

been making payments towards her restitution and that she remained employed throughout her supervision (*id.* at 5). Ms. Bolds testified that she was currently employed at Burger King, working 30 hours per week, making \$9.75 per hour (*id.* at 7). She was also working for Door Dash (*id.*). Ms. Bolds is 26 years old, she lives with her father and is raising her five-year-old daughter, for whom she is financially responsible (*id.* at 6, 7-8). Ms. Bolds testified that she makes payments towards the restitution but is not able to pay the outstanding \$9,600, though she gives the court “what I can” (*id.* at 8).²

The trial court noted that probation was not asking for a specific amount to be paid each month (*id.* at 11). The following exchange then occurred:

THE COURT: I am assuming that *as long as some payments are made on a monthly basis for the next 477 days that at the conclusion there will be a motion to convert the balance of any restitution due to a civil judgment against Ms. Bolds.*

MS. LATONICK: *Correct Your Honor.*

(*id.* at 12) (emphasis added). The court did not make note of the fact that Ms. Bolds had been making monthly payments since at least 2016 when the order for monthly

² On cross-examination, Ms. Bolds testified that she was not aware she was going to have to pay back \$8,255.20 to Standard Fire Company and that she thought she was only going to owe a couple of thousand dollars, but nothing close to \$11,000 (N.T. 12/16/20, at 9-10). In her Statement of Matters Complained of on Appeal, Ms. Bolds raised an issue regarding the amounts of the initial restitution sentence, but she does not raise that issue in this brief.

payments was first entered. The trial court then found Ms. Bolds in violation of parole seemingly solely for failing to pay the entire outstanding balance of her restitution and sentenced her to her back time of 477 days with immediate parole. She was ordered to make monthly payments towards restitution first. The court then contradicted its statement above by ordering that “[y]our case may be closed once restitution is paid in full” (*id.* at 15).

On January 7, 2021, Ms. Bolds filed a timely appeal from imposition of sentence. On January 26, 2021, counsel filed a timely Statement of Matters Complained of on Appeal, a copy of which is attached as Exhibit “A.” On March 8, 2021, the trial court filed a Rule 1925(a) Opinion, which is attached as Exhibit “B.”

V. SUMMARY OF ARGUMENT

As the trial court concluded, the restitution here was imposed under 18 Pa.C.S. § 1106(a) as a condition of Ms. Bolds' direct sentence, and it was not a condition of her parole. Thus, because the restitution was not a condition of her parole, she could never have been found in violation of parole for failing to pay it. Rather, the proper method for enforcement of payment when restitution is imposed as part of the sentence is not through recurrent revocation hearings, but through the contempt proceedings pursuant to 18 Pa.C.S. § 1106(f). Therefore, each of Ms. Bolds' revocation sentences constituted illegal sentences.

Even if the restitution was a condition of Ms. Bolds' parole, then she could only be found in violation of her parole if the trial court first determined that she willfully failed to pay it. Here, the trial court made no finding at the December 16, 2020 revocation hearing that any failure to pay was willful. The testimony, to the contrary, indicated that Ms. Bolds was regularly making monthly payments and making every effort to pay what she could based on her financial means. Moreover, at no time at any of her prior three revocation hearings in 2016, 2017 and 2019 did the Master at those hearings make any willfulness inquiry or finding prior to perfunctorily finding her in violation of parole. Finally, as the condition imposed was merely that she make "monthly payments," Ms. Bolds was in compliance with that condition and could therefore not be found in violation. Therefore, the

revocation sentence imposed on December 16, 2020 was illegal, as were all of her prior revocation sentences.

Further, Ms. Bolds' December 16, 2020 revocation sentence, imposing her back time of 477 days plus restitution, will extend beyond the 7-year statutory maximum for her underlying offense and is therefore an illegal sentence. Though she has not been incarcerated during any part of her sentence, this revocation sentence is nonetheless illegal because the trial court failed to give her any credit whatsoever for her almost 7-years of "street time" on parole without providing any reason for doing so and extended her sentence beyond the statutory maximum where her only "violation" was an inability to pay the entire outstanding balance of her restitution. Her revocation sentence was, therefore, illegal.

Finally, Ms. Bolds' waiver of counsel at her revocation hearings before Masters on August 18, 2017 and January 11, 2019 were not knowing and voluntary. Therefore, the resultant revocations sentences constituted illegal sentences. The colloquies conducted did not satisfy the requirements of Pa.R.Crim.P. 121 and were so deficient as to provide no information regarding her alleged violations or the legal ramifications therefrom.

The experience of Ms. Bolds in being subjected to multiple revocation hearings over the course of 7 years, where nothing was ever put on the record at any hearing regarding what payments she hadn't made to render her subjected to

revocation proceedings, when she was clearly in compliance with the order of “monthly payments” imposed by the court, defies logic. She is now almost five years beyond when she should have completed her parole. The only reason she remains on supervision is because she is unable to pay back \$9,600 all at once. Each time she tried to broach the subject of her financial constraints, the lower courts failed to follow the law and found her in violation again and again absent any finding that she willfully failed to make any payments. Moreover, the lower courts completely failed to recognize that, under 18 Pa.C.S. §1106, revocation hearings were not the proper vehicle to enforce payment. The illegalities contained in these proceedings are all the more glaring in light of the fact that the last revocation sentence resulted in extending her parole beyond the statutory maximum sentence for her underlying offense.

For all of the above reasons, and as her restitution has already been reduced to a civil judgment, her judgment of sentence, including restitution, should be vacated and her supervision terminated. Going forward, any enforcement of payments should be pursuant to 18 Pa.C.S. § 1106(f).

VI. ARGUMENT

On November 18, 2014, Ms. Bolds was sentenced to time served to 23 months of incarceration with immediate parole for the offense of receiving stolen property (graded as a felony of the third degree), and she was ordered to pay restitution in a total amount of \$10,418.09. No payment plan was established at the time of sentencing as is required by 18 Pa.C.S. 1106(c)(2)(ii). At her first revocation hearing on April 15, 2016, a Master – not a Common Pleas Court Judge – ordered her to make monthly payments towards restitution first. Despite the fact that restitution was never made a condition of her parole, and although no evidence was ever presented at any of her revocation hearings that she was not in compliance with making payments, Ms. Bolds was found in violation of her parole four times (on 3 of those occasions the “hearings” were not before a Common Pleas Court Judge and were completely perfunctory, at 2 of those perfunctory hearings she had no counsel present, and at the first hearing no payment plan had even been established).³ For all of the reasons discussed below, her judgment of sentence should be vacated and her supervision terminated.

³ Ms. Bolds did not file a post-sentence motion after any of her four revocation sentences challenging the legality of those sentences. Nevertheless, a challenge to the legality of a sentence is non-waivable. *Commonwealth v. Milhomme*, 35 A.3d 1219, 1221 (Pa. 2011). Moreover, where a preceding sentence was illegal, any subsequent probation revocation sentence is also illegal. *Id.* at 1222.

1. BECAUSE RESTITUTION WAS ORDERED AS A CONDITION OF APPELLANT'S DIRECT SENTENCE AND NOT AS A CONDITION OF PAROLE, THEN SHE COULD NOT BE FOUND IN VIOLATION OF PAROLE FOR NONPAYMENT, SUCH THAT EACH OF APPELLANT'S FOUR REVOCATION SENTENCES CONSTITUTED AN ILLEGAL SENTENCE.

The trial court correctly concluded that the restitution here was not imposed as a condition of parole, but rather as a condition of the direct sentence under 18 Pa.C.S. § 1106(a). Because the restitution was not a condition of her parole, Ms. Bolds could never have been found in violation of parole for failing to pay it. The proper method for enforcement of payment was not through recurrent revocation hearings, but rather through the contempt proceedings provided in 18 Pa.C.S. § 1106(f). Therefore, each of Ms. Bolds' revocation sentences constituted illegal sentences. This Court should vacate her judgment of sentence and terminate her supervision. Any further issues with payment of restitution should be pursuant to the procedures set forth in §1106(f) and not through revocation proceedings.

The version of §1106 applicable to Ms. Bolds' case provides, in relevant part, as follows:

§ 1106. Restitution for injuries to person or property

(a) General rule.--Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury

directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

(b) Condition of probation or parole.--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, his compliance with such order may be made a condition of such probation or parole.

(c) Mandatory restitution.--

(1) The court shall order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

...

(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

(i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

(ii) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just.

(iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.

(iv) Shall consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title.

(3) The court may, at any time or upon the recommendation of the district attorney that is based on information received from the victim and the probation section of the county or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution, alter or amend any order of restitution made pursuant to paragraph (2), provided, however, that the court states its reasons and conclusions as a matter of record for any change or amendment to any previous order.

(4) (i) It shall be the responsibility of the district attorneys of the respective counties to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered. This recommendation shall be based upon information solicited by the district attorney and received from the victim.

(ii) Where the district attorney has solicited information from the victims as provided in subparagraph (i) and has received no response, the district attorney shall, based on other available information, make a recommendation to the court for restitution.

(iii) The district attorney may, as appropriate, recommend to the court that the restitution order be altered or amended as provided in paragraph (3).

...

(f) Noncompliance with restitution order.--Whenever the offender shall fail to make restitution as provided in the order of a judge, the probation section or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution shall notify the court within 20 days of such failure. Whenever the offender shall fail to make restitution within 20 days to a magisterial district judge, as ordered, the magisterial district judge shall declare the offender

in contempt and forward the case to the court of common pleas. Upon such notice of failure to make restitution, or upon receipt of the contempt decision from a magisterial district judge, the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

18 Pa.C.S. §1106 (Effective: January 31, 2005 to October 23, 2018).

The trial court here unequivocally concluded that the restitution was imposed as part of Ms. Bolds' direct sentence pursuant to 18 Pa.C.S. §1106(a). *See* Rule 1925(a) Opinion, at 16, 19. When restitution is imposed as a condition of the direct sentence, then it is not automatically also a condition of parole. *See* 18 Pa.C.S. §1106(b) (“Condition of probation or parole.--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, the offender's compliance with such order *may* be made a condition of such probation or parole.”) (emphasis added).

Because the restitution here was never made a condition of her parole, then she could not be found in violation of parole. This is because a court may only revoke probation or parole upon proof of the violation of specific conditions of the probation or parole. *Commonwealth v. Foster*, 214 A.3d 1240 (Pa.2019). In *Foster*, the Supreme Court of Pennsylvania held that a court must first find that the defendant either committed a new crime or violated a specific condition of probation in order to be found in violation. *Id.* at 1243, 1250. Where restitution is part of the sentence and not a specific condition of parole, then there was no condition of parole to violate

and, pursuant to *Foster, supra*, Ms. Bolds could not ever have be found in violation of her parole for failure to pay restitution.

Rather, because restitution imposed under §1106(a) is enforceable until paid (see *Commonwealth v. Griffiths*, 15 A.3d 73, 75 (Pa. Super. 2010)), the proper method of enforcement is pursuant to 18 Pa.C.S. §1106(f) contempt proceedings – not through revocation hearings. In *Commonwealth v. James*, 771 A.2d 33 (Pa. Super. 2001), this Court held that monitoring of appellant's restitution payments under Section 1106 did not make him eligible for relief under the PCRA because he had completed his sentence and thus he was not currently serving a sentence of imprisonment, probation, or parole even though he had outstanding restitution. *James*, 771 A.2d at 36 (emphasis added). This Court held that, while the restitution was ordered as part of the appellant’s direct sentence, and the trial court had the “continuing power to monitor and enforce that sentence,” that monitoring did not entitle appellant to PCRA relief. *Id.*

Significantly, in the direct appeal that preceded the PCRA in *James*, this Court had explained that because the restitution there was imposed as part of the direct sentence, *the trial court had no basis upon which to find a violation of probation for nonpayment. Id.* (emphasis added). This Court had explained in the direct appeal:

Appellant remains subject to the restitution sentence that was originally imposed, which was the total amount of the victim's

losses cited in the information to which he pled guilty, ***and that sentence is to be considered independently of his now expired probation.*** However, the trial court has the continuing authority to enforce the sentence of restitution, and ***may utilize its full contempt power as a means to enforce that sentence.***

Id. (emphasis added).

In light of *James* and *Griffiths, supra*, the trial court here had no basis upon which to find Ms. Bolds in violation of parole if her restitution was imposed as a condition of her direct sentence. Each of her revocation sentences was illegal. As such, this Court should vacate her judgment of sentence. Moving forward, the trial court may use its full contempt power as a means to enforce the outstanding balance of the original sentence. *Griffiths, James, supra*; 18 Pa.C.S. § 1106(f). It should be noted, however, that Ms. Bolds was ordered merely to make “monthly payments” towards her restitution – which she did. Therefore, it is questionable whether any contempt proceedings could properly be sought as she has been compliant with the order to make “monthly payments.”

2. EVEN IF RESTITUTION WAS MADE A CONDITION OF APPELLANT’S PAROLE, EACH OF APPELLANT’S FOUR REVOCATION SENTENCES CONSTITUTED AN ILLEGAL SENTENCE BECAUSE THE TRIAL COURT NEVER MADE ANY FINDING AT ANY REVOCATION HEARING THAT ANY NONPAYMENT WAS WILLFUL, AND SHE WAS IN COMPLIANCE WITH HER MONTHLY PAYMENTS AS ORDERED BY THE

COURT.

When restitution is imposed as part of the direct sentence pursuant to Section 1106(a), it may also be imposed as a condition of parole pursuant to Section 1106(b). 18 Pa.C.S. §1106(b). Here, as the trial court concludes, that did not happen. However, if restitution had also been made a condition of parole, the trial court could only have found Ms. Bolds in violation of parole if it inquired into her ability to pay and made a determination on the record that she willfully failed to make payments.⁴

Instantly, the trial court made no finding that any failure to pay was willful. The testimony, to the contrary, indicated that Ms. Bolds was regularly making monthly payments and making every effort to pay what she could based on her financial means (*see* N.T. 12/16/20, at 5-8). Moreover, at no time at any of her prior three revocation hearings in 2016, 2017 and 2019 did the Master make any

⁴ Both Ms. Bolds' Rule 1925(b) Concise Statement of Errors and the trial court's opinion refer to the restitution here in the context of a condition of probation, as opposed to a condition of parole. Ms. Bolds' Rule 1925(b) Statement references 42 Pa.C.S. § 9763 – the statute permitting imposition of restitution as a condition of probation – which is not applicable to Ms. Bolds' case because her sentence involved parole and not probation. Despite the mistaken reference to her sentence as involving probation, the arguments regarding the inquiry into willfulness apply both to sentences of parole and probation. Any issues set forth in the Rule 1925(b) Statement pertaining specifically to restitution imposed as a condition of probation under 42 Pa.C.S. § 9763 are not raised herein. Moreover, as the trial court concluded that the restitution here was imposed under Section 1106(a), it did not analyze any of Ms. Bolds' other claims. Therefore, the distinction between probation and parole did not matter for purposes of the trial court's analysis. Finally, as stated, challenges to the legality of a sentence are non-waivable. *Milhomme*, 35 A.3d at 1221.

willfulness inquiry prior to perfunctorily finding her in violation of parole. Finally, as the condition imposed was merely that she make “monthly payments,” Ms. Bolds was in compliance with that condition and could therefore not be found in violation. Therefore, the revocation sentence imposed on December 16, 2020 was illegal, as were all of her prior revocation sentences. Her restitution should be vacated and her supervision terminated.⁵

- a. Any violation of parole must have been based on a finding that Ms. Bolds was willful in her failure to pay restitution.

The law in this Commonwealth is clear that nonpayment of restitution is a technical violation only if a defendant willfully refuses to pay. This Court has explained that only “the willful refusal to pay a fine may be considered a technical parole violation for which a parolee may be re-incarcerated.” *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. 1994). Therefore, an “examination of fault must be made before probation is revoked” because “the Board must show that the petitioner was somewhat at fault in order to prove a violation.” *Hudak v. Board of Probation and Parole*, 757 A.2d 439, 441 (Pa. Commw. 2000). *See also Miller v. Board of Probation and Parole*, 784 A.2d 246, 248 (Pa. Commw. 2001) (that the Commonwealth must prove that a parolee failed to take sufficient

⁵ The restitution was reduced to a civil judgment pursuant to 42 Pa.C.S. § 9728 on November 26, 2014.

bona fide efforts is the fault element necessary to prove a violation for nonpayment); *Lawson v. Board of Probation and Parole*, 524 A.2d 1053, 1056 (Pa. Commw. 1987) (“In determining whether a parolee or probationer may have parole or probation revoked for failure to pay court imposed fines, costs and restitution, the court or Board, as the case may be, must take into consideration and make a reasonable allowance for the parolee's or probationer's individual economic situation.”).

In order to determine if there was a technical violation for nonpayment, the trial court must “inquire into the reasons for appellant's failure to pay” and “make any findings pertaining to the willfulness of appellant's omission.” *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. 1984). The trial court in the instant matter made no such inquiry at any of Ms. Bolds’ four revocation hearings and made no finding at any hearing that Ms. Bolds willfully failed to pay back her restitution. Thus, each revocation sentence imposed constituted an illegal sentence. Her parole should be terminated and restitution vacated.

- b. Ms. Bolds complied with the court’s orders to make monthly payments towards restitution, so the court had no authority to revoke her parole as there was no willful failure to pay and she was not in violation of any condition of her parole.

Even had the trial court made a proper willfulness inquiry, the evidence presented on December 16, 2020 demonstrated that any failure to pay was not willful.

Additionally, each order of the court specified that she was to make “monthly payments” to be paid towards restitution, which she did. Therefore, it is unclear why the Commonwealth continued to bring her before the court for revocation hearings when there is no indication in any record from prior proceedings or from the most recent proceeding that she was not in compliance with the court’s order.

On April 15, 2016, Ms. Bolds appeared before a Master with counsel, but the Master failed to make any inquiry into the payments she had made or her ability to make payments, or whether she was able to make payments but simply did not. No payment plan had been established at the original sentencing, so the only violation could have been that she failed to pay the entire outstanding balance of the restitution. Yet, nothing in the record indicated that she willfully failed to make any payments. Though Ms. Bolds “stipulated” to her violation, no alleged violation was ever entered into the record, so it is impossible to discern to what she was actually stipulating.

On August 18, 2017, when she appeared before a Master *and without counsel*, no information was put on the record *whatsoever* regarding any payments she had made or not made, or why she was in violation *at all*. Indeed, when asked how much she still owed and presented questions to the Master, she was, despite not being represented at the hearing by counsel, ironically told to talk to her counsel (N.T. 8/18/17, at 4-5).

At a revocation hearing before a Master on January 11, 2019 (and again where she was not represented by counsel), Ms. Bolds testified that she had been giving her probation officer \$40.00 per month, but that she had recently received a receipt stating that she had only paid \$30.00, which was incorrect (N.T. 1/11/19, at 4). The Commonwealth stated that the records showed she had paid \$155.00 in total, but Ms. Bolds testified that she had definitely paid more than that (*id.* at 4-6). Nobody was able to explain this discrepancy, nor did the Master reduce her outstanding payments to reflect this discrepancy (*id.* at 6). Despite this testimony that she was clearly in compliance with the “monthly payments” ordered by the court, the Master found her in violation and revoked her parole anyway.

Similarly, at the revocation hearing on December 16, 2020, the probation officer testified that Ms. Bolds had made payments towards her restitution (N.T. 12/16 /20, at 5). There was no indication anywhere in the record that she was not in compliance with the payment plan of “monthly payments” established by the court; yet it appears that she was found in violation for failing to be able to pay back the entire \$9,600 outstanding balance because she could not afford to do so (*id.* at 6-8, 13-14).

The trial courts here seemed to be under the impression that Ms. Bolds’ failure to pay back the entire amount of the restitution originally imposed constituted a violation of parole. Yet, the orders of the court at each revocation hearing provided

that she was merely to make “monthly payments.” At the hearing on December 16, 2020, the trial court even noted that probation was not asking for a specific amount to be paid each month (N.T. 12/16/20, at at 11). The following exchange then occurred:

THE COURT: I am assuming that *as long as some payments are made on a monthly basis for the next 477 days that at the conclusion there will be a motion to convert the balance of any restitution due to a civil judgment against Ms. Bolds.*

MS. LATONICK: *Correct Your Honor.*

(*id.* at 12) (emphasis added). The court completely ignored the fact that Ms. Bolds had been making “some payments” on a monthly basis since at least 2016 when the court ordered her to pay monthly payments. Based upon the court’s own logic, because she had been making “some payments” on a monthly basis for years, the court should have terminated her supervision at the December 2020 hearing. Moreover, her restitution had already been converted to a civil judgment on November 26, 2014. Nevertheless, the court then went on to revoke her parole and state that “[y]our case may be closed once restitution is paid in full” (*id.* at 15). The courts cannot impose payment plans for restitution and then find a person in violation of probation or parole for failing to pay the entire outstanding balance if they have been compliant with the payment plan. This process flies in the face of a

person's due process rights. *See Morrissey v. Brewer*, 408 U.S. 471 ,488-490 (1972) (discussing that certain due process rights are required at revocation hearings).

Finally, even absent the compliance with her monthly payments, if the trial courts had inquired into any failure to make payments here, the evidence demonstrated that Ms. Bolds made a good-faith effort to pay the restitution during her time on parole, even though she has not been able to pay the outstanding balance in full.

In order to establish that a defendant willfully failed to make payments, a court needs to determine whether a defendant's nonpayment was a "deliberate disregard of the court's order" or instead stemmed from "circumstances beyond the defendant's control" due to the person's financial situation. *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. 2018); *see also Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. 2018) (trial court failed to make required finding that the defendant "had the present financial ability to pay the outstanding fines and costs such that imprisonment was warranted"). Courts cannot treat nonpayment as a strict liability offense merely because the person did not pay. *See id.* Moreover, a defendant who is indigent cannot be found to have violated the terms of supervision due to nonpayment, as a finding of indigence "preclude[s] any determination" that the defendant's nonpayment "was willful." *Diaz*, 191 A.3d at 866 n.24. Thus, when a defendant is "penniless and unable, through no fault of his own, to pay any sum on

the delinquencies,” the defendant is not in “willful noncompliance.” *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973).

It is clear that, instantly, Ms. Bolds’ nonpayment of the entire outstanding balance of restitution was not due to deliberate disregard of the court’s order, but rather, stemmed from circumstances beyond her control due to her financial situation. Ms. Bolds’ probation officer testified that Ms. Bolds had been making payments towards her restitution and that she remained employed throughout her supervision (12/16/20, at 5). Though she was making payments when she could, she was unable to pay back the full outstanding balance due to financial constraints. Ms. Bolds testified that she was currently employed at Burger King, working 30 hours per week, making \$9.75 per hour (*id.* at 7). She was also working for Door Dash (*id.*). Ms. Bolds is 26 years old, she lives with her father and is raising her five-year-old daughter, for whom she is financially responsible (*id.* at 6, 7-8). Ms. Bolds testified that she makes payments towards the restitution but is not able to pay the outstanding \$9,600, though she gives the court “what I can” (*id.* at 8). Thus, even had the court made the proper willfulness inquiry, there would have been no basis upon which to find Ms. Bolds in technical violation of her parole.

The experience of Ms. Bolds in being subjected to multiple revocation hearings over the course of 7 years, where nothing was ever put on the record at any hearing regarding what payments she hadn’t made to render her subjected to

revocation proceedings, when she was clearly in compliance with the order of “monthly payments” imposed by the court, defies logic. She is now almost five years beyond when she should have completed her parole. The only reason she remains on supervision is because she is unable to pay back \$9,600 all at once. Each time she tried to broach the subject of her financial constraints, the lower courts failed to follow the law and found her in violation again and again absent any finding that she willfully failed to make any payments. The illegalities contained in these proceedings are all the more glaring in light of the fact that the last revocation sentence resulted in extending her parole beyond the statutory maximum sentence for her underlying offense (*see infra* Part VI.3).

Each of her revocation sentences constituted an illegal sentence. It has been almost 7 years since her original sentence, so, if the restitution was a condition of her parole, a remand for re-sentencing will not resolve the glaring illegalities that transpired over the years. As such, the judgment of sentence, including her restitution, should be vacated and Ms. Bolds’ supervision terminated.

3. APPELLANT’S DECEMBER 16, 2020 REVOCATION SENTENCE, ORDERING PAYMENT OF RESTITUTION BEYOND THE STATUTORY MAXIMUM SENTENCE FOR THE UNDERLYING OFFENSE AND FAILING TO GIVE CREDIT FOR ALMOST SEVEN YEARS OF “STREET TIME” ON PAROLE, DEPRIVED HER OF HER STATE AND FEDERAL DUE PROCESS

RIGHTS AND CONSTITUTED AN ILLEGAL SENTENCE.

Ms. Bolds initially pled guilty on November 18, 2014 to the underlying offense of receiving stolen property, graded as a felony of the third degree, which carries a maximum statutory penalty of seven years of incarceration or probation. 18 Pa.C.S. § 106 (b)(4). Therefore, Ms. Bolds' sentence of probation or incarceration cannot extend beyond November 18, 2021. At each of Ms. Bolds' four revocation hearings, she was re-sentenced to her back time of 477 days with immediate parole and was ordered to make monthly payments towards restitution. As she was sentenced to her back time of 477 days on December 20, 2020, her sentence will extend beyond the 7-year statutory maximum. Though she has not been incarcerated during any part of her sentence, this last revocation sentence is nonetheless illegal because the trial court failed to give her any credit whatsoever for her almost 7-years of "street time" on parole without providing any reason for doing so, and extended her sentence beyond the statutory maximum where her only "violation" was an inability to pay the entire outstanding balance of her restitution. As the amount of restitution had already been reduced to civil judgment and there was never any finding of a willful failure to pay, extending her parole beyond the statutory maximum without giving her credit for any of her almost 7 years spent on parole

was illegal.⁶

The trial court has discretion to award credit for time spent at liberty on parole. *Commonwealth v. Michenfelder*, 408 A.2d 860, 862 (Pa. Super. 1979) (where appellant was not statutorily entitled to credit for time spent on parole in good standing because he was not within the jurisdiction of the Board of Parole, appellate court must determine whether trial court abused its discretion in failing to award credit for street time). In *Michenfelder*, this Court held that there was no abuse of discretion by the trial court because the reinstated 23 month sentence did not exceed the statutory maximum nor was it manifestly excessive in view of the trial judge's conclusion that appellant's two arrests while on parole indicated that he was not rehabilitated. *Id.*

Instantly, however, the reinstatement of Ms. Bolds' 23 month sentence *will* exceed the statutory maximum and she had no arrests while on parole or any other violations other than failing to pay \$9,600 in restitution – which she does not have the financial ability to pay. As the amount of restitution had previously been reduced to civil judgment, there was never a finding that she willfully failed to pay, and there were no other violations for almost 7 years, the trial court's failure to give credit for

⁶ Though Ms. Bolds does not raise this issue in the court below nor in her Rule 1925(a) Concise Statement of Errors, a challenge to the legality of a sentence is non-waivable. *Commonwealth v. Williams*, 920 A.2d 887, 888 (Pa. Super. 2007); *Commonwealth v. Milhomme*, 35 A.3d 1219, 1221 (Pa. Super. 2011).

almost 7 years of street time was not only an abuse of discretion but recommitment to her back time constituted an illegal sentence as her parole was extended beyond the statutory maximum.

Moreover, though the trial court ordered recommitments of Ms. Bolds' sentence in the form of her back time at each revocation hearing, in practicality, Ms. Bolds' revocation sentences were not recommitments, but were illegal extensions of her parole for the sole purpose of paying off restitution (*see, e.g.*, N.T. 1/11/19, at 7 ("So you're being extended to get that restitution paid off")). *See Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. 1994) (holding that because it did not act within 30 days of date of its original sentencing order as set forth in 42 Pa.C.S. § 5505, trial court lacked jurisdiction to extend petitioner's parole, even though petitioner petitioned for extension of his parole to afford him opportunity to pay his fines). In *Rosenberry*, this Court held that not only does a trial court lack jurisdiction to modify an order beyond the 30 day time limit set forth in 42 Pa.C.S. § 5505, but that only a willful failure to pay a fine may be considered a technical parole violation. *Id.*

Just as in *Rosenberry*, instantly, instead of devising a payment schedule, the trial court effectively modified Ms. Bolds' sentence to extend her parole period beyond the statutory maximum for her underlying offense solely so that she could pay off the full amount of her restitution. The Commonwealth does not need to keep

Ms. Bolds on parole in perpetuity to insure payment. *See id.* Rather, as the restitution had already been reduced to a civil judgment, restitution can be collected through 42 Pa.C.S. § 9728. *See id;* *see also* 42 Pa.C.S. § 9728 (“Collection of restitution, reparation, fees, costs, fines and penalties.”); 18 Pa.C.S. § 1106(f) (discussed *supra* Part VI.1). Thus, Ms. Bolds’ December 16, 2020 revocation sentence constituted an illegal sentence. As such, the judgment of sentence should be vacated and Ms. Bolds’ supervision terminated.

4. APPELLANT WAS DENIED HER STATE AND FEDERAL DUE PROCESS RIGHTS WHEN AN UNCOUNSELED PAROLE VIOLATION HEARING WAS ALLOWED TO PROCEED ON AUGUST 18, 2017 AND JANUARY 11, 2019 IN THE ABSENCE OF A KNOWING AND INTELLIGENT WAIVER, SUCH THAT THE RESULTANT REVOCATION SENTENCES CONSTITUTED ILLEGAL SENTENCES.

As an initial matter, Ms. Bolds did not raise this issue in the court below nor in her Rule 1925(b) Concise Statement of Errors. Nevertheless, this issue is not waived because “as a general rule, failure to raise an issue in a criminal proceeding does not constitute a waiver where the defendant is not represented by counsel in the proceeding.” *Commonwealth v. Murphy*, 214 A.3d 675, 678 (Pa. Super. 2019). This rule does not apply where the defendant knowingly and intelligently waived representation by counsel. *Commonwealth v. Monica*, 597 A.2d 600, 603 (Pa. 1991).

Ms. Bolds did not knowingly and intelligently waive representation by counsel at her revocation hearings on August 18, 2017 and January 11, 2019. Moreover, a claim that a sentence was illegal can be raised at any time. *Milhomme*, 35 A.3d 1221. Therefore, she has not waived this issue.

Pa.R.Crim.P. 708(B)(1) provides that the trial court will not revoke parole unless a violation is found following a hearing “at which the defendant is present and represented by counsel.” Pa.R.Crim.P. 708(B)(1). In order to make a knowing and intelligent waiver under Pa.R.Crim.P. 121⁷, “the individual must be aware of

⁷ Pa.R.Crim.P. 121 provides, in relevant part:

(2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:

(a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;

(b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;

(c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;

(d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;

(e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and

(f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely

both the nature of the right and risks and consequences of forfeiting it.” *Commonwealth v. Houtz*, 856 A.2d 119, 123 (Pa. Super. 2004). Without a proper Pa.R.Crim.P. 121 colloquy, a court cannot “ascertain that the defendant fully understands the ramifications of a decision to proceed pro se and the pitfalls associated with the lack of legal training.” *Commonwealth v. Robinson*, 970 A.2d 455, 460 (Pa. Super. 2009) (*en banc*).

In *Murphy*, *supra*, this Court held that the defendant did not knowingly and intelligently waive representation by counsel where the lower court merely asked the defendant if he understood that he had a right to have an attorney present at the proceedings, and then confirmed that the defendant did not retain counsel or apply for the Public Defender’s Office. *Murphy*, 214 A.3d at 679. This Court found that the discussion regarding the defendant’s right to counsel was “truncated and fell well short of a colloquy memorializing a knowing and voluntarily waiver of counsel” *Id.*

Just as in *Murphy*, *supra*, Ms. Bolds did not knowingly and intelligently waive representation by counsel on either August 18, 2017 or January 11, 2019 before proceeding with a revocation hearing. Notably, the hearings on these dates were held

asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.
Pa.R.Crim.P. 121(2).

before a Master, not a Common Pleas Court Judge, and it was the Master who conducted the wavier colloquy. The following exchange occurred between Ms. Bolds and a Master on August 18, 2017 regarding Ms. Bolds' appearance without counsel:

THE COURT: Thank you. Ms. Bolds you understand you have the right to be represented by Counsel at this hearing?

MS. BOLDS: Yes.

THE COURT: And you understand if we find you in violation we may resentence you today technically?

MS. BOLDS: Yes.

THE COURT: Knowing that is it your desire to proceed without Counsel today?

MS. BOLDS: Yes.

THE COURT: And are you willing to proceed before myself instead of a Judge this morning?

MS. BOLDS: Yes.

(N.T. 8/18/17, at 3). The Master presiding over the hearing then perfunctorily found her in violation without placing any reasons on the record for doing so. See *id.* Indeed, when asked how much she still owed and presented questions to the Master, she was, despite not being represented at the hearing by counsel, ironically told to talk to her counsel (*Id.* at 4-5).

Similarly, the following exchange occurred with a Master on January 11, 2019:

THE COURT: Thank you. Ms. Bolds, do you understand you have the right to be represented by counsel at this hearing?

THE DEFENDANT: What's that?

THE COURT: An attorney?
THE DEFENDANT: Oh, yes.
THE COURT: Public Defender, who just left.
THE DEFENDANT: Yes.
THE COURT: You have the right to – or private counsel.
You have the right to have an attorney at this proceeding.
THE DEFENDANT: Yes.
THE COURT: Do you understand that? And do you understand if we find you in violation, we may re-sentence you today?
THE DEFENDANT: Yes.
THE COURT: Knowing that, is it your desire to proceed without counsel today?
THE DEFENDANT: Yes.
THE COURT: Thank you. And are you willing to proceed before myself appointed by the Court instead of a Judge today?
THE DEFENDANT: Yes.
THE COURT: Okay. Thank you. So the single violations are financial. Fines, costs, and restitution still outstanding?
THE DEFENDANT: Yes.
THE COURT: Any disagreement with that?
THE DEFENDANT: No.
THE COURT: Okay. A recommendation?
THE DEFENDANT: The only thing -- no. I don't know. Recently, I only got one receipt coming from here. They're saying that I only paid \$30 towards my restitution this year, but I actually paid -- I give my P.O. like \$40 a month.
THE COURT: Okay. So I don't know where your payments are going, but you should go to Court Financial and get a printout.
THE DEFENDANT: Um-hum.

(N.T. 1/11/19, at 3-4).

As in *Murphy, supra*, the above exchanges were insufficient to constitute an adequate waiver of counsel. The discussions were “truncated and fell well short of a colloquy memorializing a knowing and voluntar[y] wavier of counsel.” *See Murphy, supra*. From the record, it appears that she was not even told what her alleged violations were and any legal ramifications of such a violation. Therefore, this Court should vacate the December 16, 2020 order revoking Ms. Bolds’ parole, as well as her judgment of sentence, based on these two prior illegal revocation sentences. *See Milhomme*, 35 A.3d at 1222 (where a preceding sentence was illegal, any subsequent probation revocation sentence is also illegal.).

VII. CONCLUSION

WHEREFORE, for the reasons stated above, appellant requests that this Court reverse the order of the trial court finding her in violation of parole, dismiss the violation, vacate the restitution and judgment of sentence, and discharge her from supervision. Any further proceedings regarding nonpayment should be pursuant to 18 Pa.C.S. §1106(f).

Respectfully submitted,

/S/

EMILY MIRSKY, Assistant Defender
Chief, Appeals Division
CHRISTOPHER WELSH, Defender

CERTIFICATION OF COMPLIANCE WITH RULE 2135

I do hereby certify on this 20th day of April 2021, that the Brief For Appellant filed in the above captioned case on this day does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is 8,415 as counted by Microsoft Word.

/S/
EMILY MIRSKY, Assistant Defender
Attorney Registration No. 89661

CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

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.

/S/
EMILY MIRSKY, Assistant Defender
Attorney Registration No. 89661

EXHIBIT A

OFFICE OF THE PUBLIC DEFENDER
COUNTY OF DELAWARE
BY: Christopher Welsh, Defender, and
Emily Mirsky, Assistant Defender
Chief, Appeals Division

Identification No. 89661
220 N. Jackson St.
Media, PA 19063
(610) 891-4106

Attorney for Shanae Bolds

2021 JAN 26 AM 11:28
OFFICE OF JUDICIAL SUPERVISOR
DELAWARE CO. PA.
FILED

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,
PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
VS. : CP-23-CR-0004160-2014
SHANAE BOLDS, :
Appellant : 163 EDA 2021

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

TO THE HONORABLE GEORGE M. GREEN, PRESIDING IN THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION, FOR THE COUNTY OF DELAWARE:

The above named defendant by her attorneys, Emily Mirsky, Assistant Defender, Chief, Appeals Division, and Christopher Welsh, Defender, files the following Statement of Matters Complained of on Appeal:

1. On November 18, 2014, appellant entered into a guilty plea and was convicted of receiving stolen property (F3). She was sentenced to time served to 23 months of incarceration with immediate parole and was ordered to pay restitution in the amount of \$1,556.84 to Ann Huben, \$8,255.20 to Standard Fire Insurance Company, \$306.05 to William Richan and \$300.00 to the Victims Compensation Assistance Program. The total amount of restitution owed was

\$10,418.09 and liability was ordered to be joint and severable with two co-defendants. Appellant was also ordered to pay court costs.

2. On April 15, 2016, appellant appeared for a revocation hearing and was found in violation of probation solely for failing to pay her restitution and was sentenced to her back time with immediate parole. She was ordered to make monthly payments towards restitution first.

3. On August 18, 2017, appellant appeared for a revocation hearing and was found in violation of probation solely for failing to pay her restitution and was sentenced to her back time with immediate parole. She was ordered to make monthly payments towards restitution first.

4. On January 11, 2019, appellant appeared for a revocation hearing and was found in violation of probation solely for failing to pay her restitution and was sentenced to her back time with immediate parole. She was ordered to make monthly payments towards restitution first.

5. On December 16, 2020, appellant appeared before this Court for a revocation hearing and was found in violation of probation solely for failing to pay her restitution and was sentenced to her back time with immediate parole. She was ordered to make monthly payments towards restitution first.

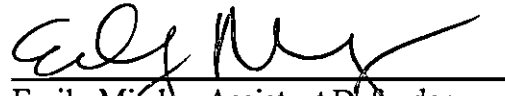
6. On January 7, 2021, appellant filed a timely appeal from imposition of sentence.

7. On January 14, 2021, this Court entered an Order directing appellant to file a Statement of Matters Complained of on Appeal within twenty-one (21) days from the date of the Order.

8. Appellant plans to raise the following issues on appeal:

- a. Appellant's original sentence imposed on November 18, 2014 ordering restitution to two individuals and to an insurance company constituted an illegal sentence inasmuch as the Commonwealth failed to establish whether the insurance company had reimbursed either individual as a result of the appellant's criminal conduct and therefore the restitution ordered was duplicative and failed to satisfy the requirements set forth in 18 Pa.C.S. § 1106(c)(2).
- b. Each of appellant's revocation sentences (imposed on April 15, 2016, August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because, if restitution was ordered as part of appellant's sentence pursuant to 18 Pa.C.S. §1106(a), it was not also a condition of her probation pursuant to 42 Pa.C.S. § 9763, such that appellant could not be revoked for nonpayment.
- c. Appellant's revocation sentences (imposed on August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because if restitution was imposed as a condition of probation pursuant to 42 Pa.C.S. § 9763, then the restitution expired at the end of appellant's sentence, even if it had not been paid .
- d. Each of appellant's revocation sentences (imposed on April 15, 2016, August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because, if payment of restitution was a condition of appellant's probation pursuant to 42 Pa.C.S. § 9763, then nonpayment of restitution is a technical violation only if nonpayment is willful and there was never a finding at any revocation hearing that any nonpayment was willful, such that there could be no revocation and re-sentencing for nonpayment.
- e. Each of appellant's revocation sentences (imposed on April 15, 2016, August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because, if payment of restitution was a condition of appellant's probation pursuant to 42 Pa.C.S. § 9763, appellant was entitled to a determination regarding her ability to pay the outstanding restitution prior to imposition of continued payments.
- f. The court costs imposed as part of appellant's original sentence on November 18, 2014 rendered the sentence illegal inasmuch as appellant was entitled to a determination at sentencing of whether court costs should be reduced or waived based on her financial means and an ability to pay.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Emily Mirsky", written over a horizontal line.

Emily Mirsky, Assistant Defender
Chief, Appeals Division
Christopher Welsh, Defender

OFFICE OF THE PUBLIC DEFENDER
DELAWARE COUNTY
220 N. Jackson St.
Media, PA 19063
(610) 891- 4106
Mirskye@co.delaware.pa.us

OFFICE OF THE PUBLIC DEFENDER
COUNTY OF DELAWARE

BY: Christopher Welsh, Defender, and
Emily Mirsky, Assistant Defender
Chief, Appeals Division

Identification No. 89661
220 N. Jackson St.
Media, PA 19063
(610) 891-4106

Attorney for Shanae Bolds

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,
PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

CP-23-CR-0004160-2014

VS. :

SHANAE BOLDS,
Appellant

: 163 EDA 2021


PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Statement of Matters Complained of on Appeal upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 122:

The Honorable George M. Green
Delaware County Courthouse
201 West Front St.
Media, PA 19063
via hand delivery

Catherine Kiefer, Esq.
District Attorney's Office; Appellate Division
201 West Front St.
Media, PA 19063
via hand delivery

Dated: January 25, 2021



Emily Mirsky, Assistant Defender, Chief, Appeals Division
OFFICE OF THE PUBLIC DEFENDER

VERIFICATION

The facts set forth in the foregoing are true and correct to the best of the undersigned's knowledge, information and belief and are verified subject to the penalties for unsworn falsification to authorities under Pennsylvania Crimes Code section 4904 (18 Pa.C.S. § 4904).

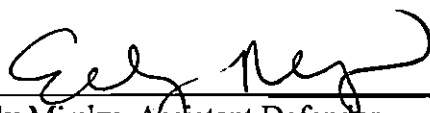


Emily Mirsky, Assistant Defender
Chief, Appeals Division

Date: January 25, 2021

CERTIFICATION 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.



Emily Mirsky, Assistant Defender
Chief, Appeals Division
Attorney ID No. 89661

Date: January 25, 2021

EXHIBIT B

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

COMMONWEALTH OF PENNSYLVANIA : No.: 4160-2014
 :
 v. :
 :
 SHANAE BOLDS :

Kathleen Kiefer, Esquire Counsel for Appellee Commonwealth of Pennsylvania
Emily Mirsky, Esquire - Counsel for Appellant Shanae Bolds

GREEN, J.

DATE: March 8, 2021

OPINION

Appellant Shanae Bolds appeals from the December 16, 2020
Judgment of Imposition of Sentence.

PROCEDURAL AND FACTUAL HISTORY

On April 19, 2014 at approximately 2:00 a.m., Chester City Police
Officer Jason Black observed an automobile traveling on Curry Street,
Chester, Delaware County, Pennsylvania without its headlights illuminated
and a traffic stop was initiated. (4/19/14 Affidavit of Probable Cause). During
the traffic stop, the vehicle was identified as the same vehicle stolen in a
home invasion on April 16, 2014. (4/19/14 Affidavit of Probable Cause).

Appellant Shanae Bolds was identified as the driver of the vehicle on April 19, 2014 and taken into police custody. (4/19/14 Affidavit of Probable Cause). Appellant Bolds was subsequently charged with 18 Pa. C.S. § 3928, Unauthorized Use of a Motor Vehicle, 18 Pa.C.S. § 3925, Receiving Stolen Property, 75 Pa. C.S. § 4302 (a)(1) Period for Requiring Lighted Lamps, 75 Pa. C.S. § 4302(b), Signal Lights, and 75 Pa. C.S. § 1501, Driving Without a License.¹

On November 18, 2014 Appellant Bolds entered a negotiated guilty plea to the sole charge of 18 Pa.C.S. § 3925, Receiving Stolen Property² and was sentenced to time served (4/19/14-11/18/14) to 23 months confinement with immediate parole. (11/18/14 N.T., p. 9). Joint and several restitution with docket numbers 4159-14 & 4158-14 was imposed as part of the sentence with payment to be made in the following allocations: John Huben

¹ Appellant Bolds was also arrested under criminal docket 004156-2014 for the April 16, 2014 home invasion incident and faced the following charges: Robbery, Robbery – Inflict Serious Bodily Injury, Robbery Threat Imm. Serious Injury, Robbery – Inflict Threat Imm. Bodily Injury, robbery- Take Property From Another By Force, Burglary, Criminal Trespass, Receiving Stolen Property, Theft By Unlawful Taking, Theft By Unlawful Taking – Moveable Property, Simple Assault with a Deadly Weapon, Aggravated Assault, Reckless Endangering Another Person, Firearms Not to Be Carried Without a License, Possessing an Instrument of Crime, and Criminal Conspiracy.

² Pursuant to the parties' negotiations all additional counts were dismissed, and a *Nolle Pros Order* was entered in Appellant Bolds' companion case under docket 004156-2014. (11/18/14 N.T., p. 4).

- \$1,556.84, Standard Fire Insurance Company - \$8,255.20, William Richan
- \$306.05 and the Victims' Compensation Assistance Program - \$300.00.
(11/18/14 N.T., p. 10). Appellant Bolds' trial counsel stipulated to the terms
of the negotiated plea and Appellant Bolds was colloquyed by both her
counsel and the trial court regarding the terms of negotiated guilty plea prior
to the imposition of sentence. (11/18/14 N.T., pp. 5-8). The restitution
amounts were appended to the Certificate of Imposition of Sentence.
(11/18/14 Addendum to Certificate of Imposition of Sentence). Neither a
Post-Sentence Motion nor a direct appeal to the Pennsylvania Superior Court
was filed.

On April 16, 2016, Appellant Bolds appeared for a hearing, agreed to
proceed before a Gagnon II hearing officer and stipulated to a violation of
parole. (4/14/16 N.T., p. 3). It was recommended Appellant Bolds be found
in violation and parole be revoked. (4/14/16 N.T., p. 3). Appellant was to
receive her full back time of 477 days with immediate parole effective April
14, 2016 and she was required to follow the rules and regulation of probation
and parole including reporting as directed and making monthly payments
towards restitution. (4/14/16 N.T., p. 3). Finally, it was further recommended
that all interest in the case be closed once the restitution was satisfied.

(4/14/16 N.T., p. 3 & 4/15/16 Certificate of Imposition of Judgment of Sentence). Appellant was advised of her appeal rights, but no appeal was taken. (4/14/16 N.T., p. 5).

On August 18, 2017, Appellant Bolds appeared before a Gagnon II hearing officer to address a financial violation of the terms of parole. (8/18/17 N.T., pp. 3-4). Appellant Bolds received the same disposition as that described above. (8/18/17 N.T., p. 4, & 8/18/18 Certificate of Imposition of Judgment of Sentence). Appellant was advised of her appeal rights, but no appeal was taken. (8/18/17 N.T., pp. 5-6).

On January 11, 2019, Appellant Bolds appeared before a Gagnon II hearing officer to address a financial violation of the terms of parole. (1/11/19 N.T., pp. 4). Appellant Bolds received the same disposition as that imposed at the prior two hearings: she was found in violation of parole with parole to be revoked, received her full back time of 477 days with immediate parole effective January 11, 2019, was required to follow the rules and regulation of probation and parole including reporting as directed and making monthly payments towards restitution, and all interest in the case be closed once the restitution was satisfied. (1/11/19 N.T., pp. 6-7 & 1/11/19

Certificate of Imposition of Judgment of Sentence). Appellant was advised of her appeal rights, but no appeal was taken. (1/11/19 N.T., p. 7).

On December 16, 2020, Appellant Bolds appeared before the trial court for a violation of the rules and regulations of parole. (11/6/20 Request for Gagnon II Hearing Report & 12/16/20 N.T., p. 4). Agent George Buckley of Delaware County Adult Probation and Parole advised the court Appellant Bolds requested the hearing following a November 2020 appearance before a Hearing Officer. (12/16/20 N.T., p. 4). Agent Buckley again recommended: Appellant Bolds be found in violation of parole with parole to be revoked, receive her full back time of 477 days with immediate parole effective December 16, 2020, she was required to follow the rules and regulation of Probation and Parole including reporting as directed and making monthly payments towards restitution, and all interest in the case to be closed once the restitution was satisfied. (12/16/20 N.T., pp. 3-4).

Counsel for Appellant Bolds inquired of Agent Buckley and the Agent confirmed Appellant Bolds was currently employed and had made payments towards restitution in the past. (12/16/20 N.T., p. 5). Appellant Bolds also addressed the court and confirmed she was working two jobs, one at a fast-food restaurant and the other at a food delivery company. (12/16/20 N.T.,

p. 7). Appellant Bolds agreed she had made restitution payments in the past, but she simply could not afford to pay the entire restitution at issue. (12/16/20 N.T., p. 8). On cross-examination, the Commonwealth confirmed Appellant Bolds entered a negotiated guilty plea on November 18, 2014, and joint and several restitution was imposed with payment to be allocated as follows: John Huben - \$1,556.84, Standard Fire Insurance Company - \$8,255.20, William Richan - \$306.05 and the Victims' Compensation Assistance Program - \$300.00. (12/16/20 N.T., p. 9). Appellant Bolds testified her trial counsel at the time of sentencing described a different financial payment structure and Appellant Bolds was surprised when an amount of restitution over \$3,000.00 was imposed. (12/16/20 N.T., p. 10).

The Commonwealth argued restitution was part of Appellant Bolds' sentence as imposed on November 18, 2014. (12/16/20 N.T., p. 11). The Commonwealth was not seeking Appellant Bolds be incarcerated, but rather, desired Appellant continue to make payments in *some* fashion. The Commonwealth did not seek the imposition of a minimum monthly amount. (12/16/20 N.T., p. 11).

In opposition to the Commonwealth's argument, the trial court requested counsel for Appellant Bolds to make argument in opposition to the Commonwealth's request, but none was offered:

Court: So, I restate my question. Mr. Hoffman what is the objection to Agent Buckley's recommendation given the record of the negotiated guilty plea? The attachment of that schedule to the sentencing sheet and the fact that this restitution was to be join[t] and several with two other individuals who presumably were also found guilty at that time or about that time?"

[NO RESPONSE]

Court: Hearing nothing I am accepting the recommendation of Agent Buckley.

(N.T, 12/16/20, p. 13).

The trial court accepted Agent Buckley's recommendation and imposed a sentence consistent with that recommendation. (12/16/20 N.T., p. 15 & 12/16/20 Certificate of Imposition of Judgment of Sentence). Appellant Bolds was advised of her post-sentence rights. (12/16/20 N.T., p. 15). No Post-Sentence Motion was filed but a Notice of Appeal issued on January 7, 2021.

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

The issues raised in Appellant's Concise Statement of Matters

Complained of on Appeal are as follows:

1. Appellant's original sentence imposed on November 18, 2014 ordering restitution to two individuals and to an insurance company constituted an illegal sentence inasmuch as the Commonwealth failed to establish whether the insurance company had reimbursed either individual as a result of the appellant's criminal conduct and therefore the restitution ordered was duplicative and failed to satisfy the requirements set forth in 18 Pa.C.S. § 1106(c)(2).
2. Each of the appellant's revocation sentences (imposed on April 15, 2016, August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because, if restitution was ordered as part of appellant's sentence pursuant to 18 Pa.C.S. § 1106(a), it was not also a condition of her probation pursuant to 42 Pa.C.S. § 9763, such that appellant could not be revoked for nonpayment.
3. Appellant's revocation sentences (imposed on August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because if restitution was imposed as a condition of probation pursuant to 42 Pa.C.S. § 9763, then the restitution expired at the end of appellant's sentence, even if it had not been paid.
4. Each of appellant's revocation sentences, (imposed on April 15, 2016, August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because, if payment or restitution was a condition of appellant's probation pursuant to 42 Pa.C.S. § 9763, then nonpayment was willful and there was never a finding at any revocation and re-sentencing for nonpayment.

5. Each of appellant's revocation sentences (imposed on April 15, 2016, August 18, 2017, January 11, 2019 and December 16, 2020) constituted illegal sentences because, if payment of restitution was a condition of appellant's probation pursuant to 42 Pa.C.S. § 9763, appellant was entitled to a determination regarding her ability to pay the outstanding restitution prior to imposition of continued payments.

6. The court costs imposed as part of appellant's original sentence on November 18, 2014 rendered the sentence illegal inasmuch as appellant was entitled to a determination at sentencing of whether court costs should be reduced or waived based on her financial means and an ability to pay.

DISCUSSION

I. Illegal Sentence.

Appellant Bolds first contends the sentence imposed on November 18, 2014 constituted an illegal sentence. An appeal from an order of restitution based upon a claim that a restitution order is unsupported by the record challenges the legality, rather than the discretionary aspects, of sentencing. Commonwealth v. Redman, 864 A.2d 566, 569 (Pa. Super. 2004)). Accordingly, "the determination as to whether the trial court imposed an illegal sentence is a question of law; the standard of review in cases dealing with questions of law is plenary." Commonwealth v. Hunt, 220 A.3d 582,

585 (Pa. Super. 2019)(*quoting Commonwealth v. Hughes*, 986 A.2d 159, 160 (Pa. Super. 2009)).

18 Pa.C.S. § 1106, Restitution for injuries to person or property, was amended on October 24, 2018 by the Pennsylvania General Assembly long after Appellant's criminal actions, guilty plea, and sentencing were completed. *See* 2018 Pa. Legis. Serv. Act 2018-145 (S.B. 897). The pre-amendment version of § 1106 in effect on November 18, 2014 provided as follows:

(a) General rule.--Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

(b) Condition of probation or parole.--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, his compliance with such order may be made a condition of such probation or parole.

(c) Mandatory restitution.--

(1) The court shall order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any

restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

(ii) If restitution to more than one person is set at the same time, the court shall set priorities of payment. However, when establishing priorities, the court shall order payment in the following order:

(A) The victim.

(B) The Crime Victim's Compensation Board.

(C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

(D) Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

(2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

(i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

(ii) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems

just.

(iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.

(iv) Shall consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title.

* * *

(f) Noncompliance with restitution order.--Whenever the offender shall fail to make restitution as provided in the order of a judge, the probation section or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution shall notify the court within 20 days of such failure. Whenever the offender shall fail to make restitution within 20 days to a magisterial district judge, as ordered, the magisterial district judge shall declare the offender in contempt and forward the case to the court of common pleas. Upon such notice of failure to make restitution, or upon receipt of the contempt decision from a magisterial district judge, the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

18 Pa.C.S. §§ 1106(a), (c), (repealed Oct. 24, 2018, P.L. 891, No. 145, § 1, effective Jan. 31, 2005) (internal footnote omitted).

It is well-established under Pennsylvania law "[r]estitution is a creature of statute and, without express legislative direction, a court is powerless to direct a defendant to make restitution as part of his sentence." Commonwealth v. Kinnan, 71 A.3d 983, 986 (Pa. Super. 2013) (*citing*

Commonwealth v. Harner, 617 A.2d 702, 704 (Pa. 1992)). While Pennsylvania statutes generally should be construed liberally, “penal statutes are always to be construed strictly, and any ambiguity in a penal statute should be interpreted in favor of the defendant.” Commonwealth v. Driscoll, 401 A.2d 312, 316 (Pa, 1979); *see also* 1 Pa.C.S. § 1928(b)(1). Finally, “where restitution is imposed in addition to a statutory punishment, such as imprisonment, the order must be strictly scrutinized since its purpose is primarily punitive.” Commonwealth v. Hunt, 220 A.3d 582, 587–88 (Pa. Super. 2019) (*citing* Commonwealth v. Walton, 483 Pa. 588, 397 A.2d 1179, 1184 (1979)).

Consistent with the version of 18 Pa.C.S. § 1106, Restitution for injuries to person or property, in effect on the date of sentencing, restitution to Standard Fire Insurance Company in the amount of \$8,255.20 was proper and not duplicative. On November 18, 2014, the Commonwealth clearly established and placed Appellant Bolds on notice of the exact amount of restitution owed to Standard Fire Insurance Company, as well as the amounts owed to the individual victims as evidenced by the record, the addendum notice and Appellant’s agreement to the plea. (11/18/14 N.T., p. 4). Importantly, a listing of the joint and several obligations was clearly

delineated and made part of the Certificate of Imposition of Judgment of Sentence. (11/18/14 Addendum to the Certificate of Imposition of Judgment of Sentence). Moreover, Appellant Bolds stipulated to the terms of the negotiated sentence including those restitution figures. (11/18/14 N.T., pp. 5-8).

In Commonwealth v. Rush, 909 A.2d 805 (Pa. Super. 2006), a defendant, who had pled guilty to theft offenses, directly challenged his restitution sentence, ordered jointly and severally with co-defendants. In Rush, the defendant "was made fully aware, prior to entering the plea, that the court would impose a specific amount of restitution upon acceptance of the plea, and whereby the defendant agreed to accept restitution set in a co-defendant's case for the same crime." Id. at 808. Specifically, the trial judge notified the defendant, in open court, of his intention, upon acceptance of the plea, to impose the restitution jointly and severally with his co-defendant. Id. at 809. At the conclusion of the colloquy proceeding, the Commonwealth recited its recommended sentence, including the joint and several restitution sentence. Id. In concluding the restitution sentence was legal, the court noted that the defendant "had a full understanding of the nature and consequences of his plea and ... knowingly and voluntarily

decided to enter the plea 'which encompassed an agreement to pay \$28,450 in restitution' [and where] the amount in restitution was already established and agreed-upon as stipulated in the written plea petition as well as on the record orally at the plea hearing." Id.

Like the defendant in Rush, Appellant Bolds was aware prior to entering the plea that the trial court would impose a specific amount of restitution including \$8,255.20 to Standard Fire Insurance Company upon acceptance of the plea. Appellant Bolds agreed to accept the restitution amounts. While Rush was an *open* guilty plea, Appellant Bolds entered a *negotiated* guilty plea where the amount at issue \$8,255.20 was part of the agreed upon plea. The November 18, 2004 sentence was therefore not illegal as evidenced by the notes of testimony and addendum to the Certificate of Imposition of Judgment of Sentence. (11/18/14 N.T., pp. 5-8 & 11/18/14 Addendum to the Certificate of Imposition of Judgment of Sentence). Appellant's first argument on appeal lacks merit.

II. Revocation for Nonpayment.

In her second argument on appeal, Appellant Bolds contends that if restitution was ordered as part of her sentence pursuant to 18 Pa.C.S. §

1106(a), it was not a condition of her probation and therefore could not be revoked for nonpayment. As referenced above, restitution was ordered as part of the November 18, 2014 sentence imposed upon Appellant Bolds rather than as part of probation. In the context of a criminal case, restitution may be imposed either as a direct sentence, 18 Pa.C.S. § 1106(a), or as a condition of probation, 42 Pa.C.S. § 9754. When imposed as a sentence, the injury to property or person for which restitution is ordered must directly result from the crime. *See* 18 Pa.C.S. § 1106(a); Commonwealth v. Harner, 617 A.2d 702, 704 (Pa. 1992). However, when restitution is ordered as a condition of probation, the sentencing court is accorded the latitude to fashion probationary conditions designed to rehabilitate the defendant and provide some measure of redress to the victim. Harner, 617 A.2d at 706.

Once an order of restitution has been made as part of a defendant's sentence under Section 1106(a), it is enforceable until paid. 18 Pa.C.S. § 1106(c)(2)(ii); Commonwealth v. Griffiths, 15 A.3d 73, 75 (Pa. Super. 2010); Commonwealth v. Holmes, 155 A.3d 69, 86 (Pa. Super. 2017). Section 1106(f) specifically provides a mechanism to address noncompliance with a restitution order. It provides:

(f) Noncompliance with restitution order.--Whenever the offender shall fail to make restitution as provided in the order of

a judge, the probation section or other agent designated by the county commissioners of the county with the approval of the president judge to collect restitution shall notify the court within 20 days of such failure. Whenever the offender shall fail to make restitution within 20 days to a magisterial district judge, as ordered, the magisterial district judge shall declare the offender in contempt and forward the case to the court of common pleas. Upon such notice of failure to make restitution, or upon receipt of the contempt decision from a magisterial district judge, the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

18 Pa.C.S. § 1106

Appellant Bolds stipulated to the violation for nonpayment at the hearings held on April 15, 2016, August 18, 2017, January 11, 2019 and did not appeal those dispositions. At the December 16, 2020 hearing, Agent Buckley confirmed Appellant Bolds was currently employed and had made payments towards restitution in the past. (12/16/20 N.T., p. 5). Appellant Bolds testified before the court and confirmed she was working two jobs, one at a fast-food restaurant and the other at a food delivery company. (12/16/20 N.T., p. 7). Furthermore, Appellant Bolds agreed she had made restitution payments in the past, but she simply could not afford to pay the entire restitution at issue. (12/16/20 N.T., p. 8). Appellant was concerned that her co-defendants were making no effort to pay their ordered restitution. (12/16/20 N.T., p. 14).

This court specially elicited argument from Appellant Bolds but her counsel stood mute.

Court: So, I restate my question. Mr. Hoffman what is the objection to Agent Buckley's recommendation given the record of the negotiated guilty plea? The attachment of that schedule to the sentencing sheet and the fact that this restitution was to be join[t] and several with two other individuals who presumably were also found guilty at that time or about that time?"

[NO RESPONSE]

Court: Hearing nothing I am accepting the recommendation of Agent Buckley.

(N.T, 12/16/20, p. 13).

Faced with the evidence presented on December 16, 2020, the trial court accepted Agent Buckley's recommendation and imposed a sentence consistent with that recommendation. (12/16/20 N.T., p. 15 & 12/16/20 Certificate of Imposition of Judgment of Sentence). The court's analysis included a review of the restitution ordered on November 18, 2014, Appellant's payment history and current employment status. (12/16/20 N.T., pp. 4-8). The court did not order incarceration and only required Appellant to make payments in *some* fashion; no imposition of a minimum monthly amount was required. (12/16/20 Certificate of Imposition of Judgment of Sentence). The court advised that assuming *some* payments were made

monthly for the next 477 days at the conclusion there would be a motion to convert the balance of any restitution to a civil judgment. (12/16/20 N.T., p. 12). For these reasons, Appellant's second argument on appeal must fail.

III. Restitution Imposed as a Condition of Probation.

Appellant's third through fifth issues on appeal were filed in the alternative, assuming restitution was ordered as a condition of probation. As referenced above, restitution was ordered as part of Appellant Bolds' November 18, 2014 sentence rather than as part of probation. Once an order of restitution has been made as part of a defendant's sentence under Section 1106(a), it is enforceable until paid. 18 Pa.C.S. § 1106(c)(2)(ii); Commonwealth v. Griffiths, 15 A.3d 73, 75 (Pa. Super. 2010); Commonwealth v. Holmes, 155 A.3d 69, 86 (Pa. Super. 2017).

A term of probation may not be revoked for failure to pay fines absent certain considerations by the revocation court. Commonwealth v. Eggers, 742 A.2d 174, 175 (Pa. Super. 1999). Prior to revoking probation based on failure to pay fines, costs or *restitution*, the court must "inquire into the reasons for a defendant's failure to pay and ... make findings pertaining to the willfulness of the party's omission." Id. at 175-76. In other words,

A proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay.... After making those determinations, if the court finds the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court should then consider alternatives to incarceration....

Id. at 176 (citations and internal quotation marks omitted).

As restitution was ordered as part of Appellant Bolds' November 18, 2014 sentence rather than as part of probation, these arguments on appeal are moot.

IV. Court Costs.

A claim contesting the authority of the sentencing court to impose costs and fees constitutes a non-waivable challenge to the legality of the sentence. Commonwealth v. Childs, 63 A.3d 323, 325 (Pa. Super. 2013). The Judiciary Code requires a trial court to order a convicted defendant to pay costs pursuant to 42 Pa.C.S. § 9721(c.1), which provides:

Mandatory payment of costs.—Notwithstanding the provisions of section 9728 (relating to collection of restitution, reparation, fees, costs, fines and penalties) or any provision of law to the contrary, in addition to the alternatives set forth in subsection (a), the court shall order the defendant to pay costs. In the event the court fails to issue an order for costs pursuant to section 9728, costs shall be imposed upon the defendant under this section. No court order shall be necessary for the defendant to incur liability for costs under this

section. The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. 706(C) (relating to fines or costs).

42 Pa.C.S. § 9721(c.1) (emphases added).

Rule 706 of the Pennsylvania Rules of Criminal Procedure require a trial court to determine a defendant's ability to pay costs or fines before incarcerating a defendant for non-payment. The Rule provides:

(A) A court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs.

(B) When the court determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the court may provide for payment of the fines or costs in such installments and over such period of time as it deems to be just and practicable, taking into account the financial resources of the defendant and the nature of the burden its payments will impose, as set forth in paragraph (D) below.

(C) The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations.

(D) In cases in which the court has ordered payment of a fine or costs in installments, the defendant may request a rehearing on the payment schedule when the defendant is in default of a payment or when the defendant advises the court that such default is imminent. At such hearing, the burden shall be on the defendant to prove that his or her financial condition has deteriorated to the extent that the defendant is without the

means to meet the payment schedule. Thereupon the court may extend or accelerate the payment schedule or leave it unaltered, as the court finds to be just and practicable under the circumstances of record. When there has been default and the court finds the defendant is not indigent, the court may impose imprisonment as provided by law for nonpayment.

Pa. R. Crim. P. 706.

In Commonwealth v. Childs, 63 A.3d 323 (Pa. Super. 2013), the Pennsylvania Superior Court determined that Rule 706 requires only that the sentencing court determine the defendant's ability to pay costs before ordering incarceration of the defendant for non-payment of costs. The Superior Court explained:

"Generally, a defendant is not entitled to a pre-sentencing hearing on his or her ability to pay costs. Commonwealth v. Hernandez, ... 917 A.2d 332, 336-37 (Pa. Super. 2007). While Rule 706 "permits a defendant to demonstrate financial inability either after a default hearing or when costs are initially ordered to be paid in installments," the Rule only **requires** such a hearing prior to any order directing incarceration for failure to pay the ordered costs. Id. at 337 (emphasis added). In Hernandez, we were required to determine whether Rule 706 was constitutional in light of Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). We concluded that a hearing on ability to pay is not required at the time that costs are imposed:

The Supreme Court ... did not state that Fuller requires a trial court to assess the defendant's financial ability to make payment at the time of sentencing. In interpreting Fuller, numerous federal and state jurisdictions have held that it is not constitutionally necessary to have a determination of

the defendant's ability to pay prior to or at the judgment of sentence. ... [We] conclude that Fuller compels a trial court only to make a determination of an indigent defendant's ability to render payment before he/she is committed."

Hernandez, 917 A.2d at 337.

Childs, 63 A.3d at 326.

Additionally, in Commonwealth v. Ford, 217 A.3d 824 (Pa. Super. 2019), the Pennsylvania Supreme Court addressed whether the ability-to-pay prerequisite is satisfied when a defendant agrees to pay a given fine as part of a negotiated guilty plea agreement. In a footnote, the Supreme Court cited to Rule 706 and reiterated that "[a]lthough a presentence ability-to-pay hearing is not required when **costs** alone are imposed, our Rules of Criminal Procedure provide that a defendant cannot be committed to prison for failure to pay a fine or costs unless the court first determines that he or she has the financial means to pay the fine or costs. Pa.R.Crim.P. 760(A)." Id. at 827 n.6.

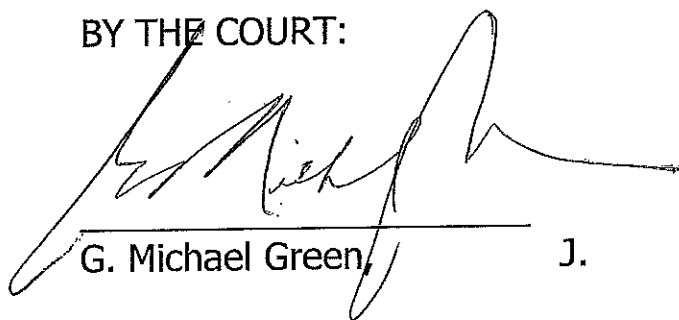
Here, Appellant Bolds is not being incarcerated due to her inability to pay the costs of prosecution imposed at her sentencing. Because Pennsylvania appellate courts do not require a sentencing court to hold an ability-to-pay hearing prior to the imposition of costs, the trial court did not

err by failing to conduct a hearing to determine Appellant Bolds ability to pay the costs of prosecution. Accordingly, Appellant Bolds' final issue entitles her to no relief.

CONCLUSION

For the foregoing reasons, the December 16, 2020 Judgment of Imposition of Sentence should not be disturbed on appeal.

BY THE COURT:



G. Michael Green, J.