In the Superior Court of Pennsylvania

No. 163 EDA 2021

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

SHANAE BOLDS

Appellant

BRIEF FOR APPELLEE,
THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE JUDGMENT OF SENTENCE ENTERED ON DECEMBER 16, 2020 BY THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, THE HONORABLE G. MICHAEL GREEN, AT CP-23-CR-0004160-2014.

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July 19, 2021

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

In her 1925(b) Statement, the Appellant failed to adequately identify the issues sought to be pursued. Did the Appellant waive all arguments on appeal?

(The trial court did not address this argument; suggested answer: yes.)

The original trial court and the subsequent *Gagnon* courts ordered restitution as a condition of the Appellant's sentence and as a condition of her parole, and the Appellant agreed for the past seven years that restitution was a condition of her parole. The plain language of 18 Pa.C.S. § 1106 clearly states that restitution can be ordered as both a condition of sentence and a condition of parole. Was restitution ordered as a condition of parole?

(The Appellant did not adequately raise this argument in her 1925(b) Statement; thus, the trial court did not address it. Suggested answer: yes.).

In parole revocation cases where a defendant failed to pay restitution, the revocation court must determine the willfulness of the failure to pay only in cases in which the Commonwealth is seeking to incarcerate the defendant. Here, neither the Commonwealth nor the *Gagnon* court sought to imprison the Appellant. Rather, she was sentenced to immediate parole. Was a willfulness determination required?

(The Appellant did not adequately raise this argument in her 1925(b) Statement; thus, the trial court did not address it. Suggested answer: yes.)

The Appellant claims that the *Gagnon* court erred by failing to give her credit for time spent on the street while on parole. However, the Appellant failed to preserve this claim by failing to include this argument in a 1925(b) Statement and the argument does not invoke the legality of the sentence because she was not entitled to such credit time. Did the Appellant waive this claim on appeal?

(The Appellant did not raise this argument in her 1925(b) Statement; thus, the trial court did not address it. Suggested answer: yes.).

At previous *Gagnon* I hearings that are not at issue in this appeal, the revocation court advised the Appellant of her right to counsel and the consequences of the revocation proceedings. The Appellant acknowledged her rights and raised no questions. Did the Appellant knowingly and voluntarily waive her right to counsel at her previous *Gagnon* I hearings?

(The Appellant did not raise this argument in her 1925(b) Statement; thus, the trial court did not address it. Suggested answer: yes.).

Even if the Appellant did not adequately waive her right to counsel, is this argument moot because her relief is a remand for a counseled *Gagnon* II hearing, which she already received?

(The Appellant did not raise this argument in her 1925(b) Statement; thus, the trial court did not address it. Suggested answer: yes.).

COUNTER-STATEMENT OF THE 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). If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. *Commonwealth v. Leverette*, 911 A.2d 998, 1001 (Pa. Super. 2006). The determination as to whether the trial court imposed an illegal sentence is a question of law; therefore the scope of review is plenary and the standard of review is de novo. *Commonwealth v. Lomax*, 8 A.3d 1264, 1267 n.3 (Pa. Super. 2010).

COUNTER-STATEMENT OF THE CASE

As part of her alleged connection to a home invasion robbery, on November 18, 2014, the Appellant, Shanae Bolds, entered a negotiated guilty plea to Receiving Stolen Property and was sentenced to time-served to 23 months with immediate parole and ordered to pay $10,418.09 in restitution to two individual victims, an insurance company, and the Victims' Compensation Assistance Program. Tr. 11/18/14, 9-10. As part of the negotiated disposition, the Commonwealth withdrew Unauthorized Use of a Motor Vehicle and several summary offenses, and the Commonwealth submitted a nolle pros order for a companion case in which the Appellant was charged with Robbery, Burglary, Theft, Aggravated Assault, Firearms Not to be Carried Without a License, Criminal Conspiracy, and related charges. *Id*. at 4.

On April 16, 2016, August 18, 2017, and January 11, 2019, the Appellant appeared before a *Gagnon* II hearing officer and stipulated that she violated her parole for failing to pay restitution. At each listing, the hearing officer sentenced her to her full back-time of 477 days with immediate parole and ordered her to follow the rules and regulations of probation and parole, including making monthly payments towards restitution. During the 2019 hearing, the hearing officer ordered that the case be closed once the Appellant pays her restitution. Tr. 1/11/19, 6-7.

A fourth *Gagnon* II hearing was held on December 16, 2020, during which the Appellant's parole officer again recommended that the Appellant be found in

violation of her parole for failing to pay the entirety of her restitution and that the court sentence her to her full back-time (477 days) with immediate parole. The Appellant, through counsel, did not offer a counterargument to the alleged violation or sentence. Tr. 12/16/20, 13. The *Gagnon* court sentenced the Appellant in accordance with the recommendation. *Id*. at 15. This timely appeal followed.

SUMMARY OF THE ARGUMENT

The Appellant waived her appellate arguments by failing to adequately identify them in her 1925(b) Statement. Her 1925(b) Statement concerns whether restitution was properly ordered as a condition of probation pursuant to 42 Pa.C.S. § 9763. But the Appellant has never been sentenced to probation and 42 Pa.C.S. § 9763 has never applied to this case. The Appellant's flawed 1925(b) Statement impeded the trial court's legal analysis of this case's issues. Indeed, the applicable portion of lower court's opinion focuses on explaining why section 9763 is inapplicable. Because the Appellant's flawed 1925(b) Statement frustrates a cogent examination of the issues, the Appellant waived her claims on appeal. But in any event, her arguments are meritless.

The plain language of 18 Pa.C.S. § 1106 clearly states that restitution can be ordered as both a condition of sentence and a condition of parole. The original trial court and the subsequent *Gagnon* courts ordered restitution as a condition of the Appellant's sentence and a condition of her parole. The Appellant recognized this condition for the past seven years and during her past four *Gagnon* hearings, including the *Gagnon* hearing that gives rise to this appeal. Her claim (for the first time on appeal) that restitution is not a condition of her parole is belied by the record.

In parole revocation cases where it is alleged that a defendant failed to pay restitution, the revocation court must determine the willfulness of the failure to pay

only in cases in which the Commonwealth is seeking reincarceration. Here, neither Adult Probation or Parole, the Commonwealth, nor any *Gagnon* court sought to imprison the Appellant. Rather, she was always sentenced to immediate parole. No willfulness determination was required.

The Appellant claims that the *Gagnon* court erred by failing to give her credit to time served on the street and by violating her parole for failing to pay the entirety of her restitution. However, the Appellant failed to preserve this claim by failing to include this argument in a 1925(b) Statement and the argument does not invoke the legality of the sentence because she was not entitled to such credit time.

The Appellant knowingly and voluntarily waived her right to counsel at her previous *Gagnon* I hearings. But even if she did not, her claim is moot. If her claim has merit, then her relief is a remand for a counseled *Gagnon* II hearing, which she already received. She was represented by counsel at the *Gagnon* II hearing that gave rise to this appeal. Thus, her argument is meritless and her relief meaningless.

ARGUMENT

A. The Appellant waived her appellate arguments by failing to adequately identify the arguments in her 1925(b) Statement.

The Appellant briefed four of the six claims from her 1925(b) statement. These the four claims all concern whether the lower courts properly ordered restitution as a condition of probation pursuant to 42 Pa.C.S. § 9763. But the Appellant has never been sentenced to probation; thus, 42 Pa.C.S. § 9763 has never applied to this case. Because the Appellant failed to adequately identify the issues sought to be pursued on appeal she has frustrated the appellate process and has waived her claims on appeal.

In order to preserve an issue for appeal, an appellant must "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues[.]" Pa.R.A.P. 1925(b)(4)(ii). "When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review." *Commonwealth v. Allshouse*, 969 A.2d 1236, 1239 (Pa. Super. 2009). "When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues." *Id*.

Here, the Appellant raised six claims of error. 1925(b) Statement, ¶ 8(a)-(f). On appeal to this Court, the Appellant only briefed four issues (the claims in subparagraphs 8(b) through 8(e)). However, the four issues briefed to this Court all concern

whether the trial court and subsequent *Gagnon* courts properly ordered restitution as a condition of probation pursuant to 42 Pa.C.S. § 9763. But the Appellant has never been sentenced to probation. The Appellant has only ever been sentenced to incarceration with immediate parole; thus, 42 Pa.C.S. § 9763 has never been applicable to this case. An analysis of section 9763 and the cases that interpret it is not helpful in the adjudication of this appeal.

Restitution was ordered as a condition of the direct sentence under 18 Pa.C.S. § 1106(a) and as a condition of parole under 18 Pa.C.S. § 1106(b). Probation was never ordered, and 42 Pa.C.S. § 9763 does not apply to this case. Because the Appellant failed to adequately frame the case as involving only restitution as a condition of parole under 18 Pa.C.S. § 1106(b) and because the Appellant mistakenly instead raised nonsensical claims of error involving probation and the applicability of 42 Pa.C.S. § 9763, the *Gagnon* court was impeded in its preparation of an opinion. Indeed, the *Gagnon* court's opinion is focused on explaining that 42 Pa.C.S. § 9763 does not apply to this case. *See* Op., 15-20. In addition, the *Gagnon* court correctly explains that because restitution was ordered under 18 Pa.C.S. § 1106 and not 42 Pa.C.S. § 9763, the Appellant's claims concerning whether restitution was properly made a condition of probation are moot.

Because the Appellant failed to adequately identify the issues sought to be pursued on appeal, her claims on appeal are waived.

B. The trial court ordered restitution as a condition of her parole, and the defendant has recognized this condition for the past seven years.

The Appellant argues for the first time on appeal that restitution was never a condition of her parole. Appellant's Br., 14-18. She is wrong. For the past seven years, the defendant has agreed that restitution was a condition of her parole. The trial court had the authority under 18 Pa.C.S. § 1106(b) to make restitution a condition of her parole and the *Gagnon* court violated her parole for failing to pay restitution. The Appellant's argument that restitution was not a condition of her parole is patently frivolous.

"Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, his compliance with such order made by made a condition of such probation or parole." 18 Pa.C.S. § 1106(b).

The plain language of 18 Pa.C.S. § 1106 clearly states that restitution can be ordered as both a condition of sentence and a condition of parole. The original trial court and the subsequent *Gagnon* courts ordered restitution as a condition of the Appellant's sentence and a condition of her parole. The Appellant has always been in agreement that restitution was ordered as a condition of her parole (until the filing of the instant brief).

Appellant's argument is premised on the belief that the *Gagnon* court "unequivocally concluded that the restitution was imposed as part of Ms. Bolds' direct sentence pursuant to 18 Pa.C.S. § 1106(a)." Appellant Br., 17. This is true, the

Gagnon court stated that restitution was ordered as a condition of the sentence. Implicit in, and fundamental to, the Appellant's argument is the misconception that the *Gagnon* court found that restitution was not also a condition of parole. However, the *Gagnon* court did not address that argument because the Appellant never raised it in her flawed and nonsensical 1925(b) Statement.

The *Gagnon* court did not address whether the restitution was also ordered as a condition of parole; rather, the *Gagnon* court only addressed whether the restitution was ordered as a condition of probation under 42 Pa.C.S. § 9763. The Appellant notes this distinction in footnote four of her brief. The *Gagnon* court's analysis of whether the restitution was a condition of probation under section 9763 is irrelevant: the Appellant has never been sentenced to probation in this case.

This confusion—and the unnecessary analysis from the *Gagnon* Court and the Appellant—as to whether restitution was properly ordered as a condition of probation is the result of the Appellant's defective 1925(b) Statement; a point the Appellant reluctantly concedes:

> 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 . . . .

Appellant's Br., 20 n.4.

Thus, while the *Gagnon* court explained that restitution was never ordered as a condition of probation (because the Appellant was never sentenced to probation), the trial court never explicitly stated that restitution was (or was not) ordered as a condition of parole. This is because the defendant never raised the issue during her *Gagnon* II hearing or in her 1925(b) Statement.

Certainly it is true that the *Gagnon* court did not specifically address whether restitution was ordered as a condition of parole under 1106, but clearly it was the intent of the parties that restitution was a condition of parole. Restitution was a part and parcel of the negotiated disposition, in return for the withdrawal of many serious felonies. This was the Appellant's fourth *Gagnon* hearing, and at no point in her previous three hearings did she claim that restitution was not a condition of parole; nor during the underlying fourth *Gagnon* hearing did the Appellant claim that restitution was not a condition of parole; nor in her 1925(b) Statement giving rise to the instant appeal, did the Appellant claim that restitution was not a condition of parole.

The Appellant has been on parole for about seven years. But it is only now in her brief to this Court that the Appellant claims that restitution was not a condition of her parole and that the *Gagnon* court "unequivocally" stated that restitution was not a condition of her parole. Obviously restitution was a condition of her parole, otherwise, the *Gagnon* court would not have violated her parole for failing to pay restitution. As the *Gagnon* court found, "Appellant Bolds stipulated to the violation

for nonpayment at the [*Gagnon*] hearings held on April 15, 2016, August 18, 2017, and January 11, 2017 and did not appeal those dispositions." Op., 17. When asked point blank at the underlying *Gagnon* II hearing what the Appellant's objection was to the parole officer's recommendation that she be found in violation of her parole for failing to pay restitution, defense counsel stood mute. Op., 17-18 (*citing* Tr. 12/16/20, 13). The Appellant's argument that restitution was not a condition of her parole is belied by the record.

C. A finding that a defendant's failure to pay restitution was willful is only applicable in cases in which the Commonwealth is seeking to incarcerate the defendant.

The Appellant claims that in order for a *Gagnon* court to find her in violation of her parole for failing to pay restitution, the court must first make a factual-finding that the Appellant's failure to pay restitution was willful. Appellant's Br., 19-28. No precedent has ever required this. Rather, our courts require a willfulness inquiry only when the government is seeking to incarcerate an individual for failing to pay restitution or court costs. The Commonwealth has never sough to incarcerate the Appellant for failing to pay restitution; thus, no willfulness inquiry was necessary.

In *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064 (1983), the Supreme Court held that the *Gagnon* court may imprison a defendant for failure to pay a fine and restitution if the failure was willful. *Bearden*, 461 U.S. at 672. If the court determines that the defendant cannot make payments despite bona fide efforts to do so,

the court cannot imprison, but may impose alternative punishments:

> [I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. **If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment.** Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence, may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine.

Bearden, 461 U.S. at 672-73. Thus, the clear holding of *Bearden* is that a finding of willfulness is necessary to imprison a defendant and that, if there is no willfulness finding a *Gagnon* court may impose punishment other than imprisonment, such as, parole or probation. *Bearden* is the seminal Supreme Court case from which the Appellant's arguments are derived.

Bearden's holding has never been disturbed. Indeed, the Appellant begins her argument reinforcing the holding that a willfulness inquiry is necessary only when seeking to incarcerate a defendant: "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**.'" Appellant's Br., 21 (*quoting Powell v. Rosenberry*, 654 A.2d 1328, 1331 (Pa. Super. 1994) (emphasis supplied)).

Courts in the Commonwealth have held that a finding of willfulness is

necessary only in cases in which the Commonwealth was seeking to incarcerate a defendant. *See Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. 1984)[1] (the revocation court must inquire into the reasons for a probationer's failure to pay and must make findings pertaining to the willfulness of his omission before imprisoning the defendant); *see also Miller v. Bd. of Prob & Parole*, 784 A.2d 246 (Pa. Commw. 2001)[2] (parole board revoked parole and resentenced defendant to 12 months of incarceration); *Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. 2018)[3] (defendant found in criminal contempt during a 35-person "mass purge hearing" and sentenced the defendant to two weeks in prison); *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. 2018)[4] (defendant found in criminal contempt and sentenced to 30 days in prison); *Hudak v. Board of Probation and Parole*, 784 A.2d 246 (Pa. Commw. 2000)[5] (defendant resentenced to six months of incarceration for technical violations of probation); *Lawson v. Bd. of Probation and Parole*, 524 A.2d 1053 (Pa. Commw. 1987)[6] (defendant resentenced to several years of imprisonment for technical violations of parole); *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. 1999) (finding of inability to pay despite sufficient bona fide efforts to do so is required before revoking probation and resentencing defendant to incarceration);

[1] Appellant's Br., 22
[2] Appellant's Br., 21
[3] Appellant's Br., 26
[4] Appellant's Br., 26
[5] Appellant's Br., 21
[6] Appellant's Br., 22

Commonwealth v. Ballard, 814 A.2d 1242 (Pa. Super. 2002) (case in which court revoked probation and imposed a sentence of 2.5 to five years of incarceration); *Commonwealth v. Allshouse*, 969 A.2d 1236 (Pa. Super. 2009) (case involving court costs where court revoked probation and imposed a sentence of two to 10 years of incarceration).

The Appellant does not cite to any precedent to support her argument that a willfulness inquiry is necessary to find a defendant in violation of her parole. In all of the cases cited by the Appellant, and in the others included above, this Court and the Commonwealth Court held that a willfulness inquiry was necessary where the Commonwealth was seeking to incarcerate a defendant, and these holdings are consistent with *Bearden*, *supra*. In *Bearden*, the Supreme Court clearly held that alternative forms of punishment (alternative from imprisonment) are permissible in the absence of a finding of willfulness. *Bearden*, 461 U.S. at 672.

In parole and probation revocation cases where it is alleged that a defendant has failed to pay restitution, the revocation court must conduct a determination of the willfulness of the failure to pay *only* in cases in which the Commonwealth is seeking to incarcerate the defendant. Here, neither Adult Probation or Parole, the Commonwealth, nor any *Gagnon* court sought to imprison the Appellant. Rather, she was always sentenced to immediate parole. Appellant does not dispute this. All parties agree on the facts. Appellant is mistaken about the law. No willfulness

determination was required. The Appellant's argument is meritless.

D. By failing to include it in her 1925(b) Statement, the Appellant waived her argument that the *Gagnon* court erred by failing to give her credit for time served while on county parole, but in any event, a defendant is not entitled to credit for street time served while on county parole.

The Appellant next claims that the *Gagnon* court erred by "fail[ing] to give her any credit whatsoever for her almost 7-years of 'street-time' on parole" and by violating her parole for failing to pay the entirety of her restitution. Appellant's Br., 29-32. Thus, the Appellant is challenging the discretionary aspect of her sentence and the discretionary decision to revoke parole in the first place. However, the Appellant failed to preserve this claim by failing to object to the violation at that *Gagnon* II hearing, failing to file a post-sentence motion, and failing to include this argument in a 1925(b) statement.

Any claims not included in a 1925(b) statement are waived. *Commonwealth v. Lord*, 553 Pa. 415, 420 719 A.2d 306 (1998). Appellant concedes that she failed to include this claim in her 1925(b) statement. Appellant's Br., 30 n.6. Thus, this argument is waived.

* * *

The Appellant is mistaken in her belief that her claim invokes the legality of the sentence. Appellant Br., 30 n.6 (*citing Commonwealth v. Williams*, 920 A.2d 887, 888 (Pa. Super. 2007) & *Commonwealth v. Milhomme*, 35 A.3d 1219, 1221

(Pa. Super. 2011)).[7]

Here, there is nothing illegal about the Appellant's underlying sentence of time-served to 23 months of incarceration for a felony of the third degree. "Clearly the order revoking parole does not impose a new sentence; it requires appellant, rather to serve the balance of a valid sentence previously imposed." *Commonwealth v. Mitchell*, 429 Pa. Super. 435, 438, 632 A.2d 934 (1993). "Moreover, such a recommittal is just that—a recommittal and not a sentence." *Id*. (*citing Abraham v. Dept. of Corrections,* 150 Pa.Cmwlth 81, 97, 615 A.2d 814, 822 (1992)).

The Appellant appears to be arguing that her sentence is illegal because she did not get credit for her street time. However, she was not entitled to that credit. *See Commonwealth v. Fair*, 345 Pa. Super. 61, 497 A.2d 643, 645 (1985) ("[W]hen [a defendant is] found in violation of parole [he] is not entitled as of right to credit for time spent on parole without violation.") (*citing Commonwealth v. Michenfleder*, 268 Pa.Super. 424, 408 A.2d 860 (1979)). Furthermore, "[a]n appellant wishing to appeal the discretionary aspects of a probation-revocation sentence has no absolute

[7] *Williams* does not concern a trial court's ability to revoke parole and resentence a defendant to his or her back-time. *Milhomme* was a case where the trial court revoked probation and resentenced the defendant, but the legality of the sentence was implicated because the original sentence that was imposed when the defendant pled guilty was illegal. *Milhomme*, 35 A.3d at 1221-22. In *Milhomme*, the defendant was sentenced to two years of probation contingent upon the defendant first serving a flat four months in prison. *Id*. at 1222. That original sentence was illegal because it did not contain a minimum and a maximum. *Id*. (*citing* 42 Pa.C.S. § 9756(a), (b)). Contrary to the Appellant's assertion, *Milhomme* does not stand for the proposition that a challenge to the decision to revoke parole or the subsequent sentence imposed invokes the legality of the sentence, unless of course there is something inherently illegal about the underlying sentence.

right to do so but, rather, must petition this Court to do so." *Kalichak*, 943 A.2d at 289 (*citing Commonwealth v. Malovich*, 903 A.2d 1247, 1250 (Pa. Super. 2006)). Thus, the argument that the *Gagnon* court, in its discretion, should have given her credit for her street time, does not invoke the legality of the sentence.

Similarly, the Appellant's challenge to the decision to revoke parole does not implicate the legality of the sentence. For sentences such as the Appellant's in which the defendant is serving a county sentence (maximum incarceration less than 23 months), the decision to recommit a defendant to prison or to grant parole is subject to the discretion of the *Gagnon* court. *Fair*, 497 A.2d at 645 (1985); *see also Commonwealth v. Kalichak*, 943 A.2d 285, 289 (Pa. Super. 2008) ("[W]hen a court revokes probation and imposes a new sentence, a criminal defendant needs to preserve challenges to the discretionary aspects of that new sentence either by objecting during the revocation sentencing or by filing a post-sentence motion.").

The issue facing this Court on appeal "is whether the trial court erred, as a matter of law, in revoking [A]ppellant's parole . . . [and] to support a revocation of parole, the Commonwealth need only show, by a preponderance of the evidence, that a parolee violated his parole." *Mitchell*, 429 Pa. Super. at 438-39 (*citing Commonwealth v. Smith*, 368 Pa. Super. 354, 358, 534 A.2d 120, 122 (1987)). When restitution is a condition of parole under 18 Pa.C.S. § 1106(b) and a defendant fails to comply with the order to pay the restitution, "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(f).[8]

Here, the Appellant violated her parole by failing to pay the entirety of her restitution. As the *Gagnon* court noted, the Appellant did not challenge that accusation during the hearing. It certainly was not an abuse of discretion for the *Gagnon* court to find by a preponderance of the evidence that the Appellant violated her parole. Op., 17-18 (*citing* Tr. 12/16/20, 13).

E. The Appellant knowingly and voluntarily waived her right to counsel at her previous *Gagnon* I hearings, but in any event her argument is moot because she received counsel at the *Gagnon* II hearing that gave rise to this appeal.

The Appellant knowingly and voluntarily waived her right to counsel at her previous *Gagnon* I hearings. *See* Def. Br., 32-37. But even if she did not, her claim is moot. If her claim has merit, then her relief is a remand for a counseled *Gagnon* II hearing, which she already received. She was represented by counsel at the *Gagnon* II hearing that gave rise to this appeal. Thus, her argument is meritless and her

[8] The Appellant appears to argue that because contempt proceedings are one option for enforcing a restitution order, the Commonwealth and/or the Gagnon court are precluded from finding the Appellant in violation of her parole. Appellant's Br., 10, 14, 18, 19. Clearly this argument is undermined by the plain language of 18 Pa.C.S. § 1106(f) which states that there are two remedies available: a contempt proceeding "**or**" a parole violation hearing. 18 Pa.C.S. § 1106(f) (emphasis supplied). And, as discussed earlier, any argument that restitution was not a condition of parole is belied by the record and the procedural history of this case. Op., 17. ("Appellant Bolds stipulated to the violation [of parole] for nonpayment [of restitution] at the [*Gagnon*] hearings held on April 15, 2016, August 18, 2017, and January 11, 2017 and did not appeal those dispositions.")

relief meaningless.

A defendant is entitled to counsel at a parole revocation hearing. Pa.R.Crim.P. 708(B)(1). In order to make a knowing and intelligent waiver of the right to counsel "the individual must be aware of both the nature of the right [to counsel] and the risks and consequences of forfeiting it." *Commonwealth v. Houtz*, 856 A.2d 119, 123 (Pa. Super. 2004). In *Commonwealth v. Murphy*, 214 A.3d 674 (Pa. Super. 2019), this Court held that a waiver of counsel colloquy was insufficient where it was "truncated" and failed to comply with Pa.R.Crim.P. 121 *and Commonwealth v. Grazier*, 552 Pa. 9, 713 A.2d 81 (1998). *Murphy*, 214 A.3d at 679. However, in *Murphy*, unlike here, the *Gagnon* court simply advised the defendant that he had the right to an attorney; the *Gagnon* court did not advise the defendant of any potential consequences of the proceeding. *Id*. In addition, *Murphy* involved a situation in which the *Gagnon* court conducted an "*en masse*" hearing in which several probation revocation proceedings were conducted simultaneously, a practice this Court cautioned against. *Id*. at 679 n.4.

Here, the previous *Gagnon* I hearings were individual hearings in which the Appellant was advised not only that she had the right to counsel, but that the *Gagnon* I hearing officer could resentence the Appellant if he found her in violation of her parole. *See* Tr. 8/18/17, 3 & Tr. 1/11/19, 3-4. Thus, the colloquy in the instant matter exceeding the truncated colloquy performed at the *en masse* revocation hearing in

Murphy. The Appellant's waiver of counsel was knowing and intelligent.

In any event, the Appellant's allegedly unlawful waiver of counsel pertains to previous *Gagnon* I hearings, not the counseled *Gagnon* II hearing that gave rise to this appeal. Thus, the alleged unlawful wavier of counsel was cured by the fact that she was represented by counsel at the underlying *Gagnon* II proceeding.

Even if the Appellant's claim has merit—and it does not—her remedy would be a remand for a counseled *Gagnon* I hearing, which is a meaningless and unnecessary remedy because she already received a counseled *Gagnon* II hearing after her allegedly unlawful *Gagnon* I hearings. *See Murphy*, 214 A.3d at 680 (where the Court found that the defendant did not adequately waive the right to counsel, the remedy was a remand for a *Grazier* hearing or a counseled *Gagnon* II hearing). Here, the Appellant already received a counseled *Gagnon* II hearing; thus, even if her argument has merit, she has already received the relief she would be entitled to.

Consequently, her claim that she did not adequately waive her right to counsel is moot.[9]

[9] In addition, the Commonwealth contends that the Appellant's argument is waived because she did not include it in her 1925(b) Statement and she is not serving an illegal sentence. She claims that her sentence is illegal because she did not adequately waive her right to counsel at previous *Gagnon* I hearings. However, this appeal arose from a counseled *Gagnon* II hearing. Her counseled *Gagnon* II hearing cured an alleged illegality from previous uncounseled *Gagnon* I hearings. Because she received counsel at the underlying *Gagnon* II hearing and because she is appealing the judgment of sentence imposed at the counseled *Gagnon* II hearing, her sentence cannot be declared illegal on the basis that she did not adequately waive her right to counsel at previous *Gagnon* I hearings. Because her claim cannot implicate the legality of her sentence, the claim is waived for failing to include it in her 1925(b) Statement.

CONCLUSION

The Commonwealth respectfully requests that this Court affirm the judgment of sentence.

Respectfully submitted,

Date: July 19, 2021

/s/D. Daniel Woody
D. DANIEL WOODY
ID No. 309121
Assistant District Attorney

CERTIFICATION

Confidential Information and Confidential Documents

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

Respectfully submitted,

Date: July 19, 2021

/s/*D. Daniel Woody*
D. DANIEL WOODY
ID No. 309121
Assistant District Attorney

PROOF OF SERVICE

D. Daniel Woody, Assistant District Attorney, hereby certifies that on July 19, 2021, he served the following persons in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121.

Hand-Delivery:
Honorable G. Michael Green
Delaware County Courthouse
Media, Pennsylvania 19063

Emily Mirsky, Esquire
Chief, Appeals Division
Delaware County Office of the Public Defender
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