

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

EDA 2021

NO. 163

COMMONWEALTH OF PENNSYLVANIA

VS.

SHANAE BOLDS,
Appellant

REPLY 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.

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I. STATEMENT OF THE CASE

Ms. Bolds' principal brief sets forth the procedural history and facts of this case. This reply brief addresses the Commonwealth's contentions that (1) Ms. Bolds waived all of her issues on appeal by failing to adequately identify them in her Rule 1925(b) Statement; (2) a willfulness inquiry is required only if incarceration is sought; and (3) Ms. Bolds' claim that her revocation exceeds the statutory maximum does not relate to the legality of her sentence.

Contrary to the Commonwealth's contentions, first, none of Ms. Bolds claims on appeal are waived because they all address the legality of her revocation sentence. Second, a willfulness inquiry is required even where a defendant is not being incarcerated. Third, although Ms. Bolds did not serve her sentence in prison, her time on supervision will now exceed the statutory maximum sentence and she was never given any credit for her time spent on parole even though she never violated the courts' orders to make monthly payments. Thus, her claims on appeal all challenge the legality of her revocation sentence(s).

II. ARGUMENT

1. THIS COURT MUST REJECT THE COMMONWEALTH'S ARGUMENT THAT APPELLANT WAIVED ALL OF HER ISSUES ON APPEAL BY FAILING TO ADEQUATELY IDENTIFY THEM IN HER RULE 1925(B) STATEMENT.

Ms. Bolds argues in her principal brief that the revocation court (and all of her prior revocation courts) imposed an illegal sentence when it found her in violation of parole solely due to her inability to pay the entire amount of her restitution and sentenced her to her back time with immediate parole. She asserts that the revocation court had no authority to revoke her parole under 18 Pa.C.S. § 1106 and that even if it did, the revocation sentence was illegal because there was no inquiry into her willfulness to make payments. Further, she asserts that the revocation court did not have authority to revoke her parole because she was compliant with court orders to make monthly payments. She additionally asserts that the revocation sentence was illegal as her time on supervision now extends beyond the statutory maximum sentence and she was not given credit for any of her time on parole; and that two of her prior revocation sentences were illegal because there was no sufficient waiver of counsel at her *Gagnon II* hearings before a Master.¹ All of her claims on appeal

¹ The Commonwealth contends that these waivers occurred at *Gagnon I*

relate to the legality of her revocation sentence.

The Commonwealth's response ignores the fact that Ms. Bolds' claims on appeal address the legality of her revocation sentence(s). In other words, Ms. Bolds challenges the revocation court's authority to both revoke her parole and re-sentence her to back time and restitution payments. Where a claim concerns the sentencing court's authority to impose a sentence, it is reviewable as of right on direct appeal, without regard to preservation of the claim." *Commonwealth v. Weir*, 239 A.3d 25, 34 (Pa. 2020) (citing *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1275 (Pa. 2014)); see also *Weir*, 239 A.3d at 37 (a challenge to the sentencing court's authority to order restitution raises a non-waivable legality of sentencing issue); *Commonwealth v. Koger*, __A.3d __, 2021 WL 2280978, at *4-5 (Pa. Super. June 4, 2021) (holding the trial court lacked the authority to impose a revocation sentence where the Commonwealth could not prove by a preponderance of the evidence that Appellant committed any violations as allegedly defined in the probation officer's VOP petition). Therefore, Ms. Bolds did not waive any of her claims on appeal as they all address the legality of her revocation sentences.

hearings, not *Gagnon II* hearings (see Brief for Appellee brief, at 20-22). These hearings were actually *Gagnon II* hearings that were not before a Judge, but rather before a Master, and where insufficient colloquies were performed prior to the "waivers" of counsel. See CPCMS docket and N.T. (11/18/17, at 3-4; N.T. 1/11/19, at 3-4).

Additionally, Ms. Bolds did not waive any of her claims by mistakenly averring in her Rule 1925(b) Statement that her sentence was one of probation instead of parole, nor by referencing 42 Pa.C.S. § 9763 (relating to restitution imposed as a condition of probation) instead of 18 Pa.C.S. § 1106(b) (relating to restitution imposed as a condition of parole). Whether Ms. Bolds' sentence was one of probation or parole, her claims on appeal would be the same, just without reference to 42 Pa.C.S. § 9763. Moreover, because the revocation court unequivocally concluded that restitution was ordered as a condition of the sentence, it chose not to address Ms. Bolds' remaining claims. As with restitution imposed as a condition of probation, a trial court "may" order restitution as a condition of parole – it is not a given. *See* 18 Pa.C.S. § 1106(b) ("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."). Therefore, since the revocation court concluded that restitution was not a condition of probation, it would have likewise concluded it was not a condition of parole. Regardless, because Ms. Bolds' claims all address the legality of her sentence, her claims are not waived.

The Commonwealth also argues that Ms. Bolds "agreed" throughout the duration of the case that restitution was a condition of her parole. *See* Brief for

Appellee, at 10. However, merely because she was ordered to pay restitution does not automatically mean that it was a condition of her parole. *See, supra*, § 1106(b). Additionally, her “agreement” cannot be gleaned from the fact of her being found in violation of parole multiple times. At any rate, a person cannot agree to an illegal revocation sentence. *See Commonwealth v. Tanner*, 205 A.3d 388, 399 (Pa. Super. 2019) (explaining that a guilty plea resulting in an illegal sentence is not enforceable because a contract with an illegal term is void and unenforceable).

2. THIS COURT MUST REJECT THE COMMONWEALTH'S ARGUMENT THAT A WILLFULNESS INQUIRY IS REQUIRED ONLY IF A DEFENDANT IS BEING INCARCERATED FOR FAILURE TO PAY.

Ms. Bolds argues in her principal brief that, if the restitution was ordered as a condition of her parole, the revocation sentence constituted an illegal sentence because the revocation court had no authority to revoke her parole without first inquiring whether she willfully failed to make restitution payments. The Commonwealth contends that a willfulness inquiry is only required prior to a defendant’s incarceration for failure to make payments. The Commonwealth’s position is erroneous. A finding that a defendant willfully violated a condition of probation or parole is required before a court can revoke probation or parole for a technical violation, regardless of whether the violation relates to nonpayment of

finer, costs or restitution and regardless of whether the sentence contemplated is one of incarceration.

The law in this Commonwealth is firmly established that revocation is appropriate for technical violations only when the evidence shows and the trial court finds that a defendant has “willfully disregarded the terms of his probation.” *Commonwealth v. Heilman*, 876 A.2d 1021, 1027 (Pa. Super. 2005) (“Moreover, in Pennsylvania, “cases that [have] upheld revocation on the basis of technical violations [have] found ‘wilful or flagrant disrespect’ for the terms of probation on the part of the defendants.”); *see also Commonwealth v. Allshouse*, 969 A.2d 1236, 1242 (Pa. Super. 2009) (reversing revocation because there “was no basis for the trial court's finding that the Commonwealth demonstrated by a preponderance of the evidence that Appellant willfully violated a no-contact order.”); *Commonwealth v. Carver*, 923 A.2d 495, 499 (Pa. Super. 2007) (citing *Commonwealth v. Ballard*, 814 A.2d 1242, 1246 (Pa. Super. 2003), for the proposition that probation could not be revoked “based solely upon technical violations because there was no willful or flagrant disrespect for probationary terms evidenced by defendant”); *Commonwealth v. Ballard*, 814 A.2d 1242, 1246 (Pa. Super. 2003) (explaining that a record that is “devoid of any finding by the court” that the defendant acted willfully rendered the revocation unlawful); *Commonwealth v. Dorsey*, 476 A.2d 1308,

1311-1312 (Pa. Super. 1984) (discussing that the law over time has established that willful conduct must be established in order to sustain a revocation of probation or parole); *Commonwealth v. Del Conte*, 419 A.2d 780, 782 (Pa. Super. 1980) (concluding the evidence did not establish Del Conte's "wilful or flagrant disrespect" for the terms of his parole as had been established in other cases in which the Court affirmed revocation based on technical violations.). To adopt the Commonwealth's reasoning would ignore this precedent and allow Ms. Bolds and other indigent defendants to be repeatedly punished with what becomes indefinite supervision because of their poverty and inability to pay restitution in full—which is why this Court has repeatedly and consistently refused to allow trial courts to revoke parole or probation for anything less than willful conduct.

This standard requiring a finding of willfulness is the same for cases addressing revocation for nonpayment of fines, costs or restitution. As articulated in *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328 (Pa. Super. 1994), the "willful refusal to pay . . . may be considered a technical parole violation." *Rosenberry*, 645 A.2d at 1331. The factual basis of *Rosenberry* explains that it is not the type of sentence, *i.e.* incarceration, that dictates the necessary requirements for revocation. There, the defendant's parole was illegally revoked and extended without determining that he had willfully refused to pay, as in Ms. Bolds' case.

Rosenberry later was incarcerated for an unrelated parole violation while on that illegal parole—but it was the initial revocation that this Court ruled was illegal. *Id.*

It is true that the defendants in the cited cases appealed after their supervision was revoked and they were sentenced to incarceration, but not a single one of these cases state or hold that the willfulness of the defendant’s conduct only matters if the defendant faces incarceration. Yet, the Commonwealth’s position is that in every single case decided by this Court—*Heilman*, *Carver*, *Del Conte*, *Dorsey*, *Rosenberry*, *Ballard*, *supra*— the Court actually meant willfulness is required for “incarceration” instead of merely “revocation.” That proves too much.

The only way for the Commonwealth to prevail, which would lead to an outcome where indigent defendants can be kept on parole indefinitely until they pay all fines, costs, and restitution in full—even if they are making payments when they are able to afford them—would be for this Court to overrule all of that binding precedent. This Court cannot and should not do so. Instead, by faithfully applying this precedent, it should find that the trial court has given Ms. Bolds yet another illegal sentence by illegally revoking her supervision without finding that she willfully refused to pay.

Further, the Fourteenth Amendment provides an additional constitutional protection against punishing a defendant for nonpayment absent a finding of

willfulness. Instead of asking whether the nonpayment constitutes a violation, the Fourteenth Amendment offers a backstop against *punishing* a defendant who has not willfully refused to pay. That is the central takeaway from *Bearden v. Georgia*, 461 U.S. 660 (1983): a trial court must inquire into the reasons for nonpayment, make findings on the record, and consider other sentencing alternatives if the defendant's nonpayment is not willful. *Bearden*, 461 U.S. at 672.

To be sure, the specific form of punishment before the Court in *Bearden* was incarceration following revocation, but the Commonwealth is flatly wrong when it suggests that any punishment less than incarceration escapes constitutional scrutiny. To know that the Commonwealth is wrong requires only relying on the words of the High Court itself. In *Mayer v. Chicago*, 404 U.S. 189 (1971), one of the precursors in the line leading to *Bearden*, the Court explicitly rejected the argument that the constitutional protections afforded by the Fourteenth Amendment turn on whether the defendant faces incarceration: the “invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed.” *Mayer*, 404 U.S. at 197 (requiring that the defendant be provided a free transcript for appeal even when not facing incarceration). In other words, nothing in the Fourteenth Amendment or the U.S. Supreme Court's interpretation thereof actually draws the line for

constitutional protections based on whether a defendant faces incarceration or instead, additional parole.

This Court also has rejected the argument that *Bearden* and the constitutional protections afforded to indigent defendants by the Fourteenth Amendment should be cabined to situations where a defendant faces incarceration. In *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. 1988), this Court ruled that *Bearden* and the Fourteenth Amendment are indeed applicable to situations where the defendant is merely seeking admission to Accelerated Rehabilitative Disposition, as the inability for an indigent defendant to access ARD because of a requirement to pay restitution to enter constitutes “a deprivation . . . contrary to the fundamental fairness required by the Fourteenth Amendment.” Certainly the *Melnyk* defendant was not facing the choice between ARD or incarceration, and this Court did not offer such a myopic interpretation of the Constitution.

The Commonwealth’s brief does not cite or discuss *Mayer* or *Melnyk*, and it entirely misses the mark with its suggestion that the Fourteenth Amendment’s protections apply to one form of punishment and one form only: incarceration. What has happened to Ms. Bolds, by being repeatedly placed on extended periods of parole solely because she lacked the ability to pay restitution in full, is as much a violation of the Fourteenth Amendment as if she were actually

incarcerated—although this Court need not even reach the constitutional issue because, as is set forth above, the revocation was itself illegal.

3. THIS COURT MUST REJECT THE COMMONWEALTH'S ARGUMENT THAT APPELLANT'S CLAIM THAT HER REVOCATION SENTENCE EXCEEDS THE STATUTORY MAXIMUM SENTENCE IS NOT A CHALLENGE TO THE LEGALITY OF THE SENTENCE.

Ms. Bolds also argues in her principal brief that her 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, she argues that her revocation sentence is nonetheless illegal because the trial court failed to give her any credit whatsoever for her almost 7-years of time on parole without providing any reason for doing so where she was compliant with court orders to make monthly payments.

The Commonwealth contends that this issue is waived because the decision to award credit for time spent on parole is within a trial court's discretion. It is worthwhile to point out, however, that had Ms. Bolds served her entire sentence in jail (time served to 23 months of incarceration), the revocation court would not have been able to violate her on December 16, 2020 for any inability to pay restitution

because the sentence would have exceeded the maximum statutory penalty. *Commonwealth v. Williams*, 662 A.2d 658, 659 (Pa. Super. 1995) (explaining that the new sentence imposed by the revocation court must not exceed the statutory maximum when factoring in all time spent in custody, otherwise the sentence is illegal). The revocation court would have no discretion and would have to terminate supervision.

Ms. Bolds has never been given credit for any of her time on parole. She had no arrests while on parole or any violations – the sole reason for her predicament is her inability to pay the full amount in restitution, and there has never been a finding at any prior hearing that she willfully failed to pay. Significantly, she was compliant with court orders to make monthly payments. The Commonwealth does not need to keep Ms. Bolds on parole in perpetuity to ensure payment. *See Rosenberry*, 645 A.2d at 1331. 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.”). A person can also be held in contempt for failure to pay. *Rosenberry*, 645 A.2d at 1331.

Finally, the Commonwealth’s position that the revocation court had authority to revoke Ms. Bolds’ parole because she did not comply with a court order to pay restitution in full ignores the fact that the court orders directed her to make “monthly

payments” and that *she was compliant with those orders*. See Brief for Appellee, at 19-20. The Commonwealth and revocation court seem to think she was in violation for failing to pay the entire amount of restitution, but a person cannot be found in violation for failing to pay the entire amount when the specific order of the court was to make “monthly payments” – which she did. See *Commonwealth v. Foster*, 214 A.3d 1240, 1243, 1250 (Pa. 2019) (holding that a court may only revoke probation or parole upon proof of the violation of specific conditions of the probation or parole); *Koger*, 2021 WL 2280978, at *2-5 (same). As Ms. Bolds was compliant with the courts’ orders to make monthly payments, the revocation court (and the prior revocation courts) had no authority to revoke her parole.

III.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,

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