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46 MAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

NO. 46 MAP 2018

COMMONWEALTH OF PENNSYLVANIA
Appellant

VS.

CHRISTIAN LEE FORD
Appellee

BRIEF FOR APPELLANT

Appeal from the Order of the Superior Court at No. 620 MDA 2017 dated November 30, 2017, reconsideration denied February 9, 2018, Reversing the PCRA order of the Lancaster County Court of Common Pleas, Criminal Division, at Nos. CP-36-CR-0001443-2016, CP-36-CR-0001496-2016, and CP-36-CR-0002530-2016 dated March 10, 2017 and remanding.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **Page**

UNITED STATES CASE

STATUTES

STATEMENT OF JURSIDICTION

This Honorable Court has jurisdiction to rule on the instant matter pursuant to 42 Pa.C.S. § 724(a).

ORDER IN QUESTION

In light of the foregoing, we reverse the order of the PCRA court in part, vacate the fines imposed at Case No. 2530 and Case No. 1443, and remand for resentencing in accordance with 42 Pa.C.S. § 9726…

Order denying PCRA relief reversed in part. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/30/2017

STATEMENT OF SCOPE AND STANDARD OF REVIEW

This appeal turns on an issue of statutory construction. Therefore, this Honorable Court's standard of review is *de novo*, and the scope of review is plenary. *Commonwealth v. Samuel*, 599 Pa. 166, 172, 961 A.2d 57, 60-61 (2008).

STATEMENT OF THE QUESTION INVOLVED

Where a defendant bargains for and agrees to pay a specific fine as part of a negotiated plea agreement, must the sentencing court conduct a separate inquiry into the defendant's ability to pay the agreed-upon fine?

Suggested Answer: No.

Answered in the affirmative by the Superior Court

Answered in the negative by the Court of Common Pleas

STATEMENT OF THE CASE

On June 23, 2016, the Appellee, Christian Ford, entered negotiated guilty pleas on three dockets in the Court of Common Pleas of Lancaster County. The negotiated plea agreements entered at Docket Nos. CP-36-CR-0001443-2016 ("Case 1443") and CP-36-CR-0002530-2016 ("Case 2530") each included a $100 fine. No restitution or reparation was ordered with respect to any of the cases. As part of the guilty-plea proceedings, Ford signed negotiated plea agreements for Case 1443 and Case 2530, each of which explicitly denoted the $100 fine that Ford agreed to pay. (R. 25a-26a). As part of the on-the-record colloquy, Ford confirmed that he had reviewed the plea agreements, spoken to his attorney about them, and signed them. (R. 47a). The terms of the negotiated pleas were accepted by the Court, and Ford was sentenced to, *inter alia*, pay the $200 in fines which he agreed to pay.

Ford subsequently filed a petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S. § 9741 *et seq.* ("PCRA"). Ford contended, *inter alia*, that plea counsel was ineffective for failing to object when the agreed-upon $100 fines were imposed without a formal determination of Ford's ability to pay. (R. 27a-29a). The Court of Common Pleas found no merit in any of Ford's contentions and dismissed the PCRA action. (The Court of Common Pleas' Opinion dated March 10, 2017 is attached hereto as Appendix B). Ford appealed that ruling to the Superior Court.

By Memorandum Opinion dated November 30, 2017, the Superior Court found that, even though the $200 in fines was imposed at Ford's request as part of a plea agreement, Ford was entitled to a separate hearing regarding his ability to pay those fines. (The Superior Court's Memorandum Opinion dated November 30, 2017 is attached hereto as Appendix B). The Superior Court accordingly vacated the $100 fines imposed on Cases 1443 and 2530, and remanded to the Court of Common Pleas for resentencing. By Order dated February 9, 2018, the Superior Court denied reargument of this ruling.

On August 22, 2018, this Honorable Court granted *allocatur* to determine whether a sentencing court must inquire into a defendant's ability to pay a fine which the defendant bargained for and agreed to pay as part of a negotiated plea agreement.

SUMMARY OF THE ARGUMENT

In order for a fine to be imposed, it must appear of record that the defendant will be able to pay that fine. Where the defendant bargains for and agrees to pay a particular fine as part of a plea agreement, it will always appear of record that he is able to pay that fine. The Superior Court's contrary holding burdens the plea bargaining process by unnecessarily taxing precious judicial resources. The Superior Court's contrary holding also undermines the plea bargaining process by giving the defendant the ability to renege on a fine after the plea agreement has been submitted to the court. Additionally, the Superior Court's ruling contradicts the Superior Court's own precedent, which holds that a defendant cannot raise an ability-to-pay challenge to a financial obligation imposed as part of a negotiated plea agreement.

ARGUMENT

Where a defendant bargains for and agrees to pay a specific fine as part of a negotiated plea agreement, the sentencing court is not required to conduct a separate inquiry into the defendant's ability to pay the agreed-upon fine.

Pursuant to Section 9726(c) of the Sentencing Code, a court may sentence a criminal defendant to pay a fine so long as "it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa.C.S. § 9726(c). There does not appear to be any statute, rule of procedure, or precedential authority that prescribes how the sentencing court should determine the defendant's ability to pay. The plain language of Section 9726(c) simply dictates that the defendant's ability to pay the fine must "appear of record."

In the case at bar, Ford stood before the sentencing court and tendered plea agreements in which he agreed to pay two separate $100 fines. The $100 fines were delineated on plea agreements which he signed and submitted to the court. The record thus reflected that the $100 fines at issue in this appeal were requested and agreed upon by Ford as part of the plea bargain.

Notwithstanding this record, Ford contended in his PCRA petition that the sentencing court should have inquired into his ability to pay the $100 fines. The Superior Court agreed with Ford, and held that the $100 fines were illegal because

it did not appear of record that Ford was or would be able to pay the fines. For a variety of reasons, the Superior Court erred in so ruling.

First and foremost, the Superior Court entirely overlooked the plea agreements that Ford signed and submitted at the time of his plea. A plea bargain is not a matter of adhesion, and here Ford's plea was knowingly, voluntarily, and intelligently entered. Where a defendant specifically bargains for and agrees to pay a fine and asks the court to accept the terms of the plea agreement, his conduct certifies that he is not only able but willing to pay that fine. By necessary implication, a party has the ability to perform the terms of the bargain into which he enters. The record therefore conclusively establishes that Ford was able to pay the two $100 fines at issue in this appeal.

Second, implementing the Superior Court's ruling threatens to substantially burden or even derail the plea-bargaining process. This Honorable Court has long recognized that plea bargaining is essential to the administration of criminal justice. *See, e.g., Commonwealth v. Martinez*, 637 Pa. 208, 230-31, 147 A.3d 517, 531 (2016) ("[P]lea bargain and agreements are essential components of the criminal justice system" that are "look[ed] upon...with favor."); *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (recognizing the central role negotiated plea agreements play in criminal justice system); *Commonwealth v. Alvarado*, 442 Pa. 516, 520, 276 A,2d

526, 528 (1971) ("[P]lea bargaining...frequently serv[es] the best interests of both the Commonwealth and the accused.").

Requiring a court to conduct an ability-to-pay inquiry after accepting a negotiated plea agreement unnecessarily prolongs and complicates plea proceedings. To require the sentencing court to further probe into the financial condition of a defendant who has already agreed to pay a particular fine is a burdensome waste of precious judicial resources. The Superior Court's holding forebodes the squandering of untold courtroom hours in pursuit of information which, as a necessary component of the plea agreement, is not in dispute.

The Superior Court's ruling also injects uncertainty into the plea-bargaining process. Both parties to a negotiated plea agreement need the certainty that all of the plea agreement's terms will be honored. *Cf. Martinez*, 637 Pa. at 231, 147 A.3d at 531 ("[P]lea bargains are clearly contractual in nature."). If the defendant can remove the agreed-upon fine through some eleventh-hour, post-negotiation claim of poverty, the Commonwealth will never be able to submit a negotiated plea agreement with confidence that its aims and concerns will be satisfied. Such uncertainty would hamstring the effectiveness of the plea-negotiation process.

Third, not only does the Superior Court's ruling imperil the plea-bargaining process, it also contradicts the Superior Court's own precedential authority. Specifically, in *Commonwealth v. Gardner*, 632 A.2d 556 (Pa. Super. 1993), *appeal*

denied, 539 Pa. 665, 652 A.2d 835 (Pa. 1994), Jesse Gardner entered into a negotiated guilty plea pursuant to which he agreed to pay restitution. *Gardner*, 632 A.2d at 556-57. At the time of the plea, the total amount of restitution had not been ascertained, but Gardner was aware of what the maximum amount of restitution could be. *Id.* After sentencing, Gardner alleged that the sentencing court should have separately inquired into his ability to pay the final restitution figure. At the time, a sentencing court could not order the payment of restitution without first determining the defendant's ability to pay. *See, e.g., Commonwealth v. McKiel*, 629 A.2d 1012 (Pa. Super. 1993); *Commonwealth v. Galloway*, 448 A.3d 568, 577 (Pa. Super. 1982).[1] Nonetheless, the Superior Court held that Gardner "had agreed to pay restitution as part of the plea agreement" and so he was foreclosed from "rais[ing] the question of his ability to pay." *Id.*

The Superior Court's holding in the case at bar cannot be squared with the *Gardner* panel's ruling. Because the *Gardner* decision is a precedential authority, and because its holding is supported by common sense, it is respectfully submitted that the Superior Court's contrary holding was legally erroneous and should be overturned. The Commonwealth and the sentencing court had reason to expect, in accordance with *Gardner*, that no separate ability-to-pay determination needed to be

[1] The requirement of a pre-sentence assessment of the defendant's ability to pay restitution terminated in 1995, when the General Assembly amended 18 Pa.C.S. § 1106(c) to require mandatory restitution regardless of ability to pay.

made in connection with a negotiated guilty plea. To allow the Superior Court to suddenly and arbitrarily subject the case at bar to a radically different standard on collateral review is contrary to precedent and fundamentally unfair.

CONCLUSION

Where a defendant bargains for and agrees to pay a $100 fine as part of a knowingly, voluntarily, and intelligently tendered plea agreement, there is no need for the sentencing court to further probe into the defendant's ability to pay that fine. To conserve precious judicial resources, to maintain the certainty that must undergird the plea bargaining process, and to vindicate common sense, it is respectfully requested that this Honorable Court **REVERSE** the Superior Court's ruling and uphold the Court of Common Pleas' denial of Ford' PCRA action.

Respectfully submitted,

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Dated: November 1, 2018

APPENDIX A

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
CHRISTIAN LEE FORD,	:	
Appellant	:	No. 620 MDA 2017

Appeal from the PCRA Order March 10, 2017
in the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0001443-2016,
CP-36-CR-0001496-2016, and CP-36-CR-0002530-2016

BEFORE: LAZARUS, DUBOW, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED NOVEMBER 30, 2017**

Christian Lee Ford (Appellant) appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Upon review, we reverse the order in part and remand for proceedings consistent with this memorandum.

On June 23, 2016, Appellant entered into a negotiated plea agreement for three informations, and was sentenced accordingly as follows.

CP-36-CR-0001443-2016 (Case No. 1443):

- two to four years of incarceration and a fine of $100 at count one (35 P.S. § 780-113(a)(30));
- two years of probation at count two (18 Pa.C.S. § 5104);
- one year of probation at count three (35 P.S. § 780-113(a)(32));

CP-36-CR-0001496-2016 (Case No. 1496):

*Retired Senior Judge assigned to the Superior Court.

- one to four years of incarceration and a fine of $1,500 at count one (75 Pa.C.S. § 3802(d)(1)(ii));
- count two (75 Pa.C.S. § 3802(d)(1)(iii)) merged;
- count three (75 Pa.C.S. § 3802(d)(2)) merged;
- 90 days of incarceration and a fine of $1,000 at count four (75 Pa.C.S. § 1543(b)(1));

CP-36-CR-0002530-2016 (Case No. 2530):

- three years of probation and a fine of $100 at count one (35 P.S. § 780-113(a)(16));
- one year of probation at count two (35 P.S. § 780-113(a)(32)).

All periods of incarceration and probation were ordered to be served concurrently, and costs were imposed as to all counts.

Appellant did not file post-sentence motions or a direct appeal. On September 22, 2016, Appellant filed *pro se* a document entitled "Petition for Review," which the PCRA court properly treated as a timely-filed PCRA petition. The PCRA court appointed counsel, who filed an amended PCRA petition on Appellant's behalf.

On January 26, 2017, the PCRA court issued a notice pursuant to Pa.R.Crim.P. 907, indicating its intention to dismiss Appellant's petition without a hearing. Appellant did not file a response, and on March 10, 2017, the PCRA court dismissed Appellant's petition. Appellant timely filed a notice of appeal.[1]

[1] Appellant complied with the PCRA court's order to file a concise statement of errors complained of on appeal. The PCRA court did not provide an opinion (*footnote continued on next page*)

Appellant raises two issues for our consideration.

> A. Whether the [PCRA] court ... erred in refusing post-conviction relief where the sentencing court imposed a penalty of fines and costs without a hearing on Appellant's ability to pay, or whether payment would interfere with Appellant's ability to pay restitution?
>
> B. Whether the [PCRA] court ... erred in denying post-conviction relief where trial counsel failed to object to, or take reasonable steps to correct, the imposition of an illegal sentence of fines on his client?

Appellant's Brief at 4.

"Our standard of review of a [PCRA] court order granting or denying relief under the PCRA calls upon us to determine 'whether the determination of the PCRA court is supported by the evidence of record and is free of legal error.'" ***Commonwealth v. Barndt***, 74 A.3d 185, 192 (Pa. Super. 2013) (quoting ***Commonwealth v. Garcia***, 23 A.3d 1059, 1061 (Pa. Super. 2011)).

With respect to his first issue, Appellant contends that the PCRA court erred in rejecting his claim that the sentencing court imposed an illegal sentence of fines and costs without conducting a pre-sentence hearing on his ability to pay.[2] Appellant's Brief at 8-9.

(*footnote continued*)
pursuant to Pa.R.A.P. 1925(a), but instead relied upon its March 10, 2017 opinion, wherein the PCRA court addressed its reasons for denying Appellant's PCRA petition.

[2] Notably, Appellant does not address his claim as to costs within the argument section of his brief. Appellant's Brief at 8-11 (addressing fines only). This (*footnote continued on next page*)

Here, Appellant agreed to the imposition of fines and costs as part of his negotiated plea agreements. ***See*** Negotiated Plea Agreements, 6/23/2016; N.T. 6/23/2016, at 2-4, 7-8. Nevertheless, a PCRA petitioner may challenge the legality of a negotiated sentence. ***Commonwealth v. Rivera***, 154 A.3d 370, 381 (Pa. Super. 2017) (*en banc*); ***Commonwealth v. Gentry***, 101 A.3d 813, 819 (Pa. Super. 2014) ("[A] defendant cannot agree to an illegal sentence, so the fact that the illegality was a term of his plea bargain is of no legal significance.").

The PCRA court addressed this claim as follows.

> While there is no requirement in Pennsylvania that a trial judge must consider, in the first instance, a criminal defendant's ability to pay the costs of prosecution and attendant fees, such a

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(*footnote continued*)
issue is waived for lack of development. ***Harkins v. Calumet Realty Co.***, 614 A.2d 699, 703 (Pa. Super. 1992) ("Issues in the statement of questions presented and not developed in argument are also deemed waived."). Even if this Court were to address this claim, we find that Appellant's claim that the imposition of costs without a pre-sentence hearing on his ability to pay rendered his sentence illegal lacks any legal basis.

> Generally, a defendant is not entitled to a pre-sentencing hearing on his or her ability to pay costs. 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.

Commonwealth v. Childs, 63 A.3d 323, 326 (Pa. Super. 2013) (internal citations and quotations omitted) (emphasis in original). If appellant at some point in the future is unable to make payments, then the sentencing court will be required to conduct a hearing on Appellant's ability to pay before ordering incarceration for failure to pay.

> requirement exists with respect to general fines. ... 42 Pa.C.S.[ ] § 9726(c). This section does not, however, apply to the mandatory fine provisions applicable in this case.

PCRA Court Opinion, 3/10/2017, at 12.

A sentencing court may impose a fine as an additional sanction in certain circumstances. 42 Pa.C.S. § 9721(a); 42 Pa.C.S. § 9726(b). A sentencing court "shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa.C.S. § 9726(c). This Court has held that

> a claim that the trial court failed to consider the defendant's ability to pay a fine can fall into several distinct categories. First, a defendant may claim that there was no record of the defendant's ability to pay before the sentencing court. In the alternative, a defendant may claim that the sentencing court did not consider evidence of record. Finally, a defendant may claim that the sentencing court failed to permit the defendant to supplement the record.
>
> After reviewing these categories, we conclude that only the first type of claim qualifies as non-waivable.... Section 9726(c) requires that it be "of record" that the defendant can pay the fine. Therefore, an argument that there was no evidence of the defendant's ability to pay constitutes a claim that the fine was imposed in direct contravention of a statute. Furthermore, a complete lack of evidence in the record would be apparent from the face of the record and would not require the application of reasoning or discretion on the part of the appellate court. Accordingly, we conclude [ ] that a claim raising the complete absence of evidence of the defendant's ability to pay is not subject to waiver for a failure to preserve the issue in the first instance.

Commonwealth v. Boyd, 73 A.3d 1269, 1273–74 (Pa. Super. 2013) (*en banc*). However, a pre-sentence hearing on the ability to pay is not required prior to the imposition of mandatory fines. ***Commonwealth v. Gipple***, 613 A.2d 600, 601 n. 1 (Pa. Super. 1992).

After review of the plea/sentencing transcript we agree with Appellant that no inquiry was made, and no record existed, as to Appellant's ability to pay the agreed-upon fines at the time of his sentencing hearing. As such, Appellant's claim falls under the first type set forth in ***Boyd***, and his claim challenges the legality of his sentence.

At Case No. 1496, Appellant was ordered to pay a fine of $1,500 for a violation of 75 Pa.C.S. § 3802(d)(1)(ii). The Motor Vehicle Code provides that a defendant convicted under this subsection for a second offense shall "pay a fine of not less than $1[,]500...." 75 Pa.C.S. § 3804(c)(2)(ii). Appellant was ordered to pay the mandatory minimum fine, and thus Appellant was not entitled to a pre-sentence hearing on his ability to pay this fine.

Appellant was also ordered at this information to pay a fine of $1,000 for a violation of 75 Pa.C.S. § 1543(b)(1). A defendant convicted under this subsection "shall be sentenced to pay a fine of $500...." 75 Pa.C.S. § 1543(b)(1). As noted above, a pre-sentence hearing on the ability to pay is not required for mandatory fines. However, the sentencing court improperly imposed the mandatory fine applicable to a violation of 75 Pa.C.S.

§ 1543(b)(1.1)(i), not 75 Pa.C.S. § 1543(b)(1), the subsection under which Appellant actually was convicted.[3] Thus, because the fine imposed exceeded the statutorily mandated fine, and was imposed without a hearing on Appellant's ability to pay, that portion of the sentence is illegal.

At Case No. 2530, Appellant was ordered to pay a fine of $100 for a violation of 35 P.S. § 780-113(a)(16). A defendant "shall, on conviction thereof, be sentenced to imprisonment not exceeding one year **or** to pay a fine not exceeding five thousand dollars ($5,000), **or** both." 35 P.S. § 780-113(b) (emphasis added). The imposition of a fine for possession of a controlled substance is discretionary, and Appellant was entitled to a pre-sentence hearing on his ability to pay. ***See Commonwealth v. Thomas***, 879 A.2d 246, 264 (Pa. Super. 2005) (vacating sentence where trial court did not make specific findings on defendant's ability to pay the fine imposed).

At Case No. 1443, Appellant was ordered to pay a fine of $100 for a violation of 35 P.S. § 780-113(a)(30). A defendant "shall be sentenced to imprisonment not exceeding fifteen years, **or** to pay a fine not exceeding two hundred fifty thousand dollars ($250,000), **or** both **or** such larger amount as is sufficient to exhaust the assets utilized in and the profits obtained from the illegal activity." 35 P.S. § 780-113(f) (emphasis added). Again, the

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[3] 75 Pa.C.S. § 1543(b)(1.1.)(i) provides that a defendant "shall be sentenced to pay a fine of $1,000 and to undergo imprisonment for a period of not less than 90 days."

imposition of this fine was discretionary, and thus Appellant was entitled to a pre-sentence hearing on his ability to pay. ***Thomas***, 879 A.2d at 264.

With respect to his second issue, Appellant contends that trial counsel was ineffective for failing to object to, or take reasonable steps to correct, Appellant's illegal sentence of fines. Counsel was ineffective for failing to raise this claim, however, because we have granted relief as to the illegal portions of Appellant's sentences regarding fines, this claim is moot. The only remaining fine (count one of Case No. 1496) was a mandatory fine, and thus, as detailed hereinabove, no pre-sentence hearing was required. Accordingly, we find that counsel was not ineffective for failing to raise that meritless claim. ***See Commonwealth v. Tilley***, 80 A.2d 649 (Pa. 2001) (holding that counsel will not be deemed ineffective for failing to raise a meritless claim).

In light of the foregoing, we reverse the order of the PCRA court in part, vacate the fines imposed at Case No. 2530 and Case No. 1443, and remand for resentencing in accordance with 42 Pa.C.S. § 9726. We vacate Appellant's fine at count four of Case No. 1496 and remand for resentencing consistent with 75 Pa.C.S. § 1543(b)(1). We affirm the PCRA order in all other respects.[4]

Order denying PCRA relief reversed in part. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

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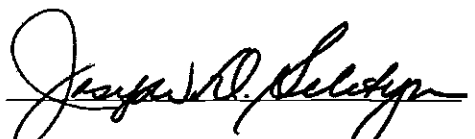
[4] If the Commonwealth believes that it is no longer receiving the benefit of the bargain it agreed to with Appellant, it may ask the PCRA court to vacate the convictions prior to resentencing.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/30/2017

APPENDIX B

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
C R I M I N A L

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	Nos. 1443-2016, 1496-2016, 2530-2016
	:	
CHRISTIAN LEE FORD	:	

Pa.R.A.P. 1925(a) MEMORANDUM OF OPINION

BY: ASHWORTH, J., APRIL 28, 2017

Defendant Christian Lee Ford has filed an appeal to the Superior Court of Pennsylvania from the denial on March 10, 2017, of his amended petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46. The reasons for the denial of that petition are stated in my March 10, 2017 Opinion and Order. Defendant's concise statement of errors complained of on appeal identifies the same issues addressed in my Opinion of March 10, 2017. Therefore, I rely on that Opinion to comply with Pa. R.A.P. 1925(a).

BY THE COURT:

DAVID L. ASHWORTH
JUDGE

Copies to: Susan E. Moyer, Assistant District Attorney
R. Russell Pugh, Esquire

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :
:
v. : Nos. 1443-2016, 1496-2016, 2530-2016
:
CHRISTIAN LEE FORD :

OPINION

BY: ASHWORTH, J., MARCH 10, 2017

Before the Court is Christian Lee Ford's amended petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-46. For the reasons set forth below, this amended petition will be dismissed without a hearing.[1]

I. Background

On July 14, 2015, Ford was involved in a one-car accident in East Lampeter Township at which time he ran off the road and struck several mailboxes and a fire hydrant. The police officer who responded to the scene found Ford to be unsteady on his feet, unable to follow directions, and exhibiting constricted pupils. Ford was transported by ambulance to the hospital for evaluation and treatment of injuries. At the

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[1]Under Rule 907 of the Pennsylvania Rules of Criminal Procedure, a PCRA court may dispose of a post conviction collateral relief petition without a hearing if it is satisfied after reviewing the materials submitted that no genuine issues of material fact exist and that the petitioner is not entitled to post conviction relief. *See also* **Commonwealth v. Taylor**, 933 A.2d 1035, 1040 (Pa. Super. 2007) ("[A] petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings.") (citation omitted).

hospital, Ford was advised he was under arrest for DUI and further advised of implied consent. While being read PennDOT's form DL-26 ("Chemical Testing Warnings and Report of Refusal to Submit to Chemical Testing"), Ford interrupted, stating: "I know what's in my system: Cocaine, Xanax, Percoset 15 and Marijuana." Ford submitted to a blood test which confirmed the presence of drugs in his system.

As a result, Ford was charged at No. 1496-2016 with the following: DUI: Controlled Substance – Schedule II Drugs (Cocaine and Amphetamines); DUI: Controlled Substance – Metabolites (Cocaine and Heroin); DUI: Controlled Substance – Impaired Ability; and Driving with a Suspended License.[2] When Ford failed to appear for his preliminary hearing on these charges on September 2, 2015, a bench warrant was issued for his arrest.

Ford was eventually apprehended by the police on the outstanding bench warrant on March 18, 2016. After being told he was under arrest, Ford fled on foot and had to be chased down. Once caught and taken to the ground, Ford then refused to put his hands behind his back, causing the officers to use substantial force to handcuff him. A search incident to arrest revealed 159 bags of heroin and $320.25 in U.S. currency on Ford's person. A digital scale and syringes were also found in Ford's possession. As a result, Ford was charged at No. 1443-2016 with possession with intent to deliver (PWID) heroin, resisting arrest and possession of drug paraphernalia.[3] Bail was posted on March 28, 2016, and Ford was released from custody.

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[2]75 P.S. § 3802(D)(1)(ii), 75 P.S. § 3802(D)(1)(iii), 75 P.S. § 3802(D)(2), and 75 P.S. § 1543(B)(1), respectively.

[3]35 P.S. § 780-113(A)(30), 18 Pa.C.S.A. § 5104, and 35 P.S. § 780-113(A)(32), respectively.

On April 21, 2016, the bail bondsman, who was attempting to revoke Ford's bail and return him to Lancaster County Prison, called for police assistance when he discovered that Ford was in possession of a needle and heroin packets. The police arrested Ford and charged him at No. 2530-2016 with possession of a controlled substance and drug paraphernalia.[4]

On June 23, 2016, Ford entered into three separate negotiated plea agreements on each of the three above-referenced Informations. I accepted the tendered pleas (Notes of Testimony, Guilty Plea (N.T.) at 4, 13), and immediately sentenced Ford in accordance with the negotiated agreements. At No. 1443-2016, Ford received a sentence of two to four years' incarceration on the PWID charge and probationary terms of two years and one year for the resisting arrest and possession of drug paraphernalia charges. This sentence was concurrent with the sentences imposed at Nos. 1496-2016 and 2530-2016. The negotiated plea included a $100.00 fine, a $250.00 fee and forfeiture of $325.25. Costs were imposed on all counts. (Id. at 2-3.)

At No. 1496-2016, Ford received a sentence of one to four years' incarceration on Count 1, DUI: Controlled Substance (Cocaine and Amphetamines), and a concurrent sentence of 90 days' incarceration for the offense of driving while suspended. The other two DUI counts merged with Count 1 for sentencing purposes. Ford also received fines of $1,500.00 for his second DUI offense[5] and $1,000.00 for the

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[4]35 P.S. § 780-113(A)(16), and 35 P.S. § 780-113(A)(32), respectively.

[5]Ford was subject to the DUI mandatory sentence for a second offense, having committed his first DUI on September 9, 2010. The tier III sentence includes a mandatory fine of $1,500.00. *See* 75 P.S. § 3804(e).

driving charge,[6] and was ordered to pay restitution in the amount of $107.00 for the damaged mailboxes. Costs were also imposed on all counts. (N.T. at 3.)

At No. 2530-2016, Ford received probationary terms of three years for drug possession and one year for drug paraphernalia possession. Ford also agreed to a $100 fine and costs. These sentences were concurrent to the sentences at Nos. 1443-2016 and 1496-2016. (N.T. at 4.) Ford received time credit for 75 days and was made eligible for a Recidivism Risk Reduction Incentive (RRRI) sentence of 18 months. (Id. at 13.)

Ford filed neither post sentence motions nor a direct appeal from the above judgment of sentence. Ford was represented at the guilty plea and sentencing hearing on June 23, 2016, by the Lancaster County Public Defender's Office and, specifically, Patricia Spotts, Esquire.

On September 20, 2016,[7] Ford, acting *pro se*, filed a timely "petition for review" which I treated as a petition post conviction collateral relief, challenging the legality of his sentence.[8] Pursuant to Rule 904(A) of the Pennsylvania Rules of Criminal

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[6]Ford was subject to the DUI-enhanced mandatory sentence of 90 days' incarceration and a $1,000.00 fine for driving with a suspended license as a result of a previous DUI conviction. *See* 75 P.S. § 1543(b).

[7]The pleading is deemed filed on the date of mailing rather than the date of docketing, September 22, 2016, pursuant to the "prisoner mailbox rule." **Commonwealth v. Crawford**, 17 A.3d 1279, 1281 (Pa. Super. 2011) ("Under the prisoner mailbox rule, we deem a *pro se* document filed on the date it is placed in the hands of prison authorities for mailing.").

[8]This petition was outside the time period for a motion to modify sentence. Ford's petition challenged the authority of the sentencing court to impose fines, costs and restitution without first ascertaining his ability to pay and, thus, challenged the legality of his sentence. *See* **Commonwealth v. Boyd**, 73 A.3d 1269, 1273 (Pa. Super. 2013) (*en banc*) (a claim that there is no record of a defendant's ability to pay a fine before the court is a legality of sentence issue that cannot be waived); **Commonwealth v. Childs**, 63 A.3d 323, 325 (Pa. Super. 2013) (*en*

Procedure, R. Russell Pugh, Esquire, was appointed to represent Ford on his collateral claims. After consulting with Ford, Attorney Pugh filed an amended petition on December 27, 2016, which represents that: (1) Ford "has been subjected to a sentence in excess of the lawful maximum, to wit, the Court did not conduct a hearing or find facts related to Ford's ability to pay the fines and costs imposed"; (2) Ford's "inability to pay the fines and costs will prevent him from being paroled at his minimum, or prior to expiration of the maximum"; and (3) trial counsel was ineffective for failing to pursue a sentence modification or direct appeal from the unlawful sentence. (*See* Amended PCRA Petition at ¶¶ 7-9.) The Commonwealth filed a timely response to the amended petition denying the need for an evidentiary hearing.

After reviewing Ford's amended PCRA petition and the Commonwealth's response thereto, I found that there were no disputed issues of fact, Ford was not entitled to post conviction collateral relief, and no purpose would be served by any further proceedings. Therefore, on January 26, 2017, pursuant to Pa.R.Crim.P. 907(1), I filed a notice of my intention to dismiss the amended PCRA petition without a hearing. Ford was given 30 days to file an amended petition or to otherwise respond to the Court's Notice. No response has been filed with the Court.

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banc) (stating that a claim contesting the authority of the sentencing court to impose fees and costs constitutes a challenge to the legality of the sentence). Issues concerning legality of sentence are cognizable under the PCRA. *See* **Commonwealth v. Concordia**, 97 A.3d 366, 372 (Pa. Super. 2014) (stating that "while challenges to the legality of a defendant's sentence cannot be waived, they ordinarily must be raised within a timely PCRA petition"). Furthermore, any petition filed after a judgment of sentence has become final should be treated as a PCRA petition. **Commonwealth v. Johnson**, 803 A.2d 1291, 1293 (Pa. Super. 2002). Ford's petition was filed within one year of when the judgment of sentence became final. Clearly, this Court has jurisdiction under the PCRA to address the petition. *See* 42 Pa.C.S.A. § 9545(b).

II. Eligibility for PCRA Relief

Initially, I note that "[t]he entry of a guilty plea constitutes a waiver of all defenses and defects except claims of lack of jurisdiction, invalid guilty plea, and illegal sentence." **Commonwealth v. Kennedy**, 868 A.2d 582, 593 (Pa. Super. 2005). Ford has not challenged the jurisdiction of this Court nor does he challenge the validity of his guilty plea. Ford's amended petition does, however, dispute the legality of his sentence. Specifically, Ford claims his sentence is illegal because I failed to hold a hearing regarding his ability to pay the fees, costs and fines assessed against him as part of his sentence. Ford's argument implicates the authority of the court to impose costs and fines as part of a sentence, which concerns the legality of a sentence. *See* **Childs**, *supra*. Legality of sentence is always subject to review within the PCRA. *See* 42 Pa.C.S.A. § 9543(a)(2)(vii).

Ford further claims his trial counsel was ineffective for failing to pursue a sentence modification or direct appeal from the unlawful sentence which resulted from the Court's failure to hold an ability-to-pay hearing. "A criminal defendant has the right to effective counsel during a plea process as well as during trial." **Commonwealth v. Hickman**, 799 A.2d 136, 141 (Pa. Super. 2002).

The law presumes that counsel rendered effective assistance. **Commonwealth v. Spotz**, 610 Pa. 17, 44, 18 A.3d 244, 259-60 (2011). To overcome this presumption, a petitioner must show that (1) the underlying substantive claim is of arguable merit, (2) the counsel had no reasonable basis for his conduct, and (3) the ineffectiveness caused the petitioner prejudice. Id. at 44-45, 18 A.3d at 260. The petitioner bears the

burden of proving all three prongs of the test. **Commonwealth v. Meadows**, 567 Pa. 344, 787 A.2d 312, 319-20 (2001).

In order to prevail on an ineffective assistance of counsel for failure to file a post-sentence motion claim, the petitioner must establish prejudice. **Commonwealth v. Liston**, 602 Pa. 10, 16, 977 A.2d 1089, 1092 (2009) ("[T]he failure to file post-sentence motions does not fall within the limited ambit of situations where a defendant alleging ineffective assistance of counsel need not prove prejudice to obtain relief.") To establish prejudice, a petitioner must demonstrate that "there is a reasonable probability that but for the act or omission in question, the outcome of the proceedings would have been different." **Commonwealth v. Spencer**, 892 A.2d 840, 842 (Pa. Super. 2006). "A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness." **Commonwealth v. Daniels**, 600 Pa. 1, 17, 963 A.2d 409, 419 (2009). Thus, when it is clear that a petitioner has failed to meet the prejudice prong of the ineffective assistance of counsel test, the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met. **Commonwealth v. Baker**, 880 A.2d 654, 656 (Pa. Super. 2005).

III. Discussion

A. Legality of Sentence

Initially, Ford claims that because "the Court did not conduct a hearing or find facts related to Ford's ability to pay the fines and costs imposed, and whether the payment of fines and costs would prejudice payment of restitution," his sentence is "in

excess of the lawful maximum." (*See* Amended PCRA Petition at ¶ 8.) Ford seeks, therefore, to have his sentence vacated and sentence reimposed without assessment of fines and costs. (Id. at ¶ 11.) The Commonwealth objects to this argument on two grounds: first, a court cannot modify the terms of a negotiated plea agreement without the consent of the Commonwealth; and, second, a sentencing court is not required to conduct a hearing at the time fines and costs are imposed. I must concur with the Commonwealth that Ford's challenge to the legality of his sentence is wholly without merit.

It is well established in Pennsylvania that because plea bargaining is such an integral part of our criminal justice system, specific enforcement of valid plea bargains is a matter of fundamental fairness. **Commonwealth v. Mebane**, 58 A.3d 1243, 1249 (Pa. Super. 2012). As our Superior Court stated in **Commonwealth v. Parson**, 969 A.2d 1259 (Pa. Super. 2009) (*en banc*), "when the parties enter the plea agreement on the record and the court accepts and approves the plea, then the parties and the court must abide by the terms of the agreement." Id. at 1268 (citations omitted). Our appellate court has also explained that

> where the parties have reached a specific sentencing agreement and the court has conducted a colloquy with the defendant regarding the terms of the agreement, the court cannot later modify the terms of the agreement without the consent of the Commonwealth. In effect, this would deny the Commonwealth the full benefit of the agreement which it reached with the defendant and the defendant, in turn, would receive a windfall.

Commonwealth v. Townsend, 693 A.2d 980, 983 (Pa. Super. 1997) (citation omitted). "A 'mutuality of advantage' to defendants and prosecutors flows from the ratification of

the bargain. When a defendant withdraws or successfully challenges his plea, the bargain is abrogated and the defendant must be prepared to accept all of the consequences which the plea originally sought to avoid." **Parson**, *supra* at 1267-68.

In the instant matter, the record reflects that the fines, costs and restitution were included in the three plea agreements. (*See* Plea Agreements for Nos. 1443-2016, 1496-2016, 2530-2016.) Ford acknowledged reviewing and signing all of the plea agreements.[9] (N.T. at 5.) In my oral colloquy with Ford, I reviewed the potential fines associated with each of the charged offenses. (Id. at 7-8.) When the Commonwealth presented the agreements in open court, pursuant to Pa.R.Crim.P. 590(B)(1), it was expressly stated on the record that Ford must pay all fines, restitution and costs. (Id. at 2-4.) Ford did not dispute the fines and restitution figures.[10] When I specifically asked Ford if he had any questions regarding the plea agreements, Ford only referred to his eligibility for a RRRI sentence. (Id. at 8.) Thus, it is abundantly clear that, at the time Ford entered his guilty pleas, as a part of the plea agreements, he specifically agreed, on the record, to pay the restitution, fines, and costs associated with his charges.

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[9]I note that the statements made during a plea colloquy bind a criminal defendant. *See* **Commonwealth v. Muhammad**, 794 A.2d 378, 384 (Pa. Super. 2002).

[10]The fact that neither the Commonwealth nor the Court delineated the exact amount of costs to be imposed is not determinative in this case. *See* **Commonwealth v. Mazer**, 24 A.3d 481, 484 (Pa. Cmwlth. 2011) (court need not set forth specific costs to be collected; practice of judge ordering defendant to pay costs, and leaving assessment of amount of costs to clerk is common practice); **Richardson v. Pennsylvania Dept. of Corrections**, 991 A.2d 394, 397 (Pa. Cmwlth. 2010) ("We see no impediment to the clerk's performing [the] ministerial duty [of calculating costs], if, . . . the imposition of costs generally has been authorized by the trial judge"; "[c]alculating the amount of costs imposed by the trial judge is a . . . ministerial and appropriate role for the Clerk").

The payment of fines, costs and restitution was as much a part of the negotiated plea agreement as the concurrency among the three dockets, time to be served in the state correctional facility, time to be served on probation, and any conditions imposed as a part of probation or parole. The Commonwealth has indicated that it does not consent to the removal of the fines and/or costs, or any other portion of the negotiated plea agreements, from the terms of the agreements on the three dockets. This Court has no ability to unilaterally alter the agreements by lessening or eliminating the fines and costs without the Commonwealth's consent.[11]

Ford received the benefit of the plea agreements in this case and cannot now seek to alter part of the agreements as to the sentence by challenging the fines and costs to be paid to the Commonwealth. To do so would "deny the Commonwealth the

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[11]Moreover, I lack the authority to simply vacate the costs as they are statutorily imposed upon every criminal defendant sentenced in this Commonwealth. The Sentencing Code states that

> 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. . . .

42 Pa.C.S.A. § 9721(c.1) (emphasis added). Section 9728 further provides that "in the event the court fails to issue an order . . . imposing costs upon the defendant, the *defendant shall nevertheless be liable for costs*, as provided in section 9721(c.1)," and "[a]ny sheriff's costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other *costs associated with the prosecution, shall be borne by the defendant*. . . ." 42 Pa.C.S.A. § 9728(b.2),(g) (emphasis added). Ford, therefore, is responsible for costs regardless of whether the Commonwealth specifically negotiates for them in the guilty plea or not. *See* 42 Pa.C.S.A. § 9721(c.l); 42 Pa.C.S.A. § 9728(b.2),(g); **Mazer**, *supra;* **Richardson**, *supra*. Ford cites no law indicating he is immune from payment of statutorily mandated court costs simply because his plea bargain did not expressly delineate the amounts. The caveat to this is Rule 706 of the Rules of Criminal Procedure which does not bar assessment of costs based on indigency at the time of sentencing, but only provides for a hearing on ability to pay and for possible reduction or payment by installments before a defendant may be imprisoned for failure to pay or where the defendant requests a hearing on inability to pay the installments set by the court. Pa.R.Crim. P. 706. *See also* discussion, *infra*.

full benefit of the agreement which it reached with the defendant and the defendant, in turn, would receive a windfall." **Townsend**, *supra* at 983. Accordingly, Ford's claim that his sentence was illegal lacks merit and may be dismissed on this basis alone.

With regard to my failure to ascertain Ford's financial status before accepting the negotiated plea agreements and imposing fines and costs as part of his sentence, our Superior Court has only recently addressed this argument in the panel decision issued in **Childs**, *supra*. There, the Court reasoned:

> 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.[12] Id. at 337

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[12]Rule 706 of the Pennsylvania Rules of Criminal Procedure 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.

(emphasis added). In **Hernandez**, we were required to determine whether Rule 706 was constitutional in light of **Fuller v. Oregon**, 417 US. 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. Accordingly, the trial court did not err in denying Appellant a hearing on his ability to pay costs.

Childs, 63 A.3d at 326.

While there is no requirement in Pennsylvania that a trial judge must consider, in the first instance, a criminal defendant's ability to pay the costs of prosecution and attendant fees, such a requirement exists with respect to general fines. Section 9726(c)(1) of the Judicial Code states that "[t]he court shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa.C.S.A. § 9726(c). This section does not, however, apply to the mandatory fine provisions applicable in this case.

Here, Ford entered a negotiated plea agreement with terms consistent with the mandatory minimum sentencing provisions established by the legislature at 75 P.S. §§ 1543 (driving while operating privilege is suspended or revoked) and 3804 (DUI offenses). Specifically, Ford was sentenced to the DUI-enhanced penalties of Section

1543(b) of 90 days' incarceration and a mandatory fine of $1,000.00,[13] and to the DUI mandatory sentence provisions set forth in Section 3804(e) of 90 days' incarceration and a mandatory fine of $1,500.00 for a second offense, tier III DUI offense.[14] This sentencing court, therefore, lacks authority to impose a sentence less severe than that mandated by the legislature. *See* **Commonwealth v. Mazzetti**, 615 Pa. 555, 564, 44 A.3d 58, 64 (2012) (where a mandatory minimum sentence applies, the court is deprived of the discretion to impose an alternative); **Mebane**, 58 A.3d at 1249 (sentencing court generally prohibited from imposing a sentence inconsistent with an applicable mandatory minimum sentence). *See also* **Commonwealth v.**

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[13]Section 1543 provides, in pertinent part:

> (1.1)(i) A person who has an amount of alcohol by weight in his blood that is equal to or greater than .02% at the time of testing or who at the time of testing has in his blood any amount of a Schedule I or nonprescribed Schedule II or III controlled substance, as defined in . . . The Controlled Substance, Drug, Device and Cosmetic Act, or its metabolite or who refuses testing of blood or breath and who drives a motor vehicle on any highway or trafficway of this Commonwealth at a time when the person's operating privilege is suspended or revoked . . . shall, upon a first conviction, be guilty of a summary offense and *shall be sentenced to pay a fine of $1,000* and to undergo imprisonment for a period of not less than 90 days.

75 P.S. § 1543(b)(1)(1.1)(i)) (emphasis added).

[14]Section 3804 of the DUI statute provides specific penalties for DUI offenders as follows:

> § 3804. Penalties
> * * *
> (c) Incapacity; highest blood alcohol; controlled substances.– An individual who violates . . . section 3802(c) or (d) shall be sentenced as follows:
> * * *
> (2) For a second offense, to:
> (i) undergo imprisonment of not less than 90 days;
> (ii) pay a fine of not less than $1,500;
> (iii) attend an alcohol highway safety school approved by the department; and
> (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

75 P.S. § 3804(c).

Popielarcheck, 151 A.3d 1088, 1092 (Pa. Super. 2016) (recognizing the mandatory sentencing schemes, with enhanced penalties based on prior DUI offenses, in Section 3804 of the Pennsylvania DUI statue). The language of Sections 1543 and 3804 evinces an unequivocal intent by the legislature that persons committing multiple DUIs, while driving with a suspended license as a result of a previous DUI conviction, be punished according to the minimum sentences set forth therein. Ford's suggestion that the mandatory minimum sentencing provisions of Sections 1543 and 3804 must make allowance for a defendant who lacks the present ability to pay the fines lacks support in the statute and in caselaw. For this reason, Ford's right to a hearing to determine his ability to pay the mandatory fines of $1,000.00 for driving with a suspended license and $1,500.00 for a second, tier III DUI offense is not afforded.

Again, it bears repeating that, in the instant case, Ford negotiated his plea agreements, which included the payment of these mandatory fines. At his guilty plea/sentencing hearing, Ford had the opportunity to present evidence to persuade the Court not to impose the fines. He was silent as to that part of his sentence related to the payment of fines and costs. Thus, Ford's claim that his sentence was illegal for failure of the Court to hold an ability-to-pay hearing fails.[15]

Ford further contends his sentence is illegal because his "inability to pay the fines and costs will prevent him from being paroled at his minimum, or prior to expiration of the maximum." (*See* Amended PCRA Petition at ¶ 7.) Ford's argument lacks merit as there is no right to parole at the expiration of the minimum term.

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[15]As in **Childs**, *supra*, if Ford should fail to make payments and the Commonwealth seeks to commit him for that failure, then a hearing will be required.

It is well settled in Pennsylvania that a prisoner has no legitimate expectation of being paroled after serving his minimum sentence. **Winklespecht v. Pennsylvania Board of Probation and Parole**, 571 Pa. 685, 690, 813 A.2d 688, 691 (2002). Further, our Supreme Court has determined that there is no absolute right to be released from prison on parole upon the expiration of the minimum term. **Rogers v. Pennsylvania Board of Probation and Parole**, 555 Pa. 285, 289, 724 A.2d 319, 321 (1999). "Parole is nothing more than a possibility." **Weaver v. Pennsylvania Board of Probation and Parole**, 688 A.2d 766, 770 (Pa. Cmwlth. 1997). "[P]arole is a matter of grace and mercy shown to a prisoner who has demonstrated to the Parole Board's satisfaction his future ability to function as a law-abiding member of society upon release before the expiration of the prisoner's maximum sentence." **Rogers**, 555 at 292, 724 A.2d at 322-23. A prisoner may apply for parole at the expiration of his minimum term and have that application considered by the Parole Board. If, however, the Parole Board denies it, the period of confinement can be the maximum period of incarceration specified by the sentencing court. Id. at 289, 724 A.2d at 321.

In the instant case, there is no entitlement to parole at the expiration of Ford's minimum sentence. Thus, Ford's claim must be dismissed.

B. Ineffective Assistance of Counsel

Finally, Ford argues his trial counsel was ineffective for failing to pursue a sentence modification or direct appeal from the alleged unlawful sentence. (*See* Amended PCRA Petition at ¶ 9.) For the reasons set forth above, Ford's sentence is not illegal, and this claim lacks arguable merit and must be dismissed.

When asked whether she was satisfied that Ford was making a knowing, voluntary and intelligent decision to plead guilty, Ford's trial attorney, Patricia Spotts, noted on the record that she "had lots of discussions with [Ford], and this is what he wants." (N.T. at 9.) As fully set forth above, it was clearly acknowledged in the written guilty plea colloquy and during the oral colloquy with the Court that Ford would be paying fines and costs as part of his negotiated agreement with the Commonwealth. Such fines and costs are lawful and were not excessive in this case. Accordingly, Attorney Spotts had no reason to pursue a sentence modification or direct appeal following the entry of the negotiated guilty pleas. As the claim advanced by Ford is without arguable merit, his ineffective assistance of counsel claim must be dismissed.

IV. Conclusion

For the reasons set forth above, Christian Lee Ford's amended post conviction collateral relief petition must be denied.

Accordingly, I enter the following:

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	Nos. 1443-2016, 1496-2016, 2530-2016
	:	
CHRISTIAN LEE FORD	:	

ORDER

AND NOW, this 10th day of March, 2017, upon consideration of Christian Lee Ford's amended petition for post conviction collateral relief, and the Commonwealth's response thereto, it is hereby ORDERED that said amended petition is DENIED.

Pursuant to Pa.R.Crim.P. 907(4), this Court advises Petitioner that he has the right to appeal from this Order. Petitioner shall have 30 days from the date of this final Order to appeal to the Superior Court of Pennsylvania. Failure to appeal within 30 days will result in the loss of appellate rights.

BY THE COURT:

DAVID L. ASHWORTH
JUDGE

CLERK OF COURTS
2017 MAR 10 PM 3:46
LANCASTER COUNTY, PA

Copies to: Amara M. Riley, Assistant District Attorney
R. Russell Pugh, Esquire

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Commonwealth of Pennsylvania, Appellant	:	No. 46 MAP 2018
v.	:	
Christian Lee Ford, Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that, in compliance with Rule of Appellate Procedure 121(b), I am this day causing to be served a true and correct copy of the foregoing brief upon the following person(s) in the manner indicated below.

Service by first-class mail:

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Dated: November 1, 2018

CERTIFICATE OF COMPLIANCE

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

Submitted by: Commonwealth of Pennsylvania

Signature: _____

Name: Travis S. Anderson

Attorney No. (if applicable): 307264