

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

558 WDA 2022

COMMONWEALTH OF PENNSYLVANIA

v.

DEREK MARSHALL, *Appellant*

Appeal from the April 8, 2022 judgment of sentence in
the Court of Common Pleas of Allegheny County at
CP-02-CR-3258-2016.

BRIEF FOR APPELLEE

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**COUNTER-STATEMENT
OF THE QUESTION PRESENTED**

1. Whether the lower court erred when it violated appellant’s probation for failing to pay his restitution, without expressly finding that that failure to pay was willful.

Lower court answer: No

COUNTER-STATEMENT OF THE CASE

This is a direct appeal in a criminal case. Appellant Derek Marshall appeals the order of the lower court revoking his probation for failure to pay his restitution and imposing a new five year term of probation.

On May 13, 2016, the Commonwealth charged appellant with two counts of theft by unlawful taking—movable property, 18 Pa.C.S. § 3921(a), one count of receiving stolen property, 18 Pa.C.S. § 3925(a), and one count of criminal conspiracy, 18 Pa.C.S. § 903. The charges arose from appellant’s role in the numerous thefts, over a period of years, from a jewelry store. (Doc. 2, affidavit, at 2–5.)

On January 9, 2017, appellant pled guilty as charged. He was sentenced to five years of probation and ordered to pay \$68,031.43 in restitution. (Doc. 7.) The restitution was ordered as part of the sentence, the payment of which was ordered to be a condition of probation. (*Ibid.*)

In five years of probation, appellant only paid \$2,496 of his restitution. (Gag II Hr’g Tr. at 3.) Therefore, in late 2021, as appellant was nearing the end of his probationary term, the probation office accused him of violating

the terms of his probation. (Doc. 9.) A Gagnon II hearing was held on April 8, 2022, at which time the lower court revoked appellant’s probation, sentenced him to another term of five years of probation, and ordered him to continue to make restitution payments. (Doc. 10; Gag II Hr’g Tr. at 6–7.)

Although appellant initially missed the deadline to file a post-sentence motion, within 30 days of the probation revocation sentencing order he successfully petitioned to have that right reinstated. (Docs. 12, 14.) He filed his post-sentence motion on April 29, 2022. (Doc. 13.) Appellant then timely filed his notice of appeal before the lower court ruled on his post-sentence motion.¹ (Doc. 15.) Appellant also filed a motion to close interest in his probation, but did so after the notice of appeal divested the lower court of jurisdiction to act on the motion.² (Doc. 17.) Still, the lower court entered a written order denying the motion on July 25, 2022. (Doc. 18).

This appeal follows.

SUMMARY OF THE ARGUMENT

Before revoking a defendant’s probation for failure to pay fines, costs, or restitution, trial courts must find as fact that the defendant’s failure to pay

1 Appellant could not wait any longer because the filing of his post-sentence motion did not toll the appeal period. *Commonwealth v. Parlante*, 823 A.2d 927, 929 (Pa. Super. 2003). Additionally, appellant’s notice of appeal was filed 31 calendar days after his sentencing. (Docs. 10, 15.) However, because the deadline after 30 days would have fallen on a Sunday, and because the notice was filed the next day, the filing is not late. See, 1 Pa.C.S. § 1908.

2 See, Pa.R.A.P. 1701(a).

was willful, or that the defendant otherwise made insufficient bona fide efforts to pay. Here, the lower court made no such findings. The Commonwealth is constrained to concede that this was error.

However, unlike what appellant suggests, the appropriate remedy here is to remand for a new revocation hearing, not simply to discharge appellant from his probation. First, when confronted with similar situations in the past, both this Court and the Commonwealth Court have remanded for new revocation hearings rather than simply vacating the revocation orders. Second, the record here is sparse and vague, and the lower court's findings of fact were extremely limited. This case could greatly benefit from a remand for a do-over, as is permitted under the precedent the Commonwealth cites below.

Finally, even if this Court orders appellant to be discharged from his probation entirely, this should not affect his obligation to continue paying restitution. This is because his restitution was ordered as a part of his sentence and, as such, is enforceable until paid, regardless of whether appellant is still serving his sentence.

This Court should remand for a new revocation hearing.

ARGUMENT

Claim 1 — Appellant is correct that the lower court never made a finding that his failure to pay his restitution was willful. This Court should remand for a new revocation hearing.

Appellant's sole claim is that the lower court erred by revoking his probation without first making a finding that his failure to pay his restitution was done willfully. (Appellant's Br. at 11.)

This appeal arises from a probation revocation below. In such cases, this Court's review is "limited to the validity of the revocation proceedings and the legality of the judgment of sentence. See, e.g., *Commonwealth v. Anderson*, 788 A.2d 1019, 1022 (Pa. Super. 2001), citing *Commonwealth v. Gheen*, 688 A.2d 1206 (Pa. Super. 1997).

When ordering a defendant at sentencing to pay restitution as a direct part of the sentence, the court should not, and indeed *cannot*, inquire into the defendant's ability to pay. 18 Pa.C.S. § 1106(c)(1)(i); *Commonwealth v. McCabe*, 230 A.3d 1199, 1208 (Pa. Super. 2020). However, if the payment of restitution is also ordered as a condition of probation (or parole, as the case may be), a court cannot revoke that probation for lack of payment if the non-payment was the result of indigency. See, e.g., *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. 1984); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). Instead, in such circumstances the court must find that the defendant's failure to pay was willful, or that the defendant made insufficient bona fide efforts to acquire the resources to pay. See, e.g., *Commonwealth v. Eggers*,

742 A.2d 174, 175 (Pa. Super. 1999). This requirement exists to prevent indigent defendants from being sentenced to prison solely because they do not have enough money. *Bearden*, above, 461 U.S. at 667. Such an outcome would violate the fundamental fairness guaranteed to defendants under the Fourteenth Amendment. *Id.* at 672–673.

Appellant is correct that, when the lower court revoked his probation, it never made an express finding that he willfully refused to pay his restitution, or that he made insufficient bona fide efforts to comply with his restitution order. The lower court did not do so, either at the time of the Gagnon II hearing or in its rule 1925(a) opinion. (Gag II Hr’g Tr. at 5–7; Trial Ct. Op. at 4–5.) Instead, the court seems to believe that the failure to pay restitution is, *ipso facto*, grounds for revocation. (Trial Ct. Op. at 5 (“as Defendant’s payment of restitution was a condition of his probation, failure to pay restitution is a violation of the terms and conditions of probation. Thus, this Court was within its authority to revoke Defendant’s period of probation...”)) The Commonwealth is constrained to concede that this is error.

To appellant, this mandates the vacating of his new sentencing order and a discharge from probation. (Appellant’s Br. at 23.) The Commonwealth, however, believes that a remand for a new revocation hearing would be more appropriate, both under the case law and under the specific circumstances of this case.

First, the case law—in situations where a lower court erred for revoking probation/parole for failure to pay without first finding that that failure was

willful, both this Court and the Commonwealth Court have in the past remanded for a new revocation hearing, rather than simply discharging the defendant from probation:

1. In *Eggers*, above, the lower court revoked the defendant's probation for nonpayment of restitution after holding a hearing on the matter. *Eggers*, 742 A.2d at 174. The court, however, made no determination whether or not that nonpayment was willful, despite the evidence presented that the defendant was, in fact, indigent. *Id.* at 175, 176. Rather than simply discharging the defendant, this Court ordered a remand for a new probation revocation hearing. *Id.* at 176.
2. In *Dorsey*, above, the defendant's parole was violated for failing to pay restitution. *Dorsey*, 476 A.2d at 1310. On appeal, this Court agreed with the defendant that the lower court had failed to make a finding that the failure to pay was willful. *Id.* at 1312. This Court remanded, rather than simply reversing the order revoking the defendant's parole.³

3 *Dorsey* is somewhat complicated by the fact that there were *two* reasons for remand, because lower court also failed to articulate the reasons for imposing the sentence that it did. *Id.* at 1313. So, strictly speaking, this Court merely remanded for "resentencing" in that case. *Ibid.* However, read in context, this remand must have allowed for the lower court to consider anew the willfulness of the defendant's nonpayment of restitution. After all, this Court had already found the revocation-without-willfulness to be error, so the revocation itself was invalid and could not stand, regardless of the subsequent sentencing error. It would make little sense for this Court to remand and yet *not* allow the lower court to correct the reversible error it had just identified concerning the validity of the revocation. And if the remedy were simply to vacate the revocation order, then this Court would not have remanded for resentencing *at all*, because any sentencing issues would have been moot. Therefore, the remand in *Dorsey* must have allowed the lower court to go back and reconsider the willfulness of the defendant's nonpayment.

3. In *Commonwealth v. Reed*, 285 A.3d 334 (Pa. Super. 2022), the lower court violated the defendant’s parole, in part, for failing to pay court-ordered fines and costs. *Reed*, 285 A.3d at 336. On appeal, the defendant claimed that the lower court did so without holding an ability to pay hearing. *Id.* at 336–337. This Court agreed. *Id.* at 338. Instead of simply discharging the revocation order, this Court ordered a remand for the lower court to follow the proper procedure and hold an ability to pay hearing. *Id.* at 338–339.
4. Turning to the Commonwealth Court, in *Miller v. Pennsylvania Bd. of Prob. & Parole*, 784 A.2d 246 (Pa. Commw. Ct. 2001), the Pennsylvania Board of Probation and Parole (Board) revoked the defendant’s parole after he failed to pay for a polygraph examination, which was a necessary part of his sex offender treatment and a condition of his parole. *Miller*, 784 A.2d at 246. The defendant claimed he could not pay due to indigency. *Ibid.* The Commonwealth Court, citing *Bearden*, held that the defendant’s parole could not be revoked absent a finding of willful failure to pay. *Id.* at 248. Despite the taking of testimony below, that Court found the record to be inconclusive and so, rather than merely reverse the decision of the Board, the Court remanded for further proceedings. *Id.* at 249.

Second, as to the circumstances of this case: the record as it stands is sparse to the point that appellate review is impeded. The transcript of the Gagnon II hearing, containing the sum total of the evidence submitted by the probation department and appellant, is only nine pages long. Although appellant told the lower court that he was working, there was no specific discussion of how much money he was making, what his expenses were, and whether he was continuing to make regular payments towards his restitution. The lower court’s findings of fact concerning appellant’s ability to pay were nonexistent; the most the court said was that it “considered” appellant’s abil-

ity to pay, and even that was only stated in its rule 1925(a) opinion. (Trial Ct. Op. at 4.) This case sorely calls for more thorough factfinding, so the Commonwealth submits that, consistent with the case law cited above, a remand for another Gagnon II hearing is best solution here.⁴

Finally, regardless of how the courts decide this revocation issue—and consequently regardless of appellant’s ability to pay or his status on or off probation—appellant is still required to pay his restitution. This is because the restitution was initially ordered as part of the sentence, and the payment of which was a condition of probation. (Doc. 7.) This is a permissible ar-

4 In its brief, *amicus* highlights a discrepancy concerning which party has the initial burden of showing that the defendant is indigent. (Amicus Br. at 13, n 9.) A review of the case law shows that, if anything, *amicus* does not go far enough.

It is clear that the Commonwealth Court expressly considers it to be the defendant’s burden to show his inability to pay. See, *Miller*, 784 A.2d at 248; see also *Lawson v. Com., Pennsylvania Bd. of Prob. & Parole*, 524 A.2d 1053, 1057 (Pa. Commw. 1987). This Court has been more ambiguous. Some cases suggest it is not the defendant’s burden, while others suggest it is. See, e.g., *Dorsey*, 476 A.2d at 1312 (this Court reasoning that, although appellant had the opportunity to prove that he was indigent, he did not do so. Nevertheless, since the lower court failed to make a finding of willful failure to pay, this Court reversed.) But see, e.g., *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. 1994) (“If the Commonwealth suspected otherwise, it could have requested a parole revocation hearing at which [defendant] would have been entitled to establish his present inability to pay the fine...”). For its part, our Supreme Court has written, in an opinion that admittedly is in the context of paying a fine, that “appellants must be given the opportunity to establish that they are unable to pay the fine,” *Com. ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973), which suggests to the Commonwealth that it is the defendant’s burden to do so.

This Court could take the opportunity in this appeal to clarify whether it is the defendant’s initial burden to prove his indigency in revocation hearings.

rangement. See, 18 Pa.C.S. § 1106(b) (whenever restitution is ordered as part of a sentence, the offender's compliance with the order may be a condition of probation); but see, *Commonwealth v. Holmes*, 155 A.3d 69, 72 (Pa. Super. 2017) (court could not order restitution as a part of sentence and also as a condition of probation under the now-repealed 42 Pa.C.S. § 9754(c)(8).) When restitution is ordered as a part of a sentence, the defendant's ability to pay is expressly not to be considered. 18 Pa.C.S. § 1106(c)(1)(i). Such restitution orders are enforceable until paid, regardless of whether the defendant has finished serving his sentence. *Commonwealth v. Griffiths*, 15 A.3d 73, 78 (Pa. Super. 2010), citing 18 Pa.C.S. § 1106(c)(2)(ii).

CONCLUSION

This Court should remand for the lower court to determine whether appellant's failure to pay his restitution was willful.

Respectfully submitted.

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CERTIFICATE OF WORD COUNT

I certify that this brief complies with Pa.R.A.P. 2135(a)(1) because it is shorter than 30 pages.

/s/ Daniel A. Vernacchio

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I certify that on March 20, 2023, I served a copy of this brief on counsel for the appellant in the manner described below, in compliance with Pa.R.A.P. 121.

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