

IN THE SUPERIOR COURT OF PENNSYLVANIA  
EASTERN DISTRICT

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EDA 2022

NO. 1966

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COMMONWEALTH OF PENNSYLVANIA

VS.

BRUCE BATES,  
Appellant

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REPLY BRIEF FOR APPELLANT

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Appeal From the Judgment Of Sentence Of The Court Of Common Pleas Of Delaware County, Order Entered June 28, 2022, Imposed On Information No. CP-23-CR-0006975-2011.

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## I. STATEMENT OF THE CASE

Mr. Bates is in agreement with the Commonwealth that the revocation of his parole was unlawful because the trial court never considered his ability to pay and never made a finding that he willfully refused to pay. At the very least, this requires that the matter be remanded for the trial court to make a proper finding regarding his ability to pay, and for termination of supervision if the court finds he is unable to pay the full amount of restitution during the term of his supervision.

However, in light of the repeated unlawful revocations to which Mr. Bates has been subjected, as set forth in his principal brief, this Court should terminate supervision without a remand pursuant to *Commonwealth v. Bolds*, 272 A.3d 463, 2022 WL 71879 (Pa. Super. Jan. 7, 2022) (unpublished). Contrary to the Commonwealth's contention that this Court should "disavow" the holding and reasoning in *Bolds*, *Bolds* and *Commonwealth v. Marshall*, 2023 WL 5097263 (Pa. Super. Aug. 9, 2023) (unpublished), both unpublished cases, can be reconciled and this Court can adopt or adhere to the reasoning of both. Like in *Bolds*, Mr. Bates has repeatedly had his supervision revoked and extended without the trial court ever considering his ability to pay; and like in *Bolds*, the restitution was entered as a civil judgment years ago. He should be entitled to the same relief in the form of termination of his supervision.

For all of the reasons stated in the principal brief and herein, Mr. Bates respectfully requests that this Court reverse the order of the trial court finding him in violation of parole, dismiss the violation, vacate the judgment of sentence, and discharge him from supervision. In the alternative, Mr. Bates respectfully requests that this Court remand to the trial court to make a finding as to whether he is unable to pay the restitution; and if unable, to terminate his supervision.

## II. ARGUMENT

TERMINATION OF SUPERVISION IS THE APPROPRIATE REMEDY EITHER WITH OR WITHOUT A REMAND, PURSUANT TO EITHER *COMMONWEALTH V. BOLDS*, 272 A.3D 463, 2022 WL 71879 (PA. SUPER. JAN. 7, 2022) (UNPUBLISHED) OR *COMMONWEALTH V. MARSHALL*, 2023 WL 5097263 (PA. SUPER. AUG. 9, 2023) (UNPUBLISHED).

Mr. Bates agrees with the Commonwealth that, at the very least, Mr. Bates is entitled to a remand to the trial court for a determination as to whether he lacks the ability to pay the amount of restitution owed. *See* Brief for Appellee, at 6-7, 14-18. The Commonwealth concurs with Mr. Bates that the trial court never made a finding that Mr. Bates willfully failed to pay the restitution – a finding required prior to revocation of probation or parole. *See id.* at 14-18; Brief for Appellant, at 32-37.

As the Commonwealth explains,

The trial court, at the Commonwealth’s urging, did not account for defendant’s ability to pay. **At the time of the hearing, defendant had no income.** His counsel explained that defendant had been injured in December of 2021, and put on temporary disability later due to that injury (N.T. 4/26/22, 5). Nevertheless, with no evidence of willfulness, defendant’s parole was revoked. The Commonwealth agrees that defendant is entitled to relief on this basis. His case should be remanded to give the trial court an opportunity to assess his ability to pay. *See Marshall*, 2023 WL 5097263, at \*3 (explaining that the appropriate remedy is to “remand[] for a new hearing rather than vacat[e] the revocation with no further

proceedings”); *Eggers*, 742 A.2d at 176 (remanding the case for a new revocation hearing).

**On remand, the Commonwealth will not oppose terminating defendant’s parole if the trial court finds that defendant is unable to pay restitution. Based on the information presented by the defendant during the 2022 revocation hearings – information that the Commonwealth has no reason to doubt – it is unlikely the trial court will find defendant able to pay.**

*See* Brief for Appellee, at 17 (emphasis added).

This outcome and rationale are in accordance with this Court’s recent unpublished decision of *Commonwealth v. Marshall*, 2023 WL 5097263 (Pa. Super. Aug. 9, 2023) (unpublished). In *Marshall*, the appellant, like Mr. Bates, argued that the “requisite injury was not made by the trial court into his ability to pay but impermissibly treated non-payment automatically as a technical violation of probation.” *Marshall*, 2023 WL 5097263, at \*2. The Commonwealth there agreed, as did this Court. *Id.* “[T]he trial court’s revocation of Marshall’s probation without a determination that the failure to pay more was willful and not due to inability to pay was in error.” *Id.* This Court then held the proper remedy was a new revocation hearing to address the defendant’s ability to pay the restitution. *Id.* at \*3.

*Marshall* then set forth the required procedure and potential outcomes upon remand. *See id.* If, upon remand, the trial court finds that the defendant does not have the ability to pay the full amount of restitution during the term of imposed supervision, then the Commonwealth’s petition to revoke probation should be



dismissed. *Id.* If the trial court finds that the defendant does have the ability to pay, the trial court has discretion to find that there has been a violation of a condition of probation and may extend probation to insure payment of restitution; *or* the court may decline to do so and find that collection through 42 Pa.C.S. § 9728 is more appropriate. *Id.* Whether the trial makes a finding of inability to pay or not, termination of supervision is an appropriate outcome and is within the trial court's discretion. *See id.*

As the evidence presented by Mr. Bates demonstrated an inability to pay the restitution, and as the Commonwealth essentially concedes as much, upon any remand, the trial court should terminate his supervision pursuant to *Marshall*. *See* Brief for Appellee at 18.

However, pursuant to *Bolds*, this Court does not need to remand the matter for a finding of whether Mr. Bates has the ability to pay. While the Commonwealth argues that this Court should “disavow the reasoning of Bolds,” *see* Brief for Appellee at 14, *Bolds* does not contradict *Marshall*. This Court found *Bolds* to be inapplicable in *Marshall* because in *Bolds*, parole had been repeatedly improperly extended without proof that the defendant was noncompliant with restitution payments; whereas, in *Marshall*, there were not multiple extensions of probation (i.e., multiple revocations or parole). *Marshall*, 2023 WL 5097263, at \*3 n.6. The instant matter involves the exact factual and procedural circumstances as *Bolds* (and

arises out of the same trial court), where Mr. Bates' parole was extended multiple times due to the trial courts finding him in violation of parole for failure to pay restitution without proof that he was noncompliant. Moreover, *Marshall* did take *Bolds* into account by providing that the trial court can terminate supervision based upon 42 Pa.C.S. § 9728 (the statute relating to collection of restitution pursuant to civil judgments), even when there has been a finding of an ability to pay. *See Marshall*, 2023 WL 5097263, at \*3. Both *Bolds* and *Marshall* are applicable instantly.

Thus, this Court should terminate Mr. Bates' supervision pursuant to *Bolds*, and without remand. *Marshall* does not conflict with *Bolds* – both cases allow for termination of supervision because of 42 Pa.C.S. § 9728. When there have been repetitive violation hearings over years, an inability to pay may be presumed and the court can terminate supervision based upon 42 Pa.C.S. § 9728. *See Bolds*, 272 A.3d at 463; *Marshall*, 2023 WL 5097263, at \*3. There were not multiple revocations in *Marshall*, which is why this Court did not apply *Bolds* in that case. Or, this Court can hold pursuant to *Marshall* that remand is appropriate for the trial court to make a finding that Mr. Bates is unable to pay the restitution such that termination of supervision is warranted.

### III. CONCLUSION

WHEREFORE, for the reasons stated in Mr. Bates' principal brief and in this reply brief, Mr. Bates, by his counsel, respectfully requests that this Court reverse the order of the trial court finding him in violation of parole, dismiss the violation, vacate the judgment of sentence, and discharge him from supervision. In the alternative, Mr. Bates respectfully requests that this Court remand to the trial court to make a finding as to whether he is unable to pay the restitution; and if unable, to terminate his supervision.

Respectfully submitted,

                  /S/ *Emily Mirsky*                    
EMILY MIRSKY, Assistant Defender  
Chief, Appeals Division  
CHRISTOPHER WELSH, Chief, Public Defender

**CERTIFICATION OF COMPLIANCE WITH RULE 2135, PA.R.A.P.**

I do hereby certify on this 28<sup>th</sup> day of September 2023, that the Brief For Appellant filed in the above captioned case on this day does not exceed 7,000 words. Using the word processor used to prepare this document, the word count is 1,548 as counted by Microsoft Word.

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

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

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

/S/  
EMILY MIRSKY, Assistant Defender  
Attorney Registration No