IN THE

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

NOS. 1870 WDA 2017 and 737 WDA 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

TYNECIA MILTON-BIVINS,
Appellant

BRIEF FOR APPELLEE

Appeal from the judgment of sentence entered November 16, 2017 at CC No. 200508439 and on April 20, 2018 at CC Nos. 201007609 and 201504177 in the Allegheny County Court of Common Pleas, Criminal Division.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

COUNTER STATEMENT OF THE QUESTION INVOLVED 4

COUNTER STATEMENT OF THE CASE 5

SUMMARY OF THE ARGUMENT 16

ARGUMENT 18

I. THE ORDERS OF RESTITUTION WERE LEGALLY IMPOSED. 18

II. THE RECORD REVEALS THAT BOTH JUDGE NAUHAUS AND JUDGE LAZZARA CONSIDERED MORE THAN APPELLANT'S FAILURE TO PAY RESTITUION BEFORE REVOKING APPELLANT'S PROBATION AND IMPOSING TERMS OF CONFINEMENT. FURTHERMORE, THE RECORD DEMONSTRATES THE COURTS CONSIDERED APPELLANT'S ABILITY TO MAKE PAYMENTS. 26

III. THE COURTS DID NOT ERR IN REVOKING APPELLANT'S PROBATION AND IMPOSING A SENTENCE OF INCARCERATION. APPELLANT'S CLAIM THAT THE COURTS FAILED TO CONSIDER RELEVANT FACTORS DOES NOT RAISE A SUBSTANTIAL QUESTION FOR THIS COURT'S REVIEW. FURTHERMORE, SUFFICIENT REASONS FOR THE SENTENCES IMPOSED WERE PLACED ON THE RECORD. 39

CONCLUSION 47

CERTIFICATE OF COMPLIANCE 48

TABLE OF AUTHORITIES

Cases

Bearden v. Georgia, 461 U.S. 660 (1983).....27

Commonwealth ex rel. Powell v. Rosenberry, 645 A.2d 1328 (Pa.Super. 1994).....36

Commonwealth v. Clarke, 70 A.3d 1281 (Pa.Super. 2013).....42

Commonwealth v. Coleman, 905 A.2d 1003 (Pa.Super. 2006), ...24

Commonwealth v. Cook, 941 A.2d 7 (Pa.Super. 2007).....41

Commonwealth v. Dorsey, 476 A.2d 1308 (Pa.Super. 1984).....28

Commonwealth v. Downing, 990 A.2d 788 (Pa.Super. 2010.....42

Commonwealth v. Eggers, 742 A.2d 174 (Pa.Super. 1999).....28, 36

Commonwealth v. Fish, 752 A.2d 921 (Pa.Super. 2000). 44

Commonwealth v. Gonzalez–Dejusus, 994 A.2d 595 (Pa.Super. 2010) ...40

Commonwealth v. Kalichak, 943 A.2d 285 (Pa.Super. 2008).....41

Commonwealth v. Lee, 876 A.2d 408 (Pa.Super. 2005) 30, 40

Commonwealth v. Mitchell, 632 A.2d 934 (Pa.Super. 1993) 46

Commonwealth v. Ritchey, 779 A.2d 1183 (Pa.Super. 2001). 40

Commonwealth v. Runion, 662 A.2d 617 (Pa. 1995) 23

Commonwealth v. Sims, 770 A.2d 346 (Pa.Super. 2001). 43

Commonwealth v. Smith, 669 A.2d 1008 (Pa. 1996)..... 43

Commonwealth v. Tuladziecki, 522 A.2d 17 (Pa. 1987). 42

Commonwealth v. Veon, 150 A.3d 435 (Pa. 2016) 19

Statutes

1 Pa.C.S.A. § 1991 23

42 Pa.C.S. §9771(c) 43

42 Pa.C.S.A. § 9754(c)(8)..... 22

42 Pa.C.S.A. § 9781(b)..... 40

55 Pa. Code §§ 275.11, 275.12 26

62 P.S. §481(c)..... 23

71 P.S. §§181 and 182 25

Other Authorities

Memorandum of Understanding between the Office of Inspector General and the Department of Public Welfare 25

COUNTER STATEMENT OF THE QUESTION INVOLVED

I. Whether the orders of restitution are illegal?

II. Whether the lower courts erred by revoking probation based on appellant's failure to pay restitution and by failing to consider her ability to make payments?

III. Whether the lower courts erred by failing to consider relevant sentencing criteria before revoking probation and imposing sentence?

COUNTER STATEMENT OF THE CASE

This is an appeal of the judgment of sentence entered November 16, 2017 and on April 20, 2018 in the Allegheny County Court of Common Pleas, Criminal Division at CC Nos. 200508439, 201007609 and 201504177.

A. Procedural History

Regarding the appeal docketed at 1870 WDA 2017, appellant, Tynecia Milton-Bivens was charged at CC No. 200508439, with 2 counts of Theft by Deception (18 Pa.C.S. §3922); and 5 counts of Criminal Conspiracy. (18 Pa.C.S. §903) (Docket Entry (DE) No. 2) On March 13, 2006, appellant appeared before the Honorable Lester G. Nauhaus and pled guilty to the above charges. (DE No. 3) Appellant was sentenced the same day to 7 years of probation at Counts 1, 2 and 3 to be served consecutively. She was also ordered to pay, as a condition of her probation, $24,000 in restitution to National City Bank ($19,216.03), Dollar Bank ($2,721.46) and Standard Bank ($2,100). (DE Nos. 4, 5) On November 16, 2017, appellant was found to be in violation of the terms of her probation and was sentenced to 3 and a half to 7 years at Count 1. No further penalty was imposed at the remaining counts. (DE No. 14)

Appellant's post-sentence motions were denied on December 18, 2017. (DE Nos. 15, 20) This appeal, consolidated with the appeal at 737 WDA 2017, follows.

Regarding the appeal at 737 WDA 2018, appellant was charged at CC No. 201007609 with one count of Public Assistance/False Statements in violation of 62 P.S. §481 (DE I, No. 2). On September 19, 2011, appellant pled guilty to the foregoing charge and was sentenced to 84 months of probation and ordered to pay $47,706.50 in restitution to the Office of the Inspector General. (DE I Nos. 4, 5) After being found to be in violation of the terms of her probation following reports from the probation office of probation violations, appellant was resentenced to 84 months of probation with the terms including compliance with the Justice Related Service (JRS) Plan and to make regular $100 payments on her restitution balance. (DE I, No. 13)

At CC No. 201504177, appellant was charged with 8 counts of Theft of Services in violation of 18 Pa.C.S.A. §3926(a)(4)) and 3 counts of Possession of a Controlled Substance in violation of 35 P.S. 780-113(a)(16)). (DE II, No. 2) On November 5, 2015, appellant represented by James Sheets, Esquire, appeared before the Honorable Beth A. Lazzara and pled guilty to the above-named charges. (DE II, No. 4) Pursuant to a

plea agreement, appellant was sentenced at Count 1, to 5 years of probation and ordered to pay restitution in the amount of $10,000 to the victim, UMPC. The same conditions were imposed at the remaining theft counts for a total of 5 years of probation and $10,000 of restitution. No further penalty was imposed at the possession counts. (DE II, Nos. 5, 6) Appellant was found to be in violation of the terms of her probation and was resentenced on February 10, 2017 to 7 years of probation and ordered to make regular $100 restitution payments. (DE II, No. 10)

On April 20, 2018, appellant was found to be in violation of the terms of her probation at both CC No. 201007609 and CC No. 201504177, and her probation was revoked in both cases. At CC No. 201007609, she was sentenced to 3 and a half to 7 years' incarceration. (DE I, No. 19) Appellant's post-sentence motions were denied on May 17, 2018. (DE I, No. 22) At CC No. 201504177 she was sentenced to 3 and a half to 7 years' incarceration at Count 1. No further penalty was imposed at the remaining counts. (DE II, No. 12) At timely Notice of Appeal was filed in both cases. (DE I, No. 23)

B. Factual History

The facts underlying appellant's convictions at CC No. 2005084399 were summarized by Assistant District Attorney Yifat Shaltiel at the guilty plea proceedings as follows:

> May it please the Court, if the Commonwealth were to proceed on CC 2005-084399, Commonwealth witnesses would have proved that on August 16, 2004, National City Bank reported that Tyniecia Milton Bivins was passing fraudulent checks on her closed account.
>
> The Defendant in here also deposited fraudulent checks into two of her own accounts at the National City Bank which were opened with fraudulent Social Security numbers.
>
> Milton Bivins admitted to passing the checks and to conspiring with other co-Defendants in order to deposit her checks into the closed account with National City Bank into the co-Defendant's personal accounts and then withdrawing the funds before the bank had a chance to find out the account was closed.
>
> The Defendant and the co-Defendants would have then divided the proceeds among themselves.
>
> Between June 8, 2004 and June 17, 2004, the Defendant along with Andrea Pascal deposited several closed account checks of the Defendant into Pascal's account through an ATM. They then withdrew the funds before National City Bank determined that the account was closed.
>
> The total incurred by National City Bank on those two dates was $5,729.56.
>
> ***

On May 11, 2004, the Defendant, along with Michelle Jackson, deposited a closed account check of the Defendant into Jackson's National City account through an ATM. They then withdrew the money before National City Bank determined the account to be closed.

National City incurred a loss of $4,671.78.

On May 19, 2004, Milton Bivins and Sheree Jennings deposited two closed account checks of the Defendant into Jennings' account through an ATM again.

National City incurred a total loss of $5,823.12. On April 21, 2004, Milton Bivins and Malaika Burks deposited a closed account check of the Defendant's into Burks' account through an ATM.

National City incurred a loss of $2,991.57.

On August 12, 2004, Milton Bivins and Leslie McCoy deposited a closed account check of the Defendant into McCoy's Dollar Bank account. They then withdrew the money before the bank determined that the account was closed.

The total loss to Dollar Bank was $2,721.46.

On August 4, 2004, Milton Bivins and Michelle Jackson deposited a closed account check of Milton Bivins into Jackson's Standard Bank account. They then withdraw the funds before National City Bank determined that that account was closed.

The amount there was total lost to Standard Bank was $2,100.

Those would be the facts of the Commonwealth,

Your Honor.

(GPT 3//13/2006[1] at 8-12)

At CC No. 201007609, the fact underlying appellant's conviction were stipulated as being those contained in affidavit of probable cause which states as follows:

> The CCIS Office, who was actively administering this case, began questioning the employment status of Tyniecia Bivins, after Tyniecia Bivins failed to submit required paperwork to the CCIS office. It was found that the reported employer does not exist. This information was confirmed by visiting the employer's reported address, speaking with the landlord of that reported address, etc.

(737 WDA 2018, DE I, No. 1; GPT[2] 9/19/11 at 12)

The facts underlying appellant's convictions at CC No. 201504177 were also stipulated to as the facts contained in the Affidavit of Probable Cause which states as follows:

> On September 4, 2014, your Affiant, Officer Heather

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[1] GPT 3/13/2006 followed by numerals refers to the pages of the Guilty Plea Transcript dated March 13, 2006 at CC No. 200508439.

[2] GPT 9/19/11 followed by numerals refers to the pages of the Guilty Plea and Sentencing Transcript dated September 19, 2011.

Pope, UPMC Police, received a referral from Francis Cambest, UPMC St. Margaret Security Supervisor regarding a possible case of identity misrepresentation. According to the referral, a patient presented to the St. Margaret Hospital Emergency Department on August 31, 2014 as Tynisha Bivens, Date of Birth */*/**** Social Security Number ***-**-****. The Emergency Department staff recognized the patient from a visit earlier in the week and that she had used a different name for that admission.

St. Margaret Nursing and Registration Staff conducted a medical records search and discovered that the patient had identified herself as Tyniecia Bivins, Date of Birth */*/****, Social Security Number ***-**-**** during a visit to St. Margaret on August 28, 2014 for left leg pain. When the Emergency Department physician asked Bivens if she had been treated under a different name prior to August 31, 2014, she agreed that she had and left AMA.

In addition to the two aforementioned names that they had discovered for the patient, staff were also able to identify a third possibility. The alias, Tienesha Johnson, Date of Birth */*/****, Social Security Number ***-**-****, had been a patient at UPMC East on August 13, 2014 for a dislocated jaw.

After receiving Cambest's referral, your affiant entered each alias and date of birth into the Lexis Nexis Site. The site was able to identify that Tyniecia Bivins, Date of Birth */*/****, Social Security Number ***-**-**** was an actual individual. Further, the report identified last name variations for Bivins as Bivens and Johnson. There were no reports available for Tynisha Bivens or Tienesha Johnson based upon the identifying information given at admission.

On September 5, 2014, Gerry Moran, Manager of Presbyterian Security Operations, was able to pull surveillance photos from Tienesha Johnson's June 19, 2014 visit to the UPMC Presbyterian Emergency Department. In addition, surveillance photos from Johnson's UPMC East Emergency Department visit on August 13, 2014 were obtained. Francis Cambest was able to provide surveillance photos from Bivins' August 31, 2014 visit to the St. Margaret Emergency Department during which she identified herself as Tynisha Bivens. Your Affiant was able to positively identify Tienesha Johnson and Tynisha Bivens as Tyniecia Bivins by comparing all surveillance photos with Bivins' Pennsylvania driver's license photo.

On September 22, 2014, your Affiant received billing, visit, and clinical information for all visits associated with Bivins and her alias names, Tienesha Johnson and Tynisha Bivens. Bivins has presented to the UPMC East, Presbyterian, and St. Margaret Emergency Departments on multiple occasions using the Tienesha Johnson and Tynisha Bivens aliases in an effort to obtain services and controlled substances.

Given that Tyniecia Bivins has been identified as presenting as Tienesha Johnson, Date of Birth */*/**** and Social Security Number ***-**-****and Tynisha Bivens, Date of Birth */*/****, Social Security Number ***-**-**** at UPMC and that this fictitious information could only be known by Tyniecia Bivins, it is clear that she also used this same information for other visits to UPMC controlled facilities as listed hereafter. This notion is further supported by stark commonality in the nature of the visits.

The details of Bivins' UPMC Emergency

Department visits are as follows:

March 24, 2014: Bivins presented to the UPMC Mercy Emergency Department as Tienesha Johnson, Date of Birth */*/****, Social Security Number ***-**-****. She complained of abdominal pain and nausea. She received a prescription for twelve (12) Percocet tablets, 5/325, 1 tab every 4 hrs upon discharge. The total charges associated with this visit are $2,075.00.

May 13, 2014: Bivins presented to the UPMC East Emergency Department as Tienesha Johnson, Date of Birth */*/****, Social Security Number ***-**-****. She was seen for a possible kidney stone. She was not given a prescription upon discharge. The total charges associated with this visit are $8,273.75.

June 9, 2014: Bivins presented to the UPMC St. Margaret Emergency Department as Tienesha Johnson, Date of Birth */*/****, Social Security Number ***-**-****. She complained of infection symptoms associated with her mouth being wired shut. She received a prescription for twenty-four (24) Oyxcodone 5mg tablets, 1 tablet every 6 hours upon discharge. The total charges associated with this visit are $2,813.00.

June 17, 2014: Bivins presented to the UPMC East Emergency Department as Tienesha Johnson, Date of Birth */*/****, Social Security Number ***-**-****. She complained of persistent jaw pain and was transferred to UPMC Presbyterian Hospital. She was not given a prescription upon discharge. The total charges associated with this visit are $4,028.25.

June 19, 2014: Bivins presented to the UPMC Presbyterian Emergency Department as Tienesha Johnson, Date of Birth */*/****, Social Security

Number ***-**-****. She complained of mouth pain. She was given a prescription for twelve (12) Oxycodone 5mg capsules, 1 capsule every 6 hours upon discharge. The total charges associated with this visit are $7,940.75.

July 14, 2014: Bivins presented to the UPMC St. Margaret Emergency Department as Tienesha Johnson, Date of Birth */*/****, Social Security Number ***-**-****. She complained of stomach and head pain. She was not given a prescription upon discharge. The total charges associated with this visit are $2,771.00.

August 13, 2014: Bivins presented to the UPMC East Emergency Department as Tienesha Johnson, Date of Birth */*/****, Social Security Number ***-**-****. She complained of a dislocated jaw associated with an assault. She was not given a prescription upon discharge. The total charges associated with this visit are $3,560.00.

August 31, 2014: Bivins presented to the UPMC St. Margaret Emergency Department as Tynisha Bivens, Date of Birth */*/****, Social Security Number ***-**-****. She complained of diarrhea, nausea and abdominal pain. She was not given a prescription upon discharge. The total charges associated with this visit are $616.25.

Based upon the aforementioned facts, your Affiant, Officer Heather Pope, respectfully requests that the stated charges be filed upon Tyniecia Bivins.

(737 WDA 2018, DE II No. 1; GPT 11/4/15[3] at 4)

[3] GPT 11/4/15 followed by numerals refers to the pages of the Guilty Plea and Sentencing Transcript dated November 4, 2015.

SUMMARY OF THE ARGUMENT

The original orders of restitution to multiple banks, UPMC and the Office of the Inspector General are not illegal. Appellant's restitution was imposed a condition of her probation under 42 Pa.C. §9754 and was not a direct sentence under 18 Pa.C.S.A. §1106. Thus, the definition of a "victim" under §1106 is not applicable.

The record demonstrates that the lower courts considered reasons beyond appellant's failure to make restitution payments and did not err in failing to make a formal inquiry into the reasons for appellant's failure to comply with the terms of her restitution. The record reveals that appellant made misrepresentations to both Judge Nauhaus and Judge Lazzara over the course of multiple probation revocation hearings, failed to report as required by the terms of her probation and failed a drug test. It is clear from the record that the revocation of probation was necessary to vindicate the authority of the sentencing court. Consequently, the courts did not err in revoking probation and imposing a term of total confinement without a further inquiry in to appellant's ability to make restitution payments.

Appellant's claim regarding the discretionary aspects off his sentence fails to raise a substantial question for this court's review in that her actual claim is that the court failed to consider mitigating factors. Regardless,

the probation revocation court was presented with sufficient information about appellant's offenses and her rehabilitative needs to structure the sentence now at issue, imposed after appellant committed both technical probation violations and additional crimes. The record reveals the courts carefully considered the circumstances of appellant's case and that the sentence imposed was necessary to address appellant's recurrent issues and did not constitute an abuse of the court's discretion. As a result, the sentences should be affirmed by this Honorable Court.

ARGUMENT

I. THE ORDERS OF RESTITUTION WERE LEGALLY IMPOSED.

On appeal from the revocation of her probation, appellant first claims that the orders of restitution are illegal because "corporations and the Commonwealth are not victims under the restitution statute." (Brief for Appellant at 18) The Commonwealth submits that restitution orders were legally imposed as conditions of appellant's probation.

The determination as to whether the trial court imposed an illegal sentence is a question of law. The standard of review in cases dealing with questions of law is plenary. *Commonwealth v. Atanasio,* 997 A.2d 1181, 1182–83 (Pa.Super.2010) (citations and quotations omitted).

Appellant relies on *Commonwealth v. Veon*, 150 A.3d 435, 448 (Pa. 2016), wherein our Supreme Court confronted the question of whether a government agency can be the recipient of an award of criminal restitution. The defendant, legislator Michael Veon, was convicted of misappropriating funds from the Department of Community and Economic Development ("DCED") and ordered to pay restitution to the DCED. Our Supreme Court deemed the imposition of restitution illegal and vacated the sentence. The *Veon* Court observed that §1106 "unambiguously establishes that DCED cannot be a 'victim' because the relevant provisions provide that there can

be no restitution when there is no human victim." 150 A.3d at 454 n. 29. To qualify for restitution under Subsection 1106(c)(1)(i), a Commonwealth agency either must be a victim as that term is used in that subsection or must have reimbursed a victim as defined by Section 11.103, directly or by paying a third party on behalf of the victim. DCED received no compensation from another Commonwealth agency and thus was not entitled to restitution under Section 1106. *Id.*

The Commonwealth submits that the orders of restitution were not imposed pursuant to §1106 but were conditions of appellant's probation pursuant to 42 Pa.C.S. §9754. In *Commonwealth v. DeShong*, 850 A.2d 712 (Pa.Super. 2005), this Court distinguished between restitution that is imposed as a direct sentence pursuant to 18 Pa.C.S.A. §1106(c) and restitution that is imposed as a condition of probation pursuant to 42 Pa.C. §9754. This Court explained:

> Restitution is authorized under both the Crimes Code and under the Sentencing Code. The Crimes Code, in 18 Pa.C.S.A. § 1106, controls restitution as a direct sentence. The Sentencing Code, in 42 Pa.C.S. § 9754, permits a sentence of probation and offers a non-exclusive list of permissible conditions of probation, including restitution.[5]
>
> The two sections work in tandem and both can be given full effect. Probation is a separate sentence permitted by the Sentencing Code under certain

> circumstances. 42 Pa.C.S.A. §§9721(a)(1), 9722. When the trial court chooses to impose a sentence of probation, it may attach conditions to the defendant staying on probation and not being put in jail, including paying restitution, whether the restitution is also a separate penal sentence or a rehabilitative condition of probation. 42 Pa.C.S.A. § 9754(b).

Deshong, 850 A.2d at 715-716. A review of the record, both the sentencing proceedings and sentencing orders make clear that restitution was imposed as conditions of appellant's probation in all three cases.

Specifically, at CC No. 2000508439, Judge Nauhaus stated at sentencing: "Defendant to understand that as soon as the restitution is paid off, I'll take her off probation." (GPT 3/13/06 at 14) The intent that restitution be a condition of probation is also reflected in the sentencing order. (See DE No. 4) At CC No. 201007609, Judge Lazzara similarly stated:

> Ma'am, if you are able to pay that amount back before the termination of 84 months, I would certainly agree to terminate your probation earlier. So whenever that gets paid off, your probation will be finished.

(GPT 9/19/01 at 17) The sentencing order also indicated that restitution was a condition of probation. (737 WDA 2018, DE I, No. 4) Finally, at CC No. 201504177, Judge Lazzara stated at sentencing:

> I am going to go below the guidelines based on the recommendation of the victim in the hopes that restitution is going to be paid. You will serve a period of five years of probation. That, ma'am, will begin today. It is a requirement of that probation, ma'am, you pay a minimum of $100 per month for your restitution.

(GPT 11/4/15 at 16-17) Again, the sentencing order also reflected that restitution was a condition of probation. (DE No. II, No. 5)

As a result, appellant's restitution orders are conditions of probation and governed by 42 Pa C.S.A. § 9754 (c)(8) and not 18 Pa. C.S.A. §1106. See *Deshong, supra, 850 A.2d at 715* (restitution order following the words "It is further ordered," and where judge did not say the restitution was a condition of probation but simply ordered Deshong to pay it was a direct penal sentence.)

Furthermore, when restitution is imposed as a condition of probation, the required nexus between the defendant's criminal conduct and the victim's injury is relaxed. 42 Pa.C.S.A. § 9754(c)(8). See *Commonwealth v. Harner,* 617 A.2d 702, 704 (Pa.Super. 1992). In such a situation, the sentencing court is accorded the latitude to fashion probationary conditions designed to rehabilitate the defendant and provide some measure of redress to the actual victim. *Harner*, supra, 617 A.2d at 706.

Although *Veon* is inapplicable, the Commonwealth notes that the

Court relied upon long-standing precedent interpreting the Statutory Construction Act, 1 Pa.C.S.A. § 1991. That precedent established "the plain and ordinary meaning of the word 'person' excluded Commonwealth agencies 'where the legislature has not otherwise spoken.' " *Veon, supra*, 150 A.3d at 450 (quoting *Commonwealth v. Runion*, 662 A.2d 617, 619 (Pa. 1995)). Thus, Commonwealth agencies were ineligible for restitution. *See id.*

The Statutory Construction Act explicitly includes corporations and other limited liability organizations in the definition of "person." 1 Pa.C.S.A. §1991. The statutory scheme explicitly encompasses human persons such as those victimized by appellant within the class of victims entitled to restitution. Consequently, even if §1106 applied, appellant's claims are clearly meritless for the additional reason that Dollar Bank, National City Bank and Standard Bank, as well as UMPC fall within the definition of a "person."

At CC No. 201007601, restitution was imposed for Public Assistance/False Statements, 62 P.S. §481(c) after appellant obtained $47,706.05 in subsidized child care benefits by misrepresenting her employment status to Child Care Information Services (CCIS) of Allegheny County. Specifically, appellant submitted false documents to the CCIS

office for the purpose of obtaining benefit payments beginning in November of 2006. The imposition of restitution is statutorily mandatory in welfare fraud cases and manifested in the statute's use of term "shall". 62 P.S. § 481(c) specifically states:

> (c) Any person committing a crime enumerated in subsection (a) **shall be ordered to pay restitution of any moneys received by reason of any false statement,** misrepresentation, impersonation, failure to disclose required information or fraudulent means.

§ 481. False statements; investigations; penalty, PA ST 62 P.S. § 481 (emphasis added). In *Commonwealth v. Coleman*, 905 A.2d 1003, 1009 (Pa.Super. 2006), this Court recognized that independent statutory authority exits to require the payment of restitution to the Department of Public Welfare under 62 P.S. section 1407(b)(2)(i) which provides that the trial court shall order any person convicted of fraud "to repay the amount of the excess benefits or payments plus interest on that amount at the maximum legal rate from the date payment was made by the Commonwealth to the date repayment is made to the Commonwealth").

Additionally, *Veon* stressed that the DCED was not a "direct victim" because it did not suffer "physical or mental injury, death or the loss of earnings under this act" as a consequence of a criminal act. *Veon, supra*,150 A.3d at 450 (Pa., 2016). Here, however, the Pennsylvania

Depart of Human Services (DHS) (formerly Department of Public Welfare – DPW) suffered a "loss of earnings" as a consequence of appellant's criminal acts.

Pursuant to the Memorandum of Understanding between the Office of Inspector General and the Department of Public Welfare, the Office of Inspector General (OSIG) is designated as the state agency responsible for the collection of public assistance payments issued by DHS.

Sections 501 and 502 of the Administrative Code (71 P.S. §§181 and 182) require Commonwealth Departments and agencies to coordinate their work and activities with other Departments and agencies[4]. Furthermore, other sections of the Pennsylvania Code also identify the Office of the Inspector General as the agency responsible for pursuing criminal

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[4] DHS' own responsibility to issue such payments (and more generally to administer the public welfare programs, including general assistance), is established through 62 P.S. §403. The definition of "Department" in section 403 is found in section 102 of the Public Welfare Code (62 P.S. § 102).

Sections of the Pennsylvania Code also identify the Office of the Inspector General as the agency responsible for pursuing criminal prosecutions for welfare fraud, as well as conducting additional types of collection activities for identified improper welfare payments. See, for example,

prosecutions for welfare fraud, as well as conducting additional types of collection activities for identified improper welfare payments. *See*, for example, 55 Pa. Code §§ 275.11, 275.12.

Finally, on October 24, 2018, Senate Bill 897 was signed into law as Act 145 by Pennsylvania Governor Tom Wolf. The Act amends §1106(c) to include restitution to "any affected government agency" within the term "victim". Thus, the Commonwealth submits that it is clear that it was never the legislature's intent to allow those who commit welfare fraud to avoid paying restitution to a state agency.

For all of the foregoing reasons, the orders of restitutions were legally ordered as conditions of appellant's probation and no relief is due on this claim.

II. THE RECORD REVEALS THAT BOTH JUDGE NAUHAUS AND JUDGE LAZZARA CONSIDERED MORE THAN APPELLANT'S FAILURE TO PAY RESTITUION BEFORE REVOKING APPELLANT'S PROBATION AND IMPOSING TERMS OF CONFINEMENT. FURTHERMORE, THE RECORD DEMONSTRATES THE COURTS CONSIDERED APPELLANT'S ABILITY TO MAKE PAYMENTS.

Appellant next argues that the court erred in imposing a term of total confinement without considering the reasons for her failure to make restitution payments. (Brief for Appellant at 20)

The United States Supreme Court, in *Bearden v. Georgia*, 461 U.S. 660 (1983) held that a term of probation may not be revoked for failure to pay fines absent certain considerations by the revocation court. Specifically:

> {I}n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the

> probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. (Footnote omitted).

Bearden, supra, 461 U.S. at 672. This holding has been interpreted by this court as requiring the revocation court to inquire into the reasons for a defendant's failure to pay and to make findings pertaining to the willfulness of the party's omission. *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa.Super. 1984); *Commonwealth v. Eggers,* 742 A.2d 174, 175–76 (Pa.Super. 1999); *Commonwealth v. Ballard,* 814 A.2d 1242, 1247 (Pa.Super. 2003).

Appellant avers that her "probation revocations and sentences of incarceration…were based on her failure to make restitution payments." (Brief for Appellant at 21) However, it is clear that the matter of appellant's probation revocation is not as simple as that. The records of the three cases reveal that in each, probation was revoked for multiple reasons and that incarceration was ultimately appropriate to vindicate the authority of the sentencing court.

At CC No. 200508439, it was established at the December 16, 2016 probation violation hearing that appellant had paid $15 towards the $24,037.49 that had been imposed on March 13, 2006. (Probation

Violation Hearing 12/16/16 at 3) At the hearing, Attorney Jessica Herndon pointed out that appellant had a fixed income and suffered mental health issues. *Id*. Judge Nauhaus observed that despite not making any payments other than $15 on November 9, 2015, appellant supported a smoking habit. (*Id*). Nevertheless, the court accepted appellant's pledge to make $50 monthly payments and continued probation, adding that appellant needed to be compliant, to forego smoking and abide by those conditions. *(Id* at 7-8)

On October 5, 2017, appellant appeared before Judge Nauhaus for violating probation. The court learned that no further payments had been made toward restitution. (Probation Violation Hearing 10/5/17 at 2) Appellant's probation officer also informed the court that on June 12, 2017, appellant reported to the probation office where she submitted a urine sample that indicated the presence of cocaine which was confirmed through tests. Furthermore, this occurred after appellant had denied drug use and signed a Substance Abuse Denial form. (*Id* at 3) Appellant was arrested on July 5, 2017 as a result of the positive drug test and at the time of her arrest, had $1,132 on her person. (*Id*)

At the November 16, 2017 probation violation hearing, Judge Nauhaus stated:

> The Court ordered a pre-sentence report which the Court has shared with not only current Counsel but Mr. Lee who was here before, and the pre-sentence report indicates a history of property crimes, history of property crimes, theft of services, Public Assistance, filing false statements, all kinds of other stuff, **and up until very recently[5], no payments on the 24,000.**

The Court further noted that it had previously stressed a zero tolerance policy and addressed appellant's failed drug test:

> She had a hot urine, didn't she? Hello? Let me ask you this question. I wrote down here, comply with JRS plan, zero tolerance. What does zero tolerance mean?

(Probation Violation Hearing November 16, 2017 at 7)

At the hearing, Probation Officer Walls stressed that including hearings on November 18, 2009, November 2, 2011 and December 16, 2016, it was now appellant's fifth time before the court. He noted that despite being in possession of over $1,000 the last time she was apprehended, appellant had made no further payments. (*Id* at 4-5) Mr. Walls argued that appellant was not amenable to county supervision and

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[5] Contrary to appellant's assertions, the court acknowledged that appellant had paid some of her restitution. (See Brief for Appellant at 27)

asked for a period of incarceration. However, defense counsel represented that appellant could attribute the aforementioned excess of $1,000 towards the restitution[6]. The Court responded as follows:

> It's too little too late. You know, now it's not a matter of the money. To be perfectly honest with you, it's not a matter of the money. These banks are never going to see that money. These banks are never, ever going to see the 24,000, so putting that aside -- and the only reason she was put on probation was for these banks to get their money back, and it's never going to happen. It's never going to happen.

(*Id* at 5) The court also heard from Marvin Robinson from Justice Related Services who represented that appellant complied with her treatment plan. (*Id* at 6) The court questioned this, noting appellant's failed drug test as follows:

> No, no, no. See, zero tolerance is zero tolerance. It's not zero tolerance, you can do a little cocaine and we'll put you in a program, we'll put you in a program. That's not what happens here, that's not what happens here. We put her on zero tolerance and we said, ma'am, you're not allowed to do drugs. You are not allowed to do drugs. Isn't that what we said? You are not allowed to do drugs. That's what

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[6] This obviates the need for an inquiry into whether the cash actually belonged to appellant as defense counsel represented that to the court that it was appellant's money. (See Brief for Appellant at 27-28)

> JRS said to her, and in spite of the fact that they told her she wasn't allowed to do drugs, what did she do? The same thing that we told her she had to pay restitution. Eventually, eventually, you got to pay the piper.

(*Id* at 7-8)

Consequently, it is clear from the foregoing that Judge Nauhaus did not revoke probation and impose a term of confinement merely because of her appellant's failure to pay restitution but because of her general refusal to adhere to the terms of her probation and recent failure of a drug test. Moreover, it is clear from both from the statements of the probation officer and defense counsel that the non-payment was willful as appellant made no payments, except for $15, despite being apprehended with over $1,000 which counsel acknowledged could be put towards restitution.

Regarding appellant's cases at CC No. 201007609 and 201504177, appellant appeared before Judge Lazzara on February 10, 2017 for a probation violation hearing. The court noted at the outset that appellant had made multiple misrepresentations regarding her income, education and her case before Judge Nauhaus. (Probation Violation Hearing 2/10/17 at 2) At the hearing, Mr. Walls informed the court that appellant was currently required to make $50 a month payments of restitution and that Judge Nauhaus had implemented a zero tolerance policy regarding the

terms of her probation. (Id at 4-5) The Court heard from Mr. Rogers regarding a JRS service plan. (Id at 5) The court noted that it had reviewed the presentence report and that it revealed that probation could not verify any of appellant's representations regarding employment and education and that appellant had written letters to Judge Nauhaus misrepresenting the actions of the court. Mr. Rogers stated that appellant's chance of success in Mental Health Court was "50/50" and that appellant would certainly be in front of the court on a regular basis, with which the court agreed. (*Id* at 8) Despite Judge Lazzara's concern and frustration with appellant, she nevertheless allowed appellant to continue with probation to continue and to follow the JRS plan and stated as follows:

> Mr. Walls, I'm going to let you monitor it instead of Mental Health Court for the simple fact that I will be tempted every time I see her to put her in state prison and I don't want that temptation.

(*Id* at 10, 11) The court then revoked probation at CC No. 201007609 and imposed a new 7 year period of probation. Probation was also revoked at CC No. 20154177 and a concurrent term of 7 years' of probation was imposed. The court stressed the requirements of the JRS plan and that appellant must comply with treatment and not use any illegal substances. (*Id* at 13-14) The court also stressed a zero-tolerance policy with regards to restitution payment, treatment attendance and drug screens. (Id at 17)

On April 20, 2018, appellant appeared before Judge Lazzara, having already been sentenced by Judge Nauhaus on technical probation violations. It was noted that appellant had made some small monthly restitution payments. (Hearing Transcript 4/20/18 at 8) The court again noted appellant's continued misrepresentation to both her and Judge Nauhaus. *Id.*

In her brief, appellant lists the various payments she made toward restitution, admitting that those payments "are not a significant amount." (Brief for Appellant at 28) Regardless, the record is clear that like Judge Nauhaus, Judge Lazzara did not sentence appellant solely due to her failure to pay restitution alone and that the court was much more concerned with appellant's pattern of misrepresentations to the court. Judge Lazzara stated as follows:

> We told you you messed up, you were told multiple times, every time you were in here before me and Judge Nauhaus, everybody told you you messed up and you needed to start doing stuff differently and you didn't do stuff differently. What you did is you tried to play me and Judge Nauhaus against each other, lying to one court about what the other court was doing. It's unfortunate, we talk, we have probation to talk to. So we know. It wasn't going to work. You may have thought you were really slick about that but, you know, it made him mad enough to send you up for seven and a half -- 7 to 14. Right?

(Hearing Transcript 4/20/18 at 6) Regarding the ability to pay restitution, the court stated in its Opinion as follows:

> While the court did not hold a separate hearing to determine the Defendant's ability to pay restitution, any inability to pay was never raised or brought to this court's attention at that time. To the contrary, the Defendant made affirmative representations to this court during that November 4, 2015 sentencing hearing that she had the means and ability to make the restitution payments as required. Through her attorney, she communicated that she soon would be returning to work and that she would be making $35 an hour. (Sentencing Transcript, 11/4/15, p. 12). She informed the court that she would be dedicating "most" of her salary to the total amount of restitution she owed. (Sentencing Transcript, 11/4/15, p. 12). She never objected to her financial ability to make restitution, and she conceded that she had the means to make such payments and that she was simply choosing not to do so. (Sentencing Transcript, 11/4/15, p. 18- 19).
>
> At the probation violation hearing held on February 10, 2017, the Defendant had not only failed to make the required payments, she also had failed to comply with this court's order to complete a drug and alcohol evaluation, and she had failed to report to probation as directed. (Probation Violation Hearing, 2/10/17, p. 6). The court also had 3 learned that the Defendant had lied to the court about her education and employment. However, despite her non-compliance with her probation, the court again provided the Defendant with another opportunity to come into compliance by revoking her probation and imposing a new seven (7) year term of probation at each case number, which were ordered to run concurrently. At no point did the

> Defendant ever suggest or imply that she would be unable to make the $100 court-ordered restitution payment every month. (Probation Violation Hearing, 2/10/17, pp. 2-18).
>
> At the April 20, 2018 probation violation hearing, the court explicitly noted that it would have appreciated any effort to make even the smallest restitution payments every month. The Defendant's failure to contribute as little as $5 a month showed that she was unwilling, and not unable, to comply with the terms of her probation. (Probation Violation Hearing, 4/20/18, pp. 9-10). She had not made a single restitution payment since 2017. (Id. at 9-10). Had the Defendant made even nominal monthly payments, the Defendant would not have suffered the same fate. However, given her overall conduct during her time on probation with this court, the revocation of probation and a sentence of total confinement was appropriate to vindicate the authority of the court.

(Opinion of Judge Lazzara at 3-4)

Appellant relies on two distinguishable cases for the proposition that a defendant cannot be committed to prison for failure to pay fines and costs without a hearing addressing ability to pay. *See Commonwealth ex rel. Powell v. Rosenberry,* 645 A.2d 1328, 1331 (Pa.Super. 1994) ("There is no indication in the record that Powell has willfully refused to pay his fine."); and *Commonwealth v. Eggers,* 742 A.2d 174, 176 (Pa.Super. 1999) (finding "the trial court did not make any inquiry into the reasons

surrounding Appellant's failure to pay" and "the court ignored the fact that Appellant had been making additional payments to the clerk of courts....").

Unlike the cases cited by appellant, here probation was not revoked as a reaction to the non-payment of restitution. There is a record concerning appellant's misrepresentations regarding her ability to pay and appellant was apprehended with a large amount of cash on her person. As noted by Judge Nauhaus in his opinion:

> [D]uring the probation violation hearing it was established that Defendant had a thousand dollars on her before she was detained in the probation office. (PVH at 4). **Thus Defendant had the funds to make some effort towards restitution**.

(Opinion of Judge Nauhaus at 6) (emphasis added)[7]

It is ultimately submitted that appellant's probation was not revoked due to non-payment of restitution without regard for the defendant's ability to pay. Instead the record reveals that both Judge Lazzara and Judge Nauhaus gave appellant every opportunity to make some meaningful effort

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[7] Judge Lazzara notes in her opinion that when she imposed the order of restitution at CC No. 201504177, she had noted that appellant "ha[d] the means and ability to make your victims whole and you just haven't been doing it." (GPT 11/4/15 at 18-19)

toward restitution and became continuously frustrated by appellant's misrepresentations and continued probation violations.

The Commonwealth would finally note that this Court may affirm the decision of the lower court on any basis. Here, a sentence of confinement was necessary to put an end to the cycle of probation violations. Judge Lazzara stated as follows:

> You know, Miss Bivins, you have put yourself in an impossible place, you know, with your conduct. You know, look at the original conduct that got you there; $57,000 in restitution owed on my cases alone. That doesn't even count what we have for Judge Nauhaus. You put yourself in this position because you just sort of did what you wanted to do. I kept telling you, you know, five, ten, twenty dollars a month, keep doing it, you know, and you wouldn't even follow that because you knew better. You knew better to the point of getting yourself at this point where you are in Muncy for Judge Nauhaus and what am I supposed 8 to do with you at this point?
>
> You know, I give you a county sentence, then you got to serve the county sentence before they send you back up to Muncy. That's just going to add to your time. I'm supposed to give you probation and trust when you come out you're going to start paying on these? Be on probation for what, the rest of your life? I mean, what do you leave me? You don't leave me with a whole lot of choice, right?

(Hearing Transcript 4/20/18 at 9-10)

Clearly the sentences imposed were necessary to vindicate the

authority of the sentencing court and were not designed to punish an indigent defendant and the Commonwealth submits that the judgment of sentence should be affirmed.

III. THE COURTS DID NOT ERR IN REVOKING APPELLANT'S PROBATION AND IMPOSING A SENTENCE OF INCARCERATION. APPELLANT'S CLAIM THAT THE COURTS FAILED TO CONSIDER RELEVANT FACTORS DOES NOT RAISE A SUBSTANTIAL QUESTION FOR THIS COURT'S REVIEW. FURTHERMORE, SUFFICIENT REASONS FOR THE SENTENCES IMPOSED WERE PLACED ON THE RECORD.

Finally, appellant claims that the courts erred by not considering appropriate reasons before imposing sentence. (Brief for Appellant at 30)

Appellant's claims challenge the discretionary aspects of his sentence. *See Commonwealth v. Lee*, 876 A.2d 408 (Pa.Super. 2005) (claim that the trial court erred in imposing an excessive sentence is a challenge to the discretionary aspects of a sentence); *Commonwealth v. Gonzalez–Dejusus*, 994 A.2d 595 (Pa.Super. 2010) (claim that the trial court erred in imposing consecutive sentences is a challenge to the discretionary aspects of a sentence).

This court has held that "sentencing is a matter vested in the sound discretion of the sentencing judge, whose judgment will not be disturbed absent an abuse of discretion." *Commonwealth v. Ritchey*, 779 A.2d 1183, 1185 (Pa.Super. 2001). Moreover, pursuant to statute, appellant does not have an automatic right to appeal the discretionary aspects of her sentence. *See* 42 Pa.C.S.A. § 9781(b). Instead, appellant must petition this Court for permission to appeal the discretionary aspects of her

sentence. *Id.*

As this Court has explained:

> [t]o reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b).

Commonwealth v. Cook, 941 A.2d 7, 11 (Pa.Super. 2007); *see also Cartrette*, 83 A.3d at 1042. ("issues challenging the discretionary aspects of a sentence [following the revocation of probation] must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived"); *Commonwealth v. Kalichak*, 943 A.2d 285, 289 (Pa.Super. 2008) ("when a court revokes probation and imposes a new sentence, a criminal defendant needs to preserve challenges to the discretionary aspects of that new sentence either by objecting during the revocation sentencing or by filing a [motion to modify] sentence").

As our Supreme Court has held, the determination of whether a

substantial question exists must be done prior to and separately from the determination of the potential merits of an issue. *Commonwealth v. Tuladziecki*, 522 A.2d 17, 19 (Pa. 1987). If it were otherwise, a challenger would "in effect obtain[ ] an appeal as of right from the discretionary aspects of a sentence"—a result that would violate statutory law. *Id*.

Appellant has complied and included a 2119(f) statement in her brief. In the statement, appellant technically raises a substantial question by alleging that he court did not consider relevant factors such as protection of the public, the gravity of the underlying offenses and her own attributes, including her rehabilitative needs. *Commonwealth v. Clarke*, 70 A.3d 1281 (Pa.Super. 2013), appeal denied, 85 A.3d 481 (Pa. 2014). However, appellant's entire argument regarding the discretionary aspects of her sentence is that the court failed to consider that no one was physically hurt by her crimes and also her mental illness. (Brief for Appellant at 32) Such claims that the court failed to consider mitigating factors actually do no raise a substantial question and the Commonwealth submits that despite the language used in her 2119(f) statement, a substantial question has not been raised. *Commonwealth v. Downing*, 990 A.2d 788, 794 (Pa.Super. 2010) (a claim of inadequate consideration of mitigating factors does not

raise a substantial question for review)

However, even if a substantial question has been raised, there is no merit to appellant's claim. The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Commonwealth v. Smith,* 669 A.2d 1008, 1011 (Pa. 1996). After probation is revoked, the ability of the revoking court to impose a sentence of total confinement is limited to three situations: where the defendant has been convicted of another crime, where "the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned," or when "such a sentence is essential to vindicate the authority of the court." 42 Pa.C.S. §9771(c).

Furthermore, the focus of a probation violation hearing is whether the conduct of the defendant indicates that probation is not a useful means of achieving his rehabilitation and/or a sufficient deterrent against future criminal conduct. *Commonwealth v. Sims,* 770 A.2d 346, 350 (Pa.Super. 2001). This Court's review in a probation revocation case is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that were before it at the time of the initial

sentencing. *Commonwealth v. Fish,* 752 A.2d 921 (Pa.Super. 2000). Upon sentencing following revocation of probation, a trial court is limited only by the maximum sentence that could have been imposed originally at the time that probation was imposed. *Id*. at 923 (emphasis supplied).

Here, the revocation courts acted within their discretion when it revoked appellant's probation and imposed sentence. The reasons for the terms of incarceration that were within the statutory limits are well-documented in the foregoing arguments and the circumstances clearly justified the lower courts' decision to impose a prison sentence. Appellant had, in effect, thumbed her nose at every effort that the court system made to rehabilitate her. After both judges imposed original sentences of probation and provided appellant with an opportunity for rehabilitation, appellant committed numerous violations of probation, made numerous misrepresentations to the courts and, regarding the case before Judge Nauhaus and one of the cases before Judge Lazzara, committed additional crimes. Indeed, the courts had been lenient in not sentencing appellant to terms of imprisonment in 2006, 2011 and 2016 or at the numerous intervening probation revocation proceedings.

Instead, appellant was given numerous opportunities to comply with the terms of her probation but simply ignored the court's authority and

failed to meet the conditions of her probation. Notably, at least two of the three justifications exist for imposing a sentence of confinement insofar as appellant also demonstrated a likelihood of committing additional crimes while on probation. See *Commonwealth v. Cappellini,* 690 A.2d 1220, 1225 (Pa.Super. 1997) ("[a]ppellant's drug use, combined with his resistance to treatment and supervision, is enough to make a determination that, unless incarcerated, appellant would in all likelihood commit another crime")

Overall, the record is clear that each court revoked appellant's probation and imposed a sentence of total confinement in order to vindicate the authority of the court. "A sentencing court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing court's consideration of the facts of the crime and character of the offender." *Commonwealth v. Crump,* 995 A.2d 1280, 1283 (Pa.Super. 2010), citing *Commonwealth v. Malovich,* 903 A.2d 1247, 1253-54 (Pa.Super. 2006). In her Rule 1925(a) opinion, Judge Lazzara noted:

> At the April 20, 2018 probation violation hearing, the court explicitly noted that it would have appreciated any effort to make even the smallest restitution

> payments every month. The Defendant's failure to contribute as little as $5 a month showed that she was unwilling, and not unable, to comply with the terms of her probation. (Probation Violation Hearing, 4/20/18, pp. 9-10). She had not made a single restitution payment since 2017. (Id. at 9-10). Had the Defendant made even nominal monthly payments, the Defendant would not have suffered the same fate. However, given her overall conduct during her time on probation with this court, the revocation of probation and a sentence of total confinement was appropriate to vindicate the authority of the court.

(Opinion of Judge Lazzara at 4)

Under these circumstances prison sentences were essential to vindicate the court's authority. See *Malovich,* supra, 903 A.2d at 1253-54 (finding that where appellant had not complied with court-imposed efforts toward his rehabilitation, incarceration, not probation, was appropriate). *Cf. Commonwealth v. Mitchell,* 632 A.2d 934 (Pa.Super. 1993) (judge properly revoked parole based on defendant's failures to appear for court or pay restitution, although defendant was not convicted of any new offenses).

Accordingly, the sentences were clearly designed to address appellant’s ongoing failure comply with the terms of probation despite numerous opportunities to do so. The fact that appellant is unhappy with the sentence or can identify lesser sentences does not make her sentence

manifestly unreasonable. There is, in fact, no right to a particular sentence or to a minimal one. It is the Commonwealth's position that the sentences imposed re legal and appropriate under the circumstances and should therefore be affirmed.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the judgment of sentence be affirmed.

Respectfully submitted,

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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 Record of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Margaret Ivory_____
Signature:__/s/_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that although the Brief of Appellee exceeds 30 pages, it is in compliance with the word count limits set forth in Pa.R.A.P. 2135(a)(1).

Dated: February 15, 2019

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PROOF OF SERVICE

I hereby certify that I am this day serving two (2) copies of the within Brief for Appellee upon Counsel for Appellant in the manner indicated below which service satisfies the requirements of Pa.R.A.P 121:

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