

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

v.

TYNIECIA MILTON-BIVINS

Appellant

: No. 1870 WDA 2017

Appeal from the Judgment of Sentence November 16, 2017
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0008439-2005

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

v.

TYNIECIA MILTON-BIVINS

Appellant

: No. 737 WDA 2018

Appeal from the Judgment of Sentence April 20, 2018
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0004177-2015,
CP-02-CR-0007609-2010

BEFORE: PANELLA, P.J., STABILE, J., and McLAUGHLIN, J.

MEMORANDUM BY PANELLA, P.J.:

FILED SEPTEMBER 13, 2019

Tyniecia Milton-Bivins appeals from the judgments of sentence imposed on November 16, 2017 and April 20, 2018, following the revocation of her probation in the case docketed at CP-02-CR-0008439-2005 (hereinafter "8439-2005") and the cases docketed at CP-02-CR-0004177-2015 (hereinafter "4177-2015") and CP-02-CR-0007609-2010 (hereinafter "7609-

2010"). Specifically, she claims that each trial court erred when it imposed a sentence of total confinement for her failure to pay restitution without conducting a hearing concerning her ability to pay. Because we are constrained to conclude that each trial court imposed an illegal sentence, we vacate each judgment of sentence and remand for a new hearing, during which the trial court must render appropriate findings on Appellant's financial ability to pay restitution.

A. Case Number 8439-2005

On March 13, 2006, Appellant pleaded guilty to two counts of theft by deception and five counts of criminal conspiracy. She was sentenced to an aggregate sentence of twenty-one years of probation and ordered to pay \$24,037.49 in restitution to National City Bank, Dollar Bank, and Standard Bank.

On December 5, 2016, the court held a probation violation hearing, and continued probation with the arrangement that Appellant would pay \$50.00 a month in restitution.

On November 16, 2017, the court held another violation hearing, during which it found that Appellant failed to make payments toward her restitution,¹

¹ Although the trial court mentioned that Appellant had at one point tested positive for cocaine in violation of the conditions of her probation, during the violation hearing, the probation officer made clear that she "is here because she has failed to pay the restitution. She is not here for [Justice Related Services] failure. She is not here for anything else. December 16, 2016, she

revoked her probation and resentenced her to an aggregate sentence of not less than seven nor more than fourteen years of incarceration. The trial court denied Appellant's post-sentence motion on December 20, 2017.² This timely appeal followed.

B. Case Numbers 7609-2010 and 4177-2015

On September 19, 2011, at docket number 7609-2010, Appellant pleaded guilty to one count of fraud obtaining food stamps. She was sentenced to seven years of probation and ordered to pay \$47,706.05 in restitution.

On November 4, 2015, at docket number 4177-2015, Appellant pleaded guilty to eight counts of theft and three counts of possession of controlled substance. The trial court sentenced her to an aggregate sentence of five years of probation and ordered to pay \$10,000.00 in restitution to UPMC.

On February 10, 2017, at a probation violation hearing on docket numbers 7609-2010 and 4177-2015, the court sentenced Appellant to seven years of probation and ordered that she make regular \$100.00 monthly payments total on the balance of restitution.

agreed to pay the restitution. She did not do that. That is why she is here. She's not here for anything else." N.T. Hearing, 11/16/17, at 10.

² Appellant's post-sentence motion did not toll the thirty-day deadline for filing her notice of appeal. **See** Pa.R.Crim.P. 708(E). Therefore, the trial court only had until Monday, December 18, 2017, to rule on the post-sentence motion. **See Commonwealth v. Coleman**, 721 a.2d 798, 799 (Pa. Super. 1998). Regardless, Appellant timely filed her notice of appeal on December 14, 2017.

On April 20, 2018, the court held another violation hearing, during which it found that Appellant had failed to make \$100.00 monthly payments on the combined restitution, revoked her probation in both cases, and resentence her to not less than three and a half nor more than seven years of incarceration, to run concurrent to the incarceration imposed at docket number 8439-2005. The court denied Appellant's post sentence motion on May 17, 2018. This timely appeal followed.³

On November 15, 2018, this Court issued a Per Curiam order granting Appellant's application and consolidating the above appeals because the issues raised were the same in both. Appellant raises three questions on appeal.

[1.] Were the trial courts' sentences illegal because it failed to consider [Appellant's] ability to pay restitution?

[2.] Were the trial courts' sentences illegal because corporations and the Commonwealth are not victims under the restitution statute, 18 Pa.C.S.[A.] §1106, and therefore [Appellant] does not lawfully owe any restitution?

[3.] Were the trial courts' sentences an abuse of its discretion because it failed to consider the relevant sentencing criteria for [Appellant]?

Appellant's Brief, at 3.⁴ We need only reach Appellant's first issue, as it is dispositive of this appeal.

³ Appellant filed a single notice of appeal from both docket numbers on May 29, 2018. Therefore, the dictates of ***Commonwealth v. Walker*** are not applicable. **See** 185 A.3d 969, 977 (Pa. 2018) (stating that the requirement to file separate notices of appeal from multiple trial court docket numbers will be applied to appeals filed after June 1, 2018).

⁴ We have re-numbered the listed questions for ease of disposition.

In the first issue, Appellant claims that both trial courts imposed illegal sentences upon revocation of her probation. **See** Appellant’s Brief, at 20-30. Specifically, she contends that “before a court may [] find that a defendant violated the terms of her probation for not paying fines, costs, or restitution, it must conduct an inquiry into the defendant’s ability to pay.” **Id.** at 13. Therefore, Appellant claims that because neither court conducted an inquiry into her ability to pay prior to making a finding concerning the willfulness of her nonpayment, the sentences imposed violated her constitutional rights. **See id.** at 22-23. After careful review, we agree.

In an appeal from a sentence imposed after a trial court’s revocation of probation, this Court “can review the validity of the revocation proceedings, the legality of the sentence imposed following revocation, and any challenge to the discretionary aspects of the sentence imposed.” **Commonwealth v. Wright**, 116 A.3d 133, 136 (Pa. Super. 2015) (citation omitted). The instant appeal involves a challenge to the legality of the sentence imposed.

The scope and standard of review applied to determine the legality of a sentence are well settled.

If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court’s application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.

Commonwealth v. Dixon, 161 A.3d 949, 951 (Pa. Super. 2017) (citation omitted).

Revocation of probation proceedings are governed by 42 Pa.C.S.A. § 9771, which states that a trial court may revoke probation upon proof of a violation of a condition of that probation. **See** 42 Pa.C.S.A. § 9771(a)-(b). The court may impose a sentence of total confinement if it finds that: (1) the defendant has been convicted of another crime; (2) the defendant's conduct indicates that it is likely that she will commit another crime; or (3) total confinement is essential to vindicate the authority of the court. **See id.** at § 9771(c).

A term of probation may not be revoked for failure to pay fines absent certain considerations by the revocation court. Prior to revoking probation on the basis of failure to pay fines, costs or restitution, the court must inquire into the reasons for a defendant's failure to pay and . . . make findings pertaining to the willfulness of the party's omission. In other words,

A proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay. . . . After making those determinations, if the court finds the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court should then consider alternatives to incarceration. . . .

Commonwealth v. Ballard, 814 A.2d 1242, 1247 (Pa. Super. 2003) (citations and quotation marks omitted; ellipses in original).

The trial court's responsibilities concerning a defendant's inability to pay fines, costs, and restitution, are governed by Rule 706 of the Pennsylvania Rules of Criminal Procedure, which 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.

Pa.R.Crim.P. 706(A)-(C).

"If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." ***Bearden v. Georgia***, 461 U.S. 660, 668 (1983) (citation omitted). "But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." ***Id.*** at 668-69 (footnote omitted).

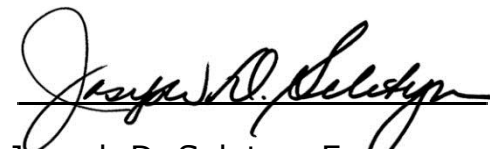
Here, in both cases, the trial courts revoked Appellant's probation because she failed to pay restitution. **See** N.T. Hearing, 11/16/17, at 10; N.T. Hearing, 4/20/18, at 2, 9-10. Additionally, both trial courts acknowledge that they did not conduct a formal ability to pay inquiry; however, each claims that there was some discussion with respect to Appellant's financial ability. **See** Trial Court Opinion, 11/01/18, at 3 (observing that Appellant "never objected to her financial ability to contribute to restitution[.]"); Trial Ct. Op., 10/12/18,

at 6 (stating that because Appellant had one thousand dollars on her when she was detained, she “had the funds to make some effort toward restitution”).

Upon review, we conclude that neither court conducted an adequate hearing into Appellant’s ability to pay restitution. **See** Pa.R.Crim.P. 706(A), (C); **Ballard**, 814 A.2d at 1247. The courts imprisoned Appellant without either conducting a hearing concerning her ability to pay restitution, or making the required findings of facts concerning her financial resources. Under these circumstances, we conclude that the courts failed to apply the law properly and imposed illegal sentences. **See Commonwealth v. Diaz**, 191 A.3d 850, 866 (Pa. Super. 2018). Therefore, we are constrained to vacate the judgments of sentence in both cases, and remand to the trial courts.⁵

Judgments of sentence vacated. Cases remanded to trial courts. Panel jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/13/2019

⁵ Having vacated the judgments of sentence on Appellant’s first issue, we need not address her remaining issues. **See Commonwealth v. Sodomsky**, 137 A.3d 620, 629, (Pa. Super. 2016), *appeal denied*, 158 A.3d 1236 (Pa. 2016), *cert. denied*, 137 S.Ct. 1205 (2017).