

**IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 558 WDA 2022

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

DEREK MARSHALL,

Appellant.

REPLY BRIEF FOR APPELLANT

Appeal from the Judgment of Sentence Entered April 8, 2022, in the Court of
Common Pleas of Allegheny County in CP-02-CR-0003258-2016

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The Commonwealth agrees that Mr. Marshall was illegally found in violation of his probation, illegally had that probation revoked, and was illegally punished with a new term of probation when the trial court held that Mr. Marshall's failure to pay off \$68,031.43 in restitution before the end of his probation was a per se violation of that probation, without regard to whether he had the ability to pay that sum.

The Commonwealth suggests, however, that the errors below mean that this Court lacks a sufficient record to discharge Mr. Marshall's probation. The Commonwealth goes on to make the point that, even if Mr. Marshall's probation ends, he still must pay the remainder of his restitution.

The Commonwealth's second point answers the first. Mr. Marshall certainly will still owe his remaining restitution—both because that restitution was imposed as part of his sentence and because a civil judgment has been entered against Mr. Marshall to secure the payment of that restitution. *See* Rule 1925(a) Opinion dated Sept. 1, 2022, 2-3 (“Defendant was found to owe restitution in the amount of \$68,031.43 ... This restitution is imposed as a part of the sentence and as a condition of probation.”): *Com. v. Marshall*, CP-02-CR-3258-2016 (Jan. 20, 2017) (Entry of Civil Judgment). As this Court held in *Commonwealth v. Bolds*, the entry of that civil judgment renders further supervision “moot” and provides the basis for the discharge of Mr. Marshall's probation in the absence of any other reason for

maintaining it. *Com. v. Bolds*, No. 163 EDA 2021, 2022 WL 71879 at *1 (Pa. Super. Ct. Jan. 7, 2022) (unpublished) (“The current challenge to Bolds’ restitution sentence is rendered moot where a civil judgment, pursuant to 42 Pa.C.S. § 9728, was entered in favor of the Commonwealth against Bolds.... Defendant discharged. Jurisdiction relinquished.”).

Moreover, sending this case back for a hearing is an exercise in futility. The condition of probation that Mr. Marshall was charged with violating was the order that he pay \$68,031.43 in restitution—the full sum. *See* Rule 1925(a) Opinion dated Sept. 1, 2022, at 3 (“Due to his failure to satisfy his restitution prior to the expiration of his five (5) years of probation, a *Gagnon II* hearing was held before the undersigned on April 8, 2022.”). There is no reason to think that Mr. Marshall—who has worked multiple jobs while putting his life back together following his conviction—had the means to pay over \$68,000 in restitution during the five years following his sentencing.

If this Court does remand for a new *Gagnon II* hearing, the Court should make clear that Mr. Marshall cannot be found in violation of his probation if, in the trial court’s view, he “made insufficient bona fide efforts to acquire the resources to pay.” *Cf.*, Brief for Appellee at 3. The trial court may *not* revoke Mr. Marshall’s probation if it believed that he should have tried harder to squeeze a few more dollars from his budget to pay toward his restitution. The trial court may only

revoke Mr. Marshall's probation if it finds that Mr. Marshall could have, but refused, to pay the sum of \$68,031.43 before the fifth anniversary of his sentencing, because that was the specific condition imposed upon Mr. Marshall--to pay the full amount of \$68,031.43 during his time on probation. Whether he made "bone fide" efforts to pay is only relevant to the question of whether he was capable of paying the full amount he was ordered to pay.

This is black letter law. A defendant may be found to have violated his probation only if he failed to meet an obligation that is specifically identified as a condition of probation. *Com. v. Foster*, 214 A.3d 1240 (Pa. 2019). As the court below made clear in its opinion, the condition imposed on Mr. Marshall was that he pay \$68,031.43 in restitution. He cannot be found in violation of that condition if the trial court believes he could have paid a little more than he did if he'd just worked a little harder. He can only be found in violation of that condition if the trial court finds that he could have paid the *full sum* by the expiration of his probation.

That is why remand in this case is a futility. If the case is remanded for a new *Gagnon II* hearing, the trial court must consider not just Mr. Marshall's earnings, but also his expenses. *See, e.g., Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (record insufficient to support imposing a fine when it "does not disclose his current income," and with "no indication in the record that

the sentencing court considered appellant's indebtedness"). To revoke Mr. Marshall's probation, the trial court would have to find that Mr. Marshall was able to pay \$65,000 more than he did in light of his own basic needs. The Commonwealth does not even suggest that this could be the case.

This Court should also make clear, as it has before, that the burden is on the Commonwealth to "prove by a preponderance of the evidence" each of the elements of the charged probation violation, including the element of willfulness. *Commonwealth v. Dorsey*, 476 A.2d 1308, 1311 (Pa. Super. 1984). This Court has repeatedly held that one of the elements of every technical violation is whether there was a "willful or flagrant disrespect for the terms of probation on the part of the defendants" to revoke probation. *See, e.g., Commonwealth v. Heilman*, 876 A.2d 1021, 1027 (Pa. Super. Ct. 2005) (court could not revoke probation for failure to attend treatment where there was no evidence of willful noncompliance). *See also, e.g., Commonwealth v. Carver*, 923 A.2d 495, 499 (Pa. Super. Ct. 2007) (probation cannot be revoked for a failed drug test "based solely upon technical violations because there was no willful or flagrant disrespect for probationary terms evidenced by defendant"); *Commonwealth v. Allshouse*, 969 A.2d 1236, 1242 (Pa. Super. Ct. 2009) (reversing revocation based on no-contact order when there "was no basis for the trial court's finding that the Commonwealth

demonstrated by a preponderance of the evidence that Appellant willfully violated the no-contact order”).

The trial court’s obligation to inquire into Mr. Marshall’s ability to pay is a backstop designed to prevent the violation of Due Process that occurred here, but the first failure of proof below was the Commonwealth’s. The Commonwealth does not suggest that it can meet its burden of proof. Rather than seeking remand, it should withdraw the violation and agree to discharge Mr. Marshall from probation.

As the Commonwealth has conceded, there was not sufficient evidence to find Mr. Marshall in violation of his probation, to revoke that probation or to impose a new sentence of probation. This Court should vacate the order of the trial court finding him in violation of probation and discharge him from probation.

Respectfully submitted,

/s/ Mary Catherine Roper

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.P. 2135 that this brief does not exceed 7000 words.

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.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties via PACFile.

Dated: April 10, 2023

/s/ Mary Catherine Roper
Mary Catherine Roper