SENTENCING FOR PROBATION OFFICERS
SEARCH AND SEIZURE FOR PROBATION OFFICERS
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Minimum sentences (cont.)

Suggested minimum sentences: Sentencing Guidelines (cont.)

Aggravated and mitigated ranges

The trial court stated on the record its awareness that Wallace's sentence exceeds the sentencing guidelines, and articulated its reasons for deviating from those guidelines as follows:

1. Wallace shot a stranger in the head and left him on the street. The victim had no connection to Wallace and his coconspirators. The victim did not provoke the attack in any way. The crime reflects a cold-blooded attempt by Wallace to maliciously commit murder for sport.
2. Wallace's lengthy criminal history and prior significant periods of state incarceration have been ineffective to accomplish rehabilitation, and have not deterred future criminal conduct. This crime occurred a mere eight months after Wallace's release from serving a parole violation for prior firearms and drug-dealing offenses.
3. Wallace poses a clear danger to the community and this sentence is necessary to protect the community from his violent propensities.
4. The court has a responsibility to impose confinement that is necessary to protect the public from acts of violence and terror. Based on Wallace's prior criminal history and the callous, dangerous, and menacing actions surrounding this crime, there is an undue risk that Wallace would commit another violent crime and harm another innocent person unless he is separated from the community.
5. Any lesser sentence would depreciate the seriousness of this crime.

It is impermissible for a trial court to consider factors already included within the sentencing guidelines as the sole reason for increasing or decreasing a sentence to the aggravated or mitigated range. However, trial courts are permitted to use prior conviction history and other factors included in the guidelines if they are used to supplement other extraneous sentencing information. These reasons included, in addition to Wallace's prior criminal history, the need to protect the community and the nature of the aggravated assault offense — i.e., the fact that Wallace's acts reflect a "cold-blooded attempt" to "murder for sport."

Wallace, 244 A.3d 1261 (Pa. Super. 1/8/21)
appeal pending, No. 183 MAL 2021 (filed 4/9/21)

Minimum sentences (cont.)

Alternative minimum sentence: Recidivism Risk Reduction Incentive (RRRI)

A single first degree burglary conviction does not make a defendant ineligible for RRRI. The single, present, conviction does not constitute a history of violent behavior.

Cullen-Doyle, 640 Pa. 783, 164 A.3d 1239 (7/20/17)
Link to: Todd, J. dissenting

Defendant and the Commonwealth agree that resisting arrest qualifies as a crime demonstrating violent behavior for the purposes of 61 Pa.C.S. § 4503(1). The only question in this case is therefore whether a single prior conviction for a crime demonstrating violent behavior, such as resisting arrest, constitutes a history of such behavior which is disqualifying for RRRI.

While the present circumstances are slightly different than those in *Cullen-Doyle* in that this defendant's ineligibility for a sentence under the RRRI Act was based on a single **prior** conviction for a crime demonstrating violent behavior as opposed to Cullen-Doyle's single **present** conviction for a crime demonstrating violent behavior, we nonetheless find its reasoning determinative.

Finnecy, ___ Pa. ___, 249 A.3d 903 (4/29/21)
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Bradley, 237 A.3d 1131 (Pa. Super. 8/7/20) (single prior disorderly conduct)
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Is the prior conviction for an equivalent offense?

A New Jersey aggravated assault is not equivalent to a Pennsylvania aggravated assault for purposes of the three strikes law found at 42 Pa.C.S. § 9714.

A review of § 9714 reveals that the Pennsylvania legislature carefully crafted the definition section of a crime of violence so that its reach would be targeted and specific. Specifically, § 9714(g) lists single subsections of particular crimes, most of which are first-degree felonies. For example, with aggravated assault, the legislature chose to include only two of the seven subsections. The remaining five subsections were excluded. This deliberate distinction makes it clear that the legislature intended to directly limit this statute's application to only the most serious aggravated assault crimes, those which require the Commonwealth to show that the actor either attempted to cause, or did cause, "serious bodily injury." 42 Pa.C.S. § 9714(g).

In contrast, defendant's New Jersey aggravated assault statute plainly proscribes a lesser degree of bodily injury than the qualifying Pennsylvania crimes. Specifically, a "significant bodily injury" [in New Jersey] targets temporary losses of bodily function, whereas a "serious bodily injury" [in Pennsylvania] pertains to permanent or protracted losses of bodily function.

Since we [conclude] that defendant's 2010 New Jersey aggravated assault conviction was not a "crime of violence" as defined in Pennsylvania, he did not qualify for an enhanced sentence under § 9714.

Johnson, 241 A.3d 398 (Pa. Super. 10/9/20)

A conviction for the version of burglary in effect prior to the effective date of Act 122 of 2012 was not an equivalent offense to the burglary pursuant to 18 Pa.C.S. § 3502(a)(1), which now qualifies as a prior burglary "strike" under the "three strikes" law, 42 Pa.C.S. § 9714.

Lites, 234 A.3d 806 (Pa. Super. 6/29/20)

Diversionary sentencing options

Motivational Boot Camp: 61 Pa.C.S. §§ 3901 et seq.

Even though the offenses of homicide by vehicle while driving under the influence, 75 Pa.C.S. § 3735, and leaving the scene of an accident involving death, 75 Pa.C.S. § 3742, both carry mandatory minimum sentences of imprisonment, neither offense precludes a defendant's eligibility for Boot Camp.

Herrin, 248 A.3d 583 (Pa. Super. 3/22/21)

Former State Intermediate punishment

Since the General Assembly unequivocally repealed the SIP revocation procedure without enacting counterparts to those deleted sections in the new statute [a "saving clause"], the trial court could not rely on the repealed sections for the authority to order Williams' SIP sentence revoked. We also hold that Williams cannot continue to serve the original SIP sentence where the SIP statute has been repealed and substituted with the State drug treatment program, and where there is no saving clause applicable to Williams' case.

Williams, ___ A.3d ___ (Pa. Super. 8/27/21)

Imposition of sentence of probation

Conditions of probation or parole

Vilsaint was sentenced to 8 years of probation. The sentencing court authorized the probation office to enroll Vilsaint into any "program probation officials deem necessary." The probation officer assigned to the case ordered Vilsaint not to consume any alcohol. Vilsaint twice tested positive for alcohol consumption.

Franklin County's sentence form had a check list of possible special conditions of probation. A prohibition regarding the consumption of alcoholic beverages was not checked off. A probation officer telling Vilsaint he cannot drink is not and cannot fairly be equated to enrolling a probationer into a program. Under the direct authority of the court, probation officials were entitled to order Vilsaint to obtain alcohol counseling. If the probation officer felt Vilsaint had a problem with alcohol, then he was authorized to require counseling. Simply telling Vilsaint not to drink is not the equivalent of enrolling him into a program.

Conditions of probation are provided for by statute, [former] 42 Pa.C.S. § 9754(c), and must be ordered by the sentencing court, not the probation offices and not by any individual probation officer.

Vilsaint, 893 A.2d 753 (Pa. Super. 2/13/06)

Defendant's sentence: 2-4 years followed by 5 years of probation. Defendant served the full four years of imprisonment and was released to begin serving his term of probation. At the

time of his release, defendant was required to sign a "Special Conditions of Parole" form, which set out a number of conditions to which the term of probation was subject, one of which was that he was not to have "any contact with any minors under the age of 18 for any reason." Defendant's probation was violated and he was sentenced to 18-60 months' imprisonment.

The conditions defendant was charged with violating were not imposed by the court. Rather, the conditions upon which the Commonwealth sought revocation were recited on a preprinted form applicable to parole, and were drafted by, and signed by a parole agent as the issuing authority. Moreover, while the opening sentence of the "Special Conditions of Parole" form reads in relevant part, "you are subject to the following conditions which are being imposed pursuant to Condition No. 7 of the original conditions governing your parole," the trial court did not impose "Condition No. 7" or any other condition regulating defendant's term of **probation**.

The probation revocation sentence was vacated.

MacGregor, 912 A.2d 315 (Pa. Super. 11/21/06)

Imposition of sentence of probation (cont.)

Conditions of probation or parole (cont.)

The provisions of the Prisons and Parole Code mandate the [Parole] Board and its agents to establish uniform standards for the supervision of probationers under its authority, and further to implement those standards and conditions. [Former] 61 Pa.C.S. § 6131(a)(5)(ii) [and former] § 6151. Put differently, courts shall levy "conditions of probation," and the Board and its agents may impose "conditions of supervision," consistent with the legislative mandates.

The General Assembly has specifically enumerated fourteen conditions that a court may place upon a probationer. These conditions, found in [former] 42 Pa.C.S. § 9754(c), "shall" be imposed by a sentencing court "to insure or assist the defendant in leading a law-abiding life." [Former] 42 Pa.C.S. § 9754(b). Moreover, these conditions are inherently non-inclusive, because [former] clause (13) of Section 9754(c) permits a court to impose any condition necessary to ensure the "rehabilitation of the defendant." *Id*. [Former] § 9754(c). Consistent, then, with a court's constitutional and statutory authority to impose a sentence, these fourteen conditions must be the starting point in any analysis of a probation violation.

[Former] 61 Pa.C.S. § 6131(a)(5)(ii) and [former] § 6151 direct the Board and its agents to establish and impose "conditions of supervision," distinct from "conditions of probation." We thus conclude that the Board and its agents may impose conditions of supervision that are **germane to, elaborate on, or interpret** any conditions of probation that are imposed by the trial court. This interpretation gives meaning to all of the statutory provisions relevant to this case and thus: (1) maintains the sentencing authority solely with a trial court; (2) permits the Board and its agents to evaluate probationers on a one-on-one basis to effectuate supervision; (3) sustains the ability of the Board to impose conditions of supervision; and (4) authorizes that a probationer may be detained, arrested, and "violated" for failing to comply with either a condition of probation or a condition of supervision. In summary, a trial court may impose conditions of probation in a generalized manner, and the Board or its agents may impose more specific conditions of supervision pertaining to that probation, so long as those supervision conditions are in furtherance of the trial court's conditions of probation.

Supervision Condition 19, that defendant should not "enter or loiter within 1,000 feet of areas where the primary activity at such locations involve persons under the age of 18," is a permissible condition of supervision imposed by the Board and is derivative of the trial court's condition of probation that defendant not have unsupervised contact with minors. What apparently occurred here is that the Board felt it necessary to expound upon the trial court's no contact order, by prohibiting defendant from placing himself into situations where he could easily violate his terms and conditions of probation. Accordingly, legal authority exists for revocation of defendant's probation for a violation of Supervision Condition 19. To the extent the Superior Court held otherwise, it erred.

Elliott, 616 Pa. 524, 50 A.3d 1284 (9/7/12)
[EDITOR'S NOTE: The conditions of probation are now found at 42 Pa.C.S. § 9763(b).]

Imposition of sentence of probation (cont.)

Conditions of probation or parole (cont.)

Three supervision conditions, [imposed by the Parole Board] which require defendant to obtain [sexual offender] treatment and [to] restrict his residence and his contact with minors, plainly are not germane to the sole court-imposed condition of [special] probation, which merely required defendant to pay costs, fines, and restitution. Nor could one say they elaborate on or interpret this condition of probation. Accordingly, the Board exceeded its authority in imposing these conditions, and the trial court erred in revoking defendant's probation based upon his violations of these conditions.

Shires, 240 A.3d 974 (Pa. Super. 9/28/20)
[EDITOR'S NOTE: Both *Elliott* and *Shires* involved Common Pleas Court orders revoking a term of special probation. Special probation is revoked, when appropriate, by the sentencing judge and not by the Parole Board. These cases do not appear to address the powers of the Parole Board to enforce its conditions during periods of state supervised supervision. When a parolee is under state supervision, 37 Pa. Code § 63.4 sets forth general conditions of parole and 37 Pa. Code § 65.4 sets forth general conditions of special probation or parole. 37 Pa. Code § 63.5 directs the parolee to "comply with special conditions which are imposed by the Board or which are subsequently imposed by the parole agent" and 37 Pa. Code § 65.5 directs the special probationer or parolee to comply with "special conditions which will be subsequently imposed by his parole agent." These provisions do not require a restatement of those conditions by the sentencing judge.]

The law provides a general condition of probation – that the defendant lead "a law-abiding life," *i.e.*, that the defendant refrain from committing another crime. [Former] 42 Pa.C.S. § 9754(b). To insure that general condition is met, or to assist the defendant in meeting that general condition, the order must also include certain "specific conditions" from the list enumerated in [former] Section 9754(c). Only upon the violation of any of the "specified conditions" in the probation order (general or specific) may a court revoke the defendant's probation. 42 Pa.C.S. § 9771(b). A court may find a defendant in violation of probation only if the defendant has violated

one of the "specific conditions" of probation included in the probation order or has committed a new crime. The plain language of the statute does not allow for any other result.[13]

> [13]This Court previously referred to the prohibition against committing a new crime as "an implied condition" of a sentence of probation. . . . [Former] [S]ection 9754(b) expressly provides that the intention of the General Assembly in permitting a court to enter an order of probation, and attach conditions thereto for the defendant to follow, is to have the defendant lead "a law-abiding life." [Former] 42 Pa.C.S. § 9754(b). It is clear and unambiguous that central to a sentence of probation is the condition that the defendant remain crime-free.

Social media postings by defendant depicting guns, drugs, large amounts of money and defendant's sentencing sheet from his plea agreement, along with profane captions posted with some of the pictures may not form the basis for a violation of probation absent either the commission of a new crime or the violation of a specific condition of probation.

The Commonwealth makes no argument that the statutory scheme governing probation in Pennsylvania either expressly or implicitly provides a basis for finding a defendant in violation of probation for communicating an intent to commit a violent crime. The Commonwealth does not even suggest that our statutes support such a finding. Based on our review of the relevant provisions and the advocacy presented, we decline to create a new condition of probation that has not been provided for by our General Assembly.

It is clear that the effectiveness of probation as a rehabilitative tool and as a deterrent to antisocial conduct is the lens through which a violation is to be viewed. Revocation and resentencing are warranted if, in the face of a new criminal act or the violation of a condition of probation, the court finds that probation is no longer achieving its desired aims of rehabilitation and deterring criminal activity. As the statute provides, a court never reaches this question unless there is a violation of a specified term of the probation order or the probationer commits a new crime.[14]

> [14]We expressly disapprove of the Superior Court's reliance on [*Infante*, 585 Pa. 408, 888 A.2d 783 (12/29/05), and *Ortega*, 995 A.2d 879 (Pa. Super. 5/17/10), *appeal denied*, 610 Pa. 607, 20 A.3d 1211 (4/19/11), which could be read to stand] for the proposition that revocation of probation is permissible in the absence of a finding that the defendant violated a specified condition of probation [merely because] the VOP court finds that probation has been ineffective to rehabilitate or to deter against antisocial conduct.

Foster, 654 Pa. 266, 214 A.3d 1240 (8/20/19)
Link to: Todd, J. concurring
Link to: Dougherty, J. concurring and dissenting

Koger was charged with violating three general conditions of his probation and parole. A probation officer testified that appellant had been provided with a copy of the rules of the adult probation office, which he had signed. The trial court acknowledged that it did not advise appellant of the general conditions of his probation or parole at the time of sentencing. Rather, the general

rules, regulations, and conditions governing probation and parole in Washington County were explained to him by an adult probation officer immediately following the sentencing proceeding.

Because the trial court did not impose, at the time of sentencing any specific probation or parole conditions, the court could not have found that Koger violated one of the specific conditions' of probation or parole included in the probation order. In short, a sentencing court may not delegate its statutorily proscribed duties to probation and parole offices and is required to communicate any conditions of probation or parole as a prerequisite to violating any such condition. Accordingly, we reverse the revocation of probation and parole and we vacate the VOP judgment of sentence.

Koger, 255 A.3d 1285 (Pa. Super. 6/4/21) (general county conditions of supervision)
appeal pending, No. 270 WAL 2021 (filed 9/8/21)

Imposition of sentence of probation (cont.)

Conditions of probation or parole (cont.)

Monetary conditions of probation may be imposed for the purpose of restitution or fines. Notably, however, [the former version of Title 42,] Section 9754, [did] not expressly include a provision permitting the type of monetary condition imposed here – payment of court costs. Probation may not be revoked for the non-payment of court costs.

Hudson, 231 A.3d 974 (Pa. Super. 4/16/20)
[EDITOR'S NOTE: Permissible conditions of probation are now found at 42 Pa.C.S. § 9763. The holding of this case still applies under the current statute.]

A Lebanon County Court of Common Pleas policy prohibited "the active use of medical marijuana, regardless of whether the defendant has a medical marijuana card, while the defendant is under supervision by the Lebanon County Probation Services Department."

The Policy is deemed to be contrary to the immunity accorded by Pennsylvania's Medical Marijuana Act, and as such, the policy shall not be enforced. Nothing in this Opinion restrains judges and probation officials supervising probationers and others from making reasonable inquiries into whether the use of marijuana by a person under court supervision is lawful under the Act. And nothing impedes a revocation hearing or other lawful form of redress, where there is reasonable cause to believe that a probationer or other person under court supervision has possessed or used marijuana in a manner that has not been made lawful by the enactment.

Gass v. 52nd Judicial District, ___ Pa. ___, 232 A.3d 706 (6/18/20)

Imposition of sentence of probation (cont.)

Conditions for sexual offenders

Defendant, who was deaf, pleaded guilty to one count of indecent assault, committed against an adult victim who was also deaf. Defendant received a sentence of two years' probation subject to the conditions that he (1) not have contact with children, and (2) not access the internet without permission of the probation officer.

The sentencing court justified these restrictions by noting that defendant's prior victims were vulnerable, deaf women and that the defendant might move on to a class of victim who is equally vulnerable, such as a child. The court relied upon the fact that charges were pending against defendant in Virginia pertaining to child pornography.

There was no evident nexus between the crime to which defendant pled guilty and the restrictions upon his ability to use computers, smartphones, and the internet. *Houtz*, 982 A.2d 537 (Pa. Super. 9/16/09). Furthermore, defendant presented unchallenged testimony that these technological restrictions would severely restrict his ability to communicate effectively with the speaking world. ("[U]sing a computer or cell phone to access that is very important to me. Using a technology called the video phone, that's how I make phone calls for work or to let someone know of an emergency.").

There is one factual source of information concerning defendant's alleged used of a computer in an illicit sexual fashion, namely, the charges brought against him in Virginia that were pending at the time of sentencing. A court in imposing sentence may consider prior arrests as long as the court realizes that the defendant had not been convicted on those prior charges. However, the sentencing court treated these unproven charges against defendant as proof positive of his criminal conduct.

With regard to the internet restrictions, and its impact upon defendant's livelihood, the sentencing court declared that it would be the duty of defendant's probation officer "to determine to what extent he may use the internet to communicate for bona fide employment, educational or treatment purposes." The order permitted the probation officer to "tailor" the internet ban to accommodate defendant's hearing impairment. The legislature has specifically empowered the court, and not any individual probation officers, to impose the terms of probation. Thus, a sentencing court may not delegate its sentencing decision to any person or group.

Carr, ___ A.3d ___ (Pa. Super. 8/30/21)

Defendant pled guilty to sexual offenses involving a 15-year old female. The terms of defendant's probation included special conditions, including a condition restricting his internet access. As part of his plea, defendant signed a form specifically acknowledging that he would be bound by the special conditions while on probation. The probation condition at issue in this case stated that defendant "shall not possess or use a computer with access to any 'online computer service,' or any other electronic device that allows internet connections and/or access at any location (including employment) without the prior written approval of the probation/parole officer. This includes any internet services provided, bulletin board system[,] or any other public or private computer network."

In 2014, within 48 hours of his release from prison on parole, defendant obtained a smartphone and used it to access the internet in order to solicit women on Craigslist, exchange

nude photos of himself, and view various pornographic websites. In 2015, defendant was detained after being caught with a smartphone and computer tablet in violation of his probation conditions. Defendant gave his probation officer an invalid password for the phone, but the probation office was able to examine the tablet and saw that pornographic websites had been accessed through the internet web browser. In 2016, defendant was detained again. This time, his probation officer alleged that while defendant was residing at the Remnant House, defendant hid a smartphone at the pizza shop where he worked. When he was confronted by Remnant House staff, he tried to break the phone and erase its data, then grabbed the wrist of a staff member who tried to take the phone from him.

Defendant argues that the internet restriction does not have a nexus to his crimes and was imposed without regard to his individual rehabilitative needs. However, defendant is appealing from his sentence imposed after his probation for sex crimes was revoked for, inter alia, using the internet for a sexual purpose. While defendant contends that his original crimes standing alone did not have a connection to internet use and the Commonwealth did not introduce evidence to support an internet ban, he did not challenge the restriction on his internet use at that time. In fact, he entered into a negotiated guilty plea whereupon he agreed to serve 10 years' probation with terms that included the specific internet-restriction condition at issue.

Essentially, what defendant is asking this court to do is to override the discretion of the trial court to re-impose a sentence with a condition of probation that mirrors the one he originally agreed to abide by in exchange for a guilty plea. Because his original sentence was negotiated through his guilty plea, defendant could not have challenged the discretionary aspects of his sentence at the outset. Now, after failing to abide by it repeatedly, defendant is challenging the trial court's discretion to impose it. Like a defendant who seeks to challenge an agreed-upon sentence as part of the original direct appeal, challenging the discretion of the trial court to re-impose the same condition as part of a probation revocation proceeding would permit a defendant another bite at the proverbial apple after the defendant failed to hold up his end of the bargain.

What is before us is whether the trial court abused its discretion by imposing an internet restriction as a condition of probation after defendant violated his probation. In other words, the trial court did not impose the internet restriction on the trial record alone.

Defendant additionally argues that the internet-restriction probation condition is a constitutionally overbroad blanket internet ban in violation of Defendant's rights under the First Amendment of the United States Constitution and Article 1, Section 7 of the Pennsylvania Constitution. Even if defendant were to have properly preserved the claim, his sole reliance on *Packingham v. North Carolina*, ___ U.S. ___, 137 S.Ct. 1730, 198 L.Ed.2d 273 (6/19/17), would not necessarily warrant him relief. The statute at issue in *Packingham* constituted an automatic and effectively complete restriction of internet access that applied to all convicted sex offenders, even if they had completed serving their sentence. This differs from defendant's situation, insomuch as he is subject to probation supervision that is reviewed regularly by the trial court, and he could obtain the permission of his probation officer to access the internet. *See Commonwealth v. Sperber*, 177 A.3d 212, 220-21 (Pa. Super. 12/12/17) (Bowes, J., concurring) (suggesting that *Packingham* may not apply to a condition of probation restricting internet access).

Starr, 234 A.3d 755 (Pa. Super. 6/23/20)
appeal denied, ___ Pa. ___, 243 A.3d 724 (12/29/20)

Imposition of sentence of probation (cont.)

Applicable statutes

42 Pa.C.S. § 9754. Order of probation.

. . .

(b) Conditions generally. -- The court shall attach reasonable conditions authorized by Section 9763 (relating to conditions of probation) as it deems necessary to insure or assist the defendant in leading a law-abiding life.

42 Pa.C.S. § 9763. Conditions of probation.

. . .

(b) Conditions generally. -- The court may attach any of the following conditions upon the defendant as it deems necessary:

(1) To meet family responsibilities.

(2) To be devoted to a specific occupation, employment or education initiative.

(3) To participate in a public or nonprofit community service program.

(4) To undergo individual or family counseling.

(5) To undergo available medical or psychiatric treatment or to enter and remain in a specified institution, when required for that purpose.

(6) To attend educational or vocational training programs.

(7) To attend or reside in a rehabilitative facility or other intermediate punishment program.

(8) [Deleted by amendment: To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons.]

(9) To not possess a firearm or other dangerous weapon unless granted written permission.

(10) To make restitution of the fruits of the crime or to make reparations, in an affordable amount, and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime.

(11) To be subject to intensive supervision while remaining within the jurisdiction of the court and to notify the court or designated person of any change in address or employment.

(12) To report as directed to the court or the designated person and to permit the designated person to visit the defendant's home.

(13) To pay a fine.

(14) To participate in drug or alcohol screening and treatment programs, including outpatient programs.

(15) To do other things reasonably related to rehabilitation.

(16) [Deleted by amendment: To remain within the premises of the defendant's residence during the hours designated by the court.]

(17) [Deleted by amendment: To be subject to electronic monitoring.]

. . .

(d) **Restrictive conditions of probation**.-- Probation may include restrictive conditions that:

(1) house the person full time or part time, including inpatient treatment; or

(2) significantly restrict the person's movement and monitor the person's compliance with the program, including electronic monitoring or home confinement.

Imposition of sentence of probation (cont.)

Applicable statutes (cont.)

42 Pa.C.S. § 9771. Modification or revocation of order of probation.

(a) General rule.--The court has inherent power to at any time terminate continued supervision, lessen the conditions upon which an order of probation has been imposed or increase the conditions under which an order of probation has been imposed upon a finding that a person presents an identifiable threat to public safety.

Revocation of probation or parole

Procedure for revocation hearings

The Commonwealth charged Giliam with a violation of probation because he allegedly committed new crimes. The Commonwealth asserted only that Giliam was arrested and charged with new crimes. The Commonwealth did not allege that Giliam violated any condition of his probation. As such, Giliam's new charges were the sole basis for seeking revocation of his probation. Giliam was subsequently acquitted at the trial on the new charges.

Because Giliam's violation of probation was based solely on allegations of new criminal charges for which he was later acquitted, ultimately, no violation of probation occurred. Consequently, Giliam's probation revocation sentence is void.

The trial court contended that it did not rely **solely** on Giliam's new charges to revoke his probation. Rather, the trial court concluded that the three-year probation sentence for Giliam's original charges was not serving the desired outcome, to rehabilitate Giliam, because he was still acting erratically and violently.

A violation of probation [VOP] court may not consider whether the probation was an effective deterrent when deciding whether a defendant violated probation. In *Foster*, 654 Pa. 266, 214 A.3d 1240 (8/20/19), the Supreme Court of Pennsylvania clarified the process a court must undertake when considering whether to revoke probation. First, a VOP court must determine whether a probation violation actually occurred. If it did, only then the court may consider the rehabilitative effectiveness of the probation in deciding whether to revoke the probation.

Although a VOP court may conduct a revocation of probation hearing prior to trial on the underlying charges, more recently our Supreme Court has cautioned against proceeding in this manner. *Infante*, 585 Pa. 408, 888 A.2d 783 (12/29/05). This court has also observed that in many cases it may be preferable to defer hearing until after the trial, thus avoiding the possibly unjust result of revoking probation, only to find later that the probationer has been acquitted of the charges that prompted the revocation hearing.

Giliam, 233 A.3d 863 (Pa. Super. 6/3/20)

Revocation hearing preceded the disposition of the new, pending charges. At a pretrial hearing on the new charges, the key Commonwealth's evidence was suppressed.

The VOP court erred by declining to consider defendant's challenge to the probation violation in light of the trial court's suppression ruling. Further, because it appears that the VOP court relied, at least in part, on evidence that was later suppressed, the violation cannot stand.

Parson, ___ A.3d ___ (Pa. Super. 7/28/21)

Split sentence: Imprisonment and probation on one count

Split sentences may be imposed even if only one charge is pending
11 ½-23 months, followed by 8 years consecutive probation
A lawful sentence where statutory maximum is 20 years

Pierce, 497 Pa. 434, 441 A.2d 1218 (3/10/82)

Defendant may be paroled after the attainment of the minimum portion of a split sentence. If, after parole, defendant is convicted for a new offense, then it is necessary to determine whether the new offense was committed during defendant's parole period or during his consecutive probationary period. Defendant's consecutive probation may not be revoked if the new offense was committed before the probationary period commenced. *Wendowski*, 278 Pa. Super. 453, 420 A.2d 628 (6/13/80) (authorizing a revocation of uncommenced probation), and its progeny are overruled.

Simmons, ___ A.3d ___ (Pa. Super. 8/18/21) (en banc)
Link to: Kunselman, J. concurring
Link to: Bowes, J. concurring and dissenting
[EDITOR'S NOTE: Would the result be different if the probation was ordered to be served concurrent with the prison sentence?]

Financial obligations to the government

Court costs

Defendants Lehman and Davis were resentenced pursuant to decisions by the Supreme Court of the United States which decisions required the resentencing of juveniles who had received mandatory sentences to life imprisonment without parole. At the resentencing hearings, each defendant introduced expert testimony that he was ready for immediate parole. The Commonwealth introduced competing expert testimony. Lehman was ordered to pay costs related to resentencing in the amount of $15,478.38, and Davis was ordered to pay costs in the amount of $20,674.73. For the most part, these amounts reflected the cost of expert testimony presented by the Commonwealth.

Costs assessed against a criminal defendant include the necessary expenses incurred by the district attorney in connection with the prosecution. 16 P.S. § 1403 (applicable to counties of the third class). This is a penal statute which must be specifically construed, and interpreted in the light most favorable to the accused.

In this case, the original sentencing hearings for defendants were indeed necessitated by their actions of committing first-degree murder that resulted in their convictions, and those expenses would have been properly chargeable to them under Section 1403. In direct contrast, however, their resentencing hearings were not necessitated by defendants' own actions, but by a change in the law: the resentencing was necessary only because the original proceedings took place pursuant to unconstitutional legislation. The costs may not be collected.

Lehman, ___ Pa. ___, 243 A.3d 7 (12/22/20)

Financial obligations to the government (cont.)

Ability to pay fines or court costs

Subsection 9726(c) of the Sentencing Code requires record evidence of a defendant's ability to pay a non-mandatory fine even in the negotiated guilty plea context. Because no such evidence exists in the record before us, the trial court imposed an illegal sentence. Defendant's agreement to a negotiated plea, even one which includes a negotiated fine, does not waive defendant's right, pursuant to the statute, to have a judicial determination of his ability to pay the fine.

We are confident that this procedure will not derail the plea-bargaining process. Indeed, in many cases the trial court will be able to ascertain the defendant's ability to pay by asking one simple question: "How do you plan to pay your fines?"[14]

> [14]Although the parties' briefs and the lower court opinions speak in terms of the trial court "holding a hearing on" or "inquiring into" a defendant's ability to pay, we note that Subsection 9726(c) does not necessarily require testimonial evidence. It is certainly possible that non-testimonial evidence — like a thorough presentence investigation report detailing a defendant's assets and income — could satisfy Subsection 9726(c)'s mandate. But no such evidence exists in this case.

Ford, ___ Pa. ___, 217 A.3d 824 (9/26/19) (discretionary, not mandatory fines)
Link to: Mundy, J. dissenting

Pennsylvania courts have consistently held that a determination of a defendant's ability to pay is an integral requirement of imposing restitution **as a condition of probation**. Accordingly, where a sentencing court fails to consider a defendant's ability to pay prior to imposing restitution as a probationary condition, the order of restitution constitutes an illegal sentence.

Whatley, 221 A.3d 651 (Pa. Super. 10/18/19)

BUT SEE:

Restitution, imposed as a direct sentence, pursuant to 18 Pa.C.S. § 1106(c), must be ordered despite financial status of defendant. At time of sentencing, ability to pay is not relevant.

Rohrer, 719 A.2d 1078 (Pa. Super. 11/9/98)

Financial obligations to the government (cont.)

Ability to pay fines or court costs (cont.)

ISSUE TO BE DECIDED:

Defendant's judgment of sentence included the imposition of mandatory court costs. Defendant maintained that Rule 706(C), along with Sections 9721(c.1) and 9728(b.2) of the Sentencing Code, mandated that the court hold an ability-to-pay hearing before imposing court costs at sentencing. We disagree. Instead, we hold that while a trial court has the discretion to hold an ability-to-pay hearing at sentencing, Rule 706(C) only requires the court to hold such a hearing when a defendant faces incarceration for failure to pay court costs previously imposed on him.

Lopez, 248 A.3d 589 (Pa. Super. 3/23/21) (en banc)
Link to: Dubow, J. dissenting
appeal granted, No. 27 EAP 2021 (granted 8/24/21)

The primary purpose of restitution is rehabilitation of the offender. Consequently, recompense to the victim is only a secondary benefit, as restitution is not an award of damages. The federal bankruptcy statute includes a prohibition from discharge of both fines and restitution orders in a state criminal case. A contrary holding would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems.

The exclusion of restitution from bankruptcy discharge is not dependent on the relative timing of the discharge of the civil obligation in relation to the imposition of the criminal sanction. The discharge of a civil debt prior to the commencement of a criminal proceeding has no bearing on the purpose served by a restitution order. Similarly, the level of participation of the victim/creditor in any bankruptcy proceeding is irrelevant to the distinct status of and purpose of a restitution order.

We conclude that the Legislature did not alter the rehabilitative, enforcement, deterrent and other purposes for restitution orders in criminal sentencing by making such orders mandatory. The Legislature allowed for consideration of a defendant's ability to pay by a court when considering a defendant's compliance with the order. Because the mandatory restitution order serves criminal justice goals, restitution orders remain distinct from civil debt liability with respect to discharge in bankruptcy. This distinction is unaffected by the temporal relationship between the proceedings in the bankruptcy court and the criminal prosecution. Additionally, it is unaffected by a creditor's participation in the bankruptcy proceedings. In the instant case there is no indication the restitution award was improperly sought by the prosecutor or awarded by the sentencing court.

Petrick, ___ Pa. ___, 217 A.3d 1217 (9/26/19)

ISSUE TO BE DECIDED:

Defendant tendered an open guilty plea to theft as a condition of enrolling in the Montgomery County Veterans' Treatment Court [VTC] Program. The trial court determined that defendant should pay restitution in the amount of $34,857.24. Defendant successfully completed

the Veterans' Treatment Court Program. Since defendant had not paid the restitution, charges were not dismissed and defendant was sentenced to two years' probation.

Chapter 3 of the Rules of Criminal Procedure governs ARD programs, but it does not control problem solving courts such as the Montgomery County Veterans' Treatment Court Program.

We distinguish *Melnyk*, 378 Pa. Super. 42, 548 A.2d 266 (9/12/88). First, Melnyk challenged her exclusion from ARD. As discussed above, Veterans Treatment Court, absent authority to the contrary, is not ARD. Further, unlike Melnyk, this defendant was not denied admission into a diversionary program. Rather, defendant sought and was granted admission into Veteran's Treatment Court. As part of the VTC program, defendant — as well as the presiding judge and the court coordinator — signed the "Agreement to Participate in Veteran's Treatment Court, Montgomery County PA" [Agreement], in which defendant agreed to numerous conditions. Among the conditions, the Agreement provided that restitution should be paid in full. Defendant signed and initialed the Agreement. Under these circumstances, which include defendant's affirmative acts, we cannot conclude that defendant was deprived of fundamental fairness.

Restitution was imposed as a condition of defendant's sentence pursuant to 18 Pa.C.S. § 1106 which specifies that restitution is mandatory and the defendant's financial resources, i.e., his ability to pay, is irrelevant unless and until he defaults on the restitution order.

The trial court did not violate defendant's rights or impose an illegal sentence.

McCabe, 230 A.3d 1199 (Pa. Super. 3/27/20)
appeal granted, No. 50 MAP 2020 (granted 8/25/20) (argued 3/10/21)

Restitution

On June 29, 2017, at the plea hearing, both counsel informed the trial court that the total restitution claimed exceeded $65,000.00, but that defendant disputed whether he was responsible for that total amount because some of the destroyed or damaged property had belonged to him [not to the victims]. Defense counsel requested a hearing be scheduled to determine the proper restitution amount. The trial court granted the request and proceeded with the guilty plea colloquy.

Following the entry of the plea, the trial court proceeded to the non-restitution aspects of sentencing and imposed a time-served [207 day] sentence. Defense counsel then specifically requested defendant remain in the York County Prison, and not be released on a detainer to Maryland, until after the restitution hearing had occurred. The trial court granted counsel's request, and its June 29, 2017 order included a provision scheduling the requested restitution hearing for August 28.

On August 28, 2017, at the restitution hearing, the Commonwealth presented its witnesses and documentation supporting its proposed restitution amount. Defendant objected to the court's jurisdiction, but the trial court overruled the objection and heard the evidence. The court was unable to complete the hearing in the time allotted, and the matter was continued to September 15, 2017 for defendant to present his case for a lower restitution amount. At the September hearing, defendant's new counsel again argued the court lacked jurisdiction to enter a restitution order or amend the sentencing order because more than 30 days had passed since the June 29, 2017 order, which defendant deemed to be a final sentencing order. At the completion of the proceedings on September 15, the trial court entered an order directing defendant to pay $70,951.59 restitution.

The circumstances of this particular case are unique in that defense counsel at the time of sentencing agreed to proceed with sentencing but disputed the restitution amount and requested an additional hearing. There is nothing in the Rules of Criminal Procedure or the Judicial Code that precludes a sentencing court from conducting a sentencing proceeding over multiple days as the needs of the parties and the court's schedule may necessitate.[9] Accordingly, the trial court announced the incarceration portion of the sentence with other conditions in an order dated June 29, 2017. In response to defendant's request, the order included setting a date for a further hearing on August 28, 2017 to address certain factual issues about the ownership of the damaged property included in the Commonwealth's valuation of restitution.

[9]This is of course subject to the Rule of Criminal Procedure requiring that sentencing be held within 90 days of a conviction or plea, unless a delay is granted for good cause. Pa.R.Crim.P. 704(A).

On this record, it is apparent the sentencing court proceeded with a segmented or bifurcated sentencing hearing, resulting in a complete and final order only on September 15, 2017. Viewed in this manner, the sentence is compliant with Section 1106.

SAYLOR, C.J. CONCURRING JOINED BY TODD, DOUGHERTY, JJ.:

It was clear to all that the "Sentence Order" of June 29, 2017, was intended to be interlocutory, since a restitution hearing was contemplated at the initial sentencing hearing and was scheduled on the face of the order itself. Moreover, part of the sentencing court's concern with proceeding with the incarceration portion of the sentence was to account for the fact that defendant had already served 207 days in prison, which was far greater than the minimum sentence contemplated by the court.

Although the sentencing court's reasoning was understandable, decoupling components of a sentencing scheme in such a fashion should only be undertaken in extraordinary circumstances, where the court has good and articulable reasons to support the proposition that one component will not affect the others. And I would be hard pressed to say that this could occur lawfully in a scenario in which the defendant did not overtly consent to this unusual procedure.

Cochran, ___ Pa. ___, 244 A.3d 413 (1/20/21)

Link to: Saylor, C.J. concurring

Link to: Wecht, J. dissenting

Restitution (cont.)

Was the victim adequately compensated or excessively compensated?

Collectible coins were stolen. The original cost of the property defendant stole was $86,974.93, while its "current value [based upon testimony at the restitution hearing regarding recent sales on Ebay]" was $58,600.

The victim's loss is not of past medical bills or future earnings, or of fungible, depreciating property that may readily be replaced, such as an automobile or a television. Nor is defendant capable of returning the coins to the victim, which defendant pawned for far less than their value. Rather, defendant has forever deprived the victim of rare collectibles that he acquired, piece by piece, over many years, searching for those in perfect condition, with zero flaws under a certain power of magnification. Nowhere can the victim go to reacquire the whole of what defendant stole.

In light of our legislature's demand for restitution to constitute the fullest compensation for a victim's loss, and the sentencing court's freedom to consider any matters it deems appropriate in determining the proper amount, we cannot agree with defendant that the value of the coin collection at the time he wrongfully acquired it was necessarily the proper measure. The limitation simply is not supported by the language of the statute or by the cases applying it.

Defendant acknowledges that awarding the replacement costs of the property taken "makes the victim whole by creating the opportunity to repurchase that property and restore the pre-theft state of affairs." However, defendant conflates replacement costs at the time of the restitution order with market value at the time of the theft, something that simply is not true where the stolen property fluctuates in value. Indeed, the record reflects that the replacement value of the whole collection at the time of the restitution hearing was substantially greater than the market value of the sum of its parts at the time it was unlawfully taken by defendant.

In electing to set the victim's acquisition costs as the full value of his loss, rather than the market values at the time of the theft of the individual coins and sets that comprised the collection, the sentencing court offered the following explanation:

> Though the coins themselves are tangible personal property, the actions of defendant are more analogous to the situation where someone steals a victim's stock portfolio and sells the stocks on a day when the market is down. Instead of the rightful owner getting to sell the stocks at their maximum value on a day of their choosing, a third party that caused them harm gets to set their deflated value and the victim must live with the injurious economic consequences of this bad actor.
>
> A more just outcome is to award the victim what it initially cost that person to acquire the items, as that sets the real economic damage of what was taken from the bona fide owner. . . . In a situation such as this, the loss suffered by the victim to the collectibles was not only the market value of the coins on the date of the theft, but the opportunity to set the timing of the sale for a more beneficial day in the fluctuating market. The record supports the amount ordered, as the victim was very thorough in calculating the purchase price for the coins. As such, the amount of restitution the [c]ourt ordered . . . makes the victim whole, rather than making him suffer a loss artificially initiated in the down market by defendant's malfeasance, a loss the owner would not have suffered but for the defendant's untimely misconduct.

This thoughtful consideration of the extent of the victim's loss in light of the atypical property involved evinces an utterly reasonable exercise of the sentencing court's considerable sentencing discretion. It entered a restitution order providing compensation for a loss that the victim would not have sustained but for defendant's crime, and the amount chosen by the sentencing court representing that loss that is supported by the record.

DUBOW, J. DISSENTING, JOINED BY LAZARUS, J.:

The trial court used the purchase price because it found that the use of eBay sales did not reflect the fact that if defendant had not stolen the coins, defendant could have sold the coins at a more financially advantageous time and received more for the coins. In other words, the trial court acknowledged that the use of the eBay sales for an involuntary transfer did not fully compensate the victim because the involuntariness of the transfer deprived the victim of selling the coins at the

most financially advantageous time. The Majority Opinion echoes this concern. I agree with this concern.[1] I disagree, however, with using the purchase price of the coins as the appropriate methodology to determine the victim's loss.

[1]This is the reason I reject defendant's position that the trial court should have determined the restitution amount to be $55,600.

I would instead use the methodology that courts have been using to value property in eminent domain proceedings. In an eminent domain proceeding, the court awards the property owner compensation for the involuntary loss of the property by determining the fair market value of the property on the date of the taking.

The determination of the value of the coins and, thus, the amount of restitution that defendant should pay, should be based on the fair market value on the date of the theft. Included in this determination is the price for which a reasonable seller would have been willing to sell the coins on the day of the theft. The victim's testimony about sales on eBay does not reflect the concept of a "willing buyer" and a "willing seller." Rather, it represented an average of sales, which is merely one factor that an appraiser uses and extrapolates from to determine the fair market value of property. Without expert testimony from an appraiser who can calculate the price at which a willing seller would sell and a willing buyer would purchase the coins, the trial court cannot determine the amount that will fully compensate the victim.

The purchase price is not a reliable measure of the victim's actual loss on the date of the theft. At a minimum, the victim will not be compensated for those coins that appreciated in value. The practical implications of the majority's holding is that a victim will never be fully compensated if the defendant has stolen an item that appreciates in value. If a victim may only recover the purchase price of the item stolen and the item appreciates in value, the victim will only be partially compensated for his loss.

Since the trial court must value a victim's loss at the time of the crime and the trial court in this case valued the loss based on the purchase price that reflects a value at a much earlier time, I would find that the trial court abused its discretion by valuing the coins according to their purchase price. I would reverse the decision of the trial court and remand for a new hearing. At a new hearing, the parties should present expert testimony that reflects the involuntary nature of the theft of the coins and the value of the coins based upon the victim being a "willing seller" transacting with a "willing buyer" on the date of the theft.

Solomon, 247 A.3d 1163 (Pa. Super. 3/16/21) (en banc)

Link to: Dubow, J. dissenting

appeal pending, No. 193 MAL 2021 (filed 4/15/21)

Modification of sentence

TODD, J. JOINED BY DONOHUE, DOUGHERTY, JJ.:

In May 2013, defendant pled guilty to one count of driving under the influence of alcohol ("DUI") - general impairment, and one count of DUI - highest rate of impairment. On August 13, 2013, the trial court sentenced defendant to a term of five years intermediate punishment, which included 90 days incarceration at the Lycoming County Prison pre-release facility. He also was ordered to pay the costs of prosecution and a $1,500 fine.

In 2017, defendant filed a motion for early termination of his sentence of intermediate punishment. On September 29, 2017, the trial court determined that defendant had "complied with all conditions of supervision, paid all fines and costs, and completed all obligations" associated with his county intermediate punishment, and, accordingly, granted his petition.

That night, however, defendant was arrested for, and charged with, another DUI offense. The trial court granted reconsideration of the September 29 order and vacated the order granting defendant early release from the terms of his intermediate punishment sentence.

As the trial court's revocation of its order terminating defendant's sentence of intermediate punishment infringes upon a liberty interest similar to that which is infringed upon in the revocation of probation or parole, we further conclude that due process protections must apply in both circumstances. In particular, we find that defendant was entitled to notice and fair warning of any subsequent act or behavior that could lead to the trial court's revocation of its order terminating his sentence of intermediate punishment. We hold that a trial court may not vacate a prior order terminating a sentence of intermediate punishment or probation based on subsequent conduct, unless that conduct constitutes a violation of specified conditions of the termination order, of which the individual had notice.

WECHT, J. CONCURRING:

I agree with the [Opinion Announcing the Judgment of the Court's] ultimate conclusion that, although the statute technically authorized the trial court's rescission of its order terminating Hoover's intermediate punishment sentence, the effect of that rescission violated Hoover's due process rights. Thus, I concur in the result reached by the [plurality].

Hoover, ___ Pa. ___, 231 A.3d 785 (5/19/20) (plurality opinion)
Link to: Donohue, J. concurring
Link to: Wecht, J. concurring
Link to: Baer, J. concurring and dissenting

When do changes in sentencing law implicate the Ex Post Facto Clause?

61 Pa.C.S. § 6137.2, requires a trial court to impose a mandatory 12-month period of reentry supervision "in addition to" any aggregate sentence of four or more years' imprisonment. *See* 61 Pa.C.S. § 6137.2(e). Furthermore, it applies to any defendant "sentenced after the effective date." 61 Pa.C.S. § 6137.2(f).

The court's imposition of a 12-month period of reentry supervision based upon Section 6137.2 constitutes an additional punishment for acts he committed before the December 2019 enactment of the statute. Thus, as applied to defendant, the sentencing provision constitutes an unconstitutional ex post facto punishment.

Carey, 249 A.3d 1217 (Pa. Super. 4/19/21)
appeal pending, No. 263 MAL 2021 (filed 5/18/21)

ARD Program

Pursuant to *Alleyne v. United States*, 570 U.S. 1, 133 S.Ct. 2151, 186 L.Ed.2d 314 (6/17/13), a defendant's prior acceptance of ARD must be proven to the trier of fact. Acceptance of ARD is not the equivalent of a prior conviction which need not be proven to the trier of fact pursuant to *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (3/26/98).

The treatment of an ARD acceptance conclusively as a prior offense, resulting in enhanced punishment with a mandatory minimum sentence, offends both substantive and procedural due process. The Commonwealth seeks to label defendants as recidivist drunk drivers based solely on their prior acceptances of ARD. Due process considerations protect those accused of committing a crime from conviction except upon proof beyond a reasonable doubt. Accordingly, if the Commonwealth seeks to enhance a defendant's DUI sentence based upon that defendant's prior acceptance of ARD, it must prove, beyond a reasonable doubt, that the defendant actually committed the prior DUI offense.

Chichkin, 232 A.3d 959 (Pa. Super. 5/20/20)

ISSUE TO BE DECIDED:

May a non-conviction disposition from another state count as a prior conviction for DUI purposes or is the underlying statute unconstitutional?

Commonwealth v. Garrett Hayes, No. 54 MAP 2021 (transferred 7/19/21)

DUI Sentencing

Court may impose a jail sentence in excess of the mandatory minimum sentence of 6 months' probation, 75 Pa.C.S. § 3804(a)(1) particularly where, as here, the applicable range under the sentencing guidelines exceeds the mandatory minimum sentence. The offense was an ungraded misdemeanor.

Brown, 240 A.3d 970 (Pa. Super. 9/28/20)

June 3, 2006	Date of first offense
March 27, 2007	Conviction for first offense
July 10, 2016	Date of second offense

Issue: Was defendant's prior "offense" within 10 years of "the date of the offense for which the defendant is being sentenced [July 10, 2016]?" *See* 75 Pa.C.S. § 3806(b)(1)(i).

The 10 year period is measured from the date of conviction, March 27, 2007, not from the date the offense was committed, June 3, 2006. July 10, 2016 was within 10 years of March 27, 2007, and defendant was properly sentenced as a second offender.

Mock, ___ Pa. ___, 219 A.3d 1155 (11/20/19)
Link to: Donohue, J. dissenting
Link to: Wecht, J. dissenting

Search and Seizure

On the evening of October 4, 2018, State Parole Agent Shipley and Harrisburg Police Officer Foose visited 1720 North Street, Harrisburg, the approved parole residence of Marquis Emery, defendant's brother, who had been under Agent Shipley's active supervision as a high-risk offender. As they drove toward the address — from which authorities had recently confiscated 120 bundles of heroin and a firearm, and which is otherwise situated in a high-crime, high-drug neighborhood — they noticed four males sitting on the porch. As they exited the vehicle, both the agent and officer detected the smell of freshly burnt marijuana.

Agent Shipley addressed the group and recognized defendant once he began talking with him. Specifically, the agent knew defendant was Emery's brother and that he was also on state parole. When Agent Shipley asked defendant to stand for a consented-to pat-down, he observed a bag of marijuana on defendant's chair. The agent also noticed defendant was making a subtle attempt to pass a set of keys and a single key to his aunt, Angela Murray, but he ordered the group to leave the keys where they were. At this point, Agent Shipley told defendant that he was addressing him as state parole agent to state parolee.

When asked what the set of keys were for, defendant said the set belonged to his father's van, which he had just driven to the present location. Agent Shipley used the keys to perform a consent search of the van, which yielded no contraband. The agent returned to the porch and asked defendant what the single key was for, and defendant claimed it was for his work locker. The agent deemed this a lie, he testified, as he knew from its distinctive shape and size that it was a vehicle key.

With key in hand, Agent Shipley walked directly to a white Chevrolet Impala and used the key to unlock and open a door. He entered the vehicle and observed a semiautomatic firearm in the center console. He alerted Officer Foose and other [police] officers now on the scene of his finding and allowed them to complete the search, which uncovered additional marijuana, heroin, and fentanyl.

Parolees agree to endure warrantless searches based only on reasonable suspicion in exchange for their early release from prison. Parole agents need not have probable cause to search a parolee or his property; instead, reasonable suspicion is sufficient to authorize a search. A search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty.

The Commonwealth established that Agent Shipley had formed a reasonable suspicion that defendant was storing contraband in the Chevrolet Impala. Specifically, Agent Shipley encountered defendant sitting on the porch of his brother's residence, a known drug distribution address within a larger neighborhood marked by drug crime. As he approached, Agent Shipley smelled "freshly burnt marijuana," and he soon discovered that defendant had been concealing a personal baggie of marijuana underneath himself as he sat in a chair.

Though defendant was generally cooperative during the encounter — readily claiming ownership of all keys resting on a table next to his chair and consenting to the search of a van he alleged he had just driven — he lied to Agent Shipley about the single key placed atop the others, saying it belonged to his work locker. Agent Shipley rejected defendant's information, as he unquestionably recognized the key as another car key.

At that moment, the totality of circumstances known to Agent Shipley included: Defendant's presence at an address implicated in the local drug trade; the aroma of recently smoked marijuana in the air, coupled with defendant's attempt to hide the small amount of marijuana in his possession; his effort to surreptitiously remove the car keys from the table without catching Agent Shipley's attention; his claim of ownership of the single key; and, his subsequent lie about the single key belonging to his work locker, suggesting an attempt to draw the agent's attention away from the car to which it really belonged to prevent a vehicle search. Agent Shipley thus articulated the specific observations and reasonable inferences therefrom that gave him reasonable suspicion to believe defendant had involved the Chevrolet Impala in his present illegal activity. His testimony at the suppression hearing thus supported the propriety of the contested vehicle search.

Wright, 255 A.3d 542 (Pa. Super. 6/9/21)
appeal pending, No. 398 MAL 2021 (filed 7/7/21)