Annual Conference Handouts

Plenary Session:

Legal Updates for Probation & Parole

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SENTENCING FOR PROBATION OFFICERS
SEARCH AND SEIZURE FOR PROBATION OFFICERS
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Minimum sentences

Determines parole eligibility

Pursuant to Pennsylvania law, the maximum term represents the sentence imposed for a criminal offense, with the minimum term merely setting the date after which a prisoner may be paroled. *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (7/1/68).

Martin v. [Parole Board], 576 Pa. 588, 840 A.2d 299 (12/30/03)
Link to: Nigro, J. dissenting
Sutley, 474 Pa. 256, 378 A.2d 780 (10/7/77)
Dial v. Vaughn, 733 A.2d 1 (Pa. Cmwlth. 5/20/99) (en banc)

The imposition of a minimum incarceration sentence by the trial court serves the limited purpose of notification to the Pennsylvania Board of Probation and Parole of the initial date that the defendant is eligible for parole.

Butler, 458 Pa. 289, 328 A.2d 851 (10/16/74)
Lee, 876 A.2d 408 (Pa. Super. 4/27/05)

This Commonwealth employs an indeterminate sentencing scheme. *Commonwealth v. Kleinicke*, 895 A.2d 562, 572 (Pa. Super. 3/8/06), *appeal denied*, 593 Pa. 738, 929 A.2d 1161 (8/16/07). Under such a scheme, a sentencing court, when imposing a penalty of confinement, announces a sentence that includes both a minimum and a maximum term. *Id.*; 42 Pa.C.S. § 9756(a). The time the defendant will actually serve in custody is indeterminate at the moment of sentencing because the defendant may ultimately serve only the minimum, the maximum or any sentence between the two. *Kleinicke*, 895 A.2d at 572. In any event, the minimum period of confinement must not exceed one half the maximum. 42 Pa.C.S. §§ 9756(b), 9757. Additionally, statutes that mandate minimum periods of incarceration serve only to limit the sentencing court's discretion as to the minimum term, not as to the maximum term. *Kleinicke*, 895 A.2d at 572. The highest possible maximum term is, of course, set for each offense by the Legislature. *See, e.g.*, 18 Pa.C.S. §§ 1103, 1104, 1105 (setting maximum terms for felony, misdemeanor and summary offenses).

Stemple, 940 A.2d 504 (Pa. Super. 1/2/08)

Minimum Sentences (cont.)

Determines parole eligibility (cont.)

Eligible for state parole only at the minimum sentence date

61 Pa.C.S. § 6137(a)(3) states that "[t]he power to parole granted under this section to the board may not be exercised in the board's discretion at any time before, but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Board of Pardons in a sentence which has been reduced by commutation."

Notwithstanding arguably ambiguous expressions of legislative intent, a defendant sentenced to life imprisonment following a conviction for second degree murder is not eligible to be paroled. An imposition of such a sentence of life imprisonment does not create an implicit minimum sentence of one days' imprisonment.

Hudson v. Parole Board, ___ Pa. ___, 204 A.3d 392 (3/26/19)

Link to: Wecht, J. concurring

May be eligible for county parole prior to minimum date

Defendant must be declared by the sentencing judge to be eligible for a reentry plan, provided that the maximum sentence is less than two years and no mandatory minimum sentence is required. 42 Pa.C.S. §§ 9756(b)(2),(3); Pa.R.Crim.P. 704, Comment

Reentry plan eligibility is part of the public sentence record. § 9756(b)(3)

District Attorney entitled to ten days written notice prior to parole. § 9756(b)(3)

Definition of "reentry plan" at 42 Pa.C.S. § 9756(e)

> [A] release plan that may include drug and alcohol treatment, behavioral health treatment, job training, skills training, education, life skills or any other conditions deemed relevant by the court.

Judicial power to release inmates [on parole]. 42 Pa.C.S. § 9776

A trial court's imposition of a county sentence and retention of parole authority does not satisfy Section 9756(b)(3) and make a defendant eligible for parole prior to the expiration of his minimum sentence. The court shall, at the time of sentencing, state whether or not the defendant is eligible to participate in a reentry plan in order for that defendant to be eligible for parole prior to the completion of the aggregate minimum sentence.

Finley, 135 A.3d 196 (Pa. Super. 4/5/16)

Under prior law, it was the province of the Common Pleas judge whether to grant or deny parole on a county sentence of less than two years duration. *Romolini*, 384 Pa. Super. 117, 557 A.2d 1073 (4/14/89), but the normal power of a common pleas court judge to grant parole prior to the expiration of the minimum sentence could not be used to avoid the consequences of the legislatively mandated minimum sentence of imprisonment for driving under the influence of alcohol. *Pryor*, 347 Pa. Super. 239, 500 A.2d 811 (9/27/85).

Minimum Sentences (cont.)

Determines parole eligibility (cont.)

No automatic right to parole at the expiration of the minimum sentence

In Pennsylvania, there is no right of a convicted person to be conditionally released prior to the expiration of the maximum term of the imposed sentence. A parole eligibility date, usually set at the expiration of the prisoner's minimum sentence, does not vest any right to grant of parole upon reaching that date. The denial of parole by the Pennsylvanian Board of Probation and Parole is not judicially reviewable by appeal to the Commonwealth Court. *Reider v. Pennsylvania Board of Probation and Parole*, 100 Pa. Cmwlth. 333, 514 A.2d 967 (9/5/86).

Rogers v. [Parole Board], 555 Pa. 285, 724 A.2d 319 (1/22/99)

Link to: Nigro, J. dissenting

Parole is nothing more than a possibility, and, when granted, it is nothing more than a favor granted upon a prisoner by the state as a matter of grace and mercy shown by the Commonwealth to a convict who has demonstrated a probability of his ability to function as a law-abiding citizen in society. When the court sentences an offender to a maximum term of imprisonment of less than two years, the common pleas court retains authority to grant and revoke parole. 42 Pa.C.S. § 9776; *Finley*, 135 A.3d 196, 199 (Pa. Super. 4/5/16). When the defendant is eligible for parole, the trial court's decision to grant parole is a discretionary act, and it is subject to appellate review under an abuse of discretion standard.

The record does not support Becker's assertion that the denial of her parole by the trial court was manifestly unreasonable. First, we note, Becker's gender and concomitant pregnancy are incidental to her well-chronicled heroin addiction. As such, the basis of the Becker's parole denial, as stated by the trial court, was the substantial risk that she would use heroin, not her unique status. In coming to its decision, the trial court expressed concern for the health of Becker's unborn child. However, the trial court did not discuss prisoner access to women's healthcare, prenatal care, child welfare resources or other associated services that might indicate its decision was motivated entirely by Becker's status. Rather, it focused on Becker's prior use of heroin and the dangers it posed to her and others. Specifically, the trial court reiterated its concern with "[Becker] using drugs and . . . harming herself" and the potential for relapse. N.T. Parole Hearing, 8/22/16, at 7, 15–17, 69 ("[S]he has a bad history [of heroin abuse][,] and history dictates when she gets out [of prison], she uses").

The trial court's concerns are well founded. The trial court originally sentenced Becker to two years' probation, during which she failed to comply with her probation requirements, did not seek drug treatment or counseling, did not maintain a stable residence and absconded from monitoring. While on probation, Becker admittedly used five bags of heroin intravenously per day; her heroin use continued until May 5, 2016. Thus, the trial court had to determine whether Becker's approximately 3½ month abstention from heroin use, incarceration and subsequent counseling and drug treatment mitigated the considerable risk that Becker would use heroin again and/or posed a public safety risk. We discern no abuse of discretion by the trial court regarding the denial of Becker's parole.[4]

> [4]In addition to the trial court's scrutiny of Becker's heroin addiction, the potential for relapse in heroin addicts, and public safety, the trial court also considered Becker's heroin use during pregnancy and the many effects of heroin exposure to an unborn child. N.T. Parole Hearing, 8/22/16, at 66, 69. Given these considerations, it would not have been manifestly unreasonable for the trial court to deny parole in order to ensure the safety of Becker's unborn child, nor is there any evidence such a decision would be based on partiality, bias or ill will.

Becker, 172 A.3d 35 (Pa. Super. 10/10/17)

Neither the General Assembly nor Pennsylvania's courts have required a trial court to advise a defendant who is pleading guilty of the circumstances affecting the defendant's eligibility for parole. Defendant does not deny that he was advised of his actual maximum and minimum sentence. We decline to extend the court's duty to advise a defendant of the sentencing consequences of his plea further than that required by Pa.R.Crim.P. 319 [now Rule 590] and by existing Pennsylvania case law which requires the court to inform the defendant of the permissible range of sentences and the maximum punishment that might be imposed. Defendant was fully advised of his maximum and minimum sentence and we will not require trial courts to advise defendants of the release rules of the Pennsylvania Board of Probation and Parole. A defendant's eligibility for parole is a collateral consequence of his guilty plea concerning which the court has no duty to inform defendant.

Stark, 698 A.2d 1327 (Pa. Super. 8/6/97)

The failure of the Pennsylvania Board of Probation and Parole to release a defendant on parole at the completion of his minimum sentence does not provide a legal basis for the trial court to permit a defendant to withdraw his guilty plea more than 30 days after the imposition of sentence, and does not provide a basis for relief under the Post-Conviction Relief Act.

Walters, 814 A.2d 253 (Pa. Super. 12/20/02)
appeal denied, 574 Pa. 760, 831 A.2d 599 (8/26/03)
Vega, 754 A.2d 714 (Pa. Super. 6/16/00) (not a cognizable PCRA claim)

Requirement of sexual offender treatment

42 Pa.C.S. § 9718.1(a) requires certain sexual offenders to "attend and participate" in a Department of Corrections program of counseling or therapy. An offender is not eligible for parole unless he has "participated in the program." 42 Pa.C.S. § 9718.1(b)(1)(ii).

The inmate sought a writ of mandamus directing the Department of Corrections to include him on a list of inmates who are eligible for parole. Stodghill had attended 15 of the 120 sex offender treatment program sessions; however, his participation was deemed unsatisfactory, he failed to complete required assignments, and often slept or was disruptive during the sessions.

The Department of Corrections did not err in determining that Stodghill had not complied with the statue, even though "completion" of the program is not a requirement.

Stodghill v. Dept. of Corrections, 150 A.3d 547 (Pa. Cmwlth. 11/23/16)
aff'd per curiam, 644 Pa. 463, 177 A.3d 182 (1/18/18)

Minimum Sentences (cont.)

Determines parole eligibility (cont.)

Court may not grant retroactive parole

Common pleas court lacks power to make its grant of parole retroactive to date prior to actual imposition of sentence.

Patrick v. [Parole Board], 110 Pa. Cmwlth. 121, 532 A.2d 487 (10/7/87)
Fleegle v. [Parole Board], 110 Pa. Cmwlth. 227, 532 A.2d 898 (10/9/87)
appeal denied, 518 Pa. 614, 540 A.2d 535 (3/22/88)

Because defendant never posted bail on the new charges, all time served between arrest and sentencing was credited to the new charge. When, after sentencing on December 13, 1988, the trial judge discovered this fact, he, on June 27, 1990, granted parole retroactively to January 18, 1989.

Patrick and *Fleegle* are factually distinguishable from the instant case since the sentencing judge, here, did not attempt to retroactively set petitioner's parole date to a date prior to the actual imposition of sentence. However, the action of the sentencing judge in this case is equally violative of the basic principle enunciated in *Fleegle* and *Patrick* that a common pleas court, through the use of retroactive parole, may not do indirectly what it is powerless to do directly; namely, make a portion of petitioner's Board imposed back time run concurrently with a newly imposed county sentence.

The Board acted properly in [disregarding the trial court's illegal parole modification] and not recomputing petitioner's back time based on the sentencing court's orders.

Bailey v. [Parole Board], 140 Pa. Cmwlth. 108, 591 A.2d 778 (5/20/91)

Maximum sentence

Mandatory maximum sentence

42 Pa.C.S. § 9718.5. Mandatory period of probation for certain sexual offenders.

(a) Mandatory probation supervision after release from confinement.--A person who is convicted in a court of this Commonwealth of an offense under Section 9799.14(d) (relating to [Tier III sexual offenses]) shall be sentenced to a mandatory period of probation of three years consecutive to and in addition to any other lawful sentence issued by the court.

(b) Imposition.--The court may impose the term of probation required under subsection (a) in addition to the maximum sentence permitted for the offense for which the defendant was convicted.

(c) Authority of court in sentencing.– [Provision is mandatory and supersedes sentencing guidelines.]

(d) Direct supervision.– [May be supervised by state Parole Board pursuant to 61 Pa.C.S. § 6133(a) (special probation).]

Consecutive or concurrent sentences

Under prior law, sentences were presumed to be concurrent. But see:

Amendment to Pa.R.Crim.P. 1406 at 26 Pa. Bull. 5694 (11/23/96) [now Rule 705]
Judge should declare whether sentences are concurrent or consecutive
Statutes and case law, not the rules of procedure, will control

Silence is no longer presumed to be an imposition of concurrent sentences
Ware, 737 A.2d 251 (Pa. Super. 7/9/99)
appeal denied, 561 Pa. 657, 747 A.2d 900 (12/28/99)
Moran, 823 A.2d 923 (Pa. Super. 4/29/03)

A sentence may not be imposed to run consecutive to a future sentence.

Holz, 483 Pa. 405, 397 A.2d 407 (1/24/79)

BUT SEE:

A federal district court judge may direct that a federal sentence be served consecutively to a state sentence which has not yet been imposed.

Setser v. United States, 566 U.S. 231, 132 S.Ct. 1463, 182 L.Ed.2d 455 (3/28/12)

Nothing in *Holz* requires that a sentencing court impose sentences for separate offenses in the order in which the underlying conduct occurred, in the order in which the charges were brought, or the order in which convictions were obtained.

Payne, 797 A.2d 1000 (Pa. Super. 4/24/02)
appeal denied, 570 Pa. 685, 808 A.2d 571 (9/24/02)

While the court of common pleas may recommend that a state sentence run concurrently to a federal sentence, the court has no authority to so demand. The decision of whether a federal prison in which a defendant is serving his federal sentence may be designated as a place of state confinement is to be made by the Federal Bureau of Prisons. *Barden v. Keohane*, 921 F.2d 476 (3rd Cir. 12/27/90). Simply put, "neither the federal court nor the Bureau [is] bound in any way by the state court's direction that the state and federal sentences run concurrently." *Id*. at 477 n.4.

Mendoza, 730 A.2d 503 (Pa. Super. 4/20/99) (dicta)

Consecutive or concurrent sentences (cont.)

Aggregation of all consecutive sentences now required by 42 Pa.C.S. § 9762(f)

(f) Aggregation.--For purposes of this section, the sentences or terms of incarceration shall mean the entire continuous term of incarceration to which a person is subject, notwithstanding whether the sentence is the result of any of the following:

(1) One or more sentences.

(2) Sentences imposed for violations of probation or intermediate punishment.

(3) Sentences to be served upon recommitment for violations of parole.

(4) Any other manner of sentence.

Effect of sentence aggregation

Place of incarceration: Determined by aggregate maximum sentence

(Sentences imposed prior to November 24, 2011)
Less than two years - county prison
Two years, but less than five years - county or state prison
Five years or more - State Correctional Institution
42 Pa.C.S. § 9762

(Sentences imposed after November 24, 2011) 42 Pa.C.S. § 9762
Less than two years - county prison
Aggregate sentence does not include M2 or higher – county prison
Two years, but less than five years - state prison, unless all the following:
County prison population is less than 110% of the rated capacity
Judge, DA and prison warden agree to county confinement
At least one conviction must be for an M2 or higher – § 9762(i)
Five years or more - State Correctional Institution

75 Pa.C.S. § 3804(d):
§ 3804. Penalties.

. . .

(d) Extended supervision of court.--If a person is sentenced pursuant to this chapter and, after the initial assessment required by Section 3814(1), the person is determined to be in need of additional treatment pursuant to Section 3814(2), the judge shall impose a minimum sentence as provided by law and a maximum sentence equal to the statutorily available maximum. A sentence to the statutorily available maximum imposed pursuant to this subsection may, in the discretion of the sentencing court, be ordered to be served in a county prison, notwithstanding the provisions of 42 Pa.C.S. § 9762 (relating to sentencing proceeding and place of confinement).

Consecutive or concurrent sentences (cont.)

Effect of sentence aggregation (cont.)

Place of incarceration: Determined by aggregate maximum sentence (cont.)

A sentencing court has no discretion or authority to impose a sentence for a DUI violation prior to the completion of the assessment required by 75 Pa.C.S. § 3814. This section requires, in certain circumstances including those presented herein (where defendant had a prior DUI conviction within ten years), a full drug and alcohol assessment, to be completed prior to sentencing. For the benefit of the offender and the public, the legislature set forth a specific and precise sentencing scheme that requires, in Sections 3804 and 3815, that the treatment recommendations developed through the assessment be implemented as part of the offender's sentence. A sentence imposed without the requisite presentence assessment does not comply with the Vehicle Code's mandatory sentencing scheme for DUI offenders.

Taylor, 628 Pa. 547, 104 A.3d 479 (11/20/14)
Link to: Eakin, J. dissenting

The assessment required by Taylor, 628 Pa. 547, 104 A.3d 479 (11/20/14), may be compelled only after conviction or offer of ARD. The trial court may not compel such assessment at any earlier stage of the proceedings by making submission to an assessment a condition of pre-conviction bail. Nothing precludes a defendant from voluntarily submitting to an assessment.

Parsons, 166 A.3d 1242 (Pa. Super. 7/14/17)

The payment of drug and alcohol assessment fees, while borne by the defendant, must be imposed in a manner consistent with the offender's ability to pay. Incarceration for the nonpayment of costs is explicitly permitted only upon a finding that the defendant is financially able to pay.

To the extent that a trial court may require payment of costs following a guilty plea but prior to sentencing, the court shall henceforth comply with Pa.R.Crim.P. 706 before incarcerating a defendant due to an asserted inability to pay. While Rule 706 by its language applies only in the sentencing context, it is repugnant to the administration of criminal justice to hold that its protections would not extend to the defendant who has pleaded guilty but has yet to be sentenced.

Dennis, 164 A.3d 503 (Pa. Super. 5/22/17)

75 Pa.C.S. § 3804(d) is not applicable when the sentencing court exercises its discretion to sentence a defendant to County Intermediate Punishment. The sentencing court is not obliged to impose a 5 year period of county intermediate punishment upon a defendant in need of treatment.

Popielarcheck, ___ Pa. ___, 190 A.3d 1137 (8/17/18)
Watson, 157 A.3d 926 (Pa. Super. 3/8/17)
appeal denied, ___ Pa. ___, 196 A.3d 1017 (11/5/18)

We agree with the Commonwealth that the court erred by ordering that Borovichka's drug and alcohol evaluation occur after sentencing, when Section 3814 clearly mandates that drug and alcohol assessments occur before sentencing under Section 3802. The legislature, by requiring the evaluations to take place before sentencing, sought to provide the court with the information necessary to answer two questions: (1) "the extent of the defendant's involvement with alcohol or other drug," and (2) "what type of sentence would benefit the defendant and the public." *See* 75 Pa.C.S. § 3814. Here, by failing to order the evaluation to take place before sentencing, the court was without the information necessary to craft a sentence to meet Borovichka's individual needs. Therefore, we are compelled to vacate Borovichka's judgment of sentence and remand the matter to the trial court to re-address its sentencing scheme in light of Borovichka's drug and alcohol evaluation.

We, however, decline the Commonwealth's specific request to direct the court to impose a five year mandatory maximum sentence, per 3804(d), because it is unclear from the record whether that section applies. The Commonwealth has not provided us with any evidence regarding Borovichka's post-sentencing evaluation. We can neither confirm that the evaluation took place nor confirm its results. We also cannot determine whether Borovichka's evaluation was an initial assessment, under Section 3814(1), or a full assessment under Section 3814(2). This distinction is crucial because Section 3804(d) requires the court to impose the statutory available maximum sentence only on an individual who is determined to be in need of additional treatment after a full assessment under Section 3814(2). The results of Section 3814(1)'s initial evaluation do not trigger Section 3804(d)'s mandatory maximum sentence. As such, without being provided any evidence of Borovichka's post-sentencing evaluation, we do not accept the Commonwealth's assertion that Section 3804(d) applies.

Borovichka, 18 A.3d 1242 (Pa. Super. 4/27/11)

Under 42 Pa.C.S. § 9762(2), the decision whether to place prisoners sentenced to a maximum period of two years or more but less than five years in a county facility, or to relinquish custody of such individuals to the Bureau of Corrections for placement in a state facility is within the sound discretion of the trial judge.

A court should consider the differences between the state and county prison environment in choosing to sentence an individual to a state rather than a county facility. Defendant pled guilty to five counts of Robbery. The District Attorney agreed not to pursue the mandatory five year sentence. The court also considered the fact that defendant provided testimony which led to convictions in other robbery cases. State system had better educational and vocational programs. No abuse of discretion in sentence to state facility.

Stalnaker, 376 Pa. Super. 181, 545 A.2d 886 (5/23/88)
County of Allegheny v. Commonwealth of Pennsylvania,
518 Pa. 556, 544 A.2d 1305 (7/28/88)

Requiring the sentence to be served in a state as opposed to a county institution is purely within the discretion of the trial judge limited only by statutes or Department of Correction regulations as to where a sentence may be served.

24 month maximum sentence for first offense. The sentencing court found defendant had an alcohol problem with which he had not been able to deal effectively, and which the court found posed a serious risk, if left untreated. Drinking appeared to relate to other problems delineated in the pre-sentence report which raised deep concerns with the trial judge.

Most first-time sentences for DUI are considerably less than imposed here and rarely, if ever, have we seen such a sentence mandated to be served in a state institution. The record, however, clearly establishes that the trial court at the guilty plea hearing informed the defendant how seriously he viewed this matter and that guided by the pre-sentence investigation, a sentence up to the statutory maximum would be a distinct if not likely possibility. The trial court determined defendant needed treatment which was only available in the state institution and, therefore, directed the sentence be served where the treatment was available. In view of the general overload of both local and state institutions, it is not possible for this Court to determine that defendant would be better or worse in one rather than the other.

Morrison, 391 Pa. Super. 449, 571 A.2d 453 (3/12/90)

42 Pa.C.S. § 9762(h): Nothing in this section shall prohibit the transfer of prisoners otherwise authorized by law or prevent a judge from changing the place of confinement between State and county facilities to the extent that the judge would have such discretion at the time of imposition of sentence or recommitment.

STATUTE RESOLVES THE FOLLOWING CONFLICT:
COMPARE:

Plea agreement provided that DA would recommend 29 ½ -59 month sentence to be served in Bucks County prison. Four days later defendant was administratively transferred to State Correctional Institution at Graterford. Defendant sought only a retransfer back to Bucks County Prison, not withdrawal of his guilty plea.

Common Pleas court has no authority to transfer prisoners. DA was not responsible for transfer which was made for reasons of overcrowding. DA did not violate his commitment to defendant. This appeal does not relate to the plea bargain. It relates to the administration of correctional institutions.

WIEAND, J. DISSENTING: Commonwealth had an affirmative duty to honor the promise pertaining to the place where defendant would be required to serve his term of imprisonment. Defendant must be given the opportunity to withdraw his plea of guilty.

Com. ex rel. Black v. Superintendent, 293 Pa. Super. 442, 439 A.2d 193 (12/29/81)

WITH:

Trial court accepted a plea agreement calling for a 9-18 month sentence, to be served in a county prison. Trial court ordered the sentence to run consecutive to "any other sentences previously imposed." At that time defendant was serving a state prison sentence for prior crimes. The Department of Corrections aggregated Rathfon's sentence with the state sentence previously imposed, resulting in Rathfon having to serve both sentences in a state prison.

We cannot ignore the fact that the record reveals that Rathfon bargained for a county sentence, that the court accepted the plea and sentenced Rathfon under the continuing misapprehension that the sentence would be served in the county jail, and that plea counsel was apparently not aware that the Sentencing Code and Department of Corrections policy would result in aggregation of the sentences, which would preclude the possibility of Rathfon serving the sentence in the county jail. Additionally, it is within the province of the PCRA court to make credibility determinations, and it apparently believed Rathfon when he testified at the PCRA hearing that he would not have pled guilty had he known the sentence would be served in state prison. The PCRA court accepted Rathfon's reasons for preferring county jail over state prison and concluded that Rathfon did not get what he had bargained for, given that the written plea agreement and associate proceedings unequivocally indicated that his sentence was to be a county sentence. Since the reasonable probability test is not stringent and the record supports the PCRA court's conclusions, we must affirm [the order granting PCRA relief and permitting the withdrawal of Rathfon's guilty plea].

Rathfon, 899 A.2d 365 (Pa. Super. 5/9/06)

Consecutive or concurrent sentences (cont.)

Effect of sentence aggregation (cont.)

Place of incarceration: Determined by aggregate maximum sentence (cont.)

Lower court has the inherent power to change facility or location in which defendant is to serve sentence - not a "modification" or an "increase." Trial court could change 8-16 month sentence from county prison to state prison since it would be served consecutively to a parole violation recommitment to state prison.

Ward, 340 Pa. Super. 1, 489 A.2d 809 (2/28/85)

The Commonwealth and defendant entered into a plea agreement for a sentence of 18 months to 5 years imprisonment. The trial judge originally ordered defendant to serve that sentence in county prison. Part way through his sentence defendant was transferred to state prison and defendant moved to vacate or modify his sentence so as to contain a provision requiring it to be served in the county prison.

A sentence whose maximum term is 5 years or more must be served in a state prison. 42 Pa.C.S. § 9762. Therefore, in order to properly modify the sentence to permit service in a county prison, the judge would have had to modify the length as well as the place of confinement.

However, because the sentence in this case arose from a negotiated plea agreement, the court could not unilaterally alter the length of defendant's sentence without the consent of the Commonwealth.

Townsend, 693 A.2d 980 (Pa. Super. 4/9/97)

Consecutive or concurrent sentences (cont.)

Effect of sentence aggregation (cont.)

Place of incarceration: Determined by aggregate maximum sentence (cont.)

Defendant contends that the trial court abused its discretion by ordering defendant to serve his sentence in a state correctional institution rather than in a county facility. defendant cites 204 Pa. Code § 303.11(b)(2) for the proposition that defendant's crime falls within Level 2 of the sentencing guidelines, and that the sentencing options available for Level 2 include confinement in a county facility, but not a state facility.

In the case *sub judice*, the trial court imposed upon defendant a maximum term of three years in prison. Pursuant to the clear, plain language of [former] section 9762(2) the trial court had the discretion to commit defendant to either the Bureau of Corrections, which is the agency responsible for administering the state correctional system and its facilities, or a county prison.

In suggesting that confinement in a state facility is not a sentencing option in this case, defendant has incorrectly interpreted 204 Pa. Code § 303.11(b)(2), which indicates that the sentencing options available to a person who commits a "Level 2 offense," includes total confinement in a county facility under a county sentence, partial confinement in a county facility, restrictive intermediate punishments, or restorative sanctions. However, 204 Pa. Code § 303.11(b)(2) provides for such sentencing options only when the "Level 2" offender is sentenced in the standard range, which is defined as having an upper limit of less than 12 months in prison and a lower limit of restorative sanctions. In fact, 204 Pa. Code § 303.11(b) plainly indicates that "[t]he sentencing level is based on the standard range of the sentencing recommendations."

In the case *sub judice*, defendant was properly sentenced in the aggravated range to a term of one year to three years in prison. The standard range sentencing options provided for in 204 Pa. Code § 303.11(b)(2), which do not conflict with the criteria set forth in [the former version of] 42 Pa.C.S. § 9762, are not applicable to defendant. *See Commonwealth v. Hanson*, 856 A.2d 1254 (Pa. Super. 8/23/04) (holding that court control over the offender and a county sentence are not of concern for a "Level 2 offense" when an aggravated sentence is imposed).

> [L]ittle if any guidance exists to aid the trial court in exercising its discretion with respect to determining the place for confinement under [the former] 42 Pa.C.S. § 9762(2). While a convicted individual has no constitutional or other inherent right to serve his imprisonment in any particular institution or type of institution, a court should consider the differences between the state and county prison environment in choosing to sentence an individual to a state rather than a county facility. In *Commonwealth v. Ward*, 340 Pa. Super. 1, 489 A.2d 809 (2/28/85), we recognized:
>
> > The policy behind requiring that a person sentenced to simple imprisonment serve the sentence in a county jail and not a state penitentiary recognizes that such a person, who is rarely in trouble, should not be subjected to imprisonment with persons guilty of serious misdemeanors or felonies.

Stalnaker, 545 A.2d at 889 (citation omitted).

In the case *sub judice*, the trial court's decision to commit defendant to a state correctional institution rather than a county facility did not constitute an abuse of discretion. The sentencing proceedings reveals that the trial court thoroughly considered and balanced the factors enumerated in the Sentencing Code, as well as considered a pre-sentence report, in determining that a state correctional facility was the appropriate place for defendant to serve his sentence.

The trial court considered the testimony from defendant's wife, who is the young victim's mother, regarding the effect defendant's actions had on the family when defendant crashed his vehicle while traveling 112 mph, thereby rendering his son a paraplegic. The trial court heard defendant's wife testify regarding the horror of observing the victim in the hospital immediately after the accident and told the court that, following the accident, defendant, referring to the victim, stated he was "starting to hate that F'n kid." Defendant's wife testified about the difficulties in taking care of the victim and indicated that defendant does not assist her in any manner. She also informed the trial court that defendant will not take responsibility for the accident and, in fact, bought himself a high performance sports car shortly thereafter.

In response to all of the testimony and pre-sentence report, the trial court stated on the record that it believed defendant is not remorseful, it noted defendant's habit of excessive speeding and "need for speed," and it indicated defendant abrogated a clear duty of care towards his son. In sum, in sentencing defendant to a state correctional institution, the sentencing court properly balanced the seriousness of the offense committed by defendant, the impact the crimes have had on the victim, defendant's lack of remorse, and defendant's rehabilitative needs.

Fullin, 892 A.2d 843 (Pa. Super. 2/1/06)

Consecutive or concurrent sentences (cont.)

Effect of sentence aggregation (cont.)

Place of incarceration: Determined by aggregate maximum sentence (cont.)

We concede that the cases dealing with the issue of sentencing outside the guidelines typically concern the length of sentence; however, we find that where the trial court has the discretion to impose a state sentence or a county sentence, the court must articulate its reasons for choosing state time when county time is recommended under the guidelines. Section 303.11(b)(2), which enumerates sentencing levels, is no less a part of the Sentencing Guidelines as the sections relating to duration of sentence. Accordingly, we hold that in cases where the Sentencing Guidelines recommend a county sentence, but the trial court has the option to impose either a county sentence or a state sentence, the court shall place the reasons for imposing a state sentence on the record. To reach any other conclusion would render Section 303.11 mere surplusage. Because the trial court did not enumerate its reasons for imposing a state sentence when a county sentence was recommended, we find that it committed an abuse of discretion.

Hartle, 894 A.2d 800 (Pa. Super. 3/2/06)

Defendant pleaded guilty to accidents involving death or personal injury; driving while operating privilege is suspended or revoked; operation of a motor vehicle without required

financial responsibility; and operation following suspension of registration and he was sentenced to 10 months to 4 years imprisonment, to be served in a state correctional facility.

In *Hartle*, this Court noted that "[t]rial judges in this Commonwealth are granted the discretion to commit convicted criminals with maximum sentences of two years or greater to the Pennsylvania Department of Corrections." *Id.* Notably, this discretion derives from the sentencing provisions of Chapter 97, Subchapter E, which state, in relevant part, that "[a]ll persons sentenced to a total or partial confinement for ... maximum terms of two years or more but less than five years may be committed to the Bureau of Corrections for confinement or may be committed to a county prison within the jurisdiction of the court. . . ." 42 Pa.C.S. § 9762. With that provision in mind, we recall that defendant's most serious offense basically involved leaving the scene of an accident without fulfilling the duty to provide information and/or to render aid.

The injuries arising from the automobile accident were not serious. Considered in the abstract, without consideration of defendant's criminal history or the sentencing court's stated reasons for its sentence, defendant's four year maximum sentence-calculated to be more than four times greater than defendant's minimum sentence-raises an eyebrow in light of the offense to which he pleaded guilty and, to some degree, the general sentencing provision as set forth in 42 Pa.C.S. § 9756(b), which requires the imposition of a minimum sentence that does not exceed one-half of the maximum. Stated alternatively, and in consideration of this mandate, a sentencing court must impose a maximum sentence that is at least twice the minimum. Although there is no restriction placed on the court's decision regarding the maximum sentence, aside from the statutory maximum, we observe that very frequently sentencing courts comply with Section 9756(b) by simply imposing a maximum sentence twice that of the minimum sentence. We note that had the sentencing judge adhered to this common practice and imposed a maximum sentence of twice the minimum, defendant's maximum sentence would have been four months shy of the requisite standard for state confinement, and defendant would have undoubtedly received placement in a county facility.

Edwards, 906 A.2d 1225 (Pa. Super. 8/22/06)

Consecutive or concurrent sentences (cont.)

Effect of sentence aggregation (cont.)

Parole eligibility: Determined by aggregate maximum sentence

(Sentences imposed after November 24, 2111) 61 Pa.C.S. §§ 6132(a)(2)(ii), (b)

Sentences served in county prison – parole by sentencing judge

Sentences served in state prison – parole by Parole Board

(Sentences imposed prior to November 24, 2011)

Less than two years: Sentencing judge 42 Pa.C.S. §§ 9775, 9776

More than two years: Pa. Board of Probation and Parole

61 Pa.C.S. § 6132(a)(2)(ii)

[Dep't of Corrections] v. Reese, 774 A.2d 1255 (Pa. Super. 3/30/01)

appeal denied, 567 Pa. 761, 790 A.2d 1016 (11/20/01)

Parole Board was supervising prisoners in county prisons

Parole Board may not grant early parole: 61 Pa.C.S. § 6137(a)(3)

Mandatory conditions of parole for some DUI offenders: 75 Pa.C.S. § 3815(b)

§ 3815. Mandatory sentencing.

. . .

(b) Parole. --

(1) An offender who is determined pursuant to section 3814 (relating to drug and alcohol assessments) to be in need of drug and alcohol treatment shall be eligible for parole in accordance with the terms and conditions prescribed in this section following the expiration of the offender's mandatory minimum term of imprisonment.

(2) The following shall be conditions of parole:

(i) If the offender is not determined under the procedures set forth in section 3814 to be addicted to alcohol or another substance, the offender must refrain from:

(A) the use of illegal controlled substances; and

(B) the abuse of prescription drugs, over-the-counter drugs or any other substances.

(ii) If the offender is determined under the procedures set forth in section 3814 to be addicted to alcohol or another substance, the offender must do all of the following:

(A) Refrain from:

(I) the use of alcohol or illegal controlled substances; and

(II) the abuse of prescription drugs, over-the-counter drugs or any other substances.

(B) Participate in and cooperate with drug and alcohol addiction treatment under subsection (c).

The court imposed a 2 ½ to 5 year sentence. The court conditioned defendant's parole or probation on his **consent to random searches** by the Gun Violence Task Force.

Because the court sentenced defendant to a maximum term of incarceration of two or more years, defendant's parole would be under the exclusive supervision of the Pennsylvania Board of Probation and Parole and not the Court of Common Pleas. Therefore, any condition the sentencing court purported to impose on defendant's state parole is advisory only. See [former] 61 P.S. § 331.18 (A judge in his discretion may make at any time any recommendation he may desire to the board respecting the person sentenced and the term of imprisonment said judge believes such person should be required to serve before a parole is granted to him, but a recommendation made by a judge as aforesaid respecting the parole or terms of parole of such person **shall be advisory only**, and no order in respect thereto made or attempted to be made as a part of a sentence shall be binding upon the board in performing the duties and functions herein conferred upon it.) (emphasis added).

The portion of the sentence which imposed conditions upon defendant's parole was vacated upon that basis, without comment regarding its possible validity as part of a county sentence.

Mears, 972 A.2d 1210 (Pa. Super. 5/4/09)
[EDITOR'S NOTE: The former 61 P.S. § 331.18 has been reenacted, in substantially identical form at 61 Pa.C.S. § 6134(b).]

The conclusion we reached in *Mears* is currently codified at 61 Pa.C.S. §§ 6132(a) and 6134(b)(1), (2) ("A recommendation made by a judge under paragraph (1) respecting the parole or terms of parole of a person shall be advisory only. No order in respect to the recommendation made or attempted to be made as a part of a sentence shall be binding upon the [state parole board] in performing the duties and functions conferred on it by this chapter.").

Coulverson, 34 A.3d 135 (Pa. Super. 11/29/11)

Revocation of probation or parole

Different sanctions

Violation of probation

Court imposes a new sentence
All sentencing options available as at time of original sentence
Pronounce minimum and maximum sentence if jail sentence imposed
Revocation sentence not limited to length of original probationary period
Pierce, 497 Pa. 437, 441 A.2d 1218 (3/10/82)
Ware, 737 A.2d 251 (Pa. Super. 7/9/99)
appeal denied, 561 Pa. 657, 747 A.2d 900 (12/28/99)
Fusselman, 866 A.2d 1109 (Pa. Super. 12/14/04)
appeal denied, 584 Pa. 691, 882 A.2d 477 (9/13/05)
(revocation of county intermediate punishment sentence)

Alternative sanction for revocation of probation: 42 Pa.C.S. § 9771.1
Swift, predictable and immediate sanctions on offenders
Judicial district must establish the program
Focused on offenders who commit drug related crimes
Not limited to such offenders
Ineligible for program: § 9771.1(c)(2)
"has been convicted or adjudicated delinquent"
crime of violence or Megan's Law offense
Specific warnings to be provided at time of sentencing
Random drug testing a permissible condition of probation
Probation violation hearing within two business days after arrest
Court shall impose a term of imprisonment "of up to"
3 days for a first violation 7 days for a second violation
14 days for a third violation 21 days for a 4th + violation
Weekend imprisonment authorized for 1st or 2nd violations
Exception to sanctions for "compelling reason"
Court "may" revoke probation after third violation
Local rules may adopt "inconsistent" terms of imprisonment

Revocation of probation and resentencing does not implicate double jeopardy because revocation is not a second punishment for the original conviction, but rather is an integral element of the original conditional sentence.

Pierce, 497 Pa. 437, 441 A.2d 1218 (3/10/82)

Revocation of probation or parole (cont.)

Different sanctions (cont.)

Violation of probation (cont.)

Upon revoking a defendant's probation and imposing a new sentence, a court has available to it essentially all the sentencing alternatives that existed at the time of the initial sentencing. 42 Pa.C.S. § 9771(b). Thus, if the original offense was punishable by total confinement, such a penalty is available to a revocation court, subject to the limitation that the court shall not impose total confinement unless it finds that: (1) the defendant has been convicted of another crime; (2) the defendant's conduct indicates a likelihood of future offenses; or (3) such a sentence is necessary to vindicate the court's authority. *Commonwealth v. Malovich*, 903 A.2d 1247, 1251 (Pa. Super. 7/17/06); 42 Pa.C.S. § 9771(c).

Kalichak, 943 A.2d 285 (Pa. Super. 1/30/08)

After serving his term of imprisonment, defendant was released to probation. Defendant then was charged with violating the terms and conditions of probation as a result of his failure to report and due to a subsequent arrest for possession of a controlled substance. At the time of his second arrest, defendant was shot but fled from the hospital and remained a fugitive until yet a third arrest. A violation of probation hearing was conducted and the trial court found defendant did violate his probation. He was sentenced to a term of one to two years of incarceration with a consecutive term of four years of probation for the technical violations.

The sentence to imprisonment for technical violations was not an abuse of sentencing discretion. The court considered the testimony at the VOP hearing regarding defendant's lack of success under probation, arrest while under supervision, failure to appear on numerous occasions, and flight from a halfway house while under parole supervision. The sentencing record therein reveals defendant was found in possession of a controlled substance while on probation, thus showing defendant was likely to commit another crime.

Crump, 995 A.2d 1280 (Pa. Super. 5/28/10)
appeal denied, 608 Pa. 661, 13 A.3d 475 (11/30/10)

Revocation of probation or parole (cont.)

Different sanctions (cont.)

Violation of probation (cont.)

Defendant was placed on probation by the juvenile court. After defendant's 18th birthday, defendant committed a theft and was charged as an adult. Defendant was found to be in violation of his juvenile probation and was sentenced to 10 days to one year imprisonment in the county jail.

Defendant was still a "child" subject to the Juvenile Act. He was an individual "under the age of 21 years who committed an act of delinquency before reaching the age of 18 years." 42 Pa.C.S. § 6302.

A person over 18 years of age but under 21 years of age who violates probation imposed for an offense committed prior to his or her 18th birthday cannot be incarcerated in an adult facility for the probation violation. As is clear from the plain language of 42 Pa.C.S. § 6352, placement in an adult correctional facility is not included among the enumerated options available to a juvenile court following an adjudication of delinquency, and § 6352(b) removes any doubt as to the propriety of committing a child to an adult penal institution by specifically prohibiting it.

J.M., 42 A.3d 348 (Pa. Super. 4/9/12)

Notwithstanding any formal or informal policy in York County pursuant to which there was no supervision of a person on probation while an appeal was pending, that policy did not act to stay defendant's sentence. There was no order in the record staying defendant's sentence. Therefore, at the time probation was revoked, defendant's term of probation had already expired. Consequently, the trial court lacked the authority to revoke the probation, and the sentence of imprisonment was illegal.

Mathias, 121 A.3d 558 (Pa. Super. 7/29/15)

Link to: Shogan, J. concurring

Revocation of probation or parole (cont.)

Different sanctions (cont.)

Violation of county parole

Defendant is recommitted for the balance of his maximum sentence

No new minimum and maximum sentence is to be imposed

Ware, 737 A.2d 251 (Pa. Super. 7/9/99)

appeal denied, 561 Pa. 657, 747 A.2d 900 (12/28/99)

Shimonvich, 858 A.2d 132 (Pa. Super. 9/1/04)

Stafford, 29 A.3d 800 (Pa. Super. 9/26/11)

Court may reparole - Fair, 345 Pa. Super. 61, 497 A.2d 643 (8/23/85)

75 Pa.C.S. § 3815(d) – Mandatory sanction for violation of treatment rules

Revocation of parole, work release or other form of pre-release

Ineligible for reparole unless readmitted to treatment program

Unlike a probation revocation, a parole revocation does not involve the imposition of a new sentence. *Commonwealth v. Mitchell*, 429 Pa. Super. 435, 632 A.2d 934 (Pa. Super. 11/1/93). Indeed, there is no authority for a parole-revocation court to impose a new penalty. Rather, the only option for a court that decides to revoke parole is to recommit the defendant to serve the already-imposed, original sentence. At some point thereafter, the defendant may again be paroled.

Therefore, the purposes of a court's parole-revocation hearing-the revocation court's tasks-are to determine whether the parolee violated parole and, if so, whether parole remains a viable means of rehabilitating the defendant and deterring future antisocial conduct, or whether revocation, and thus recommitment, are in order. The Commonwealth must prove the violation by a preponderance of the evidence and, once it does so, the decision to revoke parole is a matter for the court's discretion. In the exercise of that discretion, a conviction for a new crime is a legally sufficient basis to revoke parole. *Commonwealth v. Galletta*, 864 A.2d 532 (Pa. Super. 12/7/04).

Kalichak, 943 A.2d 285 (Pa. Super. 1/30/08)

Revocation of probation or parole (cont.)

State Parole revocation: Convicted violators

61 Pa.C.S. § 6138(a)(2)

If the parolee's recommitment is so ordered, the parolee shall be reentered to serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted and, except as provided under paragraph (2.1), shall be given no credit for the time at liberty on parole

No credit for time at liberty on parole (forfeit "street time")

61 Pa.C.S. § 6138(a)(2.1)

The Board may, in its discretion, award credit to a parolee recommitted under paragraph (2) for the time spent at liberty on parole, unless any of the following apply:

(I) The crime committed during the period of parole or while delinquent on parole is a crime of violence as defined in 42 Pa.C.S. § 9714(g) (relating to sentences for second and subsequent offenses) or a crime requiring registration under 42 Pa.C.S. Ch. 97 Subch. H (relating to registration of sexual offenders).

(II) The parolee was recommitted under Section 6143 (relating to early parole of inmates subject to federal removal order).

ISSUE TO BE DECIDED:

If the Parole Board chooses not to award credit pursuant to Section 6138(a)(2.1), the parolee serves the remainder of his sentence as if he had not been granted parole. 61 Pa.C.S. § 6138(a)(2). However, if the Parole Board does award credit, the parolee no longer has "time spent at liberty on parole," i.e., "street time." *Id*. This is so because Section 6138(a)(2.1) requires the Parole Board to choose a course of action with regard to a convicted parole violator's street time at the time of recommitment. If the Parole Board chooses to "award credit" for the parolee's street time towards his sentence, the street time is gone. The only extant "time spent at liberty on parole" will be that time that falls between the parolee's most recent reparole and his recommitment. The award of sentence credit is an affirmative act and not a decision to defer the forfeiture of street time to a later time.

When Young was recommitted in 2015 as a convicted parole violator, the Parole Board lacked the statutory authority to revoke the 1918 days of credit it had awarded him in 2013. Those 1918 days had already been applied to his original sentence. Just as the Parole Board lacks the power to revoke days served on a sentence in prison, it lacks the power to revoke days served on a sentence by reason of the Parole Board's express award of credit in the course of a prior recommitment.

Young v [Parole Board], 189 A.3d 16 (Pa. Cmwlth. 6/12/18) (en banc)
appeal granted, No. 1 MAP 2019 (granted 1/2/19)

Revocation of probation or parole (cont.)

Court may not "extend" parole period

Trial court lacks authority to extend a parole period in order to force a defendant to pay fines and costs. Extension of parole is an impermissible modification of sentence beyond the 30 day period during which such modifications are permitted.

Com. ex rel. Powell v. Rosenberry, 435 Pa. Super. 337, 645 A.2d 1328 (7/18/94)
[EDITOR'S NOTE: The court did not address; therefore, did not forbid, a court's finding a violation of parole, recommitting the defendant, then reparoling him immediately as a means of extending supervision for the purposes of collecting fines, costs or restitution.]

Once trial court discharged defendant from probation, despite fact that no restitution amount had ever been fixed or paid, and once 30 days had passed after entry of that order without the Commonwealth taking an appeal, trial court lacked jurisdiction to enter order holding defendant in indirect criminal contempt for failure to pay restitution, absent any allegation of fraud or any other circumstance which was so grave or compelling as to constitute extraordinary cause justifying court's intervention beyond statutory 30–day period.

Facer, 447 Pa. Super. 352, 669 A.2d 385 (12/29/95)

BUT SEE:
42 Pa.C.S. § 9728(c) permits financial obligations which have been reduced to judgment under that statute to be collected beyond the maximum term of confinement or maximum term of potential imprisonment.

Ralston, 800 A.2d 1007 (Pa. Cmwlth. 6/20/02)

Revocation of probation or parole (cont.)

Must county parole revocation and a new sentence be served consecutively?

COMPARE:

Defendant was found guilty and was sentenced by Judge Sheppard, on January 2, to 11 ½ to 23 months imprisonment. The Commonwealth filed a petition for modification and the sentence was vacated on January 16.

On April 8 defendant appeared before Judge Cain on a parole violation hearing and was recommitted to serve the balance of a previously imposed sentence, a recommitment of 20 months and 14 days. On April 15 defendant reappeared before Judge Sheppard who reimposed the sentence originally imposed on January 2.

When defendant applied for parole before Judge Sheppard, the Commonwealth argued that, as a matter of law, Judge Sheppard's sentence of April 15 was required to be served consecutively to Judge Cain's parole recommitment. Therefore, the Commonwealth argued, until Judge Cain's sentence was served in its entirety, defendant could not commence serving Judge Sheppard's sentence. And, it is argued, until the commencement of Judge Sheppard's sentence, defendant could not be paroled on it.

It is the Commonwealth's contention on appeal that a judge of the Court of Common Pleas may not grant parole on a sentence where there has been a previous imposition of back-time for a prior parole violation. It bases its argument upon a repealed section of the Pennsylvania statutes relating to parole, 61 P.S. § 305. Notwithstanding the repeal, the argument is posed that the repealed section has passed into the common law such that the prohibition against concurrent service of back and front-time on county sentences remains a vital part of the law. The Commonwealth maintains that the repeal, effective June 27, 1978 by the Judiciary Act Repealer Act, (JARA), 42 P.S. § 20002(a)[955], does not change the law because § 20003(b) of the same act saves it from oblivion.

[Former] Pa.R.Crim.P. 1406 [now Rule 705] became effective in 1973 and was amended in 1975. As such, the savings clause of JARA, § 20003(b), does not continue to give the force of law to repealed § 305. [Former] Rule 1406 [was] a general rule in effect at the time JARA became effective, and it, therefore, "shall prescribe and provide the practice and procedure with respect to the enforcement of any right, remedy or immunity where the practice and procedure had been governed by the repealed statute on the date of its repeal." 42 P.S. § 20003(b).

We conclude that [former] Pa.R.Crim.P. 1406 does govern the imposition of county sentences by Common Pleas courts where a defendant may be serving a sentence which is back time on a prior conviction. The authority of the Common Pleas judge to grant parole at any time, see [former] 61 P.S. § 314, lends support for the determination that the specific repeal of 61 P.S. § 305 coupled with the provisions of [former] Rule 1406 requires a finding that a judge of the Court of Common Pleas may grant parole where the time served on that sentence has been served concurrently with another county sentence. This includes situations where the prior sentence is being served after imposition of back time for a violation of probation or parole.

We recognize that this holding is a result different from the law as it relates to state sentences over which the Board of Probation and Parole has exclusive jurisdiction. Under [former] 61 P.S. § 331.21a [now found at 61 Pa.C.S. § 6138(a)(5)], a prisoner may not serve concurrently both back and front-time sentences. That is, the remainder of the sentence on which the prisoner had been paroled must be served before service of a new sentence may commence. However, the

existing statutes and court rules require a finding that the judges of the Courts of Common Pleas have been vested with authority that the [Parole] Board has not.

Romolini, 384 Pa. Super. 117, 557 A.2d 1073 (4/14/89)

WITH:

The original sentence imposed at 3404 of 1997 was entered upon an open plea of guilty and was not ordered to run concurrently, nor consecutively, with any other sentence. While defendant was on parole therefrom, he entered a negotiated plea of guilty to aggravated assault at 2924 of 1998 before a different judge. The state sentence imposed for that crime was ordered to run concurrent with defendant's previous county sentence at 3404 of 1997. Three weeks later, before the original judge, defendant's parole at 3404 of 1997 was revoked and he was directed to serve his back time consecutive to the sentence imposed at 2924 of 1998. As previously expressed herein, the consecutive nature of the recommitment was proper. Although defendant now complains of a double jeopardy violation in case number 3404 of 1997, we see none. We note that defendant's complaint, if of any merit, might possibly be better expressed as the alleged failure to receive the benefit of the presumably bargained for exchange in the sentence subsequently negotiated at 2924 of 1998. We express no opinion in that respect.

We find that the consecutive back time requirement imposed upon state parolees is equally applicable to county parolees as following the legislature's intent that the administration of parole should be uniform. Accordingly, we find no illegality in the trial court's order directing defendant to serve the balance of his parole sentence consecutively to his current state sentence.

Ortiz, 745 A.2d 662 (Pa. Super. 1/19/00)
appeal denied, 568 Pa. 658, 795 A.2d 973 (9/7/00)
[EDITOR'S NOTE: In *Ferrer*, 319 Pa. Super. 152, 465 A.2d 1275 (9/23/83), Superior Court held that the now repealed 61 P.S. § 305 had been interpreted to require that a county parole violation and a new sentence be served consecutively. *Romolini* relied upon the former Rule 1406, now Rule 705, to conclude that *Ferrer* and 61 P.S. § 305 were no longer in effect. The text of former Rule 1406, as relied upon in *Romolini*, was substantially amended, effective January 1, 1997, *See* 26 Pa. Bull. 5694 (11/23/96). The Report accompanying the amendment stated that the intent of the amendment was to provide that issues of credit for time served should now be governed by statute and by case law. *Ortiz* has now followed *Ferrer* and held that a sentence for a violation of county parole **must** be imposed to run consecutively to the new charge that formed the basis for the parole violation. There does not appear to be any case addressing whether *Romolini* and *Ortiz* are reconcilable.]

Revocation of probation or parole (cont.)

When a defendant violates probation, has he breached any plea agreement?

Original sentence: 3 concurrent terms of 21-42 months imprisonment followed by 2 years of probation. Following a probation revocation, new sentence was 3 consecutive terms of 5-10 years of imprisonment, the maximum sentence for each offense. On remand, the trial court imposed 3 concurrent 5-10 year sentences. On the second appeal, defendant argued that the court was limited to 42 months imprisonment.

It is clearly stated in the Sentencing Code not only that the court may revoke a defendant's probation if appropriate, but also that "[u]pon revocation the sentencing alternatives available to the court shall be the same as were **available at the time of initial sentencing**." 42 Pa.C.S. § 9771 (emphasis added). Likewise, this Court has explicitly stated that "upon revocation of probation, the court possesses the same sentencing alternatives that it had at the time of the original sentencing." *Commonwealth v. Pierce*, 497 Pa. 437, 441 A.2d 1218 (3/10/82). As it is well established that the sentencing alternatives available to the court at the time of initial sentencing are all of the alternatives statutorily available under the Sentencing Code, these authorities make clear that at any revocation of probation hearing, the court is similarly free to impose any sentence permitted under the Code and is not restricted by the bounds of a negotiated plea agreement between a defendant and a prosecutor.

The argument that "any sentence imposed after probation revocation must not exceed the maximum sentence originally imposed" is legally unsupportable and is inconsistent with both the clear and unambiguous language of the Sentencing Code and this court's precedent.

Wallace, 582 Pa. 234, 870 A.2d 838 (3/29/05)

Link to: Saylor, J. concurring and dissenting

Link to: Nigro, J. dissenting

Credit for time served

Statute: 42 Pa.C.S. § 9760
Rule: Pa.R.Crim.P. 705
Former version of rule [former Rule 1406] addressed issues of credit
Former Rule 1406 was substantially amended, effective January 1, 1997
26 Pa. Bulletin 5694 (November 23, 1996)
Credit now governed by statute and by case law

No double counting of credit

2 separate and unrelated charges filed against defendant on same day. Defendant is first sentenced on Judge Temin's charges, and receives credit for all time spent in custody. Judge Sheppard, when sentencing on his charges, denies credit to defendant.

Judge Sheppard properly denied defendant credit.

Following his reasoning, defendant would receive a windfall on sentencing for a completely unrelated crime. This court does not deal in "volume discounts." Applying the rationale of *Commonwealth v. Frank*, 263 Pa. Super. 452, 398 A.2d 663 (2/16/79), to the present case, we hold that once Judge Temin credited defendant for time previously served, defendant's time in custody was no longer "a result of" [42 Pa.C.S. § 9760(1)] the charges brought before Judge Sheppard.

Hollawell, 413 Pa. Super. 42, 604 A.2d 723 (3/6/92)
Merigris, 452 Pa. Super. 78, 681 A.2d 194 (8/1/96)
(credit applied against federal sentence may not be applied a second time)
appeal denied, 548 Pa. 616, 693 A.2d 587 (5/6/97)
Barndt v. [Dep't of Corrections], 902 A.2d 589 (Pa. Cmwlth. 6/28/06)
(credit applied against federal sentence may not be applied a second time)

Judge Melvin sentenced defendant on December 4, 1992.

Judge Durkin sentenced defendant on October 20, 1993. That sentence was ordered to be served concurrently with Judge Melvin's sentence.

Defendant is not entitled to credit against Judge Durkin's sentence for the time served between December 4, 1992 and October 20, 1993.

Wassell v. [Dep't. of Corrections], 658 A.2d 466 (Pa. Cmwlth. 4/27/95)
Lloyd, 353 Pa. Super. 241, 509 A.2d 868 (3/21/86)

Defendant was incarcerated in Maryland, serving a sentence. Pennsylvania authorities lodged a detainer against him on October 2, 1990. Defendant was sentenced in Pennsylvania on August 26, 1991. Pennsylvania may not grant credit for time served in Maryland prior to August 26, 1991. A sentencing judge cannot direct that a sentence commence on a date prior to the date of sentencing when the defendant is serving time on an unrelated charge.

Doxsey v. [Dep't of Corrections], 674 A.2d 1173 (Pa. Cmwlth. 4/15/96)

Credit for time served (cont.)

No double counting of credit (cont.)

Defendant was serving a sentence of imprisonment. He escaped. While at large, he committed a robbery. He was captured and reincarcerated on November 10, 1987. He was sentenced for the new robbery on April 20, 1988.

Defendant was not entitled to credit against the April 20, 1988 sentence for time served from November 10, 1987 to April 20, 1988 since that time was attributable to the previous sentence of imprisonment.

Jones v. [Dep't of Corrections], 683 A.2d 340 (Pa. Cmwlth. 9/24/96)

1/8/94 Bucks County commitment
6/23/94 Bucks County sentence with credit from 1/8/94
8/9/94 Montgomery County sentence

Montgomery County sentence may not include credit for any time period subsequent to January 8, 1994.

Brown v. [Dep't of Corrections], 686 A.2d 919 (Pa. Cmwlth. 12/20/96)

Defendant was sentenced on November 19, 1991 to 2 ½ to 5 years imprisonment. On February 2, 1993 defendant was sentenced to 7 to 20 years imprisonment for a murder conviction which had been entered on October 5, 1991. The trial court granted credit for time served on the February 2, 1993 sentence from September 28, 1990 until February 2, 1993.

The Department of Corrections, however, only awarded defendant credit for the time he served from September 28, 1990 to November 19, 1991. Contrary to the trial court's order, the Department did not credit any of defendant's time in prison from November 20, 1991 to February 2, 1993 towards his murder sentence because that period of incarceration had already been applied to defendant's sentence which was imposed on November 19, 1991. Thus, the Department contended that crediting all of defendant's pre-sentence incarceration time to his murder sentence would result in an impermissible double credit.

Here, since defendant's incarceration from November 19, 1991 to February 2, 1993 had already been applied to his November 19, 1991 sentence, it could not have also been legally applied to his murder sentence.

Jackson v. Vaughn, 565 Pa. 601, 777 A.2d 436 (7/18/01)

Link to: Saylor, J. dissenting

Credit for time served (cont.)

Commitment pursuant to probation/parole detainer

Issue: Defendant is arrested on new charges. Those new charges constitute a potential violation of defendant's parole. A parole violation detainer is lodged against defendant. Is the time served by defendant to be credited against the potential sentence for the new offense or against the potential back time for the parole violation?

If a defendant is being held in custody **solely** because of a detainer lodged by the Board and has otherwise met the requirements for bail on the new criminal charges, the time that he spent in custody shall be credited against his original sentence. If a defendant, however, remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence

Gaito v. [Parole Board], 448 Pa. 397, 412 A.2d 568 (3/20/80)

Defendant served one year, one month and 19 days, without posting bail, following arrest for a DUI. The ultimate sentence for that DUI was 48 hours of incarceration. The Board's detainer had been lodged on the day that defendant began his state court pre-trial commitment.

[W]e hold that, where an offender is incarcerated on both a Board detainer and new criminal charges, all time spent in confinement must be credited to either the new sentence or the original sentence.[6] We further hold that the indigency of a detainee in failing to satisfy the requirements for bail is not determinative as to whether the offender receives credit for time served.

> [6]We are cognizant of the potential ambiguities that may arise using the various sentencing alternatives available to trial courts pursuant to 42 Pa.C.S. § 9721, and in particular, the possibility that a sentence of guilt without further penalty may have implicitly accounted for the period of pre-trial confinement served by the defendant. *Cf.* 42 Pa.C.S. § 9760(1) (requiring trial courts, in fashioning a sentence, to give credit for "all time spent in custody as a result of the criminal charge for which a prison sentence is imposed"). Consistent with the equitable principle that time spent in custody pursuant to new criminal charges and a detainer warrant must be credited against some period of a parolee's confinement, if a trial court intends an alternative sentence to include the time served pending disposition of the new criminal charges, such an intent should be expressly stated on the record.

Our decision in the instant matter does not create a "penal checking account." It merely provides for the allocation of all periods of confinement: (1) where confinement is the result of both a Board warrant and pending criminal charges; (2) where there is no period of incarceration imposed; (3) where the charges are *nolle prossed*; (4) or the parolee is acquitted.

Martin v. [Parole Board], 576 Pa. 588, 840 A.2d 299 (12/30/03)

Link to: Nigro, J. dissenting

Jones v. [Parole Board], 872 A.2d 1283 (Pa. Cmwlth. 4/27/05)
appeal denied, 586 Pa. 731, 890 A.2d 1061 (12/14/05)

Credit for time served (cont.)

Recommitment following probation/parole revocation in split sentence

COMPARE:

Defendant was originally sentenced to 11 1/2-23 months' imprisonment, to be followed by three years of probation. Defendant served his minimum sentence and was paroled. His parole was violated and he was recommitted and served the entirety of the original 23-month sentence.

While serving his three year probationary period, defendant was arrested on new charges and committed on a probation violation detainer. Defendant served 8 months and 23 days in custody, attributable to the probation violation detainer. After his conviction on new charges, defendant was sentenced for the violation of his probation to 3½-7 years' imprisonment. Defendant was allowed credit only for the time served on the probation violation detainer and not for the original 23 months which had been served pursuant to the earlier imprisonment portion of the sentence. The law entitles defendant to credit for both periods of imprisonment, a total period of credit of 31 months and 23 days.

Williams, 443 Pa. Super. 479, 662 A.2d 658 (6/19/95)
appeal denied, 544 Pa. 607, 674 A.2d 1071 (3/12/96)
[ANALYSIS: The Court held that defendant was entitled to approximately 32 months credit against his 42-84 month sentence. The court correctly concluded that this reduced defendant's remaining maximum sentence to 52 months. The Court went on to suggest that defendant's remaining minimum sentence was 26 months or one-half the 52-month maximum sentence. This is incorrect. If defendant's base sentence was 42-84 months and he received 32 months credit, then his sentence would be one where he would have 52 months remaining on his maximum sentence but only 10 months (42 months minus 32 months credit) remaining on his minimum sentence.]

WITH:

The defendant, Richard G. Bowser, pled guilty on August 22, 1994, to Receiving Stolen Property, 18 Pa.C.S. § 3925. On the same day, the defendant was sentenced pursuant to a plea agreement to serve a period of incarceration of not less than six months nor more than twenty-three months and to a consecutive three-year period of probation. As the defendant had already been incarcerated for eleven months and nineteen days, he was paroled forthwith. On June 29, 1998, the court revoked the defendant's probation due to a new criminal conviction and imposed a sentence of incarceration of not less than one year nor more than three years.

On or about July 7, 2000, the defendant filed a Motion for Time Credit requesting that he be given credit on the "revocation sentence" of one to three years for the eleven months and nineteen days that he was incarcerated on the original sentence of six to twenty-three months. The motion was denied on July 11, 2000. This appeal followed.

Having received credit for the time in jail on the first component of the sentence, defendant did not spend the last half of the 23-month incarcerative portion of the sentence in jail. Probation began after that credit. Credit has been given once; had no credit been given, he would not have been paroled in August 1994, and his probation would not have begun for some months thereafter. We see no reason to award duplicate credit in the second component of the sentence.

Defendant cites *Commonwealth v. Williams*, 443 Pa. Super. 479, 662 A.2d 658 (6/19/95), and claims our application of 42 Pa.C.S. § 9760 therein requires him to be credited again with the time spent in jail awaiting trial. In *Williams*, this court ordered the defendant's sentence (following the revocation of probation) be credited with previous time spent incarcerated, because the revocation sentence constituted the maximum time the defendant could serve for the crime; to avoid it being an illegal sentence, the defendant had to receive credit for time previously served for the same crime.

Williams does not control our case. Defendant's revocation sentence (one to three years), combined with the time to which he has previously been sentenced (six to 23 months), does not equal the maximum amount of time to which he can be sentenced (seven years). Accordingly, defendant's sentence is not illegal and *Williams* does not apply. Because defendant has already received credit, and no error can be found in the trial court's sentence, we affirm.

OLSZEWSKI, J. DISSENTING: Defendant entered a guilty plea for receiving stolen property and the trial court imposed its sentence pursuant to a plea agreement. While awaiting trial, the Commonwealth incarcerated defendant for eleven months and nineteen days. Because the minimum sentence imposed was only six months, defendant was immediately released on parole. On June 29, 1998, the lower court revoked defendant's probation due to a new criminal conviction, then re-sentenced defendant to one to three years. These sentences were both imposed as a result of the single underlying offense of receiving stolen property. Thus, defendant is entitled to credit for all "time spent in custody prior to trial, during trial, pending sentence, and pending resolution of an appeal." *Williams*, 443 Pa. Super. at 481, 662 A .2d at 659 (citing 42 Pa.C.S. § 9760(1)). To do otherwise would be to impose two separate sentences on defendant for a single crime, a sentence that would not have been available at the time of the original sentence.

Bowser, 783 A.2d 348 (Pa. Super. 9/11/01)
appeal denied, 568 Pa. 733, 798 A.2d 1286 (5/22/02)

WAS *BOWSER* CORRECTLY DECIDED?

Michael McCray was sentenced to 11 ½ to 23 months imprisonment, and a concurrent sentence of 10 years of probation. He served most of the 23 months before being placed on probation. McCray subsequently violated his probation and was sentenced to 2-4 years of imprisonment. The Department of Corrections refused to credit McCray with the time served prior to being placed on probation.

A unanimous Commonwealth Court panel concluded that the holding in *Williams* and the dissenting opinion in *Bowser* correctly stated the law, and that McCray was entitled to credit against his 2-4 years sentence for the time served prior to being placed on probation. *McCray v. [Dep't of Corrections]*, 807 A.2d 938 (Pa. Cmwlth. 10/1/02).

The Supreme Court of Pennsylvania in *McCray* granted review, and then reversed the order of the Commonwealth Court. The Supreme Court did not reach the merits of the credit issue, concluding, instead, that a mandamus proceeding in the Commonwealth Court, directed against the Department of Corrections, was not the proper procedural vehicle for challenging the denial of credit by the probation revocation court. Instead, such a challenge should be presented to the sentencing (or probation revocation) court.

In separate concurring opinions, Justice Castille stated that he would specifically uphold the decision in *Bowser*, and Justice Saylor stated that he would specifically overrule *Bowser*. Justice Eakin was the author of the *Bowser* decision when he served as a Superior Court judge. The views of the remaining four justices were not stated. *McCray v. [Dep't of Corrections]*, 582 Pa. 440, 872 A.2d 1127 (4/27/05).

However, in *Aviles v. [Dep't of Corrections]*, 875 A.2d 1209 (Pa. Cmwlth. 6/2/05), a divided panel of Commonwealth Court held that the Supreme Court in *McCray* "reaffirmed the Superior Court majority holding in *Bowser*." The panel majority upheld the denial of credit.

Credit for time served (cont.)

Recommitment following probation/parole revocation in split sentence (cont.)

The practical applications of *Williams* and *Bowser* are not necessarily clear in the best of circumstances. And, neither *Williams* nor *Bowser* is entirely on point in the instant matter. Though *Williams* seems to espouse the view that § 9760 requires credit for time served to be given in circumstances such as this, and even more so when not crediting the time would render a sentence illegal, no concerns of an illegal sentence are implicated here, where defendant's original sentence and new sentence, combined, fall below the statutory maximum. At the same time, although *Bowser* embraces the position that § 9760 does not require a double credit for time served to be given in matters such as this, particularly when the original and new sentences combined are below the statutory maximum, unlike the situation in *Bowser*, no clear double counting of time served is involved in the instant matter.

The record in this matter does not demonstrate a clear intention by the sentencing court. Given the conflicting rationales used by the lower court for giving and denying credit for time served, it is not clear that the court realized that it had this power and was intentionally exercising that discretion, or if the court was simply caught in the admittedly confusing practical applications of *Bowser* and *Williams*. Therefore, we vacate the sentence and remand this matter for re-sentencing.

In the future, in order to prevent confusion such as happened in this matter, the trial court, when re-sentencing after revocation of parole or probation, should state on the record whether or not the new sentence is inclusive of the original sentence and formulate and furnish the new sentence accordingly.

Yakell, 876 A.2d 1040 (Pa. Super. 6/3/05)

Credit for time served (cont.)

Recommitment following probation/parole revocation in split sentence (cont.)

Pursuant to *Yakell* the sentencing court should make its intention clear, when revoking probation on a split sentence, as to whether credit for time served is intended to be granted. When a sentencing court follows the Superior Court's suggestion by making an order that is clear, whether the new sentence is inclusive or not of the original sentence, mandamus would then be available to an inmate to have the Department carry out that clear direction.

Oakman v. [Dep't of Corrections], 893 A.2d 834 (Pa. Cmwlth. 2/15/06)

6/21/07	Defendant taken into custody (violation of condition of bail)
10/11/07	Defendant sentenced to probation
11/8/07	Defendant incarcerated pursuant to probation detainer (technical violation)
1/10/08	Sentence for probation violation: 15-30 months imprisonment

Revocation of the probation places defendant in the same position he was in at the time of his original sentencing. Clearly, at the time of his original sentencing, the trial court was required to credit defendant with time served pursuant to Section 9760(1). Therefore, upon revocation of his probation and resentencing, the trial court was required to credit defendant with all time served. Defendant is entitled to credit for all time he spent incarcerated prior to his resentencing on January 10, 2008.

FITZGERALD, J. CONCURRING AND DISSENTING: The majority's reasoning seemingly mirrors the Commonwealth Court's holding in *McCray*, which was reversed, and Judge Olszewski's dissent in *Bowser*, which our Supreme Court rejected. In light of *McCray* and *Yakell*, and absent further clarification by our Supreme Court, I cannot conclude Section 9760(1) mandates that time spent in custody prior to imposition of the original sentence (June 21, 2007 to October 11, 2007) must automatically be credited toward a subsequent VOP sentence. For all these reasons, I must respectfully dissent from that part of the majority's decision mandating the award of 113 days of credit for time served [June 21, 2007 through October 11, 2007].

In applying Section 9760 to the instant facts, defendant's sixty-two days of incarceration from November 8, 2007, until January 9, 2008, relate directly to his VOP sentence. Because there is no disconnect between that time served and the sentence he is currently ordered to serve, I would conclude that he is entitled to credit for those sixty-two days.

Johnson, 967 A.2d 1001 (Pa. Super. 2/26/09)

Credit for time served (cont.)

Recommitment following probation/parole revocation in split sentence (cont.)

Defendant was originally given a split sentence, a term of incarceration of one to two years followed by a consecutive term of three years of probation. The trial court's sentence after the revocation of probation was one to two years imprisonment with a consecutive term of four years of probation. Defendant contends that when the two separate split sentences are added together, the amount of time exceeds the statutory maximum of ten years. The question thus becomes whether the original split sentence of incarceration and probation are to be factored into determining the legality of the new sentence imposed after the revocation of probation. We find that under the facts of the present case, the original probation sentence is not to be considered in determining the legality of defendant's subsequent sentence.

When determining the lawful maximum allowable on a split sentence, the time originally imposed cannot exceed the statutory maximum. *See* 42 Pa.C.S. § 9754; 42 Pa.C.S. § 9756; *Commonwealth v. Nickens*, 259 Pa. Super. 143, 393 A.2d 758 (10/20/78); *Commonwealth v. Perkins*, 302 Pa. Super. 12, 448 A.2d 70 (7/16/82). Thus, where the maximum is ten years, a defendant cannot receive a term of incarceration of three to six years followed by five years of probation. However, in a situation where probation is revoked on a split sentence, as in the case *sub judice*, a defendant is not entitled to credit for time spent on probation. 42 Pa.C.S. § 9771(b); see also 42 Pa.C.S. § 9760 (credit for time served).

We have found no case law nor has defendant supplied any authority that would command a sentencing court to give credit for the amount of probationary time a person is originally given in determining the legality of a subsequent sentence for violation of probation. Section 9760 compels credit toward a sentence only for time served while incarcerated.

The new sentence of one to two years imprisonment followed by a consecutive term of four years of probation does not exceed ten years, nor does the total amount of time defendant would spend incarcerated, which, including previous periods of incarceration, would total four years, surpass the ten-year maximum sentence.

Furthermore, the total period of time defendant would spend imprisoned plus the new term of probation imposed does not equal the statutory maximum of ten years. Since defendant is not entitled to the inclusion of his original probation sentence in determining the legality of his revocation sentence under the facts of this case, and his revocation sentence does not exceed ten years, the sentence is not illegal.

Crump, 995 A.2d 1280 (Pa. Super. 5/28/10)
appeal denied, 608 Pa. 661, 13 A.3d 475 (11/30/10)

Restitution

Pa.R.Crim.P. 705.1. Restitution.

(A) At the time of sentencing, the judge shall determine what restitution, if any, shall be imposed.

(B) In any case in which restitution is imposed, the judge shall state in the sentencing order:

(1) the amount of restitution ordered;
(2) the details of a payment plan, if any, including when payment is to begin;
(3) the identity of the payee(s);
(4) to which officer or agency the restitution payment shall be made;
(5) whether any restitution has been paid and in what amount; and
(6) whether the restitution has been imposed as a part of the sentence and/or as a condition of probation.

Restitution as a direct sentence or as a condition of probation

Defendant pled guilty to two counts of interference with custody of children after she took her son and daughter, without consultation, from their father's legal custody in Harrisburg, Pennsylvania, to the State of Louisiana.

Restitution is a creature of statute and, without express legislative direction, a court is powerless to direct a defendant to make restitution as part of a sentence. As a direct sentence, restitution is authorized by 18 Pa.C.S. § 1106. Restitution as a direct sentence can be permitted only as to losses for which the defendant has been held criminally accountable. The very words of the statute provide that it is applicable only upon conviction for a crime wherein property has been stolen, converted, unlawfully obtained or its value substantially decreased, or where the victim suffers personal injury directly resulting from a crime. Interference with custody of children is not such a crime.

Restitution not permissible, pursuant to Section 1106, for private investigators hired by father to locate missing children, for legal fees in both states, or for expenses for trips to Louisiana. Section 1106 makes no provision for the award of counsel fees, no award is appropriate for legal fees incurred by father in states to which mother had brought the children.

Restitution may also be imposed as a condition of probation, pursuant to 42 Pa.C.S. § 9754(c)(8), and, under such circumstances, the courts are traditionally and properly vested with a broader measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case. Such restitution is also authorized by statute. 42 Pa.C.S. § 9754(c)(8). Such sentences are encouraged and give the trial court the flexibility to determine all the direct and indirect damages caused by a defendant and then permit the court to order restitution so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way. The instant restitution order is supportable as a condition of parole or probation.

Remand for court to conduct hearing to determine what loss or damage has been caused, what amount of restitution defendant can afford to pay, and how it should be paid.

Harner, 533 Pa. 14, 617 A.2d 702 (11/12/92)

Restitution (cont.)

Restitution as a direct sentence or as a condition of probation (cont.)

Defendant convicted of theft by receiving stolen property may not be required to pay restitution as a direct sentence for other property stolen during the burglary which the Commonwealth has not proven was either stolen or received by defendant.

Reed, 374 Pa. Super. 510, 543 A.2d 587 (6/20/88)

In the present case, although the jury determined that the amount involved in the embezzlement was less than $50.00, the sentencing court had sufficient evidence to require that defendant pay the victim $2,000.00 in restitution.

In ***Reed***, the defendant was charged and convicted of theft by receiving stolen property having a combined value of not more than $480.00. Defendant was ordered to pay restitution in the amount of $12,002.67, which was an amount equal to the total loss sustained by the victim. Although the total amount ordered by the court was equal to the total losses, we held that there was no evidence to show a causal connection between the total losses sustained and the defendant's role in receiving some of the property stolen. In the present matter, however, we find that there was sufficient evidence before the court to find a causal connection between defendant's actions and the losses sustained by the restaurant. Thus, our decision in ***Reed*** does not control our decision in this case.

Dohner, 725 A.2d 822 (Pa. Super. 2/18/99)

The jury found defendant guilty of criminal mischief and agricultural vandalism. The jury determined the loss to be more than $1,000.00, but less than $5,000.00. As such, the criminal mischief and agricultural vandalism convictions were graded as misdemeanors of the 2nd and 1st degree, respectively. Wright was sentenced to two concurrent terms of twenty-three months of probation. The court also ordered Wright to pay restitution in the amount of $20,745.82. The court based its restitution order on information the court had before it at the time of sentencing, namely estimates and repair bills from agricultural implements dealers.

Restitution for injuries to a person or property is authorized by statute "in addition to the punishment prescribed" for the crime at issue. *See* 18 Pa.C.S. § 1106(a). The amount of a restitution order is limited by the loss or damages sustained as a direct result of defendant's criminal conduct and by the amount supported by the record.

Defendant points to no authority that limits the court's restitution discretion to an amount determined by a jury for grading purposes.

Wright, 722 A.2d 157 (Pa. Super. 11/20/98)

On September 11, 2001, Tim Wiley reported that his truck had been broken into and that a Nokia cell phone, approximately $15.00 in cash, a wrist watch and a black vinyl attaché bag were stolen. The total estimated value was in excess of $200.00. As Sergeant Glenn K. Manns was

leaving the scene, Wiley reported seeing a man carrying his attaché bag and a cell phone in that vicinity. The suspect, later identified as Kelly, was arrested. As Sergeant Manns attempted to handcuff him, Kelly resisted and escaped. Sergeant Manns pursued Kelly and called for backup. Kelly dropped the cell phone, which was later identified as belonging to Wiley. Kelly was ultimately apprehended and officers recovered from him two other stolen cell phones belonging to a second victim and a stolen CD player belonging to a third victim, Krista Cowan.

Defendant entered a *nolo contendere* plea to three counts of Receiving Stolen Property. The court held a restitution hearing, after which it ordered Kelly to pay restitution in the amount of $2,269.80 as a condition of probation. Of that amount, $1,938.41 represented the cost for repair to Cowan's truck and $330.67 represented the value of the CD player.

On appeal Kelly argues the restitution order is improper in that his plea of *nolo contendere* to receiving stolen property was with regard to the CD player. Therefore, Kelly claims that since he was not criminally responsible for the damage to the truck, requiring him to pay for property damage to the truck punishes him for a crime for which he was not convicted. We disagree.

In *Commonwealth v. Reed*, 374 Pa. Super. 510, 543 A.2d 587 (6/20/88), this Court held that a defendant convicted of unlawfully receiving property taken in a burglary could not be ordered as part of his sentence to make restitution for the total loss sustained in the burglary. In that case there was no evidence of a causal connection between total losses sustained and the defendant's role in receiving some of the property that was stolen.

In *Reed*, unlike this case, restitution was imposed as part of the defendant's sentence pursuant to 18 Pa.C.S. § 1106(a), which requires a showing of a direct causal connection. *See Commonwealth v. Dohner*, 725 A.2d 822, 824 (Pa. Super. 2/18/99).

Here, the sentencing court specifically stated that the restitution order was a condition of probation, and the court was imposing restitution pursuant to 18 Pa.C.S. § 1106(b) and 42 Pa.C.S. § 9754. Where restitution is imposed as a condition of probation, the required nexus is relaxed. *See Commonwealth v. Harner*, 533 Pa. 14, 617 A.2d 702 (11/12/92); *see also In re M.W.*, 555 Pa. 505, 725 A.2d 729 (2/25/99). The sentencing court is accorded latitude in fashioning probationary conditions designed to rehabilitate the defendant and to provide some measure of redress to the victim.

We recognize that a restitution order as a condition of probation cannot be indiscriminate. It is true that the court in this case heard no testimony as to how Kelly obtained the CD player, and "assume[d] he paid 20 bucks on the street from some unknown guys." However, the verdict means Kelly was convicted of buying the goods, and he either knew they were stolen or reasonably should have known they were stolen. We note that President Judge Walker reasoned that "if those people aren't out there buying stolen property, people aren't breaking in . . ." In other words, Kelly provided a market for that person who is criminally responsible for the break-in and damage to the truck. While this would not be enough to be considered a "direct" result of the criminal activity, we do agree with Judge Walker that this can be considered "indirectly" connected to the criminal activity.

Kelly, 836 A.2d 931 (Pa. Super. 11/7/03)

Restitution (cont.)

Restitution as a direct sentence or as a condition of probation (cont.)

The sentencing court imposed restitution in the amount of $12,212.17 for the injuries sustained by Baeza-Guzman. Popow argues this was improper because he was acquitted of both aggravated assault and simple assault for the stabbing of Baeza-Guzman, and was convicted of simple assault under 18 Pa.C.S. § 2701(a)(3) ("attempt by physical menace to put another in fear of imminent serious bodily injury."). We agree with Popow that following the acquittal on the assault charges with respect Baeza-Guzman, the jury finding indicates that Popow was not directly responsible for the injuries to Baeza-Guzman. However, he could be held to be indirectly responsible for them. It is not certain from the jury's verdict whether Baeza-Guzman was cut accidentally during the scuffle, or whether he was stabbed in self-defense because he was choking Mr. Popow. In either event, the illegal actions of Popow triggered the entire event and therefore he is indirectly responsible for the injuries.

The language does not impose the restitution as a condition of probation. *See* 42 Pa.C.S. § 9754. Despite the fact that this may be somewhat technical, under Pennsylvania law this is an imposition of restitution under 18 Pa.C.S. § 1106(a), which is improper when the injuries are an indirect rather than a direct result of the criminal activity. *See Commonwealth v. Reed*, 374 Pa. Super. 510, 543 A.2d 587 (Pa. Super. 6/20/88) (defendant convicted of unlawfully receiving property taken in a burglary could not be ordered as part of his sentence under 18 Pa.C.S. § 1106(a) to make restitution for total loss sustained in the burglary; no evidence of a direct causal connection between total losses sustained and the defendant's role in receiving some of the property that was stolen); *see also Commonwealth v. Harner*, 533 Pa. 14, 617 A.2d 702 (11/12/92) (restitution may be imposed only for those crimes to property or person where victim suffered loss that flows from conduct that forms basis of crime for which defendant is held criminally accountable); *Commonwealth v. Dohner*, 725 A.2d 822, 824 (Pa. Super. 2/18/99) (same).

Here, the injuries were not directly caused by the simple assault, since that conviction was for threatening conduct and placing others in fear. Restitution could be ordered, however, as a condition of probation. *See Harner, supra*; *see also In re M.W.*, 555 Pa. 505, 725 A.2d 729 (2/25/99).

The sentencing court is accorded latitude in fashioning probationary conditions designed to rehabilitate the defendant and to provide some measure of redress to the victim. And, when restitution is imposed as a condition of probation, the required nexus is relaxed.

We conclude, therefore, that the court improperly ordered restitution as part of Mr. Popow's sentence under 18 Pa.C.S. § 1106(a) since the injuries were not directly caused by the simple assault for which he was held accountable.

Popow, 844 A.2d 13 (Pa. Super. 2/18/04)

While the victim is no longer unconscious, he is unable to bathe, dress, comb his hair, or brush his teeth without assistance. The victim is unable to return to his home, and he will require care in a nursing home indefinitely. The nursing home receives a per diem rate from the Department of Public Welfare for the victim's care; however, the victim is still responsible for a payment of $436.00 per month. Since the victim has no income, the money he is eligible for from the Social Security Administration is paid directly to the nursing home. As of July 11, 2005, the Department of Public Welfare had paid the nursing home $36,042.03, which was an average monthly payment of $4,167.32. When such a payment was multiplied by twelve months and then multiplied by the victim's life expectancy of 23.86 years, the total was $1,193,187.06. When the projected $1,193,187.06 was added to the $36,042.03 the Department of Public Welfare had already paid for the victim's care, the total is $1,229,229.09. This figure did not include monies being paid by the Social Security Administration.

Defendant makes much of the fact the jury acquitted him of aggravated assault. This fact alone does not require a different result. The facts of this case reveal that the trial court's imposition of restitution was not wholly and irrationally disproportionate to the crimes committed by defendant. In addition, contrary to defendant's assertion, the trial court did not order him to compensate the victim for all of the losses associated with the victim's injuries. The trial court's restitution amount is equivalent to the amount the Department of Public Welfare is expected to pay for nursing home care over the anticipated lifetime of the victim. The trial court's restitution amount did not include the victim's social security monies, which are given directly to the nursing home, or any prior medical bills.

Oree, 911 A.2d 169 (Pa. Super. 11/3/06)
appeal denied, 591 Pa. 699, 918 A.2d 744 (2/23/07)

Defendant spit on the police officers after she was arrested for drunk driving. The sentencing court ordered her to pay restitution to an insurance company for the costs of precautionary blood testing for the officers.

While the Crimes Codes provides for restitution as a direct sentence, 18 Pa.C.S. § 1106(a), portions of the Sentencing Code allow it as a condition of probation or intermediate punishment. 42 Pa.C.S. § 9754(c)(8) (authorizing restitution as a condition of probation); 42 Pa.C.S. § 9763(b)(10) (authorizing restitution as a condition attached to intermediate punishment); 204 Pa. Code § 303.14(c)(2) (restitution may be imposed as a direct sentence or as a condition of probation or intermediate punishment).

Restitution under 18 Pa.C.S. § 1106(a) must be only for "personal injury directly resulting from the crime." Restitution as a condition of probation is for "loss or damage caused." Although this statute includes the word "caused," it does not contain the language "directly resulting from the crime" as does 18 Pa.C.S. § 1106(a). Case law has made clear that there is a significance to this difference in language. Specifically, when restitution is a condition of probation under 42 Pa.C.S. § 9754(c)(8), rather than a direct sentence under the Crimes Code, there need not be a direct nexus between offense and loss. *Commonwealth v. Popow*, 844 A.2d 13, 19 (Pa. Super.

2/18/04). While restitution cannot be indiscriminate, an indirect connection between the criminal activity and the loss is sufficient. *Commonwealth v. Kelly*, 836 A.2d 931, 934 (Pa. Super. 11/7/03).

This more liberal standard for ordering restitution is consistent with the rehabilitative purposes of probation. Thus, even without direct causation, a court may properly impose restitution as a probationary condition if the court is satisfied that the restitution is designed to rehabilitate the defendant and to make some measure of reimbursement to the victim. *Popow*, 844 A.2d at 19. Such sentences afford courts latitude to order restitution so that offenders will understand the egregiousness of their conduct, be deterred from re-offending, and be encouraged to live responsibly. *Interest of M.W.*, 555 Pa. 505, 511, 725 A.2d 729, 732 (2/25/99). They also give sentencing courts flexibility to determine all direct and indirect damages caused by an offender.

Restitution as a condition of intermediate punishment (IP) under 42 Pa.C.S. § 9763(b)(10) is for "loss or damage caused by the crime." The language in § 9763(b)(10) closely resembles the verbiage in § 9754(c)(8). Both sections reference loss or damage "caused" by the crime but they do not dictate that the restitution be a direct result of the offense. We find that the legal standard for attaching restitution as a condition of IP should be the same as the standard for restitution which is imposed as a probationary condition. In short, we hold that, to impose restitution as a condition of IP pursuant to 42 Pa.C.S. § 9763(b)(10), there need not be a direct nexus between conduct and loss. Rather, an indirect connection between an offender's activity and the victim's damage will justify the restitution order. A sentencing court must have the latitude to include such restitution as a condition of IP if restitution serves the various purposes of IP.

The restitution for precautionary blood tests was ordered as part of the drunk driving sentence. Defendant's drunk driving did not directly cause the officers to require precautionary blood testing. Therefore, the direct nexus required by § 1106(a) is lacking, and the statute does not authorize, as part of the DUI sentence, restitution for the blood tests in this case.

While the act of spitting was plainly not the same as drunk driving, it certainly was a part of defendant's overall conduct which stemmed from her DUI. We believe that there is an undeniable, albeit indirect, link connecting defendant's drunk driving, her presence at the hospital for DUI blood alcohol testing, her act of spitting on officers who arrested her for DUI, and their need for precautionary blood testing. Restitution will serve the purposes of helping to teach defendant the egregiousness of her conduct, to deter her from re-offending, and to encourage her to live responsibly. The restitution also will provide reimbursement to the insurance company. The insurance company is properly considered to be a victim for restitution purposes. *Commonwealth v. Colon*, 708 A.2d 1279, 1281 (Pa. Super. 3/3/98) (finding that restitution to insurer was a proper condition of intermediate punishment imposed for DUI conviction). Based on the foregoing analysis, we find that the restitution is supportable as a condition of IP.

Harriott, 919 A.2d 234 (Pa. Super. 2/8/07)
appeal denied, 594 Pa. 686, 934 A.2d 72 (10/16/07)

Even when ordered as a condition of probation, the court may not order the payment of restitution where all of the victim's stolen property was recovered and was not damaged.

Kinnan, 71 A.3d 983 (Pa. Super. 7/3/13)

Restitution (cont.)

Restitution as a direct sentence or as a condition of probation (cont.)

The trial court convicted defendant of the offense of harassment for slapping E.G. The couch was replaced because that was where E.G. contended she had been raped. The jury found defendant not guilty of the rape. Even assuming that there was a loss of property within the meaning of Section 1106, there was no direct nexus between the crime for which defendant was convicted and the loss of the couch, as Section 1106 requires. Accordingly, Section 1106 provided no authority to the trial court to include restitution for the couch in defendant's sentence.

Barger, 956 A.2d 458 (Pa. Super. 8/29/08) (en banc)
appeal denied, 602 Pa. 655, 980 A.2d 109 (6/26/09)

Restitution as a condition of probation affirmed for damage caused to the victim's car even though the offenses of conviction were leaving the scene of an accident involving damage to an attended vehicle, and driving while under suspension, not any conduct causing the accident.

Nuse, 976 A.2d 1191 (Pa. Super. 7/8/09)

OPINION IN SUPPORT OF AFFIRMANCE:

When restitution is ordered under Section 1106(a), it is a part of an offender's sentence. A sentence of restitution is mandatory when there has been injury to person or property by an offender's criminal conduct. Restitution as a part of a sentence is not satisfied until paid in full, regardless of a defendant's financial resources. In contrast, ordering restitution as a condition of probation under Title 42, Section 9754(c)(8) must be based upon an offender's ability to pay and also, as stated, is discharged upon the expiration of the term of probation regardless of whether the obligation has been paid in full. It is inconsistent to order restitution as a sentence, regardless of an ability to pay and without discharge until paid in full, and at the same time order restitution as a condition of probation where the ability to pay must be determined and the restitution obligation is discharged upon the expiration of the term of probation. If restitution must be ordered and paid in full under Section 1106(a), it cannot at the same time also be a condition of probation that can be discharged upon completion of probation.

Because we find restitution had to be ordered under Section 1106(a), we need not reach the question as to whether the trial court erred in failing first to determine defendant's ability to pay restitution under Section 9754 of the Sentencing Code, 42 Pa.C.S. § 9754, which permits restitution to be imposed as a condition of probation. If we were to reach this question, we would conclude that the trial court erred in ordering restitution as a condition of probation under Section 9754 without first determining defendant's ability to pay the restitution.

OPINION IN SUPPORT OF REVERSAL:

We agree that the trial court erred to the extent it ordered restitution as a condition of defendant's probation under Section 9754(c)(8) of the Sentencing Code. As explained in the Opinion in Support of Affirmance, restitution cannot be imposed as both a condition of probation and as part of a defendant's sentence under Section 1106(a) of the Crimes Code. Furthermore, the trial court did not determine defendant's ability to pay as required under Section 9754(c)(8).

Holmes, 155 A.3d 69 (Pa. Super. 1/4/17) (en banc) (equally divided court) (*per curiam* order)
Link to: Opinion in support of affirmance
Link to: Opinion in support of reversal

Defendant pled guilty to aggravated indecent assault, and the Commonwealth withdrew the charge of unlawful contact with a minor. In the absence of a conviction, defendant may not be ordered to pay restitution to replace the victim's computer which had been seized as evidence relating to the unlawful contact with a minor charge.

Zrncic, 167 A.3d 149 (Pa. Super. 7/12/17)

Restitution (cont.)

Judicial responsibility at sentencing; may not be delegated to probation office

If restitution is ordered, the amount must be determined at the time of sentencing, 18 Pa.C.S. § 1106(c)(2). It also placed upon the Commonwealth the requirement that it provide the court with its recommendation of the restitution amount at or prior to the time of sentencing. 18 Pa.C.S. § 1106(c)(4). Although the statute provides for amendment or modification of restitution "at any time," 18 Pa.C.S. § 1106(c)(3), the modification refers to an order "made pursuant to paragraph (2). . ." *Id*. Thus, the statute mandates an initial determination of the amount of restitution at sentencing. This provides the defendant with certainty as to his sentence, and at the same time allows for subsequent modification, if necessary. *See* 18 Pa.C.S. § 1106(c)(3); *cf.* 42 Pa.C.S. § 5505.

The trial court must determine the loss or damage the defendant has caused, what amount of restitution he can afford to pay, and how he should pay it. The trial court may not delegate these obligations to any agency, such as the Office of Probation and Parole.

Dinoia, 801 A.2d 1254 (Pa. Super. 6/19/02)
Deshong, 850 A.2d 712 (Pa. Super. 5/13/04)

18 Pa.C.S. § 1106(c)(2) mandates that "at the time of sentencing the court **shall specify the amount** and method of restitution" (emphasis added). This must be read in conjunction with Subsection (c)(4) requiring the Commonwealth to make a recommendation to the Court "at or prior to the time of sentencing."

Ortiz, 854 A.2d 1280 (Pa. Super. 7/22/04) (en banc)
appeal denied, 581 Pa. 674, 863 A.2d 1145 (11/12/04)
Mariani, 869 A.2d 484 (Pa. Super. 1/21/05)
Ramos, 197 A.3d 766 (Pa. Super. 10/10/18)

Restitution (cont.)

Judicial responsibility at sentencing (cont.)

Restitution order in the amount of $3,156.00 to an animal shelter as part of sentence for cruelty to animals was legal and authorized by [the former] 18 Pa.C.S. § 5511(j) which provides statutory authority for the court to order the defendant to "pay the cost of the keeping, care and destruction of the animal." The statute does not require that restitution be recommended or determined at the time of sentencing.

Lee, 947 A.2d 199 (Pa. Super. 4/1/08)
appeal denied, 602 Pa. 676, 981 A.2d 218 (7/22/09)

The statutes under which defendant was convicted do not contain restitution provisions. Further, the record contains no indication the Commonwealth recommended any amount for restitution. Thus, we are constrained to vacate the award of restitution in the face of unambiguous statutory language and remand for a determination as to the appropriate amount of restitution to be awarded. "It **shall** be the responsibility of the district attorneys of the respective counties to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered." 18 Pa.C.S. § 1106(c)(4)(i) (emphasis added.)

Allshouse, 924 A.2d 1215 (Pa. Super. 4/18/07)
aff'd, 604 Pa. 65, 985 A.2d 847 (12/29/09)
vacated and remanded on other grounds, 562 U.S. 1267, 131 S.Ct. 1597, 179 L.Ed.2d 495 (3/7/11)

BUT SEE:

In *Ortiz*, the statute under which the defendant was convicted, Theft by unlawful taking or disposition, 18 Pa.C.S. § 3921, does not contain a restitution provision; the statute under which defendant here was convicted, Bad checks, 18 Pa.C.S. § 4105(e), clearly does. In pertinent part, that statute provides:

> (e) Costs. -- Upon conviction under this section the sentence shall include an order for the issuer or passer to reimburse the payee or such other party as the circumstances may indicate for:
>
> (1) The face amount of the check.

In this case, the trial court ordered defendant to pay $800.00 restitution to the victim. It is undisputed the face amount of the dishonored check defendant used to purchase the automobile in question was $800.00. Accordingly, the sentence of restitution imposed upon defendant is proper; there was no need for the Commonwealth to make a recommendation to the court as is required by 18 Pa.C.S. § 1106(c)(4)(i).

Redman, 864 A.2d 566 (Pa. Super. 12/17/04)
appeal denied, 583 Pa. 661, 875 A.2d 1074 (6/2/05)

Restitution (cont.)

Who/What is a qualified "victim?"

Act 145 of 2018 (effective, October 24, 2018)

18 Pa.C.S. § 1106(h) Definitions

> "Victim." As defined in section 103 of the act of November 24, 1998 (P.L.882, No.111), known as the Crime Victims Act [18 P.S. § 11.103]. The term includes an affected government agency, the Crime Victim's Compensation Fund, if compensation has been paid by the Crime Victim's Compensation Fund to the victim, any insurance company that has compensated the victim for loss under an insurance contract and any business entity.
>
> "Affected government agency." The Commonwealth, a political subdivision or local authority that has sustained injury to property.

18 P.S. § 11.103 Definitions

> "Victim." The term means the following:
>
> (1) A direct victim.
>
> (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
>
> (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child's family:
>
> Chapter 25 (relating to criminal homicide).
>
> Section 2702 (relating to aggravated assault).
>
> Section 3121 (relating to rape).
>
> (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiancé, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

Search or Police Powers of Probation Officers

Applicable statutes

42 Pa.C.S. § 9913. Peace officer power for probation officers.

An officer is declared to be a peace officer and shall have police powers and authority throughout this Commonwealth to arrest, with or without warrant, writ, rule or process, any person on probation, intermediate punishment or parole under the supervision of the court for failing to report as required by the terms of that person's probation, intermediate punishment or parole or for any other violation of that person's probation, intermediate punishment or parole.

§ 9912. Supervisory relationship to offenders.

(a) General rule.--Officers are in a supervisory relationship with their offenders. The purpose of this supervision is to assist the offenders in their rehabilitation and reassimilation into the community and to protect the public.

(b) Searches and seizures authorized.--

(1) Officers and, where they are responsible for the supervision of county offenders, State parole agents may search the person and property of offenders in accordance with the provisions of this section.

(2) (i) Officers may search, in accordance with the provisions of this section, the person and property of any offender who accepts ARD as a result of a charge of a violation of 18 Pa.C.S. Ch. 31 (relating to sexual offenses) if the court has determined that the offender shall be subject to personal and property searches as a condition of the offender's participation in the ARD program.

(ii) The court shall notify each offender so offered ARD, prior to admission to an ARD program, that the offender shall be subject to searches in accordance with this section.

(iii) Nothing in this section shall be construed to permit searches or seizures in violation of the Constitution of the United States or section 8 of Article I of the Constitution of Pennsylvania.

(c) Effect of violation.--No violation of this section shall constitute an independent ground for suppression of evidence in any probation and parole or criminal proceeding.

(d) Grounds for personal search.--

(1) A personal search of an offender may be conducted by an officer:

(i) if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision;

(ii) when an offender is transported or taken into custody; or

(iii) upon an offender entering or leaving the securing enclosure of a correctional institution, jail or detention facility.

(2) A property search may be conducted by an officer if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.

(3) Prior approval of a supervisor shall be obtained for a property search absent exigent circumstances. No prior approval shall be required for a personal search.

(4) A written report of every property search conducted without prior approval shall be prepared by the officer who conducted the search and filed in the offender's case record. The exigent circumstances shall be stated in the report.

(5) The offender may be detained if he is present during a property search. If the offender is not present during a property search, the officer in charge of the search shall make a reasonable effort to provide the offender with notice of the search, including a list of the items seized, after the search is completed.

(6) The existence of reasonable suspicion to search shall be determined in accordance with constitutional search and seizure provisions as applied by judicial decision. In accordance with such case law, the following factors, where applicable, may be taken into account:

(i) The observations of officers.

(ii) Information provided by others.

(iii) The activities of the offender.

(iv) Information provided by the offender.

(v) The experience of the officers with the offender.

(vi) The experience of officers in similar circumstances.

(vii) The prior criminal and supervisory history of the offender.

(viii) The need to verify compliance with the conditions of supervision.

(e) Nonresident offenders.--No officer shall conduct a personal or property search of an offender who is residing in a foreign state except for the limited purposes permitted under the Interstate Compact for the Supervision of Parolees and Probationers. The offender is held accountable to the rules of both the sending state and the receiving state. Any personal or property search of an offender residing in another state shall be conducted by an officer of the receiving state.

(e.1) Status of seized items.--

. . .

(f) When authority is effective.--The authority granted to the officers under this section shall be effective upon enactment of this section, without the necessity of any further regulation by the board.

Search or Police Powers of Probation Officers (cont.)

Applicable cases

42 Pa.C.S. § 9912(d)(2) provides that a probation officer may conduct a property search of an offender under his supervision only "if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision." A sentencing court, as a condition of probation, may not authorize a probation officer to conduct a random, suspicionless search of defendant's residence for weapons. The trial court may not authorize a probation officer to conduct a search which is otherwise prohibited by statute.

The Supreme Court declined to reach or address whether the constitution would permit or prohibit such searches.

DISAPPROVING: *Alexander*, 16 A.3d 1152 (Pa. Super. 3/18/11) (*en banc*), *appeal denied*, 621 Pa. 662, 74 A.3d 124 (9/3/13); *Galendez*, 27 A.3d 1042 (Pa. Super. 8/24/11), *appeal denied*, ___ Pa. ___, __ A.3d ___ (9/24/13)

Wilson, 620 Pa. 251, 67 A.3d 736 (5/28/13)

Link to: McCaffery, J. dissenting

Authority of probation officer is limited to the person under supervision (McDowell) and does not authorize a search of a different person (Scott) who was seen removing a black bag from the residence of the person under supervision.

Once the bag was removed from the premises by defendant, the officers had no authority to detain defendant, search the bag that he removed from McDowell's residence, or do anything other than perhaps call the police on McDowell's behalf, if they believed the bag was being stolen. No evidence was presented to suggest the officers believed defendant to be armed and dangerous, warranting a search for their protection.

Scott, 916 A.2d 695 (Pa. Super. 1/12/07)
appeal denied, 594 Pa. 713, 937 A.2d 445 (11/27/07)

On December 2, 2013, Pennsylvania Parole Agents Michael Welsh and Gregory Bruner conducted a routine home visit to the residence of parolee Gary Waters. Agent Welsh characterized the neighborhood as a "high crime" area. Waters invited the agents into the home, where they immediately recognized the strong odor of marijuana, which increased as they continued through the home. The agents and Waters proceeded through the front room and dining room to the kitchen, where defendant, Mathis, was seated in a chair, near the rear door of the home, in the midst of receiving a hair cut from Waters. Agent Welsh detained Waters in the front room, questioning him regarding the marijuana odor. Agent Welsh also noticed at this time an ashtray full of marijuana "roaches" sitting on a table in the front room. However, neither agent witnessed anyone actually smoking, nor was there any particular indication that marijuana had been smoked in the kitchen.

Agent Welsh told defendant, "I want to get you out of here as soon as I possibly can. Could you do me a favor, grab your personal belongings and come to the front room?" Defendant was cooperative with all of the agent's requests. Agent Welsh testified that the encounter, to that point, remained relaxed and conversational, but that defendant appeared uneasy, and displayed broken eye contact. As defendant collected his belongings in the kitchen, Agent Welsh noticed that he picked up his jacket by gently placing a hand underneath the jacket and over top of the jacket and kind of holding it up to his body "like it was a football [or] a baby."

When defendant began walking to the other room, he continued to hold the jacket to his side in a "protecting type of grip" while also turning away from the agent, which revealed a bulge in the jacket. These observations caused Agent Welsh to have concerns regarding the agents' safety. He then asked defendant if he could pat him down for safety reasons, because he intended defendant not to leave the residence with a gun or drugs. Defendant refused, at which time Agent Welsh again noticed the bulge, described as the size of a cigarette pack or wallet, which further raised Agent Welsh's suspicions that defendant was secreting contraband or a weapon. Agent Welsh reached out to the bulge and felt what he believed was the handle of a firearm. He seized the jacket and pulled it forcefully from defendant, throwing it to the ground. Defendant was then handcuffed and patted down. Thereafter, Agent Welsh noticed a bag of marijuana on the floor between defendant's feet, while Agent Bruner recovered a handgun from the jacket.

Once we recognize the authority of parole officers to search parolees and their premises, we cannot ignore the hazards involved in this kind of public duty. A bullet's message is deadly no matter who the sender is. A law-enforcement officer in a potentially perilous situation must have a basic right of self-protection notwithstanding the shape of his badge. As long as an officer is

properly pursuing his lawful duty, the only issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety was in danger.

As to parole agents' designation as peace officers, in addition to their circumscribed common law arrest powers, they are statutorily empowered to employ deadly force for self-protection or protection of another and in the course of making an arrest "when [the officer] believes that such force is necessary to prevent death or serious bodily injury to himself or such other person." 18 Pa.C.S. § 508(a)(1). In this respect, it is also notable that parole agents are sanctioned to carry firearms in performing their duties. *See* 37 Pa. Code § 69.1–.3.

Accordingly, innate to these common law and statutory authorizations is the power to undertake constitutionally permissive actions that may preempt resort to the use of deadly force. In other words, an agent's authority to use force includes the power to prevent violent confrontation in the first instance, as it "would be anomalous to hold that parole officers may carry weapons like peace officers, place themselves in peril like peace officers, and conduct lawful arrests like peace officers, yet not protect themselves in the face of apparent danger.

In terms of previous decisions of this Court finding that various officials had exceeded their statutory authorization, the Commonwealth accurately notes that they are distinguishable as pertaining to limitations on officials' criminal investigative powers. The nature of a *Terry* frisk is materially different in both scope and purpose from an investigative search for evidence of criminality, since a protective pat-down is limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a full search. The purpose of a limited search after a temporary detention is not to discover evidence of crime but to allow the peace officer to pursue investigation without fear of violence. In this regard, private citizens' Fourth Amendment rights remain substantively unaltered pursuant to our view of parole agents' authority to ensure their own safety, since any intrusion must be justified by reasonable suspicion, the same standard restricting intrusions by police officers.

As for the decision in *Scott*, 916 A.2d 695 (Pa. Super. 1/12/07), we agree with the Superior Court's assessment that the case is factually distinguishable insofar as there was no basis in that case for the probation officers to believe that the probationer's nephew posed a threat to anyone's safety.

Accordingly, we conclude that parole agents have the authority to conduct a protective *Terry* frisk of non-parolees within the course of executing their statutorily imposed duties, so long as reasonable suspicion supports the agents' conduct.

Mathis, ___ Pa. ___, 173 A.3d 699 (11/22/17)
Link to: Dougherty, J. dissenting
Link to: Wecht, J. dissenting

On February 12, 2015, several probation officers went to defendant's residence to verify his compliance with the terms and conditions of his probation. The probation officers stepped inside the doorway to defendant's kitchen and immediately observed, in plain view, clear, empty, corner-cut baggies; cigar packages, which were opened and discarded on the floor; and small rubber bands. From the probation officers' training and experience, they recognized these items as drug paraphernalia. The probation officers also saw a shotgun in an open closet in the kitchen.

Defendant accompanied the probation officers to the third floor of the residence and to his bedroom. Defendant sat down on a box spring/mattress that was on the floor. The probation officers noticed a box of nine-millimeter rounds on the floor next to the box spring/mattress. In a half-open dresser drawer, the officers also saw clear, empty baggies, U.S. currency, and a digital scale. Additionally, the probation officers observed some type of attachment to a device used to smoke marijuana, which had liquid dripping from it. The probation officers also observed several prohibited knives. At this point, the probation officers placed defendant in handcuffs.

Three drug task force agents arrived at the residence approximately fifteen minutes later. The probation officers asked the agents if they were interested in pursuing charges based on what the probation officers had seen in plain view. The agents decided not to pursue a search warrant or criminal charges against defendant. The remaining probation officers performed the authorized search of defendant's residence. The probation officers opened a refrigerator in defendant's bedroom located directly next to the box spring/mattress, and discovered suspected cocaine

The trial court suppressed the evidence found in the refrigerator.

The trial court erred when it said the probation officers' first walk-through of defendant's residence constituted a "search." Here, defendant signed regulations allowing for unannounced home visits to verify his compliance with the terms and conditions of his probation. When the probation officers entered defendant's residence, the purpose of their presence was to verify his compliance with the regulations. The probation officers then took a "tour" of the home, making only a visual inspection of defendant's residence. Nothing in the record supports defendant's statements that the probation officers "forced" or "pushed their way inside [his] residence without invitation" or that the probation officers' entry was akin to a "raid." Rather, the record confirms the probation officers performed an unannounced home visit as set forth in their regulations.

During the course of the home visit, the probation officers saw, in plain view, various items which the officers immediately recognized as drug paraphernalia as well as a shotgun in the open kitchen closet. The probation officers saw other evidence of drug paraphernalia in defendant's bedroom, ammunition and several prohibited knives. These observations gave the probation officers reasonable suspicion to believe defendant had other contraband in the residence. The officers' search (conducted with proper prior approval) was consistent with and reasonably related to their supervisory duties to confirm whether defendant possessed drugs or weapons in violation of the regulations. *See* 42 Pa.C.S. § 9912. The probation officers' search was not illegal simply because the drug paraphernalia and other items situated in plain view constituted separate probation violations or because the search occurred after the task force agents left the premises. Additionally, the fact that the task force agents originally decided to pass on pursuing a search warrant or criminal charges, based on the evidence found in plain view, does not nullify the probation officers' reasonable suspicion to conduct a thorough search.

Accordingly, we affirm the trial court's denial of suppression of the evidence observed in plain view, and we reverse the trial court's suppression of the cocaine found in the refrigerator.

Parker, 152 A.3d 309 (Pa. Super. 12/12/16)

Riley v. California, 573 U.S. ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (6/25/14), does not apply to searches of a parolee's phone by a parole agent.

Agent Clark testified that based on his prior experience, he believed Murray's cell phone could contain additional evidence of a parole violation, such as "conversations in reference to the firearm that [Murray] was speaking about" or "photographs of [Murray] with the firearm." Accordingly, we conclude that Agent Clark's search of Murray's cell phone for text messages and photos was reasonably related to his duty to investigate a suspected parole violation.

STABILE, J. CONCURRING: Defendant admitted to Agent Clark that he handled a firearm and passed it on to an acquaintance. Agent Todd believed, based on his prior experience, that defendant's cell phone could reveal communications referencing the firearm. I believe defendant's statement to Agent Clark, combined with Agent Clark's prior experience, was sufficient to create reasonable suspicion in support of a search of defendant's cell phone. We are not faced here with a bald assertion, based on an agent's experience, that cell phones often contain relevant evidence.

Murray, 174 A.2d 1147 (Pa. Super. 11/15/17)
Link to: Stabile, J. concurring
appeal denied, ___ Pa. ___, 187 A.3d 204 (6/4/18)

Under the "stalking horse" doctrine, Pennsylvania courts historically invalidated probation officers' searches and subsequent seizures of evidence where the probation officers essentially "switched hats," and, in all relevant respects, became police officers. Although most cases in our jurisdiction analyzing the "stalking horse" doctrine predated Section 9912 and its predecessor statute, the doctrine is still "pertinent" to the extent a probation officer aids the police by statutorily circumventing the warrant requirement, based on reasonable suspicion, instead of the heightened standard of probable cause.

Federal jurisprudence has called into question the continued vitality of the "stalking horse" doctrine. *See United States v. Knights*, 534 U.S. 112, 122, 122 S.Ct. 587, 593, 151 L.Ed.2d 497, ___ (12/10/01) (holding search of probationer's home is constitutional so long as probation officer has reasonable suspicion that probationer who is subject to search condition in probation agreement is engaged in criminal activity; "Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose"). *See also Commonwealth v. Hughes*, 575 Pa. 447, 836 A.2d 893 (11/25/03) (plurality opinion) (reaffirming that Pennsylvania Constitution provides parolee with no greater protection than United States Constitution in area of warrantless searches of parolee's residence, where parolee has signed agreement to allow search of his premises as condition of parole).

Parker, 152 A.3d 309 (Pa. Super. 12/12/16)