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IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

3880 EDA 2017 -- 2242 EDA 2018

COMMONWEALTH OF PENNSYLVANIA
Appellee

v.

ROBERT WILLIAMS
Appellant

BRIEF FOR APPELLEE

Appeal from the November 6, 2017 Judgment of Sentence
and the June 25, 2018 Denial of Post-Conviction Relief
of the Philadelphia Court of Common Pleas
at CP-51-CR-00011614-2007

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- *Answered in the negative below*.

II. Did the PCRA court erroneously deny the defendant's recusal motion where, on the unique facts of this case, a reasonable person would question the court's impartiality?

- *Answered in the negative below*.

III. Did the sentencing court erroneously impose a state prison sentence, where the defendant has no new convictions, does not pose a threat to the community, is employed, and where the conduct in question did not warrant incarceration?

- *Answered in the negative below*.

COUNTER-STATEMENT OF THE CASE

Appellant Williams contends that he is entitled to post-conviction relief in the form of a new trial and that the Honorable Genece Brinkley should be recused from his case. He also argues that the judge abused her discretion in imposing a state prison sentence for technical violations of his probation.

Consistent with its position in the lower court, the Commonwealth agrees that Williams is entitled to post-conviction relief and that any technical violations of his probation do not warrant incarceration. Given the manner in which the lower court conducted Appellant's violation of probation hearing, the Commonwealth also agrees that this matter should be remanded for further proceedings before another judge.

The following Statement of the Case concentrates on three aspects of this matter: (1) the Commonwealth's evidence at Williams' 2008 bench trial, (2) the evidence presented at his 2017 VOP hearing, and (3) the reasons for the Commonwealth's subsequent agreement to post-conviction relief.

I. Defendant's 2008 Bench Trial

A. The Commonwealth's case

The Commonwealth's only witness at Williams' bench trial was Officer Reginald Graham. Officer Graham testified that he saw Williams leave a house and go to a nearby corner, where he saw Williams sell small

items to an unidentified woman. Graham then saw Williams return to the house. (N.T. 8/19/08 at 37-38; R.R. at 74a). Later that day, Graham watched as a confidential informant bought cocaine from Williams at the same corner. (N.T. 8/19/08 at 40-41; R.R. at 74a-75a).

The next day, Officer Graham returned with a search warrant for the house. Just as police officers arrived to execute the warrant, Graham saw Williams leaving the house. As Graham approached Williams, Williams reached for a gun in his waistband, pointed it at Graham, and then attempted to run. Graham and other officers tackled Williams and recovered the gun. (N.T. 8/19/08 at 44-46; R.R. at 75a-76a). Police then searched the house and recovered drugs and money. (N.T. 8/19/08 at 47-51; R.R. at 76a-77a). They also arrested five other people inside the house.[1]

B. Williams' defense

Williams testified that he never sold drugs and had not been in the area on the day before his arrest, when Officer Graham observed drug sales. Williams admitted possessing the gun but denied pointing it at the police. He accused the police of beating him, requiring post-arrest hospital treatment. He

[1] Three of the other people in the house were apparently never charged with any crimes. (N.T. 8/19/08 at 63-65; R.R. at 80a-81a). Two others were tried with Williams, but neither was convicted. (N.T. 8/19/08 at 78, 117-118; R.R. at 84a, 94a).

subsequently made a complaint to the Police Internal Affairs Division (IAD). (N.T. 8/19/08 at 80-84; R.R. at 84a-85a). In addition to his own testimony, he presented four character witnesses. (N.T. 8/19/08 at 96-100; R.R. at 88a-89a).

C. The trial court's verdict and sentence

The court convicted Williams of firearms offenses, KIP, and simple assault on Officer Graham. (N.T. 8/19/08 at 119; R.R. at 94a). The court subsequently sentenced him to 11½ to 23 months of incarceration followed by 10 years of probation. (R.106a-111a).

II. Defendant's November 6, 2017 Violation of Probation Hearing

At his November 6, 2017 VOP hearing, the court ruled that Williams was in technical violation of his probation and sentenced him to 2 to 4 years in state prison. Three aspects of this proceeding are particularly significant.

First, Williams had not been convicted of any new offenses. (N.T. 11/6/17 at 71; R.R. 422a).

Second, both Williams' probation officer and the Commonwealth's attorney recommended a continued period of probation.[2] The probation officer testified that Williams was "meeting expectations". (N.T. 11/6/17 at

[2] Williams' probation hearing occurred before the present Philadelphia District Attorney assumed office.

17-18; R.R. 409a). The officer also indicated that he would be "comfortable continuing supervising him" and comfortable if Williams was "not in prison." (N.T. 11/6/17 at 44; R.R. 415a). The Commonwealth's attorney agreed that the technical violations did not warrant a prison sentence. (N.T. 11/6/17 at 28; R.R. 438a) ("I do not think that they are violations that require the defendant to be incarcerated at this point").

Third, after the conclusion of all testimony regarding the specific violations enumerated in the hearing notice, the court accused Williams of an additional violation: failing to adhere to her order directing him to perform community service. According to Judge Brinkley, she made a personal "surprise visit" to the homeless shelter where Williams was performing court-ordered community service, to "check up" on him. When she got there, she sat at a table to "blend in". During that visit, the court discovered that Williams was bagging clothes for the homeless, rather than serving them food, as she had previously ordered. (N.T. 11/6/17 at 69-68, 73; R.R. 448a, 450a).

The evidence regarding the violations specified in the hearing notice and the additional community service issue may be summarized as follows:

A. Williams' technical violations of probation

At the beginning of Williams' November 6, 2017 VOP hearing, the court announced its intention to address three potential probation violations.

1. *Failing a January 9, 2017 drug test and possessing Fast Flush*

Williams tested positive for oxycodone in January, 2017. On the same day, his probation officer discovered that Williams possessed a product called Fast Flush. This product purports to mask drug use and enable a drug user to pass a urine test. (N.T. 11/6/17 at 15; R.R. 408a).

After Williams failed the January drug test, his probation officers tested him numerous times, always with negative results. (N.T. 11/6/17 at 16-17; R.R. 409a) ("We drug tested every single time. The urines were negative every time"). The officers also counseled Williams about his drug use. Under their supervision, he completed a drug treatment program. (N.T. 11/6/17 at 20; R.R. 409a). At the time of his November VOP hearing, Williams had been clean for ten months.

2. *Receiving permission to travel to Greece but not going*

In August of 2017, the court entered an order permitting Williams to travel to Greece. (N.T. 11/6/17 at 36; R.R. 413a). However, despite receiving authorization to make this trip, Williams remained in Philadelphia and did not tell his probation officer that he had changed his plans. (N.T. 11/6/17 at 39; R.R. 414a). Williams' probation officer did not think that his failure to announce his decision to stay in Philadelphia constituted a violation of the conditions of his probation. In response to the court's inquiry, the probation

officer informed the court that, in her other cases, the officer was simply unused to the level of "judicial oversight" undertaken by the court in this case:

> So I would like to think that we treat each case individually, that we make determinations in terms of technical violations on how we feel it's appropriate to proceed, and with all due respect, Your Honor, maybe judicial oversight is not as much as that we received in this case. So I think there is a decent amount of ability to make decisions on how we believe it's best appropriate to treat the individual case.

(N.T. 11/6/17 at 40-41; R.R. 414a-415a).

3. *Arrests on charges that were later dismissed*

Williams was arrested twice. Neither charge resulted in a conviction. The first arrest occurred in Atlanta. According to the evidence, a fight occurred pitting one of Williams' traveling companions against some unidentified airport employees. Williams went to his companion's assistance. After the ensuing investigation, the police determined that the airport employees had initiated the confrontation. These persons were dismissed from their jobs and the charges against Williams were dropped. (N.T. 11/6/17 at 21-22; R.R. 409a-410a).

The other arrest occurred in New York City. Although the record is unclear, the police apparently arrested Williams for performing a stunt of some kind while riding a motorcycle. He entered a diversion program and the charges were dismissed. (N.T. 11/6/17 at 23; R.R. 409a-410a).

B. Bagging clothes rather than serving meals at the homeless shelter

Because of its evident importance to the court's decision to sentence Williams to state prison, the facts relating to his community service at a homeless shelter must be set forth in some detail.

At the outset of the November 6, 2017 VOP hearing, the court listed the activities which "possibly" constituted technical violations of Williams' probation. As articulated by the court, these actions consisted of: (1) his failed January drug test, (2) his failure to inform his probation officer when he did not travel to Greece, and (3) his arrests in New York City and Atlanta. The court did not mention Williams' alleged failure to fulfill the community service requirement imposed by the court as a condition of his probation. (N.T. 11/6/17 at 12-13; R.R. 407a-408a). Thereafter, during the course of over 150 pages of hearing transcript, the parties addressed the potential violations enumerated by the court at the outset of the proceedings. At no point did the court raise the topic of Williams' failure to perform community service.

After all the evidence had been taken and after the arguments of counsel and the defendant's allocution, the court for the first time raised the subject of Williams' community service. (N.T. 11/6/17 at 67; R.R. 448a). The court explained that she made a personal "surprise visit" to the homeless shelter

where Williams was working, to "check up" on him. When she got there, she sat at a table to "blend in". During that visit, the court discovered that Williams was bagging clothes for the homeless, rather than serving them food, as she had ordered. (N.T. 11/6/17 at 69-68, 73; R.R. 448a, 450a).

When Williams asked the court for permission to respond to this new issue, the court initially refused. (N.T. 11/6/17 at 67-68; R.R. 448a). Eventually Williams gave a lengthy explanation, claiming that the managers of the shelter had assigned him the duty of bagging clothes, rather than serving food. (N.T. 11/6/17 at 69; R.R. 449a). The court rejected this explanation, stating that she had talked to a "gentleman" who worked at the shelter and learned that Williams had chosen the duty of bagging clothes. (N.T. 11/6/17 at 69; R.R. 449a).

Williams then proceeded to outline the activities that he had performed on behalf of the homeless, in an effort to fulfill the community service condition of his probation. According to Williams, these activities included serving meals "every day from then on out". (N.T. 11/6/17 at 70; R.R. 449a). They also included walking the streets of Center City Philadelphia, offering food to homeless people. (N.T. 11/6/17 at 72; R.R. 449a). Given the absence of notice regarding this potential violation, none of the parties were in a position to call witnesses to support or contest Williams' explanation.

After his attempt to explain his effort to comply with his community service requirement, the court referred again to her surprise visit and her discovery that Williams was not serving meals. (N.T. 11/6/17 at 73; R.R. 450a). The court then concluded that Williams had been thumbing his nose at her and that the only way to vindicate the court's authority was to sentence him to state prison:

> [E]very time I do more and more and more to give you break after break after break to help you, you, basically, thumb your nose at me and just do what you want the way you want. So, I have to -- I'm going to give you a sentence of incarceration. This sentence is absolutely necessary to vindicate the authority of the Court.

(N.T. 11/6/17 at 74; R.R. 450a).

III. The Commonwealth's Loss of Confidence in Williams' Conviction

On February 24, 2018, Williams filed a PCRA petition arguing that after-discovered evidence undermined confidence in his 2008 conviction and that he was entitled to a new trial. For the following reasons, the Commonwealth agreed.

The only witness to testify against Williams was Officer Reginald Graham. As the Commonwealth explained in the Stipulations submitted at Williams' PCRA hearing, a police Internal Affairs Division (IAD) investigation concluded that, at a time prior to Williams' trial, Graham committed theft while on duty. Graham also lied about that theft during the

ensuing internal affairs investigation. The charges against Graham arose out of evidence that federal agents developed during their investigation of a subdivision of the Philadelphia Police Department known as the Narcotics Field Unit. (Stipulation; R.R. 883a).

Graham was a member of that unit. During the federal investigation of that unit, Graham failed a polygraph examination when he denied participating in a theft while working as a police officer. Although he was not charged federally with the other officers in the narcotics unit, Graham resigned from the police department prior to being formally dismissed. (Stipulation; R.R. 883a). As noted, the misconduct in question occurred prior to Williams' trial.

In addition, former Police Officer Jeffrey Walker—a cooperating witness relied upon by the United States Attorney during the federal prosecution of the corrupt Philadelphia narcotics officers—accused Graham of criminal misconduct in his capacity as a police officer. Although the federal trial of the other narcotics officers resulted in acquittals, the Commonwealth subsequently relied on Officer Walker's accusations, when it agreed to post-conviction relief for over a thousand PCRA petitioners whose

convictions depended upon the indicted officers' testimony. (Stipulation; R.R. 884a).[3]

In 2018, the Commonwealth for the first time disclosed that the District Attorney's Office had information regarding Officer Graham's misconduct and that it possessed this information as early as September 7, 2014. Prior to 2018, the DAO never disclosed this information to Williams or to any other defendants in cases where Graham was a critical witness. (Stipulation; R.R. 883a-884a). Although it did not disclose this information to these defendants, the DAO placed Graham's name on an internally maintained list of "do-not-call" officers. (N.T. 6/18/18 at 30; R.R. at 812a). Prior to 2018, the Commonwealth never notified any defendant in any Graham-related case about its decision to avoid calling this officer, specifically because the Commonwealth mistrusted his credibility. (N.T. 6/18/18 at 30; R.R. at 812a).

Prior to Williams' PCRA hearing, the Commonwealth had already agreed to post-conviction relief with respect to three other PCRA petitioners,

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[3] The practice of agreement to post-conviction relief where the petitioner's conviction depended upon the testimony of corrupt officers was established in 1995, i.e. decades before the present Philadelphia District Attorney assumed office. (N.T. 6/18/18 at 22; R.R. at 810a). Not all of these officers were formally charged with criminal offenses. (N.T. 6/18/18 at 24-25; R.R. at 810a-811a). With respect to the specific narcotics officers accused by former Officer Walker and tried in federal court, the DAO agreed to dismiss over 1000 cases. (N.T. 6/18/18 at 29; R.R. at 812a).

based specifically upon its loss of confidence in Graham's credibility. (N.T. 6/18/18 at 31; R.R. at 812a). Where Officer Graham was a critical witness, a different PCRA court granted relief in each of these three cases, without an evidentiary hearing. (Stipulation; R.R. 884a). Since Williams' PCRA hearing, the Commonwealth has also agreed to post-conviction relief in numerous additional cases, where Graham was a critical witness. Pursuant to that agreement, another PCRA court granted relief in all of these cases, again without an evidentiary hearing.

Finally, in addition to the information about the FBI/ IAD investigation of Graham, Williams' PCRA petition included a statement from another police officer who had been present during Williams' arrest. According to this officer, certain aspects of Graham's trial testimony were false, including the claim that Williams fled from the arresting officers and pointed a gun at Graham. Although the Commonwealth did not stipulate to the truthfulness of this new evidence, it agreed that the officer would so testify if called as a witness. (Stipulation; R.R. 883a-884a).

SUMMARY OF ARGUMENT

1. The Commonwealth has agreed to PCRA relief in numerous cases where the conviction depended upon the testimony of Officer Reginald Graham. In accordance with a policy established in 2014 with respect to other suspect officers, the Commonwealth has consistently declined to stand behind convictions based on evidence provided by officers, such as Graham, whose credibility the DAO can no longer trust. Appellant Williams' case should be treated no differently. Where after-discovered evidence undermines confidence in the honesty of the only witness to inculpate him, Williams is entitled to a new trial.

2. The lower court erroneously denied Williams' recusal motion. Recusal was required, *inter alia*, due to Judge Brinkley's "surprise" visit to the homeless shelter where Williams was performing community service and her subsequent reliance on her own observations during that visit to resolve disputed issues of fact and to revoke Williams' probation. After raising this potential violation without prior notice to the parties, the court played the role of both decision maker and fact witness. In so doing, the court inappropriately created the appearance of partiality.

3. The court abused its discretion when it imposed a two to four year state prison sentence based on the technical violations of probation in

issue here. Defendant had no new convictions. He completed drug treatment and passed regular drug tests for the next ten months. He was employed and did not pose a threat to the community. Where both the Commonwealth and his probation officer recommended continued probation, Williams' behavior did not warrant incarceration.

ARGUMENT

I. The PCRA court erroneously denied post-conviction relief, where after-discovered evidence regarding the credibility of the only witness to testify against the defendant would likely result in a different verdict if a new trial were granted and where the Commonwealth no longer has confidence in the validity of the defendant's conviction.

The Commonwealth has agreed to PCRA relief in the cases of numerous defendant/petitioners, whose convictions hinged upon the testimony of Officer Reginald Graham. Consistent with a policy established in 2014 with respect to other suspect officers, the Commonwealth has regularly declined to stand behind convictions grounded upon evidence provided by officers, such as Graham, whose credibility the DAO can no longer trust. Appellant Williams' case should be treated no differently.

To receive a new trial based on after-discovered evidence, the defendant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted. Commonwealth v. Pagan, 950

A.2d 270, 292 (Pa. 2008). The new evidence about Officer Graham fulfills these criteria.

A. The Evidence Could Not Have Been Obtained Earlier

As the lower court agreed, the information about Officer Graham could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence. Opinion, 6/25/18, at 16.[4] Graham's misconduct occurred in 2005 and Williams' trial occurred in 2008. (N.T. 6/18/18 at 105; R.R. 831a). Although Graham's misconduct predated Williams' trial, the Philadelphia District Attorney's Office did not advise Williams of the questions regarding Graham's credibility until 2018. (Stipulation; R.R. 884a).[5]

B. The Evidence Is Not Merely Corroborative Or Cumulative

Evidence that the police department dismissed Graham for dishonesty is not corroborative or cumulative. Williams' trial testimony challenged Graham's credibility with respect to certain facts, such as whether the

[4] The lower court filed two Opinions. Its June 25, 2018 Opinion solely addresses Williams' PCRA petition. Its March 29, 2018 Opinion deals with the other issues presented in this appeal.

[5] In 2014, the DAO became aware of Graham's misconduct and placed his name on an internally maintained list of "do-not-call" officers. (N.T. 6/18/18 at 30; R.R. at 812a). The DAO did not publicize this list until February, 2018.

defendant participated in street level drug sales prior to his arrest and whether he pointed a gun at Graham. However, at the time of trial, no evidence suggested that Graham had previously been involved in dishonest activities in connection with his duties as a narcotics officer. As the Supreme Court explained in Commonwealth v. Small, 189 A.3d 961 (Pa. 2018):

> If the new evidence is of a different and "higher" grade or character, though upon the same point, or of the same grade or character on a different point, it is not "merely" corroborative or cumulative, and may support the grant of a new trial based on after-discovered evidence.

Id., at 974. Here, the information about Graham's dishonesty uncovered during the FBI/IAD investigation is of a different and higher grade than any self-interested testimony a criminal defendant could personally offer with respect to Graham's credibility.

C. The Evidence Will Not Be Used Solely To Impeach Credibility

Evidence that former officer Graham (1) committed a theft while on duty, (2) was dismissed from the police force for lying, and (3) was placed on an undisclosed list of officers whom the DAO mistrusted so completely that those officers could never be called as a witnesses in any case, constitutes more than mere impeachment. After-discovered impeachment evidence may compel a different verdict where it is material and exculpatory. This is particularly true where the new evidence fundamentally undermines the

testimony of the only witness to inculpate a defendant. *See e.g.* Commonwealth v. Mosteller, 284 A.2d 786, 788 (Pa. 1971) (granting a new trial where after-discovered evidence undermined the credibility of the only witness to testify against the defendant); Commonwealth v. Krick, 67 A.2d 746, 749 (Pa.Super. 1949) (granting a new trial where the after-discovered evidence would "completely destroy and obliterate the testimony of the one witness upon whose testimony the defendant was convicted"); Commonwealth v. McCracken, 659 A.2d 541, 545 (Pa. 1995) (same).[6]

D. Likelihood Of A Different Verdict

It is axiomatic that the Commonwealth cannot call a witness whose credibility it mistrusts. The Commonwealth also has "an affirmative duty to correct the testimony of a witness which [the prosecutor] knows to be false." Commonwealth v. Carpenter, 372 A.2d 806, 810–811 (Pa. 1977) *citing* Giglio

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[6] The requirement that the new evidence will not be used *solely* to impeach credibility has troubled reviewing courts. As former Superior Court Judge Klein and current Supreme Court Justice Wecht have opined:

> [I]f the goal is to find justice, there well may be circumstances where after-discovered evidence that goes only to attack credibility may justify a new trial.

Commonwealth v. Choice, 830 A.2d 1005, 1012 (Pa.Super. 2003) (Klein, J., dissenting); Commonwealth v. Foreman, 55 A.3d 532, 538–539 (Pa.Super. 2012) (Wecht, J., concurring). As Mosteller, Krick, and McCracken make clear, evidence that substantially undermines the credibility of the only witness to inculpate a defendant is *not solely* impeachment evidence.

v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959). Consistent with this obligation, the Commonwealth has for decades conceded post-conviction relief in hundreds of cases, where there is powerful evidence of a police officer's dishonesty and where that officer's testimony was crucial to the defendant's conviction.

This is such a case. Where Officer Graham was the prosecution's only witness, confidence in the outcome of Williams' conviction is undermined. As both the Commonwealth and every other PCRA court has concluded, defendants whose convictions are based upon crucial testimony from Officer Graham should receive post-conviction relief in the form of a new trial.

II. The PCRA court erroneously denied the defendant's recusal motion where, on the unique facts of this case, a reasonable person would question the court's impartiality.

Recusal was required in this case, *inter alia*, due to Judge Brinkley's "surprise" visit to the homeless shelter where Williams was performing community service and her subsequent reliance on her own observations during that visit to revoke Williams' probation. Prior to the VOP hearing, the judge did not advise the parties or the probation officer that she considered Williams' conduct at the shelter to be a potential violation. (N.T. 11/6/17 at 12-13; R.R. 407a-408a). Then, after raising the topic *sua sponte* at the conclusion of testimony, the court inappropriately played the role of both decision maker and fact witness.

According to Judge Brinkley, after "blending" into the crowd at the shelter, she saw Williams bagging clothes for the homeless, rather than serving them food. (N.T. 11/6/17 at 69-68, 73; R.R. 448a, 450a). When the court unexpectedly broached this potential violation at his VOP hearing, Williams attempted to offer an explanation. In response, the judge refuted his claims with her own observations and with hearsay information that the court evidently acquired by talking to an unidentified shelter employee. (N.T. 11/6/17 at 69; R.R. 449a).

Taken together, the court's decision to personally "check up" on Williams at the shelter, her *sua sponte* addition of a new technical violation at the conclusion of his VOP hearing, and her participation in the VOP hearing as both judge and witness, created the appearance of partiality and required recusal from both the VOP hearing and from the subsequent PCRA proceedings.

Where a party makes a recusal motion, the inquiry is not whether the jurist was in fact biased against that party, but whether, even if actual bias or prejudice is lacking, the conduct or statement of the court raises an appearance of impropriety. In the Interest of McFall, 617 A.2d 707, 712 (Pa. 1992). As the Supreme Court observed in McFall:

> A jurist's impartiality is called into question whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter ... Any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias. ... The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements.

Id. at 712-713 (Pa. 1992) (citations and internal quotation marks omitted). Accordingly, as this Court explained in Commonwealth v. Benchoff, 700 A.2d 1289 (Pa.Super. 1997), a judge "must recuse [herself] if there is substantial doubt as to [her] ability to preside impartially" or if "the judge's behavior *appears* to be biased or prejudicial". *Id*. at 1295-1296 (*emphasis in*

original); *see also* In re Murchison, 349 U.S. 133, 136 (1955) ("justice must satisfy the appearance of justice"); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988) (same). Importantly, the appearance of partiality is evaluated by the impression created by the jurist's conduct in the public eye. As this Court emphasized in Commonwealth v. Stevenson, 829 A.2d 701 (Pa.Super. 2003), "disqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality." *Id*. at 705.

Here, instead of asking a probation officer to visit the shelter to assess Williams' compliance with the court's community service requirement, Judge Brinkley personally assumed the role of investigator. No evidence suggests that the judge routinely made this type of unannounced personal visit to monitor her other probationers. Where the assigned probation officer testified that "judicial oversight [in the officer's other cases] is not as much as that we received in this case" (N.T. 11/6/17 at 40-41; R.R. 414a-415a), there is, at a minimum, the *appearance* of an untoward attention to the details of Williams' probation.

The appearance of partiality is enhanced by the court's failure to provide advance notice to the parties of her intent to treat the bagging of clothes, rather than the serving of food, as a distinct probation violation. In

the absence of notice, neither party could conduct its own investigation. In particular, Williams was unable to introduce witnesses to support his otherwise self-serving claim that he served food on other days and only bagged clothes on the date of the judge's visit pursuant to instructions from shelter staff. Nor could he cross-examine the shelter employee to whom the court spoke during her visit and who apparently made statements to the court, which the court subsequently employed to refute Williams' claims.

As the Supreme Court has explained, an additional basis for recusal arises when a judge has "personal knowledge of disputed facts" and is "in a position to rule on objections to [her] own testimony and to assess [her] own credibility in light of conflicting evidence." Mun. Publications, Inc. v. Court of Common Pleas of Philadelphia Cty., 489 A.2d 1286, 1289 (Pa. 1985); *See also* PA ST CJC Rule 2.11(A)(1) ("A judge shall disqualify himself or herself in any proceeding in which the judge… has … personal knowledge of the facts that are in dispute in the proceeding").

As noted above, the interests at the heart of a recusal motion go beyond the individual proceedings. As the Supreme Court noted in Reilly by Reilly v. Se. Pennsylvania Transp. Auth., 489 A.2d 1291 (Pa. 1985):

> Questions concerning the fairness, impartiality, or bias of the trial court always affect the administration of justice and can cloak the whole system of judicature with suspicion and distrust. Because recusal requests call into question our ability to mediate

> fairly, they raise important issues in which the public is concerned. If our courts are perceived to be unfair and biased, our future ability to adjudicate the public's grievances and wrongs will be threatened, because we all lose the one thing that brings litigants into our halls of justice—their trust. Without the people's trust that our decisions are made without malice, ill-will, bias, personal interest or motive for or against those submitting to our jurisdiction, our whole system of judicature will crumble.

Id. at 1301.

The public perception of unfairness and bias is exactly what the court's behavior has engendered here. As Justice Baer observed in his dissenting Opinion in Commonwealth v. Williams, 188 A.3d 382 (Pa. 2018), Judge Brinkley's "continued involvement has created an appearance of impropriety that tends to undermine public confidence in the judiciary." *Id*. Because her conduct during these proceedings creates the appearance of unfairness and partiality, Judge Brinkley erred in denying Williams' recusal motion.

III. The VOP court erroneously imposed a state prison sentence, where the defendant had no new convictions, completed drug treatment, did not pose a threat to the community, was employed, and where the conduct in question did not warrant incarceration.

The court abused its discretion when it imposed a two to four year state prison sentence based on the technical violations of probation in issue here. When a court revokes probation, 42 Pa.C.S. § 9771(c) imposes limitations on its ability to sentence a defendant to total confinement. Commonwealth v. Carver, 923 A.2d 495, 497 (Pa.Super. 2007). Under § 9771(c):

> The court shall not impose a sentence of total confinement upon revocation unless it finds that:
>
> (1) the defendant has been convicted of another crime; or
> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
> (3) such a sentence is essential to vindicate the authority of the court.

None of the statutory conditions for incarceration is applicable here.

First, Williams has not been convicted of another crime. Although he was arrested twice for minor offenses, the charges were dismissed and Williams has no new convictions. *See* Commonwealth v. Jones, 50 A.2d 342, 344 (Pa. 1947) (mere arrests and indictments, without convictions . . . have no

value as probative matter). Commonwealth v. Moriarty, 180 A.3d 1279, 1286 (Pa.Super. 2018) (same).

Second, no evidence suggested that Williams was likely to commit a new crime if not incarcerated. Although he tested positive for oxycodone in January, 2017, he subsequently completed a treatment program. He also passed regular drug exams for the ensuing ten months. (N.T. 11/6/17 at 16-17; R.R. 409a) ("There was never a time that he was never available for supervision. We drug tested every single time. The urines were negative every time"). Significantly, throughout the period in question, he successfully maintained lawful employment as an entertainer. Where he was crime free and successfully employed, the court had no reason to incarcerate Williams to protect the community.

Third, "violations" such as Williams' failure to travel to Greece and his failure to serve food (as opposed to bagging clothes) at a homeless shelter do not justify a state prison sentence "to vindicate the authority of the court." A revocation violates due process when it is "fundamentally unfair or arbitrary." Bearden v. Georgia, 461 U.S. 660, 666 (1983). In addition, courts cannot revoke probation for violations of "unforeseeable" conditions, such as those in issue here. Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam). In Douglas, for example, an explicit condition of probation required Douglas to

report arrests "without delay." Douglas did not report a speeding citation until eleven days later. *Id.* at 430–31. The trial court concluded that the delay "displayed poor attitude toward his probation" and was not in "strict compliance with [its] terms." *Id.* at 431. The Supreme Court held that the trial court erred because the citation was not the equivalent of an arrest under state law, and even if the trial court had construed it as such, "the *unforeseeable* application of that interpretation [would have] deprived [Douglas] of due process." *Id.* at 431–432 (emphasis added). Here, the distinction between bagging clothes and serving meals, which had such apparent significance for the court, was equally unforeseeable.

Due process requires that a probationer have fair notice of the type of violations that can result in new sanctions. "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." Burns v. United States, 287 U.S. 216, 223 (1932); United States ex rel. Sole v. Rundle, 435 F.2d 721, 724 (3d Cir. 1971) ("Though the Constitution does not prohibit the discretionary exercise of the power to revoke probation, this does not mean that such discretion may be absolute. . . . The exercise of that discretion is invalid whenever there is a showing that it was motivated by arbitrary or capricious reasons.").

Review of the notes from Williams' VOP hearing leads to one conclusion: the court only resorted to a discussion of Williams' community service after he had presented plausible defenses to the specific violations of which he had advance notice. The topic of his community service only arose at the end of the proceedings, after he had presented evidence that: (1) all new charges had been dismissed, (2) he had completed drug treatment and passed drug tests for ten months, and (3) both his probation officer and the Commonwealth recommended that his probation be continued.

The lower court abused its discretion in imposing a prison sentence for the technical violations in issues here. This matter should be remanded for a new VOP hearing before a different judge. *See* Commonwealth v. Mullins, 918 A.2d 82, 86 (Pa. 2007) (where VOP hearing record is insufficient to sustain revocation, appellate court should remand for the VOP court to determine whether probation remains the proper course).

CONCLUSION

For the above stated reasons, Appellant Williams should be awarded a post-conviction relief in the form of a new trial. In the alternative, his recusal motion should be granted and this matter should be remanded for a violation of probation hearing before a new judge.

Respectfully submitted,

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AVERMENT OF ACCURACY AND COMPLETE REPRESENTATION

I certify that the electronic copy of Appellee's Brief is an accurate and complete copy of the paper version.

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CERTIFICATION OF COMPLIANCE WITH RULE 2135

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that, based on a word count conducted by the word processing system used to prepare it, Appellee's brief contains less than 14,000 words, exclusive of the cover of the brief and the pages containing the table of contents, table of citations, proof of service and any addendum.

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellee has been served upon the below named individuals at the indicated addresses by electronic filing on the indicated date.

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