[J-10-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 50 MAP 2020
	:	
Appellee	:	Appeal from the Order of Superior
	:	Court at No. 48 EDA 2019 dated
	:	March 27, 2020 Affirming the
v.	:	Judgment of Sentence dated
	:	December 3, 2018 of the
	:	Montgomery County Court of
JOSEPH MCCABE,	:	Common Pleas, Criminal Division, at
	:	No. CP-46-CR-2684-2016.
Appellant	:	
	:	ARGUED: March 10, 2021

OPINION

JUSTICE MUNDY **DECIDED: December 22, 2021**

In this appeal by allowance, we consider whether a problem-solving court, in this case a Veterans Treatment Court (VTC), created pursuant to 42 Pa.C.S. § 916[1] is subject

[1] In 2010, the Legislature passed Act 30, which in pertinent part provides as follows:

> **§ 916. Problem-solving courts**
>
> **(a) Establishment.--**The court of common pleas of a judicial district and the Municipal Court of Philadelphia may establish, from available funds, one or more problem-solving courts which have specialized jurisdiction, including, but not limited to, veterans courts, drug courts, mental health courts and driving under the influence courts, whereby defendants are admitted to a court-supervised individualized treatment program. The court may adopt local rules for the administration of problem-solving courts and their related treatment services. The local rules may not be inconsistent

to Chapter 3 of the Pennsylvania Rules of Criminal Procedure (the Rules) governing Accelerated Rehabilitative Disposition (ARD). We also consider whether Appellant, Joseph McCabe, due to his inability to fully pay restitution, was denied the full benefit of the problem-solving court in contravention of his rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution.

I - Factual and Procedural Background

We begin by summarizing the factual and procedural history of this case. Following the filing of a criminal complaint on February 19, 2016, Appellant was arrested on charges of theft by unlawful taking[2] and receiving stolen property[3] in connection with the April 2015 taking of a collection of gold coins from the home of Thomas and Kathy Mohn in Upper Merion, Montgomery County, Pennsylvania, with whom Appellant had been staying. Montgomery County had instituted a VTC Program in 2011, the terms of which are set forth in the Montgomery County Veterans Treatment Court Policy and Procedural Manual (2011).[4] Appellant applied for participation in the VTC and was

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> with this section or any rules established by the Supreme Court.
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> …
>
> **(f) Local rules.--**A court of common pleas of a judicial district or the Municipal Court of Philadelphia that established a veterans court, multicounty veterans court or veterans track under this section may adopt local rules for the administration of the courts and their related treatment services. The local rules may not be inconsistent with this section or any rules established by the Supreme Court.

42 Pa.C.S. § 916.

[2] 18 Pa.C.S. § 3921(a).

[3] 18 Pa.C.S. § 3925(a).

accepted into the program. As a condition thereof, he entered an open plea to the theft charge graded as a third-degree felony on April 24, 2017. The VTC's order accepting the plea noted that sentence would be deferred and, as a condition, that a restitution hearing would be scheduled. VTC order, 4/24/17, at 1. A restitution hearing was held on August 14, 2017, after which the VTC ordered on January 2, 2018, that restitution of $34,857.24 be a condition of Appellant's sentence.[5] During the course of the VTC program, Appellant made regular payments toward restitution in accordance with the VTC's order. Appellant successfully completed the requirements and conditions of the VTC program and following his successful completion a sentencing hearing was held on December 3, 2018.[6] The court reviewed the sentencing guidelines and acknowledged Appellant's success in the VTC program:

> You have done a remarkable job in Veteran's Court. You have served as a role model. You have been compliant with everything that we asked of you. That shows me you are capable of doing better. You have it in you. But this was a very serious crime.

N.T., 12/3/18, at 21. The trial court proceeded to sentence Appellant to a two-year term of probation. Appellant filed a timely motion to reconsider the judgment of sentence which

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[4] The VTC Manual can be found on the Montgomery County website at Veterans-Treatment-Court-Policy-and-Procedure-Manual (montcopa.org)

[5] Appellant filed a motion to reconsider the restitution order, which the VTC denied on April 5, 2018. In his motion to reconsider, Appellant challenged only the valuation of the gold. Also, in his motion, Appellant acknowledged that Pa.C.S. § 1106(c), regarding mandatory restitution, would apply at sentencing and did not challenge the timing of the restitution hearing. *See* Defendant's Motion to Reconsider Restitution Award, CP-46-CR-2684-2016 (filed 3/8/2018).

[6] Appellant's sentencing was presided over by the Honorable Cheryl L. Austin. Prior proceedings had been presided over by the Honorable Todd D. Eisenberg.

the trial court denied on December 14, 2018. Appellant filed a timely appeal to the Superior Court.[7]

The Superior Court noted the common thread among Appellant's issues was a challenge to the restitution component of his sentence. As such the court reviewed it as a challenge to the legality of his sentence, applying a plenary review for any error of law. The Superior Court noted its standard was to ascertain the intent of the legislature by applying a statute's plain language. Only when such language is ambiguous or leads to a patently absurd result will other interpretive tools be applied. *Commonwealth v. McCabe*, 230 A.3d 1199, 1203 (citing *Commonwealth v. Hall*, 80 A.3d 1204, 1211 (Pa.

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[7] Appellant raised the following issues before the Superior Court:

> 1. Since Veterans Court is controlled by Chapter 3 of the Rules of Criminal Procedure, was it an error of law when the trial court instead acted pursuant to a Veteran's Court Manual that is not in compliance with Chapter 3 of the Rules of Criminal Procedure, ordered restitution pursuant to 18 Pa.C.S. §1106(a) which is not permitted when ordering restitution pursuant to Chapter 3 of the Rules of Criminal Procedure, and thereafter failed to dismiss all charges against [Appellant] based upon that illegal restitution award?
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> 2. Regardless of whether Chapter 3 of the Rules of Criminal Procedure applies to Veterans Court, was [Appellant] impermissibly denied a dismissal of charges based on his inability to pay full restitution, notwithstanding his successful completion of Veterans Court, in violation of his right to Due Process and Equal Protection under the United States Constitution?
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> 3. Conversely, if Veterans Court is not controlled by Chapter 3 of the Rules of Criminal Procedure, was the Court's refusal to dismiss the charges against [Appellant] in error when that refusal was based upon an illegal order of restitution entered prior to sentencing with no statutory authority for such a restitution order?

Commonwealth v. McCabe, 230 A.3d 1199, 1201-02 (Pa. Super. 2020).

2013)). Appellant first contended that the VTC Manual fails to comply with Chapter 3 of the Rules, pertaining to ARD, which, in his view, governs Section 916 problem-solving courts. Appellant argued that problem solving courts, including the VTC in this case, are merely specific subsets of ARD and that Chapter 3 was intended to furnish the procedure to be followed. The Superior Court conceded the similarities between the diversionary programs of problem-solving courts and ARD, noting both hold cases in abeyance to afford treatment or supervision options to defendants. *Id.* at 6. But the court also noted the significant differences between the respective programs. These differences include that for ARD the discretion to submit a case to the program is exclusive to district attorneys, while a team of stakeholders makes decisions pertaining to a defendant's participation in a VTC. This is due in part to the greater treatment-focused aims that problem-solving courts are designed to address. Need for treatment is a requirement for VTC participation but need not be a factor in ARD participation. VTC participation is not limited to first time offenders as for the most part is ARD. Additionally, participation in the VTC program requires an entry of a plea, while ARD is a pre-adjudication program. Further, successful completion by a defendant of an ARD program requires dismissal of the charges he or she is facing, whereas by successfully completing the VTC program, a defendant "may have the court consider dismissing or reducing" the underlying charges. *Id*. (quoting VTC Manual at 8).

Based on these differences, the Superior Court rejected Appellant's interpretation that all problem-solving courts are subsets of ARD to be governed by Chapter 3 of the Rules. The court held that the absence of language in Chapter 3 expanding the definition of ARD to include other diversionary programs and problem-solving courts belied Appellant's interpretation. The Superior Court further held Chapter 3's language was clear and unambiguous that ARD and other diversionary programs are distinct. *Id.* at 8.

The absence of special rules promulgated to apply to problem-solving courts authorized under Section 916 cannot result in expanding Chapter 3 of the Rules to apply by default. To do so, the Superior Court held, would violate the separation of powers by having the judiciary effectuate changes and definitions the legislature declined to adopt. *Id.* at 8-9. The court held that even if the language employed in Chapter 3 could be deemed ambiguous, the differences in the programs weigh against Chapter 3 governing VTCs.

The Superior Court also rejected Appellant's second claim that the trial court's failure to dismiss his charges was based on his inability to fully pay restitution during the term of the program in violation of his due process and equal protection rights. Appellant relied on *Commonwealth v. Melnyk*, 548 A.2d 266 (Pa. Super. 1988), in which the Superior Court held that a petitioner's eligibility to enter an ARD program may not be denied based on indigency where the petitioner demonstrates a bona fide willingness to pay restitution according to his or her means. The Superior Court distinguished *Melnyk* as pertaining to admission into an ARD program. In this case, Appellant applied and was admitted into the VTC. The agreement he signed included the condition that "fines, costs, and restitution must be paid in full." *McCabe*, -- A.3d --, 2018 WL 1724871 at 11-12. In these circumstances, the fundamental fairness concerns in *Melnyk* were not implicated. The Superior Court also reviewed the statutory directives for restitution to be imposed as a direct sentence or as a condition of probation. Under Pa.C.S. § 1106, a sentencing court is mandated to impose restitution without regard to ability to pay. A defendant's ability to pay only becomes relevant if there is a subsequent default of the restitution order. *Id.* at 14 (citing *Commonwealth v. Colon*, 708 A.2d 1279, 1284 (Pa. Super. 1998)). Pursuant to the plain language of these provisions, the Superior Court concluded Appellant was not denied due process or equal protection by the trial court's imposition

of restitution without regard to his inability to pay the same in full during the VTC program's duration.

Finally, the Superior Court rejected Appellant's contention that the trial court's restitution order was illegal because it conducted a restitution hearing prior to sentencing. Appellant argued that Section 1106(c)(2) requires the amount of restitution must be determined at the time of sentencing. The cases relied on by Appellant disapproved of sentences entered that left the determination of the amount of restitution to a later date or deferred such determination. While the amount of restitution was determined in this case prior to sentencing as part of Appellant's participation in the VTC program, that did not violate Section 1106's directive that the amount of restitution be determined at sentencing. Here the amount was defined at the time of sentencing and the sentence with respect to restitution was not open-ended, indefinite, or speculative.

Appellant filed a petition for allowance of appeal with this Court, which we granted to review the following questions.

> Is the pretrial disposition program Veterans Treatment Court controlled by Chapter 3 of the Rules of Criminal Procedure?
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> Was [Appellant] impermissibly denied full benefits of the Veterans Treatment Court program, namely a dismissal of charges, based upon his inability to pay full restitution, in violation of his Fourteenth Amendment right to Due Process and Equal Protection under the United States Constitution?

II – Veterans Treatment Court

Appellant argues that both sources of statutory authority for a court to impose restitution as part of a sentence require the restitution to be determined at sentencing, to wit, Section 9763 (formerly Section 9754) when imposed as a condition of probation or Section 1106(a) as a stand-alone element of a sentence. In the former provision, imposition is in the discretion of the sentencing court upon consideration of all

circumstances including a defendant's ability to pay.[8] In the latter provision, imposition is mandatory without consideration of a defendant's financial means.[9] The only exception,

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[8] Section 9754, in effect at the time of Appellant's sentencing, included among the permissible conditions of probation a sentencing court could impose, that a defendant "make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby." 42 Pa.C.S. § 9754 (c)(8) (amended 2019). The provision was amended effective December 18, 2019, deleting subsection (c) and transferring it to a new Section 9763. The language of the relevant condition was slightly altered, but did not impact the necessity to consider a defendant's ability to pay when imposing restitution as a condition of probation, *i.e.*, "To make restitution of the fruits of the crime or to make reparations, in an affordable amount and on a schedule that the defendant can afford to pay, for the loss or damage caused by the crime." 42 Pa.C.S. § 9763 (b)(10).

[9] Section 1106 provides in pertinent part as follows:

> **§ 1106. Restitution for injuries to person or property**
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> **(a) General rule.--**Upon conviction for any crime wherein:
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> (1) property of a victim has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime;
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> . . .
>
> **(c) Mandatory restitution.--**
>
> (1) The court shall order full restitution:
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> (i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other government agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered

Appellant maintains, is Rule 316, applicable to ARDs. Appellant argues his sentence is illegal because the only source of authority for imposing restitution in a diversionary problem-solving court such as the VTC, is under Rule 316. Rule 316 provides that conditions "may be such as may be imposed with respect to probation after conviction of a crime including restitution . . . ." Pa.Crim.P. 316(A). Imposition of restitution as a condition of probation requires an assessment of a defendant's ability to pay before an amount or manner of payment is set. Appellant notes, "[o]utside of Rule 316, there are no rules of procedure that would permit the trial court to enter a restitution order and enforce it prior to sentencing. Thus, the VTC program must be controlled by Chapter 3."

> for loss previously compensated by an insurance company to the insurance company.
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> . . .
>
> (2) At the time of sentencing the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:
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> > (i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.
> >
> > (ii) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just.
> >
> > (iii) Shall not order incarceration of a defendant for failure to pay restitution if the failure results from the offender's inability to pay.
> >
> > (iv) Shall consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title.
>
> …

18 Pa.C.S. § 1106.

Appellant's Brief at 22. Appellant contends this Court, in promulgating Chapter 3 of the Rules, intended the Rules to be applicable to all predisposition diversionary programs. In support, Appellant references this Court's decision in *Commonwealth v. Lutz*, 495 A.2d 928 (Pa. 1985), in which this Court held the legislature's creation of an ARD program in the Vehicle Code was subject to Chapter 3 of the Rules and could not authorize practices inconsistent with those rules, nor authorize incompatible local rules in contravention of our constitutional rule-making authority.[10] Appellant argues this case is analogous to the circumstances in *Lutz* because there are no rules other than Chapter 3 that could apply to the diversionary problem-solving courts. According to Appellant, the interpretation of the Section 916 authorizing statute urged by the Commonwealth and adopted by the Superior Court would permit rulemaking in contravention of this Court's exclusive constitutional rule-making authority. Appellant adds that even if Chapter 3 Rules do not apply to VTCs, there is no authority elsewhere in the Rules for the trial court to enter a restitution order prior to sentencing. Appellant disputes the Superior Court's conclusion that the restitution order made by the trial court as part of the conditions for Appellant's participation in the VTC was not a sentence nor carried the same legal impact, writing that:

> Judge Eisenberg's restitution order had the force of law at the time it was entered on January 2, 2018. The facts of the case prove this. The cause of [Appellant] being sentenced in the first place was his inability to pay the full restitution amount ordered by Judge Eisenberg—this is undisputed."

Appellant's Brief at 29.

The Commonwealth argues the Superior Court correctly interpreted the procedural requirements for problem-solving courts as being distinct from ARD. The Commonwealth notes the discrete aspects between the programs as found by the Superior Court and

[10] Specifically, the Court found the statute's restriction of the district attorney's discretion in determining a defendant's ARD eligibility inconsistent with the applicable Rules.

observes, that the legislature could well have employed language equating the two diversionary programs, but chose not to. The authorization of individual local courts to adopt rules for problem-solving courts established in their jurisdictions is limited by the admonition they not be inconsistent with rules promulgated by the Supreme Court. For this reason, the Commonwealth argues Appellant's reliance on *Lutz* is inapt. The Commonwealth contends the Superior Court employed correct statutory interpretation rules by following the plain language of the provisions and reading the enactments of Section 916 and the Chapter 3 Rules *in pari materia*. Because VTC is not an ARD program, the lower courts did not err in holding Chapter 3 of the Rules did not apply.

The Commonwealth further argues that the restitution order entered at sentencing pursuant to Section 1106 was proper and indeed required without consideration of Appellant's ability to pay. The Commonwealth argues there is no prohibition in the Rules from holding a hearing to determine the amount of restitution involved in a case prior to sentencing. The authority cited by Appellant involve instances where the determination of restitution was deferred in some manner until after sentencing. The policy concerns underlying those decisions are actually benefited by an earlier restitution hearing. The restitution hearing in this case did not impose a sentence upon Appellant at that time, but established the amount of restitution for the VTC treatment plan. The requirement that restitution be determined at sentencing does not preclude that determination being based on an earlier proceeding as long as the defendant's notice, due process, and appeal rights are met, which they were in this case.

In reviewing this issue, we recount that "[o]ur standard of review of a lower court's interpretation of a statute is *de novo*, and our scope of review is plenary." *Commonwealth v. Montgomery*, 234 A.3d 523, 533 (Pa. 2020). We are mindful that when engaging in statutory interpretation,

> the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the legislature. 1 Pa.C.S. § 1921(a). When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent.

Commonwealth v. Finnecy, 249 A.3d 903, 913 (Pa. 2021) (internal quotation marks and some citations omitted).

Appellant interprets *Lutz* too broadly. *Lutz* dealt specifically with the interplay between a legislatively created ARD program in the Vehicle Code and our ARD rules. The *Lutz* Court concluded that rule-making authority, as a constitutional separation of powers matter, lay with this Court and is not delegable to the individual courts of common pleas by the legislature. To the extent such local rules are inconsistent with the Rules they are per se invalid. *Lutz*, 495 A.2d at 935-96. The gravamen of Appellant's position is that Chapter 3 of the Rules is intended to be applied to any pre-dispositional program. However, unlike the Vehicle Code ARD at issue in *Lutz*, the VTC in this case is not a predisposition program in the sense that it **diverts** proceedings prior to (and potentially in lieu of) an adjudication of the charges facing a defendant. Rather, the VTC program **defers** proceedings after the adjudicatory disposition of the charges via a plea of guilty in order to provide specialized court-supervised treatment programing to qualifying defendants before sentencing.[11] Contrastingly, the Chapter 3 Rules require deferring action on the adjudication of charges upon admission. Pa.R.Crim.P. 315. Additionally,

[11] The VTC Manual in this case provides:

> When the defendant is formally accepted into Veterans Treatment Court, the defendant must enter a plea to certain agreed-upon charges. Thereafter the defendant will proceed through the three phases of engagement identified in the Terms of Participation section herein. Sentencing may be deferred pending completion of the Veterans Treatment Court program. Upon successful completion of the Veterans Treatment Court program, the defendant's charges may be reduced or dropped all together.

VTC Manual at 8.

in Section 916 the legislature did not define the problem-solving courts it authorizes as necessarily pre-adjudication programs, but provided that municipal courts and courts of common pleas "may" adopt local rules for the administration of the courts and their related treatment services. The local rules "**may not be inconsistent with this section or any rules established by the Supreme Court**." 42 Pa.C.S. § 916(f) (emphasis added).

We agree with the Superior Court that the legislature could very well have designated the problem-solving courts it was authorizing under Section 916 as an ARD had that been its intention. In fact, that was the situation in *Lutz*, where the legislature expressly created an ARD program under the Vehicle Code. The VTC program, while sharing some aspects and goals of ARD, is clearly not an ARD program. The treatment opportunities are designed to address the defined needs of certain classes of offenders (e.g. mental health issues, drug dependencies, and in the case of the VTC, the existence of these issues in the consequence of military service) after the entry of a plea. The treatment and engagement phases are performed after the plea and prior to sentencing, which may, for that purpose, be postponed by mutual consent. There is no guarantee or entitlement to dismissal of the charges upon completion of the program. The targeted treatments and programing afforded by the VTC are themselves a benefit, as is the mitigating consideration of a defendant's successful participation at sentencing. These differences and the specific language employed by the legislature lead us to conclude that the VTC in this case is not equivalent to ARD and the lower courts did not err in holding the Chapter 3 Rules do not apply.

We also reject Appellant's contention that Chapter 3 must apply by default because no other rules authorize the trial court's determination of restitution prior to sentence. There is nothing in the Rules that preclude a hearing to determine the amount of restitution from being held prior to sentencing. Section 1106 as noted by the Superior

Court, requires that restitution be determined at sentencing. Instantly, the restitution hearing in aid of the VTC program did not impose restitution as a sentence or factor in Appellant's acceptance into the VTC. Appellant had the full opportunity to be heard, to seek modification, and to appeal the restitution finding in due course.

At sentencing, the trial court determined restitution as required by Section 1106 albeit with the aid of findings of the earlier restitution hearing. The January 2, 2018 restitution order was not, as Appellant contends, an imposition of a sentence, but a determination of the amount of restitution for payment as a condition of sentencing. The money Appellant paid toward restitution during the pendency of the VTC program was not released to the victim until after the sentence was entered. *See* N.T. 12/3/18 at 15-16. At the December 3, 2018 sentencing hearing, the trial court in this case followed the statutory requirement of Section 1106 in imposing restitution as part of Appellant's sentence. We also note that Section 1106(c)(2)(iv) contemplates earlier orders when it directs the sentencing court to "consider any other preexisting orders imposed on the defendant, including, but not limited to, orders imposed under this title or any other title." 18 Pa.C.S. § 1106(c)(2)(iv). Accordingly, we disagree with Appellant that the VTC proceeded without authority in holding a restitution hearing prior to sentencing.

III – Due Process

In his second issue, Appellant argues that if the Chapter 3 Rules do not apply to VTC cases, the circumstances of this case, where Appellant was denied the dismissal of his charges solely due to his financial inability to fully pay the restitution within the treatment period of the VTC program, represent a violation of his constitutional rights to due process and equal protection. Appellant argues this case is "nearly identical" to *Melnyk*, wherein the Superior Court vacated the defendant's conviction on welfare fraud when she had been denied admission into ARD because of her inability to pay the full

restitution amount within the term of the ARD program. The court held that it is an abuse of discretion to summarily base an ARD admission decision on improper criteria such as indigency. Appellant argues that the court in *Melnyk* applied well-settled constitutional jurisprudence, writing:

> The *Melnyk* court based its opinion squarely on the principles set forth in a line of cases running from *Griffin v. Illinois*, 351 U.S. 12 (1956) to *Bearden v. Georgia*, 461 U.S. 660 (1983). The takeaway from these cases is that courts cannot limit access to features of the criminal justice system—be they appeals, probation, or diversion—to only those who can afford to pay some financial obligation.

Appellant's Brief at 33.

Appellant argues that, while *Melnyk* involved the denial of admittance into a program, in the instant case Appellant was denied the full benefit of a successful completion of the program due only to his indigency. Appellant notes, the *Melnyk* court indeed held that "the State must consider alternative conditions for admittance to ***and completion of*** the ARD program." *Id.* at 35 (quoting *Melnyk*, 548 A.2d at 272 (emphasis added by Appellant)). Appellant argues that the Superior Court erred in holding *Melnyk* distinguishable on the bases that it concerned admission into a diversionary program and that Appellant signed an agreement, but even if those distinguishing factors were apt, they did not foreclose further inquiry into Appellant's due process and equal protection claims. Appellant argues the refusal to dismiss his charges upon his successful completion of the VTC program solely due to the outstanding restitution he could not afford to pay within the treatment period is an equivalent violation of his due process and equal protection rights. Appellant argues these rights are not overcome by the Commonwealth's interest in victim compensation, and Appellant contends the Commonwealth offered no rehabilitative or penological interest served by its refusal to

recommend dismissal of the charges. Appellant maintains his sentence, occasioned only due to his indigency was thus unconstitutional.[12]

Alternatively, Appellant argues the trial court's decision not to dismiss his charges solely because he could not afford to pay the full restitution amount prior to sentencing violates his constitutional rights to due process and equal protection. Appellant does not claim that Section 916 or the VTC Manual facially create an impermissible classification or handling, but that the court relied on an impermissible classification in exercising its sentencing discretion. Thus, Appellant has advanced an as-applied constitutional challenge.

In answer to Appellant's due process and equal protection claims, the Commonwealth asserts they are based on an erroneous factual predicate. Appellant claims it is undisputed that he was denied dismissal of his charges solely based on his indigency and his inability to pay the restitution in full within the VTC program's duration. The Commonwealth notes there is no entitlement to dismissal in VTC even if a defendant is fully successful in meeting his or her program and treatment obligations. Defendants successfully completing the program "may have the court consider dismissing or reducing their charges" on a case-by-case basis in consideration of the record, and the nature of the charges by the sentencing judge. Commonwealth Brief at 49 (quoting VTC Manual

[12] The American Civil Liberties Union of Pennsylvania filed a brief as *amicus curiae* in support of Appellant. The *amicus* recounts the well-settled state and federal jurisprudence requiring equal treatment of individuals in the criminal justice system, eschewing disparate results on account of indigency or financial means. *Amicus* urges this Court to apply the heightened level of scrutiny applicable to such constitutional challenges. Under such inquiry, *amicus* argues, this Court should conclude Appellant was denied the opportunity to successfully "complete" the program and receive the full benefit of such successful completion. *Amicus* proceeds on the same initial assumption relied on by Appellant, to wit, "If Mr. McCabe had been able to pay $34,000 in restitution, **there is no dispute** that he would have walked out of Veteran's Treatment Court ("VTC") with his case closed, his charges dismissed, and no criminal record." *Amicus* Brief at 3 (emphasis added).

at 8). The Commonwealth recites the supporting statements made by the trial court upon announcing its sentence as being devoid of any reliance on improper considerations, including Appellant's indigency. The Commonwealth notes it is Appellant's burden to demonstrate a factual basis for his assertions on appeal, and aside from a bald assertion that the matter is undisputed, has failed to show the decision not to dismiss the charges and to sentence Appellant to a period of probation was based on his indigency and the outstanding amount of restitution.

The Commonwealth counters Appellant's reliance on *Melnyk* by noting that to the extent Appellant faults the prosecutor for not seeking *nolle prosequi* of his charges, the VTC Manual does not mention *nolle prosequi*, an initiative of the prosecution under Rule 585, as opposed to dismissal, a consideration of the court under Rule 586. The Commonwealth points out that Rule 586, requires consideration by the court of victim compensation in its exercising its discretion to dismiss charges.[13]

In reviewing Appellant's claim, we are guided by the following:

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[13] The Rule provides:

> When a defendant is charged with an offense which is not alleged to have been committed by force or violence or threat thereof, the court may order the case to be dismissed upon motion and a showing that:
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> (1) the public interest will not be adversely affected; and
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> (2) the attorney for the Commonwealth consents to the dismissal; and
>
> (3) satisfaction has been made to the aggrieved person or there is an agreement that satisfaction will be made to the aggrieved person; and
>
> (4) there is an agreement as to who shall pay the costs.

Pa.R.Crim.P. 586.

> A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right. A criminal defendant may seek to vacate his conviction by demonstrating a law's facial or as-applied unconstitutionality.

United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010) (citations omitted). Our standard of review of an as-applied challenge requires a defendant to show that he or she has been impacted by an alleged discriminatory or improper exercise of discretion in applying the questioned statute. *Commonwealth v. Hairston*, 249 A.3d 1046, 1060 (Pa. 2021).

Here, Appellant baldly asserts "[t]he cause of [Appellant] being sentenced in the first place was his inability to pay the full restitution amount ordered by Judge Eisenberg—this is **undisputed**." Appellant's Brief at 29 (emphasis added). To the contrary, the Commonwealth does dispute that was a reason, let alone the only reason, the VTC did not dismiss the charges and imposed the probationary sentence. The VTC stated the reasons for its sentence as follows:

> Mr. McCabe, I just do not follow the sentiment that because the victim is a professional who has other monies that it justifies the taking of his property. There is no justification for taking of his property. That's stealing. That's theft. And that's why you are here today.
>
> You have done a remarkable job in Veteran's Court. You have served as a role model. You have been compliant with everything that we have asked of you. That shows me you are capable of doing better. You have it in you. But this is a very serious crime.

N.T., 12/8/18, at 21. The VTC did not justify its sentence based on Appellant's outstanding restitution balance, rather on the severity of the offense and Appellant's

attitude toward it.[14] Neither does Appellant provide any factual support for his assertion that his case is anomalous to the resolution of other VTC cases attributable to his indigency and outstanding restitution.

We also agree with the Commonwealth that Appellant conflates notions of *nolle prosequi*, which entail prosecutorial discretion, with dismissal, which implicates judicial discretion. *Compare* Pa.R.Crim.P. 585, *with* Pa.R.Crim.P. 586. The VTC Manual speaks to consideration (again not to a right) of dismissal of the charges against him. Dismissal under the Rules requires a court to consider whether "satisfaction to the aggrieved person" has been or will be accomplished. Pa.R.Crim.P. 586. Because consideration of dismissal is within a trial court's discretion under the Rules, the VTC provides nothing inconsistent in this regard. Indeed, were the VTC to authorize the trial court to grant dismissal based on criteria inconsistent with Rule 586, it would run afoul of our holding in *Lutz* and the authorizing language of Section 916.[15]

IV - Conclusion

The language of Section 916 does not perforce create an ARD program to be governed by Chapter 3 of the Rules,[16] and specifically the VTC does not. Problem-solving courts such as the VTC are designed to provide funding and programing to afford individualized treatment to offenders with issues that have contributed to their criminal

[14] The size of the restitution amount is, of course, related to the severity of the offense as the grading of theft offenses is related to the value of the property stolen. Such consideration by the sentencing court does not imply Appellant's indigency was a factor in sentencing Appellant to a term of probation.

[15] Appellant does not challenge the constitutionality of Rule 586 facially or as-applied.

[16] The language of Section 916 may be flexible enough to encompass ARD-equivalent programs, by placing the application, treatment, and completion components prior to a plea or adjudication of the charges. If so, Chapter 3 Rules may be applicable, but such is not the case instantly. The limiting language in Section 916 that any program rules not be inconsistent with the Rules would apply in either case.

conduct, after the entry of a plea. Such treatment is itself a benefit and the chief impetus in enacting Section 916. Positive sentencing consideration, including dismissal of charges, may accompany a successful completion of the program, but the program does not create guarantees, procedures, or discretion not already authorized under the Rules. Accordingly, we affirm the Superior Court's determination that the trial court's sentencing order regarding restitution was not governed by Chapter 3 of the Rules. We also affirm the judgments of the lower courts, finding no as-applied constitutional infirmities to have been established in Appellant's claim.

Chief Justice Baer and Justices Saylor, Todd, Donohue, Dougherty and Wecht join the opinion.

Justice Wecht files a concurring opinion.