

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 14th day of December, 2017.

Dorothy Elizabeth Cilwa, Appellant,

against Record No. 161278
Court of Appeals No. 0687-15-4

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the judgment of the Court of Appeals should be reversed. The sole question presented to this Court on appeal is whether the Court of Appeals erred in dismissing the appeal of Dorothy Elizabeth Cilwa (the defendant), from a judgment of the Circuit Court of Fairfax County, as moot.

The case had a long history in the circuit court. The defendant was convicted, on her guilty plea, of grand larceny in the Circuit Court of Fairfax County on March 19, 2008. On May 18, 2008 the court imposed a sentence of three years imprisonment, but suspended all three years upon the conditions that she be of good behavior for one year and under the supervision of a probation officer for that period, to include such substance abuse and mental health testing and counseling as the probation officer might prescribe. On August 14, 2008 the court held a probation revocation hearing, having received a report from the probation officer that the defendant had been convicted of misdemeanor concealment of merchandise. The defendant admitted the violation. The court found her to be in violation, but ordered that none of her suspended sentence be revoked. Instead, the court ordered that her period of supervised probation be extended for one year to commence on August 14, 2008. The court also ordered her to pay restitution and costs.

The defendant was arrested on June 7, 2009 on charges of grand larceny and possession of burglary tools. The probation officer reported this to the court and requested instructions because it was doubtful that these new charges would be disposed of before the expiration of the

defendant's probation on August 14, 2009. The court directed issuance of a bench warrant. On July 27, 2009 the defendant and the probation officer both signed an "Extension of Probation" form addressed to the trial judge. The defendant signed the form as "Offender." The form stated that she did "agree to voluntarily extend my probation indefinitely beyond the scheduled termination date of August 14, 2009, in order to complete inpatient substance abuse treatment and to allow time for disposition of my pending felony charge." In the form, the defendant also acknowledged that she was aware that she had a right to appear before the court in this matter and to be represented by an attorney, but that by signing the form she waived those rights. On September 16, 2009, the court entered an order extending the defendant's probation "indefinitely, or until further order by the court."

On October 16, 2009 the defendant was brought before the court on a bench warrant arising out of new charges of grand larceny and trespassing in the previous month. At a revocation hearing on December 17, 2009, the defendant admitted violating the conditions of probation. The court so found, but again ordered that she be transferred "to an intermediate residential substance abuse treatment facility" and that she "remain under the same terms and conditions of supervised probation."

On February 14, 2012 the court issued a bench warrant for the defendant's arrest on receiving a report that she had been discharged from the treatment program after she had overdosed on drugs. On April 9, 2012 the court entered an order granting the defendant's request for a "bed to bed" transfer to the Demeter House Program in Arlington. On September 18, 2012 the probation officer reported to the court that the defendant had successfully completed her treatment at Demeter House and was now residing at a transitional house called Steps to Recovery. Having successfully completed the requirements of that program, she graduated from it on January 10, 2013.

On February 7, 2013 the defendant signed a "Condition of Probation Supervision" form in which she acknowledged that she had been placed on supervised probation on December 28, 2012 for an indefinite period of time subject to specified conditions to which she agreed by signing the form.

On March 27, 2013 the probation officer informed the court by letter that the defendant had been arrested on new charges of petty larceny, had admitted taking drugs and was attempting to enter a long-term treatment facility. On May 23, 2014 the probation officer informed the court

by letter that the defendant had left the treatment program in which she had been participating, against staff advice, and was attempting to enter another. On January 28, 2015 the probation officer informed the court by letter that the defendant had been arrested on felony and misdemeanor drug possession charges, identity theft and traffic offenses. The court issued a bench warrant, scheduled a revocation hearing for March 27, 2015 and appointed the Public Defender to represent her. The defendant, by counsel, moved the court to dismiss the bench warrant. The court denied the motion. The defendant then admitted the charges for which the warrant had been issued. The court thereupon found her in violation of the conditions of her probation, ordered 90 days of her suspended sentence to be served, terminated probation supervision in this case and awarded counsel fees to her attorney.

The defendant appealed the court's final order to the Court of Appeals. Her appeal was initially denied by per curiam order. She requested review by a three-judge panel, which granted the appeal. Both parties filed briefs but neither of them addressed the issue of mootness. The appeal was set for oral argument on September 8, 2016, but on August 12, 2016, without notice to the parties or hearing, the Court of Appeals issued, sua sponte, an unpublished order dismissing the appeal as moot.

The court concluded from the record that the defendant had completed service of the 90-day period of incarceration she had been ordered to serve and that her probation had been terminated. Therefore, the court held that any opinion it might express would be purely advisory, unless she carried the burden of proving the existence of "concrete and continuing injury which was a collateral consequence" of the trial court's decision. *Cilwa v. Commonwealth*, Record No. 0687-15-4 (August 12, 2016) (unpublished) (citing *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 531, 722 S.E.2d 827, 831 (2012)). (J.A. 103) We awarded the defendant an appeal.

Because the order dismissing the appeal was entered sua sponte, the issue of mootness had never been raised or addressed at any earlier stage of the proceedings and the parties were given no opportunity to address it before the order was entered.

On April 19, 2017, the Supreme Court of the United States decided *Nelson v. Colorado*, 581 U.S. ___, 137 S.Ct. 1249, 1252 (2017), holding that a defendant convicted in a criminal case has a due process right to the return of funds paid as fees, court costs and restitution if the defendant's convictions are invalidated with no possibility of retrial. The Court of Appeals, of

course, did not have the benefit of that decision when it dismissed the defendant's appeal in August 2016.

In light of *Nelson*, we conclude that the Court of Appeals erred in dismissing the defendant's appeal.* Although some of the collateral consequences resulting from the judgment of the trial court may be too remote and speculative to defeat a claim of mootness, a continuing obligation to pay fees, costs and restitution is not among them.

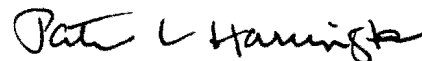
The Attorney General, on brief, concedes that the Court of Appeals erred in dismissing the case sua sponte, but invites this Court to decide the underlying case on its merits for reasons of judicial economy. Because the sole assignment of error in the defendant's appeal to this Court is: "The Court of Appeals erred in dismissing Mrs. Cilwa's appeal as moot," Rule 5:17(c)(1) precludes us from accepting that invitation.

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this order.

Justice McCullough took no part in the resolution of the appeal.

A Copy,

Teste:



Clerk

* The defendant moved this Court to issue a writ of certiorari to the clerk of the trial court for a statement of the fees and costs taxed against the defendant in this case. The Commonwealth did not oppose the motion and the writ was issued. The clerk responded with a statement showing an amount of \$874.62 owed by the defendant.