

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
Appellant	:	PENNSYLVANIA
	:	
v.	:	
	:	
KAZIMIERZ AREST	:	
Appellee	:	No. 1663 Philadelphia 1997

Appeal from the Judgment of Sentence March 17, 1997  
 In the Court of Common Pleas, Criminal Division  
 Philadelphia County,  
 No. M.R. 97-000830  
 M.C. 9601-2153

BEFORE: DEL SOLE, JOYCE and HOFFMAN, JJ.  
 \*\*\*REVISED 05/28/98\*\*\*

OPINION BY HOFFMAN, J.: Filed: May 27, 1998

This is an appeal by the Commonwealth from a March 17, 1997 judgment of sentence against appellee, Kazimierz Arest, for driving under the influence of alcohol or controlled substance.<sup>1</sup> The Commonwealth raises the following issue for our review:

Did the lower court err in affirming the Municipal Court order, which imposed an illegal sentence of intermediate punishment (house arrest) for [appellee's] second conviction of driving while under the influence of alcohol, where such sentence was in direct contravention of the provisions of the Sentencing Code set forth at 42 Pa. C.S. §§ 9729(a) and 9763(c)?

Commonwealth's Brief at 4.

On October 3, 1996, appellee was tried and convicted in Philadelphia Municipal Court of driving under the influence.<sup>2</sup> On October 17, 1996, appellee was sentenced to thirty (30) days to one (1) year house arrest with electronic monitoring, fined \$532.00, and ordered to pay any restitution to be determined by the probation department. The

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<sup>1</sup> 75 Pa. C.S. § 3731.

<sup>2</sup> This was appellant's second conviction for driving under the influence of alcohol or controlled substance.

Commonwealth appealed to the Common Pleas court arguing that the sentence was illegal. On March 17, 1997, the Common Pleas court affirmed the judgment of sentence. This timely appeal followed.

The Commonwealth challenges the legality of appellee's sentence, first arguing that the sentence was illegal because the sentencing code only allows a sentence of house arrest to be imposed pursuant to an approved county intermediate punishment program.<sup>3</sup> We disagree.

Sentencing is a matter vested in the sound discretion of the trial court. *Commonwealth v. Kratzer*, 660 A.2d 102, 104 (Pa. Super. 1995). However, where the court imposes an illegal sentence, the sentence must be corrected. *Id.*

Section 9729 allows a court to sentence eligible offenders to intermediate punishment pursuant to a county intermediate punishment plan. *See* 42 Pa.C.S. § 9729. If Section 9729 were alone in providing for intermediate punishment, we would be inclined to accept the Commonwealth's argument. However, section 9721 of title 42 also addresses intermediate punishment. Section 9721 deals with sentences generally and states that a court, in determining the sentence to be imposed, shall "consider and select one or more of the following alternatives... (6) intermediate punishment." 42 Pa.C.S. § 9721. Given that section 9721 makes no mention of a county intermediate punishment program, we find that a defendant may be sentenced to intermediate punishment outside of the context of a county intermediate punishment program.<sup>4</sup> Thus, we dismiss this claim.

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The county intermediate punishment program allows counties to sentence eligible offenders outside the context of the general sentencing scheme. *See* 61 P.S. § 1101 et. seq.

In essence, sections 9721 and 9729 are both enabling statutes that allow a court to utilize the provisions of intermediate punishment outlined in section 9763. That a court can sentence a

The Commonwealth also argues that the sentence was illegal in that a defendant convicted of driving under the influence of alcohol or controlled substance may not be sentenced to house arrest **without drug and alcohol treatment**. We agree.

Section 9763 of title 42 outlines the parameters of sentences of intermediate punishment. Relevant here is part (c), which states:

**(c) Restriction.- A defendant convicted under 75 Pa.C.S. § 3731(e) (relating to driving under influence of alcohol or controlled substance) may only be sentenced to intermediate punishment:**

**in a residential inpatient program or in a residential rehabilitative center; or**

**by house arrest or electronic surveillance combined with drug and alcohol treatment.**

42 Pa.C.S. § 9763(c).(emphasis added).

“When the language of a statute is clear and unambiguous, the judiciary must read its provisions in accordance with their plain meaning and common usage.’ *Commonwealth v. Bell*, 512 Pa. 334, 339, 516 A.2d 1172, 1175 (1986) (citing 1 Pa.C.S. § 1903(a) (Supp.1986)).” *Commonwealth v. DiMauro*, 642 A.2d 507 (Pa. Super. 1994). We find that section 9763(c) clearly mandates drug and alcohol treatment whenever a defendant convicted of driving under the influence is sentenced to house arrest or electronic surveillance. Consequently, appellee’s sentence for driving under the influence, house arrest without drug and alcohol treatment, was improper. Thus, we vacate the

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defendant to intermediate punishment pursuant to section 9721, without following the procedures outlined in section 9729, is as elementary as the fact that a traveler, given the choice between two paths that lead to a single destination, can choose one path and not have to pay the tolls strewn along the other.

judgment of sentence so that appellant may be sentenced in accordance with section 9763.<sup>5</sup>

Judgment of sentence vacated, case remanded for re-sentencing, jurisdiction relinquished.

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In *Commonwealth v. Harrison*, 661 A.2d 6 (Pa. Super 1995), we were faced with a challenge to the legality of an intermediate punishment sentence of home confinement. In *Harrison*, the defendant had been convicted of driving under the influence (42 Pa. C.S. § 3731) and of driving while operating privilege is suspended or revoked, DUI related (42 Pa. C.S. § 1543.) Both convictions carried a mandatory minimum sentence. Section 9721(a)(1) of title 42 expressly prohibits a sentence of intermediate punishment for any offense that carries a mandatory minimum unless specifically authorized under section 9763 of the sentencing code. We vacated the sentence because section 9763 did not authorize an intermediate punishment for a violation of 42 Pa. C.S. § 1543. *Id.* at 7-8 (citing *Commonwealth v. Yale*, 657 A.2d 987 (Pa. Super. 1985)).

In vacating the defendant's sentence we noted, in a single paragraph, that the trial court properly sentenced the defendant to intermediate punishment for his conviction of driving under the influence because section 9763 did authorize an intermediate punishment for a conviction of driving under the influence. The opinion does not mention whether the home confinement was coupled with drug or alcohol treatment, therefore, it is unclear whether our decision here is in conflict with *Harrison*. Furthermore, as we ultimately reversed the judgment of sentence in *Harrison*, our discussion of any other portion of the sentence was dicta.

5303.16. Basic Sentencing Matrix

Level	OGS	Example Offenses	Prior Record Score						RFEL	REVOC	AGG/RMT
			0	1	2	3	4	5			
LEVEL 5 State Incar	14	Murder 3 Inchoate Murder/SBI	72-240	84-240	96-240	120-240	168-240	192-240	204-240	240	+/- 12
	13	Inchoate Murder/no SBI Drug Del. Result in Death PMD Cocaine, etc. (>1,000 gms)	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12
	12	Rape IDS/ Robbery (SBI) Robbery/car (SBI)	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12
	11	Agg Asslt (SBI) Voluntary Manslaughter Sexual Assault PMD Cocaine, etc. (100-1,000 gms)	36-54 BC	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12
	10	Kidnapping Arson (person inside) Agg Asslt (lett. SBI) Robbery (threat. SBI) Agg. Indecent. Asslt Causing Catastrophe(F1) PMD Cocaine, etc. (50-<100 gms)	22-36 BC	30-42 BC	36-48 BC	42-54	48-60	60-72	72-84	120	+/- 12
	9	Robbery/car (no SBI) Robbery (F1/F2) Burglary (home/person) Arson (no person)	12-24 BC	18-30 BC	24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/- 12
LEVEL 4 State Incar RIP trade	8 [F1]	Agg Asslt (BI w/DW) Agg Asslt (lett. BI w/DW) Invol. Manal. (when DUI) Hom. by Vehicle (when DUI) Theft (>\$100,000) PMD Cocaine, etc. (10-<50 gms)	9-16 BC	12-18 BC	15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	NA	+/- 9
LEVEL 3 State/ Cnty Incar RIP trade	7 [F2]	Robbery (inflicts/threatens BI) Burglary (home/ no person) Statutory Sexual Assault Theft (>\$50,000-\$100,000) Sexual Abuse/Child (take photo) PMD Cocaine, etc. (2.5-<10 gms)	6-14 BC	9-16 BC	12-18 BC	15-21 BC	18-24 BC	24-30 BC	35-45 BC	NA	+/- 6
	6	Invol. Manal. (when no DUI) Hom. by Vehicle (when no DUI) Burglary (not home/person) Theft (>\$25,000-\$50,000) Arson (property) PMD Cocaine, etc. (<2.5 gms)	3-12 BC	6-14 BC	9-16 BC	12-18 BC	15-21 BC	21-27 BC	27-40 BC	NA	+/- 6
LEVEL 2 Cnty Incar RIP RS	5 [F3]	Burglary (not home/no person) Corruption of Minors Robbery (prop by force) Firearms (loaded) Theft (>\$2000-\$25,000) PMD (1-<10 lb of marij)	RS-9	1-12 BC	3-14 BC	6-16 BC	9-16 BC	12-18 BC	24-36 BC	NA	+/- 3
	4	Indecent assault Forgery (money, stock, etc.) Firearms (unloaded) Crim Trespass (breaks in)	RS-3	RS-9	RS-<12	3-14 BC	6-16 BC	9-16 BC	21-30 BC	NA	+/- 3
	3 [M1]	Simple Assault Terr. Threats Theft (\$200-\$2000) Retail Theft (3rd) DUI (M1) Drug Poss.	RS-1	RS-6	RS-9	RS-<12	3-14 BC	6-16 BC	12-18 BC	NA	+/- 3
LEVEL 1 RS	2 [M2]	Theft (\$50-<\$200) Retail Theft (1st, 2nd) DUI (M2) Bad Checks	RS	RS-2	RS-3	RS-4	RS-6	1-9	6-<12	NA	+/- 3
	1 [M3]	Most Misd. 3's; Theft (<\$50) Drug Paraph. Poss. Small Amount Marij.	RS	RS-1	RS-2	RS-3	RS-4	RS-6	3-6	NA	+/- 3

1. Shaded areas of the matrix indicate restrictive intermediate punishments may be imposed as a substitute for incarceration.
2. When restrictive intermediate punishments are appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline ranges.
3. When the range is RS through a number of months (e.g. RS-9), RIP may be appropriate.

Key:

CNTY	= county	RP	= restrictive intermediate punishments
INCAR	= incarceration	RS	= restrictive sanctions
PWD	= possession with intent to deliver	< ; >	= less than; greater than
REVOC	= repeat violent offender category	BC	= best camp
RFEL	= repeat felony 1 and felony 2 offender category	Indice	= Three Strike Offense

**PA COMMISSION ON SENTENCING  
SUMMARY OF SENTENCING ALTERNATIVES**

<b>SENTENCING ALTERNATIVE</b>	<b>TITLE 42 SECTIONS</b>	<b>PURPOSE</b>	<b>LIMITATIONS ON ELIGIBILITY</b>	<b>PERIOD OF TIME</b>	<b>MANDATORY APPLICATIONS</b>	<b>GUIDELINE APPLICATION</b>
<b>Guilt without further penalty</b>	9721(a)(2) 9723	Probation would be appropriate, but appears unnecessary.	Except under mandatory provisions, no specific limitations on eligibility. Use based on discretion of the court.	N/A	Does not satisfy mandatory incarceration requirement.	N/A
<b>Fine</b>	9721(a)(5) 9726(a) 9758	<b>FINE ONLY:</b> If, with regard to the nature and circumstances of the crime and the history and character of the defendant, a fine alone suffices.	As authorized by law, court must determine defendant's ability to pay, and that fine will not prevent payment of restitution.	The period of time that judgment has full effect may exceed the maximum term of imprisonment to which the defendant could have been sentenced.	Does not satisfy mandatory incarceration requirement.	N/A
<b>Fine</b>	9721(a)(5) 9726(b) 9758	<b>FINE AS ADDITIONAL SENTENCE.</b> If defendant has derived pecuniary gain from the crime or that fine will serve deterrent or correctional purpose.	As authorized by law, court must determine defendant's ability to pay and that fine will not prevent payment of restitution.	The period of time that judgment has full effect may exceed the maximum term of imprisonment to which the defendant could have been sentenced.	Does not satisfy mandatory incarceration requirement.	N/A
<b>Restitution</b>	9721(b) 9728	<b>RESTITUTION IN ADDITION TO ALTERNATIVES:</b> Court shall order defendant to compensate victim of criminal conduct for damages or injury sustained.	No limitations on eligibility; Act 1995-12 mandates restitution.	The period of time that judgment has full effect may exceed the maximum term of imprisonment to which the defendant could have been sentenced.	Does not satisfy mandatory incarceration requirement.	N/A

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<b>Order of Probation</b>	9721(a)(1) 9722 9754	Probation recommended when criminal activity included no serious harm, defendant is generally law-abiding, the behavior is unlikely to recur, and confinement deemed unnecessary or would cause an excessive hardship.	Except under mandatory provisions, no specific limitations on eligibility. Use based on discretion of the court. Length of term of Probation may not exceed maximum term for which defendant could be confined.	[FLAT] Length of term of supervision not to exceed the maximum term for which the defendant could be confined.	Does not satisfy mandatory incarceration requirement.	Probation is a Restorative Sanction[RS], and considered non-confinement for purposes of the Guidelines. No Guidelines restriction.
<b>Intermediate Punishment</b>	9721(a)(6) 9729 9763	Intermediate punishment recommended for defendant who would otherwise be sentenced to partial or total confinement and who does not demonstrate present or past violent behavior.	Ineligible offense listing. Sentencing authority required via PCCD based on county plan and minimum program standards.	[FLAT] Length of term for which defendant is to be in an IP program or programs not to exceed the maximum term for which the defendant could be confined.	Generally does not satisfy mandatory incarceration requirement. <b>EXCEPTIONS:</b> (1) Residential inpatient treatment for DUI; (2) Intermediate Punishment including house arrest, electronic monitoring, and treatment for DUI.	IP includes Restorative Sanction [RS; non-confinement for G'line purposes] and Restrictive Intermediate Punishment [RIP confinement for G'line purposes] definition based on minimum program requirements and classification via County IP Plan.

**PA COMMISSION ON SENTENCING  
SUMMARY OF SENTENCING ALTERNATIVES**

<b>SENTENCING ALTERNATIVE</b>	<b>TITLE 42 SECTIONS</b>	<b>PURPOSE</b>	<b>LIMITATIONS ON ELIGIBILITY</b>	<b>PERIOD OF TIME</b>	<b>MANDATORY APPLICATIONS</b>	<b>GUIDELINE APPLICATION</b>
<b>Partial Confinement</b>	9721(a)(3) 9724 9755	Probation would appear inappropriate, but further appears total confinement not required, and facilities available.	Confinement consistent with protection of public, consideration of Sentencing Guidelines, PSI, and mandatories. Use based on discretion of the court.	[MIN/MAX] Court shall specify the length of the term of partial confinement which may not exceed the maximum term for which defendant could be confined, and shall impose a minimum sentence which shall not exceed one half the maximum.	Generally does not satisfy mandatory incarceration requirement, as it is lesser sentence than Total Confinement <b>EXCEPTION:</b> Work Release for DUI.	Partial Confinement is considered Total Confinement for purposes of Guideline application. Guidelines provide recommendation for term of minimum sentence.
<b>Total Confinement</b>	9721(a)(4) 9725 9756	Total confinement necessary because: undue risk that defendant would commit another crime under lesser alternative; correctional treatment provided most effectively via commitment to institution; or lesser sentence depreciates seriousness of crime.	Confinement consistent with protection of public, must consider Guidelines, PSI, and mandatories. Use based on discretion of the court. Specify any maximum period up to the limit authorized by law.	[MIN/MAX] Court shall specify any maximum period up to the limit authorized by law, and shall impose a minimum sentence which shall not exceed one half the maximum.	Satisfies mandatory incarceration requirement.	Periods of incarceration based on Total Confinement for purposes of Guideline application. Guidelines provide recommendation for term of minimum sentence.



COUNTY	NO AUTH	DEADOUT	COM SVC	TESTING	EM	FINES	REHAB	HA	IND SVC	INTENS	REPORT	DLAIN	TASC	RESTIT	WK CAMP	WK REL	OTHER
1 ADAMS			X	X	X			X		X	X						
2 ALLEGHENY					X			X		X		X					X
3 ARMSTRONG			X	X	X			X		X		X					
4 BEAVER			X	X	X			X		X		X					
5 BEDFORD					X			X		X		X					
6 BERKS			X	X	X			X		X		X					
7 BLAIR			X	X	X			X		X		X					
8 BRADFORD			X	X	X			X		X		X					
9 BUCKS			X	X	X			X		X		X					
10 BUTLER			X	X	X			X		X		X					
11 CAMBERLA			X	X	X			X		X		X					
12 CAMERON			X	X	X			X		X		X					
13 CARBON			X	X	X			X		X		X					
14 CENTRE			X	X	X			X		X		X					
15 CHESTER			X	X	X			X		X		X					
16 CLARION			X	X	X			X		X		X					
17 CLEARFIELD			X	X	X			X		X		X					
18 CLINTON			X	X	X			X		X		X					
19 COLUMBIA			X	X	X			X		X		X					
20 CRAWFORD			X	X	X			X		X		X					
21 CUMBERLAND			X	X	X			X		X		X					
22 DAUPHIN			X	X	X			X		X		X					
23 DELAWARE			X	X	X			X		X		X					
24 ELK			X	X	X			X		X		X					
25 ERIE			X	X	X			X		X		X					
26 FAYETTE			X	X	X			X		X		X					
27 FOREST			X	X	X			X		X		X					
28 FRANKLIN			X	X	X			X		X		X					
29 FULTON			X	X	X			X		X		X					
30 GREENE			X	X	X			X		X		X					
31 HUNTINGDON			X	X	X			X		X		X					
32 INDIANA			X	X	X			X		X		X					
33 JEFFERSON			X	X	X			X		X		X					
34 JUNIATA			X	X	X			X		X		X					
35 LACKAWANNA			X	X	X			X		X		X					
36 LANCASTER			X	X	X			X		X		X					
37 LAWRENCE			X	X	X			X		X		X					
38 LEBANON			X	X	X			X		X		X					
39 LEHIGH			X	X	X			X		X		X					
40 LUZERNE			X	X	X			X		X		X					
41 LYCOMING			X	X	X			X		X		X					
42 MCKEAN			X	X	X			X		X		X					
43 MERCER			X	X	X			X		X		X					
44 MIFFLIN			X	X	X			X		X		X					
45 MONROE			X	X	X			X		X		X					
46 MONTGOMERY			X	X	X			X		X		X					
47 MONTGOMERY			X	X	X			X		X		X					
48 NORTHAMPTON			X	X	X			X		X		X					
49 NORTHAMBERLAND			X	X	X			X		X		X					
50 PERRY			X	X	X			X		X		X					
51 PHILADELPHIA			X	X	X			X		X		X					
52 PIKE			X	X	X			X		X		X					
53 POTTER			X	X	X			X		X		X					
54 SCHUYLKILL			X	X	X			X		X		X					
55 SNYDER			X	X	X			X		X		X					
56 SOMERSET			X	X	X			X		X		X					
57 SULLIVAN			X	X	X			X		X		X					



**PA COMMISSION ON SENTENCING  
SUGGESTED DRAFT LEGISLATION [1-15-98]**

**Title 42: Intermediate Punishment [Ineligible Offender]**

**§9729. Intermediate punishment**

(c) Ineligibility.--

(1) A person convicted of any of the following offenses shall be ineligible for sentencing under this section:

- 18 Pa.C.S. Sec. 2502 (relating to murder).
- 18 Pa.C.S. Sec. 2503 (relating to voluntary manslaughter).
- 18 Pa.C.S. Sec. 2702(a)(1) or (2) (relating to aggravated assault).
- 18 Pa.C.S. Sec. 2703 (relating to assault by prisoner).
- 18 Pa.C.S. Sec. 2704 (relating to assault by life prisoner).
- 18 Pa.C.S. Sec. 2901 (relating to kidnapping).
- 18 Pa.C.S. Sec. 3121 (relating to rape).
- 18 Pa.C.S. Sec. 3122.1 (relating to statutory sexual assault).
- 18 Pa.C.S. Sec. 3123 (relating to involuntary deviate sexual intercourse).
- 18 Pa.C.S. Sec. 3124.1 (relating to sexual assault).
- 18 Pa.C.S. Sec. 3125 (relating to aggravated indecent assault).
- 18 Pa.C.S. Sec. 3126 (relating to indecent assault).
- 18 Pa.C.S. Sec. 3301(a) (relating to arson and related offenses).
- 18 Pa.C.S. Sec. 3701(a)(1)(i), (ii), or (iii) (relating to robbery).
- 18 Pa.C.S. Sec. 3702 (relating to robbery of motor vehicle).**
- 18 Pa.C.S. Sec. 3923 (relating to theft by extortion).
- 18 Pa.C.S. Sec. 4302 (relating to incest).
- 18 Pa.C.S. Sec. 5121 (relating to escape).

(2) An offense under this subsection also includes a conviction under 18 Pa.C.S. Sec. 3502 (relating to burglary) where ~~the grading of the offense was a felony of the first degree under section 3502(c)(1).~~ **at the time of the offense any person is present.**

(3) A person sentenced under 18 Pa.C.S. Sec. 6314 (relating to sentencing and penalties for trafficking drugs to minors) or 7508 (relating to drug trafficking sentencing and penalties) shall be ineligible for sentencing under this section.

**(4) A person subject to a sentence the calculation of which included a deadly weapon enhancement as defined pursuant to the sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing or any offense for which possession of a deadly weapon is an element of the statutory definition of the crime shall be ineligible for sentencing under this section.**

**Title 42: Intermediate Punishment [Ineligible Offender]**

**§9763. Sentence of intermediate punishment.**

\* \* \*

(c) Restriction.--A defendant convicted under 75 Pa.C.S. ~~§1543(b) (relating to driving while operating privilege is suspended or revoked)~~ or §3731(e) (relating to driving under the influence of alcohol or a controlled substance) may only be sentenced to intermediate punishment:

(1) In a residential inpatient program or in a residential rehabilitative center; **or**

(2) By house arrest or and electronic surveillance combined with drug and alcohol treatment; **or**

**(3) In a partial confinement work release program.**

**Title 42:        *Prohibition of Parole [Shock Incarceration]***

**§9755. Sentence of partial confinement**

(a) General rule.-In imposing a sentence involving partial confinement the court shall specify at the time of sentencing the length of the term during which the defendant is to be partially confined, which term may not exceed the maximum term for which he could be totally confined, and whether the confinement shall commence in a correctional or other appropriate institution.

(b) Minimum sentence.-The court shall impose a minimum sentence of partial confinement which shall not exceed one-half of the maximum sentence imposed.

\* \* \*

**(h) Prohibition of parole with an intermediate punishment sentence.-The court may impose a sentence to imprisonment without the right to parole under this subsection only when:**

**(1) sentence is imposed pursuant to section 9763 (relating to sentence of intermediate punishment) in which case the sentence shall specify the number of days of partial confinement to be served; and**

**(2) the maximum sentence of partial confinement imposed on one or more indictments to run consecutively or concurrently total 90 days or less.**

**Title 42:        *Prohibition of Parole [Shock Incarceration]***

**§9756. Sentence of total confinement**

(a) General rule.-In imposing a sentence of total confinement the court shall at the time of sentencing specify any maximum period up to the limit authorized by law and whether the sentence shall commence in a correctional or other appropriate institution.

(b) Minimum sentence.-The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed.

(c) Prohibition of parole **for summary offenses** ~~-Except in the case of murder of the first degree, the~~ **The** court may impose a sentence to imprisonment without the right to parole **under this subsection** only when:

(1) a summary offense is charged.

(2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and

(3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

**(d) Prohibition of parole with intermediate punishment sentences. The court may impose a sentence to imprisonment without the right to parole under this subsection only when:**

**(1) sentence is imposed pursuant to section 9763 (relating to sentence of intermediate punishment) in which case the sentence shall specify the number of days of total confinement also to be served; and**

**(2) the maximum sentence of total confinement imposed on one or more indictments to run consecutively or concurrently total 90 days or less.**