

An ACLU-PA Courtroom Guide to Representing Defendants in Contempt and Probation/Parole Hearings for Nonpayment of Fines, Costs, and Restitution¹

Legal Background

1. The burden of proof is on the Commonwealth to show that the defendant has willfully refused to pay—which means showing that the defendant has the ability to pay. *See Commonwealth v. Eggers*, 742 A.2d 174, 175-76 (Pa. Super. Ct. 1999).²
 - a. Nonpayment standing alone is insufficient to show willfulness. *See Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018).³
 - b. The Commonwealth can satisfy its burden only if the evidence shows that the defendant either: 1) had the money to pay (after meeting his basic life needs) and refused to do so, or 2) that the defendant had not made a bona fide effort to acquire the work necessary to pay. *See Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018).⁴
2. Prior to punishing the defendant for nonpayment, the *court* must inquire into the reasons for nonpayment, not wait for the defendant to raise inability to pay as a defense. *See Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984).⁵
 - a. The Superior Court has held that a trial court can only hold a defendant in contempt or find a violation of probation/parole after it makes findings on the record pertaining to the defendant’s ability to pay. *See Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018).⁶
3. In civil contempt proceedings, even if the court finds that the defendant was able to pay—and is therefore in contempt—it can only impose a purge condition if it finds *beyond a reasonable doubt* that the defendant has the present ability to meet that purge, which is a separate question from whether the defendant is in contempt. *See Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977).⁷

¹ More detailed materials—which include detailed citations—addressing ability to pay, contempt, and probation/parole are available on our website: www.aclupa.org/debtorsprisons

² *Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977) (the “general rule is that in civil contempt proceedings the burden is on the complaining party to prove noncompliance by a preponderance of the evidence”). Note that while *Barrett* and civil contempt case law generally describe “inability to comply” with a court order as an affirmative defense to be proven by the alleged contemnor, the constitutional procedural protections outlined in *Bearden* require that the Commonwealth show the defendant *can* comply. *See, e.g., Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984) (even where the defendant did not “offer any evidence concerning his indigency,” the trial court violated his constitutional rights because it did not “inquire into the reasons for appellant’s failure to pay [n]or did it make any findings pertaining to the willfullness of appellant’s omission as required by *Bearden*”).

³ *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018) (contempt for nonpayment “has a *mens rea* element of specifically intending to defy the underlying court order,” which requires that the court “examine the totality of the defendant’s life circumstances”).

⁴ *Id.*; *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973) (defendant who is “penniless and unable, through no fault of his own, to pay any sum on the delinquencies” is not in “willful noncompliance”).

⁵ *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (“a sentencing court must inquire into the reasons for the failure to pay”); *Dorsey*, 476 A.2d at 1312.

⁶ *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018); *Dorsey*, 476 A.2d at 1312; *Commonwealth v. Eggers*, 742 A.2d 174, 175-76 (Pa. Super. Ct. 1999); *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994).

⁷ In civil contempt, courts allow a defendant to “purge” the finding of contempt and escape punishment if the defendant completes a certain action. A common purge condition is paying money, such as “30 days in jail unless

4. Pennsylvania law flatly prohibits jailing indigent defendants for nonpayment. This also prohibits a jail sentence coupled with a purge condition for indigent defendants. *See Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981).⁸

Presenting a Defense

1. Contest that the defendant is in contempt and/or in violation of the defendant's probation/parole.
2. The defendant should offer evidence about his financial resources and explain why he has not paid.
 - a. If the defendant is indigent and unable to afford his basic life needs, put those facts on the record: can the defendant afford housing, food, medical care, transportation, and dependent care without public assistance?⁹
 - b. It may help to have the defendant fill out a standardized ability-to-pay evaluation form (income and expense statement) and testify from that.
 - c. The defendant will also need to explain how he or she has looked for work, or for more work if underemployed.
 - d. Ask the defendant to produce any relevant documents if they are available, such as paystubs, bills, or public benefits paperwork (including the Access Card used for food stamps and Medicaid).
3. If the evidence shows that the defendant was unable to pay, the defendant cannot be held in contempt and has not violated the terms of probation/parole.
 - a. Thus, even if a term of incarceration is not imposed, the defendant cannot be held in contempt or have probation extended. *See Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018).¹⁰
4. If your client is found in contempt or has his probation/parole revoked despite evidence of indigence, you may be able to get a stay by filing an appeal or quick release through a petition for a writ of habeas corpus.¹¹ Contact the ACLU of Pennsylvania with any questions or to discuss options and get sample pleadings.

the defendant pays \$100." *See Barrett*, 368 A.2d at 621 (court "should set conditions for purging the contempt and effecting release from imprisonment with which it is convinced Beyond [sic] a reasonable doubt, from the totality of the evidence before it, the contemnor has the present ability to comply").

⁸ *See Pa.R.Crim.P. 706* (fines and costs); *Pa.R.Crim.P. 456* (addressing summary cases); 42 Pa. Cons. Stat. § 9730(b)(2) (same); 18 Pa. Cons. Stat. § 1106(c)(2)(iii) (restitution). As the Commonwealth Court has explained, the Rules "preclude[] the possibility of imprisonment ever being imposed upon one whose indigency is established." *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (describing then-*Pa.R.Crim.P. 65*, which contained identical language to current Rule 706 and applied only to summary offenses). *See also Diaz*, 2018 PA Super 175 (finding of indigence "preclude[s] any determination" that the defendant's nonpayment "was willful").

⁹ Defendants are presumed indigent if they receive means-based public assistance the services of the public defender. *Eggers*, 742 A.2d at 176 n.1. These standards are also used in the model bench card endorsed in *Diaz*, 2018 PA Super 175 at n. 23, and *Smetana*, 2018 PA Super 176 at n. 10. Look generally to the ACLU-PA guide on ability to pay and the discussion regarding the test for indigence being whether a defendant can afford his basic life needs.

¹⁰ If the defendant is unable to pay, he has not violated the court's order. *See Diaz*, 2018 PA Super 175 (finding of indigence "preclude[s] any determination" that the defendant's nonpayment "was willful," which is a prerequisite for finding a defendant in contempt); *Rosenberry*, 645 A.2d at 1331 (nonpayment of a fine is a technical violation only if the defendant willfully refused to pay).

¹¹ *Pa.R.A.P. 1764* explains that in criminal cases where no other rule applies, the rules governing civil appeals apply. Accordingly, a defendant can seek a stay pursuant to *Pa.R.A.P. 1732*.