IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MAP 2018 NO. 46

COMMONWEALTH OF PENNSYLVANIA,
Appellant

V.

CHRISTIAN LEE FORD,
Appellee

BRIEF OF AMICUS CURIAE DEFENDER ASSOCIATION OF PHILADELPHIA PA. ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Appeal From The Order Of The Superior Court At No. 620 MDA 2017, Dated November 30, 2017, Reconsideration Denied February 9, 2018, Reversing The PCRA Order Of The Lancaster County Court Of Common Pleas, Criminal Division, At Nos. CP-36-CR-0001443-2016, CP-36-CR-0001496-2016, And CP-36-CR-0002530-2016 Dated March 10, 2017 And Remanding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATEMENT OF INTEREST OF THE AMICUS CURIAE

Defender Association Of Philadelphia

The Defender Association of Philadelphia is a private, non-profit corporation which represents a substantial percentage of the criminal defendants in Philadelphia County at trial, at probation and parole revocation proceedings, and on appeal. The Association is active in all of the trial and appellate courts, as well as before the Pennsylvania Board of Probation and Parole. The Association attempts to insure a high standard of representation and to prevent the abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

Pennsylvania Association of Criminal Defense Lawyers

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As amicus curiae, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed in Pennsylvania, and work to achieve justice and dignity for defendants. PACDL includes approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

SUMMARY OF ARGUMENT

The Commonwealth does not dispute that the mandatory unambiguous language of 42 Pa.C.S. § 9726 prohibits a judge from imposing a fine unless he first determines "(1) the defendant is or will be able to pay the fine." "The court shall not sentence a defendant to pay a fine" unless this determination "appears of record." Id.

The Commonwealth's sole argument is that this Court should carve out a statutory exception to this mandatory judicial duty where the parties agree in a proposed plea agreement to a fine because such agreements are contractual in nature. This Court has eschewed reading exceptions into statutory provisions as being beyond its proper role, and should not do so here.

The Court has noted that the analogy of plea agreements to contracts is limited. Contracts, unlike plea agreements, are not subject to oversight by a third person, a judge, who has the discretion and responsibility where appropriate to reject the proposed agreement of the parties. Pa.R.Crim.P. 590 (court has discretion whether to accept guilty pleas and agreements).

The judge may not ignore the mandatory statutory duty to determine whether the defendant is or will be able to pay a fine before accepting a plea agreement and imposing a fine. Contract principles provide no support for the Commonwealth's position. It has long been established that terms of contracts are unenforceable where

in their formation or performance they are in violation of a statute.

Finally, it is important that this Court disavow the incorrect rulings of the Superior Court panels in this and other cases concerning costs. The Superior Court panels have held that costs may be imposed without regard to the ability of the defendant to pay them, failing to follow Rule 706 of the Rules of Criminal Procedure promulgated by this Court.

ARGUMENT

1. The Judge Violated His Mandatory Statutory Duty When He Accepted A Proposed Plea Agreement That Contained A Fine Without Determining Whether The Defendant Had The Ability To Pay That Fine.

The Commonwealth-appellant does not dispute that a judge has a mandatory statutory duty under 42 Pa.C.S. § 9726 to consider whether a defendant has the ability to pay a fine before he imposes it. "The plain language of Section 9726(c) simply dictates that the defendant's ability to pay the fine must 'appear of record'." Commonwealth brief, 8.[1] The Commonwealth, in the face of the plain unambiguous mandatory language of Section 9726 and an *en banc* decision of the Superior Court, concedes as a general matter that a sentence is illegal under Section 9726 when a judge does not make the requisite determination of an ability to pay before imposing a sentence of a fine. Commonwealth v. Boyd, 73 A.3d 1269, 1273-74 (Pa. Super. 2013) (*en banc*) (sentence of a fine is illegal where there is a lack of record evidence

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[1] The Commonwealth then makes the non-sequitur argument that because a defendant agrees on the record to pay a fine as part of a plea bargain, this conduct shows that he is able to pay the fine. Commonwealth brief, 9. The Commonwealth cannot and does not point to anything in the plea agreement or the transcript that supports a finding of an ability to pay. The Superior Court correctly concluded "that no inquiry was made, and no record existed, as to Appellant's ability to pay the agreed - upon fines at the time of his sentencing hearing." Superior Court memorandum opinion, November 30, 2017, at 3 (Exhibit A).

to support a finding of an ability to pay under 42 Pa.C.S. § 9726).[2] See, e.g., Commonwealth v. Thomas, 879 A.2d 246, 264 (Pa. Super. 2005) (sentence of a fine vacated because judge did not make requisite determination of an ability to pay under 42 Pa.C.S. § 9726; remand for resentencing after determination of defendant's ability to pay a fine).[3]

In pertinent part 42 Pa.C.S. § 9726 provides:

. . . .

> (c) Exception - The court shall not sentence a defendant to pay a fine unless it appears of record that:
>
> (1) the defendant is or will be able to pay the fine ....

For cases where the parties present a plea agreement that contain an agreement to pay a fine the Commonwealth asks this Court to carve out an exception to the statute's mandatory judicial duty to determine an ability to pay at sentencing. However, Section 9726 contains no guilty plea exception to its prohibition against imposing a fine without first determining that the defendant has an ability to pay. This Court has consistently refused to rewrite statutes by supplying omissions or engrafting exceptions to the plain language of a statute, and should not do so here.

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[2] Rule 706 (C), Pa.R.Crim.P., also requires a determination at sentencing of whether there is an ability to pay a fine (or costs). See infra 12-17.

[3] The Superior Court ordered the same limited remand relief in this case. Exhibit A, 5.

See, e.g., Commonwealth v. Mazzetti, 44 A.3d 58, 67 (Pa. 2012) ("This Court may not supply omissions in a statute . . . ."); Castellani v. Scranton Times, L.P., 956 A.2d 937, 950 (Pa. 2008) (refusing to engraft upon the Shield Law an exception to protection for reporter sources since it was not authorized by the statutory text); Commonwealth v. Scott, 532 A.2d 426, 428 (Pa. 1987) ("the question of what exceptions to it (the statute) are to be recognized, is a matter for the state legislature . . . and cannot be supplemented by judicial fiat no matter how well intended.")

The Commonwealth contends that this Court must recognize a statutory exception to Section 9726 and refuse to correct an illegal sentence in violation of that statute because the fine here was part of a plea bargain. Like the Superior Court *en banc* this Court should hold "that a criminal defendant cannot agree to an illegal sentence, so the fact that the illegality was a term of his plea bargain is of no legal significance." Commonwealth v. Rivera, 154 A.3d 370, 381 (Pa. Super. 2017) (*en banc*) (*quoting* Commonwealth v. Gentry, 101 A.3d 813, 819 (Pa. Super. 2014)).

The Commonwealth's only argument is that plea agreements are contractual in nature and therefore each party must abide by all of the terms of an agreement.[4]

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[4] The Commonwealth relies on a single panel decision of the Superior Court as binding authority for this Court. Commonwealth v. Gardner, 632 A.2d 556 (Pa. Super. 1993). Commonwealth brief, 10-12. That decision cited to no authority in support of its conclusory ruling and is neither persuasive nor binding precedent for this Court. Further Gardner has been effectively overruled by a subsequent *en banc* opinion of the Superior Court that holds that a plea continue...

There are major flaws with this contract based claim. Commonwealth brief, 9-12.

Although we have an adversary system, a judge is not a potted plant. There are many contexts where the agreement of the parties is not controlling, and the judge must disregard it to enforce the law or the rights of a party. See, e.g., M & P Management v. Williams, 937 A.2d 398 (Pa. 2007) (lack of jurisdiction non-waivable by parties); Commonwealth v. Pfender, 421 A.2d 791, 796 (Pa. Super. 1980) (lie detector results are unreliable and inadmissible despite stipulation of parties to admissibility). In the probation and parole context this Court has held that search and seizure rights will be enforced despite agreements signed by defendants agreeing to searches deemed unreasonable by the Court. E.g., Commonwealth v. Scott, 698 A.2d 32, 36 (Pa. 1997), *rev'd on other grounds*, Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998). "[W]e opined that Scott's parole agreement was immaterial to Scott's Fourth Amendment right against unreasonable searches and seizures." Commonwealth v. Arter, 151 A.3d 149, 155 (Pa. 2016).

Judges have mandatory duties with respect to sentencing that apply to all proceedings, including guilty pleas. In Commonwealth v. Taylor, 104 A.3d 479 (Pa. 2014), the defendant pled guilty, and was sentenced for a DUI offense. Id., at 481-84.

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[4]...continue
agreement cannot validly contain an agreement for an illegal sentence. Commonwealth v. Rivera, supra, 154 A.3d at 381.

This Court held that the sentence was illegal because the judge proceeded to sentencing without first obtaining and considering a drug and alcohol assessment as mandated by statute. Id. at 492-93. "[T]he assessment required by Section 3814(2) is not discretionary; it is a mandatory component of the DUI sentencing scheme enacted by the legislature." Id. at 493 n.18.

Likewise, for every offense where the judge is considering imposing a fine the Legislature has mandated that the judge cannot impose a fine unless she first determines that the defendant has an ability to pay a fine.

The Commonwealth is correct that this Court has generally recognized that plea agreements are scrutinized with concepts related to contract law, but it has also cautioned that "the analogy of a plea agreement as contract is not a perfect one." Commonwealth v. Martinez, 147 A.3d 517, 531 (Pa. 2016). A significant difference from contract law is that a meeting of the minds between the two parties is not controlling because a third party, the judge, can refuse to accept an agreement by the parties. See, e.g., Pa.R.Crim.P. 590 ("The judge may refuse to accept a plea of guilty or nolo contendere...."); Commonwealth v. Wilson, 335 A.2d 777, 778 (Pa. Super. 1975) ("The decision whether to accept a plea bargain is the exclusive discretion of the trial judge and is not reviewable."). Even after accepting a plea agreement the judge has the discretion to order the guilty plea withdrawn. See, e.g., Pa.R.Crim.P.

591(A); Commonwealth v. Rosario, 679 A.2d 756 (Pa. 1996) (trial court did not abuse its discretion in ordering withdrawal of plea accepted pursuant to a plea agreement).

The Commonwealth asks this Court to override the plain and unambiguous statutory obligation of § 9726 by asserting, without any support, that determining an ability to pay "threatens to burden or even derail the plea-bargaining process." Commonwealth brief, 9. This Court, however, has always refused on separation of powers grounds to disregard statutory language based on this Court's view of the best policy. See, e.g., Commonwealth v. Scott, supra, 532 A.2d at 428 ("strong as some of these criticisms of the statute may be ... statute cannot be supplemented by judicial fiat no matter how well-intended."); Cali v. City of Philadelphia, 177 A.2d 824, 835 (Pa. 1962) ("[W]e have no power ... to rewrite Legislative Acts or Charters, desirable as that sometimes would be."). Further, this statutory requirement of determining an ability to pay before imposing a fine has been in existence since 1974. 42 Pa.C.S.A. 9726 (Credits). During the 45 years since enactment the Legislature has not found it necessary to amend the statute and remove the mandatory requirement because of any practical difficulties in enforcement. It is also apparent that very often it will "appear of record" (42 Pa.C.S. §9726) before sentencing whether a defendant has the ability to pay-a-fine, and many other times a few questions will suffice to make the

determination.[5]

The Commonwealth's attempt to rely on principles of contract law should be unavailing for the reasons already advanced, and also because contract law provides no support for the Commonwealth's position. The Commonwealth's brief does not cite any contract law cases. It is well established in Pennsylvania that provisions of contracts are unenforceable when they violate a statute. See, e.g., McIlvaine Trucking v. Worker's Compensation Appeal Board, 810 A.2d 1280, 1286-87 (Pa. 2002). "[A] bargain is illegal if either the formation or performance of it are prohibited by statute." Employer's Liability Assurance Corp. v. Fischer & Porter Co., 75 A.2d 8, 10 (Pa. Super. 1930).

> In general, parties may contract as they wish... At the same time, however, freedom of contract is not absolute. 'A Promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or if the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.'

Central Dauphin School District v. American Casualty Company, 426 A.2d 94, 96 (Pa. 1981) (citations omitted) (*quoting* Restatement (Second) of Contracts Tentative

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[5] As the ACLU amicus brief makes clear, when monetary sentences are imposed in violation of statutes requiring a determination of an ability to pay, the imposition of such sentences can have severe consequences on indigent defendants. The Commonwealth advances no societal interest in maintaining such illegal sentences.

Draft).

This Court should hold that the defendant's fines are illegal because they were imposed in violation of 42 Pa.C.S. § 9726.[6] The defendant gains no windfall if relief is granted here. All he gets on remand is the on the record determination of whether he has the ability to pay the fines imposed that he was entitled to before the judge accepted this term of the plea argument. If the judge determines that he has an ability to pay the fines that were imposed the fines would be reinstated.[7]

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[6] Although the plain unambiguous language of Section 9726 makes no distinction between discretionary and mandatory fines, the Superior Court erroneously denied relief for the mandatory fines. The panel relied on a single case, Commonwealth v. Gipple, 613 A.2d 600 (Pa. Super. 1992). Exhibit A, 2. Gipple provides no support for the Superior Court's ruling because it is inapposite, considering and rejecting only a constitutional issue. "Appellant does not argue that a failure to examine one's ability to pay is violative of any legislative act." Id. at 121 n.1. The Superior Court then simply notes in dictum in Gipple in conclusory fashion that Section 9726 does not apply to mandatory fines, citing only to Commonwealth v. Brown, 566 A.2d 619 (Pa. Super. 1989), a case that did not even cite or discuss Section 9726. Id. Brown relied solely on the language of a particular mandatory sentencing act, 18 Pa.C.S. § 7508, that was later held unconstitutional by this Court. Commonwealth v. Mattteo, 177 A.3d 182, 191 (Pa. 2018).

[7] If it is determined that there is an inability to pay the fines, only that illegal term of the agreement needs to be vacated. The fines at issue here were indisputably a very minor part of this plea agreement where the defendant agreed to two to four years of incarceration, a period of probation, and costs of over $4,400. Exhibit A, 1; R.R. 62A-65A. Throughout this litigation, both here and in the lower courts, neither party has sought to vacate the guilty plea, and there would be no basis for doing so. See, e.g., Commonwealth v. Alvarado, 276 A.2d 526, 529-30 (Pa. 1971) (fair relief here for breach of one part of plea agreement is modification of sentence, not vacating plea). See also, e.g., Huber v. Huber, 470 A.2d 1385, 1389-90 (Pa. Super. 1984) (where contract partially performed, and invalid term not the primary purpose of the contract or essential, relief should be not enforcing the invalid provision); Forbes v. Forbes, 48 A.2d 153, 156 (Pa. Super. 1946) (same).

2. Rule 706 Of The Rules Of Criminal Procedure Prohibits A Judge From Imposing Costs Without First Determining Whether They Should Be Reduced Or Waived Based On Financial Means And An Inability To Pay.

a. Introduction

The defendant in this case has been assessed court costs of over $4400 without any determination of whether he is or will be able to pay those costs. See R.R. 62a-65a. The Superior Court held that this issue was "waived for lack of development." Exhibit A, p. 5 n.2. The allocatur grant is limited to the closely related issue concerning fines.

Amicus addresses this issue only because the Superior Court, after finding waiver, alternatively held that "we find that Appellant's claim that the imposition of costs without a pre-sentence hearing on his ability to pay rendered his sentence illegal lacks any legal basis." Id. The Superior Court panel relied on a single case, another panel decision of that court, Commonwealth v. Childs, 63 A.3d 323 (Pa. Super. 2013). As we will demonstrate, both are incorrect, impermissibly disregarding Rule 706 (C) of the Rules of Criminal Procedure.

It is important that this Court explicitly not endorse the Superior Court panel decisions concerning costs. Countless indigent defendants in Pennsylvania are affected every day. As explained more fully in the ACLU amicus brief, the Superior

Court's panel decisions concerning costs lead to serious adverse consequences for indigent defendants, with anxiety, failure to pay hearings and incarceration.

b. Recognition That Costs Are Appropriate Only Where There Is An Ability To Pay.

As a general matter, this Court has long been sensitive to the issue of whether costs should be imposed (here, as typical, thousands of dollars) on those that cannot afford them. A defendant "should repay the Commonwealth the necessary costs and expenses of prosecution, if he is found guilty beyond a reasonable doubt, and is financially able to do so." Commonwealth v. Coder, 415 A.2d 406, 408 (Pa. 1980) (*quoting* Commonwealth v. Coder, 382 A.2d 131, 137 (Pa. Super. 1977) (Cercone, J., dissenting). Of course, "the notion that the costs of crime should be shifted from the public fisc onto financially able wrongdoers is a legitimate one." Commonwealth v. Garzone, 34 A.3d 67, 80 (Pa. 2012).

These well established notions of fairness in the treatment of indigent defendants are reflected in a specific rule adopted by this Court, Rule 706.

c. Rule 706, Pa.R.Crim.P., Bars The Imposition Of Costs Without Determining That The Defendant Has An Ability To Pay.

Pennsylvania Rule of Criminal Procedure 706 provides in pertinent part:

(C) The court, in determining the amount and method of

> payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations.

Pa.R.Crim.P.706 (C).[8]

It is well settled that the plain and unambiguous language of the Pennsylvania Rules of Criminal Procedure may not be disregarded. See, e.g., Commonwealth v. Hagans, 394 A.2d 470 (Pa. 1978); Commonwealth v. Milliken, 300 A.2d 78 (Pa. 1973). The language of Rule 706 (C) is plain and unambiguous with regard to fines and costs, and sets forth the court's obligation at sentencing. Section (C) states that "in determining the amount and method of payment of a fine or costs (the judge) shall . . .", and it then sets forth the judge's mandatory obligation. "The word 'shall' by definition is mandatory and it is generally applied as such." In re Adoption of L.B.M., 161 A.3d 172, 179 (Pa. 2017), (*quoting* Chanceford Aviation Props. L.L.P. v. Chanceford Twp. Bd. of Supervisors, 923 A.2d 1099, 1104 (Pa. 2007)). The mandatory obligation set forth in Section C at sentencing in determining fines or costs is that the judge "shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means . . . ." Rule 706 (C).[9]

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[8] The original Rule was 1407 (C). It was renumbered as Rule 706 (C), and was essentially identical to the current Rule's subsection (C).

[9] In sharp contrast to fines and costs neither this Court in Rule 706, nor the

continue...

The panel decision of the Superior Court in this case, and some past panel decisions, with no analysis, have held that, unlike fines, an inability to pay determination is not required for costs at sentencing under Rule 706. Commonwealth v. Childs, 63 A.3d 323, 326 (Pa. Super. 2013) (court may refuse to consider an ability to pay when imposing costs); Commonwealth v. Hernandez, 917 A.2d 332, 336-37 (Pa. Super. 2007) (same).

These panel decisions are obviously wrong.[10] The Court has made clear that limitations not contained in its rules should not be read into them. See, e.g.,

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[9]...continue
Legislature, has provided that ability to pay is a determination that must be made at sentencing for orders of restitution for victims. 18 Pa.C.S. § 1106 (C)(1) in pertinent part provides as follows:

> (c) MANDATORY RESTITUTION-
>
> (1) The court shall order full restitution:
>
> (i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss.

[10] The General Assembly takes the same view that Rule 706 (C) applies at sentencing and vests the trial court with authority to reduce or waive costs based on the defendant's financial circumstances. In Act 96 or 2010, the legislature amended 42 Pa. Cons. Stat. §§ 9721 (c.1) and 9728 (b.2) so that a defendant is automatically liable for costs upon conviction (even if the court does not explicitly order it) "unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706 (C) (relating to fines or costs)." § 9728 (b.2); see also § 9721 (c.1) ("The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706 (C) (relating to fines or costs)."). As the legislative history explains, the references to Rule 706 (C) were intended to allow the "sentencing court" to "retain all discretion to modify or even waive costs in an appropriate case." Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010) PN 2181 (attached as Exhibit B).

Commonwealth v. Mullen, 333 A.2d 755 (Pa. 1975). "This Court consistently has held that the Rules of Criminal Procedure must be interpreted as written." Commonwealth v. Brocklehurst, 420 A.2d 385, 387 (Pa. 1980). The Superior Court panels have no authority to treat an important part of this Court's Rule governing costs as mere surplusage.[11]

The panel decisions of the Superior Court are also incorrect for another reason. They are inconsistent with an *en banc* decision that preceded them, Commonwealth v. Martin, 335 A.2d 424 (Pa. Super. 1975). Martin involved a defendant who had been appointed a public defender by the President Judge of the county based on a finding of indigency. Id. at 425-26. The defendant challenged the imposition of a fine by the sentencing judge who refused to consider his apparent indigency. Id. at 425-26. The *en banc* Court vacated the order to pay the fine (id. at 426) correctly, holding that "[i]n order to impose a fine, a sentencing judge must consider provisions of the Pennsylvania Rules of Criminal Procedure. Rule 1407 (c) . . . ." Id. at 425. "The court did not consider any further information to determine whether that finding

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[11] The statutory construction rules apply to construing the Rules of Criminal Procedure. Pa.R.Crim.P. 101(C). "Because the legislature is presumed to have intended to avoid mere surplusage, every word, sentence, and provision of a statute must be given effect." Allegheny Sportsmen's League v. Rendell, 860 A.2d 10, 19 (Pa. 2004) (*quoting* Independent Oil and Gas Association v. Board Assessment, 814 A.2d 180, 183 (Pa. 2002)). See 1 Pa.C.S. § 1921 ("Every statute shall be construed, if possible, to give full effect to all its provisions."). 1 Pa.C.S. § 1922(2) (It is presumed "[t]hat the General Assembly intends the entire statute to be effective and certain").

(of indigency) was erroneous – that is, he did not comply with provisions of Rule 1407 (now, 706 (C))". Id. at 426 (footnote omitted).

Because Rule 706 (C) by its clear terms applies equally to fines and costs Superior Court panels could not disregard the *en banc* holding in Martin.[12] "An opinion of the court *en banc* is binding on any subsequent panel of the appellate court in which the decision is rendered." Pa.R.A.P. 3103(b). See, e.g., In The Interest Of: A.A., 195 A.3d 896, 909 (Pa. 2018) ("We note the panel below correctly relied on Kemp (rather than a more recent inconsistent panel decision) as it was a binding *en banc* decision.").

Finally, if this Court somehow concluded that Rule 706 (C) is ambiguous as to whether there must be a sentencing determination of an ability to pay before costs are imposed, the result should be the same. In Commonwealth v. Garzone, supra, 34 A.3d at 75, this Court held that because statutes governing the imposition of costs are "penal in nature" they must be strictly construed.[13] That means that "'such language should be interpreted in the light most favorable to the accused....' Commonwealth

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[12] After Martin, some panel decisions did recognize that there must be an ability to pay determination pursuant to the Rule before imposing fines or costs. See, e.g., Commonwealth v. Adame, 526 A.2d 408, 409 (Pa. Super. 1987); Commonwealth v. Mead, 446 A.2d 971, 973-74 (Pa. Super. 1982). The Commonwealth Court has reached the same conclusion. See, e.g. Knighton v. Commonwealth, 600 A.2d 266, 267 (Pa. Cmwlth. 1991).

[13] See also Fordyce v. Clerk of Courts, 869 A.2d 1049, 1053 (Pa. Cmwlth. 2005) (costs statute as penal sanction must be strictly construed).

v. Huggins, 575 Pa. 395, 836 A.2d 862, 868 n.5 (2003) (*quoting* Commonwealth v. Booth, 564 Pa. 228, 766 A.2d 843, 846 (2001))." Id. In Garzone, for example, this Court held that the costs that the prosecution sought should not be recovered under the governing statute because "the question being equivocal (at best), the narrowing construction favoring appellees must prevail." 34 A.3d at 78.

CONCLUSION

For the foregoing reasons, this Court should hold that a judge in all cases may not impose a fine or costs at sentencing without first determining whether the defendant has the ability to pay them.

Respectfully submitted,

/S/

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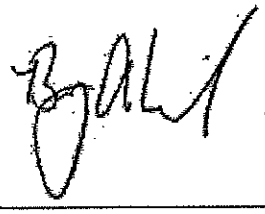

BRADLEY WINNICK, President
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Criminal Defense Lawyers

CERTIFICATION OF COMPLIANCE WITH RULE 531

I do hereby certify on this 26th day of February, 2019, that the Brief Of Amicus Curiae filed in the above captioned case on this day does not exceed 7,000 words. Using the word processor used to prepare this document, the word count is 4,472 as counted by WordPerfect.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/S/

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EXHIBIT "A"

2017 WL 5943470
Only the Westlaw citation
is currently available.
NON–PRECEDENTIAL DECISION—SEE SUPERIOR COURT I.O.P 65.37
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Christian Lee FORD, Appellant

No. 620 MDA 2017
|
Filed November 30, 2017

Appeal from the PCRA Order March 10, 2017, in the Court of Common Pleas of Lancaster County, Criminal Division at No(s): CP–36–CR–0001443–2016, CP–36–CR–0001496–2016, and CP–36–CR–0002530–2016

BEFORE: LAZARUS, DUBOW, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.:

*1 Christian Lee Ford (Appellant) appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546. Upon review, we reverse the order in part and remand for proceedings consistent with this memorandum.

On June 23, 2016, Appellant entered into a negotiated plea agreement for three informations, and was sentenced accordingly as follows.

CP–36–CR–0001443–2016 (Case No. 1443):

- two to four years of incarceration and a fine of $100 at count one (35 P.S. § 780–113(a)(30));
- two years of probation at count two (18 Pa.C.S. § 5104);
- one year of probation at count three (35 P.S. § 780–113(a)(32));

CP–36–CR–0001496–2016 (Case No. 1496):

- one to four years of incarceration and a fine of $1,500 at count one (75 Pa.C.S. § 3802(d)(1)(ii));
- count two (75 Pa.C.S. § 3802(d)(1)(iii)) merged;
- count three (75 Pa.C.S. § 3802(d)(2)) merged;
- 90 days of incarceration and a fine of $1,000 at count four (75 Pa.C.S. § 1543(b)(1));

CP–36–CR–0002530–2016 (Case No. 2530):

- three years of probation and a fine of $100 at count one (35 P.S. § 780–113(a)(16));
- one year of probation at count two (35 P.S. § 780–113(a)(32)).

All periods of incarceration and probation were ordered to be served concurrently, and costs were imposed as to all counts.

Appellant did not file post-sentence motions or a direct appeal. On September 22, 2016, Appellant filed *pro se* a document entitled "Petition for Review," which the PCRA court properly treated as a timely-filed PCRA petition. The PCRA court appointed counsel, who filed an amended PCRA petition on Appellant's behalf.

On January 26, 2017, the PCRA court issued a notice pursuant to Pa.R.Crim.P. 907, indicating its intention to dismiss Appellant's petition without a hearing. Appellant did not file a response, and on March 10, 2017, the PCRA court dismissed Appellant's petition. Appellant timely filed a notice of appeal. [1]

Appellant raises two issues for our consideration.

> A. Whether the [PCRA] court ... erred in refusing post-conviction relief where the sentencing court imposed a penalty of fines and costs without a hearing on Appellant's ability to pay, or whether payment would interfere with Appellant's ability to pay restitution?
>
> B. Whether the [PCRA] court ... erred in denying post-conviction relief where trial counsel failed to object to, or take reasonable steps to correct, the imposition of an illegal sentence of fines on his client?

Appellant's Brief at 4.

"Our standard of review of a [PCRA] court order granting or denying relief under the PCRA calls upon us to determine 'whether the determination of the PCRA court is supported by the evidence of record and is free of legal error.' " ***Commonwealth v. Barndt***, 74 A.3d 185, 192 (Pa. Super. 2013) (quoting ***Commonwealth v. Garcia***, 23 A.3d 1059, 1061 (Pa. Super. 2011)).

***2** With respect to his first issue, Appellant contends that the PCRA court erred in rejecting his claim that the sentencing court imposed an illegal sentence of fines and costs without conducting a pre-sentence hearing on his ability to pay. [2] Appellant's Brief at 8–9.

Here, Appellant agreed to the imposition of fines and costs as part of his negotiated plea agreements. ***See*** Negotiated Plea Agreements, 6/23/2016; N.T. 6/23/2016, at 2–4, 7–8. Nevertheless, a PCRA petitioner may challenge the legality of a negotiated sentence. ***Commonwealth v. Rivera***, 154 A.3d 370, 381 (Pa. Super. 2017) (*en banc*); ***Commonwealth v. Gentry***, 101 A.3d 813, 819 (Pa. Super. 2014) ("[A] defendant cannot agree to an illegal sentence, so the fact that the illegality was a term of his plea bargain is of no legal significance.").

The PCRA court addressed this claim as follows.

> While there is no requirement in Pennsylvania that a trial judge must consider, in the

> first instance, a criminal defendant's ability to pay the costs of prosecution and attendant fees, such a requirement exists with respect to general fines.... 42 Pa.C.S.[ ] § 9726(c). This section does not, however, apply to the mandatory fine provisions applicable in this case.

PCRA Court Opinion, 3/10/2017, at 12.

A sentencing court may impose a fine as an additional sanction in certain circumstances. 42 Pa.C.S. § 9721(a); 42 Pa.C.S. § 9726(b). A sentencing court "shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa.C.S. § 9726(c). This Court has held that

> a claim that the trial court failed to consider the defendant's ability to pay a fine can fall into several distinct categories. First, a defendant may claim that there was no record of the defendant's ability to pay before the sentencing court. In the alternative, a defendant may claim that the sentencing court did not consider evidence of record. Finally, a defendant may claim that the sentencing court failed to permit the defendant to supplement the record.
>
> *3 After reviewing these categories, we conclude that only the first type of claim qualifies as non-waivable.... Section 9726(c) requires that it be "of record" that the defendant can pay the fine. Therefore, an argument that there was no evidence of the defendant's ability to pay constitutes a claim that the fine was imposed in direct contravention of a statute. Furthermore, a complete lack of evidence in the record would be apparent from the face of the record and would not require the application of reasoning or discretion on the part of the appellate court. Accordingly, we conclude [ ] that a claim raising the complete absence of evidence of the defendant's ability to pay is not subject to waiver for a failure to preserve the issue in the first instance.

Commonwealth v. Boyd, 73 A.3d 1269, 1273–74 (Pa. Super. 2013) (*en banc*). However, a pre-sentence hearing on the ability to pay is not required prior to the imposition of mandatory fines. ***Commonwealth v. Gipple***, 613 A.2d 600, 601 n. 1 (Pa. Super. 1992).

After review of the plea/sentencing transcript we agree with Appellant that no inquiry was made, and no record existed, as to Appellant's ability to pay the agreed-upon fines at the time of his sentencing hearing. As such, Appellant's claim falls under the first type set forth in ***Boyd***, and his claim challenges the legality of his sentence.

At Case No. 1496, Appellant was ordered to pay a fine of $1,500 for a violation of 75 Pa.C.S. § 3802(d)(1)(ii). The Motor Vehicle Code provides that a defendant convicted

under this subsection for a second offense shall "pay a fine of not less than $1[,]500...." 75 Pa.C.S. § 3804(c)(2)(ii). Appellant was ordered to pay the mandatory minimum fine, and thus Appellant was not entitled to a pre-sentence hearing on his ability to pay this fine.

Appellant was also ordered at this information to pay a fine of $1,000 for a violation of 75 Pa.C.S. § 1543(b)(1). A defendant convicted under this subsection "shall be sentenced to pay a fine of $500...." 75 Pa.C.S. § 1543(b)(1). As noted above, a pre-sentence hearing on the ability to pay is not required for mandatory fines. However, the sentencing court improperly imposed the mandatory fine applicable to a violation of 75 Pa.C.S. § 1543(b)(1.1)(i), not 75 Pa.C.S. § 1543(b)(1), the subsection under which Appellant actually was convicted.[3] Thus, because the fine imposed exceeded the statutorily mandated fine, and was imposed without a hearing on Appellant's ability to pay, that portion of the sentence is illegal.

At Case No. 2530, Appellant was ordered to pay a fine of $100 for a violation of 35 P.S. § 780–113(a)(16). A defendant "shall, on conviction thereof, be sentenced to imprisonment not exceeding one year **or** to pay a fine not exceeding five thousand dollars ($5,000), **or** both." 35 P.S. § 780–113(b) (emphasis added). The imposition of a fine for possession of a controlled substance is discretionary, and Appellant was entitled to a pre-sentence hearing on his ability to pay. ***See Commonwealth v. Thomas***, 879 A.2d 246, 264 (Pa. Super. 2005) (vacating sentence where trial court did not make specific findings on defendant's ability to pay the fine imposed).

At Case No. 1443, Appellant was ordered to pay a fine of $100 for a violation of 35 P.S. § 780–113(a)(30). A defendant "shall be sentenced to imprisonment not exceeding fifteen years, **or** to pay a fine not exceeding two hundred fifty thousand dollars ($250,000), **or** both **or** such larger amount as is sufficient to exhaust the assets utilized in and the profits obtained from the illegal activity." 35 P.S. § 780–113(f) (emphasis added). Again, the imposition of this fine was discretionary, and thus Appellant was entitled to a pre-sentence hearing on his ability to pay. ***Thomas***, 879 A.2d at 264.

4** With respect to his second issue, Appellant contends that trial counsel was ineffective for failing to object to, or take reasonable steps to correct, Appellant's illegal sentence of fines. Counsel was ineffective for failing to raise this claim; however, because we have granted relief as to the illegal portions of Appellant's sentences regarding fines, this claim is moot. The only remaining fine (count one of Case No. 1496) was a mandatory fine, and thus, as detailed hereinabove, no pre-sentence hearing was required. Accordingly, we find that counsel was not ineffective for failing to raise that meritless claim. ***See Commonwealth v. Tilley, 80 A.2d 649 (Pa. 2001) (holding that counsel will not be deemed ineffective for failing to raise a meritless claim).

In light of the foregoing, we reverse the order of the PCRA court in part, vacate

the fines imposed at Case No. 2530 and Case No. 1443, and remand for resentencing in accordance with 42 Pa.C.S. § 9726. We vacate Appellant's fine at count four of Case No. 1496 and remand for resentencing consistent with 75 Pa.C.S. § 1543(b)(1). We affirm the PCRA order in all other respects. [4]

Order denying PCRA relief reversed in part. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

All Citations

Not Reported in Atl. Rptr., 2017 WL 5943470

Footnotes

* Retired Senior Judge assigned to the Superior Court.

1 Appellant complied with the PCRA court's order to file a concise statement of errors complained of on appeal. The PCRA court did not provide an opinion pursuant to Pa.R.A.P. 1925(a), but instead relied upon its March 10, 2017 opinion, wherein the PCRA court addressed its reasons for denying Appellant's PCRA petition.

2 Notably, Appellant does not address his claim as to costs within the argument section of his brief. Appellant's Brief at 8–11 (addressing fines only). This issue is waived for lack of development. ***Harkins v. Calumet Realty Co.***, 614 A.2d 699, 703 (Pa. Super. 1992) ("Issues in the statement of questions presented and not developed in argument are also deemed waived."). Even if this Court were to address this claim, we find that Appellant's claim that the imposition of costs without a pre-sentence hearing on his ability to pay rendered his sentence illegal lacks any legal basis.

> Generally, a defendant is not entitled to a pre-sentencing hearing on his or her ability to pay costs. While Rule 706 **permits** a defendant to demonstrate financial inability either after a default hearing or when costs are initially ordered to be paid in installments, the Rule only **requires** such a hearing prior to any order directing incarceration for failure to pay the ordered costs.

Commonwealth v. Childs, 63 A.3d 323, 326 (Pa. Super. 2013) (internal citations and quotations omitted) (emphasis in original). If appellant at some point in the future is unable to make payments, then the sentencing court will be required to conduct a hearing on Appellant's ability to pay before ordering incarceration for failure to pay.

3 75 Pa.C.S. § 1543(b)(1.1)(i) provides that a defendant "shall be sentenced to pay a fine of $1,000 and to undergo imprisonment for a period of not less than 90 days."

4 If the Commonwealth believes that it is no longer receiving the benefit of the bargain it agreed to with Appellant, it may ask the PCRA court to vacate the convictions prior to resentencing.

EXHIBIT "B"

HOUSE OF REPRESENTATIVES
DEMOCRATIC COMMITTEE

BILL ANALYSIS

BILL NO: **SB1169** PN2181 SPONSOR: Sen. Waugh
COMMITTEE: Judiciary
DATE: September 15, 2010

PROPOSAL/EXECUTIVE SUMMARY: An act to amend title 42, (Judiciary Code), to further provide for the imposition of costs at sentencing in criminal matters, and for periodic increases.

EXISTING LAW: While this bill would amend 42 Pa. CSA §§9721, & 9728, it would do so by adding new subsections. The first statute addresses sentencing generally, and the latter addresses the specific topic of fines, costs, restitution, and other matters. This bill is in response to a specific court case. Amended on the floor on July 1, 2010, 42 Pa. CSA §§1725.1 and 3571 were amended, as explained below.

ANALYSIS: This bill is the senate version of HB2119, as it appeared in its final form, (PN3033). Thus, and because it is a mirror image of that bill, the analysis of HB2119, shall appear here in modified form. This bill is the senate version of the legislative response to an unusual case from the commonwealth court decided in May, 2009. In that case, ***Spotz v Commonwealth, et al.,*** 972 A2d. 125, (Pa. Cmwlth. 2009), a defendant, (a man under a sentence of death from Cumberland County), sued to stop the small but automatic deductions from his prison account of money applied to court costs, after his criminal conviction, on the grounds that the sentencing court had failed to include standard 'costs payment language' in the official sentencing order. Spotz was successful in his suit, and the DOC, was enjoined from making these deductions. (On behalf of the county official who had requested it) This bill would add new subsection (c.1), to §9721, to provide that regardless of whether a sentencing court includes a provision in a sentencing order imposing costs, that costs imposition will be automatic, except that under an amendment passed in committee on March 16, 2010, and which does differentiate this bill from HB2119, a court would retain all discretion to modify or even waive costs in an appropriate case, pursuant to Pa.R.Crim. P. 706(C). (Supreme Court Rule) The addition of new subsection (b.2), to §9728, accomplishes the same goal as to the statute specifically addressing the imposition of fines, costs, restitution, and other matters collateral to sentencing, with the same exception under criminal rule 706(C), added by the amendment in committee.

Addressing a flaw that was uncovered in two costs statutes of title 42, Pa. CSA §§1725.1 and 3571(c)(4), which provide for periodic costs increases tied to the consumer price index, and which sunset on January 1, 2010, an amendment was adopted on July 1, 2010. The amendment extended the sunset dates as to each statute to January 1, 2025. Amended again on the floor on September 14, 2010, the amendment amends 42 Pa. CSA §6327, by adding new subsection (c.1), to further provide that if a minor is facing one of several charges, murder, voluntary manslaughter, aggravated assault, robbery, rape, aggravated and common indecent assault, kidnapping, or conspiracy attempt or solicitation of any such offense, has not been released on bail, and is moving to transfer their case to the juvenile system, they may, with the consent of

the commonwealth attorney and a court order authorizing it, be housed in a secure detention facility approved by the department of public welfare until such time as the motion for transfer is denied, or they turn 18, in which event, the minor shall be transferred to the county jail, provided they have not posted bail.

EFFECTIVE DATE: 60 days from date of enactment. Moreover, the bill would only affect a sentencing taking place after the effective date. No retroactive application. The provisions which are the subject of the amendment of September 14, 2010, shall be effective immediately upon enactment. (Addition of new 42 Pa. CSA §6327(c.1))

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