

An Overview of Fines and Costs Procedures in Summary Cases

A. Summary:

- Courts must ensure that they set payment plans that defendants can personally afford.¹
- Courts must hold a hearing and make specific factual findings that the defendant is able to pay and willfully refusing to before putting a defendant in jail.²
- Defendants who are indigent or otherwise unable to afford to pay cannot be jailed for nonpayment.³
- No defendant can be jailed unless he is represented by counsel or executes a valid waiver of counsel and colloquy in accordance with Rule 121.⁴
- Before setting collateral, the court must make specific findings of fact in writing that there is a reasonable likelihood that the defendant will not appear for a hearing.⁵
- The court can only set collateral that the defendant can personally afford to post.⁶

B. Determining Ability to Pay:

- Defendants who are indigent are, as a matter of law, unable to pay while indigent.⁷
 - Indigence is defined as not being able to afford to meet basic life needs;⁸
 - Defendants who receive food stamps, Medicaid, TANF, Supplemental Security Income, or other public assistance are presumed indigent;⁹ and
 - Courts should use 125% of the federal poverty guidelines (\$15,000 for a family size of one) as a guide star and presume that defendants are indigent if their income is less.¹⁰
 - To overcome these presumptions of indigence, the court must actually inquire into the defendant's income and expenses.
- The Superior Court directs that a court determine a defendant's ability to pay by looking at that defendant's entire financial picture and "life circumstances" such as by using an ability-to-pay evaluation form, not by asking how much money they have on a given day.¹¹
- This is a question of only the defendant's finances—not extended family or friends from whom he or she can borrow money; just the defendant's own resources.¹²

C. Setting a Payment Plan:

- Payment plans, including those that are set at sentencing and those that are set when defendants default (or come to court because they cannot afford to pay) must be "reasonable" in light of the defendant's financial resources.¹³
- In setting a payment plan, the court must make findings regarding the defendant's ability to pay, based on his income and expenses—and regardless of the total amount of money that the defendant owes.¹⁴
- There are no minimum payment plans:¹⁵
 - Many defendants will be able to make regular payments of \$5 or \$10 per month but cannot afford to pay \$50 or \$100 consistently. With higher payments, many defendants fail to pay anything because they are worried that they will be jailed for not paying enough or have been told by court staff that there is no flexibility.

- While courts may instruct clerks that there is a “default” or standard payment plan (e.g., \$25), defendants must also be told that if they cannot afford that default amount, they have the right to a hearing with the judge to ask for a lower amount. Many judges also give their clerks authority to negotiate a payment plan with defendants.
- Defendants who are indigent and present evidence that they are unable to pay should have their payments temporarily suspended.¹⁶
 - For example, if a defendant has lost his or her job or is still looking for work.
 - In those cases, the court should have the defendant report back to the court within a reasonable period of time to check on their financial status.
- Defendants can agree to a payment plan without a hearing, but the court cannot impose one over the defendant’s objection without holding a hearing where it analyzes the defendant’s finances.¹⁷

D. Community Service:

- As an alternative to requiring payments, once a defendant defaults, the court has discretion to have that defendant perform community service to work off the balance.¹⁸
 - The term of community service, as well as the hourly rate, must be reasonable, and the court must take into account any disabilities or lack of access to transportation; the court should also consider other factors, such as child-care needs or any paid employment.
- Community service in traffic cases: there is an ongoing internal discussion among MDJs as to whether community service is available in traffic cases. AOPC has taken no position either way on this issue.¹⁹

E. Proceedings upon Default:

- Whenever a defendant who has defaulted appears on his or her own, or is arrested and brought to the court, the court must hold a payment determination hearing “immediately” where it examines the defendant’s financial status in accordance with the principles outlined above.²⁰
 - Rule 456 permits delaying such a hearing, but the defendant must be given a time and date for the payment determination hearing and released on recognizance.²¹
 - If the hearing is not held immediately, the court must vacate the bench warrant before the defendant leaves.²²
- At this payment determination hearing, the court can either set the defendant on a new payment plan or, in certain circumstances, hold the defendant in contempt.²³

1. Collateral:

- The only time the court may delay a hearing without releasing the defendant on recognizance is if the court has reasonable grounds to believe the defendant will not appear for that hearing—but the presumption is that all defendants are free to go.²⁴

- The court must consider each of the Rule 523 factors in determining whether reasonable grounds exist to believe the defendant will not return; it cannot focus on only one or two factors.²⁵
- If the court believes that such grounds do exist, the defendant—not the defendant’s friends or family—must be able to post that collateral; if he or she cannot, the court cannot set collateral.²⁶
- If the court sets collateral and jails the defendant, it should hold the payment determination hearing within 72 hours, as the commitment expires after that time.²⁷
- As a practical matter, the court should use this procedure sparingly if at all. In the time it takes the court to determine whether a defendant is able to afford to post the collateral, the court could have held an ability-to-pay hearing to place the defendant on a payment plan. Incarceration under these circumstances is almost always unconstitutional, and it is also a waste of judicial resources.²⁸

2. Contempt Proceedings at the Payment Determination Hearing:

- No matter how much money the defendant owes, the court can only hold a defendant in contempt under Rule 456 if the court finds that he or she “willfully” failed to pay. That is, the defendant is has the *present ability* to pay and is willfully refusing to do so.²⁹
- At the payment determination hearing, the court must affirmatively inquire into the defendant’s financial circumstances.³⁰
 - This inquiry must happen each and every time the defendant appears in court.³¹
 - The court should consider using an ability-to-pay evaluation form.
 - The court must make an explicit finding that the defendant is able to pay and willfully refusing to.³²
 - Pennsylvania law prohibits jailing indigent defendants for non-payment.³³
 - Even if the court determines a defendant is in contempt, it can impose other sanctions, such as community service, instead of incarceration.
- When courts impose imprisonment and offer the defendant an opportunity to escape jail by paying a certain amount of money, they are using their “civil contempt” authority and imposing a “purge condition.”³⁴
 - The court must find *beyond a reasonable doubt* that the defendant has the *present ability* to pay that purge amount of money; if he or she cannot, then the condition and any imprisonment is illegal.³⁵

3. The Right to Counsel:

- If the court is considering imposing jail, it must provide a free attorney to the defendant—and a defendant cannot be jailed if he or she was not represented by counsel.³⁶
 - A defendant cannot be penalized for asking for a lawyer, even if the court will have to reschedule the hearing.³⁷

- A defendant can waive counsel only after the court discusses with the defendant the six warnings in Rule 121 and the defendant actually understands and voluntarily waives his or her right to an attorney.³⁸
- Simply giving the defendant the contact information for the public defender—or having the defendant sign a waiver form without the Rule 121 discussion—is insufficient and an illegal denial of the right to counsel.³⁹
- If the defendant does waive the right to counsel, the court must also sign the waiver form, which is the court’s affirmation that it actually complied with this procedure.⁴⁰
- The defendant must also have a “timely opportunity to consult with counsel, *i.e.*, before he appears before the judge.”⁴¹

4. The Right to Appeal:

- At the outcome of the hearing, the court must also inform the defendant of the right to appeal to the court of common pleas within 30 days from whatever sentence the court imposes, be it a new payment plan or imprisonment.⁴²
- If the court actually imposes imprisonment, it must stay execution of that sentence for at least 30 days, so that the defendant can appeal, and give the defendant a date on which to turn himself or herself in.⁴³
 - A defendant can waive that 30-day stay only after the court discusses with the defendant the right to appeal and that the appeal will be heard by a judge on the court of common pleas.⁴⁴ The court should also inform the defendant of the right to proceed in forma pauperis (without paying appeal filing fees).

¹ 42 Pa. Cons. Stat. § 9730(b)(3) (the court setting a payment plan must “consider the defendant’s financial resources, the defendant’s ability to make restitution and reparations and the nature of the burden the payment will impose on the defendant”); *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973) (payment plans must be “reasonable”).

² Pa.R.Crim.P. 456(C) (requiring an immediate hearing if a defendant appears after having defaulted); 42 Pa. Cons. Stat. § 9730(b)(1) (same); *In re Davis*, 954 A.2d 118, 123 (Pa. Ct. Jud. Disc. 2007) (MDJ violated law by issuing “commitment orders for defendants who had failed to pay fines and costs without holding a hearing to assess the defendant’s financial ability to pay . . . Respondent decided whether or not to commit defendants to jail based on his own unsubstantiated, personal evaluation of defendants’ financial wherewithal. This is a violation of the law of Pennsylvania.”); *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (court must make findings about defendant’s ability to pay); *Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C. 3d 523, 528-29 (1977) (hearing addressing defendant’s finances required prior to incarceration).

³ Pa.R.Crim.P. 456(D) (incarceration for nonpayment authorized only if the defendant is able to pay); 42 Pa. Cons. Stat. § 9730(b)(2) (same); *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (rules of criminal procedure prohibit incarcerating indigent defendants).

⁴ Pa.R.Crim.P. 122(A)(1) (requiring appointment of counsel when there is a “likelihood” of imprisonment); *Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983) (Rule 122 (then numbered Rule 316) requires appointment of counsel prior to imprisonment for nonpayment of fines and costs); *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (Constitution requires that the court appoint counsel whenever a defendant faces a likelihood of imprisonment for nonpayment).

⁵ Pa.R.Crim.P. 456(C) (requiring release “on recognizance unless the issuing authority has reasonable grounds to believe that the defendant will not appear” and requiring that the court specify those facts “in writing”); Pa.R.Crim.P. 452 (same).

⁶ Pa.R.Crim.P. 456(C)(2) (requiring that the court specify in “in writing . . . the facts that support a determination that the defendant has the ability to pay monetary collateral”); Pa.R.Crim.P. 452 (same). As the Superior Court explained in analogous circumstances, such language requires that the court consider the *defendant’s* financial resources only. *Commonwealth v. Smetana*, 2018 PA Super 176 (Pa. Super. Ct. 2018).

⁷ *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (analogous provision governing criminal cases, Pa.R.Crim.P. 706, enforces the constitutional requirement that there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’” (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)); *Commonwealth v. Diaz*, 2018 PA Super 175 at n.24 (Pa. Super. Ct. 2018) (indigence “preclude[s] any determination” that the defendant’s nonpayment “was willful” because the defendant lacks the ability to pay).

⁸ Because of the “dearth of case law” in criminal cases, the Superior Court has instructed trial courts to look to the “well-established principles governing indigency in civil cases” through the in forma pauperis line of cases.

Commonwealth v. Lepre, 18 A.3d 1225, 1226 (Pa. Super. Ct. 2011). See *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981) (If “the individual can afford to pay court costs only by sacrificing some of the items and services which are necessary for his day-to-day existence, he may not be forced to prepay costs in order to gain access to the courts, despite the fact that he may have some ‘excess’ income or unencumbered assets.”).

⁹ *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999) (receiving public assistance (*e.g.*, food stamps or Medicaid) and the services of the public defender’s office “invite the presumption of indigence”).

¹⁰ See *Commonwealth v. Diaz*, 2018 PA Super 175 at n. 23 (endorsing the use of the model bench card released by the Conference of Chief Justices and Conference of State Court Administrators’ National Task Force on Fines, Fees and Bail Practices, available at

http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx, which uses 125% of the federal poverty guidelines as a benchmark for determining indigence). See also *Stein Enterprises*, 426 A.2d at 1131 (granting in forma pauperis status for individual whose annual income in 2017 dollars was \$13,652); *Gerlitzki*, 307 A.2d at 308 (granting in forma pauperis status for a couple whose annual income in 2017 dollars was \$29,531).

¹¹ See, *e.g.*, *Commonwealth v. Mauk*, 2018 PA Super 98 (Pa. Super. Ct. 2018); *Commonwealth v. Ruiz*, 470 A.2d 1010, 1012 (Pa. Super. Ct. 1984) (mere knowledge that a defendant is employed “cannot alone provide a sufficient picture of appellant’s finances so that an intelligent finding as to his ability to pay the fines and costs imposed can be made.”); *Commonwealth v. Martin*, 335 A.2d 424, 426 n.3 (Pa. Super. Ct. 1975) (en banc) (court erred in determining ability to pay fine based only on information “available in appellant’s original application for counsel”); *Commonwealth v. Schwartz*, 418 A.2d 637, 640 (Pa. Super. Ct. 1980) (at sentencing, information that the defendant “sold \$980 worth of drugs to the undercover agents the previous year and was currently working with his father in the construction industry, ‘bringing home approximately \$150 per week,’” was insufficient to determine ability to pay fine).

¹² *Commonwealth v. Smetana*, 2018 PA Super 176 (Pa. Super. Ct. 2018) (“Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted.”).

¹³ *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973) (payment plans must be “reasonable”).

¹⁴ *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (court must make findings on defendant’s ability to pay when either imposing a payment plan); *Commonwealth v. Smetana*, 2018 PA Super 176 (Pa. Super. Ct. 2018) (same).

¹⁵ See, *e.g.*, *Lawson v. Commonwealth*, 524 A.2d 1053, 1056-57 (Pa. Commw. Ct. 1987) (approving monthly \$5 payment plan).

¹⁶ *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (analogous provision governing criminal cases, Pa.R.Crim.P. 706, enforces the constitutional requirement that there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’” (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)). The Pennsylvania Supreme Court has explained that there is no “no basis in logic or law” to find a distinction between fines and costs when addressing a defendant’s inability to pay. *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 162 (Pa. 1973).

¹⁷ Pa.R.Crim.P. 456(C) (requiring an immediate hearing if a defendant appears after having defaulted); 42 Pa. Cons. Stat. § 9730(b)(1) (same); *Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C. 3d 523, 528-29 (1977) (hearing addressing defendant’s finances required prior to incarceration).

¹⁸ 42 Pa. Cons. Stat. § 9730(b)(3).

¹⁹ The “debate” is a question of statutory interpretation and the interplay between four statutes: 42 Pa. Cons. Stat. §§ 1520 and 9730 and 75 Pa. Cons. Stat. §§ 1533 and 6504.

²⁰ Pa.R.Crim.P. 456(C) (requiring an immediate hearing if a defendant appears after having defaulted); 42 Pa. Cons. Stat. § 9730(b)(1) (same); *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984) (trial court “did not inquire into the reasons for appellant’s failure to pay or did it make any findings pertaining to the willfulness of appellant’s omission,” in violation of *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) and *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973)).

²¹ Pa.R.Crim.P. 456(C) (when a defendant appears, “the issuing authority shall conduct a hearing immediately to determine whether the defendant is financially able to pay as ordered”).

²² A bench warrant for failure to pay under Pa.R.Crim.P. 430(B)(3)(a) is used to compel a defendant’s appearance at court. Once the defendant actually appears, there is no longer a valid basis for an arrest. Pa.R.Crim.P. 456(C) explains that the court must either hold the hearing immediately, or if that is not possible, release the defendant on recognizance (or set collateral, if appropriate), which the court could not do if there were still a valid bench warrant.

²³ Pa.R.Crim.P. 456(D); 42 Pa. Cons. Stat. § 9730(b).

²⁴ Pa.R.Crim.P. 456(C) (requiring release “on recognizance unless the issuing authority has reasonable grounds to believe that the defendant will not appear” and requiring that the court specify those facts “in writing”); Pa.R.Crim.P. 452 (same). The Explanatory Comment to Rule 456 notes, “However, the issuing authority should only set monetary collateral when he or she has determined that less restrictive conditions of release will not be effective in ensuring the defendant’s appearance.”

²⁵ Pa.R.Crim.P. 456(C)(1) (permitting a court to set collateral “as provided in Rule 523”); Pa.R.Crim.P. 523 Explanatory Comment (“When deciding whether to release a defendant on bail and what conditions of release to impose, the bail authority must consider *all the criteria provided in this rule*, rather than considering, for example, only the designation of the offense or the fact that the defendant is a nonresident.”) (emphasis added).

²⁶ Pa.R.Crim.P. 456(C) (requiring the court to state in writing “the facts that support a determination that the defendant has the ability to pay monetary collateral”); Pa.R.Crim.P. 452 (same). As the Superior Court explained in analogous circumstances, such language requires that the court consider the *defendant’s* financial resources only. *Commonwealth v. Smetana*, 2018 PA Super 176 (Pa. Super. Ct. 2018).

²⁷ Pa.R.Crim.P. 456(C)(3) (specifying that “the defendant shall not be detained without a hearing longer than 72 hours or the close of the next business day if the 72 hours expires on a non-business day). Pa.R.Crim.P. 101(C) instructs that, “To the extent practicable, these rules shall be construed in consonance with the rules of statutory construction.” The “overarching goal of statutory interpretation is to ascertain the intent” of the Supreme Court in promulgating its rules, and “we should not interpret the statute strictly and literally if doing so would create a result that is absurd, unreasonable, or impossible to execute.” *In re K.A.P.*, 916 A.2d 1152, 1157 (Pa. Super. Ct. 2007). It would be unreasonable to permit courts to detain defendants for 72 hours based on a finding that they may not appear at the payment determination hearing and then release them after 72 hours on recognizance without having yet held the hearing, as after release there would be no guarantee that the defendant would appear at the subsequent hearing. In such circumstances, the 72-hour detention would be purely punitive, which is not permitted by the Rules.

²⁸ As the Supreme Court explained in *Tate v. Short*, 401 U.S. 395, 398 (1971) the “Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.” Accordingly, the court must hold an ability-to-pay hearing and determine whether the defendant willfully failed to pay *prior to* any incarceration arising out of nonpayment. *See Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

²⁹ *Commonwealth v. Rosser*, 407 A.2d 857, 858, 860 n.8 (Pa. Super. Ct. 1979) (civil contempt for nonpayment of fines and costs requires evidence of willfulness of nonpayment, as only a “non-indigent person who willfully fails to pay fines or costs” may be imprisoned); *Thompson v. Thompson*, 2018 PA Super 122 (Pa. Super. Ct. 2018) (willfulness is defined as whether the defendant has “**present** ability to pay; it does not contemplate **future** ability to pay”) (emphasis in original).

³⁰ *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984) (defendant's opportunity to provide evidence of indigence not sufficient for finding of willfulness, as "the lower court did not inquire into the reasons for appellant's failure to pay or did it make any findings pertaining to the willfulness of appellant's omission as required by *Bearden*"); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (court must inquire into the reasons for the failure to pay).

³¹ *Commonwealth v. Mauk*, 2018 PA Super 98 (Pa. Super. Ct. 2018) (court must hold ability-to-pay hearing every time the defendant appears for a contempt hearing "because the person's financial situations may have changed since the last time she or he was before the court.").

³² *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (court must make findings about defendant's ability to pay).

³³ Pa.R.Crim.P. 456(D) (incarceration for nonpayment authorized only if the defendant is able to pay); 42 Pa. Cons. Stat. § 9730(b)(2) (same); *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (rules of criminal procedure prohibit incarcerating indigent defendants); *Commonwealth v. Diaz*, 2018 PA Super 175 at n.24 ("finding of indigence "preclude[s] any determination" that the defendant's nonpayment "was willful").

³⁴ *Barrett v. Barrett*, 368 A.2d 616, 620-21 (Pa. 1977) (explaining that a court uses its civil contempt power "with the objective of compelling performance and not inflicting punishment").

³⁵ *Barrett v. Barrett*, 368 A.2d 616, 620-21 (Pa. 1977) (stricter evidentiary standard of "Beyond a reasonable doubt" necessary to avoid conditioning "a person's avoidance of or release from imprisonment on his performing acts beyond his power to perform," which would convert a sentence of civil contempt to one of criminal contempt without the necessary safeguards).

³⁶ Pa.R.Crim.P. 122(A)(1) (requiring appointment of counsel when there is a "likelihood" of imprisonment); *Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983) (Rule 122 (then numbered Rule 316) requires appointment of counsel prior to imprisonment for nonpayment of fines and costs).

³⁷ Doing so would interfere with the right to counsel protected by Pa.R.Crim.P. 122.

³⁸ Pa.R.Crim.P. 121(A)(2) (explaining the required information that must be discussed with a defendant in order to obtain a valid waiver); *Commonwealth v. Houtz*, 856 A.2d 119, 124 (Pa. Super. Ct. 2004) (defendant's prior experience with judicial system is irrelevant to whether there is a waiver, and failure "to conduct a thorough on-the-record colloquy before allowing a defendant to proceed to trial pro se constitutes reversible error"); *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (without an on-the-record colloquy pursuant to Rule 121, the defendant cannot waive counsel).

³⁹ Pa.R.Crim.P. 121(A)(2) (explaining the required information that must be discussed with a defendant in order to obtain a valid waiver).

⁴⁰ Pa.R.Crim.P. 121(A)(3) (waiver must be signed by judge "with a certification that the defendant's waiver was made knowingly, voluntarily, and intelligently").

⁴¹ *Commonwealth v. Mauk*, 2018 PA Super 98 (Pa. Super. 2018); *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. 2018).

⁴² Pa.R.Crim.P. 456(D)(3) (a court must "advise the defendant of the right to appeal within 30 days for a hearing de novo in the court of common pleas").

⁴³ Pa.R.Crim.P. 461(A) ("In all summary cases in which a sentence of imprisonment has been imposed, execution of sentence shall be stayed until the time for appeal expires."). Because Pa.R.Crim.P. 456(D)(3)(c) also specifies that the court must "direct the defendant to appear for the execution of sentence on a date certain," the appropriate procedure is to set that date for at least 30 days after the court's order imposing imprisonment.

⁴⁴ Pa.R.Crim.P. 461 permits a defendant to waive the stay of execution of the sentence in writing. For this to be a knowing and intelligent waiver, the defendant "must be aware of both the nature of the right and the risks and consequences of forfeiting it." *Commonwealth v. Johnson*, 158 A.3d 117, 121 (Pa. Super. Ct. 2017).