From: Andrew Christy, ACLU-PA
Re: Costs at sentencing and costs for diversionary programs
Date: Updated October 31, 2018

MEMORANDUM

Most judges that we speak to believe that they have no power to waive court costs at sentencing, but our reading of the Rules of Criminal Procedure, case law, and legislative history establishes that Common Pleas judges have the discretion to waive costs under Rule 706. Discretion in imposing costs at sentencing was established with Rule 706 in 1973 and has been acknowledged by the Legislature as recently as 2010. The statutory and rules-based framework governing ability-to-pay costs applies both at sentencing and when an individual enters a diversionary program.

Courts have authority under Pa.R.Crim.P. 706(C) to reduce or waive costs based on a defendant's indigence. The legislature has acknowledged and codified this authority in 42 Pa. Cons. Stat. §§ 9721(c.1) and 9728(b.2), and this authority applies even to otherwise "mandatory" costs. *See Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 at *4 (Pa. Super. Ct. Oct. 31, 2017) (Rule 706(C) "permits the trial court to consider the burden of the amount of costs in light of a defendant's financial means"). This authority applies equally to both sentencing and diversionary programs.

With respect to diversionary programs, the Superior Court has explained that the Constitution requires that a trial court must "consider alternative conditions for admittance to *and completion of* the ARD program" if the defendant "has no ability to pay" despite bona fide efforts to do so. *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988) (emphasis added). Otherwise, indigent defendants would be denied the ability to participate in or graduate from the diversionary program solely due to poverty, which is unconstitutional.

I. All costs at sentencing are discretionary if the defendant lacks the ability to pay them.

In 2010, the legislature amended 42 Pa. Cons. Stat. §§ 9721(c.1) and 9728(b.2) via Act 96 to automatically impose costs at sentencing "unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs)." As the legislative history explains, the amendment was 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. In other words, the statute reflected the legislature's understanding that trial courts *already had* the discretion under Rule 706(C) to reduce or waive costs at sentencing.

Rule 706(C) applies at sentencing and requires—or at least permits—courts to consider a defendant's ability to pay when imposing fines and costs: "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." While it is not obvious from the Rule's

text that it applies at sentencing, case law explains that it does.[1] *See, e.g.*, *Commonwealth v. Martin*, 335 A.2d 424, 425 (Pa. Super. Ct. 1975) (en banc) (then-Rule 1407(C), today Rule 706(C), requires that a sentencing judge consider ability to pay when imposing a fine); *Commonwealth v. Genovese*, 675 A.2d 331, 333-34 (Pa. Super. Ct. 1996) (same).

Although a more recent panel decision has held that Rule 706(C) does not *require* an ability-to-pay hearing at sentencing, it certainly does not *prohibit* it. *Commonwealth v. Childs*, 63 A.3d 323, 326 (Pa. Super. Ct. 2013).[2] *Childs* itself even acknowledges that although the defendant is liable for costs, the trial court can "determine[] otherwise pursuant to" Rule 706(C). As a result, courts still maintain authority to reduce costs based on a defendant's inability to pay. The Superior Court opinion in *Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 (Pa. Super. Ct. Oct. 31, 2017) is instructive. In that case, the trial court reduced "mandatory" prosecution and lab costs, and the Superior Court—citing §§ 9721(c.1) and 9728(b.2)—affirmed that the trial court had discretion to do so under Rule 706(C). While unpublished, it is a straightforward application of the statutory language, and it confirms that courts can reduce otherwise "mandatory" costs.[3]

Under Rule 706(C) and §§ 9721(c.1) and 9728(b.2), judges have the discretion to reduce and/or waive all costs, even so-called "mandatory" costs. It is true that many statutes establishing court assessments, such as the line item for the Judicial Computer Project, 42 Pa. Cons. Stat. § 3733(a.1), and the Victim Witness Service fund, 18 P.S. § 11.1101, say that their respective costs "shall" be imposed. However, §§ 9721(c.1) and 9728(b.2) and the Rules of Construction mean that courts unquestionably have discretion to reduce or waive these costs for two reasons.

First, all of the statutes governing costs must interpreted together (read *in pari materia*), whenever possible. 1 Pa. Cons. Stat. § 1932. Moreover, when a "general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both." 1 Pa. Cons. Stat. § 1933. Looking at the statutes through this lens, it is not clear that there is any conflict, let alone that the statutes are irreconcilable. Sticking to the example in § 11.1101, that statute imposes the "mandatory" Victim Witness Service cost, and it does so even if the court fails to order its imposition. Nothing in the statute, however, speaks to what happens if a court enters an affirmative order that the defendant lacks the ability to pay that cost. The way to give effect to the "mandatory" costs statutes and §§ 9721(c.1) and 9728(b.2) is to interpret that the latter provide exactly the discretion to reduce or waive such costs, precisely as the Superior Court did in *Burrows*.

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[1] This is particularly clear when the text of Rule 706(C) is compared with the statutory language governing the imposition of a fine at sentencing, which is nearly identical. *See* 42 Pa. Cons. Stat. § 9726(c), (d).

[2] On this point, to the extent that *Childs* conflicts with *Martin*—an en banc decision that acknowledges that an ability-to-pay hearing is *required* under what is today Rule 706(C)—*Childs* is invalid. *See In the Interest of A.A.*, 149 A.3d 354, 361 n.4 (Pa. Super. Ct. 2016) (court must ignore three-judge panel opinion that conflicts with prior binding en banc opinion).

[3] The only other case to address these statutory provisions is *Lepre v. Susquehanna County Clerk of Judicial Records*, 2121 C.D. 2012, 2013 WL 5508784 (Pa. Commw. Ct. 2013), which held that Rule 706(C) permits a court to reduce the amount owed when the defendant appears post-sentencing for a hearing after default. Citing to *Childs* (discussed in the prior footnote), *Lepre* notes that a hearing is not required at sentencing, which is likely incorrect.

Second, §§ 9721(c.1) and 9728(b.2) both state that they apply "Notwithstanding any provision of law to the contrary." 42. Pa. Cons. Stat. § 9728(b.2). To the extent that there is any actual irreconcilable conflict between two statutes, 1 Pa. Cons. Stat. § 1933 explains that the specific generally prevails—"*unless* the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail." (emphasis added). Sections 9721(c.1) and 9728(b.2) were both enacted in 2010, long after other costs (including the Victim Witness Service statute, which was created in 1998). Moreover, the General Assembly, in enacting these statutes, has demonstrated its "manifest intention" that they trump older, more specific statutes. The Superior Court has ruled that when a statute uses the language "notwithstanding any other provision of this title or other statute to the contrary," such language "clearly indicates that the legislature intended to limit the application of prior" statutes. *Commonwealth v. Smith*, 544 A.2d 991, 998 (Pa. Super. Ct. 1988) (en banc). Thus, under the rules of statutory construction in § 1933, the use of that language in §§ 9721(c.1) and 9728(b.2) means that those statutes prevail.

While many attorneys and judges are unaware of §§ 9721(c.1) and 9728(b.2) and the interplay with Rule 706(C), the legal interpretations are actually rather straightforward, as the *Burrows* court explained. Accordingly, courts certainly have discretion to reduce or waive costs at sentencing for indigent defendants, and they should act accordingly.

II. Costs for diversionary programs.

A. Courts are limited in the costs they can impose for diversionary programs.

A defendant "may be required to only pay costs authorized by statute." *Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980); *Commonwealth v. Houck*, 335 A.2d 389, 391 (Pa. Super. Ct. 1975) (en banc). Accordingly, only costs that explicitly refer to diversionary programs like ARD can be assessed. The diversionary program governed by 35 P.S. § 780-117 has additional costs that can be assessed, as a defendant must plead guilty or nolo contendere, and numerous costs (outlined at the end of this memorandum) apply in cases with such a plea. In addition, the booking center fee in 42 Pa. Cons. Stat. § 1725.5 and the criminal lab user fee in 42 Pa. Cons. Stat. § 1725.3 explicitly cross-reference § 780-117.

Courts may take the view that certain costs, like the State and County Court assessment, apply to diversionary programs because they must be imposed "in every criminal case." 42 Pa. Cons. Stat. § 1725.1(b). Those statutes lack a qualifier that a defendant must, for example, be convicted or plead guilty in order to have costs imposed—qualifiers that exist in other statutes. Under this reasoning, any generally-applicable statute that imposes costs in criminal cases can allow costs to be imposed in diversionary programs. It is possible that this an appropriate reading, although as is noted above several costs explicitly reference diversionary programs, which suggests that the legislature knows how to apply specific costs to those programs if it intends to. And there must be some limits on imposing costs: certainly, the legislature could not impose costs on individuals who are not convicted. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255-57 (2017) (state has "zero claim" on costs paid once a conviction is overturned because there has been no adjudication of guilt).

B. The court must consider the defendant's ability to pay when imposing costs as part of a diversionary program.

Our main concern is that indigent defendants either cannot join or cannot complete diversionary programs like ARD because they cannot afford to pay the costs. Rule 706(C) still governs these proceedings, as the Rule applies to all misdemeanor and felony cases, and by its plain language, it applies whenever determining the "amount" of costs (so it is not simply cabined to sentencing following conviction). Indeed, both Rule 706 and 42 Pa. Cons. Stat. § 9728 apply more broadly than merely at sentencing: they are about how courts impose and collect costs. Section 9728(a) applies not only to convictions but also to any "pretrial disposition order." Accordingly, § 9728(b.2)—which applies to any proceedings disposed of under § 9728(a) and specifically references Rule 706(C)—and Rule 706(C) apply to diversion cases. Whenever a court orders a defendant to participate in a diversionary program, it must consider the defendant's ability to pay costs in the same way that it would if the defendant were convicted.

This approach is also the one that makes the most sense in light of the constitutional limits on collecting fines and costs from indigent defendants. Rule 706 was created to ensure that, consistent with *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158 (Pa. 1973), defendants are not incarcerated merely because they are unable to pay fines and costs. As the Superior Court has explained, rather than waiting for a defendant to default on an amount he cannot possibly pay, "it is far more rational to determine the defendant's ability to pay at the time the fine is imposed." *Commonwealth v. Schwartz*, 418 A.2d 637, 640 (Pa. Super. Ct. 1980). The Superior Court has applied those same constitutional concerns to policies that exclude defendants from participating in diversionary programs without "consider[ing] alternative conditions for admittance to and completion of the ARD program" if the defendant "has no ability to pay" despite bona fide efforts to do so. *Commonwealth v. Melnyk*, 548 A.2d 266, 272 (Pa. Super. Ct. 1988). Whether a defendant is denied admission or denied graduation from such a program due to the defendant's indigence, the result is the same: that denial would "deprive the petitioner her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id*.[4]

In addition, Pa.R.Crim.P. 316, which sets forth the rules governing participation in ARD, permits the court to impose costs and restitution, if appropriate (but not a fine). The Comment, however, is explicit that while "reasonable charges for the expense of administering the program may be imposed on defendants," the intention of the Supreme Court is to allow "qualified individuals who are indigent to participate in the ARD program without payment of costs or charges." Pa.R.Crim.P. 316 Comment. Rule 316 also appears to prohibit the practice of requiring prepayment of court costs as a condition of admittance, as the Comment notes that the costs associated with the program "may be imposed on those admitted into the program," but "no

[4] The defendant in *Melnyk* was able to pay the ARD costs, but not over $10,000 in restitution. The court's holding and discussion of constitutional principles, however, suggests no reason to draw a distinction between the types of financial obligations. Indeed, Pennsylvania courts treat fines, costs, and restitution equally when a defendant is unable to pay. *See, e.g.*, *Parrish*, 304 A.2d at 162 (finding "no basis in logic or law" to draw a distinction between fines and costs).

separate fees [may] be required for application for admission into the program." Thus, any practices that require that a defendant prepay certain costs in order to enter ARD appear illegal.

Accordingly, courts must engage in the same Rule 706(C) ability-to-pay inquiry when setting costs for diversionary programs that they would at sentencing for the underlying offenses. A defendant cannot be denied access to ARD due to an inability to pay costs or restitution, and Rule 316 also prohibits the payment of costs from being a prerequisite to participation in the program.

III. Costs at issue.

We have catalogued costs that routinely appear on docket sheets unless the court orders otherwise, which are available in the document "Court Cost Statutes" at www.aclupa.org/finesandcosts.