

An ACLU-PA Guide to Probation/Parole Revocation Hearings for Nonpayment of Fines, Costs, or Restitution

Some probation departments file violations of probation/parole against defendants who have not paid fines, costs, and restitution. The Commonwealth bears the burden of showing that the defendant “willfully” failed to pay, and without a court finding that the defendant willfully failed to pay, the defendant has not violated the terms of supervision. We intend this Guide to help attorneys and judges comply with the legal requirements underlying these *Gagnon II* hearings for nonpayment.¹

Paying fines, restitution, and the costs of supervision can be conditions of probation.

Fines: Paying a fine imposed as part of the sentence can be a condition of probation.² Because the fine is imposed as part of the sentence (rather than solely as a condition of probation), it must be paid even if the defendant has completed probation.

Restitution: There are two types of restitution: restitution that is part of the sentence under 18 Pa. Cons. Stat. § 1106(a), and restitution that is not part of the sentence but is instead only a condition of probation under 42 Pa. Cons. Stat. § 9754(c)(11). A condition of probation can require a defendant to pay either type of restitution. However, restitution that is imposed *solely* as a condition of probation under § 9754(c)(11) (as opposed to as both a condition of probation and as part of the sentence) “expires upon the end of the term of probation, even if the amount of restitution ordered has not been paid.”³ By contrast, restitution that is ordered as part of the sentence under § 1106(a) is part of the sentence and does not expire at the end of the defendant’s probation.⁴ At sentencing, counsel should ask the judge to clarify which type of restitution the court is imposing.

Costs: Except for supervision fees, a court cannot require that a defendant pay costs as a condition of probation, and a defendant therefore does not violate the terms of his probation due to nonpayment of court costs. Payment of costs is *not* a proper condition of probation because costs are “a mere incident to judgment” and “are not part of the criminal’s sentence.” As a result, an order to pay costs is “not ‘reasonably related to the rehabilitation of the defendant’” under 42 Pa. Cons. Stat. § 9754(c).⁵ Supervision fees are an exception, however, as the statute imposing that cost explicitly makes payment a “condition of supervision.”⁶

Violations of probation/parole hearing for nonpayment.

If payment of a fine, cost, or restitution is a condition of probation, nonpayment is a technical violation only if the defendant willfully refused to pay.⁷

¹ How to determine whether the defendant is “able to pay” is the subject of a separate ACLU-PA Guide available at www.aclupa.org/finesandcosts.

² 42 Pa. Cons. Stat. § 9754(c)(11).

³ *Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. Ct. 2010); *Commonwealth v. Holmes*, 155 A.3d 69, 86-87 (Pa. Super. Ct. 2017) (en banc) (opinion of four judges).

⁴ *Holmes*, 155 A.3d at 86-87.

⁵ *Commonwealth v. Rivera*, 95 A.3d 913, 917 (Pa. Super. Ct. 2014).

⁶ 18 P.S. 11.1102(c).

⁷ *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994).

- Willfulness is defined as having the ability to pay and refusing to make payments.
 - The court must determine whether the defendant’s nonpayment was a “deliberate disregard of the court’s order” or instead stems from “circumstances beyond the defendant’s control” due to the person’s financial situation.⁸
 - Courts cannot treat nonpayment as a strict liability offense merely because the person did not pay.⁹
 - A defendant who is **indigent** cannot be found to have violated the terms of supervision due to nonpayment, as a finding of indigence “preclude[s] any determination” that the defendant’s nonpayment “was willful.”¹⁰
 - Thus, when a defendant is “penniless and unable, through no fault of his own, to pay any sum on the delinquencies,” the defendant is not in “willful noncompliance.”¹¹
- The burden is on the Commonwealth to show by a preponderance of the evidence that the defendant willfully failed to pay.¹²
- Without a court finding that the defendant willfully failed to pay, the defendant has not committed a violation of probation/parole—and therefore cannot be punished for nonpayment.¹³
- To determine whether a defendant is able to pay, refer to the separate ACLU-PA Guide available at www.aclupa.org/finesandcosts

Because of both the United States and Pennsylvania Supreme Courts’ longstanding interest in avoiding incarceration due solely to a defendants’ indigence, the trial court has an affirmative obligation to inquire into the defendant’s finances and reasons for nonpayment.

- Nonpayment is not a mere affirmative defense, as the case law squarely places an obligation on the court itself to inquire even if the defendant does not raise inability to pay as a defense.¹⁴

⁸ *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. 2018). *See also Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (trial court failed to make required finding that the defendant “had the present financial ability to pay the outstanding fines and costs such that imprisonment was warranted”); *Commonwealth v. Smetana*, 2018 PA Super 176 (Pa. Super. Ct. 2018) (court improperly imputed family member’s financial resources on defendant).

⁹ *Id.*

¹⁰ *Diaz*, 2018 PA Super 175 at n.24.

¹¹ *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973).

¹² *Commonwealth v. Dorsey*, 476 A.2d 1308, 1311 (Pa. Super. Ct. 1984) (“The Commonwealth in each probation or parole revocation proceeding must prove by a preponderance of the evidence a violation of such parole,” and probation or parole cannot “be revoked for less than willful conduct.”).

¹³ *Rosenberry*, 645 A.2d at 1331 (explaining that “the willful refusal to pay a fine may be considered a technical parole violation for which a parolee may be re-incarcerated”); *Commonwealth v. Smalls*, CP-46-CR-0005242-2013, 2018 WL 4112648 at *2 (Montgomery Co. Ct. Com. Pleas Aug. 7, 2018) (defendant who cannot “meet his basic life needs and still have money to pay . . . cannot be found to be in violation of his parole).

¹⁴ *Dorsey*, 476 A.2d at 1312 (“even when the defendant fails to “offer any evidence concerning his indigency,” a trial court unconstitutionally revokes probation or parole if it does not “inquire into the reasons for appellant’s failure to pay or . . . make any findings pertaining to the willfulness of appellant’s omission as required by Bearden”).

- The Superior Court has repeatedly ruled that trial courts unconstitutionally revoked defendants’ probation without making the necessary inquiry into their financial circumstances.¹⁵
- The court must make findings on the record regarding the defendant’s financial ability to pay.¹⁶

These requirements—that the trial court at a *Gagnon II* hearing inquire into the reasons for the defendant’s nonpayment and find a violation only if the defendant is willfully refusing to pay—apply equally even if the court is not considering incarceration.¹⁷ A defendant is entitled to an ability-to-pay hearing and such a finding whenever he is exposed to “increased conditions of supervision,” including an extension of the length of supervision.¹⁸

Defendants have a right to counsel that can only be waived in accordance with Rule 121.

Pennsylvania law provides a right to counsel in probation/parole revocation hearings.¹⁹ Pa.R.Crim.P. 121 permits a court to accept a waiver of counsel only via an on-the-record colloquy in open court.

- Per Rule 121, “the judge or issuing authority, at a minimum, shall elicit the following information from the defendant” six categories of information prior to accepting any waiver of counsel.²⁰
- Some probation offices have defendants sign stipulations of violations that purport to waive this right to counsel, without ever appearing before a judge. These stipulations—and the resulting violation orders—are unlawful.²¹
- Defendants who are currently on probation/parole as a result of such an unlawful stipulation arising from nonpayment of fines, costs, or restitution should seek to have their supervision terminated.

¹⁵ *Dorsey*, 476 A.2d at 1312; *Commonwealth v. Eggers*, 742 A.2d 174, 175-76 (Pa. Super. Ct. 1999); *Commonwealth v. Ballard*, 814 A.2d 1242, 1247 (Pa. Super. Ct. 2003); *Commonwealth v. Allshouse*, 969 A.2d 1236, 1242 (Pa. Super. 2009). *See also Commonwealth v. Mauk*, -- A.3d --, 2018 PA Super 98, 2018 WL 1959744, at *3 (Pa. Super. Ct. April 26, 2018) (willful nonpayment of fines and costs has a “mens rea element of specifically intending to defy the underlying court order”).

¹⁶ *Diaz*, 2018 PA Super 175 (court must make “findings of fact” regarding the defendant’s ability to pay in proceedings following default).

¹⁷ *Rosenberry*, 645 A.2d at 1331.

¹⁸ *George v. Beard*, 824 A.2d 393, 396 (Pa. Commw. Ct. 2003); *Rosenberry*, 645 A.2d at 1331.

¹⁹ *Bronson v. Commonwealth Bd. of Prob. & Parole*, 421 A.2d 1021, 1026 (Pa. 1980); *Com. ex rel Rambeau v. Rundle*, 314 A.2d 842 (Pa. 1973). *See also* Pa.R.Crim.P. 708.

²⁰ *Commonwealth v. Houtz*, 856 A.2d 119, 123-124 (Pa. Super. 2004) (While “[t]he trial judge need not literally be the one to pose the questions to the defendant ... the text of Rule 121(c) requires the judge to ascertain the quality of the defendant’s waiver.”).

²¹ *Diaz*, 2018 WL 3060310 at *11 (trial court’s failure to either provide the defendant with counsel or seek a waiver under Rule 121 prior to incarcerating the defendant for nonpayment of fines and costs rendered that incarceration illegal).