

IN THE
SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 893 MDA 2017

COMMONWEALTH OF PENNSYLVANIA

Appellee

vs.

WILLIAM DIAZ

Appellant

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE QUESTIONS INVOLVED

A. Whether the Trial Court erred by holding Defendant in civil contempt for failure to pay his fines and costs.

(Suggested Answer: No)

B. Whether Defendant knowingly, intelligently, and voluntarily waived his right to counsel.

(Suggested Answer: Yes)

STATEMENT OF THE CASE

By way of separate criminal informations, William Diaz (hereinafter "Defendant") was charged with one (1) count of Retail Theft,¹ and one (1) count of Possession of Drug Paraphernalia.² Defendant pled guilty on both cases. Defendant was sentenced and ordered to pay fines and costs on both cases. Defendant currently owes over \$2,000 in fines and costs.

Defendant was scheduled for a hearing on January 30, 2017, because he failed to make payments on his fines and costs. Defendant failed to appear for that hearing and the court issued a bench warrant as a result of Defendant's absence. Defendant was later arrested on the bench warrant and was brought to a bench warrant hearing before the Honorable Samuel A. Kline, Judge, on April 6, 2017. At the hearing, Judge Kline set Defendant's bail in the amount of \$200 cash for both dockets. Defendant did not have \$200 for bail and consequently remained in incarceration.

¹ 75 Pa.C.S.A. § 3929 (A)(1)

² 35 P.S. § 780-113 (A)(32)

Defendant was then scheduled for a fines and costs contempt hearing on April 24, 2017. At the hearing, Defendant was held in civil contempt for his inability to pay his fines and costs. Defendant was sentenced to 30 days in jail. Judge Kline set a purge condition of \$250 and ordered Defendant to pay his fines and costs by monthly installments of \$100.

Defendant is now appealing the April 24, 2017, decision of the Trial Court which held Defendant in civil contempt for his failure to pay his fines and costs.

SUMMARY OF ARGUMENT

The trial court may incarcerate defendants who do not pay their fines and costs. The judge is given discretion in determining whether a defendant is willfully refusing to pay their fines and costs. The judge is also given discretion on how to determine whether a defendant is willfully refusing to pay their fines and costs. Furthermore, the court determines whether a defendant is financially able or unable to pay.

If a judge determines that a defendant is willfully refusing to pay their fines and costs, the judge may hold that defendant in civil contempt. The court then sets a purge amount in order to give the Defendant an opportunity to avoid further incarceration.

Each of these factors, considerations, and determinations lie within the discretion of the trial court.

ARGUMENT

A. The Trial Court did not err by holding Defendant in civil contempt for failure to pay his fines and costs.

Courts have to power of civil contempt. Civil contempt allows a court to imprison an individual who is willfully disobeying a court order. To sustain a finding of civil contempt, the complainant must prove certain distinct elements: (1) that the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent. *Lachat v. Hinchcliffe*, 769 A.2d 481, 488-489 (Pa. Super. 2001). Civil contempt is a suitable procedure to require a defendant to comply with court order for payment of fine and costs. *Commonwealth, Lancaster County v. Rosser*, 407 A.2d 857 (Pa. Super. 1979).

The Pennsylvania Rules of Criminal Procedure provides that a court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs. *Pa.R.Crim.P. 706(A)*.

Rule 706 also provides that in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, the court should 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)*.

Additionally, Rule 706 the Pennsylvania Rules of Criminal Procedure states that:

In cases in which the court has ordered payment of a fine or costs in installments, the defendant may request a rehearing on the payment schedule when the defendant is in default of a payment or when the defendant advises the court that such default is imminent. At such hearing, the burden shall be on the defendant to prove that his or her financial condition has deteriorated to the extent that the defendant is without the means to meet the payment schedule. Thereupon the court may extend or accelerate the payment schedule or leave it unaltered, as the court finds to be just and practicable under the circumstances of record. When there has been default and the court finds the defendant is not indigent, the court may impose imprisonment as provided by law for nonpayment.

Pa.R.Crim.P. 706(D).

The sentencing judge is required to determine, before imposing a fine on defendant, that defendant is able to pay it. *Commonwealth v. Schwartz*, 418 A.2d 637, 639 (Pa. Super. 1980). If it appears that the defendant cannot pay a fine, the judge will have to consider alternative penalties. *Id.* If the judge does not at the outset determine the defendant's ability to pay a fine, he will often be forced to imprison him at some later point, when he fails to pay the fine. *Id.*

However, before a defendant may be imprisoned for not paying a fine, he must be given an opportunity to establish that he is unable to pay the fine. *Id.* Upon a showing of indigency, the defendant should be allowed to make payments in reasonable installments. *Commonwealth ex. rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973).

The judge has discretion when determining whether an individual has the ability or inability to pay their fines and costs. Neither Rule 706 of the Pennsylvania Rules of Criminal Procedure, nor the Rule's surrounding case law, provides a judge with guidance on how to

determine whether a defendant is willfully refusing to pay their fines and costs.

The Court in this case was under the impression that Defendant must have had *some* ability to pay his fines and cost. First, the Defendant stated to the fact that he gives blood plasma for money, and has done so in the past. (R. 38a). Second, Defendant alluded that he had the possibility of work in the near future. (R. 38a). And third, Defendant referred that he has someone in Reading, Pennsylvania, that can put money down for his bail. (R. 35a).

Considering these facts as a whole, Defendant must have had some ability to pay his fines and costs and willfully refused to do so. The Trial Court did not abuse its discretion.

Accordingly, Defendant's claims should be dismissed.

B. Defendant knowingly, intelligently, and voluntarily waived his right to counsel.

Whenever there is a likelihood in a proceeding that imprisonment will be imposed, counsel must be assigned. *Commonwealth v. Farmer*, 466 A.2d 677 (Pa. Super. 1983). This applies to contempt proceedings for nonpayment of fines and costs because there is a likelihood imprisonment will be imposed. *Id.*

The constitutional right to counsel may be waived, but this waiver is valid only "if made with knowledge and intelligence." *Commonwealth v. Houtz*, 856 A.2d 119, 122 (Pa. Super. 2004) (citing *Commonwealth v. Carey*, 340 A.2d 509 (1975)). In order to make a knowing and intelligent waiver, the individual must be aware of both the nature of the right and the risks and consequences of forfeiting it. *Id.* Furthermore, it must be showed that the accused was offered counsel but intelligently and understandingly rejected the offer. *Id.* (quoting *Commonwealth v. Payson*, 723 A.2d 695, 699-700 (Pa. Super. 1999)).

Defendant was told that he had the right to an attorney. However, there is no evidence that Defendant applied for the services of the Public Defender's Office, nor hired private counsel, for his fines and costs contempt hearing. Rather, Defendant decided to proceed *pro se*. Defendant's decision to not apply for the services of the Public Defender's Office and Defendant's decision to proceed *pro se* operates as a waiver of counsel. Defendant was offered counsel but intelligently and understandingly rejected that offer.

Therefore, Defendant knowingly, intelligently, and voluntarily waived his right to counsel for the purpose of the contempt hearing.

Accordingly, Defendant's claims should be dismissed.

CONCLUSION

For the foregoing reasons, and in the interests of justice, the Commonwealth requests that This Honorable Court affirm the Trial Court's order and dismiss Defendant's claims.

Respectfully Submitted,

Date: November 20, 2017

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