Received 12/13/2017 8:07:42 PM Superior Court Middle District

Filed 12/13/2017 8:07:00 PM Superior Court Middle District
893 MDA 2017

IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 893 MDA 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

WILLIAM DIAZ,

Appellant.

REPLY BRIEF FOR APPELLANT WILLIAM DIAZ

Appeal from Order of the Court of Common Pleas
of Lebanon County, Pennsylvania dated April 24, 2017

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ARGUMENT

A. The Court of Common Pleas abused its discretion when it implicitly held that Mr. Diaz had the ability to pay his past due fines and costs, a purge amount set by the court, and $100 per month in the future.

The Commonwealth does not contend that the court below conducted a proper ability to pay hearing before finding Mr. Diaz in contempt, sentencing him to jail with a $250 purge, and then ordering him to pay $100 per month going forward. (R. 38a-39; R. 41a). As set forth in Appellant's opening brief, the court below failed to follow the law and for that reason its orders should be vacated.

The Commonwealth argues, instead, that the court below did not abuse its discretion because there was evidence that Mr. Diaz could sell his blood plasma, believed he had a lead on future work, and had "someone in Reading" he thought might pay his bail. Appellee Br. at 7. The Commonwealth's argument is contrary to the law. "Abuse of discretion" is a highly deferential standard of review, but it is not a meaningless one.

The evidence identified by the Commonwealth does not come close to supporting a finding that Mr. Diaz willfully failed to keep up with his payment plan. Nor does it come close to supporting a finding that Mr. Diaz had the ability to pay $250 to avoid incarceration. Nor, finally, does the evidence support a finding that Mr. Diaz could pay $100 per month in the future as a payment plan.

What the evidentiary record shows is that Mr. Diaz had previously been

employed and able to pay—and indeed he did make regular payments towards his fines and costs for more than a year while employed. (R. 16a; R. 53a). But by the time of the trial court's hearing, Mr. Diaz had been out of regular work for more than a year, and he was selling his blood plasma to supplement his food stamps. (R. 53a; R. 71a). Although he expressed to the court that he thought a friend may be able to come with money to bail him out, that of course never happened, no person was even identified, and he spent three weeks in jail. (R. 35; R. 71). Regardless, the only financial consideration is of Mr. Diaz's ability to pay, not the hypothetical ability of his friends, as their resources cannot be imputed to him. *See Barrett v. Barrett*, 368 A.2d 616, 623 (Pa. 1977) (civil contempt purge condition valid only if the defendant "had the present ability to comply with the conditions set by the court *for purging himself* of his contempt") (emphasis added); Pa.R.Crim.P. 706(A) (court must analyze the defendant's financial ability to pay). To do otherwise would risk turning one defendant's obligation to pay fines and costs into a form of communal punishment that burdens the finances of the defendant's friends and family.

The record, in short, shows that Mr. Diaz was, at the time of the hearing, profoundly indigent and unable to pay anything toward his fines and costs. This Court has explained that receiving public assistance, such as the food stamps Mr. Diaz receives, "invite the presumption of indigence." *Commonwealth v. Eggers*,

742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999). Additionally, this Court has repeatedly instructed Pennsylvania's trial courts to look to the "well-established principles governing indigency in civil cases" when determining indigence in criminal cases. *Commonwealth v. Lepre*, 18 A.3d 1225, 1226-27 (Pa. Super. Ct. 2011).[1] Those *in forma pauperis* ("IFP") cases show that inability to pay is fundamentally a question of whether an individual "is able to obtain the necessities of life." *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc). Where, as here, a person has "no income except public assistance benefits" and "minimal" net worth, he cannot afford to pay. *Id.* Under those cases, even if Mr. Diaz had $5 left over after buying food with the money he obtained from selling his blood plasma, he had no obligation to put it towards his fines and costs because he was not even close to meeting his basic life needs.

B. Mr. Diaz did not waive his right to counsel.

The Commonwealth agrees that Mr. Diaz was entitled to counsel under this

[1] This Court has noted that "we can all agree there are circumstances where we must borrow concepts from our civil law because there is a dearth of case law on the topic in the criminal context," such as IFP principles. *Commonwealth v. Reese*, 31 A.3d 708, 718 n.2 (Pa. Super. Ct. 2011) (en banc). This is also consistent with courts' practices in other states that have similarly incorporated their IFP principles into criminal fines and costs cases. *See City of Richland v. Wakefield*, 380 P.3d 459, 464 (Wash. 2016) (en banc) (reiterating that "courts can and should use [the civil rule governing IFP eligibility] as a guide for determining whether someone has an ability to pay costs" in criminal cases, and "courts should seriously question that person's ability to pay" if they meet those standards) (citations omitted).

Court's decision in *Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983), but argues that Mr. Diaz waived his right to counsel because he did not procure counsel before his hearing. Again, the Commonwealth misstates the law.

The lower court merely advised Mr. Diaz that he had a right to counsel, but then moved on to other matters without inquiry or even allowing Mr. Diaz to speak. That is insufficient. "The finding of a waiver may not be made lightly, … and if the record does not affirmatively show the waiver, the burden of proving the waiver is on the Commonwealth." *Commonwealth v. Grant*, 323 A.2d 354, 357 (Pa. Super. Ct. 1974) (internal citations omitted). The law requires a court to ensure, through a Pa.R.Crim.P. 121 colloquy, that a defendant has knowingly waived his right to counsel. *See id.* at 357-58. The trial court did not conduct such a colloquy or take any other step to protect Mr. Diaz's right to counsel. That violated Mr. Diaz's rights and invalidated the finding of contempt and jail sentence.

The Commonwealth suggests that the mere existence of a Public Defender's Office in Lebanon County is sufficient to satisfy the right to counsel afforded by Pa.R.Crim.P. 122(A)(2) and the Due Process Clause of the Fourteenth Amendment. *See* Appellee Br. at 10 (arguing that "not apply[ing] for the services of the Public Defender's Office and [] proceed[ing] pro se operates as a waiver counsel"). However, the Commonwealth cites no support for this proposition,

which is contrary to precedent. "Waiver may not be found from the appearance of appellant without counsel, … or from the failure to request counsel." *Commonwealth v. Neal*, 563 A.2d 1236, 1243 (Pa. Super. Ct. 1989) (citing *Rice v. Olson*, 324 U.S. 786 (1945)); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); *accord Grant*, 323 A.2d at 358. The burden is on the Commonwealth to establish that Mr. Diaz "was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley*, 369 U.S. at 516; *Commonwealth v. Houtz*, 856 A.2d 119, 122 (Pa. Super. Ct. 2004) (citations omitted). Mr. Diaz did not "intelligently and understandingly reject" an offer of counsel. There is no basis to find that he implicitly waived his right to counsel, particularly when there is no evidence on the record to determine what he understood about his rights or what actions he took—which only highlights the trial court's error in not conducting the required colloquy.

C. This Court should provide clear guidance to Pennsylvania's trial courts.

The Commonwealth appears to agree with Mr. Diaz that Pennsylvania's trial courts need additional guidance on how to adjudicate nonpayment of fines and costs. Appellee Br. at 7. Both trial courts and the defendants that appear before them would benefit greatly from explicit instruction that courts should apply certain presumptions of indigence, including those that arise from the well-developed IFP case law: 1) a defendant is receiving means-based public assistance,

see Eggers, 742 A.2d at 176 n.1; 2) a defendant is unable to afford basic life needs, such as housing, food, transportation, child care, etc., s*ee Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (court lacks evidence to support finding of ability to pay a fine when a defendant has no "financial assets [or] liabilities" and has been "living from hand to mouth"); *Gerlitzki*, 307 A.2d at 308; and 3) that defendants should have their fines and costs payments temporarily suspended when they experience economic hardship. *See Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (explaining that, under Pa.R.Crim.P. 706, 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)). Beyond those presumptions, whenever a court assesses ability to pay, it must take into account "all the facts and circumstances of the situation, both financial and personal" in order to determine whether someone is able to pay. *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). *See also Commonwealth v. Ruiz*, 470 A.2d 1010, 1012 (Pa. Super. Ct. 1984) (mere knowledge that a defendant was employed, without knowing more about his financial circumstances, was insufficient to determine ability to pay). This Court should take the opportunity presented by this case to affirm those decisions, and so instruct Pennsylvania's trial courts, to avoid the type of unconstitutional incarceration that Mr. Diaz suffered.

CONCLUSION

For the foregoing reasons, the Court should hold that the trial court exceeded its authority by holding Appellant William Diaz in civil contempt without inquiring into his ability to pay, by imposing a purge condition he was unable to afford, and by putting him on an unreasonable payment plan with which he will be unable to comply. Accordingly, this Court should vacate the trial court's April 24 order, clarify the standards that the trial court must follow, and remand for new proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

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