Received 3/4/2019 12:07:20 PM Supreme Court Middle District

Filed 3/4/2019 12:07:00 PM Supreme Court Middle District
46 MAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NO. 46 MAP 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

CHRISTIAN LEE FORD
Appellee

BRIEF OF APPELLEE

Appeal from the Order of the Superior Court at No. 620 MDA 2017 dated November 30, 2017, reconsideration denied February 9, 2018, Reversing the PCRA order of the Lancaster County Court Of Common Pleas, Criminal Division, at Nos. CP-36- CR-0001443-201 CP-36-CR-0001496-2016, and CP-36-CR-0002530-2016 dated March 10, 2017 and remanding.

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Dated: March 4, 2019

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STATEMENT OF THE CASE

On June 23rd, 2016, in the Court of Common Pleas in Lancaster County, Christian Ford entered a guilty plea pursuant to a negotiated plea agreement on three informations and was sentenced as follows:

1. No. 1443

- Count one-two (2) to four (4) years incarceration and a fine of $100 - possession with intent to deliver a controlled substance (35 P.S. § 780-113(a)(30);
- Count two-two (2) years probation (18 Pa.C.S. § 5104);
- Count three-one year (1) probation on count three (35 P.S. § 780-113(a)(32);
- Costs of $852.90. (RR at 62a).

2. No. 1496

- Count one-one (1) to four (4) years incarceration and a fine of $1,500 (75 Pa.C.S. § 3802(d)(1));
- Count four-ninety days (90) incarceration and a fine of $1,000 (75 PA.C.S. § 1543(b)(1));
- Costs of 938.90. (RR at 63a).

3. No. 2530

- Count one-three (3) years probation, and a fine of $100 (35 P.S. § 780-113(a)(16); and

- Count two - One-year probation (35 P.S. § 780-113(a)(16)).
- Costs of 954.90. (RR 65a).

RR at 1a-4a, 14a-15a, 25a-26a, and 30a-32a.

Mr. Ford did not file post-trial motions or a direct appeal of his judgment of sentence. RR at 1a-24a. On September 22, 2016, Mr. Ford filed a *pro se* petition pursuant to the Post-Conviction Relief Act. RR at 17a. The trial court appointed counsel who filed an amended counseled Petition. In that petition, Mr. Ford alleged that he received an unlawful sentence based upon the imposition of a fine without a hearing on his ability to pay it . RR at 27a-30a. On January 26, 2017, the PCRA Court issued a notice pursuant to P.R.Crim.P. 907 stating its intention to dismiss Mr. Ford's petition without a hearing. RR at 7a. On March 10, 2017 the PCRA court then dismissed the petition. RR at 7a. Timely notice of appeal was filed wherein Mr. Ford raised the following issue:

1. Whether the PCRA court erred in refusing post-conviction relief with a sentencing court imposed a penalty of fines and costs without a hearing on appellant's ability to pay or whether payment would interfere with appellant's ability to pay restitution?

2. Whether the PCRA court erred in denying post-conviction relief where trial counsel failed to object to or take reasonable steps to correct the imposition of an illegal sentence of fines on his client?

Superior Court Opinion, at 1.

The Superior Court remanded the case for new sentencing after finding that the trial court erred by imposing a fine without making a determination that Mr. Ford had the ability to pay such a fine. Superior Court Opinion at 4. The court found that under 42 Pa.C.S. § 9726(c) the trial court was required to convene a hearing to determine Mr. Ford's ability to pay a fine, regardless of his agreement to the fine as part of his guilty plea agreement. Superior Court Opinion at 3-4. The Superior Court determined that the obligation of the trial court to conduct this analysis was non-waivable by the defendant. Superior Court Opinion at 3.

There are two places in the record setting forth the terms of Mr. Ford's plea agreement: (1) the executed written guilty plea agreement and written guilty plea colloquy that sets forth the terms and conditions of the guilty plea and the trial rights that were being given up; and (2) the oral guilty plea colloquy in which Mr. Ford engaged with the court and counsel at the time of his in court guilty plea hearing. In neither of the written documents nor in the oral colloquy is the trial court's duty to evaluate Mr. Ford's financial condition addressed. RR at 25a-26a, and 30-58a. Further, there is no reference to Section 9726's prohibition against imposition of a fine that Mr. Ford could not afford to pay. *Id.* Finally, there is no admonition that default on the payment of a fine could result in a finding of contempt and further incarceration beyond the term of the agreed upon

sentence. *Id.* The Superior Court found that Mr. Ford's consent to the terms of the guilty plea did not constitute either an explicit or implicit waiver of the court's obligations of Section 9726. Superior Court Opinion at 3.

SUMMARY OF THE ARGUMENT

In this case, appellee Christian Ford entered a consolidated guilty plea on three cases pursuant to a plea agreement which called for imposition of fines. For each case the trial court imposed a fine without conducting a hearing on Mr. Ford's ability to pay those fines as required by statute. 42 Pa.C.S. § 9276 permits a court to impose a fine as part of the sentence, but limits that power in two important ways. First, "the court shall not sentence a defendant to pay a fine unless it appears of record that the defendant is or will be able to pay a fine." Second, where the court finds an ability to pay, the court must determine "the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose limitations on the power of the court to impose such a fine." If the court finds that the defendant cannot afford to pay a fine, it is prohibited from imposing one. The court failed to undertake that inquiry in violation of section 9276 rendering the sentence unlawful and requiring a remand for a hearing on Mr. Ford's ability to pay the fines imposed.

Mr. Ford's agreement to pay fines as part of the plea agreement does not relieve the sentencing court of its obligation under section 9726, as that sentencing statute places an affirmative obligation on the sentencing court to not impose a fine unless the record shows that the defendant can afford it. It is not a "right" that the defendant can waive. The mere fact that a defendant agreed as part of the plea bargaining process to pay a specific fine is not by itself sufficient for the sentencing court to meet its statutory obligation. Where a guilty plea agreement calls for a term of imprisonment, the primary priority for that criminal defendant is the restoration of liberty. Under such circumstances, an agreement to pay a fine as part of the plea agreement does not indicate whether the defendant can actually afford to pay that fine, which is what is required by Section 9726. Section 9726 imposes a mandatory duty on the sentencing court to inquire into a defendant's ability to pay a fine and make findings regarding his financial circumstances. This evaluation cannot be waived by the defendant because it is not a right but rather a duty imposed upon the court as part of the sentencing scheme to assure that an illegal sentence is not imposed. Regardless, the record in the case indicates that no waiver happened here. The sentencing court had no way of knowing whether Mr.

Ford even knew that fines cannot exceed his financial means or that his failure to pay the fine could lead to further incarceration.

The appropriate remedy here is not to vacate the entire sentence and the plea agreement, which would have far-reaching consequences beyond this case and would have the potential to interfere with the plea agreement process. Instead, this Court should do what the Superior Court has repeatedly done when an illegal financial condition is imposed by a sentencing court: only vacate the financial condition and remand for resentencing only on that portion.

ARGUMENT

A. 42 Pa.C.S. § 9726 imposes a substantive limit on the sentence that a court can impose, and the trial court imposed an illegal sentence by not complying with that statute.

The Commonwealth suggests what seems to be a reasonable proposition: a defendant who enters into a plea agreement that requires him to pay a specific fine should be required to pay it as part of his sentence. But within this proposition is an attempt to upend the sentencing structure in Pennsylvania and to permit courts to impose illegal sentences. Doing so would violate 42 Pa.C.S. § 9276 and 40 years of consistent case law from this Court and the Superior Court. This Court must instead reaffirm the importance of Section 9726 and the obligation of the sentencing court to impose a fine that does not exceed the defendant's financial means.

42 Pa.C.S. § 9276 permits a court to impose a fine as part of the sentence, but it has two significant limitations on the power of the court to impose such a fine:

> (c) Exception.--The court shall not sentence a defendant to pay a fine unless it appears of record that:
>
> (1) the defendant is or will be able to pay the fine; and
>
> (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

> (d) Financial resources.--In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

Subsection (c) prohibits *any* fine unless the record shows that the defendant can afford to pay a fine and that such payments will not prevent the defendant from paying restitution. Subsection (d) requires that the court only impose a specific dollar amount that a defendant can afford.[1] In other words, if a court determines based on the "financial resources" of the defendant and the "burden" it would impose that a defendant can only afford a $50 fine, the court is *prohibited* from imposing a larger fine. 42 Pa.C.S. § 9726(d). This serves as a statutory maximum on the allowable sentence (the fine).

Working together, (c) and (d) impose a substantive, statutory limit on the power of the court to impose a fine. If the record does not support that a defendant can afford a specific fine, then § 9726 imposes a statutory maximum on the allowable sentence by capping the fine at a lower amount. Indeed, the *en banc* Superior Court—in an opinion joined by then-Judges Mundy and Wecht, with then-Judge Donohue concurring—ruled that § 9726 "clearly limits the sentencing

[1] The term "amount and method of payment" is a term of art that refers to the total amount of money the defendant owes. It does not refer to payment plans, which are addressed by 42 Pa.C.S. §§ 9730 and 9758. As is described below, the term of art comes from the Model Penal Code.

court's power to impose fines; the court is prohibited from imposing a fine unless the record indicates that the defendant will be able to pay the fine." *Commonwealth v. Boyd*, 73 A.3d 1269, 1272 (Pa. Super. 2013)(*en banc*). As a result, the question of whether the trial court abided by § 9726 goes directly to the legality of the sentence and cannot be waived. *Id.*

It is axiomatic that a defendant may not agree to an illegal sentence as part of a plea agreement, as a "plea agreement cannot contain a term proscribed by the Legislature." *See, Commonwealth v. Dorsey*, 421 A.2d 777, 778 (Pa. Super.1980) (striking from a plea agreement a term that required the defendant to pay more than one set of court costs); and *Commonwealth v Rivera*, 154 A.3d 370, 381 (Pa. Super. 2017)(en banc)(defendant cannot "bargain" for an illegal sentence). If a statute imposes a maximum sentence of three years in jail, and the defendant in a plea agreement agrees to *five* years in jail, the sentencing court would lack the statutory authority to impose such a sentence. If a sentencing court can disregard the statutory maximum in Section 9726, it would be functionally no different, as fines are punishment just like a sentence of incarceration. *See Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. 2014)(explaining that fines are "direct consequences, and therefore, punishment").

The Commonwealth's position that sentencing courts are free to

disregard the clear mandate and limits imposed by § 9726(c) and (d) is particularly remarkable because this Court and the Superior Court have consistently ruled over the past 40 years that a sentencing court *cannot* impose a fine unless the record shows that the defendant is able to afford to pay that fine. While this Court has only touched on the topic once, the Superior Court has issued at least **twenty** published opinions confirming that the trial court has an obligation to consider the defendant's ability to pay a fine under 42 Pa.C.S. § 9726: *Commonwealth v. Riggins*, 377 A.2d 140 (Pa. 1977)(vacating entire sentence, including a fine, for failure to state reasons on the record under the new sentencing code); *Commonwealth v. Boyd*, 73 A.3d 1269, 1272 (whether a trial court complied with the requirements of § 9726 goes to the legality of the sentence and cannot be waived) (Mundy, J. and Wecht, J. joining opinion; Donohue, J. concurring in result); *Commonwealth v. Allshouse*, 924 A.2d 1215, 1228 n.26 (Pa. Super. 2007), affirmed 36 A.3d 163 (explaining that "our precedent strongly suggests we strictly adhere to the mandates" of § 9726, and vacating a fine because the trial court imposed it without sufficient financial information); *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. 2005)(trial court failed to make "specific findings of appellant's ability to pay the fine imposed," in violation of § 9726); *Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. 1997)(fine in summary case must

be based on the defendant's ability to pay under § 9726); *Commonwealth v. Boyd*, 679 A.2d 1284, 1290 (Pa. Super. 1996)(record was insufficient to "determine whether the lower court had sufficient information available to conclude that appellant had or will have the financial ability to pay the fine"); *Commonwealth v. Gaddis*, 639 A.2d 462, 470-71 (Pa. Super. 1994)(trial court "erred in sentencing appellant to pay such an astronomical fine without making inquiry as to his ability to pay" as required by § 9726); *Commonwealth v. Fusco*, 594 A.2d 373, 375 (Pa. Super. 1991)(vacating fine because "no inquiry was made as to his ability to pay the fine imposed"); *Commonwealth v. Adame*, 526 A.2d 408, 409 (Pa. Super. 1987)(reversing the sentencing order of a trial court because of "procedural irregularities," including "[f]ailure to articulate the amount of the fine, its due date and inquire as to the appellant's financial ability to pay (*see* 42 Pa. C.S. §§ 9758(a), 9726(d) and Pa.R.Crim.P. 1407)"); *Commonwealth v. Hess*, 503 A.2d 448, 450 (Pa. Super. 1986)(sentencing court "complied with the mandates of subsections 9726(c) and (d) of the Sentencing Code" in imposing a fine); *Commonwealth v. Stock*, 499 A.2d 308, 316 (Pa. Super. 1985)(pursuant to § 9726, sentencing judge appropriately considered the defendant's ability to pay a fine); *Commonwealth v. Yacoubian*, 489 A.2d 228, 235 (Pa. Super. 1985)(fine improper where it prevented the defendant from paying restitution); *Commonwealth v. Warden*, 484 A.2d 151,

155 (Pa. Super. 1984)(fine vacated where there was "absolutely no inquiry on the record" as to the defendant's ability to pay the fine); *Commonwealth v. Scatena*, 332 A.2d 855, 865-69 (Pa. Super. 1984)(sentencing judge had sufficient information through presentence investigation to impose fine under § 9726); *Commonwealth v. Croll*, 480 A.2d 266, 276 (Pa. Super. 1984)(fine vacated for failure to comply with § 9726); *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. 1984)(court lacked evidence necessary to impose a fine when the defendant "has neither financial assets nor liabilities" and has been "living hand to mouth"); *Commonwealth v. Falkenhan*, 452 A.2d 750, 758 (Pa. Super. 1982)(fine for direct criminal contempt must comply with § 9726); *Commonwealth v. Arenella*, 452 A.2d 243, 248 (Pa. Super. 1982)(vacating fine for failure to follow § 9726); *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. 1982)(per curiam) (affirming other parts of the sentence but vacating the fine, as the trial court violated both Section 9726 and Rule 1407(C) (today Rule 706(C)) because it had insufficient information about the defendant's finances); *Commonwealth v. Reardon*, 443 A.2d 792, 795 (Pa. Super. 1981)(per curiam)(trial judge failed to comply with § 9726 in imposing a fine); *Commonwealth v. Schwartz*, 418 A.2d 637, 639-40 (Pa. Super. 1980)(trial court lacked sufficient information about the defendant's finances to impose a fine).

Indeed, in at least four of these cases, the Superior Court ruled that the fine was illegally imposed as part of the sentence under Section 9726 even if the defendant pled guilty. *See, Fusco*, 594 A.2d at 375; *Gaskin*, 472 A.2d at 1157-58; *Mead*, 446 A.2d at 973; and *Schwartz*, 418 A.2d at 639-40. Pennsylvania courts have, for decades, been required to consider defendants' ability to pay fines after a plea agreement, yet the plea agreement process has not collapsed.

Finally, the Superior Court has already ruled that a defendant cannot agree to financial obligations that exceed those authorized by statute, because that would lead to an illegal sentence. In *Commonwealth v. Dorsey*, 421 A.2d 777, 778 (Pa. Super. 1980), a defendant in Lancaster County entered into a plea agreement where he agreed to pay three sets of court costs—one on each indictment. However, state law permits only *one* set of court costs.[2] The court explained that "[i]t must be obvious, however, that a plea agreement cannot contain a term proscribed by the Legislature. It is appropriate, then, to strike such a term from the agreement, especially when, as is undisputed here, that term did not induce the

[2] The statute in *Dorsey*, the Act of March 10, 1905, P.L. 35, 19 P.S. § 1294, was repealed by Act 53 of 1978, the "Judiciary Act Repealer Act" ("JARA"). However, JARA contained a savings clause that keeps repealed statutes active as part of the common law unless they have been superseded by court rule, which the 1905 Act has not. As a result, it remains binding as part of Pennsylvania's common law. *See, e.g., Harnish v. School Dist. of Philadelphia*, 732 A.2d 596, 598 n.1 (Pa. 1999)(act governing compulsory nonsuit repealed by JARA, "but remains in effect as part of the common law").

Commonwealth to enter the agreement." *Id.* Section 9726 plays the same role here: the legislature has proscribed imposing any fine that a defendant cannot afford. Such a practice is illegal, and a defendant therefore cannot agree to it.

Because the trial court failed to consider Mr. Ford's ability to pay the fines at issue and imposed those fines without any evidence on the record regarding his ability to pay it, the trial court imposed an illegal sentence.

B. The history of 42 Pa.C.S. § 9726 demonstrates that it is an integral part of the sentencing structure enacted by the legislature to cure the problem of defendants owing unaffordable fines.

The importance of 42 Pa.C.S. § 9726(c) and (d) as integral parts of the sentencing structure—which were intended to place substantive limits on courts' sentencing authority—is further highlighted in the history of its enactment, which dates to the 1962 Model Penal Code. In the early 1970s, Pennsylvania's courts were grappling with contemporaneous opinions from the United States Supreme Court that "unquestionably demonstrated that the desire to eliminate inequities in the criminal process caused by indigency." *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973). At the time, there was a real focus and concern on court practices that jailed indigent defendants for nonpayment of fines and costs even though those defendants had no ability to pay. Both this Court and the General Assembly recognized that the way to end that scourge was to ensure that

indigent defendants are not assessed unaffordable debt in the first place.

Thus, this Court issued its opinion in *Parrish*, invalidating a practice by the Lancaster County Court of Common Pleas that automatically and routinely jailed defendants who were too poor to pay fines and costs. *Id.* Two months later, this Court adopted Pa.R.Crim.P. 706 (at the time, it was Rule 1407). In addition to codifying the *Parrish* decision in section (A) and (D) and requiring that defendants have payment plans in section (B), section (C) requires that sentencing courts consider defendants' ability to pay fines and costs at sentencing.[3]

Then, a year after Rule 706/1407 was adopted, the legislature in Act 345 of 1974 adopted Section 7.02 of the Code as 18 Pa.C.S. § 1326—which today is 42 Pa.C.S. § 9726. This provision was drawn verbatim from Section 7.02 of the 1962 Model Penal Code from the American Law Institute. Exhibit "A." *See Commonwealth v. Colin*, 335 A.2d 383, 388 (Pa. Super. 1975)(Hoffman, J., dissenting) (noting that the Model Penal Code served as the basis for the 1974 revisions). In so doing, the legislature put a definitive and substantive limit on the imposition of any fines that are beyond the defendant's means.

Counsel is unaware of any legislative history specifically addressing

[3] The language in the provision is nearly identical to that in 42 Pa.C.S. § 9726(d). Amicus curiae the Defender Association of Pennsylvania provide additional detail on Pa.R.Crim.P. 706(C) in its amicus brief.

42 Pa.C.S. § 9726, as it was part of a larger criminal justice reform package. However, there are extensive commentaries accompanying Section 7.02 of the 1962 Model Penal Code. As the drafters explained, "a defendant of very limited assets . . . may be devastated by even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense." Model Penal Code and Commentaries, American Law Institute (1985) at 240. Exhibit "A." With this policy goal in mind, § 9726 was drafted so "that fines should not be imposed on those who are or will be unable to pay them." *Id.* at 242. The intended outcome was that the only cases where fines are unpaid should be those where "an error as to the application of this criterion has been made (in which case the fine should be set aside) or cases in which the defendant could pay the fine but has refused to do so." *Id.* at 241.[4]

Much of this part of the Model Penal Code was concerned with the downstream consequences of defendants being jailed sometime after sentencing because they were too poor to pay fines (the same concern this Court expressed in *Parrish* and Rule 706). With that in mind, the Commentary to the Code reflects a concern not only about unlawful incarceration but also that "to a very large extent

[4] To make this work in practice, the language in 42 Pa.C.S. §9726(d) was intended to fix "the amount of a fine and the method of payment" to the "financial resources of the defendant" based on the burden payment will impose. *Id.* at 243.

the impact" of using fines "turns on the means of the defendant":

> a defendant of wealth is often unaffected by a fine and may be more than willing to treat the fine as an acceptable cost of engaging in prohibited conduct; a defendant of very limited assets, however, may be devastated by even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense.

Model Penal Code and Commentaries, American Law Institute (1985) at 240. Exhibit "A."

In other words, indigent defendants face a disproportionate burden because they struggle to pay what are modest fines to people with means. The drafters of the Model Penal Code—and the General Assembly in adopting these provisions wholesale in 42 Pa.C.S. § 9726—had a clear view: only permit courts to impose fines that the record shows the defendant can afford. This has been the law for 45 years. To do otherwise violates § 9726 and constitutes an illegal sentence.[5]

[5] Mr. Ford's PCRA counsel unfortunately did not file a cross-Petition for Allowance of Appeal with respect to the Superior Court's ruling that "mandatory" fines are not subject to 42 Pa.C.S. § 9726(c) and (d). While this issue is therefore not before the Court, the Court should note that as a matter of statutory construction there are *no* mandatory fines. That is because statutes that impose "mandatory" fines must be read *in pari materia* with § 9726, since both address the same topic. 1 Pa.C.S. §1932. Accordingly, 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." *Id.* at § 1933. The specific prevails over the general if there is a conflict—but *only if* the conflict is "irreconcilable." *Id.* at § 1933. The statutory language in a statute imposing a "mandatory" fine can easily be read together with § 9726 without being irreconcilable: the court must impose that statutory fine *unless the defendant cannot afford it* under § 9726. As a result, Mr. Ford urges this Court to not draw any distinctions between statutes that impose discretionary fines versus those that impose mandatory fines.

C. A sentencing court is still bound by its sentencing obligations under 42 Pa.C.S. § 9726 even if a defendant enters into a plea agreement that lists a specific fine.

Mr. Ford agreed to pay fines as part of his sentence. This does not, however, relieve the *sentencing court* of its obligation under 42 Pa.C.S. § 9726(c) and (d), as that sentencing statute places an affirmative obligation on the sentencing court to not impose a fine unless the record shows that the defendant can afford it. Thus, it is not a "right" that the defendant can waive. The mere fact that a defendant agreed as part of the plea bargaining process to pay a specific fine is not by itself sufficient for the sentencing court to meet its statutory obligation. 42 Pa.C.S. § 9726 imposes a mandatory duty on the sentencing court to inquire into a defendant's ability to pay a fine and make findings regarding his financial circumstances. This evaluation cannot be waived by the defendant because it is not a right but rather a duty imposed upon the court as part of the sentencing scheme to assure that an illegal sentence is not imposed. Amici details the important policy goals that are served by the non-waivable nature of this requirement. Were this Court to be unpersuaded, however, and find that waiver can be manifested by the defendant at his guilty plea or sentencing hearing, no waiver happened here because it was not explained that a fine could not be imposed if he could no afford

it. See Pa.R.Crim.P. 590(B)(2)(judge must "determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of nolo contendere is based.")

Where important procedural protections are waived, that waiver is only valid where the court has received a proper colloquy and the record manifests that the waiver was given knowingly, intelligently and voluntarily. For example, waiver of jury trial rights, whether in favor of a bench trial or a guilty plea must be accompanied by court colloquy that demonstrates that the defendant's decision is knowing, intelligent and voluntary. See Pa. R. Crim. Pr. 620. By affirmatively prohibiting the imposition of a fine where it is obvious that a defendant cannot afford it and making that prohibition mandatory ("The court shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine."), the legislature made is crystal clear that it should not be waivable. Should this Court find, however, that it is waivable, such a waiver should carry with it the same comprehensiveness and certainty demanded of the waiver of other important court procedures.

An agreement to pay a fine as part of a plea agreement does not indicate whether the defendant can actually afford to pay that fine, which is what is required by § 9726. While the record does not reflect Mr. Ford's motives in terms

of the plea deal, there is nothing to suggest that they were any different than virtually any other defendant in his position: expedite the restoration of liberty; minimize the period of supervision and worry about the financial cost later regardless of the capacity to afford it. Among other problems with assuming that a defendant who pleads guilty is acknowledging he can afford to pay a specific fine is that the sentencing court has no way of knowing whether the defendant even knew that fines cannot exceed his financial means or that his failure to pay the fine could lead to future proceedings that could result in further incarceration. The written and oral plea colloquy as well as the plea agreement are entirely free of any mention of the fact that state law prohibits imposition of a fine that exceeds the defendant's ability to pay. While the Commonwealth writes in its brief that "[b]y necessary implication, a party has the ability to perform the terms of the bargain into which he enters," the Commonwealth misses the mark. When defendants are weighing potentially long jail sentences on one hand and a far more abstract financial consequence on the other, there is certainly no reason why a rational defendant would give a second thought to the difficulty of paying something with which he will struggle.

Further, placing the obligation on the trial court to affirmatively inquire into a defendant's ability to pay is actually a well-established part of

Pennsylvania law that arises out of the contempt and probation violation case law. As is explained in more detail by Amicus Curiae ACLU of Pennsylvania, Pennsylvania courts continue to unlawfully incarcerate defendants through contempt hearings and to revoke or extend periods of supervision for defendants who fail to pay fines and costs. One way that our law has developed to address this problem is to put an affirmative obligation on the trial court to inquire into the reasons for nonpayment. For example, the Superior Court has explained that even if the defendant did not "offer any evidence concerning his indigency," the trial court violates *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) if it does not "*inquire* into the reasons" for nonpayment and make "findings" about the defendant's ability to pay. *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. 1984)(emphasis added). That court affirmed these principles just last year, explaining that trial courts violate the law by jailing defendants for nonpayment without making "findings of fact" regarding their ability to pay. *See Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. 2018); and *Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. 2018)(same). In those circumstances, as at sentencing under Section 9726, it is the trial court's obligation to make certain findings regarding ability to pay. The defendant's acquiescence or failure to raise his inability to pay does not excuse the sentencing court of its

obligation.

The Commonwealth argues that *Commonwealth v. Gardner*, 632 A.2d 556 (Pa. Super. 1993), a case about restitution, dictates that a defendant cannot raise his inability to pay if he agreed to pay an amount as part of a plea bargain. That argument, and the reliance on *Gardner* fall apart upon closer scrutiny. Certainly *Gardner* is not binding on this Court, and to the extent that it is directly relevant to a court's obligation under 42 Pa.C.S. § 9726, it would also be in rather clear contradiction with, at a minimum, four Superior Court cases that invalidated fines imposed after the defendant entered into a plea agreement. *See Fusco*, 594 A.2d at 375; *Gaskin*, 472 A.2d at 1157-58; *Mead*, 446 A.2d at 973; *Schwartz*, 418 A.2d at 639-40.

The biggest problem, however, is that *Gardner* was operating under an entirely different statutory framework. To be clear, it is not merely that "fines are different from restitution" as a legal matter (although they are)[6]. Instead, it is

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[6] The goals of restitution are rehabilitative and restorative and are valued above payment of a fine which is punitive. *See e.g., Commonwealth v. Walton* 397 A.2d 1179, 1845 (Pa. 1970). Restitution is intended to impress upon the defendant that his criminal conduct caused the victim's loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible. *Commonwealth v. Anderson*, 39 A.2d 300 (Pa. 1990). The primacy of restitution over fines is evidenced in two ways. The current restitution statute makes restitution mandatory regardless of defendant's ability to pay (18 Pa.C.S. § 1106(c)(1)); and Section 9726 makes a fine of secondary importance to restitution. Section 9726 (c) states that the "[t]he courts shall not sentence, the defendant to pay a fine unless it appears of record that: (2) the fine will not prevent the defendant from making restitution or reparation of the victim of the crime." Thus, the type of permissiveness that the *Gardner* court may read into the defendant's agreement to pay restitution is not controlling or even persuasive with respect to the rules created by the legislature with respect to the imposition of a fine under 9726.

that the General Assembly *never* mandated that restitution must be tailored to a defendant's ability to pay. The Commonwealth is correct that before 1995, the practice in Pennsylvania was to limit restitution to what a defendant could afford. But this was *not* part of 18 Pa.C.S. § 1106 (the statute that at the time permitted restitution—today it is mandatory), and not part of a statutorily-mandated sentencing scheme. Instead, it was solely a requirement imposed by case law, dating back to *Commonwealth v. Fuqua*, 407 A.2d 24, 25-26 (Pa. Super. 1979), based on decisions from other states and the rehabilitative and restorative purpose of restitution. While the General Assembly explicitly prohibited such a consideration in Act 12 of the 1995 special legislative session, reviewing the prior statute shows that there was no prohibition against imposing restitution if a defendant was unable to afford it.[7]

With fines and 42 Pa.C.S. § 9726, there is, of course, an entirely different statutory scheme. Here, a fine can *only* be imposed if the defendant is able to afford to pay it. It goes to the substantive power of the court to impose that fine in the first place. The General Assembly imposed no statutory maximum on the restitution at issue in *Fuqua* and *Gardner*—in contrast to § 9726, which has

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[7]Act 12 came from House Bill 18, P.N. 136. *See* https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=1995&sind=1&body=H&type=B&bn=0018.

precisely such a statutory maximum. Simply copying and pasting *Gardner*'s holding onto this case would ignore this different statutory structure and violate § 9726. As a result, *Gardner* is inapposite.

D. The appropriate remedy is to vacate for resentencing only the part of the sentence that imposes the illegal fine, while leaving the remainder of the plea agreement unaffected.

The sentencing court did not abide by its statutory obligation under 42 Pa.C.S. § 9726(c) and (d). The appropriate remedy is not to vacate the entire sentence and the plea agreement, which would have far-reaching consequences beyond this case and would have the potential to interfere with the plea agreement process. Instead, this Court should do what the Superior Court has repeatedly done when an illegal financial condition is imposed by a sentencing court: only vacate the financial condition and remand for resentencing only on that portion.

In at least three cases of which counsel is aware, the Superior Court has confronted illegal financial obligations and stricken them without affecting the remainder of the sentence. In *Mead*, the Superior Court in a *per curiam* decision ruled that the trial court violated both § 9726 and Rule 706(C) (then Rule 1407(C)) by failing to consider the defendant's ability to pay the fine. 446 A.2d at 973-74. The defendant had pled guilty, but the Court nevertheless vacated the fine—while keeping the other portions of the guilty plea intact—and remanded for the trial

court to consider the defendant's ability to pay the fine. *Id.* ("Consequently, we must vacate *that portion* of appellant's sentence and remand for further proceedings. Judgment of sentence affirmed as to imprisonment and payment of restitution and costs only. *Judgment of sentence as to fine is vacated* and case remanded for further proceedings")(emphasis added).

The court made a substantially similar ruling in *Dorsey*, in which it determined that a defendant entered into a plea agreement that unlawfully required that he pay multiple sets of court costs. As a result, the court found it "appropriate, then, to strike such a term from the agreement" without disturbing the rest of the agreement. *Dorsey*, 421 A.2d at 778. Similarly, in *Commonwealth v. Gentry*, 101 A.3d 813, 819 (Pa. Super. 2014)—in an opinion by then-Judge Mundy—the Superior Court vacated a "placeholder" restitution order and instructed the sentencing court to "conduct a new sentencing hearing, limited to the issue of restitution." Again, this decision did not upset the remainder of the plea agreement, which was not illegal or otherwise invalid. *Id.* at 815.

The sentencing court should do precisely what the Superior Court in *Mead* has instructed: abide by the requirements of the plea agreement while still following the statutory mandate of § 9726 by determining whether the defendant is able to pay the fine. If the sentencing court determines that the defendant is *unable*

to pay the agreed-upon fine, the sentencing court must reduce it accordingly without invalidating the rest of the plea agreement. To do otherwise would eviscerate the General Assembly's sentencing structure as codified in § 9726. Accordingly, this Court should vacate the $100 fine and remand so that the sentencing court can determine whether Mr. Ford can afford it—and if not, impose either no fine or a lower fine.

CONCLUSION

For the foregoing reasons, appellee submits that the fines imposed on him should be stricken and the case remanded with instructions that the trial court convene a hearing to determine whether Mr. Ford can afford to pay a fine, and if so, the maximum amount he can afford consistent with the provisions of Section 9726.

Respectfully submitted,

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Attorney for Appellee Christian Lee Ford

EXHIBIT

A

MODEL PENAL CODE

AND

COMMENTARIES

(Official Draft and Revised Comments)

With text of Model Penal Code as adopted
at the 1962 Annual Meeting of
The American Law Institute
at Washington, D.C., May 24, 1962

PART I

GENERAL PROVISIONS
§§ 6.01 to 7.09

PHILADELPHIA, PA.
THE AMERICAN LAW INSTITUTE
1985

The drafting of the Model Penal Code and Commentaries, which began in 1952, was supported by a grant from the Rockefeller Foundation. The project to revise the Commentaries, which began in 1976, was supported in part by Grant Number 76-NI-AX-0085, awarded to the American Law Institute by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U. S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document do not necessarily represent the official position or policies of the Rockefeller Foundation or the U. S. Department of Justice.

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Library of Congress Catalog Card Number: 84-51700

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traditional language of the Model Code is employed, or the newer terminology of conditional discharge is substituted.[36]

Section 7.02. Criteria for Imposing Fines.*

(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) the defendant has derived a pecuniary gain from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) In determining the amount and method of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

Explanatory Note

Subsection (1) proceeds on the premise that a fine alone should be a sanction to which the court turns only for affirmative reasons,

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[36] *See* Conn. § 53a-29 (supervision if probation, no supervision if conditional discharge; discretionary conditions in both cases); Ky. §§ 533.020, .030 (supervision for probation only; discretionary conditions for both except for requirement of no criminal conduct); N.H. §§ 651:2, :20 (& Supp. 1977) (supervision for probation only; conditions discretionary in all cases; court may require defendant sentenced to suspended sentence to report to prison facility); N.Y. §§ 65.00, .05, .10 (& Supp. 1979) (supervision for probation only; conditions discretionary except for probation requirement of reporting to officer); Md. (p) §§ 65.00, .05, .10 (supervision for probation only; conditions discretionary for both); Mass. (p) ch. 264, §§ 20, 21 (supervision for probation only; conditions discretionary for both); Mich. (2d p) 1979 Final Draft §§ 1305, 1315, 1320 (supervision for probation only; conditions discretionary except for requirements of no violation of criminal law, staying within jurisdiction of state, and report to probation supervisor).

* *History.* Presented in Tentative Draft No. 2 to the Institute at the May 1954 meeting. Reprinted in Tentative Draft No. 4. Presented again to the Institute in Proposed Final Draft No. 1 and approved at the May 1961 meeting. *See* ALI Pro-

that generally other sanctions are likely to be more effective. It accordingly provides that a fine alone should be employed only when it alone will suffice for protection of the public. Subsection (1) does not apply to violations, nor to offenses where a corporation is the defendant.

Subsection (2) articulates criteria for those occasions when the court is considering a fine in addition to a sentence of imprisonment or probation. The premise again is that the routine imposition of fines is to be discouraged, and that affirmative reasons should underlie the imposition of fines in this context.

Subsection (3) provides that a fine shall not be imposed unless the defendant is adjudged capable of paying it, either at once or in the future. Article 302 elaborates on methods of payment and the problem of nonpayment, Section 302.2 providing in particular that nonpayment can result in a jail sentence only when, in effect, the defendant is in contempt of the court order, i.e., only when he could have paid the fine but did not.

Subsection (3)(b) states a second criterion for the imposition of fines, namely that a fine should not be employed when it would interfere with the defendant's opportunity to make restitution or reparation to the victim of the crime.

Subsection (4) directs the court to consider the defendant's resources and ability to pay in determining the amount and method of payment of a fine.

Comment†

1. *Purpose.* This section articulates the policy of the Model Code to discourage use of fines as a routine or even frequent punishment for the commission of crime. Under the classification of offenses set out in Section 1.04 any offense that is punishable *only* by a fine is declared to be a noncriminal violation, since it dilutes the moral blameworthiness that ought to be associated with the concept of crime to apply the concept to behavior for which society is willing only to exact a monetary penalty. Whether or not the imposition of another penalty is permitted, the promiscuous use of fines rests on largely untested assumptions about the deterrent efficacy of sentences requiring only the

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ceedings 349–52 (1961). Reprinted with verbal changes in the Proposed Official Draft and approved at the May 1962 meeting. *See* ALI Proceedings 226–27 (1962). For original Comment, *see* T.D. 2 at 36 (1954).

† With a few exceptions, research ended Oct. 1, 1979. For the key to abbreviated citations used for enacted and proposed penal codes throughout footnotes, see p. xxxi *supra*.

payment of a fine.[1] The use of a fine also has distinctly negative value for the administration of penal law when its real rationale is the financial advantage of the agency levying the fine.

This section approaches the use of fines by declaring that they may not be imposed unless the court is satisfied that specifically enumerated conditions have been met. These conditions differ depending on whether the fine is the only penalty imposed or accompanies an imprisonment or probation sentence. Both cases are governed, however, by the limitations in Subsection (3) concerning the impact a fine would have on the defendant's financial circumstances.

2. *Fine as the Only Penalty.* Subsection (1) supports a restricted role for fines by requiring that a court, before imposing a fine as the only sanction for an offense,[2] must satisfy itself that, considering the characteristics of the offense and of the offender, such a disposition will suffice for public protection. In the absence of an opinion, a fine may not be the only sanction employed by the court. Criminal offenses, which are ostensibly to be taken seriously by the general population, should not be routinely met by the imposition of fines as the sole sanction.

However, this section must not be taken to foster the notion that imprisonment should presumptively be the disposition in lieu of a fine. Section 7.01 clearly states that this is not the intention. The two sections together require that the court accord priority to probation or a suspension of sentence, moving from this as a

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[1] "Though studies have shown the threat of small fines to be effective in reducing the frequency of some types of behavior, the studies to date have dealt with relatively minor offenses that are not strongly motivated, and there is no reason to suppose that economic threats are of any unique efficacy." F. Zimring & G. Hawkins, Deterrence 178 (1973). Nigel Walker interprets studies showing a low reconviction rate for offenders who have been fined to indicate

> that the sort of man whom courts think they can correct by means of a fine is in the nature of things more likely to go straight whatever is done to him. This is not at all unlikely. The man who is regarded by sensible courts as worth fining is the man with a steady job, good wages and a fixed address: a better prospect than the intermittently employed man with 'no fixed abode'. The very nature of a fine makes it *less* likely to be applied to the men who are *most* likely to be reconvicted.

N. Walker, Sentencing in a Rational Society 95 (1969).

[2] Subsection (1) is not intended to apply to cases where a corporation is the defendant or where the conviction is for a violation. In both instances, the only alternatives open to the court are a fine and a suspension of the sentence. *See* Sections 6.02(4) and 6.04(1). Since a suspension of the imposition of sentence is not a sentence but the withholding of sentence, it should not be considered another "disposition" within the language of Section 7.02(1). On the other hand, selection between the alternatives set forth in Section 6.02(3) will be governed by the criterion of 7.02(1). Subsections (3) and (4) of Section 7.02 apply fully to corporations and to convictions for violations, as well as to the cases covered by Section 6.02(3).

starting point to a fine alone or to imprisonment only if the factors specified by the Model Code as sufficient to support these alternatives affirmatively emerge.

The judgment that fines are of sufficiently doubtful correctional and deterrent utility to warrant treating the question in this manner has been accepted in several recently revised codes and proposals.[3]

3. *Fine with Other Sanctions.* Subsection (2) addresses the question of when fines should be employed in addition to other sanctions.[4] Again, the major thrust of the proposal is aimed at discouraging the routine use of fines. The question is properly put as whether, given the decision to impose some other sanction, the addition of a fine to the sentence is likely to contribute significantly to achievement of the objectives of the sentencing law. Here, it is possible to state the criteria for use of fines more narrowly than in the case of the use of fines alone, since these are viewed as ancillary to sanctions that offer a greater potential in most instances for satisfying the purposes of the law.

The first criterion, permitting the use of a fine when the defendant derived pecuniary benefit from the offense, suggests that

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[3] *See* Haw. § 706-641(1); Iowa § 909.1; Kan. § 21-4607(1); Mass. (p) ch. 254, § 16(b); Tenn. (p) § 39-821(a)(5); Vt. (p) § 3.50.2. The 1970 Study Draft of a New Federal Criminal Code contained such a provision but it was omitted without comment from the 1971 Final Report. *Compare* Brown Comm'n Final Report § 3302 *with* Brown Comm'n Study Draft § 3302(2). There was, however, general agreement of the Commission with the point that the routine imposition of fines should be discouraged. Criteria were stated in § 3302(1) of the Brown Comm'n Final Report which were designed, like Section 7.02(1) and (2) of the Model Penal Code, to retard the routine imposition of a fine: "Because fines do not have affirmative rehabilitative value and because the impact of the imposition of a fine is uncertain, e.g., it may hurt an offender's dependents more than the offender himself, fines are discouraged . . . unless some affirmative reason indicates that a fine is peculiarly appropriate." Brown Comm'n Final Report § 3302 Comment. A 1979 proposed Federal Criminal Code made reference to justifying criteria for *all* sentences. *See* U.S. (p) S. 1722 §§ 2003, 2202 (Sept. 1979). The National Advisory Comm'n on Criminal Justice Standards and Goals, Corrections, Standard 5.5 (1973) is an almost verbatim endorsement of Section 7.02.

[4] *See* Section 6.02(3). *See also* note 2 *supra*. As observed in Comment 5 to Section 7.01, the Model Code proceeds within the tradition of providing for a suspension of the imposition of a sentence rather than a conditional discharge. Although no provision is expressly made in Section 301.1 for the imposition of a fine in cases where sentence is suspended and the defendant is released upon conditions, this might be done under the general terms of Section 301.1(2)(*l*). Codes that employ the device of conditional discharge as a form of sentence often accomplish this possibility more directly by permitting a release upon conditions accompanied by a fine. *See* Ill. ch. 38, §§ 1005-5-3(b), -9-1(b)(& Cum. Supp. 1979); Ky. § 532.040; N.H. § 651:2(IV); N.Y. §§ 60.01(2)(c), 65.05(2); Md. (p) § 75.00(1). When the supervision aspects of probation are appropriate, Section 6.02(3)(d) permits a fine to be joined to the probation order.

There is one code that uses conditional discharge as a sentencing alternative but does not permit a fine to be imposed at the same time. It does, on the other hand, permit a fine and probation. Conn. § 53a-28.

fines are most justified when the offender acted from economic incentives. The idea is not only that he should be deprived of profit from the offense, but also that those who act in response to economic motives are more inclined than not to respond to the economic disincentives contained in the law. A number of recently revised codes and proposals have adopted something like this first criterion.[5]

There were thought to be some other special cases as well for which use of a fine might be appropriate. Some acts of vandalism, for example, though too serious in certain contexts to warrant a fine alone, may warrant imposition of a fine as an addition to probation or a short prison term, in order to contribute to deterrence of the offender or of other potential offenders.[6] Thus, Subsection (2)(b) puts the obligation on the court to arrive at the conclusion that the fine is "specially adapted"—is uniquely useful in the particular context—to deterrence of the crime involved or to the correction of the offender. Several recent revisions contain similar language.[7]

4. *General Limiting Criteria.* Both Subsections (1) and (2) deal with the issue of when a fine should be used in relation to the other sanctions that are available for crime. Subsection (3) shifts the focus to factors about the defendant that indicate, in spite of conclusions that might be justified in their absence, that a fine is not appropriate.

One of the serious difficulties in the use of fines is that to a very large extent the impact of the sanction turns on the means of the defendant: a defendant of wealth is often unaffected by a fine and may be more than willing to treat the fine as an acceptable cost of engaging in prohibited conduct; a defendant of very limited assets, however, may be devastated by even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense.

It can, of course, be said that all criminal sanctions have disparate impacts and that taking such disparity into consideration is one of the important ingredients of the sound exercise of sen-

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[5] *See* Haw. § 706-641(2)(a); Kan. § 21-4607(2)(a); Ky. § 534.030(2)(d); N.J. § 2C:44-2(a)(1); N.D. § 12.1-32-05(1)(b) (whether defendant gained as result of crime is one factor to be considered in determining whether to impose fine); Mass. (p) ch. 264, § 16(b); Tenn. (p) § 821. *See also* 3 ABA Standards for Criminal Justice 18-2.7(a) Commentary (2d ed. 1980).

[6] Some provisions permit the court to fix the amount of the fine at twice the gross loss that the defendant's damage to property caused. *See, e.g.*, Ala. §§ 13A-5-11(a)(4), -5-12(c); Fla. § 775.083(f).

[7] *E.g.*, Haw. § 706-641(2)(b); Kan. § 21-4607(2)(b); N.J. § 2C:44-2(a)(2).

tencing discretion by the courts. But the problem is of a very different character when a defendant is actually unable to pay a fine. The traditional response to this situation was to require, as a substitute, service of a jail term fixed according to a variety of criteria but usually based on a ratio of dollars to days.[8] The irony of this practice was that in most cases jail would already have been considered in fixing the sentence and the fine chosen in the belief that no productive purpose would be accomplished by a jail sentence. The defendant in this position was thus required to serve a jail sentence that had previously been determined not to be necessary for preventive, deterrent or other correctional purposes.

It was for these reasons that the Model Code reformulated the law on this issue, even prior to the Supreme Court's decision in *Tate v. Short*, which adopted the view that " '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.' "[9]

Under Subsection (3), the court is not permitted to impose a fine on a defendant who is unable to pay it at the time of sentence and who will not be able to pay a deferred fine in installments or a lump sum. Cases in which a fine is imposed and not paid, therefore, will ordinarily either be instances in which an error as to the application of this criterion has been made (in which case the fine should be set aside) or cases in which the defendant could pay the fine but has refused to do so. Under Section 302.2 a defendant may be imprisoned if he wilfully refuses to pay a fine ordered by the court.

It may be argued against this scheme that the indigent escapes fines completely while others have to pay and that a jail sentence may still have to be imposed in order to prevent the indigent from escaping criminal punishment altogether. By discouraging widespread use of fines in Subsections (1) and (2), the Model Code blunts the force of this point. Moreover, the phrase "is or will be able to pay" allows the imposition of fines for some defendants presently unable to pay, although the sentencing court should

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[8] A collection of the laws of each state on this point is reproduced as an Appendix to the opinion of the Court in Williams v. Illinois, 399 U.S. 235, 246 (1970), which held that a state may not, under the equal protection clause, subject convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. *See also* ABA Standards, Sentencing Alternatives and Procedures § 6.5 Commentary at 285–93 (Approved Draft 1968).

[9] 401 U.S. 395, 398 (1971) (quoting from Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

consider whether the defendant has other financial obligations that should take precedence over satisfaction of a fine.[10]

In regard to defendants for whom a fine would be the appropriate sanction but who are unable to pay, the court must consider which of the remaining sanctions can most usefully be employed. There are numerous ways, for example, in which a sentence of probation can be employed, or in which a conditional release in the form of a suspension of the sentence can be used. If a jail sentence is necessary in some of these cases in order to vindicate the authority of the law, at least the term can be set in an individualized manner that reflects its being an undesirable but required result.

The judgment that fines should not be imposed on those who are or will be unable to pay them, together with the sanction of contempt or a close analogy in the event of nonpayment, has found acceptance in a number of recently revised codes and proposals.[11]

Subsection (3) also contains a second criterion, namely, that it is inappropriate to sentence a defendant to pay a fine that will prevent him from making restitution or reparation to the victim of his offense. This rests on the simple judgment that the state should not compete with the victim of the crime for what may be the meager assets of the offender. To the extent that the victim would be entitled to a civil judgment, or to the extent that restitution or reparation may be required as a condition of a probationary sentence, any impulse of the court to impose a fine that would have priority in its claims upon the assets of the defendant and diminish the chances of repayment should be resisted. Several recently enacted and proposed revisions have somewhat similar provisions.[12]

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[10] *Compare* ABA Standards, Sentencing Alternatives and Procedures § 2.7(c) (Approved Draft 1968); 3 ABA Standards for Criminal Justice 18–2.7(c) (2d ed. 1980).

[11] *See* Ill. ch. 38, §§ 1005–9–1(c)(1), –9–3(a); Iowa § 909.5; Kan. § 21–4607(3) (although courts must consider ability to pay, the statute does not provide for a sanction of contempt for those who can afford to pay the fine but fail to do so); Ky. §§ 534.030(2), .060(1); Me. tit. 17–A, §§ 1302, 1304; N.J. § 2C:44–2(b) to (d); N.D. § 12.1–32–05(1)(a), (3); Ohio § 2947.14; Ore. § 161.685; Pa. R. Crim. P. 1407 (1979); Cal. (p) S.B. 27 § 1304(a) ("A person may not be sentenced to a term of imprisonment for failing to pay a fine which he is financially unable to pay."); Md. (p) § 75.00; Mass. (p) ch. 264, §§ 16(c), 18; Mich. (2d p) 1979 Final Draft § 1515; Tenn. (p) § 821(a) (does not provide for sanction of contempt); Vt. (p) §§ 3.50.2(1)(c), .50.4. *See also* ABA Standards, Sentencing Alternatives and Procedures § 6.5 (Approved Draft 1968). The Kentucky and New Jersey revisions, *supra*, also borrow a related idea from the ABA Standards by explicitly precluding the imposition of a jail alternative at the time of sentencing.

[12] *See* Haw. § 706–641(3)(b); Ill. ch. 38, § 1005–9–1(c)(2); Ky. § 534.030(2)(c); N.J. § 2C:44–2(b); N.D. § 12.1–32–05(1)(c); Wash. § 9A.20.030 (court can order restitu-

5. *Amount and Payment Method.* Subsection (4) states the related additional point that, since even among defendants "able" to pay there are vast differences in resources, the court should always consider in fixing the amount of a fine and the method of payment the financial resources of the defendant and the burdens upon him that payment will impose.

Section 7.03. Criteria for Sentence of Extended Term of Imprisonment; Felonies.*

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

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tion in lieu of fine); U.S. (p) S. 1722 § 2202(a)(3) (Sept. 1979) (requiring the court to consider "any obligation imposed upon the defendant to make . . . restitution or reparation to the victim of the offense"); Mich. (2d p) 1979 Final Draft § 1515; Tenn. (p) § 821(a)(4); Vt. (p) § 3.50.2(1)(c)(3); ABA Standards, Sentencing Alternatives and Procedures § 2.7(c)(iii) (Approved Draft 1968); 3 ABA Standards for Criminal Justice 18–2.7(c)(iii) (2d ed. 1980).

* *History.* Presented to the Institute in Tentative Draft No. 2 and considered at the May 1954 meeting. *See* ALI Proceedings 81–87 (1954). Reprinted in Tentative Draft No. 4. Resubmitted, with verbal changes in Subsection (4)(c), to the Institute in Proposed Final Draft No. 1 and approved at the May 1961 meeting. *See* ALI Proceedings 349–52 (1961). Reprinted in the Proposed Official Draft approved at the May 1962 meeting. *See* ALI Proceedings 226–27 (1962). For original Comment, see T.D. 2 at 38 (1954).

CERTIFICATE OF SERVICE

Alan J. Tauber hereby certifies that on this day, he has caused to be served the foregoing appellee brief upon the following persons by first class mail, postage prepaid:

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/s/ Alan J. Tauber
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CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents

/s/Alan J. Tauber
Alan J. Tauber