



PACDL

Pennsylvania Association of
Criminal Defense Lawyers

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February 22, 2018

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635

Re: Proposed Pennsylvania Rules of Criminal Procedure Regarding the Incarceration of the Indigent for Failure to Pay in Summary Cases

Dear Attorney Wasileski:

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As such, PACDL presents the perspective of experienced criminal defense attorneys who aim to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and work to achieve justice and dignity for defendants. PACDL's membership includes more than 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

The Public Defender Association of Pennsylvania (PDAPA) is a Pennsylvania non-profit corporation whose membership is comprised of the 600 or so public defenders employed full or part time in the 67 county public defender offices of this Commonwealth. The association was incorporated in 1971.

Overall, PACDL and PDAPA support the motive behind the proposed amendments -- to ensure that the enforcement of financial assessments on the poor in summary matters proceed in a constitutional manner. Namely, we want to prevent the imprisonment of defendants for failing to pay court imposed financial assessments if they do not actually have the financial ability to pay the assessments. In light of this goal, and in the interest of clarifying the proposed amendments, PACDL and PDAPA have several suggestions:

Specify the Right to Counsel in Ability-to-Pay Hearings in the Text of Rule 456

The Committee's comments to Rule 456 clearly acknowledge that defendants have the right to counsel in any proceeding which may result in the defendant's imprisonment. As acknowledged by the Committee, this right has long been recognized by the Courts and has been long been embodied in the Pennsylvania Rules of Criminal Procedure. See *Commonwealth v. Farmer*, 466 A.2d 677 (Pa. Super. 1983), *Commonwealth v. Spontarelli*, 791 A.2d 1254 (Pa. Commw 2002); Rules 121 & 122.

Yet, in our experience, even under existing case law and procedural rules, defendants frequently are not appointed counsel in failure-to-pay hearings. Based on reports of conversations with defendants and court staff, there appear to be some instances in which the Magisterial District Justice ("MDJ") and/or the MDJ's staff

has assumed that a defendant has waived his or her right to counsel without proper colloquy. In other instances, the MDJ believes that counsel is only necessary at the guilt stage of the case and not in any subsequent hearing concerning a default in payment of fines and costs.

In light of the failure of MDJs to afford the right to counsel prior to imprisoning indigent defendants for failing to pay financial assessments, even in light of settled case law and procedural rules, we believe that it is necessary to specify the right to counsel in the text of Rule 456, and not simply refer to the right to counsel in the comments.

Ensure that License Suspensions Occur Only After an Ability-to-Pay Hearing has been Held and Defendants have had the Opportunity to Appeal

In our experience, the ability to drive is of paramount importance to our clients in finding and maintaining employment and caring for their dependents. We make the following suggestion to avoid exacerbating an indigent defendant's inability to pay court ordered financial assessments.

As currently written, Rule 470 instructs the issuing authority to notify the Pennsylvania Department of Transportation ("PennDOT") of a defendant's failure to pay prior to any ability-to-pay hearing and prior to any on-the-record determination that the defendant's failure to pay was deliberate. This notice to PennDOT then results in the suspension of the defendant's license, even if the defendant failed to receive the Court's notice and even if the failure to pay was not deliberate but was due to indigence. The suspension of driver's licenses for failure to pay court imposed financial assessments is unconstitutional unless there is first a hearing to determine that the defendant actually had the ability to pay the financial assessments. *See Robinson v. Purkey*, Civil Action No. 17-1263, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017); *Fowler v. Johnson*, Civil Action No. 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017). The Rule should be amended such that notices to PennDOT triggering the suspension of licenses are issued only after such hearings are held.

Furthermore, a defendant has a right to appeal a determination that his or her default was deliberate rather than due to an inability to pay. *See* Rule 456(D)(3)(b). Under the proposed amendments to Rule 470, there is no provision to delay the transmission of notice to PennDOT to allow a defendant 30 days to appeal any determination that the default was deliberate or to appeal the imposition of a payment plan that the defendant may be financially unable to meet. Any notice to PennDOT should be delayed pending the full 30-day appeal period and, if a notice of appeal is filed, any notice to PennDOT should be delayed pending the outcome of the appeal.

Creation of Clear Guidelines Regarding Presumptions of Indigence

We understand that many MDJ's are extremely busy and may not be familiar with Pennsylvania case law on this issue. Therefore, with the hope of providing clearer guidelines, we urge the Committee to include certain benchmarks for the presumption of indigence, with the understanding that those found to be indigent cannot be imprisoned for failing to pay fines and costs. As an example of more guidelines, the rule could include a presumption of indigence, which can then be reconsidered by the MDJ if appropriate, when a defendant already has the services of court-appointed counsel or if the defendant is receiving means-based public assistance (such as food stamps, Medicaid, or Supplemental Security Income). *See, e.g., Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (noting that the fact the defendant received public assistance and was

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represented by the Allegheny County Public Defender's Office invited a presumption of indigence). In addition, the Rules could provide that a person who makes 150% of the federal poverty level or less is presumptively indigent and therefore cannot be imprisoned for failing to pay financial assessments. Such guidelines could also help determine appropriate payment plans and when such plan must be reduced or temporarily suspended.

In conclusion, PACDL and PDAPA support the goal of the proposed amendments -- to prevent the punishment of indigent defendants for failing to pay fines and costs which they do not have the ability to pay. The above-suggestions further this goal and provide clearer guidance to MDJs, counsel and defendants.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark B. Sheppard', with a stylized, cursive flourish.

Mark B. Sheppard
President, PACDL

A handwritten signature in blue ink, appearing to read 'Kimberly Makoul', with a stylized, cursive flourish.

Kimberly Makoul
Interim President, PDAPA