



April 22, 2019

VIA EMAIL

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
610 Commonwealth Avenue, Ste. 6200
Harrisburg, PA 17106-2635
Email: criminalrules@pacourts.us

Re: Comments to Notice of Proposed Rulemaking – Proposed Amendment of Pa.Rs.Crim.403, 407, 408, 409, 411, 412, 413, 414, 422, 423, 424, 454, 456 and 470

Dear Mr. Wasileski,

Fines and Fees Justice Center (FFJC) is a national nonprofit hub for information, collaboration, and advocacy on the imposition and enforcement of fines and fees in the justice system. Our mission is to create a justice system that treats individuals fairly, ensures public safety and community prosperity, and is funded equitably. Toward that end, we work with judges, court administrators, community organizations, advocates and other justice system stakeholders across the country to reform fines and fees practices.

FFJC is pleased to submit these comments on the revised rules. We do so to provide our view of best practices with respect to the imposition and enforcement of fines and fees. Our comments are informed by rule changes other state courts have adopted as well as legislation enacted in other states.

At the outset, we commend the Criminal Rules Committee for proposing rule amendments intended to provide greater guidance to magisterial district judges who impose and enforce fines, costs and restitution. Many Pennsylvania residents face profoundly harmful, and often unconstitutional consequences if they cannot afford immediately to pay the fines, costs and restitution the Legislature has mandated. The Committee's proposed rules are a positive step forward, but, as currently proposed, we believe they are inadequate.

General Comments

Ability to Pay Immediately

Several of the rules trigger a determination of whether a person "is without the financial means immediately to pay the fine and costs." In the Comments, the Court lists factors that "should be considered" by magisterial district judges in assessing a person's ability to pay. Those factors are important, but the rules are insufficient because they do not provide any guidance about how a judge should weigh those factors. At a minimum, the rules should provide that the following people are presumed to be unable to immediately pay, unless a judge makes findings on the record to the contrary: a person who receives public assistance; qualifies for the services

of a public defender; earns less than 200% of the federal poverty level; is, within the last six months has been homeless or residing in a mental health or other treatment program; or, is under the age of 18.

Several other courts have adopted rules or guidance for judges that contain all or part of this standard including the Washington State Supreme Court, the Arizona Supreme Court, the Michigan Supreme Court, the Ohio Supreme Court, and the Mecklenburg County, North Carolina District Court. (Bench cards reflecting each of these Courts policies are available at www.finesandfeesjusticecenter.org/clearinghouse).

In addition, the Court should articulate a specific standard and require judges to make a finding that the defendant has satisfied that standard. FFJC recommends that the Court adopt the following standard: A person can immediately pay their fines and costs only if their income and assets exceed the amount needed to meet their own and their family’s basic living expenses, including food, shelter, clothing, necessary medical expenses, child support/care, utilities, and transportation.” Again, several other courts have adopted this or a similar standard. Without a standard, judges across Pennsylvania likely will make inconsistent determinations when faced with the same set of facts.

Finally, the rules should explicitly state that in making the determination of whether an individual has the ability to immediately pay fines and costs, the Court must look only to the defendant’s income and cannot ask or assume that an individual obtain or borrow money from a friend or family member. In this regard, factor (5) in the relevant Comments (“other contributions to household support from spouse, parents, children, or others”) should be stricken. None of those people have any obligation to pay the fines and fees imposed on another person – even a spouse. In addition, it is difficult, if not impossible to ascertain the amount or consistency of those types of contributions which, because they are in the complete control of the donor, can be terminated at any time.

Installment Payments

Several rules provide for installment payments when the court has determined that a person is without the financial means immediately to pay the full amount of the fine, costs, and restitution in a single remittance. Though the rule prohibits courts from setting mandatory minimum installment payments, that sole mandate provides insufficient guidance. The better practice would be to articulate a standard. Florida law, for example, provides that monthly payments must be “reasonable” and that a payment of two percent (2%) of a person’s monthly net income is presumed to be reasonable. (Fl. Statute 28.246(d)(4)).

In addition, the Rules should direct courts to accept payments by mail, in a secure drop box, accessible 24 hours a day, or online. Requiring people to come to court to make a payment is a burden for working people and parents. Finally, with respect to payment plans, the Rules should specifically prohibit courts from assessing a payment or service charge for entering into an installment plan or for each installment.

Additional Comments on Specific Rules

Rule 403. Contents of Citation; Rule 407. Pleas in Response to Citation; Rule 408. Not Guilty Pleas – Notice of Trial; Rule 411. Procedures Following Filing of Citation – Issuance of Summons; Rule 412. Pleas in Response to Summons; Rule 413 Not Guilty Pleas – Notice of Trial; Rule 422. Pleas in Response to Summons; Rule 423. Not Guilty Pleas – Notice of Trial

These rules all suffer from similar defects. First, they require that defendants pre-pay the total amount of fines and costs as “collateral.” Most states have eliminated this or similar requirements because it chills defendants’ assertion of their right to trial. In addition, although the Court proposes allowing defendants to certify that they cannot afford to pay the collateral, there is no guidance in the rules with respect to that certification, and the defendant is required to appear in person in order to do so. That requirement is onerous. Unlike people who have the ability to post the collateral and assert their right to trial, low-income Pennsylvanians will have to take time off work or arrange child care. The better practice is to abolish the collateral requirement altogether or, at a minimum, allow defendants to certify that they cannot afford to pay the collateral remotely or by mail.

In subsection (B) – we recommend inclusion of language similar to that adopted by the National Task Force on Fines, Fees and Bail Practices, which was created by the Conference of Chief Justices and the Conference of State Court Administrators. The Task Force model language specifically informs defendants that if they cannot afford to pay the fines and fees assessed, they should inform the judge.

<https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/format%20revisions/UniformCitationLang%2010%2017%2018.ashx>

By contrast, Rule 403(B)(2)(ii) requires that citations inform defendants that If they cannot afford the collateral specified or the \$50, they must appear and enter a plea, and subsection (b)(ii) instructs defendants to appear “when a payment plan is necessary”, but nowhere in the Rule does it require notice to defendants in plain language of what they should do if they cannot afford to pay the fines and fees imposed. California Rules of Court 4.335(b), for example states simply that “courts must provide defendants with notice of their right to an ability-to-pay determination.” These Rules should impose a similar requirement.

Finally, with respect to this Rule, courts should be encouraged to allow people to set up a payment plan on line or by telephone. As with a mandatory court appearance, requiring a person to come to court poses difficult hurdles.

Rule 409. Guilty Pleas; Rule 414. Guilty Pleas; Rule 424. Guilty Pleas

FFJC encourages the Court to reconsider subsection (B)(2), which allows an issuing authority to issue an arrest warrant if the amount forwarded with a guilty plea is less than the amount of the fine and costs specified in the citation. The far better practice is the approach taken by the Supreme Court of Texas, which developed a Collection Improvement Program (CIP) and then codified the program in its Rules of Court. 1 TAC 175 (effective August 1, 2018). Texas

requires that before an arrest warrant is issued for nonpayment, three (3) contacts be attempted with the defendant. The first can be by telephone; the second two must be in writing. In Pennsylvania, people may send the wrong amount for any number of reasons. They may be mistaken about the amount owed; they may be unable to pay the full amount immediately; they may believe that they are able to pay in installments. A simple phone call or text may resolve the situation instead of the expensive and profoundly harmful step of arresting a person.

Rule 456. Default Procedures: Restitution, Fines, and Costs.

The same concern with respect to warrants described above applies with respect to warrants issued in the event a person defaults on a payment. FFJC believes the Rules adopted in Texas are a fairer procedure and can be implemented at less expense to the court than a warrant.

More significantly, the procedure for a hearing after a default is, in our view, constitutionally suspect. If the court cannot hold a hearing immediately, the defendant should always be released on their own recognizance. A defendant should not be punished because the court cannot immediately hold a hearing. Setting collateral or incarcerating a defendant for any amount of time without first determining that the failure to make a payment is willful violates due process and equal protection. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). Failing to specify that courts must provide counsel at these proceedings is also suspect. In subsection (D)(4), the Rules recognize that the right to counsel must be afforded before a sentence of imprisonment or probation is imposed – a provision FFJC endorses – but neglects to do so earlier in the process, even though incarceration is a possible outcome.

FFJC strongly supports subsection F of this Rule that allows a court to declare restitution, fines and costs uncollectable due to a defendant's inability to pay.

Rule 470. Procedures Related to License Suspensions

FFJC strongly opposes this Rule. Suspending a person's driver's license for nonpayment of fines, costs or restitution is counterproductive and often a punishment for poverty. Over 85% of Americans drive to work. Without a valid license, people lose their jobs and the ability to pay the fines, costs and restitution they owe. Without a license, people can't take their children to school, a family member to the doctor, attend church or make a court appearance. And driver's license suspensions for unpaid court debt undermines public safety. Because, in order to care for themselves and their families, people often drive even when their licenses are suspended. Law enforcement officers are then forced to spend their time citing and/or arresting people whose only crime is poverty rather than fighting serious crime. Driver's licenses should only be suspended for unsafe driving.

To be sure, Pennsylvania law requires the Pennsylvania Department of Transportation (PennDOT) to suspend the driver's licenses of people who fail to respond to a summons or fail to pay their court debt, but given the draconian nature of the sanction, due process requires courts to first determine that a person has the ability to pay. The Rule should mandate ample and multiple notices to defendants that their license will not be suspended if they appear at a hearing and the court finds they do not have the ability to pay. Before a court provides notice to PennDOT, the

court must conduct an ability to pay determination. That was the conclusion reached by federal district courts in Tennessee and Virginia in response to litigation challenging similar driver's license suspension statutes.

Though much in these revised Rules is positive, the concerns described above are troubling. We urge the Court to provide more specific and finding direction to the magisterial district judges.

Respectfully,

Lisa Foster
Co-Director
Fines and Fees Justice Center