

## An ACLU-PA Guide to Probation/Parole Revocation Hearings for Nonpayment of Fines, Costs, or Restitution

(updated September 19, 2023)

Some probation departments file violations of probation/parole against defendants who have not paid fines, costs, and restitution. The Commonwealth bears the burden of showing that the defendant “willfully” failed to pay, and without a court finding that the defendant willfully failed to pay, the defendant has not violated the terms of supervision—meaning that the defendant cannot be given an additional sentence of probation, nor can the defendant be incarcerated. We intend this Guide to help defendants, attorneys, and judges comply with the legal requirements underlying these *Gagnon II* hearings for nonpayment.<sup>1</sup>

### **Paying fines and restitution—but not costs—can be a condition of probation.**

The threshold question is whether payment of fines or restitution has been made a condition of supervision. Such conditions, authorized as *possible* conditions by 42 Pa.C.S. § 9763, are not automatic and the trial court must specifically make them part of a defendant’s probation.<sup>2</sup> The points in this section address only probation, not parole, as they are based on the specific language of the probation statute.

**Fines:** Paying a fine imposed as part of the sentence may be a condition of probation.<sup>3</sup> Because the fine is imposed as part of the sentence (rather than solely as a condition of probation), it must be paid even if the defendant has completed probation.

**Restitution:** There are two types of restitution: restitution that is part of the sentence under 18 Pa.C.S. § 1106(a), and restitution that is not part of the sentence but is instead only a condition of probation under 42 Pa.C.S. § 9763(b)(10) (formerly in 42 Pa.C.S. § 9754). A condition of probation can require a defendant to pay either type of restitution. However, restitution that is imposed *solely* as a condition of probation under Section 9763(b)(10) (as opposed to as both a condition of probation and as part of the sentence) “expires upon the end of the term of probation, even if the amount of restitution ordered has not been paid.”<sup>4</sup> By contrast, restitution that is ordered as part of the sentence under Section 1106(a) is part of the sentence and does not expire at the end of the defendant’s probation.<sup>5</sup> At sentencing, counsel should ask the judge to clarify which type of restitution the court is imposing.

**Costs:** The Superior Court has expressly ruled that a court cannot require that a defendant pay costs as a condition of probation, and a defendant therefore does not violate the terms of his probation due to nonpayment of court costs. Payment of costs is *not* a proper condition of

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<sup>1</sup> How to determine whether the defendant is “able to pay” is the subject of a separate ACLU-PA Guide available at [www.aclupa.org/finesandcosts](http://www.aclupa.org/finesandcosts).

<sup>2</sup> As the Supreme Court has explained with respect to probation conditions generally, a defendant only commits a probation violation if he violates “specified conditions” imposed by the trial court. *Commonwealth v. Foster*, 214 A.3d 1240, 1249-50 (Pa. 2019).

<sup>3</sup> 42 Pa.C.S. § 9763(b)(13).

<sup>4</sup> *Commonwealth v. Holmes*, 155 A.3d 69, 86-87 (Pa. Super. Ct. 2017) (en banc) (opinion of four judges); *Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. Ct. 2010).

<sup>5</sup> *Holmes*, 155 A.3d at 86.

probation because costs are “merely incident to the judgment” and “are not part of the criminal’s sentence.” As a result, an order to pay costs is “not ‘reasonably related to the rehabilitation of the defendant’” under 42 Pa.C.S. § 9763(b).<sup>6</sup>

### **Understand the specific conditions the court imposed for payment.**

A defendant’s probation or parole can only be revoked for a violation of a specific condition of supervision. This requires understanding whether the condition was to pay the full amount within a certain time period, to comply with a specific monthly payment plan, or some other condition. Courts sometimes misunderstand this point, assuming that not paying the full balance means that the defendant violated the terms of supervision, but it is critical to look at the specific language of the sentencing order to ensure that the revocation is based on the actual condition imposed.

- For example, in the *Marshall* case, the defendant was ordered to pay approximately \$68,000 in restitution.<sup>7</sup> The sentencing order instructed him to start making payments after 30 days of sentencing, but the court *did not* order him to make specific monthly payments. Thus, when he had paid some funds but not the entire amount by the end of probation, the question was only whether Marshall had the ability to pay the full \$68,000 during his time on probation.
- By contrast, if in that case the court had set a specific monthly payment plan and ordered that he make those payments as a condition of supervision, then the question would not be whether the defendant had paid the full amount but instead whether he had complied with the monthly payments set by the court. In such a scenario, even if the court considered revoking probation for not paying the *full* amount, the defendant’s compliance with the specific condition by making the monthly payments would mean that no violation had occurred.

### **Violations of probation/parole hearing for nonpayment.**

If payment of a fine, cost, or restitution is a valid condition of probation, nonpayment is a technical violation only if the defendant willfully refused to pay.<sup>8</sup> As the Superior Court recently summarized: “A court cannot revoke probation or parole for non-payment of fines, costs or restitution absent a determination that the failure to pay is willful or that the probationer made

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<sup>6</sup> *Commonwealth v. Rivera*, 95 A.3d 913, 917 (Pa. Super. Ct. 2014). *See also Commonwealth v. Hudson*, 231 A.3d 974, 980-81 (Pa. Super. Ct. 2020) (“It is clear from our reading of *Rivera* that court costs do not reasonably relate to the rehabilitation that probation is designed to foster, and thus, cannot be subsumed within the catchall provision of Section 9754. . . . Section 9754 does not authorize the imposition of court costs as a condition of probation”). The relevant provision in Section 9754 is now in Section 9763. The only possible exception is probation supervision fees, since the statute imposing that cost seems, on its face, to make payment a “condition of supervision.” 18 P.S. 11.1102(c). Nevertheless, the defendant in *Hudson* did owe supervision fees and the court did not draw any distinction between those and other costs, suggesting that the costs of probation supervision are no different.

<sup>7</sup> *Commonwealth v. Marshall*, No. 558 WDA 2022, 2023 WL 5097263 (Pa. Commw. Ct. Aug. 9, 2023) (unpublished).

<sup>8</sup> *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994). *See also Hudak v. Board of Probation and Parole*, 757 A.2d 439, 441-42 (Pa. Commw. Ct. 2000) (citing to *Bearden*, *Eggers*, and *Dorsey* and reasoning that “An examination of fault must be made before probation is revoked” because “the Board must show that the petitioner was somewhat at fault in order to prove a violation.”); *Miller v. Board of Probation and Parole*, 784 A.2d 246, 248 (Pa. Commw. Ct. 2001) (explaining that a parolee commits a technical violation only if he is either able to pay, or is unable to pay and has not made bona fide efforts to obtain the resources to pay).

insufficient bona fide efforts to acquire the resources to pay and is not merely the result of inability to pay.”<sup>9</sup>

- Willfulness is defined as having the ability to pay and refusing to make payments.
  - The court must determine whether the defendant’s nonpayment was a “deliberate disregard of the court’s order” or instead stems from “circumstances beyond the defendant’s control” due to the person’s financial situation.<sup>10</sup>
  - Courts cannot treat nonpayment as a strict liability offense merely because the person did not pay.<sup>11</sup>
  - A defendant who is **indigent** cannot be found to have violated the terms of supervision due to nonpayment, as a finding of indigence “preclude[s] any determination” that the defendant’s nonpayment “was willful.”<sup>12</sup>
  - Thus, when a defendant is “penniless and unable, through no fault of his own, to pay any sum on the delinquencies,” the defendant is not in “wilful noncompliance.”<sup>13</sup>
- The burden is on the Commonwealth to show by a preponderance of the evidence that the defendant willfully failed to pay.<sup>14</sup>
  - There is some tension in the case law about how this burden operates. The Commonwealth Court has created a burden-shifting process, whereby the Commonwealth must first demonstrate that the defendant has not paid, the defendant must then prove an inability to pay, and the Commonwealth must then rebut that defense and the evidence presented, potentially by demonstrating that the defendant has failed to make a good-faith effort to acquire the resources to pay.<sup>15</sup> The Superior Court adopted this framework in the unpublished *Marshall* decision.<sup>16</sup>
  - However, the Superior Court’s prior published opinion in *Dorsey* makes it the Commonwealth’s burden to prove an *ability* to pay as one of the elements of proving a violation.<sup>17</sup> This is consistent with the case law that separately obligates the trial court itself to ensure that the defendant is able to pay, even if the defendant does not raise inability to pay as a defense (discussed below).
  - Given the uncertainty regarding whose burden it is to show willfulness, the safe approach is that defense counsel should be prepared to demonstrate that the defendant is unable to pay despite a bona fide effort to do so. At the same time,

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<sup>9</sup> *Marshall*, 2023 WL 5097263 at \*2.

<sup>10</sup> *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018). See also *Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. Ct. 2018) (trial court failed to make required finding that the defendant “had the present financial ability to pay the outstanding fines and costs such that imprisonment was warranted”); *Commonwealth v. Smetana*, 191 A.3d 867 (Pa. Super. Ct. 2018) (court improperly imputed family member’s financial resources on defendant).

<sup>11</sup> *Id.*

<sup>12</sup> *Diaz*, 191 A.3d at 866 n.24.

<sup>13</sup> *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973).

<sup>14</sup> *Commonwealth v. Dorsey*, 476 A.2d 1308, 1311 (Pa. Super. Ct. 1984) (“The Commonwealth in each probation or parole revocation proceeding must prove by a preponderance of the evidence a violation of such parole,” and probation or parole cannot “be revoked for less than willful conduct.”).

<sup>15</sup> *Miller*, 784 A.2d at 248.

<sup>16</sup> *Marshall*, 2023 WL 5097263 at \*3.

<sup>17</sup> *Dorsey*, 476 A.2d at 1311.

though, counsel should argue under *Dorsey* that the burden is in fact the Commonwealth's to show a willful refusal to pay.

- In addition to the Commonwealth's burden to prove willful nonpayment, the trial court itself must also determine that the defendant willfully refused to pay.
  - Nonpayment is not a mere affirmative defense, as the case law squarely places an obligation on the court itself to inquire even if the defendant does not raise inability to pay as a defense.<sup>18</sup>
  - The Superior Court has repeatedly ruled that trial courts unconstitutionally revoked defendants' probation without making the necessary inquiry into their financial circumstances.<sup>19</sup>
  - The court must make findings on the record regarding the defendant's financial ability to pay.<sup>20</sup>
- Without a court finding that the defendant willfully failed to pay, the defendant has not committed a violation of probation/parole—and therefore cannot be punished for nonpayment.<sup>21</sup>
- To determine whether a defendant is able to pay, refer to the separate ACLU-PA Guide available at [www.aclupa.org/finesandcosts](http://www.aclupa.org/finesandcosts)

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<sup>18</sup> *Dorsey*, 476 A.2d at 1312 (even when the defendant fails to “offer any evidence concerning his indigency,” a trial court unconstitutionally revokes probation or parole if it does not “inquire into the reasons for appellant's failure to pay or . . . make any findings pertaining to the willfulness of appellant's omission as required by Bearden”). That said, there is tension between the Superior Court's rulings interpreting the U.S. Supreme Court's decision in *Bearden* and the Commonwealth Court's case law, namely that the Commonwealth Court appears to place a burden on defendants to raise inability to pay as an affirmative defense, whereas the Superior Court puts the obligation on the court to inquire. The Superior Court likely has the better interpretation in light of the plain language of *Bearden*. See *Miller v. Board of Probation and Parole*, 784 A.2d 246, 248 (Pa. Commw. Ct. 2001) (“[W]e hold that where a technical violation of parole arises because of a failure to pay for treatment, then the burden is on the parolee to demonstrate his inability to pay. Upon proof of this inability, the burden then shifts to the Board to prove that the parolee was somewhat at fault by failing to take sufficient bona fide efforts to acquire or save the necessary resources to pay for treatment.”). Even with this burden-shifting framework, the cases are all consistent that a person who cannot pay does not commit a technical violation.

<sup>19</sup> *Dorsey*, 476 A.2d at 1312; *Commonwealth v. Eggers*, 742 A.2d 174, 175-76 (Pa. Super. Ct. 1999); *Commonwealth v. Ballard*, 814 A.2d 1242, 1247 (Pa. Super. Ct. 2003); *Commonwealth v. Allshouse*, 969 A.2d 1236, 1242-43 (Pa. Super 2009). See also *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018)(willful nonpayment of fines and costs has a “mens rea element of specifically intending to defy the underlying court order”).

<sup>20</sup> *Diaz*, 191 A.3d at 866 (court must make “findings of fact” regarding the defendant's ability to pay in proceedings following default).

<sup>21</sup> *Marshall*, 2023 WL 5097263 at \*2 (trial court's failure to “make the requisite determination that Marshall's failure to pay more \$2,496 was willful or that he had the ability to pay more in restitution during the five years of his probation” rendered revocation illegal); *Rosenberry*, 645 A.2d at 1331 (explaining that “the willful refusal to pay a fine may be considered a technical parole violation for which a parolee may be re-incarcerated”); *Commonwealth v. Smalls*, No. CP-46-CR-0005242-2013, 2018 WL 4112648 at \*2 (Montgomery Co. Ct. Com. Pleas Aug. 7, 2018) (defendant who cannot “meet his basic life needs and still have money to pay . . . cannot be found to be in violation of his parole”); *Commonwealth v. Keeno*, No. 1763 WDA 2019, 2020 WL 2571191, at \*1 (Pa. Super. Ct. May 21, 2020) (unpublished) (“Appellant challenges whether the trial court erred by revoking his parole without making a finding of fact that he had the financial ability to pay these obligations. As we agree that the trial court erred, we vacate the judgment of sentence below and remand for a new hearing at which the trial court must render appropriate findings on Appellant's financial ability to pay outstanding costs, fees, and fines.”). While the opinion could have been clearer on this point, *Keeno* is reasonably straightforward that absent sufficient evidence that nonpayment was intentional, there can be no revocation. *Id.* (“[I]f the court concludes that Appellant did not have sufficient financial resources, it must then analyze whether the other two violations that it found were enough in combination to support revocation of Appellant's parole.”). *Id.* at \*2.

These requirements—that the trial court at a *Gagnon II* hearing inquire into the reasons for the defendant’s nonpayment and find a violation only if the defendant is willfully refusing to pay—apply even if the court does not impose incarceration and instead imposes additional supervision.<sup>22</sup> A defendant is entitled to an ability-to-pay hearing and such a finding whenever he is exposed to “increased conditions of supervision,” including an extension of the length of supervision.<sup>23</sup>

Even if the defendant is found to have committed *other* probation violations, the court cannot sentence him for those violations *and* a violation for nonpayment without first determining whether the nonpayment was willful.<sup>24</sup>

### **Defendants have a right to counsel that can only be waived in accordance with Rule 121.**

Pennsylvania law provides a right to counsel in probation/parole revocation hearings.<sup>25</sup> Pa.R.Crim.P. 121 permits a court to accept a waiver of counsel only via an on-the-record colloquy in open court.

- Per Rule 121, “the judge or issuing authority, at a minimum, shall elicit the following information from the defendant” six categories of information prior to accepting any waiver of counsel.<sup>26</sup>
- Some probation offices have defendants sign stipulations of violations that purport to waive this right to counsel, without ever appearing before a judge. These stipulations—and the resulting violation orders—are unlawful.<sup>27</sup>
- Defendants who are currently on probation/parole as a result of such an unlawful stipulation arising from nonpayment of fines, costs, or restitution should seek to have their supervision terminated.

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<sup>22</sup> *Marshall*, 2023 WL 5097263 at \*2 (revocation and sentence of additional probation illegal where court failed to find willful nonpayment); *Rosenberry*, 645 A.2d at 1331 (original court order revoking parole and giving a new period of parole illegal).

<sup>23</sup> *George v. Beard*, 824 A.2d 393, 396 (Pa. Commw. Ct. 2003); *Rosenberry*, 645 A.2d at 1331.

<sup>24</sup> *Commonwealth v. Cooper*, No. 2495 EDA 2019, 2020 WL 4218861, at \*2 (Pa. Super. Ct. July 23, 2020) (unpublished) (“Appellant stipulated to multiple violations of his parole in addition to his failure to pay his financial obligations, all of which the court took into consideration in resentencing Appellant. . . . We nevertheless agree that to the extent Appellant's failure to pay his financial obligations factored into the court's reasoning in any way, Appellant was entitled to an ability-to-pay hearing.”). *See also Commonwealth v. Keeno*, No. 1763 WDA 2019, 2020 WL 2571191 (Pa. Super. Ct. May 21, 2020) (“Furthermore, Appellant's nonpayment of financial obligations was one of three reasons articulated by the trial court for revoking his parole. Consequently, after the trial court determines whether Appellant was able or unable to pay his financial obligations, it must then re-evaluate its decision to revoke Appellant's parole – e.g., if the court concludes that Appellant did not have sufficient financial resources, it must then analyze whether the other two violations that it found were enough in combination to support revocation of Appellant's parole.”).

<sup>25</sup> *Bronson v. Commonwealth Bd. of Prob. & Parole*, 421 A.2d 1021, 1026 (Pa. 1980); *Com. ex rel. Rambeau v. Rundle*, 314 A.2d 842 (Pa. 1973). *See also* Pa.R.Crim.P. 708.

<sup>26</sup> *Commonwealth v. Houtz*, 856 A.2d 119, 123-124 (Pa. Super. Ct. 2004) (While “[t]he trial judge need not literally be the one to pose the questions to the defendant . . . the text of Rule 121(c) requires the judge to ascertain the quality of the defendant’s waiver.”).

<sup>27</sup> *Diaz*, 191 A.3d at 862-63 (trial court’s failure to either provide the defendant with counsel or seek a waiver under Rule 121 prior to incarcerating the defendant for nonpayment of fines and costs rendered that incarceration illegal).