IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION—CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**No. CP-51-CR-**
	:	
JOHN DOE	:	
	:	

POST-SENTENCE MOTION TO IMPOSE AN AFFORDABLE FINE

Defendant John Doe, through counsel, hereby moves this Honorable Court to impose an affordable fine pursuant to 42 Pa.C.S. § 9726(c) and (d), Pa.R.Crim.P. 706(C), and Article I, Section 13 of the Pennsylvania Constitution, and as grounds thereof avers as follows:

I. Background

1. [Background on case and details of sentence]

2. [Background on defendant's financial situation]

II. This Court cannot impose a fine without considering Mr. Doe's ability to pay that fine.

3. Pennsylvania law requires that this Court consider Mr. Doe's ability to pay a fine prior to imposing it, and it prohibits the Court from imposing a fine that Mr. Doe is or will be unable to pay. 42 Pa.C.S. § 9730 provides:

> (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.

4. This statute has two key requirements: subsection (c) prohibits imposing *any* fine on a defendant who cannot afford one, and subsection (d) limits the dollar amount of a fine to what the record shows that the defendant can afford. The Pennsylvania Supreme Court has explained that this statute puts an obligation on the sentencing court to determine on the record whether the defendant will be able to pay a fine: "Subsection 9726(c) does not put the burden on defendants to inform the court that they might have trouble paying a fine. Instead, it instructs sentencing courts not to impose a fine absent record evidence of the defendant's ability to pay." *Commonwealth v. Ford*, 217 A.3d 824, 829 (Pa. 2019). *See also Commonwealth v. Fusco*, 594 A.2d 373, 375 (Pa. Super. Ct. 1991) (vacating a fine and remanding where the trial court failed to make a record of the defendant's ability to pay before imposing a fine). As in the *Ford* case, this obligation applies even if a defendant pleads guilty and agrees to pay a specific fine. *Ford*, 217 A.3d at 829. This Court must then make findings on the record about what fine, if any, Mr. Doe can afford. *See*, *e.g.*, *Commonwealth v. Allshouse*, 924 A.2d 1215, 1228 (Pa. Super. Ct. 2007) ("[A] trial court must enter specific findings that would allow it to determine whether a defendant could pay a specific amount in fines.").

5. The requirement to consider a defendant's to pay a fine is also found in Pa.R.Crim.P. 706(C): "The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations." This provision applies at sentencing and requires that the court consider

the defendant's ability to pay when imposing a fine. *See, e.g.*, *Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. Ct. 1975) (en banc) (trial court violated Rule 706(C) (then 1407) by failing to consider the defendant's ability to pay a $5,000 fine); *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (Rule 706(c) (then 1407) and § 9726 require that a court determine "on the record, whether he would be able to pay the fine").

6. Finally, the Excessive Fines Clause in Article I, Section 13 of the Pennsylvania Constitution also requires that the Court consider a defendant's ability to pay a fine. The relevant question under Pennsylvania's Excessive Fines Clause jurisprudence—whether a fine is proportional to the gravity of the offense—includes consideration of whether it "would deprive the property owner of his or her livelihood," *i.e.* "his current or future ability to earn a living." *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 189 (2017) (citation and internal quotation marks omitted). *See also Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. Ct. 1997) (Pennsylvania's Excessive Fines Clause requires that a court consider "the individual's ability to pay.").

III. Section 9726, Rule 706(C), and the Excessive Fines Clause require that the Court consider Mr. Doe's ability to pay fines that are "mandatory" and only impose a fine that it finds the Defendant can pay.

7. The statutory, rules-based, and constitutional requirements to consider the financial resources of the defendant and the nature of the burden the fine will impose applies both to fines that are discretionary and those that are otherwise mandatory. *See* 42 Pa.C.S. § 9726(c) and (d); Pa.R.Crim.P. 706(C); Pa Const. Art. I, § 13. Thus, the fine that would ordinarily be imposed under [relevant statutory section for whatever the defendant was

convicted of] can only be imposed if this Court determines that Mr. Doe is or will be able to afford to pay it.

8. The Superior Court reached a different conclusion in *Commonwealth v. Cherpes*, 520 A.2d 439, 449 (Pa. Super. Ct. 1987), ruling that "specific penalty provisions prevail over more general penalty provisions" as a matter of statutory construction." The court reasoned that § 9726 is general, but a statute imposing a specific fine is specific and thus the specific governs as a matter of statutory authority.

9. *Cherpes* is wrong and should be cabined to its specific facts and specific sentencing statute. Statutes addressing the same topic, such as fines, must be read *in pari materia*, and "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." 1 Pa.C.S. §§ 1932, 1933. The specific prevails over general not if there is a conflict—but *only if* the conflict is "irreconcilable." *Id*. at § 1933. The *Cherpes* court ignored that "irreconcilable" caveat, and it therefore erred in its conclusion.[1]

10. Moreover, *Cherpes*—which predated the Supreme Court's ruling in *1997 Chevrolet* and the Superior Courts instruction in *Heggenstaller*—did not address the Excessive Fines Clause, which does require considering ability to pay. *See Commonwealth v. Eisenberg*, 98 A.3d 1268, 1281 (Pa. 2014) (explaining that in "the mid–1990s, this Court began to more critically analyze the Excessive Fines Clause"). That Clause necessarily sets the floor by which § 9726 and Rule 706 must be interpreted.

[1] In a non-precedential memorandum opinion, the Superior Court acknowledged that one panel decision could not overrule the panel decision in *Cherpes* and declined to analyze whether § 9726 is actually irreconcilable with a statute imposing an otherwise mandatory fine. *See Commonwealth v. Kress*, 532 MDA 2020 (Pa. Super. Ct. Nov. 18, 2020) (unpublished).

11. The statutory language in [relevant statutory section for whatever the defendant was convicted of] can easily be read together with § 9726 and Rule 706 without being irreconcilable: the Court must impose that statutory fine *unless the defendant cannot afford it* under § 9726 and Rule 706. While this Court may feel bound by *Cherpes*, the correct interpretation of the statutes governing statutory interpretation compels considering Doe's ability to pay before imposing this fine.[2] As, too, does the Constitution.

IV. This Court should not impose a fine on Mr. Doe due to his indigence.

12. As described above—and as will be presented at a hearing on this Motion—Mr. Doe is indigent and will remain unable to pay after serving his sentence. Mr. Doe [facts about receiving SSI, has not been able to afford to live on his own, etc; recite some of the key facts to show that even before this case he couldn't afford to live on his own.] Moreover, Mr. Doe received food stamps and Medicaid, and he currently receives the services of the public defender, facts that "invite the presumption of indigence." *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999). No facts rebut this presumption—and indeed the facts show that Mr. Doe is and will be unable to afford to pay a fine. *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157–58 (Pa. Super. Ct. 1984) (finding no evidence of a defendant's ability to pay a fine where defendant has no "financial assets [or] liabilities" and has been "living from hand to mouth"); *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc) (dispositive question is whether a person "is in

[2] In *Ford*, the Supreme Court addressed only non-mandatory fines, as only those fines were at issue in the case. While the Court did describe the holding of the trial court and the Superior Court as drawing a distinction between mandatory and non-mandatory fines—those lower courts held that *mandatory* fines were not subject to § 9726 in light of dicta in *Commonwealth v. Gipple*, 613 A.2d 600, 601 n.1 (Pa. Super. Ct. 1992). The Supreme Court did not actually address or rule on the question of whether § 9726 applies to mandatory fines.

poverty. If they are in poverty, it follows that they are unable to pay the costs, and their petition should be granted."); *Schoepple v. Schoepple*, 361 A.2d 665, 667 (Pa. Super Ct. 1976) (en banc) ("[O]ne in poverty will not be able to pay costs.").[3]

13. The risk of imposing a fine on Mr. Doe is that he will be unable to afford to pay it. As the Superior Court has explained, determining "defendant's ability to pay a fine will result in far more rational sentencing" as it will save this Court from having to hold a contempt hearing down the road when he is unable to pay the fine. *Commonwealth v. Schwartz*, 418 A.2d 637, 639 (Pa. Super. Ct. 1980). "Thus, rather than waiting until the defendant is brought before the court for not paying a fine, it is far more rational to determine the defendant's ability to pay at the time the fine is imposed." *Id*. at 639-40. In light of his indigence and inability to pay any fine, this Court should not impose a fine on Mr. Doe.

WHEREFORE, Defendant Doe requests that this Court not impose a fine in this matter due to his indigence.

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[3] While *Gerlitzki* and *Schoepple* are *in forma pauperis* case, the The Superior Court has instructed that trial courts should look to the "established processes for assessing indigency" through the in forma pauperis ("IFP") standards when determining whether certain costs should be waived in criminal cases. *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008) (using the IFP standards and the appointment of counsel standards to determine whether to waive the cost of an expert in a criminal case, although the defendant failed to provide evidence of indigency)*; see also Commonwealth v. Mead*, 446 A.2d 971, 974 (Pa. Super. Ct. 1982) (reviewing IFP application and petition for appointment of counsel to help determine financial status when setting a fine). This is because of the "dearth of case law" in criminal cases, compared with the "well-established principles governing indigency in civil cases." *Commonwealth v. Lepre*, 18 A.3d 1225, 1226 (Pa. Super. Ct. 2011) (applying IFP standards to waive appeal costs). These same principles should be used to determine whether a defendant is able to pay a fine under § 9726, as indigence is indigence.