

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

NO. 849 WDA 2019

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

SECADA BLACK,
Appellant

BRIEF FOR APPELLEE

Appeal from the judgment of sentence entered May 21, 2019 in the Allegheny County Court of Common Pleas, Criminal Division at CC No. 201902172.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
STATEMENT OF THE QUESTION INVOLVED.....	5
COUNTER STATEMENT OF THE CASE.....	6
SUMMARY OF THE ARGUMENT.....	9
ARGUMENT.....	10
I. THE TRIAL COURT DID NOT ERR BY IMPOSING COSTS WITHOUT FIRST PROVIDING APPELLANT WITH A DETAILING BILL.....	10
II. THE COURT DID NOT ERR WHEN IT IMPOSED THE COST OF COURT SUPERVISION.....	15
III. THE CHALLENGED COSTS WERE LAWFULLY IMPOSED PURSUANT TO STATUTE BY THE DEPARTMENT OF COURT RECORDS.....	18
IV. THE TRIAL COURT DID NOT ERR IN FAILING TO ASSESS APPELLANT’S ABLITY TO PAY COURT COSTS BEFORE IMPOSING THEM.....	21
CONCLUSION.....	24
CERTIFICATE OF COMPLIANCE.....	25
OFFER OF PROOF.....	26

TABLE OF AUTHORITIES

Cases

Commonwealth v. Boyd, 679 A.2d 1284 (Pa.Super. 1996)..... 15

Commonwealth v. Chandler, 721 A.2d 1040 (Pa. 1998) 16

Commonwealth v. Chappell, 2958 EDA 2018, 2019 WL 5063402
(unpublished Opinion decided October 9, 2019)..... 11

Commonwealth v. Childs, 63 A.3d 323 (Pa.Super. 2013) 21, 22

Commonwealth v. Coder, 490 A.2d 194 (Pa. 1980) 13

Commonwealth v. Cutillo, 440 A.2d 607 (Pa.Super. 1982) 18

Commonwealth v. Ford, 217 A.3d at 827 (Pa. 2019) 21

Commonwealth v. Gill, 432 A.2d 1001 (Pa.Super. 1981)..... 18

Commonwealth v. Gray, 608 A.2d 534 (Pa.Super. 1992) 15

Commonwealth v. Hoover, 494 A.2d 1131 (Pa.Super. 1985). 23

Commonwealth v. Larsen, 682 A.2d 783 (Pa.Super. 1996) 19

Commonwealth v. Martin, 335 A.2d 424 (Pa.Super. 1975) 22

Commonwealth v. Mead, 446 A.2d 971 (Pa.Super. 1982) 22

Commonwealth v. Mulholland, 702 A.2d 1027 (Pa. 1997) 15

<i>Commonwealth v. Nicely</i> , 638 A.2d 213, 217 (Pa. 1994	11
<i>Commonwealth v. Rivera</i> , 95 A.3d 913 (Pa.Super. 2014).....	11
<i>Commonwealth v. Williams</i> , 909 A.2d 419 (Pa.Cmwlt. 2006	19
<i>Herrshaft v. DOC</i> , 949 A.2d 976 (Pa.Cmwlt. 2008)	12
<i>Montanez v. Department of Corrections</i> , 763 F.3d 257 (3rd Cir. 2014)	12
<i>Richardson v. Pa. DOC</i> , 991 A.2d 394 (Pa. Cmwlt. 2010).....	12

Statutes

16 P.S. §4301.....	19
20 Pa.C.S.A. §901, et seq.....	19
42 Pa.C.S. §§ 9721(c.1).....	21
42 Pa.C.S.A. §2731.....	19
42 Pa.C.S.A. §2751.....	19

Other Authorities

Ordinance 38-04-OR	19
--------------------------	----

Rules

Pa.R.A.P. 1701(b)(2).....	13
Pa.R.A.P. 2117(a)(4).....	15
Pa.R.A.P. 2132.....	15
Pa.R.Crim.P. 706(C)	21

STATEMENT OF THE QUESTION INVOLVED

- I. Whether the trial court unlawfully imposed costs without first providing appellant with a detailing bill?

- II. Whether the trial court unlawfully imposed the total projected balance of monthly supervision fees on appellant at the time of sentencing?

- III. Whether the trial court unlawfully imposed certain costs for which it lacked statutory authority?

- IV. Whether Pennsylvania law required the trial court to consider appellant's ability to pay costs before imposing them?

COUNTER STATEMENT OF THE CASE

This is an appeal of the judgment of sentence entered May 19, 2019 in the Allegheny County Court of Common Pleas, Criminal Division at CC No. 201902172.

Procedural History

Appellant, Secada Black, was charged by Criminal Information with two counts of Felony Retail Theft (18 Pa.C.S.A. §3929(a)(1)); and two counts of Felony Criminal Conspiracy (18 Pa.C.S.A. §903). (Docket Entry (DE) No. 5)

On May 21, 2019, appellant appeared before the Honorable John A. Zottola. Appellant was represented by Melissa Ruggiero, Esquire and the Commonwealth was represented by Assistant District Attorney Joseph Joyce. Appellant entered into a plea agreement wherein she pled guilty to one count of Retail Theft at a reduced grading of a misdemeanor and, in exchange for her plea, the remaining retail theft count was withdrawn along with both counts of conspiracy. (DE No. 6) The parties agreed to a sentence of 12 months of probation and that appellant have no contact with the Wine and Spirits and Macy's stores in Bethel Park. *Id.* Appellant was sentenced in accord with this agreement and ordered to pay \$121 to Wine and Spirits.

(DE Nos. 7, 8) Appellant's post-sentence motions were denied on May 29, 2019. (DE Nos. 9, 10) This appeal follows.

Factual History

The facts underlying appellant's conviction were summarized by the trial court in its Opinion as follows:

On January 26, 2019 at approximately 1434, Bethel Park Police were dispatched to the Wine and Spirits store at 5000 Oxford Drive for a report a retail theft. Officer Anibaldi noted that three black females entered the Wine and Spirits, and while one female made a purchase, the other two females worked together to steal two bottles of liquor, valued at \$121.98.

Soon after, at approximately 1516, officers from the Bethel Police Department were dispatched to the Macy's Department store, located at 100 South Hills Village, for two females concealing merchandise and preparing to exit the store. While *en route* the Bethel Park Police officers were updated that the two females had been stopped by asset protection, and were causing a disturbance. The two females were detained and escorted to the store's security office before the police officers arrived. The two females were positively identified through their Pennsylvania photo identification cards. Three Macy Store employees and one uniformed mall security officer witnessed the Ms. Hart and Ms. Black select twenty items clothing from a section of the store, divide the articles of clothing between then and attempt to proceed out of the store. The total value of the items recovered was \$1,151.70. The two were stopped after they were observed concealing the items and proceeding past all points of purchase and attempting to exit through the lower level exterior exit.

Officer Anibaldi also arrived on scene to the Macy's incident and identified the two females detained at Macy's as two of the three suspects from the Wine and Spirits theft earlier in the evening.

(Trial Court Opinion at 2-3)

SUMMARY OF THE ARGUMENT

The lower court did not err in imposing costs without first providing a detailing bill. Appellant provides no authority for her claim that the court was required to provide a bill prior to sentencing or that the costs were not appropriately presented to her.

There is no support in appellant's brief or in the record for her contention that she was ordered to pay the cost of court supervision in one lump sum as opposed to monthly installments. Because there is no support for the alleged error, there is no basis to grant relief.

The Commonwealth has attached an offer of proof identifying the basis for the specific costs that appellant claims were unlawfully levied against her. Because it appears that the costs were properly imposed, there is no relief due on this claim.

Finally, appellant's claim that the trial court improperly imposed costs without considering her ability to pay is meritless. The court did not have to make, nor was appellant entitled to, such a determination at sentencing.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY IMPOSING COSTS WITHOUT FIRST PROVIDING APPELLANT WITH A DETAILING BILL.

On appeal, appellant first claims that the court unlawfully imposed costs without providing a detailing bill and that such error was compounded because neither she nor defense counsel were given information on the types and amounts of costs to be imposed. (Brief for Appellant at 9). She specifically claims that the itemization of costs in the docket nine days after sentencing was insufficient to meet the requirement “that a defendant must receive a bill of costs that outlines precisely which costs are being assessed against them, so that they have an opportunity to file objections.” (Brief for Appellant at 10) The Commonwealth submits that appellant has not established that the court erred when it imposed costs at the time of sentencing or that the itemization of those costs on the docket nine days later was in error.

The Commonwealth would point out that, as this Court has often stated, it an error-correcting court, not a policy-making court. Its principal role, therefore, is to correct errors of law made by the courts of common pleas, not to announce new policies for the Commonwealth, a role. belonging

exclusively to our Supreme Court. Here, appellant has not identified any actual trial court errors, except to imply that the court erred by following her view of what the law ought to be. In the absence of both discernible error and binding precedent, an error-correcting court has essentially nothing to adjudicate. As a court whose role is not to fashion policy, this Honorable Court should decline appellant's invitation to alter Pennsylvania law fundamentally.

In her brief, appellant claims that the costs imposed upon her are comparable to a sentence of probation “without a court explaining the length of probation or the conditions thereof.” (Brief for Appellant at 9) However, unlike probation, costs are not considered part of a sentence as is a term of probation. Instead, the “imposition of costs...[is] not considered punishment but [is] akin to collateral consequences.” *Commonwealth v. Rivera*, 95 A.3d 913 (Pa.Super. 2014) (explaining that the imposition of costs and restitution are not considered punishment because both are designed to have the defendant make the government and the victim whole. See also *Commonwealth v. Nicely*, 638 A.2d 213, 217 (Pa. 1994) (“[a] direction to pay costs in a criminal proceeding is not part of the sentence, but is an incident of the judgment). See also *Commonwealth v. Chappell*, 2958 EDA 2018, 2019 WL 5063402 (unpublished Opinion decided October 9, 2019) (“Unlike

finer, which are part of a defendant's actual sentence, a defendant who has been convicted of a crime may also be liable for the costs of prosecution, which are authorized by statute.”)

As noted by the trial court in its Opinion, appellant agreed to pay costs pursuant to her plea agreement. (DE No. 6 at 14) Therefore she was aware that costs would be imposed and the Commonwealth submits that there was nothing improper about the manner in which those costs were presented and placed on the docket on September 30, 2019. (DE No. 11) Pennsylvania Courts have held that the trial court is not required to state the amount of costs owed at the time of sentencing, and such amount can, thereafter, be calculated by the Clerk of Courts. *Richardson v. Pa. DOC*, 991 A.2d 394 (Pa.Cmwlt. 2010). When the trial court directed at sentencing that a defendant pay costs, as was done in the instant case, the DOC “may collect those costs from a prisoner without physical possession of [a] court order; a form signed by the Clerk of Court is sufficient authority.” *Id.* at 396-397; *Herrshaft v. DOC*, 949 A.2d 976 (Pa.Cmwlt. 2008), See *Montanez v. Department of Corrections*, 763 F.3d 257 (3rd Cir. 2014).⁵

Furthermore, appellant did not file any type of motion regarding the itemization of costs either preemptively once she knew that costs would be imposed or in objection after the costs were itemized on the docket. In fact,

the claim has been raised for the first time in appellant's Concise Statement of Errors Complained of on Appeal. (DE No. 15) Furthermore, it is the Commonwealth's belief that pursuant to the Pa.R.A.P. 1701(b)(2), the trial court may still act upon an actual petition to be excused from paying costs.

Finally, appellant has not provided support for her claim that she was entitled to bill of costs before the court imposed them. In support of her claim, appellant relies upon the statements contained in the Supreme Court's opinion in *Commonwealth v. Coder*, 490 A.2d 194 (Pa. 1980) that the Commonwealth is required to provide a bill of costs to a defendant who is charged with them. However, neither *Coder* nor any other authority cited by appellant states that a defendant must receive a bill of costs **before** the court states that costs will be imposed. Nor does appellant provide any support for her position that the docket entry, which is a matter of public record, is an insufficient means of providing a bill of costs. Instead, she makes numerous bald assertions that the Itemized Account of Fines, Costs, Fees, and Restitution are deficient. (DE No. 11)

As noted by the trial court in its Opinion:

In the instant case, an order for the payment of court costs was submitted to the clerk of courts for entry into the docket. The clerk of courts entered the itemized court costs into the docket, from which Appellant could file objections to. "[T]he practice of a judge ordering a defendant to pay costs, and leaving

the assessment of the amount to the clerk appears to be a common one, as it has been noted in our cases a number of times, though never as a determinative fact. See, e.g., [Herrschaft v. Dep't of Corr., 949 A.2d 976 (Pa.Cmw1th.2008)]; Commonwealth v. Williams, 909 A.2d 419 (Pa.Cmw1th.2006); Fordyce v. Clerk of Courts, 869 A.2d 1049 (Pa.Cmw1th.2005)." Richardson v. Pennsylvania Dept. of Corrections, 991 A.2d 394, 397. Therefore, the trial court did not err when it ordered Appellant to pay court costs as part of the plea agreement and assigned the responsibility of calculating court costs to the clerk of courts following the sentencing orders.

(Trial Court Opinion at 6)

Because appellant cannot identify any authority for the proposition that a detailed bill of costs was required before the court imposed sentence, she cannot establish any error by the by the trial court and no relief is due on this claim.

II. THE COURT DID NOT ERR WHEN IT IMPOSED THE COST OF COURT SUPERVISION.

In her second issue, labeled in her brief as Argument “B”, appellant argues that the lower court erred when it “immediately imposed the total projected balance of monthly supervision fees at the time of sentencing.” (Brief for Appellant at 15) Appellant argues that the this was improper because she is only obligated to pay \$45 per month. (Brief for Appellant at 14)

An appellant claiming reversible error must cite to the place in the record where the error allegedly occurred. See *Commonwealth v. Mulholland*, 702 A.2d 1027 (Pa. 1997) (appellant must point to where in record supposed error occurred); *Commonwealth v. Boyd*, 679 A.2d 1284 (Pa.Super. 1996) (same); *Commonwealth v. Gray*, 608 A.2d 534 (Pa.Super. 1992) (absent record citation to alleged error, appellate review is waived). It is appellant’s responsibility to provide “an appropriate reference in each instance to the place in the record where the evidence substantiating the fact relied on may be found.” Pa.R.A.P. 2117(a)(4); see *also* Pa.R.A.P. 2132. Here, appellant does not cite the place in the record where the court allegedly imposed the “total projected balance” of \$540. Nor does she provide any

support for her claim that this amount was being demanded in one lump sum as opposed to the installments which she claims are the appropriate method of payment. (See Brief for Appellant at 15.

Appellant's failure to indicate where in the record the court allegedly acted in error precludes any meaningful response. Also, neither the Court nor the Commonwealth is required to scour the record. See *Commonwealth v. Chandler*, 721 A.2d 1040 (Pa. 1998) (appellant must identify specific matter challenged on appeal and point to where in the record it appears)

Furthermore, as noted by the trial court in its Opinion:

Appellant was sentenced to 12 months of probation at \$45 per month. 42 Pa.B.3438 (establishing the monthly cost of supervision), for a total of \$540; \$270 being collected for the Pennsylvania Board of Probation and parole and \$270 collected for Allegheny County Probation. Act 35 of 1991 (establishing the disbursement of supervision costs). Appellant was assessed this total amount pursuant to Pa.C.S.A. §9728(b)(4). **The total amount for which the person is liable pursuant to this section may be entered as a judgment up on the person or the property of the person sentenced or ordered, regardless of whether the amount has been ordered to be paid in installments.** 42 Pa.C.S.A. §9728(b)(4)). The court did not err when assessing the totality liability for the period of supervision.

(Trial Court Opinion at unnumbered pages 5-6)

As a result of the foregoing, there is nothing to indicate any error by

the court or that appellant is not permitted to pay her court supervision fee in monthly installments. As a result, no relief is due on this claim.

III. THE CHALLENGED COSTS WERE LAWFULLY IMPOSED PURSUANT TO STATUTE BY THE DEPARTMENT OF COURT RECORDS.

Appellant next claims that certain costs are not authorized by statute and that their imposition was therefore illegal. (Brief for Appellant at 20) Specifically, she claims that there is no authority for the imposition of a “Court Technology Fee” of \$5.50, two “Department of Record – Conviction (Allegheny)” fees of \$20 and \$180, two “Record Management Fees” of \$2.20 and \$3.30, and a “Use of County (Conviction) (Allegheny)” fee of \$4.00. (*Id* at 20-21)

It is well-established that costs must not be assessed except as authorized by law, and the Commonwealth bears the burden of justifying such costs by the preponderance of evidence. *Commonwealth v. Gill*, 432 A.2d 1001 (Pa.Super. 1981). Such a challenge is properly brought in the sentencing court. See *Commonwealth v. Cutillo*, 440 A.2d 607 (Pa.Super. 1982) (petition to reduce and remit costs of prosecution filed with sentencing court, challenging assessment of cost of guards during hospitalization as cost of prosecution); *Gill, supra* (remanded for hearing on defendant's exceptions filed with trial court to various assessments made by clerk of court as prosecution costs); *but see Commonwealth v. Larsen*, 682 A.2d 783

(Pa.Super. 1996) (defendant separately appealed assessment of costs to Superior Court); *Fordyce v. Clerk of Courts*, 869 A.2d 1049 (Pa.Cmwlt.2005)." (inmate filed mandamus against county clerk of court); *Commonwealth v. Williams*, 909 A.2d 419, 420–21 (Pa.Cmwlt. 2006)

Regarding the specific costs at issue, the authority for their imposition was provided by the passage of Ordinance 38-04-OR on May 17, 2005. Ordinance 38-04-OR amended the Allegheny County Home Rule Charter with respect to the abolition of the elected Row Offices of Prothonotary, Clerk of Courts and Register of Wills, effective January 7, 2008. On that date, an Order of Court at Administrative Docket No.3 of 2008 was entered confirming that all power and authority previously vested in the elected Row Officers of Prothonotary, Clerk of Courts and Register of Wills under all applicable law, including without limitation, 16 P.S. §4301, et seq., 20 Pa.C.S.A. §901, et seq., 42 Pa.C.S.A. §2731 et seq., and 42 Pa.C.S.A. §2751, et. seq., was henceforth vested in the appointed Director of the Department of Court Records.

42 P.S. §21042 sets forth the fee schedule for a Prothonotary of the Second Class, which includes Allegheny County. However, 42 P.S. §21042.1 provides that after the effective date of the act, "the Prothonotary may establish, increase, decrease, modify or eliminate fees and charges with

the approval of the president judge.” Pursuant to 16 P.S. §4801.1(b), the Clerk of Courts collects such fees and may establish, with the President Judge’s approval, the manner in which such fees and charges shall be collected.

The Department of Court Records has provided a list of Allegheny County Assessments, including Costs and Fees¹. The list indicates that the “Court Technology Fee” is \$6.00, effective January 2, 2014. The “Department of Court Records” fee is listed at \$200 and appears to be broken into two separate amounts of ten and ninety percent which amounts to \$20 and \$180, effective February 2, 2009. The “Use of County Fee” is \$4.00, effective January 1, 1970. Finally, effective, January 2, 2014, the “Record Management Fee” is \$6.00 and appears to be divided into separate amounts of 40 percent and 60 percent.

Consequently, it is submitted, that authority exists for the challenged enumerated costs and that this claim does not merit relief.

¹ The Commonwealth has attached this list as an Offer of Proof on pages 26 and 27 of this Brief.

IV. THE TRIAL COURT DID NOT ERR IN FAILING TO ASSESS APPELLANT'S ABILITY TO PAY COURT COSTS BEFORE IMPOSING THEM.

As her final claim, appellant claims that Pennsylvania Law required that the trial court consider her ability to pay costs at the time it imposed court costs. (Brief for Appellant at 40)

There is no statutory requirement that the court consider an offender's ability to pay before imposing costs at sentencing. Instead, Pennsylvania law is clear that there is no statutory requirement that the court consider an offender's ability to pay before imposing costs at sentencing. See *Commonwealth v. Ford*, 217 A.3d at 827 n.6 (Pa. 2019) (noting that a presentence ability-to-pay hearing is not required when costs alone are imposed); *Commonwealth v. Childs*, 63 A.3d 323, 326 (Pa.Super. 2013) (recognizing that 42 Pa.C.S. §§ 9721(c.1) and 9728(b.2), and Pa.R.Crim.P. 706(C) do not mandate that a court determine ability to pay costs at sentencing; "the Rule only requires such a hearing prior to any order directing incarceration for failure to pay the ordered costs"); *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa.Super. 2007) (trial court not required by Pa.R.Crim.P. 706 to determine indigent offender's ability to pay costs).

The cases appellant relies on in support of her claim to the contrary, *Commonwealth v. Martin*, 335 A.2d 424 (Pa.Super. 1975) (*en banc*), and *Commonwealth v. Mead*, 446 A.2d 971 (Pa.Super. 1982), do not dictate a different result. Neither case relates to the question of an offender's ability to pay **costs**. In *Martin*, which was decided three decades before *Childs* and *Hernandez*, this Court, sitting *en banc*, held that an ability-to-pay determination was required for **finer**, and vacated only the portion of his sentence ordering him to pay those fines. *Martin*, 335 A.2d at 426. The Court did not rule on whether such a determination was also required in the context of costs. *Id.* at 425 (“[t]he sole meritorious issue raised in this appeal is that the lower court imposed an illegal **fine** upon the appellant”) (emphasis added).

In *Mead*, *supra*, decided in 1982, this Court concluded that the record before it was insufficient to allow a proper determination of appellant's ability to pay the fine imposed and vacated that portion of the appellant's sentence. *Mead*, *supra*, 446 A.2d at 974. However, in that case, the Court analyzed a different statute, 42 Pa. C.S. § 9726(d), which provided, “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” (emphasis added). That statute pertains to fines, not

costs. *Mead* is thus inapplicable as it does not pertain to costs.

Appellant notes that that this Court is currently reviewing this issue in *Commonwealth v. Lopez*, 1313 EDA 2018 and *Commonwealth v. Gary-Ravenell*, 2551 EDA 2018. (Brief for Appellant at 40). However, based on all of the above authority, the Commonwealth submits it is clear that the sentencing court properly – if not mandatorily - imposed costs upon appellant regardless of ability to pay and that a hearing would only be required in the event of potential incarceration for failure to pay costs.

For all of the foregoing reasons, the court did not err in failing to hold a hearing on appellant's ability to pay costs before imposing sentence.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the judgment of sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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I hereby certify that I am this day serving two (2) copies of the within Brief for Appellee upon Counsel for Appellant in the manner indicated below which service satisfies the requirements of Pa.R.A.P 121:

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