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IN THE SUPERIOR COURT OF PENNSYLVANIA

WESTERN DISTRICT

Commonwealth of Pennsylvania Appellee	: : :	
v.	:	No. 849 WDA 2019
Secada Black Appellant	: : :	

BRIEF OF AMICUS CURIAE THE MONTGOMERY COUNTY PUBLIC DEFENDER'S OFFICE

Appeal from the judgment of sentence against Appellant entered on May 30, 2018, in the matter of Commonwealth v. Secada Black, CP-02-CR-0002172-2019, in the Allegheny County Court of Common Pleas, Judge Zottola presiding.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Montgomery County Public Defender's Office represents adult and juvenile indigent individuals facing criminal charges at all stages of criminal proceedings. The onerous fines and costs that are routinely attached to our clients' criminal charges perpetuate poverty and chronic involvement in the justice system. The effects of costs and fines can and do last years beyond conviction. They create barriers to successful reentry after incarceration. In addition to causing more financial strain on indigent individuals—who are simultaneously faced with challenges of housing, transportation costs, and criminal records that negatively affect job prospects—fines and costs can result in extended terms of probation and even incarceration. Our office has a substantial interest in this matter because the law concerning the imposition and collection of fines and costs directly affects the vast majority of our clients, their families, and our community.

II. SUMMARY OF ARGUMENT

Amicus curiae the Montgomery County Public Defender's Office urges the Superior Court to vacate Appellant Secada Black's judgment of sentence and remand for resentencing and recalculation of costs, with an order that supervision fees be ordered to accrue once per month.

Requiring courts to provide criminal defendants itemized bills of costs at sentencing promotes judicial economy and good public policy. As to judicial economy, it ensures that the defense has adequate notice to raise any objections during sentencing. The sentencing court, thus, can develop a record and rule on any challenges up front, rather than issues being raised for the first time on appeal. Moreover, fully addressing costs at sentencing will encourage counsel to resolve costs issues in pre-sentence negotiations, minimizing litigation.

As to public policy, to the indigent clients represented by public defenders, court costs can be a crushing, lifelong burden. Ensuring that court costs are always addressed at sentencing would allow public defender clients to engage in plea negotiations with full information as to the financial consequences of conviction. Moreover, addressing costs at sentencing removes the incentive for indigent defendants to reject plea negotiations simply to avoid court costs.

Practical concerns also weigh in favor of assessing probation supervision fees once per month, as opposed to the common practice of assessing the entire amount

for the full sentence up front. First, assessing fees on as a monthly accrual allows more flexibility for the sentencing court to waive, defer, or reduce fees as a defendant's ability to pay changes, without forcing court clerks to recalculate the defendant's entire bill. Moreover, defendants whose supervision fees are affected by early termination or violation would not be overcharged due to clerical error or made to wait for refunds. As with adjustments made due to ability to pay, it would simply be a matter of adjusting the amount of one monthly charge as opposed to recalculating the entire bill.

The harms of lump-sum billing supervision fees disproportionately disadvantages public defender clients because even a small overcharge or waiting for a refund could itself be financially ruinous to the indigent. Lump-sum billing practices lack oversight and accountability, and public defenders carry caseloads that make checking that clients' supervision fees are being properly billed all but impossible. The result is a system that places the burdens of ensuring accurate accounting and of billing errors on those least able to carry them, indigent defendants.

III. ARGUMENT

1. PUBLIC POLICY AND PRACTICAL CONCERNS WEIGH IN FAVOR OF GIVING DEFENDANTS AN ITEMIZED LIST OF COSTS AT SENTENCING

Judges, attorneys, and, most importantly, defendants rarely know what the total bill of court costs will be for any particular conviction until after sentencing.[1] The law requires that defendants be given an itemized bill of costs and fees so that they have an opportunity to object. See Brief of Appellant. Sentencing courts should provide every defendant with an itemized bill at or before sentencing. Doing so serves judicial economy and enables defendants, especially those who are indigent, to conduct knowing and meaningful plea negotiations.

As with any other aspect of a sentencing order, defendants have the right to object and challenge any line item included in court costs that are assessed at sentencing. Id. Unlike most issues that arise at sentencing, however, challenges to costs and fees are not waivable and may be raised for the first time on appeal. See, e.g., Commonwealth v. Lehman, 201 A.3d 1279, 1283 (Pa. 2019). So, while failure to provide an itemized bill at or before a sentencing hearing may not deny defendants a meaningful ability to challenge line items (assuming costs are calculated within

[1] Additionally, the experience of public defenders through the Commonwealth—including a defender who has practiced almost thirty years in Allegheny County, as well as defenders in Dauphin, Montgomery, Philadelphia, Washington, Wayne, and York Counties—is that actual costs are not calculated by the Court of Common Pleas until after sentencing, sometimes weeks after, and defendants are not given notice of amounts due.

thirty days of sentencing), it does needlessly waste judicial resources. As with any other sentencing issue, policy and practical concerns weigh in favor of costs and fees being litigated before the sentencing court, first.

It is generally preferable to give the sentencing court an opportunity to rule on an issue. In the instant case, Ms. Black's itemized bill of costs was not prepared until nine days after her sentencing, and she was not provided notice of the bill after it was prepared. She was denied sufficient notice to include objections to costs in a post-sentence motion, which also denied the sentencing court an opportunity to hear and rule on her objections. Had she received the bill during sentencing, the issues in the instant appeal could have been resolved by the sentencing court, rather than on appeal.[2]

Without an opportunity for objections to be addressed before the sentencing court, appeals needlessly proliferate, subsequently generating a year or more of litigation that could have been avoided, all ending with an additional hearing before the trial court for an issue that should have been resolved at sentencing. Therefore, properly applying the law that requires presenting costs at sentencing preserves the typical division of judicial labor—appellate courts defining categories of fees and standards of review and trial courts applying the law to the facts of the case at hand.

[2] This applies to correcting simple clerical errors, as well. For example, the Montgomery County Public Defender's Office recently represented a client who was billed a $1,000 fine instead of the court ordered $100. He was not provided an itemized bill at sentencing, so the error was not detected or brought to the attention of a court until his case was on appeal.

"More importantly, appellate courts do not act as fact finders . . . ." Commonwealth v. Grant, 813 A.2d 726, 734 (Pa. 2002). This is especially relevant in cases where costs are being challenged on a basis that requires developing a facual record, such as ability to pay or the propriety of lab fees. See id. ("Further, appellate courts normally do not consider matters outside the record or matters that involve a consideration of facts not in evidence.") (citation omitted). The sentencing court is thus the ideal forum for hearing objections to costs, but it cannot hear those objections if a defendant does not have sufficient notice to raise them.

Lastly, providing notice of costs at sentencing preserves judicial economy because it encourages the parties to resolve issues over costs and fees before sentencing. If objections to costs and fees become more common as a result of courts providing adequate notice to defendants, criminal practice will likely change, too, in ways that will minimize litigation. When prosecutors and defense attorneys know that costs will always be addressed at sentencing, they will have incentive to resolve any potential issues before getting to court.

The vast majority of criminal prosecutions resolve by guilty plea. With itemized costs provided up front, parties would be encouraged to include joint recommendations on costs similarly to how fines and restitution are currently handled in plea negotiations. Thus, a defendant's concerns regarding costs will be

fully considered and rarely litigated, as opposed to the current situation, where they are almost never taken into account.

Informing defendants of the actual amount of court costs ensures knowing participation in plea negotiations, encourages parties to negotiate costs issues prior to sentencing, and allows unresolved issues to be litigated before the sentencing court. Rather than the "slippery slope" of burdensome additional hearings of which the lower court warns, transparency and timely presentation of costs promotes the efficient allocation of court resources.

This issue is especially relevant to clients represented by public defenders across the Commonwealth. Court costs are an enormous burden on middle-income defendants, let alone the indigent. Court debt can, and often does, lead to consequences that include re-incarceration, probation revocation, and loss of benefits, in addition to the psychological toll unsurmountable debt can take on those working poor seeking to come out from under it. See Samantha Melamed, Why are Pennsylvania Judges Sentencing People on Probation for Debts They Won't Ever be Able to Pay?, PHILA. INQUIRER (Oct. 10, 2019).[3]

According to data compiled by the ACLU of Pennsylvania from court records, the median amount of costs assessed amongst public defender clients was

[3] Available at https://www.inquirer.com/news/philadelphia-court-judge-genece-brinkley-probation-court-costs-fines-debtors-prison-aclu-20191010.html.

$1,072.00.[4] A recent study found that one-third of middle-income[5] adults do not have enough savings to cover an unexpected $400 expense without selling something or borrowing money, with six percent of that subset unable to pay by any means. Federal Reserve Board, Survey of Household Economics and Decision making (SHED) (2018).[6] Over twelve (12) percent of the Commonwealth's population lives in poverty. Census ACS 1-year survey (2018). Approximately 702,700 Pennsylvanians (5.7 percent) live in deep poverty, defined as living below half of the poverty line. The same data shows that communities of color are disproportionately affected by poverty across the state. See POVERTY AND PROGRESS, COMMUNITY ACTION ASSOCIATION OF PENNSYLVANIA (CAAP) (Oct. 23, 2017) at 2.[7]

Where $400 will drive a significant portion of middle-income households into debt, it devastates impoverished households that are relying on less-than half of that median income for food, shelter, utilities, and other basic living needs. Court debts affect not just the immediate debtor, but all other members of his or her household.

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[4] See, Colin Sharp, et al., IMPOSITION AND COLLECTION OF COURT COSTS IN PENNSYLVANIA CRIMINAL CASES: PRELIMINARY RESULTS FROM AN ANALYSIS OF 10 YEARS OF COURT DATA, ACLU (Nov. 13, 2018), at 3.

[5] In context, "middle income" was defined as households with income between $40,000 and $85,000. See Remarks by Gov. Lael Brainard, "Renewing the Promise of the Middle Class" 2019 Federal Reserve System Community Development Research Conference, Washington, D.C. available at https://www.federalreserve.gov/newsevents/speech/brainard20190510a.htm.

[6] Available at https://www.federalreserve.gov/consumerscommunities/shed.htm.

[7] Available at https://www.thecaap.org/news-events/poverty-and-progress.html.

This is especially true when mothers, fathers, and other primary caregivers find themselves subsequently incarcerated for contempt of court or probation violations for failing to pay court debt. See, e.g., Commonwealth v. Mauk, 185 A.3d 406 (Pa. Super. 2018), Commonwealth v. Diaz, 191 A.3d 850 (Pa. Super. 2018), and Commonwealth v. Smetana, 191 A.3d 867 (Pa. Super. 2018) (collectively demonstrating that, in spite of clear law stating that individuals shall not be incarcerated for failure to pay absent an ability-to-pay determination, the practice of such incarceration remains).

Because of the above, costs can be dispositive in whether a public defender client pursues plea negotiations at all. A defendant may simply choose to risk a jail sentence rather than incur thousands of dollars in court debt that they know they will never be able to pay, especially in minor cases where a defendant can avoid years of insurmountable debt by serving months in prison. While the law does not consider costs to be part of the sentence, their real and long-lasting effects cannot be minimized. Vindicating a defendant's right to be informed of the financial consequences of conviction is both fair and practical.

This is especially pressing in nonviolent misdemeanor cases such as possession of a controlled substance, where the hundreds or thousands of dollars of debt imposed by court costs is a more severe detriment to an indigent defendant than the direct consequences of conviction. Court costs also create a ripple effect of

negative consequences for a defendant's family and community. Many of these cases go to trial because the defendant will not be able to afford the basics of life with the additional burden of court costs and therefore cannot afford to not go to trial, regardless of their desire to take responsibility for their offenses.

Providing an itemized bill at sentencing, and the attendant changes to legal practice that would follow, removes the incentive for indigent defendants to reject plea negotiations or challenge negotiated sentences due solely to the financial burden of court costs because they will be empowered to enter into plea negotiations knowingly.

A defendant could still negotiate charges and recommended sentences, knowing that they will receive a precise, itemized bill at sentencing that the can, if necessary, challenge immediately. Where there is agreement on appropriate offenses and sentences, court debts need never impede or distort justice, and defendants are able to make their decisions knowing the exact financial impact. This is good public policy because it allows litigation of costs as early as possible, preventing ruinous debt from negatively affecting defendants' families or their chances for rehabilitation.

Perhaps most importantly, court costs and fees are not meant to be part of a defendant's punishment. Our Supreme Court has explained that the imposition "of costs is not part of any penalty imposed," including "the penalty imposed by statutes

providing for the punishment of criminal offenses." Commonwealth v. Giaccio, 202 A.2d 55, 58 (Pa. 1964), *rev'd on other grounds*, 382 U.S. 399. Despite this, as discussed *supra*, court costs are more detrimental than direct consequences of conviction to many indigent defendants and often result in incarceration completely unrelated to the underlying offense.

For instance, this Court recently issued published opinions in three appeals brought by the ACLU of Pennsylvania, invalidating trial court practices that led to the incarceration of dozens of defendants each month solely for failure to pay court debt. See Commonwealth v. Mauk, 185 A.3d 406 (Pa. Super. 2018); Commonwealth v. Diaz, 191 A.3d 850 (Pa. Super. 2018); Commonwealth v. Smetana, 191 A.3d 867 (Pa. Super. 2018). The defendants in each of those cases owed thousands of dollars that continued to linger because of their lack of financial resources.

Years later—seven years for Mr. Mauk, four years for Mr. Diaz, and three years for Mr. Smetana—these defendants each found themselves unlawfully and unconstitutionally incarcerated by courts that aggressively attempted to collect uncollectible funds without regard for the defendants' financial resources. Mauk, Diaz, and Smetana were all contempt cases, as they had already finished their supervision despite still owing the funds. Indeed, as this Court has recognized, a defendant "need not be on parole to pay his fine, and the Commonwealth need not

keep him on parole to insure payment." Commonwealth v. Rosenberry, 645 A.2d 1328, 1331 (Pa. Super. 1994).

Public defenders in many counties across the state routinely encounter defendants under supervision who cannot afford to pay and are either incarcerated or have their supervision extended due to nonpayment. This is in violation of their constitutional rights, and it could be prevented if courts and parties address court costs, their legality and their propriety in light of a defendant's ability to pay, at the time of sentencing. In order to effectuate this, judges, defendants, and counsel need transparent, itemized bills provided at or before sentencing.

2. ACCRUING SUPERVISION FEES ONCE PER MONTH RATHER THAN AS A LUMP SUM IS GOOD PUBLIC POLICY BECAUSE IT ALLOWS COURTS TO ADJUST SUPERVISION FEES AS CIRCUMSTANCES CHANGE AND PREVENTS CLERICAL ERRORS FROM CAUSING DEFENDANTS TO INCUR UNSUSTAINABLE DEBT

This Court should adopt the strict construction of 18 P.S. § 11.1102(c) urged by Appellant in her principal brief and rule that supervision fees must be charged once per month. Currently, it is common practice for the Courts of Common Pleas throughout Pennsylvania to charge supervision fees as an up-front lump sum. On top of being illegal, see Brief of Appellant, this is poor public policy.

First, Section 11.1102(c) enshrines sensitivity to a defendant's ability to pay in its language. 18 P.S. § 11.1102(c) ("The court shall impose as a condition of

supervision a monthly supervision fee . . . unless the court finds that the fee should be reduced, waived or deferred based on the defendant's present inability to pay.") Charging supervision fees monthly is the simplest way for courts to effectively carry out the statute's command. Currently, if a probationer's financial situation changes and the court determines that fees should be reduced, waived, or deferred, the clerk of courts must cancel the current supervision fee charge, recalculate the new total, and charge the defendant based thereon. If the fees have already been referred to civil collections,[8] the clerk of court must contact the agency and ensure that those arrangements are also amended. If fees were charged monthly, it would be a simple as the court clerk changing the monthly fee assessed, no further steps necessary.[9]

A defendant's ability to pay supervision fees can change over the course of supervision due to the ebbs and flows of life. Jobs are gained and lost, children are born, and unanticipated emergency costs crop up—all of which impose particular hardship on indigent defendants for the reasons discussed *supra*. Charging fees monthly allows courts to more easily adjust or waive payments on a month-by-

[8] In Philadelphia, for example, fees are referred to civil collections after a year of non-payment. Under the procedure supported by this brief, a civil collections agency need not be brought in for supervision fees. After a period of non-payment, the defendant's probation officer can request a hearing to assess ability to pay, and the supervising judge would be able to either find a violation of probation due to willful nonpayment or adjust supervision fees as needed to avoid unconstitutional incarceration or court debt from negatively impacting a probationer's ability to comply with the other terms of their supervision.

[9] This could also remove debt collection from the equation, so every dollar paid would go directly to the courts.

month basis, avoiding the flurry of clerical work necessary to effectuate an adjustment under the current process.

Additionally, in situations where a defendant's probation or parole ends early, due to early termination or violation, clerical simplicity is maximized. Upon the judge's order terminating probation or finding a violation, the clerk of courts can, as part of the order already being prepared, reduce, waive, or defer supervision fees. In contrast, under the current system, the clerk has to recalculate the total fees, adjust the total court costs accordingly, and contact any relevant debt collection agencies. The relative ease of adjusting a monthly charge means that the commands of Section 11.1102(c) will be more efficiently and effectively carried out with a once-per-month charge than with lump sums. Judges will have greater flexibility to adjust supervision fees if a probationer's financial situation improves or deteriorates. And clerks will only have to add one line to the orders they are already preparing for terminations and violations rather than recalculating the entire bill.

Charging supervision fees once per month is especially beneficial to public defender clients because overcharging court costs is financially ruinous to the indigent, where it may impost mere inconvenience to others. See *supra*. Simpler process means fewer potential failure points, which means fewer clerical errors leading to defendants being overcharged.

Additionally, many judges will grant early termination only if all costs and fees are paid off. That means that those defendants have overpaid their supervision fees—they have paid the full amount charged by the clerk of courts, which includes a lump-sum supervision fee that assumes the full term will be served. Even assuming that the court clerk will always issue a refund, that may already be too late for an indigent person. Public defender clients already live well below the poverty line, and overpaying supervision fees and then waiting for a refund check could easily be financially disastrous.[10] That overcharge has already prevented the defendant from buying food, paying bills, paying rent, and other basics. Monthly charges would prevent overcharging of defendants who are least able to pay.

Moreover, under the current process, there are clerical errors while recalculating supervision fees. Thus, defendants and their attorneys are on the hook for checking and re-checking a defendant's bill of costs—the same bill that is currently calculated after sentencing and rarely provided to them. Charging supervision fees once a month therefore serves two additional public goods. It simplifies the determination of court costs at sentencing. Rather than trying to prognosticate what a defendant's ability to pay supervision fees will be over the months or years of supervision, the court need only consider what the defendant can

[10] Moreover, it is the experience of at least one public defender from York County that supervision fees are never recalculated upon early termination or revocation.

pay that upcoming month. It also reduces the likelihood of accounting errors when adjustments are made to the supervisee's financial obligations. Reducing such errors is essential in a system in which overburdened public defenders do not have the time or resources to repeatedly double-check probation and parole client's bills of costs after final judgment of sentence. Public defenders already carry caseloads that make fulfilling their basic duties all but impossible.[11] It is better policy to charge supervision fees once per month. The change would save clerical work for the courts and ensure better representation from public defenders who are not spending their limited time tracking down and litigating court costs. The courts and indigent defendants would both benefit.

[11] See Colt Shaw, Pa. High Court Ruling Buoys Overburdened Public Defenders, PHILA. INQUIRER (Nov. 3, 2016), available at https://www.inquirer.com/philly/news/20161103_Pa__high_court_ruling_buoys_overburdened_public_defenders.html

IV. CONCLUSION

For the foregoing reasons, Amicus, through counsel, respectfully requests that Appellant's judgment of sentence be vacated and this case be remanded for a new sentencing hearing.

Respectfully submitted,

/S/

JASON E. PARRIS, Esq.

Certificate of Compliance with Word Limit

I certify, pursuant to Pa. R.A.P. 531 and Pa. R.A.P. 2135 that this brief does not exceed 7,000 words, as measured by the word processor used to prepare it.

/s/

Jason E. Parris, Esq.

Date: January 21, 2020

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 Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/

Jason E. Parris, Esq.

Date: January 21, 2020