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**IN THE SUPERIOR COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

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**No. 849 WDA 2019**

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**COMMONWEALTH OF PENNSYLVANIA,**

**Appellee,**

**v.**

**SECADA BLACK,**

**Appellant.**

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# CORRECTED REPLY BRIEF OF APPELLANT SECADA BLACK

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Appeal from Judgment of Sentence of the Court of Common Pleas
of Allegheny County Dated May 21, 2019 in CP-02-CR-2172-2019

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## Introduction

This appeal illustrates the twin purposes of requiring that a trial court provide the defendant with a bill of costs at sentencing: (1) to satisfy due process, and (2) to ensure that disputes over costs can be resolved, in the first instance, in the trial court. In Kafkaesque manner, the Commonwealth argues both that the trial court need not have provided Ms. Black with a bill of costs and that Ms. Black should have raised below her objections to the costs imposed.[1] Not only did the trial court fail to provide Ms. Black notice of the costs imposed, the court also imposed several improper court costs upon Ms. Black. The Commonwealth bears the burden of justifying these costs, and it has failed to do so. This Court should vacate the imposition of all costs on Ms. Black and remand with instructions for them to be re-imposed in a lawful manner.

### A. The trial court's failure to provide Ms. Black with a bill of costs or other notice of the costs it imposed against her was a legal error that requires vacatur of all costs.

The trial court—which includes not only the judge, but also court staff and the clerk of courts[2]—committed two legal errors, in direct contradiction of precedent, when it imposed costs on Ms. Black. First, the trial court never provided

[1] Ms. Black is entitled to raise her objections on appeal when the trial court has committed a legal error in imposing the costs. *See, e.g.*, *Commonwealth v. Lehman*, 201 A.3d 1279, 1283 (Pa. Super. Ct. 2019).

[2] As the Commonwealth notes, the clerk of courts in Allegheny County has been merged into the Department of Court Records.

her with *any* notice about which costs it was imposing or the total amount of costs she now owed by virtue of her conviction. Second, it did not provide her with that notice, in the form of a bill of costs, at the time of sentencing when it imposed those costs, as it is obligated to do under *Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980).

The Commonwealth does not dispute that neither Ms. Black nor her counsel was *ever* served with the bill of costs required by *Coder*. Instead, the Commonwealth argues that the clerk may calculate costs (true), and that the Department of Correction may collect on costs without a court order (also true and irrelevant to this case).[3] Neither of those points is in issue. The result of the trial court's legal errors is that the trial court imposed $1,500 in court costs against Ms. Black, split among more than two dozen separate itemized court costs, without her being able to ascertain the amount from either the sentencing hearing or sentencing order. (R. 22a; R. 27a). And the court never served her with any paperwork after the fact; no paperwork was even docketed until *nine days after* Ms. Black's sentencing, and even then, it was not actually served on the parties. (R. 04a; 30a).

The only way that Ms. Black ever learned about the costs assessed against her was that her counsel noticed the total amount of costs *more than a month* after sentencing, while she was preparing the Pa.R.A.P. 1925 statement for appeal. The

[3] Ms. Black is not incarcerated and not subject to collection by DOC.

trial court's failure to provide a contemporaneous bill of costs—or any adequate notice whatsoever—is inconsistent with the decisions of the Supreme Court and this Court and violates her constitutional right to due process.

**1. The trial court violated Ms. Black's right to due process by not providing Ms. Black a bill of costs that listed what she must pay.**

The Commonwealth does not and cannot dispute that the court never informed Ms. Black of what she was supposed to pay. Instead, it derisively dismisses these serious notice problems as a "policy" question that this Court should not address. However, the issue—as set forth in Ms. Black's opening brief—is one of providing constitutionally-adequate due process. A defendant needs to know the amount of costs so that she can file objections thereto if there are any apparent errors (as there are in this case), and she also needs to know what she is supposed to pay. All that Ms. Black asks of this Court is to correct the legal errors below in accordance with *Coder*, *Allhouse*, and *Gill*, making it clear that the trial court must provide a defendant with a bill of costs when it imposes them.

In its brief, the Commonwealth—like the trial court—suggests that any notice problem was resolved when the clerk of courts updated the docket sheet with information about the costs. Yet the Supreme Court and this Court have repeatedly ruled in other contexts that an entry on a docket sheet is *not* sufficient notice. For example, in *Commonwealth v. Hess*, 810 A.2d 1249, 1253–54 (Pa. 2002), the Supreme Court ruled that a defendant did not waive his appellate rights

for failure to file a Pa.R.A.P. 1925 statement when the requirement to do so appeared only on the docket sheet and he was not served with an order. In *Commonwealth v. Parks*, 768 A.2d 1168, 1171 (Pa. Super. Ct. 2001), this Court held that the appellant's "fundamental due process right to notice of the date of his rescheduled trial *de novo* was abridged, since it is quite clear that Appellant was not provided with a copy of the rescheduling order," even though the relevant order appeared on the docket sheet. *Accord Commonwealth v. Baker*, 690 A.2d 164, 165 (Pa. 1997) (declining to reach due process claim after finding that the clerk of courts unlawfully failed to provide notice of a change of hearing date). Here, too, the trial court failed to provide Ms. Black or her counsel the requisite notice.[4]

The Commonwealth is certainly correct that costs are not intended to be "punishment" in the way that fines are, but that distinction makes no difference to the issue here. Once costs are imposed, the defendant must pay them, on pain of contempt of court and incarceration. Costs technically become due at the time of sentencing, when they are imposed, unless the trial court instead imposes a

[4] The idea, put forth by the Commonwealth, that Ms. Black should have filed some sort of "preemptive" motion is a nonsensical catch-22. She could not have known about the problems with her costs, which would be necessary before she could object, until after the court calculated them and provided her with the list of costs. Because the court never provided her with the list of costs, she did not have the necessary information to file such objections.

payment plan pursuant to Pa.R.Crim.P. 706(B).[5] And nonpayment *is* punished through a court's contempt powers.[6] This Court has become quite familiar in recent years with the frequency with which defendants are unlawfully incarcerated when they are unable to pay. Indeed, two of this Court's recent decisions have involved such unlawful court decisions in Allegheny County. *See Commonwealth v. Dennis*, 164 A.3d 503, 509 (Pa. Super. Ct. 2017) (Allegheny County defendant unlawfully jailed for inability to pay pre-sentencing costs); *Commonwealth v. Milton-Bivins*, 1870 WDA 2017, 737 WDA 2018, 2019 WL 4390657 (Pa. Super. Ct. 2019) (unpublished) (Allegheny County defendant unlawfully jailed for nonpayment of restitution); *see also, e.g.*, *Commonwealth v. Diaz*, 191 A.3d 850, 866 (Pa. Super. 2018) (defendant unlawfully jailed for nonpayment of fines and costs); *Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018) (same). Despite these decisions, the Commonwealth contends that the court need not tell the defendant what costs she owes, even though she can later be held in contempt and incarcerated for failing to pay those costs. That rather absurdist outcome highlights the fundamental due process issue at stake.

[5] Courts can set an alternative "due" date for the payment of *fines*. *See* 42 Pa.C.S. § 9758(a) (when imposing a fine, a court "shall provide when it is to be paid"). No such statutory discretion applies to costs.

[6] This Court recently clarified that nonpayment of costs is not punishable through a probation violation. *See Commonwealth v. Hudson*, -- A.3d --, 2020 PA Super 98, 2020 WL 1887833 (Pa. Super. Ct. Apr. 16, 2020). However, regardless of whether a defendant is on supervision, nonpayment is punishable through the court's inherent contempt powers. *See Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994).

**2. To ensure adequate notice and an opportunity to be heard, the trial court should have provided the bill of costs at sentencing.**

The Supreme Court has identified sentencing as the time when a defendant is to have the opportunity to contest costs. In a case dealing with somewhat different circumstances—the legal authority for the Department of Corrections to deduct payments of costs from inmate accounts—the Court held that such deductions comport with due process because defendants have already received "notice and an opportunity to be heard at [their] sentencing hearing[s]." *Buck v. Beard*, 879 A.2d 157, 160 (Pa. 2005). Underpinning the Court's decision in *Buck* is the notion that, at the *sentencing hearing*, a defendant has received "the opportunity to present evidence to persuade the court not to impose fines, costs, and restitution." *Id.* The framework that the Supreme Court has deemed constitutionally sufficient is one in which defendants are informed of their costs at sentencing and given an opportunity to contest those costs. The constitutional bar has not been met in this matter, and this Court should vacate the imposition of court costs in this case, with instructions to the trial court to re-impose such costs only when it provides a contemporaneous bill of costs to Ms. Black and counsel, *i.e.* at sentencing.[7]

[7] The Commonwealth cites to the Commonwealth Court's decision in *Richardson v. Department of Corrections*, 991 A.2d 394 (Pa. Commw. Ct. 2010), which was also a challenge to DOC's authority to deduct court costs. The Commonwealth Court held that it is not necessarily unlawful for the trial judge to fail to sign a bill of costs, and there is nothing wrong with the clerk of courts performing the actual calculation. *Id.* at 397. Ms. Black takes no issue with either point. The

The Commonwealth's objections to this common-sense principle are semantic, and self-defeating. Costs are set by statute, and while the court has the authority to reduce or waive those costs, they are standardized across cases. To make matters easier, the Common Pleas Case Management System ("CPCMS") generates the bill of costs for court staff.[8] Even if there are some case-specific costs (such as lab fees) that may not apply from case to case, there is no practical barrier for the clerk to provide the judge and the parties with a bill of costs at sentencing.[9]

Ms. Black's case highlights the importance of enumerating costs at sentencing—and how this appeal could have been avoided entirely. If the trial court had given Ms. Black and her counsel a bill of costs at sentencing, it would have been apparent that it had imposed all $540 in supervision fees at once, an issue they could have raised with the court for correction. In addition, Ms. Black and her counsel would have been able to advise the court that certain costs seemed to lack statutory authority. Even if the court were not prepared to rule on that issue at sentencing, it could have scheduled an evidentiary hearing for the

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*Richardson* court was not, however, confronted with a challenge from an inmate who never received a bill of costs, or received one after sentencing such that he could not challenge the imposition of costs per the Supreme Court's ruling in *Buck*.

[8] CPCMS is the computer system used by all criminal courts in Pennsylvania. It was created and is operated by AOPC. It contains all of the possible court costs, and court staff use CPCMS to determine and calculate the costs.

[9] If a bill of costs had to be later revised, it could be done so with constitutionally-appropriate notice and an opportunity to object. This Court can take judicial notice of this fact without reference to the omnibus list of civil and criminal fees charged by the Allegheny County Department of Court Records that the Commonwealth has submitted as an "offer of proof."

Commonwealth to justify those costs, as it bears the burden of demonstrating that all costs are lawfully imposed. Finally, although Ms. Black's counsel did ask that all costs be waived, neither the judge nor Ms. Black and her counsel knew that the total amount was $1,500—information that could have dramatically changed the trial court's outcome." Counsel would have been able to promptly alert the trial court that even at $10 per month—a burdensome amount for Ms. Black[10]—it would have taken her more than *twelve years* to pay the court costs, which is more than *twelve times* the length of her probation. Rather than dismissively declining to hear Ms. Black's "hard luck story," the trial court may well have found that fact compelling enough to waive or at least reduce the costs and avoid this appeal.

The time to provide the bill of costs is at sentencing, as it is at that time that the defendant becomes liable for costs. Indeed, it should not be a remarkable proposition that when a court imposes a financial liability on the defendant, it also tells the defendant what the substance of that liability is. This Court would not approve of a trial court imposing a fine or restitution without first specifying the amount, any more than it would permit the court telling a defendant that she must report to jail, or must begin serving probation, without specifying the length of those sentences. To the contrary, this Court has repeatedly ruled that it is illegal to

[10] Ms. Black had recently been struck by a car and was applying for Social Security Supplemental Security Income.

impose restitution without specifying the amount of restitution at sentencing. *See, e.g.*, *Commonwealth v. Mariani*, 869 A.2d 484, 486 (Pa. Super. Ct. 2005) (explaining that it violates due process to impose restitution without specifying an amount thereof at sentencing). Yet the trial court here did precisely that with respect to the costs: it told Ms. Black she was "responsible for [court] costs" without telling her what those costs entailed or how much they totaled. (R. 22a). This was legally insufficient.

**B. That the trial court unlawfully imposed on Ms. Black the total projected balance of monthly supervision fees at once at the time of sentencing is apparent from the face of the record.**

Rather than impose the monthly $45 supervision fee as Ms. Black accrues it, the trial court immediately imposed all $540 of supervision fees for the twelve months she was projected to be on probation. The Commonwealth's argument that Ms. Black may pay this amount over time misses the point that the costs were charged to her before she actually owed them. To this, the Commonwealth offers no response at all.

Instead, the Commonwealth bizarrely argues that Ms. Black's opening brief did not adequately describe where in the record this issue arose and then *quotes* the trial court's declaration that it did, indeed, charge Ms. Black at the outset with the supervision fees it thought she would accrue over the next twelve months. Br. of Appellee at 16. Moreover, Ms. Black's brief *did* identify the parts of the record

that reflect the improper supervision fees, explaining that her counsel "discovered for the first time—**upon reviewing the court docket—that the court had imposed all of Ms. Black's supervision fees upon sentencing** and had also imposed certain costs that lacked a proper statutory basis." Appellant's Br. 5 (emphasis added). The entire point of this appeal is that costs were itemized and totaled only in two places: an entry on the court docket and a document labeled "Itemized Account of Fines, Costs, Fees, and Restitution," which was put in the case file and never served on Ms. Black or her counsel. The Commonwealth has always been well aware of the source of the trial court's error.

### C. The Commonwealth has not met its burden to demonstrate that certain costs were imposed lawfully.

The Commonwealth bears the burden of demonstrating that each cost was imposed lawfully against Ms. Black, and it fails to carry its burden here. There are four costs that appear to lack any statutory basis for their imposition: Court Technology Fee (Allegheny) for $5.50; Department of Records – Conviction (Allegheny), which is listed twice, once for $20.00 and once for $180.00; Record Management Fee (Allegheny), which is listed twice, once for $2.20 and once for $3.30; and Use of County (Conviction) (Allegheny) for $4.00. The Commonwealth has apparently abandoned the justification used by the trial court and does not claim that any of these costs are authorized by 16 P.S. §§ 3405(a.2) or 4403. Likewise, the Commonwealth does not contend that these costs are authorized by

42 Pa.C.S. § 9728(g) or the long-repealed Section 64 of the Criminal Procedures Act of 1860.[11] The agreement between the parties as to which statutes do *not* authorize these costs significantly narrows the issues.

Moreover, there seems to be no disagreement between the parties about the relevant legal standards for determining this appeal. As the Commonwealth acknowledges in its brief, it bears the "burden of justifying" the costs, rather than it being Ms. Black's burden to show the costs are unlawful. *Commonwealth v. Gill*, 432 A.2d 1001, 1009 (Pa. Super. Ct. 1981). If the costs are not authorized by statute, then they are unlawful and must be vacated. *See, e.g.*, *Commonwealth v. Houck*, 335 A.2d 389, 391 (Pa. Super. Ct. 1975). Because the statutes imposing court costs are penal in nature, they must be construed narrowly and "interpreted in the light most favorable to the accused." *Commonwealth v. Huggins*, 836 A.2d 862, 868 n.5 (Pa. 2003). As the Supreme Court has explained, where the question of whether a cost is appropriate is "equivocal (at best)," a narrower construction favoring defendants "must prevail." *Commonwealth v. Garzone*, 34 A.3d 67, 75 (Pa. 2012).

Nevertheless, the Commonwealth cites several *other* statutes—different from those relied upon by the trial court when it imposed the costs—for the basic

[11] These two provisions were addressed in Ms. Black's opening brief out of an abundance of caution, in case the Commonwealth mistakenly relied upon them.

proposition that since the Department of Court Records bills these costs, they are *ipso facto* legal. That is not so. First, 42 P.S. § 21042 sets forth certain costs that can be charged by the prothonotary in *civil* cases. As this appeal stems from costs imposed in a criminal matter, that statute is irrelevant to any costs at issue here. Second, although 16 P.S. § 4801.1 authorizes the Clerk of Courts to charge certain additional costs in criminal cases, none of the challenged costs here actually comprise any of the permissible costs in Section 4801.1.[12]

While it is possible that some of the costs at issue *could* be authorized by Section 4801.1, the Commonwealth has failed to meet its burden to show that any of them actually were lawfully authorized under that provision. Section 4801.1 gives Allegheny County's Department of Court Records (formerly the clerk of courts) a power unique among the counties: unlike other counties, whose costs and the dollar amounts thereof are specifically set by statute, Section 4801.1 empowers the Department of Court Records to "establish, modify or eliminate fees and charges," including those set forth in Section 4801.1. *See* 16 P.S. § 4801.1(b); *cf.* 42 P.S. § 21061 (establishing similar costs for second- through eighth-class counties, without giving such discretion to the clerk). However, the authority bestowed upon the Department of Court Records to set costs under Section 4801.1

[12] The other statutes cited by the Commonwealth in its brief simply deal with the general powers of the prothonotary, clerk of courts, and register of wills, none of which have any bearing on the legal issues in this appeal.

is not absolute or without oversight. Instead, the "approval of the president judge is required for the establishment of any new fees or charges or for fees which would exceed the maximum fees set forth in subsection (a)." *Id.* (emphasis added).

Yet the Commonwealth has failed to provide any reference to any administrative order or other indication that any of the challenged costs have ever been "approv[ed]" by the President Judge, which would be necessary to show that such costs are properly authorized under Section 4801.1.[13] In addition, as far as can be discerned by Appellant's counsel, the President Judge in Allegheny County has never done so for these costs.[14] The Commonwealth has failed to meet *its* burden to show that these costs are authorized by law. Without such evidence to show that the Allegheny County President Judge properly approved of these costs, they cannot have been lawfully imposed under 16 P.S. § 4801.1(b). *See Gill*, 432 A.2d at 1009 (invalidating costs that lacked statutory authorization). As such, these costs must be invalidated here.

[13] The only court administrative order referenced by the Commonwealth, Administrative Docket No. 3 of 2008, simply has nothing to do with court costs. Instead, it recognizes that the prothonotary, clerk of courts, and register of wills have been consolidated into one Department of Court Records. Although the Commonwealth did not attach this order, it is available at https://www.alleghenycourts.us/downloads/criminal/administrative_orders/Director%20of%20Court%20Records.pdf.

[14] Moreover, a search of the Pennsylvania Bulletin has failed to find any reference to any of the challenged costs. By contrast, the Allegheny County administrative order AD-2012-120-CR, which increased probation supervision fees to $45 per month, is readily available at 42 Pa.B. 3438 (June 16, 2012). The standard practice across Pennsylvania is for such orders to be published in the Bulletin, to ensure that the public is informed of such decisions.

Finally, even under a liberal reading of the requirements of Section 4801.1, the statute still does not authorize two of the costs at issue. As is discussed in Ms. Black's opening brief, the Record Management Fee (Allegheny), which appears twice, is governed by 16 P.S. § 3405(a.2). That provision *authorizes* the county commissioners to create such a fee, but it does not *establish* the fee. Certainly nothing in 16 P.S. § 4801.1 permits the Clerk of Courts to act in the place of the county commissioners and unilaterally enact that fee. To do so would create an irreconcilable conflict between Section 3405(a.2) and Section 4801.1 by simultaneously allowing two separate actors to enact the fee, which is not an appropriate interpretation under the Statutory Construction Act. *See* 1 Pa.C.S. § 1933 (explaining that in such an instance, the more specific statute, *i.e.* Section 3405(a.2), would govern). As to Section 3405(a.2) and the challenged Record Management Fee (Allegheny), the Commonwealth has failed meet its burden in providing any ordinance or other action taken by the county commissioners that properly enacted the fee. Accordingly, this fee lacks proper authorization and was unlawfully imposed on Ms. Black.

Section 4801.1 likewise does not authorize is the "Use of County Fee." The Commonwealth claims that the "Use of County Fee" was effective January 1, 1970. Yet 16 P.S. § 4801.1 was not enacted until 1996. Thus, this fee cannot find

its basis in a statute that did not exist until decades later. As a result, this fee was unlawfully imposed on Ms. Black and must be invalidated, as well.

While the Commonwealth has failed to meet its burden to justify these costs, Ms. Black recognizes that—by necessity—these issues have been raised for the first time on appeal. To the extent that this Court believes there are lingering factual issues surrounding any of these costs, it may be appropriate to remand to the trial court for further proceedings. Such an action is certainly not unprecedented: in *Gill*, this Court ruled that some court costs were illegal, but it also remanded for further proceedings on other costs, since it lacked the information necessary to resolve the matter on appeal. *See Gill*, 432 A.2d at 1008 ("Obviously, in order to relate the monies collected under the broad rule authorizing the percentage deduction to the costs of the bail program, such costs must be shown on the record. We, therefore, remand the cause for hearing of evidence relevant to this matter."). But if this Court does so, Ms. Black respectfully requests that the Court provide the trial court with clear and specific instructions on which issues it must resolve.

## Conclusion

The trial court made several errors when it imposed costs on Ms. Black and made her legally obligated to pay the court $1,500. This Court should correct those

errors by vacating the imposition of costs and remanding with instructions for the trial court to re-impose them only in a manner that comports with the law.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.P. 2135 that this brief does not exceed 7,000 words.

## 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.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

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Dated: May 19, 2020