From: Andrew Christy, ACLU-PA
Re: Imposing costs on charges that are dismissed or withdrawn through a nolle prosequi
Date: Updated February 26, 20121

MEMORANDUM

There are three main reasons why it is illegal to impose costs on a defendant for charges of which he is not convicted, whether the charges are dismissed or withdrawn through a nolle prosequi.

First, because court costs are incident to judgment and there is no judgment against a defendant without a finding of guilt, "the assessment of costs on charges withdrawn or dismissed is illegal." *Commonwealth v. Gill*, 432 A.2d 1001, 1009 (Pa. Super. Ct. 1981) (instructing the trial court on remand not to impose any costs on charges that were withdrawn after a motion of nolle prosequi).[1] *See also Commonwealth v. Bollinger*, 418 A.2d 320, 328 n.14 (Pa. Super. Ct. 1979) (en banc) (defendant "not liable for the costs of prosecution on any of the charges on which he was not convicted"). Although Pa.R.Crim.P. 585 permits that "[u]pon a nolle prosequi, costs may be imposed as the court may direct," which could be read to permit imposing costs on defendants, that the Rule has not been modified since 1964, long before *Gill* and *Bollinger* said that such a practice would be illegal.[2]

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[1] *Gill* cites a pair of since-repealed statutes, 19 P.S. §§ 1221 and 1223. These statutes remain in effect through the Judiciary Act Repealer Act as part of Pennsylvania's common law. Section 1221, the Act of Sept. 23, 1791, 3 Sm. L. 37, § 13, read: "Where any person shall be brought before a court, justice of the peace, or other magistrate of any city or county in this commonwealth, having jurisdiction in the case, on the charge of being a runaway servant or slave, or of having committed a crime, and such charge, upon examination, shall appear to be unfounded, no costs shall be paid by such innocent person, but the same shall be chargeable to and paid out of the county stock, by such city or county." *See Commonwealth v. Cohen*, 157 A. 32 (Pa Super. Ct. 1931). Section 1223, the Criminal Procedure Act of 1860, March 31, 1860, P.L. 427 provided "That the costs of prosecution accruing on all bills of indictments charging a party with felony, returned ignoramus by the grand jury, shall be paid by the county; and that the costs of prosecution accruing on bills of indictment charging a party with felony, shall, if such party be acquitted by the petit jury on the traverse of the same, be paid by the county; and in all cases of conviction of any crime, all costs shall be paid by the party convicted; but where such party shall have been discharged, according to law, without payment of costs, the costs of prosecution shall be paid by the county." That provision unquestionably remains part of the common law, which the Superior Court acknowledged as recently as 2010. *Commonwealth v. Garzone*, 993 A.2d 306, 317 (Pa. Super. Ct. 2010). As a result, *Gill*'s holding is still valid.

[2] Rule 585 was enacted in 1964 (then Rule 314). At the time, Pennsylvania law regarding costs was quite different. For example, none of the current itemized costs such as the County Court Cost (enacted in 1976) or the Crime Victim Compensation Fund (enacted in 1984) existed. Instead, the only costs were the costs of prosecution—the money that the District Attorney spent to prosecute the case, through witnesses, subpoenas, experts, etc. Pennsylvania law also permitted the jury to place costs on individuals acquitted of misdemeanors—a practice ruled unconstitutional by the United States Supreme Court in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). *See generally Commonwealth v. Smith*, 361 A.2d 881, 882 (Pa. Super. Ct. 1976) (en banc) (defendant convicted of misdemeanor but acquitted of felony could not be required to pay costs on felony charge). As Pennsylvania's statutes and case law have changed, its modern meaning must not permit imposition of costs on a defendant who has not been convicted. Moreover, at the time that Rule 585 was enacted, it was common practice to impose costs on the complainant who prosecuted a case, if the defendant was not convicted—another practice that appears to not exist today. *See, e.g.*, *County of Lehigh v. Schock*, 7 A. 52, 54 (Pa. 1886) ("Prosecutions made in good faith are not discouraged by permitting the magistrate to impose the costs on the party who made complaint. This statute has stood for nearly a century, and still seems in accord with the wise policy of the commonwealth."); *Commonwealth v. Donovan*, 181 A. 606, 608–09 (Pa. Super. Ct. 1935) (statute permits imposing costs on a prosecutor who lacks reasonable ground for

Second, because a defendant "may be required to only pay costs authorized by statute," each statute that imposes a cost would have to explicitly apply to charges that were withdrawn through a nolle prosequi. *Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980). Such statutes must be strictly construed. *Fordyce v. Clerk of Courts*, 869 A.2d 1049, 1053 (Pa. Commw. Ct. 2005). Yet none of the statutes that impose court costs permit those costs to be imposed if the charges have been withdrawn through a nolle prosequi. Instead, the various costs can only be assessed if a defendant has been admitted to ARD or another diversionary program, has pled guilty or been convicted, or entered a plea of nolo contendere. In the absence of statutory authority, these costs cannot lawfully be imposed. For a list of the standard costs, as well as the underlying statutory authority for each cost, look at the "Court Cost Statutes" we have available at www.aclupa.org/finesandcosts.

Finally, imposing costs for charges that have been withdrawn also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court explained in *Colorado v. Nelson*, 137 S. Ct. 1249, 1257 (2017) that a state has "zero claim" on costs paid once a conviction is overturned because there has been no adjudication of guilt. That is because the "presumption of innocence" prevents a state from presuming that "a person, adjudged guilty of no crime, [is] nonetheless guilty enough for monetary exactions." *Id*. at 1255–56. Yet a court does precisely that when it imposes costs on charges that have been withdrawn. Such action is no different than suggesting that the Commonwealth could assess costs against every single person for whom there is probable cause to believe that the person committed a crime. A court ordering a person to pay money without a finding of guilt does not comport with *Nelson*, and it does not comport with defendants' fundamental Due Process rights.

bringing the charges). Thus, in the proper historical context, Rule 585 is most accurately read as being about whether costs should be paid by the county or directly by the prosecutor himself.