

IN THE
SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 1058 WDA 2019

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

MARCIA DINARDO,
Appellant

REPLY BRIEF FOR APPELLANT

Appeal from the Order of Sentence entered on January 14, 2019, at CC 2018-4090, by the Honorable Alexander Bicket, Court of Common Pleas of the Fifth Judicial District of Pennsylvania.

Counsel of Record:

MELISSA R. RUGGIERO, ESQUIRE
Attorney At Law
State I.D.# 94710

**Allegheny County Office of Conflict Counsel
564 Forbes Avenue
Manor Building, Suite 600
Pittsburgh, PA 15219
(412) 350-4850**

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CASES.....	iii
ARGUMENT.....	1
CONCLUSION.....	13

TABLE OF CASES

PAGE(S)

Amrhein v. Amrhein, 903 A.2d 17 (Pa. Super. Ct. 2006).....11

Commonwealth v. Allshouse, 924 A.2d 1215 (Pa. Super. Ct. 2007).....4

Commonwealth v. Baker, 766 A.2d 328 (Pa. 2001).....3

Commonwealth v. Diaz, 191 A.3d 850 (Pa. Super. Ct. 2018).....4, 12

Commonwealth v. Eggers, 742 A.2d 174 (Pa. Super. Ct. 1999).....9

Commonwealth v. Gaddis, 639 A.2d 462 (Pa. Super. Ct. 1994).....12

Commonwealth v. Gaskin, 472 A.2d 1154 (Pa. Super. Ct. 1984).....8

Commonwealth v. Heggenstaller, 699 A.2d 767 (Pa. Super. Ct. 1997).....4

Commonwealth v. Karth, 994 A.2d 606 (Pa. Super. Ct. 2010).....6

Commonwealth v. Moody, 125 A.3d 1 (Pa. 2015).....3

Commonwealth v. Samuels, 1422 MDA 2018, 2019 WL 3231245 (Pa. Super. Ct. July 17, 2019) (unpublished).....4

Commonwealth v. Smetana, 191 A.3d 867 (Pa. Super. Ct. 2018).....4

Commonwealth v. Stewart, 84 A.3d 701 (Pa. Super. Ct. 2013).....6

Commonwealth v. Thomas, 879 A.2d 246 (Pa. Super. Ct. 2005).....4

Crosby Square Apartments v. Henson, 666 A.2d 737 (Pa. Super. Ct. 1995).....11

George v. Beard, 824 A.2d 393 (Pa. Commw. Ct. 2003).....3, 4

ARGUMENT

The Commonwealth seeks to constrain this Court’s review by contending that the only issue is whether the amount of the fine imposed on Ms. DiNardo was an abuse of discretion. That is partially correct: the imposition of the \$10,200 fine on an elderly, disabled, and indigent woman was an abuse of discretion because the court openly based the fine on factors unrelated to her ability to pay and because the fine is manifestly unreasonable in light of her current and foreseeable financial resources. But the imposition of the fine was also illegal because the trial court never made the required findings on the record concerning her ability to pay, the burden the fine would impose, and the effect that the fine would have on her payment of restitution. By failing to make those findings, the trial court disregarded the repeated instruction of this Court.

Ms. DiNardo is an elderly woman with significant and permanent disabilities that keep her confined to either a wheelchair or, for short stretches, a walker. June 3, 2019 TT at 7; June 18, 2019 TT at 7, 41. The federal government has found her permanently disabled and unable to work, and thus her sole source of “income” is Supplemental Security Income (“SSI”), the means-based form of Social Security for individuals with disabilities.¹ June 18, 2019 TT at 7, 8, 11, 12. She also receives

¹ Because of her age, her total SSI payment is split so that some of the total amount comes from SSI and some come from traditional Social Security for the elderly.

food stamps and Medicaid. Id. She uses her money each month to supplement food stamps to buy food, to pay bills associated with her condemned house (for which she still owes a mortgage and back-bills associated with home ownership), and contributes “the lion share” to expenses in her temporary household, where she lives with her unemployed daughter and unemployed, elderly, and disabled fiancé. June 18, 2019 TT at 7, 13, 14, 17-29, and 36.

Nevertheless, the trial court imposed an illegal fine of \$10,200 in violation of 42 Pa.C.S. § 9726 by simply denying Ms. DiNardo’s post-sentencing motion without making any findings on the record that she would be able to pay or how the fine would affect her ability to pay restitution. June 18, 2019 TT; July 11, 2019 TT. The court did take some evidence, but it cut those proceedings short before they were complete. June 18, 2019 TT at 41, 42; July 11, 2019 TT at 21, 22; Docket Entry 26. And when challenged on appeal, all the trial court and the Commonwealth point to is that she is not penniless—she receives those disability benefits. It is true that Ms. DiNardo is not penniless, but 42 Pa.C.S. § 9726 does not only protect homeless paupers from unaffordable fines.

A. The trial court imposed an illegal sentence in violation of 42 Pa.C.S. § 9726(c) and (d) by failing to make findings on the record that Ms. DiNardo could afford to pay any fine, let alone a fine of \$10,200, and that paying the fine would not prevent her from making restitution.

The Commonwealth argues that once a trial court hears evidence of a defendant’s ability to pay, the only remaining question is whether the court abused

its discretion by imposing too high a fine. That is not accurate, because § 9726 imposes procedural requirements on trial courts that the court below failed to satisfy. Errors of law and procedure are reviewed *de novo*. See Commonwealth v. Moody, 125 A.3d 1, 6 (Pa. 2015) (whether the trial court followed the right procedures is a question of law reviewed *de novo*). On the other hand, a court abuses its discretion when, “in *reaching a conclusion*, the trial court overrides or misapplies the law, or its judgment is manifestly unreasonable, or the evidence of record shows that the court's judgment exercised is manifestly unreasonable or lacking in reason.” Commonwealth v. Baker, 766 A.2d 328, 331 (Pa. 2001) (emphasis added).

There is no dispute that the trial court failed to make any factual findings on the record that Ms. DiNardo would be able to pay her fine, much less findings concerning the period of time over which the court expected it to take her to pay the fine in full.² Nor were there any findings that she could afford to pay a fine and still afford to pay the more than \$10,000 in restitution. These are errors of law that render the fine illegal, and this Court should vacate the fine.

While the Commonwealth argues that it would be a novel practice to require that the trial court actually consider the record and make findings to support its

² This Court has repeatedly ruled that trial courts must make findings on the record under § 9726(c), but this Court has never specifically addressed the issue under § 9726(d). The Commonwealth Court, however, has explained that a trial court must make findings under § 9726(d). See George v. Beard, 824 A.2d 393, 395 (Pa. Commw. Ct. 2003).

imposition of a fine consistent with § 9726, both this Court and the Commonwealth Court have repeatedly ruled that the trial court must do exactly that. For example, in Commonwealth v. Heggenstaller, 699 A.2d 767, 769 (Pa. Super. Ct. 1997), this Court explained that a trial court “must make an on-the-record determination regarding appellant’s financial resources and his ability to pay the imposed fine.” The Court made the same point in Commonwealth v. Allshouse, 924 A.2d 1215, 1228 (Pa. Super. Ct. 2007), where it remanded “for specific findings in accordance with section 9726(c) to determine an appropriate fine.” *See also* Commonwealth v. Thomas, 879 A.2d 246, 264 (Pa. Super. Ct. 2005) (“In the present case, the trial court did not make specific findings of appellant's ability to pay the fine imposed.”); Commonwealth v. Samuels, 1422 MDA 2018, 2019 WL 3231245 at *3 (Pa. Super. Ct. July 17, 2019) (unpublished) (“Thus, consistent with § 9726(c)(1) and Thomas, *supra*, we remand the case to the trial court for resentencing after a determination of Appellant's ability to pay a fine.”); George v. Beard, 824 A.2d 393, 395 (Pa. Commw. Ct. 2003) (“Before imposing a fine, the sentencing court must make findings on a defendant's financial ability to pay” pursuant to § 9726(d)).³ Nothing

³ This Court’s decisions have consistently held that trial courts must make findings on the record whenever they consider a defendant’s ability to pay. For example, this Court has explained that the trial court unlawfully jailed defendants for nonpayment of fines and costs when they “fail[] to make any findings of fact on Appellant’s ability to pay prior to imprisoning him.” Commonwealth v. Diaz, 191 A.3d 850, 866 (Pa. Super. Ct. 2018). *See also* Commonwealth v. Smetana, 191 A.3d 867, 873 (Pa. Super. Ct. 2018) (same).

in the Commonwealth’s brief suggests that the trial court complied with this requirement because the trial court did not.

This case illustrates why findings of fact are so important. Without making findings, there is no exercise of discretion for the appellate court to consider; instead, it is just an arbitrary conclusion by the trial court without justification. Moreover, the process of making findings forces the trial court to consider whether the defendant will *actually* be able to pay. In its 1925 opinion, the trial court dismissively concluded that Ms. DiNardo could “set up a payment plan to pay the fines and restitution over a period of time.” Trial Ct. Op. at 3. But the trial court made no findings as to how much of her subsistence benefits Ms. DiNardo could spare toward these installments, if any. Tellingly, the trial court did not even—as the law requires—specify “when” the fine is to be paid, which would also give an indication of the length of time it expected Ms. DiNardo to take to pay the \$10,200 fine. 42 Pa.C.S. § 9758(a).

Assume, *arguendo*, that Ms. DiNardo could cut back on food, or underpay bills, and pay \$10 per month to the court, half that amount would go toward the restitution she owes, leaving \$5 per month to pay her fines. *See* 204 Pa. Code § 29.353(A)(3) and (6) (explaining, unless otherwise ordered by the trial court, 50% of each payment goes to restitution, with the remaining 50% split between fines and costs). At that rate, paying “over time”, it would take Ms. DiNardo 2040 months or

170 years to pay this fine (and as long to pay her restitution). If she could scrape another \$10 from her benefits per month (such that \$10 per month went toward fines), it would take 1,020 months or 85 years to pay this fine. Ms. DiNardo is already 69 years old.⁴ The reality is that even under fictionally ideal circumstances, she will never come close to paying this fine. And the trial court candidly revealed that it understood that reality, as it made statements on the record like that as a “practical matter,” she would not be able to pay the fines. July 11, 2019 TT at 17.

Despite this, the trial court knowingly imposed a \$10,200 fine on one of the poorest Pennsylvanians,⁵ without *ever* making any findings on the record that she could afford the fine. Even in its 1925 Opinion, the trial court did not attempt to make findings that Ms. DiNardo would be able to pay.⁶ Instead, it applied the wrong legal standard, writing that it was “unpersuaded by Appellant’s alleged inability to pay.” Trial Ct. Op. at 3. That, of course, is not the legal standard; it is not Ms.

⁴ As is explained in the brief of Amici Curiae, to suggest that § 9726(c) allows courts to impose fines that would be payable over a time period that exceeds the statutory maximum sentence for the offense, or past the period of probation, would be inconsistent with this Court’s precedents regarding the legal length of probationary sentences. *See Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. Ct. 2010). In other words, it would render § 9726 meaningless to suggest that a court can impose a fine without the evidence showing that the defendant will likely be able to actually pay it within a foreseeable period of time. It would mean that any defendant can have a fine imposed for any type of offense—including the summary offenses here—that will literally take decades to pay.

⁵ Ms. DiNardo’s life-saving SSI means that her income puts her in a bracket that is only 76% that of the Federal Poverty Guidelines.

⁶ Of course, a trial court cannot make factual findings for the first time in its 1925 opinion; they must instead occur *on the record*. *See, e.g., Commonwealth v. Stewart*, 84 A.3d 701, 710 n. 3 (Pa. Super. Ct. 2013) (explaining that a trial court opinion is not part of the factual record).

DiNardo's burden to prove she cannot pay. Instead, the trial court must make findings on the record that she *can* pay. *See, e.g., Heggenstaller*, 699 A.2d at 769. Its failure to do so, while nevertheless imposing a fine of \$10,200, violated § 9726(c) and (d) and rendered the fine unlawful.

B. The trial court abused its discretion when it imposed the \$10,200 fine.

Section 9726(c) and (d) require that any fine imposed be one “the defendant is or will be able to pay,” be based on a consideration of “the financial resources of the defendant and the nature of the burden that its payment will impose,” and “not prevent the defendant from making restitution or reparation to the victim of the crime.” On the record before the trial court, it was manifestly unreasonable for that court to conclude that *any* fine met those three requirements, much less a fine of \$10,200.⁷ The trial court was not required to impose any fine on this struggling senior, and nothing in the Commonwealth's brief disagrees with the analysis—set forth in Ms. DiNardo's opening brief—showing that the statutory mandatory fine does not apply when its imposition is contravened by § 9726.

The first problem with imposing the \$10,200 fine was that the trial court misapplied the law by basing it not on Ms. DiNardo's financial resources, but instead on factors irrelevant to § 9726. The trial court attempted to justify its significant fine

⁷ In its brief, the Commonwealth agrees with Ms. DiNardo that all of her issues have been properly preserved and this Court should consider the discretionary aspects of the sentence.

as a “compromise[.]” because Ms. DiNardo pled guilty and the Commonwealth dropped the misdemeanor charges. June 3, 2019 TT at 25. At no point did the trial court suggest that it actually considered Ms. DiNardo’s financial resources and the burden that the fine would impose, as is required by § 9726(d), when it imposed the \$10,200 fine.⁸ Instead, it candidly noted that as a “practical matter,” she would not be able to pay, and it repeatedly suggested she could win the lottery. July 11, 2019 TT at 17; June 3, 2019 TT at 26; July 11, 2019 TT at 18. This was an unlawful consideration that, independently, renders the imposition of the fine unlawful.

The second problem was that the \$10,200 fine is unsupportable on this record. Ms. DiNardo is a disabled senior living on a fixed subsistence income with a negative net worth. As this Court has found before, such a person simply cannot be found able to pay a fine. For example, in Commonwealth v. Gaskin, 472 A.2d 1154, 1158 (Pa. Super. Ct. 1984), this Court explained that where the record shows that the defendant is “living hand to mouth,” there is simply insufficient evidence to impose a fine. If the trial court is correct that one of the poorest individuals in Pennsylvania is able to afford to pay a fine, then § 9726(c) is meaningless and does nothing to protect against imposing fines on indigent defendants.

⁸ Recall that the record was entirely silent regarding Ms. DiNardo’s financial resources until *after* the post-sentencing motion. The trial court had no information when it originally imposed the \$10,200 fine, other than the visual evidence that Ms. DiNardo was disabled and the fact that she was represented by the Office of Conflict Counsel. Of course, it did not modify the fine when it later denied the post-sentencing motion to set aside the fine.

The entire point of § 9726(d) is to ensure that defendants are not saddled with unaffordable fines that they have no possibility of paying, which burdens them and their families for years and decades. It reflects the reality that “a defendant of very limited assets . . . may be devastated by even a small fine that causes economic hardship both to him and to his family out of proportion to the gravity of the offense.” Model Penal Code and Commentaries, American Law Institute (1985) at 240. And in cases, such as this, where there is also an order to pay restitution, the imposition of an unaffordable fine limits the ability for defendants to put whatever meager assets they have towards that restitution. *See* 42 Pa.C.S. § 9726(c) (requiring that the court ensure that the “fine will not prevent the defendant from making restitution or reparation to the victim of the crime”).

As is set forth in the opening brief and brief of Amici Curiae, it will almost always be unlawful under the precedents of this Court and the Pennsylvania Supreme Court to impose any fine on a person who receives SSI, let alone a fine of \$10,200. Ms. DiNardo’s case highlights the problem, as all of the evidence demonstrated that she was indigent and unable to pay, and nothing rebutted the presumption that she could not pay. *See Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999) (receiving the service of the public defender and the receipt of public assistance “invite[s] the presumption of indigence”).

To the contrary, the factual record shows that it was manifestly unreasonable to impose the \$10,200 fine. Ms. DiNardo is an elderly woman who suffers from physical disabilities that confine her to a wheelchair or a walker. June 3, 2019 TT at 7; June 18, 2019 TT at 7, 41. Her love of cats and unfortunate hoarding habit led to her home being unlivable and resulted in her house being condemned; it is now being sold at a sheriff's sale. June 3, 2019 TT at 7; June 18, 2019 TT at 13, 21. As a result, of the condemnation Ms. DiNardo and her fiancé Thomas Crory live with her daughter Jodi DiNardo at Jodi's home. June 18, 2019 TT at 7, 13-14, 23, 36. Mr. Crory is elderly and disabled and her daughter is unemployed. Id. Ms. DiNardo also receives food stamps and Medicaid. Id. at 8. Ms. DiNardo has outstanding bills, taxes and mortgage on her condemned house. Id. at 22-27.

The trial court took judicial notice that Ms. DiNardo has an annual income of \$9,756 from SSI. Id. at 12. Whether calculated based on a household size of one or three, Ms. DiNardo's annual receipt of \$9,756 per year in SSI funds places her at either 76% of the Federal Poverty Guidelines or 45%; either way, she is well below those Guidelines and unquestionably in poverty.⁹

The Commonwealth's disagreement with all of this is consistent with the trial court's view: Ms. DiNardo did not prove that she could *not* pay the fine, as the trial

⁹ 85 Fed. Reg. 12 at 3060.

court apparently disbelieved that she has bills and other expenses that she spends her SSI funds on. Yet that constitutes a manifestly unreasonable abuse of discretion, as trial courts are not free to simply disregard the evidence and then decide by fiat that a person who receives SSI can somehow afford a \$10,200 fine. No evidence suggested that she does not have significant expenses. Condemned houses still have taxes and back utility payments that must be paid. They still have mortgages to pay they do not simply disappear. Splitting bills with her unemployed daughter and disabled fiancé in her current living arrangement is not the same as *not* paying. And, of course, she has to feed and clothe herself, at the very least. What the trial court did was ignore the “the ordinary expenses attendant on everyday life.” Crosby Square Apartments v. Henson, 666 A.2d 737, 738-39 (Pa. Super. Ct. 1995). *See also* Amrhein v. Amrhein, 903 A.2d 17, 22 (Pa. Super. Ct. 2006) (individuals “obviously need to eat and be clothed”). Speculation untethered from the facts is not sufficient for the trial court to meet its obligation under § 9726(d) that 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). If the Commonwealth disbelieved her financial circumstances, it was free to put on evidence to show that. It did not.

There is no question that Ms. DiNardo is indigent, and neither the trial court nor the Commonwealth suggest otherwise. A defendant need not be completely penniless and homeless in order to fall under the auspices of § 9726. As this Court

has noted in a related context, a “finding of indigency would appear to preclude any determination that [a defendant’s] failure to pay the court-ordered fines and costs was willful.” Commonwealth v. Diaz, 191 A.3d 850, 866 n.24 (Pa. Super. Ct. 2018). Such a person is, as a legal matter, unable to pay anything, as a court would otherwise be able to hold him in contempt for that nonpayment. The same reasoning applies here: Ms. DiNardo is indigent, and a court cannot on that record find that she is able to pay the fine. *See* Commonwealth v. Gaddis, 639 A.2d 462, 470-72 (Pa. Super. Ct. 1994) (vacating a fine in part due to “appellant’s present indigency”).

The error here dovetails with the trial court’s failure to make any findings on the record set forth above. And it again raises the fundamental problem with the suggestion that Ms. DiNardo can simply pay in installments on a payment plan. That is both wrong and irrelevant. It is wrong because it would take her well past the end of her life expectancy to pay even a small amount of this fine, assuming that she can pay anything at all (which she cannot). It is irrelevant because § 9726 does not say that a trial court can impose any amount of a fine that it wants, as long as it puts a defendant on a payment plan. Instead, it says that the court must consider the defendant’s financial resources and the burden it will cause when imposing the fine in the first instance. The trial court’s failure to do so here renders the fine unlawful.

Finally, given Ms. DiNardo’s limited income and negative net worth, it was manifestly unreasonable for the trial court to conclude that a fine would not prevent

Ms. DiNardo from paying restitution. Even if she ever has any available resources to put towards restitution, there is no realistic chance that she will ever finish paying that amount given her age and her extremely limited resources. Therefore, every dollar of fines imposed on her reduces, in equal amount, the sum she will be able to pay toward restitution before the end of her life. On its face, § 9726 requires that courts avoid this outcome, too.

CONCLUSION

For the above reasons, this Court should vacate the sentence and remand to the trial court.

Respectfully submitted:

/s/ Melissa R. Ruggiero, Esq.

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.

Submitted by: Marcia DiNardo

Signature: /s/ Melissa Ruggiero

Name: Melissa Ruggiero

Attorney No.: 94710

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH)	
OF PENNSYLVANIA,)	
)	
Appellee)	
)	
vs.)	No. 1058 WDA 2019
)	
MARCIA DINARDO,)	
Appellant)	

PROOF OF SERVICE

I hereby certify that a true and correct copy of the within Reply Brief for Appellant has been served upon opposing counsel:

Michael W. Streily, Esquire
Assistant District Attorney
401 Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA 15219-2489

By: Melissa R. Ruggiero, Esq.

Date: April 28, 2020