

From: ACLU of Pennsylvania
Re: Reducing or waiving costs at sentencing
Updated June 11, 2021

MEMORANDUM

Many courts of common pleas impose costs at sentencing without considering a defendant's ability to pay, often because judges believe they do not have the authority to reduce costs. This memorandum explains that courts do, in fact, have legal authority to reduce or entirely waive costs at sentencing if the defendant cannot afford to pay them. This memo addresses two questions:

- Do common pleas judges have discretion to reduce or waive costs at sentencing because of a defendant's indigence?
- What authority has the legislature given common pleas judges with respect to costs that are normally "mandatory"?

As we explain below, the Rules of Criminal Procedure, statutes, case law, and legislative history establish that common pleas judges have the discretion to reduce or waive all costs at sentencing, even so-called "mandatory" costs, based on the defendant's financial means.

1. Common Pleas Judges may adjust costs at sentencing in light of the defendant's financial situation.

The *en banc* Superior Court has directly ruled that courts may consider a defendant's financial resources at sentencing and reduce or waive costs: "[W]e hold that [] a trial court has the discretion to hold an ability-to-pay hearing at sentencing...." See *Commonwealth v. Lopez*, 248 A.3d 589, 590 (Pa. Super. Ct. 2021) (*en banc*). See also *id.* at 595 (trial court has "discretion to conduct such a hearing at sentencing" to reduce or waive costs). The *Lopez* decision rejected the appellant's argument that Pa.R.Crim.P. 706(C) requires the trial court to consider the defendant's ability to pay before imposing costs at sentencing, but expressly confirmed the court's authority to do so. Under the Rule, a sentencing court "in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations." Pa.R.Crim.P. 706(C).¹ *Lopez* follows on other decisions from that Court that have similarly confirmed the authority of courts to reduce or waive costs based on the defendant's financial circumstances. See, e.g., *Commonwealth v. Mulkin*,

¹ This mirrors the inquiry that is also required of the sentencing court before it imposes a fine pursuant to 42 Pa.C.S. § 9726:

- (c) **Exception.** — The court shall not sentence a defendant to pay a fine unless it appears of record that:
- (1) the defendant is or will be able to pay the fine; and
 - (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.
- (d) **Financial resources.** — 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.

228 A.3d 913, 919 (Pa. Super. Ct. 2020) (“The trial court may also provide that a defendant shall not be liable for costs under Rule 706.”); *Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 at *4 (Pa. Super. Ct. Oct. 31, 2017) (Rule 706(C) “permits the trial court to consider the burden of the amount of costs in light of a defendant's financial means”).

2. The court has the ability to reduce or waive all costs if the defendant lacks the ability to pay them.

The *Lopez* decision, as with prior decisions from the Superior Court, confirms trial courts’ authority to reduce or waive even costs that would otherwise be “mandatory.” 248 A.3d at 590-91. In *Lopez*, the court explained that the trial court had imposed “mandatory court costs.” *Id.* at 590-91. And while the decision did not mandate reduction or waiver of those costs, the court did affirm that the trial court had the *authority* to do so, never suggesting that the relevant Rule and statutes circumscribe that authority for costs that are otherwise “mandatory.” This is consistent with that court’s prior treatment of “mandatory” costs, where it held that the statute requiring the imposition of lab fees “is mandatory and does not provide for consideration of a defendant's ability to pay,” but that the trial court nevertheless “retains some discretion under Rule 706(C)” to waive those costs. *Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 at *9 (Pa. Super. Ct. Oct. 31, 2017) (Pa. Super. Ct. Oct. 31, 2017) (unpublished) (affirming decision by trial court to waive lab costs and otherwise limit the total amount of costs). The result is that no costs are mandatory if the defendant cannot afford to pay them, and the trial court instead has the authority to reduce or waive all costs.

We can confirm the correctness of these decisions by performing the analysis required by the rules of construction when there is concern about conflict between two or more statutes. The legislature has created several dozen costs that are imposed on defendants upon their conviction – some of these are applied to narrow classes of convictions, while others apply to all convictions. A list of these costs is available at www.aclupa.org/finesandcosts. The legislature has described most, but not all, of these assessments in mandatory terms. For instance, the line item for the Judicial Computer Project, 42 Pa.C.S. § 3733(a.1)(iii), says that its cost “shall” be imposed.

But the legislature has also repeatedly provided that courts may waive costs in light of the defendant’s financial circumstances. Most notably, the law provides that costs are to be imposed automatically, “*unless* the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs).” 42 Pa.C.S § 9728(b.2) (emphasis added); *see also* 42 Pa.C.S § 9721(c.1) (same). This statement applies “Notwithstanding any provision of law to the contrary.” *Id.* Pa.R.Crim.P. No. 706(C), in turn, states: “The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant’s financial means, including the defendant’s ability to make restitution or reparations.” Putting these provisions together results in a rule that costs are imposed automatically upon conviction unless the sentencing court, after considering the defendant’s financial means, waives them:

the defendant shall nevertheless be liable for costs, as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to

finer or costs) . . . (C) The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations.

In other words, the legislature intends for costs to be imposed only on those defendants that a court finds will be able to afford to pay them, in the same way that courts must do with fines. This point was made explicit in the legislative history accompanying the passage of § 9728(b.2) and § 9721(c.1), which unequivocally states that these statutory amendments and their cross-references to Rule 706(C) were intended to allow "the sentencing court" to "retain all discretion to modify or even waive costs in an appropriate case." Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010) PN 2181.

Courts cannot, of course, choose which among these various statutory provisions they wish to follow – they must, instead, strive to follow all applicable provisions, if possible. That is where the rules of statutory construction come in. When we apply the rules of statutory construction, it is clear that there is no barrier to giving effect to both the statutes imposing costs and the statutes allowing for the waiver of those costs. In other words, the court's discretion under § 9728(b.2) and § 9721(c.1) to waive statutory costs applies to all costs.²

a. The statutes imposing costs and the statutes providing for the waiver of costs after considering the defendant's financial means are *in pari materia* and must be read to give effect to all of the provisions.

Statutes that deal with the "same class of persons or things," even if they are codified separately and were enacted at different times, must be "construed together, if possible, as one statute." 1 Pa.C.S. § 1932. The courts must treat the separate statutory provisions as a single expression of legislative intent and, if possible, read them to give effect to all of their provisions. *See, e.g., Commonwealth v. Mazzetti*, 44 A.3d 58, 65 (Pa. 2012) (reading sentencing provisions *in pari materia*).

The statutory provisions that direct the imposition of costs, the provisions that make the imposition of costs automatic (without need for court order), the provisions that allow courts to waive costs, and Rule 706(C), all deal with the same subject, the imposition of criminal court costs, and therefore must be read *in pari materia* – as a single, cohesive statutory scheme.³ This

² In theory, of course, this analysis should be conducted separately for each of the statutes that impose court costs, because the statutory language varies slightly from statute to statute. But in our view, none of the statutes imposing costs contains the kind of language that would suggest an intent to supersede Sections 9728(b.2) and 9721(c.1). We would be happy to address separately any costs statute that concerns the Court. Such an analysis must always keep in mind that statutes imposing costs are "penal" in nature and subject to strict construction. *Commonwealth v. Garzone*, 34 A.3d 67, 75 (Pa. 2012). This requires that they each be "interpreted in the light most favorable to the accused." *Commonwealth v. Huggins*, 836 A.2d 862, 868 n.5 (Pa. 2003) (quoting *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001)).

³ The Rules of Construction also apply when construing court rules with statutes. *See Lohmiller v. Weidebaugh*, 469 A.2d 578, 581 (Pa. 1983) (statute and court procedural rule that "relate to the same subject matter . . . must be read *in pari materia* so that effect can be given to both" pursuant to 1 Pa.C.S. § 1932).

principle is true even when one statutory provision is general and the other specific: if a “general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both.” 1 Pa.C.S. §§ 1933.

It is only if it is not possible to read two or more statutes to give effect to all of their provisions that the court must decide which statute controls.

b. The statutes imposing costs and the statutes providing for the waiver of costs after considering the defendant’s financial means must be read to preserve the ability to waive all costs: any other reading would effectively eliminate the waiver provisions.

Applying the requirement to read statutory provisions that are in *pari materia* together to, as an example, the Judicial Computer Project provision, 42 Pa.C.S. § 3733(a.1)(iii), § 9728(b.1), and Rule 706(c) yields the following:

An additional fee of \$10 shall be charged by the clerks of courts of all courts of common pleas, or by any officials designated to perform the functions thereof, for the initiation of any criminal proceeding for which a fee, charge or cost is now authorized and a conviction is obtained or guilty plea is entered. . . .

Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection (a) imposing [these] costs upon the defendant, the defendant shall nevertheless be liable for [these] costs, as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs). . . . (C) The court, in determining the amount and method of payment of [these] costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant’s financial means, including the defendant’s ability to make restitution or reparations.

This is the proper reading, with Section 9728(b.1) modifying Section 3733(a.1)(iii) to make that cost automatic, but still subject to the court’s power to waive costs after considering the defendant’s financial means. If, instead, we read Section 3733(a.1)(iii) *after* Section 9728(b.1), as an exception to the court’s power to waive costs after considering the defendant’s financial means, then Section 3733(a.1)(iii) would cancel out Section 9728(b.1). The first reading gives Section 3733(a.1)(iii) effect by imposing the cost in every case “unless the court determines otherwise,” while the second reading erases the court’s power to waive costs entirely. The first reading gives effect to all of the statutory provisions; the second reading gives effect to only one of them, which would violate Section 1933 of the rules of construction.

It is sometimes argued that a more specific statutory provision automatically prevails over a general provision like Section 9728(b.1), but that is not a correct statement of the principles of statutory construction. Instead, a specific statutory instruction controls over a general *only if* the general provision is “in conflict with a special provision” *and* “the conflict between the two provisions is irreconcilable.” 1 Pa.C.S. § 1933. These are strict requirements. “Only if the conflict between the general and specific provisions is irreconcilable does the

special provision prevail and act as an exception to the general provision under 1 Pa.C.S. § 1933.” *Commonwealth v. Karetny*, 880 A.2d 505, 520 (Pa. 2005).

In *Karetny*, the Supreme Court addressed whether there was an “irreconcilable conflict” between two provisions in the Crimes Code that set forth separate offenses for the same conduct. 880 A.2d at 518. The Superior Court had concluded that a general provision supersedes a specific provision, per Section 1933, without actually analyzing whether the conflict was irreconcilable. *Id.* Even though the same underlying conduct could lead to prosecution under both provisions, the Supreme Court reasoned that merely because two provisions overlap does not mean that they “should be said to be in facial, irreconcilable conflict with each other” such that only one statute should prevail. *Id.* at 522. *Karetny* thus reaffirms the maxim that Section 1933 first requires courts to ascertain the existence of an irreconcilable conflict *before* concluding that one provision prevails over another.

Applying this analysis shows that there is no actual conflict between a statute that imposes court costs and Sections 9728(b.1) (read in conjunction with Rule 706(C)), let alone one that is “irreconcilable.” The natural reading of the statutes and the Rule—and the one that gives effect to all provisions—is that the trial court must impose the cost *unless* the trial court chooses to waive it after considering the defendant’s financial means. Even if this does somehow constitute a conflict between the statutes, it is not irreconcilable. To be irreconcilable means that “simultaneous compliance” with both provisions “is impossible.” *See Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adam Tp.*, 32 A.3d 587, 594 (Pa. 2011) (addressing the analogous context of conflict between statute and ordinance). That would require that Section 3733(a.1)(iii) say something like, “the court must impose this cost *even if the defendant cannot afford to pay it.*” Nothing in the Judicial Computer Project statute or any other court cost statute specifies that a defendant must pay that cost *even if* unable to afford it. Absent clear and explicit statutory language to that effect, Section 9728(b.1) and Rule 706(C) apply to costs imposed under Section 3733(a.1)(iii) and other costs statutes.

c. *If the statutes imposing costs and the statutes providing for the waiver of costs after considering the defendant’s financial means cannot be read to give effect to both, then the statutes providing for the waiver of costs take precedence.*

Finally, even if there were an “irreconcilable conflict” between the statutes imposing costs and the statutes allowing for their waiver, the discretion afford to trial courts in Sections 9721(c.1) and 9728(b.2) would prevail. Both statutes state that they apply “Notwithstanding any provision of law to the contrary.” To the extent that there is any actual irreconcilable conflict between two statutes, 1 Pa.C.S. § 1933 explains that the specific provision prevails—“*unless* the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.” (emphasis added). Sections 9721(c.1) and 9728(b.2) were both enacted in 2010, long after 3733(a.1)(iii) and other costs. Moreover, the General Assembly, in enacting these statutes, has demonstrated its “manifest intention” that they trump older, more specific statutes. The Superior Court has ruled that when a statute uses the language “notwithstanding any other provision of this title or other statute to the contrary,” such language “clearly indicates that the legislature intended to limit the application of prior” statutes. *Commonwealth v. Smith*, 544 A.2d 991, 998 (Pa. Super. Ct. 1988) (en banc). Thus, under the

rules of statutory construction in § 1933, the use of that language in §§ 9721(c.1) and 9728(b.2) means that those statutes prevail.⁴

As a result, courts have the authority to reduce costs based on a defendant's inability to pay. The Superior Court opinion in *Burrows* is instructive. While unpublished, it is a straightforward application of the statutory language, and it confirms that courts can reduce otherwise "mandatory" costs. And the *Lopez* court, by confirming the authority of a court to exercise its discretion to waive the "mandatory" costs imposed by that trial judge, again affirms that costs are not mandatory for those who cannot afford to pay them.

⁴ In *Commonwealth v. LeBar*, 860 A.2d 1105, 1111 (Pa. Super. Ct. 2004), the Superior Court suggested that the \$60 costs set forth in 18 P.S. 11.1101 are mandatory (while any amount over \$60 is discretionary). However, it—and the Commonwealth Court's opinion in *Spotz v. Commonwealth*, 972 A.2d 125, 133-34 (Pa. Commw. Ct. 2009) that adopted the *LeBar* reasoning—did not engage in any meaningful statutory construction or even mention Rule 706. Both opinions also predate the 2010 amendments that added Sections 9721(c.1) and 9728(b.2). No opinion contradicts the analysis set forth in this memorandum.