

NO. 27 EAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA

v.

ALEXIS LOPEZ

COMMONWEALTH'S BRIEF FOR APPELLEE

Defense Appeal from the March 23, 2021 Decision of the Pennsylvania Superior Court at 1313 EDA 2018, Affirming the Judgments of Sentence of the Philadelphia Court of Common Pleas at CP-51-CR-0004377-2015.

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COUNTER-STATEMENT OF THE QUESTION INVOLVED

Whether Pennsylvania Rule of Criminal Procedure 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing.

- *Answered in the negative by the court below.*

COUNTER-STATEMENT OF THE CASE

After revoking defendant Alexis Lopez's probation sentence, the Honorable Glenn B. Bronson resentenced him and imposed \$1695.94 in mandatory court costs without first considering his ability to pay them. Defendant appealed, claiming that Pennsylvania Rule of Criminal Procedure 706(C) required the trial court to consider his ability to pay costs before imposing them. The en banc Pennsylvania Superior Court affirmed, holding that although Rule 706(C) grants a trial court discretion to consider a defendant's ability to pay costs at sentencing, it does not require such consideration unless and until a defendant is threatened with incarceration for defaulting on payments. As it maintained before the Superior Court, the Commonwealth disagrees and believes that Rule 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing. Accordingly, this Court should vacate defendant's sentence and remand the case for consideration of defendant's ability to pay the costs.

On June 30, 2015, defendant entered a negotiated guilty plea to possessing a controlled substance with intent to deliver. Pursuant to the plea agreement, Judge Bronson sentenced defendant to eleven and one-half to twenty-three months of incarceration, followed by three years of probation.

Once paroled, defendant absconded from supervision three times, each time resulting in the trial court holding a violation of probation (VOP) hearing, revoking his probation, and resentencing him.

In January 2018, the trial court held a VOP hearing on defendant's third incident of absconding from supervision. The court found defendant in technical violation of his probation, revoked his probation, and deferred resentencing.

In April 2018, defendant filed a "Motion for Ability-to-Pay Hearing at Sentencing to Waive Costs," claiming that Rule 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing, and claiming that he was unable to pay such costs. Brief for Appellant, Exhibit B.

A few days later, the trial court held a resentencing hearing, at which it resentedenced defendant to six to twenty-three months of incarceration, followed by two years of probation. The court also denied defendant's motion, refused to consider his ability to pay, and imposed \$1695.94 in mandatory court costs. (N.T. 4/27/18, 17, 31).

Defendant appealed. The Pennsylvania Superior Court sua sponte directed en banc review. The Commonwealth (agreeing with defendant) argued that Rule 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing. The Superior Court affirmed,

holding that although Rule 706(C) grants trial courts the discretion to consider a defendant's ability to pay costs at sentencing, it does not require such consideration unless and until a defendant is threatened with incarceration for defaulting on payments. Commonwealth v. Lopez, 248 A.3d 589, 595–96 (Pa. Super. 2021) (en banc).

On August 24, 2021, this Court granted allowance of appeal.

SUMMARY OF ARGUMENT

As the Commonwealth maintained before the Pennsylvania Superior Court, Rule 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing. The plain language of Rule 706(C) is mandatory in its directive that a trial court "shall" consider a defendant's ability to pay costs in determining the amount and method of payment, which necessarily occurs at sentencing. Although such consideration is mandatory, a trial court retains the discretion to choose the procedures by which it conducts the inquiry.

Requiring a trial court to consider a defendant's ability to pay costs at sentencing also gives effect to all of Rule 706's provisions and is supported both by the rule's placement within the "Sentencing Procedures" subchapter of Pennsylvania Rules of Criminal Procedure and by references to the rule in the Sentencing Code.

Moreover, this construction of Rule 706(C) is supported by this Court's recent decisions in analogous cases, Commonwealth v. Ford, 217 A.3d 824 (Pa. 2019), and Commonwealth v. Weir, 239 A.3d 25, 37 (Pa. 2020). The Pennsylvania Superior Court's reliance on its own, earlier precedent was therefore misplaced.

Furthermore, following Rule 706(C)'s requirement that a trial court consider a defendant's ability to pay costs, and waive them where appropriate, at sentencing increases the likelihood, frequency, and amount of restitution payments to victims.

ARGUMENT

Rule 706(C) Requires a Trial Court to Consider a Defendant's Ability to Pay Prior to Imposing Mandatory Court Costs at Sentencing.

As the Commonwealth maintained before the Pennsylvania Superior Court, Rule 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing. The plain language of Rule 706(C) makes this clear. Moreover, this requirement gives effect to all of Rule 706's provisions and is supported both by Rule 706's placement within the "Sentencing Procedures" subchapter of the Pennsylvania Rules of Criminal Procedure and by references to Rule 706(C) in the Sentencing Code. Finally, this requirement is consistent with this Court's decisions in the analogous cases of Commonwealth v. Ford, 217 A.3d 824 (Pa. 2019), and Commonwealth v. Weir, 239 A.3d 25, 37 (Pa. 2020). Accordingly, this Court should vacate defendant's sentence and remand the case for consideration of defendant's ability to pay the costs.

Interpreting the Pennsylvania Rules of Criminal Procedure presents a question of law for which this Court's standard of review is de novo and its scope of review is plenary. Commonwealth v. Dowling, 959 A.2d 910, 913 (Pa. 2008).

The Pennsylvania Rules of Criminal Procedure are "construed in consonance with the rules of statutory construction." Pa. R. Crim. P. 101(C). "[A]ll questions of statutory interpretation" are "guided by the principle that the language of a

statute provides the best indication of the [drafters'] intent.” Ford, 217 A.3d at 828 n.9. “[T]he words of a statute ‘shall be construed according to rules of grammar and according to their common and approved usage.’” Commonwealth v. Garzone, 34 A.3d 67, 75 (Pa. 2012) (quoting 1 Pa. C.S. § 1903(a)). “[W]hen the words of a statute are unambiguous,” this Court “do[es] not look beyond the law’s plain meaning.” Ford, 217 A.3d at 828 n.9 (citing 1 Pa. C.S. § 1921(b)). Statutes authorizing the imposition of costs in criminal cases are “penal in nature and therefore subject to strict construction in favor of [defendants].” Garzone, 34 A.3d at 75. Moreover, a statute “shall be construed, if possible, to give effect to all its provisions.” Weir, 239 A.3d at 37 (quoting 1 Pa. C.S. § 1921(a)).

A. The plain language of Rule 706(C) requires a trial court to consider a defendant’s ability to pay costs at sentencing.

The plain language of Rule 706(C) is unambiguous. In full, it provides: “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.” Pa. R. Crim. P. 706(C) (emphasis added). The plain language of Rule 706(C) includes five relevant elements.

First, and importantly, the phrase “shall . . . consider” imposes a mandatory requirement on a trial court. See Weir, 239 A.3d at 37 (holding that the phrase

“shall consider” in a statute is “mandatory in its directive and removes any discretion from the sentencing court”); In re Adoption of L.B.M., 161 A.3d 172, 179 (Pa. 2017) (“The word ‘shall’ is by definition mandatory[.]”).

Second, grammatically, the object of the required consideration is “the burden upon the defendant by reason of the defendant’s financial means,” i.e., his ability to pay. See 1 Pa. C.S. § 1903(a) (“Words and phrases shall be construed according to rules of grammar[.]”).

Third, the required consideration of a defendant’s ability to pay relates to both “a fine” and “costs,” includes “the defendant’s ability to make restitution or reparations,” and makes no exception for “mandatory” costs. See 1 Pa. C.S. § 1903(a); 42 Pa. C.S. § 9721(c.1) (requiring that courts order the “[m]andatory payment of costs” by defendants, except that “[t]he provisions of this subsection do not alter the court’s discretion under Pa. R. Crim. P. No. 706(C)”).

Fourth, the phrase “insofar as is just and practicable,” grants a trial court discretion to set or modify the amount of court costs after conducting the required consideration of a defendant’s ability to pay mandatory costs; it does not grant a trial court discretion to refuse to conduct such an inquiry at all. See Lopez, 248 A.3d at 598 (Dubow, J., concurring in part and dissenting in part) (agreeing with this interpretation); see also Weir, 239 A.3d at 25 (holding that a non-exhaustive list following the phrase “in determining the amount and method of restitution, the

court [s]hall consider” in a statute “is the clearest possible indication” that setting the amount of restitution “remain[s] in the exercise of the sentencing court’s discretion”).

Fifth, and contrary to the Superior Court’s majority opinion, the phrase “in determining the amount and method of payment” shows that the required consideration of a defendant’s ability to pay mandatory costs occurs when they are imposed—at sentencing. See 42 Pa. C.S. § 9721(a), (c.1) (requiring that courts order the mandatory payment of costs “in addition to” the “sentence *to be* imposed” (emphasis added)); Weir, 239 A.3d at 25 (interpreting a restitution statute with identical phrasing to require the relevant consideration to occur when restitution is imposed).

The Superior Court’s majority opinion did not disagree with the first three elements listed above and did not comment on the fourth. See Lopez, 248 A.3d at 592, 594. Rather, the court disputed only the *timing* of the required consideration of a defendant’s ability to pay mandatory costs, holding that such consideration is required only *after* a defendant is threatened with incarceration for defaulting on payments, “as referenced in Sections A and B” of Rule 706. Id. at 592–93; see id. at 596 (Dubow, J., concurring in part and dissenting in part) (characterizing the question presented as a “timing issue”). In doing so, the court circumvented reading the plain language of Rule 706(C), not even acknowledging plain language

as the guiding principle of statutory construction. See id. at 592–96. This was erroneous. See Weir, 239 A.3d at 37 (analyzing the “plain language” of the relevant subsection before considering its context within the remainder of the statute); Ford, 217 A.3d at 828 (confining the entire “plain language” analysis to the relevant subsection of the statute). (In any event, as discussed in Section B below, reading Rule 706(C) in the context of the rest of the rule leads to the same conclusion.)

Moreover, to the extent the Superior Court’s majority opinion conducted an implicit plain language analysis, it correctly concluded that Rule 706(C) does not require a trial court to hold “an ability-to-pay *hearing* at sentencing,” as the word “hearing” is absent from Rule 706(C). Lopez, 248 A.3d at 590 (emphasis added). However, the court incorrectly concluded that Rule 706(C) does not require a trial court to “*consider*” a defendant’s ability to pay “at sentencing,” when the plain language of the rule includes the phrase “shall . . . consider.” Id. at 595 (emphasis added). Holding a hearing and considering evidence are not synonymous. See Ford, 217 A.3d at 831 & n.14 (suggesting alternatives to an ability-to-pay hearing, including “a thorough presentence investigation report” on the issue or “asking one simple question: How do you plan to pay your fines?”). Thus, a trial court has the discretion to choose its *method* of consideration but must nevertheless “consider” a defendant’s ability to pay costs at sentencing. Pa. R. Crim. P. 706(C).

B. Requiring consideration of a defendant's ability to pay at sentencing gives effect to all of Rule 706's provisions and is supported both by its placement within the Pennsylvania Rules of Criminal Procedure and by references to Rule 706(C) in the Sentencing Code.

Reading Rule 706(C) to require a trial court to consider a defendant's ability to pay mandatory court costs at sentencing is consistent with the requirement that a statute must be construed to "give effect to all its provisions." 1 Pa. C.S. § 1921(a). Moreover, this interpretation is supported by Rule 706's placement within the "Sentencing Procedures" subchapter of the Pennsylvania Rules of Criminal Procedure and by references to Rule 706(C) in the Sentencing Code.

Each subsection of Rule 706 contemplates a unique proceeding at a different time between the imposition of costs at sentencing and the imprisonment of a defendant for defaulting on payments.¹ A trial court considers a defendant's

¹ In full, Rule 706 provides:

- (A) A court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs.
- (B) When the court determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the court may provide for payment of the fines or costs in such installments and over such period of time as it deems to be just and practicable, taking into account the financial resources of the defendant and the nature of the burden its payments will impose, as set forth in paragraph (D) below.

ability to pay costs when “determining the amount and method of payment” at sentencing. Pa. R. Crim. P. 706(C). The trial court may then order a defendant to pay costs in “installments,” but only after determining at a hearing that he cannot pay them “immediately or in a single remittance.” *Id.* at 706(B). Thereafter, a defendant who has defaulted or may default on installment payments “may request a rehearing on the payment schedule.” *Id.* at 706(D) (emphasis added). The trial court may “commit [a] defendant to prison for failure to pay . . . costs,” but only after determining at a hearing that he “is financially able to pay.” *Id.* at 706(A).

The Superior Court’s majority opinion characterized its analysis as reading the subsections of Rule 706 “*sequentially* and as a whole, as the rules of statutory

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- (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.
 - (D) In cases in which the court has ordered payment of a fine or costs in installments, the defendant may request a rehearing on the payment schedule when the defendant is in default of a payment or when the defendant advises the court that such default is imminent. At such hearing, the burden shall be on the defendant to prove that his or her financial condition has deteriorated to the extent that the defendant is without the means to meet the payment schedule. Thereupon the court may extend or accelerate the payment schedule or leave it unaltered, as the court finds to be just and practicable under the circumstances of record. When there has been default and the court finds the defendant is not indigent, the court may impose imprisonment as provided by law for nonpayment.

Pa. R. Crim. P. 706.

interpretation direct.” Lopez, 248 A.3d at 592 (emphasis added). Ostensibly because Rules 706(A), (B), and (D) contemplate situations where costs have already been imposed and where a defendant has already defaulted (or may soon default) on cost payments, the court imbued Rule 706(C) with a similar temporal requirement. See id. But the court cited no authority, and the Commonwealth can find none, for the proposition that statutory construction demands a sequential reading of subsections to determine their place along the timeline of criminal proceedings. See 1 Pa. C.S. §§ 1921–39. Consequently, the sequence of Rule 706’s subsections is not dispositive of their chronology.

A familiar example brings this point home. A trial court can file a Rule 1925(a) Opinion (addressing an appellant’s claims) only *after* the appellant has filed a Rule 1925(b) Statement (providing a court with notice of those claims). See Pa. R.A.P. 1925. An interpretation of Rule 1925 requiring the event described in subsection (a) to precede that in subsection (b) “would lead to ‘a result that is absurd, impossible of execution[,] or unreasonable.’” Garzone, 34 A.3d at 75 (quoting 1 Pa. C.S. § 1922). Similarly, here, a trial court can hold an ability-to-pay hearing under Rule 706(A) for a defendant’s *failure to pay* costs only *after* the *amount and method of payment* has been determined pursuant to Rule 706(C).

Moreover, Rule 706’s placement among the subchapters of the Pennsylvania Rules of Criminal Procedure supports the conclusion that Rule 706(C) requires a

trial court to consider a defendant’s ability to pay mandatory costs at sentencing. See 1 Pa. C.S. § 1924 (directing that chapter and section headings “may be used to aid in the construction” of statutes, although they are not dispositive); Garzone, 34 A.3d at 77 (considering the relevant statute’s placement among statutes within the same code after conducting a plain language analysis). Notably, Rule 706 appears in a subchapter titled “Sentencing Procedures”—*not* the subchapter titled “Post-Sentencing Procedures.” It follows that *some* portion of Rule 706 is intended to control initial sentencing proceedings, yet all of the subsections other than Rule 706(C) involve post-sentence proceedings.

Similarly, the sequence of the chapters themselves generally follows the chronological order of the criminal proceedings that they reference.² Naturally, the “Sentencing Procedures” subchapter, under which Rule 706 appears, is listed *before* the “Post-Sentencing Procedures” subchapter. This ordering further supports the conclusion that some portion of Rule 706 is intended to control a proceeding that occurs *before* post-sentence proceedings. To the extent that this sequential reading of subchapter titles and the Superior Court’s sequential reading of Rule 706’s subsections support equal but conflicting conclusions, “the narrower construction favoring [defendant] must prevail.” Garzone, 34 A.3d at 78.

² The only exceptions are for subchapters involving special *topics*—those for summary offenses (Chapter 4), death sentences (Chapter 8), and Philadelphia Municipal and Traffic Division cases (Chapter 10).

Furthermore, expanding the contextual analysis to include references to Rule 706(C) in the Sentencing Code further supports the Commonwealth’s argument. Section 9721, titled “Sentencing generally,” includes a subsection titled “Mandatory payment of costs.” 42 Pa. C.S. § 9721(c.1). That subsection requires that “in addition to the sentencing alternatives set forth in subsection (a), the court shall order the defendant to pay costs.” Id. Subsection (a), in turn, lists an array of sentencing alternatives for courts to consider “*in determining the sentence to be imposed[.]*” Id. at § 9721(a) (emphasis added). Read together, these subsections require a trial court to order a defendant to pay costs at the same time it determines the sentence to be imposed. Id. at § 9721(a), (c.1). However, Section 9721(c.1) provides the exception that “[t]he provisions of this subsection do not alter the court’s discretion under Pa. R. Crim. P. No. 706(C) (relating to fines or costs).” Id. at § 9721(c.1).

Similarly, Section 9728, which is titled “Collection of restitution, reparations, fees, costs, fines[,] and penalties,” includes a subsection titled “Mandatory payment of costs.” 42 Pa. C.S. § 9728(b.2). That subsection requires that the defendant be “liable for costs,” even when “the court fails to issue an order . . . *imposing costs.*” Id. (emphasis added). However, as with Section 9721(c.1), that liability is not triggered if “the court determines otherwise pursuant to Pa. R. Crim. P. No. 706(C) (relating to fines or costs).” Id.

In short, reading Rule 706 in conjunction with Sections 9721 and 9728 makes clear that the relevant time for considering a defendant's ability to pay mandatory costs pursuant to Rule 706(C) occurs when a court determines the sentence to be imposed, i.e., at sentencing. See Lopez, 248 A.3d at 597 (Dubow, J., concurring in part and dissenting in part) (agreeing that these references to Rule 706(C) “authorize[] the trial court to modify the amount of costs *when imposing them*” (emphasis added)).

C. This Court's recent decisions in the analogous cases of Ford and Weir provide further support.

Recently, in Commonwealth v. Ford, 217 A.3d 824 (Pa. 2019), this Court analyzed the statute authorizing trial courts to impose non-mandatory fines. That statute provides, in full: “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.” 42 Pa. C.S. § 9726(c). “Consistent with this unambiguous statutory mandate,” this Court held that “trial courts are without authority to impose non-mandatory fines absent record evidence that the defendant is or will be able to pay them.” Ford, 217 A.3d at 829. “Because no such evidence exist[ed] in the record,” this Court vacated the sentence as illegal and remanded the case for consideration of the defendant's ability to pay the fines. Id. at 831. This Court noted that Section 9726(c) made no mention of a hearing and that the required

consideration could instead be achieved by “a thorough presentence investigation report” or by “asking one simple question: How do you plan to pay your fines?” Id. at 831 & n.14. Therefore, consistent with Ford, the required consideration of a defendant’s ability to pay non-mandatory fines occurs when they are “imposed” at sentencing, but a trial court retains discretion to choose how to conduct the inquiry.

One year later, in Commonwealth v. Weir, 239 A.3d 25 (Pa. 2020), this Court analyzed the statute authorizing trial courts to impose mandatory restitution and addressed whether a challenge to a restitution order impacted the legality or discretionary aspects of a sentence. See 18 Pa. C.S. § 1106. Consistent with the “plain language” of the statute, this Court held that the legality of a sentence concerns a trial court’s “authority to impose restitution,” while the discretionary aspects of a sentence concern a trial court’s “*determination of the amount of restitution*” and “the evidence supporting it.” Id. at 37–38 (emphasis added). Therefore, consistent with Weir, the required consideration of a defendant’s ability to pay mandatory restitution occurs when it is “imposed” at sentencing, but a trial court retains discretion to choose how to conduct the inquiry.

Here, this Court is tasked with analyzing the statutes that authorize trial courts to impose the only remaining type of monetary sanction that can be imposed upon a defendant—court costs. See 42 Pa. C.S. § 9730 (titled “Payment of court costs, restitution[,] and fines,” and listing only those three monetary sanctions in its

provisions for “payment . . . after imposition of sentence”); see also 18 Pa. C.S. §§ 1101–11 (including only costs, restitution, and fines as authorized monetary dispositions for offenders). Section 9721(c.1) requires a trial court to order the “[m]andatory payment of costs” by defendants, incorporating by reference the exception that this does “not alter the court’s discretion under Pa. R. Crim. P. No. 706(C)[.]” 42 Pa. C.S. § 9721(c.1). Rule 706(C), in turn, includes the relevant clause: “the court, *in determining the amount and method* of payment, *shall . . . consider*[.]” Pa. R. Crim. P. 706(C) (emphasis added). This language is virtually identical to that of both the non-mandatory fines statute at issue in Ford and the mandatory restitution statute at issue in Weir. See 18 Pa. C.S. § 1106(C)(2)(i) (“*In determining the amount and method* of restitution, the court *[s]hall consider . . .*” (emphasis added)); 42 Pa. § C.S. 9726(d) (“*In determining the amount and method of payment* of a fine, the court *shall take into account . . .*” (emphasis added)). It follows that this identical language demands an identical result: Rule 706(C)’s required consideration of a defendant’s ability to pay mandatory court costs occurs when they are imposed at sentencing, but a trial court retains discretion to choose how to conduct the inquiry.

The Superior Court’s holding to the contrary relied substantially upon its own pre-Ford and pre-Weir decision in Commonwealth v. Ciptak, 657 A.2d 1296 (Pa. Super. 1995), rev’d on other grounds, 665 A.2d 1161 (Pa. 1995). See Lopez,

248 A.3d at 592–93. There, the court addressed the same question presented here. See Ciptak, 657 A.2d at 1297. In the court’s view, the rule “deal[t] in its entirety with a defendant’s default from payment of a fine or the costs.” Ciptak, 657 A.2d at 1297.³ However, because the rule also referenced fines, the court was constrained to acknowledge the body of law requiring a trial court to consider a defendant’s ability to pay fines when imposing them at sentencing. Id. Consequently, the court distinguished between fines and costs, reasoning that costs are not a sentence and therefore not “subject to the same discretionary valuation afforded [to] the trial court in imposing fines.” Id. However, this flatly contradicts the plain language of Rule 706, which draws no such distinction between fines and costs, referencing them in conjunction throughout its subsections. Pa. R. Crim. P. 706(A)–(D). Moreover, the distinction between punishment (fines) and collateral consequences (costs and restitution) did not deter this Court from interpreting the plain language of the *restitution* statute in Weir as requiring the relevant “consider[ation]” to occur at the time restitution is imposed. See 239 A.3d at 38.

The Superior Court’s majority opinion also quoted an inapposite footnote from Ford for the proposition that this Court “recently indicated its *agreement* with Ciptak’s interpretation.” Lopez, 248 A.3d at 593 (emphasis in original). That

³ The rule at issue was the predecessor to Rule 706, which was identical to the current version in all material aspects. Compare Pa. R. Crim. P. 1407(C) (renumbered and amended 2000), with Pa. R. Crim. P. 706(C).

footnote reads, in relevant part, that an “ability-to-pay *hearing* is not required when costs alone are imposed[.]” *Id.* at 593 (quoting *Ford*, 217 A.3d at 827 n.6) (emphasis added). But Rule 706(C)’s use of the word “*consider*,” like the “appears of record” language in the statute at issue in *Ford*, “*does not necessarily require testimonial evidence*” at a hearing. *Ford*, 217 A.3d at 831 n.14 (emphasis added). Indeed, the absence of the word “hearing” from the statute in *Ford* did not prevent this Court from interpreting it to require *some* evidence of a defendant’s ability to pay a fine. *See id.* at 830–31. Rather, this Court suggested alternatives to a hearing, including “a thorough presentence investigation report” or “asking one simple question: How do you plan to pay your fines?” *Id.* at 831 & n.14. Therefore, reading Rule 706(C) to require a trial court to consider a defendant’s ability to pay mandatory court costs at sentencing, while providing a trial court discretion to choose how to conduct the inquiry, is both consistent with and supported by *Ford*.

D. Requiring consideration of a defendant’s ability to pay mandatory court costs at sentencing benefits victims of crime.

Reading Rule 706(C) to require consideration of a defendant’s ability to pay mandatory court costs at sentencing has the practical effect of helping victims of crime: any money collected from a defendant is more likely to be paid to victims as restitution. “No less than 50% of all moneys collected” from defendants must “be used to pay restitution to victims.” 42 Pa. C.S. § 9728(g.1). Conversely, “[a]ny

remaining moneys *shall* be used to pay fees, costs, fines, penalties[,] and other court-ordered obligations. *Id.* (emphasis added). Thus, *up to* 50% of the money collected from defendants may be allocated to pay costs and fines rather than to reimburse victims. The plain language of Rule 706(C) includes the “ability to make restitution or reparations” in its consideration of a defendant’s ability to pay costs. Pa. R. Crim. P. 706(C). Consequently, if a particular defendant lacks the ability to pay both costs and restitution, a trial court could waive costs. Payments made by a defendant who owes no court-imposed costs would therefore be allocated entirely to reimbursing victims. See 42 Pa. C.S. § 9728(g.1).⁴

For all the above reasons, the Commonwealth urges this Court to hold that Rule 706(C) requires a trial court to consider a defendant’s ability to pay prior to imposing mandatory court costs at sentencing. Because the trial court here refused to do so, this Court should vacate defendant’s sentence and remand the case for consideration of defendant’s ability to pay the costs.

⁴ As the ACLU notes, data from the Administrative Office of Pennsylvania Courts shows that collection rates for victims’ restitution is abysmal. Appellant Amicus Curiae Brief, ACLU, 23. For example, as of 2018, Philadelphia County has collected 18.9% of costs imposed in 2011, but only 8.8% of the restitution ordered that year. *Collection Rates Over Time*, AOPC, <http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts> (last visited Dec. 29, 2021) (select “Criminal” and “Philadelphia” from the “Select a Case Type” and “Select a County” drop-down menus, respectively).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court vacate defendant's sentence and remand the case for consideration of his ability to pay the costs.

Respectfully submitted,

/s/ Andrew J. Greer

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