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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	MAL 2022
VS.	:	NO.
RAHSAAN O. MAY, Petitioner	:	

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR TO THE SUPREME COURT

Petition To Allow An Appeal From The February 15, 2022 Opinion Of A Superior Court Panel At No. 139 EDA 2021, Affirming The November 23, 2020 Judgment Of Sentence Entered By The Court of Common Pleas, Criminal Trial Division of Delaware County, On CP-23-CR-0004281-2018.

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March, 2022

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IN THE SUPREME COURT OF PENNSYLVANIA
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PETITION FOR ALLOWANCE OF APPEAL FROM
THE SUPERIOR TO THE SUPREME COURT

TO THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

Rahsaan May, by his counsel, Emily Mirsky, Assistant Defender, Chief, Appeals Division, and Christopher Welsh, Defender, respectfully petitions for allowance of appeal in the captioned matter and represents:

1. Petitioner/Appellant, Rahsaan May, seeks allowance of appeal from the February 15, 2022 published opinion of a panel of the Superior Court (Bowes, J., Stabile, J. and McCaffery, J.), affirming the judgment of sentence entered by the trial court.

This case is the natural companion to *Commonwealth v. Lopez*, 248 A.3d 589 (Pa. Super. 2021), *allowance of appeal granted*, 261 A.3d 1031 (Pa. 2021), and *Commonwealth v. Ford*, 217 A.3d 824 (Pa. 2019). While *Lopez* is

addressing the issue of whether an ability to pay inquiry is required prior to imposition of mandatory costs, and *Ford* addressed the issue of whether an ability to pay inquiry is required prior to imposition of discretionary fines, this case raises the issue of whether such an inquiry is required at sentencing prior to imposition of mandatory fines. This Court should accept review because this Court has never addressed this issue, the Superior Court has never conducted a proper statutory construction analysis and relies upon cases that are of questionable validity, and because petitioner raises a challenge under the Excessive Fines Clause of the Pennsylvania and United States Constitutions – a challenge not previously addressed by this Court in this context.

2. REFERENCE TO REPORT OF OPINIONS BELOW

A three-judge panel of the Pennsylvania Superior Court on February 15, 2022 issued a published opinion affirming the November 23, 2020 judgment of sentence entered by the Delaware County Court of Common Pleas at Docket Number CP-23-CR-0004281-2018. A copy of the Superior Court's Opinion is attached as Exhibit "A." The opinion of the trial court is attached as Exhibit "B."

3. TEXT OF THE ORDER IN QUESTION

> For the reasons that follow, we find that § 9726(c) does not apply to mandatory fines, Rule 706(C) does not require an ability to pay hearing until incarceration for failure to pay is at issue, and 75 Pa.C.S. § 3804(c)(1)(ii) does not violate the excessive fines clause of the Pennsylvania and United States Constitutions.
>
> Judgment of sentence affirmed.
>
> Judgment Entered.

Commonwealth v. May, 139 EDA 2021, at 8, 20 (Pa. Super. Feb. 15, 2022).

4. QUESTIONS PRESENTED

A. Whether the Superior Court erred by holding that it is "well-established" that 42 Pa.C.S. § 9726 does not apply to mandatory fines, where the rules of construction require that a sentencing court consider the defendant's ability to pay *any* fine pursuant to 42 Pa.C.S. § 9726?
   (Suggested Answer: Yes.)

B. Whether Pa.R.Crim.P. 706(C) requires an ability to pay inquiry prior to imposition of a mandatory fine?
   (Suggested Answer: Yes.)

C. Whether imposition of the instant fine violates the Excessive Fines Clause of the Pennsylvania and U.S. Constitutions, which requires a consideration of ability to pay to determine whether a fine is excessive?
   (Suggested answer: Yes.)

5. STATEMENT OF THE FACTS.

Petitioner, Rahsaan May, was found guilty of DUI (75 Pa.C.S. § 3802(d)(1)(i)) following a non-jury trial. He was sentenced on November 23, 2020

to 6 months of probation, a $1,000.00 fine, 80 hours of community service and various costs. The trial court did not consider Mr. May's ability to pay a $1000 fine prior to imposing it; and the record did not contain the information necessary for such a consideration. There was no pre-sentence investigation and the court lacked basic information such as Mr. May's salary.

6. THIS COURT SHOULD GRANT ALLOWANCE OF APPEAL FOR THE FOLLOWING REASONS.

> A. The Superior Court erred in holding that it is "well-established" that 42 Pa.C.S. § 9726 does not apply to mandatory fines; rather, the rules of statutory construction require that the sentencing court consider a defendant's ability to pay *any* fine pursuant to 42 Pa.C.S. § 9726.

The Superior Court erroneously held that it is "well-established" that 42 Pa.C.S. § 9726 does not apply to mandatory fines. *Commonwealth v. May*, 139 EDA 2021, at 10-11 (Pa. Super. Feb. 15, 2022). The law regarding the applicability of Section 9726 to imposition of mandatory fines is far from well-established. Rather, appellate courts have relied upon cases discussing this issue in *dicta* where the issue of mandatory fines was not raised by the parties, or cases in which the reasoning is now of questionable validity in light of evolvements in the law. The Superior Court has never – not in this case nor in any other – engaged in the proper statutory analysis required by the rules of construction. As a result, it

has wrongly narrowed the scope of 42 Pa.C.S. § 9726 in a way that the legislature did not intend.

First and foremost, 42 Pa.C.S. § 9726 could not be any clearer that courts must consider a defendant's ability to pay a fine at sentencing. In its relevant portions, Section 9726 requires –

> **(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.

42 Pa.C.S. § 9726(c), (d).

This statute has two key requirements: subsection (c) prohibits imposing *any* fine on a defendant who cannot afford one, and subsection (d) limits the dollar amount of a fine to what the record shows that the defendant can afford. Indeed, this Court recently described it as an "unambiguous statutory command requiring record evidence of the defendant's ability to pay." *Ford*, 217 A.3d at 829.

The crux of Mr. May's argument is one of statutory construction – that the unmistakable command of § 9726 does not give way in the face of a specific and

generally mandatory fine such as the $1,000 assessed here under 75 Pa.C.S. § 3804(c)(1)[1] as it applies to 75 Pa.C.S. § 3802(d)(1). This argument is one that the Superior Court has never properly engaged in and which it also fails to do so instantly.

A specific provision prevails over a general one only in narrow and specific circumstances. Such situations are exceedingly rare and this is not one of them. The starting point whenever interpreting provisions in two statutes governing the same subject is to read them *in pari materia*. 1 Pa.C.S. § 1932, "Statutes in pari materia," provides:

> (a) Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things.
>
> (b) Statutes in pari materia shall be construed together, if possible, as one statute.

---

[1] 75 Pa.C.S. § 3804(c)(1) states:

> Incapacity; highest blood alcohol; controlled substances. -- . . . an individual who violates section 3802(c) or (d) shall be sentenced as follows:
>
> (1) For a first offense, to:
>
> (i) undergo imprisonment of not less than 72 consecutive hours;
>
> (ii) pay a fine of not less than $1,000 nor more than $5,000;

75 Pa.C.S. § 3804(c)(1).

1 Pa.C.S. § 1932. Here, the statutes at issue are sentencing provisions involving the imposition of fines, so they must be read together as if they were one statute. *See*, *e.g.*, *Commonwealth v. Hansley*, 47 A.3d 1180, 1186 (Pa. 2012) (sentencing statutes read *in pari materia*). Doing so with the relevant provisions from Sections 3804(c)(1) and 9726 – putting them together in a unified scheme – shows how they complement each other –

> (c) . . . an individual who violates section 3802(c) or (d) shall be sentenced as follows:
>
> (1) For a first offense, to:
>
> (i) undergo imprisonment of not less than 72 consecutive hours;
>
> (ii) pay a fine of not less than $1,000 nor more than $5,000;

75 Pa.C.S. § 3804(c)(1).

> (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.

42 Pa.C.S. § 9726(c), (d).

Section 9726 certainly imposes an indigence exception to the provisions that would ordinarily require imposition of the fines applicable in this case. Whether that provision gives way to Section 3804(c)(1) requires the next analytical step. Section 1933, "Particular controls general," provides:

> Whenever 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. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, 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.

1 Pa.C.S. § 1933.

With Section 3804(c)(1) as a penal provision interpreted strictly, and Section 9726 "liberally constructed to effect [its] objects and to promote justice," the appropriate interpretation of these provisions is that the fine in Section 3804(c)(1) is not mandatory for those who are too poor to pay it. 1 Pa.C.S. § 1928. This interpretation comports with the rule that even if there is a conflict between two provisions, "but the conflict is not irreconcilable, they shall be construed to give effect to both statutes." *Commonwealth v. Parmar*, 710 A.2d 1083, 1088 (Pa. 1998) (citing 1 Pa.C.S. § 1933).

The Superior Court Panel, however, failed to conduct any meaningful statutory analysis, instead erroneously holding that "[i]t is well-established that § 9726(c) does not apply to mandatory fines." *May*, 139 EDA 2021, at 10. In support of this holding, the Panel cited to *Commonwealth v. Gipple*, 613 A.2d 600 (Pa. Super. 1992), and this Court's decision in *Ford*, *supra*, which also cites to *Gipple*. *Id*. *Gipple*, however is inapposite and *Ford* did not address the issue presented regarding imposition of mandatory fines.

In *Gipple*, a panel of the Superior Court stated in a footnote that "[a]ppellant does not argue that a failure to examine one's ability to pay is violative of any legislative act. Although it is true that the general fine provision requires a sentencing court to inquire as to the ability to pay a fine imposed, 42 Pa.C.S. § 9726 does not apply to the mandatory fine provision of 18 Pa.C.S. § 7508."[2] In other words, the *Gipple* court *sua sponte* mused about an argument that was not even argued and was not before it.[3] That *dicta* has no value for unpacking the legal issues. It lacks any persuasive or precedential authority.

---

[2] *Gipple* cited to *Commonwealth v. Brown*, 566 A.2d 619 (Pa. Super. 1989) for this proposition, although *Brown* was about mandatory minimum jail sentences and had nothing to do with fines or the relevant statutes.

[3] The issue raised by the appellant in *Gipple* was whether the mandatory fine pursuant to 18 Pa.C.S. § 7508 violated the Excessive Fines Clause of the Pennsylvania Constitution. *Gipple*, 613 A.3d at 601. *Gipple* held that it did not, concluding that "[t]he mere fact that the court did not inquire into appellant's ability to pay is irrelevant to the question of whether the fine is excessive. . . Rather, the dispositive inquiry in determining whether a mandatory fine is violative of Article I, Section 13 of the Pennsylvania Constitution revolves solely around the question of

Further, *Ford, supra*, did not hold that Section 9726(c) does not apply to mandatory fines. *Ford* addressed only the discretionary, non-mandatory fines that were the subject of that appeal. *See Ford*, 217 A.3d at 831 (vacating the entire sentence as illegal where an ability to pay inquiry was required prior to imposition of non-mandatory fines even though the defendant had agreed to pay fines as part of a guilty plea). In *Ford*, the trial court imposed both non-mandatory and mandatory fines, but it was only the issue related to imposition of the non-mandatory fines that was appealed by the Commonwealth to this Court. *Id*. at 828. While discussing the procedural history of the case, *Ford* cited the lower court opinion and the footnote from *Gipple, supra* at 601 n.1 (where the issue of mandatory fines was neither raised by the parties nor briefed), for the notion that Section 9726(c) does not apply to mandatory fines; but that was not the issue on appeal nor was it the holding in *Ford. Ford*, 217 A.3d at 827. Therefore, the Superior Court's conclusion here that this *dicta* in *Ford* resolved this issue and that an ability to pay inquiry is not required prior to imposition of mandatory fines, is erroneous.

---

whether, under the circumstances, the fine is 'irrational or unreasonable.'" *Id.* at 602. As discussed *infra* Part 6.C, however, this holding is of dubious vitality as this Court more recently explained in *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153 (Pa. 2017), that the relevant question under Excessive Fines Clause jurisprudence, *i.e.*, whether a fine is proportional to the gravity of the offense, includes consideration of whether the imposition of a fine "would deprive the property owner of his or her livelihood, *i.e.*, 'his current or future ability to earn a living.'" *1997 Chevrolet*, 160 A.3d at 189.

The Superior Court here also relied upon *Commonwealth v. Cherpes*, 520 A.2d 439 (Pa. Super. 1987), which held that, under a now-repealed statute, the mandatory and specific fine at issue there prevailed over the more general provision in Section 9726(c). *Cherpes*, 520 A.2d at 449. The entirety of the analysis in *Cherpes* is as follows:

> In *Commonwealth v. Bidner*, [422 A.2d 847 (Pa. Super. 1980)], we ruled that specific penalty provisions prevail over more general penalty provisions. Such is the situation here. The penalty provision in § 409(c) is specific, and based on the rule in *Bidner*, must prevail over the more general provision in § 9726(c). *See* 1 P.S. § 1933 (if conflict between special and general provisions exists, special provision shall prevail).

Cherpes, 520 A.2d at 449 (footnote omitted).[4] However, *Bidner* and the operation of Section 1933's "general-specific" rue of statutory construction in the context of criminal prosecutions was abrogated by 42 Pa.C.S. § 9303. *Commonwealth v. Karetny*, 880 A.2d 505, 518 (Pa. 2005) (noting that the enactment of 42 Pa.C.S. § 9303 has abrogated operation of the Section 1933 "general-specific" rule of statutory construction in the context of criminal prosecutions); *Commonwealth v. Nypaver*, 69 A.3d 708, 713-714

[4] In *Bidner*, the Superior Court held that the defendant could not be charged with crimes under the Crimes Code where his conduct violated a penal provision of the Election Code, which enacted a comprehensive category of offenses and penalties. *Bidner*, 422 A.2d at 850. "[T]he Crimes Code was not meant to prevail over the specific penalty measures of the Election Code."). *Id.*

(Pa.Super.2013) (explaining enactment of 42 Pa.C.S.A. § 9303 halted operation of "specific/general" rule of statutory construction in the context of criminal prosecution, "***and cases which applied that concept as a basis for their holdings are no longer precedential"***; citing *Bidner* as one of the cases applying that concept) (emphasis added); *see also* 42 Pa.C.S. § 9303 ("Notwithstanding the provisions of 1 Pa.C.S. § 1933 . . . where the same conduct of a defendant violates more than one criminal statute, the defendant may be prosecuted under all available statutory criminal provisions without regard to the generality or specificity of the statutes.").

As cases applying the concept articulated in *Bidner* are no longer precedential, *Cherpes*' limited reasoning leading to its conclusion is of questionable validity. *See Nypaver*, *supra*. Even though *Cherpes* was not about prosecuting a defendant under various criminal provisions, it relied upon *Bidner* for a discussion of the "specific/general" rule of construction, the premise of which was later abrogated. *See id.* The validity of *Cherpes* is all the more debatable in light of the fact that *Cherpes* conducted no actual statutory construction analysis to determine if the statues at issue there were irreconcilably in conflict with one another. *See Karetny*, 880 A.2d at 518 (conducting statutory analysis to determine if two statutes were irreconcilably

in conflict with one another). Therefore, the Superior Court's reliance upon *Cherpes* is questionable. This Court should accept review in order to apply the proper statutory construction analysis to find that the statutes at issue are not irreconcilably in conflict with one another and that Section 9726 applies to the imposition of all fines regardless of whether they are mandatory.

B. Pa.R.Crim.P. 706(C) requires an ability to pay inquiry prior to imposition of a mandatory fine.

The issue of whether Pa.R.Crim.P. 706(C) requires an ability to pay inquiry prior to imposition of mandatory costs is being addressed by this Court in *Lopez*, *supra*. *Lopez* should be dispositive as Rule 706(C) governs impositions of fines and costs. The Superior Court Panel here made no distinction between treatment of fines and costs, while *Lopez*, relying upon *Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. 1975) (*en banc*) (fine illegal under predecessor to Rule 706(C) absent consideration of ability pay), did treat fines as receiving different treatment than costs. In the event this Courts finds a distinction between fines and costs under Rule 706(C), the imposition of the instant fine constituted an illegal sentence as the trial court failed to consider Mr. May's ability to pay as required by Pa.R.Crim.P. 706(C) and *Martin*.

C. Imposition of the instant fine violates the Excessive Fines Clause of the Pennsylvania and U.S. Constitutions, which requires a consideration of a person's ability to pay to determine whether a fine is excessive.

Even if Section 9726 and Rule 706(C) do not apply to the "mandatory" fines in Section 3804, then the fine imposed here was unconstitutional in violation of Article 1, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the U.S. Constitution, which prohibit "excessive fines." *See* Pa. Const. Art. 1, §13; U.S. Const. amend. VIII. Courts considering whether a fine is constitutionally excessive must consider a person's ability to pay as part of the analysis – as explained by this Court in *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153 (Pa. 2017). Just last year, while this case was pending on appeal, the Supreme Court of Washington became the latest state to say that even what could seem like a small fine (just over $500), can nevertheless be constitutionally excessive in light of the person's financial circumstances. *City of Seattle v. Long*, 493 P.3d 94, 114-115 (Wash. 2021). This consideration of an individual's ability to pay is rooted in the history of the Excessive Fines Clause, which demonstrates that the central inquiry in Excessive Fines Clause jurisprudence is whether a defendant saddled with a fine can meet his basic life needs. This requires considering a defendant's ability to pay that fine and the

impact it would have on their ability to meet the subsistence needs of themselves and their family.

The Superior Court Panel ignored Mr. May's argument that a person's ability to pay is central to the inquiry of whether a fine is excessive under the Excessive Fines Clause. Rather, it determined under *Commonwealth v. Eisenberg*, 98 A.3d 1268 (Pa. 2014) (which struck down a mandatory fine as excessive under the Excessive Fines Clause), that $1000 is not grossly disproportionate to the crime committed, and summarily concluded that $1000 was "unlikely to deprive Appellant of his livelihood." *May*, 139 EDA 2021, at 19. It rendered this conclusion despite the fact that Mr. May was represented by a public defender and there was no information in the record about his salary or circumstances in order to be able to make that determination. By ignoring any inquiry into his ability to pay the fine based on his financial circumstances and ability to meet his basic life needs with imposition of a fine, the Panel essentially concluded that $1000 is not an amount that would deprive *anybody* of their livelihood, thereby rendering any inquiry into one's ability to pay irrelevant.

The Panel conducted an improper analysis under the Excessive Fines Clause by failing to take into consideration Mr. May's ability to pay the fine and summarily concluding that $1000 is not a fine that would be excessive to any

defendant under the instant statute. In recent decades, courts in Pennsylvania and across the country have applied the Excessive Fines Clause in a way that more closely honors its text and original purpose: to preserve a minimum basic subsistence for the convicted individual and his family.

This Court recently explained that while Pennsylvania's Excessive Fines case law, like that of the U.S. Supreme Court, generally focuses on whether the fine is "grossly disproportionate to the gravity of the offense," this is not an objective analysis that is divorced from the subjective impact on the individual. *1997 Chevrolet*, 160 A.3d at 186. In *1997 Chevrolet*, a case involving a civil *in rem* forfeiture proceeding, this Court explained the factors that must be considered by a court in determining whether an economic sanction should be considered excessive under the Excessive Fines Clause. Justice Todd, after a thorough historical analysis, on behalf of a unanimous court, concluded in essence that ability to pay is one requisite factor. *Id*. at 188-89. This Court explained that the proportionality analysis includes consideration of whether it "would deprive the property owner of his or her livelihood": "We find such consideration —whether the forfeiture would deprive the property owner of his or her livelihood, i.e., his current or future ability to earn a living ... to be entirely appropriate ...." *Id*. at 189 (citation and internal quotation marks omitted). In

concluding that the Clause reflects "hostility to such onerous fines that would deprive one of his or her means of living," this Court pointed to historical research showing that the Clause is tailored to "personal circumstances" including "the ability to maintain some minimal level of economic subsistence." *Id.* at 188-89 (citations omitted).

The U.S. Supreme Court recently echoed the same sentiment, noting historically a fine could not be "so large as to deprive [an offender] of his livelihood" and that fines could not constitute more than a person's "circumstances or personal estate will bear." *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (citations and internal quotation marks omitted). In other words, a fine cannot be so large that it would be ruinous or contribute to a person's impoverishment. *See Eisenberg*, 98 A.3d at 1286 (fine excessive where, among other factors, it left court with "no discretion to inquire into the specific facts or the individual circumstances of a case" and "could act to effectively pauperize a defendant for a single act").

As the Indiana Supreme Court recently concluded, the roots of the Excessive Fines Clause "specifically contemplated an economic sanction's effect on the wrongdoer." *State v. Timbs*, 134 N.E.3d 12, 37 (Ind. 2019) ("*Timbs II*"). Other modern court decisions continue to reflect that the fine's "effect on the owner is an appropriate consideration in determining" whether it is excessive. *Timbs II*, 134

N.E.3d at 37; *see also Colorado Dep't of Labor and Employment v. Dami Hospitality, LLC*, 442 P.3d 94, 102 (Colo. 2019) (a court "considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment"). This past year the Washington Supreme Court squarely confronted the issue of whether the Excessive Fines Clause applied to costs, and whether there had to be a consideration of a defendant's ability to pay. *City of Seattle v. Long*, 493 P.3d 94 (Wash. 2021). The court conducted a thorough historical analysis, noted a modern trend (*id*. at 108-114), and held that under the Excessive Fines Clause a court "should also consider a person's ability to pay" in determining excessiveness. *Id*. at 114. As to Mr. Long, the court held that given his dire circumstances, $547 in vehicle impoundment costs, with a $50 a month payment plan, were constitutionally excessive. *Id*. at 114-15.

Accordingly, the Excessive Fines Clause sets a *floor* below which a fine cannot be imposed if a person could only afford to pay it by forfeiting some of the money he needs to meet the basic subsistence needs of himself or his family. Indeed, this recognition that some people are simply too poor to have a fine imposed is consistent with the legislature's intent in adopting Section 9726, which prohibits a court from imposing *any* fine absent evidence that the defendant "is or will be able to pay the fine." 42 Pa.C.S. § 9726(c); *see Ford*, *supra* (Section

9726(c) prohibits imposing a fine absent record evidence of the defendant's ability to pay that fine). While the mandate in Section 9726 is somewhat broader than the prohibition in the Excessive Fines Clause that a fine cannot "pauperize" a defendant, the limitation on imposing a fine on those who cannot meet their subsistence needs is shared by both. *Eisenberg*, 98 A.3d at 1286. Thus, an individualized consideration of the defendant's financial circumstances and ability to pay a fine is required at sentencing to comport with not only Section 9726 but also the Excessive Fines Clause. To do otherwise "would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally." *Timbs II*, 134 N.E.3d at 36.

For being quite literally an ancient protection, the Excessive Fines Clause has rarely been litigated in Pennsylvania or elsewhere, and its protections for indigent defendants have only recently seen resurgence. But as with Section 9726 and this Court's decision in *Ford*, the Clause places an obligation on the sentencing court to ensure it does not impose a fine on an individual who cannot pay it without sacrificing the means of subsistence. The trial court here never made that determination and never determined, *inter alia*, whether Mr. May has the ability to meet his basic life needs such as housing, food, medical care, dependent

care, and transportation. So too did the Superior Court ignore the importance of this inquiry in the excessiveness analysis.

This Court should accept review to rule on this constitutional issue and find that the trial court violated the mandate of the Excessive Fines Clause by imposing a fine without considering whether it would impact Mr. May's subsistence.

WHEREFORE, for the above reasons, Petitioner, by his counsel respectfully requests that this Court grant an Allowance of Appeal.

Respectfully submitted,

/S/ Emily Mirsky
EMILY MIRSKY, Assistant Defender
Chief, Appeals Division
CHRISTOPHER WELSH, Director

CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Appellate Procedure, I hereby certify that the foregoing Petition for Allowance of Appeal complies with the following requirements:

1. This Petition was prepared with word processing software, using proportionately spaced Times New Roman fourteen-point typeface. *See* Rule 124, Pa.R.A.P.

2. This Petition consists of 20 pages plus a cover page, tables, and certificate of service. The total word count, as calculated by word processing software, falls below the limit of 9,000 words. *See* Rule 1115, Pa.R.A.P.

3. This filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents. *See* Rule 127, Pa.R.A.P.

/s/ Emily Mirsky
Emily Mirsky
Assistant Defender,
Chief, Appeals Division
Attorney No. 89661
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I did serve a copy of the foregoing Petition for Allowance of Appeal upon the following person by Personal Service. This manner of service is in conformity with the Pennsylvania Rules of Appellate Procedure. *See* Pa.R.A.P. 121.

Catherine Kiefer, Esquire
Office of the District Attorney
Delaware County Courthouse
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(Attorney for the Commonwealth)

Dated: March 17, 2022

/s/ Emily Mirsky
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Atty. No. 89661
Attorney for Petitioner,
Rahsaan May

EXHIBIT A

2022 PA Super 25

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RAHSAAN O. MAY	:	
Appellant	:	No. 139 EDA 2021

Appeal from the Judgment of Sentence Entered November 23, 2020
In the Court of Common Pleas of Delaware County Criminal Division at
No(s): CP-23-CR-0004281-2018

BEFORE: BOWES, J., STABILE, J., and McCAFFERY, J.

OPINION BY BOWES, J.: **FILED FEBRUARY 15, 2022**

Rahsaan O. May appeals from his November 23, 2020 judgment of sentence imposed after the trial court found him guilty of driving under the influence ("DUI") of a controlled substance. After careful review, we affirm.

The trial court summarized the facts as follows:

> On February 28, 2018[,] at 8:33 a.m., police officers from the Radnor Township Police Department were dispatched to the 200 block of King of Prussia Road, Radnor Township, Delaware County, Pennsylvania to respond to a report of an overturned box truck. King of Prussia Road is a state highway near a railroad overpass utilized by both AMTRAK and SEPTA's regional rail system. King of Prussia Road and the secondary roadways leading to the overpass have multiple, clearly posted bridge height signs referencing a 10' 10" clearance. Upon arriving on scene, Officer Janoski observed a white box truck bearing Pennsylvania registration ZJM-4627 partially overturned and resting on its driver side positioned under the bridge. The truck displayed the name "Two Men and A Truck" and appeared to Officer Janoski to be a 19-foot box truck with a height of [twelve] feet. During the crash investigation it was determined the truck was operated by

> [Appellant] who was positively identified by his Pennsylvania Drivers' License number.
>
> Appellant May stated he was traveling southbound on King of Prussia Road when the box of the truck struck the I-beam of the bridge causing the vehicle to overturn. [Appellant] was aware the truck was [twelve] feet high but he did not see the signs warning of the bridge height. When the truck collided with the bridge it overturned striking an occupied vehicle traveling under the overpass in a northbound direction.
>
> While speaking with [Appellant] at the scene, Officer Janoski detected an odor of burnt marijuana emanating from his person. When asked if he smoked anything that day, [Appellant] responded: "I smoked a little weed this morning." While speaking with [Appellant], he persistently placed his hands inside his sweatshirt pockets despite Officer Janoski's repeated instructions to [Appellant to] keep his hands visible. [Appellant] voluntarily agreed to an officer safety pat down and a green, leafy vegetable matter was located on his person.
>
> [Appellant] submitted to [s]tandardized [f]ield [s]obriety [t]esting and was ultimately placed in police custody. Appellant was transported to Bryn Mawr Hospital where he was advised of [c]hemical [t]esting [w]arnings DL-26 and voluntarily submitted to a chemical test of his blood.

Trial Court Opinion, 2/26/21, at 1-3 (citations omitted).

Appellant was arrested and charged with DUI of a controlled substance. The Commonwealth filed a motion *in limine* to exclude the testimony of Appellant's proposed expert, Dr. Lawrence Guzzardi. On October 14, 2020, the trial court granted oral argument on the motion before excluding the testimony and report. Appellant immediately proceeded to a non-jury trial. The Commonwealth put forth the testimony of the operator of the vehicle that Appellant hit, the officer who responded to the accident, and a toxicologist who opined that Appellant's blood contained marijuana metabolites. Appellant

elected not to testify but argued that the marijuana detected in his blood was too low to impair his ability to operate a motor vehicle. The trial court found Appellant guilty of DUI of a controlled substance, an ungraded misdemeanor.

On November 23, 2020, the court sentenced Appellant to six months of restrictive probation and ordered him to pay a mandatory $1,000 fine and $168 lab fee. As conditions of his restrictive probation, Appellant was ordered to complete twenty days of electronic home monitoring, eighty hours of community service, undergo a Court Reporting Network evaluation, and complete safe driving classes. Appellant filed a post-sentence motion which was denied. The instant appeal followed. Both Appellant and the trial court complied with the mandates of Pa.R.A.P. 1925.

Appellant presents the following issues for our review:

> 1. Whether the lower court erred in precluding the testimony of defense expert, Lawrence Guzzardi, MD, to refute the laboratory report (Exhibit C8) and testimony of two prosecution witnesses, since the expert's proffered testimony was relevant, including on the issue of credibility, and therefore could have caused the factfinder to disregard some or all of the prosecution's evidence, thereby resulting in acquittal?
>
> 2. Whether the court below erred and imposed an illegal sentence when it ordered Appellant to pay a fine without first assessing his ability to pay?

Appellant's brief at 4-5.

First, Appellant challenges the trial court's decision to exclude expert testimony and a report. ***See*** Appellant's brief at 12-18. We review a trial court's decision to admit or exclude expert opinion testimony under an abuse

of discretion standard. ***See Commonwealth v. Pi Delta Psi, Inc.***, 211 A.3d 875, 881 (Pa.Super. 2019). An abuse of discretion "occurs if the trial court renders a judgment that is manifestly unreasonable, arbitrary or capricious; that fails to apply the law; or that is motivated by partiality, prejudice, bias or ill-will." ***Id***. (quoting ***Hutchinson v. Penske Truck Leasing Co.***, 876 A.2d 978, 984 (Pa.Super. 2005)).

Herein, the trial court prohibited Lawrence Guzzardi, M.D., a toxicologist, from submitting a report or offering testimony after Appellant conceded that Dr. Guzzardi would not dispute the test results indicating the presence of marijuana in Appellant's blood. N.T. Non-Jury Trial, 10/14/20, at 15. Instead, he planned to offer testimony questioning Appellant's level of impairment. ***Id***. The trial court reasoned that since the controlled substance subsection at issue prohibited any amount of the controlled substance to be within an accused's system, testimony regarding the level of Appellant's impairment was not relevant. ***Id***.; ***see also*** Pa.R.E. 402 (explaining that relevant evidence is evidence that tends to establish a material fact in the case or make a fact at issue more or less probable). We agree.

Appellant proceeded to trial on a charge of 75 Pa.C.S. § 3802(d)(1)(i), DUI of a controlled substance, which provides:

> (d) Controlled substances. An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1) There is in the individual's blood **any amount** of a:

> (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

75 Pa.C.S. § 3802(d)(1)(i) (emphasis added).

Therefore, for the Commonwealth to meet its burden of proof, it needed to prove: (1) that Appellant was in actual physical control or operated the motor vehicle and (2) that he had a schedule I controlled substance in his blood. ***Id***. The Commonwealth was not required to establish that Appellant was impaired in order to convict him pursuant to § 3802(d)(1)(i). ***See Commonwealth v. Hutchins***, 42 A.3d 302, 310 (Pa.Super. 2012) (finding that a conviction under § 3802(d)(1) does not require that a driver be impaired, only that a driver has any amount of a specifically enumerated controlled substance in his blood). Since the DUI subsection at issue criminalizes any amount of schedule I controlled substance in the blood, it was within the court's discretion to conclude that testimony regarding Appellant's level of impairment was irrelevant.

Appellant counters that ***Commonwealth v. Taylor***, 209 A.3d 444 (Pa.Super. 2019), supports his position. ***See*** Appellant's brief at 14-16. However, his reliance on ***Taylor*** is misplaced. In ***Taylor***, the appellant was arrested for DUI after she crashed her vehicle into a utility pole, failed field sobriety testing, and admitted to taking Xanax and Adderall. No blood testing was completed, and the appellant was unable to provide the amounts she took or how long before the accident they were ingested.

The appellant was charged with endangering the welfare of a child and DUI of a Schedule IV controlled substance, a different subsection than the one at issue in the case at bar. ***See*** 75 Pa.C.S. § 3802(d)(2). At trial, "a central point of dispute" was whether the appellant was impaired by controlled substances at the time she crashed the vehicle. ***Id***. at 447. To establish impairment, the Commonwealth relied on the arresting officer's testimony about the field sobriety testing and his opinion that the appellant's performance was impaired due to drug use. The defense countered that the appellant's poor performance was due to a head injury and sought to admit the testimony of Dr. Guzzardi. Dr. Guzzardi confirmed that appellant had been prescribed Xanax and Adderral, but explained that, when taken as proscribed, the appellant should have experienced little to no side effects from the drugs. Dr. Guzzardi also attempted to opine that field sobriety testing had never been validated as indicators of impairment due to drug use. However, the Commonwealth objected and the trial court sustained the objection. Accordingly, the jury never heard Dr. Guzzardi's opinion regarding the effectiveness of field sobriety testing for detecting drug impairment. The appellant was convicted.

On appeal, we reversed, holding that Dr. Guzzardi's opinion was derived from "years of rigorous scholarship" and would have rebutted the officer's conclusion that the appellant was impaired by drugs. ***Id***. at 449, 451 ("the excluded testimony went to the heart of a central jury question."). Since it

was for the jury to weigh the evidence, and it was never afforded the opportunity, the trial court committed prejudicial error by excluding the testimony. ***Id***.

Unlike in ***Taylor***, herein, expert testimony concerning the impairing effects of the medication was irrelevant to whether Appellant would be convicted or acquitted. The prosecution in this case involved a different subsection of the DUI statute that did not require proof of impairment. Moreover, the Commonwealth proved its case through admission of a blood test result that showed the presence of marijuana in Appellant's blood, not field sobriety testing. Dr. Guzzardi's planned testimony would not have challenged the methodology behind the chemical testing of Appellant's blood, nor the findings that Appellant had a Schedule I controlled substance in his blood while driving. ***See*** N.T., 10/14/20, at 11-12, 15, 18-19, 23. Thus, it would not have controverted the Commonwealth's evidence and the trial court was well within its discretion to deny the testimony. Accordingly, we find that ***Taylor*** is inapplicable, and no relief is due on Appellant's first issue.

In his second claim, Appellant alleges that the court erroneously imposed a mandatory fine without first assessing his ability to pay, which was in violation of 42 Pa.C.S. § 9726(c), Pa.R.Crim.P. 706(C), and the excessive

fines clause of the Pennsylvania and United States Constitutions.[1] ***See*** Appellant's brief at 18. Since this argument challenges the legality of Appellant's sentence, "[o]ur standard review over such questions is *de novo* and our scope of review is plenary." ***Commonwealth v. Wolfe***, 106 A.3d 800, 802 (Pa.Super. 2014). For the reasons that follow, we find that § 9726(c) does not apply to mandatory fines, Rule 706(C) does not require an ability to pay hearing until incarceration for failure to pay is at issue, and 75 Pa.C.S. § 3804(c)(1)(ii) does not violate the excessive fines clause of the Pennsylvania and United States Constitutions.

I. 42 Pa.C.S. § 9726(c)

First, Appellant argues that the trial court erred by imposing a $1,000 fine without conducting a hearing to determine his ability to pay pursuant to 42 Pa.C.S. § 9726(c). ***See*** Appellant's brief at 18. Section 9726(c) provides, in relevant part, as follows:

> 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[.]

42 Pa.C.S. § 9726(c). Appellant contends that § 9726(c) required the trial court to hold such a hearing before imposing any fine. ***Id***. at 19. Appellant

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[1] Appellant raises this claim for the first time on appeal. However, this claim is non-waivable since Appellant argues that it implicates the legality of his criminal sentence. ***See Commonwealth v. Boyd***, 73 A.3d 1269, 1270 (Pa.Super. 2013) (*en banc*). Accordingly, we decline to find waiver.

concedes that the fine imposed here was required by 75 Pa.C.S. § 3804(c)(1)(ii), but nevertheless asserts that § 3804 and § 9726 can be harmonized by reading the provisions so as to conclude that the mandatory fine must be imposed unless the defendant cannot afford it. ***Id***. at 28-31. Specifically, 75 Pa.C.S. § 3804(c)(1)(ii) provides as follows:

> An individual who violates section 3802 . . . (d) **shall** be sentenced as follows:
>
> (1) for a first offense, to:
>
> . . .
>
> (ii) pay a fine of not less than $1,000 nor more than $5,000[.]

75 Pa.C.S. § 3804(c)(1)(ii) (emphasis added). Appellant also urges us to overrule or distinguish ***Commonwealth v. Cherpes***, 520 A.2d 439 (Pa.Super. 1987), which held that the general provisions of § 9726(c) could not prevail over a specific penalty provision. ***Id***. at 28.

In contrast, the Commonwealth responds that Appellant's sentence was legal. ***See*** Commonwealth's brief at 18-19. It maintains that the ability-to-pay inquiry of § 9726(c) is required only for non-mandatory fines. ***Id***. at 19 (citing ***Commonwealth v. Ford***, 217 A.3d 824, 829 (Pa. 2018)). Thus, consistent with ***Cherpes*** and its progeny, the Commonwealth maintains that the specific penalty provision at issue herein must govern. ***Id***. at 19-20; ***see also*** 75 Pa.C.S. § 3804(c)(1)(ii). We agree.

It is well-established that § 9726(c) does not apply to mandatory fines. ***See Commonwealth v. Gipple***, 613 A.2d 600, 601 n. 1 (Pa.Super. 1992) (finding that § 9726(c) did not apply to mandatory fines). This position was recently reinforced by our Supreme Court in ***Ford***, wherein the Court observed that "a presentence hearing on the ability to pay a mandatory fine is not required." ***Ford***, ***supra*** at 827-28 (citing ***Gipple***, ***supra*** at 601 n.1).

In this case, the trial court concluded that the fine imposed was statutorily required by § 3804(c)(1)(ii). ***See*** Trial Court Opinion, 2/26/21 at 23-26. Specifically, 75 Pa.C.S. § 3804(c)(1)(ii) provides that "an individual who violates section 3802 . . . **shall** be sentenced," on a first offense, to "pay a fine of not less than $1,000 nor more than $5,000." 75 Pa.C.S. § 3804(c)(1)(ii) (emphasis added). We agree that the sentencing court was statutorily required to impose a fine of at least $1,000. ***See Oberneder v. Link Computer Corp.***, 696 A.2d 148, 150 (Pa. 1997) ("By definition, 'shall' is mandatory."). Thus, § 9726(c) was inapplicable and Appellant's claim of an illegal sentence is meritless. ***See Ford***, ***supra*** at 827-28. Furthermore, for the reasons explained, *infra*, we reject Appellant's argument urging us to overturn or distinguish ***Cherpes***. This panel is bound by existing precedent and, therefore, lacks the authority to overturn another panel decision. ***See Commonwealth v. Beck***, 78 A.3d 656 (Pa.Super. 2008) (holding that a three-judge panel of this Court is "not empowered to overrule another panel of the Superior Court").

In ***Cherpes***, a township commissioner was convicted of violations of the State Ethics Act and unsworn falsification to authorities. As part of his sentence, the commissioner was ordered to pay a mandatory fine of $197,061 pursuant to a specific penalty provision. On appeal, he argued that the specific penalty provision, which required a penalty equal to three times the amount gained through violation of the State Ethics Act, should have been construed in light of § 9726(c) so that the fine was tempered by his ability to pay. ***See Cherpes***, ***supra*** at 449. In affirming the commissioner's sentence, the ***Cherpes*** court concluded that a statute setting forth a mandatory penalty was "specific," and thus "prevail[ed] over the more general provision in § 9726(c)." ***Id***. at 449 (citing ***Commonwealth v. Bidner***, 422 A.2d 847 (Pa.Super. 1980); 1 P.S. § 1933). Accordingly, our review confirms that ***Cherpes*** controls in these circumstances. Thus, Appellant's argument is without merit.

II. Pa.R.Crim.P. 706(C)

In his second sub-claim, Appellant alleges that the $1,000 fine constituted an illegal sentence under Pa.R.Crim.P. 706(C). ***See*** Appellant's brief at 24. Pennsylvania Rule of Criminal Procedure 706(C) 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). In Appellant's view, Rule 706(C) also instructs courts to consider the burden upon a defendant before imposing a fine, such that a failure to do so constitutes an illegal sentence. ***Id***. at 24-25. We disagree.

When viewed in its proper context, it is clear that Rule 706(C) only requires the court to hold an ability-to-pay hearing when a defendant faces incarceration for failure to pay court costs previously imposed on him:

> (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.
>
> (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 (emphasis added).

Our review of the relevant authority confirms our interpretation of Rule 706. As we have previously explained:

> [A] defendant is not entitled to a pre-sentencing hearing on his or her ability to pay costs. While Rule 706 permits a defendant to demonstrate financial inability either after a default hearing or when costs are initially ordered to be paid in installments, the Rule only requires such a hearing prior to any order directing incarceration for failure to pay the ordered costs.... [I]t is not constitutionally necessary to have a determination of the defendant's ability to pay prior to or at the judgment of sentence. We [therefore] conclude that [a] ... trial court only [must] make a determination of an indigent defendant's ability to render payment before he/she is committed.

Commonwealth v. Childs, 63 A.3d 323, 326 (Pa.Super. 2013) (citation omitted).

Here, Appellant was convicted of § 3802(d)(1)(i), and the trial court was required to impose the $1,000 fine as a result. ***See*** 75 Pa.C.S. § 3804(c)(1)(ii). Consistent with the foregoing, the trial court properly concluded that because it was not committing Appellant to serve incarceration for failing to pay the mandatory fine, no ability to pay hearing was required. ***See*** Trial Court Opinion, 2/26/21, at 24-26. Appellant counters that ***Commonwealth v. Martin***, 335 A.2d 424 (Pa.Super. 1975) (*en banc*), and ***Commonwealth v. Lopez***, 248 A.3d 589 (Pa.Super. 2021) (*en banc*), support his position that an ability to pay hearing was required by Rule 706(C). We disagree.

In ***Martin***, the defendant was convicted of involuntary manslaughter and sentenced to pay a $5,000 fine pursuant to a discretionary sentencing statute. The relevant statute instructed the sentencing court that it "may" sentence a person convicted of a first-degree misdemeanor to pay a fine not exceeding $10,000. On appeal, we vacated and remanded for resentencing because we found that the sentencing court's reasoning for imposing a $5,000 fine was improper. ***Id***. at 426. Accordingly, we vacated the non-mandatory fine on grounds not related to Rule 706. Thus, this case is inapposite to Appellant's argument.

Lopez involved the imposition of mandatory court costs following a probation revocation. Prior to the resentencing hearing, appellant filed a motion for an ability-to-pay hearing to waive costs, which he argued was required by Rule 706(C). The court heard argument on the legal issues raised by the motion before denying it. On appeal, this Court conducted a statutory analysis of Rule 706(C) and found that Rule 706(C) did not **require** a trial court to hold an ability-to-pay hearing until a defendant risked incarceration for failing to pay court costs. ***See Lopez***, ***supra*** at 592. While the trial court retained discretion to hold an ability-to-pay hearing at sentencing, it was not mandated to do so by Rule 706(C). Instantly, Appellant was subjected to a mandatory fine and was not facing incarceration due to a failure to pay the fine. Thus, Appellant's reliance on ***Lopez*** is unavailing. Accordingly, his second sub-claim also fails.

III. Excessive Fines Clause

In his final sub-claim, Appellant contends that the imposition of a $1,000 fine violated the prohibition against excessive fines contained in the Eighth Amendment of the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution. ***See*** Appellant's brief at 32-42. Specifically, Appellant contends that § 3804 is unconstitutional because it requires a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine would "effectively pauperize a defendant for a single act." ***Id***. at 36. We disagree.

Whether a fine is excessive under our Constitution is a question of law, therefore our standard of review is *de novo* and our scope of review is plenary. ***See Commonwealth v. Eisenberg***, 98 A.3d 1268, 1279 (Pa. 2014). The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., Amend. VIII. The protections provided by Article I, Section 13 of the Pennsylvania Constitution are coextensive with those provided by the Eighth Amendment.[2] ***See Commonwealth v. 5444 Spruce Street, Philadelphia***, 832 A.2d 396, 399 (Pa. 2003).

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[2] Article I, Section 13 of the Pennsylvania Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." PA. CONST., Art. I, § 13.

In addressing Appellant's argument, we are guided by ***Eisenberg***, which instructs us to consider whether the fine imposed was reasonably proportionate to the crime it criminalizes. In ***Eisenberg***, our Supreme Court determined that a mandatory minimum fine of $75,000 for a conviction of a first-degree misdemeanor theft from a casino of $200 was an excessive fine in violation of Article I, Section 13 of the Pennsylvania Constitution. In conducting its proportionality analysis, the Court was persuaded by the fact that: (1) the amount owed was 375 times the amount of the theft; (2) the Crimes Code equivalent of the appellant's offense – a first degree misdemeanor – would have been $10,000; (3) the maximum fine imposable under the Crimes Code was $50,000, which would be for a murder or attempted murder conviction, and (4) the fine would exhaust five years of pre-tax income for a minimum wage worker, "effectively pauperiz[ing] a defendant for a single act." ***Id***. at 1286. The ***Eisenberg*** court also distinguished its holding from cases where the fine is "tailored, scaled, and in the strictest sense calculated to their offenses", as follows:

> In [***Commonwealth v.***] ***Church***, [522 A.2d 30 (Pa.1987),] overweight vehicles were fined on a sliding scale **per pound** over the weight limit. In ***Eckhart*** [***v. Department of Agriculture***, 8 A.3d 401 (Pa.Cmwlth. 2010)], the appellant kennel operator had committed numerous infractions incurring a fine amount in excess of $150,000 based on a $100–$500 **per dog/per day** penalty scheme, $15,000 of which appellant claimed was excessive in light of perceived triviality of the offense. In [***Commonwealth v.***] ***CSX*** [***Transportation, Inc.***, 653 A.2d 1327 (Pa.Cmwlth. 1995),] the appellant's train car leaked enough corn syrup into the Youghiogheny River to kill approximately 10,000 fish, and thus

> appellant incurred a roughly $100,000 fine, based on a $10 **per fish** calculation.

Id. at 1287 n.24 (emphasis in original).

Herein, the statute at issue follows the "sliding scale" approach expressly sanctioned by ***Eisenberg*** as it is "tailored, scaled, and in the strictest sense calculated to [the] offenses." ***Id***. at 1287. Section 3804 distinguishes DUI punishments based upon the substance imbibed, the level of impairment, the number of prior DUI's committed, if there was an accident that resulted in bodily injury or property damage, and if there were any minor occupants. ***See*** Pa.C.S. § 3804. Further, the mandatory DUI fines at issue in this case amount to far less than the substantial criminal administrative penalties in ***Church*** and ***CSX***. ***See Eisenberg***, ***supra*** at 1287 n.24.

With specific regard to Appellant's § 3802(d)(1)(i) conviction, our legislature has encased the proportionality assessment favored by ***Eisenberg*** within the statute, which is tailored and scaled based upon the number of DUI offenses a defendant has committed:

> **(c) Incapacity; highest blood alcohol; controlled substances**.--An individual who violates section 3802(a)(1) and refused testing of breath under section 1547 (relating to chemical testing to determine amount of alcohol or controlled substance) or testing of blood pursuant to a valid search warrant or an individual who violates section 3802(c) or (d) shall be sentenced as follows:
>
> (1) For a first offense, to:
>
> (i) undergo imprisonment of not less than 72 consecutive hours;

(ii) pay a fine of not less than $1,000 nor more than $5,000;

(iii) attend an alcohol highway safety school approved by the department; and

(iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

(2) For a second offense, to:

(i) undergo imprisonment of not less than 90 days;

(ii) pay a fine of not less than $1,500;

(iii) attend an alcohol highway safety school approved by the department; and

(iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

(3) For a third or subsequent offense, to:

(i) undergo imprisonment of not less than one year;

(ii) pay a fine of not less than $2,500; and

(iii) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

75 Pa.C.S. § 3804(c).

Additionally, the $1,000 fine does not threaten Appellant with the functional equivalent of "pauperization." ***See Eisenberg***, ***supra*** at 1285-86. The ***Eisenberg*** Court found persuasive the fact that with a minimum wage of $7.25 per hour, a $75,000 fine would exhaust approximately five years of pre-tax income of a minimum wage worker. However, with minimum wage still at $7.25 per hour, § 3804(c)(1)(ii)'s $1,000 fine is seventy-five times less impactful than the one at issue in ***Eisenberg***.

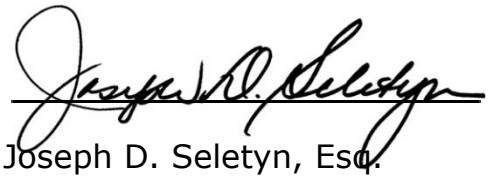
Simply put, Appellant has not convinced us that the fine at issue was akin to the one our Supreme Court struck down in ***Eisenberg***. A fine of $1,000 is not grossly disproportionate to the crime committed and unlikely to deprive Appellant of his livelihood. Undoubtedly, the Commonwealth has a compelling interest in protecting its citizens from the dangers posed by impaired driving, which are well-established. ***See Commonwealth v. Tarbert***, 535 A.2d 1035, 1042 (Pa. 1987) (citing a string of cases summarizing the "terrible costs in human life, injury and potential" that drunk driving exacts). Indeed, we do not underestimate the impact of Appellant's actions, and those similarly situated, which by driving after imbibing intoxicating substances put the lives and property of other citizens of this Commonwealth at risk. ***See*** N.T. 10/14/20, at 38 (Mr. Flaherty testifying that if Appellant's truck had impacted his vehicle any lower it "probably would have just killed me").

Herein, the legislature found that driving while impaired by a Schedule I substance merited a minimum mandatory fine of $1,000. ***See*** 75 Pa.C.S. § 3804(c). As that punishment is proportional to the crime, we hold that

§ 3804 does not violate the excessive fines clause of the Pennsylvania or United States Constitution.[3, 4]

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/15/2022

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[3] Public Justice and the American Civil Liberties Union have filed *amicus curiae* briefs in support of Appellant's position. However, their arguments are more properly addressed to this Court *en banc* or to our Supreme Court, as we lack the authority to overrule the precedent they challenge or to make policy determinations.

[4] Our decision does not bar Appellant from requesting an ability-to-pay hearing in the future. A defendant has the constitutional right to an opportunity to show that he cannot afford the fine or costs that have been imposed on him prior to being incarcerated for failure to pay the fine or costs. ***See Commonwealth v. Lopez***, 248 A.3d 589, 594 (Pa.Super. 2021).

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

COMMONWEALTH OF PENNSYLVANIA	:	No.: 4281-2018
v.	:	
RAHSAAN MAY	:	

Ashleigh Latonick, Esquire for Appellee Commonwealth
Steven M. Papi, Esquire for Appellant Rahsaan May

GREEN, J.

DATE: February 26, 2021

OPINION

Appellant Rahsaan May appeals following a guilty verdict rendered on October 14, 202, the November 23, 2020 Judgment of Imposition of Sentence and the December 3, 2020 denial of Appellant's Post-Sentence Motion.

PROCEDURAL AND FACTUAL HISTORY

On February 28, 2018 at 8:33 a.m., police officers from the Radnor Township Police Department were dispatched to the 200 block of King of Prussia Road, Radnor Township, Delaware County, Pennsylvania to respond

to a report of an overturned box truck. (3/12/18 Affidavit of Probable Cause, D-1). King of Prussia Road is a state highway near a railroad overpass utilized by both AMTRAK and SEPTA's regional rail system. (3/12/18 Affidavit of Probable Cause). King of Prussia Road and the secondary roadways leading to the overpass have multiple, clearly posted bridge height signs referencing a 10'10" clearance. (3/12/18 Affidavit of Probable Cause, D-1). Upon arriving on scene, Officer Janoski observed a white box truck bearing Pennsylvania registration ZJM-4627 partially overturned and resting on its driver side positioned under the bridge. (3/12/18 Affidavit of Probable Cause, D-1). The truck displayed the name "Two Men and A Truck" and appeared to Officer Janoski to be a 19-foot box truck with a height of 12 feet. (3/12/18 Affidavit of Probable Cause, D-1). During the crash investigation it was determined the truck was operated by Rahsaan May who was positively identified by his Pennsylvania Drivers' License number. (3/12/18 Affidavit of Probable Cause, D-1).

Appellant May stated he was traveling southbound on King of Prussia Road when the box of the truck struck the I-beam of the bridge causing the vehicle to overturn. (3/12/18 Affidavit of Probable Cause, D-1). Appellant May was aware the truck was 12 feet high but he did not see the signs

warning of the bridge height. (3/12/18 Affidavit of Probable Cause, D-1). When the truck collided with the bridge it overturned striking an occupied vehicle traveling under the overpass in a northbound direction. (3/12/18 Affidavit of Probable Cause, D-1).

While speaking with Appellant May at the scene, Officer Janoski detected an odor of burnt marijuana emanating from his person. (3/12/18 Affidavit of Probable Cause). When asked if he smoked anything that day, Appellant May responded: "I smoked a little weed this morning." (3/12/18 Affidavit of Probable Cause). While speaking with Appellant May, he persistently placed his hands inside his sweatshirt pockets despite Officer Janoski's repeated instructions to Appellant May keep his hands visible. (3/12/18 Affidavit of Probable Cause). Appellant May voluntarily agreed to an officer safety pat down and a green, leafy vegetable matter was located on his person. (3/12/18 Affidavit of Probable Cause).

Appellant May submitted to Standardized Field Sobriety Testing and was ultimately placed in police custody. (3/12/18 Affidavit of Probable Cause). Appellant was transported to Bryn Mawr Hospital where he was advised of Chemical Testing Warnings DL-26 and voluntarily submitted to a chemical test of his blood. (3/12/18 Affidavit of Probable Cause). Appellant

May was arrested and charged with one count of 75 Pa.C.S. § 3802(d)(2), Driving Under the Influence of Alcohol or a Controlled Substance.

The matter proceeded to a nonjury trial on October 14, 2020. Prior to trial and without objection, the Commonwealth amended the Criminal Information to reflect a charge of 75 Pa.C.S. § 3802(d)(1)(i), Driving Under Influence of Alcohol or Controlled Substance, which provides:

> (d) **Controlled substances.** An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1) There is in the individual's blood **any** amount of a:
>
> (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

75 Pa.C.S. § 3802(emphasis added), 10/14/20 N.T., p.4.

Prior to trial, the Commonwealth filed a Motion *in Limine* to exclude the testimony of Appellant May's proposed expert, Dr. Lawrence Guzzardi. In opposition to the Commonwealth's Motion, Appellant May contended his proposed expert would dispute the observations of the Radnor officer on scene and advanced the theory that the admitted "levels of marijuana are so insignificant that nobody can be – found unfit to drive under this."

(10/14/20 N.T., p. 25). The trial court accepted oral argument on the Motion *in Limine* and granted the Motion excluding Appellant's expert. The trial court provided the following rationale:

> First, the Commonwealth is proceeding under Title 75, Section 3802(d)(1)(i), and not under Title 75 Section 3802(d)(2). For this reason, the Commonwealth's Motion *in limine* to preclude the use of the expert report and testimony pursuant to that report of Dr. Guzzardi is granted. Dr. Guzzardi's testimony is precluded for two reasons. One, it is not relevant given the information the Commonwealth is proceeding upon under Rule 401. Evidence is relevant if, A, it has any tendency to make a fact more or less probable than it would be without the evidence; and B, the fact is of consequence in determining the action. Here, it's also important to note that the testimony of Dr. Guzzardi would in effect, if it's consistent with the report, admit an essential element of the proof in the Commonwealth's case. That is that any level of marijuana or its metabolite was present in the blood of the Defendant based upon the sample drawn at or about the time of the motor vehicle collision with an overhead structure, which is the subject of this criminal case.

(10/14/20 N.T., pp. 26-27).

> I'd like to read for the record Pennsylvania Rule of Evidence 803(25)(C). "Exceptions to the rule against hearsay regardless of whether the declarant is available as a witness. The following are not excluded by the rule against hearsay regardless of whether the declarant is available as a witness: #25, an opposing party's statement. The statement is offered against an opposing party and (C) was made by a person whom the party authorized to make a statement on the subject." In this case, were Dr. Guzzardi to testify based upon the argument I've heard today, Dr. Guzzardi would say that the blood draw from Mr. May at or about the time of the motor vehicle accident in which it's alleged Mr. May was operating a motor vehicle which struck an overhead

> structure, that that blood sample included some level of marijuana or its metabolites. That admission would corroborate the Commonwealth's case. I understand that the defense intends a constitutional challenge to Title 75, Section 3802(d)(1)(i). Nevertheless, this Court is constrained by the requirements of that statute. And Ms. Latonick on behalf of the Commonwealth has accurately recited the essential elements and the proof necessary on the part of the Commonwealth, including its burden, to prevail.

(10/14/20 N.T., pp. 31-32).

At trial, the Commonwealth first called Bret Flaherty as a witness. (10/14/20 N.T., pp. 33). On February 28, 2018 at approximately 8:30 a.m., Mr. Flaherty was traveling on King Prussia Road, Radnor Township, Delaware County, Pennsylvania underneath an overpass when "out of nowhere a truck cam slamming down onto my car." (10/14/20 N.T., p. 35). Mr. Flaherty accelerated to escape the truck but his vehicle sustained significant damage and was "totaled." (10/14/20 N.T., p. 35). Mr. Flaherty testified had he been even a second later in driving under the overpass, the truck "would have hit lower and probably would have just killed me." (10/14/20 N.T., p. 38). Mr. Flaherty is familiar with that roadway and noted there are multiple signs advising of the bridge height and he confirmed the bridge itself is painted yellow. (10/14/20 N.T., pp. 35 & 37).

The Commonwealth next called Radnor Township Police Officer Alex Janoski to testify. (10/14/20 N.T., p. 41). Officer Janoski is a fifteen (15) year veteran of the Radnor Township Police Department currently assigned to the Highway Patrol Unit. (10/14/20 N.T., p. 42). He is responsible for enforcing motor vehicle violations, investigating alleged impaired drivers and accident reconstruction. Officer Janoski has been trained in both standardized field sobriety and advanced roadside impaired driving enforcement. (10/14/20 N.T., p. 42, 46 & 98).

On February 28, 2018, Officer Janoski was on patrol operating a marked police motorcycle and was dispatched to the accident scene involving the overturned truck on King of Prussia Road. (10/14/20 N.T., p. 48). King of Prussia Road is a two-lane state highway with multiple signage warning of the 10'10" bridge clearance. (10/14/20 N.T., pp. 48-49). Officer Janoski observed the white box truck on its side under the bridge. (10/14/20 N.T., p. 51). At trial, Officer Janoski identified Appellant May as the driver of the white box truck. (10/14/20 N.T., p. 52). On scene, Officer Janoski inquired if Appellant May required medical attention which was declined. (10/14/20 N.T., p. 55). Appellant May advised he was following a GPS map on his phone

and did not notice the signs warning of the bridge height. (10/14/20 N.T., p. 56).

While speaking with Appellant May, Officer Janoski detected the odor of burnt marijuana. (10/14/20 N.T., p. 56). Officer Janoski also observed Appellant May presented with red, bloodshot, and glassy eyes. (10/14/20 N.T., p. 56). Officer Janoski inquired if Appellant May had smoked anything that day and Appellant May responded: "I smoked a little weed this morning." (10/14/20 N.T., p. 61). During the interview, Appellant May placed his hands in his pockets after Officer Janoski requested on several occasions he leave his hands visible. (10/14/20 N.T., p. 63). An officer safety pat down was performed and suspected marijuana was located on Appellant May's person. (10/14/20 N.T., p. 64). Officer Janoski requested Appellant May submit to standardized field sobriety testing. (10/14/20 N.T., p. 65). Based on his training and experience, Officer Janoski had reasons to suspect Appellant May was under the influence, including but not limited to the smell of burnt marijuana, Appellant's admission to smoking that very morning, and the presence of the suspected marijuana obtained following the safety pat down. (10/14/20 N.T., pp. 65 & 107). Appellant May was placed under arrest for suspicion of driving under the influence. (10/14/20 N.T., p. 65).

Officer Janoski requested Appellant May submit to a blood draw. (10/14/20 N.T., p. 66). Appellant May was advised of his implied consent to chemical test warnings and agreed to the blood draw. (10/14/20 N.T., p. 66 & C-6). Appellant May was transported to Bryn Mawr Hospital where Officer Janoski read the DL-26B form verbatim to Appellant May. (10/14/20 N.T., p. 66 & 68, C-6). Once the blood was drawn by a nurse, it was secured by Officer Janoski in a DRUGSCAN kit, returned to Radnor Township Police Department, logged into temporary evidence and ultimately conveyed for analysis. (10/14/20 N.T., p. 68).

The Commonwealth's final witness was Dr. Richard Cohn. (10/14/20 N.T., p. 135). The trial court determined Dr. Cohn was qualified to offer expert opinion testimony in the field of forensic toxicology based on his scientific, technical and other specialized knowledge. (10/14/20 N.T., p. 150). Dr. Cohn is a forensic toxicologist employed with DRUGSCAN. (10/14/20 N.T., p. 136). DRUGSCAN is a forensic toxicology laboratory certified both federally and by the Commonwealth of Pennsylvania. (10/14/20 N.T., p. 150 & C-7).

Dr. Cohn examined Appellant May's laboratory specimen submitted by Radnor Township Police Department and authored a forensic toxicology

report dated April 4, 2018. (10/14/20 N.T., p. 154 & 157, C-8). Dr. Cohn testified that marijuana was present in the sample of Appellant May's blood submitted by Radnor Township Police:

> Dr. Cohn: Cannabinoids or marijuana. Findings are as follows: 5 nanograms, delta-9-THC, which is the active constituent -- pharmacologically active constituent of marijuana for mL blood. That's nanograms per mL blood, and 62 nanograms of the 9-carboxy-THC, which is the inactive metabolite for mL blood. Those were the findings relative to cannabinoids or marijuana.

(10/14/20 N.T., p. 158).

Dr. Cohn confirmed delta-9-THC is the principal psychoactive ingredient of marijuana, a Schedule I controlled substance. (10/14/20 N.T., p. 159). It is metabolized as a non-psychoactive compound delta-9-carboxy-THC. (10/14/20 N.T., p. 159).

Appellant May elected not to testify but argued in closing the marijuana detected in his blood on the day of the accident was so low as to have no psychoactive effects nor did it impair his ability to operate a motor vehicle. (10/14/20 N.T., p. 230). The Commonwealth argued on February 28, 2018 Appellant Rahsaan May drove, operated, and was in active physical control of a box truck, on King of Prussia Road in Radnor Township, Delaware County, Pennsylvania, and he did so after he consumed marijuana, a Schedule I controlled substance. (10/14/20 N.T., p. 239). The trial court

found Appellant May guilty of 75 Pa.C.S. § 3802(d)(1)(i) and he was sentenced to a period of twenty (20) days of electronic home monitoring, eighty (80) hours community service, required to undergo a CRN evaluation and complete safe driving classes. Appellant May was fined $1000.00 and $168.00 in costs were assessed.(10/14/20 Verdict Slip & 11/23/20 Certificate of Imposition of Sentence). On December 1, 2020, Appellant May filed a Post-Sentence Motion which was denied by Order dated December 3, 2020. The instant appeal followed.

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

The issues raised in Appellants' Concise Statement of Matters Complained of on Appeal are as follows:

> 1. The court erred in excluding the testimony and report of defense witness, Lawrence Guzzardi, MD, to refute the laboratory report (Exhibit C8) and testimony of two prosecution witnesses (Officer Janoski and Dr. Cohn) since his proffered expert testimony was relevant, especially on the issue of credibility, and therefore could have resulted in the factfinder disregarding some or all the prosecution's evidence, thereby resulting in acquittal.
>
> 2. Mr. May's conviction and judgement of sentence for count one, allegedly driving with five nanograms of suspected marijuana (Delta-9-THC) in his blood, should vacated as a *de minimus* infraction, especially where his purported conduct did not actually cause or threaten the harm or evil sought to be

prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction.

3. The evidence is insufficient to sustain the conviction for count one, driving under the influence, since the prosecution failed to prove beyond a reasonable doubt that Mr. May drove, operated, or was in actual physical control of the movement of a vehicle.

4. The court erred when it sentenced Mr. May for violating 75 Pa. C.S. § 3802(d)(2), since the prosecution did not pursue that offense - let alone prove Mr. May was unfit to safely drive, operate, or control the movement of a vehicle – and the court did not convict him of that offense.

5. The court erred and imposed an illegal sentence when it ordered a $1,000 fine, without first assessing Mr. May's ability to pay.

DISCUSSION

I. MOTION *IN LIMINE*

Appellant May's first argument on appeal contends the trial court erred by excluding the testimony and report of Lawrence Guzzardi, M.D. The decision of whether expert testimony is to be admitted at trial lies within the sound discretion of the trial court, and this decision will not be reversed absent a clear abuse of discretion. Commonwealth v. Bardo, 709 A.2d 871, 878 (Pa. 1998). Pennsylvania Rule of Evidence 702 speaks to the general admissibility of expert testimony where scientific evidence is at issue, and

provides that a witness who is qualified as an expert may testify "in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by a layperson; (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert's methodology is generally accepted in the relevant field." PA.R.E 702. Thus, to be admissible, the expert testimony must be beyond the knowledge possessed by a layperson and assist the trier of fact to understand the evidence or determine a fact in issue. Commonwealth v. Walker, 92 A.3d 766, 780 (Pa. 2014)(emphasis added).

In opposition to the Commonwealth's Motion *in Limine* to exclude the report and testimony of Dr. Guzzardi, counsel for Appellant May repeatedly offered that Dr. Guzzardi's report and/or proposed testimony would challenge neither the methodology nor the findings related to the blood draw. (10/14/20 N.T., pp. 11, 12, 15, 18, 19, 23). Counsel conceded on multiple occasions that Dr. Guzzardi would agree that the Commonwealth's test results confirmed Appellant May had some level of delta-9-THC, which is the active constituent of marijuana or 9-carboxy-THC marijuana present on the date of the accident. (10/14/20 N.T., pp. 11, 12, 15, 18, 19, 23).

Through Dr. Guzzardi, Appellant May sought to establish the level of marijuana or its metabolite present in Appellant May's blood was insufficient to render him under the influence on February 23, 2018 and thus incapable of operating a vehicle.

Prior to trial and without objection, the Commonwealth amended the Criminal Information to reflect a charge of 75 Pa.C.S. § 3802(d)(1)(i), Driving Under Influence of Alcohol or Controlled Substance, which provides:

> (d) Controlled substances. An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1) There is in the individual's blood **any amount** of a:
>
> (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

75 Pa.C.S. § 3802(emphasis added), 10/14/20 N.T., p.4.

The controlled substance subsection at issue in this case prohibits **any amount** of the controlled substance to be within an accused's system. *See* 75 Pa.C.S. § 3802(d)(1)(emphasis added); Commonwealth v. Hutchins, 42 A.3d 302, 310 (Pa. Super. 2012). "[A] conviction under [Subsection

3802(d)(1)] does not require that a driver be impaired; rather, it prohibits the operation of a motor vehicle by any driver who has any amount of specifically enumerated controlled substance in his blood." Commonwealth v. Etchison, 916 A.2d 1169, 1174 (Pa. Super. 2007), *aff'd*, 943 A.2d 262 (Pa. 2008). Based on the argument and offer of proof presented by Appellant May's trial counsel in opposition to the Commonwealth's Motion *in* Limine, the testimony of Dr. Guzzardi would not have assisted the trier of fact to understand the evidence or to determine a fact at issue. Dr. Guzzardi would not and could not refute the evidence that Appellant May's blood sample included some level of marijuana or its metabolites. The report and testimony of Dr. Guzzardi were properly excluded.

II. *DE MINIMUS* INFRACTION

Appellant's second argument on appeal is the heart of the defense presented at trial and the opposition advocated to the Commonwealth's Motion *in Limine* addressed above. Namely, the amount of marijuana in Appellant's blood is a *de minimus* infraction. Appellant was charged with of 75 Pa.C.S. § 3802(d)(1)(i), Driving Under Influence of Alcohol or Controlled Substance. The applicable statute provides:

> (d) Controlled substances. An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1) There is in the individual's blood **any amount of a**:
>
> (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act;

75 Pa.C.S. § 3802(emphasis added).

Appellant May disregards the plain language of the controlled substances statute. Unlike the subsections addressing alcohol-related offenses which require that an accused's blood alcohol content be within a specific percentage range (*see* 75 Pa.C.S. §§ 3802(a)(2), (b) & (c)), the controlled substance subsection at issue here prohibits any amount of the controlled substance to be within an accused's system. *See* 75 Pa.C.S. § 3802(d)(1); Commonwealth v. Hutchins, 42 A.3d 302, 310 (Pa. Super. 2012). "[A] conviction under [Subsection 3802(d)(1)] does not require that a driver be impaired; rather, it prohibits the operation of a motor vehicle by any driver who has any amount of specifically enumerated controlled substance in his blood." Commonwealth v. Etchison, 916 A.2d 1169, 1174 (Pa. Super. 2007), *aff'd*, 943 A.2d 262 (Pa. 2008). Appellant's second argument on appeal must fail as the plain language of the applicable statute

specifically prohibits the operation of a motor vehicle by any driver who has any amount of specifically enumerated controlled substances, including marijuana, in his or her blood.

III. INSUFFICIENT EVIDENCE TO PROVE OPERATION OR PHYSICAL CONTROL OF VEHICLE

Appellant's third argument on appeal addresses the purported lack of sufficient evidence to establish Appellant May drove, operated, or was in actual physical control of the movement of a vehicle. When reviewing a sufficiency of the evidence claim, Pennsylvania courts must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, is sufficient to support all elements of the offense. Commonwealth v. Moreno, 14 A.3d 133 (Pa. Super. 2011). Additionally, the Superior Court may not reweigh the evidence or substitute its own judgment for that of the fact finder. Commonwealth v. Hartzell, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial so long as it links the accused to the crime beyond a reasonable doubt. Moreno, *supra* at 136; Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa. Super. 2011).

The testimony of the Commonwealth's witness, Officer Janoski in conjunction with Appellant's exhibit D-1, the Affidavit of Probable Cause, were sufficient evidence to prove Appellant May drove, operated and was in actual physical control of the movement of the white box truck which struck an overpass and overturned on King of Prussia Road, Radnor Township, Delaware County, Pennsylvania on February 28, 2018. On February 28, 2018 at 8:33 a.m., police officers from the Radnor Township Police Department were dispatched to the 200 block of King of Prussia Road, Radnor Township, Delaware County, Pennsylvania to respond to a report of a truck that had collided with a bridge and overturned onto the roadway. (3/12/18 Affidavit of Probable Cause, D-1). King of Prussia Road is a two-lane state highway with multiple signage warning of a 10'10" bridge. (10/14/20 N.T., pp. 48-49). Once on scene, Radnor Police Officer Janoski observed a white box truck on its side under a bridge or overpass. (10/14/20 N.T., p. 51). During the crash investigation it was determined the truck was being operated by Rahsaan May who was positively identified by his Pennsylvania Drivers' License number. (3/12/18 Affidavit of Probable Cause, D-1). At trial, Officer Janoski identified Appellant May as the driver of the white box truck. (10/14/20 N.T., p. 52). Appellant May advised Officer Janoski he was

following a GPS map on his phone and simply did not see the signs warning of the bridge height. (10/14/20 N.T., p. 56). Appellant May stated he was traveling southbound on King of Prussia Road when the box of the truck struck the I-beam of the bridge causing the box truck to overturn. (3/12/18 Affidavit of Probable Cause, D-1).

Appellants third argument on appeal must be disregarded. The evidence presented at trial including the testimony of Officer Janoski and Appellant May's exhibit D-1, were sufficient evidence to prove Appellant May drove, operated and was in actual physical control of the movement of the white box truck which struck an overpass and overturned on King of Prussia Road, Radnor Township, Delaware County, Pennsylvania on February 28, 2018.

IV. SENTENCING

Appellant May next contends the trial court erred at sentencing by referring to 75 Pa. C.S. § 3802(d)(2) rather than 75 Pa.C.S. § 3802(d)(1)(i). Prior to trial and without objection, the Commonwealth amended the Criminal Information from 75 Pa. C.S. § 3802(d)(2) to reflect a charge under 75 Pa.C.S. § 3802(d)(1)(i), Driving Under Influence of Alcohol or Controlled

Substance. After rendering a guilty verdict on the sole charge of 75 Pa.C.S. § 3802(d)(1)(i), on October 14, 2020, Appellant May was sentenced on November 23, 2020. At sentencing, the trial court inadvertently referenced 75 Pa. C.S. § 3802(d)(2). (11/23/20 N.T., p. 4). This misstatement is harmless error.

In advance of sentencing both Appellant May's trial counsel and counsel for the Commonwealth submitted sentencing memorandum addressing 75 Pa.C.S. § 3802(d)(1)(i) rather than 75 Pa. C.S. § 3802(d)(2). Appellant May's trial counsel sought a mitigated sentence of twenty (20) days home monitoring and credit "for conditions already met, in considering the State interest in mitigating the danger of COVID-19 cases." (Appellant May's Sentencing Memorandum, p. 2 & 11/23/20 N.T., p. 5). Appellant May was sentenced as follows:

> Trial Court: I sentence you to a period of probation with restrictive conditions of six months to be supervised by the County of Delaware Office of Adult Probation and Parole Services. **The first 20 days of which will be spent on the electronic home monitor.** There will be a separate order which will identify Mr. May's daily schedule for purposes of that electronic monitor.[1] In addition I impose a fine consistent with the statute of $1,000. There are other conditions. He is to complete and follow all the recommendations of the CRN

[1] By Order dated December 29, 2020, the Certificate of Judgment of Imposition of Sentence was amended to permit Appellant May to attend to childcare responsibilities.

evaluation. He is to complete the safe driving classes. He is to complete a substance abuse evaluation and follow the recommendations of any of those evaluations.

* * *

Trial Court: All right $168 representing the laboratory fee for Drug Scan's evaluation of the specimen taken. And that is to be reimbursed to the Radnor Township Police Department. In addition Mr. May is to complete 80 hours of community service. **He is receiving the probation with restricted conditions sentence due to the current Covid-19 conditions in the Commonwealth of Pennsylvania and Delaware County specifically**. Finally he is given credit on the sentencing certificate for any of these conditions which he has completed. He is to comply with the rules and regulations as govern probation and parole and the general rules that have application in Mr. May's case. They would specifically include the DUI rules. **With that I would ask that each of the attorneys take a look at the sentencing certificate before I sign it just to make sure I completed it properly. Mr. Baldini do you have an addition?**

Mr. Baldini[Appellant's Trial Counsel]: Just credit for any conditions already completed.

Trial Court: I did say that. If it appears accurate, I will sign it as prepared. Mr. May, I am signing the sentencing certificate.

(11/23/20 N.T., pp. 11-12)(emphasis added).

Any inadvertent reference to the incorrect subsection of 75 Pa. C.S. § 3802 at sentencing is harmless error. The Pennsylvania Supreme Court has long held that:

> Although a perfectly conducted trial is indeed the ideal objective of our judicial process, the defendant is not necessarily entitled to relief simply because of some imperfections in the trial, so long as he has been accorded a fair trial. A defendant is entitled to a fair trial but not a perfect one. If a trial error does not deprive the defendant of the fundamentals of a fair trial, his conviction will not be reversed.

Commonwealth v. Noel, 629 Pa. 100, 104 A.3d 1156, 1169 (2014) (*quoting* Commonwealth v. Wright, 599 Pa. 270, 961 A.2d 119, 135 (2008)) (brackets and quotation marks omitted).

The sentence issued on November 23, 2020 is consistent with the charge pursued at trial and the verdict rendered under of 75 Pa.C.S. § 3802(d)(1)(i) rather than 75 Pa.C.S. § 3802(d)(2). Indeed, the trial court considering the COVID-19 pandemic accepted the suggested sentence of Appellant May's trial counsel while also noting the minimum sentence of 72-hour confinement. Given the potential COVID-19 impact on Appellant May, the trial court advised as follows at sentencing:

> Trial Court: So it is my understanding that in matters of this nature during that earlier uptick in COVID-19 cases we were imposing sentences six months' probation with restricted conditions and 20 days on the electronic monitor. Supervision to be by the County of Delaware Office of Adult Probation and Parole Services. I am returning to that sentencing scheme for the time being because of concerns that have been described to me by our President Judge and I think most people have read about in the media, that prisons have seen an increase in Pennsylvania in the number of COVID cases. I don't want to put Mr. May in that position where he might contract the infection, and in the event he has been exposed to it I wouldn't want him

> to be bringing it into the prison and exposing others in the prison population and the staff to that infection either. So it seems to me to make sense to proceed in this way for the time being until we are notified that the current wave of cases has begun to subside.

(11/23/20 N.T., pp. 5-6).

Any inadvertent reference to the incorrect subsection of 75 Pa. C.S. § 3802 at sentencing did not deprive Appellant May of the fundamentals of a fair trial and his conviction should not be reversed. Appellant May received the sentence suggested by his trial counsel and trial counsel reviewed and approved the Certificate of Imposition of Sentence prior to its entry on November 23, 2020 without suggesting amendment. This issue on appeal is moot.

V. ABILITY TO PAY FINE

Appellant May's final argument on appeal asserts the trial court erred and imposed an illegal sentence when it ordered a $1,000 fine, without first assessing Appellant May's ability to pay. A claim contesting the authority of the sentencing court to impose costs and fees constitutes a non-waivable challenge to the legality of the sentence. Commonwealth v. Childs, 63 A.3d

323, 325 (Pa. Super. 2013). A claim the trial court imposed an illegal sentence is a question of law and, as such, the scope of appellate review is plenary and the standard of review is *de novo*. Id. The legislature provides for the imposition of certain mandatory costs and fees associated with a criminal conviction. *See, e.g.,* 18 P.S. § 11.1101(a)(1) ("A person who pleads guilty . . . shall, in addition to costs imposed under 42 Pa.C.S. § 3571(c) (relating to Commonwealth portion of fines, etc.), pay costs . . . and may be sentenced to pay additional costs in an amount up to the statutory maximum monetary penalty for the offense committed."); *see also* Commonwealth v. LeBar, 860 A.2d 1105 (Pa. Super. 2004) (discussing mandatory costs and fees in context of court's failure to include mandatory court costs in sentencing order and propriety of subsequent deductions for court costs by Department of Corrections in absence of valid court order).

There is no requirement in Pennsylvania that a trial court consider a criminal defendant's ability to pay the costs of prosecution and/or fees attendant to that prosecution. *See* Childs, 63 A.3d at 326–27 (holding that a criminal defendant is not entitled to a hearing on his ability to pay costs unless a trial court seeks to incarcerate that defendant for failure to pay court costs). Generally, a defendant is not entitled to a pre-sentencing

hearing on his or her ability to pay costs. Commonwealth v. Hernandez, 917 A.2d 332, 336–37 (Pa. Super. 2007). "While [Pennsylvania] Rule [of Criminal Procedure] 706 permits a defendant to demonstrate financial inability either after a default hearing or when costs are initially ordered to be paid in installments, the Rule only requires such a hearing prior to any order directing incarceration for failure to pay the ordered costs." Id. at 337. In Hernandez, the Superior Court was asked to determine whether Rule 706 was constitutional considering Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). It was concluded that a hearing on ability to pay is not required at the time that costs are imposed:

> The Supreme Court . . . did not state that Fuller requires a trial court to assess the defendant's financial ability to make payment at the time of sentencing. In interpreting Fuller, numerous federal and state jurisdictions have held that it is not constitutionally necessary to have a determination of the defendant's ability to pay prior to or at the judgment of sentence . . . [We] conclude that Fuller compels a trial court only to make a determination of an indigent defendant's ability to render payment before he/she is committed.

Hernandez, 917 A.2d at 337.

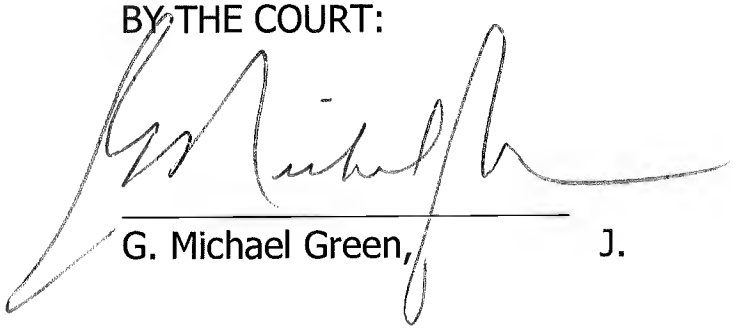
A $1,000.00 fine was imposed at sentencing. (11/23/20 N.T., pp. 11-12). Appellant May is not entitled to a hearing on his ability to pay costs unless a court later seeks to incarcerate Appellant May for the failure to

pay those court costs. Therefore, Appellant's final issue on appeal lacks merit.

CONCLUSION

For the foregoing reasons, the verdict rendered on October 14, 2020, the November 23, 2020 Judgment of Imposition of Sentence and the December 3, 2020 denial of Appellant's Post-Sentence Motion should not be disturbed on appeal.

BY THE COURT:



G. Michael Green, J.