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IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 139 Eastern District Appeal 2021

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

RAHSAAN O. MAY,
Appellant

BRIEF OF APPELLANT

Appeal from the judgment of sentence entered November 23, 2020 in the Delaware County Court of Common Pleas at Docket No. CP-23-CR-0004281-2018.

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June, 2021

TABLE OF CONTENTS

Brief *Page*

TABLE OF CITATIONS

Federal Cases *Page*

Pennsylvania Cases

Other Cases

Constitutional Provisions

Statutes

Court Rules

Other References

STATEMENT OF JURISDICTION

This appeal is from the judgment of sentence entered in a criminal matter. As such, the Pennsylvania Superior Court has jurisdiction pursuant to Section 742 of the Judicial Code, which states –

> The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.

42 Pa. C.S. § 742; *see also* Pa. RAP 341.

This appeal is not within the exclusive jurisdiction of the Commonwealth Court or the Pennsylvania Supreme Court.

JUDGMENT OF SENTENCE IN QUESTION

On November 23, 2020 Judge George M. Green of the Delaware County Court of Common Pleas imposed the judgment of sentence in question –

> Count one: [75 Pa. C.S. § 3802(d)(1)(i)] (ungraded misdemeanor). Driving under the influence of a schedule 1 substance, tier three first offense – six months of restrictive probation with the first twenty days on electronic home monitoring (EHM), a $1,000 fine, $168 lab fee, and eighty hours of community service.[1]

(Sentencing Certificate 11/23/20; NT 11/23/20 at 10-13).[2]

The judgment of sentence became final for appeal when the court denied a timely, counseled post-sentence motion. (Motion 12/1/20; Order 12/3/20; Appendix A at 10-11).[3]

[1] Due to public health concerns, the sentencing court imposed EHM in lieu of the seventy-two-hour confinement period provided for in 75 Pa. C.S § 3804(c)(1). (NT 11/23/20 at 4-6).

[2] The sentencing court later issued an order modifying the terms of Mr. May's EHM, specifically regarding his permitted travel. (NT 11/23/20 at 11; Order 12/29/20).

[3] When the court pronounced the penalty, it mistakenly sentenced Mr. May pursuant to 75 Pa. C.S. § 3802(d)(2). (NT 11/23/20 at 4-5, 10-11; Appendix A at 4, 19-23).

SCOPE AND STANDARD OF REVIEW

As stated in *Morrison v. Commonwealth, Department of Public Welfare*, 646 A.2d 565 (Pa. 1994) –

> 'Scope of Review' refers to 'the confines within which an appellate court must conduct its examination.' In other words, it refers to the *matters* (or 'what') the appellate court is permitted to examine.

Id. at 570 (citation omitted, emphasis in original) (quoting *Coker v. S.M. Flickinger Company, Inc.*, 625 A.2d 1181, 1186 (Pa. 1993)); *see also Commonwealth v. Widmer*, 744 A.2d 745, 750 (Pa. 2000).

The "Standard of Review" relates to the manner in which (or "how") the examination of the relevant evidence is to be conducted; it refers to the degree of scrutiny that is to be applied to the lower court's decision. *See Morrison, supra*; *Widmer, supra* at 751; *see also* Pa. RAP 2111 (note).

Argument I) An appellate court's scope of review when evaluating evidentiary rulings is limited to an examination of the trial court's stated reasons for its decision. *See Commonwealth v. Horvath*, 781 A.2d 1243, 1246 (Pa. Super. 2001) (citation omitted). The standard of review in such matters is whether the trial court abused its discretion. *See Commonwealth v. Minerd,* 753 A.2d 225, 229 (Pa. 2000) (involving admissibility of expert testimony) (citation omitted). A trial court abuses its discretion when it, *inter alia*, misapplies the law. *See Commonwealth v. Levanduski*, 907 A.2d 3, 14 (Pa. Super. 2006) (citation omitted).

Argument II) Generally, sentencing is a matter vested in the trial court's discretion and must be overturned on appeal when the court abuses that discretion. *See Commonwealth v. Campion*, 672 A.2d 1328, 1333-34 (Pa. Super. 1996) (citations omitted). Illegal sentencing claims, however, present non-waivable questions of law for which an appellate court's scope of review is plenary, and its standard of review is *de novo*. *Commonwealth v. Lomax*, 8 A.3d 1264, 1267, n. 3 (Pa. Super. 2010) (citations omitted).

Illegal sentencing issues – including those involving the propriety of fines and restitution – can be raised at any stage of the case, and the court can even address them *sua sponte*. *See Commonwealth v. Childs*, 63 A.3d 323, 325 (Pa. Super. 2013) (citations omitted); *Commonwealth v. Stradley*, 50 A.3d 769, 774 (Pa. Super. 2012) (citation omitted); *Commonwealth v. Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. 2010) (citation omitted).

Accordingly, Mr. May does not include in this brief a Petition for Allowance of Appeal. *See* Pa. RAP 2119(f); 42 Pa. C.S. § 9781(b) (relating to discretionary sentencing claims); *see also Commonwealth v. Mears*, 972 A.2d 1210, 1211 (Pa. Super. 2009) (an illegal sentence must be vacated).

STATEMENT OF THE QUESTIONS INVOLVED

I) 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?

(Answered in the negative by the court below)

II) 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?

(Answered in the negative by the court below)

STATEMENT OF THE CASE

In the early morning hours of February 28, 2018, police responded to a traffic accident in Radnor, Delaware County, Pennsylvania. (NT 10/14/20 at 34-35, 47-48). A box truck apparently attempted to pass under a bridge with insufficient height clearance. (NT 10/14/20 at 49-51). Police believed Appellant, Rahsaan May, operated the truck. (NT 10/14/20 at 41-42, 52-55). Mr. May might have missed signage about the low bridge when he was checking his phone's directions. (NT 10/14/20 at 56).

According to Officer Alex Janoski of Radnor Township, Mr. May smelled of burnt marijuana, had cottonmouth, and exhibited bloodshot, glassy eyes. (NT 10/14/20 at 56-59, 62; Exhibit C1). Mr. May allegedly told police he smoked "a little bit of weed" in the morning. (NT 10/14/20 at 61). After a pat down, Officer Janoski discovered suspected marijuana particles in Mr. May's pocket, but he never submitted them for laboratory testing. (NT 10/14/20 at 63-64, 70-71, 216).

Mr. May participated in field sobriety testing – horizontal gaze nystagmus, one leg stand, and walk and turn – during which he was calm and cooperative. (NT 10/14/20 at 62, 64-65). After purportedly displaying poor balance and difficulty following directions, police opined Mr. May was under the influence. (NT 10/14/20 at 65-66). However, Mr. May did not stumble, fall, or slur words at any other point during the interaction. (NT 10/14/20 at 122-124). Laboratory

testing conducted by Dr. Richard Cohn revealed no more than five nanograms of active THC and sixty-two nanograms of its inactive metabolite in Mr. May's system. (Exhibit C8, as redacted).

Police charged Mr. May with driving under the influence (DUI) and a traffic violation. (*See* Exhibit D1; NT 10/14/20 at 68-69). He waived his preliminary hearing on DUI only, and the magistrate transferred the case to the Court of Common Pleas, where the prosecution lodged an Information. (MJ-32243-CR-76-2018; Information 8/8/20). It ultimately prosecuted Mr. May under 75 Pa. C.S. § 3802(d)(1)(i) – driving under the influence of a schedule 1 substance.[4] (NT 10/14/20 at 3-5, 14-15; Order 10/28/20).

Mr. May intended at trial to call expert witness, Lawrence Guzzardi, MD, to refute the prosecution's evidence, including the field sobriety testing. (NT 10/14/20 at 9-25). Dr. Guzzardi – a board certified toxicologist – would explain that the reported THC levels are trivial. (*See* Memorandum 10/2/20 at Exhibit A).[5] Contrary to the officer's purported observations and Dr. Cohn's belief, such low quantities would not be expected to cause indicia of impairment. (NT 2/24/20 at 4-5; NT 10/14/20 at 9-10, 16-17, 29-30).

[4] The prosecution initially charged a different subsection of driving under the influence, alleging the presence of an additional substance, but it later opted not to pursue it and redacted its laboratory report. (NT 10/14/20 at 4-5, 14, 156-158, 218-219).

[5] Dr. Guzzardi's Report dated August 3, 2020 is attached as "Exhibit A" to the Commonwealth's October 2, 2020 Memorandum.

The prosecution did not dispute Dr. Guzzardi's medical qualifications but nevertheless sought to exclude his testimony. (Memorandum 10/2/20). It argued his testimony was irrelevant because Mr. May faced allegations of operating a vehicle with any amount of THC in his blood. (NT 10/14/20 at 14-15, 157). The court agreed and precluded Mr. May from calling Dr. Guzzardi as a witness. (NT 10/14/20 at 26-31; Order 10/14/20).

A nonjury trial commenced October 14, 2020. Over Mr. May's objection, Dr. Cohn testified for the prosecution as an expert in forensic toxicology. (NT 10/14/20 at 2, 135, 150). Dr. Cohn concluded that, at the time Mr. May's blood was drawn, he recently used marijuana and was under its "impairing psychoactive effects." (Exhibit C8). Dr. Cohn also testified that standard field sobriety tests can be used to detect drug use and that there was a toxicologically significant quantity of THC in Mr. May's system – enough to cause adverse pharmacological actions, including impaired driving abilities. (NT 10/14/20 at 160-161, 165-168, 211-215).

At the conclusion of the trial's evidentiary stage, Mr. May urged the court to acquit him. (NT 10/14/20 at 230-239). Among other things, none of the trial witnesses ever observed him operate the truck. (NT 10/14/20 at 37, 49, 86, 233). After hearing argument, the trial court convicted Mr. May of violating 75 Pa. C.S. § 3802(d)(1)(i). (Information at Ct. 1; NT 10/14/20 at 244; Verdict 10/14/20; Order 10/28/20; Appendix A at 4, 10-11).

On November 23, 2020, the court below sentenced Mr. May to, *inter alia*, six months of restrictive probation and ordered him to pay a $1,000 fine. (*See* Judgment of Sentence in Question, *supra* at 2). At no time did the sentencing court evaluate Mr. May's financial condition or assess his ability to pay fines, costs, or fees. Mr. May filed a timely, counseled post-sentence motion, asserting, *inter alia*, that the court erred in granting the prosecution's request to exclude Dr. Guzzardi's testimony. (Motion 12/1/20).

The court denied Mr. May's post-sentence motion without a hearing, and Mr. May timely appealed to the Superior Court. (Order 12/3/20; Notice 12/31/20). Pursuant to a Pa. RAP 1925(b) concise statement order, Mr. May submitted that the court erred in precluding him from calling Dr. Guzzardi as an expert witness, and that it unlawfully imposed a fine without considering his ability to pay. (Appendix B).

On February 26, 2021, the trial court filed an Opinion (Appendix A) and directed transmittal of the record to the Superior Court, where the case now awaits disposition. (Order 2/26/21). Mr. May files this Brief of Appellant and prays that the Court vacate the judgment of sentence.

SUMMARY OF THE ARGUMENTS

Issue I) The trial court erred in precluding Mr. May from calling Dr. Guzzardi as an expert witness, whose proffered testimony was relevant regarding the credibility of prosecution witnesses and thus could have created reasonable doubt. If permitted to testify, Dr. Guzzardi would have undermined the police officer's testimony about Mr. May's purported signs of impairment. He also would have undermined the prosecution expert's belief that Mr. May recently ingested toxicologically significant amounts of THC and labored under its impairing effects at the time of the blood draw.

Though the government prosecuted Mr. May for driving with any amount of THC in his system, Dr. Guzzardi's proffered testimony was relevant because it would have called the truthfulness of the prosecution's evidence into doubt. The factfinder, in turn, would have been permitted to disregard some or all of that evidence. Dr. Guzzardi's testimony also would have supported a finding that the alleged conduct is *de minumus*, requiring dismissal. The court permitted the prosecution to present expert testimony but denied Mr. May the opportunity to rebut it. He is entitled to a new trial.

Issue II) Imposition of a $1,000 fine constituted an illegal sentence because Mr. May was entitled to a determination at sentencing of whether payment of fines should be reduced or waived based on his financial means

and an ability to pay. 42 Pa. C.S. § 9726(c), (d); Pa. R.Crim.P. 706(C). The trial court failed to make such a determination, in violation of Section 9726, which prohibits the imposition of unaffordable fines – even if the fine would otherwise be "mandatory" for a defendant with means. The Court also violated the Excessive Fines Clauses of Article 1, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the United States Constitution, as interpreted by this Court and the Pennsylvania Supreme Court by failing to consider Mr. May's individual financial circumstances and whether he could meet the subsistence needs for himself and his family without public assistance.

ARGUMENTS

I. 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, BECAUSE THE EXPERT'S PROFFERED TESTIMONY WAS RELEVANT, INCLUDING AS TO CREDIBILITY, AND THUS COULD HAVE CAUSED THE FINDER OF FACT TO DISCREDIT OR DISREGARD SOME OR ALL OF THE PROSECUTION'S EVIDENCE, RESULTING IN ACQUITTAL.

In determining the admissibility of evidence, the trial court must assess its relevance, because relevant evidence is generally admissible. *See Commonwealth v. Hawk*, 709 A.2d 373, 376 (Pa. 1998) (citations omitted); Pa. R.E. 402. The test for relevance is whether the evidence logically tends to establish a material fact in the case or tends to make a fact at issue more or less probable. *See Hawk*, *supra* (citation omitted); Pa. R.E. 401. This includes evidence tending to support or advance a reasonable inference or presumption regarding the existence of a material fact. *See Hawk*, *supra*.

It is within the factfinder's sole province to assess the credibility and weight of the admissible evidence and to resolve conflicting testimony. *See* Pa. SSJI (Crim) § 4.17 (credibility of witnesses). As such, the factfinder is free to disregard

some or all of the evidence. *See Commonwealth v. Bullick*, 830 A.2d 998, 1000 (Pa. Super. 2003) (citations omitted). The maxim "falsus in uno, falsus in omnibus" (or "false in one, false in all") embodies this principle, which modern standard jury instructions incorporate –

> If you decide that a witness deliberately testified falsely about a material point, [that is, about a matter that could affect the outcome of this trial,] you may for that reason alone choose to disbelieve the rest of his or her testimony. But you are not required to do so. You should consider not only the deliberate falsehood but also all other factors bearing on the witness's credibility in deciding whether to believe other parts of [his] [her] testimony.

Pa. SSJI (Crim) § 4.15 (suggested jury charge); *see also Commonwealth v. Parente*, 133 A.2d 561, 563-64 (Pa. Super. 1957).

Regarding expert testimony, a trial court must permit an expert to testify if it will help the factfinder determine a fact in issue or understand the evidence. *See* Pa. R.E. 702; *Commonwealth v. Alicia*, 92 A.3d 753, 760 (Pa. 2014) (citation omitted). An expert witness possesses knowledge, training, skills, experience, or education beyond that of an average layperson. *See* Pa. R.E. 702. An expert's opinion does not need to be conclusive to be admissible. *See Hawk*, *supra* (citation omitted).

The threshold for an expert's qualification is quite liberal: If the witness "has ***any*** reasonable pretension to specialized knowledge on the subject under investigation he may testify and the weight to be given to his evidence is for the

[factfinder]." *Commonwealth v. Bourgeon*, 654 A.2d 555, 557 (Pa. Super. 1994) (emphasis added) (quoting *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 924 (Pa. 1974)); *see also Wright v. Residence Inn by Marriott, Inc.*, 207 A.3d 970 (Pa. Super. 2019) (citation omitted) (precluding expert medical testimony prejudicial).

In *Commonwealth v. Taylor*, 209 A.3d 444 (Pa. Super. 2019), the appellant sped and crashed her vehicle into a utility pole with her young child in a car seat. *Id*. at 446. When police arrived at the accident scene, they noticed she had bloodshot eyes and slurred speech but did not smell of alcohol. *Id*. After she allegedly performed poorly on field sobriety tests by displaying difficulty balancing and following instructions, police charged her with DUI and endangering the welfare of a child (EWOC). *Id*. at 446-47. The court convicted her of both counts. *Id*. at 446.

At the appellant's trial, the parties disputed whether she was impaired by any controlled substances during the crash. *Id*. at 447. The officer testified about her performance on field sobriety tests and suspected she was under the influence. *Id*. The appellant called Dr. Guzzardi – the same doctor at issue here – as an expert to rebut the prosecution's evidence. *Id*. The prosecution did not dispute his qualifications. *Id*. at 450.

Dr. Guzzardi testified the appellant's prescribed medication taken as directed would cause few side effects, but the court barred him from opining about the sobriety testing's lack of utility in identifying drug impairment. *Id*. at 448. On appeal, the Superior Court reversed, holding that the trial court committed prejudicial error in precluding Dr. Guzzardi's opinion about the sobriety tests, which he derived from "years of rigorous scholarship." *Id*. at 449-50. The panel reasoned –

> Dr. Guzzardi would have opined that field sobriety tests are not scientifically proven methods of detecting drug impairment. If admitted into evidence and accepted by the jury, ***this expert opinion would have rebutted the officer's conclusion that Taylor was impaired by drugs***. It was for the jury to weigh that evidence, but it never got the chance.

Id. at 451 (emphasis added) (citation omitted).

In the present case, as in *Taylor*, the prosecution does not dispute Dr. Guzzardi's medical credentials. (Memorandum 10/2/20); *see Taylor*, *supra* at 450. Instead, the prosecution argued – and the trial court agreed – that his proffered testimony is irrelevant, because 75 Pa. C.S. § 3802(d)(1)(i) does not ***require*** proof of impairment. (Order 10/14/20; Appendix A at 11-15). The trial court's reasoning is erroneous, constitutes prejudicial error, and must be reversed. *See Horvath*, *supra* at 1246 (scope and standard of review).

As in *Taylor*, Officer Janoski alleged Mr. May had poor balance and difficulty with instructions during sobriety testing, before opining Mr. May was

under the influence. (NT 10/14/20 at 65). He also claimed Mr. May had cottonmouth and bloodshot, glassy eyes. (NT 10/14/20 at 56, 62).

Similarly, Dr. Cohn – the prosecution's expert – believed post-accident blood tests revealed Mr. May recently used marijuana and was under its "impairing psychoactive effects." (Exhibit C8 at 2). He suggested standard sobriety tests can be utilized to detect drug use and that the quantity of THC in question was toxicologically significant – enough to impair driving ability. (NT 10/14/20 at 160-161, 165-168, 211-215).

Similar to *Taylor*, Dr. Guzzardi would be expected to rebut the prosecution's evidence. *See Taylor*, *supra* at 451. Among other things, he would have refuted the utility of field sobriety testing in this case. *See id*. He would have explained how the trivial THC levels at issue would not be expected to cause indicia of impairment, notwithstanding Officer Janoski's purported observations. (NT 10/14/20 at 9-10, 16-17, 29-30). He also could have contradicted Dr. Cohn's claims that blood results indicated Mr. May recently ingested toxicologically significant quantities of marijuana and labored under its psychoactive effects at the time his blood was drawn. (*Compare* Dr. Guzzardi Report 8/3/20 *with* Exhibit C8).

Like in *Taylor*, Dr. Guzzardi's testimony would have highlighted the dispute about Mr. May's alleged impairment, calling into doubt the credibility of two

prosecution witnesses. *See Taylor*, *supra* at 447. Accordingly, the judge sitting as factfinder would have been justified in disregarding the entirety of that prosecution evidence, including but not limited to the blood sample's chain of custody and the lab report (Exhibit C8) of which Dr. Cohn approved. *See* Pa. SSJI (Crim) § 4.15; *see also Parente*, *supra*. The trial record without this evidence would be patently insufficient to support Mr. May's conviction under 75 Pa. C.S. § 3802(d)(1)(i).

The prosecution placed Mr. May's alleged impairment at issue, because it believed doing so was relevant and necessary to secure a "driving ***under [the] influence***" conviction. *See* 75 Pa. C.S. § 3802 (emphasis added). Dr. Guzzardi's testimony would have likely exposed substantial flaws in the prosecution's case. *See Bullick*, *supra* (reiterating that factfinder is free to disbelieve some or all evidence). At the very least, his expert knowledge of toxicology and medicine would have helped the factfinder "understand the evidence." *See Alicia*, *supra* at 760; Pa. R.E. 702.

Dr. Guzzardi's proffered testimony was also relevant to explain how Mr. May's alleged conduct – i.e. operating a vehicle with trivial THC levels in his system – is *de minimus* and likely did not in any way contribute to the traffic accident. *See* 18 Pa. C.S. § 312 (*de minimus* infractions); *see also* Pa. R.E. 401-402 (relevance). A determination that the conduct at issue did not cause the harm or evil the DUI statute is designed to prevent would ***require*** dismissal. *See* 18 Pa.

C.S. § 312(a) ("The court shall dismiss"); *see also Commonwealth v. Gemelli*, 474 A.2d 294, 300 (Pa. Super. 1984) (citation omitted) (defendant not required to preserve *de minimus* infractions issue).

The court erred in precluding Mr. May from calling Dr. Guzzardi as a witness. It permitted the prosecution to present expert testimony and other evidence of Mr. May's alleged impairment. (NT 10/14/20 at 2, 65, 135, 150, 218). Mr. May "never got the chance" to rebut it. *See Taylor*, *supra* at 451. The trial court's abuse of discretion deprived Mr. May of due process and a fair trial. *See* U.S. Const. Amend. VI, XIV; Pa. Const. Art. 1, § 9. He is entitled to a new trial. *See Taylor*, *supra*; *see also Hawk*, *supra* at 377 (finding that trial court erred in precluding expert testimony).

II. IMPOSITION OF A "MANDATORY" FINE CONSTITUTED AN ILLEGAL SENTENCE BECAUSE THE TRIAL COURT FAILED TO CONDUCT AN INQUIRY INTO APPELLANT'S ABILITY TO PAY IT.

At sentencing, Mr. May was found guilty of 75 Pa. C.S. § 3802(d)(1) and was sentenced to six months of probation with electronic monitoring for the first twenty days, plus a $1,000 fine, the lowest amount authorized by the sentencing statute. (NT 11/23/20 at 11). Imposition of the $1,000 fine constituted an illegal sentence because he was entitled to a determination at sentencing of whether payment of fines should be reduced or waived based on his financial

means and an ability to pay. 42 Pa. C.S. § 9726(c), (d); Pa. R.Crim.P. 706(C).[6] The trial court's failure to make such a determination and impose a fine that the record showed he could afford violated Section 9726, as that statute prohibits the imposition of unaffordable fines – even if the fine would otherwise be "mandatory" for a defendant with means.[7]

Moreover, by failing to consider Mr. May's individual financial circumstances and whether he could meet the subsistence needs for himself and his family without public assistance, the Court also violated the Excessive Fines Clauses of Article 1, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the United States Constitution, as interpreted by this Court and the Pennsylvania Supreme Court.

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[6] Because this argument goes to the legality of the sentence, it cannot be waived. *See Commonwealth v. Boyd*, 73 A.3d 1269, 1272 (Pa. Super. 2013) (*en banc*); *Commonwealth v. Gary-Ravenell*, 2020 WL 6257159 at *7 (Pa. Super. 2020) (*en banc*) (non-precedential) ("In light of the foregoing discussion, we conclude an allegation that the trial court failed to consider a defendant's ability to pay before imposing a fine is a challenge to the legality of his sentence, and is not subject to waiver.").

[7] Notably, the trial court's opinion did not address the issue that imposition of *fines* was illegal in the absence of any consideration of Mr. May's ability to pay. Rather, the trial court's opinion discusses ability to pay in the context of *costs and fees*. (*See* Appendix A at 23-26). Costs and fines are distinct legal concepts. Costs are not considered punishment, are akin to a collateral consequence and "are a reimbursement to the government for the expenses associated with the criminal prosecution." *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. 2014). Conversely, fines are "direct consequences and, therefore, punishment." *Id*. Therefore, the trial court's opinion does not address the issue raised by Mr. May in this appeal and in his Rule 1925 Statement.

A. The trial court imposed a fine without any evidence that Mr. May had the ability to pay it and without making any finding on the record that he had the ability to pay it.

To lawfully impose a fine, a trial court must first determine whether the defendant is or will be able to pay, and Section 9726 prohibits a court from imposing a fine without such record evidence. The trial court here conducted no inquiry into Mr. May's financial resources or ability to pay the fine imposed. The court made no finding, either at the sentencing hearing or in its Rule 1925(a) Opinion (Appendix A) that Mr. May had the ability to pay the fine.

The only evidence of record regarding Mr. May's ability to pay was that Mr. May has three children – ages 6, 3 and 1 years old. (NT 11/23/20 at 7). He supports the middle child and takes care of the oldest and youngest during the days when the mother is at work. (*Id*). He works nights doing packaging for FedEx and works thirty-six hours per week. (*Id*). There was no evidence regarding his salary and no pre-sentence investigation was prepared. This information is insufficient to establish Mr. May had an ability to pay the $1,000 fine that was imposed.

While fines are generally a sentencing option, Section 9726 places clear limits on the ability of sentencing courts to impose fines on defendants who cannot afford to pay –

> **(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.

Multiple opinions from this Court and the Pennsylvania Supreme Court reiterate that a fine is lawful only if the record shows that the defendant is or will be able to pay. Whether a defendant raises concerns about his ability to pay is "wholly irrelevant" to the sentencing court's obligation. *Commonwealth v. Ford*, 217 A.3d 824, 829 (Pa. 2019). "Subsection 9726(c) does not put the burden on defendants to inform the court that they might have trouble paying a fine. Instead, it instructs sentencing courts not to impose a fine absent record evidence of the defendant's ability to pay." *Id.*; *see also Commonwealth v. Fusco*, 594 A.2d 373, 375 (Pa. Super. 1991) (vacating a fine and remanding where the trial court failed to make a record of the defendant's ability to pay before imposing a fine).

Thus, to comply with § 9726 and the Supreme Court's instruction in *Ford*, two things must occur at sentencing. First, the record must show that the defendant is or will be able to pay a fine: "Consistent with th[e] unambiguous statutory mandate [of § 9726] . . . a sentence is illegal when the record is silent as to the defendant's ability to pay the fine imposed." *Ford*, 217 A.3d at 828; *see Commonwealth v. Allshouse*, 924 A.2d 1215, 1228 (Pa. Super. 2007) ("[A] trial court must enter specific findings that would allow it to determine whether a defendant could pay a specific amount in fines."), *aff'd*, 985 A.2d 847 (Pa. 2009), *cert. granted, judgment vacated on other grounds*, 562 U.S. 1267 (2011); *Fusco*, 594 A.2d at 375 (vacating fine because "no inquiry was made as to his ability to pay the fine imposed"). As these cases explain, it is the sentencing court's responsibility to take the steps necessary to create a sufficient record.

Second, based on the evidence before it, the trial court must make findings on the record regarding the financial ability of the defendant to pay – and, if appropriate, the reasonable likelihood that the defendant will be able to pay in the future. *See Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. 2005) (trial court failed to make "specific findings of appellant's ability to pay the fine imposed," in violation of § 9726); *Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. 1997), (trial court "must make an on-the-record determination regarding appellant's financial resources and his ability to pay the imposed fine").

That requirement bars a court from imposing a fine in the hope that the defendant will obtain an unexpected windfall. *See Commonwealth v. Gaddis*, 639 A.2d 462, 470-72 (Pa. Super. 1994) (vacating an "astronomical fine" where the sentencing judge failed to make a record of the defendant's ability to pay and instead relied on rumors that the defendant might experience a future windfall).

It is clear that the record here is insufficient to establish that Mr. May has an ability to pay a specific amount of fines, and, of course, the trial court did not make any findings on the record that he could afford to pay it. This Court has repeatedly rejected that mere knowledge of a defendant's employment is sufficient to find that the defendant is able to pay a fine. For example, in *Commonwealth v. Schwartz*, 418 A.2d 637, 640 (Pa. Super. 1980), this Court held that the record was insufficient for the trial court to impose a fine when all it reflected was that the defendant "sold $980 worth of drugs to the undercover agents the previous year and was currently working with his father in the construction industry, 'bringing home approximately $150 per week.'"

As the Court explained, "This was hardly enough information to make an intelligent finding as to appellant's ability to pay the fine." *Id*. And in *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. 1982), this Court held that a presentence report addressing "sporadic employment history, but [that] does not disclose his current income," was insufficient, particularly where "there is no

indication in the record that the sentencing court considered appellant's indebtedness (as reflected in his petition for appointment of counsel and his in forma pauperis petition), or even that he lived at home, was single, and had no dependents." *See also Thomas*, 879 A.2d at 264 (invalidating fine where court "stated merely that it had 'all the appropriate information,' knowing appellant's history and his recent ten year sentence to federal prison"); *Commonwealth v. Reardon*, 443 A.2d 792, 795 (Pa. Super. 1981) (court failed to consider the defendant's financial status and reasons for imposing a fine); *Fusco*, 594 A.2d at 355-56 (information that a defendant would be working, without an indication of income, was insufficient to show he could pay a fine).

The situation is no different here, as the trial court lacked such basic information as how much income Mr. May takes home each month, how much his basic living expenses – rent, utilities, transportation, medical care – cost each month, and how much he spends on dependent care for his children. Accordingly, imposition of a fine in this matter constitutes an illegal sentence.

B. The fine imposed constitutes an illegal sentence in violation of Pa. R.Crim.P. 706(C).

In addition to constituting an illegal fine under Section 9726, the $1,000 fine also constitutes an illegal sentence because it was imposed in violation of Rule 706(C). That provision provides that "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). Accordingly, without considering the burden imposed upon the defendant's financial resources in determining the amount, the fine is illegal.

As the *en banc* decision in *Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. 1975) (*en banc*) explained, "In order to impose a fine, a sentencing judge must consider provisions of the Pennsylvania Rules of Criminal Procedure. Rule [706](C)," and the failure to do so meant that a trial court "did not comply with provisions of Rule [706]."[8] This Court recently affirmed that Martin remains good law with respect to what Rule 706(C) requires when courts impose fines. *See Commonwealth v. Lopez*, 248 A.3d 589, 595 (Pa. Super. 2021) (*en banc*) (explaining that the ruling in *Martin* does not apply to costs but without overruling that decision). Therefore, the imposition of this fine constitutes an illegal sentence. The court failed to consider Mr. May's ability to pay as required by Pa. R.Crim.P. 706(C) and *Martin*.

C. <u>When a statute imposes a specific fine as the sentence for an offense, the rules of construction require that the sentencing court consider the defendant's ability to pay that fine pursuant to 42 Pa. C.S. § 9726.</u>

[8] At the time, Rule 706 was numbered 1407, but without any substantive differences.

Section 9726 could not be any clearer that courts must consider a defendant's ability to pay a fine at sentencing. In its relevant portions, it 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). Indeed, the Supreme Court described it as an "unambiguous statutory command requiring record evidence of the defendant's ability to pay." *Ford*, 217 A.3d at 829.

This unmistakable command 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) as it applies to 75 Pa. C.S. § 3802(d)(1) –

> **(c) 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).

Nevertheless, contrary to the plain meaning of Section 9726, a panel of this Court reached a different conclusion in *Commonwealth v. Cherpes*, 520 A.2d 439 (Pa. Super. 1987), with respect to a now-repealed sentencing provision, ruling that the statute at question there was a "specific penalty provisions [that] prevail[s] over more general penalty provisions" as a matter of statutory construction. *Id*. at 449. *Cherpes* reasoned that Section 9726 is general, but a statute imposing a specified fine is specific and thus the specific governs as a matter of statutory authority. It thus found a conflict between Section 9726 and the "shall" verbiage in the statutes creating certain fines.

But the *Cherpes* panel decision shrugged off the application of fundamental rules of statutory construction: that statutes related to the same subject be read *in pari materia*; that statutes "shall be construed, if possible, so that effect may be given to both"; and that a specific provision controls over a general one *only if* the two provisions are irreconcilable. 1 Pa. C.S. § 1933. 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).

Cherpes' failure to follow and apply the rules of construction is apparent on its face and renders its conclusion invalid. A specific provision prevails over a general one only in narrow and specific circumstances; such situations are exceedingly rare. That does not mean this Court has to overrule *Cherpes*, which a panel of this Court cannot do. But it does mean that this Court should cabin *Cherpes* to the specific fine at issue in that case, which has long-since been repealed. *See Mayhugh v. Coon*, 331 A.2d 452, 456 (Pa. 1975) ("The doctrine of stare decisis was never intended to be used as a principle to perpetuate erroneous principles of law"); *Commonwealth v. McClelland*, 233 A.3d 717, 742 (Pa. 2020) (Saylor, J. concurring and dissenting) (finding *Verbonitz* so insufficiently reasoned that it fails to qualify for precedential treatment); *Commonwealth v. McCormick*, 772 A.2d 982, 984 (Pa. Super. 2001) (holding that the trial court erred by applying the holding of a prior panel decision to the case *sub judice*, while also acknowledging that a panel may not overrule a prior panel's decision).

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 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[9] –

> (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

[9] This complementing of statutes also applies with summary offense provisions.

> (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.

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).

In similar circumstances involving conflicts between local ordinances and state statutes, this Court has explained that "irreconcilable" means that "simultaneous compliance . . . is impossible." *Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adam Twp*., 32 A.3d 587, 594 (Pa. 2011). By contrast, here, simultaneous compliance with both of these statutes would be quite simple: again, they can be read together to provide that these fines are mandatory ***unless the defendant cannot afford them***. This reading gives effect to the language of Section 9726 as well as the fines in question. And under this construction, there was no evidence Mr. May could afford to pay this fine, so it should not have been imposed. Absent a specific instruction that a fine must be imposed even on those who cannot afford it, Section 9726 must be given effect.

This Court has *never* engaged in that proper analysis, with *Cherpes* as the only, insufficient attempt. In another panel decision, *Commonwealth v. Gipple*, 613 A.2d 600, 600 n. 1 (Pa. Super. 1992), the Court stated in a footnote that "Appellant 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."[10] In other words, the *Gipple* court *sua sponte* mused about an argument that was not even argued and was not before it. That *dicta* has no value for unpacking the legal issues. It lacks any persuasive or precedential authority.

The Supreme Court explicitly and intentionally left this matter unaddressed in *Ford*, as that decision addressed only the discretionary, non-mandatory fines that were subject to that appeal. *See Ford*, 217 A.3d at 827 (explaining in the procedural background section that the Superior Court panel cited *Gipple* to distinguish between "mandatory" and discretionary fines, but only the discretionary fines were appealed to the Court). Accordingly, it is time for this Court to conduct the proper statutory analysis that is consistent with the rules of construction. Doing so shows that Section 9726 – and Rule 706(C) – apply even to the otherwise "mandatory" fine at issue here.

D. <u>If Section 9726 and Rule 706(C) do not apply to this fine, then its imposition would be unconstitutional under the Excessive Fines Clauses of the Pennsylvania and U.S. Constitutions.</u>

If this Court rules that Section 9726 does not apply to the "mandatory" fine in Section 3804, then the trial court imposed an unconstitutional fine in violation of Article 1, Section 13 of the Pennsylvania Constitution and the Eighth

[10] *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.

Amendment to the U.S. Constitution, which prohibit "excessive fines." As set forth below, 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 Mr. May's ability to pay that fine and the impact it would have on his ability to meet the subsistence needs of himself and his family. Yet this Court can avoid a constitutional ruling – which would cast grave doubt on the constitutionality of not only Section 3804 but a host of other fines imposed on indigent defendants – by interpreting Section 9726 in a manner that at a minimum comports with the constitutional floor. *See*, *e.g.*, *Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020) (citing *Commonwealth v. Herman*, 161 A.3d 194, 212 (2017)) ("Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction").

The legislature wisely adopted Section 9726(c) and (d) with the effect of prohibiting courts from imposing fines in violation of the Excessive Fines Clause, and the "reasonable construction" of that provision as applying to the fine set forth in Section 3804 avoids any constitutional infirmity.[11] Otherwise,

[11] Because this argument goes to the legality of the sentence, it cannot be waived. *See Boyd*, 73 A.3d at 1272; *Gary-Ravenell*, 2020 WL 6257159 at *7 (non-precedential) ("In light of the foregoing discussion, we conclude an allegation that the trial court failed to consider a defendant's ability to pay before imposing a fine is a challenge to the legality of his sentence, and is not subject to waiver."); *see also Commonwealth v. Eisenberg*, 98 A.3d 1268, 1278 (Pa. 2014) (holding that "if the Court were to find that the mandatory fine . . . is constitutionally excessive,

Section 3804 would be unconstitutional. *See State v. Yang*, 452 P.3d 897, 904 (Mont. 2019) (sentencing statute "is facially unconstitutional to the extent it requires a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine is excessive").

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. As the Pennsylvania Supreme Court recently explained, it was not until the mid-1990s when "this Court began to more critically analyze the Excessive Fines Clause in the context of forfeiture matters" after only a handful of prior cases that lacked any analysis or "developed reasoning." *Eisenberg*, 98 A.3d at 1281-82. As part of this renewed interest in the Clause, this Court has already held that sentencing courts must consider the "individual's ability to pay" as part of the analysis to determine whether imposition of the fine would be excessive for that individual. *Heggenstaller*, 699 A.2d at 769. The Pennsylvania Supreme Court echoes that requirement. *See Commonwealth v. 1997 Chevrolet &*

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the non-discretionary fine imposed would be illegal," and a "mandatory fine on grounds that it is unconstitutionally excessive under Article 1, § 13, implicates the legality of the sentence for purposes of Section 9781"); *accord Commonwealth v. Brown*, 71 A.3d 1009, 1015-16 (Pa. Super. 2013) (A "claim that a sentence violates an individual's right to be free from cruel and unusual punishment is a challenge to the legality of the sentence, rendering the claim unwaivable"); *Commonwealth v. Nibblins*, 2021 WL 248537 at *5 n. 2 (Pa. Super. 2021) (non-precedential). In addition, raising this in the context of a canon of statutory interpretation, this argument cannot be waived any more than any other statutory interpretation argument that implicates the legality of the sentence.

Contents Seized from Young, 160 A.3d 153, 186 (Pa. 2017). The Supreme Court has ruled that the Excessive Fines Clause prohibits such fines even if the sentencing statute imposes a mandatory fine/penalty. *Eisenberg*, 98 A.3d at 1282.[12] Accordingly, even for seemingly "mandatory" fines like Section 3804, the failure to comply with the Excessive Fines Clause renders a fine unconstitutional.

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. As our Supreme Court has explained, the proportionality analysis includes consideration of whether it "would deprive the property owner of his or her livelihood," i.e. "his current or future ability to earn a living." *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," the Supreme Court pointed to historical research showing that the clause is tailored to "personal

[12] This Court considered and rejected an excessive fines challenge to a fine in *Gipple*, but that decision was abrogated by *Eisenberg*, which found a mandatory fine to nevertheless be excessive. The *Gipple* decision held that an inquiry "into appellant's ability to pay is irrelevant to the question of whether the fine is excessive. Such an argument is more properly characterized as a challenge to appellant's due process rights." *Gipple*, 613 A.2d at 602. Yet as is described in this section, *Heggenstaller* and *1997 Chevrolet* have rejected that limitation and instead have expressly held that consideration of the defendant's ability to pay *is* required as part of the Excessive Fines Clause analysis. Moreover, the binding test for whether a fine is excessive is not whether it is "irrational or unreasonable," as the *Gipple* court stated, but instead whether it is disproportionate. *Gipple* is no longer good law.

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").[13]

The historical record supports the conclusions of the Pennsylvania and U.S. Supreme Court, showing that a central concern of the Clause dating back to the adoption of Magna Carta in 1215 was to preserve a minimum basic subsistence for the convicted individual and his family. Chapter 14 of Magna Carta addressed the imposition of "amercements" (what today are fines) –

> A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement" [salvo contenemento suo]; and a

[13] An *Edmunds* analysis is not required because Mr. May does not allege that the Pennsylvania and U.S. Constitutions should be subject to separate interpretation. *See Eisenberg*, 98 A.3d at 1279 n. 12 (Pa. 2014) (citing *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991)).

> merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "waynage"--if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.[14]

The "consensus" view of this provision is that "to save a man's 'contenement' was to leave him sufficient for the sustenance of himself and those dependent on him" and that he could not "be pushed absolutely to the wall" such that he would have to sell items associated with his livelihood to satisfy the fine.[15] By also protecting the basic property of merchants and feudal serfs, Magna Carta set forth that "a minimum core level of economic viability was protected notwithstanding the imposition of monetary penalties." *Id*. 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*").

These fundamental limits on unaffordable fines have been part of Pennsylvania law since pre-Revolution times and continue to the present day. In 1682, William Penn and the other founders of Pennsylvania wrote in the "Laws

[14] Magna Carta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.). The principle predates even Magna Carta. As Blackstone put it, the concept of salvo contenemento was "[a] rule that obtained even in Henry the Second's time, and means only that no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear." 4 William Blackstone, Commentaries *372-73 (Univ. of Chi. Press ed. 1979).

[15] Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833 (2013) (quoting William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 293 (2d ed. 1914)).

Agreed Upon in England" that "all Fines shall be moderate, and saving men's Contenements, Merchandize or Wainage."[16] The 1776 Constitution provided that "all fines shall be moderate," and the 1790 Constitution adopted the same framing as the Eighth Amendment to the U.S. Constitution that had been adopted a year earlier, prohibiting "excessive fines." 1790 Pa. Const. Ch. II, § 29; 1790 Pa. Const. Art. IX, § 13. Throughout this, the prevailing view in Pennsylvania continued to be that the ban on excessive fines was a ban on fines that would interfere with a person's subsistence living. In 1864, Senator Edgar Cowan of Pennsylvania – addressing the purpose of the Eighth Amendment on the floor of Congress – repeated the instruction from Magna Carta that a constitutional fine must "save[] to the freeholder his tenement, to the merchant his merchandise, to the villein his wainage," and he went on to explain that such a fine must "be determined from the condition of the man how much he could pay without touching the sustenance of his wife and children."[17]

The takeaway from the historical record is that the Excessive Fines Clause is fundamentally concerned with ensuring that an individual does not have to pay a fine that is so much that it will compromise his livelihood and subsistence – and

[16] Laws Agreed Upon in England, Section XVIII (1682), https://www.paconstitution.org/texts-of-the-constitution/colonial (last accessed May 29, 2021).

[17] Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833 (2013) (quoting Cong. Globe, 38th Cong., 1st Sess. 561 (1864) (statement of Sen. Edgar Cowan)).

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"). For example, in *1997 Chevrolet*, the Pennsylvania Supreme Court expressed a concern about forfeiture that would take "property [that] is essential to the owner's livelihood" such as "whether the property is a family residence," which is simply a modern reflection of an individual's subsistence needs. *See 1997 Chevrolet*, 160 A.3d at 188; *see also Nez Perce County Prosecuting Attorney v. Reese*, 136 P.3d 364, 371 (Idaho 2006) ("Additionally, the effect of forfeiture on the defendant's family or financial circumstances is relevant").

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.

As in the past, one of the ways in which a fine can be excessive is if it deprives a person of his literal tools of the trade that allowed him to put food on the family for himself and his family. But in modern society, we also have another straightforward standard that goes to whether a person can meet those basic subsistence needs: the receipt of lifesaving, means-based public assistance to meet those basic life needs. When the government has determined that a person is too poor to feed himself and requires food stamps through the Supplemental Nutrition Assistance Program, or has such significant disabilities that he cannot work and must live off of Social Security benefits, and must subsist on Supplemental Security Income ("SSI"), the government has already determined that the person has no sustainable economic livelihood; the person is unable to subsist without that public assistance. The reality of such benefits is that they are the difference, on a month-to-month basis, between subsistence and destitution.[18]

[18] For this reason, the allowance of payment by installment (Pa. R.Crim.P. 706(B) does not avoid the excessiveness of a fine that can only be paid through use of subsistence benefits. The receipt of such benefits is always conditioned on a lack of other assets, meaning that, on an ongoing basis, these benefits are the person's subsistence, which the Clause says cannot be forfeited.

Put simply, the Excessive Fines Clause bars a penalty that requires surrender of a person's means of subsistence, including means-based assistance. Otherwise, a person who the government already determined is too poor to even support himself and his family would be compelled to dip into whatever limited "means of living" he does have, simply pushing him farther below the government's poverty threshold. *1997 Chevrolet*, 160 A.3d at 297. For that reason, 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 the Supreme 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. The plainest evidence of this would be if he receives any

means-based public assistance that the government allocates *only* and *specifically* for individuals who cannot meet those needs.

This Court, however, need not use this case to outline the contours of the Excessive Fines Clause. By instead following the Supreme Court's instruction under the canon of constitutional avoidance to adopt the "reasonable construction" of Section 9726 that comports with the floor set by the Excessive Fines Clause, it can avoid deciding the constitutional issue. All the Court must hold is that Section 9726 does what it says: prohibits unaffordable fines and requires consideration of the defendant's financial circumstances when setting the amount of a fine. Otherwise, it must rule on the 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 his subsistence.

CONCLUSION

Based upon the arguments raised herein, the judgment of sentence must be vacated and the matter remanded for a new trial; and in the alternative, remanded for a new sentencing hearing to address Mr. May's ability to pay a fine.

Respectfully submitted,

/s/ *Steven M. Papi*

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Attorney for Appellant,
Rahsaan May

/s/ *Emily Mirsky*

Emily Mirsky
Attorney for Appellant,
Rahsaan May

CERTIFICATE OF COMPLIANCE

Pursuant to the Pennsylvania Rules of Appellate Procedure, I hereby certify that the foregoing document (Brief of Appellant) complies with the following requirements –

1. This brief was prepared with word processing software, using proportionately spaced Times New Roman fourteen-point typeface, with footnotes in twelve-point typeface. *See* Pa. RAP 124.

2. This brief consists of forty-four pages plus a cover page, tables, and a certificate of service. The total word count, as calculated by word processing software, falls below the 14,000-word limit. *See* Pa. RAP 2135. Including the cover page, tables, notes, and this certificate, but excluding appendices, the brief consists of less than 11,700 words.

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* Pa. RAP 127.

/s/ *Steven M. Papi*

Steven M. Papi
Attorney for Appellant
Attorney No. 206695

APPENDIX A

TRIAL COURT OPINION

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.

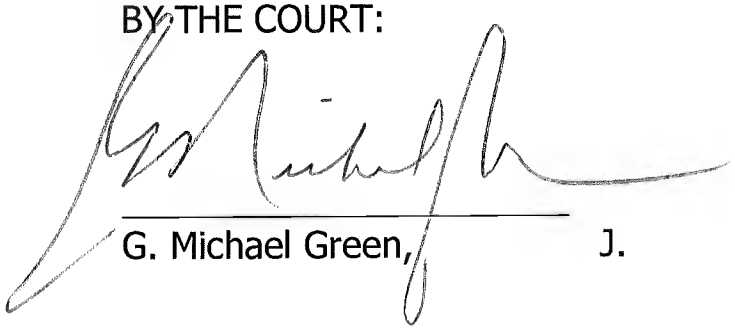
A $1,000.00 fine was imposed at sentencing. (11/23/20 N.T., pp. 11-12). Appellant May is not entitled to a hearing on his ability to pay costs unless a court later seeks to incarcerate Appellant May for the failure to

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.

APPENDIX B

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Steven M. Papi
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IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-23-CR-0004281-2018
V.	:	OTN: U 567935-4
RAHSAAN O. MAY, Defendant/Appellant	:	(139 EDA 2021)

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Defendant/Appellant, above-named, complains of the following –

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 of the prosecution's evidence, thereby resulting in acquittal.

2) Mr. May's conviction and judgment of sentence for count one, allegedly driving with five nanograms of suspected marijuana (Delta-9-THC) in his blood, should be vacated as a *de minimus* infraction, especially where his

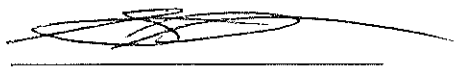
purported conduct did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction.

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.

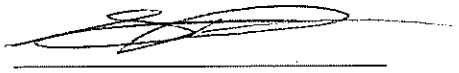
Respectfully submitted,



Steven M. Papi
Attorney for Defendant,
Rahsaan May

CERTIFICATE OF COMPLIANCE

I hereby certify 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.



Steven M. Papi
Office of the Public Defender
Attorney No. 206695

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I did serve a copy of the foregoing document upon the following persons by personal service. This manner of service satisfies the requirements of the Pennsylvania Rules of Appellate Procedure.

Judge George M. Green
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Delaware County Courthouse
201 West Front Street,
Media, Pennsylvania 19063

Catherine Kiefer, Esquire
Office of the District Attorney
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Date: 1/22/21

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I did serve a copy of the foregoing Brief of Appellant upon the following person electronically by way of the Pacfile system –

Frederick J. Stollsteimer, Esquire
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Attorney for Appellee
Commonwealth of Pennsylvania

Dated: 6/24/21

/s/ *Steven M. Papi*

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