

**IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 894 MDA 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

BRIAN SMETANA,

Appellant.

REPLY BRIEF FOR APPELLANT BRIAN SMETANA

Appeal from Order of the Court of Common Pleas
of Lebanon County, Pennsylvania dated April 24, 2017

Andrew Christy
Pa. I.D. No. 322053
Mary Catherine Roper
Pa. I.D. No. 71107
American Civil Liberties Union
of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513 x138
achristy@aclupa.org
mroper@aclupa.org

Jacqueline M. Lesser
Pa. I.D. No. 204622
Kevin M. Bovard
Pa. I.D. No. 310818
Baker & Hostetler LLP
2929 Arch Street – 12th Fl.
Philadelphia, PA 19104
215-568-3300
jlesser@bakerlaw.com
kbovard@bakerlaw.com

Counsel for Appellant

TABLE OF CONTENTS

ARGUMENT1

 A. The Court of Common Pleas abused its discretion when it implicitly held that Mr. Smetana had the ability to pay his past due fines and costs, a purge amount set by the court, and \$100 per month in the future.....1

 B. This Court should provide clear guidance to Pennsylvania’s trial courts.....3

CONCLUSION.....5

TABLE OF AUTHORITIES

<i>Barrett v. Barrett</i> , 368 A.2d 616 (Pa. 1977).....	2
<i>Commonwealth v. Gaskin</i> , 472 A.2d 1154 (Pa. Super. Ct. 1984)	4
<i>Commonwealth v. Lepre</i> , 18 A.3d 1225 (Pa. Super. Ct. 2011)	3
<i>Commonwealth v. Ruiz</i> , 470 A.2d 1010 (Pa. Super. Ct. 1984).....	4
<i>Fuller v. Oregon</i> , 417 U.S. 40 (1974).....	4
<i>Gerlitzki v. Feldser</i> , 307 A.2d 307 (Pa. Super. Ct. 1973) (en banc).....	3, 4
Pa.R.Crim.P. 706.....	2, 4
<i>Stein Enterprises, Inc. v. Golla</i> , 426 A.2d 1129 (Pa. 1981)	4

ARGUMENT

A. The Court of Common Pleas abused its discretion when it implicitly held that Mr. Smetana had the ability to pay his past due fines and costs, a purge amount set by the court, and \$100 per month in the future.

The Commonwealth does not contend that the court below conducted a proper ability to pay hearing before finding Mr. Smetana in contempt, sentencing him to jail with a \$200 purge, and then ordering him to pay \$100 per month going forward. (R. 22a). As set forth in Appellant's opening brief, the court below failed to follow the law and for that reason its orders should be vacated.

The Commonwealth argues, instead, that the court below did not abuse its discretion because there was evidence that Mr. Smetana had recently started working, had previously paid his fines and costs consistently in the prior year, and believed that he had work waiting for him upon his release. Appellee Br. at 7. The Commonwealth's argument is contrary to the law. "Abuse of discretion" is a highly deferential standard of review, but it is not a meaningless one.

The evidence identified by the Commonwealth does not come close to supporting a finding that Mr. Smetana willfully failed to keep up with his payment plan. Nor does it come close to supporting a finding that Mr. Smetana had the ability to pay \$200 to avoid incarceration. Nor, finally, does the evidence support a finding that Mr. Smetana could pay \$100 per month in the future as a payment plan.

What the evidentiary record shows is that Mr. Smetana had previously been employed and able to pay—and indeed he did make regular payments towards his fines and costs for more than a year while employed. (R. 12a; R. 36a). But by the time of the trial court’s hearing, Mr. Smetana had been out of regular work for approximately six months because of his alcoholism, and he had been homeless before moving in with his girlfriend. (R. 36a – 36a). Although he suggested to the court that his sister may be able to post \$200 to keep him out of jail, she in fact refused to post the money because he already owed her \$4,000. (R. 22a; R. 44a). Regardless, the only financial consideration is of Mr. Smetana’s ability to pay, not the hypothetical ability of his friends and family, as their resources cannot be imputed to him. *See Barrett v. Barrett*, 368 A.2d 616, 623 (Pa. 1977) (civil contempt purge condition valid only if the defendant “had the present ability to comply with the conditions set by the court *for purging himself* of his contempt”) (emphasis added); Pa.R.Crim.P. 706(A) (court must analyze the defendant’s financial ability to pay). To do otherwise would risk turning one defendant’s obligation to pay fines and costs into a form of communal punishment that burdens the finances of the defendant’s friends and family.

The record, in short, shows that Mr. Smetana was, at the time of the hearing, profoundly indigent and unable to pay anything toward his fines and costs. This Court has explained that receiving public assistance, such as the food stamps and

Medicaid Mr. Smetana receives, “invite the presumption of indigence.”

Commonwealth v. Eggers, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999).

Additionally, this Court has repeatedly instructed Pennsylvania’s trial courts to look to the “well-established principles governing indigency in civil cases” when determining indigence in criminal cases. *Commonwealth v. Lepre*, 18 A.3d 1225, 1226-27 (Pa. Super. Ct. 2011).¹ Those *in forma pauperis* (“IFP”) cases show that inability to pay is fundamentally a question of whether an individual “is able to obtain the necessities of life.” *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc). Where, as here, a person has “no income except public assistance benefits” and “minimal” net worth, he cannot afford to pay. *Id.* The record shows that Mr. Smetana was unable to meet his basic needs.

B. This Court should provide clear guidance to Pennsylvania’s trial courts.

The Commonwealth appears to agree with Mr. Smetana that Pennsylvania’s trial courts need additional guidance on how to adjudicate nonpayment of fines and

¹ This Court has noted that “we can all agree there are circumstances where we must borrow concepts from our civil law because there is a dearth of case law on the topic in the criminal context,” such as IFP principles. *Commonwealth v. Reese*, 31 A.3d 708, 718 n.2 (Pa. Super. Ct. 2011) (en banc). This is also consistent with courts’ practices in other states that have similarly incorporated their IFP principles into criminal fines and costs cases. *See City of Richland v. Wakefield*, 380 P.3d 459, 464 (Wash. 2016) (en banc) (reiterating that “courts can and should use [the civil rule governing IFP eligibility] as a guide for determining whether someone has an ability to pay costs” in criminal cases, and “courts should seriously question that person’s ability to pay” if they meet those standards) (citations omitted).

costs. Appellee Br. at 7. Both trial courts and the defendants that appear before them would benefit greatly from explicit instruction that courts should apply certain presumptions of indigence, including those that arise from the well-developed IFP case law: 1) a defendant is receiving means-based public assistance, *see Eggers*, 742 A.2d at 176 n.1; 2) a defendant is unable to afford basic life needs, such as housing, food, transportation, child care, etc., *see Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984) (court lacks evidence to support finding of ability to pay a fine when a defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth”); *Gerlitzki*, 307 A.2d at 308; and 3) that defendants should have their fines and costs payments temporarily suspended when they experience economic hardship. *See Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (explaining that, under Pa.R.Crim.P. 706, there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’”) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)). Beyond those presumptions, whenever a court assesses ability to pay, it must take into account “all the facts and circumstances of the situation, both financial and personal” in order to determine whether someone is able to pay. *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981). *See also Commonwealth v. Ruiz*, 470 A.2d 1010, 1012 (Pa. Super. Ct. 1984) (mere knowledge that a defendant was employed, without knowing more about his

financial circumstances, was insufficient to determine ability to pay). This Court should take the opportunity presented by this case to affirm those decisions, and so instruct Pennsylvania's trial courts, to avoid the type of unconstitutional incarceration that Mr. Smetana suffered.

CONCLUSION

For the foregoing reasons, the Court should hold that the trial court exceeded its authority by holding Appellant Brian Smetana in civil contempt without inquiring into his ability to pay, by imposing a purge condition he was unable to afford, and by putting him on an unreasonable payment plan with which he will be unable to comply. Accordingly, this Court should vacate the trial court's April 24 order, clarify the standards that the trial court must follow, and remand for new proceedings.

Respectfully submitted,

/s/ Andrew Christy

Andrew Christy

PA ID No. 322053

Mary Catherine Roper

Pa. I.D. No. 71107

AMERICAN CIVIL LIBERTIES UNION
OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513

Jacqueline M. Lesser
Pa. I.D. No. 204622
Kevin M. Bovard
Pa. I.D. No. 310818
Baker & Hostetler LLP
2929 Arch Street – 12th Fl.
Philadelphia, PA 19104
215-568-3300
jlesser@bakerlaw.com
kbovard@bakerlaw.com

Date: December 13, 2017

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

Via PACFile and USPS:

David R. Warner, Jr.
Lebanon County Solicitor
Buzgon Davis Law Offices
525 S 8th St
Lebanon, PA 17042
717-274-1421
warner@buzgondavis.com

Lebanon County Office of the District Attorney
Municipal Building, Room # 11
400 South 8th Street
Lebanon, PA. 17042-6794

/s/ Andrew Christy

Date: December 13, 2017