

From: ACLU of Pennsylvania
Re: Reducing or waiving costs post-sentencing upon default
Date: Updated September 19, 2022

MEMORANDUM

While some trial courts believe that they lack the authority to reduce or waive costs, the Supreme Court of Pennsylvania has held that they not only have such authority but in fact have a *duty* to consider reducing or waiving those costs if a defendant has defaulted on payment or default is imminent. Such an obligation arises from Pa.R.Crim.P. 706(C). The Legislature has confirmed this power in a pair of statutes permit the reduction or waiver of all costs, even those that would be otherwise “mandatory.”

A. Trial courts have authority to reduce or waive court costs and must consider doing so if a defendant defaults on payment and is unable to pay.

There is no question that courts have the authority to reduce or waive costs. *See Commonwealth v. Mulkin*, 228 A.3d 913, 919 (Pa. Super. Ct. 2020) (“The trial court may also provide that a defendant shall not be liable for costs under Rule 706.”). This authority arises from Pa.R.Crim.P. 706(C), which 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.” It is also contained in statutes that automatically impose costs, “unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs).” 42 Pa.C.S § 9728(b.2) (emphasis added); see also 42 Pa.C.S § 9721(c.1) (same).

In *Commonwealth v. Lopez*, --A.3d--, 2022 WL 3363051 (Pa. 2022), the Pennsylvania Supreme Court ruled that these provisions do not require that a trial court reduce or waive costs based on a defendant’s finances at *sentencing* (although courts have the discretion to do so).¹ However, the Court explained that Rule 706(C) imposes a “duty” to determine the “amount” of costs “post-sentence upon the defendant’s default and a finding of his inability to pay.” *Id.* at *9. It is upon default that the Court must consider the defendant’s financial resources and consider whether to reduce or waive costs accordingly. The Court went on to explain that “Rule 706 does not apply unless and until there has been a default in the payment of fines or costs. We do not hold that the threat of incarceration is the triggering event for applying Sections 9721(c.1) or 9728(b.2)” to reduce or waive costs. *Id.* at *13. As a result, it is default, not the risk of imprisonment, which triggers the Court’s duty to determine the amount a defendant should pay.

The Court made clear that the trial court is not limited to placing defendants on payment plans when they are unable to pay the entire amount of costs. The Court differentiated between Rule 706(B), governing payment plans, and 706(C). While “Section (B) concerns payments in installments . . . Section (C) pertains to the amount and method of payment.” 2022 WL 3363051 at *5. Rule 706(C) has nothing to do with installment payments and instead provides “for the

¹ For more information about the court’s discretion to reduce or waive costs at sentencing, please consult the ACLU of Pennsylvania’s separate memorandum “Reducing or waiving costs at sentencing,” available at www.aclupa.org/finesandcosts.

post-sentence modification or waiver of costs upon a proper showing of insufficient financial means.” 2022 WL 3363051 at *7.²

The legislative history confirms the intent of the legislature to permit courts to reduce or waive costs based on indigence when it enacted § 9728(b.2) in 2010. As the legislative history explains, those statutes were intended to allow the “sentencing court” to “retain all discretion to *modify or even waive costs* in an appropriate case.” Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010) PN 2181 (emphasis added). Such legislative intent reflects the reality that indigent defendants simply cannot afford to pay anything more than nominal costs, and the court is given the power to avoid assigning defendants unaffordable financial obligations. However, as the Court explained in *Lopez*, it is the mandatory use of the language “shall” in Rule 706(C) that places a duty upon the court when defendant defaults. In light of these statutory amendments, and their cross-reference to Rule 706(C), no costs are mandatory if the trial court determines that the defendant cannot afford them.³

B. A trial court’s authority to reduce or waive costs is not limited to sentencing.

The Supreme Court and Superior Court decisions in *Lopez* explain that a court *can* reduce or waive costs at the time of sentencing, but the point of the decision is that the court does not have to do so at that time. It has broad discretion to adjust costs, with the only requirement that it *must* hold such a hearing and consider ability to pay upon default. *Lopez*, 2022 WL 3363051 at *9. This ruling affirms the authority of courts to “modif[y] or waiv[e] costs upon a proper showing of insufficient financial means” whenever a defendant is unable to pay. *Id.* at *7.

There is no time limit on doing this, as the Supreme Court explained in *Lopez*. See 2022 WL 3363051 at *8. Costs “are not part of the criminal’s sentence but are merely incident to the judgment.” *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014). Unlike a fine, costs are not punishment and are more “akin to collateral consequences.” *Id.* See also *Commonwealth v. Nicely*, 638 A.2d 213, 217 (Pa. 1994) (“The imposition of costs in a criminal case is not part of the sentence, but rather is incident to the judgment.”). This means that jurisdictional limits in 42 Pa.C.S. § 5505 on the modification of “sentences” do not come into play when considering a reduction in court costs.

For example, the Commonwealth Court has explained that when a defendant challenges the clerk of court’s imposition of certain costs after the appeal period has run, “[s]uch a challenge is properly brought in the sentencing court.” *Commonwealth v. Williams*, 909 A.2d 419, 421 (Pa. Commw. Ct. 2006). In *Williams*, the defendant originally brought a challenge to certain costs in the trial court three years after his conviction, and the trial court dismissed for lack of

² The phrase “in determining the amount and method of payment of a” fine or cost in Rule 706(C) is a term of art that refers to determining the *total amount* that the defendant owes. The same language is in 42 Pa.C.S. § 9726(d) (addressing fines), and case law is clear that it refers to the total amount that is owed, not the payment plan requiring specific monthly installments. See, e.g., *Commonwealth v. Croll*, 480 A.2d 266, 275-76 (Pa. Super. Ct. 1984) (§ 9726(c) and (d) require that a court consider the defendant’s ability to pay the entire fine). It originates in Section 7.02 of the 1962 Model Penal Code. By contrast, Rule 706(B) governs payment plans.

³ For a discussion of a trial court’s authority to waive otherwise “mandatory” costs if it finds that the defendant is unable to afford to pay them, please consult the ACLU of Pennsylvania’s separate memorandum “Reducing or waiving costs at sentencing,” available at www.aclupa.org/finesandcosts.

jurisdiction. The Commonwealth Court reversed, ruling that the trial court is the proper forum for such a claim. Similarly, in *Fordyce v. Clerk of Courts*, the Commonwealth Court explained that it had transferred a petition for a writ of mandamus to the trial court because it had “exclusive jurisdiction” over the costs matter even though the time to appeal had already passed; when the case returned on appeal, the court ultimately invalidated the challenged costs. 869 A.2d 1049, 1050 (Pa. Commw. Ct. 2005).

Such decisions are consistent with the statutory framework created by Act 96 of 2010. In 42 Pa.C.S. §§ 9721(c.1) and 9728(b.2), that Act addressed two separate procedures: § 9721(c.1) governs costs at sentencing, and § 9728(b.2) addresses costs that are being collected. Section 9721(c.1) provides:

(c.1) Mandatory payment of costs.--Notwithstanding the provisions of section 9728 (relating to collection of restitution, reparation, fees, costs, fines and penalties) or any provision of law to the contrary, in addition to the alternatives set forth in subsection (a), the court shall order the defendant to pay costs. In the event the court fails to issue an order for costs pursuant to section 9728, costs shall be imposed upon the defendant under this section. No court order shall be necessary for the defendant to incur liability for costs under this section. The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).

This provision solely addresses *sentencing orders* because § 9721 is all about sentencing. This provision directs that a defendant is liable for costs even if the court does not include them in an order. Nonetheless, the court still has discretion under Rule 706(C) to reduce or waive costs based on ability to pay.

But while § 9721(c.1) is focused on sentencing, the other statutory amendment in 42 Pa.C.S. § 9728(b.2) is focused on subsequent proceedings. Section 9728 is titled “Collection of restitution, reparation, fees, costs, fines and penalties” and it discusses exactly that: *collections* and the procedures that occur *after* sentencing. It addresses the procedures used to collect fines, costs, and restitution, something that naturally happens well after sentencing and often takes years or decades. Section 9728(b.2) provides:

(b.2) Mandatory payment of costs.--Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection (a) imposing costs upon the defendant, the defendant shall nevertheless be liable for costs, as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs). The absence of a court order shall not affect the applicability of the provisions of this section.

Logically, § 9728(b.2) must mean something different than § 9721(c.1). If they were both merely intended to make defendants liable for court costs even if the court does not impose those court costs, then § 9728(b.2) would be duplicative and would have no separate meaning. It would be a nullity. *See* 1 Pa.C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions”); *Commonwealth v. Velez*, 51 A.3d 260, 265 (Pa. Super. Ct. 2012) (“Basic

rules of statutory construction set forth that statutes ‘shall be construed, if possible, to give effect to all its provisions’ and that the ‘legislature did not intend any statutory language to exist as mere surplusage.’”).

Instead, the appropriate reading is that § 9721 governs sentencing and § 9728 governs collections down the road. This is evident from the statutory structure and the way that each of those provisions operates. Accordingly, when the General Assembly specifically addressed the waiver of costs under Rule 706(C) both at sentencing (§ 9721(c.1)) and later, during collections proceedings (§ 9728(b.2)), it intended for courts to be able to consider the defendant’s ability to pay during both phases of a case. Such an interpretation is the only way to give a distinct meaning to each statute.

Finally, as the *Lopez* decision suggests, nothing in Rule 706(C) limits its application to any particular time. By its plain text, it applies “when” the court “determine[s] the amount and method of payment of a fine or costs.” Rule 706(C). That is the same language used in 706(B), which governs payment plans: “When the court determines, after hearing, that the defendant is without the financial means to pay . . .” Rule 706(B). Both provisions have no temporal limit, and in both cases there is no prohibition against a defendant petitioning a court for relief down the road when the costs imposed at sentencing have proved too much for the defendant to afford.