

From: Andrew Christy, ACLU-PA
Re: Reducing or waiving costs at sentencing
Date: Updated September 8, 2019

MEMORANDUM

Most judges that we speak to believe that they have no power to waive court costs at sentencing, but our reading of the Rules of Criminal Procedure, case law, and legislative history establishes that Common Pleas judges have the discretion to reduce or waive costs under Rule 706. Discretion in imposing costs at sentencing was established with Rule 706 in 1973 and has been acknowledged by the legislature as recently as 2010. The statutory and rules-based framework governing whether a defendant can afford to pay costs applies at sentencing, when the court imposes those financial obligations.

Courts have authority under Pa.R.Crim.P. 706(C) to reduce or waive costs based on a defendant's indigence. The legislature has acknowledged and codified this authority in 42 Pa.C.S. §§ 9721(c.1) and 9728(b.2), and this authority applies even to otherwise "mandatory" costs. *See Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 at *4 (Pa. Super. Ct. Oct. 31, 2017) (Rule 706(C) "permits the trial court to consider the burden of the amount of costs in light of a defendant's financial means"). This authority applies equally to both sentencing and diversionary programs.

I. All costs are discretionary if the defendant lacks the ability to pay them.

A. Sentencing courts have the authority to reduce or waive costs.

In 2010, the legislature amended 42 Pa.C.S. §§ 9721(c.1) and 9728(b.2) via Act 96 to automatically impose costs at sentencing "unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs)." As the legislative history explains, the amendment was 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. In other words, the statute reflected the legislature's understanding that trial courts *already had* the discretion under Rule 706(C) to reduce or waive costs at sentencing. Those statutory amendments also remove any doubt: the legislature does not intend for costs to be "mandatory" if a defendant is unable to pay.

Rule 706(C) applies at sentencing and requires—or at least permits—courts to consider a defendant's ability to pay when imposing fines and costs: "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." While it may not be obvious from the Rule's text that it applies at sentencing, case law explains that it does.¹ *See, e.g., Commonwealth*

¹ This is particularly clear when the text of Rule 706(C) is compared with the statutory language governing the imposition of a fine at sentencing, which is nearly identical. *See* 42 Pa.C.S. § 9726(c), (d). Approximately 20 published Superior Court opinions explain that § 9726 applies at sentencing. *See, e.g., Commonwealth v. Boyd*, 73 A.3d 1269, 1272 (Pa. Super. Ct. 2013) (en banc).

v. Martin, 335 A.2d 424, 425 (Pa. Super. Ct. 1975) (en banc) (then-Rule 1407(C), today Rule 706(C), requires that a sentencing judge consider ability to pay when imposing a fine); *Commonwealth v. Genovese*, 675 A.2d 331, 333-34 (Pa. Super. Ct. 1996) (same).

Although a recent panel decision held that Rule 706(C) does not *require* an ability-to-pay hearing at sentencing, it certainly does not *prohibit* it. See *Commonwealth v. Childs*, 63 A.3d 323, 326 (Pa. Super. Ct. 2013).² *Childs* itself acknowledges that although the defendant is liable for costs, the trial court can “determine[] otherwise pursuant to” Rule 706(C). As a result, courts still maintain authority to reduce costs based on a defendant’s inability to pay. The Superior Court opinion in *Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 (Pa. Super. Ct. Oct. 31, 2017) is instructive. In that case, the trial court reduced “mandatory” prosecution and lab costs, and the Superior Court—citing §§ 9721(c.1) and 9728(b.2)—affirmed that the trial court had discretion to do so under Rule 706(C) in light of the defendant’s inability to pay. While unpublished, it is a straightforward application of the statutory language, and it confirms that courts can reduce otherwise “mandatory” costs.

B. Under well-established principles of statutory interpretation, no costs are “mandatory.”

Under Rule 706(C) and §§ 9721(c.1) and 9728(b.2), judges have the discretion to reduce and/or waive all costs, even so-called “mandatory” costs. It is true that many statutes establishing costs, such as the line item for the Judicial Computer Project, 42 Pa.C.S. § 3733(a.1)(iii), says that its cost “shall” be imposed. However, §§ 9721(c.1) and 9728(b.2) and the Rules of Construction mean that courts have discretion to reduce or waive such costs for two reasons.

First, all of the statutes governing costs must interpreted together (read *in pari materia*), whenever possible, and when 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.” 1 Pa.C.S. §§ 1932-33. Looking at the statutes through this lens, it is not clear that there is any conflict, let alone that the statutes are irreconcilable. The way to give effect to statutes that impose court costs, such as the Judicial Computer Project cost—while not ignoring the plain language of §§ 9721(c.1) and Rule 706(C)—is that certain costs must be imposed *unless* the defendant cannot afford them.³ After all, nothing in the Judicial Computer Project statute or any other court cost statute specifies that a defendant must pay that cost *even if* he is unable to afford it. Such an approach is also consistent with the Superior Court’s decision in *Burrows*.

Second, even if there is an “irreconcilable conflict,” the discretion afford to trial courts in §§ 9721(c.1) and 9728(b.2) prevail. Both statutes state that they apply “Notwithstanding any provision of law to the contrary.” To the extent that there is any actual irreconcilable conflict

² On this point, to the extent that *Childs* conflicts with *Martin*—an en banc decision that acknowledges that an ability-to-pay hearing is *required* under what is today Rule 706(C)—*Childs* is invalid. See *In the Interest of A.A.*, 195 A.3d 896, 909 (Pa. 2018) (courts must ignore three-judge panel opinion that conflict with prior binding en banc opinion).

³ The Rules of Construction also apply when construing court rules with statutes. See *Lohmiller v. Weidebaugh*, 469 A.2d 578, 581 (Pa. 1983) (statute and court procedural rule that “relate to the same subject matter . . . must be read *in pari materia* so that effect can be given to both” pursuant to 1 Pa.C.S. § 1932).

between two statutes, 1 Pa.C.S. § 1933 explains that the specific generally prevails—“*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.” (emphasis added). Sections 9721(c.1) and 9728(b.2) were both enacted in 2010, long after other costs. Moreover, the General Assembly, in enacting these statutes, has demonstrated its “manifest intention” that they trump older, more specific statutes. The Superior Court has ruled that when a statute uses the language “notwithstanding any other provision of this title or other statute to the contrary,” such language “clearly indicates that the legislature intended to limit the application of prior” statutes. *Commonwealth v. Smith*, 544 A.2d 991, 998 (Pa. Super. Ct. 1988) (en banc). Thus, under the rules of statutory construction in § 1933, the use of that language in §§ 9721(c.1) and 9728(b.2) means that those statutes prevail.⁴

While many attorneys and judges are unaware of §§ 9721(c.1) and 9728(b.2) and the interplay with Rule 706(C), the legal interpretations are actually rather straightforward. Accordingly, courts have discretion to reduce or waive costs at sentencing for indigent defendants, and they should act accordingly.

II. Costs at issue.

We have catalogued costs that routinely appear on docket sheets unless the court orders otherwise, which are available in the document “Court Cost Statutes” at www.aclupa.org/finesandcosts.

⁴ In *Commonwealth v. LeBar*, 860 A.2d 1105, 1111 (Pa. Super. Ct. 2004), the Superior Court suggested that the \$60 costs set forth in 18 P.S. 11.1101 are mandatory (while any amount over \$60 is discretionary). However, it—and the Commonwealth Court’s opinion in *Spotz v. Commonwealth*, 972 A.2d 125, 133-34 (Pa. Commw. Ct. 2009) that adopted the *LeBar* reasoning—did not engage in any meaningful statutory construction or even mention Rule 706. Both opinions also predate the 2010 amendments that added §§ 9721(c.1) and 9728(b.2). No opinion contradicts the analysis set forth in this memorandum.