

**Proposed New Pa.R.Crim.P. 1037
and Revisions to the *Comment* to Pa.R.Crim.P. 462**

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt new Rule 1037 regarding appeals for trial de novo from the Philadelphia Traffic Court. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed amendments to the rules precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

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no later than Friday, June 19, 2009.

May 6, 2009

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

D. Peter Johnson, Chair

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RULE 462. TRIAL *DE NOVO*.

(A) When a defendant appeals after conviction by an issuing authority in any summary proceeding, upon the filing of the transcript and other papers by the issuing authority, the case shall be heard *de novo* by the judge of the court of common pleas sitting without a jury.

(B) The attorney for the Commonwealth may appear and assume charge of the prosecution. When the violation of an ordinance of a municipality is charged, an attorney representing that municipality, with the consent of the attorney for the Commonwealth, may appear and assume charge of the prosecution. When no attorney appears on behalf of the Commonwealth, the affiant may be permitted to ask questions of any witness who testifies.

(C) In appeals from summary proceedings arising under the Vehicle Code or local traffic ordinances, other than parking offenses, the law enforcement officer who observed the alleged offense must appear and testify. The failure of a law enforcement officer to appear and testify shall result in the dismissal of the charges unless:

(1) the defendant waives the presence of the law enforcement officer in open court on the record;

(2) the defendant waives the presence of the law enforcement officer by filing a written waiver signed by the defendant and defense counsel, or the defendant if proceeding *pro se*, with the clerk of courts; or

(3) the trial judge determines that good cause exists for the law enforcement officer's unavailability and grants a continuance.

(D) If the defendant fails to appear, the trial judge may dismiss the appeal and enter judgment in the court of common pleas on the judgment of the issuing authority.

(E) If the defendant withdraws the appeal, the trial judge shall enter judgment in the court of common pleas on the judgment of the issuing authority.

(F) The verdict and sentence, if any, shall be announced in open court immediately upon the conclusion of the trial.

(G) At the time of sentencing, the trial judge shall:

(1) if the defendant's sentence includes restitution, a fine, or costs, state the date on which payment is due. If the defendant is without the financial means to pay the amount in a single remittance, the trial judge may provide for installment payments and shall state the date on which each installment is due;

(2) advise the defendant of the right to appeal to the Superior Court within 30 days of the imposition of sentence, and that, if an appeal is filed, the execution of sentence will be stayed and the trial judge may set bail;

(3) if a sentence of imprisonment has been imposed, direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period; and

(4) issue a written order imposing sentence, signed by the trial judge. The order shall include the information specified in paragraphs (G)(1) through (G)(3), and a copy of the order shall be given to the defendant.

(H) After sentence is imposed by the trial judge, the case shall remain in the court of common pleas for the execution of sentence, including the collection of any fine and restitution, and for the collection of any costs.

COMMENT: This rule is derived from former Rule 86(G) and former Rule 1117(c).

The procedures for conducting the trial *de novo* in the court of common pleas set forth in paragraphs (B), (F), and (G) are comparable to the summary case trial procedures in Rule 454 (Trial in Summary Cases).

Pursuant to paragraph (B), the decision whether to appear and assume control of the prosecution of the trial *de novo* is solely within the discretion of the attorney for the Commonwealth. When no attorney appears at the trial *de novo* on behalf of the Commonwealth or a municipality, the trial judge may ask questions of any witness who testifies, and the affiant may request the trial judge to ask specific questions. In the appropriate circumstances, the trial judge may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the trial judge.

The provisions of paragraph (C) that permit the court to continue the case if there is good cause for the officer's unavailability were added in response to *Commonwealth v. Hightower*, 438 Pa. Super. 400, 652 A.2d 873 (1995).

Paragraph (D) makes it clear that the trial judge may dismiss a summary case appeal when the judge determines that the defendant is absent without cause from the trial *de novo*. If the appeal is dismissed, the trial judge should enter

judgment and order execution of any sentence imposed by the issuing authority.

Pursuant to paragraph (G), if the defendant is convicted, the trial judge must impose sentence, and advise the defendant of the payment schedule, if any, and the defendant's appeal rights. See Rule 704(A)(3) and Rule 720(D). No defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at trial. See *Alabama v. Shelton*, 535 U.S. 654 (2002), *Scott v. Illinois*, 440 U.S. 367 (1979), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Once sentence is imposed, paragraph (H) makes it clear that the case is to remain in the court of common pleas for execution of the sentence and collection of any costs, and the case may not be returned to the magisterial district judge. The execution of sentence includes the collection of any fines and restitution.

For the procedures for appeals from the Philadelphia Traffic Court, see Rule 1037.

NOTE: Former Rule 86 adopted July 12, 1985, effective January 1, 1986; revised September 23, 1985, effective January 1, 1986; the January 1, 1986 effective dates extended to July 1, 1986; amended February 2, 1989, effective March 1, 1989; amended March 22, 1993, effective January 1, 1994; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; amended February 27, 1995, effective July 1, 1995; amended October 1, 1997, effective October 1, 1998; amended May 14, 1999, effective July 1, 1999; rescinded March 1, 2000, effective April 1, 2001, and paragraph (G) replaced by Rule 462. New Rule 462 adopted March 1, 2000, effective April 1, 2001; amended February 28, 2003, effective July 1, 2003; *Comment* revised March 26, 2004, effective July 1, 2004; amended January 18, 2007, effective August 1, 2007 [.] ; **Comment revised _____, 2009, effective _____, 2009.**

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COMMITTEE EXPLANATORY REPORTS:

FORMER RULE 86:

Final Report explaining the March 22, 1993 amendments to former Rule 86 published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).

Final Report explaining the October 28, 1994 amendments to former Rule 86 published with the Court's Order at 24 Pa.B. 5843 (November 26, 1994).

Final Report explaining the February 27, 1995 amendments to former Rule 86 published with the Court's Order at 25 Pa.B. 935 (March 18, 1995).

Final Report explaining the October 1, 1997 amendments to former Rule 86 concerning stays published with the Court's Order at 27 Pa.B. 5408 (October 18, 1997).

Final Report explaining the May 14, 1999 amendments to former Rule 86, paragraph (G), concerning the police officer's presence published with the Court's Order at 29 Pa.B. 2776 (May 29, 1999).

NEW RULE 462:

Final Report explaining the reorganization and renumbering of the rules and the provisions of Rule 462 published at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the February 28, 2003 amendments published with the Court's Order at 33 Pa.B. 1326 (March 15, 2003).

Final Report explaining the March 26, 2004 Comment revision published with the Court's Order at 34 Pa.B. 1931 (April 10, 2004).

Final Report explaining the January 18, 2007 amendment to paragraph (G)(2) published with the Court's Order at 37 Pa.B. (, 2007).

Report explaining proposed Comment revision regarding new Rule 1037 and procedures for the appeal from the Philadelphia Traffic Court published at 39 Pa.B. (, 2009).

(This is a new rule.)

RULE 1037. APPEAL FROM SUMMARY CONVICTION.

(A) When a defendant appeals after the entry of a guilty plea or a conviction in any summary proceeding in the Philadelphia Traffic Court, upon the filing of the transcript and other papers by the Traffic Court, the Court of Common Pleas may schedule a status or settlement conference prior to the *de novo* summary trial.

(1) In the event the attorney for the Commonwealth or a designee and the defendant reach a negotiated plea, the plea may be entered before a Trial Commissioner and, upon approval by a judge of the Court of Common Pleas, the negotiated sentence will be recorded.

(2) In the event a negotiated plea is not reached or is not approved by the court, the case shall be heard *de novo* by a judge of the Court of Common Pleas sitting without a jury.

(B) The attorney for the Commonwealth may appear and assume charge of the prosecution. When no attorney appears on behalf of the Commonwealth, the affiant may be permitted to ask questions of any witness who testifies.

(C) In appeals from summary proceedings in the Philadelphia Traffic Court, the law enforcement officer who observed the alleged offense must appear and testify. The failure of a law enforcement officer to appear and testify shall result in the dismissal of the charges unless:

(1) the defendant waives the presence of the law enforcement officer in open court on the record;

(2) the defendant waives the presence of the law enforcement officer by filing a written waiver signed by the defendant and defense counsel, or the defendant if proceeding *pro se*, with the clerk of courts; or

(3) the trial judge determines that good cause exists for the law enforcement officer's unavailability and grants a continuance.

(D) If the defendant fails to appear for the trial *de novo*,

(1) when the appeal is from a mandatory sentence of imprisonment, the Court of Common Pleas judge shall dismiss the appeal, enter judgment in the Court of Common Pleas on the judgment of the Traffic Court judge, and issue a bench warrant and a commitment for the defendant. Execution of the sentence shall commence immediately upon defendant's arrest; and

(2) in all other cases, the Common Pleas Court judge may dismiss the appeal and enter the judgment in the Court of Common Pleas on the judgment of the Traffic Court judge.

(E) If the defendant withdraws the appeal, the Court of Common Pleas judge shall enter the judgment in the Court of Common Pleas on the judgment of the Traffic Court judge.

(F) At the time of sentencing, the Court of Common Pleas judge shall:

(1) if the defendant's sentence includes a fine or costs and the defendant has the financial means to pay the amount in a single remittance, the judge shall instruct the defendant to make the payment at the Philadelphia Traffic Court. If the defendant is without the financial means to pay the amount in a single remittance, the judge shall instruct the defendant to contact the Philadelphia Traffic Court to establish an installment payment plan;

(2) advise the defendant of the right to appeal to the Superior Court within 30 days of the imposition of sentence, and that, if an appeal is filed, the execution of sentence will be stayed and the judge may set bail;

(3) if a sentence of imprisonment has been imposed, direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period; and

(4) issue a written order imposing sentence, signed by the judge. The order shall include the information specified in paragraphs (F)(1) through (F)(3), and a copy of the order shall be given to the defendant and to the Traffic Court.

(G) After sentence is imposed by the Court of Common Pleas judge, and either after the expiration of the time to file an appeal to the appellate courts, or, if a sentence of imprisonment has been imposed, after the execution of the sentence of imprisonment, the case shall be returned to the Philadelphia Traffic Court for the collection of any outstanding fines and costs and for all other appropriate action.

COMMENT: This rule was adopted in 2009 to provide the procedures for appeals from the Philadelphia Traffic Court to the Court of Common Pleas of the First Judicial District. Except as provided in this rule, the procedures of Rules 460, 461, and 462, governing appeals for a trial *de novo* in summary cases, shall apply to summary case appeals in the Philadelphia Traffic Court.

For purposes of this rule, "judgment" means the determination of guilty and any sentence imposed on the defendant.

The date upon which payment is due upon a sentence of a fine or costs ordinarily will be 30 days following imposition of sentence.

NOTE: Rule 1037 adopted _____, 2009, effective _____, 2009.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining proposed new Rule 1037 concerning procedures for the appeal from the Philadelphia Traffic Court published at 39 Pa.B. (_____, 2009).

REPORT

Proposed New Pa.R.Crim.P. 1037 and Revisions to the Comment to Pa.R.Crim.P. 462

PHILADELPHIA TRAFFIC COURT APPEALS

As part of its oversight of the rules governing procedures in the Philadelphia Traffic Court, the Committee was asked by the Traffic Court to examine several aspects of appeal procedures. As discussed more fully below, due to the high volume of cases and unique circumstances of the Traffic Court, practices have developed in the Philadelphia Traffic Court that are not explicitly provided for in the rules. The Committee therefore formed a Subcommittee¹ with several representatives of the Traffic Court and the First Judicial District to develop rule changes that would address some of these differences.

Upon the recommendation of this Subcommittee, the Committee is proposing new Rule 1037 that would provide the procedures for appeals from the Philadelphia Traffic Court to the Court of Common Pleas. It would replace the Rule 462 appeal procedures for the Traffic Court. However, except where Rule 1037 differs, the procedures in Rules 460 and 461 still would apply.

The proposed new rule would address three areas: (1) general appeal procedures; (2) procedures addressing failures to appear for appeal; and (3) procedures related to the collection of fine and costs.

¹ The Subcommittee consisted of Dominic Rossi, Philadelphia Deputy Court Administrator, Legal Services; Traffic Court Administrative Judge Bernice De Angelis; David Wasson, Chief Deputy Court Administrator, First Judicial District; and Robert DeEmilio, Deputy Court Administrator of the Philadelphia Traffic Court. Charles J. Grant, Esq. and John Delaney, Esq. were the Criminal Procedural Rules Committee representatives.

Appeal Procedures

As stated above, due to the high volume of cases in the Traffic Court and the significant numbers of appeals from Traffic Court, local practices have developed that vary from the strict letter of Rule 462 procedures. These variations do not adversely affect the rights of the parties and provide an efficient and effective method of adjudicating appeals arising from the Traffic Court. The Committee believes that an explicit recognition of these procedures in the rules would remove any confusion about them.

Currently, upon the filing of a Notice of Appeal in the Traffic Court, a summary trial date is assigned for an appearance at the Court of Common Pleas. The Traffic Court Docket and record is then forwarded to the Court of Common Pleas. On the summary trial date, a conference is conducted by a Trial Commissioner at which the defendant and a representative of the District Attorney's Office appear for purposes of negotiating a plea. If the parties agree on a plea, the plea is approved by a Common Pleas judge. If a plea cannot be agreed upon, a *de novo* summary trial is subsequently conducted by a Common Pleas judge. If the defendant pleads or is found guilty and sentenced, payment of any fine and costs is directed to the Traffic Court. The Traffic Court receives and distributes all payments of outstanding fines and costs and, as authorized by Rule 456, may issue and modify installment payment orders and may issue warrants for a defendant's arrest for non-payment.

These procedures would be formally recognized in paragraphs (A), (F), and (G) of new Rule 1037. Paragraphs (B) and (C) would provide the existing statewide practice of permitting the attorney of the Commonwealth, or in his or her absence, the

affiant to conduct the trial *de novo* and requiring the law enforcement officer's appearance unless waived to be applicable in Traffic Court appeals.

Failure to Appear

The proposal also intends to clarify the procedures for the execution of bench warrants issued when the defendant has failed to appear for the trial *de novo* in the Court of Common Pleas, especially in those cases that involve a mandatory sentence of incarceration. It was unclear under the current practice whether the Common Pleas judge could dismiss the appeal and have a warrant issued for the defendant to be taken for service of the sentence. Therefore, paragraph (D) would provide that, in a failure to appear case, the appeal would be dismissed and the judgment of the Traffic Court entered in the Court of Common Pleas. If the case involves a sentence of mandatory incarceration, a bench warrant would be issued by the Court of Common Pleas along with the issuance of a commitment order. The warrant would contain the notation that defendant is already sentenced and would therefore be taken directly to serve his or her sentence.

It should be noted that the hearing requirement of Rule 150 (Bench Warrants) is currently being satisfied in the First Judicial District by the fact that a Trial Commissioner conducts these hearings at the Philadelphia County Prison whenever a defendant is arrested on a bench warrant or surrenders himself or herself at the Traffic Court.

Fines and Costs

The proposal also authorizes an exemption from the general policy of the Pennsylvania Supreme Court that once a case has gone up from a minor court to a court of common pleas, no remand to the minor court should be allowed.² After the initial policy of no remands was developed, the Philadelphia Traffic Court was excluded from the policy for purposes of the payment and collection of fine and costs. This

² The most recent statement of this policy was contained in a September 28, 2006 letter from then-Chief Justice Cappy to all President Judges, emphasizing this point.

exemption was stated as part of an amendment to Traffic Court procedures adopted by the Court in 2005.³ Specifically, the *Final Report* to that Recommendation stated:

b. Trial *de novo*

Another issue concerns the 2003 changes to the Criminal Rules that clarify once a case is appealed for a trial *de novo*, the case is to remain in the common pleas court for disposition. This procedure is contrary to what is occurring in Philadelphia. Both Traffic Court and Philadelphia Common Pleas Court have serious concerns about the significant burden the statewide procedure would have on the Common Pleas Court, especially given the extraordinary number of cases involved and the amount of the fines and costs owed. Both courts note the current practice of returning the cases to Traffic Court for collection following the trial *de novo* works efficiently and has been successful.

However, because this exemption was not stated in the rules themselves, questions about these procedures continue to persist. Therefore, paragraph (G) would provide that, either after the expiration of the time to file an appeal to the appellate courts, or, if a sentence of imprisonment has been imposed, after the execution of the sentence of imprisonment, the case is to be remanded to the Traffic Court for the collection of any outstanding fines and costs. The Traffic Court would also perform “all other appropriate action” such as requesting that the Pennsylvania Department of Transportation suspend the defendant’s operating privilege if the defendant failed to comply with the payment plan, and be able to use the remedies set forth in Rule 456 if the defendant failed to comply with the payment plan.

Finally, in order to ensure the defendant understands this process, upon sentencing after the appeal, Common Pleas judge is required to advise the defendant that he or she has 30 days to pay the fines and costs in full or to contact the Traffic Court to renegotiate the payment plan.

³ See 35 Pa.B. 5239 (September 24, 2005).