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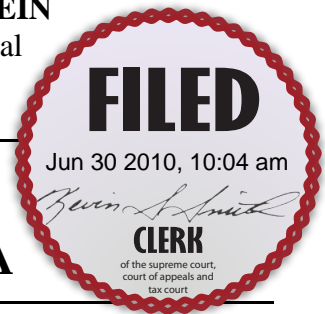
ATTORNEY FOR APPELLANT:

TIMOTHY J. O'CONNOR
O'Connor & Auersch
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

JERMAINE J. JOHNSON,
Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

)))))))))

No. 49A04-0910-CR-591

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0811-FB-268644

June 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jermaine Johnson was convicted of robbery, a Class B felony.¹ As part of his sentence, he was ordered to pay a \$100 Supplemental Public Defender Service fee. The fee should not have been imposed without the court making explicit findings in support thereof because the court had found Johnson was indigent. We accordingly reverse and remand.

FACTS AND PROCEDURAL HISTORY

The State charged Johnson with robbery and carjacking², both Class B felonies. At Johnson's initial hearing, the trial court found him indigent, appointed a public defender as his counsel, and assessed a \$100 Supplemental Public Defender Service Fee. A jury found Johnson guilty of robbery and the court sentenced him. The court ordered Johnson pay a \$10 fine and court costs, in addition to the \$100 fee assessed at his initial hearing.

DISCUSSION AND DECISION

Johnson argues the trial court abused its discretion when assessing the fee because it had declared him indigent. A trial court has discretion in sentencing a defendant and its decision will be reversed only if there is a manifest abuse of discretion. *Jester v. State*, 746 N.E.2d 437, 439 (Ind. Ct. App. 2001). If the trial court imposes fees within the statutory limits, there is no abuse of discretion. *Mathis v. State*, 776 N.E.2d 1283, 1289 (Ind. Ct. App. 2002), *trans. denied*. A defendant's indigency does not shield him from all costs or fees related to his conviction. *See, e.g., Like v. State*, 760 N.E.2d 1188, 1193 (Ind. Ct. App. 2002) (finding no abuse of discretion where the court imposed a \$300 marijuana eradication fee on

¹ Ind. Code § 35-42-5-1.

² Ind. Code § 35-42-5-2.

an indigent defendant), *reh'g granted and remanded on other grounds*, 766 N.E.2d 416 (Ind. Ct. App. 2002).

Three statutes empower the trial court to impose a fee on a defendant for the cost of his appointed representation. *See* Ind. Code §§ 33-37-2-3, 33-40-3-6, 35-33-6-7. Johnson's fee was not proper under any of them.³

Ind. Code § 33-37-2-3 states in relevant part:

(a) Except as provided in subsection (b), when the court imposes costs, it shall conduct a hearing to determine whether the convicted person is indigent. If the person is not indigent, the court shall order the person to pay:

- (1) the entire amount of the costs at the time sentence is pronounced
- (2) the entire amount of the costs at some later date; or
- (3) specified parts of the costs at designated levels.

* * * * *

(e) If, after a hearing under subsection (a) or (b), the court determines that a convicted person is able to pay part of the costs of representation, the court shall order the person to pay an amount of not more than the cost of the defense services rendered on behalf of the person.

In *Banks v. State*, 847 N.E.2d 1050 (Ind. Ct. App. 2006), *trans. denied*, the trial court found Banks indigent and ordered him to pay \$200 in public defender fees. We noted the order would be erroneous if it had been made pursuant to Ind. Code § 33-37-2-3(a), because that statute permits the court to order a defendant to pay “[i]f the person is not indigent,” but the court had found Banks indigent. *Id.* at 1052. Johnson was found indigent at an initial hearing, so the \$100 Supplemental Public Defender Service Fee could not be valid under Ind.

³ As we have mentioned on other occasions, a thorough legislative consideration of the various conflicting provisions of Indiana Code that address appointment of counsel and payment of associated costs of representation for indigent criminal defendants would be helpful. *See Banks v. State*, 847 N.E.2d 1050, n3 (Ind. Ct. App. 2005), *Lamonte v. State*, 839 N.E.2d 172, n1 (Ind. App. Ct. 2005).

Code § 33-37-2-3.

Ind. Code § 33-40-3-6 states in relevant part:

(a) If at any stage of a prosecution for a felony or a misdemeanor the court makes a finding of ability to pay costs of representation under section 7 of this chapter,⁴ the court shall require payment by the person . . . of the following costs in addition to other costs assessed against the person:

- (1) Reasonable attorney's fees if an attorney has been appointed for the person by the court.
- (2) Costs incurred by the county as a result of court appointed legal services rendered to the person.

(Footnote added).

In *Lamonte v. State*, 839 N.E.2d 172 (Ind. Ct. App. 2005), a trial court required Lamonte to pay \$400 to the Supplemental Public Defender Service Fund pursuant to this statute. We held that fee was an abuse of discretion because the court imposed it without finding Lamonte was able to pay for his appointed representation under Ind. Code § 33-40-3-7. *Id.* at 176.

Similarly, this trial court did not find Johnson could pay for his representation based on the criteria set forth in Ind. Code § 33-40-3-7. Thus, the trial court did not have authority to impose the \$100 fee against Johnson pursuant to this section of the Indiana Code.⁵

⁴ Ind. Code § 33-40-3-7 requires the trial court consider the following when determining if the person is able to pay the costs of representation:

- (1) the person's independently held assets and assets available to the spouse of the person or the person's parent if the person is unemancipated;
- (2) the person's income;
- (3) the person's liabilities; and
- (4) the extent of the burden that payment of costs assessed under section 6 of this chapter would impose on the person and the dependents of the person.

⁵ In addition, the fee assessed to Johnson presumably was significantly less than what would be "reasonable attorney's fees" or "costs incurred by the county" for Johnson's appointed counsel, Ind. Code § 33-40-3-6, suggesting the court did not intend to impose costs under this section.

Finally, we turn to Ind. Code § 35-33-7-6, which provides:

(a) Prior to the completion of the initial hearing the judicial officer shall determine whether a person who requests assigned counsel is indigent. If the person is found to be indigent, the judicial officer shall assign counsel.

* * * * *

(c) If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following:

(1) For a felony action, a fee of one hundred dollars (\$100).

As the court found Johnson indigent and assessed the Supplemental Public Defender Service Fee in the same hearing, it appears the trial court intended to impose the fee pursuant to this statute.

However, in *May v. State*, 810 N.E.2d 741, 746 (Ind. Ct. App. 2004), we held that in order to impose fees under Ind. Code § 35-33-7-6, the trial court must enter an explicit finding regarding the defendant's ability to pay part of the cost of his representation. Because the trial court made no such finding regarding Johnson, it could not impose a \$100 fee pursuant to Ind. Code § 35-33-7-6.

Because the trial court did not enter findings required to support a fee under any of the three statutes, we must reverse its assessment of the \$100 Supplemental Public Defender Service Fee and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

BAILEY, J., and BARNES, J., concur.