

RENDERED: OCTOBER 21, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000564-MR  
AND  
NO. 2010-CA-000565-MR

DONTE E. MCGEE, SR.

APPELLANT

v. APPEALS FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NOS. 09-CR-000990 & 09-CR-003193

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING

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BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: Donte McGee appeals from an order of the Jefferson Circuit Court imposing \$130 in court costs and a \$1000 fine arising from McGee's plea of

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<sup>1</sup> Senior Judge Ann O'Malley Shake, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

guilty to one count of Possession of a Controlled Substance, 1<sup>st</sup> Degree. McGee argues that because he is indigent, the trial court erred in imposing the costs and fees. The record demonstrates that McGee is indigent, and we must conclude that the trial court was statutorily barred from imposing costs and a fine. As such, we reverse on this issue.

In 2009, the Jefferson County grand jury indicted McGee under two separate indictments charging him with various crimes including Trafficking in a Controlled Substance, 1<sup>st</sup> Degree (cocaine), Trafficking in a Controlled Substance within 1000 Yards of a School, 1<sup>st</sup> Degree, Operating a Motor Vehicle By a Person Whose Operator's License has been Revoked, Suspended, Cancelled or Denied, and Speeding. After the two proceedings were consolidated, McGee accepted an offer from the Commonwealth providing that he would plead guilty to the charge of Possession of a Controlled Substance, 1<sup>st</sup> Degree, in exchange for dismissal of the remaining charges and a sentence of one year in prison or two years of probation. On December 16, 2009, McGee appeared in open court where the plea was entered.

On February 16, 2010, McGee returned to court for sentencing and received a probated sentence. The court also imposed \$130 in court costs and a \$1000 felony fine. McGee, through counsel, moved to waive the costs and fine due to McGee's indigency. The motion was denied and the sentence was imposed.

Thereafter, McGee filed a motion to reconsider the court's imposition of costs and the fine in each case. The motions were denied, and this appeal followed.

McGee now argues that the trial court erred when it imposed the costs and fine. As a basis for argument, McGee contends that he was found to be indigent and therefore, by operation of statute is not subject to the imposition of the costs and fine. He directs our attention to provisions of KRS Chapter 534 and Chapter 23A, which he claims require the court to waive costs and fines for indigent defendants. While acknowledging that there is no video record of the court designating McGee as indigent, he notes that the court appointed a public defender, that a public defender "appointment card" appears in the record, that he was represented by a public defender throughout the proceeding below, and that the trial court rendered an order after sentencing granting his motion to proceed *in forma pauperis* on appeal. In sum, he contends that the trial court was required by statute to waive costs and fines, and he seeks an order reversing the imposition of the costs and fine. The Commonwealth has filed a responsive brief, but has not asserted therein that the court's imposition of costs and the fine was proper.

KRS 534.030(1) provides that "a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars (\$1000)." The statute goes on to state, however, that a fine "required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to

KRS Chapter 31.” KRS 534.030(4). Additionally, KRS 23A.205(2) provides for the waiver of the otherwise mandatory court costs as to any defendant determined to be poor as defined by KRS 453.190(2).

In the matter at bar, McGee acknowledges that there is no video record of the court designating him as indigent. Nevertheless, it is uncontroverted that the court appointed a public defender to represent McGee through the proceeding, that McGee did receive such representation and continues to do so on appeal, that an appointment card memorializing the public defender’s appointment appears in the record, and that a post-sentencing order appears in the record allowing McGee to proceed *in forma pauperis* on appeal. When viewing the record in its entirety, it is clear that McGee is properly characterized as indigent for purposes of KRS 534.030(4), and poor for purposes of KRS 23A.205(2) and 453.190(2). By using “shall” language, it is clear that the Legislature intended the waiver of costs and fines to be mandatory for persons who fall within the scope of the respective statutes. The record demonstrates that McGee is such a person, and accordingly, we must reverse the order imposing the costs and fee.

For the foregoing reasons, we reverse the order of the Jefferson Circuit Court directing McGee to pay the costs and fee resulting from his plea of guilty and subsequent conviction.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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