

RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000646-MR

ADDISON LEE CUTSINGER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 09-CR-001396

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: Addison Lee Cutsinger brings this appeal from a March 9, 2010, judgment of the Jefferson Circuit Court imposing court costs and fees upon appellant following a guilty plea to sundry criminal offenses. Upon the narrow issue of court costs and fees, we reverse and remand.

Appellant entered a plea agreement with the Commonwealth and pleaded guilty to six counts of burglary in the third degree, one count of cultivation of marijuana, three counts of theft by unlawful taking over \$300 and one count of theft by unlawful taking under \$300. By judgment entered March 9, 2010, and pursuant to the plea agreement, the circuit court sentenced appellant to five-years' imprisonment; however, appellant's sentence was probated for a period of five years. Relevant to this appeal, the court also imposed court costs of \$130 and a \$1,000 felony fine upon appellant. This appeal follows.

Appellant contends the circuit court erred by imposing court costs of \$130 and a felony fine of \$1,000 as he qualified as an indigent person. We agree.

It is well-established that a circuit court may not impose court costs upon an indigent criminal defendant. *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987). Furthermore, Kentucky Revised Statutes (KRS) 534.040(4) provides that a felony fine "shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010).

In this case, the record demonstrates that the circuit court granted appellant's motion to proceed *in forma pauperis*, and appellant was represented by a public defender in the proceedings below. As such, appellant qualified as an indigent person. *See Travis*, 327 S.W.3d 456. Thus, we conclude the circuit court erred by imposing \$130 in court costs and a \$1,000 felony fine against appellant.

Accordingly, we reverse the March 9, 2010, judgment solely as to imposition of such court costs and felony fine.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and remanded for proceedings consistent with this opinion.

MOORE, JUDGE, CONCURS.

WINE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

WINE, JUDGE, DISSENTING: I agree the opinion of the majority is legally correct as far as it goes. The courts are required to waive all court costs and fines for needy persons as defined under KRS 453.190(2) and KRS 31.110(1)(b). However, at the time of sentencing, persons such as Mr. Cutsinger impress upon the court that they can become contributing members of the community for reasons including, but not limited to, the fact they are now employed. Here, this trial court reasonably relies upon this representation, and after deciding to probate Mr. Cutsinger, imposed reasonable financial conditions. Probation included paying fines and court costs which would demonstrate acts of accountability.

This initial determination of indigency should not remain static, rather as provided for in other sections of Chapter KRS 31, additional hearings may be appropriate. KRS 31.211(1). *See also Donovan v. Commonwealth*, 60 S.W.3d 581 (Ky. App. 2001).

Courts should be mandated to conduct a second hearing at the time of sentencing to determine whether indigency status, which prohibits bearing the

expensive costs of representation, also prohibits paying fines and court costs by individuals who are now employed.

It would be appropriate for our legislature to reexamine the prohibition against imposing fines and court costs against persons to be determined to be indigent at the time of arraignment pursuant to KRS 31.110(1)(b) and KRS 23A.205(2).

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