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IN THE
COURT OF APPEALS OF INDIANA

JOSEPHINE SALLS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0802-CR-29
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0704-CM-195

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Josephine Salls appeals her conviction for Resisting Law Enforcement, as a Class A misdemeanor, and her sentence following a bench trial. She presents two issues for review:

1. Whether the evidence is sufficient to support her conviction.

2. Whether the trial court erred when it ordered her to pay a fine, costs, and reimbursement for public defender fees.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On March 20, 2007, Deputy Jason Sunday of the Elkhart County Sheriff's Department accompanied Rosie Griffy, a Child Protective Services investigator, to the apartment of Shanae Salls in Osceola. Officer Sunday and Griffy went there to take Shanae's infant into protective custody pursuant to an emergency custody order. The order had been issued because the infant had tested positive for cocaine.

Upon Officer Sunday and Griffy's arrival, Shanae telephoned her mother, Salls. When Salls arrived, Shanae handed the infant to her. Officer Sunday and Griffy explained that they were there to take custody of the baby pursuant to an emergency custody order. Officer Sunday instructed Salls to give the baby to Griffy, but Salls replied that the baby was not going anywhere and asked whether the child could stay with her. Griffy explained that placement of the baby with Salls might be possible after a background check of her and an investigation of her home.

Salls refused to hand the baby to Griffy and backed into the apartment's kitchen. Officer Sunday again ordered Salls to give the child to Griffy in compliance with the

court order, but Salls picked up a wall phone and dialed 911. She said she was calling the police because Officer Sunday and Griffy were trying to kidnap the child. Officer Sunday reminded Salls that he was a police officer, dressed in full uniform, and he offered to call for additional officers on his radio. Officer Sunday and Griffy both approached Salls, who was agitated, shouting, and interrupting Officer Sunday.

Salls was holding the baby in her left arm. Officer Sunday took the phone from Salls' right hand and grabbed Salls' right wrist because she was beginning to back further away. As Griffy approached, Salls began pulling and turning away, and Officer Sunday held Salls' arm to keep her from turning away. Griffy then took the baby from Salls' left arm. Officer Sunday told Salls that she needed to stop pulling away and that he was going to place her in handcuffs "for officer safety and to detain her because she had been resisting law enforcement." Transcript at 10. Salls pulled away further before Officer Sunday was successful in handcuffing her.

The State charged Salls with resisting law enforcement, as a Class A misdemeanor. At the conclusion of a bench trial, the court found Salls guilty as charged and sentenced her as follows:

> 1 year jail/suspended on 1 year Reporting Probation supervision, Terms of Probation are issued in open Court. The Terms of Probation include no alcohol/illegal drug use while on Probation, random drug and alcohol screens (urine, saliva, blood or hair follicle); Probation Administration Fee, initial and monthly Probation User's Fees.
>
> $200.00 fine, $160.00 Court Costs, $1000.00 reimbursement for Public Defender fees. Financials are due by June 11, 2008 with financial compliance hearing set for July 2, 2008 at 3:00 p.m.

Appellant's App. at 44 (emphasis in original). Salls now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Salls contends that the evidence is insufficient to support her conviction for resisting law enforcement, as a Class A misdemeanor. Specifically, she argues that her conviction cannot stand because the State did not show that she forcibly resisted Officer Sunday. We cannot agree.

To prove the offense of resisting law enforcement, as a Class A misdemeanor, the State was required to show that Salls "forcibly resist[ed] with the authorized service or execution of a civil or criminal process or order of the court." Ind. Code § 35-44-3-3(a)(2) (Lexis 2008). Our supreme court has held that forcible resistance as contemplated in that statute requires more than passive refusal to obey a law enforcement officer's command. Spangler v. State, 607 N.E.2d 720, 724 (Ind. 1993). "[O]ne 'forcibly resists' law enforcement when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties." Id. at 723.

But forcible resistance does not require outright violence by the defendant. "Clearly our jurisprudence has not read 'violent' to mean that which is thought of in common parlance. Were that definition to be applied, only those individuals who commit acts such as striking, kicking, or biting police officers could be guilty of resisting law enforcement." Johnson v. State, 833 N.E.2d 516, 519 (Ind. Ct. App. 2005). Thus, to satisfy the forcible resistance element of Section 35-44-3-3(a)(2), the State was required to show only that a defendant applied "some 'force' such that the officers had to exert

force to counteract [the defendant's] acts in resistance." Id. at 518 (referring to Guthrie v. State, 720 N.E.2d 7 (Ind. Ct. App. 1999)).

Here, the evidence most favorable to the judgment shows that Officer Sunday asked Salls to give the child to Griffy. Salls refused, backed into the kitchen, and dialed 911. Up to this point, there is no evidence of forcible resistance. However, Officer Sunday took hold of Salls' right wrist because she continued to back away, refusing to give Griffy the baby. As Griffy approached to take the baby, pursuant to the emergency order, Officer Sunday had to maintain a hold on Salls' arm to prevent Salls from pulling and turning away from Griffy. When Officer Sunday told Salls that he was going to place her under arrest for officer safety and because she had been resisting, Salls pulled away again.

Salls' acts of pulling away from Griffy and from Officer Sunday while the officer was holding Salls' arm constitutes "forcible resistance" as contemplated in Section 35-44-3-3(a)(2). The statute does not require violent resistance but merely some act that required the officer to exert force to counteract the resistance. See id. Thus, the evidence is sufficient to support Salls' conviction.

Issue Two: Costs, Fines, and Reimbursement Fees

Salls also contends that the trial court erred when it sentenced her. Specifically, she argues that the court was required to determine whether she was indigent before it ordered her to pay a fine, costs, and reimbursement for public defender fees. Because the court did not make a determination of indigency, Salls argues that the imposition of a fine, costs, and reimbursement for the public defender was error. We must agree.

A trial court may order a defendant to pay a fine, costs, or reimbursement for appointed counsel, but the court must first conduct a hearing to determine whether the defendant is indigent. For example, before imposing a fine, a court "shall conduct a hearing to determine whether the convicted person is indigent. . . ." I.C. § 35-38-1-18(a) (emphasis added). And Indiana Code Section 33-37-2-3(a) provides that a court "shall conduct a hearing to determine whether a convicted person is indigent" whenever it imposes costs.[1] (Emphasis added). But Indiana Code Section 33-37-4-1, which authorizes the clerk of the court to collect specified costs from the defendant, does not require a prior determination of indigency.

Trial courts are also authorized to order defendants to pay reimbursement for appointed counsel. Indiana Code Section 35-33-7-6 provides in part:

> (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 to the person.
>
> * * *
>
> (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).
>
> (2) For a misdemeanor action, a fee of fifty dollars ($50). . . .
>
> (d) The court may review the finding of indigency at any time during the proceedings.

[1] If the court suspends payment of all or part of the costs until the convicted person has completed all or part of the sentence, it "shall conduct a hearing at the time the costs are due to determine whether the convicted person is indigent." I.C. § 33-37-2-3(b) (emphasis added).

Indiana Code Section 33-40-3-6 also authorizes an order for public defender reimbursement. That section provides that a court must make a finding of a defendant's ability to pay before ordering the defendant to pay reimbursement for assigned counsel. Ind. Code § 33-40-3-6(a). Section 33-40-3-6 does not limit the amount that the trial court can order to be reimbursed except that the amount "may not exceed the cost of defense services rendered to the person." Ind. Code § 33-40-3-6(d).

This court addressed the propriety of an order for the reimbursement of public defender costs in Stanley v. State, 755 N.E.2d 708 (Ind. Ct. App. 2001). There the trial court had ordered the defendant to pay $6000 as reimbursement for public defender fees. The record on appeal did not show that an indigency hearing had been held. Therefore, the court "assume[d]" that the trial court must have found the defendant to be indigent because it had appointed counsel at the initial hearing. Stanley, 755 N.E.2d at 711. The court also found that the trial court must have re-evaluated the defendant's financial status at some point because it had later ordered him to pay reimbursement for his assigned counsel. But the trial court's sentencing order did not provide the statutory authority for its reimbursement order, and the defendant had not provided a copy of the initial hearing transcript on appeal. Nor did the record disclose evidence or findings regarding the actual cost of the defense services rendered to the defendant.[2] This court held that "[w]ithout such findings, we are unable to determine how the trial court arrived at the $6,000.00 figure." Id. at 712. Thus, we reversed and remanded "for proceedings consistent with [that] opinion." Id.

[2] Former Indiana Code Section 33-9-11.5-6(d) (now Section 33-40-3-6(d)) limits the sum that can be assessed as reimbursement for assigned counsel to the cost of the defense services rendered.

Here, at the initial hearing, the court made the following entry in the Chronological Case Summary ("CCS"): "Public Defender appointed with possible reimbursement." Appellant's App. at 2. Because the court assigned counsel to Salls, it must have determined her to be indigent. See Stanley, 755 N.E.2d at 711. But the record contains no further indication that the trial court made a determination that Salls was indigent or that it had re-evaluated her ability to pay before ordering her to pay a fine, costs, or reimbursement for her assigned counsel. As in Stanley, the record provided on appeal does not include a transcript of the initial hearing, and the court did not indicate at sentencing the statutory basis for ordering reimbursement or how it calculated the reimbursement amount. Nor do the parties on appeal point to any evidence in the record showing the cost of Salls' defense. Thus, we are unable to determine the propriety of the order requiring Salls to pay a fine, costs, or reimbursement for her assigned counsel. See id. at 712. As such, following Stanley, we must reverse that part of the sentencing order and remand for the trial court to determine Salls' ability to pay and then to reconsider the order to pay a fine, costs, and reimbursement.

Affirmed in part, reversed in part, and remanded.

DARDEN, J., and BROWN, J., concur.