

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002500-MR

DEPARTMENT OF PUBLIC ADVOCACY,
COMMONWEALTH OF KENTUCKY, and
FINANCE AND ADMINISTRATION
CABINET, COMMONWEALTH OF
KENTUCKY

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 98-CR-00379

DOUGLAS M. STEPHENS, JUDGE,
KENTON CIRCUIT COURT, SECOND
DIVISION, and KENTON COUNTY
COMMONWEALTH'S ATTORNEY'S OFFICE

APPELLEES

NO. 1998-CA-002501-MR

DEPARTMENT OF PUBLIC ADVOCACY,
COMMONWEALTH OF KENTUCKY, and
FINANCE AND ADMINISTRATION
CABINET, COMMONWEALTH OF
KENTUCKY

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00324

PATRICIA M. SUMME, CHIEF JUDGE,
KENTON CIRCUIT COURT, FOURTH
DIVISION, and KENTON COUNTY
COMMONWEALTH'S ATTORNEY'S OFFICE

APPELLEES

NO. 1998-CA-002502-MR

DEPARTMENT OF PUBLIC ADVOCACY,
COMMONWEALTH OF KENTUCKY, and
FINANCE AND ADMINISTRATION
CABINET, COMMONWEALTH OF
KENTUCKY

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE

PATRICIA M. SUMME, CHIEF JUDGE,
KENTON CIRCUIT COURT, FOURTH
DIVISION, and KENTON COUNTY
COMMONWEALTH'S ATTORNEY'S OFFICE

APPELLEES

NO. 1998-CA-002788-MR

DEPARTMENT OF PUBLIC ADVOCACY,
COMMONWEALTH OF KENTUCKY, and
FINANCE AND ADMINISTRATION
CABINET, COMMONWEALTH OF
KENTUCKY

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00371

PATRICIA M. SUMME, CHIEF JUDGE,
KENTON CIRCUIT COURT, FOURTH
DIVISION, and KENTON COUNTY
COMMONWEALTH'S ATTORNEY'S OFFICE

APPELLEES

OPINION
REVERSING AND VACATING

** ** * * * * *

BEFORE: HUDDLESTON, McANULTY AND MILLER, JUDGES.

McANULTY, JUDGE: The consolidated actions in this appeal arose when the Kenton County Commonwealth's Attorney sought payment from the KRS 31.185 special account for the costs incurred by his office for copying discovery materials provided to indigent defendants who were represented by the Kenton County Public Defender Office. The circuit courts granted the motions for reimbursement. We reverse.

In the first of these cases, the Commonwealth's Attorney filed a motion in the circuit court for an order requiring the Kenton County Public Defender system to pay for copies received from the Commonwealth's Attorney's Office for discovery under the rules of procedure for the fiscal year 1997-1998, in the total amount of \$779.40. On September 1, 1998, Chief Judge Patricia Summe entered an order, styled "IN RE: Copies Provided by Kenton County Commonwealth's Attorneys Office to the Kenton County Public Defender's Office," that ordered the Kenton County Public Defender to pay the Commonwealth's Attorney's Office \$779.40 for the "reasonable and necessary" cost of copying discovery for 1997-1998. Judge Summe further adjudged that the amount was to be paid by the Finance and Administration Cabinet from the special account provided in KRS 31.185 and KRS 31.200.

Thereafter, in three criminal cases involving indigent defendants, Kenton County circuit courts ordered payment from the special account for copying costs for discovery in each case, in amounts ranging from \$10.00 to \$40.00. The Finance and Administration Cabinet and the Department of Public Advocacy

(hereinafter appellants) appealed the reimbursement orders, which were consolidated in the present appeal. We find that review of appellants' arguments is proper since, although they were not raised below, appellants were not parties to the underlying criminal cases and had no opportunity to raise the objections below. RCr 9.22.

Having reviewed the issues herein and the applicable law, we conclude that the statutes cited by the circuit court do not constitute authority for the reimbursement orders. KRS 31.185 and KRS 31.200 control when the special account funds are to be paid. As will be shown, neither statute applies in this set of circumstances. We do not find, therefore, that the General Assembly intended these costs to be paid from the special account.

Appellants argued first that the special account cannot be charged for copying expenses because indigent defendants are exempted from such costs by KRS 31.110(1). That statute provides that a needy person who has been detained or charged is entitled to attorney representation. Further, it provides: "The courts in which the defendant is tried shall waive all costs." Appellants argue that because this provision does not specifically say "*court costs*," the legislature must have intended it to be more expansive and comprehensive than a waiver of court costs. They would have us apply it to waive the copying costs ordered by the circuit court.

We disagree with this interpretation for two reasons. First, we note that KRS 31.110(1) clearly states that the *court* shall

waive costs. This must mean court costs, since the use of the word waive implies that the court shall relinquish its costs as opposed to costs or expenses owed to others (such as a witness fee or cost of a transcript). We believe, therefore, that provision excludes fees that constitute court costs incident to litigation, or fees to officers for services. Cf. Stafford v. Bailey, 282 Ky. 525, 138 S.W.2d 998 (1940). Secondly, an expansive definition which discharges all costs incurred in representing indigent defendants would render the other statutes in Chapter 31 pertaining to expenses for representation of indigents – KRS 31.185 and KRS 31.100 – meaningless. “KRS 31.100, et seq., is a unified enactment[.]” Morton v. Commonwealth, Ky., 817 S.W.2d 218, 220 (1991). Each section of a legislative act should be read in light of the act as a whole, with a view to making it harmonize, if possible, with the entire act and with each section and provision thereof. Kentucky Tax Comm'n v. Sandman, 300 Ky. 423, 189 S.W.2d 407 (1945). In order for the whole act to have meaning, “costs” cannot mean all costs and expenses. For these reasons, we reject appellants' expansive interpretation of KRS 31.110(1), and hold that it does not govern the issue in the case at bar.

Turning our attention to the two statutes relied upon by the circuit court, KRS 31.185(1) states:

Any defending attorney operating under the provisions of this chapter [Department of Public Advocacy] is entitled to use the same state facilities for the evaluation of evidence

as are available to the attorney representing the Commonwealth. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county.

Section (3) of KRS 31.185 dictates that all court orders entered pursuant to the above provision be paid by the Finance and Administration Cabinet from the special account; section (2) establishes the funding for the special account. As appellants interpret this statute, it was error for the trial court not to find that the public defenders were entitled to use state facilities rather than be charged for copies. The Commonwealth counters that this statute has no application because evaluation of evidence does not encompass the mere copying of discovery compliance materials. We agree with the Commonwealth.

The Commonwealth correctly asserts that KRS 31.185 was designed to ensure that indigent criminal defendants have access to expert assistance for the evaluation of evidence. In cases applying KRS 31.185, it has been used to allow defendants either to use state facilities and personnel for expert assistance, or to pay for a private facility or private expert. See Binion v. Commonwealth, Ky., 891 S.W.2d 383 (1995) (mental health expert witness); McCracken County Fiscal Court v. Graves, Ky., 885 S.W.2d 307 (1994) (investigative costs, psychological examination fees, expert psychological witness); Smith v. Commonwealth, Ky., 734 S.W.2d 437 (1987) (crime scene or ballistics expert); Todd v. Commonwealth, Ky., 716 S.W.2d 242

(1986) (mental evaluation); Perry County Fiscal Court v. Commonwealth, Ky., 674 S.W.2d 954 (1984) (psychologist and ballistics expert). We conclude that a prosecutor's staff and office equipment are not the sort of "state facility for the evaluation of evidence" that the statute was designed to provide to criminal defendants. Indeed, furnishing copies of discovery documents does not constitute *evaluation* of evidence. Thus, we hold KRS 31.185 has no application to this question.

The Commonwealth asserts that the costs are payable pursuant to KRS 31.200. That statute states, in pertinent part:

(1) Subject to KRS 31.190, any direct expense, including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript that is necessarily incurred in representing a needy person under this chapter, is a charge against the county on behalf of which the service is performed; provided, however, that such a charge shall not exceed the established rate charged by the Commonwealth and its agencies.

(2) Any direct expense including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript shall be paid from the special account established in KRS 31.185(2) and in accordance with the procedures provided in KRS 31.185(3). (Emphasis supplied.)

We believe that this statute does not provide authorization for the copying costs either. It concerns payment only for a necessary "direct expense" of representation of an indigent defendant by a public advocate. The expense incurred by the Commonwealth in making copies to provide discovery is a direct expense of the Commonwealth.

Thus, KRS 31.200 does not address the situation in these cases. We conclude that the Commonwealth has failed to show a means for charging the copying expense against the special account within the statutes which govern it.

Furthermore, we agree that the criminal discovery rules provide no support for the Commonwealth's Attorney's motion for payment. RCr 7.24 requires the Commonwealth "to permit the defendant to inspect and copy or photograph" discovery materials, "or copies thereof." RCr 7.26 requires the Commonwealth to produce witness statements and make them "available for examination and use by the defendant." The Commonwealth argues that neither rule *requires* it to do photocopying. This is true. The rules say that the defendant may inspect and copy the actual items in the possession of the Commonwealth, and thus mean that a defendant may take possession of them. However, they also allow the Commonwealth to provide copies of the items in lieu of having the defense take them to inspect, copy and/or photograph. As a result, the Kenton County Commonwealth's Attorney's Office could provide the originals to the defendants, or prepare copies so as to ensure that the evidence remains in its custody and control. The Commonwealth's Attorney elected to prepare and provide the defense with copies rather than furnish the evidence to the defendants. Nothing in the criminal rules places the expense of this decision by the Commonwealth's Attorney on the defense. Office expenses of Commonwealth's Attorney's offices in the

performance of their duties are to be paid by the Commonwealth. KRS 15.750.

For the foregoing reasons, we reverse and vacate the orders in these consolidated cases which ordered payment of the expense of photocopying discovery from the special account of KRS 31.185.

ALL CONCUR.

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