

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000868-MR

BILLY JOE WILLIAMS

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE PAUL E. BRADEN, JUDGE  
ACTION NO. 08-CR-00145

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART AND VACATING IN PART

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BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

VANMETER, JUDGE: Billy Joe Williams appeals from the judgment of the  
Whitley Circuit Court sentencing him to seven years' imprisonment pursuant to a  
plea agreement. For the following reasons, we affirm in part and vacate in part.

Williams was arrested on July 22, 2008, and later indicted and  
charged with one count of unlawful transaction with a minor in the first degree

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<sup>1</sup> Senior Judge Joseph E. Lambert 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.

(UTM 1st), pursuant to KRS 530.064. Williams was arrested following a sting operation where an adult posed as a minor over a computer and Williams traveled to Williamsburg, Kentucky to meet with that “minor.”

The indictment by the grand jury charged that:

On or about the 22<sup>nd</sup> day of July, 2008, in Whitley County, Kentucky, the above-named defendant, BILLY JOE WILLIAMS, committed the offense of Criminal Attempt of Unlawful Transaction with A Minor First Degree when he knowingly attempted to induce, assist or cause what he thought to be a minor child under the age of sixteen to engage in illegal sexual activity.

Williams orally moved the trial court to dismiss the indictment arguing that because no actual minor was involved it was impossible for him to commit the offense of attempted UTM 1st. The trial court denied the motion, and thereafter Williams entered a conditional guilty plea to attempted UTM 1st and received a sentence of seven years’ imprisonment. Additionally, the court ordered Williams to pay court costs in the amount of \$125 and a fee for public representation in the amount of \$450. This appeal followed.

Williams argues the trial court abused its discretion by denying his motion to dismiss the indictment for failure to charge an offense. We disagree.

Our review of a trial court’s denial of a motion to dismiss is an abuse of discretion standard of review. *Commonwealth v. Deloney*, 20 S.W.3d 471, 474 (Ky. 2000). The trial court abused its discretion if its “decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Lucas v.*

*Commonwealth*, 258 S.W.3d 806, 807 (Ky.App. 2008) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

KRS 530.064 states, in pertinent part:

(1) A person is guilty of unlawful transaction with a minor in the first degree when he or she knowingly induces, assists, or causes a minor to engage in:

(a) Illegal sexual activity; or

(b) Illegal controlled substances activity other than activity involving marijuana;

Except those offenses involving minors in KRS Chapter 531 and in KRS 529.100 where that offense involves commercial sexual activity.

In this case, Williams was indicted and charged with attempted UTM

1st. KRS 506.010, the criminal attempt statute, provides in pertinent part:

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) Intentionally does or omits to do anything which, under the circumstances *as he believes them to be*, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(emphasis added).

Although KRS 530.064 requires an actual minor be involved, the criminal attempt statute has no such requirement. Rather, the criminal attempt statute only requires a substantial step towards the commission of what would

constitute a crime under those circumstances as Williams believed them to be. Here, Williams believed he was communicating with a minor while knowingly inducing, assisting and causing that “minor” to engage in illegal sexual activity. Accordingly, the trial court did not abuse its discretion by denying Williams’ motion to dismiss the indictment.

Next, Williams argues the trial court improperly imposed court costs and a fee for representation because he was declared indigent. We agree.

This issue is not properly preserved for our review. Therefore, any error may only be “noticed on appeal if the error is ‘palpable’ and ‘affects the substantial rights of a party[.]’” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). Kentucky law suggests “a palpable error ‘affects the substantial rights of a party’ only if ‘it is more likely than ordinary error to have affected the judgment.’” *Id.* (citations omitted). Relief is not justified unless the palpable error has “resulted in a manifest injustice . . . in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Id.* (citation omitted).

KRS 31.110(1) states:

A needy person . . . is entitled:

- (a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and
- (b) To be provided with the necessary services and facilities of representation including investigation and

other preparation. *The courts in which the defendant is tried shall waive all costs.*

KRS 31.110(1)(a) and (b). (emphasis added). Additionally, both KRS 534.030(4) and KRS 534.040(4) preclude the court from imposing fines upon indigent clients.

KRS 31.120(1) states:

The determination of whether a person covered by KRS 31.110 is a needy person shall be deferred no later than his first appearance in court or in a suit for payment or reimbursement under KRS 31.150, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each step in the proceedings, whether he is a needy person. However, nothing herein shall prevent appointment of counsel at the earliest necessary proceeding at which the person is entitled to counsel, upon declaration by the person that he is needy under the terms of this chapter. In that event, the person involved shall be required to make reimbursement for the representation involved if he later is determined not a needy person under the terms of this chapter.

In *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994), the Kentucky Supreme Court held the trial court must “independently determine the appropriateness of any fine[.]” In doing so, the court must consider whether the defendant is indigent. *Id.* The Court held that because Simpson was represented by an assistant public advocate at trial, the court may assume the trial judge had determined Simpson to be indigent, and therefore any fine was inappropriate. *Id.*

In this case, Williams was ordered to pay \$125 in court costs and a \$450 fee for representation by the Department of Public Advocacy. Under the holding in *Simpson*, we can assume Williams was determined to be an indigent defendant because he was represented by an assistant public advocate at trial.

Although there is no record of the trial court's findings regarding indigence, the trial court granted Williams' motion to proceed with an appeal *in forma pauperis* without payment of costs and appointing the Department of Public Advocacy to represent Williams on appeal. From these actions taken by the trial court, we can determine the trial court understood Williams to be an indigent defendant throughout the trial process. Accordingly, under KRS 31.110 and KRS 31.120(1), the order for Williams to pay \$125 in court costs and a \$450 fee for representation was in violation of Williams' statutorily protected rights.

The judgment and sentence of the Whitley Circuit Court is affirmed, except for the portion imposing a fine and fee, which is vacated.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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