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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002274-MR

DESEAN MAYNES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CR-002518

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,¹ SENIOR JUDGES.

ISAAC, SENIOR JUDGE: Desean Maynes appeals from an order of the Jefferson Circuit Court imposing court costs following a guilty plea and order granting him felony pretrial diversion.

¹ Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On the day the trial court took the appellant's guilty plea and allowed him to enter the felony diversion program, the court did not impose a public defender fee but imposed court costs of \$130 and inquired as to how long he would need to pay that sum. Defense counsel argued that Maynes was indigent, stating that he had been in custody for a few weeks and had a newborn child, and argued that statutory and case law required waiver. The trial court disagreed, imposed the court costs of \$130 and then allowed the defendant six months to pay. Defense trial counsel then filed a motion for the court to reconsider and that motion was heard and denied. From that order, Maynes appeals.

In order to properly analyze the issue before the court, several statutes must be considered, specifically Kentucky Revised Statutes (KRS) 23A.205(2), KRS 453.190(2), KRS 31.211(1), and KRS 31.110(1)(b). We start with KRS 23A.205(2) which states,

The taxation of court costs against a defendant, upon conviction in a case, shall be mandatory and shall not be subject to probation, suspension, proration, deduction, or other form of nonimposition in the terms of a plea bargain or otherwise, unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.

The legislature is clear that imposition of court costs is mandatory unless the court finds the defendant is a poor person, which is defined in KRS 453.190(2) as "a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life,

including food, shelter, or clothing.” A logical interpretation of these two statutes read together would produce a rule that court costs are not waivable unless the payment of those costs would deprive the defendant or his or her dependents of the basic necessities of food, shelter or clothing, now and in the foreseeable future.

In Chapter 31 of the Kentucky Revised Statutes, the legislature defines those persons entitled to appointed legal representation and services in criminal cases and also sets out the criteria for that determination. KRS 31.100 states in subsection 3(a) that a “[n]eedy person” or “indigent person” means:

A person eighteen (18) years of age or older or emancipated minor under the age of eighteen (18) who, at the time his or her need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation[.]

Subsection 2 defines expenses “when used with reference to representation under this chapter,” to include “the expenses of investigation, other preparation, and trial, together with the expenses of any appeal[.]” KRS 31.100(2). This Chapter 31 definition of a needy or indigent person is clearly a different definition than that of a poor person under KRS 453.190(2), which is the required definition for a KRS 23A.205(2) determination.

In determining whether a person is a needy person, KRS 31.120(2) directs the court to consider various factors, including income, assets and obligations of the defendant, but it also directs a consideration of the complexity of the case, the amount of time an attorney would spend on the case and the amount an attorney would charge for similar circumstances. Clearly, a critical component

of this determination is the cost of legal counsel and whether a person has the funds to immediately hire an attorney. In many cases, the defendant is in custody and therefore, without employment.

KRS 31.120 (1) states in part that

[T]he court concerned shall determine, with respect to each step in the proceedings, whether he is a needy person. . . . [T]he 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.

KRS 31.211(1) states that

At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and **court costs**. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided under this chapter. This partial fee determination shall be made at each stage of the proceedings. [Emphasis added.]

Subsection 2 of the same statute goes on to state that if the partial fee, or any portion thereof, is not paid by the due date, the court's order is a civil judgment subject to collection under Kentucky Rules of Civil Procedure (CR) 69.03 and KRS Chapter 426. This statute, KRS 31.211, most clearly mandates that a court may order the payment of court costs by a criminal defendant who has been allowed a public defender.

The very chapter authorizing the appointment of counsel expressly mandates the court collect partial fees for representation, other necessary services and court costs, if the court determines the defendant has an ability to pay. There is clear legislative intent for the court to consider a defendant's ability to pay an attorney and to pay court costs and, the statute obligates the court to order payment, whether partial or full, or in installments, if the court finds the defendant is able to pay. The fact that the statute allows non-payment of those costs to turn into a civil judgment subject to collection shows a clear intent for the ultimate collection of these fees.

Kentucky law is clear that “[t]he fundamental rule in statutory interpretation is to give effect to the legislative intent.” *Kentucky Indus. Util. Customers, Inc. v. Kentucky Util. Co.*, 983 S.W.2d 493, 500 (Ky. 1998). In determining the legislature's intent, a court “may not interpret a statute at variance with its stated language.” *Commonwealth v. Allen*, 980 S.W.2d 278, 280 (Ky. 1998) (internal citations omitted). The legislature has made it clear with the implementation of KRS 23A.205(2) and KRS 31.211(1) that court costs are to be collected unless a defendant is completely destitute and without any ability either presently or in the foreseeable future to pay those sums.

If it is the legislature's intent to simply waive court costs (or for that matter all legal fees), once a court has allowed appointed defense counsel, then KRS 31.211 cannot be given any meaning. This statute recognizes that criminal defendants come with varying degrees of abilities to pay, presently and in the

future. The immediacy of the need for counsel requires the trial court to appoint attorneys for defendants who cannot quickly raise significant funds to hire private counsel. This initial decision to appoint counsel does not end the inquiry as to payment of a partial fee for legal representation, the other necessary services and facilities of representation and court costs. As stated in KRS 31.211(1), “[t]his partial fee determination shall be made at each stage of the proceedings.”

In the case before us, the trial court properly held a hearing pursuant to KRS 31.211(1). Since that statute requires the court to look at circumstances at each stage of the proceeding, the sentencing operated as the KRS 31.211 hearing at the final stage. At the time of the sentencing, the appellant was in completely different circumstances than he was at the time of arraignment. At sentencing, the appellant was being released from custody and was beginning a diversion program. Although appellant argued he was presently unemployed due to his incarceration and that he had a newborn to support, there was no evidence presented by appellant that he had any physical or mental disabilities preventing him from employment. The court had decided no partial fees for counsel would be assessed and therefore, he would owe nothing for his legal representation in the case. The court did find, however, that the appellant had the ability to pay \$130 over a six-month period. This order amounts to less than one dollar a day over that period. Under these circumstances such an order clearly would not deprive him or his dependents of the necessities of life, including food, shelter, or clothing. That factual finding stands and shall not be set aside unless clearly erroneous. CR 52.01.

[T]he findings of fact of the trial court should not be reversed unless they are determined to be clearly erroneous. In making such consideration the appellate court must keep in mind that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact.

Bealert v. Mitchell, 585 S.W.2d 417, 418 (Ky.App. 1979).

Appellant argues that the court has no authority to assess court costs once he has been provided with a public defender. He argues that once a public defender was appointed to represent him, the court was obligated to waive court costs pursuant to KRS 31.110(1)(b). Appellant also cites *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987), which found no inconsistencies existed between KRS 23A.205 and KRS 31.110, recognized that KRS 31.110 is controlling, and ruled that court costs should be waived.

Since the *Edmonson* ruling predated the 2002 passage of KRS 31.211, it is no longer controlling, as that statute is specific in directing the court to determine whether a defendant qualifying for public defender services can pay some or all of his or her legal costs and court costs, and if the court so finds, mandates that payment be ordered.

Chapter 31 has been mistakenly used to support the argument that court costs are not allowed to be imposed upon defendants who have been appointed counsel. In setting the representation and services to which a needy person is entitled, KRS 31.110(1)(b) states that he or she is, “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.**” (Emphasis added.) This last sentence has been used to support the position that court costs cannot be assessed to a defendant utilizing the services of an appointed attorney. That position is too simplistic and is untenable if the sentence is read in context with the sentence immediately preceding it and the other relevant statutes. In KRS 31.110(1)(b), the legislature was clearly referring to the costs of preparing and maintaining a defense for the needy person, not court costs being imposed after conviction. The more specific statute of KRS 31.211 clearly controls. The legislature could not be clearer that court costs are assessable against criminal defendants who have appointed counsel under the rules set out in KRS 23A.205 and KRS 31.211.

For these reasons, the order of the Jefferson Circuit Court assessing court costs against the appellant is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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