

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000995-MR

AARON D. SETTERS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 10-CR-001014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

WINE, JUDGE: Aaron D. Setters appeals from a judgment of conviction by the Jefferson Circuit Court, arguing that the trial court erred by imposing costs on him despite his indigent status. We agree with Setters that the trial court was not authorized to impose court costs on an indigent defendant. But while the trial court's oral ruling stated that it intended to impose court costs, the court signed a

written order waiving those costs. Since that written order is controlling, we conclude that Setters is not aggrieved by the trial court's decision. Hence, we affirm.

On April 15, 2010, Setters entered a plea of guilty to one count of illegal possession of a controlled substance (heroin), and two counts of illegal possession of drug paraphernalia. Pursuant to his plea agreement, the Commonwealth recommended a sentence of two years. The Commonwealth also recommended diversion of the sentence for a period of five years. The trial court imposed the recommended sentence.

On April 22, the trial court entered a final judgment and order of diversion.<sup>1</sup> As part of that order, the trial court ordered Setters to pay \$130 in court costs. Shortly thereafter, Setters filed a motion to waive court costs, noting that the trial court had previously found him to be indigent. The trial court orally indicated that it intended to deny the motion to waive court costs. The court noted that it had required Setters to be employed as a condition of his diversion, and that court costs would not be payable for some time. Consequently, the court concluded that Setters would not be indigent at the time costs were due. However, the trial court granted Setters' motion to proceed *in forma pauperis* and for appointment of appellate counsel. The trial court also signed Setters' tendered order waiving court costs.

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<sup>1</sup> The April 22 order made several corrections to its prior order accepting Setters' guilty plea, entered on April 15.

On appeal, Setters argues that the trial court erred by imposing court costs on him despite his indigent status. We agree. Under Kentucky Revised Statutes (KRS) 23A.205(2), a trial court shall impose court costs on a defendant unless it finds that the defendant is a “poor person.” The statute appears to allow the trial court some discretion in waiving costs. But in several recent cases, the Kentucky Supreme Court has held that KRS 31.110(1)(b) requires waiver of all costs for indigent defendants, notwithstanding the discretion allowed by KRS 23A.205(2). *Ladriere v. Commonwealth*, 329 S.W.3d 278, 283 (Ky. 2010); and *Wiley v. Commonwealth*, \_\_\_ S.W.3d. \_\_\_, 2010 WL 4146148 (Ky. 2010).<sup>2</sup> See also *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010), and *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987).

There is no question that Setters qualifies as indigent under KRS 31.100(3)(a). As part of the court’s “Progressive Docket,” the Jefferson District Court appointed counsel for Setters when he was initially charged. That appointment necessarily included a finding that he was an indigent or needy person as defined by KRS 31.100(3)(a). There is no indication that Setters’ indigent status had changed by the time he entered his plea or when the final judgment was entered. Consequently, the trial court was not authorized to impose court costs on him.

But while the trial court orally indicated that it would impose costs on Setters, it actually signed the order waiving court costs. It is well-established that a

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<sup>2</sup> *Wiley* became final on March 24, 2011, and is designated for publication.

court speaks only by its written record. *Holland v. Holland*, 290 S.W.3d 671, 675 (Ky. App. 2009). Consequently, the trial court's most-recent written order waiving Setters' court costs controls over its oral rulings. In the absence of any later written orders changing this decision, this Court cannot grant relief to Setters because he has not been aggrieved by the trial court's action.

Moreover, despite Setters' argument to the contrary, it does not appear that the trial court inadvertently entered the order waiving his court costs. Setters' appointed counsel tendered two separate orders relating to his motions; one to waive court costs and another for appointment of counsel and to proceed *in forma pauperis* on appeal. The trial court specifically signed and entered both orders. While the trial court's action is at odds with its oral statements, we must presume that the trial court intended to enter both orders.

Accordingly, the order of the Jefferson Circuit Court waiving Setters' court costs is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth B. McMahon  
Assistant Public Defender  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

J. Hays Lawson  
Assistant Attorney General  
Frankfort, Kentucky