

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

NO. 2009-CA-002218-MR

REGINALD GARRISON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 09-CR-000926

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING IN PART

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BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT, SENIOR JUDGE.

CAPERTON, JUDGE: Reginald Garrison appeals from the Jefferson Circuit

Court's judgment that ordered him to pay court costs and a felony fine after he pled

guilty to use/possession of drug paraphernalia, subsequent offense under KRS

218A.500. The sole issue on appeal is whether the trial court erred by requiring

Garrison, who was represented by a public defender, to pay court costs and a

felony fine. After a thorough review of the parties' arguments, the record, and the

applicable law, we conclude that the trial court erred in requiring Garrison to pay court costs and a felony fine in light of his indigency. Accordingly, we vacate that portion of the final judgment.

Garrison was arrested on March 4, 2009, for use/possession of drug paraphernalia, subsequent offense, after police found a crack pipe in his shoe.<sup>1</sup> He entered into a plea agreement with the Commonwealth in which he agreed to waive indictment, proceed by way of information and plead guilty. The recommended sentence was one year with the matter of probation left up to the sentencing court.<sup>2</sup> At final sentencing, the court denied Garrison's request for probation and imposed the one year sentence.

When the final judgment was entered on August 19, 2009, the court imposed court costs of \$130.00 and a felony fine of \$1,000 in addition to the one year sentence. Garrison's attorney filed a motion asking the court to waive the court costs and fine due to Garrison's indigency. The court denied said motion on August 31, 2009, reasoning that court costs and felony fines were statutory. It is from this imposition of court costs and a felony fine that Garrison now appeals.

At the outset we note that Garrison properly preserved this issue for our review by timely raising the matter with the trial court. While the Commonwealth is correct that as a general rule pleading guilty unconditionally waives all defenses

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<sup>1</sup> Garrison was a passenger in a car stopped by the police.

<sup>2</sup> The court rejected his first guilty plea when Garrison argued that the police had no probable cause to stop the vehicle in which he was a passenger. Two days thereafter, Garrison again entered a plea of guilty in accordance with the plea agreement. Garrison's plea was accepted and sentencing was scheduled for August 13, 2009.

except that the indictment did not charge an offense, the general rule is inapplicable here as sentencing is jurisdictional. *Hughes v. Commonwealth*, 875 S.W.2d 99, 100 (Ky. 1994). See also *Elmore v. Commonwealth*, 236 S.W.3d 623, (Ky.App. 2007) (“A defendant may by direct appeal challenge the legality of a sentence imposed pursuant to a guilty plea because sentencing issues are considered “jurisdictional” and cannot be waived.”). With this in mind, we now turn to the parties’ arguments.

The Commonwealth argues that in light of *Myers v. Commonwealth*, 42 S.W.3d 594 (Ky. 2001), a defendant may waive rights provided by statute with a guilty plea. Contrary to the Commonwealth’s argument, *Myers* is not controlling in the case *sub judice* because recently our Kentucky Supreme Court overruled *Myers* in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010)<sup>3</sup>. The Commonwealth also argues that Garrison may not carve out portions of the plea agreement that he wishes to avoid and leave the remainder. We do not find this argument to be persuasive because the court costs and felony fines were not contained in the plea agreement.<sup>4</sup> We now turn to Garrison’s argument that the trial court erred by assessing court costs and a felony fine after he had been found

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<sup>3</sup> In *McClanahan* our Supreme Court, in response to the Commonwealth’s argument that a defendant could agree to a sentence of years outside the statutory range, stated “We reject the Commonwealth’s argument, and in so doing we conclude that our analysis in *Myers* was flawed, warranting its reconsideration.” *McClanahan* at 698. We see little difference between agreeing to a punishment not imposed by statute and a defendant seeking the imposition of costs and fines that are statutorily waived.

<sup>4</sup> Moreover, “the Judge must independently determine the appropriateness of any fine, and if so, the appropriate amount and method of payment thereof. In so doing, the Judge must also consider whether the appellant is indigent.” *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994) citing KRS 534.030.

to be indigent and that such assessments are in contravention of our well-established jurisprudence.

In support of his argument concerning the inappropriate imposition of court costs, Garrison cites this Court to KRS 23A.205, which states in part:

- (1) Court costs for a criminal case in the Circuit Court shall be one hundred dollars (\$100).
- (2) 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.

We note that KRS 453.190(2), cited to in KRS 23A.205(2), defines a poor person as: “(2) A “poor person” means 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.” This definition differs from that of a “needy person”, i.e., an indigent who is entitled to be represented by a public defender. Indeed, KRS 31.100 states in part that a:

- (3) “Needy person” or “indigent person” means:
  - (a) 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

*Id.*

Thus, an indigent is entitled to representation by a public defender under KRS 31.110, which states in part:

1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile Justice or Cabinet for Health and Family Services for having committed a public or status offense as those are defined by KRS 610.010(1), 610.010(2)(a), (b), (c), or 630.020(2) is entitled:

(a) To be represented by an attorney to the same extent as a person having his or her 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.*

*Id.* Emphasis added.

In *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987), the Kentucky Supreme Court addressed the interplay between KRS 23A.205, which grants the trial court discretion in imposing court costs, and KRS 31.110, which requires a court to waive all costs for a needy person. In *Edmonson* the Court held:

KRS 23A.205(1) fixes the amount and KRS 23A.205(2) grants the trial court discretion in imposing court costs. However, KRS 31.110(1)(b) states that a needy person is entitled to legal representation, including investigation and other preparation, and “The courts in which the defendant is tried shall waive all costs.” We see no inconsistency in these statutes. The specific statute, KRS 31.110, is controlling. *Heady v. Commonwealth*, 597 S.W.2d 613 (1980).

*Edmonson* at 596.

*Edmonson* makes clear that the trial court should not impose court costs upon an indigent defendant. In the case *sub judice* Garrison was represented by the public defender’s office throughout the proceedings. Accordingly, we may assume that the trial court had determined that Garrison was indigent. *See Simpson v.*

*Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994). Given *Edmonson*, the trial court erred by imposing court costs upon an indigent defendant and we must vacate the imposition of court costs in the final judgment. We now turn to Garrison's argument concerning imposition of a felony fine.

Garrison cites this Court to KRS 534.030, which states in part:

(1) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars (\$1,000) and not greater than ten thousand dollars (\$10,000) or double his gain from commission of the offense, whichever is the greater....

**(4) Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.**

*Id.* (Emphasis added).

By the plain language of the statute itself, fines required under KRS 534.030 shall not be imposed upon an indigent defendant. *See Layne v. Newberg*, 841 S.W.2d 181, (Ky. 1992) (“We may not interpret a statute at variance with its stated language.”). Thus, the trial court erred by imposing a felony fine upon an indigent defendant, such indigency evidenced by fact that the trial court appointed a public defender to represent Garrison throughout the proceedings. Accordingly, we vacate the imposition of a felony fine in the final judgment.

In light of the foregoing, we vacate the portion of the final judgment which imposed court costs and a felony fine upon an indigent defendant.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bruce P. Hackett  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

J. Hays Lawson  
Assistant Attorney General  
Frankfort, Kentucky