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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001781-MR

KRISTOPHER GILREATH

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 11-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

MOORE, JUDGE: Kristopher Gilreath appeals the McCreary Circuit Court's judgment ordering him to pay restitution in the amount to \$132,376.21, as well as court costs of \$130.00 and administrative and attorney fees of \$450.00. After a careful review of the record, we affirm because the circuit court did not err in

ordering McCreary to pay more than \$100,000 in restitution, or in ordering him to pay court costs and administrative and attorney fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gilreath was indicted on the charge of first-degree assault. The indictment alleged that Gilreath “struck a vehicle driven by Randy Swain with his motor vehicle causing serious physical injury to Randy Swain while the defendant was driving under the influence.”

The Commonwealth provided an offer on a plea of guilty to Gilreath, which stated that if Gilreath entered a guilty plea to the charge, the Commonwealth would recommend a sentence of ten years of imprisonment and restitution paid to the victim. The offer also provided that the Commonwealth would recommend that Gilreath be denied probation. Furthermore, the offer stated that “court costs, and any fees, fines, or restitution must be paid as assessed by the Court.”

(Capitalization changed).

Gilreath moved to enter a guilty plea in accord with the Commonwealth’s offer. The circuit court accepted his guilty plea and postponed sentencing to a later date. After several continuances, Gilreath’s sentencing hearing was held. The court sentenced him to ten years of imprisonment. The court held that a fine should not be imposed because Gilreath was indigent. However, Gilreath was ordered to pay court costs of \$130.00, administrative and attorney fees totaling \$450.00, and restitution of \$132,376.21. The restitution, fees and cost were ordered to be paid at the rate of \$100.00 per month, with the first

payment due and owing the month after Gilreath is released from imprisonment for a period of thirty days, and each month thereafter until paid in full.

Gilreath now appeals, contending as follows: (a) Equal protection and public policy dictate that criminal defendants sent to prison not be subject to criminal restitution in excess of the \$100,000 cap set forth in KRS¹ 533.030(3); and (b) because Gilreath was indigent and a “poor person,” the court should not have imposed court costs and administrative and attorney fees.

II. ANALYSIS

A. EQUAL PROTECTION

Gilreath first alleges that the Equal Protection Clause and public policy dictate that imprisoned criminal defendants should not be required to pay restitution in excess of the \$100,000 cap set forth in KRS 533.030(3). That statute provides in pertinent part as follows:

When imposing a sentence of probation or conditional discharge in a case . . . where the victim suffered actual medical expenses, direct out-of-pocket losses, or loss of earning as a direct result of the crime, . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense. Payment of restitution to the victim shall have priority over payment of restitution to any government agency. Restitution shall be ordered in the full amount of the damages, unless the damages exceed one hundred thousand dollars (\$100,000) or twice the amount of the gain from the commission of the offense, whichever is greater, in which case the higher of these two (2) amounts shall be awarded.

¹ Kentucky Revised Statute.

KRS 533.030(3). The statute does not apply to Gilreath because he was sentenced to imprisonment, and the statute specifies that the cap is only applicable to criminal defendants sentenced to probation or conditional discharge. *See* KRS 533.030(3); *Jones v. Commonwealth*, 382 S.W.3d 22, 32-33 (Ky. 2011).

Gilreath argues, however, that because the statute applies only to defendants sentenced to probation or conditional discharge, and not to imprisonment, it violates public policy and the Equal Protection Clause as applied to Gilreath, who was sentenced to imprisonment. We first note that “[u]nder traditional equal protection analysis, the government is only required to show a rational basis for its actions unless the actions involve a suspect class or a fundamental right.” *Mahoney v. Carter*, 938 S.W.2d 575, 577 (Ky. 1997) (internal quotation marks and citation omitted). Prisoners are not a suspect class for equal protection purposes. *See Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). Additionally, the issue before us does not involve a fundamental right. Thus, we must apply the rational basis test to Gilreath’s equal protection claim.

The United States Supreme Court has stated the following regarding rational-basis review pertaining to equal protection claims:

We many times have said . . . that rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along

suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and [t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.

Heller v. Doe, 509 U.S. 312, 319-21, 113 S.Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993) (internal quotation marks and citations omitted).

Usually, when a criminal defendant is sentenced to probation or criminal discharge, it is because the crime he/she committed was less serious than the crimes defendants commit for which they are sentenced to imprisonment. Therefore, it is rational for the legislature to cap restitution for those sentenced to

probation or criminal discharge, and not for those sentenced to imprisonment, because the legislature increases penalties for more serious crimes. Consequently, Gilreath's rights under the Equal Protection Clause were not violated when the circuit court ordered him to pay more than \$100,000 in restitution to his victim.

Gilreath also claims that public policy dictates that the cap on restitution should apply to imprisoned criminal defendants. However,

the public policy of the Commonwealth is normally expressed through the acts of the legislature, and not through decisions issued by the courts. *Com. ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky.1992) (“The establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare that acts constitute a violation of public policy.”).

Wehr Constructors, Inc. v. Assurance Co. of America, 384 S.W.3d 680, 687 (Ky. 2012) (noting that *Wilkinson*, 828 S.W.2d at 610, was *overruled on other grounds* by *Com. ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009)). Therefore, we do not have the power to declare that the legislature's decision regarding the applicability of the KRS 533.030(3) restitution cap to certain criminal defendants and not to others violates public policy. Consequently, this claim fails.

B. COURT COSTS AND FEES

Gilreath next contends that because he was indigent and a “poor person,” the court should not have imposed court costs and administrative and attorney fees. He acknowledges that this issue was not preserved, but asks us to

review it nonetheless because sentencing issues may be raised for the first time on appeal. Because “sentencing is jurisdictional[,] it cannot be waived by [the] failure to object.” *See Phillips v. Commonwealth*, 382 S.W.3d 52, 57 (Ky. App. 2012) (internal quotation marks and citations omitted). Thus, this issue may be asserted for the first time on appeal, and it is proper for us to review it. *See Phillips*, 382 S.W.3d at 57.

Gilreath proceeded in the circuit court with appointed counsel from the Department of Public Advocacy. Additionally, Gilreath’s motion to proceed *in forma pauperis* on appeal was granted by the circuit court, and the court noted in its judgment that it was not imposing a fine upon Gilreath because he was indigent. However, regarding court costs, the Kentucky Supreme Court has recently held that “KRS 23A.205 controls as to the imposition of court costs upon conviction.” *Maynes v. Commonwealth*, 361 S.W.3d 922, 931 (Ky. 2012). That statute provides, in pertinent part, as follows:

(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.*

KRS 23A.205 (emphasis added). In the present case, Gilreath has not cited to any portion of the record supporting his contention that the circuit court found him to be a “poor person,” as required to avoid paying court costs. As discussed in

Maynes, there is a difference between a “poor person” and a “needy” or “indigent” person. *See Maynes*, 361 S.W.3d at 924-929. A “poor person” is defined at 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.” However, a “needy person” or “indigent person” is defined at KRS 31.100(3)(a) as a “person eighteen (18) years of age or older . . . 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.”

The circuit court in this case noted in its judgment that Gilreath was an indigent person, but there was no finding in the judgment that Gilreath was a “poor person.” Thus, the circuit court did not err in imposing court costs on Gilreath upon his conviction pursuant to KRS 23A.205. *See Maynes*, 361 S.W.3d at 932. Additionally, “defendants eligible for [Department of Public Advocacy] representation may nevertheless be required to contribute to their defense or to pay court costs if the court determines that they are able to do so.” *Maynes*, 361 S.W.3d at 928. Therefore, the circuit court did not err in ordering Gilreath to pay court costs and administrative and attorney fees.

Consequently, the judgment of the McCreary Circuit Court is affirmed.

ALL CONCUR.

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