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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001812-MR

FRANKLIN D. RICE

APPELLANT

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 08-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, THOMPSON, AND VANMETER, JUDGES.

THOMPSON, JUDGE: Franklin D. Rice, *pro se*, appeals the denial of his motion to convert his fine and court costs into a definite term of imprisonment to run concurrently with his other sentence.

In 2008, Rice was charged with first-degree sodomy. The circuit court determined Rice to be a needy person as defined in Kentucky Revised Statutes (KRS) Chapter 31 and appointed counsel without fee.

Rice pled guilty to an amended charge of first-degree sexual abuse in exchange for a recommended sentence of ten-years' incarceration and a \$1,000 fine. The circuit court sentenced Rice in accordance with the recommendation and ordered him to pay his fine and court costs at a rate of \$50 per month within sixty days of his release. Rice did not file a direct appeal.

In July 2013, Rice filed a motion with the circuit court to have his fine and court costs converted into a concurrent sentence pursuant to KRS 534.060. The circuit court denied his motion and Rice timely appealed. The Commonwealth filed a motion to dismiss Rice's appeal.

Rice argues the circuit court erred in failing to convert his fine and court costs into a definite term of imprisonment to be served concurrently with his other sentence because he is unable to pay his fine and court costs. Rice states he is indigent and does not have good work prospects following his release. We construe Rice's argument to be that his fine and court costs constitute an illegal sentence because he is indigent or a poor person. We note that Rice is not seeking to withdraw his guilty plea and proceed to trial.

The requirement that Rice pay court costs is not an illegal sentence. Although Rice was determined to be a needy, or indigent, person when provided court-appointed counsel, "a person can be a 'needy person' without also being a 'poor person.'" *Miller v. Commonwealth*, 391 S.W.3d 857, 870-71 (Ky. 2013). The Court in *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012) (quoting KRS 453.190(2)), explained that a person may be needy enough to qualify for free

legal assistance without necessarily being “poor” unless that person is “also unable to pay court costs without ‘depriving himself or his dependent of the necessities of life, including food, shelter or clothing.’” Such persons who are not “poor persons” but cannot pay costs immediately are entitled to enter into a payment plan. *Buster v. Commonwealth*, 381 S.W.3d 294, 305 (Ky. 2012). While it constitutes an illegal sentence to assess court costs to a defendant determined to have the financial status of a poor person, if there was no determination or request for determination at sentencing of the defendant’s financial status, there is no error in the sentencing court imposing costs even where the defendant qualified for appointment of a public defender. *Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014).

While the wording of KRS 534.030(4) specifically prohibits requiring indigent persons from paying fines and in *Roberts v. Commonwealth*, 410 S.W.3d 606, 611 (Ky. 2013), the Court concluded a trial court’s provision of court-appointed counsel was a finding of indigency, Rice’s sentence is not illegal because he agreed to pay this fine pursuant to a favorable plea agreement.

As part of a plea agreement, the Commonwealth may insist on conditions that include waiver of certain rights that inure to the benefit of the defendant. *Porter v. Commonwealth*, 394 S.W.3d 382, 391 (Ky. 2011). A defendant may voluntarily waive statutory sentencing protections in exchange for an otherwise favorable plea agreement. *Commonwealth v. Townsend*, 87 S.W.3d 12, 15 (Ky. 2001).

Through his plea bargain, Rice waived his right to be treated as an indigent for purposes of avoiding a mandatory fine and also indicated he was able to pay the fine and court costs in exchange for a favorable plea agreement. Therefore, we determine that his fine and court costs were properly imposed pursuant to a valid plea agreement.

Rice additionally argues the circuit court erred in failing to grant his motion to convert his fine and court costs into a term of imprisonment where he requested such action was adversely affected and waived a show cause hearing regarding his nonpayment. Rice argued the circuit court was compelled to grant his motion because his outstanding fine affected his institutional classification impacting his custody level, potential transfer status and ability to participate in various programs. We determine the circuit court properly acted within its discretion in denying Rice's request because Rice's motion was premature.

KRS 534.060 provides as follows:

- (1) When an individual sentenced to pay a fine defaults in the payment of the fine or any installment, the court upon motion of the prosecuting attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.
- (2) Following an order to show cause under subsection (1) of this section, unless the defendant shows that his default was not attributable to an intentional refusal to obey the sentence of the court and not attributable to a failure on his part to make a good-faith effort to obtain the necessary funds for payment, the court may

order the defendant imprisoned for a term not to exceed:

- (a) Six (6) months, if the fine was imposed for the conviction of a felony; or
- (b) One-third (1/3) of the maximum authorized term of imprisonment for the offense committed, if the fine was imposed for conviction of a misdemeanor; or
- (c) Ten (10) days, if the fine was imposed for conviction of a violation.

(3) If the default in payment of a fine is determined to be excusable under the standards set forth in subsection (2) of this section, the court may enter an order allowing the defendant additional time for payment, reducing the amount of each installment, or modifying the manner of payment in any other way.

.....

KRS 534.020(2) provides: “The response of a court to nonpayment of a fine shall be determined only after the fine has not been paid, and as provided in KRS 24A.175 or 534.060.”

The statutes provide there must be an actual default before a court can convert a defendant’s fine into a term of imprisonment. Therefore, the circuit court lacked authority to grant Rice’s motion.

Accordingly, we affirm the Owen Circuit Court’s denial of Rice’s motion to convert his fine and court costs into a definite term of imprisonment to run concurrently with his other sentence. Because the matter has been briefed, the

merits of Rice's appeal considered, and the judgment affirmed, the Commonwealth's motion to dismiss the appeal is moot.

ALL CONCUR.

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