

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000329-MR

LLOYD LEE

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 15-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

JONES, JUDGE: Lloyd Lee appeals from an order of the Carroll Circuit Court denying his “Motion to Waive Fines, Costs and Fees.” On appeal, Lee argues that the trial court erred in denying his motion as he was indigent at the time of his sentencing. After careful review of the record, we affirm in part, vacate in part, and remand.

I. BACKGROUND

On May 4, 2015, Lee pleaded guilty to six counts of first-degree trafficking in a controlled substance. In return for Lee's guilty plea and conditioned on Lee testifying against two of his co-defendants, the Commonwealth agreed to recommend a five-year prison sentence, a \$1,000 fine, and \$855 in restitution. The trial court accepted Lee's guilty plea and set his sentencing for June 1, 2015. At Lee's sentencing hearing, the trial court sentenced Lee in accordance with the plea agreement. Lee was ordered to serve 180 days of the five-year prison term, with the remainder probated for a period of five years. Court costs in the amount of \$155 and a public defender fee of \$600 were also assessed. Lee was ordered to begin satisfying his monetary obligation ninety days after being released. He was then turned over to the custody of the sheriff.

After Lee had been released to the sheriff's custody, Lee's counsel requested that the court waive the \$1,000 fine due to Lee being indigent. When the trial court expressed its annoyance at the request for waiver, Lee's counsel explained that KRS¹ 534.030(4) states that fines imposed under the statute, such as the fine imposed on Lee, "shall not be imposed upon any person determined by the court to be indigent. . . ." The Commonwealth objected and reminded the court that the determination of indigency can be made at every stage of the proceedings. After stating it had considered Lee's presentencing investigation report (PSI),² the

¹ Kentucky Revised Statutes.

² The PSI was not included in the record.

trial court denied Lee's request, finding he had the ability to pay. A Final Judgment and Sentence of Imprisonment and Order of Probation was entered on June 4, 2015. Lee did not directly appeal from the judgment.³

On February 5, 2016, Lee moved to waive his fines, costs, and fees. In his motion, Lee argued that imposition of the \$1,000 fine was inappropriate under KRS 534.030 because the trial court had found him to be a needy person as defined in KRS Chapter 31 and he had been represented by a public defender throughout the proceedings. Lee additionally argued that he is disabled and currently entitled to social security benefits in the amount of \$733 per month. However, because Lee had received an overpayment of benefits in the amount of \$1,466, the Social Security Office was currently deducting \$83 per month from his benefit check until the overpayment was repaid.⁴ The Commonwealth did not respond to the motion. The trial court again declined to waive Lee's fines, costs, and fees. However, the trial court suspended Lee's payments until October of 2017 – at which time the social security office would no longer be deducting the \$83 from Lee's social security check – and modified his monthly payments towards his court costs, fines, and attorney fees to \$83 per month. The trial court opined that, if Lee could live with the government taking \$83 out of his monthly

³ “While an unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence, there are some remaining issues that can be raised in an appeal,” including “sentencing issues.” *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008) (internal citations omitted).

⁴ Lee's motion did not expressly indicate that the social security benefits were Lee's only source of income. At the hearing on the motion, however, Lee's counsel did state that Lee's monthly income while he was repaying the social security office was \$650 per month, indicating that the benefits are, in fact, his only source of income.

income, he could live with paying \$83 per month into the court system towards his fines and fees.

On March 2, 2016, Lee filed a motion with the trial court to proceed on appeal *in forma pauperis*. The motion was granted by order dated March 7, 2016, which indicated that the trial court had found Lee to be a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b). This appeal followed.

II. ANALYSIS

On appeal, Lee argues that the trial court erred in assessing fines, court costs, and attorney fees against him for several reasons. He argues that, because the fines and costs will necessarily come out of his social security benefits check, the trial court violated 42 U.S.C.A.⁵ § 407(a) – the “anti-alienation” provision of the Social Security Act. Additionally, Lee argues that because of his continued indigency, the trial court erred in levying fines against him and in requiring him to pay court costs and attorney fees. The Commonwealth, however, argues that the trial court lacked jurisdiction to hear Lee’s February 5, 2016, motion as it came well beyond ten days after the final judgment entered on June 4, 2015. Therefore, the Commonwealth contends that Lee’s appeal is improper and must be dismissed.

A. Jurisdictional Issues

The question of jurisdiction is one of law; therefore, our review of the question is *de novo*. *Peak v. Commonwealth*, 482 S.W.3d 409, 410 (Ky. App.

⁵ United States Code Annotated.

2015) (citing *Appalachian Reg'l Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53-54 (Ky. 2007)). The Commonwealth is correct in its assertion that a trial court generally loses jurisdiction to amend a sentence if ten days have passed since final judgment has been entered. See CR⁶ 59.05; *Fagan v. Commonwealth*, 374 S.W.3d 274, 280 (Ky. 2012). Nonetheless, the trial court did hear Lee's motion and ruled on that motion without objection from the Commonwealth.

In *Commonwealth v. Steadman*, 411 S.W.3d 717 (Ky. 2013), the Kentucky Supreme Court noted the difference between subject matter jurisdiction and "particular case" jurisdiction. While "subject-matter jurisdiction 'refers to a court's authority to determine 'this kind of case,'" jurisdiction over a particular case "refers to a court's authority to determine a specific case" *Id.* at 722 (quoting *Commonwealth v. Griffin*, 942 S.W.2d 289, 290 (Ky. 1997)). In *Steadman*, the Court found that "[a] court's power to affect its own judgment within ten days of entry or after the filing of a notice of appeal is this latter category: jurisdiction over a particular case." *Id.* at 722.

For purposes of this case, the important distinction between subject matter jurisdiction and personal case jurisdiction is that, while issues of subject matter jurisdiction cannot be waived, issues concerning personal case jurisdiction are subject to waiver. *Id.* at 724; see also *Griffin*, 942 S.W.2d at 291 ("[A] lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived.") (quoting *Collins v. Duff*, 283 S.W.2d 179 (Ky. 1955)). In

⁶ Kentucky Rules of Civil Procedure.

the instant case, the Commonwealth did not raise objections to the trial court's exercise of jurisdiction in hearing and ruling on Lee's motion to waive his fines, costs, and fees. As the Commonwealth waived the jurisdictional issue at the trial court, we cannot rule on the issue now.

B. Anti-Alienation Provision of the Social Security Act

One of Lee's arguments against the trial court's imposition of fees and costs deals with the anti-alienation provision of the Social Security Act. Lee notes that his only source of income is his social security benefit check, which he receives monthly. As such, Lee argues that the trial court's order requiring him to pay fines and fees necessarily orders him to pay out part of his social security benefits to the state, which he alleges is in violation of federal law. Specifically, Lee directs this Court's attention to 42 U.S.C.A. § 407(a), which states:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Lee argues that the trial court's order falls into the category of "other legal process" and, therefore, cannot stand. While Lee's brief to this Court raises an interesting question of law, a review of the record indicates that the argument was never made to the trial court. While Lee did bring up the fact that he received social security benefits to demonstrate his poverty level, he never argued that requiring him to pay fines and costs out of the amount he receives in social security

would violate federal law. The only arguments Lee made at the trial court level concerning waiver of fees and costs dealt with Lee's indigency and the financial hardship paying those fees and costs would cause him.

“It has long been this Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal. Most simply put, ‘[a] new theory of error cannot be raised for the first time on appeal.’” *Fischer v. Fischer*, 348 S.W.3d 583, 588 (Ky. 2011) (quoting *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999)). “[W]hen an appellate court determines to reverse a trial court, it cannot do so on an unpreserved legal ground unless it finds palpable error, because the trial court has not had a fair opportunity to rule on the legal question.” *Id.* “Palpable error” is that which “affects the substantial rights of a party” and results in “manifest injustice.” RCr⁷ 10.26. “We have described manifest injustice as ‘a repugnant and intolerable outcome.’” *Commonwealth v. Young*, 487 S.W.3d 430, 440 (Ky. 2015) (quoting *McCleery v. Commonwealth*, 410 S.W.3d 597, 606 (Ky. 2013)). We must note, however, that Lee has not requested palpable error review. Accordingly, we are under no requirement to address this claim. *See Celina Mut. Ins. Co. v. Harbor Ins. Agency, LLC*, 332 S.W.3d 107, 113 (Ky. App. 2010).

C. Imposition of Court Costs

Lee next contends that the trial court violated *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), when it assessed court costs against

⁷ Kentucky Rules of Criminal Procedure.

him. In *Maynes*, the Court examined KRS 23A.205, which deals with court costs, and the “poor person” definition found in KRS 453.190(2). KRS 23A.205(2) states as follows:

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.*

(Emphasis added).

KRS 453.190(2) defines a “poor person” 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.” After examining the statutes, the Court concluded that a court’s appointment of counsel for a needy defendant does not necessarily preclude an order requiring the defendant to contribute to his defense, provided that the trial court has substantial reason to believe that he can do so, or will be able to do so within the foreseeable future. *Maynes*, 361 S.W.3d at 933. Lee contends that the trial court failed to examine KRS 23A.205 to ascertain whether Lee would be able to pay his court costs without depriving himself and his dependents of the basic necessities of life.

Lee is correct that the trial court did not specifically articulate findings that Lee would be able to pay his court costs and fees in the foreseeable future

without depriving himself of the basic necessities of life; however, the record indicates that Lee never requested that the trial court determine his poverty status. Lee *was* deemed to be indigent under the “needy person” standard of KRS 31.100. R. 41. However, the “needy person” standard is different than the standard for finding a person to be a “poor person” under KRS 453.190(2) and KRS 23A.205. To find a defendant “needy” or “indigent” under KRS 31.100(5)(a), the trial court looks only to the defendant’s ability *at that time* to provide for payment of an attorney and all other necessary expenses. “Thus, the fact that Appellant was represented by appointed counsel, does not exempt him from court costs upon the basis that he is a ‘poor person.’” *Nunn v. Commonwealth*, 461 S.W.3d 741, 753 (Ky. 2015). “If a trial judge was not asked at sentencing to determine the defendant’s poverty status and did not otherwise presume the defendant to be . . . [a] poor person before imposing court costs, then there is no error to correct on appeal.” *Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014).

D. Imposition of Fines

Lee next argues that, because he was determined to be indigent under KRS 31.100(5), the trial court violated KRS 534.030(4) by imposing the \$1,000 fine against him. As stated *supra* p. 2, KRS 534.030(4) states that fines “shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.” Lee directs our attention to *Commonwealth v. Reed*, 374 S.W.3d 298 (Ky. 2012), in which the Kentucky Supreme Court found that the trial

court's imposition of a \$1,000 fine on a indigent defendant who had pleaded guilty was improper.

Reed, however, is distinguishable from the present case. In *Reed*, the \$1,000 fine was not part of the plea agreement – the “agreement was for the Commonwealth to recommend a fine and for defense counsel to be allowed to make a motion opposing the fine.” *Id.* at 301. Here, the \$1,000 fine is clearly part of the plea agreement between Lee and the Commonwealth. Lee entered into the agreement and did not appeal from the trial court's judgment adopting it. Therefore, the \$1,000 is binding and enforceable.

E. Public Defender Fee

Lee's final argument on appeal is that the trial court erred in requiring him to pay a \$600 public defender fee after finding him to be indigent or needy under KRS 31.100. KRS 31.120 establishes the procedures by which the trial court determines whether a person is “needy” and eligible for appointment of a public defender. In pertinent part, it states:

(c) A person who, after conviction, is sentenced while being represented by a public defender shall continue to be presumed a needy person, and the court, at the time of sentencing, shall enter an Order In Forma Pauperis for purposes of appeal without having to show further proof of continued indigency, unless the court finds good cause after a hearing to determine that the defendant should not continue to be considered an indigent person.

KRS 31.120(c).

Lee was represented by a public defender throughout the proceedings at the trial court and continues to be represented by a public defender on appeal. While the trial court did find that Lee would be able to pay costs in the near future, the trial court made no findings that Lee was, at the time of his sentencing, no longer considered indigent under KRS Chapter 31. *See Spicer*, 442 S.W.3d at 34-35. Therefore, the court's imposition of the \$600 public defender fee was improper, and we vacate it.

III. CONCLUSION

In conclusion, we affirm the trial court as to the imposition of court costs and the \$1,000 fine and vacate as to the imposition of the public defender fee. We therefore remand this matter to the Carroll Circuit Court for entry of a judgment consistent with this opinion.

ALL CONCUR.

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