

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000787-MR

THOMAS HOWARD

APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT,
HONORABLE R. LESLIE KNIGHT, JUDGE
ACTION NOS. 15-CR-00007 AND 15-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: ACREE, JONES, AND KRAMER, JUDGES.

KRAMER, JUDGE: Thomas Howard appeals from an order of the Carroll Circuit Court denying his motion to waive fines and court costs. Regarding the fine, Howard argues that the circuit court erred in imposing the fine upon him because he was previously determined to be indigent. Regarding the court costs, Howard

argues the circuit court erred by not making a determination whether he had the ability to pay the costs. After careful review of the record and applicable case law, we find no error in the circuit court's imposition of court costs. However, we agree with Howard that the imposition of the criminal fine against Howard was improper. Therefore, we affirm in part, vacate in part, and remand.

The underlying criminal prosecution involved Howard, Howard's father, Howard's brother, and another co-defendant. The four men, in various levels of involvement for each transaction, sold prescription pain pills to a confidential informant. These unlawful transactions led to Howard's arrest. Howard, who was deemed indigent at his arraignment, was represented by an assistant public advocate in May 2015 when he pled guilty to four separate criminal charges. One of these charges was a misdemeanor and the three others were felonies. Thereafter, in June 2015 the circuit court sentenced Howard to a total of five years' imprisonment, probated for five years. In addition, Howard was ordered to pay a \$1,000 fine, court costs, restitution, a supervision fee, and a public advocate's fee. Howard did not directly appeal from the judgment.¹

¹ "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).

Ten months later, in April 2016, Howard moved to waive the \$1,000 fine and the court costs. He argued that KRS² 534.030 and KRS 534.040 prohibit the circuit court from levying fines and costs against indigent criminal defendants, such as himself. The circuit court did not hold an evidentiary hearing and entered an order denying Howard's motion without explaining the reason for the denial. Howard timely appealed from that order.

On appeal, Howard takes issue with his sentence. Specifically, he takes issue with the circuit court's imposition of fines and court costs. "Our authority to review criminal sentences is jurisdictional, and we maintain inherent authority to cure defective sentencing with respect to fines and court costs." *Howard v. Commonwealth*, 496 S.W.3d 471, 478 (Ky. 2016) (citing *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010)). Because "sentencing is jurisdictional[,] it cannot be waived by [the] failure to object." *Phillips v. Commonwealth*, 382 S.W.3d 52, 57 (Ky. App. 2012) (internal quotation marks and citation omitted). The analysis for the imposition of fines and the imposition of court costs is slightly different; therefore, we will address each in turn.

Regarding the imposition of fines, Howard argues that the circuit court erred in imposing the \$1,000 fine because he was determined to be indigent. KRS 534.030 and KRS 534.040 govern the imposition of fines on a person found

² Kentucky Revised Statutes.

guilty of committing a felony or misdemeanor, respectively. Both statutes unequivocally state that “[f]ines required by this section *shall not be imposed* upon any person determined by the court to be indigent pursuant to KRS Chapter 31.” KRS 534.030(4) and KRS 534.040(4) (emphasis added). The language is clear on its face, and this proposition has been affirmed repeatedly by this Court and the Kentucky Supreme Court. *See Roberts v. Commonwealth*, 410 S.W.3d 606 (Ky. 2013) (Imposition of fine for firearm and drug convictions was erroneous in light of defendant’s indigent status.); and *Wright v. Commonwealth*, 391 S.W.3d 743 (Ky. 2012) (Imposition of fine for assault and drug charges was erroneous after trial court found defendant to be indigent.). In fact, the Kentucky Supreme Court found that the fine imposed on Howard’s father, who was a co-defendant in the underlying prosecution, was erroneous because he too was deemed indigent.

Howard, 496 S.W.3d at 479. Specifically, the Court stated:

Howard had been previously adjudged an “indigent” person for purposes of KRS Chapter 31. KRS 534.030(4) states that fines “required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.” Because proceedings reflected Howard’s indigent status, we agree that imposition of the \$1,000 criminal fine should be vacated.

Id. In the instant appeal, the circuit court determined Howard to be indigent for the purposes of legal representation and KRS Chapter 31. Therefore, KRS 534.030(4) and KRS 534.040(4) also apply to Howard.

The Commonwealth argues that the language of KRS 534.030(4) and KRS 534.040(4) should not apply because Howard’s offenses are defined outside the penal code. For this proposition, the Commonwealth relies on the language in both statutes that reads, “[e]xcept as otherwise provided for an offense defined outside this code[.]” KRS 534.030(1) and KRS 534.040(2). While it is true that all of Howard’s offenses are defined outside the penal code,³ the Commonwealth’s argument lacks merit.

Recently, in *Commonwealth v. Moore*, 545 S.W.3d 848 (Ky. 2018),⁴ the Kentucky Supreme Court interpreted the proscriptions against fining indigent criminal defendants in KRS 534.030(4) and KRS 534.040(4) to apply to misdemeanors and felonies defined outside the penal code *so long as* KRS 534.030 and KRS 534.040 establish the applicable fines. In *Moore*, the defendant was convicted of driving under the influence (DUI); a crime that is defined outside the penal code. *Moore*, 545 S.W.3d at 849. The Court specifically stated, “because the fine for a felony DUI . . . is not set forth in KRS Chapter 189A, but is instead found in the penal code provision, KRS 534.030, which sets fines for felony offenses generally, a DUI felon . . . who is indigent may be exempted from the

³ Kentucky’s penal code is in KRS Chapter 500 through KRS Chapter 534. Howard’s convictions were all pursuant to KRS Chapter 218A.

⁴ Upon a motion by the Commonwealth, this appeal was held in abeyance in June 2017 pending finality of the *Moore* case. *Moore* became final on May 17, 2018.

payment of their fines[.]”⁵ *Id.* at 852. Therefore, because the fines for all of Howard’s felony and misdemeanor offenses are set by KRS 534.030 and KRS 534.040, respectively, the Commonwealth’s argument fails. Thus, the \$1,000 criminal fine is vacated.

Turning to Howard’s second argument, he asserts the circuit court erred when it imposed court costs against him because the court did not determine whether he had the ability to pay at the sentencing phase. Although he did not request such a determination, Howard argues that because the circuit court found him to be a “poor person”⁶ within the meaning of KRS 453.190 for purposes of this appeal, the court was required to make a finding at sentencing regarding his ability to pay court costs. We disagree.

The imposition of court costs is governed by KRS 23A.205, which provides that court costs shall be imposed upon a convicted defendant “unless the

⁵ The Court came to a different conclusion for the defendant in *Moore*; however, that was only because he was charged with a misdemeanor DUI. The fines for misdemeanor DUI offenses are *expressly* detailed outside of the penal code in KRS 189A.010(5)(a), (b), and (c). Felony DUI offenses on the other hand, like *all* offenses to which Howard pled guilty, use KRS 534.030 or KRS 534.040 to set the fine.

⁶ Specifically, the circuit court found that Howard was a “pauper” within the meaning of KRS 453.190. KRS 453.190 does not define pauper, however, it does define “poor person[.]” For clarity, we will treat the circuit court’s usage of the term “pauper” to mean “poor person” for the entirety of this opinion.

court finds that the defendant is a poor person as defined by KRS 453.190(2)^{7]} and that he . . . is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.” KRS 23A.205(2). Boiled down, the issue is whether the circuit court was required to make a finding at sentencing regarding Howard’s ability to pay court costs when such a finding was not requested by Howard and the court did not find him to be a “poor person” until approximately eleven months after sentencing.

The Kentucky Supreme Court addressed this issue in *Spicer v. Commonwealth*, 442 S.W.3d 26, 34-35 (Ky. 2014). In *Spicer*, the defendant was deemed indigent at his arraignment and was allowed to proceed *in forma pauperis* on appeal. However, the Court held that the imposition of court costs was acceptable because the defendant did not request a finding regarding his poverty status at sentencing and was not adjudged to be a “poor person” prior to sentencing. *Id.* at 35. Specifically, the Court stated, “[i]f 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. *Id.*

⁷ KRS 453.190(2) defines a “poor person” as one “who has an income at or below one hundred percent (100%) on the sliding scale of indigency . . . or is unable to pay the costs and fees of the proceeding . . . without depriving himself or his dependents of the necessities of life”

Howard was eventually found to be a “poor person” pursuant to KRS 453.190; however, that finding was eleven months after sentencing. The “poor person” determination must be made “at the time of the entry of the final judgment, or immediately thereafter.” *Miller v. Commonwealth*, 391 S.W.3d 857, 870 (Ky. 2013) (vacating the circuit court’s imposition of court costs because the costs were imposed contemporaneously with a finding that the defendant was a “poor person” pursuant to KRS 453.190). Therefore, because Howard was not adjudged to be a “poor person” at the time of sentencing, and he did not request such a finding, the circuit court did not err in ordering Howard to pay court costs.

In light of the foregoing, we affirm the circuit court’s judgment with respect to the imposition of court costs; but, we vacate the portion of the judgment that imposes the criminal fine against Howard. We remand the case to the circuit court for entry of a new judgment consistent with this opinion.

ALL CONCUR.

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