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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001623-MR

JUSTIN WARREN — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 17-CR-00035

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, JOHNSON,[1] AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Justin Warren appeals the fines, court costs, and jail fees imposed upon him after his conviction for DUI, driving with a suspended license, and being a persistent felony offender in the first degree. Warren was

[1] Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

sentenced to a prison sentence of ten years and ordered to pay a $500 fine, $160 in court costs, and a $22 per day jail fee for his time in the Fulton County Jail. We find that the $500 fine was improper and reverse and remand for the trial court to vacate that part of Warren's sentence. We also find that the argument regarding court costs was not properly preserved and does not amount to palpable error; therefore, we affirm as to that issue. Finally, as to the argument regarding jail fees, due to a recent opinion by the Kentucky Supreme Court, we find it necessary to remand this issue to the trial court for a hearing.

As a preliminary matter, we must note that neither Warren nor his public defender objected to the imposition of the fine, courts costs, or fees; therefore, these issues were not preserved for review at the trial level.[2] This Court may, however, review sentencing errors even when not properly preserved in the trial court. *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010). Here, only the fine is considered a sentencing error. The court costs and jail fees, therefore, will only be reviewed for palpable error.

Kentucky Revised Statute (KRS) 534.040(4) prohibits the imposition of a fine on an individual who the court has determined to be indigent pursuant to KRS Chapter 31. It is undisputed that Warren was found indigent by the trial court

[2] This Court is perplexed as to why defense attorneys, especially those working for the Department of Public Advocacy, do not routinely object to the imposition of fines, fees, and costs for their indigent clients. The law on indigent and poor defendants not having to pay fines, fees, and costs has been settled for some time and should be automatically objected to.

as he was assigned a public defender. The Commonwealth concedes that the $500 fine was illegal and should be vacated. We agree and reverse and remand with directions for the trial court to vacate this part of Warren's sentence.

As for the court costs, KRS 23A.205(2) states:

> 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 453.190(2) states:

> A "poor person" means a person who has an income at or below one hundred percent (100%) on the sliding scale of indigency established by the Supreme Court of Kentucky by rule or 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.

A person who is indigent for the purposes of imposing or not imposing a fine is not necessarily a poor person as it relates to the two above statutes. *Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014).

As we have stated, this is not a sentencing issue under the facts of this case. The imposition of court costs is only an illegal sentence if the court has found a defendant to be a poor person, but still imposes the costs. *Id.* Since the

court was not asked to determine whether or not Warren was a poor person as defined in KRS 453.190(2), there can be no sentencing error.

Examining this issue for palpable error, Kentucky Rule of Criminal Procedure (RCr) 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

"To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

We find that the imposition of court costs in this case was not manifestly unjust. The Kentucky Supreme Court has held that court costs will not be vacated unless a defendant's status as a poor person has first been raised in the trial court.

> 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 an indigent or poor person before imposing court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined. It is only when the defendant's poverty status has been established, and court costs assessed contrary to that

> status, that we have a genuine "sentencing error" to correct on appeal.

Spicer, 442 S.W.3d at 35. *See also Roe v. Commonwealth*, 493 S.W.3d 814, 831 (Ky. 2015); *Nunn v. Commonwealth*, 461 S.W.3d 741, 753 (Ky. 2015). As Warren's status as a poor person was not raised in the court below, we find there was no manifest injustice.

Warren's final claim on appeal is that the trial court erred in imposing jail fees. KRS 441.265 requires a sentencing court to order reimbursement to a county jail for the cost of confinement up to $50 a day. Warren argues that the Fulton County Jail did not have a fee reimbursement policy in place; therefore, this was an illegal fine. This issue will be reviewed for palpable error.

KRS 441.265 states in pertinent part:

> (1) A prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown.
>
> (2) (a) The jailer may adopt, with the approval of the county's governing body, a prisoner fee and expense reimbursement policy, which may include, but not be limited to, the following:
>
> 1. An administrative processing or booking fee;
>
> 2. A per diem for room and board of not more than fifty dollars ($50) per day or the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to the jail;

> 3. Actual charges for medical and dental treatment; and
>
> 4. Reimbursement for county property damaged or any injury caused by the prisoner while confined to the jail.
> (b) Rates charged may be adjusted in accordance with the fee and expense reimbursement policy based upon the ability of the prisoner confined to the jail to pay, giving consideration to any legal obligation of the prisoner to support a spouse, minor children, or other dependents. The prisoner's interest in any jointly owned property and the income, assets, earnings, or other property owned by the prisoner's spouse or family shall not be used to determine a prisoner's ability to pay.

There is no evidence in the record as to whether the Fulton County Jailer has adopted a reimbursement policy. The lack of evidence is no doubt caused by defense counsel failing to object to the imposition of the fees.

In *Weatherly v. Commonwealth*, No. 2017-SC-000522-MR, 2018 WL 4628570 (Ky. Sept. 27, 2018), the Kentucky Supreme Court examined this same issue. Raymond Weatherly was ordered to pay $1,513 in jail fees. His trial counsel did not object to the fees; therefore, the Supreme Court analyzed the issue pursuant to the palpable error standard. The Court vacated the jail fees because it found that there was no evidence in the record that the reimbursement policy set forth in KRS 441.265(2) existed.

We decline to vacate the jail fees at this time. The *Weatherly* case does not indicate whether or not the Jailer therein had a jail fee reimbursement policy, only that there is no evidence it existed. That is exactly the same situation

we have here. In addition, the *Weatherly* case was not published; therefore, it is not binding on this Court. Kentucky Rule of Civil Procedure (CR) 76.28(4). We find that the most prudent course of action would be to remand this issue to the trial court in order for it to determine whether the reimbursement policy exists. Because we are remanding this issue, Warren shall also be allowed to put on evidence showing any "good cause" as to why he should not be required to pay the fees. KRS 441.265(1).

Based on the foregoing, we reverse and remand for the trial court to vacate the $500 fine and to hold a hearing regarding KRS 441.265, but affirm the imposition of the court costs.

JOHNSON, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur with the majority's reasoning and conclusion. However, I write separately to address the anomaly recently identified by the Supreme Court that the indigency exemption of KRS 534.040(4) does not apply to misdemeanor fines expressly set forth in KRS 189A.010(5)(a), (b), and (c). "By its own clear language, the indigency exemption of subsection (4) applies only to 'fines required by' KRS 534.040 [and] grants an indigency exemption *only* for misdemeanors defined within the penal code and for

which KRS 534.040 establishes the applicable fines." *Commonwealth v. Moore*, 545 S.W.3d 848, 850 (Ky. 2018) (emphasis in original).

The misdemeanor for which Warren was fined, like the misdemeanor in *Moore*, is *not* "defined within the penal code[.]" *Id.* That misdemeanor is defined at KRS 186.620(2). However, unlike KRS 189A.010(5)(a) which Moore was found to have violated, KRS 186.620(2) does *not* "state[] with particularity the fines that may be imposed . . . ." *Moore*, 545 S.W.3d at 851. Determining the fine for violating KRS 186.620(2) requires cross-referencing KRS 186.990(3) which says, "A person who violates [KRS 186.620] shall be guilty of a Class B misdemeanor." KRS 186.990(3). To determine the amount of the fine, we must then turn to the penal code and, specifically, to KRS 534.040(2)(b).

The necessity of resorting to KRS 534.040 to determine the fine applicable to violations of KRS 186.620(2) means the indigency exemption remains available in Warren's case for the same reason the Supreme Court said it would remain available for felony DUI offenses – that in order to determine the fine, "one must refer to fines genetically provided in the penal code . . . ." *Moore* 545 S.W.3d at 851.

My purpose in writing separately is to clarify that indigents will remain exempt from paying fines, even under *Moore*, unless *both*: (1) the offense

is defined outside the penal code, and (2) the fine is established independently of the penal code.

For this reason, and the other reasons stated in the well-crafted majority opinion, I concur.

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