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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001793-MR

ONTAREO BISHOP — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 16-CR-00030

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND K. THOMPSON, JUDGES.

COMBS, JUDGE: This is a criminal case in which Ontareo Bishop appeals from the Fulton Circuit Court's final judgment and sentence of imprisonment entered on October 17, 2016. At his jury trial, Bishop was convicted of three counts of wanton endangerment, first-degree fleeing or evading police, reckless driving, operating a motor vehicle on a suspended license, disregarding a stop sign, speeding, and terroristic threatening. After our review, we vacate those portions of

the judgment convicting Bishop of speeding and assigning him court costs and jail fees. We affirm the remainder of the judgment.

I. Background

On March 26, 2016, at approximately 5:30 p.m., Sheriff's Deputy David Thomas was on patrol in Fulton County when he saw Bishop driving a maroon Dodge Avenger with two minor children (his own child and the child of a friend) in the back seat of the vehicle. Deputy Thomas recognized Bishop from previous interactions and knew that Bishop did not have a valid driver's license. The deputy activated his emergency equipment and attempted to initiate a traffic stop of the vehicle. Rather than comply with the stop, Bishop drove away from Deputy Thomas at a high rate of speed. At one point during his pursuit, Deputy Thomas used radar to determine that Bishop was travelling at a rate of ninety-three (93) miles per hour in a zone with a posted speed limit of thirty-five (35) miles per hour.

Bishop's driving was not only fast -- but also erratic. Deputy Thomas observed Bishop's vehicle travelling at ninety miles per hour, without stopping, through two intersections. Bishop also passed other vehicles in no-passing zones and travelled around other vehicles on curves. Deputy Thomas believed that Bishop was driving recklessly with no regard for anyone's safety, including his

own. The deputy was particularly perturbed at the danger Bishop's driving posed for his two minor passengers.

While he was pursuing Bishop, Deputy Thomas used his radio to contact Officer Charles Farthing with the Hickman Police Department for assistance. In an attempt to block Bishop's path, Officer Farthing parked his cruiser in the center of the roadway. The attempt did not succeed. Bishop drove his vehicle off the side of the road to go around Officer Farthing's cruiser and then continued speeding away from the area. Officer Farthing later testified that Bishop was travelling much faster than the posted speed limit and that he was not driving in a safe and careful manner.

After Bishop successfully eluded police, Deputy Thomas questioned pedestrians in his attempt to locate him before driving to Bishop's grandparents' house. Neither Bishop nor the Dodge Avenger was present at the time. Later that evening, however, Deputy Thomas found Bishop when he returned to the grandparents' home. Bishop categorically denied driving the Dodge Avenger earlier that day. Nonetheless, Deputy Thomas placed Bishop under arrest for the incident. During his arrest, Bishop muttered a general threat of bodily harm against Deputy Thomas. The next morning, police discovered the Dodge Avenger parked at Indian Hills Village, an apartment complex in Hickman, Kentucky. When the vehicle was searched, police discovered a wallet in the console

containing Bishop's Tennessee identification card, his Social Security card, and his Visa debit card.

The Fulton County grand jury indicted Bishop on multiple charges stemming from the incident as follows: speeding, fleeing or evading police, four counts of wanton endangerment, reckless driving, operating on a suspended license, two counts of disregarding a stop sign, possession of multiple operator's licenses, third-degree terroristic threatening, and being a first-degree persistent felony offender (PFO). The Fulton Circuit Court held Bishop's jury trial on September 27, 2016. The Commonwealth presented testimony from Deputy Thomas and Officer Farthing consistent with the narrative set forth above. Through Deputy Thomas, the Commonwealth introduced dashboard camera video footage of Deputy Thomas's pursuit and Bishop's later arrest. The Commonwealth also presented a record custodian of the Transportation Cabinet who testified that Bishop did not possess a valid driver's license on the date of the incident.

For his trial strategy, Bishop attempted to show that Deputy Thomas was mistaken in identifying him as the driver of the vehicle. The defense presented testimony from Bishop's mother, Christine Robertson, who owned the Dodge Avenger. She testified she had left the vehicle parked at Indian Hills Village. She also gave testimony to the effect that Bishop's wallet within the

vehicle did not necessarily mean that he drove the on the date of the incident; Bishop often left his wallet there because she frequently drove him to various places. Robertson also did not believe that Bishop had access to her vehicle, but she admitted that she was in Memphis on the day of the incident. Bishop also presented alibi testimony from his grandparents, who testified that two boys came to visit them that day. The grandparents testified that Bishop and the boys were dropped off by Bishop's cousin, Leonard Smith. Although Bishop attempted to subpoena Leonard Smith, he did not appear in court to testify.

After deliberation, the jury found Bishop guilty of three counts of wanton endangerment,[1] first-degree fleeing or evading police,[2] reckless driving,[3] operating a motor vehicle on a suspended license,[4] disregarding a stop sign,[5] speeding,[6] and terroristic threatening.[7] The jury thereafter recommended sentencing as follows: ninety days for the operating on a suspended license conviction; thirty days for the terroristic threatening conviction; one year on each

[1] Kentucky Revised Statutes (KRS) 508.060, a Class D felony.

[2] KRS 520.095, a Class D felony.

[3] KRS 189.290, a violation.

[4] KRS 186.620(2), a Class B misdemeanor pursuant to KRS 189A.090(2).

[5] KRS 189.330, a violation.

[6] KRS 189.390, a violation.

[7] KRS 508.080, a Class A misdemeanor.

felony conviction, to be served consecutively; and a fine of fifty dollars for each traffic violation. The trial court entered its final judgment on October 17, 2016, sentencing Bishop in accordance with the jury's verdict to four-years' imprisonment and fines totaling one hundred fifty dollars. The trial court also ordered Bishop to pay court costs amounting to one hundred sixty dollars and jail fees totaling six hundred forty dollars. This appeal followed.

II. Analysis

Bishop presents six arguments on appeal. His first three issues claim the following errors at trial: that the trial court erroneously permitted the Commonwealth to use a peremptory strike against a black *venireperson* on the basis of race; that the trial court violated Bishop's constitutional protection against double jeopardy by convicting him of speeding and wanton endangerment; and that the trial court violated Bishop's right to compulsory process regarding Leonard Smith's subpoena. Bishop's last three issues address the financial costs resulting from his conviction. Specifically, he argues that the trial court erroneously imposed court costs, fines, and jail fees against him at sentencing. We will consider each argument in turn.

A. *Batson* challenge

For his first issue on appeal, Bishop who is African-American, argues that the trial court erred in denying his *Batson* challenge to the prosecutor's use of

a peremptory strike. Following *voir dire*, during a conference in chambers, the Commonwealth privately informed Bishop and the trial court that it intended to use a peremptory strike on Juror 20, a black woman. By way of explanation, the Commonwealth stated that Juror 20 would not make eye contact during *voir dire* and that she visibly expressed her displeasure at the Commonwealth's questions. Additionally, the Commonwealth said it had received information from officers with knowledge of Juror 20 who believed that she would be "hostile" to law enforcement. After reviewing the video of Juror 20's interactions with the Commonwealth on *voir dire*, the trial court ruled in favor of the Commonwealth, stating that the strike was based appropriately on race-neutral reasons. The trial court also noted there were other black jurors in the *venire*, one of whom remained on Bishop's jury after the strikes.

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), forbids the use of peremptory strikes against a potential juror based on race because doing so results in a violation of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States. "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85, 106 S. Ct. at 1716. A prosecutor may use a peremptory strike against a potential juror who happens to belong to a racial minority group, but he must have a race-neutral

reason for doing so. *Id*., 476 U.S. at 98, 106 S. Ct. at 1724. When a defendant alleges that a prosecutor has stricken a member of the *venire* based on race, the trial court must engage in a three-part test:

> First, the defendant must show a prima facie case of racial discrimination. If the trial court is satisfied with the defendant's showing, the burden shifts to the prosecutor to state race-neutral reasons for the peremptory strikes. The trial court must then determine whether the defendant has sufficiently proven purposeful discrimination.

Mash v. Commonwealth, 376 S.W.3d 548, 555 (Ky. 2012) (quoting *Thomas v. Commonwealth*, 153 S.W.3d 772, 777 (Ky. 2004)). "[A] *Batson* violation is structural error not subject to harmless error review." *Johnson v. Commonwealth*, 450 S.W.3d 696, 706 (Ky. 2014), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015). However, "[b]ecause the trial court is the best 'judge' of the Commonwealth's motives in exercising its peremptory strikes, great deference is given to the court's ruling." *Tunstull v. Commonwealth*, 337 S.W.3d 576, 585 (Ky. 2011) (quoting *Gray v. Commonwealth*, 203 S.W.3d 679, 691 (Ky. 2006)). "On appellate review, a trial court's denial of a *Batson* challenge will not be reversed unless clearly erroneous." *Id*. (citations omitted).

We must examine a trial court's decision through the lens of the three-part test outlined in *Mash*, *supra*. We begin by noting that there was no need to

analyze the first prong (in which the defendant must show *prima facie* discrimination) because the prosecutor **voluntarily** offered an explanation for the peremptory strike. When "the prosecutor offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate issue of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing . . . becomes moot." *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992).

For the second prong of the test, "[t]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Mash*, 376 S.W.3d at 555 (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991)). Despite Bishop's assertions to the contrary, "demeanor is a race-neutral explanation[.]" *Thomas v. Commonwealth*, 153 S.W.3d 772, 778 (Ky. 2004). The Commonwealth cited Juror 20's demeanor and her apparent reputation as being hostile to law enforcement as its reasons to strike her from the panel. Therefore, the Commonwealth successfully met its burden of providing a facially neutral explanation for this part of the test.

Finally, the third prong of the test required the trial court "to determine whether the prosecutor's race-neutral reason was actually a pretext for

racial discrimination." *Mash*, 376 S.W.3d at 556. On this point, we must rely heavily on the trial court:

> Because the trial court's decision on this point requires it to assess the credibility and demeanor of the attorneys before it, the trial court's ultimate decision on a *Batson* challenge is like a finding of fact that must be given great deference by an appellate court. In the absence of exceptional circumstances, appellate courts should defer to the trial court at this step of the *Batson* analysis.

Id. (citations and internal quotation marks omitted). "Although a prosecutor theoretically could fabricate a demeanor-based pretext for a racially-motivated peremptory strike, the third step in *Batson* alleviates this concern by permitting the court to determine whether it believes the prosecutor's reasons." *Thomas*, 153 S.W.3d at 778.

Bishop contends that the allegations concerning Juror 20's demeanor amount to mere pretext. However, there is no evidence supporting this assertion -- let alone clear error required to warrant reversal. The trial court examined the video of the *voir dire* proceedings to confirm its recollection regarding the interaction between the Commonwealth and Juror 20 before concluding that there was "no doubt" that the strike was based on race-neutral reasons. The trial record supports the trial court's ruling. The Commonwealth only struck three members of the *venire*, and there is no evidence to suggest that it was specifically targeting racial minorities. Two black persons remained in the *venire*, one of whom served

on Bishop's jury. Furthermore, the Commonwealth came forward on its own and brought the court's attention to the fact that it was using a peremptory strike as to Juror 20 and that she was a member of a racial minority. When "'the prosecutor defend[s] his use of peremptory challenges without being asked to do so by the judge' [this] could 'be taken as evidence of the prosecutor's sincerity.'" *Mash*, 376 S.W.3d at 557 (quoting *Hernandez*, 500 U.S. at 369, 111 S. Ct. at 1872). The trial court did not err on this issue.

B. Double jeopardy

For his second issue on appeal, Bishop contends the trial court's instructions erroneously permitted the jury to convict him of both speeding and wanton endangerment in violation of federal and state constitutional prohibitions against double jeopardy:

> "The double jeopardy clause of the Fifth Amendment to the United States Constitution provides in pertinent part that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' Kentucky's Constitution includes a virtually identical provision in § 13." *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996). "Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Id*. (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932)).

Montgomery v. Commonwealth, 505 S.W.3d 274, 279 (Ky. App. 2016). "If, however, the exact same facts could prove the commission of two separate

offenses, then the double jeopardy clause mandates that while a defendant may be prosecuted under both offenses, he may be convicted under only one of the statutes." *Id*. (quoting *Clark v. Commonwealth*, 267 S.W.3d 668, 675 (Ky. 2008)). Bishop admits this issue is not preserved; however, "the constitutional protection against double jeopardy is not waived by failing to object at the trial level." *Little v. Commonwealth*, 422 S.W.3d 238, 248 (Ky. 2013) (citation omitted).

The trial court instructed that a guilty verdict on speeding required Bishop's jury to find as follows:

> A. That in this county on or about the 26th day of March, 2016 and before the finding the Indictment herein, Ontareo C. Bishop intentionally was speeding in a motor vehicle, by exceeding the posted speed limit in his motor vehicle[.]

With respect to the three counts of first-degree wanton endangerment for which Bishop was convicted, the court instructed the jury to find as follows in order to arrive at a guilty verdict:

> A. That in this county on or about the 26th day of March, 2016 and within 12 months before the finding of the Indictment herein, Ontareo C. Bishop, while operating a motor vehicle, was speeding by exceeding the posted speed limits;

> B. That in so doing, Ontareo C. Bishop wantonly created a substantial danger of death or serious physical injury to . . .[8]
>
> AND
>
> C. That under the circumstances, such conduct manifested extreme indifference to the value of human life.

In order to avoid a violation of the prohibition against double jeopardy, the instructions for *each* offense must contain an element "which the other does not." *Burge*, 947 S.W.2d at 809 (quoting *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182). The trial court's instructions on wanton endangerment required the jury to find that Bishop was speeding and added the element of "extreme indifference to the value of human life." However, there is nothing in the speeding instruction which is not already present in the wanton endangerment instructions. The Commonwealth argues that an added charge of speeding was appropriate based on Officer Farthing's separate observation of the offending conduct. We disagree. For purposes of double jeopardy analysis, the focus must **be on the offending conduct** and not on the number of separate individuals witnessing it. This Court has previously held that an appellant's "continued [act of fleeing or

[8] The wanton endangerment instructions only differ from each other in part (B), in which each instruction particularly identifies one of three individuals placed at risk by Bishop's conduct—namely, the two minor children in the car as well as Officer Farthing.

evading in a vehicle] constituted a single event without any sufficient break in conduct and time, and thus cannot be parsed into separate and distinct offenses[,]" and this "does not change simply because other officers become involved." *Foley v. Commonwealth*, 233 S.W.3d 734, 738 (Ky. App. 2007).

The Commonwealth also argues that the distinction as to mental states -- intentional for speeding and wanton for wanton endangerment -- justifies separate charges. Again, we disagree. ***Both*** offenses required the jury to find that Bishop was speeding. The wanton endangerment instruction merely goes one step farther, asking the jury to find that the same conduct manifested extreme indifference to the value of human life. "[I]t is fundamental that a defendant may not be convicted of both a greater offense and a lesser included offense for the same crime[.]" *Kiper v. Commonwealth*, 399 S.W.3d 736, 744 n.13 (Ky. 2012).

"[T]he Commonwealth is permitted to carve out of a single criminal episode the most serious offense, but not to punish a single episode as multiple offenses." *Clark*, 267 S.W.3d at 678 (citation omitted). Because there is nothing in the speeding instruction which is not already encompassed by the wanton endangerment instruction, the trial court erroneously permitted a conviction of both speeding and wanton endangerment in violation of double jeopardy principles. "The remedy for a double jeopardy violation is to vacate the **lesser** of the two offenses." *Montgomery*, 505 S.W.3d at 280 (emphasis added). As noted

previously, first-degree wanton endangerment is a Class D felony while speeding is merely a traffic violation. Accordingly, we vacate Bishop's convictions for speeding and leave intact his three convictions for wanton endangerment.

C. Compulsory process

In his third issue on appeal, Bishop contends that the trial court violated his right to compulsory process. During Bishop's trial, Leonard Smith did not appear to testify on his behalf -- despite Bishop's assertions that Smith had been served with a subpoena to compel his appearance at trial. In a discussion at the bench, the trial court revealed that it had received a letter from Smith stating he did not want to be involved in the case. Furthermore, Smith's father had directly contacted the trial court to ask how Smith could avoid testifying. The trial court informed Smith's father that Smith would have to get a lawyer to file a motion to quash the subpoena.

The parties then discussed whether there was adequate service for the subpoena; the subpoena states that service occurred "by delivery of a true copy to: Leonard Smith – through his mother – Robbie Kinney." Bishop argued that service through Smith's mother was proper because she accepted the subpoena on his behalf. But Bishop admitted that Smith was more than eighteen years of age. The trial court concluded the bench conference by ruling that there was no indication that Smith was properly amenable to a subpoena.

Bishop now argues that the court's communication, *ex parte*, with Smith's father deprived him of his constitutional right to compulsory process. "[Section] 11 of the Kentucky Constitution and the sixth amendment to the United States Constitution contain substantially identical language. In all criminal prosecutions, an accused has the right 'to have compulsory process for obtaining witnesses in his favor.'" *Ross v. Commonwealth*, 577 S.W.2d 6, 9 (Ky. App. 1977). Although this assertion of error is unpreserved, Bishop requests review for palpable error pursuant to RCr[9] 10.26:

> Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice requires showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted). "For an error to be palpable, it must . . . involve prejudice more egregious than that occurring in reversible error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citation and internal quotation marks omitted). In addition, "[a]n error is palpable only if it is shocking or

[9] Kentucky Rule of Criminal Procedure.

jurisprudentially intolerable." *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (citation and internal quotation marks omitted).

As a preliminary matter, we are concerned by the trial court's rather nonchalant acknowledgement of an *ex parte* communication in a criminal case with a potential witness or with someone representing the interests of a potential witness. With some exceptions not applicable here, Supreme Court Rule (SCR) 4.300, Canon 2.9(A) states, in relevant part, that:

> [a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter[.]

Much of our case law on *ex parte* communication involves parties or their attorneys. *See, e.g.*, *Commonwealth v. Cambron*, 546 S.W.3d 556, 561 (Ky. App. 2018) ("A basic tenet of the legal profession is *ex parte* communication between a judge and an attorney in a pending case is disfavored. The danger of giving one side 'private access to the ear of the court' has been recognized for years."). However, the restriction on *ex parte* communication is not confined to parties and their attorneys.

> The trial judge should insist that neither the prosecutor nor the defense counsel *nor any other person* discuss a pending case with the judge ex parte, except after adequate notice to all other parties or when authorized by law or in accordance with approved practice.

Commonwealth v. Wilson, 384 S.W.3d 113, 114-15 (Ky. 2012) (emphasis added) (quoting AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, 6-2.1 (2d ed. 1986)), *abrogated on other grounds by Commonwealth v. Carman*, 455 S.W.3d 916 (Ky. 2015).

Despite our concerns over the propriety of the trial court's *ex parte* communication, the trial court correctly found Smith was not under subpoena pursuant to our procedural rules. A subpoena "create[s] a continuing obligation . . . to be available as a witness until the case [is] concluded or until . . . dismissed by the court." *Otis v. Meade*, 483 S.W.2d 161, 162 (Ky. 1972). If Smith had not been properly served, he had no obligation to appear. According to the rules for criminal procedure,

> [a] subpoena may be served by any officer by whom a summons might be served. It may also be served by any person eighteen years of age or over, and that person's affidavit endorsed thereon shall be proof of service or the witness may acknowledge service in writing on the subpoena. Service of the subpoena shall be made by delivering or offering to deliver a copy thereof *to the person to whom it is directed*.

RCr 7.02(4) (emphasis added). Identical language may be found in the relevant portion of CR[10] 45.03(1): "Service of the subpoena **shall be made** by delivering or

[10] Kentucky Rules of Civil Procedure. We find further guidance in our civil rules because "[t]he Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure." RCr 13.04.

offering to deliver a copy thereof to the person to whom it is directed." (Emphasis added).

Bishop argued to the trial court that Smith was properly served through his mother. We do not agree. Parents may accept service of a subpoena for their children -- but only when those children are "unmarried infant[s]" or "person[s] of unsound mind." CR 4.04(3). It is undisputed that Smith was not directly served with a subpoena and that Smith was more than eighteen years of age, which is the age of legal majority in Kentucky. KRS 2.015. Furthermore, there are no allegations Smith was "of unsound mind." Thus, neither provision allowing service through a parent applies here. Accordingly, the trial court did not err in finding that Smith was not under subpoena for Bishop's trial.

"[T]he Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. . . . Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial." *Taylor v. Illinois*, 484 U.S. 400, 415-16, 108 S. Ct. 646, 656, 98 L. Ed. 2d 798 (1988). Because Bishop failed to secure the witness through the procedures available to him through no fault of the trial court, the trial court's unrelated *ex parte* actions did not interfere with Bishop's compulsory process rights.

D. Court costs

For Bishop's fourth issue on appeal, he contends that the trial court erroneously assessed court costs against him despite his indigency. The trial court found that Bishop did not qualify as a "poor person" and sentenced him to pay one hundred sixty dollars within six months of his release from incarceration. This issue is not preserved. However, the imposition of costs, fines, and fees is a sentencing issue, and "an appellate court is not bound to affirm an illegal sentence just because the issue of the illegality was not presented to the trial court." *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011). Trial courts are required to assess court costs against a defendant pursuant to KRS 23A.205. The version of KRS 23A.205 in effect at the time Bishop was sentenced[11] provided as follows:

> (1) Court costs for a criminal case in the Circuit Court shall be one hundred dollars ($100).
>
> (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.

[11] After Bishop's judgment of conviction, the General Assembly amended the statute to allow trial courts to "establish an installment payment plan in accordance with KRS 534.020." KRS 23A.205(3), *amended by* 2017 Ky. Acts, ch. 158, § 2 (effective June 29, 2017). However, a criminal defendant is subjected to penalties according to the version of the statute in effect at the time of sentencing. *See Rodgers v. Commonwealth*, 285 S.W.3d 740, 750-51 (Ky. 2009) (discussing KRS 446.110).

> (3) If the court finds that the defendant does not meet the standard articulated in subsection (2) of this section and that the defendant is nonetheless unable to pay the full amount of the court costs and fees at the time of sentencing, then the court shall establish a show cause date by which time the court costs, fees, and fines shall be paid and may establish an installment payment plan whereby the defendant pays the full amount of the court costs, fees, and fines to the circuit clerk in installments as established by the court. *All court costs and fees under the installment plan shall be paid within one (1) year of the date of sentencing notwithstanding any remaining restitution or other monetary penalty owed by the defendant and arising out of the conviction.* Installment payments will be applied first to court costs, then to restitution, then to fees, and then to fines.

(Emphasis added.)

In analyzing the terms of the statute that was in effect at the time of Bishop's sentencing, our Supreme Court has held that criminal defendants facing court costs comprise three mutually exclusive categories of persons:

> (1) those who are able to pay their costs, (2) 'poor persons' who are not required to pay court costs at all, and (3) those who are not 'poor persons,' yet nevertheless cannot pay immediately and are entitled to enter into a payment plan.

Buster v. Commonwealth, 381 S.W.3d 294, 304-05 (Ky. 2012). For those in the third category, "costs must be paid within one year of the date of sentencing." *Id*. at 305 (internal quotation marks omitted) (citing KRS 23A.205(3)).

The trial court, *sua sponte,* found that Bishop was not a "poor person" warranting the non-imposition of court costs. However, we cannot reconcile the

trial court's decision with the three categories of *Buster* defendants. The trial court did not assign court costs for immediate payment, implicitly excluding Bishop from the first *Buster* group. Nor would Bishop be able to pay within one year of sentencing due to his incarceration, excluding him from the third *Buster* group. As a result, Bishop could only reasonably be categorized as part of the second group, "'poor persons' who are not required to pay court costs at all[.]" *Buster*, 381 S.W.3d at 305. In addition, the trial court sentenced Bishop to a payment plan outside the one-year post-sentencing time frame permitted by the then governing version of KRS 23A.205(3) that was then in effect. The court lacked the authority to do so. Based on these factors, we conclude that court costs were improperly levied in this case. Therefore, we reverse the decision as to these costs.

E. Fines

In his fifth issue, Bishop argues that the trial court erroneously assessed fines against him in the sum of one hundred fifty dollars -- despite his indigency. He contends the trial court violated KRS 534.040(4), which provides: "[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." Because the public defender's office represented Bishop at trial and continues to represent him on appeal, he asserts that the trial court improperly assessed fines against him in clear derogation of the statute.

The Kentucky Supreme Court recently addressed this very issue in *Commonwealth v. Moore*, 545 S.W.3d 848 (Ky. 2018), holding as follows:

> KRS 534.040 generally establishes the fines that can be imposed for misdemeanors and violations, but subsection (2) expressly excepts from its provisions any "offense defined outside this code" where the fine has been "otherwise provided." "This code" means the Kentucky Penal Code, KRS Chapters 500 through 534.
>
> . . . By its own clear language, the indigency exemption of subsection (4) applies only to "fines required by" KRS 534.040. In other words, the plain language of the statute grants an indigency exemption only for misdemeanors defined within the penal code and for which KRS 534.040 establishes the applicable fines.

Id. at 850.

In the case before us, the trial court assessed three separate fifty-dollar fines for speeding, reckless driving, and disregarding a stop sign. Because we are vacating Bishop's conviction for speeding on double jeopardy grounds, we need only consider the two fines for reckless driving and disregarding a stop sign. These offenses are traffic violations as defined in KRS 189.290 and KRS 189.330, respectively. The penalties for both offenses are defined in KRS 189.990(1): "Any person who violates any of the provisions of [the enumerated traffic regulations] shall be fined not less than twenty dollars ($20) nor more than one hundred dollars ($100) for each offense." Pursuant to *Moore*, we have recently held that offenses defined outside the penal code and penalized by

KRS 189.990(1) are not subject to the waiver provision in KRS 534.040(4). *Fultz v. Commonwealth*, 554 S.W.3d 385, 388 (Ky. App. 2018). Based on these considerations, we must affirm the portion of the fines not affected by the vacating of Bishop's speeding conviction in the amount of one hundred dollars.

F. Jail fees

For his sixth and final issue on appeal, Bishop contends that the trial court erred in assessing jail fees against him totaling six hundred forty dollars. He argues that: "in the absence of an approved reimbursement policy, a trial court cannot assign a *per diem* jail fee for prisoners because it does not comply with KRS 441.265(2)." In making this argument, Bishop relies upon the recent unpublished case issued by our Supreme Court in *Melton v. Commonwealth*, 2016-SC-000552-MR, 2018 WL 898307 (Ky. Feb. 15, 2018). KRS 441.265(1) provides that: "[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." In *Melton*, the Supreme Court discussed how this portion of the statute is qualified by KRS 441.265(2), which directs as follows:

> 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.

Melton, 2018 WL 898307 at *11. The Supreme Court ultimately ruled that a trial court could not assign a *per diem* jail fee when the county had not set forth an approved reimbursement policy for jail costs. *Id*. at *12.

The Supreme Court recently reinforced *Melton* with another unpublished decision further strengthening Bishop's argument. In *Weatherly v. Commonwealth*, 2017-SC-000522-MR, 2018 WL 4628570 (Ky. Sept. 27, 2018), the Court held that: "when the county has not set forth an approved reimbursement policy for jail costs, the trial court cannot assign a per diem fee for prisoners." *Id*. at *10. The Court then stated, "[f]rom the record, there is no evidence that Fulton County had established a jail fee reimbursement policy pursuant to statute, and no evidence that such policy was ever presented to the trial court to be considered in sentencing." Accordingly, the court vacated the assessment of jail fees. *Id*.

Although unpublished appellate cases are not binding precedent, we may cite them for persuasive value "if there is no published opinion that would adequately address the issue before the court." CR 76.28(4)(c). To the best of our

knowledge and research, there is no case which addresses the issue before us as squarely as *Weatherly*. Indeed, the issue before us is fundamentally indistinguishable from that in *Weatherly*. Both cases address an underlying action in Fulton County and the question of whether the trial court may assign jail fees in the absence of a jail fee reimbursement policy in that county. Our Supreme Court answered that question in the negative, and we are persuaded this case does not warrant a contrary result. Therefore, we vacate the trial court's imposition of jail fees.

III. Conclusion

For the foregoing reasons, we vacate those portions of the Fulton Circuit Court's judgment convicting Bishop of speeding, assigning him court costs for that violation, and imposing jail fees. We affirm the remainder of the judgment and remand for entry of a new judgment consistent with this opinion.

J. LAMBERT, JUDGE: CONCURS.

K. THOMPSON, JUDGE CONCURS AND FILES SEPARATE OPINION.

THOMPSON, K., JUDGE, CONCURRING: I concur with the majority's well-written opinion and write separately only to emphasize there is an issue that, although insignificant to Bishop's criminal case, is of substantial public

importance. I cannot ignore that the pursuit of Bishop by Deputy Thomas was a substantial factor in causing the children to be in a dangerous situation.

Whether attributable to the increased number of motorists involved in crime, the glamorization of police pursuits on television, in movies and video games, or the increased propensity of criminal suspects to flee police, police pursuits have become increasingly dangerous for the officers, the suspects and innocent third parties. In 2003, there were an estimated 35,000 police pursuits across the United States and nearly forty percent of those pursuits resulted in crashes. Patrick T. O'Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511 (2006).

These statistics have led to changes in police procedures in Kentucky as well as local and state police departments across the nation. For instance, the Louisville Metro Police Department has adopted procedures for police pursuits in the Department's Standard Operating Procedures including precluding pursuit for non-violent felony offenders when the identity of the suspect is known. *See Mattingly v. Mitchell*, 425 S.W.3d 85, 87 (Ky.App. 2013). Based on Deputy Thomas's pursuit of Bishop, I reasonably conclude that the Fulton County Sherriff's Department does not have similar procedures and policies.

Deputy Thomas initially pursued Bishop because he did not have a valid driver's license. He did so even though he knew Bishop from prior interactions and that he could be easily located. According to Deputy Thomas's testimony, Bishop was travelling at speeds well over 90 miles per hour in a thirty-five mile per hour speed zone, went through two intersections without stopping and passed vehicles in no-passing zones. While the majority notes that Deputy Thomas was "perturbed at the danger Bishop's driving posed to his two minor passengers[,]" Deputy Thomas could have prevented any danger posed by not beginning the pursuit or, once it became apparent that the children were endangered, stopping the pursuit.

Without policies and procedures regarding a law enforcement officer's pursuit of a suspect, the officer is left without any mandatory direction and must decide whether to pursue a suspect or continue a pursuit based on the circumstances. As evidenced by the above statistics, frequently that decision is a bad one resulting in injury or death. All law enforcement departments in Kentucky should be required to have procedures and policies similar to that adopted by the Louisville Metro Police Department.

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