

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2004-SC-0793-MR

DATE 7-6-06 ELLAGROU+DC

ADELE CRAVEN

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 00-CR-00495

V.

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming In Part, Remanding In Part

During her second trial for the murder of her husband, Appellant, Adele Craven, pled guilty to complicity to murder. For this crime, Appellant was sentenced to life imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant appeals one very narrow issue before this Court. She claims that the inclusion of court costs and attorney fees in the final judgment against her was not authorized as it was not a component of the plea agreement she made with the

Commonwealth. Pursuant to the Amended Judgment and Sentence on Plea of Guilty entered on June 15, 2004,¹ Appellant was ordered to pay the following costs:

Pay court costs - \$100.00 to the Kenton Circuit Clerk's Office. KRS 23A.205. Pay the costs of defense in the amount of \$107,785.75 for expert and defense costs. Reimburse any Public Defender fees as contracted for through the Department for Public Advocacy.

Appellant argues that imposition of these costs against her are contrary to the terms of the plea agreement she made with the Commonwealth. She contends the trial court lacked authority to amend the terms of her plea agreement by imposing these costs without first giving her the opportunity to withdraw from the plea. Commonwealth v. Reyes, 764 S.W.2d 62, 65 (Ky. 1989); Kennedy v. Commonwealth, 962 S.W.2d 880, 881 (Ky. App. 1997).

The Commonwealth counters that the imposition of costs were no part of the plea agreement. Furthermore, the Commonwealth contends that such costs are mandatory conditions that must be considered and imposed, if applicable, by the trial court pursuant to statute. The agreement in this case was of a type that is labeled a "sentence bargain." Hoskins v. Maricle, 150 S.W.3d 1, 22 (Ky. 2004). In exchange for a plea of guilty to complicity to murder, the Commonwealth agreed to recommend a sentence of life imprisonment. There is no indication that costs were ever discussed by either party during the course of the negotiations (and Appellant makes no contention otherwise). Accordingly, the Commonwealth argues that its plea agreement simply did not address or include incidental conditions that might be imposed by the trial court.

¹ In her brief, Appellant complains about other conditions (namely, restitution) set forth in a Judgment and Sentence on Plea of Guilty that was entered on April 27, 2004. Yet the April 27, 2004, Judgment was superseded by an Amended Judgment and Sentence on Plea of Guilty that was entered on June 15, 2004. Thus, this Court need only review those costs and conditions which are set forth in the Amended Judgment.

Upon review, we agree with the Commonwealth that imposition of costs by the trial court was not a component of the agreement entered into by the Commonwealth and Appellant. Even though costs were not discussed or included within the terms of the plea agreement, KRS 23A.205(2) specifically states that the imposition of court costs are "mandatory" and shall not be subject to any form of "nonimposition in the terms of a plea bargain or otherwise." Id. We, therefore, find no evidence whatsoever to support Appellant's contention that nonimposition of court costs should be presumed from a silent plea agreement.²

In regard to expert and attorney fees, KRS 31.211(1) states:

At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided under this chapter. *This partial fee determination shall be made at each stage of the proceedings.*

Id. (emphasis added). In similar fashion to KRS 23A.205, this statute indicates that consideration of reimbursement for expert and attorney fees is an independent mandatory obligation of the trial court. Thus, such fees are also not presumed to be waived or addressed by a silent plea agreement between the Commonwealth and Appellant. Imposing mandatory court costs and fees pursuant to statute did not amend or alter any conditions of the plea agreement between Appellant and the Commonwealth.

Citing to Hord v. Commonwealth, 450 S.W.2d 530, 531 (Ky. 1970), Appellant argues that the trial court violated due process by allegedly amending its oral judgment

² Appellant has not alleged on appeal that she is exempt from having to pay court costs pursuant to KRS 31.110(b). We, therefore, decline to address the issue *sua sponte*.

against her some sixty days after it was pronounced. On February 19, 2004, Appellant waived her right to a pre-sentence investigation report and asked to be sentenced at that time by the trial court. The trial court orally pronounced a sentence of life imprisonment. On April 27, 2004, a written Judgment and Sentence on Plea of Guilty was entered by the trial court. An Amended Judgment and Sentence on Plea of Guilty was entered on June 15, 2004. Both written judgments contain court costs and fees which were not discussed by the trial court on February 19, 2004. Appellant argues that the trial court's oral sentencing should be considered final, and that imposition of costs and fees in a subsequent written judgment violates due process of law. We disagree.

As mentioned above, the consideration and imposition, if applicable, of court costs and legal representation fees are mandatory obligations of the trial court that are prescribed by statute. Appellant does not allege that the trial court somehow inflicted these costs and fees "due to a vindictive or retaliatory motive." Cardwell v. Commonwealth, 12 S.W.3d 672, 677 (Ky. 2000). Thus, the imposition of such mandatory costs and fees after rendition of the oral pronouncement of judgment did not constitute the vindictive imposition of greater punishment as it was envisioned in Hord, supra. See id.

Moreover, Hord, supra, referred to the finality of *written* judgments. Id. at 532. It is simply not reasonable to rely on a trial court's oral sentencing as a final pronouncement of all possible conditions that may be imposed within the written judgment. CR 54.01 (a "final judgment" is a *written* order of the court); Viers v. Commonwealth, 52 S.W.3d 527, 528 (Ky. 2001) (trial court has authority to "either correct[] language that is inconsistent with the oral judgment, or suppl[y] language that was inadvertently omitted from the oral judgment."). The consideration and imposition,

if applicable, of costs and fees in this case were mandatory by statute, and thus, it should have been no surprise to Appellant that such costs and fees may have been included within the trial court's written final judgment (even though they were not discussed at the oral sentencing).

Appellant next alleges that the trial court erred in ordering restitution without affording her a hearing. Appellant's argument is moot as no restitution was ordered by the trial court in its amended final judgment. Yet, KRS 31.211(1) does require the trial court to conduct a "nonadversarial hearing" for the purpose of determining "whether a person who has requested a public defender is able to pay a partial fee for legal representation" Id. While a hearing was held regarding the factual basis for the amount of costs actually expended for Appellant's defense, no inquiry was made into Appellant's ability to pay for these costs.³ As such an inquiry should have been made, see Donovan v. Commonwealth, 60 S.W.3d 581 (Ky. App. 2001), we are utilizing our discretion, in the interests of justice, to remand this case for further proceedings regarding whether Appellant has the ability to pay a partial fee for defense costs, including her ability to pay public defender fees, pursuant to KRS 31.211(1). RCr 10.26.

The judgment of the Kenton Circuit Court is affirmed in part and remanded in part for further proceedings in accordance with this opinion.

Lambert, C.J., Cooper, Graves, Roach, and Scott, J.J., concur.

Johnstone, and Wintersheimer, J.J., concur except as to the remand for further proceedings regarding whether Appellant has the ability to pay partial fees/costs pursuant to KRS 31.211(1).

³ Curiously, while Appellant's trial counsel sought to have court costs set aside due to her inability to pay, see Edmonson v. Commonwealth, 725 S.W.2d 595, 596 (Ky. 1987), they did not similarly ask to have the expert and attorney fees set aside due to inability to pay.

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