

**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**NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  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 BINDING PRECEDENT IN ANY OTHER  
CASE IN ANY COURT OF THIS STATE; HOWEVER,  
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,  
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR  
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED  
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE  
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION  
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED  
DECISION IN THE FILED DOCUMENT AND A COPY OF THE  
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE  
DOCUMENT TO THE COURT AND ALL PARTIES TO THE  
ACTION.

# Supreme Court of Kentucky

2010-SC-000502-MR

KENYON M. POLLOCK

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
NO. 07-CR-003666

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

Appellant Kenyon Pollock appeals from his judgment and sentence following a guilty plea to murder and tampering with physical evidence. We affirm Appellant's conviction and sentence, but reverse and remand for further consideration of whether Appellant should be ordered to pay court costs.

Appellant was indicted by a Jefferson County grand jury for murder and tampering with physical evidence. The Commonwealth alleged that Appellant shot Depeitro Bell in the back of the head, which led to Bell's death approximately one hour later. In addition, the Commonwealth alleged that Appellant hid the murder weapon, which was never recovered.

Following the first day of his trial, Appellant agreed to enter a plea of guilty. Appellant and the Commonwealth agreed to "an augmented open plea with the removal of the non-capital life sentence from the penalty range." Thus, the circuit court had discretion to impose a sentence of between 20 years' and

50 years' imprisonment. The circuit court conducted a colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969), and accepted Appellant's plea of guilty.

At final sentencing, the trial court stated:

We all know what occurred. We all know how it occurred. We saw it on the video and we discussed this at the plea. Obviously, Mr. Pollock is not eligible for probation. And the range is 20 to 50. Looking at his prior record, he's got a significant, consistent, serious, violent prior felony and misdemeanor record. He wasn't successful on parole - probation or parole - during that period of time. To say it's a violent crime is understating it. It was heinous. It was violent. And I will tell you Mr. Bell's family are not the only victims, nor is Mr. Bell. Your [Appellant's] family also is victimized by your actions. They're victimized by the fact that you did this. And they may very well be victimized by the fact that maybe you haven't accepted responsibility completely. Maybe you have portrayed to them that you, in fact, are somehow a "victim" of the system. I don't know that, but I'm saying they too are victimized here.

When I look at all of the factors for this very large range of penalty, **I certainly, certainly cannot consider anything other than the maximum.** And why is that? The nature of this crime. Your criminal history. Society is at risk with you in it, regardless of what your family believes. You exacted the maximum from Mr. Bell. I don't believe any less should be extended to you in this case. Now, justice and fairness dictate both - they are not the same thing, by the way - but they both dictate a maximum total sentence. And to get to that total sentence, I am going to sentence you to 50 years total. I formally sentence you to 49 years for murder, one year for tampering with physical evidence. Those will run consecutive for 50 years.

(Emphasis added.)

Appellant argues that the trial court's statement that it "certainly cannot consider anything other than the maximum" demonstrates that Appellant was denied the right to an impartial trial judge. We disagree.

Upon review of the record, it is clear that the trial judge's comment that she "certainly, certainly cannot consider anything other than the maximum" was a figure of speech. The trial judge did not literally refuse to consider a lesser sentence, as Appellant contends. In fact, it is clear from the entirety of the judge's statement that she considered the full range of penalties, but determined that the maximum sentence was appropriate in this case given Appellant's prior criminal record and the nature of the murder.

In addition, before imposing the 50-year sentence, the court spent time reviewing Appellant's motion for imposition of a 25-year sentence, as well as letters from Appellant and his family members. It is clear from the record that the trial court considered—but ultimately rejected—a sentence of less than the maximum. The trial court did not abuse its discretion, and there was therefore no error. *See McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010).

Finally, Appellant argues that the trial court erred by imposing upon him \$130 in court costs. This issue is not preserved, and Appellant requests review for palpable error pursuant to RCr 10.26.

Appellant was originally represented by a public defender. Following a breakdown in communication between Appellant and his attorney, the trial court ordered that a private attorney be appointed. The trial court also granted Appellant's motion to proceed *in forma pauperis* on appeal. However, in its

Judgment of Conviction and Sentence, the trial court imposed court costs of \$130.

Recently, in *Maynes v. Commonwealth*, this Court held that a “needy” person under KRS 31.100, who is entitled to representation by a public defender, does not necessarily qualify as a “poor” person who is exempt from the imposition of court costs under KRS 23A.205. \_\_\_ S.W.3d \_\_\_, No. 2010-SC-000681-DG, 2012 WL 976059, at \*6-7 (Ky. Mar. 22, 2012).<sup>1</sup> However, *Maynes* goes on to state that “[w]ithout some reasonable basis for believing that the defendant can or will soon be able to pay, the imposition of court costs is indeed improper.” 2012 WL 976059, at \*8. The Court thus distinguished *Maynes*, where the defendant received probation and the imposition of costs was proper, from cases where the defendants were sentenced to lengthy prison terms, where the imposition of costs was deemed improper. *Id.* (distinguishing *Wiley v. Commonwealth*, 348 S.W.3d 570 (Ky. 2010); *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010); *Ladriere v. Commonwealth*, 329 S.W.3d 278 (Ky. 2010); and *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987)). *See also id.* at \*10 (“ . . . *Maynes* subsequently entered a plea agreement whereby he was to be released from custody. The restoration of his freedom was also the restoration of his ability to work, and so justified the trial court's order that he pay the statutorily mandated court costs pursuant to KRS 23A.205.”).

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<sup>1</sup> On June 27, 2011, this Court ordered this case held in abeyance pending final determination of *Maynes*. *Maynes* became final on April 12, 2012.

Because Appellant received a 50-year sentence, it is unlikely that he will be able to pay court costs. It also appears from the record that the trial court never determined whether Appellant was a “poor person” as defined in KRS 453.190(2).<sup>2</sup> If he is, he would be exempt from the imposition of court costs pursuant to KRS 23A.205. While Appellant failed to preserve this issue below, we have previously held that the improper imposition of court costs amounts to palpable error. See *Wiley*, 348 S.W.3d at 574. We therefore remand this case to the trial court for consideration, in light of *Maynes*, of whether Appellant is a “poor person” under KRS 453.190(2) and KRS 23A.205.

The conviction and sentence entered by the Jefferson Circuit Court are hereby affirmed. However, the imposition of court costs is reversed, and the case is remanded for further consideration in light of *Maynes v. Commonwealth*.

All sitting. All concur.

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<sup>2</sup> “A ‘poor person’ means 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.” KRS 453.190(2).

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