

RENDERED: JULY 31, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001891-MR

EVERETT R. HOBBS

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JUDY D. VANCE MURPHY, JUDGE
ACTION NO. 17-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Everett Hobbs appeals the Adair Circuit Court Judgment and Sentence entered on November 27, 2018. He alleges the circuit court improperly ordered him to pay court costs because he qualifies as a “poor person” under Kentucky Revised Statutes (KRS) 453.190(2). Finding no error, we affirm.

BACKGROUND

Hobbs pleaded guilty to a variety of charges from identify theft and possession of a controlled substance and drug paraphernalia, to failure to maintain insurance and driving under the influence. He was sentenced to eighteen (18) months' imprisonment. At the sentencing hearing, the circuit court did not address court costs and neither did Hobbs' plea agreement. However, the circuit court's final written judgment ordered him to pay \$165 in court costs within six months of his release from prison. Coincidentally, the circuit court granted Hobbs' motion to proceed *in forma pauperis* on appeal noting that "it appears that the defendant is a pauper within the meaning of KRS 453.190 and 31.110(2)(b)." Hobbs appealed.

STANDARD OF REVIEW

Clearly, Hobbs did not preserve his claim that the imposition of costs is a sentencing error. However, the Kentucky Supreme Court has said, "[N]othing is required to preserve the issue [of sentencing error] for appellate review," and "palpable error review is superfluous." *Jones v. Commonwealth*, 382 S.W.3d 22, 27-28 (Ky. 2011). By that, the Court obviously meant it is self-evident that a sentencing error is a palpable error because it necessarily affects the outcome of the proceeding. *See Wiley v. Commonwealth*, 348 S.W.3d 570, 574 (Ky. 2010) (imposition of court costs on a poor person is palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26).

The statute governing imposition of court costs 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 23A.205(2) (emphasis added). The referenced statute defining a “poor person” says:

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.

KRS 453.190(2). Therefore, if the evidence of record shows both that Hobbs qualifies as a “poor person” under KRS 453.190(2) *and* that he could not pay court costs either at the time of sentencing or in the foreseeable future, the imposition of costs must be reversed. However, absent such evidence, the circuit court’s imposition of costs was mandated by statute.

ANALYSIS

“KRS 23A.205 contemplates three distinct and mutually exclusive classifications 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.” *Jones v. Commonwealth*, 527 S.W.3d 820, 823 (Ky. App. 2017) (“*Jones II*”). The evidence of record does not support a clear finding that Hobbs falls within the first classification.

And, contrary to Hobbs’ assertion, the evidence of record also fails to support that he falls in the second classification as a “poor person.” The facts of Hobbs’ case show he falls within the third classification as they are substantively indistinguishable from those in *Spicer v. Commonwealth*, in which the Kentucky Supreme Court said:

The assessment of court costs in a judgment fixing sentencing is illegal *only* if it orders a person adjudged to be “poor” to pay costs. Thus, while an appellate court may reverse court costs on appeal to rectify an illegal sentence, we will not go so far as to remand a facially-valid sentence to determine if there was in fact error. 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 v. Commonwealth, 442 S.W.3d 26, 35 (Ky. 2014). In the case now under review, just as in *Spicer*, “[a]t no point does the record reflect an assessment of Appellant’s financial status, other than that . . . he was permitted to proceed on

appeal *in forma pauperis*.” *Id.* at 34; *see also id.* at 35 (“defendant who qualifies as ‘needy’ under KRS 31.110 because he cannot afford the services of an attorney is not necessarily ‘poor’ under KRS 23A.205”).

In this case, costs were minimal – \$165. Furthermore, Hobbs’ sentence was not particularly long at 18 months and he was given six months thereafter to pay. Excluding his incarceration time, he will have six months to amass what amounts to \$27.50 per month. Given these facts, it is obvious the circuit court concluded Hobbs would be able “to pay the court costs in the foreseeable future.” KRS 23A.205(2). We agree. There is no sentencing error here.

CONCLUSION

For the foregoing reasons, we affirm the Adair Circuit Court’s Judgment and Sentence entered November 27, 2018.

ALL CONCUR.

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