



by Hon. Craig Z. Clymer **The Legality of Assessing Court Costs Against Kentucky's**
& **Kristen Worak** **Indigent Criminals: Kentucky's High Court Should Reverse Itself**

The Department of Public Advocacy is responsible for providing legal representation to indigent persons charged with crimes in Kentucky. For years, statutes designed to provide for adequate funding for the DPA have been in place, through recoupment of attorney's fees from indigent defendants.³ The Kentucky Supreme Court has, however, misinterpreted statutes designed to recoup DPA costs from their defendant clients. As explained in this article, the current statutes are designed for courts to require indigent defendants to repay all or a portion of their attorney fees, services, and court costs, but the Kentucky Supreme Court has negated the legislative intent by holding that these statutes instead prohibit courts from collecting funds. The legal result is that Kentucky courts are enforcing statutes in a manner directly opposite to legislative intent. The practical result is that indigent defendants are not receiving the legal representation to which they are entitled.

The Public Advocate publicized the problem of drastic funding cuts in a recent letter to the author, which cited a Kentucky Supreme Court opinion holding that court costs cannot be assessed against indigent defendants. The Department of Public Advocacy (DPA) has three sources of revenue: 20% of DUI fees, 3.5% of court costs which are capped by statute at no more than \$1.75 million, and partial fees pursuant to section 31.211 of the Kentucky Revised Statutes. The Kentucky Supreme Court rulings have effectively eliminated the ability of trial courts to assess even partial fees on indigent defendants, one of the DPA's primary sources of revenue. The DPA is now unable to adequately provide for representation of indigent defendants because the Kentucky Supreme Court's rulings specifically mandating that court costs may not be assessed against indigent defendants severely curtail the DPA's funding.

The Supreme Court has established that once there is a finding of indigency, no court costs or fees can be assessed against the indigent defendant. The basis for the ruling lies in section 31.110(1)(b) of the Kentucky Revised Statutes, which states that, as to indigent defendants, "[t]he courts in which the defendant is tried shall waive all costs." This hard and fast application of the rule stems from a string of opinions beginning with *Edmonson v. Commonwealth*.

Edmonson involved a defendant who pled guilty to first-degree sexual abuse and rape and was ordered to pay court costs and to serve a prison sentence. On appeal, Edmonson objected to the imposition of court costs on the grounds that he was indigent, that he was represented by a public defender, and that he was permitted to proceed *in forma pauperis* on appeal. The Supreme Court cited section 23A.205(1) of the Kentucky Revised Statutes, which granted the trial court discretion in imposing court costs. The Court ultimately held that section 31.110(1)(b), which requires that court costs be waived for indigent defendants, was more specific than section 23A.205(1) and applied to the case. The Supreme Court therefore reversed the trial court's

ruling imposing court costs.

Most recently, the Kentucky Court of Appeals cited *Edmonson* in *Garrison v. Commonwealth*. In *Garrison*, the defendant appealed a Jefferson Circuit Court order requiring him to pay court costs of \$130.00 and a \$1,000 felony fine. The Court of Appeals held that *Edmonson* had “[made] clear that the trial court should not impose court costs upon an indigent defendant.” The court determined that the trial court must have found Garrison to be an indigent because he was appointed a public defender. The Court of Appeals’ opinion made no mention of section 31.211 (permitting trial courts to assess partial fees against indigent defendants), nor to trial court inquiries into Garrison’s ability to pay a partial fee. The Court of Appeals held that because Garrison was indigent, no court costs could be assessed. It vacated the portion of the final judgment which imposed court costs and felony fines.

I. Statutory Amendments

The Kentucky Supreme Court’s reliance in 1997 on section 23A.205(1) in *Edmonson* was based on the statute as originally enacted in 1987. But that statute was amended in 2002 to make court costs mandatory rather than discretionary. In a hearing before the Senate Committee on Appropriations and Revenue on March 12, 2002, Representative Rob Wilkey explained that this amendment was proposed in part to equalize court costs across the state and to require that the indigent defendant show that “he is a poor person at this time and in the foreseeable future” in order for a court to waive court costs.

Also effective in 2002 was newly enacted section 31.211. This statute specifically provides for assessment of partial fees against indigent defendants. Section 31.211(2) expressly affords relief for the DPA to collect unpaid partial fees under Civil Rule 69.03 and section 426 of the Kentucky Revised Statutes.

Despite the sweeping changes in the statutes, courts of the Commonwealth have continued to rely on *Edmonson* in their analysis of costs imposed on indigent defendants, with little or no discussion of the 2002 amendments or additions to section 23A.205 or Chapter 31 of the Kentucky Revised Statutes. For example, the Kentucky Supreme Court’s 2010 opinion in *Travis v. Commonwealth* simply cited section 23A.205(2) in determining that an indigent was improperly assessed court costs. In *Travis*, the Supreme Court found reversible error in the imposition of court costs and fines of two defendants who were represented by public defenders and allowed to proceed on appeal *in forma pauperis*. The Court cited section 23A.205(2) and determined that Travis and his co-defendant were “clearly indigent” because they had been allowed to proceed on appeal *in forma pauperis* and had been represented by public defenders at the time of trial.

In a recent opinion written by Judge Sheila Isaac, the Court of Appeals did consider the effect of the 2002 amendments to section 23A.205 and chapter 31 of the Kentucky Revised Statutes. In *Maynes v. Commonwealth*, the defendant appealed an order requiring him to pay court costs. The trial court allowed Maynes to enter a pre-trial diversion program but ordered him to pay \$130 in court costs; Maynes was not ordered to pay any fee for his public defender. Maynes’s public defender argued that he should not be assessed court costs because Maynes was indigent; however, the court assessed costs but allowed Maynes six months to pay.

The Court of Appeals held that, by enacting section 31.211 in 2002, the Kentucky’s legislature clearly intended that some indigent defendants could be assessed court costs. Because *Edmonson* had relied on the pre-amendment version of section 31.110(1)(b), requiring courts to

waive all costs for indigent defendants, the holding was no longer valid due to the addition of section 31.211(1) permitting partial fees. The Court of Appeals specifically found that the trial court had properly held a hearing pursuant to section 31.211(1) and opined:

At the time of the sentencing, the appellant was in completely different circumstances than he was at the time of arraignment. At sentencing, the appellant was being released from custody and was beginning a diversion program. Although appellant argued he was presently unemployed due to his incarceration and that he had a newborn to support, there was no evidence presented by appellant that he had any physical or mental disabilities preventing him from employment. The court had decided no partial fees for counsel would be assessed and therefore, he would owe nothing for his legal representation in the case. The [trial] court did find, however, that the appellant had the ability to pay \$ 130 over a six-month period. This order amounts to less than one dollar a day over that period. Under these circumstances such an order clearly would not deprive him or his dependents of the necessities of life, including food, shelter, or clothing.

The court seems to have concluded that Maynes was not a “poor person” at the time he entered a guilty plea in that he did have the ability to pay nominal court costs over the course of six months following his diversion. The Court therefore found that costs were appropriately imposed.

Maynes’s *Edmonson* argument was that once he had been appointed a public defender, the court was barred from imposing court costs pursuant to section 31.110(1)(b). For many years, this very argument has convinced many appellate courts to reverse the imposition of court costs. The Court of Appeals in *Maynes*, however, held that the plain language and most reasonable reading of section 31.110(1)(b) referred to “costs” as those costs incurred in preparing and maintaining a defense for the indigent defendant, not the court costs imposed *after the conviction*. Discretionary review was granted in *Maynes* on March 16, 2011, and is set to be heard by the Supreme Court in the near future.

The *Maynes* court analyzed several statutes that are important in determining whether an indigent defendant may be assessed court costs. Each will be discussed in turn.

II. Kentucky Revised Statutes Sections 23A.205(2) and 453.190(2)

As amended in 2002, section 23A.205(2) of the Kentucky Revised Statutes reads: 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.

Section 453.190(2) of the Kentucky Revised Statutes defines a “poor person” as “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.” By reference, section 23A.205(2) mentions a defendant’s inability to pay three times within the same provision: the defendant must be “unable to pay” the costs and fees without depriving himself

and/or his dependents of the necessities of life; the defendant must be unable to pay court costs [now]; *and* the defendant must be unable to pay court costs in the foreseeable future. It seems clear then, that even a “poor person” could still be found to have the ability to pay court costs in the future. Had the legislature not intended for the courts to consider the future ability of defendants to pay, then insertion of the phrase, “and will be unable to pay the court costs in the foreseeable future” would not have been included. To give meaning to the statute as a whole requires the courts to continually reconsider a defendant’s ability to pay throughout the pendency of the case.

III. Kentucky Revised Statute Section 31.100(3) Indigent Defined

The definition of an “indigent” or “needy person” is found in chapter 31, which is devoted to the Department of Public Advocacy. An “indigent” person is defined as “[a] person eighteen (18) years of age or older or emancipated minor under the age of eighteen (18) who, at the time his or her need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation.” Expenses include “the expenses of investigation, other preparation, and trial, together with the expenses of any appeal[.]” This definition refers to all of those costs incurred *during* court proceedings, and do not extend beyond final adjudication. Therefore, “indigents” cannot have expenses waived in perpetuity, but only until a criminal case is final. Additionally, the language provides that the indigent defendant must be unable to pay for his or her representation or other necessary expenses *at the time his or her need is determined*. This indicates that the legislature did not intend for the courts to extend “indigent” status beyond the proceedings finally resolving the case. An initial finding of indigency is not a permanent finding of indigency. It is a temporary finding, expressly deemed to be reviewed throughout the proceedings in light of the defendant’s then existing financial status. Had the legislature intended otherwise, the statutes would not mandate for the courts to determine the defendant’s indigent status at each stage of the proceedings. It follows then, that the Maynes opinion correctly interpreted the relevant statutes: court costs may be assessed where appropriate after the conclusion of the case.

IV. Kentucky Revised Statutes Sections 31.110 and 31.211

Pursuant to section 31.110, needy or indigent persons are entitled to the following:

- (a) To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled; and
- (b) To be provided with the necessary services and facilities of representation including investigation and other preparation. *The courts in which the defendant is tried shall waive all costs.*

The second sentence of subsection (b) is one of the most frequently cited statutory provisions used by the courts of the Commonwealth in reversing trial courts’ imposition of court costs and attorney’s fees. That sentence must not be considered alone but must be considered and read together with the preceding sentence, section 31.110(1)(a), as well as Chapter 31 as a whole.

To fully understand the legislature’s intent in the meaning of the phrase “waive all costs” as used in section 31.110(1)(b), courts must understand what “costs” are. The term “represented” as used in section 31.110(1)(a) suggests that subsection (1)(a) relates to formal legal advocacy or employment as an attorney for a criminal defendant. Subsection (1)(b) distinguishes, by sepa-

ration, the “necessary services and facilities of *representation*” such as investigation and other preparation for representation. Because these necessary services and facilities were addressed in a separate provision, the legislature must have intended that they be treated differently than the attorney’s representation (probably physical presence and advocacy). Therefore, the requirement of subsection (1)(b) that courts waive all costs for indigent defendants must be read to mean that “costs” are those things associated with the functions or duties of the attorney such as the cost of depositions, lab examinations, etc. Those things do not include court costs, which are mandatory for all cases pursuant to the more specific statute, section 23A.205(1). Rather, “costs” here relate to those costs that attorneys incur in representing a defendant. Further, that sentence cannot be read to mean that the courts must waive all legal costs *including attorney’s fees* because to do so would in effect give no meaning to section 31.211(3). Section 31.211(1) contemplates imposing partial fees on defendants who were appointed public defenders, stating:

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.

The phrases “fee for legal representation,” “other necessary services and facilities of representation,” and “court costs” are expressly differentiated in this portion of the statute. If any of these words were intended to be included in a large umbrella category of “costs” as waived in section 31.110(1)(b), the inclusion of “the other necessary services and facilities of representation” would be redundant. Also, the statute specifically provides that payment could be ordered “to recover money for representation” which should be interpreted as it is plainly read. This also reaffirms the assertion that section 31.110(b) does not forbid the imposition of fees for representation.

In considering the statute as a whole, with particular attention to section 31.211’s language regarding the imposition of partial fees, the courts must conclude that the legislature intended some indigent defendants could be assessed partial attorney’s fees, if appropriate, though such assessment should only take place after careful consideration following a section 31.211 hearing. Section 31.211 became effective in 2002. By giving no effect to the changes wholly enacted in 2002, courts are choosing to ignore the clear legislative intent to modify the statutory scheme’s effect.

V. Kentucky Revised Statutes Section 31.120(1)

After a court determines a defendant is indigent, the court has a continuing duty to monitor a defendant’s status at each step of the proceedings pursuant to section 31.120(1). This provision indicates the legislature anticipated that the financial status of defendants would or could change throughout the proceedings; otherwise, inquiries into indigent status would only be required at arraignment. The requirement that courts inquire into the indigent’s ability to pay throughout the proceedings also appears in section 31.211(1).

VI. Distinguishing Between Poor Persons and Indigents

Those opinions following the *Edmonson* precedent also often cite section 23A.205(2), providing for mandatory imposition of court costs unless the defendant is determined to be a “poor person” as defined in section 453.190(2). Courts have confused the terms “poor person” and “indigent” on more than one occasion. *Hatton v. Commonwealth* involved a defendant whose court costs had been waived because he was a “poor person,” but he was fined \$1,000.00. Hatton was represented by private counsel and no affidavit of indigency appeared in the record until he filed his appeal and motion to proceed *in forma pauperis*. The Kentucky Supreme Court stated, “Although the trial court referred to Appellant as ‘indigent’ during the sentencing hearing, we are of the opinion that such was poor wording rather than a legal finding.”

Similar “poor wording” in *Travis v. Commonwealth* added to the confusion. Although the Supreme Court was correct in finding that Travis and his co-defendant were indigent due to their representation by public defenders, the Court was incorrect in stating that section 23A.205(2) barred court costs being assessed against “indigents”. Instead, section 23A.205(2) forbids the imposition of court costs on “poor person[s].” The definition for a “poor person” under section 453.190(2), which is referred to in section 23A.205(2), is clearly different from the definition of an “indigent” person, as defined in chapter 31. This distinction between a “poor person” and an “indigent” is subtle, but important.

The distinction the *Travis* opinion failed to discuss was noted in a concurring opinion written by Judge Sheila Isaac in *Flowers v. Commonwealth*. Judge Isaac recognized the legislative intent in requiring indigent defendants to pay court costs according to their means but also recognized that the Kentucky Supreme Court held otherwise, noting that “[a]lthough the definitions of ‘poor person’ and ‘indigent’ are entirely different and a reading of the statutes would indicate that court costs would be mandatory for all but the most impoverished persons, we are constrained by the holding in *Travis*.” The defendant in *Flowers* had been represented by a public defender, was sentenced to five years imprisonment which was probated, and was ordered to pay \$125.00 court costs and a \$1,000 felony fine. The Kentucky Court of Appeals reversed the judgment, which had ordered Flowers to pay court costs and fines, citing *Edmonson and Travis*.

Classification as an indigent merely requires the inability to “provide for the payment of an [private] attorney and all other necessary expenses of representation.” In making the determination of indigency for any defendant, chapter 31 directs the court to consider multiple factors: income; source of income; property owned; number of motor vehicles owned and in working condition; other assets; outstanding obligations; number and ages of dependents; the United States Department of Labor poverty level guidelines; *complexity of the case*; *amount a private attorney would charge for similar services*; *amount of time a private attorney would reasonably spend on the case*; payment of money bail, other than a property bond of another to secure the person’s release from confinement on the present charge; and any other circumstances presented to the court relevant to financial status. Some of those factors are essentially comparisons between what the defendant would be required to pay private counsel versus a public advocate.

A defendant is deemed a “poor person”, however, if payment of the costs and fees of the proceedings would deprive the defendant or his dependants of the necessities of life. This definition envisions the most destitute of defendants, whose financial obligations cannot even stretch to accommodate monthly installments paid toward court costs spread over the course of one year. Court costs are \$130.00 per criminal case in circuit court. Thus, for one criminal case, a defendant could potentially be required to pay about \$10.83 per month towards court costs, or about thirty-six cents per day over the course of a year. Section 23A.205 therefore contemplates that only the most financially destitute persons shall be assessed court costs.

Those who cannot afford to pay installments totaling \$130.00 in one year most certainly could not afford to retain a private attorney. Private defense counsel would likely require clients to pay retainers initially, or very soon after they are retained. These retainers, often thousands of dollars, are beyond the means of many. Those persons who could not otherwise afford to hire a private attorney and who meet all other qualifications could be classified as “indigent” by the trial court and appointed a public defender to assist them in their criminal proceedings. However, some of those same indigent defendants would not be forced to deprive themselves or their dependents of the necessities of life if ordered to pay court costs amounting to approximately \$10.83 per month, particularly after their cases are finally adjudicated. For that reason, a chapter 31 “indigent” is not always a “poor person”, and may be assessed partial fees “for legal representation, the other necessary services and facilities of representation, *and court costs*” following an appropriate section 31.211 hearing.

This is the most reasonable interpretation of the two statutes. When the application of two statutes leads to apparent conflict, we have a duty to harmonize them so as to give effect to both, if possible. “The first duty of a court when required to construe statutes is to harmonize them if possible so as to allow both to stand unless there is an obvious inconsistency or an ambiguity exists.” When a defendant is not so impoverished that he is a “poor person”, unable to pay court costs now and unable to pay them in the foreseeable future, then section 31.211 is more specific and appropriate. If a section 31.211 hearing reveals that the defendant could pay a partial fee, then section 31.110(1)(b) could appropriately be applied. “[W]here statutory provisions overlap, the provision that deals more specifically with the matter at issue controls.” Even clearer is the fact that the Affidavit of Indigency form provides a line on which district and circuit court judges may assess a partial fee to be paid for DPA services. This appears just above the judge’s signature. This form, used by Kentucky’s Administrative Office of the Courts, is consistent with current statutory intent.

Conclusion

The *Edmonson* Court considered and gave effect to the correct statute as it was written in 1997. The holding in *Edmonson* is simply incorrect now as a result of statutory amendments. The only difference is that now courts also must inquire into an indigent’s ability to pay a particular fee under section 31.211(1). Court costs are mandatory for all but “poor persons”, including indigents who are not “poor persons,” and even indigents may be assessed partial fees and costs if the court determines they are able.

There are many instances in which an indigent defendant would be financially able to pay court costs or partial attorney’s fees to the department of public advocacy. These partial fees are a fraction of the fees charged by private defense attorneys and manageable for most defendants. A defendant may be indigent, having lost his job while incarcerated and owning no real property; however, upon release on bond or probated he may be able to return to work and pay nominal fees.

The DPA needs the funds that the legislature intended the Courts to collect. The Kentucky Supreme Court, in several cases, based their rulings that indigent defendants are entitled to no court costs on *Edmonson*, which interpreted statutes, primarily section 23A.205(1) and chapter 31, that were later amended or superseded. The failure to give effect or meaning to the statutes, as a whole and as amended, leads to a result contrary to what the legislature intended.

Consequently, the Department of Public Advocacy is not being paid the partial fees that the legislature intended they receive. This significant loss in funds based on the High Court's failure to follow the legislature's intent is directly linked to the quality and adequacy of representation provided by the DPA to indigent defendants. Fewer partial fees result in less funding provided to the DPA. Decreased funds mean the DPA must stretch its resources, in both the number of attorneys hired and the caseload assigned to those attorneys. By severely restricting the DPA's resources, the Kentucky Supreme Court's rulings are straining the DPA's attorney caseload and indigent defendants are not receiving the legal representation to which they are entitled.

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