

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001066-MR

MICHAEL KNOX

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE FREDERIC J. COWEN, JUDGE  
ACTION NOS. 08-CR-002531 AND 08-CR-003063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Michael Knox appeals a decision of the Jefferson Circuit Court requiring him to pay court costs despite being declared indigent. However, indigence is not determinative and an indigent individual may be required to pay court costs if there is a “reasonable basis for believing that the defendant can or will soon be able to pay[.]” *Butler v. Commonwealth*, 367 S.W.3d 609, 616 (Ky.

App. 2012) (quoting *Maynes v. Commonwealth*, 361 S.W.3d 922, 930 (Ky. 2012)). For the reasons set forth below, Knox will not be able to pay the fines in the near future and the decision of the circuit court is reversed and this cause is remanded.

On August 3, 2010, Knox entered into a plea agreement for a total of eight counts of robbery in the first degree and one count of theft by unlawful taking. The Commonwealth recommended a sentence of ten years and agreed that Knox would be released to the home incarceration program (HIP) pending final sentencing. The plea contained a hammer clause that increased the sentence to twenty years if he failed to appear at final sentencing. The circuit court accepted the plea and sentencing was scheduled for October 6, 2010. Knox was instructed that if he failed to comply with the requirements of HIP, or if he picked up any new charges, his sentence would increase to twenty years. The plea did not mention court costs.

On October 6, 2012, Knox was in custody for a HIP violation and his sentencing was rescheduled for November 10, 2010. At final sentencing, the court found Knox in violation of HIP and sentenced him to twenty years in prison pursuant to the hammer clause. Knox was then permitted to proceed *in forma pauperis* and was appointed appellate counsel. The Supreme Court of Kentucky vacated the sentence and remanded for resentencing. *Knox v. Commonwealth*, 361 S.W.3d 891 (Ky. 2012).

Knox was resentenced on May 7, 2012. In compliance with the Supreme Court's order, the circuit court considered the entire range of penalties,

denied probation, sentenced Knox to a total of seventeen years' imprisonment, and ordered him to pay court costs in the amount of \$130 immediately upon his release from custody. Knox asserts that he should not be required to pay court costs upon his release because of his indigence and the length of his sentence. Knox did not preserve the issue below, however, "court costs and fines are imposed as part of the sentence, and as such cannot be waived by failure to object." *Butler*, 367 S.W.3d at 615 (citation omitted). On appeal, Knox asserts that he should not have been ordered to pay court costs because he is indigent.

Kentucky Revised Statutes (KRS) 23A.205 provides for statutorily mandated court costs. The Supreme Court of Kentucky has concluded "that [a] trial court [is] authorized ... to impose court costs [on a defendant] despite [his] status as an indigent defendant entitled to the services of a public defender." *Butler*, 367 S.W.3d at 616 (quoting *Maynes*, 361 S.W.3d at 929). The court "distinguished between a 'needy' person's inability to pay for legal representation and a 'poor' person's inability to pay court costs and fees." *Id.* at 616 (citation omitted). When determining if an individual is "poor," the court noted the importance of considering defendant's ability to pay court costs in the reasonable future. *Maynes*, 361 S.W.3d at 930. A closer look at the underlying facts of both *Maynes* and *Butler* are instructive as to the considerations necessary to make this determination.

In *Butler*, the court determined that a fine of \$1,130 was improper because defendant was sentenced to seven years in prison, during which he would

be unable to work, and was ordered to pay the fine immediately upon release. *Butler*, 367 S.W.3d 609. In contrast, defendant in *Maynes*, was only ordered to pay \$130, was released from custody and able to work, and was given a six-month period subsequent to his release. *Maynes*, 361 S.W.3d 922. In *Maynes*, the court determined defendant would be able to pay the costs in the near future and distinguished the case from those involving lengthy prison terms where a defendant would be unable to pay in the near future because the prisoner would be unable to work. *Id.* In other words, to determine if there is a reasonable basis for believing that a defendant will be able to pay, it is relevant to consider the length of the sentence, the ability to work, the amount of the fine, and when the fine is due. *See Butler*, 367 S.W.3d 609. With this in mind, we turn to the facts of this case.

Knox was ordered to pay \$130 immediately upon his release from serving a seventeen-year prison term. Although the amount of the costs is lower than defendant in *Butler*, Knox is also serving a lengthy sentence and will be unable to work while doing so. Also, like *Butler*, Knox was ordered to pay the costs immediately upon his release. Thus, we find that there is no reasonable basis for believing that Knox will be able to pay the court costs in the near future. For these reasons, we reverse the judgment only as to the imposition of court costs and remand this cause for proceedings consistent with this opinion.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings consistent with this Opinion.

CAPERTON, JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CLAYTON, JUDGE, DISSENTING: I respectfully dissent. This Court cannot make the finding that Mr. Knox is unable to pay the court costs in the near future. Therefore, the order imposing costs should be vacated and this case should be remanded to the trial court for resentencing on the issue of the imposition of costs consistent with *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), and *Butler v Commonwealth*, 367 S.W.3d 609 (Ky. App. 2012).

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