

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001207-MR

KENDRICK HUNT

APPELLANT

v. APPEAL FROM HICKMAN CIRCUIT COURT  
HONORABLE TIMOTHY A. LANGFORD, JUDGE  
ACTION NO. 11-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART AND  
REVERSING IN PART

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Kendrick Hunt was convicted of trafficking in a controlled substance in the first degree and was sentenced to a term of eight years' imprisonment. At final sentencing, the Hickman Circuit Court imposed court costs, fees, and restitution, and Hunt now appeals the imposition of these fines. After careful review, we affirm in part and reverse in part.

In June 2011, Hunt was indicted on two counts of trafficking in cocaine, but because the total amount of cocaine sold in the two buys was each less than four grams, the charges were amended down to two class D felonies. Hunt was convicted by a jury and, as stated above, sentenced to a term of eight years' imprisonment. At a sentencing hearing on January 19, 2012, the Commonwealth stated that it was seeking restitution in the amount of \$300.00, or \$150.00 for each time it purchased cocaine from Hunt. At this time, defense counsel stated that Hunt did not disagree with the \$300.00. The court determined that restitution should be paid in the amount of \$500.00, which was the total of \$300.00 for the buys and \$100.00 for each time a confidential informant was utilized (\$200.00).

The trial court then determined that Hunt had spent 116 days in jail and held that Hunt would have to reimburse the jailer for \$23.00 a day, for a total of \$2,668.00. The court instructed Hunt that he would have to pay the fees within a year of his final release, and that if he were unable to do so, he could request more time before the time period expired. The court advised Hunt that if he paid on the amount, it would grant him more time, but that if he failed to pay, it would hold him in contempt. The trial court then asked Hunt whether he had any commissary funds in his account with which he could pay his court costs. Hunt stated that he did not believe he had any money in his account at that time.

In its January 19, 2012, order, the circuit court held that Hunt had assets in his commissary account which prevented it from finding that he was a "poor person." In a separate hand written order entered the same day, the trial

court required Hunt to pay the fees, restitution, and court costs within eight months of his release. By another order entered the following day, the court found Hunt to be “needy” as defined in Kentucky Revised Statutes (KRS) 31.110 and appointed the Department of Public Advocacy to represent him on appeal. The court also waived court costs under KRS 23A.205(2) and KRS 24A.175(3). Hunt’s private counsel withdrew three weeks later, and Hunt petitioned this Court for permission to file a belated appeal. We granted his motion, and this appeal now follows.

On appeal, Hunt makes several arguments, and we will address each in turn. First, Hunt argues that the trial court erred by requiring him to pay \$155.00 in court costs. Hunt concedes this allegation is not preserved, and the record reflects that trial counsel did not object to the trial court’s imposition of court costs, but Hunt urges this Court to address it because it is a substantive sentencing error, citing *Cummings v. Commonwealth*, 226 S.W.3d 62, 66 (Ky. 2007). Hunt urges this Court to review his arguments *de novo*.

The Commonwealth concedes that this Court has inherent jurisdiction to cure sentencing errors, but it argues that this case is similar to *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2012), wherein the Kentucky Supreme Court addressed the imposition of court costs, jail fees, and restitution. There, the Court stated:

Appellant's claim that the imposition of restitution in excess of \$100,000.00 violates KRS 533.030(3) squarely fits within Grigsby's conception of a “sentencing issue” because he alleges that the award of restitution in this case is contrary to statute. This Court will not be bound

to affirm a sentence that violates a statute simply because no objection was made in the trial court. Thus, we conclude that appellate review of that alleged error is not impeded by Appellant's failure to object.

On the other hand, Appellant's more serious concern about the sentencing order is that restitution was imposed without regard for the basic components of fundamental due process, including prior notice of the claim and a meaningful opportunity to be heard. There is no doubt that restitution is a proper component of a judgment imposing a final sentence. It is mandatory under KRS 532.032, and is, therefore, not an illegal sentence per se. However, the error claimed here is of a different nature than a sentence that violates a specific statute. It is a procedural deficiency, albeit of constitutional dimensions, more akin to the kind of procedural error alleged in *Montgomery v. Commonwealth*, 819 S.W.2d 713, 720 (Ky. 1991). There, a defect in PFO II instructions allowed the jury to fix a sentence for the PFO charge without fixing a sentence on the underlying crime. Despite the claim that the error presented a “sentencing issue,” this Court declined to review the issue because it was unpreserved and had no prejudicial effect upon the defendant.

Without depreciating the seriousness of Appellant's claim that he was denied due process, we conclude that his argument does not present a “sentencing issue,” and therefore is subject to review as unpreserved error under the palpable error standard of RCr 10.26. Under that rule, an unpreserved error may be reviewed on appeal only if the error is “palpable” and “affects the substantial rights of a party.” Even then, however, relief is appropriate only “upon a determination that manifest injustice has resulted from the error.” RCr 10.26; *Wiley v. Commonwealth*, 348 S.W.3d 570, 574 (Ky. 2010).

*Id.* at 29. While we agree that the facts in *Jones* are similar to the instant case, in *Jones* the Court noted that the arguments about sentencing errors were two-fold, and thus *Jones* was arguing that the trial court violated a statute and also that it

violated his due process rights. Here, Hunt only argues that the trial court violated KRS 23A.205, and thus his argument is that the court violated a sentencing statute. Because Hunt's argument is that the trial court violated a statute in its sentencing order, we will review his argument *de novo*. See *Jones, supra*. See also *Cummings, supra*.

KRS 23A.205, as amended in 2002, states:

- (1) Court costs for a criminal case in the Circuit Court shall be one hundred dollars (\$100).
- (2) 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.
- (3) If the court finds that the defendant does not meet the standard articulated in subsection (2) of this section and that the defendant is nonetheless unable to pay the full amount of the court costs and fees at the time of sentencing, then the court shall establish a show cause date by which time the court costs, fees, and fines shall be paid and may establish an installment payment plan whereby the defendant pays the full amount of the court costs, fees, and fines to the circuit clerk in installments as established by the court. All court costs and fees under the installment plan shall be paid within one (1) year of the date of sentencing notwithstanding any remaining restitution or other monetary penalty owed by the defendant and arising out of the conviction. Installment payments will be applied first to court costs, then to restitution, then to fees, and then to fines.

A “poor person” is defined in KRS 452.190(2) 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.”

The record reflects that the trial court inquired as to whether Hunt had funds in his commissary account, and Hunt stated that he previously had funds, but that he did not think he had any funds left in the account at the time of the sentencing hearing. On appeal to this Court, Hunt notes that he was nineteen at the time of sentencing and had no money and no job. Further, he was facing eight years in prison, and he had no prospect of earning money in the foreseeable future. As such, Hunt argues that the trial court erred when it found that he was not a poor person and required him to pay court costs.

We disagree. The record reflects that the trial court found that Hunt would be able to earn money to pay the nominal court costs after his release from prison. The trial court orally stated at the sentencing hearing that it would work with Hunt, and that if Hunt was making efforts to pay his costs, fees, and restitution, it would grant extensions of time for him to be able to do so. In *Spicer v. Commonwealth*, 442 S.W.3d 26 (Ky. 2014), the Kentucky Supreme Court stated:

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.

In this case, the record does not reflect an assessment of Appellant's financial status, other than that he was appointed a public defender and permitted to proceed on appeal in forma pauperis. A 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. *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012). Thus, simply because Appellant was represented by a public defender does not mean he is necessarily exempt from court costs. Because the trial judge's decision regarding court costs was not inconsistent with any facts in the record, the decision does not constitute error, “sentencing” or otherwise, and we affirm the imposition of court costs and the arrest fee.

In the instant case, the trial court inquired as to Hunt’s financial status. The record reflects that while Hunt stated he did not believe he had money in his account, the trial court did not find him to be a poor person under KRS 23A.205. The trial court did not err when it required Hunt to pay court costs.

Hunt next argues that the trial court erred when it required him to pay \$2,668.00 in jail fees. At the sentencing hearing, the trial court stated that it would impose a jail fee of \$23.00 per day, and Hunt was incarcerated at the Hickman County Jail for 116 days, which amounts to \$2,668.00. Hunt argues that the trial court’s ruling was improper under KRS 441.265.

KRS 441.265 states, in pertinent part:

(1) A prisoner in a county jail shall be required by the sentencing court to reimburse the county for expenses incurred by reason of the prisoner's confinement as set out in this section, except for good cause shown.

(2) (a) The jailer may adopt, with the approval of the county's governing body, a prisoner fee and expense reimbursement policy, which may include, but not be limited to, the following . . . .

Hunt makes several arguments as to how the trial court erred when it required him to reimburse the Hickman County Jail for jail fees he incurred while being housed there. Hunt argues that there was good cause shown to warrant the trial court to waive the fees. In support of this, Hunt argues that he was not able to pay the fees, as he had no income. Hunt contends that the trial court was not permitted to consider his family's income when determining whether it had good cause to waive reimbursement of the fees.

We agree that under KRS 441.265(2)(b), the trial court was not permitted to consider any resources of Hunt's family when it determined whether he would be required to reimburse jail fees. However, the record does not reflect that the trial court did consider Hunt's family's resources, as no evidence was provided about such resources, and the trial court did not inquire about any such resources. Quite simply, the trial court determined that Hunt would be able to work while incarcerated and upon release to reimburse the jail fees and did not find that good cause had been shown to warrant waiving the fees. We find no error in this regard.



Next, Hunt argues that in order for a court to require a prisoner or defendant to reimburse jail fees, KRS 441.265(2)(a) mandates that the jail must first have a reimbursement policy in place that has been approved by the county's governing body. As provided above, KRS 441.265(2) states, "The jailer *may* adopt, with the approval of the county's governing body, a prisoner fee and expense reimbursement policy . . . ." We read this statutory provision to say that a county or jail may adopt a policy that sets out specifically how fees will be reimbursed, but we do not read the statute as requiring a jail or county to have such a policy in place. Hunt points to no authority or case law for his proposition that the statute requires a jail to have such a policy before a prisoner can be ordered to reimburse jail fees. Accordingly, we find Hunt's argument in this regard to be without merit.

Hunt next argues that jail fees cannot be awarded to another county for incarceration on another crime. In support of this, Hunt contends that in this case, he was incarcerated for trafficking cocaine in Hickman County. He contends that there is a "suggestion in the record" that prior to these charges, Hunt was acquitted in a prior case involving an assault and may have spent time in the Grayson County Jail either on that assault case or in regards to this case. Hunt argues that based upon the record, the court could not have determined whether he was charged jail fees for the trafficking charges or for time spent in jail on other charges, for which he was acquitted. He contends that if the trial court imposed jail fees in this case based upon time spent in jail in another case, it would violate his state and federal constitutional rights and the proscription against double jeopardy.

Hunt provides no citations to the record to support his argument that he was ordered to reimburse jail fees for time spent in jail for another crime. A review of the sentencing hearing reflects that there was a brief mention of the time spent in Grayson County, but there is no indication that that time was included in the 116 days for which the jail fee was assessed in this case. Without specific references to the record that support this argument, we cannot say that Hunt was ordered to reimburse jail fees for time spent in jail on another charge. “We will not engage in gratuitous speculation . . . based upon a silent record. It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Hunt next urges this Court to apply the standard for the payment of jail fees set forth in KRS 523.045. However, Hunt admits that this statute applies in the context of individuals being assessed jail fees for misdemeanor offenses. As Hunt was charged with and convicted of a felony offense, KRS 441.265 was applicable, and KRS 523.045 has no bearing on this case.

Next, Hunt alleges that the trial court violated Kentucky statutory law when it required him to pay restitution to a non-victim, specifically the Pennyrile Narcotics Task Force. In its order, the trial court ordered Hunt to pay \$500.00 in restitution to the task force for reimbursement of money used to set up the cocaine buys with Hunt. Hunt alleges that this violated KRS 532.032, KRS 532.033, and KRS 421.500(1), because the task force was not a victim. Further, Hunt contends

that KRS 532.032 requires that the victim be specifically named in the trial court's order requiring restitution.

KRS 532.350(1) defines restitution as “any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act[.]” KRS 532.032(1) states:

Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.

Hunt argues that this provision requires that a victim be *named* specifically in the order requiring restitution. The Commonwealth argues that restitution can be paid to an organization under KRS 532.033(1) and that the trial court did not err when it awarded restitution in the amount of \$500.00 to be paid to the task force.

While Hunt's argument that the trial court did not include a “named victim”<sup>1</sup> in the restitution order is somewhat difficult to follow, we do agree with Hunt that the task force was not a victim of Hunt's crime. KRS 421.500(1) defines a victim as “an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime . . . .” The task force is a group of law enforcement officers who work collaboratively to prevent drug crimes, and money is allocated to the task force accordingly. We cannot conclude that the task

---

<sup>1</sup> The trial court's order required that restitution be paid to the “Pennryile Task Force.”

force suffered direct or threatened financial harm as a result of Hunt's crime. The task force is simply not a victim in the sense that the statutory scheme contemplates to be compensated for any harm it suffers. Accordingly, we reverse the portion of the trial court's order requiring Hunt to pay \$500.00 in restitution to the Pennyrile Narcotics Task Force.

Based on the foregoing, we affirm the Hickman Circuit Court's order requiring Hunt to pay \$155.00 in court costs and \$2668.00 in jail fees. We reverse the trial court's order requiring Hunt to pay restitution to the Pennyrile Narcotics Task Force in the amount of \$500.00.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Susan Jackson Balliet  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky  
  
Thomas A. Van De Rostyne  
Assistant Attorney General  
Frankfort, Kentucky