

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Josh Weathersby,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 21, 2022

Court of Appeals Case No.
21A-CR-1464

Appeal from the Marion Superior
Court

The Honorable Cynthia L. Oetjen,
Judge

The Honorable Anne Flannelly,
Magistrate

Trial Court Cause No.
49D30-2012-F5-38449

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Defendant, Josh Weathersby (Weathersby), appeals the trial court's imposition of costs following his sentencing for residential breaking and entering, a Level 6 felony, Ind. Code § 35-43-2-1.5; criminal trespass, a Class A misdemeanor, I.C. § 35-43-2-2(b)(2); interference with reporting a crime, a Class A misdemeanor, I.C. § 35-45-2-3(1); and invasion of privacy, a Class A misdemeanor, I.C. § 35-46-1-15-1(a)(1).
- [2] We affirm, in part, and remand, in part, with instructions.

ISSUE

- [3] Weathersby presents us with one issue on appeal, which we restate as:
Whether the trial court abused its discretion when it failed to question him as to his indigency at the sentencing hearing and imposed community corrections costs based on a sliding fee scale.

FACTS AND PROCEDURAL HISTORY

- [4] On December 30, 2020, the State filed an Information, charging Weathersby with strangulation, a Level 6 felony; residential breaking and entering, a Level 6 felony; domestic battery, a Class A misdemeanor; interfering with reporting a crime, a Class A misdemeanor, invasion of privacy, a Class A misdemeanor, and two Counts of criminal trespass, Class A misdemeanors. On June 9, 2021, a jury trial was conducted, at the close of which the jury found Weathersby guilty of residential breaking and entering, interfering with reporting a crime,

invasion of privacy, and two Counts of criminal trespass. The jury acquitted him of strangulation and domestic battery.

[5] On July 7, 2021, the trial court conducted a sentencing hearing. At the beginning of the sentencing hearing, the trial court dismissed one Count of criminal trespass. Subsequently, the trial court asked Weathersby to present “evidence regarding ability to pay.” (Transcript p. 229). Weathersby testified that prior to his arrest he had been employed as a phlebotomist, that he had been incarcerated for “approximately the last seven months” and that his employment “is no longer available” to him. (Tr. p. 229). He denied having saved up any money. Following Weathersby’s testimony and arguments from both parties, the trial court sentenced Weathersby to an aggregate term of two and one-half years in community corrections and ordered him to complete fifty-two weeks of domestic violence counseling. With respect to costs, the trial court stated the following:

I'm ordering you to pay \$185 in court costs and a \$100 Public Defender Supplemental Fund fee, and with respect to the cost of [c]ommunity [c]orrections, I've ordered you placed on the sliding fee scale. And I assess those few costs because although you've been unemployed while you've been in jail, you are able-bodied and you have worked in the past and you appear to the [c]ourt to be able to obtain a job.

Now, if you find during the course of the next 910 days that after making a good faith effort, you can't find employment, you certainly have the right to send a letter to the [c]ourt, and we'll set a hearing to see whether or not you should continue to pay the

two fees I've assessed, the court costs and a PD fee and the sliding fee scale costs to [c]ommunity [c]orrections.

(Tr. p. 234). The trial court ordered Weathersby held in the Marion County jail until placed on home detention through community corrections.

[6] Weathersby now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[7] Sentencing decisions include decisions to impose fees and costs. *Berry v. State*, 950 N.E.2d 798, 799 (Ind. Ct. App. 2011). A trial court's sentencing decisions are reviewed under an abuse of discretion standard. *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007). "An abuse of discretion has occurred when the sentencing decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id.* at 588 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). "If the fees imposed by the trial court fall within the parameters provided by statute, we will not find an abuse of discretion." *Berry*, 950 N.E.2d at 799.

[8] Weathersby now contends that the trial court abused its discretion when it failed to inquire as to his indigency at the time of sentencing and imposed a sliding fee scale for community corrections without specifying the exact amount. Pursuant to Indiana Code section 33-37-2-3, if a trial court imposes costs on a defendant, a trial court is required to conduct an indigency hearing. However, "the statute does not otherwise dictate when the hearing is to be

held.” *Berry*, 950 N.E.2d at 802. A trial court acts within its authority when it chooses to wait and see if a defendant can pay probation fees before it finds the defendant indigent. *See* I.C. ch. 35-38-2 (no language in this chapter requires the trial court to conduct an indigency hearing before or directly after ordering probation fees); *Johnson v. State*, 27 N.E.3d 793, 794 (Ind. Ct. App. 2015). That being said, the trial court has a duty to conduct an indigency hearing at some point in time. I.C. § 33-37-2-3. At the latest, an indigency hearing for probation fees should be held at the time a defendant completes his sentence. *Johnson*, 27 N.E.3d at 794.

[9] Here, during the sentencing hearing, the trial court expressly inquired if Weathersby wished to present any evidence regarding his ability to pay. Weathersby gave a brief testimony about his employment and financial status. Accordingly, the trial court did question Weathersby about his indigency. Moreover, we note that the trial court was not required to obtain further information at this point before imposing fees and costs. Weathersby’s indigency is “more appropriately determined not at the time of the initial sentencing but at the conclusion of incarceration, thus allowing consideration of whether defendant may have accumulated assets through inheritance or otherwise.” *Whedon v. State*, 765 N.E.2d 1276, 1279 (Ind. 2002). As such, the latest date to conduct an indigency hearing would be either at the completion of the sentence or before a revocation premised on failure to pay fees. *Johnson*, 27 N.E.2d at 794.

[10] Nevertheless, the trial court placed Weathersby on home detention with GPS monitoring through community corrections, with costs determined “on the sliding fee scale.” (Tr. p. 234). Neither the sentencing order, nor the transcript further clarified the sliding fee scale to be used. Indiana Code section 35-38-2.5-5 provides that “as a condition of probation a court may order an offender confined to the offender’s home for a period of home detention.” Indiana Code section 35-38-2.5-6(7) provides that an order for home detention must include “[a] requirement that the offender pay a home detention fee set by the court in addition to the probation user’s fee required under [I.C. §] 35-38-2-1 or [I.C. Art.] 31-40.”

[11] The record before us does not indicate who established the sliding fee scale or who administers it. Therefore, we have no way of knowing whether the trial court intended to delegate any statutory responsibility regarding fees to community corrections or whether the fees requested by community corrections were consistent with the sliding fee scale. Accordingly, we remand the matter to provide the trial court an opportunity to clarify its intent regarding the fees and for further proceedings consistent with this opinion. *See Amick v. State*, 126 N.E.3d 909, 911- (Ind. Ct. App. 2019) (remanding the matter to provide the trial court an opportunity to clarify its intent regarding the sliding fee scale).

CONCLUSION

[12] Based on the foregoing, we hold that the trial court inquired as to Weathersby’s indigency at the sentencing hearing, but we remand to clarify the sliding fee scale of the community corrections costs.

[13] Affirmed, in part, and remanded, in part, with instructions.

[14] Robb, J. and Molter, J. concur