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**IN THE
COURT OF APPEALS OF INDIANA**

LYNN WIGGINS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0610-CR-857

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Shaheed, Judge
Cause No. 49G14-0605-FC-082287

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Lynn Wiggins (“Wiggins”) appeals the imposition of a \$200.00 drug interdiction fee following his conviction for possession of cocaine as a Class D felony. He argues that the mandatory nature of the fee violates his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because he is indigent and unable to pay the fee. However, because the trial court reduced the fee to a civil judgment, Wiggins faces no criminal consequences as a result of his inability to pay the fee. Therefore, the imposition of the fee does not violate Wiggins’ constitutional rights.

Facts and Procedural History

On May 8, 2006, Wiggins was arrested after a police officer observed him placing a small amount of crack cocaine into a smoking device. The State charged Wiggins with Count I, Possession of Cocaine as a Class D felony under Indiana Code § 35-48-4-6, and Count II, Possession of Paraphernalia as a Class D felony under Indiana Code § 35-48-4-8.3(b). Wiggins entered an initial plea of not guilty, and the trial court determined Wiggins to be indigent and appointed an attorney for him.

Pursuant to a plea agreement, Wiggins agreed to plead guilty to Count I, and the State agreed to dismiss Count II. The trial court sentenced Wiggins to 365 days in community corrections, with eighty-two days of credit time. The trial court also assessed court costs of \$159.00 and a fine of \$1.00 but found Wiggins to be indigent and therefore not liable for those amounts. Finally, the court imposed a “drug interdiction fee.” Pursuant to Indiana Code § 33-37-5-9, such a fee is mandatory for any person convicted

of an offense under Indiana Code chapter 35-48-4. The fee can range from \$200.00 to \$1000.00. Here, the trial court imposed the minimum fee of \$200.00. Wiggins' counsel objected to the imposition of the drug interdiction fee, contending that it is unconstitutional as applied to indigent defendants. The trial court overruled Wiggins' objection but reduced the fee to a civil judgment against Wiggins. Wiggins now appeals.

Discussion and Decision

On appeal, Wiggins contends that Indiana Code § 33-37-5-9, which governs the imposition of the drug interdiction fee, is unconstitutional. Indiana Code § 33-37-5-9 provides, in pertinent part:

(b) The court shall assess a drug abuse, prosecution, interdiction, and correction fee of at least two hundred dollars (\$200) and not more than one thousand dollars (\$1,000) against a person convicted of an offense under IC 35-48-4.

(c) In determining the amount of the drug abuse, prosecution, interdiction, and correction fee assessed against a person under subsection (b), a court shall consider the person's ability to pay the fee.

As can plainly be seen from the text of the statute, the fee must be at least \$200.00 regardless of the defendant's ability to pay it. *See Taylor v. State*, 786 N.E.2d 285, 287-88 (Ind. Ct. App. 2003). Wiggins argues that the mandatory nature of this fee makes it unconstitutional when applied to indigent defendants. Specifically, he argues that the imposition of the drug interdiction fee on an indigent defendant violates the Fourteenth Amendment to the United States Constitution, which provides that no State shall "deprive any person of life, liberty, or property, without due process of law" or "deny to any person within its jurisdiction the equal protection of laws." U.S. Const. amend XIV, § 1. Wiggins maintains that the mandatory drug interdiction fee, as applied to indigent

defendants, violates both the Due Process Clause and the Equal Protection Clause.¹ We cannot agree.

Due process and equal protection principles converge in assessing the treatment of indigents in our criminal justice system. *Bearden v. Georgia*, 461 U.S. 660, 664-65 (1983). But these principles are only implicated where an indigent criminal defendant faces some differential treatment or is deprived of some life, liberty, or property interest as a result of his inability to pay. For example, the defendants in *Griffin v. Illinois*, 351 U.S. 12 (1956), could not pursue an appeal because they could not afford to pay for a transcript of the trial court proceedings. In *Williams v. Illinois*, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971), the defendants were imprisoned because of their inability to pay fines and court costs. In *Bearden*, 461 U.S. 660, the defendant had his probation revoked and was ordered incarcerated because of his inability to pay a fine and restitution. More recently, and more close to home, the defendants in *Mueller v. State*, 837 N.E.2d 198 (Ind. Ct. App. 2005), were precluded from participating in a pretrial diversion program, whereby they would not be prosecuted, because of their inability to pay the program fees. In all of these cases, the Court found the practice to violate the Due Process Clause, the Equal Protection Clause, or both.²

¹ Wiggins also argues that the statute violates Article I, § 12 of the Indiana Constitution, which provides: “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.” However, Wiggins has failed to support this contention with cogent reasoning or by citation to relevant authority; he merely quotes the language of the provision and baldly claims that the drug interdiction fee violates it. As such, he has waived any challenge to the fee under Article I, § 12. *See* Ind. Appellate Rule 46(a)(8)(A).

² This is not to say that a criminal defendant can never be jailed for failing to pay a fine, a fee, court costs, or restitution. *See Bearden*, 461 U.S. at 672-74; *Tate*, 401 U.S. at 400-01. The holdings cited all involved defendants unable to pay by reason of involuntary indigency.

Here, on the other hand, Wiggins cannot point to any different treatment he will receive or any life, liberty, or property interest of which he will be deprived as a result of his inability to pay the drug interdiction fee. Payment of the fee has not been made a condition of probation. *Cf. M.L. v. State*, 838 N.E.2d 525 (Ind. Ct. App. 2005) (holding that ability to pay must be considered when restitution is made condition of probation), *reh'g denied, trans. denied*. Instead, Wiggins is like any other person burdened by a civil judgment, and he faces the same consequences as a non-indigent person who fails to pay such a judgment. The fact that he cannot currently pay does not mean that the judgment holder—here, the clerk of court—cannot seek payment, for example, by garnishment. As the United States Supreme Court has stated:

The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

Williams, 399 U.S. at 244.

In sum, the difference between Wiggins and the defendants in *Griffin*, *Williams*, *Tate*, *Bearden*, and *Mueller* is that Wiggins does not face the prospect of jail time because of his inability to pay.³ Therefore, Wiggins has not, as he argues, been deprived of “equal justice.” Appellant’s Br. p. 5. He is faced only with a civil money judgment, and he has made no argument whatsoever that such a result violates his constitutional rights. Under these circumstances, we cannot say that the trial court’s imposition of a

³ Wiggins cannot be imprisoned for failure to pay a civil money judgment because Article I, § 22 of the Indiana Constitution provides that “there shall be no imprisonment for debt, except in case of fraud[.]” *See also Pettit v. Pettit*, 626 N.E.2d 444, 445, 447 (Ind. 1993).

\$200.00 drug interdiction fee violated Wiggins' rights under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

ROBB, J., and BRADFORD, J., concur.