STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 8, 2000
v	No. 206890 Shiawassee Circuit Court
CHARLES ERNEST CHANDLER, Defendant-Appellant.	LC No. 96-007713 FC

Before: Gage, P.J., and White and Markey, JJ.

GAGE, P.J. (dissenting).

I respectfully dissent because I find that the trial court appropriately exercised its inherent discretion in concluding that defendant should reimburse the court for the costs of his appointed counsel at the rate of ten dollars per week.

As the majority acknowledges, both the Michigan Supreme Court and this Court previously have recognized a trial court's inherent authority and discretion to demand from a criminal defendant that he provide reimbursement for the expenses of his court-appointed counsel.

> The ability of courts to require defendants to repay expenses of court-appointed counsel has been recognized by the Michigan Supreme Court. In *Davis v Oakland Circuit Judge*, 383 Mich 717; 178 NW2d 920 (1970), the Michigan Supreme Court held that a circuit judge has authority to order a criminal defendant to make restitution to the county of the costs of the defendant's appointed counsel from funds belonging to the defendant but which he failed to disclose at the time counsel was appointed. In doing so, the Court reasoned:
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> No authority has been cited, and independent research has uncovered none, which in any way tends to impair the selectively discretionary power of a trial judge to apply known assets of an alleged indigent toward defraying—in some part—the public cost of providing for that indigent the assistance of counsel which [Const 1963, art 1, § 20] and the Bill of Rights uniformly guarantee. [*Id*. at 720.]
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> In *People v Bohm*, 393 Mich 129; 223 NW2d 291 (1974), the defendant applied to the Michigan Supreme Court for the appointment of counsel to prosecute an appeal from this Court to the Supreme Court. The Court found that although the

> defendant was not impecunious, he was "indigent" insofar as ability to hire a competent lawyer and thus ordered appointment of counsel. *Id*. at 130. In doing so, the Court further ordered that the "trial court in its discretion may enter an appropriate order for repayment." *Id*. at 131. [*People v Nowicki*, 213 Mich App 383, 387; 539 NW2d 590 (1995).]

As I briefly discuss below, the trial court in the instant case properly exercised this selective discretion in imposing defendant's reimbursement obligation.

I find unpersuasive the majority's suggestion that the instant case might be distinguishable from *Nowicki* on the basis that the defendant in *Nowicki* pleaded guilty, while the instant defendant won acquittal of the charges against him. Defendant's acquittal should not itself shield him from any potential obligation to reimburse the taxpayers of Shiawassee County for the expense of his appointed counsel. Where defendant in the form of his acquittal verdict obviously derived substantial and valuable assistance from the trial court's appointment of counsel at the taxpayers' expense, I can think of no valid reason to grant defendant the further windfall of automatic immunity from potential reimbursement merely because the jury ultimately found defendant not guilty. The court's appointment of defendant's counsel at public expense is tantamount to a loan, and defendant's acquittal does not represent a valid basis for its forgiveness. Furthermore, to limit potential reimbursement of the costs of appointed counsel only to convicted defendants effectively and improperly renders the reimbursement obligation penal in nature. *Nowicki, supra* at 386 (explaining that the reimbursement obligation "is completely independent of [the defendant's] sentence," and "does not arise as a consequence of his conviction").

I further disagree with the majority's conclusion that the trial court failed to act with sufficient caution in imposing the reimbursement obligation. While the majority attempts to distinguish the basis for the instant trial court's reimbursement order from the trial court's reasoning in *Nowicki*, both the instant trial court and the *Nowicki* trial court determined that the reimbursement obligation "arises from the defendant's obligation to defray the public cost of representation." *Id*. at 386. At the May 23, 1997 show cause hearing, the trial court observed that "over $10,000 in taxpayer monies have been expended in your defense," that defendant received representation that would have cost him at least one hundred thousand dollars if obtained from retained counsel, and that twenty dollars per week "from a taxpayer's standpoint I think it's probably more than reasonable." The court again indicated at the June 23, 1997 continued hearing that it did not believe it should write off the approximately ten thousand dollars in assistance that defendant received "out of this court's line item, which is funded by the general fund of Shiawassee County," and that "I feel that I have a continuing obligation that does not dissipate with a finding of not guilty to hold *this* defendant responsible for . . . reimbursement of attorney fees wherein, from the outset, there was an indication that he could make some contribution" (emphasis added). The record clearly demonstrates that the trial court determined that defendant's reimbursement obligation "arises from the defendant's obligation to defray the public cost of representation." *Id*. at 386.

I also reject the majority's finding that the trial court failed to carefully consider defendant's asserted inability to pay the ordered reimbursement. The record establishes that the trial court held a continued hearing on three separate dates (5/23/97, 6/23/97 and 9/22/97) at which it entertained defendant's challenges to the court's authority to enter a reimbursement obligation and defendant's assertions that he could not afford to pay reimbursement. The court did consider, properly in my view,

defendant's assertions at some point during the pretrial proceedings that if the court ordered bond defendant could look for work, apparently to fund his defense. Although the bond hearing transcript does not contain defendant's remarks, defendant himself acknowledged at the May 23, 1997 hearing that he previously represented to the court that he could search for employment if the court ordered bond.

The trial court's careful consideration of defendant's asserted lack of income also is reflected in the court's two reductions of the initially ordered reimbursement amount of forty-five dollars per week. At the May 23, 1997 hearing, the court considered defendant's asserted total disability and lack of income, the fact that defendant's wife paid one hundred dollars per week in rent for she and defendant, and defendant's explanation with respect to his job hunting efforts that after his acquittal he unsuccessfully sought work from two former employers, but had not complete any formal written employment applications. At the hearing's conclusion, the trial court reduced the required weekly payment to at least twenty dollars, which amount defendant explicitly conceded was reasonable. The court then continued the hearing, observing that if defendant returned for the hearing not having paid any reimbursement, the court would expect to see documentation concerning defendant's failed search for employment. By the time of the continued June 23, 1997 hearing, however, defendant had made no payments, generally reasserting his inability to pay. Although defendant on that date requested a later hearing to establish defendant's inability to pay, defendant at the September 22, 1997 hearing merely reasserted his total disability and lack of any income, including disability benefits. Despite that defendant failed to verify or even allege that he made any efforts to obtain some employment after the May 1997 hearing, the trial court ultimately again reduced the required reimbursement amount to at least ten dollars per week.

I conclude that the record demonstrates that the trial court carefully considered its reimbursement orders. In light of defendant's past indications of willingness to seek some source of income, his failure to satisfy the court that he engaged in any job hunting efforts, and the purpose of defendant's obligation to defray the public cost of his representation, I cannot conclude that the trial court abused its discretion in ordering that defendant provide reimbursement of only ten dollars per week. *Davis, supra*; *Nowicki, supra* at 387-388. See also *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996) ("[A]n abuse of discretion . . . exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling."). Defendant's basic needs are not compromised by the nominal requirement of ten dollars per week for reimbursement to the citizens of Shiawassee County for the costs of defendant's representation.[1]

I would affirm the trial court's reimbursement order.

/s/ Hilda R. Gage

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[1] In the event defendant can establish circumstances that render the ten dollar per week amount an undue hardship, he may petition the trial court for relief. See *People v LaPine*, 63 Mich App 554, 558; 234 NW2d 700 (1975) ("[I]f payment is impossible or would constitute an undue hardship, these conditions should be modified or withdrawn.").