

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DJUAN VINCENT BARNES,

Defendant-Appellant.

UNPUBLISHED

June 17, 2008

No. 278271

Oakland Circuit Court

LC No. 2006-208947-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of larceny in a building, MCL 750.360, and stealing or retaining a financial transaction device without consent, MCL 750.157n(1). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of two to 15 years for each conviction. He appeals as of right. We affirm defendant's convictions, but vacate the portion of the judgment of sentence requiring him to pay attorney fees, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the use of his prior convictions to score the sentencing guidelines' prior record variables and to enhance his maximum sentence as an habitual offender violated his constitutional rights under the Sixth and Fourteenth Amendments, US Const, Ams VI, XIV. Because defendant did not raise this issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Wyrick*, 265 Mich App 483, 489; 695 NW2d 555 (2005), vacated in part on other grounds 474 Mich 947 (2005).

Defendant acknowledges that this Court rejected this argument in *Wyrick*, *supra* at 489-490, and that the use of prior convictions to increase a sentence is consistent with the United States Supreme Court's decisions in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998). Although he asserts that "the vitality of *Almendarez-Torres* has been eroded by subsequent Supreme Court rulings," that decision has not been overruled. Because binding precedent supported the trial court's use of defendant's prior convictions to enhance his sentences, there was no plain error.

Additionally, defendant argues that the trial court erred in ordering him to contribute to the cost of his court-appointed attorney without first assessing his ability to pay. Because defendant did not object to the imposition of attorney fees at sentencing or raise this issue in a motion for resentencing, we review for plain error affecting his substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004), citing *Carines*, *supra* at 763.

“A defendant may be required to reimburse the county for the cost of his court-appointed attorney.” *Dunbar*, *supra* at 251. Unless the defendant specifically objects to the reimbursement amount at the time it is ordered, the trial court is not required to make specific findings on the record regarding the defendant’s ability to pay. *Id.* at 254. The court does, however, “need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant’s presentence investigation report or, even more generally, a statement that it considered the defendant’s ability to pay.” *Id.* at 254-255. The reimbursement amount should also correspond to the defendant’s foreseeable ability to pay. *Id.* at 255. Here, the trial court plainly erred by ordering defendant to pay court-appointed attorney fees without providing any indication that it considered defendant’s ability to pay. At sentencing, the trial court stated that defendant was responsible to pay for his court-appointed attorney, without giving the reimbursement amount, and the judgment of sentence indicated that the reimbursement amount was yet to be determined. The trial court subsequently issued an order to remit prisoner funds stating that defendant owed a balance of \$1330 “for the obligation ordered in the judgment of sentence.” Accordingly, we vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for the trial court to reconsider its reimbursement order in light of defendant’s present and future ability to pay.

Affirmed in part, vacated in part, and remanded for reasons consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering