

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARC PAUL SANDERS,

Defendant-Appellant.

UNPUBLISHED

July 15, 2008

No. 273929

Monroe Circuit Court

LC No. 04-033815-FC

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

This matter is before this Court on remand from the Michigan Supreme Court “for consideration as on leave granted.” *People v Sanders*, 480 Mich 949; 741 NW2d 318 (2007). Defendant appeals the trial court’s denial of his post-conviction motion to correct his sentence.¹ We affirm in part and reverse in part.

Defendant first argues that the trial court erred in denying him credit for the entirety of his time served in jail prior to sentencing. We disagree.

Defendant was a parole absconder from the state of Florida at the time of his arrest on May 11, 2004. The Michigan Department of Corrections (MDOC) concluded that the Florida Parole Commission “closed interest” in defendant on September 23, 2004. Defendant was granted credit for time served between that date and the date of his sentencing, January 27, 2004.

Defendant first claims that Florida’s post-confinement release, the conditions of which he was in violation at the time of his arrest in Michigan, does not constitute parole as defined by Michigan law. Thus, he argues, he was not held on a parole detainer and is entitled to credit for the entirety of his presentence custody. This unpreserved issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Ordinarily, a defendant who has served time in jail before sentencing is entitled to credit toward his sentence for that time. MCL 769.11b; *People v Stead*, 270 Mich App 550, 551; 716

¹ This Court originally denied leave to appeal. *People v Sanders*, unpublished order of the Court of Appeals, entered May 4, 2007 (Docket No. 273929).

NW2d 324 (2006). MCL 769.11b states, however, that credit is based on “time in jail prior to sentencing *because* of being denied or unable to furnish bond for the offense of which he is convicted.” (Emphasis added.) Thus, when a parolee is arrested, he is held pursuant to a parole detainer, and not entitled to credit for the time held in jail. *Stead, supra* at 551-552. The defendant is entitled to credit against the previous, unfinished sentence for which he was paroled. *Id.* at 552.

Parole in Michigan is defined as “conditional release.” *People v Matelic*, 249 Mich App 1, 25; 641 NW2d 252 (2001), overruled on other grounds *People v Stewart*, 472 Mich 624 (2005) (quoting *People v Raihala*, 199 Mich App 577; 502 NW2d 755 (1993)); see also *People v Williams*, 463 Mich 942; 621 NW2d 214 (2000) (Corrigan, J., dissenting) (noting substantive difference between parole and federal supervised release). In this case, defendant provides no authority for his assertion that his post-confinement release in Florida does not constitute parole. The MDOC investigating agent contacted Florida authorities and determined that defendant was on parole at the time of his arrest. The communication from the state of Florida was from the Florida Parole Commission and in regard to violations of defendant’s conditional release. There is no evidence to suggest that defendant’s post-confinement release was substantively different from parole as contemplated by Michigan law.

Defendant further argues that because Michigan law does not expressly prohibit granting credit to parolees for time served, the trial court erred in denying defendant credit. This unpreserved issue is reviewed for plain error affecting substantial rights. *Carines, supra* at 763-764. This Court has recently reiterated that the language of MCL 769.11b limiting credit to persons who cannot post or are denied bond excludes the granting of credit for time served to persons held on parole detainer. *People v Filip*, 278 Mich App 635, 641; ___ NW2d ___ (2008). “[T]he plain language of MCL 769.11b is inapplicable under the circumstances when a parolee is held on new charges constituting a parole violation.” *Id.* (summarizing *People v Seiders*, 262 Mich App 702, 706-707; 686 NW2d 821 (2004)). This conclusion is unaffected by the fact that defendant’s paroled sentence was in Florida. See *Seiders, supra* at 704-706 (denying credit to Missouri parolee).

Defendant next claims that even if he was a parolee at the time of his arrest, his obligations to Florida expired on May 26, 2004, because he had only 15 days remaining on his paroled sentence, and his credit should run from this date. Defendant preserved this issue by arguing it before the trial court at sentencing and in his post-conviction motion. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). Preserved issues of sentencing are reviewed for an abuse of discretion. *People v Hendrix*, 263 Mich App 18, 20; 688 NW2d 838 (2004), mod on other grounds 471 Mich 926 (2004). However, whether a defendant is entitled to credit for time served and other issues of statutory interpretation are questions of law which this Court reviews de novo. *Stead, supra* at 551; *Hendrix, supra* at 20. Underlying factual findings by the trial court are reviewed for clear error. *People v Golba*, 273 Mich App 603, 613; 729 NW2d 916 (2007).

In this case, there is no evidence in the lower court record to support defendant’s contention. The trial court relied on the conclusions of the MDOC investigating agent in the Presentence Investigation Report (PSIR). Defendant presented no documentation or other evidence concerning the extent of his obligation to Florida to the trial court. The PSIR indicated

that Florida expressly “closed its interest” in defendant on September 23, 2004. It was not clear error for the trial court to rely on this conclusion.

Defendant finally argues that because he was not given due credit for time served he is effectively being subjected to multiple punishments for the same crime, in violation of his right against double jeopardy. This issue is also unpreserved and reviewed for plain error affecting substantial rights. *Carines, supra* at 763-764. Double jeopardy protections are implicated when a defendant is subjected to more punishment than intended by the Legislature. *People v Calloway*, 469 Mich 448, 453; 671 NW2d 733 (2003) (Kelly, J, concurring). This Court has already confirmed that the Legislature intended to deny credit toward a new sentence to an individual held on a parole detainer. *Seiders, supra* at 704-706. Thus, defendant’s punishment did not violate double jeopardy.

Defendant next argues that the trial court erred when it failed to consider his ability to pay before ordering reimbursement for court-appointed attorney fees. We agree. This issue is also unpreserved on appeal. *Carines, supra* at 763-764.

Absent an objection by the defendant, a court does not need to make formal findings on the record regarding the defendant’s ability to pay. *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004); see also *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007); *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007). Defendant did not object at the time of sentencing. However, the sentencing court must provide some indication that it considered the ability to pay. *Dunbar, supra* at 254-255. This can be as little as a “statement that it considered the defendant’s ability to pay.” *Id.* The trial court made no such statement. This constitutes plain error. *Carines, supra* at 763. Because the error affects defendant’s substantial rights the case must be remanded to the trial court to address the question of attorney fee reimbursement considering defendant’s ability to pay. *Arnone, supra* at 908; *Dunbar, supra* at 254-255.

Defendant’s final argument on appeal is that the MDOC misinterpreted the trial court’s order to collect money from defendant’s account to pay for restitution, attorney fees and other costs. We disagree.

This issue was not properly before the trial court. Defendant does not allege any error in the trial court proceedings or seek any change in the trial court’s order to remit prisoner funds. Moreover, defendant’s post-conviction motion was not timely filed. See MCR 6.429(B); MCR 6.502. Nevertheless, the trial court considered and ruled on this issue. Thus, we can review the trial court’s denial of defendant’s motion. Defendant’s argument is based on a question of statutory law, which we review de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

The trial court ordered the MDOC to withdraw 50 percent of defendant’s earnings above \$50 a month to be paid toward attorney fees and other costs. The court also ordered defendant to pay restitution according to MCL 791.220h, which limits the MDOC from withdrawing more than 50 percent of defendant’s earnings over \$50 a month for restitution. MCL 791.220h(1). Defendant contends that MCL 780.766a(2) prohibits the MDOC from deducting more than 50 percent from a prisoner’s earnings for all costs and fees, including restitution. The MDOC is currently taking 100 percent of defendant’s earnings above the \$50 threshold and splitting it equally between restitution and defendant’s other fees, in accordance with the trial court’s order.

Contrary to defendant's contention, the plain language of MCL 780.776a(2) merely determines what percentage of all money deducted should go toward restitution:

[I]f a person is subject to payment of victim payments [(restitution)] and any combination of other fines, costs, assessments, probation or parole supervision fees, or other payments, 50% of each payment collected by the court from that person shall be applied to payment of victim payments, and the balance shall be applied to payment of fines, costs, supervision fees, and other assessments or payments. [MCL 780.766a(2).]

By dictating that restitution payments should constitute a maximum of 50 percent of defendant's above-threshold earnings, MCL 791.220h merely ensures compliance with MCL 780.766a(2). Defendant misapprehends the plain language of MCL 780.766a(2).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio