

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JOSEPH CAMBONI,

Defendant-Appellant.

UNPUBLISHED

September 29, 2009

No. 287268

Macomb Circuit Court

LC No. 06-002408-FH

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted a portion of his sentence following a probation violation on his conviction for larceny from a building, MCL 750.360. We affirm in part, reverse in part and remand for correction of defendant's judgment of sentence. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On February 7, 2007, defendant was sentenced to five years' probation, with 270 days to be served in the county jail. Following an early release to participate in a residential substance abuse program, defendant was returned to jail after he was involuntarily terminated in the program. Defendant was released on February 11, 2008, after serving a total of 235 days in jail, with "good time" credits.¹ After his release, he failed to report to probation. On April 22, 2008, defendant pleaded guilty to a probation violation, and on May 30, 2008, he was sentenced to 21 months to six years in prison. The trial court also awarded defendant 240 days' time served, despite defendant's objection that he be awarded credit for the "good time" jail credit he had earned. The trial court further ordered defendant to pay costs and attorney fees arising out of his conviction and probation violation proceedings.

Defendant first argues that the trial court erred when it refused to grant defendant 35 days' "good time" credit toward his prison sentence. Defendant is correct. The prosecutor acknowledges that this Court's decision in *People v Resler*, 210 Mich App 24; 532 NW2d 907 (1995), addresses this question. In *Resler*, the defendant was originally sentenced to probation, with the first year to be served in the county jail. The defendant was released 60 days early

¹ See MCL 51.282.

because of good time granted by the sheriff. However, the defendant's probation was later revoked and he was sentenced to prison. The trial court granted credit only for the time actually served in jail, and defendant appealed, arguing that he was also entitled to credit for 60 days' good time. This Court agreed with the defendant. *Id.* at 25.

Plaintiff acknowledges that *Resler* is binding on this Court. See MCR 7.215(J). To the extent that plaintiff argues that this Court should consider declaring a conflict panel to revisit *Resler*, we decline to do so. Therefore, we reverse the trial court's denial of defendant's request to add good time and remand this matter for the trial court to add 35 days to defendant's previous credit.

Defendant also challenges the trial court's imposition of \$1,200 in court costs, \$1,150 in attorney fees and \$1,200 in supervision fees. He appears to argue that his trial counsel provided ineffective assistance when he failed to challenge the imposition of these fees and costs on the grounds that defendant was indigent.

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* at 663-664. Because no *Ginther*² hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Here, defendant cannot show outcome determinative error on the part of trial counsel. MCL 769.1k provides in pertinent part:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

(a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].

(b) The court may impose any or all of the following:

(i) Any fine.

(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

(iii) The expenses of providing legal assistance to the defendant.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

(iv) Any assessment authorized by law.

(v) Reimbursement under [MCL 769.1f].

Pursuant to MCL 769.1l, a trial court can recoup the costs imposed under MCL 769.1k by authorizing the Department of Corrections to take funds from a prisoner's prison account:

If a prisoner under the jurisdiction of the department of corrections has been ordered to pay any sum of money as described in section 1k and the department of corrections receives an order from the court on a form prescribed by the state court administrative office, the department of corrections shall deduct 50% of the funds received by the prisoner in a month over \$50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds \$100.00, or the entire amount if the prisoner is paroled, is transferred to community programs, or is discharged on the maximum sentence.

Both statutes operate irrespective of a defendant's ability to pay. Defendant argues, however, that the trial court was nevertheless obliged to read such a requirement into the statute. He bases his assertion as to the imposition of attorney fees on this Court's decision in *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), which held that, before imposing a fee for a court-appointed attorney, a trial court must state on the record its presentence determination that the defendant has a foreseeable ability to pay the fee. However, our Supreme Court recently overruled *Dunbar* in *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). The *Jackson* Court held that such an ability-to-pay assessment is only constitutionally necessary when that imposition is actually enforced and a defendant contested his ability to pay. *Id.* at 275, 290-292. Then, when a trial court attempts to enforce its earlier imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his *then* existing indigency. The trial court must then evaluate "whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id.* at 293 (emphasis in original). The *Jackson* Court also held "remittance orders of prisoner funds, under MCL 769.1l, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment because the statute is structured to only take monies from prisoners who are presumed to be nonindigent." *Id.* at 275.

Here, while defendant argues that he was indigent when the trial court decided otherwise during the imposition of the fees, defendant has not shown that any enforcement had begun at the time of his resentencing. Thus, he cannot show that counsel provided ineffective assistance during resentencing in failing to challenge the initial imposition of the fees prior to enforcement.

Defendant provides nothing to support his claim of error concerning the imposition of costs other than attorney fees. A trial court may require a convicted defendant to pay costs where such a requirement is expressly authorized by statute, *People v Nance*, 214 Mich App 257, 258-259; 542 NW2d 358 (1995). The plain language of MCL 769.1k authorizes the imposition of these costs but does not require the trial court to consider a defendant's ability to pay them. Also, the imposition of costs other than attorney fees does not raise the same Sixth Amendment implications as the imposition of attorney fees. See *Jackson*, *supra* at 285. Thus, defendant has not shown that the trial court erred in ordering him to pay the additional costs here.

Because the trial court was authorized to impose costs and fees, defendant cannot show outcome-determinative error on the part of trial counsel. Defense counsel who decline to raise spurious objections are not guilty of rendering ineffective assistance of counsel. *Cox, supra* at 453.

We affirm in part, reverse in part and remand for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello