STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2016
v	No. 326655 Emmet Circuit Court
JAMES BRUCE DAMBERG, Defendant-Appellant.	LC No. 14-004086-FH

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Gina Stephani allowed defendant to test drive her 2000 Pontiac Bonneville in anticipation of his purchase of the vehicle. Defendant instead drove the car from Petoskey to Grand Rapids, where he had a court date, and remained on the road for the next two days. When Stephani realized that her car was AWOL, she reported it as stolen. A day or two after defendant began his "test drive," a state trooper stopped him for speeding and took him into custody. The car was towed back to Stephani at her expense.

A jury convicted defendant of using a motor vehicle without authority, MCL 750.414. Defendant now challenges his sentence, the court's restitution order, and the imposition of court costs. We find merit only in defendant's court cost argument, and remand for a hearing to establish a factual basis for the costs. In all other respects, we affirm.

I

At his trial, defendant asserted that he drove the Pontiac to Grand Rapids believing that the trip would offer a "very valid road test for the vehicle." Defendant insisted that he had not exceeded his authority to use the car because he and Stephani had never agreed on time or geographical limits for the test drive. The jury did not see it that way.

At sentencing, defense counsel advocated that the court treat defendant's offense as a misdemeanor so that defendant could have "the opportunity to fully make everybody in this situation right; to pay restitution." Defendant proclaimed: "the main issue today should be and is my commitment to make whole the victim for any costs incurred out-of-pocket, restitution and court costs to this Court and this community." He pledged to pay $500 on the day of sentencing "and by a week from today, I will pay the entire amount owed." The court stated that it would "revisit the proper sentence" if defendant failed to make the promised payments. The court then

sentenced defendant to 11 months in jail, and ordered him to pay $1,716 in restitution (the sum recommended in the presentence information report) and $300 in court costs.

II

Defendant first contends that the trial court denied him equal protection of the law by "revisiting" defendant's sentence when he failed to pay the $500 deposit on the restitution amount owed to Stephani. But the record contains no indication that the trial court ever adjusted or altered defendant's sentence in any fashion. Rather, the register of actions filed with defendant's brief on appeal evidences that defendant paid $500 one week after he was sentenced. Neither the register of actions nor any evidence submitted to this Court substantiates that the trial court "revisited" defendant's sentence. Accordingly, defendant has not established a factual predicate for his equal protection claim.

III

Defendant next complains that the trial court abused its discretion by ordering him to pay $1,716 in restitution. Because defendant willingly agreed to pay restitution in this amount, he has waived any error.

As we have described, defendant's counsel averred that defendant wished to "fully make everybody in this situation right" by paying restitution. Defendant echoed that sentiment. Neither defendant nor his counsel took issue with the amount of restitution Stephani sought. By agreeing to pay the restitution set forth in the PSIR, defendant intentionally relinquished his right to a restitution hearing. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

IV

Lastly, defendant argues that the trial court lacked statutory authority to impose $300 in court costs. In his brief, defendant cites a previous version of MCL 769.1k, which provided that a trial court may impose "[a]ny cost" or "[a]ny fine." 2014 PA 352. In *People v Cunningham*, 496 Mich 145, 158; 852 NW2d 118 (2014), our Supreme Court ruled that this statute did not independently authorize court costs. Instead, the statute "provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Id.* In response to *Cunningham*, the Legislature amended MCL 769.1k, which now provides that a trial court may impose "any cost reasonably related to the actual costs incurred by the trial court." MCL 769.1k(1)(b)(*iii*); 2014 PA 352. As amended, § 1k "independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense." *People v Konopka (On Remand)*, 309 Mich App 345, 358; 869 NW2d 651 (2015). "This amended version applies to all fines, costs, and assessments ordered under MCL 769.1k before June 18, 2014, the date Cunningham was decided, and after October 17, 2014, the effective date of the amendatory act. 2014 PA 352." *Id.* at 357.

The trial court properly assessed and imposed costs under MCL 769 .1k(1)(b)(*iii*) and we affirm that decision. However, we are bound to remand to the trial court because it failed to "establish a factual basis, under the subsequently amended statute, for the $[300] in costs imposed." *Konopka (On Remand)*, 309 Mich App at 359. On remand, the court must explain

how "the costs imposed were reasonably related to the actual costs incurred by the trial court." *Id.* at 359-360. If the court is unable to do so, it must "alter that figure." *Id.* at 360.

We affirm, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly