STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2012
v	No. 303456 Wayne Circuit Court
DANIEL JOSE FLORES, Defendant-Appellant.	LC No. 10-009189-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant Daniel Flores appeals as of right his bench trial convictions of carjacking[1] and unarmed robbery.[2] The trial court sentenced Flores to serve 81 to 180 months for each conviction. We affirm.

I. FACTS

This case arises from an incident that took place during the early morning hours of August 14, 2010. At around 6:00 p.m. on August 13, 2010, Michael Morrison went to the Three Nicks Bar in Dearborn, Michigan, to deliver a table to his friend who was disc jockeying at the bar later that evening. While at the bar, Morrison saw and recognized Flores. Morrison had not seen Flores since they were in high school about six years earlier. Morrison and Flores engaged in a friendly conversation, and Morrison then left the bar.

Morrison returned to the bar around 11:45 p.m. to watch his friend perform. Morrison drove his 1995 Cadillac Deville to the bar. When he arrived at the bar, he saw Flores again. Flores introduced Morrison to his cousin, and the three socialized and drank for about 45 minutes to an hour.

At around 12:45 a.m., Morrison decided to leave the bar. He said goodbye to Flores and Flores' cousin. Flores' cousin then asked Morrison for a ride. He asked Morrison to take him

[1] MCL 750.529a.

[2] MCL 750.530.

and Flores to Central Avenue and Cahalan Street in Detroit, Michigan. Morrison agreed, and the three men got into Morrison's 1995 Cadillac Deville. Flores sat in the passenger seat, and Flores' cousin sat in the back on the passenger's side. Morrison drove Flores and his cousin to the corner of Central Avenue and Cahalan Street, but when he pulled over the vehicle to let them out, Flores and his cousin abruptly began punching Morrison in the head. According to Morrison, they were punching him "in the head from the side . . . and from the back . . . ." He used his right arm to block punches, and with his left hand he unbuckled his seat belt and opened the car door. As Morrison got out of his vehicle, his silver necklace was torn from his neck and his wallet was pulled from his back pocket. Flores and his cousin then drove away in Morrison's vehicle.

Morrison filed a police report in which he described and named Flores as one of the passengers in his vehicle that night. Morrison also identified a photograph of Flores. Morrison's vehicle was later recovered in Lincoln Park, Michigan. And police arrested Flores.

The prosecution charged Flores with one count of carjacking, and it also filed a habitual offender notice. Following its presentation of proofs at Flores' bench trial, the prosecution moved to amend the Information to include a count of unarmed robbery. In a written decision, the trial court granted the prosecution's motion and found Flores guilty of carjacking and unarmed robbery.

At sentencing, neither party objected to the trial court's scoring of the guidelines. The prosecution indicated that "the bottom end of the guidelines are correct. They score [Flores] as a first offender." It then argued that, in light of Flores' status as a third habitual offender, "the top of the guidelines are 202 months or 16.8 years." The trial court indicated that Flores' minimum sentencing guidelines range was 81 to 135 months. The trial court then sentenced Flores "to the bottom of the guidelines," that is, the minimum sentencing guideline range for first time offenders. The trial court stated:

> I am sentencing you—your guidelines are eighty-one to one hundred and thirty-five months, which is 6.9 years to whatever, one hundred thirty-five. But I am sentencing you to 6.9 to 15 years on the carjacking. And that is also robbery unarmed, the same, 6.9 to 15 years.

Flores now appeals.

II. SENTENCING

A. STANDARD OF REVIEW

Flores argues that the trial court improperly sentenced him as a habitual offender. Specifically, Flores contends that the trial court failed to make a determination on the record that his prior convictions existed. Generally, this Court reviews a trial court's decision whether to enhance a defendant's sentence under the habitual offender statutes for an abuse of discretion.[3]

[3] *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

However, because Flores failed to preserve this issue, this Court will review this issue for plain error affecting his substantial rights.[4]

B. LEGAL STANDARDS

A "[trial] court is given discretion to enhance the maximum sentence for subsequent felony convictions."[5] MCL 769.13 governs the enhancement of a defendant's sentence on the basis of prior convictions. When sentencing a habitual offender, the trial court must determine the existence of the defendant's prior convictions, either during sentencing or a separate hearing before sentencing.[6] A prior conviction may be established by evidence including but not limited to: (1) a copy of a judgment of conviction, (2) a transcript of a prior trial, plea-taking or sentencing proceeding, (3) information contained in a presentencing report, or (4) a statement of the defendant.[7]

C. APPLYING THE STANDARDS

Here, the trial court did not enhance Flores's sentence. At sentencing, the trial court stated:

> I am sentencing you—your guidelines are eighty-one to one hundred and thirty-five months, which is 6.9 years to whatever, one hundred thirty-five. But I am sentencing you to 6.9 to 15 years on the carjacking. And that is also robbery unarmed, the same, 6.9 to 15 years.

The trial court clearly indicated that Flores's minimum sentencing guidelines range was 81 to 135 months, and it sentenced Flores within that range. At sentencing, the prosecution argued that Flores was a third habitual offender and that, pursuant to the applicable sentencing guidelines grid, the trial court should use its discretion to sentence Flores within the higher or enhanced range which would have been 81 to 202 months. However, the trial court declined to enhance Flores's sentence and imposed a sentence that fell well within the applicable minimum sentencing guidelines range for a first time offender. Accordingly, Flores's claim that the trial court enhanced his sentence is a misstatement of fact. Additionally, his claim that the trial court failed to make a determination about the existence of his prior convictions under MCL 769.13(5) is misplaced because Flores was not sentenced as a habitual offender. Therefore, the trial court was not required to make a determination on Flores's prior convictions. In sum, Flores failed to show plain error affecting his substantial rights.

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[4] *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[5] *People v Bonilla-Machado*, 489 Mich 412, 429; 803 NW2d 217 (2011).

[6] MCL 769.13(5).

[7] MCL 769.13(5).

III. COURT COSTS

A. STANDARD OF REVIEW

Flores argues that he was denied due process because the trial court imposed court costs without assessing his ability to pay. Generally, this Court reviews de novo the constitutionality of the procedure used to impose and enforce court-appointed attorney fees and court costs.[8] Flores' claim is unpreserved because he failed to object to the trial court order requiring him to pay court costs. This Court reviews unpreserved constitutional errors for plain error affecting substantial rights.[9]

B. LEGAL STANDARDS

"[A] defendant is not entitled to an ability-to-pay assessment until the imposition of the fee is enforced."[10] The Court has held that mandatory pre-sentencing assessments "frustrate[] the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees."[11] Additionally, mandatory assessments conflict with the trial court's ability to impose a fee for court-appointed counsel.[12]

C. APPLYING THE STANDARDS

Flores does not provide any evidence to support his claim that the trial court erred by imposing court costs. A trial court may require a convicted defendant to pay court costs where

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[8] *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009).

[9] *Carines*, 460 Mich at 764.

[10] *Jackson*, 483 Mich at 292.

[11] *Id*. at 275, 289-290.

[12] 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 section 1j of this chapter.
>
> (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.

such a requirement is expressly authorized by statute.[13] The plain language of MCL 769.1k allows the trial court to impose court costs and does not require the trial court to consider a defendant's ability to pay.[14] Additionally, the imposition of court costs and fees other than attorney fees does not raise the same Sixth Amendment issues as attorney fees.[15] Accordingly, Flores has not shown that the trial court erred in ordering him to pay court costs.

Flores also argues that the trial court failed to make a specific finding under MCL 771.3(5) about the nature and costs of the expenses incurred in prosecuting him. MCL 771.3(2)(c) provides that, "[a]s a condition of probation, the court may require the probationer . . . [p]ay costs pursuant to subsection (5)." MCL 771.3(5) states that, "[i]f the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer." MCL 771.3(5) is not applicable because the statute pertains to probationers, and Flores is a prisoner. Accordingly, Flores failed to show plain error from the imposition of court costs.

We affirm.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan

[13] *People v Nance*, 214 Mich App 257, 258-259; 542 NW2d 358 (1995).

[14] *Jackson*, 483 Mich at 284.

[15] *Id*. at 277, 285.