

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
November 15, 2012

v

CLYDE ANTHONY OWENS,  
  
Defendant-Appellant.

No. 306028  
Wayne Circuit Court  
LC No. 11-000353-FH

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Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm (“felon in possession”),<sup>1</sup> possession with intent to deliver marijuana,<sup>2</sup> and possession of a firearm during the commission of a felony (“felony-firearm”).<sup>3</sup> Defendant was sentenced, as a second habitual offender,<sup>4</sup> to nine months to seven and one-half years in prison for the felon in possession conviction, time served for the possession with intent to deliver marijuana conviction, and two years in prison for the felony-firearm conviction. Defendant appeals by right. We affirm in part, reverse in part, and remand.

**I. BASIC FACTS**

On November 8, 2010, Detroit Police Officer Aaron Colwell observed defendant participate in a suspected narcotics transaction outside a residence at 15480 Faircrest Street in Detroit. After Officer Colwell approached defendant and announced his identity as a police officer, defendant and his cohort, Ronald Jamal Williams, ran into the residence and locked the door behind them. Officer Colwell knocked on the door and defendant’s mother, who owned the home, let him and other officers inside. Officers arrested defendant in the basement, and a

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<sup>1</sup> MCL 750.224f.

<sup>2</sup> MCL 333.7401(2)(d)(iii). Although the statute uses the spelling “marihuana,” this Court uses the more common spelling, “marijuana,” in its opinions.

<sup>3</sup> MCL 750.227b.

<sup>4</sup> MCL 769.10.

search of the backpack he had on his person uncovered two gallon-sized bags of marijuana. A subsequent search of the home uncovered a large garbage bag containing six gallon-sized bags of marijuana and three firearms in a bedroom upstairs.

Following defendant's conviction, the trial court sentenced defendant as follows:

*The Court:* [ ]And on the felon being in possession of a firearm, I sentence him to serve nine months to five years with the Michigan Department of Corrections.

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*The Prosecutor:* Under the habitual second, it would be zero to eleven. I'm sorry, your Honor.

*The Court:* Zero to eleven? I'll leave it at the nine months. Next time, check it before.

*The Prosecutor:* I will.

*The Clerk:* Nine months to...

*The Court:* To seven and a half?

*The Clerk:* Seven and a half.

*The Prosecutor:* Yes.

## II. SENTENCING

Defendant first argues that the trial court erred in sentencing him to nine months to seven and one-half years in prison for his felon in possession conviction. We agree, and we reverse defendant's sentence for felon in possession and remand for resentencing consistent with MCL 769.34(4)(a) and MCL 769.31(b).

This Court reviews de novo questions of statutory interpretation, and a trial court's decision to depart from the sentencing guidelines for an abuse of discretion.<sup>5</sup> Defendant's sentencing guidelines score for his felon in possession conviction placed him in an intermediate sanction cell with a sentencing guidelines range of 0 to 11 months.<sup>6</sup> MCL 769.34(4)(a) provides:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines . . . is 18 months or less, the

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<sup>5</sup> *People v Buehler*, 477 Mich 18, 23-24; 727 NW2d 127 (2007).

<sup>6</sup> MCL 777.66; MCL 777.21(3)(a).

court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Therefore, unless justified by substantial and compelling reasons stated on the record, MCL 769.34(4)(a) prohibited the trial court from sentencing defendant to prison. The sentencing transcript demonstrates that the trial court erred when it failed to articulate any reasons for declining to impose an intermediate consistent with defendant's recommended guidelines range. Indeed, the prosecution concedes in its appellate brief that the trial court erred when it "sentenced defendant to nine months to seven and one-half years in prison without articulating substantial and compelling reasons for a departure." Accordingly, remand for resentencing consistent with MCL 769.34(4)(a) is required.<sup>7</sup>

### III. CRIME VICTIM'S RIGHTS FUND FEE

Defendant also argues that the trial court's assessment of a \$130 fee for the Crime Victim's Rights Fund ("CVRF Fee") violates the bar against ex post facto laws because the crimes were committed before the Legislature increased the fee from \$60 to \$130. We disagree.

Defendant failed to raise this issue below; this issue is therefore unpreserved. Accordingly, to avoid forfeiture of the issue, defendant bears the burden to show that the issue amounts to a plain error affecting his substantial rights.<sup>8</sup>

This Court recently addressed this issue in *People v Earl*,<sup>9</sup> and concluded that the increased CVRF Fee does not violate the Ex Post Facto Clause.<sup>10</sup> In *Earl*, the defendant argued that the \$130 CVRF Fee violated the bar against ex post facto laws because the CVRF Fee was \$60 at the time he committed his crimes.<sup>11</sup> In rejecting the defendant's argument that the CVRF Fee constituted restitution, and therefore a form of punishment, this Court relied on its previous statement in *People v Matthews*,<sup>12</sup> regarding the nature of the assessments made pursuant to MCL 780.905:

[T]he assessment is *not intended to be a form of restitution* dependent upon the injury suffered by any individual victim. Instead, the Legislature,

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<sup>7</sup> *People v Lucey*, 287 Mich App 267, 274; 787 NW2d 133 (2010) (failure of trial court to articulate substantial and compelling reason for departure requires remand for resentencing).

<sup>8</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>9</sup> \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No 302945, issued June 19, 2012).

<sup>10</sup> *Id.* (slip op at 6).

<sup>11</sup> *Id.*

<sup>12</sup> 202 Mich App 175, 176; 508 NW2d 173 (1993).

pursuant to the authority granted it under Const. 1963, art. 1, § 24(2) and (3), has provided for the assessment against certain defendants for the benefit of all victims.<sup>[13]</sup>

This Court then noted, “[T]he Ex Post Facto Clause does not apply to legislative control of remedies and modes of procedure that do not affect matters of substance.”<sup>14</sup> Because the CVRF Fee was not punitive, nor did it affect substantive matters, this Court held that the trial court’s assessment of the \$130 fee did not violate the ex post facto doctrine.

Because this Court has held the CVRF Fee does not constitute a punishment under the Ex Post Facto Clause, the increased assessment does not violate defendant’s rights under that clause. Defendant does not present any new arguments persuading us to stray from our holding in *Earl*. Accordingly, because defendant has failed to persuade us that the imposition of the CVRF fee in this case was a plain error affecting his substantial rights, he has forfeited his right to appellate review of this issue.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Cynthia Diane Stephens  
/s/ Michael J. Riordan

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<sup>13</sup> *Earl*, \_\_ Mich App at \_\_ (slip op at 5) (emphasis added).

<sup>14</sup> *Id.* (citations omitted).