STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ALAN VANWERT,

Defendant-Appellant.

UNPUBLISHED
October 25, 2012

No. 309293
Midland Circuit Court
LC No. 10-004450-FH

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(dissenting)*

I respectfully dissent. I believe the trial court's use of a fine imposed while utilizing a delayed sentence is not an abuse of discretion. Accordingly, I would affirm the sentence.

MCL 333.7401(1)(d)(iii) allows for a punishment of "imprisonment for not more than 4 years or a fine of not more than $20,000.00, *or both*." (emphasis added). Although a statutory fine of $20,000 is the maximum fine imposed for this felony, it is not the maximum punishment. I believe that the maximum punishment, including a fine and incarceration, is the "precise type of punishment authorized by the Legislature" for this offense, not the fine alone. *People v Saenz*, 173 Mich App 405, 409-410; 433 NW2d 861 (1988). If the fine imposed in this case were the maximum punishment available under the statute, then I might be inclined to concur with majority opinion.

In *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995), this Court articulated that "probation is a matter of grace, not of right, and the trial court enjoys broad discretion in determining the conditions to be imposed as part of probation." In *Oswald*, a man pleaded guilty to retail fraud and received five years probation with the first seven months to be served in jail. The trial court also imposed a fine of $1,500, although the maximum statutory fine allowed for retail fraud was $1,000. The Court reasoned that an absence of statutory language in the probation statute limiting the fine that a court may impose along with probation showed a legislative intent to have probation fines be imposed notwithstanding statutory fines for the underlying offense(s). Although the defendant in *Oswald* received a fine greater than the statutory maximum for his offense *and* incarceration, his sentence was upheld.

Similarly, in *People v Williams*, 57 Mich App 439, 441-442; 225 NW2d 798 (1975) (citations omitted), it was held that "when a defendant is given probation, he is not deprived of any of his rights without due process, but rather he is given the privilege of avoiding the usual

penalty of his crime by the payment of a sum of money and observance of other conditions." In the instant case, defendant was given probation and ordered to pay a fine in accordance with MCL 771.1 and MCL 771.3(2)(b). Upon successfully paying this fine, defendant will be convicted of a misdemeanor rather than a felony. Also, defendant will be able to avoid any incarceration, although MCL 333.7401(2)(d)(iii) allows for defendant to be sentenced for up to four years imprisonment. Thus, defendant is being required to pay a fine in order to avoid the "usual penalty" of imprisonment for up to four years.

Without statutory language limiting the trial court's power to impose a fine along with probation, I cannot find the fine imposed in the instant case as double punishment. Furthermore, the trial court afforded defendant the opportunity to pay a fine in order to avoid incarceration, which is one of the benefits of utilizing probation in sentencing.

Finally, and importantly, there was evidence of defendant's assets and income at sentencing: the PSIR indicated that defendant had a steady income of $2,000 per month. Given defendant's income at the time of sentencing, merely asserting that the fine was "far beyond [defendant's] ability to pay" is an inadequate argument.[1] And the Michigan Supreme Court has previously held that it is not sufficient for an appellant to "simply announce a position or assert and error" and leave the rest of the work for the Court. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Therefore, I would affirm.

/s/ Amy Ronayne Krause

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[1] I acknowledge the majority's assertion that this seems to allow a reasonably affluent person to pay money to get charges lowered from felonies to misdemeanors. However, as the law reads, the result is in accordance with our jurisprudence, and the Court does not decide abstract questions of law. There has been no challenge raised in this case as to whether the statute creates a buy-out option for rich felons, so we will not issue an advisory opinion at this time. Furthermore, it is important to note that MCR 6.502 allows a defendant to motion the court to set aside a judgment based on inability to pay an imposed fine.