

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALLEN PIESKE,

Defendant-Appellant.

UNPUBLISHED

January 31, 2008

No. 273291

Washtenaw Circuit Court

LC Nos. 04-001612-FC

04-001663-FC

04-001664-FC

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Defendant, acting *in propria persona*, challenges those portions of the judgments of sentence requiring him to pay court costs of \$1,280 and appointed counsel costs of \$600 in each case. We vacate those portions of the judgments requiring defendant to pay court costs and to reimburse the county for appointed counsel costs, and remand this matter to the trial court for consideration of defendant's ability to make payment to reimburse the county for appointed counsel costs.

Defendant pleaded guilty to three counts of bank robbery, MCL 750.531, contained in three separate files. On November 10, 2004, the trial court sentenced defendant to serve concurrent terms of 7 to 30 years in prison, and to pay court costs of \$1,280 and \$600 in appointed counsel costs in each case. Subsequently, the trial court granted defendant's motion to correct a clerical error, but denied the motion for resentencing.

This Court denied defendant's delayed application for leave to appeal; however, our Supreme Court, in lieu of granting leave to appeal, remanded this matter to this Court for consideration as on leave granted of the issue whether the trial court "properly imposed court costs and attorney fees on the defendant." The application was denied in all other respects.

A person who was afforded appointed counsel might be ordered to reimburse the county for the costs of that representation, if such reimbursement can be made without substantial hardship. A court need not make specific findings on the record regarding the defendant's ability to pay, but must provide some indication that it considered the defendant's financial situation prior to ordering reimbursement. The amount ordered to be reimbursed must be related to the defendant's foreseeable ability to pay. A court must afford the defendant notice and an

opportunity to be heard prior to ordering repayment for appointed counsel expenses. *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004); see also MCR 6.005(B).

In 316 PA 2005, the Legislature enacted MCL 769.1k, which became effective on January 1, 2006, and which 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.

(iv) Any assessment authorized by law.

(v) Reimbursement under section 1f of this chapter.

Prior to the enactment of MCL 769.1k, a trial court could require a convicted defendant to pay court costs only if such a requirement was expressly authorized by statute. *People v Antolovich*, 207 Mich App 714, 716; 525 NW2d 513 (1994); *People v Jones*, 182 Mich App 125, 126; 451 NW2d 525 (1989).

We vacate that portion of each judgment that requires defendant to pay costs in the amount of \$1,280. Defendant failed to object to the orders requiring him to pay court costs; therefore, our review is for plain error. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The armed robbery statute does not authorize a trial court to order a defendant to pay court costs. MCL 750.531. MCL 769.1k(1)(b)(ii) now authorizes the imposition of court costs in a case such as this one; however, that statute was enacted after sentencing occurred in this case. To require defendant to pay court costs would change the punishment and inflict a greater punishment than the law attached to the crime of bank robbery when the offenses were committed. We conclude that requiring defendant to pay court costs would violate the federal and state constitutional prohibitions against the imposition of ex post facto laws. US Const, art 1, § 10; Const 1963, art 1, § 10. See also *People v Dolph-Hostetter*, 256 Mich App 587, 596-597; 664 NW2d 254 (2003).

We vacate that portion of each judgment that requires defendant to reimburse the county \$600 for appointed counsel costs, and remand this matter with instructions that the trial court

consider defendant's ability to pay and, if appropriate, enter a separate order directing defendant to reimburse the county.¹ Defendant failed to object to the orders requiring him to pay appointed counsel costs; therefore, our review is for plain error. *Carines, supra*. A review of the sentencing transcript shows that the trial court gave no indication that it considered defendant's ability to pay prior to ordering reimbursement. A remand for further proceedings is necessary. *Dunbar, supra* at 251-255.

We vacate that portion of each judgment of sentence requiring defendant to pay court costs in the amount of \$1,280. We also vacate that portion of each judgment of sentence requiring defendant to pay the county \$600 in appointed counsel costs, and remand this matter to the trial court for reconsideration of defendant's ability to reimburse the county for the cost of his appointed counsel. We affirm the judgments in all other respects. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

¹ In *People v Arnone*, Monroe Circuit Court Docket No. 05-034540-FH, the trial court ordered the defendant to reimburse the county for appointed counsel costs. The defendant sought delayed leave to appeal (Docket No. 271028), and in an order entered on August 7, 2006, this Court denied the delayed application. The defendant sought leave to appeal to our Supreme Court. In an order entered on March 30, 2007, our Supreme Court ordered the Monroe County Prosecuting Attorney to answer the question and to address, inter alia, whether *Dunbar, supra*, and *People v Nowicki*, 213 Mich App 383, 386-388; 539 NW2d 590 (1995) (in which this Court held that a defendant's obligation to reimburse the county for appointed counsel expenses is independent of the sentence imposed in a criminal case) were correctly decided. In an order entered on June 20, 2007, our Supreme Court, in lieu of granting leave to appeal, vacated that portion of the judgment of sentence that ordered the defendant to reimburse the county for attorney fees, and remanded the case to the trial court for a decision on the issue that considered the defendant's ability to pay. Our Supreme Court noted that if the trial court concluded that the defendant had the ability to make payment, reimbursement was to be mandated in a separate order, and not in the judgment of sentence. *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007). Our Supreme Court issued its order in *Arnone, supra*, after MCL 769.1k was enacted; however, the defendant in *Arnone, supra*, was sentenced prior to the enactment of the statute. Therefore, notwithstanding the fact that the enactment of MCL 769.1k now enables a trial court to include an order for reimbursement in the judgment of sentence, *Arnone, supra*, indicates that in a case in which sentencing occurred prior to the enactment of MCL 769.1k, any order of reimbursement should be entered separately from the judgment of sentence.