STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2009
v	No. 281669 Wayne Circuit Court
ROBERT JAY HOWELL, Defendant-Appellant.	LC No. 07-009066-FH

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant claims an appeal from his conviction of attempted larceny from a person, MCL 750.357, MCL 750.92, entered after a bench trial. He was sentenced to two years' probation. We affirm defendant's conviction and sentence, but vacate that portion of the judgment that required defendant to reimburse the county for the cost of his representation, and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with assault with intent to rob while unarmed, MCL 750.88, in connection with an unsuccessful attempt to rob a store. His bond was set at $7,500. Counsel was appointed to represent defendant. At the arraignment on the information, counsel for defendant requested that defendant's bond be reduced to personal recognizance. The trial court[1] denied the request but ordered that a report be prepared.

At a docket conference, the trial court evaluated the case pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), and indicated that it would sentence defendant within the guidelines, which recommended a minimum term range of 19 to 38 months. Defendant attempted to plead guilty to the charged offense, but could not provide a sufficient factual basis for intent. The case was set for trial.[2]

[1] Wayne Circuit Judge David Groner presided over the arraignment.

[2] The case was placed on the docket of Wayne Circuit Judge Leonard Townsend.

At a calendar conference, defendant moved for a reduction of bond. The trial court denied the motion, but did not preclude defendant from raising the issue at a later time. Defendant then requested substitute counsel, prompting the following exchange:

> THE COURT: When you retain somebody, you pick whoever you want. When a person is indigent, the Court appoints the attorney. And we only appoint qualified people. You can't pick who you want.
>
> And either you have to get along with the lawyer that you have, or you'll have to go out and provide your own counsel, or represent yourself, which I do not recommend.
>
> But I have heard no complaints in this matter about the attorney not doing her job. There's no reason, you can't pick—you can only pick when you go out and pay the lawyer yourself.
>
> So, there being no reason whatsoever to relieve this attorney from this assignment, the Court will decline to do that, also.
>
> However, again, you are free to either represent yourself, or hire your own lawyer.
>
> When attorneys are appointed by the Court, they're appointed by the Court because they're experienced and competent counsel. We know better who's capable than the accused.
>
> Okay, thank you.
>
> DEFENDANT: So do I have a bond?
>
> THE COURT: Yeah; $7,500.00 or 10 percent, which is $750.00. It's the same bond. But you have a bond.
>
> * * * *
>
> MS. EVANS (defendant's counsel): And because we have not had an opportunity to discuss any options today because [defendant] indicated he no longer wanted me to—
>
> THE COURT: Well, you can go back and talk. The Court will not intervene at this time—
>
> DEFENDANT: And also, your Honor, I've stressed the fact to her that I did need to get out cause I have some matters to take care of. My house is up for sale.
>
> THE COURT: Oh, yeah, well that was—
>
> DEFENDANT: My job's on the line.

THE COURT: Well, yeah, that's—

DEFENDANT: And she forgot, again, sir, to—

THE COURT: Well, that's not your lawyer's fault, because your house is in foreclosure.

DEFENDANT: —to ask for a reduction, or I mean, to reinstate my bond.

THE COURT: Well she can't—listen, I'm the only person that can do that. Don't blame her because I refused.

DEFENDANT: She didn't even ask.

THE COURT: Well, she did. Here's the report right here. In order to—she must have asked, to get the report here.

Besides, just because an attorney is asked to do something doesn't mean that they can do it. It's up to the Judge whether he'll go along with it or not. And I don't go along with it. It's not her fault.

DEFENDANT: But she—

THE COURT: It wouldn't make any difference who your lawyer was it wouldn't make any difference.

DEFENDANT: She didn't state it in front of Judge Groner, I was right there.

THE COURT: Didn't state what? The only thing that matters is this report. That's the only thing that matters.

* * * *

DEFENDANT: She doesn't even believe what I'm trying to tell her.

THE COURT: What is it that you're trying to tell her?

DEFENDANT: About my whole case, about what happened.

THE COURT: Well, what difference does it make whether she believes it or not, she's not going to judge the case. Either the judge or the jury will, the attorney doesn't have to say, "Oh, I believe you." So what?

Defendant asserted that counsel was attempting to force him to plead guilty, and that she would not accept his assertion that he did not attempt to rob the store. Defendant opted for a trial.

The trial court conducted a bench trial, and convicted defendant of the lesser offense of attempted larceny from a person. The trial court found that the evidence did not show that an

assault occurred. The trial court sentenced defendant to serve a term of two years' probation. The trial court did not *mention* the topic of reimbursement of attorney fees at sentencing, but the judgment of sentence provided that defendant was to repay $400 in appointed counsel fees.

An indigent person entitled to appointed counsel is not entitled to choose his own lawyer. *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). Appointment of substitute counsel is warranted only upon a showing of good cause, and if substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). A trial court's decision regarding substitute counsel is reviewed for an abuse of discretion. *Id*.

Defendant argues that he is entitled to a new trial because the trial court abused its discretion by denying his request for substitute counsel. We disagree.

Defendant was dissatisfied because counsel failed to get his bond reduced, and because counsel did not seem to accept his version of the incident, and relayed plea offers to him. Defense counsel moved for a bond reduction, but the trial court denied the motion. Defendant opines that had counsel explained that he (defendant) had urgent personal matters to attend to before trial, the trial court would have reduced his bond. However, the trial court's remarks at the calendar conference indicate that such an explanation would not have changed the trial court's decision regarding bond. Moreover, defense counsel was required to relay plea offers to defendant. A counsel's failure to relay plea offers can constitute ineffective assistance under certain circumstances. See *People v Todd*, 186 Mich App 625, 634; 465 NW2d 380 (1990). Throughout the proceedings, defendant maintained that he was innocent of the charged offense, and that he wished to have a trial. Defendant proceeded to a bench trial and was convicted of a lesser offense. Nothing in the record indicates that a different result would have been obtained had the trial court granted defendant's request for substituted counsel.

Defendant has not demonstrated that good cause existed for substitution of counsel, as he has not shown that he and appointed counsel had a legitimate difference of opinion with regard to a fundamental trial tactic. *Bauder*, *supra* at 193. The trial court did not abuse its discretion by denying defendant's request for substitution of counsel. *Id*.

In *People v Trapp (On Remand)*, 280 Mich App 598, 600-601; ___ NW2d ___ (2008), this Court stated:

> 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 before ordering the reimbursement. The amount to be reimbursed must be related to the defendant's present and future 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); MCR 6.005(B).

MCL 769.1k, which became effective on January 1, 2006, provides in pertinent part:

> 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 [MCL 769.1j].
>
> (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 [MCL 769.1f].
>
> This statute does not eliminate the requirement, set forth in *Dunbar* that the trial court consider a defendant's ability to pay before ordering reimbursement of appointed counsel costs. See *People v Arnone*, 478 Mich 908 (2007).

Defendant failed to object to the order requiring him to pay appointed counsel costs; thus, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We conclude that the trial court erred by failing to consider defendant's present and future ability to pay before ordering defendant to reimburse the county for appointed counsel costs. The trial court did not mention the topic of reimbursement during the sentencing hearing, and nothing on the record indicates that the trial court gave any consideration to defendant's ability to pay before ordering reimbursement.

A remand for further proceedings is necessary. *Dunbar*, *supra* at 251-255. An evidentiary hearing is not required on remand. The trial court may obtain and rely on an updated report from the probation department. *Id*. at 255 n 14. If the trial court concludes that it should eliminate or modify the reimbursement requirement, it should enter an amended judgment of sentence to that effect. MCL 769.1k authorized entry of an order requiring repayment of attorney fees; thus, such an order may be made part of the judgment of sentence, if appropriate. See *Trapp*, *supra* at 600-601.

We reject plaintiff's assertion that the law in this area is not clear, and that defendant has not suffered any sanction due to an alleged inability to reimburse the county for attorney fees. This Court is required to follow the decision in *Trapp*. MCR 7.215(J)(1).

We affirm defendant's conviction and sentence. We vacate that portion of the judgment of sentence requiring defendant to reimburse the county $400 for the cost of his appointed counsel, and remand this matter to the trial court with instructions to consider defendant's present and future ability to make such reimbursement. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood