

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JODY NUNN,

Defendant-Appellant.

UNPUBLISHED

May 7, 2009

No. 284529

Washtenaw Circuit Court

LC No. 07-000655-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right from those portions of the judgment of sentence requiring him to pay various costs and to reimburse the county for the cost of appointed counsel. We vacate that portion of the judgment requiring defendant to reimburse the county for the cost of appointed counsel, affirm the judgment in all other respects, and remand this matter to the trial court for further proceedings.

Defendant was convicted by a jury of two counts of criminal sexual conduct in the second degree, MCL 750.750c(1)(i) (actor is employee of Department of Corrections [DOC] and victim is under the jurisdiction of the DOC). The victim, a prisoner, alleged that defendant, a corrections officer, engaged in sexual intercourse with her in a corrections facility.

The trial court sentenced defendant to concurrent terms of 43 months to 15 years in prison. In addition, the trial court ordered defendant to pay various costs, including \$120 in state minimum costs, \$60 in a crime victim's assessment fee, \$750 in restitution, and \$1,280 in court costs, and to reimburse the county \$500 in appointed counsel costs. Defense counsel did not object to the imposition of costs or the reimbursement order.

On appeal, defendant argues that trial counsel rendered ineffective assistance by failing to object to the imposition of various costs on the ground that defendant was indigent and unable to pay the costs. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20;

People v Carbin, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel’s deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel’s error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

“A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute.” *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). MCL 769.1k(1), 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.j(1)(a)].

(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].

The various costs imposed by the trial court are authorized by statute. See MCL 769.1j(a) (state minimum costs); MCL 780.905(1) (crime victim’s assessment fee);¹ MCL 780.766 (restitution);² and MCL 769.34(6) (court costs).³

¹ MCL 780.905(1) provides that a court “shall” order a defendant to pay the appropriate amount as specified.

² MCL 780.766(2) provides that a court “shall” order that restitution be paid as appropriate. MCL 780.767(1) provides that the probation department may conduct an investigation to determine the amount of restitution that is due, but does not provide that the defendant’s ability to pay such restitution be taken into account. However, MCL 780.766(14) provides that a person cannot be incarcerated for violating probation or parole on the ground that the person failed to pay restitution, unless it is shown that the person was able to pay but willfully failed to do so.

Defendant cites no authority for the proposition that the trial court was required to take into account defendant's ability to pay these costs. The statutes authorizing the costs make no reference to a defendant's ability to pay. Defendant has not shown that trial counsel's failure to object to the imposition of costs resulted in prejudice in that defendant has not demonstrated that but for counsel's alleged error, it is reasonably probable that the outcome of the proceedings would have been different, *Carbin, supra* at 600, and that the result that did occur was fundamentally unfair or unreliable. *Odom, supra* at 715.

Next, defendant argues that the trial court erred in ordering him to reimburse the county for the cost of appointed counsel without considering his ability to do so. We agree.

In *People v Trapp (On Remand)*, 280 Mich App 598, 600; 760 NW2d 791 (2008), this Court addressed this issue, and stated:

A person who was afforded appointed counsel might be ordered to reimburse the county for the costs of that representation, if such reimbursement could 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 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 before ordering payment of appointed counsel expenses. *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004); MCR 6.005(B).

The *Trapp* Court stated that MCL 769.1k "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. *People v Arnone*, 478 Mich 908 (2007)." *Trapp, supra* at 601.

Defendant failed to object to the trial court's order requiring him to reimburse the county for the cost of appointed counsel; thus, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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.⁴ 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 prior to 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

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³ MCL 769.34(6) provides that a court "may" order a defendant to pay costs.

⁴ The prosecution confesses error in this regard.

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 601-602.

We vacate that portion of the judgment of sentence requiring defendant to pay the county \$500 for the cost of his appointed counsel, affirm the judgment in all other respects, and remand this matter to the trial court with instructions that the trial court consider defendant's present and future ability to reimburse the county for the cost of his appointed counsel. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens