STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENISA KAY BAILEY, also known as DENISHA KAY SUGGS,

Defendant-Appellant.

UNPUBLISHED
December 15, 2015

No. 323190
Genessee Circuit Court
LC No. 13-033876-FH

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Defendant pleaded guilty to felonious assault, MCL 750.82, and carrying a concealed weapon, MCL 750.227, for her role in the mob attack of a man outside his home. On appeal, defendant challenges the constitutionality of the court's assessment against her of $500 in court costs pursuant to MCL 769.1k(1)(b)(*iii*). Defendant's constitutional challenges lack merit and we affirm the trial court's assessment of costs. However, we remand as required by *People v Konopka (On Remand)*, 309 Mich App 345, 359-360; 869 NW2d 651 (2015), so the court may establish a factual basis for the costs assessed.

Defendant failed to preserve her challenge to the assessment of court costs by objecting in the trial court. See *People v Jackson*, 483 Mich 271, 292 n 18; 769 NW2d 630 (2009). Our review is therefore limited to plain error. *Id.* at 356. Interpretation of the applicable statute is a legal question that we review de novo, however. *Id.*

The assessment of court costs against a convicted criminal defendant is governed by MCL 769.1k. At the time of defendant's sentencing, the statute provided, in relevant 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 [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].

In *People v Cunningham*, 496 Mich 145, 158; 852 NW2d 118 (2014), our Supreme Court held that a court's authority to impose "any cost" as provided in MCL 769.1k(1)(b)(*ii*) was limited to "those costs that the Legislature has separately authorized by statute." In reaction, the Legislature amended MCL 769.1k. *Konopka (On Remand)*, 309 Mich App at 357. See 2014 PA 352, effective October 17, 2014. The relevant provisions of the statute now provide:

> (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 [MCL 769.1j].
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.
>
> (*ii*) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.
>
> (*iii*) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law, *any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case*, including, but not limited to, the following:
>
> (A) Salaries and benefits for relevant court personnel.
>
> (B) Goods and services necessary for the operation of the court.
>
> (C) Necessary expenses for the operation and maintenance of court buildings and facilities.
>
> (*iv*) The expenses of providing legal assistance to the defendant.

(*v*) Any assessment authorized by law.

(*vi*) Reimbursement under [MCL 769.1f]. [Emphasis added.]

Defendant contends that the statutory amendment does not apply to her case. She asserts that the trial court lacked statutory authority to impose $500 in court costs and that application of the amended statute would violate the constitutional prohibition against ex post facto laws. However, as amended, MCL 769.1k(1)(b)(*iii*) permits a trial court to impose court costs against a convicted defendant even if those costs are not independently authorized by the offense statute. *Konopka (On Remand)*, 309 Mich App at 357. In *Konopka*, this Court addressed and rejected several constitutional challenges to the amendment of MCL 769.1k. Of import to defendant's appeal, this Court thoroughly examined and rejected the argument that the application of the amended statute to defendants who were convicted or sentenced before the amendment's effective date amounted to an unconstitutional ex post facto punishment. *Id.* at 370-376.

Defendant further challenges the constitutionality of MCL 769.1k(1)(b)(*iii*) by asserting that it deceptively imposes a tax in violation of Const 1963, art 4, § 32, which provides: "Every law which imposes, continues or revives a tax shall distinctly state the tax." The constitutional provision is referred to as the "distinct-statement clause."

> The purpose of this provision "is to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature." *Dawson v Secretary of State*, 274 Mich App 723, 747; 739 NW2d 339 (2007) (citations and quotation marks omitted). The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax, *Dukesherer Farms, Inc v Ball*, 73 Mich App 212, 221; 251 NW2d 278 (1977), aff'd 405 Mich 1; 273 NW2d 877; 432 NW2d 721 (1979), such as when a tax is disguised as a regulatory fee, *Dawson*, 274 Mich App at 740. [*Gillette Commercial Operations North America & Subsidiaries*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 325258 et al, issued September 29, 2015), slip op at 39.]

The first step in examining the constitutional muster of MCL 769.1k(1)(b)(*iii*) is to determine whether it assesses a "governmental 'fee' " or a tax. *Dawson*, 274 Mich App at 740.

> "[Ta]xes and assessments do have a number of elements in common. Both are exactions or involuntary contributions of money the collection of which is sanctioned by law and enforceable by the courts. Here, however, the similarity ends". Exactions which are imposed primarily for public rather than private purposes are taxes. Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed. [*Dukesherer Farms*, 405 Mich at 15-16 (citations omitted).]

In distinguishing between a fee and a tax, there are three questions a court must consider:

> (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to

> refuse or limit its use of the service to which the charge is related. [*Westlake Transp, Inc v Pub Serv Comm*, 255 Mich App 589, 612; 662 NW2d 784 (2003), citing *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998).]

In relation to the first factor, this Court has noted that taxes are generally revenue-raising tools, " 'while fees are usually in exchange for a service rendered or a benefit conferred.' " *Dawson*, 274 Mich App at 723, quoting *Westlake Transp*, 255 Mich App at 612. In analyzing whether MCL 769.1k(1)(b)(*iii*) violated the constitutional protections of due process and equal protection under the law, this Court characterized the assessment of costs as a revenue-generating measure. See *Konopka (On Remand)*, 309 Mich App at 369. This Court reasoned that it was "rational[]" to treat criminal defendants differently than civil litigants and held:

> Because "the state, including its local subdivisions, is responsible for costs associated with arresting, processing, and adjudicating individuals" who commit criminal offenses, the classification scheme imposing costs on criminal defendants but not civil litigants is "rationally related to the legitimate governmental purpose of generating revenue from individuals who impose costs on the government and society." [*Id.*, quoting *Dawson*, 274 Mich App at 738.]

It is logical to treat the assessment of costs under MCL 769.1k(1)(b)(*iii*) as revenue-generating rather than as a service payment. The service of adjudicating criminal defendants is performed for the benefit of society as a whole, not for the criminal defendant who certainly would prefer to forego detection and criminal proceedings.

To deem an assessment proportional under the second factor, it need not be " 'equal . . . to the amount required to support the services it regulates.' " *Dawson*, 274 Mich App at 740, quoting *Westlake Transp*, 255 Mich App at 615. An assessment is not a tax merely because it "is larger than the costs it would defray." *Dawson*, 274 Mich App at 742. Rather, " 'what is a reasonable fee must depend largely upon the sound discretion of the legislature,' " considering the totality of the circumstances known to that body. *Id.*, quoting *City of Dearborn v State Tax Comm*, 368 Mich 460, 472; 118 NW2d 296 (1962). Courts must " 'presume[] that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence.' " *Id.*

MCL 769.1k(1)(b)(*iii*) permits the assessment of "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case." Again, the assessment need not equal the actual cost, so the statutory language does not automatically render the assessment disproportionate.

In *Westlake Transp*, 255 Mich App at 593, 611, this Court considered whether $100 application fees and $100 annual renewal fees for intrastate truckers amounted to a governmental fee or a tax. In support of their claim that the statutorily-imposed costs were a tax, the plaintiffs presented a senate fiscal report that detailed the amounts collected and the manner in which they were expended. *Id.* at 614. "[T]he charts showed that there was a surplus nearly every year," *id.* at 615, which the plaintiffs urged supported their case. However, this Court noted, "the aggregate excess during the thirteen years was only 11.7 percent, a relatively small percentage."

Id. Accordingly, this Court found no error in the Court of Claims' conclusion "that the fees were not 'wholly disproportionate.' " *Id.*

Here, the state court administrative office (SCAO) is tasked with compiling data, which information could be used to determine the proportionality of the costs assessed under the statute. However, trial courts only began collecting and submitting data in January 2015, and the SCAO has until July 1, 2016 to compile its first report. See MCL 769.1k(7), (9). Accordingly, the evidence defendant could present to establish the unreasonableness of costs assessed under the statute simply does not yet exist.

The third factor relates to the voluntary nature of the assessment; whether the affected individual can "pass" on the service and the fee. Clearly, a criminal defendant has no power to "pass" on his or her prosecution and avoid the underlying costs. Even if a defendant chooses to plead and forego a trial, costs are incurred and assessed.

Given that MCL 769.1k(1)(b)(*iii*) is a revenue-generating measure and the assessment is forcibly imposed against unwilling individuals, we assume for this appeal that it imposes a tax, rather than a governmental fee. Such a tax only violates Const 1963, art 4, § 32 if it is not "distinctly state[d]." *Dawson*, 274 Mich App at 747. A tax is not rendered indistinct merely because the Legislature failed to use that label in the relevant statute. *Id.* The statute need only be stated "clearly enough" to avoid being "obscure or deceitful" regarding the tax. *Dukesherer Farms*, 73 Mich App at 221.

MCL 769.1k(1)(b)(*iii*) does not expressly state that the court costs are taxes, but it is neither obscure nor deceitful. The statute does not state a specific amount to be assessed, but requires the trial court to tax only those costs "reasonably related to the actual costs incurred." In addition, the statute limits the purposes for which the assessed funds may be used. Specifically, the assessed costs may be used to pay salaries and benefits for court personnel, goods and services for the court's operation, and other necessary expenses for the operation and maintenance of court facilities. MCL 7691k(1)(b)(*iii*)(A)-(C). This language prevents the court costs from going towards "objects not approved by the Legislature." *Dawson*, 274 Mich App at 747 (citation and quotation marks omitted). Therefore, MCL 769.1k does not violate the Michigan Constitution's distinct-statement clause.

Finally, defendant cursorily contends that MCL 769.1k violates the separation of powers provision of Const 1963, art 3, § 2: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." The power to levy taxes lies solely with the Legislature and may not be transferred to another branch or agency. Const 1963, art 9, § § 1-2. The statute, defendant asserts, transfers the power to impose a tax to collect court costs out of the hands of the legislative branch and into the hands of the judiciary.

We discern no constitutional violation here. We find this situation akin to the legislative delegation of sentencing discretion to trial courts. It is well established that "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature," *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), and the role of the

judiciary is to impose and administer the sentencing statutes as enacted, *id.* at 436-437. "[A]s enacted, many sentencing statutes delegate discretion to the trial courts in determining a defendant's appropriate sentence. However, the Supreme Court has proclaimed that "[t]he separation of powers clause . . . is not offended by the Legislature delegating sentencing discretion in part and retaining sentencing discretion in part." *People v Hall*, 396 Mich 650, 658; 242 NW2d 377 (1976).

We acknowledge that the imposition of costs under MCL 769.1k is "not a form of punishment," *Konopka (On Remand)*, 309 Mich App at 370, and therefore resolution of this question is not directly guided by those cases related to the delegation of sentencing discretion. Yet, this delegation, like the delegation of sentencing discretion, was not taken without providing guidance and parameters. See *Dukesherer Farms*, 73 Mich App at 221 ("[T]he bestowing of such discretion does not become an unconstitutional delegation of a legislative function where its exercise is controlled and guided by adequate standards in the statute authorizing it."). Under the statute, the trial court is limited to imposing costs that are reasonably related to those incurred by the court in a case of that nature. MCL 769.1k(1)(b)(*iii*). The statute outlines those factors the trial court may consider in its calculation, including the salaries of court personnel, goods and services necessary for the operation of the court, and necessary expenses for the operation and maintenance of court buildings and facilities. MCL 769.1k(1)(b)(*iii*)(A)-(C). The trial court must establish a factual basis for its assessment to ensure that the order complies with MCL 769.1k(1)(b)(*iii*). *Konopka (On Remand)*, 309 Mich App at 359-360. Accordingly, we discern no unconstitutional delegation of legislative authority.

The trial court properly assessed and imposed costs under MCL 769.1k(1)(b)(*iii*) and we affirm that decision. However, we are bound to remand to the trial court because it failed to "establish a factual basis, under the subsequently amended statute, for the $500 in costs imposed." *Konopka (On Remand)*, 309 Mich App at 359. On remand, the court must explain how "the costs imposed were reasonably related to the actual costs incurred by the trial court." *Id.* at 359-360. If the court is unable to do so, it must "alter that figure." *Id.* at 360.

We affirm, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher