STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD CARL FISCHER,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

Nos. 350442; 353569
Ionia Circuit Court
LC No. 2018-017635-FH

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendant appeals as of right his sentences and financial assessments following a jury trial of three counts of delivery of methamphetamine, MCL 333.7401(2)(b)(*i*). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve concurrent terms of 10 to 40 years' imprisonment for each conviction. We affirm in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

This case stems from a series of drug transactions in which defendant, Chad Carl Fischer, sold methamphetamine to an informant, who had previously been defendant's coworker. Police officers conducted controlled buys involving defendant on February 20, April 10, May 22, and June 19, 2018. For each of the four controlled buys, the informant wore an audio recording device.

I. SENTENCING

Defendant's first claim of error is that the trial court erred by imposing a sentence that was disproportionate to the defendant and the offense. Defendant acknowledges that MCL 769.34(10)

[1] See *People v Fischer*, unpublished order of the Court of Appeals, entered May 19, 2020 (Docket Nos. 350442 and 353569).

requires this Court to affirm the sentence imposed by the trial court, but he argues that MCL 769.34(10) is invalid. We disagree.

MCL 769.34(10) provides, in relevant part, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." A sentence that is within the applicable sentencing guidelines range can still be reviewed to determine if the sentence is so grossly disproportionate that it constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. *People v Posey*, 334 Mich App 338, 358; 964 NW2d 862 (2020), lv pending.[2] A within-guidelines sentence is presumptively proportionate and a sentence that is proportionate is not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). The sentencing guidelines set by the Legislature reflect the Legislature's view of "the seriousness and harmfulness of a given crime and given offender" and, therefore, "embody the principle of proportionality." *People v Dixon-Bey*, 321 Mich App 490, 524; 909 NW2d 458 (2017) (cleaned up). When a within-guidelines sentence is challenged on constitutional grounds, the presumption that the sentence is proportionate can only be overcome by "presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate." *Posey*, 334 Mich App at 358.

Defendant argues that the first sentence of MCL 769.34(10) should be declared invalid following the Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). Defendant maintains that there must be a mechanism for rebutting the presumption that sentences that fall within the sentencing guidelines are reasonable, in light of the fact that *Lockridge* made the sentencing guidelines advisory and not mandatory. See *id*. at 390-392.

After the Supreme Court's decision in *Lockridge*, this Court published multiple cases that discussed the impact that *Lockridge* had on MCL 769.34(10). In 2016, this Court in *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016), held that *Lockridge* did not alter or diminish the requirement of MCL 769.34(10) that within-guidelines sentences be affirmed on appeal. In *People v Steanhouse*, 500 Mich 453, 471 n 14; 902 NW2d 327 (2017), our Supreme Court specifically noted that it was not addressing the question whether MCL 769.34(10) "survives *Lockridge*."

More recently, the validity of MCL 769.34(10) was examined in *Posey*, which included a very similar fact pattern to the instant case. *Posey*, 334 Mich App at 356-359. In *Posey*, the defendant was initially sentenced under a guidelines range of 225 to 562 months. *Id*. at 355. The trial court imposed a minimum sentence of 264 months. *Id*. Following a successful motion, the defendant was resentenced under a guidelines range of 171 to 427 months. *Id*. The trial court again imposed a minimum sentence of 264 months. *Id*. On appeal, the defendant argued that the

[2] We note that the applications for leave to appeal to our Supreme Court are pending in *People v Posey*, 334 Mich App 338; 964 NW2d 862 (2020), lv pending ___ Mich ___; 964 NW2d 362 (2021) (Docket No. 162373), and *People v Johnson*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 351308), lv pending ___ Mich ___; 965 NW2d 218 (2021) (Docket No. 163073). Nonetheless, we are bound by both decisions under the rule of stare decisis. MCR 7.215(C)(2).

minimum sentence was not proportionate because the court failed to consider his rehabilitative potential and because the sentence was not reduced following a reduction in the applicable guidelines range. *Id*. The defendant in *Posey* asserted that MCL 769.34(10) was no longer good law in light of the decision in *Lockridge*. *Id*. at 356.

This Court in *Posey* cited the Supreme Court's decision in *Schrauben*. *Id*. The *Posey* Court also noted that our Supreme Court denied leave to appeal in *People v Ames*, 501 Mich 1026 (2018), following oral argument on the issue whether MCL 769.34(10) was rendered invalid by *Lockridge*. *Posey*, 334 Mich App at 356-357. This Court in *Posey* acknowledged that denial of leave to appeal to the Supreme Court has no precedential value, but it interpreted the Supreme Court's denial of leave in that situation as a signal that the Supreme Court accepted *Schrauben*'s holding that MCL 769.34(10) was not altered or diminished by *Lockridge*. *Id*. at 357.

Defendant argues that because the sentencing guidelines are advisory and not mandatory, that there must be a mechanism for rebutting the presumption that a within-guidelines sentence is reasonable. As the Court in *Posey* noted, there is a mechanism for challenging a sentence within the guidelines range, which is to argue that the sentence constitutes cruel and unusual punishment. *Id*. at 358.

Because *Schrauben* declared that MCL 769.34(10) was still valid following the Supreme Court's decision in *Lockridge*, and the holding in *Schrauben* was subsequently confirmed by *Posey*, this Court is bound by those cases, which upheld the validity of MCL 769.34(10). Therefore, this Court must affirm defendant's sentence.

II. RESTITUTION

Defendant's second claim of error is that the trial court erred when it ordered defendant to pay $590 in restitution. We agree.

Unpreserved claims are reviewed for plain error. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). To avoid forfeiture under the plain error rule, three requirements must be met: "(1) error must have occurred, (2) the error was plain, i.e. clear or obvious, (3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error is plain if it is clear or obvious. *Id*. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

The trial court may order restitution stemming from defendant's course of conduct that gives rise to the conviction. *People v Garrison*, 495 Mich 362, 367; 852 NW2d 45 (2014). Conversely, the trial court may not rely on any of defendant's conduct that does not give rise to a conviction as a basis for restitution. *People v McKinley*, 496 Mich 410, 419-420; 852 NW2d 770 (2014). Trial courts can order a defendant to pay restitution to a law enforcement agency for money expended by that agency in controlled purchases from a defendant. *People v Crigler*, 244 Mich App 420, 427; 625 NW2d 424 (2001).

Both parties agree that it was error for the trial court to order defendant to pay $590 of restitution, and that only $300 was expended by law enforcement in the controlled buys that led to defendant's convictions. The error was plain because it is clear that the amount of restitution

ordered was incorrect. Furthermore, defendant was prejudiced by the error because it resulted in the trial court ordering him to pay more restitution than is allowed by law.

Therefore, we vacate the $590 of restitution and remand to the trial court for the ministerial task of correcting the order to provide restitution in the amount of $300.

III. MCL 769.1K(1)(B)(*III*)

Lastly, defendant challenges the constitutionality of MCL 769.1k(1)(b)(*iii*). We are constrained to disagree.

MCL 769.1k(1)(b)(*iii*) provides that "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 . . . the court may impose . . . 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."

Constitutional challenges are typically reviewed de novo. *People v Patton*, 325 Mich App 425, 431; 925 NW2d 901 (2018). However, an unpreserved challenge to the constitutionality of a statute is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764; *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014).

A party challenging the constitutionality of a statute has the burden of proving that the law is invalid. *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016). Statutes are presumed to be constitutional, and the Court has a duty to construe a statute as constitutional unless it is clearly apparent that it is unconstitutional. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). The challenging party bears a heavy burden to overcome the presumption that a statute is constitutional. *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 569.

Challenges to the constitutionality of a statute are either a facial challenge or an as-applied challenge. *Id*. An as-applied challenge "alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (cleaned up). A facial challenge "involves a claim that a legislative enactment is unconstitutional on its face, in that there is no set of circumstances under which the enactment is constitutionally valid." *People v Wilder*, 307 Mich App 546, 556; 861 NW2d 645 (2014). When a party makes a facial challenge to the constitutionality of a statute, the claim is not dependent on the facts surrounding any particular decision, so the specific facts of the challenging party's claim are not pertinent to the analysis. *Bonner*, 495 Mich at 223.

Defendant first argues that MCL 769.1k(1)(b)(*iii*) is unconstitutional because it violates the due process rights of defendants by creating a financial incentive for trial courts to convict defendants. See US Const, Am XIV. Defendant does not argue that the trial court in his case was not impartial. Therefore, is apparent that defendant is making a facial challenge to MCL 769.1k(1)(b)(*iii*). See *Wilder*, 307 Mich App at 556.

Relevant to this inquiry is the United States Supreme Court's holdings in *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927), *Ward v Village of Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 267 (1972), and *Dugan v Ohio*, 277 US 61; 48 S Ct 439; 72 L Ed 784 (1928). The United States Supreme Court in *Tumey*, 273 US at 523, found that a judge's financial interest in the outcome of a case was unconstitutional when the judge "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case." *Tumey* held that

> [e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the later due process of law. [*Id*. at 532.]

Conversely, in *Dugan*, 277 US at 65, the United States Supreme Court found that the financial connection between the judge and the appellant's case was too remote to violate due process, and noted that the judge's personal salary was not affected by whether he convicted or acquitted in any case. *Dugan* also explained that the judge in that matter did not have any executive duties or control over financial policies. *Id*. The United States Supreme Court revisited this issue in *Ward*, 409 US 60, in which the Supreme Court found the cost scheme to be unconstitutional. *Ward* held that the "possible temptation" referred to in *Tumey* could exist when the mayor's executive responsibilities for the town finances "may make him partisan to maintain the high level of contribution from the mayor's court" for funds that the mayor generated while sitting as a judge, even when the mayor did not share directly in the fees and costs collected from that court. *Id*.

A facial challenge to the constitutionality of MCL 769.1k(1)(b)(*iii*) was addressed in *People v Johnson*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351308); slip op at 2, lv pending. In *Johnson*, this Court found that the trial court was not able to impose any amount of costs it deems necessary, but rather the costs imposed "must have a factual basis and must be reasonably related to the actual costs incurred by the court." *Id*. at ___; slip op at 7. We also held that the defendant had failed to show that trial courts are authorized to administer the revenue collected under MCL 769.1k(1)(b)(*iii*). *Id*. This Court concluded that the defendant had failed to show that the nexus between the courts and the costs imposed under MCL 769.1k(1)(b)(*iii*) more closely resembled the improper cost schemes in *Tumey* and *Ward*, than the proper cost scheme in *Dugan*. *Id.* at ___; slip op at 7. Bound by the Court's ruling in *Johnson*, we conclude that defendant has failed to demonstrate that MCL 769.1k(1)(b)(*iii*) is unconstitutional. See *id*. at ___; slip op at 7-8.

Defendant also argues that MCL 769.1k(1)(b)(*iii*) violates the principles regarding separation of powers. See Const 1963, art 3, § 2. This argument regarding separation of powers is premised on the fact that the statute forces the judiciary to violate the Constitution by not being impartial, which was also addressed and dispensed of in *Johnson*, ___ Mich App at ___; slip op at 8-9. Because defendant has not demonstrated that MCL 769.1k(1)(b)(*iii*) creates judges that are not impartial, the separation-of-powers argument is also unpersuasive. Further, we are bound by our prior decision. See *Johnson*, ___ Mich App at ___; slip op at 9.

In sum, defendant has not overcome the presumption that MCL 769.1k(1)(b)(*iii*) is constitutional.[3]

Affirmed in part, vacated in part, and remanded for the ministerial task of correcting the judgment of sentence to reflect the proper restitution. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick

[3] We note that there have been critiques of the cost scheme imposed by MCL 769.1k(1)(b)(*iii*). See *People v Cameron*, 504 Mich 927, 928 (2019) (MCCORMACK, C.J., concurring) ("No matter how neutral and detached a judge may be, the burden of taxing criminal defendants to finance the operations of his court, coupled with the intense pressures from local funding units (and perhaps even from the electorate), could create at least the appearance of impropriety. Assigning judges to play tax collector erodes confidence in the judiciary and may seriously jeopardize a defendant's right to a neutral and detached magistrate."); *Johnson*, ___ Mich App at ___ (SHAPIRO, J., dissenting); slip op at 5 (concluding that MCL 769.1K(1)(b)(iii) is unconstitutional); *People v Braziel*, unpublished opinion of the Court of Appeals, issued February 25, 2021 (Docket No. 352193) (RICK, J., concurring) (raising concerns that trial courts are not required to consider a defendant's ability to pay before imposing court costs). However, as stated, we are bound by this Court's published opinions. MCR 7.215(C)(2).