

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIANA CHARISE JONES,

Defendant-Appellant.

UNPUBLISHED

December 16, 2021

No. 355463

Wayne Circuit Court

LC No. 19-007789-02-FC

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted¹ her convictions by guilty plea to unlawful discharge of a firearm from a vehicle causing injury, MCL 750.234a(1)(b), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to prison terms and ordered to pay \$1,300 in court costs under MCL 769.1k(1)(b)(iii). Defendant challenges only the constitutionality of the court costs imposed on appeal. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a drive-by shooting in Detroit in which defendant was a passenger in the vehicle of her boyfriend. After following the victim from her place of employment, defendant handed her boyfriend a handgun, and defendant's boyfriend shot at the victim's car while the victim was inside.² The victim was hit in the arm and injured. Defendant pleaded guilty to unlawful discharge of a firearm from a vehicle causing injury and one count of felony-firearm in exchange for the prosecutor's dismissal of multiple other charges, and an agreement for a prison sentence. Additionally, defendant was ordered to pay \$136 in state costs, \$130 in crime victims' rights fees, \$400 in attorney costs, and \$1,300 in court costs.

¹ *People v Jones (On Reconsideration)*, unpublished order of the Court of Appeals, entered February 17, 2021 (Docket No. 355463).

² Defendant's boyfriend was also charged as a result of this crime, but has not filed an appeal.

II. CONSTITUTIONALITY OF MCL 769.1k(1)(b)(iii)

Defendant argues that MCL 769.1k(1)(b)(iii) is unconstitutional because it violates criminal defendants' due-process rights and it violates the separation-of-powers doctrine by preventing the judicial branch from carrying out its constitutionally assigned functions. We disagree.

Both constitutional and nonconstitutional issues must be preserved. *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). "To be preserved for appellate review, an issue must be raised before and addressed by the trial court." *People v Wiley*, 324 Mich App 130, 150; 919 NW2d 802 (2018). Defendant did not raise the issue of the unconstitutionality of MCL 796.1k(1)(b)(iii) in the trial court; thus, this issue is not preserved for appeal. *Id.*

This Court reviews an "unpreserved claim for plain error affecting defendant's substantial rights." *People v Roscoe*, 303 Mich App 633, 648; 846 NW2d 402 (2014). "Plain error affected the defendant's substantial rights if (1) there was an error, (2) the error was clear or obvious, and (3) the error prejudiced the defendant." *People v Heft*, 299 Mich App 69, 78-79; 829 NW2d 266 (2012); see also *Carines*, 460 Mich at 764 (holding plain error review extends to unpreserved claims of constitutional error). "The third *Carines* element generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (quotation marks and citation omitted).

At the time defendant was sentenced, MCL 769.1k(1)(b)(iii) stated, in relevant 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 by statute or sentencing is delayed by statute:

* * *

(b) The court may impose any or all of the following:

* * *

(iii) Until October 17, 2020,³ 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.

³ The statute was amended by 2020 PA 151, and the current expiration date is October 1, 2022. The parties do not dispute that the version of the statute cited above applies to this case.

(C) Necessary expenses for the operation and maintenance of court buildings and facilities. [Footnote added.]

MCL 769.1k(1)(b)(iii) allows for the collection of court costs in order to raise revenue for Michigan's trial courts. *People v Cameron*, 319 Mich App 215, 222; 900 NW2d 658 (2017). MCL 769.1k(1)(b)(iii) was enacted by the Legislature to address our Supreme Court's decision in *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014), which held that trial courts only have the authority to impose costs on criminal defendants that are authorized by statute. *People v Konopka (On Remand)*, 309 Mich App 345, 354-355; 869 NW2d 651 (2015). The costs authorized by MCL 769.1k(1)(b)(iii) have been upheld as a constitutional tax on criminal defendants. *Cameron*, 319 Mich App at 218.

Defendant faces a heavy burden in challenging the constitutionality of this statute. "A statute challenged on constitutional grounds is presumed to be constitutional and will be construed as such unless its unconstitutionality is clearly apparent." *People v Johnson*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 351308); slip op at 2 (quotation marks and citation omitted). "When a party asserts a facial challenge to the constitutionality of a statute, the party must demonstrate that no circumstances exist under which the statute would be valid." *People v Dillon*, 296 Mich App 506, 510; 822 NW2d 611 (2012). On the other hand, an as-applied challenge alleges a violation of a particular right specific to the defendant. *People v Wilder*, 307 Mich App 546, 556; 861 NW2d 645 (2014). Defendant does not argue that the trial court acted unfairly in her particular case, but contends that the statute unconstitutionally deprives all criminal defendants of due process. Thus, this is a facial challenge to the statute. *Johnson*, ___ Mich App at ___; slip op at 2.

Defendant faces an even more difficult challenge because *Johnson* was recently decided, and defendant presents the same arguments that failed the defendant in that case. Defendant argues that the statute is unconstitutional for two reasons: (1) it violates criminal defendants' due-process rights, and (2) it violates the separation-of-powers doctrine by preventing the judicial branch from carrying out its constitutionally assigned functions. The same challenges to the statute were brought in *Johnson*, where the defendant argued that MCL 769.1k(1)(b)(iii) "deprives criminal defendants of their due-process right to an impartial decisionmaker and violates separation-of-powers-principles." *Johnson*, ___ Mich App at ___; slip op at 1.

Defendant first argues that the statute is unconstitutional because it undermines criminal defendants' due-process right to appear before a neutral judge. The Michigan Constitution and the United States Constitution both provide that no person may be deprived of life, liberty, or property without due process of law. Const 1963, art 1, § 17; US Const, Am XIV. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Johnson*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted). Further, it "violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v Ohio*, 273 US 510, 523; 47 S Ct 437; 71 L Ed 749 (1927).

In deciding *Johnson*, this Court considered three Supreme Court cases to determine whether the defendant's due-process rights had been violated. *Johnson*, ___ Mich App at ___; slip op at 4-6. In *Tumey*, 273 US at 516-519, an ordinance allowed the mayor to preside over certain cases, to issue fines to defendants, and to keep a portion of the fine. The Supreme Court held that the mayor-judge had a "direct, personal, substantial pecuniary interest" in convicting criminal defendants, which violated their due-process rights. *Id.* at 523. To contrast, in *Dugan v Ohio*, 277 US 61, 62-63; 48 S Ct 439; 72 L Ed 784 (1928), where the mayor-judge did not directly receive a portion of the fine imposed, but was paid out of a general fund that included the fines, there was no due-process concern. Finally, in *Ward v Village of Monroeville, Ohio*, 409 US 57, 57-60; 93 S Ct 80; 34 L Ed 2d 267 (1972), where the mayor was authorized to sit as a judge in certain traffic violation cases, and was also responsible for the village's finances, the Supreme Court found it improper for an official to "occup[y] two practically and seriously inconsistent positions."

Defendant argues that MCL 769.1k(1)(b)(iii) creates "dual roles" for trial judges that are incompatible and similar to the due-process violations in *Tumey* and *Ward*. However, the facts of the present case are most similar to those in *Dugan* because the statute "do[es] not indicate where the money flows after the costs have been imposed on and paid by a convicted defendant," and does not order any portion of the money collected from criminal defendants to go directly to judges. *Johnson*, ___ Mich App at ___; slip op at 7 (quotation marks and citation omitted). Michigan trial court judges do not receive a "bonus" from convictions, like the mayor-judge in *Tumey*, and do not hold contradicting roles like the mayor-judge in *Ward*. Additionally, as noted in *Johnson*, trial court judges have little discretion in deciding what costs to assess to defendants: "the costs imposed by a trial court must have a factual basis and must be reasonably related to the actual costs incurred by the court." *Johnson*, ___ Mich App at ___; slip op at 7. There is no due-process concern, and no evidence that judges are pressured to impose certain costs, when judges do not have discretion over the costs they are imposing. *Id.*

Defendant argues that trial court judges' financial interest in "keeping trial courts open and running" is sufficient to show that the statute is unconstitutional as a violation of due process. But, like the defendant in *Johnson*, defendant fails to show the "direct nexus between a judge's compensation and any fees or costs imposed that was present in *Tumey*." *Johnson* ___ Mich App at ___; slip op at 7 (quotation marks and citation omitted). This is especially true considering our Constitution, Const 1963, art 6, § 17, states: "No judge or justice of any court of this state shall be paid from the fees of his office nor shall the amount of his salary be measured by fees, other moneys received or the amount of judicial activity of his office." Michigan trial court judges' salaries are paid out of a county's general fund, and are not dependent on the amount of costs collected from MCL 769.1k(1)(b)(iii). MCL 600.555(1). The system of costs presented in MCL 769.1k(1)(b)(iii) most closely resembles the system from "*Dugan*, where the entity exercising the judicial role benefited from a portion of the revenue generated by court assessments, but did not have control over administration of the revenue." *Johnson*, ___ Mich App at ___; slip op at 7.

Defendant also argues that MCL 769.1k(1)(b)(iii) is unconstitutional because it violates the principle of separation of powers under Michigan's Constitution. Const 1963, art 3, § 2 states:

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.

This Court addressed whether MCL 769.1k(1)(b)(iii) violates the separation-of-powers doctrine in *Cameron*, 319 Mich App at 231-232, where the defendant argued that court costs constituted a tax which the courts were not permitted to impose because the power to tax rested solely with the Legislature. But the “separation-of-powers doctrine does not require an absolute separation of the branches of government.” *Id.* at 232. This Court explained that while the power to tax generally rests with the Legislature, sharing power between branches is constitutionally permissible “[i]f the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other” *Id.* at 233. This delegation of power from the Legislature to the courts is permissible because the Legislature provided guidance in MCL 769.1k(1)(b)(iii) that the trial courts may only impose costs “reasonably related to the actual costs incurred by the trial court . . .” *Id.* at 235.

Defendant presents a different separation-of-powers argument. Specifically, defendant argues that the “Legislature effectively created a funding system for our courts that distorts the judiciary’s obligation to maintain impartiality in criminal proceedings.” However, as explained in *Johnson*, ___ Mich App at ___; slip op at 9, this argument fails to establish that the statute is facially unconstitutional because defendant has not shown that the statute creates a situation where no judge could be impartial. Because defendant has failed to establish the nexus needed in showing how a judge will benefit, she has not shown that trial court judges have a “direct, personal, substantial pecuniary interest” as a result of the statute. *Tumey*, 273 US at 523. Because defendant cannot prove that judges are impartial and thus disqualified—let alone prove that every trial court judge should be disqualified because of the statute—this separation-of-powers argument also fails.

Defendant acknowledges this Court’s recent decision in *Johnson*, but argues that the case was wrongly decided, this Court should declare a conflict with *Johnson*, and a conflict panel should be convened under MCR 7.215(J)(2) and (3). We do not believe that *Johnson* was wrongly decided, and are bound to follow it. Thus, we decline defendant’s request for a conflict panel, and hold that defendant’s argument that the trial court unconstitutionally assessed court costs under MCL 769.1k(1)(b)(iii) fails⁴.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Michelle M. Rick

⁴ Additionally, *Johnson*’s application for leave is currently pending in our Supreme Court, making defendant’s request to declare a conflict panel superfluous.