

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 17, 2013

v

DARRICK ANTHONY NEAL,

Defendant-Appellant.

No. 307652
Berrien Circuit Court
LC No. 2011-002631-FH

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant, Darrick Anthony Neal, appeals as on leave granted the sentence for his conviction of fourth-degree fleeing and eluding.¹ We affirm.

I. FACTS

Neal pleaded guilty to fourth-degree fleeing and eluding. To support his plea, Neal admitted that he was driving a vehicle on I-94 when a police officer in a marked car attempted to pull him over, that he knew the officer signaled him to pull over, and that he did not do so.

At the sentencing hearing, the prosecution requested that the trial court sentence Neal to serve 270 days in jail, which was the sentence that his presentence investigation report recommended. Neal's attorney responded by "ask[ing] the court to consider a lower amount of time upon the payment of the monies that are owed."

The trial court sentenced Neal to serve 180 days in jail, conditioned on his payment \$2,090.10 in of fines, costs, and restitution, or alternatively sentenced him to serve 270 days in jail. The trial court's order provided that if Neal did not pay the \$2,090.10 during his 180-day sentence, he would be "further confined until paid, but not to exceed a grand total of 270 days."

Neal applied for leave to appeal on the basis that the trial court's sentence unconstitutionally violated the equal protection clause. This Court granted leave to appeal.²

¹ MCL 257.602a(2).

II. CONDITIONAL SENTENCES

A. STANDARD OF REVIEW

Generally, this Court reviews *de novo* whether a trial court has violated a criminal defendant's rights to equal protection.³

B. LEGAL STANDARDS

Both the United States and Michigan constitutions guarantee equal protection under the law.⁴ "The constitutional guarantee of equal protection requires that the government treat similarly situated persons alike."⁵ A sentence that exposes an indigent defendant to incarceration unless he or she pays restitution or a fine violates the Equal Protection Clause because it unequally punishes offenders solely on the basis of indigence.⁶ A trial court cannot incarcerate a defendant for failing to pay restitution unless the failure to pay is willful.⁷

However, a defendant may waive or forfeit his or her constitutional protections.⁸ A waiver is different from a forfeiture.⁹ A forfeiture is the failure to timely assert a right, while a waiver is "the intentional relinquishment or abandonment of a known right."¹⁰ A defendant's waiver forfeits appellate review of a claimed deprivation of a right.¹¹

C. APPLYING THE STANDARDS

Neal contends that the trial court's contingent sentence was unconstitutional because it must hold an indigence hearing before basing a sentence condition on a defendant's ability to pay a fine or restitution. We conclude that Neal has waived any challenge to the conditional nature of the trial court's sentence.

² *People v Neal*, unpublished order of the Court of Appeals, entered April 23, 2013 (Docket No. 307652).

³ *People v Haynes*, 256 Mich App 341, 345; 664 NW2d 225 (2003).

⁴ *Id.*; US Const, Am XIV, § 1; Const 1963, art 1, § 2.

⁵ *People v Conat*, 238 Mich App 134, 153; 605 NW2d 49 (1999).

⁶ *Tate v Short*, 401 US 395, 397-400; 91 S Ct 668; 28 L Ed 2d 130 (1971); *People v Collins*, 239 Mich App 125, 135-136; 607 NW2d 760 (1999).

⁷ *Collins*, 239 Mich App at 136; MCL 769.1a(14).

⁸ *United States v Olano*, 507 US 725, 731; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999); *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000).

⁹ *Carter*, 462 Mich at 215.

¹⁰ *Id.* (internal quotation marks and citations omitted).

¹¹ *Id.*

A defendant waives a right by expressly approving of the trial court's action.¹² A defendant's express approval of the trial court's action "constitutes a waiver that *extinguishes* any error."¹³ Here, after the prosecution requested that the trial court sentence Neal to serve 270 days' imprisonment, his counsel "ask[ed] the court to consider a lower amount of time upon the payment of the monies that are owed." Through counsel, Neal expressly approved of the trial court conditioning a shorter sentence on him paying his fines and costs. We conclude that this approval constituted a waiver that has forfeited our review of his sentence.

Further, even if Neal did not expressly approve of his conditional sentence, he did not challenge it. A defendant who has failed to challenge a constitutional violation must show that a plain error affected his or her substantial rights.¹⁴ An error affected a defendant's substantial rights if it affected the outcome of the lower court proceedings.¹⁵ Here, Neal has not shown any error that affected the outcome of his proceedings because he has not shown that he is actually indigent, nor has he shown that the trial court would have sentenced him to serve less than 270 days if it had not imposed the unconstitutional condition. Were we to consider Neal's issue on the merits, we would reject it.

We affirm.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens

¹² *Id.* at 216.

¹³ *Id.*; see *People v Jones (After Remand)*, 197 Mich App 76, 81; 495 NW2d 159 (1992).

¹⁴ *Carines*, 460 Mich at 763.

¹⁵ *Id.*