S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2008
v MELISSA KAY CHURCHILL, Defendant-Appellant.	No. 278171 Calhoun Circuit Court LC No. 2007-000436-FH

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a motor vehicle causing damage, MCL 750.356a(3). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 30 to 180 months' imprisonment. Defendant appeals her sentence as of right. We vacate that part of the sentence that directs defendant to pay attorney fees and remand for consideration of defendant's ability to pay attorney fees.

Defendant first argues on appeal that she is entitled to resentencing because the trial court misscored offense variables (OV) 13, MCL 777.43, and OV 19, MCL 777.49. Specifically, defendant contends that OV 13 should have been scored at zero points, not ten points, absent a showing that defendant committed a combination of three or more eligible crimes within five years of the sentencing offense, and that OV 19 should have been scored at zero points because defendant was fully cooperative with the police and did not resist or otherwise interfere with the administration of justice.

Defendant raised the scoring issue in a motion to remand filed with this Court. At sentencing, however, the trial court queried the prosecutor and defense counsel, asking if there were any challenges or exceptions to the presentence investigation report (PSIR), which included the scoring tabulation sheet and references to the minimum sentencing range, and defense counsel responded that "there are no . . . corrections or additions." We find that the scoring issue was effectively waived. In *People v Carter,* 462 Mich 206, 215, 219; 612 NW2d 144 (2000), our Supreme Court discussed the principle of waiver:

> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." "One who

> waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."
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> In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review. [Citations omitted.]

Here, defense counsel expressed satisfaction with the PSIR and its scoring determinations, affirmatively indicating that no corrections or additions were necessary. Accordingly, the issue was waived for purposes of appellate review.

Defendant next argues on appeal that, because there is no indication in the record that the trial court considered defendant's present or future ability to pay court-appointed attorney fees, the part of her judgment of sentence requiring payment of $425 in attorney fees should be vacated or this Court should remand the case for a hearing on the matter. The prosecution concedes that remand for consideration of defendant's ability to pay is appropriate. This Court has held that a trial court may not order a defendant to pay attorney fees relative to the costs of his court-appointed counsel unless there is some indication that the court considered the defendant's current and foreseeable ability to pay. *People v Dunbar*, 264 Mich App 240, 255-256; 690 NW2d 476 (2004). There is no indication in the record that the trial court contemplated defendant's current and foreseeable ability to pay. We therefore vacate the attorney fee assessment and remand to the trial court for consideration of the issue concerning attorney fees under the principles espoused in *Dunbar*.[1]

Defendant also argues that she should be granted credit toward her sentence in this case for the time that she was incarcerated between her arrest and sentencing, even though she had been on parole at the time she committed the instant offense, where no additional time was added to her prior sentence when parole on that sentence was revoked.[2] Defendant relies, in part, on *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569; 548 NW2d 900 (1996).

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[1] As noted in *Dunbar, supra* at 255 n 14, "[j]ust as an evidentiary hearing is not required at the trial level, one is not required on remand. The court may obtain updated financial information from the probation department." Further, *Dunbar* states that a court's decision to make a defendant reimburse attorney fees must be included in a separate order, not the judgment of sentence, because Michigan lacks a statutory sentencing scheme authorizing repayment of court-appointed attorney fees. *Id.* at 256. However, the Legislature has since enacted MCL 769.1k(1)(b)(iii), which allows the court to impose "[t]he expenses of providing legal assistance to the defendant" in the judgment of sentence. Thus, a separate order is no longer necessary.

[2] We note that the judgment of sentence provides that the sentence is to be served consecutively to case number 04-13874, in which, according to the PSIR, defendant was sentenced to 2 to 15 years' imprisonment. The PSIR indicates that parole violation proceedings remain pending in that case.

In *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), this Court, addressing and interpreting MCL 768.7a(2) and 769.11b,[3] ruled:

> "When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. Credit is not available to a parole detainee for time spent in jail attendant to a new offense because "bond is neither set nor denied when a defendant is held in jail on a parole detainer."
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> Defendant's reliance on [*Wayne Co, supra*] is misplaced. That case concerned the legislative desire to treat parolees who commit new crimes the same as prisoners or escapees who do so. At issue was when the first sentence should end and the second should begin, not how jail credit was to be applied. [Citations omitted.]

Further, in *People v Filip*, 278 Mich App 635, 641-642; ___ NW2d ___ (2008), this Court, interpreting MCL 769.11b and 791.238 and addressing an argument comparable to the one made here, held:

> MCL 791.238(1) provides that a parolee remains legally in the custody of the Department of Corrections, and that "[p]ending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated." This provision unambiguously declares that parole violators cannot avoid confinement pending resolution of the violation proceedings. Such a period of incarceration thus constitutes part of the original sentence and in that sense is credited against it.

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[3] MCL 768.7a(2) provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

> Moreover, "denied," as used in MCL 769.11b, implies the exercise of discretion, not the recognition of outright ineligibility. For that reason, MCL 769.11b simply does not apply to parole detainees. . . .
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> Filip argues that because a parolee has necessarily served his or her minimum sentence, the parolee could never get credit for jail incarceration stemming from a new violation. We disagree. MCL 791.238(2) specifically dictates that a parole violator "is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment." And any remaining portion of the original sentence must be served before a sentence for a second offense may begin. Thus, just because a parolee has served his or her minimum sentence, it does not follow that the credit must therefore be applied against his or her new sentence when he or she remains liable to continue serving out the maximum sentence. Moreover, if a defendant is not required to serve additional time on the previous sentence because of the parole violation, then the time served is essentially forfeited. [Footnotes omitted.]

Under the holdings and reasoning in *Filip* and *Stead*, we reject defendant's argument that she was entitled to jail credit on the instant offense.

Defendant's final argument is that due process requires resentencing because the trial court enhanced defendant's sentence based on facts neither admitted by defendant nor proven to a jury beyond a reasonable doubt in violation of the rule of law set forth in *Blakely v Washington,* 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006). Although defendant argues that *Drohan* was wrongly decided, this Court is bound to follow decisions issued by our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

We vacate that part of the sentence directing defendant to pay $425 in court-appointed attorney fees and remand for consideration of defendant's ability to pay attorney fees. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald