STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2007
v	No. 268538 Wayne Circuit Court
STEVEN PIERRE COTTON, Defendant-Appellant.	LC No. 05-009454-01

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was sentenced as a habitual offender, third offense, MCL 769.11, to concurrent prison terms of 5 to 40 years for the ecstasy conviction, and two to eight years for the marijuana conviction. The court also ordered defendant to pay court costs and attorney fees as part of his sentence. Defendant appeals as of right. We affirm, but remand for entry of a separate order of reimbursement of attorney fees.

I. Underlying Facts

On September 5, 2005, beginning at 4:15 p.m., a Detroit police narcotics officer conducted "pre-raid surveillance" at 16130 Cheyenne in Detroit. Defendant lived at the residence with his girlfriend and two children. The officer observed defendant engage in three separate suspected narcotics transactions. The officer explained that in each transaction, the buyer approached defendant on the porch and gave him money, defendant stepped inside the house briefly then returned and handed the buyer a small item, after which the buyer left. The officer moved when suspected drug dealers from a different house began to approach his vehicle. He notified his narcotics crew to execute a search warrant.

At 4:55 p.m., police officers knocked and announced their presence and when no one answered, they gained entry by opening the unlocked front door. No one was inside the residence. In the front room, the police found 43 Ziploc bags containing marijuana, a pill bottle containing 24 ecstasy pills, a digital scale containing marijuana residue, empty Ziploc bags, and $43.

Outside the residence, the police encountered defendant's grandmother, mother, and brother. Defendant's brother called defendant and defendant returned home; he was observed leaving a house that was across and down the street. In a statement to the police, defendant stated that he had approximately "20 nickel bags" of marijuana and "about $200 worth" of ecstasy pills in the house. Defendant admitted that he had sold $50 worth of marijuana that day and that he would typically sell each ecstasy pill for $5.

At trial, defendant denied selling drugs on September 5, 2005. Defendant testified that at 4:00 p.m., he was en route to the hospital for an asthma concern, where he remained for 45 minutes. He returned home after the police called him and threatened to arrest his mother if he did not "come take the blame" for the drugs found in his house. Defendant also testified that he told the officers that he did not know who owned the drugs and that his cousin Jamal Sanders, who matches defendant's description, sold drugs out of defendant's house. Defendant claimed that the police fabricated the answers in his statement. He further claimed that he signed the statement and initialed each answer only because he was afraid of being beaten by the police if he did not comply with their instructions.

II. Right to Present a Defense

Defendant first argues that the trial court denied him his right to present a defense by precluding "his testimony of a prior violent encounter with police." We disagree.

During defense counsel's direct examination of defendant about the inculpatory statement that he signed, the following exchange occurred:

Q. What was [the officer] wearing?

A. A police uniform, raid squad uniform and a face mask.

* * *

Q. So he was wearing a mask and you're calm?

A. Yes, I was somewhat calm but nervous.

Q. Why were you nervous?

A. Because he had on a mask and whatever I didn't answer I had doubts that he might put his hands on me and, if he does, I would not be able to identify him through anything.

* * *

Q. Do you recall initialing the statement where it asked about the marijuana and the response was 20 nickel bags or bud?

A. I was asked the question but I told him I didn't know.

Q. If you told him you didn't know, why did you initial it?

A. Because he had a mask on and I was nervous. I didn't want to take a chance not to initial anything that he asked me and *then get beat up and put in the hospital again by some more police officers.* [Emphasis added.]

On cross-examination, the prosecutor questioned defendant about his signature and initials on the statement:

Q. Now your initials, the same initials that were placed on the rights form are next to all of the questions and the answers; correct?

A. Yes.

Q. And why are those initials there?

A. Because I signatured [sic] them *because the fact he had a ski mask on and I was nervous, if I don't answer the questions, that he could beat me up and send me to the hospital once again. I have been beaten up by the police before*. [Emphasis added.]

The prosecutor asked that defendant's answer be stricken because it was not responsive. The trial court agreed and instructed the jury to disregard defendant's answer.

On redirect examination by defense counsel, defendant again testified that he was afraid of the officer because he was in a mask and defendant feared that the officer would "beat [him] like before." The prosecutor objected to this line of questions as beyond the scope of cross examination, given that the court had stricken defendant's answer alluding to the prior incident during cross-examination. The trial court sustained the prosecutor's objection.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

The United States Constitution guarantees a defendant "a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727, 1731; 164 L Ed 2d 503 (2006). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982).

We agree with the trial court that defendant's testimony on cross-examination that the police beat him before was not responsive to the prosecutor's question. Therefore, the trial court did not abuse its discretion in excluding the answer and instructing the jury to disregard it. Additionally, we conclude that the trial court did not abuse its discretion in precluding defendant's attempt to revisit or expound on the matter on redirect examination because it was beyond the scope of cross-examination. A trial court has wide discretion to control trial

proceedings, including the scope of redirect examination, MRE 611 and MCL 768.29, and a court may disallow redirect examination that exceeds the scope of cross-examination. *See People v Weatherford*, 193 Mich App 115, 121-122; 483 NW2d 924 (1992).

We also reject defendant's claim that the trial court's evidentiary rulings deprived him of his constitutional right to present a defense. The trial court's rulings were not an exclusion of all evidence regarding defendant's motivation for signing the allegedly falsified statement, and did not otherwise limit defendant's opportunity to present a defense. Although the court precluded defendant from reiterating or elaborating on his "prior violent encounter" with the police on cross and redirect examination, defendant testified during direct examination that the police had beaten him before and that he only signed the statement because he was afraid of being beaten again. Plainly, defendant was permitted to present this defense to the jury. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Consequently, reversal is not warranted.

III. Resentencing

Defendant further argues that he should be resentenced because the trial court doubled the authorized maximum sentence for his crime of possession with intent to deliver ecstasy, pursuant to MCL 769.11(a). Defendant does not contest that the trial court was authorized to double the maximum sentence, but rather, argues that the trial court erroneously believed that it was *required* to double the maximum sentence and was unaware that such enhancement was discretionary, thus requiring sentencing. We disagree.

Defendant relies on the following remarks made by the trial court at sentencing:

> [*The trial court*]: I'm going to sentence you to five years in prison and the maximum is 50 years. That is the statutory maximum and I'm sentencing you as an habitual.
>
> [*Court clerk*]: You said five years to 20.
>
> [*The trial court*]: *I have to do 40. That is the maximum. I can't change it.* [Emphasis added.]

It is well established that "absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Knapp*, 244 Mich App 361, 388-389; 624 NW2d 227 (2001). Further, when imposing a maximum sentence that is discretionary because of the defendant's status as a repeat felony offender, the sentencing court is not required to state that it understands that it has sentencing discretion and is utilizing that discretion. *Id.*

MCL 769.11(a) is clear that an increase or doubling of the authorized maximum term of imprisonment for subsequent offenders is discretionary. There is no clear evidence here that the trial court believed that it lacked discretion. On the contrary, the trial court's remarks made during the sentencing hearing reflect that it was aware that it had discretion, and that it fully intended to sentence defendant to the maximum allowed. The trial court spent considerable time

discussing defendant's prior record, his failure to rehabilitate after receiving probation for a prior serious offense, and stated, "it is time for you to get yourself together in prison." Reading the remarks defendant cites in context, the trial court was indicating that it could not impose a maximum term of 50 years as it originally stated, not that it was mandated to impose a maximum term of 40 years. Because there is no clear evidence that the trial court was unaware of its discretion, and because the trial court is presumed to know the law, resentencing is not required.

IV. Imposition of Costs and Attorney Fees

Defendant argues that the trial court erred in imposing court costs and attorney fees. Because defendant did not timely object to the imposition of costs and attorney fees, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant first argues that the trial court erred in imposing court costs in the amount of $600 in the absence of statutory authority. "A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute." *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). Defendant maintains that costs could not properly be assessed under MCL 769.1k, because that statute did not become effective until January 1, 2006, after the date of the offense. As the prosecutor argues, however, costs were also authorized by MCL 769.34(6), which provides that, "[a]s part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments." The trial court did not identify the statutory authority on which it relied to impose costs. But because there is no indication that the court relied on MCL 769.1k as a basis for imposing costs, and because we conclude that costs were authorized under MCL 769.34(6), we find no basis for concluding that the imposition of costs constituted a clear or obvious error. *Carines*, *supra*. Consequently, appellate relief is not warranted.

Defendant further argues that the trial court erred when it ordered him to reimburse the county $1,090 in attorney fees without making a finding regarding his ability to pay. Trial courts may require criminal defendants to reimburse the county for the costs of court-appointed counsel. *People v Nowicki*, 213 Mich App 383, 388-389; 539 NW2d 590 (1995). A trial court is not required to formally make specific findings on the record regarding a defendant's ability to pay "unless a defendant specifically objects to the reimbursement amount at the time it is ordered." *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004). "However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id*. at 254-255. "A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered." *Id*. at 255.

Because defendant did not object to the imposition of attorney fees, the trial court was not required to make formal findings of fact regarding defendant's financial situation. The trial court did provide some indication that it considered defendant's potential future ability to pay. Before sentencing, the trial court indicated that it had read the presentence report, which stated that defendant, who was 26 years old at the time of sentencing, had told a different court that he was young, strong, and could obtain and maintain employment. The trial court noted that defendant

had discussed obtaining employment, but instead chose to live a self-centered life of dependency on others. The trial court concluded that it expected defendant to complete his education and obtain vocational training while in prison and that upon release, defendant would obtain employment, support his children, and be a productive citizen. Although the court made only general references, the record sufficiently reflects the trial court's consideration of defendant's ability to pay in the future.

Defendant also argues that the trial court erred when it ordered him to repay attorney fees as part of his sentence. We agree. A criminal defendant's "obligation to reimburse the county for legal fees and costs is completely independent of his sentence." *Dunbar*, *supra* at 256 n 15, quoting *Nowicki*, *supra* at 386. "Because Michigan currently lacks a statutory scheme which authorizes repayment of court-appointed attorney fees, repayment may not be imposed as part of the sentence." *Dunbar*, *supra* at 256 n 15. Rather, "[i]f [a] court decides to order defendant to pay attorney fees, it shall do so in a separate order." *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007). Therefore, we vacate that portion of the judgment of sentence ordering defendant to repay $1,090 in attorney fees, and remand for entry of a separate order establishing the terms pursuant to which repayment of those fees is required. *Dunbar, supra* at 256.

We affirm, but remand for entry of a separate order of reimbursement of attorney fees.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood