

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTEO JULIO FLORES, JR.,

Defendant-Appellant.

UNPUBLISHED

May 24, 1996

No. 180775

LC No. 94-005728-FH

Before: Kavanagh, T.G.,* P.J., and R.B. Burns** and G.S. Allen,** JJ.

MEMORANDUM.

Defendant pleaded guilty to attempted delivery of marijuana, MCL 750.92; MSA 28.287 and MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). He was sentenced to sixteen to twenty-four months' imprisonment and ordered to pay a fine of \$1,000 and court costs of \$400. He appeals as of right. We affirm in part and vacate in part. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant's prison sentence does not violate the principle of proportionality. *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994); *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Duprey*, 186 Mich App 313; 463 NW2d 240 (1990).

However, we vacate the order for court costs because defendant was sentenced under the general attempt statute, MCL 750.92; MSA 28.287, which is a separate substantive offense. The general attempt statute does not provide for the imposition of costs. *People v Johnson*, 195 Mich App 571; 491 NW2d 622 (1992); *People v Krieger*, 202 Mich App 245; 507 NW2d 749 (1993).

*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1995-1.

**Former Court of Appeals Judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1995-1.

Construing the word “or” in MCL 750.92(3); MSA 28.287(3) according to its literal meaning, we also hold that the trial court lacked authority to impose both a fine and prison sentence under the general attempt statute for defendant’s conviction. The Legislature only intended to authorize a choice between “imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars.” See *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995); *Beauregard-Bezou v Pierce*, 194 Mich App 388, 393; 487 NW2d 792 (1992). The Legislature did not authorize a sentencing court to impose more than one of these punishment choices. Hence, we vacate the fine in this case as an unlawful excess. *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994).

Finally, because we are vacating the fine and court costs, we conclude that the case must be remanded to the trial court for further proceedings on defendant’s claim for reimbursement of the bond money applied to the unlawful fine and court costs. Cf. *People v Nance*, 214 Mich App 257; ___ NW2d ___ (1995), lv pending.

Affirmed in part, vacated in part and remanded for further proceedings on defendant’s claim for reimbursement. No further jurisdiction.

/s/ Thomas G. Kavanagh
/s/ Robert B. Burns
/s/ Glenn S. Allen, Jr.