

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 25, 2012

v

TODD ALAN VANWERT,

Defendant-Appellant.

No. 309293
Midland Circuit Court
LC No. 10-004450-FH

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by leave granted his April 14, 2011 judgment of sentence and delayed sentence order. We remand for resentencing because the trial court’s order impermissibly mixed elements of sentencing and delayed sentencing.

On April 7, 2011, defendant pleaded guilty to one count of possession with intent to deliver less than five kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(iii). Pursuant to a plea agreement, the trial court stated that it would delay sentencing for one year. At that time, if defendant complied with the terms of his delayed sentence, the trial court would reduce his conviction to a misdemeanor. As the conditions of the delayed sentence, the trial court placed defendant on probation with the usual associated costs, but also imposed a fine of \$20,000. The court made clear that if the fine was not paid, defendant would not receive a reduction in his conviction. Defendant now appeals, arguing that the fine is not proportional to his offense and that the trial court should have stated reasons on the record for imposing such a large fine.

We cannot reach the defendant’s issues, however, because there is no proper sentence before us. The trial court stated that it would delay sentencing for one year. MCL 771.1(2) provides that in any case where the court has the option of sentencing the defendant to probation, “the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant’s rehabilitation”

A delay in sentencing is just that. It means that the court will impose the sentence after a period of time based on facts then known to the court. Calling a sentence a “delayed sentence” does not make it one. The court’s options at the

sentencing hearing are to impose the sentence or to enter an order delaying the imposition of any part of the sentence for reasons stated in the order.

Reasonable conditions may be imposed for the delay if they will give the defendant an opportunity to prove his or her eligibility for probation or leniency. Requiring that defendant obtain psychiatric treatment, in a proper case, may be a valid condition. Nevertheless, *jail incarceration cannot be a valid condition because it is the precise type of punishment authorized by the Legislature for the offense.* [*People v Saenz*, 173 Mich App 405, 409; 433 NW2d 861 (1988) (emphasis added); see also *People v Cannon*].

In the present case, the trial court imposed a \$20,000 fine as a condition of the delay in sentencing. That is the (maximum) fine set forth in MCL 333.7401(2)(d)(iii) as punishment for the crime. In other words, “it is the precise type of punishment authorized by the Legislature for [defendant’s] offense,” and not a means by which defendant could prove his eligibility for probation. *Saenz*, 173 Mich App at 409-410.

We recognize that MCL 771.3(10) provides that when imposing a delayed sentence a trial court “may impose, as applicable, the conditions of probation described in subsections (1), (2) and (3)” and that subsection (2)(b) allows a court to impose payment of a fine as a condition of probation. However, subsection (2)(a) provides for imprisonment in the county jail for up to one year as a condition of probation, yet in *Saenz* we held that such a probationary condition could not be applied in the delayed sentencing context as it constitutes a punishment specifically provided for by the criminal law violated. The same is true here as MCL 333.7401(2)(d)(iii) specifically provides for a fine up to \$20,000 as the punishment for its violation. The fine imposed in this case “is the precise type of punishment authorized by the Legislature for [defendant’s] offense,” and a trial court may only punish a defendant once for any given crime.¹

We vacate defendant’s sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher

¹ We also note that requiring payment of \$20,000 as a condition of obtaining a misdemeanor rather than a felony record raises constitutional questions in the absence of any mechanism by which failure to pay such an amount may be excused based on an inability to pay. See *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983).