

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EVAN STEWART,

Defendant-Appellant.

UNPUBLISHED

January 8, 2013

No. 307514

Muskegon Circuit Court

LC No. 09-058774-FH

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant pleaded guilty to possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii); possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to 10 to 40 years' imprisonment for possession with intent to deliver 50 or more but less than 450 grams of cocaine, 3 to 25 years' imprisonment for possession with intent to deliver less than 50 grams of cocaine, and to 401 days' imprisonment for possession of marijuana. In addition, the trial court imposed \$500 in court costs. Defendant filed an application for leave to appeal, which we subsequently granted. *People v John Evan Stewart*, unpublished order of the Court of Appeals, entered January 13, 2012 (Docket No. 307514). For the reasons set forth in this opinion, we affirm.

Defendant first argues that the trial court erred in scoring offense variable (OV) 15, MCL 777.45 (aggravated controlled substance offenses), at 50 points. However, at sentencing, defense counsel told the trial court: "Judge, I have no additions or corrections in the presentence investigation." The trial court also directly asked defendant "[d]o you have any additions or corrections?" Defendant responded "[n]o." Defendant's presentence investigation report [PSIR] included a sentencing information report [SIR] that scored OV 15 at 50 points. Accordingly, both defense counsel and defendant expressly informed the trial court that they had no corrections to the SIR. The sentencing guidelines were not discussed in any other manner at sentencing. Defendant's express approval of the trial court's scoring of OV 15 at 50 points waived this issue. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011), holding that a defendant affirmatively waives an issue where defense counsel states that he has no objection to a trial court's ruling. See also, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Even if defendant had not waived his arguments to the scoring, review of his arguments lead us to conclude they are without merit. Turning to the merits of defendant's arguments, he argues that, as a matter of statutory interpretation, the trial court erred in scoring OV 15 at 50 points. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). In reading a provision, "[t]he fair and natural import of the provision governs, considering the subject matter of the entire statute." *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009). The first step in interpreting statutory language is to look at the statutory text. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The Legislature is presumed to have intended the meaning it plainly expressed, and clear statutory language must be enforced as written. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). If the plain and ordinary meaning of the language is clear, judicial construction is not required or permitted. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

OV 15 is scored at 50 points where a defendant committed an offense that involved the "manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv)." MCL 777.45(1)(c). Here, defendant pleaded guilty to the offense of possession with intent to deliver 50 or more but less than 450 grams of cocaine, which is listed as a schedule 2 controlled substance under MCL 333.7214(a)(iv). Defendant does not challenge the factual basis for scoring OV 15 at 50 points, and the plain language of MCL 333.7214(a)(iv) provides that OV 15 should be scored at 50 points in this case.

However, defendant cites *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) for the proposition that the sentencing guidelines reflect the principle that "all offenders who have committed the same offense are to be sentenced with consideration of . . . the particular aspects of the offense which make it a more severe crime than the same crime committed without such aspects." From that starting point, defendant argues that offense variables reflect only "the characteristics of the case which make it more egregious than the same crime without such characteristics." Thus, defendant argues that under *Milbourn*, the application of MCL 777.45(1)(c) to defendant's case is an absurd result because OV 15 does not score "the characteristics of the case which make it more egregious than the same crime without such characteristics," but rather the underlying offense itself. And, statutes must be construed to avoid absurd results. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).

Defendant's argument is predicated on an incorrect statement of the principle of proportionality that underlies the current statutory guidelines. In *Milbourn*, our Supreme Court acknowledged that defendants should be sentenced proportionally, based on the "seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. In *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), the Michigan Supreme Court recognized that the Michigan Legislature subscribed to the principle of proportionality found in *Milbourn* when it promulgated its sentencing guidelines. *Id.* at 263-264. The Supreme Court clarified that "[o]ffense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history." *Id.* Thus, under *Babcock*, offense variables do not merely score "the characteristics of the case which make it more egregious than the same crime without such characteristics" as argued by defendant, but

also the *severity of the criminal offense itself*. Thus, the fact that OV 15 was scored at 50 points in this case based solely on defendant pleading guilty to the underlying drug offense was appropriate because OV 15 is scored based on the severity of the underlying drug offense. Construing OV 15 to be applied in that manner is not an “absurd” result based on *Babcock’s* holding. *Tennyson*, 487 Mich at 741. Accordingly, the plain language of OV 15 controls this case, *Weeder*, 469 Mich at 497.

Defendant also argues that assessing 50 points for the same conduct that led to defendant’s conviction violated defendant’s right to be protected against disproportionate and multiple punishments for a single criminal act. Defendant argues that his sentence was not properly within the guidelines range because the same conduct that led to his conviction for possession with intent to deliver 50 or more but less than 450 grams of cocaine also led to the trial court’s scoring of OV 15 at 50 points. In reference to other variables, the Michigan Legislature prohibited the use of the same conduct to support both a criminal conviction and also the scoring of an offense variable, or to support the scoring of two separate offense variables simultaneously. However, the plain language of those offense variables limited the application of those provisions to those variables themselves. The Legislature did not intend to create a broad rule preventing the same conduct from being used to form the factual basis for both a conviction and the scoring of any offense variable. And, unlike in the offense variables cited by defendant, the plain language of OV 15 creates no prohibition on the use of the same conduct to form the factual basis for both a drug conviction and also for the scoring of OV 15. Hence, we find that defendant’s argument that the trial court’s scoring of OV 15 at 50 points rendered his sentence disproportionate is meritless.

In regard to defendant’s multiple punishment argument, under both the Federal and Michigan Constitutions, a criminal defendant may not be placed twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The federal and Michigan prohibitions on double jeopardy are to be construed consistently. *People v Davis*, 472 Mich 156, 167-168; 695 NW2d 45 (2005). As part of its protection, the Double Jeopardy Clause prohibits multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). “The Double Jeopardy Clause protects against multiple punishments for the same offense in order to protect the defendant from being sentenced to more punishment than the Legislature intended.” *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005), lv den 474 Mich 934 (2005). However, “the score a defendant receives on an offense variable is not a form of punishment” under the Double Jeopardy Clause. *People v Gibson*, 219 Mich App 530, 535; 557 NW2d 141 (1996), lv den 455 Mich 873 (1997). Accordingly, the fact that the same conduct forms the factual basis for both defendant’s conviction and also for the scoring of OV 15 does not violate the prohibition on multiple punishments for the same offense. *Nutt*, 469 Mich at 574.

Defendant also argues that the trial court erred in imposing court costs in the amount of \$500 because the imposition of those costs was not expressly authorized by statute in this case. This issue is unpreserved because it was not raised before the trial court. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, error, which is clear or obvious, must have occurred and affected defendant’s substantial rights. *Id.* at 763.

“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). On appeal, plaintiff argues that MCL 769.1k and MCL 769.34(6) provided the trial court with the statutory authority to impose the court costs. MCL 769.1k provides, in relevant part, that:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(i) Any fine.

(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

(iii) The expenses of providing legal assistance to the defendant.

(iv) Any assessment authorized by law.

(v) Reimbursement under section 1f of this chapter.

MCL 769.34(6) 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 court shall order payment of restitution as provided by law.” In *People v Lloyd*, 284 Mich App 703; 774 NW2d 347 (2009), this Court addressed the very issue raised by defendant. In *Lloyd*, we held that MCL 769.1k and MCL 769.34(6) were enacted by the Michigan Legislature to expressly grant authority to a sentencing court to order a defendant to pay court costs. Thus, the trial court had the authority to impose court costs under MCL 769.1k and MCL 769.34(6), and defendant fails to show plain error in the imposition of those costs. *Carines*, 460 Mich at 763; *Lloyd*, 284 Mich App at 709-710.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra