

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ALLEN SHOEMAKER,

Defendant-Appellant.

UNPUBLISHED

June 19, 2014

No. 315295

Berrien Circuit Court

LC No. 2012-016247-FH

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals on delayed leave granted his sentence relating to plea-based convictions for eavesdropping upon a private conversation, MCL 750.539c, and capturing the image of an unclothed person, MCL 750.539j. The trial court sentenced defendant to five years' probation including 300 days' jail time, and ordered defendant to pay \$300 in attorney fees. For the reasons explained in this opinion, we affirm.

On appeal, defendant first argues that the trial court erred in requiring him to register under the Sex Offender Registration Act (SORA). Under SORA, an individual convicted of certain "listed offenses" must register as a sex offender. MCL 28.723(1)(b); *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). In requiring defendant to register, the trial court relied on MCL 28.822(s)(vii), which includes within tier I offenses "an offense committed by a person who was, at the time of the offense, a sexually delinquent person as defined in [MCL 750.10a]." Defendant maintains the trial court's reliance on this provision was in error because he had not been charged and convicted as a "sexually delinquent person" under MCL 750.10a in accordance with the procedures described in MCL 767.61a.

Defendant challenged the SORA registration requirement in the trial court, filing a motion to correct his sentence in October of 2012. In response, in December of 2012, the trial court entered an order deleting the SORA registration requirement from defendant's order of probation. Defendant sought leave to appeal in this Court in March of 2013. After his application had been filed, in April of 2013, the trial court also amended defendant's judgment of sentence to remove the sex offender registration requirement. On appeal, the prosecution does not contest the trial court's removal of the SORA registration requirement.

On these facts, there is no existing controversy between the parties for us to resolve. See *People v Richmond*, 486 Mich 29, 34-36; 782 NW2d 187 (2010). Given that defendant has

already received the relief he now requests on appeal, there is no relief this Court could fashion and, as an abstract question of law, defendant's claim is moot. See *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004) ("An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy."). Because we will not decide moot issues, we decline to reach the substantive merits of defendant's SORA argument. See *Richmond*, 486 Mich at 35, 41.

Defendant also argues on appeal that his sentence of 300 days' in jail in conjunction with five years' probation violated prohibitions on double jeopardy and exceeded the time limits on probationary sentences described in MCL 771.2(1). Having failed to raise these arguments at sentencing, his claims are unpreserved and reviewed for plain error. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002).

Under the United States and Michigan constitutions, a person may not be placed in jeopardy twice for the same offense. US Const Am V; Const 1963, art 1, § 15. These provisions protect against multiple prosecutions for the same offense, as well as multiple punishments for the same offense. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Relevant to defendant's arguments, eavesdropping upon a private conversation is a felony punishable by up to two years' imprisonment, MCL 750.539c, and capturing the image of an unclothed person is a felony punishable by up to five years' imprisonment, MCL 750.539j(2)(b). Pursuant to MCL 771.1(1), the trial court also had the option of sentencing defendant to probation. "A sentence of probation is an alternative to confining a defendant in jail or prison and is granted as a matter of grace in lieu of incarceration." *People v McKeown*, 228 Mich App 542, 545; 579 NW2d 122 (1998). The length of probation is prescribed by MCL 771.2(1), which states that "if the defendant is convicted of a felony, the probation period shall not exceed 5 years." When ordering probation, the trial court may impose conditions on probation, including a term of incarceration in county jail. See MCL 771.3(2)(a). Thus, in defendant's case, the trial court had the option of sentencing defendant to a term of imprisonment or of imposing a period of probation which could include jail time as a condition of probation.

Reviewing defendant's judgment of sentence and order of probation, we cannot conclude that the trial court violated double jeopardy principles or exceeded the maximum probationary period allowed by MCL 771.2(1). This is so because the jail time in question was imposed as a condition of defendant's probation pursuant to MCL 771.3(2)(a). That is, contrary to defendant's arguments, the trial court did not impose jail time consecutive to probation. Instead, the judgment of sentence and order of probation plainly describe the same jail time: 300 days' jail time with credit for 36 days. The order of probation begins on the day of defendant's sentencing and expires five years later; it does not run consecutively to his jail sentence. In other words, the probationary period encompasses the jail time, and the jail time is in fact a condition of defendant's probation as permitted by MCL 771.3(2)(a). This understanding of defendant's sentence comports with the trial court's verbal indication at sentencing that the jail time was imposed as a condition of probation. Given that defendant has received the sentence to which he argues he was entitled, he has not shown any error, let alone plain error affecting his substantial rights, and he is not entitled to relief.

Lastly, defendant challenges the trial court's imposition of \$300 in attorney fees based on his inability to pay. Because defendant failed to raise a timely objection in the trial court to the

enforcement of that assessment, his claim is unpreserved and reviewed for plain error. *People v Jackson*, 483 Mich 271, 292; 769 NW2d 630 (2009); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Pursuant to MCL 769.1k(1)(b)(iii), when sentencing a defendant, a court may impose a fee for the “expenses of providing legal assistance to the defendant.” Although a defendant may challenge such a fee based on his or her inability to pay, the time for such challenges does not arise when the fee is imposed. *Jackson*, 483 Mich at 292-293. Rather, a defendant must wait to contest the imposition of a fee until the trial court begins enforcement of the fee. *Id.* Once enforcement begins, “the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency.” *Id.* at 292. “The operative question for any such evaluation will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time.*” *Id.* at 292-293 (emphasis in original). In addition, MCL 771.3(6)(b) allows a probationer to petition the sentencing court for relief from attorney fees if he or she has an inability to pay.

In defendant’s case, he was required to pay \$300 in attorney fees. Defendant correctly recognizes that an ability to pay analysis was not required at sentencing when the attorney fee in question was imposed. *Jackson*, 483 Mich at 292-293. To the extent he maintains that enforcement has begun and that he currently has an inability to pay, defendant failed to raise the issue in the trial court and there is no evidence that the fee is now being collected or that defendant is currently indigent. Accordingly, defendant has not shown that he is entitled to a remand to the trial court for correction of his attorney fees assessment.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Joel P. Hoekstra

/s/ William C. Whitbeck