

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ALEXANDER HART,

Defendant-Appellant.

UNPUBLISHED

October 9, 2007

No. 270395

Shiawassee Circuit Court

LC No. 05-003390-FH

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from an order sentencing him to prison for 21 to 48 months for resisting and obstructing an officer causing injury, MCL 750.81d(2), and 12 months for domestic violence/assault (second offense), MCL 750.81(3). Defendant was convicted by a jury. Defendant challenges the admission of similar acts evidence and the portion of his judgment of sentence that assessed \$1,000 in attorney fees and \$1,000 in court costs. We affirm in part and remand.

Defendant was charged with assaulting his girlfriend, Kristi Allett, and resisting and obstructing Deputy Keith Hansen, and causing injury to him, when Hansen tried to arrest defendant. The prosecutor was permitted to present evidence regarding a prior assault on a former girlfriend and prior altercations with police. We agree with defendant that this evidence was improperly admitted. Rather than prove a scheme or plan, this evidence tended to show that defendant is a hot-headed person with a propensity to commit assaults.

We nevertheless conclude that reversal is not warranted, because the error was harmless. We are satisfied that defendant would have been convicted without the similar-acts evidence. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Defendant next asserts that the court erred in requiring him to pay \$1000 in attorney fees and \$1000 in court costs. We agree that the record does not sufficiently establish a basis for these assessments.

When a defendant requests a court-appointed attorney and claims financial inability to retain counsel, MCR 6.005(B) requires the court to assess the following factors.

(1) present employment, earning capacity and living expenses;

- (2) outstanding debts and liabilities, secured and unsecured;
- (3) whether the defendant has qualified for and is receiving any form of public assistance;
- (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
- (5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

MCR 6.005(C) states, "If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution."

In *People v Dunbar*, 264 Mich App 240, 252-254; 690 NW2d 476 (2004), the Court discussed the features of a constitutionally acceptable reimbursement program from *Alexander v Johnson*, 742 F 2d 117, 124 (CA 4, 1984):

First, the program [for reimbursement] under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy.

This Court in *Dunbar* rejected the defendant's claim that the trial court should have made a "specific finding on the record regarding his ability to pay," noting that unless the defendant expressly objects to the reimbursement when it is ordered, no such formality is necessary. *Dunbar, supra*, 264 Mich App at 254. Nevertheless, "some indication of consideration," such as a general statement that the court considered defendant's ability to pay is required. *Id.* at 254-255. The *Dunbar* Court remanded because the record was "devoid of any indication that the court recognized that defendant's ability to pay needed to be considered in imposing a reimbursement requirement, unlike fines and costs." *Id.* at 255. Finally, *Dunbar* held that, 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." *Id.* at 256 n 15.

After *Dunbar* was decided, and after these offenses were committed, the Legislature enacted MCL 769.1k, effective January 1, 2006, which provides in pertinent part:

(1) 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 . . .

(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.

* * *

(5) The court may provide for the amounts imposed under this section to be collected at any time.

The new statute does not eliminate the requirement that the court consider defendant's resources and not require repayment as long as he is indigent. Our Supreme Court has remanded in similar circumstances, citing *Dunbar*, as recently as June 30 of this year. *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007).

Here, the court gave no indication that it considered defendant's repeated pleas of inability to pay. Defendant's income and assets sheet showed \$413 in monthly expenses (incorrectly added as \$363), no assets or income, and the statement, "I have not been employed since Sept 04." Defendant signed an agreement to pay \$50 a week for appointed counsel, but this was apparently required as a prerequisite to having counsel assigned, and at the pretrial in February 2006, defense counsel noted that defendant had gotten out of jail in December and had not been working. Defendant mentioned this again at the end of trial, and said that he had no money and was losing his housing. However, he said his parents might be able to come up with something. These statements were not acknowledged by the court, and there is no showing that they were considered. We therefore remand for "a decision on attorney fees that considers defendant's ability to pay now and in the future." *Arnone, supra*.

We further note some uncertainty regarding whether the court intended to require the payment of \$1000 costs and \$1000 attorney fees. At sentencing, the court stated that it was imposing "Court Costs in the amount of \$1,000.00 to offset in some small way the cost of prosecution, as well as to offset but not, obviously, to cover in full other costs such as attorney fees." It is unclear whether the court intended to impose \$1,000 total plus the statutory costs, or

\$1,000 for attorney fees plus \$1,000 for costs. Although courts speak through their orders and not their oral statements, the court should clarify this on remand.

Defendant's convictions are affirmed. The matter of costs and attorney fees is remanded for reconsideration in light of this opinion.

/s/ Donald S. Owens

/s/ Helene N. White

/s/ Christopher M. Murray