

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 14, 2011

v

EARL WATTERS,

No. 298890
Wayne Circuit Court
LC No. 09-027750-FC

Defendant-Appellant.

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

The trial court convicted defendant of armed robbery, MCL 750.529, and bank robbery, MCL 750.531, and sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 10 to 20 years for each conviction. Defendant appeals as of right. We affirm.

I. DOUBLE JEOPARDY

Defendant's convictions arise from the robbery of Marcus Lewis, a teller at Best Bank in Detroit. Defendant first argues that his convictions and sentences for both armed robbery and bank robbery arising from a single incident violate the double jeopardy protection against multiple punishments for the same offense. We disagree.

The Double Jeopardy Clause of the state and federal constitutions protects against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Matuszak*, 263 Mich App 42, 49; 687 NW2d 342 (2004). In *People v Smith*, 478 Mich 292, 295-296; 733 NW2d 351 (2007), our Supreme Court overruled the test formerly adopted in *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984), for analyzing double jeopardy claims under the state constitution and held that the scope of the double jeopardy protection against multiple punishments for the same offense is to be analyzed under both the federal and state constitutions by applying the "same elements" test from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). As this Court explained in *People v McGee*, 280 Mich App 680, 682-683; 761 NW2d 743 (2008):

If the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent,

multiple offenses may be punished if each offense has an element that the other does not. In other words, the test “emphasizes the elements of the two crimes.” “If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .” [Footnotes omitted.]

In *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004), this Court applied the *Blockburger* test to a defendant’s separate convictions for bank robbery and armed robbery. This Court observed that

[A]rmed robbery lacks an element necessary to violate the bank, safe, or vault robbery statute: the intent to steal property from “any building, bank, safe, vault or other depository of money, bonds, or other valuables.” MCL 750.531; *People v Monick*, 283 Mich 195, 197; 277 NW 883 (1938). Similarly, the offense of armed robbery contains elements never required to prove bank, safe, or vault robbery: the use of “a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon” and the taking of property from or in the presence of a person. MCL 750.529; *People v Randolph*, 466 Mich 532, 536; 648 NW2d 164 (2002)[.] Because armed robbery and bank, safe, or vault robbery are distinct offenses under *Blockburger*, it is presumed that the Legislature intended to authorize multiple punishments. [Citation omitted.]

Defendant’s reliance on *People v Campbell*, 165 Mich App 1, 4-7; 418 NW2d 404 (1987), is misplaced because that case was based on *Robideau*, which is no longer valid. Because armed robbery and bank robbery each contains an element that the other does not, defendant’s convictions and sentences for both armed robbery and bank robbery do not violate the double jeopardy protection against multiple punishments for the same offense.

II. RESTITUTION

Next, defendant argues that, contrary to the trial court’s statement at sentencing that he would not be required to pay the restitution amount of \$1,100 until he was released on parole, the court erroneously ordered in the judgment of sentence that restitution be paid immediately. We disagree. Paragraph 12 of the judgment of sentence specifically provides that “Defendant must pay \$1,100.00 restitution while on parole.” Further, although the total amount of fees, costs, and restitution ordered in the judgment of sentence is \$2,296, an order to remit funds from defendant’s prison account provides that the Department of Corrections is to collect only the “balance of \$1,196, **not including restitution.**” [Emphasis in original.] Defendant has not shown that there has been any attempt to collect restitution from him while he has been in prison. Accordingly, defendant has failed to show that either modification of the judgment of sentence or other relief is necessary with respect to this issue.

III. ATTORNEY FEES

Defendant also argues that the trial court erred at sentencing when it ordered him to pay attorney fees of \$400 without first determining his ability to pay those fees. Because defendant

did not challenge the trial court's authority to assess those fees without inquiring into his ability to pay, this issue is not preserved. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Contrary to what defendant argues, MCL 769.1k authorized the trial court to impose a fee for his court-appointed attorney without reference to his ability to pay, and an ability-to-pay analysis was not constitutionally required at the time the fees were imposed. *People v Jackson*, 483 Mich 271, 283, 290; 769 NW2d 630 (2009). An ability-to-pay assessment is required only when a fee is enforced. *Id.* at 291. Thus, courts should not entertain ability-to-pay challenges until the time of enforcement. *Id.* at 292-293. Therefore, the trial court was not obligated to determine defendant's ability to repay the assessed attorney fees of \$400 at the time of sentencing. To the extent defendant argues that he is now obligated to pay and is indigent, he has not provided any support for that claim, nor has he overcome the statutory presumption of nonindigency in MCL 769.1l, which only allows garnishment of a prisoner's account if the balance exceeds \$50. See *Jackson*, 483 Mich at 295. Accordingly, defendant has not shown that he is entitled to a remand for a hearing on his ability to repay his attorney fees.

IV. COURT COSTS

Defendant lastly argues that the trial court lacked the authority to impose costs of \$600. Defendant did not preserve this issue by objecting to the imposition of costs at sentencing. *Jackson*, 483 Mich at 292 n 18. Therefore, we review this issue for plain error. *Carines*, 460 Mich at 763.

"A trial court may require a convicted defendant to pay costs only where such a requirement is expressly authorized by statute." *People v Wallace*, 284 Mich App 467, 468; 772 NW2d 820 (2009). Defendant correctly observes that costs are not specifically authorized by either the armed robbery statute, MCL 750.529, or the bank robbery statute, MCL 750.531. However, defendant overlooks MCL 769.1k and MCL 769.34(6), which "expressly grant[] authority to a sentencing court to order a defendant to pay court costs." *People v Lloyd*, 284 Mich App 703, 709-710; 774 NW2d 347 (2009). Accordingly, the imposition of costs was not plain error.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause