STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2012
v	No. 309293 Midland Circuit Court
TODD ALAN VANWERT, Defendant-Appellant.	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).

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RONAYNE KRAUSE, J. *(dissenting)*

I respectfully dissent. I believe the trial court's use of a fine imposed while utilizing a delayed sentence is not an abuse of discretion. Accordingly, I would affirm the sentence.

MCL 333.7401(1)(d)(iii) allows for a punishment of "imprisonment for not more than 4 years or a fine of not more than $20,000.00, *or both*." (emphasis added). Although a statutory fine of $20,000 is the maximum fine imposed for this felony, it is not the maximum punishment. I believe that the maximum punishment, including a fine and incarceration, is the "precise type of punishment authorized by the Legislature" for this offense, not the fine alone. *People v Saenz*, 173 Mich App 405, 409-410; 433 NW2d 861 (1988). If the fine imposed in this case were the maximum punishment available under the statute, then I might be inclined to concur with majority opinion.

In *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995), this Court articulated that "probation is a matter of grace, not of right, and the trial court enjoys broad discretion in determining the conditions to be imposed as part of probation." In *Oswald*, a man pleaded guilty to retail fraud and received five years probation with the first seven months to be served in jail. The trial court also imposed a fine of $1,500, although the maximum statutory fine allowed for retail fraud was $1,000. The Court reasoned that an absence of statutory language in the probation statute limiting the fine that a court may impose along with probation showed a legislative intent to have probation fines be imposed notwithstanding statutory fines for the underlying offense(s). Although the defendant in *Oswald* received a fine greater than the statutory maximum for his offense *and* incarceration, his sentence was upheld.

Similarly, in *People v Williams*, 57 Mich App 439, 441-442; 225 NW2d 798 (1975) (citations omitted), it was held that "when a defendant is given probation, he is not deprived of any of his rights without due process, but rather he is given the privilege of avoiding the usual

penalty of his crime by the payment of a sum of money and observance of other conditions." In the instant case, defendant was given probation and ordered to pay a fine in accordance with MCL 771.1 and MCL 771.3(2)(b). Upon successfully paying this fine, defendant will be convicted of a misdemeanor rather than a felony. Also, defendant will be able to avoid any incarceration, although MCL 333.7401(2)(d)(iii) allows for defendant to be sentenced for up to four years imprisonment. Thus, defendant is being required to pay a fine in order to avoid the "usual penalty" of imprisonment for up to four years.

Without statutory language limiting the trial court's power to impose a fine along with probation, I cannot find the fine imposed in the instant case as double punishment. Furthermore, the trial court afforded defendant the opportunity to pay a fine in order to avoid incarceration, which is one of the benefits of utilizing probation in sentencing.

Finally, and importantly, there was evidence of defendant's assets and income at sentencing: the PSIR indicated that defendant had a steady income of $2,000 per month. Given defendant's income at the time of sentencing, merely asserting that the fine was "far beyond [defendant's] ability to pay" is an inadequate argument.[1] And the Michigan Supreme Court has previously held that it is not sufficient for an appellant to "simply announce a position or assert and error" and leave the rest of the work for the Court. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Therefore, I would affirm.

/s/ Amy Ronayne Krause

[1] I acknowledge the majority's assertion that this seems to allow a reasonably affluent person to pay money to get charges lowered from felonies to misdemeanors. However, as the law reads, the result is in accordance with our jurisprudence, and the Court does not decide abstract questions of law. There has been no challenge raised in this case as to whether the statute creates a buy-out option for rich felons, so we will not issue an advisory opinion at this time. Furthermore, it is important to note that MCR 6.502 allows a defendant to motion the court to set aside a judgment based on inability to pay an imposed fine.