

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MELODY TYNETTE JONES,
Defendant-Appellant.

FOR PUBLICATION
April 25, 2013
9:05 a.m.

No. 309303
Berrien Circuit Court
LC No. 2011-002807-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

STACEY RENEE ANDERSON,
Defendant-Appellant.

No. 310314
Wayne Circuit Court
LC No. 11-005631-FC

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

HOEKSTRA, J.

Defendant in Docket No. 309303 pleaded guilty to attempted welfare fraud over \$500, MCL 400.60. She was sentenced to 45 days in jail, and the trial court imposed a \$300 fine, \$1,000 in court costs, \$1,556 in restitution, a \$130 crime victim rights assessment, and a \$68 state minimum fee. Defendant in Docket No. 310314 pleaded guilty to second-degree murder, MCL 750.317. She was sentenced to 16 to 30 years' imprisonment, and the trial court imposed a \$130 crime victim rights assessment and a \$68 state minimum fee. We granted both defendants' delayed applications for leave to appeal and consolidated the cases. Because we conclude that the imposition of the increased crime victim rights assessment under 2010 PA 281 to offenses committed before that law's effective date is not a violation of the ex post facto constitutional clauses, we affirm.

On appeal, both defendants argue that the imposition of the \$130 crime victim rights assessment violated the Michigan and federal constitutional prohibitions on ex post facto laws. Unpreserved constitutional issues are reviewed for plain error. *People v Carines*, 460 Mich 750,

763-764; 597 NW2d 130 (1999). Both the United States Constitution and the Michigan Constitution prohibit ex post facto laws. US Const, art 1, § 10; Const 1963, art 1, § 1. Michigan's prohibition on ex post facto laws is not more expansive than its federal counterpart. *People v Callon*, 256 Mich App 312, 317; 662 NW2d 501 (2003). "All ex post facto laws share two elements: (1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant." *Id.* at 318. "A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence." *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).

MCL 780.905 governs the payment and use of assessments and currently provides that:

(1) The court shall order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment as follows:

(a) If the offense is a felony, \$130.00.

The crime victim rights assessment found in MCL 780.905(1) is specifically authorized by the Michigan Constitution. Const 1963, art 1, § 24(3) ("[t]he legislature may provide for an assessment against convicted defendants to pay for crime victims' rights"). At the time both defendants committed their felony offenses, the crime victim rights assessment under MCL 780.905 as amended by 2005 PA 315 was \$60. 2010 PA 281 amended MCL 780.905, effective December 16, 2010, increasing the crime victim rights assessment to \$130 where a defendant is convicted of a felony offense. Both defendants argue that the trial court's application of the \$130 crime victim rights assessment constituted a retroactive increase in punishment, and thus was prohibited by the ex post facto clauses. However, we addressed the same issue in *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012). In *Earl*, we held that the imposition of the increased assessment under 2010 PA 281 to offenses committed before that law's effective date "is not a violation of the ex post facto constitutional clauses." *Id.* at 114. *Earl*'s holding is binding under MCR 7.215(C)(2) and (J)(1). Accordingly, the trial courts did not err by imposing the \$130 crime victim rights assessment on both defendants. *Carines*, 460 Mich at 763-764.

While defendants argue that *Earl* was wrongly decided and urge us to take steps to bring the case before a conflict panel, MCR 7.215(J)(2), we find their arguments entirely unpersuasive. Defendants argue that *Earl* relied on obiter dictum in *People v Matthews*, 202 Mich App 175, 177; 508 NW2d 173 (1993). Obiter dictum is an incidental remark or opinion related to but unnecessary to the case. *Allison v AEW Capital Management LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008). Addressing an alternative argument is, in fact, necessary to the disposition of a case, and consequently is not obiter dictum. *Id.* at 437. This is precisely what occurred in the portion of *Matthews* relied upon in *Earl*: this Court addressed two equal alternative bases for rejecting a particular argument raised by the defendant. Therefore, we reject the contention that *Earl* relied on obiter dictum.

We find nothing in the plain text of the statute or the act explicitly or implicitly setting forth the Legislature’s intention whether or not to make the assessment a “punishment.” The fact that the assessment is imposed only if a defendant is convicted is not, itself, dispositive. While it may be perceived as such, it does not act as a “punishment” in the legal sense because it is tied to being a felon in the abstract, rather than to any specific crime. Put another way, the assessment does not “make[] more burdensome the punishment for a crime,” *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992), quoting *Dobbert v Florida*, 432 US 282, 292-293; 97 S Ct 2290; 53 L Ed 2d 344 (1977), because it simply is not a consequence of any particular crime, but rather is a consequence of crime itself. Tellingly, the statute provides that a defendant can be charged only one such fee per criminal case, meaning the more felonies one is convicted of at once, the *lower* the fee charged per felony. Thus, it is effectively the opposite of the way in which punishment is expected to operate. We are unpersuaded that *Earl* was wrongly decided.

Defendant Jones in Docket No. 309303 also argues that the trial court erred by imposing \$1000 in court costs because the trial court failed to link those court costs to the particular expenses of the case. MCL 769.1k(1) provides:

(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.

In *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012), we held that “a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(ii) without the necessity of separately calculating the costs involved in the particular case,” This holding is binding under MCR 7.215(C)(2) and (J)(1), and again we decline to express our disagreement with this decision where we find defendant Jones’s arguments unpersuasive. Defendant’s argument that the trial court erred by failing to link the imposed court costs to the particular expenses of the case is meritless. *Id.*

Alternatively, defendant asks us to remand the case to the trial court for a hearing to establish a factual basis for the \$1,000 in court costs to ensure a reasonable relationship between the costs imposed and the costs incurred in this case, as ordered by the panel in *Sanders*, 296

Mich App at 715-716. However, this alternate relief is unnecessary because we have already upheld \$1,000 in court costs as having a reasonable relationship with the cost of conducting a felony case within the Berrien Circuit Court, the jurisdiction of defendant's case. *People v Sanders (After Remand)*, 298 Mich App 105; ___NW2d___ (2012), slip op at 2.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause

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STEPHENS, J. (*concurring*).

The majority bases its conclusion with regard to the CVRA exclusively on *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012). I acknowledge that I am compelled to follow *Earl* because it is binding precedent. MCR 7.215(J)(1). However, I write separately to note that, in my view, *Earl*'s reasoning is flawed and that therefore the majority's conclusions are inconsistent with other, prior case law interpreting the ex post facto clause. Specifically, *Earl* concluded that the CVRA is not a punishment, and therefore outside the ambit of the ex post facto clause of the Michigan Constitution. *Id.* at 114. In reaching this conclusion, *Earl* relied almost exclusively on one paragraph from *People v Matthews*, 202 Mich App 175, 177; 508 NW2d 173 (1993), in which this Court noted that the CVRA "assessment is not intended to be a form of restitution. . . ." However, because that sentence from *Matthews* was "not essential to the disposition of the case[, it] constitute[s] obiter dicta and lack[s] the force of a binding adjudication." *People v Crockran*, 292 Mich App 253, 258; 808 NW2d 499 (2011) (citations omitted). Indeed, unlike the majority and the *Earl* Court, I agree with defendants that the CVRA is a punishment because the Legislature intended for it to be a punishment. See MCL780.905. See also *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003). The majority's

conclusion is therefore contrary to prior ex post facto clause case law because the imposition of an additional \$70 dollars “increases [defendant’s] punishment” for conduct occurring before the current version of the CVRA statute took effect. *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995). See also *In re Contempt of Henry*, 282 Mich App 656; 765 NW2d 44 (2009), *People v Hill*, 267 Mich App 345; 705 NW2d 139 (2005).

/s/ Cynthia Diane Stephens