

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 13, 2014

v

RAYNAULD KEITH OTTO,  
  
Defendant-Appellant.

No. 308206  
Oakland Circuit Court  
LC No. 2003-190574-FC

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Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Defendant was sentenced in 2003, after entering a guilty plea to four counts of armed robbery. The sentence included a specific restitution order. Six years later, the circuit court ordered defendant to repay an additional debt of \$5,780.55 to cover the cost of defendant's court-appointed counsel. We granted defendant's delayed application for leave to appeal to consider the circuit court's subsequent denial of defendant's motion to vacate the 2009 order to remit prisoner funds. Although we find no merit in defendant's legal challenges, we remand this matter to the circuit court for an accounting of the amount that defendant owes for fines, costs, assessments, and court-appointed attorney fees.

**I. BACKGROUND**

On May 28 and June 16, 2003, defendant signed requests for court-appointed counsel. In each, defendant acknowledged that he was "ordered to repay the County of Oakland for any costs for a court appointed attorney." Those forms specifically indicated that the amount would be determined at a later date.

Following defendant's September 11, 2003 sentencing hearing, the court entered a judgment of sentence and ordered defendant to pay restitution of \$2,531.50, as well as a \$180 assessment for the crime victim rights fund, and \$60 for a DNA fee. The court amended the judgment three days later, but these provisions remained the same. Neither judgment of sentence specifically referenced outstanding costs for court-appointed counsel and the issue was not raised at sentencing.

On June 9, 2009, the chief judge of the circuit court signed an order to remit prisoner funds for fines, costs and assessments.<sup>1</sup> The order provided, in relevant part:

The defendant owes a balance of **\$5780.55, not including restitution** which is collected by the Department of Corrections in accordance with MCL 791.220h,<sup>[2]</sup> for the obligation ordered in the judgment of sentence or other order dated 091103.

There is no record explanation of what prompted the circuit court to enter the order at that point in time. The parties agree, however, that this order relates to the costs of court-appointed counsel. Defendant filed a motion to vacate the order, which the circuit court denied.

Defendant appeals the denial of his motion to vacate the remitter order. He contends that the court violated his right to due process of law by entering the June 9, 2009 order with no notice or hearing. Defendant argues that the court relied on statutes enacted after his sentencing to increase the financial penalty for his crimes in violation of ex post facto law prohibitions. Defendant further asserts that the court could not alter his sentence to add an attorney fee reimbursement order without first showing that his sentence was invalid and subject to amendment.

## II. LAW REGARDING COLLECTION OF FEES FOR APPOINTED COUNSEL

It has long been established that a county may require a criminal defendant to reimburse it for the cost of court-appointed counsel. *People v Bohm*, 393 Mich 129, 131; 223 NW2d 291 (1974); *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004); *People v Nowicki*, 213 Mich App 383, 388; 539 NW2d 590 (1995). See also MCR 6.005(C) (adopted in 1989 and allowing a court to require a criminal defendant to repay all or part of the cost of his court-appointed attorney). Prior to 2006, Michigan had no statutory mechanism governing the imposition and collection of such court-ordered reimbursement. As such, circuit courts had to enter a separate order to require repayment. *Dunbar*, 264 Mich App at 256 and n 15.

Effective January 1, 2006, the Legislature enacted two statutes to control the imposition and collection of reimbursement for court-appointed attorney costs. MCL 769.1k provides, in relevant part:

(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

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<sup>1</sup> Defendant's argument regarding why the chief judge of the circuit court, rather than the sentencing judge, signed the order is without merit. As was explained to defendant in a letter from the court administrator's office, the chief judge signed in her "administrative capacity" and the sentencing judge continued to preside over all issues related to the case.

<sup>2</sup> MCL 791.220h provides that payment of restitution may be taken from prisoner funds.

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:

\* \* \*

(b) The court may impose any or all of the following:

\* \* \*

(iii) The expenses of providing legal assistance to the defendant.

\* \* \*

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

MCL 769.11 in turn provides:

If a prisoner under the jurisdiction of the department of corrections has been ordered to pay any sum of money as described in [MCL 769.1k] and the department of corrections receives an order from the court on a form prescribed by the state court administrative office, the department of corrections shall deduct 50% of the funds received by the prisoner in a month over \$50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds \$100.00, or the entire amount if the prisoner is paroled, is transferred to community programs, or is discharged on the maximum sentence. The department of corrections shall give an order of restitution under [MCL 791.220h], or the crime victim's rights act, [MCL 780.751 to 780.834, priority over an order received under this section.

“These statutes give Michigan trial courts the power to both impose a fee for a court-appointed attorney as part of a defendant’s sentence and to enforce that imposition against an imprisoned defendant.” *People v Jackson*, 483 Mich 271, 283; 769 NW2d 630 (2009).

### III. ANALYSIS

Defendant contends that the circuit court deprived him of due process of law by failing to give him notice before entering the June 9, 2009 order and denying him an opportunity to be heard. See *Napuche v Liquor Control Comm*, 336 Mich 398, 403; 58 NW2d 118 (1953) (quotation marks and citation omitted) (holding that as a general rule, “[d]ue process of law requires notice and opportunity to be heard”). He also contends that the retroactive application of MCL 769.1k and MCL 769.11 amounted to an ex post facto violation. We review such constitutional challenges de novo. *Elba Twp v Gratiot Co Drain Comm’r*, 493 Mich 265, 277; 83 NW2d 204 (2013); *In re Contempt of Henry*, 282 Mich App 656, 681; NW2d 765 NW2d 44 (2009).

In *Jackson*, the Michigan Supreme Court explained the proper procedures for determining a defendant’s ability to repay the costs of a court-appointed attorney. The Court

held that an ability-to-pay assessment was not necessary at the time that the fee or cost was *imposed*, but was required when the obligation was *enforced*. *Jackson*, 483 Mich at 291-292. The Legislature, in enacting MCL 769.1l, assured that a criminal defendant's ability to pay is assessed at the time of enforcement. The statutory formula is structured to consider a defendant's ability to pay. *Jackson*, 483 Mich at 295. Specifically, MCL 769.1l creates a presumption of ability to pay because it only allows the garnishment of a prisoner's account if the balance exceeds \$50. *Jackson*, 483 Mich at 295. A prisoner has the right to rebut the presumption under the statutes as well; "he may petition the court to reduce or eliminate the amount that the remittance order requires him to pay." *Id.* at 296. To prevail, a defendant must show "manifest hardship," a high hurdle given that "a prisoner is being provided all significant life necessities by the state." *Id.*

Here, defendant had been on notice since May 2003, that he would be required to reimburse the county for the cost of his court-appointed attorney and that the amount would be determined at a later date. The statutes permitted the circuit court to enforce the order at any time and require repayment. Accordingly, the court acted within its authority in June 2009, when it imposed the attorney-fee reimbursement order and sought remittance from defendant's prison funds if defendant's account was solvent pursuant to MCL 769.1l. Defendant was not denied the opportunity to be heard because if he believes his financial circumstances are unique and repayment would result in manifest hardship, he can petition the court to reduce or eliminate the remittance order. Defendant did not challenge his ability to pay in the circuit court, only the timing of the remitter order. If defendant raises a proper motion, he will have the opportunity to be heard below.

The imposition of the attorney fee reimbursement order in 2009, even if done in reliance on the 2006 statutory enactments, also did not amount to an *ex post facto* violation. "The *ex post facto* clauses of both the state and federal constitutions prohibit inflicting a greater punishment for a crime committed than that provided for when the crime was committed." *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012). "A statute violates *ex post facto* principles if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence." *Id.* (citations omitted). "Generally, statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." *Id.* at 113 (quotation marks and citation omitted). Where, however, statutes "operate in furtherance of a remedy or mode of procedure and [] neither create new rights nor destroy, enlarge, or diminish existing rights," we generally find them to operate retrospectively "absent a contrary legislative intent." *Id.* (citation and quotation marks omitted).

The ability to impose attorney fees was permitted by caselaw and court rule long before the enactment of MCL 769.1k and MCL 769.1l. The statutes merely facilitate the collection of previously imposed fees. Therefore, the application of the statutes does not increase defendant's punishment, and does not destroy, enlarge, or diminish a criminal defendant's rights. Therefore, no *ex post facto* violation occurred and the statutes are applicable retroactively. And the circuit court had the authority to enforce defendant's obligation to repay the cost of his court-appointed attorney. Defendant signed orders in 2003, acknowledging his responsibility to repay the county. As noted in *Jackson*, 483 Mich at 291-292, the time to assess a defendant's ability to pay is when enforcement is attempted. Therefore, defendant suffered no prejudice as a result of the delay in pursuing collection. Moreover, there is no law limiting the time in which a court may collect

costs for a court-appointed attorney. According to *Jackson*, 483 Mich at 289-290, the state's interest in reimbursement for attorney fees continues indefinitely.

We also find no merit in defendant's contention that the judgment of sentence was a final order that could not be modified or amended unless the sentence was declared invalid by some form of appellate review. In 2003, when defendant's judgment of sentence was entered, an order for the recoupment of attorney fees was considered to be separate and distinct from the sentence. *Nowicki*, 213 Mich App at 386. As such, the original remittance order was part of the "request for appointed counsel and order for repayment." That order has not been modified. The 2003 remittance order expressly stated that the amount owed would be determined at a later date. The court's assessment in 2009 was consistent with that mandate.

Although we discern no constitutional or legal errors, the record is devoid of evidence regarding the calculation of the amount identified in the June 9, 2009 order. We remand to the circuit court to resolve the matter by preparing and serving upon defendant a documented accounting of the exact amount of reimbursement for fines, costs, assessments, and court-appointed attorney fees still owed by defendant.

We affirm the legality of the circuit court's order to remit prisoner funds but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher  
/s/ Henry William Saad  
/s/ Karen M. Fort Hood