

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

STEVEN MICHAEL CARTER,

Defendant-Appellee.

Supreme Court No. 134687

Court of Appeals No. 270195

Lower Court No. 05-011783

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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134687
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DEFENDANT APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTION PRESENTED

- I. ARE THE CONSTITUTIONAL UNDERPINNINGS REQUIRING A FACTUAL FINDING THAT A DEFENDANT EITHER HAS THE IMMEDIATE ABILITY, OR WILL IN THE FORSEEABLE FUTURE HAVE THE ABILITY, TO PAY THE EXPENSES OF HIS COURT APPOINTED COUNSEL BEFORE IMPOSING THOSE EXPENSES SOUND WHERE THOSE UNDERPINNINGS ARE DRAWN FROM THE UNITED STATES CONSTITUTION AND OVER 40 YEARS OF SUPREME COURT CASES INTERPRETING THE DUE PROCESS CLAUSE AS APPLIED TO THE STATES?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

I. THE CONSTITUTIONAL UNDERPINNINGS REQUIRING A FACTUAL FINDING THAT A DEFENDANT EITHER HAS THE IMMEDIATE ABILITY, OR WILL IN THE FORSEEABLE FUTURE HAVE THE ABILITY, TO PAY THE EXPENSES OF HIS COURT APPOINTED COUNSEL BEFORE IMPOSING THOSE EXPENSES ARE SOUND WHERE THOSE UNDERPINNINGS ARE DRAWN FROM THE UNITED STATES CONSTITUTION AND OVER 40 YEARS OF SUPREME COURT CASES INTERPRETING THE DUE PROCESS CLAUSE AS APPLIED TO THE STATES.

Facts

A Wayne County jury convicted Defendant-Appellant Steven Michael Carter as charged of one count of fourth-degree criminal sexual conduct following a one day jury trial on April 5, 2006. (Trial Transcript 195-196) On April 27, 2006 Judge Jones, who presided over the trial, sentenced Mr. Carter, whose guideline range was 0 to 11 months, to two years probation with the first year to be served in the county jail. (Sentencing Transcript 14, 16) The sentencing transcript reflects that there was no discussion, or even a mention, of the imposition of any types of fines, costs or fees during that proceeding. (See, generally, Sentencing Transcript) The record reflects no additional proceedings following sentencing.

This Court granted oral argument on the prosecution's application for leave to appeal from the Court of Appeals unpublished opinion remanding "this case to the trial court to consider defendant's attorney fees in light of his current and future financial circumstances and for resentencing." (Opinion at 1) This Court limited the issue for supplemental briefing to addressing the soundness of the constitutional underpinnings of *People v Dunbar*.

Argument

The constitutional right to counsel, US Const Am VI; Const 1963, art 1, § 20, guarantees that no one will be required to appear in a criminal proceeding without counsel due to indigency. *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). An indigent defendant

has the right to appointed counsel at public expense. *Jensen v Menominee Circuit Judge*, 382 Mich 535, 170 NW2d 836 (1969); MCR 6.005(B), 6.610(D)(2).

Under Michigan law, when a defendant requests a lawyer and claims financial inability to retain one, the court must determine whether that person is indigent. Under MCR 6.005(B), the court looks to 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 and 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.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer.

If a defendant's indigence is challenged, the trial court must resolve the matter at a hearing. *People v Jeske*, 128 Mich App 596; 341 NW2d 778 (1983).

The constitutional right to counsel also means that an indigent defendant may not be required to contribute as long as he remains indigent. Consequently, a post-trial order by a court that an indigent defendant must contribute to the cost of his court-appointed counsel is unconstitutional unless it complies with due process. *See Fuller v Oregon*, 417 US 40, 51-54; 94 S Ct 2116; 40 L Ed 2d 642 (1974). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Armstrong v Manzo*, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965)

The Legislature recently enacted a provision allowing the trial courts to impose an assessment on a criminal defendant for "the expenses of providing legal assistance to the

defendant.” MCL 769.1k.¹ Prior to the enactment of this statute, there was no law that provided for the imposition of an assessment to a defendant to reimburse the county for the cost of his appointed counsel. In *People v Nowicki*, 213 Mich App 383, 386-88; 539 NW2d 590 (1995), however, this Court found that such an order is implicitly authorized under MCR 6.005(C), which provides that “[i]f 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.” *Id.*

The 1989 staff comment to MCR 6.005(C) provides that “[t]his subrule pertains to contribution and should not be construed as authorizing subsequent reimbursement.” *Nowicki, supra* at 386 n 3. In *Nowicki*, however, this Court rejected the staff comment and found instead that the Rule does not preclude trial courts from ordering subsequent reimbursement of expenses paid for court-appointed counsel. *Id.* at 386 n 3. While noting that there was no statutory authority for such an order, this Court nonetheless held that a trial court had “discretionary power . . . to apply known assets of an alleged indigent toward defraying – in some part – the public cost of providing for that indigent the assistance of counsel.” *Id.* at 387.

In *People v Dunbar*, 264 Mich App 240, 690 NW2d 476 (2004) the Court of Appeals engaged in a thorough analysis of the trial court’s sentencing procedure with respect to the imposition of attorney fees to determine if it comported with due process. The Court concluded that due process required the trial court to consider the defendant’s financial circumstances. The Court stated: “It is important to recognize that the purpose of the court considering a defendant’s financial situation is to ensure that ‘repayment is not required as long as he remains indigent’” *Dunbar* at 256, quoting *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984).

¹ This provision only applies following conviction. MCL 769.1k(1)

Any court order requiring an indigent defendant to pay for his court appointed counsel must comply with due process. At the very least, due process requires the court (1) to offer to hold a hearing before it deprives the indigent defendant of a property interest and (2) to give the defendant notice of the proceeding. *Matthews v Eldridge*, 424 US 319, 333, 96 S Ct 893, 47 L Ed 2d 18 (1976).

In *James v Strange*, 407 US 128; 92 S Ct 2027; 32 L Ed 2d 600 (1972), the Supreme Court emphasized that a state could not subject an indigent who accepted court-appointed counsel to more severe collection practices than other civil debtors without violating the equal protection clause. *Id.* at 135-39. Two years later in *Fuller v Oregon*, 417 US 40, 51-54, 94 S Ct 2116, 40 L Ed 2d 642 (1974), the Supreme Court upheld an Oregon reimbursement plan that required an indigent to repay court-appointed counsel fees as a condition of probation. The Court upheld the plan because (1) the Oregon approach contained none of the invidious collection practices condemned in *James*, (2) it provided an array of procedural and substantive safeguards designed to preserve the indigent's basic right to counsel, and (3) it authorized reimbursement from the defendant only when he could afford to pay without substantial hardship. *Fuller, supra* at 45-53. Finally, in 1983, the Supreme Court in *Bearden v Georgia*, 461 US 660, 103 S Ct 2064, 76 L Ed 2d 221 (1983), ruled that a defendant who violated any monetary requirement of his probation or restitution regimen could not be imprisoned if his non-compliance resulted from his poverty alone. *Id.* at 667.

The federal courts of appeals have found that, when taken together, the Supreme Court's decisions in *James*, *Fuller*, and *Bearden*, indicate that a state's program requiring indigent defendants to reimburse attorneys fees must have five basic features to be constitutionally

acceptable. *Alexander v Johnson*, 742 F2d 117, 123-24 (CA 4, 1984); *see Olson v James*, 603 F2d 150, 153-55 (CA 10, 1979).

To comport with constitutional Due Process requires the following five features of any program of contribution/reimbursement:

(1) First, under all circumstances the state must guarantee the indigent defendant's fundamental right to counsel without procedural obstacles designed to determine whether he is entitled to court-appointed representation.

(2) Second, if a state decides to seek repayment from a defendant it must provide him with adequate notice of the contemplated action and a meaningful opportunity to be heard.

(3) Third, when deciding whether to require repayment the court 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.

(4) Fourth, the defendant who accepts court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor.

(5) 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 obstinacy. *Alexander v Johnson*, at 123-24; *see also Olson v James*, at 153-55.

As seen by the present case, the current practice in Michigan, fails to comply with at least the second and third features required by the United States Supreme Court. It does not provide an indigent defendant with adequate notice or opportunity to be heard, nor does it require the trial judge to determine the indigent defendant's ability to pay by taking cognizance of the

defendant's resources, and the hardships he or his family will endure if repayment or contribution is required.

In interpreting the federal statute that provides for the appointment of counsel for indigent federal defendants,² federal courts of appeals have consistently found that a trial court must examine a defendant's continued ability to pay before ordering reimbursement for appointed counsel. See *United States v Seminole*, 882 F2d 441, 443 (CA 9, 1989) (holding that "[i]f the 'fine' was actually an order for reimbursement of fees paid to [defendant's] court appointed counsel, the district court erred by not making the requisite finding that 'funds are available for payment' of the fees."); *United States v Mitchell*, 893 F.2d 935, 936 (CA 8, 1990) (finding trial court's failure to make an informed decision whether defendant was able to pay restitution was an abuse of discretion); *United States v Jimenez*, 600 F2d 1172, 1174 (CA 5 1979) (trial court must make a finding that the defendant is currently able to repay fees).³

In addition, the courts of many other states that have examined the issue have found that before the government can order an indigent defendant to reimburse or contribute to the costs of his appointed counsel—whether the costs are part of his sentence or not—the court imposing the

² 18 USC 3006A.

³ See also *United States v Connolly (In re Boston Herald)*, 321 F3d 174, 178-79 (CA 1, 2003); *United States v Lorenzini*, 71 F3d 1489, 1494 (CA 9, 1995); *United States v Graham*, 72 F3d 352, 359 (CA 3, 1995); *Hanson v Passer*, 13 F3d 275, 278 (CA 8, 1994), *United States v Angulo*, 864 F2d 504, 509 (CA 7, 1988); *Alexander v Johnson*, 742 F2d 117, 123-24 (CA 4, 1984); *Olson v James*, 603 F2d 150, 152-55 (CA 10, 1979).

cost must first determine the indigent defendant's ability to pay.⁴ Many states also have enacted statutes to provide for specific procedures that will comply with the requirements of due process when determining whether an indigent defendant should contribute to the cost of his appointed counsel. *See, e.g.*, Cal Penal Code §987.8(b) (Supp 2004) (providing that whenever a defendant is provided with court-appointed counsel, at the end of the criminal proceedings in the trial court, "the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof").⁵

Therefore, as indicated by the United States Supreme Court, the constitutional right to counsel means that before a court may order an indigent to contribute to the costs of his defense, he must be afforded due process. Due process at least requires that an indigent defendant must have received notice that the matter may be raised by the trial court, and he must be given a

⁴ *See Warren v City of Enterprise*, 641 So 2d 1312, 1315 (Ala Cr App, 1994); *State v Albert*, 899 P2d 103, 106-13 (Alas, 1995); *Espinoza v Superior Court*, 166 Ariz 557, 560-61, 804 P2d 90, 93-94 (1991); *Cal Teachers Ass'n v California*, 20 Cal 4th 327, 352, 975 P2d 622 (1999); *In re Estate of Benney*, 790 P2d 319, 326 (Colo, 1990); *Potter v State*, 547 A2d 595, 600 (Del, 1988); *People v Cozad*, 158 Ill App 3d 664, 670; 511 NE2d 211 (Ill App 4 Dist, 1987); *Everroad v State*, 730 NE2d 222, 226-27 (Ind Ct App, 2000); *State v Haines*, 360 NW2d 791, 797 (Iowa, 1985); *Walker v State*, 26 Kan App 2d 410, 410-12, 988 P2d 283 (1999); *Donovan v Commonwealth*, 60 SW3d 581, 584-85 (Ky App, 2001); *Haynes v State*, 26 Md App 43, 51, 337 A2d 130 (1975); *State v Tennin*, 674 NW2d 403, 407-08 (Minn, 2004); *State v Wood*, 245 Neb 63, 511 NW2d 90 (1994); *Taylor v State*, 111 Nev 1253; 903 P2d 805 (1995), *overruled on other grounds*, *Gama v State*, 112 Nev 833, 920 P2d 1010 (1996); *Opinion of the Justices*, 121 NH 531, 539; 431 A2d 144 (1981); *M v S*, 169 NJ Super 209, 218, 404 A2d 653 (1979); *State v Webb*, 591 SE2d 505, 513-14 (NC, 2004); *Matter of Adoption of K A S*, 499 NW2d 558, 565 (ND, 1993); *State v Crenshaw*, 145 Ohio App 3d 86, 90, 761 NE2d 1121 (Ohio App 8 Dist, 2001); *Williams v State*, 711 P2d 116, 118 (Okla Cr, 1985); *Johns v Johnson*, 165 Or App 561, 563-64, 996 P2d 1013 (2000); *Commonwealth v Opara*, 240 Pa Super 511, 513-27; 362 A2d 305 (1976); *State v Haight*, 179 W Va 557, 562, 371 SE2d 54 (1988); *White Eagle v State*, 280 NW2d 659, 661 (SD, 1979); *Busby v State*, 984 SW2d 627, 632 (Tex Crim App, 1998); *Ohree v Commonwealth*, 26 Va App 299, 308-09, 494 SE2d 484 (1998); *State v Morgan*, 173 Vt 533, 536; 789 A2d 928 (2001); *State v Blank*, 131 Wash 2d 230, 239, 930 P2d 1213 (1997); *State v Grant*, 168 Wis 2d 682, 684-685; 484 NW2d 370 (Wis App 1992); *Keller v State*, 771 P2d 379, 387-88 (Wyo 1989).

hearing in which the tribunal must determine the defendant's ability to pay. *See Fuller v Oregon, supra.*

At Mr. Carter's sentencing, there was absolutely no mention of the imposition of fines, costs or attorney fees. According to the order of probation⁶, the court assessed a \$50.00 crime victim assessment, \$600.00 in court costs, a \$45.00 state cost assessment and \$730.00 for legal fees. Because Judge Jones simply made these various financial assessments off the record, with no opportunity for Mr. Carter or his counsel to be heard, and without making any determination as to Mr. Carter's ability to pay, the requirements of due process were not met. The trial court reversibly erred in ordering Mr. Carter to pay \$730.00 for his appointed counsel. Due Process requires that the attorney fee assessment be vacated and this case remanded for a hearing where Mr. Carter receives adequate notice of the contemplated action and a meaningful opportunity to be heard.

⁵ See also Ala Code § 15-12-25 (Supp 2003); Ariz Rev Stat § 9-499.09 (Supp 2003); Colo Rev Stat § 21-2-106 (2003); Fla Stat Ann § 938.03 (West Supp 2004); Ga Code Ann § 17-12-10 (Supp 2003); Idaho Code § 19-854 (Supp 2003); 725 Ill Comp Stat 5/113-3.1 (2002); Ind Code § 35-38-1-18 (1998); Kan Stat Ann § 22-4513 (Supp 2002); La Rev Stat Ann 15:148 (Supp 2004); Neb Rev Stat § 29-3908 (Supp 2002); NC Gen Stat § 7A-455.1 (2003); ND Cent Code, § 12.1-32-08 (Supp 2003).


⁶ Current appellate counsel, who was only recently appointed to this case, was not provided with the order of probation or the lower court records. Therefore, this reference is based on the prosecution's and prior counsel's representations of what is contained in the order of probation.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court affirm that the constitutional underpinnings of *People v Dunbar* are sound. This Court should also remand this case to the trial court for a hearing on the Court's imposition of attorney fees and costs where Mr. Carter and his counsel are given a meaningful opportunity to be heard on the Court's intention to impose these assessments and the court, prior to ordering the assessments, takes into consideration Mr. Carter's current and foreseeable ability to pay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

VALERIE R. NEWMAN, says that on December 17, 2007, she mailed, via UPS overnight delivery, Defendant-Appellee's Supplemental Brief to this Court and via regular mail and e-mail sent one copy to the prosecution listed below:

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23184SCAP-OTH/Valerie R. Newman