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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAKESHIA DENISE BROWN,

Defendant-Appellant.

UNPUBLISHED
September 23, 2021

No. 346573
Oakland Circuit Court
LC No. 2017-262143-FH

ON REMAND

Before: M. J. KELLY, P.J., and Fort Hood and BORRELLO, JJ.

PER CURIAM.

This case returns to this Court on remand from our Supreme Court. For the reasons set forth in this opinion, we affirm.

This appeal arises from defendant's jury trial convictions of stealing, removing, retaining, or secreting another's financial transaction device without consent, MCL 750.157n, for which she was sentenced to nine months of jail time and two years' probation. See *People v Brown*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 346573), p 1. The underlying facts of the offense, which this Court previously summarized, are not relevant to the issue to be considered on remand. In our previous opinion, we addressed defendant's appellate challenges relating to an alleged due-process violation, the empaneling of an "anonymous jury," and the imposition of $500 in court costs. *Brown*, unpub op at 2. With respect to the court costs, defendant argued that they constituted and unconstitutional tax. *Id*. This Court found no errors warranting relief and affirmed defendant's convictions and sentences. *Id*. at 1-7.

Defendant thereafter filed an application for leave to appeal to the Michigan Supreme Court. On December 22, 2020, the Supreme Court vacated "that part of the judgment of the Court of Appeals addressing the trial court's assessment of court costs pursuant to MCL 769.1k(1)(b)(*iii*)." *People v Brown*, 506 Mich 1023; 951 NW2d 653 (2020). Our Supreme Court remanded the matter to this Court with the following instructions:

> [W]e REMAND this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider this case in light of *Lewis*. [*Id*.]

The Supreme Court denied leave to appeal in all other respects. *Id*.

On May 13, 2021, this Court issued an unpublished per curiam opinion in *Lewis*. *People v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued May 13, 2021 (Docket No. 350287). In *Lewis*, unpub op at 1, this Court summarized the issues presented by the defendant's arguments as follows:

> On appeal, defendant argues that MCL 769.1k(1)(b)(*iii*), which authorizes trial courts to impose court costs on convicted criminal defendants, is unconstitutional because it violates due process and the separation of powers by affecting judicial impartiality. More particularly, defendant asserts that the imposition of court costs incentivizes or pressures trial court judges to convict defendants in order to impose court costs, which, in turn, fund the trial courts.

The *Lewis* Court first determined that the defendant was making a facial challenge to the constitutionality of MCL 769.1k(1)(b)(*iii*) because the defendant alleged that "no judge can be presumed to be impartial" and did not allege that the trial court judge in that case was not impartial. *Id*. at 3. Hence, the defendant was required to "establish that no set of circumstances exists under which the [statute] would be valid and [t]he fact that the . . . [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid." *Id*. (quotation marks and citation omitted; alterations and ellipsis in original).

Furthermore, the *Lewis* Court recognized that the issues before it had recently been addressed and decided in this Court's published opinion in *People v Johnson*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 351308). *Lewis*, unpub op at 4, 5, 7.[1] In *Johnson*, ___ Mich

[1] Like *Lewis* and *Johnson*, this case involves the version of MCL 769.1k that was in effect before the amendment that took effect on September 17, 2020. See 2020 PA 151. The relevant language of the statute has not changed. MCL 769.1k(1)(b)(*iii*) provides in relevant part that a court may impose on a convicted defendant

> (*iii*) . . . any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:
>
> (A) Salaries and benefits for relevant court personnel.
>
> (B) Goods and services necessary for the operation of the court.
>
> (C) Necessary expenses for the operation and maintenance of court buildings and facilities.

App at ___; slip op at 1, the defendant raised a facial challenge to MCL 769.1k(1)(b)(*iii*), claiming that it "deprives criminal defendants of their due-process right to an impartial decisionmaker and violates separation-of-powers principles." This Court rejected both arguments and held that MCL 769.1k(1)(b)(*iii*) is not facially unconstitutional. *Id*.

In *Lewis*, addressing the defendant's due-process argument that MCL 769.1k(1)(b)(*iii*) unconstitutionally created pressure for trial court judges to convict defendants and impose costs against them, *Lewis*, unpub op at 2, this Court analyzed the issue as follows:

> [T]he *Johnson* panel addressed the question of "whether the financial interests of a trial court might raise due-process concerns." *Id*. In particular, the panel considered *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927); *Dugan v Ohio*, 277 US 61, 65; 48 S Ct 439; 72 L Ed 784 (1928); and *Ward v Village of Monroeville, Ohio*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972), before concluding that the facts of the case closely resembled those in *Dugan*, 277 US at 65, where the defendant's due-process rights were not violated because while "the entity exercising the judicial role benefited from a portion of the revenue generated by court assessments," the entity "did not have control over administration of the revenue." *Johnson*, ___ Mich App at ___; slip op at 4-7. Although MCL 769.1k(1)(b)(*iii*) generates revenue for trial courts, " 'these provisions do not indicate where the money flows after the costs have been imposed on and paid by a convicted defendant.' " *Johnson*, ___ Mich App at ___; slip op at 7, quoting *People v Alexander*, unpublished per curiam opinion of the Court of Appeals, issued May 14, 2020 (Docket No. 348593), lv pending, p 14. "Indeed, Michigan's Constitution provides that '[n]o judge or justice of any court of this state shall be paid from the fees of his office nor shall the amount of his salary be measured by fees, other moneys received or the amount of judicial activity of his office.' " *Johnson*, ___ Mich App at ___; slip op at 7, quoting Const 1963, art 6, § 17 (internal quotation marks omitted; alteration in original).
>
> Similar to the defendant in *Johnson*, in this case, defendant has failed to show "that the nexus between the courts and the costs they impose" under MCL 769.1k(1)(b)(*iii*) undermines a defendant's due-process right to appear before a neutral judge. As this Court concluded in *Alexander*:
>
> > To the extent that defendant appears to claim that judicial impartiality is generally compromised because the money collected for these costs eventually finds its way back to the trial courts by way of the complex system of funding the trial courts, providing a portion of the total funding allocated to the courts, we find such a connection to be far too attenuated to have any impact on a judge's decision whether to impose costs under MCL 769.1k(1)(b)(*iii*). This is particularly true where the amount of costs imposed is confined to that for which a factual basis exists showing that the costs are reasonably related to the actual costs incurred. [*Alexander*, unpub op at 14.]

> Because this precise issue has been addressed in *Johnson*, we are required to follow it, MCR 7.215(J)(1), and we agree with its analysis. The *Johnson* Court adequately explained why defendant's argument cannot succeed under guiding Supreme Court precedent, as the circumstances at issue in *Tumey* and *Ward*, both of which dealt with Ohio's "mayor's courts," are vastly different from a courts imposition of fees under MCL 769.1k(1)(b)(*iii*), and are more similar to *Dugan*. Other courts have come to the same conclusion under similar circumstances. See, e.g., *Commonwealth of North Mariana Islands v Kaipat*, 94 F3d 574, 580-582 (CA 9, 1996). [*Lewis*, unpub op at 4-5.]

This Court in *Lewis* continued its analysis by stating that there were additional reasons that the defendant had not shown that he was entitled to appellate relief. *Id*. at 5. The Court noted:

> Defendant, and his supporting amici, rely extensively on the premise that trial court judges can be, and sometimes are, subject to political pressure from local executives and council members (the local legislative body) who encourage judges to impose costs as frequently as possible to generate revenue for local court operations under MCL 769.1k(1)(b)(*iii*). Defendant argues that the pressure to raise revenues to pay for the listed court personnel and functions in that statute is so great that it results in a violation of the Due Process Clause of the federal constitution. [*Id*. at 5-6.]

However, this Court explained that the "defendant and his supporters fail[ed] to recognize the long-held and important presumption that judges are impartial and sufficiently independent to follow in every case the oath each has taken to uphold the laws of this state and nation." *Id*. at 6. This Court also stated, "Michigan judges are required by our ethics rule to be 'unswayed by partisan interests, public clamor, or fear of criticism,' Code of Judicial Conduct, Canon 3(A)(1), and do just that on a daily basis." *Lewis*, unpub op at 6. Noting that Michigan judges have a longstanding history of making decisions that each believes to be consistent with the law rather than being influenced by public opinion, as well as the legal presumption that elected judges "are not swayed by the political winds," this Court declined to essentially imply that there was a presumption that judges could not be independent in the face of public pressure or criticism. *Id*. at 6-7. The Court concluded that the legislative process was the proper forum in which to pursue changes to the court-funding system. *Id*. at 7.

Next, this Court similarly rejected the defendant's argument that "MCL 769.1k(1)(b)(*iii*) is unconstitutional because it violates the separation of powers by preventing trial court judges from remaining neutral and impartial" because this argument had been rejected in *Johnson*. *Lewis*, unpub op at 7-8. The *Lewis* Court concluded that the statute did not create "a situation where there exists no set of circumstances under which a judge in this state is impartial" and that the statute also did not create "financial interest in the judiciary to cause them to ignore their constitutional mandates." *Id*. at 7 (quotation marks and citations omitted). This Court therefore concluded that like the defendant in *Johnson*, the defendant in *Lewis* failed to "establish that the Legislature has made it impossible for trial courts to fulfill their constitutional mandates or that MCL 769.1k(1)(b)(*iii*) is facially unconstitutional." *Id*. at 7, quoting *Johnson*, ___ Mich App at ___; slip op at 9.

In this case, pursuant to our Supreme Court's instructions, our task is to address the trial court's assessment of court costs against defendant under MCL 769.1k(1)(b)(*iii*) in light of this Court's decision in *Lewis*.

Like the defendant in *Lewis*, defendant in this case raised a challenge to the constitutionality of MCL 769.1k(1)(b)(*iii*) on due-process and separation-of-powers grounds in her application for leave to appeal filed in the Supreme Court. Defendant did not make any specific allegations of impartiality with respect to the trial judge in her case but instead directed her arguments at the statute's effect on all Michigan judges. Thus, defendant has asserted a facial challenge,[2] as did the defendant in *Lewis*. *Lewis*, unpub op at 3; see also *Johnson*, ___ Mich App at ___; slip op at 2 (concluding that the defendant raised a facial challenge to the statute where the defendant did "not argue that the trial judge in his case acted impartially when deciding to impose court costs under MCL 769.1k(1)(b)(*iii*)" but instead argued "that MCL 769.1k(1)(b)(*iii*) operates in the state of Michigan to deprive all criminal defendants of their due-process right to appear before an impartial decisionmaker because the statute incentivizes all judges to convict criminal defendants and impose court costs to raise revenue for the courts").

With respect to the merits of defendant's arguments in this case, defendant's arguments are essentially identical to those made by the defendant in *Lewis*. Accordingly, we adopt the analysis in *Lewis* as our own for purposes of this case. Defendant has failed to demonstrate that MCL 769.1k(1)(b)(*iii*) on due-process or separation-of-powers grounds. *Lewis*, unpub op at 2-8; see also *Johnson*, ___ Mich App at ___; slip op at 1 (holding that MCL 769.1k(1)(b)(*iii*) was not facially unconstitutional on due-process or separation-of-powers grounds).

Affirmed.

/s/ Michael J. Kelly
/s/ Stephen L. Borrello

Fort Hood, J. did not participate.

[2] "A facial challenge attacks the statute itself, and requires the challenger to establish that no set of circumstances exists under which the act would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient." *Johnson*, ___ Mich App at ___; slip op at 2 (quotation marks and citation omitted; ellipsis and alteration in original).