

SUPREME COURT OF MICHIGAN

People of the State of Michigan v. Kena Banks

769 N.W.2d 221 (Mich. 2008) · No. 136524 · Decided November 14, 2008

SUMMARY

The Michigan Supreme Court denied Kena Banks's application for leave to appeal under MCR 6.508(D) concerning collection of court-appointed attorney fees from prisoner funds. Justice Corrigan concurred, concluding that Michigan statutes authorize collection without a prior ability-to-pay hearing for an incarcerated defendant. Justice Kelly dissented, stating that the trial court should have conducted a hearing under *People v. Dunbar* to assess the defendant's present and future ability to pay.

CASE DETAILS

COURT	Supreme Court of Michigan
JURISDICTION	Michigan
DECIDED	November 14, 2008
DOCKET	136524
DISPOSITION	writ_denied
PROCEDURAL POSTURE	Defendant sought Michigan Supreme Court review of the Court of Appeals' denial of leave to appeal from the trial court's denial of her motion to modify an attorney-fee reimbursement order and to suspend collection from her prison account.
STANDARD OF REVIEW	Whether the defendant established entitlement to post-conviction relief under MCR 6.508(D).
PRECEDENTIAL VALUE	limited
PARTIES	Kena Banks v. People of the State of Michigan

TOPICS

- post-conviction relief
- appellate procedure
- restitution criminal
- criminal procedure
- statutory interpretation

PRACTICE AREAS

- criminal procedure
- post-conviction relief
- appellate procedure
- restitution
- remedies

QUESTIONS PRESENTED

1. Whether Banks established entitlement to relief under MCR 6.508(D) from the order requiring collection of court-appointed attorney fees from her prison account.
2. Whether a trial court must conduct a *People v. Dunbar* ability-to-pay hearing before ordering the Department of Corrections to remit prisoner funds for court-appointed attorney fees.

HOLDINGS

1. Banks failed to meet her burden of establishing entitlement to relief under MCR 6.508(D); therefore, the Michigan Supreme Court denied her application for leave to appeal.

KEY QUOTATIONS

“the application for leave to appeal the April 2, 2008 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).” (769 N.W.2d 221)

“This statutory scheme leaves no room for a Dunbar requirement where the defendant is in prison, so defendant here is ineligible for a Dunbar hearing.” (769 N.W.2d 222)

“For these reasons, I would remand this case to the trial court for a Dunbar hearing.” (769 N.W.2d 223)

FACTUAL BACKGROUND

In 2003, Banks pleaded no contest to assault with a dangerous weapon and was sentenced to probation, with a later-calculated obligation of \$810 in court-appointed attorney fees. After she pleaded guilty to second-degree murder and began serving a 22-to-40-year prison sentence, the trial court ordered the Department of Corrections to collect 50 percent of funds she received over \$50 per month and remit them to Macomb County. Banks moved to modify the attorney-fee order, seeking suspension of payments during imprisonment and a hearing on her ability to pay upon release.

PROCEDURAL HISTORY

Banks pleaded no contest to assault with a dangerous weapon in 2003 and was ordered to pay court-appointed attorney fees. After she later received a prison sentence for second-degree murder, the trial court ordered the Department of Corrections to deduct qualifying funds from her prison account and remit them to the county. The trial court denied her motion to modify the attorney-fee order, and the Court of Appeals denied leave to appeal under MCR 6.508(D). The Michigan Supreme Court denied leave to appeal because Banks failed to establish entitlement to relief under MCR 6.508(D).

DISPOSITION

writ_denied

CASES CITED

- *People v. Dunbar*, 264 Mich. App. 240, 690 N.W.2d 476 (2004)
- *People v. Guajardo*, 213 Mich. App. 198, 539 N.W.2d 570 (1995)

- People v. LaPine, 63 Mich. App. 554, 234 N.W.2d 700 (1975)
- People v. Trapp (On Remand), 280 Mich. App. 598, 760 N.W.2d 791 (2008)
- People v. Trapp, 482 Mich. 1044, 769 N.W.2d 219 (2008)

OPINION

PER CURIAM.

769 N.W.2d 221 (2008) PEOPLE of the State of Michigan, Plaintiff-Appellee, v. Kena BANKS, Defendant-Appellant. Docket No. 136524. COA No. 283547. Supreme Court of Michigan. November 14, 2008. Order On order of the Court, the application for leave to appeal the April 2, 2008 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CORRIGAN, J. (concurring). I concur in the order denying leave to appeal because I do not believe a trial court is required to assess ability to pay under People v. Dunbar, 264 Mich.App. 240, 690 N.W.2d 476 (2004), before requiring a defendant who is in prison to commence payment of the cost of a court appointed attorney.

In 2003, defendant pleaded no contest to a charge of assault with a dangerous weapon and was sentenced to probation. The January 21, 2003, judgment of sentence required her to pay attorney fees in an amount later calculated to be \$810. Defendant failed to pay the fees.

After she later pleaded guilty of second-degree murder in connection with a crime committed on October 7, 2006, defendant was sentenced to 22 to 40 years of imprisonment. After she began serving her prison sentence and obtained employment in prison, the trial court entered an "Order to Remit *222 Prisoner Funds for Fines, Costs, and Assessments," requiring the Department of Corrections to collect 50 percent of the funds defendant receives over \$50 a month and remit the funds to Macomb County.

Defendant then filed a motion to modify the attorney fee order in the trial court. Citing Dunbar, she asked the court to suspend restitution payments to the county until she was released from prison and at that point conduct a Dunbar hearing to assess her ability to pay.

The trial court denied the motion on November 30, 2007. Defendant filed an application for leave to appeal in the Court of Appeals, and the Court denied leave to appeal under MCR 6.508(D). I concur in this Court's denial order because I do not believe that the trial court was required to assess defendant's ability to pay under Dunbar before entering the order to remit prisoner funds.

The Legislature has specifically provided a procedure by which counties are to recoup attorney fees from defendants who are sentenced to prison. MCL 769.1k(1)(b)(iii) explicitly gives a trial court the authority to order reimbursement of attorney fees,[1] and MCL 769.1l[2] requires the

Department of Corrections to deduct funds from the prisoner's account upon receiving such an order.

This statutory scheme leaves no room for a Dunbar requirement where the defendant is in prison, so defendant here is ineligible for a Dunbar hearing. MARILYN J. KELLY, J. (dissenting). I dissent from the order denying leave to appeal. I would remand this case for a hearing to assess defendant's ability to pay now and in the future pursuant to *People v. Dunbar*.^[3] Justice Corrigan is correct that the trial court was not required to hold a Dunbar hearing to assess the defendant's ability to pay before entering the order to remit prisoner funds.

But the Dunbar requirements should have been adhered to earlier when defendant was sentenced and assessed attorney fees. In *Dunbar*, the Court of Appeals held that a trial court that orders a convicted defendant to reimburse fees for his court-appointed attorney must provide "some indication... that it considered defendant's ability to pay."^[4] The court also held that "in most cases, challenges to the reimbursement order will be premature if the *223 defendant has not been required to commence repayment."^[5] In this case, at Macomb County's request, the trial court entered an order to remit prisoner funds for fines, costs, and assessments on October 2, 2007.

Defendant filed a motion for relief from judgment on November 15, 2007. Therefore, defendant timely challenged the reimbursement order pursuant to *Dunbar*. There is no indication on the record that the trial court ever assessed defendant's ability to pay attorney fees.

In addition, the statutes cited by Justice Corrigan are inapplicable and do not support her contention that defendant "is ineligible for a Dunbar hearing." Neither MCL 769.1k nor MCL 769.1l diminishes a trial court's responsibility to assess a defendant's ability to pay before ordering restitution.

The Court of Appeals recently held explicitly that MCL 769.1k "does not eliminate the requirement, set forth in *Dunbar*, supra, that the trial court consider a defendant's ability to pay prior to ordering reimbursement of appointed counsel costs."^[6] Finally, MCL 769.1l does not remove the need for a trial court to conduct a Dunbar hearing for all defendants, including prisoners.

It is a ministerial statute outlining the procedures that the Department of Corrections must follow when removing funds from a prisoner's account. For these reasons, I would remand this case to the trial court for a Dunbar hearing. NOTES [1] MCL 769.1k(1)(b)(iii) permits the trial court to "impose... [t]he expenses of providing legal assistance to the defendant."

[2] MCL 769.1/provides: If a prisoner under the jurisdiction of the department of corrections has been ordered to pay any sum of money as described in section 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 section 20h of the corrections code of 1953, 1953 PA 232, MCL 791.220h, or the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, priority over an order received under this section. MCL 769.1k and MCL 769.1l became effective on January 1, 2006, which is after the trial court entered the judgment of sentence requiring defendant to pay attorney fees, but before it entered the order to remit prisoner funds.

[3] *People v. Dunbar*, 264 Mich.App. 240, 690 N.W.2d 476 (2004). [4] *Dunbar*, supra at 254-255, 690 N.W.2d 476. [5] *Id.* at 256, 690 N.W.2d 476, citing *People v. Guajardo*, 213 Mich.App. 198, 202, 539 N.W.2d 570 (1995); *People v. LaPine*, 63 Mich.App. 554, 556, 558, 234 N.W.2d 700 (1975).

[6] *People v. Trapp (On Remand)*, 280 Mich.App. 598, 760 N.W.2d 791 (2008). This Court denied leave to appeal in *Trapp*. 482 Mich. 1044, 769 N.W.2d 219 (2008).