STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

RAYMOND F. MIAZGA,

Appellant,

v

Case No. 01-5738-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN PAROLE BOARD,

Appellee.
_____/

Raymond F. Miazga #167171
Appellant in Pro Per

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pc: Michigan Department of Attorney General

ORDER REGARDING APPELLANT'S
EX-PARTE MOTION IN OPPOSITION TO COURT
ORDER FOR PARTIAL PREPAYMENT OF FEES AND COSTS

The Appellant was arrested on December 20, 1998 and charged with OUIL 3rd and DWLS 2nd. On August 30, 1999, the Appellant pled guilty to OUIL 3rd offense. In exchange for his plea agreement, the DWLS 2nd charge and habitual offender 3rd offense enhancement were dismissed.[1] The Appellant was sentenced to 3 to 5 years confinement in the Michigan Department of Corrections and is currently confined to the Pugsley Correctional Facility.

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[1] The dismissal of the habitual offender 3rd offense charge was of significant benefit to the Defendant who had seven prior felony convictions, nine misdemeanor convictions and a juvenile record. The Defendant had served two prior prison terms and had committed the felony drunk driving while on probation. This was his fourth drunk driving offense. Dismissal of the habitual offender 3rd offense supplementation resulted in a significant cap on the Defendant's maximum potential for confinement. The Defendant was sentenced to 36 to 60 months of confinement in the Department of Corrections. This was not a maximum sentence even though the

The Appellant subsequently filed a motion for appointment of appellate counsel which was denied by this Court on May 4, 2000. The Appellant argued that the presentence report was inaccurate and his sentence was disproportionate. The Court denied that motion because the Appellant did not preserve any issues regarding the accuracy of the presentence report at the time of sentencing and the Appellant's sentence was not a maximum sentence. The Appellant, having pled guilty did not have an absolute right to the appointment of appellate counsel at public expense on appeal. Instead, he is required to seek leave to appeal and have a non-frivolous reason for doing so. *People v Najar* 229 Mich App 393 (1998).

The Appellant again filed a motion for waiver of fees and costs and a motion for appointment of appellate counsel. This time he argued that counsel should be appointed to assist him with the filing of a motion for resentencing, pursuant to MCR 6.429(B)(3), because his sentence is disproportionate. This was essentially a motion for reconsideration of the Court's May 4, 2000 Decision and Order denying the Appellant the same relief. The motion was denied because it was not timely and the Appellant failed to show any palpable error. MCR 2.119(F)(1) and (3).

On September 19, 2000, the Appellant filed another motion for waiver of fees and costs and a motion for re-sentencing/correction of invalid sentence. On September 26, 2000, the Court granted the Appellant's motion for waiver of fees and costs and issued a pre-hearing order regarding the Appellant's motion for resentencing. The Court ultimately denied the Appellant's motion finding that the motion for re-sentencing on the basis of prosecutorial vindictiveness was nothing more than a motion for reconsideration of his earlier motion to dismiss and the Appellant had not demonstrated palpable error. MCR 2.119 (F)(3). The Appellant also argued that his sentence was invalid because he was not sentenced under the applicable sentencing guidelines, MCL 777.12; MSA 28.1274(22), as required by MCR 6.425(D)(1). The guidelines apply to offenses committed after January 1, 1999. See 1998 PA 317 §34. The offense with which the Defendant was charged was committed on December 20, 1998. Therefore, the guidelines did not apply to the Appellant. His sentence was valid and the Court did not have the authority to modify it. *People v Councell*, 194 Mich App 192, 194; 486 NW2d 350 (1992).

Defendant was a career criminal whose background included alcoholism, theft and assaultive conduct.

The Appellant became eligible for parole on September 17, 2001. He was interviewed by a member of the Parole Board on May 17, 2001. The Board denied the Appellant parole. The Appellant filed yet another motion for waiver of fees and costs and a claim of appeal from that decision of the Parole Board. With his first submission, the Appellant failed to provide the Court with a statement of his institutional account as required by MCL 600.2963. By letter dated August 22, 2001, the Court advised the Appellant that a statement of his institutional account must be provided to the Court in order to support his Affidavit of Indigency. On October 4, 2001, the Appellant finally submitted a statement of account. Pursuant to MCL 600.2963(3) and (5) and based on the amount of the account balance and the average monthly deposits, the Court ordered the Appellant to pay an initial partial filing fee, resubmit his claim of appeal and, thereafter make monthly payments until the full amount of the filing fee has been paid.

On October 31, 2001, the Appellant resubmitted his claim of appeal with the initial partial payment of the filing fee. The Appellant also filed a Motion in Opposition to Court Order for Partial Prepayment of Fees and Costs. This Motion is essentially a Motion for Reconsideration of the Court's Order denying his earlier Motion to Waive Filing Fees and Costs.

STANDARD OF REVIEW

MCR 2.119(F) governs motions for rehearing or reconsideration. It provides, in pertinent part, as follows:

> (1) Unless another rule provides a different procedure for reconsideration of decision (see, e.g., MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion.
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> (2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.
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> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

I.

This Court denied the Appellant's Motion to Waive Fees and Costs on October 9, 2001. The instant Motion was not filed until October 30, 2001. Therefore, it is not timely. MCR 2.119(F)(1).

II.

The instant motion presents the same issues ruled on by the Court, by reasonable implication, since it raises the same issues as were raised in the initial motion which the Court denied. MCR 2.119(F)(3).

III.

Even assuming that the Appellant's Motion was timely filed and presented new issues, since the Court did not expressly address these issues in its October 9, 2001 Order, it will do so now.

A.

The Appellant argues that the Court erroneously relied upon MCL 600.2963 in requiring him to pay filing fees and costs because MCL 600.2963, by its clear and unambiguous language applies to a "civil action" or the "appeal in a civil action" and his appeal of the Parole Board's decision is not a "civil action" or an "appeal in a civil action." The Appellant relies upon *Dep't of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633; 385 NW2d 685; *Morgan v Kamil*, 144 Mich App 171; 375 NW2d 378 (1985); and *Porter v Board of Optometry*, 41 Mich App 150; 199 NW2d 666 (1972), overruled on other grounds 394 Mich 432; 231 NW2d 642 (1975) for the proposition that an appeal from an administrative proceeding does not change the administrative proceeding into a civil action.

In the *Horizon Tube* case, an employer appealed from the Civil Rights Commission's award of back pay and attorney fees to a former employee. One of the issues on appeal was whether MCLA 600.6013 providing for interest on money judgments recovered in civil actions authorized payment of interest on back pay award entered by the Civil Rights Commission. The Court held that proceedings before Civil Rights Commission did not constitute a civil action, so

that the statute did not authorize payment of interest on a back pay award entered by the Commission. "The fact that the Civil Rights Commission's determination had been appealed to Circuit Court did not convert it into a civil action for the purposes of awarding money judgment interest."

In *Morgan*, the question presented was whether a party to a medical malpractice agreement who files a complaint in circuit court for a medical malpractice action is entitled to prejudgment interest under MCL § 600.6013; MSA § 27A.6013 on the judgment entered on an arbitration award even though the complaint was dismissed because the trial court ordered the parties to proceed with arbitration. The Court of Appeals held that the trial court erred in awarding plaintiff prejudgment interest on the medical malpractice arbitration award because MCL 600.6013; MSA § 27A.6013 allows interest only on money judgments recovered in civil actions; it does not authorize interest on an arbitration award and the judgments entered confirming the award. "The Legislature intended MCL 600.6013; MSA 27A.6013 to apply only to judgments obtained in civil actions, through court proceedings, not arbitration." *Id* at 174.

In *Porter*, the plaintiff's license was suspended for a period of three months by the State Board of Examiners in Optometry upon the Board's finding that plaintiff had violated the Michigan Optometry Act, MCLA 338.251 et seq.; MSA 14.641 et seq. Plaintiff filed a petition for review in circuit court pursuant to the procedure outlined in the administrative procedures act of 1969. MCLA 24.301, 24.306; MSA 3.560(201), 3.560(206). The circuit judge affirmed the decision of the Board of Optometry and plaintiff filed a claim of appeal in the Court of Appeals. The question presented was whether the judgment of the circuit court on review of administrative proceedings is a final judgment appealable as of right. The Court of Appeals said no, in part, because the applicable statutes and court rules require leave to appeal from judgments and orders of administrative agencies or tribunals which by law are appealable to the Court of Appeals or the Supreme Court. MCLA 600.308 and 600.309; MSA 27A.308 and 27A.309, on the other hand, apply to appeals as of right in "civil matters in the courts" and GCR 1963, 806.1 speaks to "civil matters." "Review of administrative proceedings by a court does not change an administrative proceeding to a civil proceeding." *Id* at 152.

Based on these authorities, the Appellant herein argues that his appeal of the Parole Board's decision to deny him parole is an appeal of an administrative proceeding, a proceeding *sui generis*, and not a civil action and, therefore, MCL 600.2963 does not apply. Instead, MCR

2.002(D) applies and, upon the filing of his affidavit of indigency, this Court was required to waive or suspend the filing fees and costs until the conclusion of the litigation.

The Appellant has misunderstood these legal authorities. *Horizon Tube* and *Morgan* are cases in which the Court had to determine whether the judgment interest statute, MCL 600.6013, applied to an administrative appeal and an arbitration award, respectively. In *Porter*, the Court was concerned with the applicability of jurisdictional and appeals of right statutes to reviews of administrative decisions. In each case, the Court looked to the language and intent of the subject statute. The language and intent assisted the Court in resolving the issue presented, but language and intent is statute specific and the construction of one particular statute will not control the construction of an entirely different statute.

In the instant case, the applicable statute is MCL 600.2963 which provides, in pertinent part, as follows:

> If a prisoner under the jurisdiction of the department of corrections submits for filing a **civil action** as plaintiff in a court of this state or submits for filing **an appeal in a civil action** in a court of this state and states that he or she is indigent and therefore is unable to pay the filing fee and costs required by law, the prisoner making the claim of indigency shall submit to the court a certified copy of his or her institutional account, showing the current balance in the account and a 12-month history of deposits and withdrawals for the account. The court then shall order the prisoner to pay fees and costs as provided in this section. [Emphasis added.]

The question that must be answered is what the Legislature intend by the use of the words "civil action" and "an appeal in a civil action."

First, "civil action" is defined in Black's Law Dictionary as: (1) an action wherein an issue is presented for trial formed by averments of complaint and denials of answer or replication to new matter; (2) an adversary proceeding for declaration , enforcement, or protection of a right, or redress, or prevention of a wrong; (3) every action other than a criminal action.

A review of the House and Senate analyses of MCL 600.2963 when first introduced in 1996 and amended in 1998 state that the purpose of the statute is to ensure that prisoners who are able to pay filing fees and, where ordered, court costs, of any civil suits they initiate should do so in order to reduce the number of indigency waivers being allowed under the existing court rule. "[I]nmates who want to initiate civil lawsuits while in prison should be made to take economic responsibility for their decisions to sue." The statute was also intended to eliminate the

assumption that incarceration alone is sufficient grounds for claiming or granting indigency. Instead, the prisoner and the court are required by the statute to consider the prisoner's actual assets before allowing prisoner-initiated civil suits to proceed.

When the statute was amended in 1998, the Senate analysis defined the Apparent Problem as follows:

> Despite legislation in the past several years to limit access to the courts by prison inmates through the imposition of filing fees and court costs, lawmakers and criminal justice policy-makers are still concerned about frivolous inmate lawsuits involving complaints about some condition or practice in the institution.

The statute was designed to amend the Revised Judicature Act to add, "somewhat redundantly," that the Act's provisions concerning indigent prisoners would apply specifically to civil actions concerning prison conditions. The statute contains several sets of requirements for courts to dismiss prisoner lawsuits which are referred to variously as "cases," "complaints," "actions," or "civil actions." Legislative Analysis, SB 419 and 500, September 30, 1999.

Nothing in the analyses suggests that the Court's authority to require a prisoner to pay filing fees and, where ordered, court costs, pursuant to MCR 600.2963, is in any way limited by the type of action or appeal the prisoner files. These provisions apply to *all* civil actions filed by prisoners, whether an original civil suit over prison conditions or an appeal from a decision of the parole board. Legislative Analysis, SB 419 and 500, September 30, 1999. Consequently, MCL 600.2963 applies to the Appellant's appeal of the Parole Board's decision.

B.

Alternatively, the Appellant argues that MCL 600.2963 is unconstitutional because the Legislature enacted it in derogation of the Supreme Court's authority to establish judicial procedure. Since MCL 600.2963 conflicts with MCR 2.002(D), he argues that MCR 2.002(D) supersedes MCL 600.2963.

This Court disagrees. MCL 600.2539 establishes filing fees in civil actions in circuit court including appeals of administrative decisions. Under the Fourteenth Amendment, fees must be waived only for those unable to pay them as a function of the constitutional right of access to the courts, *Boddie v Connecticut*, 401 US 371; 91 S Ct 780; 28 L Ed 2d 113 (1971). MCR 2.002 was promulgated effective March 1, 1985 and was substantially the same as its

predecessor GCR 1963, 120. It is a rule of civil procedure that applies to any "party" who can show by ex parte affidavit or otherwise that he or she is unable because of indigency to pay fees and costs.

Fully mindful of MCR 2.002(D), the Michigan Legislature enacted MCL 600.2963 in 1996, effective June 1, 1997. It only applies to "indigent prisoners" who initiate a civil action or appeal. This statute embodies Michigan's public policy that those who spend valuable judicial resources should be required to "take economic responsibility for their decisions to sue." House Legislative Analysis, SB 1215, January 28, 1997, p. 5. As the Court said in *Lewis v DOC*, 232 Mich App 575; 591 NW2d 379 (1999):

> If the trial court were unable to fashion such payment plans, individuals like petitioner, who has filed twenty-seven unsuccessful actions in the Ingham Circuit Court, would essentially be subsidized by Michigan taxpayers to file at no cost even frivolous civil actions or appeals from administrative hearings determinations and would be able to force whatever defendants they targeted to expend the time and money involved in defending these actions.

Whenever a statute embodies substantive policy considerations, the statute, not the court rule, governs. See, *People v Conat*, 238 Mich App 134, 162-163; 605 NW2d 49 (2000) wherein the Court said:

> Under Const. 1963, art 6, § 5, the Supreme Court is given the exclusive rulemaking authority in matters of practice and procedure. *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). However, the Court "is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *Id* at 27; 597 NW2d 148. Accordingly, "[i]n resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure." *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995). However, if the statute does not address purely procedural matters, but substantive law, the statute prevails. *McDougall, supra* at 37; 597 NW2d 148.
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> In *McDougall*, the Supreme Court held that a statutory evidentiary rule restricting the admissibility of expert opinions in certain medical malpractice cases did not impermissibly infringe on the Supreme Court's constitutional rulemaking authority over practice and procedure, even though the statute directly conflicted with a court rule of evidence. *Id* The Court concluded that the statute was an enactment of substantive law, reflecting "wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists." *Id* at 35; 597 NW2d 148. Likewise, § 1 in the instant case involves regarding juvenile crime and how to punish juveniles who commit serious crimes. The

legislative intent behind the automatic waiver system was to require more severe punishment for juveniles who commit serious crimes, and § 1 was designed to further this legislative intent. See, e.g., *Veling, supra* at 27; 504 NW2d 456; *Valentin, supra* at 6; 577 NW2d 73; House Legislative Analysis, HB 4037 et al, July 22, 1996.

CONCLUSION

For the reasons stated herein, the Appellant's Motion in Opposition to Court Order for Partial Prepayment of Fees and Costs is denied.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: S/ 11/21/01