

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH MICHAEL JAN,

Defendant-Appellant.

UNPUBLISHED

January 13, 1998

No. 196492

Monroe Circuit Court

LC No. 93-025682 FH &

93-025683 FH

Before: Gage, P.J., and Murphy and Reilly, JJ.

MEMORANDUM.

This case is being decided without oral argument pursuant to MCR 7.214(E).

In 1994, defendant pled nolo contendere in each of these cases to plea bargain-reduced charges of embezzlement by agent or trustee of \$100 or less, misdemeanors under MCL 750.174; MSA 28.371. As the embezzlement statute provides no specific penalty, the maximum penalty that may be imposed for each offense is 90 days in jail, a fine of \$100, or both. MCL 750.504; MSA 28.772. In L.C. No. 93-025682 FH (hereafter “case one”), defendant was sentenced to 90 days in the county jail as part of a two year probationary term, and ordered to pay costs of \$500, by visiting Lenawee Circuit Judge Kenneth B. Glaser. In L.C. No. 93-025683 FH (hereafter “case two”), defendant was sentenced to two years’ probation and to pay restitution of \$8,445.33 in monthly installments of \$400.

In both cases, defendant signed a standard order of probation, his signature acknowledging: “I have read or heard read all the above order of probation and have received a copy. I understand and agree to comply with this order and all its rules.” In 1996, defendant was charged with violating his probation by failing to pay restitution. These charges were heard by Lenawee Circuit Judge Harvey Koselka, presiding by assignment as successor to Judge Glaser, who retired. Defendant was found guilty and sentenced to 90 days in jail in case two, while an order reflecting violation of defendant’s probation in case one was entered in that file. Defendant sought superintending control prior to the imposition of sentence following the probation violation adjudication, and this Court ordered that the complaint for superintending control be treated simply as a claim of appeal from the actual judgments entered, inasmuch as the complaint had not been adjudicated prior to completion of the trial court probation violation proceedings. MCL 769.24; MSA 28.1094; *Brown v People*, 39 Mich 57 (1878).

As to case one, since defendant was sentenced to 90 days in the county jail, the maximum authorized by statute, any further punishment, no fine being imposed, is void as in excess of the statutory authorization. *People v Bisogni*, 132 Mich App 244, 246-247; 347 NW2d 739 (1984). Accordingly, the probationary sentence in that case was void *ab initio*, and defendant could not be adjudicated guilty of violating a void probationary order. The order finding defendant to have violated his probation is reversed. This decision does not affect defendant's obligation to pay costs, if he has not already done so, but any proceedings for enforcement of that obligation will have to be civil in nature.

As to case two, defendant claims similarly that, in effect, he has been subjected to illegal consecutive sentencing, and been punished in excess of that authorized by statute. We disagree. Defendant had the right to reject probation in case two, in which event he would have insured for himself the benefits of concurrent sentencing. *People v Peterson*, 62 Mich App 258, 265; 233 NW2d 250 (1975). Instead, defendant agreed to be placed on probation, and will not now be heard to complain that his decision to do so was unwise or disadvantageous. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990); *People v Richards*, 76 Mich App 695, 698-699; 256 NW2d 793 (1977).

As the two cases are separate, defendant simply is not entitled to jail credit in case two for incarcerative time served in case one. Again, had defendant rejected probation in case two, concurrent sentencing might have achieved that end, but since he opted to accept a probationary term, he cannot now properly contend that he has been deprived of the benefits of concurrent sentencing. *People v Adkins*, 433 Mich 732, 743 ff; 449 NW2d 400 (1989). Accordingly, the 90-day jail sentence imposed for defendant's violation of probation in case two is affirmed.

Defendant further contends that the trial court erred when it originally sentenced defendant in case two to make restitution without first conducting a hearing to determine his ability to pay. This argument would be without merit in any event, since at the time of the original sentencing defendant did not dispute such ability or the amount of restitution, and therefore no hearing was required. *People v Grant*, 455 Mich 221; ___ NW2d ___ (1997). However, this issue is not properly before this Court, as this appeal of right from the probation violation adjudication and sentence is limited to issues arising from the probation violation hearings and resulting sentence. Issues relating to the original proceedings, including sentence, are outside the scope of this appeal. *People v Pickett*, 391 Mich 305, 316 ff; 215 NW2d 695 (1974).

Order of probation violation in case one reversed; probation violation adjudication and sentence in case two affirmed. The stay of sentence ordered by this Court on August 6, 1996, is hereby vacated, effective 21 days from the release of this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Maureen Pulte Reilly