

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BYRON MICHAEL LACEY,

Defendant-Appellant.

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UNPUBLISHED

March 24, 1998

No. 200623

Recorder's Court

LC No. 94-005243

Before: Cavanagh, P.J., and White and Young, JJ.

PER CURIAM.

Defendant pleaded guilty of unarmed robbery, MCL 750.530; MSA 28.798. He was placed on two years' probation. As a condition of his probation, defendant was required to pay \$1,000 restitution. On November 20, 1995, an arrest warrant for violation of probation was sought on the ground that defendant failed to pay restitution as ordered. The trial court subsequently revoked defendant's probation and sentenced him to 6 ½ to 15 years' imprisonment for the original unarmed robbery conviction. Defendant now appeals as of right. We reverse and remand for a new probation violation hearing.

Defendant's first argument on appeal is that the trial court impermissibly based its revocation decision on conduct not charged in the petition alleging probation violation. We agree. Only conduct charged in the petition may be used to determine if a condition of probation has been violated. *People v Laurent*, 171 Mich App 503, 506; 431 NW2d 202 (1988). Moreover, if the trial court finds that a condition of probation has been violated, only the conduct charged in the petition may be considered in deciding whether probation should be revoked as a result of the charged violation. *Id.*; see also *People v Acosta*, 65 Mich App 640, 641; 237 NW2d 601 (1975).

Here, in addition to defendant's failure to pay restitution, it appears that the trial court considered alleged misconduct that was not charged in the notice of probation violation – while on probation, defendant was arrested and charged with two counts of home invasion.<sup>1</sup> Therefore, we are constrained to reverse defendant's conviction and remand for a new probation violation hearing. Defendant's sentence is vacated. *Laurent, supra*; *People v Longmier*, 114 Mich App 351; 319

NW2d 579 (1982). Contrary to defendant's assertion, we see no need to assign this matter to a new trial judge on remand.

In light of our resolution of this issue, we need not reach or address the remaining issues raised by defendant in his appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Helen N. White

/s/ Robert P. Young, Jr.

<sup>1</sup> The trial court was apparently under the mistaken belief that the charged probation violation activity also included the home invasion charges. In response to defense counsel's suggestion at the beginning of defendant's probation violation hearing that the home invasion charges were "the basis of the [probation] violation," the trial court stated:

*THE COURT:* That was not the basis, Mr. Cooper. *That was one of the allegations.*

*MR. COOPER:* Okay.

*THE COURT:* Payment of restitution was ordered as part of probation. He did not pay his restitution as ordered when it was requested pursuant to the Court's instructions back in January of 1996.

*The second allegation is the defendant was arrested and charged with Robbery Armed and Home Invasion. [Emphasis added.]*

While it is clear that the trial court considered defendant's failure to pay restitution in finding defendant guilty of violating his probation, the trial court also alluded to the home invasion charges, including the fact that defendant had been acquitted of those charges in a jury trial over which the trial judge in this case also presided:

Just for the record, let me just make this record very clear.

The Court heard the testimony here in court. And while I at no time quarrel with a decision made by a jury of 12, I tend to disagree. And my standard is a little different. It's not by beyond a reasonable doubt. It's by a preponderance of evidence.

The Court therefore finds Mr. Lacey guilty of Violation of Probation.