

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT RODNEY CREGER,

Defendant-Appellant.

UNPUBLISHED

September 10, 1999

No. 203728

Jackson Circuit Court

LC No. 97-079015 FH

Before: Markman, P.J., and Saad and P.D. Houk,* JJ.

PER CURIAM.

Defendant appeals as of right from his plea-based conviction of failure to pay child support and leaving the state, MCL 750.165; MSA 28.362. We affirm defendant's conviction but remand for modification of the judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and Peggy Creger are the parents of two children. Defendant left the marital home in 1988. On November 21, 1988 Peggy Creger obtained an order requiring defendant to pay \$97 per week in support. On January 13, 1989 Peggy Creger filed a complaint for divorce. The complaint was served on defendant in Texas. On February 3, 1989 the court entered an order for temporary support requiring defendant to pay support as specified in the earlier support case. The order was served on defendant by certified mail in Mississippi. The judgment of divorce, entered on January 3, 1990, required defendant to pay \$225 per week in support.

Defendant failed to pay support. In 1994 he was extradited to Michigan to appear on a bench warrant issued in the support case. He was released after making a payment of \$400, and again left the state.

In December, 1996 defendant was charged with failure to pay child support and leaving the state, and desertion and nonsupport, MCL 750.161; MSA 28.358. Defendant pleaded guilty to failure to pay child support and leaving the state. He acknowledged that he was aware of the existence of the

* Circuit judge, sitting on the Court of Appeals by assignment.

support orders in 1994, and that he failed to pay support. The court sentenced

defendant to one and one-half to four years in prison, with credit for 120 days, and made payment on the arrearage a condition of defendant's parole.

On appeal, defendant argues that MCL 750.165; MSA 28.362 violates his right to equal protection under US Const, Am XIV and Const 1963, art 1, § 2 because by its language it applies only to "husbands" and "fathers." In *People v Ghosh*, 188 Mich App 545, 546; 470 NW2d 497 (1991), we considered and rejected this argument, finding that as used in the Penal Code, words of the masculine gender included the feminine gender.

Defendant's arguments that he has been wrongfully incarcerated due to an inability to pay support, and that he is entitled to a remand to fix the amount of the arrearage on which he must make payments as a condition of parole, are without merit. While the inability to pay court-ordered support is a defense to the charge of failing to pay support and leaving the state, *People v Ditton*, 78 Mich App 610, 617; 261 NW2d 182 (1977), no evidence produced at the plea hearing established that defendant was unable to pay support. Defendant acknowledged that although he had worked from time to time, he had failed to pay support. The criminal case was not the proper context for examining and adjusting, if appropriate, the amount of arrearage on which defendant would be required to make payments.

Defendant's argument that his plea was supported by an insufficient factual basis is without merit. The elements of the offense of failing to pay child support and leaving the state are: (1) a support order entered in a divorce decree, a decree of separate maintenance, or by order entered during the pendency of such proceedings; (2) personally served on the father, or the father having entered his appearance in such proceeding; (3) the father refuses or neglects to pay support as ordered; and (4) the father leaves the State of Michigan. MCL 750.165; MSA 28.362. Defendant left Michigan prior to entry of the February 3, 1989 order in the divorce proceeding. His refusal to pay support at that time did not occur prior to or contemporaneously with his act of leaving the state. *People v Gilliam*, 108 Mich App 695, 703-704; 310 NW2d 843 (1981). However, in 1994, defendant's refusal to pay support was contemporaneous with his act of leaving the state. The facts adduced at the plea hearing were sufficient to support a conviction of failing to pay child support and leaving the state from 1994 forward. *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975). The trial court erred in ordering payments on the arrearage amount that accrued prior to defendant's appearance in circuit court in 1994. We remand with instructions that the judgment of sentence be modified accordingly.

Defendant's argument that his counsel rendered ineffective assistance by failing to advise him of the availability of certain defenses is without merit. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is presumed to have afforded effective assistance. A defendant can overcome that presumption by showing that counsel's failure to perform an essential duty resulted in prejudice. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987). An assertion of the defense of inability to pay support would have been without basis because at the plea hearing defendant acknowledged that he had worked from time to time and was capable of paying some amount of support. Furthermore, it was undisputed that in 1994

defendant was aware of his obligation to pay support, but left the state and failed to comply with the orders. Counsel's failure to advise defendant to assert groundless defenses cannot be deemed ineffective assistance. *Pickens, supra*.

Defendant failed to support his children, notwithstanding his awareness of his obligation to do so, and his ability to do so. His sentence is not disproportionate under the circumstances. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant's conviction is affirmed, and this matter is remanded for entry of an amended judgment of sentence providing that defendant is required to make payments on that portion of the support arrearage accruing on and after the date on which defendant appeared in Jackson Circuit Court on a bench warrant issued in Jackson Circuit Court Case No. 88-48458 DS. We do not retain jurisdiction.

/s/ Stephen J. Markman

/s/ Henry William Saad

/s/ Peter D. Houk