

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS WILLIAM MELDMAN,

Defendant-Appellant.

---

UNPUBLISHED

August 14, 2008

No. 276245

Oakland Circuit Court

LC No. 2005-204772-FH

Before: Davis, P.J., and Zahra and Borrello, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felony refusal to pay child support, MCL 750.165. Defendant was accused of failing to make child support payments as required by an order entered in 1998. Defendant admitted that, between December 1, 1999, and December 1, 2005, there were several months in which he underpaid or did not pay any child support. He was sentenced to five years' probation and six months in jail, and he was ordered to pay \$34,000 in unpaid child support. Defendant appeals as of right. We affirm.

The factual basis for defendant's conviction – his actual failures to comply with his responsibilities under the child support order – is not at issue. Rather, defendant asserts that MCL 750.165 is unconstitutional, that the trial court misconstrued MCL 750.165, that he was denied due process, and that his conviction suffers from procedural infirmities.

Whether a statute is constitutional is a question of law reviewed de novo. *People v Herndon*, 246 Mich App 371, 382-383; 633 NW2d 376 (2001). Statutes are presumed to be constitutional unless their unconstitutionality is readily apparent. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). A party challenging the constitutionality of a statute has the burden of proving its unconstitutionality. *Id.* Further, issues of statutory interpretation are reviewed de novo. *People v Tombs*, 260 Mich App 201, 207; 679 NW2d 77 (2003). We review questions of law de novo, and we review a trial court's factual findings for clear error. *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005).

The elements of the crime of felony nonsupport, MCL 750.165, are: (1) the defendant was required by a decree of separate maintenance or divorce order to support a child, (2) the defendant appeared in or received notice by personal service of the action in which the order was issued, and (3) the defendant failed to pay the required support at the time ordered or in the

amount ordered. *People v Herrick*, 277 Mich App 255, 257; 744 NW2d 370 (2007). MCL 750.165 specifically provides, in relevant part:

(1) If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than \$2,000.00, or both.

As it is currently written, felony nonsupport is a strict liability offense, and inability to pay is not a defense. *People v Adams*, 262 Mich App 89, 100; 683 NW2d 729 (2004). Inability to pay was a defense to the previous incarnation of the statute; the Legislature removed from the current version, which became effective November 3, 1999, any scienter or inability defense. *Id.*, 94-100.

Defendant contends that the trial court misconstrued MCL 750.165 to be a strict liability offense. However, as discussed, the trial court's interpretation was correct. For that reason, the trial court properly excluded all evidence regarding defendant's alleged inability to pay: any such evidence would have been irrelevant and inadmissible. MRE 402. Defendant was likewise prevented from neither testifying nor presenting a defense, but rather only from presenting evidence or arguments that did not constitute defenses. Defendant contends that the absence of a scienter element in MCL 750.165 is a violation of due process, particularly given the consequences of a conviction thereof, but defendant's concerns have already been considered and rejected. *People v Westman*, 262 Mich App 184, 191; 685 NW2d 423 (2004), rev'd in part on other grounds *People v Monaco*, 474 Mich 48 (2006); *Adams*, *supra* at 98-99. Accordingly, defendant's conviction for the strict liability offense at issue did not deprive him of due process.

Defendant next argues that the plain language of MCL 750.165 only applies to child support orders entered after the current incarnation of the statute became effective. Defendant is incorrect. See *Westman*, *supra* at 187-189 (observing that a defendant who fails to pay support after the effective date of the amended statute is guilty even where the support order was entered before the enactment) and *Monaco*, *supra* at 56-57 (2006) (holding that the crime of felony nonsupport is complete when an individual fails to pay support in the amount ordered at the time ordered; a person is subject to conviction and punishment each time the statute is violated). Again, it is undisputed that on several occasions after the current incarnation of MCL 750.165 became effective, defendant failed to pay child support payments that he was then under an obligation to pay pursuant to a court order. For the same reason, the application of MCL 750.165 did not constitute a violation of the constitutional provisions against ex post facto laws: defendant's charged *violations* took place *after* the statute was amended, so no retroactive application took place. See *Westman* and *Monaco*, *supra*.

Next, defendant seeks to collaterally attack the support order that was entered in the underlying child support proceedings. However, there is simply no authority in the felony nonsupport statute or in any of the cases interpreting it that would permit this kind of collateral attack. A collateral attack on underlying proceedings might be warranted where those proceedings suffered from such a serious error that they were rendered fundamentally unfair, such as a complete failure by the trial court to explain to a deportee the right to suspension of deportation or to appeal – which the United States Supreme Court found amounted to a complete

deprivation of judicial review of the proceeding. *United States v Mendoza-Lopez*, 481 US 828; 107 S Ct 2148; 95 L Ed 2d 772 (1987), superseded on other grounds by statute as recognized in *United States v Lara-Unzueta*, 287 F Supp 2d 888 (ND Ill, 2003). The other cases defendant cites in support of this argument are inapposite because they are based on the Child Support Recovery Act (CSRA), 18 USC 228, which criminalizes only those who “willfully” fail to pay child support, and which therefore makes directly relevant whether a defendant is able to pay. Again, defendant’s intent or ability are not relevant under MCL 750.165.

Here, defendant only contends that the trial court made an erroneous finding of fact regarding imputation of income. Defendant had the opportunity, and took the opportunity, to litigate the imputed income issue in the underlying proceeding. He also had the opportunity to seek modification of the order, which he sought, albeit unsuccessfully. Even if we were to presume that the trial court’s imputation of income to defendant beyond defendant’s actual income was indeed an error, it was not the kind of serious structural error that would permit a collateral attack. Furthermore, defendant had *some* income, yet on some months made *no* payment at all. Collaterally attacking the underlying support order would not undermine defendant’s conviction.

Furthermore, there is no merit to defendant’s contention that because he was not permitted to present evidence concerning his inability to pay, the trial court applied “cross-over” estoppel.<sup>1</sup> The trial court gave no indication that it was applying principles of estoppel, and in any event it did not do so in substance. The court was simply adhering to the principle set forth in *Adams*, which, again, provides that evidence concerning a defendant’s inability to pay is irrelevant and should be excluded. The court did not prevent defendant from presenting evidence concerning any element of the offense.

Further, defendant argues that his conviction should be overturned because he was not appointed counsel during the underlying child support proceedings that led to the entry of the 1998 support order. The right to assistance of counsel attaches when the outcome of the proceeding may subject the litigant to a loss of physical liberty. *Mead v Batchlor*, 435 Mich 480, 492; 460 NW2d 493 (1990). Because the outcome of the 1998 support modification proceeding did not subject defendant to the risk of imprisonment, he was not entitled to appointed counsel.

Defendant argues that construing MCL 750.165 as a strict liability offense violates the constitutional prohibitions against cruel and unusual punishment because it punishes defendant for his “status” as a person unable to afford to pay child support. Defendant insists that his violation of the statute was “compelled and involuntary” in that he could not afford the support payments and was helpless to modify the support order because his motion to modify the order was denied, and the time to appeal the order had lapsed. We find that defendant’s violation of the statute was neither compelled nor involuntary. The amount of support that defendant was required to pay pursuant to the 1998 support order was based on defendant’s imputed income, which was arrived at with due care and by considering defendant’s credentials and qualifications, the job market, and the national average salary for the position that defendant indicated he was qualified for, wanted to pursue, and was in fact pursuing. Requiring defendant to pay \$144 weekly child support was not akin to requiring him to do something that he had little ability to

---

<sup>1</sup> In other words, giving preclusive effect in a criminal matter to an issue decided in a civil one.

do. Defendant's protestations concerning a poor job market and his license loss, though worthy of consideration, do not establish that violation of the statute was inevitable. Further, defendant presents no evidence that his punishment was disproportionate to the crime, violated standards of decency, or did not take into account his potential for rehabilitation. See *People v Walker*, 146 Mich App 371, 374-375; 380 NW2d 108 (1985) (noting that the test for whether punishment is cruel and unusual is determined by a three-pronged analysis focusing on proportionality, evolving standards of decency, and the prospect for rehabilitation). Accordingly, defendant cannot establish that the constitutional prohibition against cruel and unusual punishment was violated.

Next, defendant argues that he was unconstitutionally deprived of notice that his conduct was illegal. We disagree. We reiterate that scienter is not an element of felony nonsupport under the current version of MCL 750.165. Defendant argues that he did not know that failure to pay child support was a crime; however, that statute also does not contain any notice provision, and it is a basic legal maxim that ignorance of the law is no excuse. *People v Woods*, 241 Mich App 545, 560; 616 NW2d 211 (2000). Defendant further argues that his interactions with the agencies involved in the child support proceedings, and the previous minimal consequences he had suffered for failing to make payments, suggested to him that he would not be prosecuted as long as he paid whatever he could afford. This is essentially an "entrapment by estoppel" defense.<sup>2</sup> However, defendant presents no evidence or argument that the court or any government official told him that his conduct was legal. Although defendant was not held in contempt each and every time he violated the support order and may not have been explicitly told that his conduct was felonious, this does not establish that his failure to abide by the order was reasonable and prosecution would be unfair. Defendant's argument that he received insufficient notice is without merit.

Finally, defendant argues that MCL 750.165 violates the title-object clause of the Michigan Constitution. We disagree.

The title-object clause of the Michigan Constitution provides:

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. [Const 1963, art 4, § 24.]

Generally, the purpose of the clause is to prevent the Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge. *People v Cynar*, 252 Mich App 82, 84; 651 NW2d

---

<sup>2</sup> The defense of "entrapment by estoppel" provides that if an individual unwittingly commits an unlawful act because of his reasonable reliance on the word of a government agent, the conduct is lawful and the individual ought not to be prosecuted. *Woods, supra* at 548. To establish entrapment by estoppel, the defendant must establish by a preponderance of the evidence that: (1) a government official, (2) told the defendant that certain criminal conduct was legal, (3) the defendant relied on the official's statements, (4) the reliance was in good faith and reasonable in light of the identity of the official, the point of law represented, and the substance of the statement, and (5) given the defendant's reliance, the prosecution would be unfair. *Id.*

136 (2002). The title of an act must express the general purpose or object of the act. *Id.* However, the title of an act need not be an index to all the provisions of the act. *Id.* Instead, the test is merely whether the title gives fair notice to the legislators and the public of the challenged provision. *Id.* at 84-85. It is only where the subjects are so diverse in nature that they have no necessary connection that the fair notice aspect has been violated. *Id.* at 85.

The relevant portion of MCL 750.165's title provides: "[r]efusing to support wife or children as required by court order." The body of the statute criminalizes the conduct of an individual who "does not pay the [child or spousal] support in the amount or at the time stated in the order." MCL 750.165(1). Defendant argues that because someone "refusing" to pay is meaningfully different than someone who "does not pay," the title-object clause is violated. We agree that the former implies that one might be able to pay, whereas the latter does not, so the two phrases do not convey exactly the same idea. Nevertheless, the title of the statute expresses the general purpose of the act, which is to ensure that individuals abide by their responsibilities to pay child or spousal support as required by a support order. The two phrases do both *generally* convey the same idea: not paying court-ordered child support, for whatever reason. They are not "so diverse in nature that they have no necessary connection."

Affirmed.

/s/ Alton T. Davis

/s/ Brian K. Zahra

/s/ Stephen L. Borrello