

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOSEPH PARKS,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 291011

Ingham Circuit Court

LC No. 08-001225-FH

Before: OWENS, P.J., AND SAWYER AND O'CONNELL, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted as charged of failing to pay child support, MCL 750.165. He was sentenced to 365 days in jail and ordered to pay restitution of \$234,444.83. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant failed to make child support payments, as ordered by the Family Division of Ingham Circuit Court, from October 1, 2006, to July 16, 2008. He testified that he had made several attempts to have the amount of income imputed to him reduced. He maintained that he was a rural physician with a solo practice and that income was imputed at the higher rate earned by a physician in an urban group practice. Moreover, he testified that he was disabled and was receiving \$424 per month from the federal government. In closing, defense counsel argued that corrections should be made to the amount of income imputed, and that the amount owing should be adjusted accordingly. Although defendant presented testimony relevant to his ability to pay the support, counsel never argued that inability to pay was a defense to this crime.

On appeal, defendant asserts that he had a constitutional right to raise an inability to pay defense. This issue was not raised below and, coextensively, no constitutional argument was presented. Unpreserved constitutional errors are reviewed for plain error affecting a substantial right. This generally requires a showing that the error affected the outcome of the lower court proceedings. There must also be a showing that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Borgne*, 483 Mich 178, 768 NW2d 290, aff'd on reh on different grounds ___ Mich ___, 771 NW2d 745 (2009).

MCL 750.165 provides in pertinent 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.

(2) This section does not apply unless the individual ordered to pay support appeared in, or received notice by personal service of, the action in which the support order was issued.

In *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004), this Court interpreted this statute, as amended in 1999, and determined that it did not require a finding of intent or knowledge; instead, it is a strict liability statute for which inability to pay is not a defense. Defendant argues that the interpretation of the statute in *Adams* violates the due process protections of the state and federal constitutions. He acknowledges that in *People v Westman*, 262 Mich App 184; 685 NW2d 523 (2004), overruled on other grounds in *People v Monaco*, 474 Mich 48 (2006), this Court held that the statute did not violate due process, but asserts that this was restricted to the federal due process clause. However, the *Westman* Court simply stated, "We find no violation of defendant's right to due process." 262 Mich App at 191. It made no distinction between federal and state due process. There is no significant difference between the due process clauses of US Const, Amend V and XIV, and Const 1963, art 1, § 17. Notably, "the Michigan Constitution does not provide greater protection than the federal due process guarantee. . . ." *English v Blue Cross Blue Shield*, 263 Mich App 449, 459-460; 688 NW2d 523 (2004). Accordingly, not only is there no reason to view the holding in *Westman* as applying only to the federal constitutional due process guarantee, there is no reason to apply a different standard based on the state constitution. Since *Adams* holds that there is no inability to pay defense to the felony of failure to pay support; *Westman* provides that this holding passes constitutional muster; and this Court is bound to follow these cases pursuant to MCR 7.215(A), we conclude that there have been no constitutional violations.

Defendant argues that *People v Ditton*, 78 Mich App 610; 261 NW2d 182 (1977), established an inability to pay defense based on the federal constitution. However, the *Ditton* Court was interpreting a previous version of MCL 750.165. The preamended version required a refusal or neglect to pay, i.e., an intent element. In *Adams*, the Court concluded that inability to pay was not a defense under the amended statute given the omission of the intent element.

Defendant also argues that *Adams* and *Westman* contradict *Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889). There, the city criminalized the violation of an ordinance requiring a property owner to maintain the sidewalk in front of his house. The *Jenkinson* Court held that this duty could not be imposed where compliance was not possible. However, in *Jenkinson* there was no forum in which an ability to pay was previously determined. Whereas it might be offensive to impose strict liability under such a circumstance, no such offensiveness arises where, as here, the matter was adjudicated in a civil forum.

Defendant argues that the determination of ability to pay in a civil forum will not satisfy the due process rights attendant to a criminal proceeding. However, ability to pay is not an element of the strict liability offense of failure to pay support. In a criminal trial, the evidence presented is sufficient if each element of the crime is proven beyond a reasonable doubt. See

People v Carines, 460 Mich 750, 757; 597 NW2d 130 (1999). Thus, the prosecutor only had to establish failure to pay, not inability to pay. Defendant was not entitled to proof beyond a reasonable doubt of an inability to pay.

Finally, defendant maintains that inability to pay is a defense to an actus reus element of the failure to pay support. The *Jenkinson* Court held that, “[n]o legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform.” 77 Mich at 419. If *Jenkinson* were read to mean that inability was a defense to a required actus reus, an issue we do not decide, it does not stand for the proposition that ability must be established in the criminal proceeding.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O’Connell