

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

ANTHONY ANDRE LITTLE,

Defendant-Appellant.

No. 294575
Wayne Circuit Court
LC No. 08-019664-FH

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

MEMORANDUM.

Defendant Anthony Andre Little appeals as of right his jury-trial conviction of felony failure to pay child support, MCL 750.165. This appeal was held in abeyance pending the Michigan Supreme Court's decision in *People v Likine*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 141154/141181/141513, issued July 31, 2012). We now reverse and remand for a new trial.

Defendant argues that the trial court erred in not allowing him to assert two defenses: (1) inability to pay as evidence that he did not have the mens rea to commit the offense and (2) the common-law affirmative defense of impossibility. During a final pretrial conference on April 10, 2009, the trial court informed defendant that failure to pay child support was a strict-liability offense and that "[n]ot being able to pay the money is no defense" According to the trial court, "the only defense of it is that, 'I paid the money.'" Moreover, the trial court refused defendant's request during trial to instruct the jury to consider his ability to pay.

In *People v Adams*, 262 Mich App 89, 96-100; 683 NW2d 729 (2004), we held that the Legislature intended MCL 750.165 to be a strict-liability offense, i.e., an offense without a mens rea requirement, and that evidence of a defendant's ability to pay was irrelevant. In *Likine*, slip op at 21-22, the Michigan Supreme Court agreed that the language of MCL 750.165 indicated that the Legislature intended it to be a strict-liability offense and that mere inability to pay was not a defense. However, the Court held that the common-law affirmative defense of genuine impossibility could still be invoked. *Id.* at 27-28, 33.

Under *Likine*, felony-nonsupport defendants must make all reasonable efforts and explore all reasonably possible legal ways of obtaining money to meet their obligations. *Id.* at 31. A defendant is entitled to a jury instruction regarding impossibility if he provides prima facie evidence from which a reasonable jury could find that it was genuinely impossible for him to pay the ordered child support. *Id.* at 33. The defendant will then be exonerated if the jury finds by a

preponderance of the evidence that it was genuinely impossible for him to comply with the child-support order for each violation in the charging period. *Id.* at 34.

In this case, defendant offered evidence that he was physically disabled and unable to work during the charging period and that he unsuccessfully undertook other means by which to make money and pay child support. Although evidence of inability to pay to negate a mens rea element is irrelevant in this case, see *id.* at 21-22, it is unknown whether defendant would have provided more complete evidence regarding the defense of genuine impossibility had the trial court not erroneously determined and informed him that his only available defense was “I paid the money.” Although the Supreme Court emphasized that it is a rare defendant who can prove genuine impossibility, *Id.* at 49, we must give defendant the opportunity to try under the guidelines established by the *Likine* Court as we cannot conclude that the trial court’s error was harmless beyond a reasonable doubt on the record before us. See *id.* at 38 (reversing and remanding for a new trial where the trial court erroneously precluded the genuine-impossibility defense, the record was undeveloped, and the Court could not conclude that the error was harmless beyond a reasonable doubt).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Pat M. Donofrio

/s/ Jane M. Beckering