

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 27, 2012

v

MICHAEL DUANE STANLEY,
Defendant-Appellant.

No. 305027
Oakland Circuit Court
LC No. 2010-232230-FH

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

MEMORANDUM.

Defendant pleaded guilty to felony nonsupport, MCL 750.165. He was sentenced to 18 months to six years' imprisonment and was ordered to pay \$45,160.88 in restitution. Defendant appeals by delayed application for leave to appeal granted. We affirm defendant's conviction and sentence, but remand for clarification of the amount of outstanding restitution.

Defendant's contention that inability to pay is a valid defense to a charge of felony nonsupport was rejected in *People v Likine*, 492 Mich 367, 374-375; ___ NW2d ___ (2012). Rather, our Supreme Court held that the common-law defense of impossibility is the proper defense to felony nonsupport. *Id.* at 374. Defendant did not raise the defense of impossibility, and therefore, we affirm his guilty plea conviction for felony nonsupport.

Next, defendant argues that offense variable (OV) 16 was improperly scored. Because defendant has already served his minimum sentence and is on parole, this issue is moot. *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003). Accordingly, we decline to review the issue. Similarly, defendant's related argument that trial counsel rendered ineffective assistance of counsel is moot because it is impossible to fashion a remedy. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Lastly, defendant submits that the restitution amount he is ordered to pay in this case has the practical effect of requiring him to pay a second time the restitution amount he was ordered to pay as a result of a 2007 conviction for felony nonsupport. Indeed, the amount of restitution ordered in this case includes the \$17,154.92 in child support arrearages that defendant was ordered to pay as restitution in the 2007 case. Defendant asserts for the first time on appeal that, to the extent that he has been ordered to twice pay the \$17,154.92 arrearages, the restitution order violates the prohibition against double jeopardy. The restitution order does not violate the Double Jeopardy Clause because it is permitted in addition to any other penalty authorized by

law, MCL 780.766(2). *People v Dewald*, 267 Mich App 365, 385; 705 NW2d 167 (2005). Consequently, the claim of ineffective assistance premised on a double jeopardy violation fails. *People v Uphaus (On Remand)*, 278 Mich App 174, 186-187; 748 NW2d 899 (2008). However, the prosecution does not object to a remand for purposes of clarifying that the judgment of sentence overlaps with the underlying restitution ordered in a previous case. Accordingly, we remand for the limited purpose of clarifying that the restitution amount contained in this judgment of sentence supersedes the 2007 restitution order.

Affirmed, but remanded for the limited purpose of clarifying the order of restitution. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio