

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE HUGH BREITHAUPT,

Defendant-Appellant.

UNPUBLISHED

December 15, 2000

No. 219431

Livingston Circuit Court

LC Nos. 93-007661-FH;

93-007662-FH;93-007663-FH;

93-007664-FH;93-007665-FH;

93-007666-FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Defendant was found guilty of violating his probation and was sentenced to two to five years' imprisonment and ordered to pay \$50,849 in restitution as a condition of parole. Defendant appeals as of right, and we affirm.

Defendant first argues there was insufficient evidence presented at his probation revocation hearing for the court to determine that defendant violated the terms of his probation. We disagree. We view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the preponderance of the evidence indicated that defendant violated his probation. *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). "There must be verified facts in the record from which the court can find by a preponderance of the evidence that a violation was committed." *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998).

Defendant was serving probation pursuant to his convictions on seven counts of larceny over \$100, MCL 750.356; MSA 28.588. One of the terms of that probation was that defendant pay \$51,299 in restitution. Defendant was charged with violation of probation because in the five years since the probation order, he paid only \$450.

Recently, in *People v Collins*, 239 Mich App 125, 136-138; 607 NW2d 760 (1999), this Court recognized that a court is prohibited from incarcerating a defendant as a consequence for failure to pay restitution unless the defendant's default was wilful and the defendant was able to pay restitution. Specifically, MCL 769.1a(14); MSA 28.1073(14) states:

Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so.

This statute helps to assure indigent offenders equal protection of law if they do not have sufficient funds to pay their restitution. *Id.*, 135-137. However, we do not find that to be the situation in the present case.

We find from the verified facts that the court could have found by a preponderance of the evidence that defendant had the resources to pay additional restitution, but that he did not make a good-faith effort to do so. The \$450 payment does not show a good-faith effort by defendant to pay his restitution, especially in light of the fact that defendant paid Ingham County and Oakland County each about \$2,200 to \$2,700 in restitution during this same time period.

The facts show that defendant had the resources to make additional payments to his restitution, at least during 1997 and 1998. During that time, defendant earned about \$1,000 per month from his job at Meijer. His expenses, excluding his expenses for food and personal effects, were as high as \$936 per month. These facts indicate that defendant was only barely earning enough to cover his living expenses from his Meijer's earnings. However, defendant had earned an additional \$6,000 to \$7,000 from May 1998 to November 1998 from construction jobs, which gave him an extra \$1,000 per month for these months. This additional income would have allowed him to make additional restitution payments to Livingston County, at least more than defendant had paid during 1997 and 1998, which amounted to less than \$100. Further, as the trial court concluded, defendant's drunk driving conviction indicated that defendant had some money to socialize and to pay his conviction fines. This money could have been used toward restitution. Thus, based on the facts presented at the probation revocation hearing, we find that a rational trier of fact would conclude that the preponderance of the evidence indicated that defendant violated his probation.

Defendant also argues that the trial court abused its discretion in sentencing him by failing to award him sixty-six days' good time credit and by imposing a disproportionate sentence. On November 18, 1998, defendant was committed to the department of corrections to serve a minimum term of two years with 299 days' credit. Because it appears that defendant has completed serving his minimum sentence, this issue is moot, and we decline to review it. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Gary R. McDonald

I concur in result only.

/s/ Donald E. Holbrook, Jr.