STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2001
v	No. 226398 Genesee Circuit Court
PAUL EDWARD CULHANE, Defendant-Appellant.	LC No. 99-005283-FH

Before: Whitbeck, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant Paul Culhane pleaded guilty of attempted desertion.[1] He appeals as of right his sentence of five years' probation plus restitution. We decide this appeal without oral argument pursuant to MCR 7.214(E). We vacate the sentence and remand for resentencing.

I. Basic Facts And Procedural History

Culhane and Sheila Johnson had three children. When they divorced in 1988, the court handling the divorce granted Johnson custody of the children and ordered Culhane to pay child support. Culhane did not fulfill this support obligation between December 1, 1993, and October 26, 1999, during which time he either was employed or was unemployed but able to work.

In October 1999, the prosecutor charged Culhane with deserting his children by failing to pay for their support. Approximately two months later, in December 1999, Culhane indicated on the record that he had agreed to plead guilty to attempted desertion and "to make restitution as determined by the Friend of the Court." Before the trial court accepted Culhane's guilty plea, it advised him "that the main thrust or purpose of this prosecution is to obtain restitution. And so unless something unusual happens, it would probably be a sentence of probation requiring you to make restitution over a period of time." Culhane indicated that he understood this probability. The trial court also ascertained that Culhane understood the plea agreement and "what the maximum consequences could be . . . what we're going to try to accomplish over the next few years." After being advised of his rights, Culhane pleaded guilty of the offense. The trial court then accepted Culhane's plea and informed him that it could not alter the support amount; only

[1] MCL 750.92 (attempt); MCL 750.161 (desertion).

the judge assigned to the divorce case could change that amount if petitioned to do so. As the trial court expressed it, "The only thing I have authority to do is to decide what, if anything, should be paid on the arrearage."

According to the presentence investigator's report (PSIR), Culhane had an insignificant criminal history consisting of a 1987 misdemeanor conviction for OUIL. The PSIR also revealed that a temporary support order entered on September 26, 1988, required Culhane to pay $16 a week in child support. The judgment of divorce, entered April 16, 1989, required him to pay $100 a week for the three children, $90 per week when only two children required support, and $75 a week if only one child required support. Culhane's oldest child began living with him in March 1993 and, according to Culhane, his middle child lived with him intermittently as a teenager. The Genesee County Friend of the Court reported that Culhane had only made a payment of $438 in 1989 and second payment of $1,000 in May 1999. As a result, Culhane owed $65,945.44 in accumulated unpaid support. Culhane's failure to support his children forced Johnson to rely on public assistance for seven years. Despite his statements to the contrary during the plea proceeding, Culhane claimed that the arrearage was due in part to physical disabilities and his own need to rely on public assistance at times. He also claimed not to know that he had to go to court to have the support order amended when his children lived with him or his income changed.

The presentence investigator recommended that the trial court sentence Culhane to eighteen months' probation. The trial court rejected this recommendation because it viewed eighteen months as insufficient time to meet the primary objective of the sentence in this case, which was "to obtain from Mr. Culhane the restitution for the monies that are owed." Instead, the trial court sentenced Culhane to five years' probation and restitution equaling his child support arrearage. While on probation, the trial court ordered Culhane to obtain employment or document a disability. He was obligated to pay $300 a month toward the restitution amount of $65,945.82.

On appeal, Culhane contends that the trial court failed to articulate an adequate explanation for the sentence it imposed. He also argues that the sentence imposed is "all out of proportion to the seriousness of the offense" because his serious physical problems prevented him from working during the time he accumulated the arrearage and he was unable to work at the time of sentencing. In reviewing the proportionality of his sentence, we have determined that the sentence is, indeed, erroneous, but not for the reasons Culhane contends.

II. Statutory Maximum

In *People v Ross*,[2] this Court explained:

> Sentencing requires consideration of a number of factors: (1) severity of the crime; (2) the nature of the crime; (3) circumstances surrounding the criminal behavior; (4) defendant's attitude toward his criminal behavior; (5) defendant's

[2] *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985).

> criminal history; (6) defendant's social and personal history; and (7) statutory sentencing limits."

If we were to consider only the first six of these factors, not only would we conclude that the trial court imposed a proportionate sentence of probation, but that it articulated an adequate explanation for that sentence. As the trial court noted, the primary purpose of Culhane's sentence was to obtain restitution, which the trial court disclosed to Culhane before he entered his guilty plea. This relatively lengthy probation term ensured that Culhane remained under court supervision until he secured a job and had paid a substantial portion of the accumulated support arrearage, or established that he was unable to obtain employment because of a disability. That Culhane failed to support his children for a relatively long period only supports the conclusion that he should also be punished for an appropriately long period.[3]

However, we cannot ignore the seventh sentencing factor articulated in *Ross*. The Legislature has the constitutional authority to determine the range of sentences appropriate for an offense[4] and has delegated to the trial courts the task of determining the particular sentence appropriate to a specific offender in the felony desertion statute, MCL 750.161. Nevertheless, the Legislature has not delegated this sentencing authority to the trial courts without limitation. The statute includes two specific subsections prescribing sentences for offenders convicted under the statute. Under subsection 1, a trial court may sentence a defendant to one to three years in prison *or* three months to one year in jail.[5] Alternatively, subsection 2 provides:

> If at any time before sentence the defendant enters into bond to the people of the state of Michigan in such penal sum for such term and with such surety or sureties as may be fixed by the court, conditioned that he or she will furnish his or her spouse and children with necessary and proper shelter, food, care, and clothing, or will pay to the clerk of the court, or other designated person, such *sums of money at such times as the court shall order* to be used to provide food, shelter, and clothing for his or her spouse and children, or either of them, then the court *may make an order placing the defendant in charge of a probation officer*. The court may require that the defendant shall from time to time report to the probation officer as provided by law. The court may extend the period of probation from time to time or the court may defer sentence in the cause, but *no term of any bond or any probation period shall exceed the maximum term of imprisonment as provided for in this section*.[6]

Thus, subsection 2 not only authorized the trial court in this case to sentence Culhane to pay restitution and to be placed on probation, it limited the length of the probation term.

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[3] See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

[4] See Const 1963, art 4, § 45.

[5] MCL 750.161(1).

[6] MCL 750.161(2) (emphasis added).

The attempt statute implicated in Culhane's conviction also provides a sentencing scheme. However, the sentencing scheme in the attempt statute applies only "when no express provision is made by law for the punishment of such attempt[.]" Clearly, the desertion statute expressly provides for punishment and there is no question that the probation provision in MCL 750.161(2) controls the sentence the trial court in this case could impose. It is equally clear that the five-year probation term exceeds the maximum prison term allowed under MCL 750.161(1), which is only three years. While the facts of this case may demonstrate why the probation provision in MCL 750.161(2) may be inadequate in some cases to ensure that defendants repay a large support arrearage, the Legislature has determined the maximum sentence necessary to respond to the seriousness of this offense.[7] Thus, the trial court not only lacked the legal authority to sentence Culhane in excess of the statute,[8] it technically exceeded the Legislature's definition of the outer limits of proportionality for a sentence for this offense.

Sentence vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Janet T. Neff
/s/ Joel P. Hoekstra

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[7] See, generally, *People v Babcock*, 244 Mich App 64, 68; 624 NW2d 479 (2000) (explaining connection between social response to crime and Legislature's authority to prescribe sentences); *People v Launsberry*, 217 Mich App 358, 363-364; 551 NW2d 460 (1996) (in the context of a cruel or unusual punishment challenge, Court suggested that the Legislature may properly reflect the seriousness of the crime in the sentence prescribed by statute).

[8] See *People v Dorsey*, 107 Mich App 789, 792; 310 NW2d 244 (1981).