

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK NALI,

Defendant-Appellant.

UNPUBLISHED

December 18, 2001

No. 223064

Wayne Circuit Court

LC No. 93-003064

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals as of right the revocation of his probation for failing to pay restitution in violation of the terms of his probation, MCL 771.4, to which he pleaded guilty. Defendant was sentenced on the underlying charges of conspiracy to defraud Medicaid, MCL 400.606, and conspiracy to defraud Blue Cross-Blue Shield, MCL 752.1005, to one year in jail and ordered to pay restitution in the amount of \$46,947. We affirm.

On appeal, defendant argues that the trial court clearly erred in finding that he could pay the restitution ordered and that his failure to do so was wilful; therefore, the court abused its discretion in sentencing defendant to jail. We disagree.

The granting of probation is a matter of grace and is conditioned on the defendant paying restitution to the victim of the conduct giving rise to defendant's conviction. MCL 771.3(1)(e); MCL 771.4; *People v Collins*, 239 Mich App 125, 135; 607 NW2d 760 (1999); see, also, MCL 769.1a(11). The decision whether to revoke probation is a matter within the sentencing court's discretion. MCL 771.4; *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991). However, a defendant may not be jailed for a probation violation for failure to pay restitution unless the sentencing court determines that the defendant had the resources to pay the ordered restitution and did not make a good faith effort to do so. See MCL 769.1a(11) and (14); *Collins*, *supra* at 136-137. In making that determination, the court "shall consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay." MCL 769.1a(11).

In this case, the sentencing court conducted a hearing to determine whether defendant was unable to pay the restitution because of an alleged medical condition that prevented him from being employed. Thereafter, the sentencing court found that defendant did not make a

good faith effort to pay the ordered restitution, although he had the resources to do so, and revoked his probation. Factual findings by the sentencing court are reviewed for clear error and, here, the court's findings are not clearly erroneous. See *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995).

The record evidence included that (1) defendant made virtually no effort to comply with the restitution condition of his probation over the five-year period, (2) defendant is highly educated and holds both medical and law degrees, (3) defendant's medical expert testified that he could probably work in some capacity, (4) defendant's medical expert testified that his opinions were based on defendant's subjective complaints and lumbar spine x-rays were negative, and (5) it appeared that defendant transferred some assets into the names of other people. Based on the evidence of record, we cannot conclude that the sentencing court's findings were clearly erroneous.

Further, the court did not abuse its discretion in sentencing defendant to jail or in ordering defendant to pay restitution. See *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001). Defendant argues that he should have been given an opportunity to withdraw his guilty plea regarding the underlying charges before the sentencing court imposed a jail term. However, if probation is revoked, the court may sentence defendant on the original offense in the same manner and to the same penalty as the court might have done had the probation order never been made. MCL 771.4; *People v Burks*, 220 Mich App 253, 258-259; 559 NW2d 357 (1996). Defendant was made aware of the consequences of his failure to abide by the terms of his probation when he was originally sentenced to probation. Therefore, after revoking defendant's probation, the trial court could impose sentence as authorized by MCL 400.606, MCL 752.1005, and MCL 769.1a(2), including imprisonment and an order of restitution. See, also, 769.1a(13).

Finally, defendant argues that the sentencing court violated his constitutional rights when it ordered him to pay restitution without the representation of an attorney. However, defendant was represented by counsel when he was ordered to pay restitution, therefore, this issue lacks merit.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey