STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2008
v	No. 278671 Ingham Circuit Court
THOMAS RAY BLACK, Defendant-Appellant.	LC No. 02-000237-FH

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of failing to pay child support, MCL 750.165. Defendant was sentenced to a three-year term of probation, with twelve months in jail, to be suspended upon the payment of restitution. He was also ordered to pay $59,964.74 in restitution. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant argues that his conviction must be reversed because the trial court failed to assure that his waiver of the right to counsel was knowing and voluntary. We disagree.

The right to represent oneself is included in the right to counsel guaranteed by the Sixth Amendment of the United States Constitution, US Const, Am VI, and is specifically guaranteed by the Michigan Constitution, Const 1963, art 1, § 13. However, before permitting a defendant to dismiss his counsel and represent himself, the trial court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily, and (3) the defendant's self-representation would not disrupt, inconvenience, or burden the court. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). The trial court must also comply with MCR 6.005(D), which requires the court to offer the defendant the opportunity to consult with an attorney, and to advise him of the charge, the maximum prison sentence associated with the offense, and the risk involved in self-representation. See *People v Williams*, 470 Mich 634, 642-643; 683 NW2d 597 (2004).

Defendant contends that the trial court did not comply with *Anderson* and MCR 6.005(D), and thus did not find that his waiver of counsel was knowing and voluntary. However, our Supreme Court has held that mechanical adherence to these procedures, which "are merely vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open," is not required. *People v Adkins (After Remand)*, 452 Mich 702, 725; 551 NW2d 108 (1996), overruled in part on other grounds *Williams*, *supra* at 641. Instead, a trial court need

only substantially comply with the requirements of *Anderson* and MCR 6.005(D). *People v Russell*, 471 Mich 182, 191; 684 NW2d 745 (2004); see also *Adkins, supra* at 726-727 (rejecting a "word-for-word litany approach" in favor of a "substantial compliance" standard). "'Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a brief colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.'" *Russell*, *supra* at 191, quoting *Adkin*s, *supra* at 726-727.

Defendant complains that his request for self-representation was not voluntary and unequivocal because he chose to represent himself only after the trial court warned him at a prior hearing that it would not again appoint substitute counsel. However, an indigent defendant is not entitled to have the attorney of his choice appointed simply by requesting that the originally appointed attorney be replaced. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process," and "[g]ood cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id*.

Defendant decided on the morning of trial that his fourth appointed attorney was unsatisfactory because, whereas defendant planned on objecting to certain documents at trial, his counsel did not. This does not strike us as a difference in "a fundamental trial tactic" that would have constituted good cause and justified appointment of substitute counsel, especially here where reappointment would certainly have "unreasonably disrupt[ed] the judicial process." *Id*.; see also *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). On the record before us, we cannot conclude that defendant was entitled to substitute counsel. Nor can we conclude that defendant's subsequent decision to represent himself rather than to accept competent representation was an involuntary one.

Defendant also contends that the trial court erred when it did not advise him of the maximum possible prison sentence for his offense, as required by MCR 6.005(D)(1), and when it failed to let him discuss his choice with his appointed attorney, as required by MCR 6.005(D)(2).

Defendant correctly asserts that the trial court did not explicitly advise him of the maximum possible sentence for his offense. However, the record shows that defendant knew of his possible punishment. The maximum penalty for this offense was listed on the information. Defendant also apparently participated in a discussion regarding a plea agreement before trial began. In addition, defendant was certainly aware of the charges against him, having had a previous trial concerning the same matter. Under the circumstances, defendant entered his waiver with his eyes open as to the seriousness of his decision. We find substantial compliance with MCR 6.005(D)(1). See, e.g., *Adkins, supra* at 730-731. Moreover, "[t]he trial court complied with the requirement of MCR 6.005(D)(2) by providing defendant his court-appointed attorney as an advisor." *Williams, supra* at 646.

Defendant has not shown that his waiver was involuntary or that the trial court failed to substantially comply with the requirements of MCR 6.005 such that he is entitled to relief.

Defendant next argues that the trial court erred when it imposed restitution of $59,964.74, which represented all of defendant's child support arrearages, rather than ordering restitution of

approximately $5,400, which represented his arrearages from November 4, 1999, through August 16, 2000. We disagree.

We generally review an order of restitution for an abuse of discretion. *In re McEvoy*, 267 Mich App 55, 59; 704 NW2d 78 (2005). However, "[w]hen the question of restitution involves a matter of statutory interpretation, review de novo applies." *Id.*

Restitution is designed to allow victims of crime to recoup losses suffered as a result of criminal conduct. *People v Grant*, 455 Mich 221, 230; 565 NW2d 389 (1997). Restitution may be ordered for damages that arose out of a defendant's course of conduct. See MCL 769.1a; MCL 780.766(2); see also *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997). Moreover, restitution may be ordered for acts in a defendant's course of conduct that did not result in a conviction. *Id.* at 272; *People v Persails*, 192 Mich App 380, 383; 481 NW2d 747 (1991).

Defendant argues that the restitution order must be vacated because the prosecutor failed to establish criminal liability for the arrearage that occurred outside the period of November 4, 1999, through August 16, 2000. We disagree. In *People v Law*, 223 Mich App 585; 568 NW2d 90 (1997), rev'd in part on other grounds, 459 Mich 419 (1999), the defendant raised essentially the same argument after the trial court ordered restitution for arrearages beyond the time period for which he was found guilty of failing to pay support. This Court disagreed with the defendant's argument and found that the failure to pay child support constituted one course of conduct:

> We have also stated that restitution is not a substitute for civil damages, but encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct.
>
> In the case before us, we agree with the trial court that the unpaid child support and medical expenses were attributable to defendant's course of conduct of neglecting his children. Moreover the expenses were easily ascertainable. Documentation was submitted to the trial court during the restitution hearing verifying the amounts owed. Finally, the losses were the direct result of defendant's criminal act of abandoning his children. Therefore, we find that the trial court did not abuse its discretion by ordering defendant to pay the back child support and Christine's unpaid medical bills. [*Law*, *supra* at 589 (citations omitted).][1]

Defendant contends that, because a conviction of failure to pay child support required the prosecutor to prove an ability to pay prior to November 4, 1999,[2] he could not have been

---

[1] We note that our Supreme Court specifically affirmed this portion of this Court's opinion by ordering the remanded restitution order to include the amount of unpaid support for the entire time the defendant had been in arrears. *People v Law*, 459 Mich 419, 431; 591 NW2d 20 (1999).

[2] A parent's inability to pay was a defense to the crime of failing to pay child support under the former MCL 750.165. See *People v Ditton*, 78 Mich App 610, 617; 261 NW2d 182 (1977).
(continued…)

convicted of the offense, and his failure to pay prior to that time therefore constituted a different course of conduct. Defendant's assertion is an overly narrow interpretation of the authority allowing restitution under such circumstances. See, e.g., *People v Letts*, 207 Mich App 479, 481; 525 NW2d 171 (1994). Because the pre-1999 arrearages were part and parcel of defendant's continuous course of conduct, it is technically irrelevant whether defendant could have been found guilty of failing to pay those pre-1999 arrearages. *Id*.; see also *Persails*, *supra* at 383. As in *Law*, defendant engaged in a continuous course of conduct by neglecting to support his children. The trial court was thus within its authority when it ordered defendant to pay the restitution at issue in this case.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

(…continued)

However, the Legislature significantly amended the provisions of MCL 750.165, effective November 3, 1999. See 1999 PA 152. A defendant's inability to pay is no longer a valid defense to the crime of failing to pay child support under the current MCL 750.165. *People v Adams*, 262 Mich App 89, 97-98; 683 NW2d 729 (2004).