

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EUGENE FRAZIER,

Defendant-Appellant.

UNPUBLISHED

July 5, 2011

No. 297627

Genesee Circuit Court

LC No. 09-025685-FH

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant pleaded guilty to 11 counts of failure to pay child support, MCL 750.165. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 36 to 180 months' imprisonment for each conviction and restitution. We affirm.

Defendant argues that his trial counsel was constitutionally ineffective because he failed to move to dismiss the charges on statute of limitations grounds. Defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for counsel's error there is a reasonable probability that the results of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Where no *Ginther*¹ hearing was held and no factual findings were made, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

In *People v Monaco*, 474 Mich 48, 55; 710 NW2d 46 (2006), our Supreme Court held that a six-year statute of limitations applies to violations of MCL 750.165, pursuant to MCL 767.24(5). The Court further held:

An individual is guilty of felony nonsupport under MCL 750.165(1) if the individual "does not pay the support in the amount or at the time stated in the order" The word "or," when read in context ("does not pay"), indicates that the statute is violated if the individual neither pays the ordered amount nor pays

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

that amount when it is due. Thus, the plain language of MCL 750.165(1) directs that the crime of felony nonsupport is complete when an individual fails to pay support in the amount ordered at the time ordered. [*Monaco*, 474 Mich at 56 (emphasis added).]

Because the defendant in *Monaco* was charged with criminal nonsupport under MCL 750.165(1) more than eight years after his support obligation ended, the charges were time-barred. *Id.* at 55-56, 58.

It appears that defendant in this case is arguing that because the last order was entered in 2002, the criminal charges filed in April 2009 are time-barred. However, under *Monaco*, because each of the orders required defendant to pay child support every week, the prosecutor could have charged him with felony nonsupport each week that he did not pay the full amount. Four of defendant's children – the subjects of Counts 1, 6, 8, and 11 – turned 18 years old before the charges were filed. Because all 11 support obligations ended when the children turned 18 years old, the prosecutor had six years from these children's 18th birthdays in which to prosecute defendant. The oldest child did not turn 18 until 2006. Thus, the charges in Counts 1, 6, 8 and 11 were timely filed.

For the seven children that were under age 18 at the time the charges were filed, the prosecutor had six years from the most recent nonpayment in which to charge defendant. For Counts 2, 3, and 4, defendant did not pay anything until April 2009, for Count 5, defendant never paid anything, and for Counts 9 and 10, defendant made payments only in 1998 and 2009. Thus, all of these charges were timely filed, and counsel could not have been objectively unreasonable for failing to move to dismiss the charges. See *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). For Count 7, it is not clear when defendant failed to pay, but he has failed to show that the last nonpayment occurred more than six years before the charges were filed. “[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant's ineffective assistance of counsel argument is therefore without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering