STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 300293 Berrien Circuit Court
ROBBY LYNN SLITER, Defendant-Appellant.	LC No. 2003-405019-FH

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right[1] the revocation of his probation under MCL 771.4a, resulting from an underlying conviction for a failure to pay child support in violation of MCL 750.165. For the reasons set forth in this opinion, we affirm.

On September 17, 2003, appearing before Judge Paul L. Maloney, defendant pleaded guilty to felony failure to pay child support under MCL 750.165. In the course of entering his plea, defendant acknowledged the nonpayment of child support occurred between November 1993 and August of 2003. He further admitted that during that time he had the ability to pay and yet he did not pay. The court sentenced defendant to five years probation and 180 days in jail with credit for 39 days served. Upon verification of defendant's employment, the trial court authorized the Michigan Department of Corrections to place defendant on a tether so that defendant could work. The trial court also ordered that if the Department of Corrections thought it appropriate, defendant could be released from a tether. In addition, the trial court ordered restitution in the amount of $99,252.64 based upon figures provided by the Friend of the Court. Defendant, although unsure of what amount would be accurate, questioned the amount ordered. The trial court advised defendant the figure could be adjusted if needed, but he directed defendant to first discuss the amount with his probation officer and the Friend of the Court. Finally, among those conditions of probation listed above, the terms of defendant's probation required that he (1) "report to a probation office monthly, or as often as the probation officer may

[1] We assume without deciding that defendant's appeal from the revocation of his probation is as of right. See, *People v Kaczmarek*, 464 Mich 478, 482-483, 486; 628 NW2d 484 (2001).

require, either in person or in writing as required by the probation officer," and (2) make restitution payments.

On August 11, 2010, defendant appeared before Judge Dennis M. Wiley for violation of the terms of his probation. Defendant pleaded guilty to violating his probation. Defendant acknowledged he had not reported to the probation department since October 25, 2005 and he had not made a restitution payment since September 13, 2005. As of April of 2006, defendant had only paid $1,220.00, thus he owed a balance of $98,814.18. The trial court revoked defendant's probation and sentenced him to 13 to 48 months with credit for time served. The sentence imposed was an upward departure from the sentencing guideline recommendations of 0 to 6 months' imprisonment. The trial court specified reasons for the departure. First, the trial court found that the guidelines did not give sufficient weight to the length of time defendant had "absconded from" probation. Second, the trial court found that the guidelines did not properly account for the fact that defendant had paid "absolutely nothing since September of 2005." The court indicated that either factor independently would warrant the sentence imposed. This appeal ensued.

Defendant's first issue on appeal is that the trial court erred in failing to consider defendant's ability to pay restitution prior to revoking his probation. Defendant contends that prior to revoking defendant's probation, the trial court was required to make a determination as to defendant's ability to pay. According to defendant, due process requirements prevent the state from depriving defendant of his liberty without due process of law, and fundamental fairness requires consideration of alternatives to incarceration before revoking probation based on an inability to pay.

The State argues that the trial court did not err in revoking defendant's probation without detailed analysis of defendant's ability to pay because defendant waived his right to a probationary hearing when he pleaded guilty to the probation violations. Because defendant never indicated an inability to pay, and his counsel concurred with the sentencing recommendations before the trial court, this issue is unpreserved and should not be reviewed on appeal. According to the State, even if this Court were to consider defendant's argument, it fails because he must establish plain error, which he cannot do as defendant not only violated the restitution requirements of his probation; he also failed to report to his probation officer.

Our review of the record leads us to conclude that defendant expressly waived his right to a Probation Violation hearing when he pleaded guilty to both failing to report to the probation department and failing to make restitution payments. As noted by the State, defendant's counsel expressly agreed to the sentencing recommendation, which recommended defendant's "probation be revoked and he spend 180 in jail w/actual credit for 144 days." In lieu of arguing his inability to pay should preclude revocation of his probation, defendant affirmatively concurred with the sentencing recommendation which included revocation of his probation. By doing so, he waived any need for the trial court to consider his inability to pay as a reason not to revoke his probation. See *People v Kowalski*, 489 Mich 488, 503; __ NW2d __ (2011), reh den 802 NW2d 608 (2011) (finding clearly expressed satisfaction constitutes waiver). At no time during sentencing did defendant suggest he failed to make restitution payments because of an inability to pay. A trial court need only resolve those disputes that are actually raised. *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997), reh den 456 Mich 1201 (1997). Appeal on the issue of inability to

pay is precluded when defendant does not raise the issue before the trial court. *People v Hamilton*, 84 Mich App 601, 602; 269 NW2d 693 (1978); *People v Williams*, 66 Mich App 67, 72-73; 238 NW2d 407 (1975). Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), reh den 463 Mich 1210 (2000). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.*, citing *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

Even if we were to conclude that defendant had not waived this issue, the State's assertion that the issue is unpreserved because defendant failed to make any objection during sentencing is accurate. See, *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005), lv den 474 Mich 934 (2005). Accordingly, plain error review applies because defendant failed to preserve the issue for appeal. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). Under the plain error rule, defendant bears the burden of demonstrating a "clear or obvious" error occurred and that this error affected defendant's substantial rights. *Id.* To show the error affected substantial rights requires a showing of prejudice, specifically, that the error affected the outcome of the lower court proceedings. *Id.* Even if defendant meets his burden of persuasion, an appellate court will reverse only if the plain error led to the conviction of an innocent defendant or "seriously affected[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.* at 763-764, citing *Olano*, 507 US at 725.

Prior to revoking probation because of a defendant's failure to pay ordered restitution, the sentencing court should consider defendant's ability to pay. *Bearden v Georgia*, 461 US 660, 672; 103 S Ct 2064; 76 L Ed 2d 221 (1983); MCL 769.1a(11) & (14); MCL 780.766(11) & (14). Factors relevant to defendant's ability pay include: "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 the present case, the trial court had before it information relating to defendant's ability to pay. From the Probation Violation Report, the trial court knew that even though "defendant maintained fulltime employment as a carpet installer, he has still only paid $1,299.99". Defendant stated at his sentencing: "And I do have work - - a lot of work coming up soon as I get out of here." Additionally, the trial court engaged defendant in a discussion concerning the considerable amount of money defendant that was spending each week on the purchase of cigarettes. The trial court went so far as to perform some simple arithmetic and stated its belief that if defendant had not been spending so much on cigarettes he could have paid his child support as ordered. Hence, contrary to defendant's assertions, the trial court did consider, albeit in a somewhat limited manner, whether defendant had an ability to pay. Accordingly, because consideration of defendant's finances and employment would likely have established his ability to pay, we cannot find prejudice to defendant in not undertaking a more careful analysis. Accordingly we cannot assign plain error to defendant's claim that the trial court should have engaged in a more comprehensive analysis of his ability to pay.

We additionally conclude that defendant's probation was revoked for two distinct offenses: (1) failing to report to his probation officer, and (2) nonpayment of restitution. The

trial court specifically noted either violation independently warranted the sentence imposed. Accordingly, even if (1) defendant has not waived this issue, or (2) the trial court should have more thoroughly considered defendant's ability to pay, defendant was still guilty of failing to report to his probation officer. On its own, as a condition of defendant's probation, the failure to report to his probation officer is sufficient to warrant the revocation of his probation. MCL 771.4 ("All probation orders are revocable . . . either for a violation or attempted violation of a probation condition"). Lastly, we recognize that this Court has held that pursuant to the statutes imposing felony punishment for failure to pay child support, inability to pay is not a defense. See, *People v Adams*, 262 Mich App 89, 90, 96; 683 NW2d 729 (2004). Consequently, we cannot find that the trial court committed plain error. *Carines*, 460 Mich at 762-764.

Defendant next argues that his underlying felony conviction for nonpayment of child support is unconstitutional because defendant was denied the effective assistance of counsel in the determination of his culpability for, and ability to pay child support. While defendant acknowledges that his child support arose within the context a civil rather than a criminal proceeding, he nonetheless contends that the civil litigation surrounding the underlying support order is complex and given that his failure to pay constitutes a strict liability offense, the determination of child support was a critical stage of the proceedings against defendant and he was therefore entitled to the benefit of counsel. The State argues that defendant overstates the right to counsel during civil proceedings and furthermore, defendant may not appeal his underlying conviction as part of an appeal from a probation revocation proceeding. One of the reasons cited by the State for barring a collateral attack on defendant's underlying support order is premised on the fact that the Order of Filiation which established the child support order was entered by default. Accordingly, the State argues that it is inapposite to argue that defendant was denied counsel because he did not even appeal for the proceedings.

We find defendant's arguments regarding the civil proceedings constitute an impermissible collateral attack on proceedings outside the scope of this appeal. An impermissible collateral attack "occurs whenever challenge is made to judgment in any manner other than through direct appeal." *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). The civil court that issued the child support order has continuing and exclusive jurisdiction over that order and the surrounding proceedings. MCL 552.1224(1); *People v Likine*, 288 Mich App 648, 654-656; 794 NW2d 85 (2010). As pointed out in this Court's opinion in *Adams*, 262 Mich App at 100, had defendant desired to challenge the underlying civil proceedings which provide the basis for the support order, "there are ample statutory provisions under which a party can seek to have the judgment revised to take into consideration changing financial circumstances, instead of inviting criminal liability."

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello