

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

August 2, 1996

Plaintiff-Appellee,

v

No. 185974

LC No. 90-031778-FH

Paul Donald Vincent,

Defendant-Appellant.

Before: Michael J. Kelly, P.J., and Young and N.O. Holowka

MICHAEL J. KELLY, P.J. (Dissenting).

I respectfully dissent. This court has long held that revocation of parole for failure to make payments towards costs and restitution because of a defendant's indigence violates the equal protection clause of the Fourteenth Amendment. *People v Terminelli*, 68 Mich App 635; 243 NW2d 703 (1976); *People v Lemon*, 80 Mich App 737; 265 NW2d 31 (1978); *People v Music*, 428 Mich 356; 408 NW2d 795 (1987). In fact, MCL 771.3; MSA 28.1133, which authorizes the imposition of costs and restitution as a condition of probation, specifically states that a probation may not be revoked for failing to pay costs which the probationer can not afford. *People v Flaherty*, 165 Mich App 113; 418 NW2d 695 (1987); MCL 771.3(5), MSA 28.1133. Accordingly, a court may only revoke probation if the probationer fails to make a good faith effort to comply with the order. MCL 771.3(7); MSA 28.1133. This section of the statute provides the factors to consider in determining whether to revoke probation. *Id.* These factors include: the probationer's employment status and earning capacity, financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances. *Id.*

Applying the factors enumerated in the applicable statute to the case at hand, it is clear that revocation of the defendant's parole was an abuse of discretion. There is no evidence that the defendant has willfully defaulted on his duty to pay the requisite costs and restitution. On the other hand, evidence was submitted which showed that the defendant had attempted to obtain employment while on probation, but found himself unemployable for any job which involved cash receipts. Therefore, the defendant sought specialized training which would enable him to be employed in a

position which did not involve contact with cash receipts. To this end, defendant enrolled in a trade school to become a welder. Defendant successfully completed his studies and obtained employment as a welder. During defendant's five years of probation, he had no reported problems of any kind. The sole reason defendant's parole is being revoked is because of his inability to make payments imposed on him for costs and restitution.

The victim of the crime did not urge incarceration. The victim only wanted restitution. Now, there can be no desired restitution; the trial court has sentenced the defendant to prison where he has no earning capacity. Moreover, the trial court no longer has the authority to order the defendant to pay restitution because MCL 750.174, MSA 28.371, does not expressly provide for restitution as a remedy. *People v Krieger*, 202 Mich App 245; 507 NW2d 749 (1993). Lastly, the trial court's probation agent recommended that defendant merely serve out the remainder of his one year jail sentence, and that civil remedies be utilized to collect the remainder of the money owed to the victim.

I believe that the trial court abused its discretion in revoking the defendant's parole. The record clearly shows that the defendant's failure to pay restitution and costs was for no other reason than the defendant's indigence. The trial court failed to take into account the factors enumerated in MCL 771.3(7); MSA 28.1133, when revoking defendant's parole. Therefore, revoking the defendant's parole for failure to pay costs and restitution when the defendant was indigent was an abuse of discretion, and also, violative of equal protection.

I would reverse the trial court's ruling.

/s/ Michael J. Kelly