

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD A. LEWANDOWSKI,

Defendant-Appellant.

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UNPUBLISHED

August 13, 1996

No. 180488

LC No. 93-127015

Before: McDonald, P.J., and White, and P. J. Conlin,\* JJ.

PER CURIAM.

Defendant pleaded guilty to receiving stolen property over \$100, MCL 750.535(a); MSA 28.803, receiving stolen property less than \$100, MCL 750.535(b); MSA 28.803, and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced him to serve three years' probation and ordered him to pay certain costs, fees and restitution. Defendant's probation was later revoked for failure to make the required payments, and he was sentenced to two to fifteen years as an habitual offender, to be served concurrent to a ninety-day sentence for the misdemeanor. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion in revoking his probation because the amount of restitution was never determined. We disagree. A trial court's decision to revoke an offender's probationary status is reviewed for an abuse of discretion. *People v Alvarado*, 192 Mich App 718, 721-723; 481 NW2d 822 (1992). Probation is considered a matter of grace that confers no vested right in its continuance. *People v Johnson*, 210 Mich App 630, 634; 534 NW2d 255 (1995). Here, the trial court properly revoked defendant's probation as a result of defendant's failure to pay *anything* toward restitution or costs.<sup>1</sup> The trial court did not abuse its discretion when it revoked defendant's probation.

Additionally, contrary to defendant's assertion, MCL 780.767; MSA 28.1287(767), is inapplicable to the instant facts. Instead, MCL 771.3; MSA 28.1135, is the applicable provision because restitution was imposed as a condition of probation.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Next, defendant argues that there was insufficient evidence to establish that his restitution amount was undisputed.<sup>2</sup> The prosecution must show that a probationer has violated the terms of his probation by a preponderance of the evidence. MCR 6.445(E)(1); See *People v Perry*, 201 Mich App 347, 355; 505 NW2d 909 (1993). The trial court properly concluded that the prosecution met its burden of proof in showing that defendant violated his terms of probation. MCR 6.445(E)(1). The record indicates that the court did not base its decision on the disputed restitution figures, but on the fact that defendant failed to make any payment at all toward costs or the disputed restitution amount. No reversal is required with respect to this issue.

Defendant also asserts that the court failed to take into account defendant's ability to pay restitution. At the October 19, 1993 probation sentencing proceeding, defense counsel indicated to the court that defendant had discussed a payment plan with the insurance companies. Defendant signed the probation order regarding the restitution payments. Defendant himself stated that he would "try to make restitution to the company." It was not until the January 25, 1995 hearing on defendant's motion to vacate his conviction that defendant first asserted an inability to pay. The court noted that this was the first occasion defendant made such a claim. The court further noted that although defendant may not have earned a consistent wage, defendant had never stated that he was without funds to make any of the payments ordered. Furthermore, defendant failed to petition the trial court under MCL 771.3(5)(a); MSA 28.1133(5)(a), on the issue of inability to pay restitution, which waives this issue. See *People v Grant*, 445 Mich 535, 556; 520 NW2d 123 (1994). Again, the court's revocation decision did not stem in any way from defendant's inability to pay the amount of restitution, but from his failure to pay anything at all toward costs or restitution. In view of defendant's constant employment, no relief is merited.

Finally, defendant contends that he was denied effective assistance of counsel by defense counsel's failure to move for a hearing regarding the issue of restitution. The record reflects that defense counsel requested a restitution hearing from the probation department, but failed to properly request such a hearing before the trial court. In order to prove that counsel's assistance was so ineffective as to require reversal, a defendant must show that counsel's performance was deficient and that defendant was prejudiced. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant has failed to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defense counsel's actions did not prejudice defendant as the court did not hinge its decision on the failure to pay sufficient restitution but on defendant's blatant failure to pay anything under the court's probation order except the initial \$200 from the bond. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1993).

Affirmed.

/s/ Helene N. White  
/s/ Gary R. McDonald  
/s/ Patrick J. Conlin

<sup>1</sup> Defendant had originally paid \$200 toward his restitution directly from his bond.

<sup>2</sup> It was determined that defendant owed \$9,450 in restitution to Franklin Mutual Insurance Company and \$8,950 to the victim for a total amount of \$18,400. The probation department later submitted a restitution figure for a second insurance company, State Farm, in the amount of \$24,000.