

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE RAYMOND NEVILLS,

Defendant-Appellant.

UNPUBLISHED

February 28, 1997

No. 196090

Allegan Circuit Court

LC No. 94-009459 FH

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Defendant pleaded guilty to breaking and entering an occupied dwelling with intent to commit a felony, MCL 750.11a; MSA 28.305(a), in exchange for the prosecutor's agreement to dismiss an habitual offender charge as well as a second file with identical breaking and entering charges, and to not prosecute several uncharged break-ins defendant admitted to during the investigation. Defendant was sentenced to eight to fifteen years' imprisonment and ordered to pay \$15,087.09 in restitution. In a prior appeal, this Court affirmed defendant's sentence but held that because the sentencing court failed to follow the statutory procedures in determining the amount of restitution, the case was to be remanded to determine the proper amount of restitution. On remand, the sentencing court held a hearing and ordered restitution in the amount of \$21,093.39. Defendant appeals as of right and we affirm.

First, defendant argues that the increased restitution order reflects vindictiveness on the part of the sentencing court. We disagree. There is a presumption of vindictiveness where the same judge resentences and increases the sentence. *People v Mazzie*, 429 Mich 29; 413 NW2d 1 (1987). However, that presumption is overcome when the judge at resentencing possessed information that was unavailable to him at the initial sentencing and the extent of the increase in restitution bears a reasonable relationship to the new information. *Id.* In this case, the restitution order was increased by an amount indicated in updated figures from various insurance companies that were not available at the initial sentencing. We find no vindictiveness on the part of the sentencing court.

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

Defendant also argues that plaintiff waived any right to increased restitution by not objecting at sentencing or during the original appeal. We disagree. In light of this Court's remand order to conduct a hearing on the appropriate amount of restitution and the fact that the increased award was based on information not available at the initial sentencing, we consider the increased award to have been proper.

Next, defendant argues that he is entitled to resentencing because the sentencing court failed to offer allocution. We disagree. Defendant testified on his own behalf concerning his ability to pay, and after defendant's testimony, the court asked defense counsel, in the presence of defendant, if there was anything further. Under these circumstances, defendant was given a sufficient opportunity to advise the court of any relevant circumstances as required by MCR 6.425(D)(2).

Next, defendant claims that the order of restitution should be vacated based on defendant's inability to pay. We disagree. Based on the information presented at the hearing, the amount of the restitution order was proper. Defendant's request for relief from the order of restitution is premature. "Any request for such relief should be made when defendant is imperiled with further incarceration or punishment because of his financial inability to comply with the order of restitution." *People v Guajardo*, 213 Mich App 198, 202; 539 NW2d 570 (1995).

Last, defendant claims that the restitution order is invalid because the sentencing court failed to articulate why restitution to various insurance companies was in the "interest of justice" as required by MCL 780.766(10); MSA 28.1287(766)(10).

In *People v Gourd*, 200 Mich App 493, 496; 504 NW2d 699 (1993), this Court vacated an order of restitution because:

the court failed to indicate what "interest of justice" mandated a departure from the statute's general admonishment that restitution not be ordered with respect to a loss for which the victim or the victim's estate received or is to receive compensation. Our review reveals no special facts in this case that lead us to conclude justice would be best served by ordering restitution to [the insurer].

In the case at bar, as part of the plea agreement, plaintiff dismissed another pending breaking and entering charge and an habitual offender charge, and agreed not to pursue charges regarding "various other" break-ins defendant admitted to during the investigation. However, also as part of the agreement, defendant agreed that these other acts would be considered at sentencing. Part of the way the trial court considered these acts was to order restitution. If we were to vacate the restitution order, defendant would not have been held to part of his bargain. Under these facts,

we conclude that the interest of justice is best served by ordering restitution regardless of whether payment is to an insurance company.

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Anthony A. Monton