

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HARVEY M. AIDEM,

Defendant-Appellee.

UNPUBLISHED

March 11, 1997

No. 185142

Oakland Circuit Court

LC No. 89-97326 FH

90-103545 FH

91-109137 FH

Before: O'Connell, P.J., and Markman and M.J. Talbot,* JJ.

PER CURIAM.

The prosecution appeals as of right the sentences imposed in three related prosecutions of defendant. We vacate the sentences and remand for resentencing.

I

Defendant owned a mortgage company that became insolvent. He was subsequently prosecuted for failing to disclose to investors material information pertaining to the company's finances. In lower court docket no. 89-097326 FH, defendant pleaded nolo contendere to false pretenses over \$100, MCL 750.218; MSA 28.415; in lower court docket no. 90-103545 FH, he pleaded guilty to false pretenses over \$100, *Id.*; and in 91-109137 FH, he pleaded nolo contendere to larceny by conversion over \$100. MCL 750.362; MSA 28.594.

Because of the nature of defendant's offenses, restitution was an issue during sentencing. A special hearing was conducted on the matter, but it appears that it was difficult to distinguish between legitimate transactions conducted by defendant and those tainted by his criminal conduct. Various claimants sought, at one time or another, over \$1,500,000, the prosecution ultimately recommended restitution in the amount of approximately \$850,000, and defense counsel conceded, though perhaps for tactical reasons, that \$250,000 represented fraud claims.

Five additional hearings were conducted that are relevant for purposes of our review.

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

At the first hearing, the court sentenced defendant to concurrent terms of five to ten years' imprisonment for each conviction of false pretenses over \$100, and to a three to five year term of imprisonment for the larceny conviction, also to be served concurrently. In exceeding the guidelines recommendation of zero to twelve months, the court explained, "[t]his is one of the frauds of the worse [sic] kind that this Court's seen since it's been on the bench." The court then proceeded to state that "by the payment of \$844,766.41 . . . the Court will suspended [sic] the sentence[s]." However, there was also an indication that another hearing on the appropriate amount of restitution, in light of the uncertainty concerning the exact amount due to misconduct, would be held at some point in the future.

The consternation among the attorneys was evident. The prosecution ventured, "Your honor, if that's not paid, then that amount of restitution . . . would be a condition of parole?" The court replied in the affirmative. Defense counsel expressed his skepticism at the validity of such a sentence as well, stating, "Parole? I don't think Your Honor can make that a condition of parole." The court replied, "I can."

Defendant then moved for resentencing. At the resentencing hearing, the court "clarified" that payment of restitution would not be a condition of defendant's parole. The prosecution objected to the entire notion of resentencing defendant, and indicated at the hearing that it was proceeding with the restitution issue "under protest." Defense counsel noted that the terms of incarceration imposed by the court and the restitution ordered were "intertwined," meaning that the court was, in effect, sentencing defendant in the alternative. The court, in effect, agreed, stating that it had "included restitution as a means by which [defendant] can be released on an early date by payment of those . . . sums of restitution which are due on the fraud." The upshot of the hearing appears to have been that, in addition to the parole "clarification," the court held in abeyance the amount of restitution that it was ordering, resolving that it would be determined at a later date.

A third hearing was then held. At this hearing, defendant argued that he should be released from prison because he did not have the ability to pay the restitution,¹ and reiterated that the issue as to the amount of restitution remained unresolved. The court denied defendant's motion.

At the fourth hearing relevant for purposes of our review, the court indicated that it would be setting a restitution amount. Defendant indicated that he had an employment offer that would pay him in excess of \$45,000 per year. The court noted that "there's a great deal of controversy between \$800,000 and whatever the lower sum would be." The court then declared that defendant was to pay \$15,000 as a down payment on the restitution that was due (and, notably, did not fix a figure), and provided that defendant would pay "\$75 per week after release as a continuing obligation to be evaluated quarterly, and [all claimants would] be paid within five years." The exact amount due, the court stated, would be determined at a later hearing.

The attorneys were justifiably confused. The court explained that upon payment of the \$15,000, defendant's "prison term will be turned into a five year probationary term, with the conditions that I have stated."

Finally, a fifth hearing was held, ostensibly a defense motion for entry of the order memorializing the court's statements at the previous hearing. This hearing was held thirteen months after sentence was first imposed. The court at last gave the parties some insight into its unorthodox sentencing procedure, indicating that, in its view, the sentencing process was of "a continuing nature from the moment the individual was originally sentenced until today." The court then stated, "I am changing the order. It's not a[n] Order for Resentencing. It's an Order of Sentencing." Upon the payment of \$15,000, defendant was to be released from incarceration after serving thirteen months of his concurrent sentences. Thereafter, the court entered an order of probation, amending a previous order and reducing defendant's weekly restitution payment to \$30.00 "pending a restitution hearing, due to financial hardship." The prosecution has appealed.

II

For obvious reasons, it is difficult to approach the sentence(s) imposed with any type of analytical coherence. Initially, this Court must consider exactly what is to be reviewed – the first judgments of sentence imposed in the three prosecutions, the last judgments of sentence, or any of the intervening orders.

We believe it proper to consider only the initial judgments of sentence. The sentencing court viewed the sentencing process as being of a "continuing nature." This is incorrect. As noted in *People v Jenkins*, 438 Mich 364, 370; 475 NW2d 279 (1991) (emphasis supplied), "[t]he sentencing process is carefully designed to ensure conscientious and informed decision making *as of that moment*. Every effort is made to ensure that the judge has adequate and accurate information upon which to base the sentencing decision." One of the rationales underlying this approach would appear to be to avoid the possibility that the court's memory of the severity of a particular defendant's conduct will dim over time. For example, in the present case, the court first regarded defendant's conduct as "the worst case of fraud" it had ever encountered, but ultimately sentenced defendant to probation with weekly restitution payments of \$30. In any event, we decline to review the myriad of inconsistent "modifications" entered by the court and will focus our review on the initial judgments entered.

At the first hearing, the court sentenced defendant to concurrent terms of imprisonment of five to ten years, five to ten years, and three to five years. However, the court indicated that this was a conditional sentence, and would be suspended upon the payment of restitution.

The court was without authority to impose such a conditional sentence. As stated in *People v Neil*, 99 Mich App 677, 680; 299 NW2d 23 (1980), quoting *People v Piasecki*, 333 Mich 122, 143; 52 NW2d 626 (1952),

In Michigan, the sentencing court's authority to impose a particular sentence is derived from the relevant statutes:

The measure of control exercised in connection with the prevention and detection of crime and prosecution and punishment of criminals is set forth in the statutes of the State pertaining thereto, particularly the penal code and the code

of criminal procedure. The powers of the courts with reference to such matters are derived from the statutes

Thus, any sentence imposed must have a statutory basis.

In this case, defendant's conditional suspended sentences were invalid because the trial court lacked any statutory authority to impose them. The conditional sentence statute, MCL 769.3; MSA 28.1075, is not applicable because the statute authorizes only the imposition of a conditional sentence and a fine, with or without costs, to be paid within a stated time. As noted in *Neil, supra*, p 680, a sentence of restitution is not equivalent to the imposition of a fine under the sentencing statutes. Moreover, while MCL 780.766(14); MSA 28.1287 (766)(14), allows for restitution as a condition of probation or parole, it does not authorize the suspension of a sentence upon the payment of restitution. Thus, in the absence of any express statutory authority, we conclude that the conditional suspended sentences were invalid.

III

We must then consider the appropriate remedy when improper sentences such as those in issue are imposed. As a matter of general practice, this Court, when confronted with an invalid condition sentence not authorized by statute, has typically held that the proper remedy is to vacate only that portion of the sentence containing the invalid condition, without requiring resentencing.

For example, in *Neil, supra*, this Court vacated the portion of the defendant's sentence imposing restitution as an alternative to an additional six months' imprisonment, but affirmed the defendant's sentence of three months' imprisonment in the county jail. Likewise, in *People v Tims*, 127 Mich App 564; 339 NW2d 488 (1983), this Court vacated only the portion of the invalid conditional sentence requiring the defendant to pay court costs or serve additional time in jail, while affirming his sentence of six months in the county jail. Similarly, in *People v Greenberg*, 176 Mich App 296, 310-311; 439 NW2d 336 (1989), this Court struck the conditions of the defendant's sentence requiring full payment of restitution as a prerequisite for obtaining parole or early release without requiring resentencing.

However, in *People v Watts*, 133 Mich App 80; 348 NW2d 39 (1984), this Court remanded for resentencing where it found invalid the conditional sentence requiring the defendant to pay costs in addition to his eight-month confinement in the county jail. The *Watts* Court noted that "[a]lthough the Court in *Tims* vacated the assessment of costs, we believe that the better result where part of the sentence is void is to remand the case to the trial court for resentencing." *Id.*, p 84.

More recently, in *People v Michael Jones*, 182 Mich App 125, 128; 451 NW2d 525 (1989), this Court, after noting that "there is authority to support either vacating the imposition of costs only, *Tims, supra*, or remanding for resentencing *Watts, supra*," concluded that "the most appropriate remedy is to simply vacate the trial court's assessment of costs," while affirming the defendant's sentence of four to six years' imprisonment.

We note that in *Neil, Tims, Greenberg, and Jones*, the sentences were easily severable from the additional conditions and it did not substantially affect the original sentences.

In *Neil, supra*, defendant was sentenced to three months in jail and \$2,360 restitution or to serve an additional six months in jail. In *Tims, supra*, defendant was sentenced to six months in the county jail and ordered to pay costs of \$1,000 or spend an additional six months in jail. In *Greenberg, supra*, defendant was sentenced to six years and eight months in prison and, additionally, the court prohibited defendant's parole or release until restitution was paid. In *Jones, supra*, defendant was sentenced to four to six years imprisonment and assessed costs of \$1,500. In each of these cases, defendant's sentence was severable without affecting the original sentence.

In contrast, the sentence in the present case is not easily severable. What distinguishes this case is the fact that the invalid condition calling for the suspension of the sentences upon the payment of restitution goes to the very heart of the judgments of sentence imposed by the trial court. In contrast to the majority of decisions in this area, the instant situation involves "intertwined" components of the sentences.

Thus, unlike the prior cases in which this Court has severed the invalid condition without requiring resentencing, the invalid condition calling for the suspension of the sentences upon the payment of restitution cannot be stricken without vacating the sentences entirely because the improper condition entirely tainted the sentences imposed by the trial court. In this respect, the invalid conditional sentences in this case were tantamount to other types of invalid sentences where resentencing is required. See *In re Dana Jenkins*, 438 Mich 364, n 3; 475 NW2d 279 (1991), quoting *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981). We do not know what sentence the court would have meted out to defendant had it not misunderstood its sentencing options. It would be fundamentally unfair to defendant to simply sever one element of his sentence from the other, and impose upon defendant that element of the sentence, without knowing the extent to which the two elements of the sentence were influenced by one another. Therefore, we vacate the sentences imposed and remand for resentencing.

IV.

On remand, we also instruct the trial court to conduct a restitution hearing and to determine restitution in accordance with the statutory factors. MCL 780.766; MSA 28.1287(766); *People v White*, 212 Mich App 298; 536 NW2d 876 (1995); *People v Avignone*, 198 Mich App 419; 499 NW2d 376 (1993); *People v Persails*, 192 Mich App 380; 481 NW2d 747 (1991). In determining whether, and in what amount, to order restitution, the trial court shall consider the amount of the loss sustained by the victims, the financial resources, and the earning ability of the defendant as well as the financial needs of defendant and his dependents. MCL 780.767(1); MSA 28.1287(767)(1). Restitution is not a substitute for civil damages, but encompasses only those losses which are easily ascertained and which are a direct result of the defendant's criminal acts. *People v Tyler*, 188 Mich App 83, 89; 468 NW2d 537 (1991). Given that defendant has asserted an inability to pay and has requested a restitution hearing, the trial court is required to conduct a restitution hearing in the course of determining restitution. *Avignone, supra*; *People v Grant*, 210 Mich App 467, 470-471; 534 NW2d 149 (1995).

We vacate defendant's sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Stephen J. Markman

I concur in result only.

/s/ Michael J. Talbot

¹ This argument was premised on MCL 780.767(1); MSA 28.1287(767), which requires the court to consider the financial resources, earning ability, and financial needs of a defendant when determining an appropriate amount of restitution.