

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

DAVID ALLEN DIECK,

Defendant- Appellant.

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UNPUBLISHED

February 24, 1998

No. 201493

Oakland Circuit Court

LC No. 95-137912 FH

Before: Michael J. Kelly, P.J., and Fitzgerald and M.G. Harrison\*, JJ.

MEMORANDUM.

On plea of nolo contendere, defendant was convicted of violating the Builder's Trust Fund Act, MCL 570.152; MSA 26.332. As part of a plea bargain, defendant agreed to pay restitution. When the amount of restitution was challenged, the trial court conducted an evidentiary hearing, and eventually ordered defendant to pay restitution in the amount of \$26,606.00, after giving defendant credit for \$300 previously paid, with the further requirement that defendant pay restitution at the rate of \$750 per month. On this appeal of right, defendant contends that the amount of restitution and the amortization schedule are incorrect. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

The amount of restitution properly owing, and the rate at which restitution should be paid, in light of the defendant's financial resources and earning ability, his own financial needs and those of his dependents, and other appropriate factors, MCL 780.767(1); MSA 28.1287(767)(1), are issues initially of fact, to be resolved by a preponderance of the evidence, and with respect to the amortization schedule, a matter confided to the trial court's sound discretion and reviewable for abuse thereof. Findings of historical fact are subject to the traditional scope of appellate review for clear error. *People v Grant*, 455 Mich 221; 565 NW2d 389 (1997).

Here, although there may have been conflicting evidence, the trial court's findings are consistent with the testimony of the victim as to the amount paid to defendant and not properly paid over to subcontractors. Whether or not the victim has a legally enforceable obligation to all the subcontractors,

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

it is clearly improper that defendant retain any portion of such funds, as that would be a windfall to him resulting from his felonious conduct. See *People v Gahan*, 456 Mich 264; \_\_\_ NW2d \_\_\_ (1998).

In setting the amortization schedule, the trial court noted that defendant's testimony concerning his monthly expenses involves a certain amount of "fat." A review of defendant's iteration of those expenses confirms that the trial court's assessment does not represent an abuse of its discretion, and the resulting amortization schedule appears well within defendant's means. Any resulting crimp in defendant's lifestyle is reasonable in relation to the wrongs committed.

Affirmed.

/s/ Michael J. Kelly

/s/ E. Thomas Fitzgerald

/s/ Michael G. Harrison