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D.A. 1-7-93

**FILED**

SID J. WHITE 10/2

SEP 16 1992

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT,

By \_\_\_\_\_  
Chief Deputy Clerk

BILL H. HEWETT,

Petitioner,

v.

CASE NO. 79,153

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The Fifth District Court of Appeal properly found that the extension of petitioner's probation was proper. The state established that petitioner failed to pay the required restitution. This court's decision in Clark, infra, dealt with the requirement of a hearing prior to the enhancement of terms of probation or community control. The failure to **pay** restitution was not involved. The procedure of §948.06(4), Fla. Stat. (1987), was followed in the instant case. A hearing was held. Petitioner was present and testified. The state established that petitioner failed to pay the required restitution. The trial judge found that petitioner had some ability to pay and, **as** an alternate measure to imprisonment, extended petitioner's probation in order for him to do just that, pay. The decision of the Fifth District should be affirmed.

ARGUMENT

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEAL PROPERLY FOUND THAT THE EXTENSION OF PETITIONER'S PROBATION WAS PROPER, AS IT WAS ESTABLISHED THAT PETITIONER VIOLATED HIS PROBATION BY FAILING TO PAY RESTITUTION.

Section 948.06(4), Fla. Stat. (1987), provides:

In any hearing in which the failure of a probationer or offender in community control to pay restitution or the cost of supervision as provided in s. 945.30, as directed, is established by the state, if the probationer or offender asserts his inability to pay restitution or the cost of supervision, it is incumbent upon him to prove by clear and convincing evidence that he does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so. If the probationer or offender cannot pay restitution or the cost of supervision despite sufficient bona fide efforts, the court shall consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probationer or offender in community control who has demonstrated sufficient bona fide efforts to pay restitution or the cost of supervision.

Respondent submits, as the Fifth District Court of Appeal, that §948.06(4) does not require that a willful violation of probation must be found before a trial judge may impose an alternate measure of punishment for failing to pay restitution. Respondent

also submits that this court's decision in Clark v. State, 579 So.2d 109 (Fla. 1991), upon which petitioner solely relies, likewise does not establish such a requirement.

In Clark, Clark was placed on 2 years of community control. Id. "Two days later Clark signed a 'Waiver of Rights and Motion to Modify Community Control,' requesting the court to modify his community control to require him to enter and satisfactorily complete a [probation and restitution program] (PRC)," Id. According to the waiver, Clark waived his right to assistance of counsel and to a hearing. Id. Clark's community control was modified without a hearing. Id. An affidavit of violation of community control was filed approximately two months later for Clark's termination of his residence at PRC and for his failure to remain at PRC as required, Id. After a revocation hearing, Clark's community control was revoked, he was adjudicated guilty and sentenced to 3 years' imprisonment. Id., at 109-110.

On appeal, the revocation of Clark's community control was affirmed. Id., at 110. The appellate court found that there was no requirement for a hearing where the modification was voluntary. Id.

In reversing, this court stated:

The trial court erred in this case by enhancing the term's of Clark's community control without notice and hearing. Section 948.06, Florida Statutes (1987), provides the sole means by which the court may place additional terms on a previously entered order of probation or community control. (Footnote omitted). Before probation or community control may

be enhanced, either by extension of the period or by addition of terms, a violation or probation or community control must be formally charged and the probationer must be brought before the court and advised of the charge following the procedures of section 948.06. Absent proof of a violation, the court cannot change an order of probation or community control by enhancing the terms thereof, even if the defendant has agreed in writing with his probation officer to allow such a modification and has waived notice and hearing.

Clark, at 110-111.

The Fifth District found that the decision in Clark dealt with "the requirement of a hearing before terms of probation or community control can be enhanced." Hewett v. State, 588 So.2d 635, 636 (Fla. 5th DCA 1991). "Clark did not involve a failure to pay restitution[.]" Id. The issue addressed by the Fifth District and the issue of concern in the instant case was not whether petitioner had the proper notice and hearing. To the contrary, it is clear that petitioner did have notice and an opportunity to be heard. A violation of probation hearing was held. Petitioner was present and testified. After hearing testimony and argument, the trial judge found that petitioner "does have the ability to pay something. That he has made no effort with the exception of the three supervisory payments, . . ." (R 33).<sup>1</sup> Petitioner's probation was then extended so that he could pay the required restitution.

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<sup>1</sup> It would appear that in making such a finding that the trial judge implicitly found that petitioner's violation was willful.

The procedure of §948.06(4) was followed in the instant case. As stated above, a violation of probation hearing was held on August 10, 1990 (R 1). Petitioner was present and testified (R 4-19). Petitioner acknowledged that he had been ordered to pay restitution (R 4-5). Petitioner agreed to pay one of the victim's \$7,000.00 in restitution (R 7). Petitioner acknowledged that he had not paid the restitution (R 7). Petitioner stated that he was willing to go on two years additional probation in order to make a good faith effort to pay the victim what was due her (R 12-13).

Respondent submits that the state established that petitioner failed to pay the required restitution. As the trial judge found petitioner had some ability to pay (R 33), respondent submits that petitioner failed to prove by clear and convincing evidence that he did not have the ability to pay. Pursuant to §948.06(4), this was petitioner's burden. See also Word v. State, 533 So.2d 893 (Fla. 3d DCA 1988)(the burden is on the defendant to show by clear and convincing evidence that he does not have the ability to pay). Rather than imposing a term of imprisonment, the trial judge extended the period of probation as an alternate measure. See ~~also~~ Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 2073, 76 L.Ed.2d 221 (1983)("If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment."). Respondent submits that the trial judge complied with the requirements of §948.06(4). The Fifth District properly affirmed the ruling of



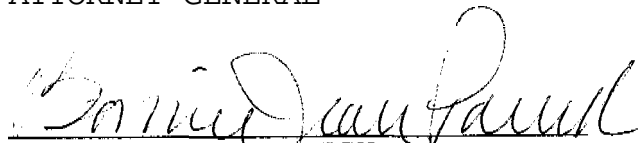
the trial judge. The decision of the Fifth District should likewise be affirmed.

CONC USION

Based on the arguments and authorities presented herein, respondent requests this court affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has **been** furnished by delivery to Michael S. Becker, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 14<sup>th</sup> day of September, 1992.



Bonnie Jean Parrish  
Of Counsel

PETERSON, Judge.

Bill HEWETT, Appellant,

v.

STATE of Florida, Appellee.

No. 90-1724.

District Court of Appeal of Florida,  
Fifth District.

Oct. 17, 1991.

Rehearing Denied Nov. 20, 1991.

Defendant appealed from an order of the Circuit Court, Brevard County, Warren H. Edwards, Senior Judge, extending his period of probation. The District Court of Appeal, Peterson, J., held that statute allowing court to consider alternative measures of punishment other than imprisonment if probationer cannot pay restitution or cost of supervision despite sufficient bona fide efforts permitted trial court to extend term of probation when defendant failed to pay court costs, public defender fee and restitution which were imposed as conditions of probation.

Affirmed.

**Criminal Law** ⇌982.7

Statute allowing court to consider alternative measures of punishment other than imprisonment if probationer cannot pay restitution or costs of supervision despite sufficient bona fide effort permitted trial court to order extension of probation to allow defendant opportunity to make past-due payments for court costs and restitution, even though no violation of probation was specifically found. West's F.S.A. § 948.06(4).

James B. Gibson, Public Defender, and Michael S. Becker, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David G. Mersch, Asst. Atty. Gen., Daytona Beach, for appellee.

Bill Hewett appeals an order extending his period of probation in circuit court case number 88-1625. We affirm.

In that case, on December 8, 1988, Hewett was placed on two years' probation for grand theft and was ordered to pay \$220 court costs, a \$350 public defender fee, and \$714 restitution as conditions of probation. On May 3, 1990, the state filed an affidavit alleging that the defendant had violated his probation by failing to pay these costs.

The record indicates Hewett also had been ordered to pay \$7,000 in restitution as a condition of probation in another case, number 89-1308, and that he failed to pay that restitution. Inexplicably, it appears the state ignored that violation when it enforced the conditions in case number 88-1625.

At the hearing on August 10, 1990, Hewett's defense was his inability to pay. The trial court subsequently entered an order extending the term of probation for two years to allow Hewett an opportunity to make the past-due payments. Relying on *Smith v. State*, 377 So.2d 250 (Fla. 3d DCA 1979), Hewett argues that the court should not have ordered the extension when no violation was specifically found. In *Smith*, the district court held that a period of probation can be extended only upon a showing of a willful violation of probation following proper notice and hearing.

Section 948.06, Florida Statutes, was amended in 1984 by the addition of subsection (4). Subsection (4) allows a court to consider alternative measures of punishment other than imprisonment if a probationer cannot pay restitution or cost of supervision despite sufficient bona fide efforts. We believe that the amendment supersedes the *Smith* rule by allowing an extension of a term of probation for a nonwillful failure to pay as to the original punishment. This alternative punishment is subject to the limitation that the sum of all penalties, to-wit: jail or prison time, community control, and probation, does not exceed the prescribed statutory limit for the crimes. In so holding, we recognize the supreme court's statement in *Clark v.*

*State*, 579 So.2d 109, 111 (Fla.1991): "Absent proof of a violation, the court cannot change an order of probation or community control, by enhancing the terms thereof..." *Clark* did not involve a failure to pay restitution; it dealt with the issue of the requirement of a hearing before terms of probation or community control can be enhanced. Thus, there was no need in *Clark* to distinguish between willful and nonwillful violations of restitution conditions. We do not believe that the supreme court in *Clark* was directing that alternative punishment could not be given under subsection (4) after proper notice and hearing where the court finds the violation of a probation condition of restitution was not willful.

AFFIRMED.

W. SHARP, and DIAMANTIS, JJ.,  
concur.



John MANSINGH, Appellant,

v.

STATE of Florida, Appellee.

No. 90-3108.

District Court of Appeal of Florida,  
First District.

Oct. 21, 1991.

Defendant was convicted in the Circuit Court, Escambia County, Joseph Tarbuck, J., on plea of guilty to grand theft and was sentenced to two years community control, with special condition that he pay restitution in amount of \$2,190. Defendant appealed. The District Court of Appeal, Ervin, J., held that: (1) in determining amount of restitution payable by defendant, trial court improperly included items defendant was never specifically charged with having stolen and that were not found in his pos-

session, and damages incurred during burglary of victim's home, and (2) evidence did not support trial court's assessment of restitution.

Reversed and remanded.

#### 1. Criminal Law ⇐1208.4(2)

In determining amount of restitution payable by defendant convicted of grand theft, trial court improperly included items defendant was never specifically charged with having stolen and that were not found in his possession, and damages incurred during burglary of victim's home; no evidence linked defendant to actual burglary or to any of unrecovered items stolen during burglary, and there was six-month time lapse between defendant's arrest and burglary. West's F.S.A. §§ 775.089(1)(a), 948.03(1)(e).

#### 2. Criminal Law ⇐1208.4(2)

Defendant cannot be required to pay restitution in excess of damages his criminal conduct caused. West's F.S.A. §§ 775.089(1)(a), 948.03(1)(e).

#### 3. Criminal Law ⇐1208.4(2)

Trial court is not tied to fair market value as sole standard for determining amount of restitution, and may exercise discretion in determining that amount. West's F.S.A. § 775.089(7).

#### 4. Criminal Law ⇐1208.4(2)

Absent circumstances tending to show that fair market value does not adequately compensate theft victim or otherwise serve purpose of restitution, amount of restitution should be established through evidence of fair market value at time of theft. West's F.S.A. § 775.089(7).

#### 5. Criminal Law ⇐1208.4(2)

For purposes of determining amount of restitution, fair market value may be established either through direct testimony or through production of evidence relating to all of four criteria: original cost, manner in which items were used, their general condition and quality, and percentage of depreciation. West's F.S.A. § 775.089(7).