Supreme Court of Florida

No. SC08-2001

CARLOS DEL VALLE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[December 15, 2011]

PER CURIAM.

Carlos Del Valle seeks review of the decision of the Third District Court of Appeal in Del Valle v. State, 994 So. 2d 425 (Fla. 3d DCA 2008), on the basis that it expressly and directly conflicts with decisions of the Second, Fourth, and Fifth District Courts of Appeal in Blackwelder v. State, 902 So. 2d 905 (Fla. 2d DCA 2005), Shepard v. State, 939 So. 2d 311 (Fla. 4th DCA 2006), and Osta v. State, 880 So. 2d 804 (Fla. 5th DCA 2004). We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

These cases present two separate questions of law regarding probation revocation for failure to pay restitution: (1) whether a trial court, before finding a

violation of probation for failure to pay restitution, must inquire into the probationer's ability to pay and determine whether the failure to pay was willful; and (2) whether the burden-shifting scheme of section 948.06(5), Florida Statutes (2011),[1] which places the burden on the probationer to prove his or her inability to pay by clear and convincing evidence, is constitutional. Regarding the first issue, the underlying constitutional principle is that an indigent probationer should not be imprisoned based solely on inability to pay a monetary obligation. Based on our fidelity to this principle, we approve the holdings of all the district courts of appeal, except the Third District, that before a trial court may properly revoke probation and incarcerate a probationer for failure to pay, it must inquire into the probationer's ability to pay and determine whether the probationer had the ability to pay but willfully refused to do so. Under Florida law, the trial court must make its finding regarding whether the probationer willfully violated probation by the greater weight of the evidence.

As to the second issue, an automatic revocation of probation without evidence presented as to ability to pay to support the trial court's finding of willfulness violates due process. Accordingly, the State must present sufficient evidence of willfulness, including that the probationer has, or has had, the ability to

1. The 2008 version of section 948.06(5) at issue in this case is identical to the current 2011 version of the statute.

pay, in order to support the trial court's finding that the violation was willful. Once the State has done so, it is constitutional to then shift the burden to the probationer to prove inability to pay to essentially rebut the State's evidence of willfulness. However, while it is constitutional to place the burden on the probationer to prove inability to pay, the aspect of section 948.06(5) that requires the probationer to prove inability to pay by the heightened standard of clear and convincing evidence is unconstitutional.

FACTS

Del Valle was charged with possession of cocaine and an unrelated, subsequent charge of third-degree grand theft. Del Valle was declared indigent, appointed a public defender, and ultimately entered a plea in each case, which resulted in his placement on probation for two years. As a condition of probation, Del Valle was responsible for paying $1,809.90 in restitution (at the rate of $80 per month) and an additional $25 per month toward the cost of supervision.

On February 14, 2008, an affidavit of violation of probation was filed, which alleged that Del Valle failed to make the required monthly payments and was $375 in arrears with respect to the cost of supervision and $1,040.92 in arrears with respect to the payment of restitution. The violation report attached to the affidavit of violation classified Del Valle as unemployed and indicated that he was provided with a job referral and job search log. Further, one section of the probation report

read: "Subject stated that he is attending Miami-Dade College for his Associate Degree but has failed to bring in documentation that he is attending the college."

Following the filing of the affidavit of violation of probation, the State offered to reinstate Del Valle to probation. However, during a July 17, 2008, hearing, the trial court rejected probation alone and required any offer by the State to include boot camp as a condition of probation. The State was not ready to proceed, so the case was continued and Del Valle was released on his own recognizance.

On August 7, 2008, another probation violation hearing was held. At the hearing, the State offered the testimony of two of Del Valle's probation officers. One officer testified that he informed Del Valle of the terms of his probation, including both the restitution payment and the obligation to pay a monthly cost of supervision. The second officer then testified that Del Valle was in arrears for both restitution and cost of supervision. After the testimony of both officers, the defense presented no witnesses, and after a brief recess the court found that "the state has sustained its burden of proof in proving both affidavits of violation of probation." The court further modified the probation to include "the special condition that he enter into and complete the Miami-Dade County Boot Camp

Program, including the after care."[2] The court then also extended the probation for two years with early termination upon successful completion of the boot camp program. The following colloquy then ensued:

> [State Attorney]: Is your Honor going to enter a criminal order of restitution, or is Mr. Del Valle continued to be ordered to pay until he surrenders October 27th his restitution amount?
>
> The Court: Yes, but I might reduce the amount each month. How much can you pay each month, Mr. Del Valle?
>
> [Del Valle]: I try to pay eighty or more a month.
>
> The Court: What is the amount you are sure you can pay?
>
> [Del Valle]: If I get a job within this week, eighty a month. The minimum is eighty.
>
> The Court: We will leave those special conditions in effect.

Del Valle appealed the decision of the trial court to the Third District Court of Appeal. The Third District affirmed the trial court, stating in full:

> Affirmed. See Gonzales v. State, 909 So. 2d 960, 960 (Fla. 3d DCA 2005) ("If the probationer's defense is inability to pay, 'it is incumbent upon the probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources

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2. A boot camp program is a form of incarceration. The Miami-Dade County Boot Camp Program, which Del Valle was required to complete in this case, is a program run by the Miami-Dade County Corrections and Rehabilitation Department as "a cost effective, population reducing, realistic reform program which serves the offender, and ultimately the community." Miami-Dade County Corrections and Rehabilitation Department, Boot Camp, http://www.miamidade.gov/corrections/boot_camp.asp (last visited November 4, 2011).

> available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so.' § 948.06(5), Fla. Stat. (2004)").

Del Valle v. State, 994 So. 2d 425, 425 (Fla. 3d DCA 2008).

In direct conflict, the Second, Fourth, and Fifth District Courts of Appeal have held that the burden of proof is on the State to establish that the probationer has the ability to pay in order to demonstrate the willfulness of the violation. See Shepard v. State, 939 So. 2d 311, 313 (Fla. 4th DCA 2006) ("It is well-settled that probation may be revoked only upon a showing that the probationer deliberately and willfully violated one or more conditions of probation."); Blackwelder v. State, 902 So. 2d 905, 907 (Fla. 2d DCA 2005) ("[T]he State is required to present evidence of the probationer's ability to pay to demonstrate the willfulness of the violation."); Osta v. State, 880 So. 2d 804, 807 (Fla. 5th DCA 2004) ("[I]n order to revoke probation for failure to pay restitution the burden is on the State to prove the 'willfulness' of the violation . . . .").

In addition, the Third District conflicts with the other district courts of appeal as to whether the trial court must make a finding on the probationer's ability to pay before revoking probation for failure to pay. The Third District has held that although a trial court should make a finding on ability to pay, the failure to do so is harmless when the probationer fails to assert and offer evidence on his or her inability to pay. Guardado v. State, 562 So. 2d 696, 696-97 (Fla. 3d DCA 1990).

All of the district courts of appeal other than the Third District have held that the trial court must make a finding that the probationer had the ability to pay before probation can be revoked for failure to pay. See Limbaugh v. State, 16 So. 3d 954, 955 (Fla. 5th DCA 2009) ("It is well-established that where the violation alleged by the State is a failure to pay costs or restitution, there must be evidence presented, and a finding of the trial court that the probationer had the ability to pay, but willfully did not do so."); Brown v. State, 6 So. 3d 671, 672 (Fla. 2d DCA 2009) ("[B]efore finding that Brown violated condition 2, failure to pay the cost of supervision, the trial court was required to find that Brown had the ability to make the required payments."); Shepard, 939 So. 2d at 314 ("[W]here the violation alleged is a failure to pay costs or restitution, there must be evidence and a finding that the probationer had the ability to pay."); Martin v. State, 937 So. 2d 714, 715 (Fla. 1st DCA 2006) ("Revoking probation for failure to pay costs without a finding that the probationer had the ability to pay requires reversal.").

ANALYSIS

Preservation and Mootness

The State initially claims that Del Valle did not properly preserve his objections and that the case is moot. These arguments have no merit. "For an issue to be preserved for appeal . . . it must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that

presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446, 447 (Fla. 1993) (internal quotation marks omitted). However, harmful due process violations are fundamental error, which need not be preserved for review. See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) ("[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process."); Wood v. State, 544 So. 2d 1004, 1005 (Fla. 1989) ("[S]uch due process violations are fundamental error.").

The State's mootness argument must also fail. Although we recognize that Del Valle's probation has already been terminated by the trial court, "[i]t is well settled that mootness does not destroy an appellate court's jurisdiction . . . when the questions raised are of great public importance or are likely to recur." Holly v. Auld, 450 So. 2d 217, 218 n.1 (Fla. 1984). Here, as a direct result of the conflict among the districts, whether a probationer may be incarcerated due to indigence can be based solely on the probationer's geographic location. This conflict has already existed for too long and has escaped review for a number of years. Further, probation revocation hearings that flow from a probationer's failure to make ordered payments are common and thus are likely to recur. Accordingly, we will consider the questions of law presented here.

Constitutional Principles

The Equal Protection and Due Process Clauses of the United States Constitution ensure that an indigent probationer is not incarcerated based solely upon inability to pay a monetary obligation. See Bearden v. Georgia, 461 U.S. 660, 664 (1983); U.S. Const. amends. V, XIV. Further, the Florida Constitution contains its own due process clause that parallels the language of the Fourteenth Amendment and states that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The Florida Constitution contains a separate and specific provision that ensures that "[n]o person shall be imprisoned for debt, except in cases of fraud." Art. I, § 11, Fla. Const.

In Bearden, although under different factual conditions, the United States Supreme Court explained the circumstances under which the State is justified in using imprisonment as a sanction to enforce collection:

> If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. . . . But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.

461 U.S. at 668-69 (emphasis added) (footnote omitted) (citation omitted). Thus, the United States Supreme Court clearly established the following principle:

> [I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must 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 who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Id. at 672-73 (emphasis added).

This Court analyzed and applied Bearden in Stephens v. State, 630 So. 2d 1090, 1091 (Fla. 1994), articulating a clear rule: "We agree and hold that, before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so." With these important constitutional principles in mind, we now turn to the applicable statutory provisions regarding restitution.

Applicable Statutory Provisions Regarding Restitution

Under the statutory scheme, there are three potential proceedings regarding restitution: (1) when the trial court assesses and orders restitution (§ 775.089(1), (6)(a), Fla. Stat. (2011)); (2) when the State or the victim attempts to enforce the restitution order (§ 775.089(5), (6)(b), Fla. Stat.); and (3) if the defendant is placed

on probation, when the trial court considers revoking probation based on the defendant's failure to pay restitution as ordered (§§ 948.032, 948.06(5), Fla. Stat. (2011)).

At the outset, it is important to consider that the defendant's financial resources or ability to pay does not have to be established when the trial court assesses and imposes restitution. To the contrary, section 775.089(6)(a), Florida Statutes (2011), provides: "The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense." A trial court is required to order restitution in addition to any punishment unless it finds "clear and compelling reasons" not to do so. § 775.089(1)(a), Fla. Stat. (2011). The court is also required to make payment of restitution a condition of probation in accordance with section 948.03, Florida Statutes (2011). That section, entitled "Terms and conditions of probation," states that the trial court "shall" make "restitution a condition of probation, unless it determines that clear and compelling reasons exist to the contrary." § 948.03(1)(f), Fla. Stat. Further, under both sections 775.089(1)(b)1. and 948.03(1)(f), if the court "does not order restitution or orders restitution of only a portion of the damages . . . it shall state on the record in detail the reasons therefor."

Prior to the current version of the statute, which has been in effect since 1995, the trial court was affirmatively required to consider the defendant's financial resources when imposing restitution:

> The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.

§ 775.089(6), Fla. Stat. (1993) (emphasis added).

In 1995, the Legislature amended the restitution statute to require consideration of a defendant's financial resources only at the time of enforcement, not imposition. See ch. 95-160, § 1, Laws of Fla. When amending the statute in 1995, the Legislature stated, among other things, that the act amending the statute was "imposing liability for court costs and attorney's fees upon defendant when civil enforcement of restitution order is necessary; providing for review at such time of the defendant's financial resources by the criminal court." Ch. 95-160, title, Laws of Fla. The statute as amended now provides:

> (6)(a) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense.
>
> (b) The criminal court, at the time of enforcement of the restitution order, shall consider the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his or her dependents, and such other factors which it deems appropriate.

§ 775.089(6), Fla. Stat. (2011). In other words, the Legislature shifted consideration of the financial resources of the defendant to the time of any enforcement of the restitution order and sent a clear message that at the time of the determination of the amount of restitution, the trial court should consider only the victim's loss in imposing restitution. Thus, since 1995, the trial court has been required to consider the defendant's financial resources when a restitution order is being enforced—not when restitution is being imposed. See State v. Shields, 31 So. 3d 281, 282 (Fla. 2d DCA 2010) ("[A]bility to pay the amounts ordered is a factor to be considered at the time of enforcement, not at imposition."); Owens v. State, 679 So. 2d 44, 45 (Fla. 1st DCA 1996) ("[A] defendant's ability to pay is to be considered only when there is an attempt to enforce the restitution order."); Nieves v. State, 678 So. 2d 468, 470 (Fla. 5th DCA 1996) ("[E]ffective May 8, 1995, section 775.089(6) was amended to provide that financial resources and ability to pay restitution shall be considered at the time of enforcement of a restitution order, rather than at the time restitution is ordered."); cf. Banks v. State, 732 So. 2d 1065, 1069-70 (Fla. 1999) ("The [district] court added: '[T]he trial court made no finding of Banks' ability to pay restitution, as we [have] held to be necessary . . . .' [State v. Banks, 712 So. 2d 1165, 1166 (Fla. 2d DCA 1998).] This was error. . . . [A] defendant's ability to pay restitution is a nonissue when the court is weighing the need for restitution versus the need for imprisonment.

Section 775.089(6), Florida Statutes (1995), provides that ability to pay shall be considered at the time of enforcement of a restitution order—not at the time when the court is weighing the respective needs.").[3]

An enforcement proceeding arises when either the State or the victim seek to enforce the order. Section 775.089(5) provides: "An order of restitution may be enforced by the state, or by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action." § 775.089(5), Fla. Stat. (2011); see also § 960.001(1)(j), Fla. Stat. (2011) ("Law enforcement agencies and the state attorney shall inform the victim of the victim's right to request and receive restitution pursuant to s. 775.089 or s. 985.437, and of the victim's rights of

3. We note that several district court cases involving the amended statute have held otherwise. However, the precedent relied upon by these cases appear to address (or in turn rely on cases addressing) the statute before it was amended in 1995. See Carter v. State, 23 So. 3d 1238, 1247 (Fla. 4th DCA 2009) ("Appellant timely objected to a restitution award without a hearing. Additionally, the trial court did not consider appellant's financial resources or ability to pay. For these reasons, we reverse the restitution order and remand for an evidentiary hearing." (citing Filmore v. State, 656 So. 2d 535 (Fla. 4th DCA 1995))), review denied 39 So. 3d 320 (Fla. 2010), and cert. denied, 131 S. Ct. 476 (2010); Exilorme v. State, 857 So. 2d 339, 340 (Fla. 2d DCA 2003) ("Section 775.089(7) requires a hearing, before restitution is imposed, to determine the amount owed to the victim as well as the defendant's ability to pay. . . . Subsections 775.089(6) and (7) require a hearing to determine both the defendant's ability to pay and the amount owed." (citing Allen v. State, 718 So. 2d 1264 (Fla. 2d DCA 1998); Faulkner v. State, 620 So. 2d 794 (Fla. 1st DCA 1993); Burch v. State, 617 So. 2d 846 (Fla. 4th DCA 1993); Denmark v. State, 588 So. 2d 324 (Fla. 4th DCA 1991))).

enforcement under ss. 775.089(6) and 985.0301[4] in the event an offender does not comply with a restitution order.").

A trial court is required to consider the defendant's financial resources during an enforcement proceeding. Section 775.089(6)(b) requires the trial court, "at the time of the enforcement of the restitution order," to "consider the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his or her dependents, and such other factors which it deems appropriate." § 775.089(6)(b), Fla. Stat. (emphasis added).

Section 775.089(7), Florida Statutes, discusses the applicable burdens:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the state attorney. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his or her dependents is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.

However, it is noteworthy that the resolution of the issue is only by the preponderance of the evidence, and in enforcement proceedings, the statute does not impose a higher burden on the defendant to demonstrate his or her financial resources even though his or her liberty is not at stake.

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4. Sections 985.437 and 985.0301, Florida Statutes (2011), pertain to restitution ordered in the juvenile context.

Although all orders of restitution may be enforced through civil enforcement proceedings, if a defendant is placed on probation, restitution is required to be ordered as a condition of probation. We thus turn to the statutes that govern restitution as a condition of probation, which is where the probationer's liberty may be affected by the failure to pay. For a defendant placed on probation, "any restitution ordered under s. 775.089 shall be a condition of the probation." § 948.032, Fla. Stat. (2011). If the defendant fails to comply with the order, the court may revoke probation. Id.

The probationer's financial resources are considered when the trial court is determining whether to revoke probation. Significantly, section 948.032, Florida Statutes, provides: "In determining whether to revoke probation, the court shall consider the defendant's employment status, earning ability, and financial resources; the willfulness of the defendant's failure to pay; and any other special circumstances that may have a bearing on the defendant's ability to pay." Id. This statute was enacted in 1984,[5] shortly after Bearden was decided.

Section 948.06, Florida Statutes, the statute at issue in this case, governs probation revocation proceedings. Subsection (5) of that statute specifically addresses probation revocation when a probationer has failed to pay restitution and

5. See ch. 84-363, § 5, Laws of Fla.

places the burden on the probationer to assert and demonstrate inability to pay by clear and convincing evidence:

> 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. 948.09, as directed, is established by the state, if the probationer or offender asserts his or her inability to pay restitution or the cost of supervision, it is incumbent upon the probationer or offender to prove by clear and convincing evidence that he or she 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.

§ 948.06(5), Fla. Stat. (2011). This provision in the statute was added in 1984 as section 948.06(4). See ch. 84-337, § 3, Laws of Fla. The provision remains substantively the same today as when it was enacted.[6]

Determination of Willfulness

We next turn to the requirement that the trial court make a determination of willfulness and whether a failure to make such a determination can be considered harmless error, as the Third District has held, or constitutes fundamental error, as the First District has held. We generally apply an abuse of discretion standard

6. The Legislature has made only minor grammatical changes to the provision since enacting it in 1984.

when reviewing a trial court's decision to revoke probation. See Lawson v. State, 969 So. 2d 222, 229 (Fla. 2007). Here, however, the issue presented is a question of law, and we apply a de novo standard of review. See id. In this case, we review the statutory scheme, construing related statutes in pari materia, and also consider the guiding constitutional principles espoused in Bearden and Stephens.

The First District has held that although the burden of proving inability to pay shifts to the probationer after the State establishes nonpayment, the trial court must make an inquiry and determination with regard to the probationer's ability to pay. See Martin v. State, 937 So. 2d 714, 715-16 (Fla. 1st DCA 2006). In fact, the First District has held that the failure of the trial court to make a finding of willfulness is reversible error:

> Section 948.06(5) does not relieve the trial court of its duty to determine that the violation was willful by proving the probationer's ability to pay. Martin, 937 So. 2d at 716; Blackwelder v. State, 902 So. 2d 905, 907 n.1 (Fla. 2d DCA 2005). Because ability to pay is an essential element for a finding that a probationer willfully violated probation for failure to pay supervisory costs, the revocation of Appellant's probation based on the alleged violation of Condition (2) constitutes fundamental error. Hobson[v. State], 908 So. 2d [1162,] . . . 1164 [Fla. 1st DCA 2005]. In Friddle v. State, 989 So. 2d 1254, 1255 (Fla. 1st DCA 2008), we held that revoking the defendant's probation based on his failure to pay restitution, without a specific finding that he had the ability to pay, compelled reversal. For the same reason, the finding that Appellant willfully violated Condition (2) must be stricken from the probation revocation order.

Odom v. State, 15 So. 3d 672, 678 (Fla. 1st DCA 2009).

Conversely, the Third District, while acknowledging the necessity of a determination of ability to pay, has concluded that the failure of a trial court to make this determination is harmless, thus eroding the underlying constitutional principle expressed in Bearden that a probationer may not be deprived of his conditional freedom simply because, through no fault of his own, he cannot pay a monetary obligation. In Guardado, 562 So. 2d at 696-97, the Third District stated:

> With regard to the third ground, failure to make payments for the cost of supervision, it is true that there should have been a finding of ability to pay. See Brown v. State, 537 So. 2d 180, 181 (Fla. 3d DCA 1989). However, under subsection 948.06(4), Florida Statutes (1989),[7] inability to pay the cost of supervision is a defense which the probationer must prove by clear and convincing evidence. Guardado offered no evidence whatsoever on that issue. That being so, the failure to make a specific finding was harmless.

The Third District's holding that the failure of a trial court to make a specific finding of ability to pay is harmless directly contradicts the clear rule established by this Court in Stephens and the rationale upon which the principle of law announced by the United States Supreme Court's decision in Bearden is based. The specific question addressed in Bearden was "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the

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7. Section 948.06(4), Florida Statutes (1989), is identical to the current section 948.06(5) for purposes of this case. Subsection (4) was renumbered as the current subsection (5) in 1997. Ch. 97-299, § 13, Laws of Fla.

failure or that alternative forms of punishment were inadequate." Bearden, 461 U.S. at 665 (emphasis added). In answering that question in the negative, the Supreme Court clearly articulated its belief that a specific inquiry with regard to ability to pay is required to pass constitutional scrutiny:

> We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. . . . To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Bearden, 461 U.S. at 672-73.

Chief Justice Canady's dissent ascribes too narrow and limited a reading to Bearden and fails to recognize the important constitutional principles announced in that decision. Far from "simply constitut[ing] a recognition that the reasons for failure to pay are relevant to whether revocation is proper and that it is impermissible to preclude consideration of those reasons," dissenting op. at 36 (emphasis added), Bearden clearly mandates that "a sentencing court must inquire into the reasons for the failure to pay" in revocation proceedings for failure to pay a fine or restitution, Bearden, 461 U.S. at 672 (emphasis added). Likewise, this Court in Stephens, 630 So. 2d at 1091, recognized that in Bearden, "the [United States Supreme] Court held that a court must investigate the reasons for failing to pay a fine or restitution in probation revocation proceedings." (Emphasis added.) This Court did not simply "[r]ecogniz[e] the illegality of . . . an unconditional plea

agreement waiver by a probationer," dissenting op. at 35, in Stephens, but instead unmistakably held that "before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so." 630 So. 2d at 1091.

Regardless of whether the State or the probationer has the burden of proof with regard to ability, or inability, to pay, both this Court and the United States Supreme Court have made it abundantly clear that there must be both an inquiry into a probationer's ability to pay and a determination of willfulness. This flows from both state and federal constitutional requirements. The Third District's holding in Guardado ignores the inquiry required by Bearden, which, according to that opinion, is necessary "[w]hether analyzed in terms of equal protection or due process." Bearden, 461 U.S. at 666. Further, Guardado is inconsistent with this Court's requirement expressed in Stephens regarding a specific finding of willfulness. A probationer cannot have his probation constitutionally revoked absent an inquiry into ability to pay and a specific finding of willfulness, and a trial court's failure to conduct such an inquiry or make such a finding cannot be deemed harmless. Although Guardado was decided prior to this Court's decision in Stephens, it has been improperly extended and relied on in decisions rendered after Stephens, including Gonzales, upon which the Third District relied in Del Valle.

See, e.g., Del Valle, 994 So. 2d at 425 (citing Gonzales, 909 So. 2d at 960); Gonzales, 909 So. 2d at 960 (citing Guardado, 562 So. 2d at 696-97).

The absence of a specific finding of willfulness in a probation revocation proceeding cannot be considered harmless error. An automatic revocation of probation without such a finding would be unconstitutional. To comply with the rules set forth in Bearden and Stephens, trial courts must inquire into a probationer's ability to pay and make an explicit finding of willfulness based on the greater weight of the evidence. The failure to comport with these requirements constitutes fundamental error.

We emphasize that the probationer's ability to pay is an element of willfulness in the context of determining whether there is a willful violation for failure to pay a monetary obligation as a condition of probation. See Odom, 15 So. 3d at 678-79 ("[A]bility to pay is an essential element for a finding that a probationer willfully violated probation for failure to pay . . . ."). As stated by this Court in Stephens, 630 So. 2d at 1091, there must be a determination that the probationer has, or has had, the ability to pay but has willfully refused to do so. Thus, the trial court must inquire into a probationer's ability to pay before determining willfulness.

Constitutionality of Section 948.06(5)

We next turn to the constitutional validity of the burden-shifting scheme of section 948.06(5). We first address the failure of section 948.06(5) to require the State to establish willfulness; and second, the constitutional validity of the requirement in section 948.06(5) that the probationer prove inability to pay by the heightened standard of clear and convincing evidence.

1. Constitutionality of Not Requiring the State to Establish Willfulness

The general principle in probation revocation proceedings is that "the burden is on the state to establish that the probationer willfully violated the terms of his probation." Howard v. State, 484 So. 2d 1232, 1233 (Fla. 1986).[8] The trial court

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8. In fact, all of the district courts, including those that hold that the State does not bear the burden to establish ability to pay, hold that the State must prove a willful violation of probation in other contexts. See Galego v. State, 27 So. 3d 152, 154 (Fla. 3d DCA 2010) ("It is the State's burden to prove, by the greater weight of the evidence, that a probation violation is a willful and substantial one."); Jenkins v. State, 963 So. 2d 311, 313 (Fla. 4th DCA 2007) ("Probation may be revoked only upon a showing that the probationer deliberately and willfully violated one or more conditions of probation. Moreover, a violation which triggers a revocation of probation must be both willful and substantial, and the willful and substantial nature of the violation must be supported by the greater weight of the evidence. The state has the burden to establish that the probationer willfully violated the terms of his probation." (citations and internal quotation marks omitted)); Stewart v. State, 926 So. 2d 413, 414 (Fla. 1st DCA 2006) ("[T]he rule is: 'The trial court may revoke probation or community control only if the State proves by the greater weight of the evidence that the defendant willfully and substantially violated a specific condition of the probation or community control.' " (quoting Yates v. State, 909 So. 2d 974, 974-75 (Fla. 2d DCA 2005))); Edwards v. State, 892 So. 2d 1192, 1194 (Fla. 5th DCA 2005) ("The State carries the burden of proving by the greater weight of the evidence that a probationer has willfully and substantially violated her probation."); Hines v. State, 789 So. 2d 1085, 1086 (Fla. 2d DCA 2001) ("The State carries the burden of proving by the

must "consider each violation on a case-by-case basis for a determination of whether, under the facts and circumstances, a particular violation is willful and substantial and is supported by the greater weight of the evidence." State v. Carter, 835 So. 2d 259, 261 (Fla. 2002). Although a defendant has fewer protections in probation proceedings than in criminal proceedings, we must always be mindful that the potential consequence of the probation violation is the incarceration of the probationer for a long period of time.

Before a trial court can revoke probation, it must find that the probationer willfully and substantially violated a condition of probation. In probation revocation proceedings for failure to pay a monetary obligation as a condition of probation, the trial court must find that the defendant's failure to pay was willful—i.e., the defendant has, or has had, the ability to pay the obligation and purposefully did not do so. See Bearden, 461 U.S. at 668-69; see also Stephens, 630 So. 2d at 1091 ("[B]efore a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so."). "If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection."

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greater weight of the evidence that a probationer has willfully and substantially violated probation.").

Bearden, 461 U.S. at 668. Accordingly, if the State seeks to revoke probation on the basis of failure to pay, it must introduce evidence on the probationer's ability to pay that would support the trial court's finding of willfulness.

The plain text of section 948.06(5), however, does not expressly address this requirement but only requires the State to establish failure to pay before the burden of proof shifts to the defendant to prove inability to pay. The absence of any recognition or mention of the element of willfulness as a first step in section 948.06(5) could alone render the statute unconstitutional.

Reading section 948.06(5) without the constitutionally required element would undermine its validity, and, therefore, we have an obligation to give the statute a constitutional construction where such a construction is possible. See Tyne v. Time Warner Entm't Co., 901 So. 2d 802, 810 (Fla. 2005). The problem with section 948.06(5) is not what is in the statute, but rather what is not.

Section 948.06(5) can be reconciled with Stephens and Bearden by simply reading into the statute the recognized element that there must be evidence presented of willfulness and construing it in pari materia with section 948.032, Florida Statutes (2011), which requires the trial court, when revoking probation, to consider the probationer's employment status, earning ability, financial resources, willfulness of failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. Construing these statutes in pari

materia preserves section 948.06(5) and the Legislature's intent to shift the burden of proving inability to pay to the defendant, while at the same time respecting the underpinning of the constitutional requirement of a determination of willfulness as enunciated in Bearden and Stephens.

Accordingly, we hold that before the burden shifts to the defendant to prove inability to pay, the State must provide sufficient evidence that would support a trial court's finding that the probationer willfully failed to pay a monetary obligation, which would include whether the probationer has, or has had, the ability to pay the obligation.

2. Constitutionality of Placing the Burden on the Probationer to Prove Inability to Pay

Once the State has established sufficient evidence for the trial court to make a determination of willfulness, under the statute, the burden is then on probationer to prove inability to pay. We consider this issue in the context of the constitutional protections afforded to the probationer. Although protection guaranteed to probationers in revocation hearings are less than those in criminal proceedings, probation revocation proceedings that result in a deprivation of liberty must comport with the due process clauses of both the Florida and United States Constitutions. The requirement that a willful and substantial violation of probation be found before probation can be revoked is rooted in the fundamental fairness notion required by due process. The United States Supreme Court has stated that

"depriv[ing] the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine" would be "contrary to the fundamental fairness required by the Fourteenth Amendment." Bearden, 461 U.S. at 672-73. The Florida Constitution also explicitly provides: "No person shall be imprisoned for debt, except in cases of fraud." Art. I, § 11, Fla. Const. Thus, the due process clause of the Fourteenth Amendment and the corresponding provisions of the Florida Constitution mandate that certain protections be in place.

We conclude that because the State is required to produce sufficient evidence in order for the trial court to make a determination of willfulness, shifting the burden to the probationer to then rebut this is constitutionally permissible. However, we conclude that the higher burden of clear and convincing evidence imposed on the probationer cannot withstand constitutional scrutiny under these circumstances.

Although the standard for proving a probation violation is the preponderance of the evidence, the defendant is required to meet a heightened burden of clear and convincing evidence to establish inability to pay. This imbalance in the scales of justice is even more significant considering the following: (1) when imposing restitution, the trial court no longer (as of 1995) considers the financial resources of the defendant and must impose restitution unless there are "clear and compelling reasons" not to do so; and (2) in a civil enforcement action where incarceration is

not at stake, the probationer is held only to a preponderance of the evidence standard to demonstrate his or her financial resources. We further consider that the Legislature has not amended section 948.06(5) with respect to placing the burden on the probationer to prove inability to pay by clear and convincing evidence since adding the requirement in 1984—at which time the financial resources of the defendant were a factor that the trial court was required to consider at the time that restitution was assessed and imposed.

This higher standard placed on the probationer distinguishes this case from those in the criminal context where the State bears the burden to prove the crime beyond a reasonable doubt—a higher standard than "clear and convincing." Accordingly, although at least one affirmative defense requires a defendant to prove the defense by clear and convincing evidence,[9] that standard is actually lower than the standard imposed on the State in that context. Here, however, it is the opposite: the probationer bears the higher standard of proof to rebut the State's case.

As articulated by the United States Supreme Court in Cooper v. Oklahoma, 517 U.S. 348 (1996), the "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." Id. at 362 (quoting

9. See § 775.027(2), Fla. Stat. (2011) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence.")

Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 283 (1990)). We conclude that imposing a burden of clear and convincing evidence on the probationer creates an impermissible risk that a person will be imprisoned simply because, through no fault of his or her own, he or she cannot pay the monetary obligation. Such an error is one of constitutional magnitude, "contrary to the fundamental fairness required by the Fourteenth Amendment" of the United States Constitution, Bearden, 461 U.S. at 673, and in violation of the Florida Constitution. See art. I, § 11, Fla. Const.

The State points to many jurisdictions that have upheld the practice of shifting the burden to prove inability to pay to the probationer. However, we note that these jurisdictions do not shift the burden to the defendant to prove inability to pay by the heightened standard of clear and convincing evidence.[10] Further, the Florida Constitution contains explicit protection against imprisonment for debt.

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10. See, e.g., Higgins v. State, No. A-7222, 2000 WL 329369, *6 (Alaska Ct. App. Mar. 29, 2000); Reese v. State, 759 S.W.2d 576, 577 (Ark. Ct. App. 1998); People v. Walsh, 652 N.E.2d 1102, 1106 (Ill. App. Ct. 1995); Turner v. State, 516 A.2d 579, 583 (Md. 1986); State v. Fowlie, 636 A.2d 1037, 1039 (N.H. 1994); State v. Parsons, 717 P.2d 99, 104 (N.M. Ct. App. 1986); State v. Turner, No. COA01-134, 2002 WL 553656, *4 (N.C. Ct. App. Apr. 16, 2002); State v. Jacobsen, 746 N.W.2d 405, 408 (N.D. 2008); State v. Hamann, 630 N.E.2d 384, 395 (Ohio Ct. App. 1993); Miller v. Penn. Bd. of Prob. & Parole, 784 A.2d 246, 248 (Pa. Cmmw. Ct. 2001); State v. LaRoche, 883 A.2d 1151, 1155 (R.I. 2005); State v. Morton, No. 01-C-01-9301-CC, 1993 WL 335421, *2 (Tenn. Crim. App. Sept. 2, 1993); Wike v. State, 725 S.W.2d 465, 468 (Tex. Ct. App. 1987); State v. Bower, 823 P.2d 1171, 1174-75 (Wash. Ct. App. 1992); Ramsdell v. State, 149 P.3d 459, 464 (Wyo. 2006).

Thus, the provision requiring the probationer to prove inability to pay by clear and convincing evidence is constitutionally infirm because it requires the defendant to bear a greater risk of an erroneous decision resulting in imprisonment for debt, despite an explicit protection in Florida's Constitution against imprisonment for debt. See art. I, § 11, Fla. Const. This risk is constitutionally unacceptable.

This Case

In this case, the trial court found a violation of probation based on Del Valle's failure to pay restitution and costs, but did not inquire into Del Valle's ability to pay or his financial resources before finding a violation of probation and ordering that Del Valle attend boot camp. The only evidence presented as to the violation was that Del Valle had been informed of the terms of his probation and that he was in arrears of both the restitution amount and the costs of supervision. Although the trial court failed to make an inquiry into ability to pay or a finding of willfulness before modifying Del Valle's probation, the Third District, relying on its prior opinion in Guardado, affirmed the trial court's order, apparently finding the trial court's failure to conduct an inquiry or make a finding of willfulness to be harmless.

Rather than establishing that Del Valle willfully violated his probation, the evidence in the record reveals that after the violation of probation was found and boot camp was ordered, he was asked by the trial court what he could pay per

month. Del Valle responded he would "try to pay 'eighty or more a month' " "[i]f I get a job within the week."[11] There was no inquiry into whether he had tried previously to obtain employment or whether he had any other financial resources with which to pay the restitution.

In short, Del Valle's probation violation and the trial court's order requiring Del Valle to complete the boot camp program were based on nothing more than his failure to pay restitution, without regard as to whether he had the ability to pay but had willfully refused to do so. This is contrary to the constitutional principles espoused in Bearden and Stephens and contrary to the Florida Constitution's protection against imprisonment for debt.

CONCLUSION

In accordance with our analysis above, we conclude that, as held by this Court in Stephens and the United States Supreme Court in Bearden, before a probationer can be imprisoned for failure to pay a monetary obligation such as restitution, the trial court must inquire into a probationer's ability to pay and make an explicit finding of willfulness based on the greater weight of the evidence. Further, in all probation revocation proceedings in which the violation alleged is a failure to pay a monetary obligation as a condition of the probation, we hold that

11. The affidavit of violation of probation indicated that Del Valle was unemployed at the time the affidavit was filed.

the State must present sufficient evidence of the probationer's willfulness, which includes evidence on ability to pay, to support the trial court's finding of willfulness. After evidence of willfulness is introduced by the State, the burden may then be properly shifted to the probationer to assert and prove inability to pay. However, we hold that it is unconstitutional to require the probationer to prove inability to pay by clear and convincing evidence—a higher burden than the burden required of the State to prove the violation.

Accordingly, we quash the decision of the Third District below and further disapprove Gonzales v. State, 909 So. 2d 960 (Fla. 3d DCA 2005), and Guardado v. State, 562 So. 2d 696 (Fla. 3d DCA 1990), to the extent that they allow a probationer to have his or her probation revoked absent an inquiry by the trial court into ability to pay and a specific finding of willfulness. We approve the holdings of all the district courts of appeal except the Third District that before a trial court may properly revoke probation and incarcerate a probationer for failure to pay, it must inquire into the probationer's ability to pay and make a determination of willfulness.

We also disapprove Gonzales and Guardado to the extent that they hold that the State need not present evidence on the probationer's ability to pay and instead place the burden on the probationer to prove inability to pay by the heightened standard of clear and convincing evidence. We disapprove the decision of the First

District in Martin v. State, 937 So. 2d 714 (Fla. 1st DCA 2006), to the extent that it relieves the State of its burden to present evidence on the probationer's ability to pay. Finally, we approve the decisions of the Second, Fourth, and Fifth District Courts of Appeal in Shepard v. State, 939 So. 2d 311 (Fla. 4th DCA 2006), Blackwelder v. State, 902 So. 2d 905 (Fla. 2d DCA 2005), and Osta v. State, 880 So. 2d 804 (Fla. 5th DCA 2004), to the extent that they hold that the State bears the burden to present evidence on the probationer's ability to pay.

It is so ordered.

PARIENTE, QUINCE, LABARGA, and PERRY, JJ., concur.
CANADY, C.J., dissents with an opinion.
LEWIS, J., dissents with an opinion, in which POLSTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, C.J., dissenting.

The central issue presented by this case, in which the petitioner challenges the constitutionality of section 948.06(5), Florida Statutes (2011), is whether in probation revocation proceedings, the burden of showing inability to pay may be placed on a probationer who has failed to make payments ordered as a condition of probation. The petitioner contends that it is unconstitutional under Bearden v. Georgia, 461 U.S. 660 (1983), and Stephens v. State, 630 So. 2d 1090 (Fla. 1994), to place that burden on a probationer. He argues that the State is constitutionally

required to prove the probationer's ability to pay before probation can be revoked based on a failure to pay.

The majority effectively accepts the petitioner's argument by requiring that the State "present sufficient evidence" of the probationer's ability to pay before revocation for failure to pay is proper. Majority op. at 2. Transforming the clear meaning of the statutory text, the majority invokes the avoidance canon and treats section 948.06(5) as merely giving the probationer an opportunity to rebut the State's evidence of ability to pay. Addressing an issue not presented by the petitioner, the majority concludes that the statutory clear and convincing evidence standard is unconstitutional. The majority also concludes that the trial court's revocation of the petitioner's probation without a finding of ability to pay constitutes fundamental error.

For the reasons that I further explain below, I disagree with the majority's interpretation of Bearden and Stephens, its resulting constitutional analysis regarding placing the burden of establishing inability to pay on the probationer, and its conclusion that the trial court's failure to make a finding of ability to pay constituted fundamental error. I express no view concerning the constitutionality of the clear and convincing evidence standard since the petitioner has presented no argument on that issue.

Neither Bearden nor Stephens addresses the central question at issue here: whether it is constitutional to place the burden on a probationer to establish inability to pay in probation revocation proceedings where the State seeks revocation on the ground that the probationer has failed to make payments required as a condition of probation. Neither case—nor any other authority—provides any basis for declaring section 948.06(5) unconstitutional or for the majority's use of the avoidance canon to rewrite the statute.

Our decision in Stephens does not address the enforcement or constitutionality of section 948.06(5). Indeed, Stephens does not mention the statute. Instead, Stephens simply recognizes the illegality of a plea agreement under which the defendant waived the right to assert in future revocation proceedings the defense of inability to make agreed restitution payments. 630 So. 2d at 1091. Recognizing the illegality of such an unconditional plea agreement waiver by a probationer is a very different matter than recognizing the illegality of placing the burden on the probationer of showing inability to pay.

In Bearden, the Supreme Court addressed a state statutory scheme under which a probationer's inability to pay was treated as "irrelevant" to the revocation decision. 461 U.S. at 673. Bearden condemned the scheme as one of which "automatically turned a fine into a prison sentence." Id. at 674. The Court specifically noted that at the revocation hearing "the petitioner and his wife

testified about their lack of income and assets and of his repeated efforts to obtain work." Id. at 673. The court further noted that notwithstanding that testimony, the trial court "made no finding that the petitioner had not made sufficient bona fide efforts to find work." Id. The court concluded that "the record as it presently stands would not justify such a finding." Id. Bearden thus dealt with a scheme which precluded consideration of a probationer's inability to pay. This is a far cry from the statute at issue here—a scheme under which the probationer is given an opportunity to litigate the issue of inability to pay, and the judge is required to consider any competent evidence of inability to pay presented by the probationer.

The Bearden court's statement that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay" must be understood in the context in which it arose. Id. at 672. In that context, the statement simply constitutes a recognition that the reasons for failure to pay are relevant to whether revocation is proper and that it is impermissible to preclude consideration of those reasons. The statement does not transform probation revocation proceedings from adversarial proceedings in which the judge sits as a neutral arbiter into inquisitorial proceedings in which the judge's role is to investigate matters which are not raised by the probationer.

The majority states that section 948.06(5)'s burden-shifting scheme "is constitutionally permissible," majority op. at 27, but then—based on an

unwarranted reading of Bearden and Stephens—resorts to "reading into the statute" a requirement that entirely defeats the burden-shifting provision adopted by the Legislature. Majority op. at 25. This is not coherent. It does violence to section 948.06(5), and it does violence to the avoidance canon. (Not to mention the violence done to Bearden and Stephens.)

The avoidance canon is a rule of restraint that points to the adoption of an interpretation that is consistent with constitutional requirements—and thus avoids ruling a statute unconstitutional—when such an interpretation is among the range of reasonable interpretations that the text of the statute will admit. In the majority's decision, the avoidance canon has mutated from a rule of restraint to a rule of revision. The avoidance canon cannot properly justify the rewriting and the evisceration of a statutory provision in the manner accomplished by the majority decision. If the majority's understanding of Bearden was correct—which it is not—the proper course of action would be to declare section 948.06(5) unconstitutional.

In probation revocation proceedings, "the probationer is entitled to less than the full panoply of due process rights accorded a defendant at a criminal trial." Carchman v. Nash, 473 U.S. 716, 726 (1985). "[I]t is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in

this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Medina v. California, 505 U.S. 437, 445 (1992) (internal quotation marks omitted) (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)). Even a criminal defendant may constitutionally be required to bear the burden of establishing that he is not competent to stand trial. Id. Since a state can impose the burden of establishing incompetency to stand trial on a criminal defendant, a state should likewise be permitted to impose the burden of establishing inability to pay on a probationer in probation revocation proceedings—proceedings which are subject to less exacting due process requirements than those applicable in criminal trials.

Finally, I disagree with the majority's conclusion that the procedural error of a trial court in failing to make a finding regarding ability to pay constitutes fundamental error. Not every procedural error is equivalent to the denial of due process. I acknowledge that in probation revocation proceedings the petitioner is entitled to "a written statement of the factfinder as to the evidence relied on and the reasons for revoking probation." Black v. Romano, 471 U.S. 606, 612 (1985). Where the failure to make required payments is at issue, that would include a finding "that the defendant was somehow responsible for the failure." Bearden,

461 U.S. at 665. That does not mean, however, that a trial court's failure to make such a finding will always require reversal.

Here, the petitioner had an opportunity to litigate the issue of ability to pay but simply failed to adequately present the issue in the trial court. The petitioner presented wholly insufficient evidence to establish his inability to pay. Although the petitioner indicated that he had no job, he did not say what efforts he had made to obtain a job. For a probationer to show an inability to pay, section 948.06(5) requires that the probationer establish a lack of resources to pay the amount ordered "despite sufficient bona fide efforts legally to acquire the resources to do so." The petitioner totally failed to show any such "bona fide efforts." On such a record, the trial court's failure to make a finding concerning ability to pay is harmless beyond a reasonable doubt. See § 59.041, Fla. Stat. (2011) ("No judgment shall be set aside or reversed, or new trial granted . . . unless in the opinion of the court . . . after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.")

I therefore dissent. I would approve the decision of the Third District in the case on review as well as the Third District's decisions in Gonzales v. State, 909 So. 2d 960 (Fla. 3d DCA 2005), and Guardado v. State, 562 So. 2d 696 (Fla. 3d DCA 1990). I would disapprove Shepard v. State, 939 So. 2d 311 (Fla. 4th DCA

2006), Blackwelder v. State, 902 So. 2d 905 (Fla. 2d DCA 2005), and Osta v. State, 880 So. 2d 804 (Fla. 5th DCA 2004).

LEWIS, J., dissenting.

The majority holds that the requirement of section 948.06(5), Florida Statutes (2011), that a defendant must prove inability to pay restitution by clear and convincing evidence to avoid revocation of probation is unjustifiably onerous and unconstitutional. I dissent.

The majority has failed to demonstrate that section 948.06(5) is unconstitutional, and has incorrectly elevated the due process rights inherent in a revocation proceeding. The loss of liberty inherent in the revocation of probation requires probationers to be accorded due process, but the revocation proceeding is not a criminal trial. See Morrissey v. Brewer, 408 U.S. 471, 489 (1972). Florida law is clear that a probation revocation hearing is more informal than a criminal trial, and the burden of proof is lessened because only the conscience of the court need be satisfied. See Cuciak v. State, 410 So. 2d 916, 918 (Fla. 1982). The State is only required to demonstrate by a preponderance of the evidence that the probationer committed a particular offense that justifies probation revocation. See Miller v. State, 661 So. 2d 353, 354 (Fla. 4th DCA 1995). Furthermore, hearsay evidence is admissible at probation revocation hearings, see Sylvis v. State, 916

So. 2d 915 (Fla. 5th DCA 2005), and this Court has even held that the right to confront witnesses prescribed by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004), does not apply to probation revocation proceedings, see Peters v. State, 984 So. 2d 1227, 1234 (Fla. 2008). Florida courts have also held that the State has the right to call the defendant as a witness to testify about non-criminal matters in probation revocation proceedings. See Perry v. State, 778 So. 2d 1072, 1073 (Fla. 5th DCA 2001). To revoke probation, a court must only conclude and determine that a substantial violation of the terms of probation occurred. See Wheeler v. State, 344 So. 2d 630, 632 (Fla. 2d DCA 1977). Requiring the probationer to establish inability to pay by clear and convincing evidence is therefore not inconsistent with this Court's recognition that the constitutional protections provided in probation revocation hearings are less than those in criminal proceedings.

The majority also disregards the fact that a probation revocation hearing is not the first time a defendant is afforded an opportunity to contest the restitution order and present evidence with regard to his or her ability to satisfy its financial demands. At the initial restitution hearing, a trial court is required to award restitution to a victim for damage or loss indirectly or directly caused by the defendant's offense and for damage or loss that relates to the defendant's criminal episode unless it finds clear and compelling reasons not to do so. See § 775.089,

Fla. Stat. (2011). In the trial court's determination, it must consider the amount of the loss sustained by the victim, see id. § 775.089(6)(a), and the State bears the burden of demonstrating, by a preponderance of the evidence, the amount of damage or loss sustained by the victim, see id. § 775.089(7). A defendant has the ability to defeat the imposition of a restitution order, or the amount, if he or she successfully contests the validity of any damage or loss allegedly caused to a victim by the defendant's crime. See Fresneda v. State, 347 So. 2d 1021, 1022 (Fla. 1977) (stating that before a trial court may order restitution, the trial court "should give the defendant notice of the proposed restitution order and allow the defendant the opportunity to be heard as to the amount of damage or loss 'caused by his offense.' "). If the trial court awards restitution, the defendant may then appeal that order and contest the validity of the order. See Schuette v. State, 822 So. 2d 1275, 1278-84 (Fla. 2002); Glaubius v. State, 688 So. 2d 913, 914-16 (Fla. 1997). On appeal, if the defendant establishes that the amount of restitution is not supported by competent, substantial evidence, that restitution order may be reversed. See Glaubius, 688 So. 2d at 916 (holding that evidence with regard to the amount of restitution awarded to the victim "must be established through more than mere speculation; it must be based on competent evidence").

Next, a final restitution order is enforceable by the State or victim in the same manner as a judgment in a civil action. See § 775.089(5); see also Sims v.

State, 637 So. 2d 21, 23 (Fla. 4th DCA 1994). During such an enforcement proceeding, the trial court considers the ability of the defendant to pay through an examination of "the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his or her dependents, and such other factors which it deems appropriate." § 775.089(6)(b). At this stage, a defendant can stop the enforcement of a restitution order if he or she can establish, by a preponderance of the evidence, an inability to satisfy the financial demands of that order. See id. § 775.089(5)-(6); see also Banks v. State, 732 So. 2d 1065, 1070 (Fla. 1999) ("Section 775.089(6), Florida Statutes (1995), provides that ability to pay shall be considered at the time of enforcement of a restitution order—not at the time when the court is weighing the respective needs.").

Therefore, since the Legislature amended section 775.089(6) in 1995, it is clear that during any civil enforcement proceeding a defendant may establish an inability to pay. During such an enforcement proceeding, a defendant has the opportunity to contest a restitution award based on an alleged inability to pay. See State v. Shields, 31 So. 3d 281, 282 (Fla. 2d DCA 2010) ("Further, Mr. Shields' ability to pay the amounts ordered is a factor to be considered at the time of enforcement, not at imposition."); Owens v. State, 679 So. 2d 44, 45 (Fla. 1st DCA 1996). If a trial court finds that a defendant has the ability to pay in an

enforcement proceeding and enforces the restitution as a civil judgment, that defendant may again contest the propriety of that order on appeal. Cf. Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc., 832 So. 2d 948, 951 (Fla. 4th DCA 2002) (concerning the appeal of a trial court's decision with regard to a petition to enforce a civil judgment under Florida Rule of Civil Procedure 1.570).

Lastly, when a defendant is placed on probation by a trial court, the trial court is required to condition that probation on compliance with any restitution order issued pursuant to section 775.089. See § 948.032, Fla. Stat. (2011). If a defendant does not comply with that restitution order, the trial court may revoke probation. See id. In a revocation proceeding, a trial court shall consider the earning capacity and ability to pay of the defendant. See id. If the State proves a willful violation of the restitution order by the defendant, the burden shifts to the defendant to prove inability to pay by clear and convincing evidence if he or she is to avoid revocation. See id. § 948.06(5).

The holding of the majority that this clear and convincing burden is unconstitutional is a dubious and obtuse proposition, especially given the extensive due process provided by the aforementioned statutory framework a trial court must follow when it imposes restitution, enforces it, and revokes probation based on the failure to adhere to it. Only when a trial court has placed a defendant on probation, and that defendant faces revocation due to an alleged failure to adhere to a

restitution order, will that defendant endure the burden of a clear and convincing standard to establish an inability to pay. See §§ 948.032, .06.

Therefore, because a defendant has had an opportunity to contest the amount of a restitution award before its imposition, and to contest that imposition on appeal, as well as to defeat enforcement of restitution by proving an inability to pay at a lower standard of preponderance of the evidence during an appealable civil enforcement proceeding, the clear and convincing burden placed on a defendant during a revocation proceeding is not unduly burdensome and is constitutional. This burden, especially given the defendant's prior opportunities to contest restitution before a revocation of probation proceeding is commenced, is in accord with the purpose of criminal restitution, which is to "compensate the victim" and to further the "rehabilitative, deterrent, and retributive goals of the criminal justice system." Kirby v. State, 863 So. 2d 238, 242 (Fla. 2003).

Moreover, by placing the burden of presenting clear and convincing evidence on the probationer to prove inability to pay, the Legislature acted in accord with its constitutional power to create an affirmative defense, which includes the ability to place on a defendant a clear and convincing burden when attempting to prove that defense. See § 775.027, Fla. Stat. (2011) ("The defendant has the burden of proving the defense of insanity by clear and convincing

evidence."); § 826.02, Fla. Stat. (2011) (providing statutory affirmative defenses to the crime of bigamy).

The burden-shifting aspect of this troubling case has also produced dissension among the district courts as to which party should go forward with the burden of proving inability to pay. Although Bearden v. Georgia, 461 U.S. 660, 664 (1983), and Stephens v. State, 630 So. 2d 1090 (Fla. 1994), both require the court to inquire into a probationer's reasons for failing to pay, both decisions are silent with regard to which party has the burden to prove inability to pay, and the burden that such a party carries. As a result, the Second, Fourth, and Fifth Districts have all implicitly held that the burden is on the State to prove inability to pay in probation revocation hearings, but none have held that section 948.06(5) is unconstitutional. See Shepard v. State, 939 So. 2d 311, 314 (Fla. 4th DCA 2006) ("Despite the language of the statute, where the violation alleged is a failure to pay costs or restitution, there must be evidence and a finding that the probationer had the ability to pay.") (citing Warren v. State, 924 So. 2d 979, 980-81 (Fla. 2d DCA 2006)); Blackwelder v. State, 902 So. 2d 905, 907 n.1 (Fla. 2d DCA 2005) ("[S]ection 948.06(5), despite its plain language, cannot relieve the State of its burden to prove that the violation was willful by proving the probationer's ability to pay.") (citing Osta v. State, 880 So. 2d 804, 807 (Fla. 5th DCA 2004)); Osta v. State, 880 So. 2d 804, 807 (Fla. 5th DCA 2004) ("Although a plain reading of the

statute appears to place the burden of proving ability to pay restitution on the probationer, our courts have held that in order to revoke probation for failure to pay restitution the burden is on the State to prove the 'willfulness' of the violation, and in order to prove 'willfulness' the State must provide evidence that the probationer has the ability to pay restitution but willfully refuses to do so.") (citing Stephens, 630 So. 2d at 1090; Hartzog v. State, 816 So. 2d 774 (Fla. 2d DCA 2002)).

Section 948.06(5), however, expresses with indisputable clarity the Legislature's intent to shift the burden of proving inability to pay by clear and convincing evidence to a defendant who asserts such a claim. This burden-shifting element of section 948.06(5) is clear and unambiguous and does not require judicial construction. See State v. Jett, 626 So. 2d 691, 693 (Fla. 1993) ("It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language."). Absent any inconsistencies with the Florida or United States Constitutions, this Court must defer to the Legislature's clear intention to shift the burden of proving inability to pay by clear and convincing evidence in a probation revocation proceeding to the probationer. Further, because the Second, Fourth, and Fifth Districts did not hold section 948.06(5) to be unconstitutional, they should not supersede the Legislature's indisputably clear intent and the clear language of the

statute to place the burden of proving inability to pay by clear and convincing evidence on a probationer. The burden with regard to inability to pay set forth in section 948.06(5) is therefore constitutionally sound and the statute must be applied as written. In essence, the approach followed by the First District Court of Appeal in Martin v. State, 937 So. 2d 714 (Fla. 1st DCA 2006), provides the proper constitutional and statutory structure.[12]

Conclusion

In accordance with the analysis above, I would hold that before a probationer can be imprisoned for failure to pay restitution or costs of supervision, the State must provide evidence that the failure to pay was willful. The burden then shifts to the probationer to establish inability to pay by clear and convincing evidence. The trial court must make a finding that a willful violation has occurred. Accordingly, I would (1) quash the decision of the Third District below; (2) disapprove all Third District decisions to the extent they allow a probationer to have his or her probation revoked absent an inquiry into ability to pay or a specific finding of willfulness; (3) disapprove all Second, Fourth, and Fifth District

12. Although I may agree with Chief Justice Canady's dissent that a harmless error analysis should apply, I cannot agree with him that the failure of the defendant to present any evidence causes harmless error. Further, the facts in this case do not support finding harmless error because the colloquy indicates that the defendant stated that he had no job.

decisions to the extent they disregard the burden-shifting required under section 948.06(5); and (4) approve the approach of the First District in Martin.

I dissent.

POLSTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Third District - Case No. 3D08-2187

(Dade County)

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