

62934-4

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NO. 62934-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

N.S.T.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden
The Honorable Joan DuBuque

APPELLANT'S REPLY BRIEF

VANESSA M. LEE
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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KING COUNTY
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A. ARGUMENT

THE REVOCATION OF N.S.T'S DEFERRED DISPOSITION WAS CAUSED BY HER INABILITY TO PAY RESTITUTION, VIOLATING PRINCIPLES DUE PROCESS AND EQUAL PROTECTION.

1. Bearden and its progeny prohibit not just imprisonment, but also conviction, based solely on poverty. Respondent argues that Bearden is inapposite because its holding applies solely to *imprisonment* as a penalty for inability to pay. Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). It is true that Bearden dealt specifically with imprisonment, as have its progeny in Washington. Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, P.3d 485 (2002); State v. Woodward, 116 Wn.App. 697, 67 P.3d 530 (2003); State v. Bower, 64 Wn.App. 227, 823 P.2d 1171 (1992). No decision of the U.S. Supreme Court or Washington Courts have addressed the revocation of a deferred disposition. However, the

The Bearden Court listed a number of alternatives to incarceration that could be appropriate consequences for non-willful failure to pay a fine:

For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. Justice Harlan

appropriately observed in his concurring opinion in Williams that “the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment.” [Tate v. Short, 401 U.S. 395, 399, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971)]. Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, see [Williams v. Illinois, 399 U.S. 235, 244, n. 21, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970)] a sentencing court can often establish a reduced fine or alternate public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources.

Bearden, 461 U.S. at 672. According to Respondent, the revocation in this case fits into the alternatives listed by the Bearden Court above. This is incorrect.

First, the court in this case did not “extend the time for making payments” – the deferred disposition period ended but the restitution was still due until paid in full. Nor did the court “reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine,” though such alternatives would have been appropriate and helpful.

Second, the State's this logic is fatally flawed because it ignores the fact that Bearden contemplated only situations where the conviction was *already* entered. In a deferred disposition, the juvenile respondent has not yet been convicted. Because she was

granted a deferred disposition, N.S.T. would obtain a conviction (her first) only if she failed to comply with all conditions. One of those conditions was completely unrealistic for her and her family (as it would be for a great many 14 year olds and working class families). Although she complied with all other convictions, she could not pay the restitution in full and her deferred disposition was revoked. Thus, although she was not *imprisoned* solely because of her poverty, she was *convicted* solely because of her poverty – a result which is just as offensive to principles of due process and equal protection.

A conviction, even without imprisonment, is a serious consequence. The United States Supreme Court has observed in the double jeopardy context that even when sentences are served concurrently, the mere fact of multiple convictions raises constitutional concerns.

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and

certainly carries the societal stigma accompanying any criminal conviction.

Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

The Washington Supreme Court has similarly recognized double jeopardy may be violated even where sentences for the two offenses are served concurrently. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1071 (1998); State v. Calle, 125 Wn.2d 769, 774-75, 888 P.2d 155 (1995). (Supreme Court rejecting concurrent sentence rule, holding "double jeopardy may be implicated when multiple convictions arise out of the same act, even if concurrent sentences have been imposed").¹ Lastly, this Court has recognized it is not simply the imposition of dual punishments which violates double jeopardy principles, but also the fact of multiple convictions.

¹ In Calle, the Washington Supreme Court noted both federal and state courts have cited Ball in concluding that double jeopardy concerns arise in the presence of multiple convictions, regardless of whether the resulting sentences are imposed consecutively or concurrently. 125 Wn.2d at 773-74, citing United States v. Gomez-Pabon, 911 F.2d 847, 861 (1st. Cir. 1990) (although defendants received concurrent rather than consecutive sentences for their dual convictions, adverse consequences still could result from the fact that two separate convictions issued), cert. denied, 498 U.S. 1074, 112 L. Ed. 2d 862, 111 S. Ct. 801 (1991); United States v. Morehead, 959 F.2d 1489, 1506 (10th Cir.) (a criminal conviction, in addition to imprisonment and a penalty assessment, presents potentially adverse consequences), aff'd sub nom. United States v. Hill, 971 F.2d 1461 (10th Cir. 1992); Chao v. State, 604 A.2d 1351, 1360 (Del. 1992) ("The United States Supreme Court has held that, for purposes of double jeopardy, the term 'punishment' encompasses a criminal conviction and not simply the imposition of a sentence.").

State v. Gohl, 109 Wn.App. 817, 822, 37 P.3d 293 (2001), citing Ball, 470 U.S. at 861 and In re Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses.

Gohl, 109 Wn.App. at 822 (emphases added).

In Gohl, the defendant was convicted of two counts of attempted first degree murder and two counts of first degree assault for the same acts involving the same two victims. 109 Wn.App. at 819. At sentencing, the court found the assaults and attempted murder counts encompassed the “same criminal conduct,” and imposed only one sentence. Id. at 822. The State argued that because the court imposed only one sentence, no double jeopardy violation occurred. Id. This Court disagreed, recognizing that it was the fact of multiple convictions which violated double jeopardy protections, despite the imposition of a single sentence. Id. Accordingly, despite a correct sentence, double jeopardy is violated when the judgment and sentence reflects multiple convictions.

The weight of the conviction is heightened for an appellant like N.S.T., who had no prior criminal record. The fact of this conviction not only burdens her with a stigma she did not previously carry, but also gives her an offender score she previously did not have and may also affect her eligibility for government programs or future jobs, or affect her immigration status or credit rating. The bottom line is that N.S.T. would not have this conviction if she had been able to pay \$2,630.40 in two years. Thus, she was convicted because of her poverty, a result clearly prohibited by the logic and principles of Bearden and Smith. This is not only “inappropriate” but “fundamentally unfair.” Bearden, 461 U.S. at 668-69, quoting Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1972).

2. The court was required to inquire into N.S.T.’s ability to pay. The State argues N.S.T. had the burden of proving her inability to pay, but ignores the court’s clear duty to inquire into that issue.

The Washington Supreme Court has held “that before enforced collection or any sanction is imposed for nonpayment, there *must* be an inquiry into ability to pay.” State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) (emphasis added). Blank

refers to “any sanction,” not merely imprisonment; see also Smith, 147 Wn.2d at 112 (“requiring the court to find that a defendant’s failure to pay a fine is intentional before remedial sanctions [not just imprisonment] may be imposed”).

In Smith, the Court found “[b]ecause the record shows no inquiry at all into Smith’s ability to pay her fines, much less the three-part inquiry required by Bearden, her commitment violated the fourteenth amendment to the United States Constitution.” Id. Since the court in this case clearly did not make the required inquiry, the same result is required here.

In any event, N.S.T. did establish her inability to pay. Because her age is uncontroverted, the sentencing court could and this Court can take judicial notice of certain facts and the logical inferences therefrom. N.S.T. could work only part time while attending school full-time, as required by state law and the conditions of her deferred disposition. At the current minimum wage of \$8.55 per hour (although 14 and 15 year olds can be paid \$7.27 an hour), it would take N.S.T. approximately 307 hours *before taxes* to earn \$2,630.40. RCW 49.46.020. Working 10 hours a week (perhaps a reasonable schedule for a high school student), it would take her more than 30 weeks, or about eight

months, to earn that amount. Again, before taxes and assuming the minimum wage, although that would not be required. It should therefore be self-evident that N.S.T. could not pay all or even a substantial portion of the restitution on her own.

Thus, the restitution could only be paid by her family.

N.S.T.'s mother, a single parent, made payments on her behalf until N.S.T. found a job, but could not assist her any longer. RP 73.

She told the court both her hours and N.S.T.'s hours at work had been cut and "if I have anything extra it usually goes to gas... I'm barely feeding my kids." RP 73. The State did not dispute the mother's testimony.

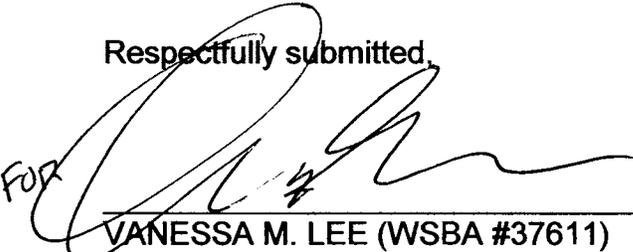
N.S.T. more than met her burden. However, it is the court's failure to inquire into her ability to pay and to consider the facts pertinent to that issue that mandate the reversal of the revocation

B. CONCLUSION

For the reasons presented above and in her Opening Brief, N.S.T. respectfully requests this Court vacate her disposition and dismiss the case with prejudice.

DATED this 15th day of December, 2009.

Respectfully submitted,

FOR 

VANESSA M. LEE (WSBA #37611)
Washington Appellate Project
Attorneys for Appellant

OLIVER DAVIS WSBA 24560

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62934-4-I
v.)	
)	
N.S.T.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STATE OF WASHINGTON
COURT OF APPEALS

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF DECEMBER, 2009.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710