

65634-1

65634-1

NO. 65634-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I



STATE OF WASHINGTON,

Respondent,

v.

TROY VANSICKLE

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY,
THE HONORABLE DOUGLAS A. NORTH

STATE'S RESPONSE BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

IVAN ORTON, WSBA No. 7723
Senior Deputy Prosecuting Attorney
Economic Crimes Unit
Criminal Division
Attorney for Appellant

W554 King County Courthouse
516 Third Ave.
Seattle, WA 98104
Telephone: 296-9010

TABLE OF CONTENTS

I.	INTRODUCTION	1
II	ISSUES	1
III	STATEMENT OF THE CASE.....	2
IV	ARGUMENT	5
A.	MOOTNESS	5
1)	<i>This Case is Moot</i>	5
2)	<i>Neither of VanSickle's Issues Involve Continuing and Substantial Public Interest</i>	6
B.	DUE PROCESS CONCERNING WILLFULNESS OF FAILURE TO PAY.....	7
C.	JURISDICTION	15
V.	CONCLUSION.....	16

TABLE OF AUTHORITIES

Washington Cases

<u>In re: Cross</u> , 99 Wash.2d 373, 376-77, 662 P.2d 828 (1983).....	5, 7
<u>In re: Personal Restraint Petition of Silas</u> , 135 Wash.App. 564, 145 P.3d 1219 (2006).....	6
<u>Smith v. Whatcom County Dist. Court</u> , 147 Wn.2d 98, 52 P.3d 485 (2002)	7, 8
<u>Sorenson v. City of Bellingham</u> , 80 Wash.2d 547, 496 P.2d 512 (1972)...	6
<u>State ex rel. Yakima Amusement Co. v. Yakima County</u> , 192 Wash. 179, 73 P.2d 759 (1937).....	6
<u>State v. Blank</u> , 131 Wn.2d 230, 930 P.2d 1213 (1997)	7, 8
<u>State v. N.S.T.</u> , 156 Wn.App. 444, 232 P.3d 584 (2010)	9, 10, 13, 14
<u>State v. Nason</u> , 168 Wn.2d 936, 233 P.2d 848 (2010),.....	7, 8
<u>State v. Turner</u> , 98 Wash.2d 731, 733, 658 P.2d 658 (1983).....	5
<u>State v. Woodward</u> , 116 Wn.App. 697, 67 P.3d 530 (2003)	passim

Federal Cases

<u>Bearden v. Georgia</u> , 461 U.S. 660, 103 S.Ct 2064, 76 L. Ed. 2d 221 (1983)	7
---	---

I. INTRODUCTION

In this appeal the defendant argues that he was not accorded due process in the determination that his failure to pay restitution was willful (one of the forty new violations) and that jurisdiction on cause number 91-1-02542-4 had expired (incarceration time was ordered on three cause numbers, concurrent).

The State responds that:

- Both issues are moot as the defendant has served all ordered incarceration time and neither issue involves a continuing and substantial public interest;
- Washington's method of allocating the burden of proof, utilized by Judge North below, comports with due process requirements;
- Supervision over the defendant on the 1991 cause number was properly extended during a time when the court still had further jurisdiction.

II ISSUES

- Is this case moot, and if so, does it involve issues of continuing and substantial public interest?
- Was jurisdiction timely extended on the 1991 cause number?

- Was defendant provided all required due process with regard to the court's finding of one violation related to the defendant's willful failure to make payments toward his legal financial obligations?

III STATEMENT OF THE CASE

This appeal involves the most recent of a long series of sentence modification hearings in three cause numbers, 91-1-02542-4, 94-1-98166-3, and 96-1-08875-8. (VanSickle refers to these respectively as the 1992, 1996 and 1997 convictions based, apparently, on the date of sentence. The State will refer to them relative to their cause numbers as the 1991, 1994 and 1996 convictions.) This series of hearings dealt with VanSickle's repeated willful failures to make payments toward his court ordered legal obligations and his equally repeated willful failure to provide required monthly statements of his income and assets.

Over this series of hearings the court had imposed increasing sanctions to punish him for his willful violations and to persuade him to be more compliant in the future, as follows:

3/22/02	120 days on each cause number, concurrent. CP 102-04;
9/12/02	300 days on each cause number, concurrent. Supervision over the defendant was extended for 10 years in all cause numbers, including the 1991 matter. CP 105-06.

- 10/23/03** 25 willful violations found, imposition of sanctions deferred until hearing set for August 5, 2004 at 8:30 AM. CP 155-56.
- 8/5/04** Defendant failed to appear and a warrant was issued for his arrest. CP 157.
- 5/27/10** Defendant appears in court following arrest on above warrant. For each cause number, concurrent, 975 days imposed for 10/23/03 violations previously found and forty additional violations found that day. CP 36-38.

In setting the most recent hearing, continued at defendant's request to May 27, 2010, the State filed a Notice of Sentence Modification Hearing and Motion to Show Cause on 3/16/10, SuppCP _____, in which the defendant was alleged to have violated the conditions of his sentence by:

- Failing to appear at the scheduled August 5, 2004 hearing;
- Failing to file monthly financial reports between November 2003 and March 2010 (77 violations);¹
- Failing to make payments toward his legal financial obligations for each month between December 2003 and March 2010 (76 violations).² *Id*

On May 26, 2007, counsel for VanSickle served on the State and the court a brief in response to the alleged violations, SuppCP _____

¹ The Notice said November 2003 through March 2003 instead of 2010. All subsequent pleadings and argument were based on the correct March 2010 ending date.

² See note 2 above.

(Defense Revocation Hearing Memorandum and Brief), in which he stated, *inter alia*, that the failures to pay were not willful because:

Due to his incarceration, the defendant did not have the means to pay his financial obligations. The few times he was out of custody, he did not have the financial ability to pay, due to his ongoing child support payments, his other financial obligations, and his lack of liquidity, which led to a bankruptcy filing. At the time he commenced Bankruptcy in 2001, he had assets of \$135,000 dollars [sic] and liabilities of \$1,097,509 dollars [sic] (Attachment E). Although a bankruptcy filing does not get rid of LFO's [sic], it is something this Court should consider with regard to defendant's ability to pay.

The State replied that, to the extent incarceration was relevant, the defendant was not in custody for a substantial portion of the time when he was alleged not to have made payments. The State also noted that once the State establishes a failure to pay, VanSickle had the burden to prove the failure was not willful. To do that, the State argued, the defendant must do more than plead poverty in general terms. He must be prepared to show his actual income and living expenses. The State noted that the defendant had not done this, that he had only stated that he was indigent and had filed for bankruptcy. Even the bankruptcy was well before the first alleged missed payment. CP 32-35.

After considering the arguments made in the briefs and at the May 27, 2010 hearing, Judge North found one continuing willful failure to pay and 39 willful failures to file required monthly reports. He imposed 15

days per violation, consecutive. He also imposed 15 days for each of the 25 violations previously found on October 23, 2003, This was a total of 975 days on each cause number, concurrent. CP 36-38.

IV ARGUMENT

A. Mootness

1) This Case is Moot

On December 3, 2010, Judge North entered an order granting VanSickle credit for time served and, concluding that with this credit the defendant had served all required time under the May 27, 2010 Order Modifying Sentence. The order stated that the defendant was entitled to immediate release. This order applied to all three cause numbers. SuppCP ____ (Order for Credit for Time Served). In short, the defendant is not being held under the order he is now appealing and thus his appeal is moot.

A case is moot if a court can no longer provide effective relief. State v. Turner, 98 Wash.2d 731, 733, 658 P.2d 658 (1983). Since the detention which is the subject of this appeal has already ended, we cannot provide the most basic relief . . . sought.

In re: Cross, 99 Wash.2d 373, 376-77, 662 P.2d 828 (1983):

2) Neither of VanSickle's Issues Involve Continuing and Substantial Public Interest

Generally the courts will not consider a moot issue. However, an exception exists for issues involving a continuing and substantial public interest. In re: Personal Restraint Petition of Silas, 135 Wash.App. 564, 568, 145 P.3d 1219 (2006). To determine whether the public interest exception applies, courts consider the following factors: (1) the public or private nature of the issue, (2) the need for a judicial decision to provide future guidance to public officers, and (3) the likelihood that the issue will recur. *Id.*

This exception to the general rule obtains only where the real merits of the controversy are unsettled and a continuing question of great public importance exists. Sorenson v. City of Bellingham, 80 Wash.2d 547, 558, 496 P.2d 512 (1972), citing State ex rel. Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P.2d 759 (1937). This case does not meet either of these general requirements. VanSickle challenges jurisdiction on one of three cause numbers where concurrent sentences were imposed. He also challenges only one violation (failure to pay) for which 15 days was imposed, out of 65 total violations and a total sentence of 975 days.

The invalidation of less than 60 days out of the minimum year and a half during which Ms. Cross has been detained seems to us of minimal significance

In re: Cross at 377.

B. Due Process Concerning Willfulness of Failure to Pay

This alleged error relates to only one of the 40 willful violations found by Judge North – the failure to make payments. CP 36.

Defendant cites Bearden v. Georgia, 461 U.S. 660, 103 S.Ct 2064, 76 L. Ed. 2d 221 (1983) and three Washington cases, State v. Nason, 168 Wn.2d 936, 233 P.2d 848 (2010), Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 52 P.3d 485 (2002) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) for the proposition that a court must conduct a three-part inquiry before it may sanction an offender to incarceration for failing to make restitution payments. A careful reading of the three cited Washington cases, and a review of two relevant cases not cited by VanSickle, show the error in this absolute pronouncement.

Blank did not involve the issue of the showing needed at a sentence modification hearing for a failure to pay restitution. That case dealt, *inter alia*, with the question of whether a sentencing court could order recoupment without, at the time of sentencing, making a finding regarding the defendant's ability to pay. In finding no such duty the court

noted that an inquiry into the defendant's ability to pay must be made at the time when sanctions are imposed. The court did not address the issue before this court of what constitutes an appropriate inquiry. State v. Blank at 242.

Smith involved a district court judge jailing a defendant as coercive contempt for failure to pay court ordered fines. Smith v. Whatcom County Dist. Court at 108-110. The district court judge made no finding that the failure to pay was willful. *Id.* at 111-112. Although the Smith court made reference to the three-part inquiry of Bearden, because there was not even a finding of willfulness, the issue of the required nature, form and degree of inquiry into ability to pay was not discussed. *Id.*

In Nason the court ordered the defendant to make specific monthly payments and ordered him, prospectively, to report to jail if he failed to pay. No provision was made for a hearing if the defendant failed to pay. Because due process required a determination of willfulness at the time of the sanction, this "auto-jail" provision was invalid. *Id.* at 945-46. Because there was no hearing at the time the incarceration sanction became active, the court in Nason focused on the requirement of a hearing contemporaneous with the sanction, not the form of the inquiry.

VanSickle cites these cases for the proposition that Bearden requires the three-part inquiry notwithstanding the defendant's burden of showing that nonpayment was not willful. Appellant's Opening Brief at 8.

This court rejected that proposition in State v. N.S.T., 156 Wn.App. 444, 232 P.3d 584 (2010). There the State filed a motion to revoke the juvenile's deferred disposition based on her failure to pay restitution. The trial court granted the motion and the juvenile appealed, claiming, *inter alia*, that the failure of the court to find her violation was willful violated her due process rights. *Id.* at 453. N.S.T. relied primarily on Bearden v. Georgia. State v. N.S.T. at 454.

In rejecting N.S.T.'s argument regarding the Bearden inquiry, the N.S.T. court stated:

N.S.T. confuses the court's instruction to inquire into the economic status of the noncompliant defendant with the burden-shifting scheme that applies during the inquiry. For example, in State v. Woodward, the court noted that under provisions of the Sentencing Reform Act (SRA), chapter 9.94A RCW, the State bears the initial burden of proving by a preponderance of the evidence that a defendant has failed to meet the terms of his or her sentencing conditions. "If the State proves the defendant's failure to comply, the burden shifts to the defendant to show cause why he or she should not be punished." To meet this burden, the defendant must do more than plead poverty in general terms: he or she should be prepared to show the court proof of (1) actual income, (2) reasonable living expenses, (3) efforts to find legal means to acquire employment and other resources from which restitution may be paid, and (4) any

lawful excuse explaining any failure to comply with the terms of community supervision. [Citations omitted]

Id. at 455. The court noted that this analytic framework was consistent with the rule from Bearden that when the probationer has made reasonable efforts to meet his court-ordered financial obligations, and yet cannot do so, through no fault of his own, it is fundamentally unfair to revoke probation automatically. *Id.* at 455-56.

The N.S.T. court then concluded that the defendant's failure to provide any direct evidence documenting actual income, assets, reasonable living expenses, or efforts to find other legal resources from which restitution might have been paid meant the N.S.T. could not meet her burden of proving that she made sufficient bona fide efforts to comply with her restitution obligation. *Id.* at 456.

The case cited by *N.S.T.*, State v. Woodward, 116 Wn.App. 697, 67 P.3d 530 (2003) held similarly. In response to court inquiry about his finances the defendant gave vague and evasive testimony that failed to establish that the violation was not willful. *Id.* at 706. The Woodward court considered the obligations of Bearden and concluded that the procedure where the State proves the violation, shifting the burden to the defendant to prove nonwillfulness, was a valid measure of the defendant's ability to pay. State v. Woodward at 534-35.

In the case before this court the defendant filed a memorandum and brief in support of the defendant's claim, *inter alia*, that any failure to make restitution payments was not willful. SuppCP ____.³ The bases for this claim were three:

1) The defendant had been incarcerated during a portion of the time covered by the alleged violations;

2) When he was not in custody the defendant did not have the means to pay due to his ongoing child support payments, his other financial obligations, and the lack of liquidity;

3) His lack of the financial ability to pay is evidenced by a 2001 bankruptcy. *Id.*

In a response brief the State argued:

1) A primary purpose of monthly financial reports (which the defendant failed to file and which make up 39 of the 40 violations found by Judge North on May 27, 2010, CP 36) was to provide an up-to-date assessment of the defendant's ability to pay.⁴ It was disingenuous of the defendant to rely at this stage on a financial condition he failed to report;

³ See note 3 above.

⁴ A copy of the kind of report the defendant was supposed to file can be found at SuppCP ____ (Order Modifying Sentence, Attachment to).

2) With regard to the claim of incarceration, there were 43 months in the violation time of November 2003-March 2010 when the defendant was not in custody;

3) The defendant had not provided the detailed statement showing required by State v. Woodward, 116 Wn.App. 697, of his actual income, his reasonable living expenses, etc.; and

4) The 2001 bankruptcy occurred two years before the first alleged violation and was thus irrelevant.

CP 32-35.

Judge North considered these briefs in reaching his finding that the failure to pay was willful. RP 4-5, CP 36-38.

At the May 27, 2010 hearing, the defendant gave several excuses for his failure to pay:

- Filed bankruptcy in 2001;
- From then until March 2002 he was supporting three kids and had over \$20,000 in child support obligations;
- Was incarcerated until June 18, 2004;
- His father was dying of pancreatic cancer, dying in February 2005;

- For the next two years he took care of his mother in Arizona;

- Was incarcerated continuously after October, 2007;
- Was willing to pay but hadn't had the money;
- Was supporting one kid and had four other kids.

RP 14-18.

VanSickle claims the court made no findings regarding the credibility of the above statements. Appellant's Opening Brief at 11. No explicit finding regarding credibility was needed. None of these claims, even if true, constitute the kind of specific information about income and expenses that our courts require a defendant to produce to establish nonwillfulness. State v. Woodward, 116 Wn.App at 706, State v. N.S.T., 156 Wn.App. at 456.

For example in N.S.T., the court found the following statement to be insufficient:

I was actually paying what I could before she got employed. Uhm, my job is at a freeze, so they cut down everyone's hours. I have household bills; I'm a single mom, too. So, I'm doing the best I can. And my household bills come first. You know, if I have anything extra, it usually goes to gas. I'm barely feeding my kids. [N.S.T.'s] working. Her hours got cut. They have to call in to see if they even have to work.

The court noted that absent from the record, was any direct evidence documenting actual income, assets, reasonable living expenses, or efforts to find other legal resources from which restitution might have been paid. *Id.*

Judge North specifically excluded the time when the defendant was incarcerated and grouped the failures to pay into one continuing violation. CP 36. He gave the defendant the opportunity to meet his burden to prove the failure to pay was not reasonable. He considered the briefs of the parties and the defendant's oral representation. And then he found the defendant's failure to pay was willful. This complies completely with the procedures required under Woodward and N.S.T.

Even if the procedure used to reach this finding was defective, it is harmless error. Subsequent to the May 27, 2010 hearing the defendant moved for release pending appeal. In response the State argued, *inter alia*, that the defendant did not meet the requirements for a stay of sentence listed in RCW 9.95.062(d), that he had undertaken, to the extent of his ability, to pay the financial obligations. SuppCP ____ (Response to Motion/State). The State noted that the defendant since May 27, 2010, had retroactively filed financial statements covering the period in which he was not incarcerated and had not made payments. Those reports from the

defendant (the information in which had not been verified by the State) showed that for the thirty-nine months between his release from custody in June 2004 and his subsequent arrest in September 2007, the defendant reported gross income of over a half million dollars, with monthly gross and net income averaging \$14,500 and \$12,200. *Id.* That information would be available to Judge North on remand and there would be no different outcome.

In addition, as noted earlier, this issue is moot as the defendant has served all time ordered for this one violation.

C. Jurisdiction

As VanSickle correctly notes, he completed his term of total confinement on the 1991 conviction on January 5, 1993. Appellant's Opening Brief at 16. As he also correctly notes, the court's jurisdiction over VanSickle's legal financial obligations related to his 1991 conviction would expire on January 5, 2003, unless the court entered an order extending its jurisdiction prior to this date. *Id.*

VanSickle then points to an order extending jurisdiction dated March 24, 2003 and states jurisdiction had already expired at that point.

VanSickle overlooks the order entered on September 13, 2002, section 5 of which extended supervision for purposes of monitoring

compliance with payment of legal financial obligations for ten additional years. This order was entered prior to the expiration of jurisdiction on January 5, 2003. CP 105-06.

Even if jurisdiction had expired on the 1991 matter, the sentence imposed was 975 days on each cause number, to be served concurrently. CP 36-38. Given that fact, and the fact that the defendant is no longer incarcerated, VanSickle's request that the matter be remanded for resentencing emphasizes the moot nature of this issue.

V. CONCLUSION

The issues raised by VanSickle are moot. Furthermore the court acted with jurisdiction and its finding of a willful failure to pay comported with due process.

RESPECTFULLY SUBMITTED

DANIEL T. SATTERBERG
KING COUNTY PROSECUTING ATTORNEY

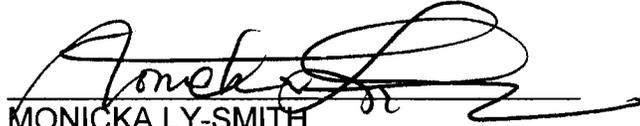
BY: 

IVAN ORTON, WSBA No. 7723
Sr. Deputy Prosecuting Attorney
Economic Crimes Unit, Criminal Division
King County Prosecuting Attorney
Attorney for Respondent State of Washington

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Peregrin Sorter and Christopher H. Gibson, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the **State's Response Brief**, in STATE V. TROY VANSICKLE, Cause No. 65634-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



MONICKA LY-SMITH

Done in Seattle, Washington

1/18/11
Date

2011 JAN 19 10:53 AM
SEATTLE, WA 98101