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No. _____

Court of Appeals No. 62934-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

N.S.T.,

Appellant.

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STATE OF WASHINGTON
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PETITION FOR REVIEW

VANESSA M. LEE
Attorney for Appellant

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

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE..... 1

 1. Argument on Appeal..... 3

 2. Decision By The Court Of Appeals 3

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED..... 4

 1. REVOCATION OF N.S.T.’S DEFERRED DISPOSITION BASED SOLELY ON NONPAYMENT, WITHOUT AN INQUIRY INTO HER ABILITY TO PAY AND A FINDING THAT THE VIOLATION WAS WILLFUL, VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT..... 6

 a. Revocation of deferred disposition based on nonpayment, without consideration of the defendant’s ability or bona fide efforts to pay, is “fundamentally unfair.” 7

 b. The juvenile court punished N.S.T. for nonpayment without inquiring into her ability to pay 9

 c. N.S.T. proved her inability to pay the outstanding restitution..... 11

 d. Revocation of a N.S.T.’s deferred disposition based on indigency violated her rights under the Equal Protection Clause..... 13

 2. REVOCATION WITHOUT A WRITTEN MOTION TO REVOKE DEPRIVED N.S.T. OF NOTICE AND RESULTED IN THE JUVENILE COURT’S LOSS OF JURISDICTION, REQUIRING DISMISSAL 14

a. Revocation without meaningful notice violated principles of due process..... 14

b. Neither the November nor December Report was a “written motion” as required by statute 16

c. The juvenile court erred in failing to dismiss the case for lack of jurisdiction 18

F. CONCLUSION..... 20

TABLE OF AUTHORITIES

Washington Supreme Court

Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 52 P.3d 485 (2002)
..... 4, 10, 11

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) 4, 9, 11, 13

State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) 15

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) 17

State v. Nason, 168 Wn.2d 936, 233 P.3d 848, 851-53 (2010) 4, 9, 13

Washington Court of Appeals

State v. Bower, 64 Wn.App. 227, 823 P.2d 1171 (1992) 9

State v. Martin, 36 Wn.App. 1, 670 P.2d 1082 (1983) 7

State v. May, 80 Wn.App. 711, 911 P.2d 399 (1996)..... 15, 18, 19, 20

State v. N.S.T., 232 P.3d 584, 2010 WL 2252530 (2010)..... 1, 3, 4, 12

State v. Todd, 103 Wn.App. 783, 790, 14 P.3d 850 (2000) 19

State v. Woodward, 116 Wn.App. 697, 67 P.3d 530 (2003) 9

State v. Y.I., 94 Wn.App. 919, 973 P.2d 503 (1999)..... 19

United States Supreme Court

Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)
..... 4, 7, 8, 9, 10, 13, 14

James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972).. 14

Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) 8

Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) 8

Decisions of Other Courts

In re Bruno R. 133 N.M. 566, 66 P.3d 339 (2003) 9

Statutes and Rules

RAP 13.4(b) 1,

RCW 13.40.127 4, 6, 14, 18

RCW 13.40.200 15

RCW 49.46.020 12

Other Authorities

BLACK'S LAW DICTIONARY 502 (8th ed.2004) 16

Washington State Employment Security Department, Labor Market and
Economic Analysis, Unemployment Rate 2000-2010, avail. at
https://fortress.wa.gov/esd/lmea/countydashboard/URateDetails.aspx?area=53_04_000033&qtype=1&comp=True&area2=53_01_000000&area3=00_00_000000 12

United States Constitution

U.S. Const. amend. XIV 1, 9, 14

A. IDENTITY OF PETITIONER

Petitioner N.S.T. respectfully requests this Court grant review of the Court of Appeals' decision affirming her juvenile disposition for malicious mischief in the first degree and robbery in the second degree.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, N.S.T. seeks review of the Court of Appeals' published decision in State v. N.S.T., 232 P.3d 584, 2010 WL 2252530 (2010). The opinion was filed on June 7, 2010. The Motion for Reconsideration was filed on June 30, 2010 and denied on July 11, 2010.

C. ISSUES PRESENTED FOR REVIEW

1. The revocation of N.S.T.'s deferred disposition, based solely on her inability to pay restitution, violates the due process and equal protection clauses of the Fourteenth Amendment.

2. N.S.T. did not receive meaningful notice of the State's intent to revoke her deferred disposition, violating her right to due process.

3. The juvenile court erred in denying N.S.T.'s motion to dismiss the case for lack of jurisdiction.

D. STATEMENT OF THE CASE

On December 13, 2006, N.S.T. stipulated that she committed residential burglary in the second degree and malicious mischief in the first degree. CP 6-7. N.S.T. was 14 years old at the time of the incident

and had no prior convictions. CP 8. The juvenile court ordered a deferred disposition, continuing the matter for twelve months, which was ultimately continued to November 30, 2008. CP 9-11.

In November 2008, the juvenile probation counselor (JPC) submitted a "Deferred Disposition Review Report" (hereafter referred to as "November Report"), stating N.S.T. had satisfied all probation conditions except full payment of \$2,530 in restitution, and recommending that the matter be "set over for revocation" if she was unable to pay the balance by the expiration of the deferral period. CP 55-58. The JPC submitted a "Deferred Disposition Revocation Report" in December 2008 (hereafter referred to as "December Report"), recommending not revocation, but "defer to court." Appendix A (CP __ (Sub No. 69)).¹ On January 6, 2009, the trial court denied the motion to dismiss.

At the final revocation hearing on January 27, 2009, the juvenile court heard from N.S.T.'s attorney and mother about the efforts of N.S.T. and her family, despite their poverty, to meet her financial obligations. RP 68, 73. The court nonetheless revoked the deferred disposition based solely on N.S.T.'s inability to pay the balance, resulting in a disposition for second degree robbery and first degree malicious mischief. CP 31-37.

¹The December Report, attached in Appendix A, was treated by all parties as part of record on appeal (see, e.g. N.S.T., 232 P.3d at 588-89) and has been filed in King County Superior Court, but counsel inadvertently failed to designate it in the Court of Appeals. It is being designated today, simultaneously with this Petition.

1. Argument on Appeal. On appeal, N.S.T. argued juvenile court violated the due process and equal protection clauses of the Fourteenth Amendment by revoking her deferred disposition based solely on her failure to pay restitution, without an inquiry into her ability to pay or a finding that the failure to pay was willful. She further argued the court lacked authority to revoke because the JPC's November report did not extend jurisdiction beyond the November 30 expiration, and the revocation violated statute and due process because neither JPC report was a written motion requesting revocation.

2. Decision By The Court Of Appeals. The Court of Appeals, Division One, ruled the juvenile court properly inquired into N.S.T.'s inability to pay, although its own remarks demonstrated its belief that it could not consider that factor in its decision. N.S.T., 232 P.3d at 589-90. The Court also ruled N.S.T. failed to "meet her burden of proving that she made sufficient bona fide efforts to comply with her restitution obligation," although it did not attempt to reconcile its ruling with the fact that neither the State nor the juvenile court ever disputed N.S.T.'s assertion that she paid as much as she could. Id. at 590.

The Court rejected the jurisdiction and notice arguments, reasoning the JPC's November Report was a written motion which extended

jurisdiction, satisfied RCW 13.40.127(7), and gave N.S.T. adequate notice. N.S.T., 232 P.3d at 587-88.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

N.S.T. requests this Court grant review of her case pursuant to RAP 13.4(b) because it conflicts with three decisions of this Court: Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 111-12, 52 P.3d 485 (2002) (before imposing criminal punishment for failure to pay legal financial obligations, the court must inquire into the defendant's ability to pay and find that failure to pay was actually willful); State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) (failure to do so at the point when remedial sanctions are sought violates due process); and State v. Nason, 168 Wn.2d 936, 233 P.3d 848, 851-53 (2010) (affirming Smith and Blank to find courts violated due process by jailing probationers for nonpayment without inquiry into their ability to pay or findings of willfulness).

The Court of Appeals' opinion also conflicts with the United States Supreme Court decision which provides the foundation for each of the decisions listed above: Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) (holding that a fine may not be automatically converted into a sentence "solely because the defendant is indigent and cannot forthwith pay the fine in full," and that such punishment for the

failure to pay cannot be imposed on one who has made “sufficient bona fide efforts” to satisfy all conditions, including financial obligations).

This case also presents four questions of first impression:

1) whether the court’s constitutional duty to *inquire* into a defendant’s ability to pay legal financial obligations necessarily includes the duty to actually *consider* that factor;

2) whether a defendant meets her burden of proving “sufficient bona fide efforts” when neither the State nor the court disputes her assertion and evidence that she has paid all she can;

3) whether a juvenile probation counselor’s “Deferred Disposition Review Report” recommending the matter be “set over for revocation” if the juvenile is unable (despite sufficient bona fide efforts) to complete all obligations by the expiration of the deferral period constitutes a “written motion” sufficient to extend the juvenile court’s jurisdiction ; and

4) whether a report with that recommendation provides the juvenile with sufficient notice to comport with due process.

Furthermore, these issues involve a significant question of law under the United States Constitution. The imposition of a juvenile disposition for failure to pay financial obligations, without meaningful inquiry into the respondent’s ability to pay such obligations, implicates the due process and equal protection clauses of the Fourteenth Amendment,

and the initiation of revocation proceedings without meaningful notice to the respondent implicates the due process clause.

Finally, this Court's clarification of these issues will be critical for the guidance of prosecutors, defense attorneys, trial courts, and the Legislature in utilizing the deferred disposition process in a way that benefits the general public as well as eligible juvenile respondents. This case therefore involves an issue of substantial public interest that should be determined by the Supreme Court.

1. REVOCATION OF N.S.T.'S DEFERRED DISPOSITION
BASED SOLELY ON NONPAYMENT, WITHOUT AN
INQUIRY INTO HER ABILITY TO PAY AND A FINDING
THAT THE VIOLATION WAS WILLFUL, VIOLATED THE
DUE PROCESS AND EQUAL PROTECTION CLAUSES OF
THE FOURTEENTH AMENDMENT.

Under RCW 13.40.127, a non-violent juvenile offender with no felony history may receive a deferred disposition, suspending the disposition for up to one year with community supervision. Payment of restitution shall be a condition of community supervision. RCW 13.40.127(5). To revoke the deferred disposition, the State must prove, by a preponderance of the evidence, the juvenile's failure to comply with the terms of the order. RCW 13.40.127(6). Lack of compliance "shall be determined by the judge upon written motion by the prosecutor or the juvenile's juvenile court community supervision counselor." If the

juvenile fails to comply, the court enters a disposition order; if the juvenile satisfies all community supervision conditions, the court vacates the conviction and dismisses the case with prejudice. RCW 13.40.127(7), (9).

N.S.T. satisfied all conditions of her deferred disposition – including community service, counseling, curfew, school attendance and lack of new probable cause referrals or criminal violations – except for the full payment of restitution. CP 9-11, 31-37. The juvenile court, believing it had no other option, revoked the deferred disposition based solely on the outstanding financial obligation. RP 73-74, CP 31-37.

a. Revocation of deferred disposition based on nonpayment, without consideration of the defendant's ability or bona fide efforts to pay, is "fundamentally unfair." Almost 30 years ago, the United States Supreme Court held that an individual's probation may not be revoked simply because he could not satisfy financial obligations, without a determination that such failure was willful. Bearden, 461 U.S. 660.² In a case similar to this one, the petitioner pled guilty and received a deferred sentence with three years probation. Id. at 662. As a condition of his probation, he was required to pay \$750 within four months. Id. Bearden made a partial payment by borrowing money from his parents but was laid

² A hearing for violation of disposition conditions or for revocation of deferred disposition is analogous to an adult probation hearing. State v. Martin, 36 Wn.App. 1, 5-7, 670 P.2d 1082 (1983), reversed on other grounds in 102 Wn.2d 300, 684 P.2d 1290.

off from his job, unable to find another, and therefore could not pay the balance. Id. The court revoked probation, entered the convictions, and sentenced Bearden to serve the balance of his probationary period in prison. Id. at 663. The Supreme Court analyzed the case under both due process and equal protection principles, observing:

There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine

Id. at 665-66.

The Court relied on Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) and Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), together holding that a fine may not be automatically converted into a sentence “solely because the defendant is indigent and cannot forthwith pay the fine in full.” Bearden, 461 U.S. at 667. The Court held that where the failure to satisfy financial obligations is not willful, revocation of probation is not only “inappropriate” but “fundamentally unfair.” Bearden, 461 U.S. at 668-69. Although nothing prevents the punishment of one who has the ability to pay his fines but

refuses to do so, the automatic conversion of a fine into a sentence without regard to willfulness amounts to “little more than punishing a man for his poverty,” which is “contrary to the fundamental fairness required by the Fourteenth Amendment.” Id. at 671, 673. See also State v. Woodward, 116 Wn.App. 697, 704, 67 P.3d 530 (2003) (applying same principle to financial obligations which included restitution); State v. Bower, 64 Wn.App. 227, 231-32, 823 P.2d 1171 (1992) (although it is “fundamentally unfair to revoke probation automatically” for nonpayment, probationer must make sufficient bona fide efforts to pay, demonstrating a concern for paying his debt to society); In re Bruno R., 133 N.M. 566, 569, 66 P.3d 339 (2003) (applying Bearden to juvenile probation).

b. The juvenile court punished N.S.T. for nonpayment without inquiring into her ability to pay. Two days after the Court of Appeals issued its decision in this case, this Court unanimously held, “before sanctions are imposed on an offender for failure to pay [a legal financial obligation], a trial court must inquire into the offender’s ability to pay.” Nason, 233 P.3d at 853. Nason affirms Bearden, 461 U.S. at 672-73 (“in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay”); Blank, 131 Wn.2d at 242 (holding “that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability

to pay”); and Smith, 147 Wn.2d at 111-12 (district court violated due process by jailing a defendant for nonpayment of fines without finding her failure to pay was willful). Although “the court may place the burden on the defendant to prove inability to pay... this does not eliminate the court’s duty to inquire, which Bearden plainly demands.” Id. at 112.

Implicit in the duty to *inquire* into ability to pay is the requirement to *consider* that factor. “Bearden requires consideration of ability to pay [and] bona fide efforts to acquire the resources to pay[.]” Id. Indeed, common sense dictates that inquiry without consideration is no inquiry at all. But here, the court did not consider N.S.T.’s ability to pay because it believed it could not. Although impressed by N.S.T.’s compliance with all other probation conditions and sympathetic to her indigency, the court erroneously stated it could not take those facts into consideration:

I do struggle with the... economic reality of... where these kids are and... what we really expect them to be able to do and their families’ needs. *But, I am bound by the confines of the legislature.* So, congratulations to you with doing so well on everything else. Really you should be very proud of yourself for that. *But, I have no option but to revoke the deferred, okay?* Somebody should go down and lobby Olympia about this.

RP 74 (emphasis added).

In fact, lobbying is unnecessary, as the question has been settled. As Bearden and its progeny make clear, the court was not just empowered but actually *required* to take into account N.S.T.’s ability to pay. Blank,

131 Wn.2d at 242; Smith, 147 Wn.2d at 111 (quoting Bearden, 461 U.S. at 672-73 (““in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay””)).

c. N.S.T. proved her inability to pay the outstanding restitution. In Washington, the court may require the defendant to prove her inability to pay financial obligations. Bower, 64 Wn.App. 227. But although the trial court believed that it should not and could not consider N.S.T.’s poverty, it was clearly convinced that her noncompliance was not willful. The court’s statement cannot be interpreted otherwise.

It is hardly surprising that the trial court was persuaded of N.S.T.’s bona fide efforts to pay and her true inability to do so. The State never disputed N.S.T.’s assertion that she paid as much as she could. The JPC’s December Report stated:

[N.S.T.] has done well on community supervision. She completed all 40 hours of community service in a timely manner and attended school as directed. *She has been employed as she has been able* and she has made a total of \$427 in payments towards her financial obligations. *[N.S.T. and her family are unable to pay the balance of the restitution by 12/13/08* which is the end of her 24 months deferred disposition.

App. A (emphasis added). If the State had any reason to believe this assertion was false, it could have introduced evidence to that effect at the January 6 hearing, or even argued as much to the court, but it did not. Nor did it dispute N.S.T.’s mother’s statements to the court:

I was actually paying what I could before she got employed... [M]y 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.

RP 73. Instead, the State, as well as the trial court, was thoroughly convinced that N.S.T. simply could not pay the full restitution.³

The Court of Appeals apparently assumed that only *documentary* evidence can prove an offender's inability to pay:

Absent from the record, however, is any direct evidence documenting actual income, assets, reasonable living expenses, or efforts to find other legal resources from which restitution might have been paid over the course of 24 months. Without such evidence, N.S.T. could not meet her burden of proving that she made sufficient bona fide efforts to comply with her restitution obligation.

N.S.T., 232 P.3d at 590. But neither statute nor caselaw supports that assumption. In fact, the expectation of such detailed record-keeping is not only unrealistic for a 14 to 16 year old girl (and even more so for other

³ Both the juvenile court and this Court can take judicial notice of certain facts and logical inferences from N.S.T.'s age of 14 to 16 years during the deferral period. 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 minimum wage of \$8.55 per hour (although 14 and 15 year olds can be paid \$7.27), 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, it would take her over 30 weeks to earn that amount. This assumes N.S.T. could have found a job providing that many hours, in a period when unemployment in King County rose from 4.2 to 6.8%. (See Washington State Employment Security Department, Labor Market and Economic Analysis, Unemployment Rate 2000-2010, avail. at https://fortress.wa.gov/esd/lmea/countydashboard/URateDetails.aspx?area=53_04_000033&qtype=1&comp=True&area2=53_01_000000&area3=00_00_000000) N.S.T. could not pay all or even a substantial portion of the restitution on her own.

defendants who are homeless, incarcerated, or mentally ill, but legitimately assert their inability to pay), it is unnecessary. Where, as here, the testimony is uncontroverted and credible, it should be sufficient to prove the inability to pay. Where, as here, the trial court *was* convinced of the defendant's inability to pay, the question is not whether the defendant carried her burden, but whether the court gave that fact sufficient inquiry and consideration. The trial court in this case, by its own admission, did not. N.S.T. succeeded in convincing the court of her inability, despite sufficient bona fide efforts, to pay the outstanding balance, but without due consideration of that fact, revocation of N.S.T.'s deferred disposition violated her rights to due process. Bearden, Blank, Smith, and Nason therefore require reversal of the disposition.

d. Revocation of a N.S.T.'s deferred disposition based on indigency violated her rights under the Equal Protection Clause. Finally, if a juvenile court can revoke a deferred disposition without inquiry into the respondent's ability to pay, or regardless of the willfulness of the violation, that would present a clear case of discrimination against indigent juveniles, in violation of the Equal Protection Clause.

Such a violation was found in James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972). There, a recoupment statute discriminated against indigent defendants, who were not afforded the same

protective exemptions as those available to other civil judgment debtors. Similarly, without a strict willfulness requirement, the State discriminates against indigent juvenile respondents like N.S.T., who cannot avoid the revocation of the deferred disposition and its grave consequences, while more financially privileged juveniles face no barrier to revocation.

The court's failure to find the essential component of willfulness and to meaningfully inquire into N.S.T.'s ability to pay was "contrary to the fundamental fairness required by the Fourteenth Amendment." The revocation – resulting in the first offense on N.S.T.'s criminal record – essentially punished a 15 year old girl for her poverty and youth, in flagrant violation of Equal Protection principles. Bearden, at 671, 673.

2. REVOCATION WITHOUT A WRITTEN MOTION TO REVOKE DEPRIVED N.S.T. OF NOTICE AND RESULTED IN THE JUVENILE COURT'S LOSS OF JURISDICTION, REQUIRING DISMISSAL.

a. Revocation without meaningful notice violated

principles of due process. RCW 13.40.127(7) requires that a juvenile's lack of compliance with the terms of deferred disposition "shall be determined by the judge *upon written motion* by the prosecutor or the juvenile's juvenile court community supervision counselor." (Emphasis added). As the statute and the cases interpreting it demonstrate, notice is an essential component of the deferred disposition process.

RCW 13.40.200, which addresses violations of restitution and community supervision orders,⁴ requires that a hearing on such a violation “must afford the respondent the same due process of law that would be afforded an adult probationer.”⁵

In State v. May, the Court rejected a due process claim where the respondent was served with the prosecutor’s written motion to revoke two weeks after the expiration of the deferral period. 80 Wn.App. 711, 713, 911 P.2d 399 (1996). The motion was not timely for the purposes of jurisdiction, but was sufficient to provide the respondent with notice. Thus, the Court found he “received the same due process of law as would be afforded an adult probationer and to which he was entitled.” Id. at 714.

Here, no such notice was afforded N.S.T. As defense counsel pointed out, setting over for a court date is not the same as providing notice. The State failed to indicate the basis for its motion to revoke or

⁴ This statute applies to the juvenile court’s authority to enforce its disposition orders, including revocation of deferred disposition orders. May, 80 Wn.App. at 714.

⁵ This Court has held,

in the context of parole violations, minimal due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts.

State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

what the juvenile probation counselor's recommendations would be. RP 54. Defense counsel also pointed out that juvenile probation counselors often set a date for revocation with the intention of wrapping up obligations before that date, and then striking the motion at the hearing. RP 54. And as discussed below, neither of the JPC's reports were written motions providing sufficient notice as required by statute.

b. Neither the November nor December Report was a "written motion" as required by statute. The juvenile court erred in ruling that "formal written notice" is not required; that ruling contradicts the statute as well as fundamental principles of due process. RP 62.

Although a written motion initiating revocation may be submitted by a JPC or the State, it is clearly required by RCW 13.40.127(7). The JPC's report in this case, recommending only that the matter be "set out for revocation," was not a "written motion" in the meaning of the statute.

Black's Law Dictionary defines "motion" as a "written or oral application requesting a court to make a specified ruling or order." BLACK'S LAW DICTIONARY 502 (8th ed.2004). The November Report does not "request the court to make a specified ruling or order." In fact, it does not "request the court" to do anything. It merely "recommends" that the matter be set over for revocation, to an unspecified date after December 13, 2008. CP 58. In contrast, the preceding

paragraph says: “Should [N.S.T.] provide verification of payment of her remaining financial obligation, probation *recommends* that this matter be dismissed.” *Id.* (emphasis added). The JPC conditionally recommended dismissal but was careful not to recommend revocation outright.

If the Legislature intended that any written recommendation or notice from the JPC should satisfy RCW 13.140.127(7), it would not have used the word “motion” – a term with a very specific legal meaning.

In construing a statute, the court’s objective is to determine the legislature’s intent. “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.”

State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005) (internal citations omitted). The word “motion” is unambiguous, and cannot include the Review Report of November 7, 2008.

If the JPC was inclined to make a formal recommendation as to revocation, the Revocation Report and not the Review Report would be the logical vehicle for it. Instead, the December Revocation Report states:

RECOMMENDATION: Defer to court
If case is revoked we recommend no additional sanctions.

App. A. Nothing in the December Report can be interpreted as a recommendation of or request for revocation.

The plain language of RCW 13.40.127 – based on longstanding, fundamental principles of due process – requires written notice in the

deferred disposition process. Without such notice, the disposition must be vacated and the case dismissed.

c. The juvenile court erred in failing to dismiss the case for lack of jurisdiction. Under RCW 13.40.127(9), if the juvenile has complied, the deferred disposition shall be vacated and the court no longer has jurisdiction over the juvenile. Here, the juvenile court's jurisdiction expired when the State failed to move for revocation before the end of the deferment period.

In May, the Court of Appeals ruled the juvenile court lacked jurisdiction in a similar scenario. 80 Wn.App. 711. There as here, the JPC's report was timely but the State's filing was not. The juvenile's deferred disposition community supervision period was due to expire on January 12, 1994. On January 10, 1994, the JPC submitted a report alleging the juvenile had failed to comply with the terms of the order. Id. at 713. On January 20, the prosecutor instituted a show cause proceeding for those portions, and set the hearing for the following month. Id. The attorney was immediately notified; the written motion to revoke was served on the juvenile respondent on January 25. Id. On February 10, almost a month past expiration, the juvenile court commissioner ruled he had jurisdiction and revoked the deferred disposition. Id. Noting the fact that a "juvenile offender is at the mercy of the State's administrative

bureaucracy,” the Court held the juvenile court’s “jurisdiction to enforce its disposition order terminates when the community supervision period expires, unless a violation proceeding is then pending before the court.” at 716 (emphasis added). Therefore the Court reversed the order.

May was affirmed in State v. Y.I., 94 Wn.App. 919, 973 P.2d 503 (1999). There, four separate financial obligations were imposed under four different disposition orders. Id. at 921. After the community supervision period for all four cases had expired, the probation officer sought to review the conditions. Id. The commissioner, ruling he still had jurisdiction, ordered Y.I. to serve three days confinement for each case, suspended for three months during which time Y.I. could either pay the fines or perform community service. Id. at 921-22. The Court of Appeals held May applies to financial obligations, and therefore the juvenile court’s jurisdiction to enforce those obligations ends when the community supervision ends. Id. at 924. See also State v. Todd, 103 Wn.App. 783, 785. 790, 14 P.3d 850 (2000) (State’s written motion, filed two weeks before expiration of deferral period, effectively instituted violation proceedings in time to extend jurisdiction).

The May Court wisely announced a “bright-line rule that clearly defines the juvenile court’s jurisdiction.” 80 Wn.App. at 716. Here, without the written motion required by statute, the court’s jurisdiction

crossed that line and expired on November 30, 2008. The court lacked the authority to enter a disposition after that date.

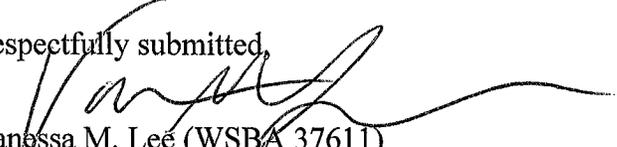
Here, as discussed above, no timely written motion instituted proceedings before the expiration of the deferment period. Accordingly, the JPC reports – taken together or separately – neither satisfied RCW 13.34.127(7) nor provided N.S.T. with the notice due process requires.

F. CONCLUSION

For the foregoing reasons, N.S.T. respectfully requests this Court grant review, vacate her disposition and dismiss the case with prejudice.

DATED this 11th day of August, 2010.

Respectfully submitted,



Vanessa M. Lee (WSBA 37611)
WASHINGTON APPELLATE PROJECT-91052
Attorneys for Petitioner

APPENDIX A

CONFIDENTIALCourt Room: 2
JCN: 216553**DEFERRED DISPOSITION, REVOCATION REPORT TO COURT**

NAME: Natasha Tucker

L.N.: 06-8-02835-1

DOB/AGE: 11/24/91 17 yrs old

DATE/TIME OF HEARING: 12/15/08 @9am

Parent/Guardian: Sherri Weis

Attorney: Jourdan, NDA

Juvenile Probation Counselor: Sprague/LLS

REASON FOR HEARING:

Offense: Res Burg/MM1

Offense Date: 6/20/06

Date of Deferred Disposition: 12/13/06

Length of Probation: 12 months extended to full 24 months

Special conditions of probation are: 40 hrs community service & \$2,630.40 restitution

List Allegations/violations:

- 1) Youth has failed to pay restitution in the full.

CIRCUMSTANCES REGARDING THE VIOLATION AND GENERAL ADJUSTMENT ON SUPERVISION:

Natasha has done well on community supervision. She completed all 40 hours of community service in a timely manner and attended school as directed. She has been employed as she has been able and she has made a total of \$427 in payments towards her financial obligations. Natasha and her family are unable to pay the balance of the restitution by 12/13/08 which is the end of her 24 months deferred disposition.

RECOMMENDATION: Defer to court**If case is revoked we recommend no additional sanctions.**

(NAME)	2	L.N.:
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RESTITUTION/VAP/FINE:

Restitution: \$ 2341.29

VAP: \$ 100

FINE: \$ _____

▪ \$10 _____ per month, with the first payment due 1/ /09

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

Juvenile Probation Counselor (Signature)

DATE

M Sprague
Melissa Sprague

Juvenile Probation Counselor Supervisor (Signature)

DATE

<p><u>THIS DOCUMENT IS CONFIDENTIAL AND IS NOT TO BE DISTRIBUTED TO MEMBERS OF THE GENERAL PUBLIC.</u></p>

DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 62934-4-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent: Ann Marie Summers - King County Prosecuting Attorney-Appellate Unit**, **appellant** and/or **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 11, 2010

FILED
COURT OF APPEALS DIV. 1
STAFF OF APPELLATE
2010 AUG 11 PM 4:55

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 62934-4-1
)	
Respondent,)	DIVISION ONE
)	
v.)	PUBLISHED OPINION
)	
N.S.T. (d.o.b. 11/24/1991),)	
)	
Appellant.)	FILED: June 7, 2010
<hr/>		

LEACH, A.C.J. — The Juvenile Justice Act of 1977, chapter 13.40 RCW, authorizes a court in certain circumstances to defer disposition of a juvenile, order restitution, and revoke the deferred disposition if restitution goes unpaid. A juvenile court revoked N.S.T.'s deferred disposition for failing to pay her court-ordered restitution. She appeals, contending that (1) the trial court lacked authority to revoke because the period of supervision had expired, (2) the State's failure to file a written motion to revoke deprived her of adequate notice, and (3) the disposition order, based solely on her failure to pay, violated her due process and equal protection rights under the Fourteenth Amendment to the United States Constitution because the court did not affirmatively find that this failure was willful.

Because a revocation proceeding was pending before the supervisory period expired, we hold that the trial court had authority to revoke. We also hold that the juvenile probation counselor's written report provided N.S.T. with constitutionally adequate notice of the reason for the revocation hearing. Finally, we conclude that N.S.T. failed to meet her burden of establishing that her inability to pay was not willful. We affirm.

FACTS

In June 2006, N.S.T. and a group of kids went to R.R.'s house where a fight over an iPod broke out. The fight took place on R.R.'s porch. At some point during the mêlée, N.S.T. threw a large rock through the living room window. R.R.'s father broke up the fight and restrained N.S.T. until the police arrived. N.S.T. was 14 years old.

The State charged N.S.T. with residential burglary and malicious mischief in the first degree. In December 2006, she stipulated to the charges, and the juvenile court granted N.S.T.'s motion for deferred disposition, continuing the matter for 12 months. Terms of the deferred disposition included community supervision, 40 hours of community service, counseling, mandatory school attendance, residency requirements and curfew, a prohibition on drugs and alcohol, and restitution in the amount of \$2,630.40, payable at a minimum rate of \$10.00 per month.

In November 2007, a juvenile probation counselor (JPC) submitted a report indicating that N.S.T. was in full compliance with all of these terms except one, payment of restitution. Because an outstanding balance was still owed, the court extended the deferral until November 30, 2008. By November 2008, N.S.T. had paid \$235.00 towards her restitution obligation, leaving an outstanding balance of \$2,341.29.¹ Early that same month, a JPC submitted a deferred disposition review report to the court indicating that unless N.S.T. provided verification of payment of her remaining financial obligation, he recommended that the matter be set for revocation.

On November 7, the court continued the matter until the middle of December. The order indicated that the parties jointly agreed to continue the "motion to revoke." At the request of N.S.T.'s attorney, the hearing was again continued until December 30. On the morning of the 30th, N.S.T.'s attorney filed a motion to vacate, arguing that because the period of supervision expired in November, the court no longer had authority to revoke. The court then granted the State's motion to continue so that it could prepare a response. The matter was reset for January 6, and N.S.T. waived her right to be present at that hearing. At the hearing, the court determined that it still had authority to revoke and denied N.S.T.'s motion to vacate. It then reset a revocation hearing for later that month.

¹ The record does not reflect how this number was obtained.

At the final revocation hearing, held January 27, 2009, the State argued that N.S.T. was not in substantial compliance with the terms of her deferred disposition because she had not paid her restitution in full. Defense counsel observed that, while employed, she made payments totaling \$235, just \$5 shy of the amount owed at the minimum rate of \$10 per month.

N.S.T.'s mother also testified that she was a single mother paying what she could before her daughter gained employment and that both her hours and her daughter's had been cut, making it difficult to pay routine household bills. Though sympathetic to N.S.T.'s position, the trial court revoked the deferred disposition stating,

You did everything that you were asked to do with the exception of the financial obligations. So, you should feel proud of the fact that you completed those community service hours. . . . But, I am bound by the confines [of] the legislature. . . . I have no option but to revoke the deferred, okay?

Somebody should go down and lobby Olympia about this.

N.S.T. appeals.

STANDARD OF REVIEW

We review de novo whether a juvenile court had authority to act and did so in compliance with the Juvenile Justice Act of 1977.²

² State v. Beaver, 148 Wn.2d 338, 344, 60 P.3d 586 (2002).

ANALYSIS

We first must decide whether the juvenile court had authority to revoke N.S.T.'s deferred disposition in January 2009 when the period of supervision was set to expire in November 2008.

The Juvenile Justice Act (JJA) establishes a framework for the deferred disposition of juvenile offender cases. The JJA authorizes the juvenile court to defer disposition of the juvenile's case for a period not to exceed one year after the juvenile is found or pleads guilty.³ As part of the deferral, the court may also impose terms, including payment of restitution.⁴ If the juvenile satisfies these terms by the expiration of the deferral period, the court vacates the conviction and dismisses the case with prejudice.⁵ But if the court finds "upon written motion by the prosecutor or the juvenile's juvenile court community supervision counselor" that the juvenile failed to comply with the terms of supervision, the court shall enter an order of disposition.⁶ Finally, at any time after deferral, upon a showing of good cause, the court may continue the case for an additional one-year period.⁷

Washington courts construing the JJA have developed a bright-line rule that a court's authority to revoke a deferred disposition order terminates upon the

³ RCW 13.40.127(2), (4).

⁴ RCW 13.40.127 (5).

⁵ RCW 13.40.127(9).

⁶ RCW 13.40.127(7).

⁷ RCW 13.40.127(8).

expiration of the supervisory period unless violation proceedings are initiated before the period expires. In State v. May,⁸ the court decided whether a juvenile court retains authority under RCW 13.40.200 to consider violations occurring during the period of community supervision but not brought to the court's attention until after the period ends. The May court answered this question no, holding that a juvenile court's authority "to enforce its disposition order terminates when the community supervision period expires, unless a violation proceeding is then pending before the court."⁹ And since the prosecutor in that case initiated a show cause hearing one week after the supervisory period ended, the trial court's order imposing detention for violation of the disposition order was reversed.

Three years later, in State v. Y.I.,¹⁰ we considered whether the juvenile court retained statutory authority to sanction a juvenile under RCW 13.40.200 for failing to pay his victim penalty assessments (VPA). Citing May, we held that the juvenile court's authority to enforce a juvenile's financial obligations under a disposition order, including VPAs, expires upon the termination of the supervisory period.¹¹ One year later, in State v. Todd,¹² the court addressed yet another application of the May bright-line rule. In that case, the juvenile court entered a deferred disposition under RCW 13.40.127(7) imposing 12 months of community

⁸ 80 Wn. App. 711, 714, 911 P.2d 399 (1996).

⁹ May, 80 Wn. App. at 716-17.

¹⁰ 94 Wn. App. 919, 922-23, 973 P.2d 503 (1999).

¹¹ Y.I., 94 Wn. App. at 924.

¹² 103 Wn. App. 783, 789-90, 14 P.3d 850 (2000).

supervision upon Todd and requiring that he commit no further "law violations."¹³ Three weeks before the expiration of the supervisory period, the State accused Todd of malicious mischief and moved to revoke his deferred disposition. At a hearing held one month after the supervisory period ended, the juvenile court found the State's motion untimely and dismissed.¹⁴ In reversing, the Court of Appeals expressly applied May's bright-line rule, noting that the juvenile court loses authority "to enforce a disposition order only if the State fails to institute violation proceedings before the expiration of the deferral period."¹⁵ Since the State had commenced revocation proceedings before the supervisory period ended, the juvenile court retained authority to revoke.

In this case, May and Todd are dispositive. N.S.T.'s deferral period expired on November 30, 2008. Sometime before November 7, 2008, a full three weeks before the supervisory period was to expire, N.S.T.'s JPC submitted a report to the court recommending revocation in the event that N.S.T. failed to pay restitution in full. The report stated, "Rather than asking for supervision to be extended 1 more month, should N[S.T.] be unable to provide verification of payment of her remaining financial obligations, probation recommends that this matter be set out for revocation."

¹³ Todd, 103 Wn. App. at 785.

¹⁴ Todd, 103 Wn. App. at 786.

¹⁵ Todd, 103 Wn. App. 790.

The agreed order entered at the November 7th hearing states that both parties agreed to continue the “motion to revoke” until mid-December. The case was continued twice more, once at the request of N.S.T. and once at the request of the State. N.S.T.’s deferred disposition was finally revoked in January 2009. Because the revocation proceeding was initiated before November 30, 2008, the juvenile court had authority to revoke N.S.T.’s deferred disposition at the final hearing in January 2009.

We next must decide N.S.T.’s claim that RCW 13.40.127(7) obligated the State to file a “formal written notice” of the basis for revocation and whether the State’s supposed failure to do so deprived N.S.T. of due process.

As an initial matter, N.S.T. mistakenly contends that RCW 13.40.127(7) requires the State to file a written motion. This statute plainly states that either the “prosecutor or the juvenile’s juvenile court community supervision counselor” may initiate revocation proceedings (emphasis added). The trial court recognized in its January 6 ruling that there is no “require[ment] that th[ere] be a formal written notice in some form saying we are the prosecutor, we are moving for revocation . . . because the JPC’s [sic] often move for revocation.”

Since the express terms of the statute authorize either a JPC or a prosecutor to initiate revocation proceedings upon written motion, the questions are whether a written motion was filed in this case and whether it fulfilled N.S.T.’s due process rights. Citing May and our Supreme Court’s holding in State v.

Dahl,¹⁶ N.S.T. claims that she was deprived of “formal written notice” and due process of law. But these cases support the State’s position, not N.S.T.’s.

In May, the court determined that the prosecutor’s untimely motion provided adequate notice. The motion alleged that May had failed to complete community service, attend school regularly, keep scheduled appointments, and avoid contact with his codefendant.¹⁷ In a footnote, the court observed that May received the same due process as would be afforded an adult probationer.¹⁸ In Dahl, the court held that before a hearing to revoke a special sex offender sentencing alternative sentence, due process requires that the State “inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations.”¹⁹

Here, the JPC filed a written document with the court titled “Deferred Disposition Review Report to Court.” This document explicitly stated that N.S.T. had complied with all of her court-ordered obligations except for the restitution requirement and that, unless she provided verification of payment of restitution, her deferred disposition should be set for a revocation hearing. A short time later, but still within the supervisory period, the JPC filed a second document with the court titled “Deferred Disposition, Revocation Report to Court.” This report repeated the assertion that N.S.T. fulfilled all of her court-ordered obligations

¹⁶ 139 Wn.2d 678, 990 P.2d 396 (1999).

¹⁷ May, 80 Wn. App. at 713.

¹⁸ May, 80 Wn. App. at 714 n.2.

¹⁹ Dahl, 139 Wn.2d at 685.

except her restitution obligation. It then stated that “[i]f case is revoked[,] we recommend no additional sanctions.”

Read together, these documents notified N.S.T. of proceedings that would result in revocation of her deferred disposition if she had not paid the full amount of restitution ordered before the hearing date. N.S.T. confirmed that these documents provided this notice to her when she argued in her brief in support of her claim that the juvenile court lacked authority to revoke:

On November 7, 2008, there was still outstanding restitution. The JPC submitted a report for that hearing recommending dismissal if the restitution was paid and recommending that it be set over for revocation if the restitution was not paid. The Court struck the review hearing and set a revocation hearing for December 15, 2008.

(Emphasis added.) We conclude that N.S.T. was provided with adequate written notice that the JPC was recommending revocation of her deferred disposition due to her failure to pay restitution. Thus, N.S.T. received all the notice she was entitled to under the law.

Finally, we decide whether the juvenile court’s revocation of N.S.T.’s deferred disposition, done without any finding that her failure to pay restitution was willful, violated her due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

N.S.T. relies primarily upon Bearden v. Georgia²⁰ where the United States Supreme Court held that a sentencing court could not revoke a defendant’s

²⁰ 461 U.S. 660, 668-69, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

probation for failure to pay a fine and restitution without evidence and findings that the defendant was somehow responsible for the nonpayment or that alternative forms of punishment were inadequate. The State claims that Bearden does not apply because N.S.T. was not incarcerated for her failure to pay. Both parties misread Bearden.

In Bearden, the Court stated that it had long been sensitive to the treatment of indigents in our criminal justice system and noted its prior holding that the State cannot convert a fine into a jail term solely because a defendant cannot immediately pay that fine.²¹ At the same time, the Court recognized limits on the principle of protecting indigent defendants.²²

The Court stated that "the reason for non-payment is of critical importance."²³ Under Bearden, a sentencing court must inquire into the reasons for an indigent defendant's failure to pay on his or her court-imposed financial legal obligations. If a defendant willfully refuses to pay or evidences an insufficient concern for paying the debt owed, the court may revoke probation.²⁴ But if a defendant fails to pay despite sufficient bona fide efforts to satisfy his legal debts, the court must consider and reject alternative measures of punishment before a period of incarceration may be imposed.²⁵ Focusing on the

²¹ See Bearden, 461 U.S. at 664 (citing Tate v. Short, 401 U.S. 395, 399, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971)).

²² Bearden, 461 U.S. at 664-65.

²³ Bearden, 461 U.S. at 668, 672.

²⁴ Bearden, 461 U.S. at 668, 672.

²⁵ Bearden, 461 U.S. at 672.

reason for noncompliance balances unlawful discrimination against the poor on the one hand and the State's interest in punishing criminal offenders on the other hand.

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,²⁶ 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."²⁷ 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.²⁸ This analytic framework is consistent with the rule that "[w]hen the probationer has made reasonable efforts to meet his court-ordered financial

²⁶ 116 Wn. App. 697, 702, 67 P.3d 530 (2003) (citing State v. Peterson, 69 Wn. App. 143, 146, 847 P.2d 538 (1993)).

²⁷ Woodward, 116 Wn. App. at 702 (citing Peterson, 69 Wn. App. at 146).

²⁸ Woodward, 116 Wn. App. at 704 (quoting State v. Bower, 64 Wn. App. 227, 233, 823 P.2d 1171 (1992)).

obligations, and yet cannot do so, through no fault of his own, it is “fundamentally unfair to revoke probation automatically.”²⁹

We hold that the same analysis applies to juvenile revocation proceedings under the JJA. Like the SRA, the JJA states, “The state shall bear the burden to prove, by a preponderance of the evidence, that the juvenile has failed to comply with the terms of community supervision,” including failure to pay restitution.³⁰ Accordingly, if the State meets this burden, the burden shifts to the juvenile defendant to prove that his or her noncompliance was not willful.

Applying this rule to the facts of this case is straightforward. N.S.T. admits that she paid only \$235 of the total \$2,600 owed. The State therefore met its burden of proving by a preponderance of the evidence that N.S.T. failed to pay restitution after 24 months.³¹ At the final restitution hearing, the court specifically asked N.S.T.’s counsel, “[W]hat information do I have about efforts to pay over the course of [the deferral period]?” Her counsel informed the court that “[N.S.T.] is currently employed. I know she was unemployed for a while. When she was employed she made \$235 worth of payments. So, that’s what she was

²⁹ Woodward, 116 Wn. App. at 704 (quoting Bower, 64 Wn. App. at 232 (quoting Bearden, 461 U.S. at 668)).

³⁰ RCW 13.40.127(6).

³¹ N.S.T. suggests that she was near total compliance because she had been paying at nearly \$10 a month. This argument overlooks the fact that she was ordered to pay restitution on the full \$2600 within the 24 months and that the minimum monthly installment at \$10 was the least she could pay in any given month without violating the order. Paying the minimum monthly amount was therefore necessary but not by itself sufficient to avoid revocation for noncompliance.

able to pay. That's what she paid over the course of this deferred disposition."

And her mother stated,

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.

Absent from the record, however, is any direct evidence documenting actual income, assets, reasonable living expenses, or efforts to find other legal resources from which restitution might have been paid over the course of 24 months. Without such evidence, N.S.T. could not meet her burden of proving that she made sufficient bona fide efforts to comply with her restitution obligation.

CONCLUSION

We affirm. The juvenile court had authority to revoke the deferred disposition order, the JPC's report satisfied N.S.T.'s minimum notice requirements, and N.S.T. failed to meet her burden of establishing her sufficient bona fide efforts to pay the amount of restitution owed.

Leach, A.C.J.

WE CONCUR:

Schiveller, J.

Seaton, J.