

62934-4

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NO. 62934-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NATASHA TUCKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN DUBUQUE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The juvenile court retains jurisdiction to revoke a deferred disposition when revocation proceedings are instituted before expiration of the deferral period. The record demonstrates that revocation was instituted before expiration the deferral period in this case. Did the juvenile court have jurisdiction to revoke the deferred disposition?

2. Minimal due process rights apply to revocation proceedings, including the right to notice of specific violations. The record demonstrates that the juvenile received written notice that revocation was being sought based on her failure to complete restitution. Did the written notice of the specific violation comport with due process?

3. Imprisonment of an offender based solely on a failure to pay financial obligations without a finding of willful failure violates due process and equal protection. In this case, the juvenile was not imprisoned for her failure to pay restitution. Did the juvenile court's imposition of an alternative to imprisonment violate due

process or equal protection when such alternatives were expressly approved by the United States Supreme Court?

B. STATEMENT OF THE CASE

Natasha Tucker was charged in King County Superior Court Juvenile Department with residential burglary and malicious mischief. CP 3-4. Tucker threw a large rock through the victim's living room window, causing approximately \$2,600 in damage. CP 5; RP 44. Tucker requested a deferred disposition. RP 1-3. The State opposed the deferred disposition, in part because the restitution amount was so large. RP 1. Defense counsel advised the court that Tucker was choosing a deferred disposition knowing that she would be responsible for paying approximately \$2,600 in restitution. RP 3. Defense counsel represented to the court that "I explained to her that she is solely responsible for that amount if she wants her deferred disposition dismissed at the end of the period." RP 3.

The court granted Tucker's request and entered a deferred disposition. CP 9-11. The court ordered 12 months of community supervision, 40 hours of community service, a \$100 victim penalty,

and restitution. CP 9-11. The court specifically ordered that "All financial obligations must be paid in full before this matter may be dismissed." CP 11. The disposition was continued to December 13, 2007. CP 10. Subsequently, the court ordered restitution in the amount of \$2,630.40. CP 12-13.

On November 29, 2007, the court entered an order continuing the deferred disposition until November 7, 2008, to allow Tucker more time to meet her financial obligations. CP 40-41. The court noted in its order that Tucker had completed the other terms of the deferred disposition. CP 40.

On November 3, 2008, the Juvenile Probation Counselor (JPC) submitted a Deferred Disposition Review Report to the court, recommending revocation. RP 54.¹ On November 7, 2008, the parties jointly agreed to continue the motion to revoke to December 15, 2008. Supp CP __ (sub 40); CP 42-43. On December 15, 2008, the matter was continued again to December 30, 2008, because Tucker's attorney was not available. Supp CP __ (sub

¹ These reports are confidential and are not made part of the Superior Court file. However, the report was discussed by the parties on the record, and referred to in the defense briefing, and the substance of the report is sufficiently clear from the record that exists. For example, on January 6, 2009, and the court in referring to the contents of the report, said "They came in and said, time's up; it hasn't been paid, but let's try to give the Respondent time to pay before a date certain. If they can't pay before that date certain, we'll be in front of the Court, asking for revocation." RP 62.

43). On December 30, 2008, a State's motion to continue was granted in order to allow the State time to respond to the defense motion to vacate, which was filed that day. Supp CP ___ (sub 45); RP 46-48. In the defense motion to vacate, counsel acknowledged that "the JPC submitted a report for that hearing [the November 7, 2008 hearing] recommending dismissal if the restitution was paid and recommending that it be set over for revocation if the restitution was not paid." CP 15.

On January 27, 2009, the revocation hearing was finally held. The State requested that the court revoke the deferred disposition, impose no sanctions, and order that restitution be paid. CP 64. The Court inquired of defense counsel about Tucker's efforts to pay restitution. CP 67. Counsel represented to the court that Tucker had been unemployed for a period, and had paid \$235 since getting a job. CP 68. The court entered an order revoking the deferred disposition, imposing no community supervision, imposing no commitment, and ordering that Tucker pay \$2,395.40 in financial obligations. CP 31-37.

C. ARGUMENT

1. THE JUVENILE COURT RETAINED JURISDICTION OVER TUCKER BECAUSE THE REVOCATION PROCEEDINGS WERE INSTITUTED BEFORE EXPIRATION OF THE DEFERRAL PERIOD.

Tucker contends that the trial court lacked jurisdiction to revoke her deferred disposition in January of 2009, because the deferred disposition period ended in November of 2008. This claim is without merit because the governing statute does not require revocation to occur before the end of the deferred disposition. It only requires that revocation proceedings be instituted before the end of the deferred disposition period, which was done in this case.

RCW 13.40.127 authorizes deferred dispositions in juvenile court. That statute provides that upon entry of a deferred disposition, the court shall continue the case for a period not to exceed one year. RCW 13.40.127(2). The court may continue the case for an additional one-year period for good cause. RCW 13.40.127(8). The statute mandates that a juvenile receiving a deferred disposition shall be ordered to pay restitution. RCW 13.40.127(5). "Payment of full restitution" is explicitly required before the disposition may be vacated. RCW 13.40.127(9). The juvenile's lack of compliance, including the failure to pay restitution,

shall be determined by the judge upon written motion by the prosecutor or the juvenile counselor. RCW 13.40.127(7). If the juvenile fails to comply with the conditions of the deferred disposition, "the court shall enter an order of disposition." RCW 13.40.127(7).

There is no dispute that at the end of the period allowed by statute for the deferred disposition, Tucker had failed to pay the full restitution amount. As such, the statute explicitly mandated entry of an order of disposition. RCW 13.40.127(5) and (7).

Tucker argues that the juvenile court lacked jurisdiction to revoke the deferred disposition because the State did not file a motion to revoke before expiration of the deferral period. However, this claim is based on a misreading of the statute and a misreading of the record. The statute provides that either the prosecutor or the juvenile counselor can make a motion for revocation based on the juvenile's lack of compliance. RCW 13.40.127(7). Here, Tucker's juvenile probation counselor submitted a report to the court on November 7, 2008, recommending revocation if Tucker failed to complete her restitution obligation. CP 15. On that date, November 7, 2008, the parties agreed to continue the "motion to revoke" until December 15, 2008. CP 43. The juvenile court's

jurisdiction had been extended to November 30, 2008. CP 40-41. So, while the deferred disposition was not actually revoked until January 27, 2009, the record is clear that the juvenile probation counselor reported Tucker's lack of compliance to the trial court on November 7, 2008, and recommended revocation, and the motion to revoke was thus instituted.

The juvenile court loses jurisdiction to revoke a deferred disposition only if violation proceedings are not instituted before the expiration of the deferral period. State v. Todd, 103 Wn. App. 783, 790, 14 P.3d 850 (2000). Here, the violation proceedings were instituted based on the report of the juvenile probation counselor, on November 7, 2008. The motion to revoke was instituted before expiration of the deferral period on November 30, 2008. As such, the juvenile court had jurisdiction to revoke her deferred disposition on January 27, 2009.

Tucker's reliance on State v. May, 80 Wn. App. 711, 911 P.2d 399 (1996), and State v. Y.I., 94 Wn. App. 919, 973 P.2d 503 (1999), is misplaced. Both of the cases were based on interpretation of a different statute: RCW 13.40.200, which governs modifications of disposition orders. May, 80 Wn. App. at 714; Y.I., 94 Wn. App. 922. Nonetheless, in those cases this Court adopted

a bright-line rule that the juvenile court's jurisdiction to enforce a disposition order terminates when the supervision period expires unless a violation proceeding is "then pending before the court." May, 80 Wn. App. at 711; Y.I., 94 Wn. App. 919, 923 (stating "We agree with the May court's analysis and with its application here.") Even under the holding of May and Y.I., which would only apply by analogy, the juvenile court retained jurisdiction over the violation proceeding that was pending when the deferral period ended. Tucker's claim that the juvenile court had no jurisdiction to revoke her deferred disposition should be rejected.

2. TUCKER RECEIVED SUFFICIENT NOTICE OF THE REQUEST AND BASIS FOR REVOCATION.

Tucker next claims that she did not receive meaningful notice of the revocation motion. This claim is not supported by the record.

As already noted, on November 7, 2008, the Juvenile Probation Counselor (JPC) submitted a written report to the juvenile court advising the court that Tucker had failed to pay restitution. This report was marked confidential and not filed in the court file. However, the report is described in detail in the defense briefing

below. Tucker's counsel outlined the events in his briefing as follows:

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.

CP 15.

Due process requires that the offender be given notice of the specific sentence violations alleged before a suspended sentence can be revoked. State v. Dahl, 139 Wn.2d 678, 684, 990 P.2d 396 (1999). RCW 13.40.127(7) does not require a detailed description of the facts supporting the alleged violation. Todd, 103 Wn. App. at 788. In the present case, Tucker received notice from the November 7, 2008, report of her juvenile probation counselor that the counselor was recommending revocation of the deferred disposition because restitution had not been paid. Tucker was notified that revocation was being sought due to her failure to pay restitution. This notice met the minimal due process standards that apply to probation revocation proceedings. See Dahl, 139 Wn.2d at 686.

**3. REVOCATION WAS STATUTORILY REQUIRED,
AND REVOCATION WITHOUT IMPRISONMENT
DID NOT VIOLATE DUE PROCESS OR EQUAL
PROTECTION.**

Tucker contends that the juvenile court violated due process and equal protection by revoking her deferred disposition without a specific finding that her failure to pay restitution was willful. This claim is without merit. RCW 13.40.127 mandates revocation of a deferred disposition when the juvenile offender fails to pay restitution. Revocation for failure to pay does not violate due process if imprisonment is not imposed.

In Bearden v. Georgia, 461 U.S. 660, 672, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), the Supreme Court held that when a probationer willfully refuses to pay legal financial obligations or fails to make bona fide efforts to pay, the court may revoke probation and impose imprisonment. If the probationer could not pay the financial obligations, despite bona fide efforts to do so, the court must consider alternative measures of punishment other than imprisonment. Id. Thus, before imprisoning a probationer for failure to pay a fine, the court must consider the probationer's ability to pay and find that his or her failure to pay was willful. Smith v.

Whatcom County District Court, 147 Wn.2d 98, 111-12, 52 P.3d 485 (2002). Pursuant to the due process and equal protection clauses of the Fourteenth Amendment, a court may not imprison an offender for failure to pay unless the failure was willful. Bearden, 461 U.S. at 666-68. The court may impose alternatives to imprisonment such as extending the time for making payments or directing that the probationer perform public service in lieu of the fine. Bearden, 461 U.S. at 672.

Washington courts have held that the State bears the initial burden of proving that an offender has failed to comply with sentencing conditions, such as payment of legal financial obligations. State v. Woodward, 116 Wn. App. 697, 702, 67 P.3d 530 (2003). The burden then shifts to the offender to show that his failure to pay was not willful. Id. The offender must do more than plead poverty in general terms. Id. at 704. Whether the offender established that the violation was not willful is reviewed under the clearly erroneous standard. Id. at 703. The court may not incarcerate a truly indigent offender because his or her indigence makes him or her unable to pay the obligations. Id.

In the present case, there is no question that the State established that Tucker failed to complete restitution. The court

inquired as to her ability to pay, and defense counsel presented no specific information about her efforts to pay, other than an assertion that she paid small amounts while she was employed.

Tucker argues that pursuant to Bearden, the court erred in revoking her deferred disposition without finding that her failure to pay restitution was willful. Bearden is inapplicable, however, because Tucker was not *imprisoned* for her failure to pay. Rather, the juvenile court employed the alternatives to imprisonment that were approved in Bearden. The juvenile court revoked the deferred disposition, and entered an order of disposition in which the court imposed no community service, no community supervision, and no commitment time. The court only imposed the outstanding restitution.

Revocation of the deferred disposition was mandated by the statute. RCW 13.40.127(7) provides that the disposition may only be vacated upon payment of full restitution. Imposition of the order of disposition, as required by statute, imposing the outstanding restitution amount and no other punishment did not violate either due process or equal protection.

D. **CONCLUSION**

The trial court's revocation of the deferred disposition and entry of the order of disposition imposing the outstanding restitution amount should be affirmed.

DATED this 13th day of November, 2009.

Respectfully submitted,

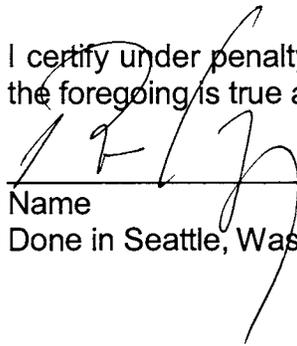
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. TUCKER, Cause No. 62934-4-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.



Name
Done in Seattle, Washington

11-13-2009

Date

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