

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

NO. 40549-1-II
CONSOLIDATED WITH
NO. 39912-1-II

STATE OF WASHINGTON

Respondent,

vs.

James M. Stone

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 01-1-00096-4
The Honorable Thomas Majhan

BRIEF OF RESPONDENT

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Date: October 6, 2010

 ORIGINAL

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STATEMENT OF THE CASE

I Statement of Issues Presented

- A. A court does not violate due process through use of a “Pay or Appear” calendar.
- B. A court may properly impose sanctions when a defendant fails to pay a LFO.
- C. The trial court properly found Mr. Stone’s failure to pay his LFO was willful in an October 2, 2009, fact finding hearing.
- D. The commissioner properly advised Mr. Stone of his right to appeal the ruling on March 23, 2010.
- E. Mr. Stone was advised of his right to an attorney by the Acknowledgment of Defendant’s Rights form which he signed on the day of the March 23, 2009, hearing.
- F. The trial court did not err by taking a report from the “Pay or Appear” Coordinator during a March 23, 2009, hearing.
- G. The trial court did not err by not explicitly finding that Mr. Stone’s failure to pay his LFO was willful.

II Statement of Pertinent Facts

In 2001, Mr. Stone was charged with possession of a controlled substance – methamphetamine and theft 2 in cause number 01-1-00096-4. The court found him indigent. He was represented by court-appointed attorney Craddock Verser. Mr. Stone pled guilty on September 28, 2001. CP 5. His sentence included financial liability for \$2,860 , 105 days in jail and 12 months of community custody. CP 15-17.

Mr. Stone served his sentence and on October 29, 2003, the Department of Corrections sent a letter to the court of the termination of their supervision. The letter also advised that Mr. Stone had paid \$290 toward his LFO, interest charges of \$ 659.81 had accrued, and his LFO was \$3,179.81

On December 8, 2003, Mr. Stone signed the order placing him on the court's Pay or Appear Calendar which required him to either pay \$25 each month toward his financial obligation or appear in court and explain why he did not pay. CP 29. The order contained the following instructions:

“Payment is due by the last business day of each month. If payment is not made by that day, Defendant must appear in Court the second Friday of the following month at 8:30 am, or call the court clerk's office at 385-9124 prior to that Friday.

If Defendant has not made the minimum payments in the preceding calendar month and does not appear on the second Friday of the following month at the Pay or Appear calendar, **a warrant will be issued for Defendant's arrest.**” CP 29.

Mr. Stone made his monthly payments for 29 consecutive months, but did not make his May 2006, payment and did not appear in court to explain his non-payment. A hearing was held on June 9, 2006, before Jefferson County Superior Court judge, the Honorable Craddock Verser. Ms. Lori Bailey, the court's Pay or Appear Coordinator, reported Mr. Stone's last payment was in April, 2006. RP 10. Ms. Bailey was not placed under oath for this report. A bench warrant for Mr. Stone was issued. RP 10.

On December 26, 2007, Ms. Vicky Lockhart, then Pay or Appear Coordinator, sent a letter to Mr. Stone acknowledging his monthly payments since June 2007, and notifying him that a warrant had been issued for his arrest since he had not made his May, 2007, payment. CP 32. An Order Re Pay or Appear for cause number 01-1-00096-4 setting his next payment month as January, 2008; setting the review hearing date for that payment on February 8, 2008; and quashing his outstanding warrant was enclosed for his signature. He promptly signed and returned the order to the court. A hearing was held on January 3, 2008, where the judge signed the order. CP 33.

Mr. Stone did not make his January, 2008, payment and did not appear at the February 8, 2008, hearing. CP 34. A bench warrant was issued. CP 35.

Mr. Stone made \$25 payments for several months but failed to make his August 2008, payment and failed to appear at his scheduled Pay or Appear calendar hearing on September 12, 2008, when a bench warrant was issued. CP 37. A hearing on Mr. Stone's non-payment was held on October 13, 2008. CP 40. Mr. Stone signed an acknowledgment of Defendant's Rights on October 13, 2008. CP 41. An Order Re Pay or Appear was entered on October 13, 2008, establishing a next payment due in November, 2008, for Mr. Stone's and releasing him from custody. CP 38. The order was refilled on October 14, 2008, with Mr. Stone's signature. CP 39.

Mr. Stone failed to make his November 2008, payment and did not appear at his December 12, 2008, Pay or Appear calendar. CP 42. A bench warrant was issued for Mr. Stone on December 12, 2008.

On March 23, 2009, a hearing was held concerning Mr. Stone's failure to make his LFO payments or appear in court to explain his failure to pay. CP 45.

Mr. Stone signed an Acknowledgement of Defendant's Rights at that hearing, which contained the following statements:

"1. To be represented by a lawyer, and if I cannot afford to pay for a lawyer, to have one provided at public expense.

...

9. To appeal after a finding of guilty after trial.
..." CP 46.

Mr. Stone did not request an attorney. RP 18-19

The court's Pay or Appear Coordinator, Ms. Lockhart, described the situation to the judge as follows:

"Mr. Stone has not made a payment since June of last year. This is his fourth warrant. In October he did appear in court and was informed that on the next warrant we also would be asking for jail time. Again, we'd like to ask for a ten day jail time as a sentence violation on this." RP 18.

Mr. Stone was given a chance to explain his eight months of nonpayment and he stated:

I'm being brought here from Spokane, as you know. When I was here last, when I got out, the residence I was in, I come back to my, it was boarded up. "Do not enter." "Do not occupy." Everything I owned was inside that residence. The owner apparently did things against Code Enforcement's wishes and there was just several things that kind of tumbled after that. And my left shoulder, my rotator cuff, I've been in the veterans hospital and I think I need surgery on it. I didn't just blatantly want to blow off the court and not make my payments. Its just been a lot of things, sir, that I've been dealing with and I want to set it all right.

I've been incarcerated as of last Monday, when they picked me up in Spokane. Sir, I, I just really need to get back and try to get things in order.

RP 18-19.

The court found his explanation insufficient to account for eight months of nonpayment and imposed 10 days of jail time to help him understand the importance of the required payment. RP 19.

Mr. Stone's next payment was set for April 2009; the review hearing for that payment was set for May 8, 2009; and he was ordered to serve 10 days in jail for failure to pay or appear. CP 44.

At that time his balance owed was \$3,453.42. A Notice of Appeal was not timely filed.

Mr. Stone failed to make his April 2009, payment and did not appear at his May 8, 2009, Pay or Appear calendar. CP 47. A bench warrant was issued for Mr. Stone. CP 48.

Mr. Stone was arrested on this warrant. The court appointed Jefferson Associated Counsel to represent him on September 24, 2009. Mr. Stone was held with a bail requirement of \$1,000 on September 25, 2009.

On October 2, 2009, a fact-finding hearing was held with Commissioner Peggy Ann Bierbaum. Mr. Stone was represented by a court appointed attorney, Mr. Davies.

The court heard testimony from Mr. Stone that he received \$339 per month for his disability from DSHS, that he spent \$100 per month for rent and electricity, and that he spent money on cigarettes. RP 40.

The trial court found that Mr. Stone's failure to pay or appear was willful. RP 43. The court noted, "You could have made a phone call, sent a letter, made some attempt to contact Superior Court here in Jefferson County. As a result of your failure to do that the County's had to issue a

warrant, there's been state expense picking you up, putting you in jail, all because you couldn't pick up the phone or send a letter." RP 43.

The court found Mr. Stone guilty of a sentence violation for non-payment. CP 56. Mr. Stone was ordered to serve 45 days in jail, with 15 days credit for time served, for failure to pay or appear, his next payment was set for November 2009, and a review hearing for that payment was set for December 11, 2009. CP 56. At that time his balance owed was \$3,649.42. A Notice of Appeal was timely filed for this sentence. Court of Appeals case No. 39912-1-II resulted.

On April 1, 2010, Mr. Stone moved this court to permit him to appeal the March 23, 2009, sentence and consolidate it with case number 39912-1-II. On May 14, 2010, the commissioner denied Mr. Stone's motion to file an untimely notice of appeal. On July 28, 2010, the court granted Mr. Stone's motion to modify and ordered him to file an amended opening brief.

III Argument

A. The “Pay or Appear” policy of Jefferson County Superior Court does not violate due process.

Mr. Stone argues the “Pay or Appear” policy of the trial court violates due process because it incarcerates individuals who fail to pay fines because of indigence. However this argument is false-to-facts.

Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence. *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 111, 52 P.3d 485 (2002) (citing *Bearden v. Georgia*, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)). However, if an offender is capable of paying but willfully refuses to pay, or if an offender does not “make sufficient bona fide efforts to seek employment or borrow money in order to pay,” the State may imprison the offender for failing to pay his or her LFO. *Bearden*, 461 U.S. at 668, 103 S.Ct. 2064. The burden is on the offender to show that his nonpayment is not willful. RCW 9.94B.040(3)(b); *Smith*, 147 Wn.2d at 112, 52 P.3d 485. Although the offender carries the burden, due process still imposes a duty on the court to inquire into the offender's ability to pay. *Smith*, 147 Wn.2d at 112, 52 P.3d 485. Inquiry into the offender's ability to pay comes at “the point of collection and when

sanctions are sought for nonpayment.” *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

A court does not violate due process when the court inquires into the Defendant’s reason for nonpayment before imposing sanctions. *State v. Nason*, 168 Wn.2d 936, 940, 233 P.3d 848 (2010), See *Smith*, 147 Wn.2d at 112, 52 P.3d 485; *Blank*, 131 Wn.2d at 242, 930 P.2d 1213.

Under the terms of the Pay or Appear provision imposed in December of 2003, Mr. Stone had to pay \$25 per month toward his LFO starting in January 2004, payment was due on the last business day of the month, and if he could not make the payment, he was to appear in court on the second Friday of the next month at 8:30 am to explain his non-payment. CP 29.

Because due process requires the court to inquire into a Defendant’s reason for nonpayment, and because the inquiry must come at the time of the collection action or sanction, the Jefferson County Superior Court Pay or Appear process conforms to due process and is legal. This appeal is without merit and should be denied.

B. Mr. Stone was NOT found to have committed a community custody violation.

Mr. Stone incorrectly asserts he was “found to have committed a community custody violation without being notified in writing of the

nature of the violation.” Amended Brief of Appellant at 14. A brief review of the record shows that Mr. Stone was released from community custody by the Department of Corrections on 10/29/03 (CP 26-28); and that he was found guilty of sentence violations by failing to make his agreed \$25 per month payments and failing to appear in court to explain his nonpayments on March 23, 2009 (CP 43-44), and on October 2, 2009 (CP 55-56).

Mr. Stone cites several authorities to show defendants accused of a probation violation are entitled to written notice of the violation. However this is irrelevant since he was not on probation.

Conversely, statutes provide authority for a court to punish sentence violations: “If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.” RCW 9.94B.040(1).

C. The trial court properly found Mr. Stone’s failure to pay his LFO was willful in an October 2, 2009, fact finding hearing.

Mr. Stone argues the trial court erred when it found his failure to pay or appear on October 2, 2009, was willful. He bases his argument on his meager income (\$339 per month, RP 39) and his claim that to travel from his home in Spokane to Port Townsend costs him approximately \$100. RP 40.

Mr. Stone's argument is disingenuous. He knew that all he had to do was communicate in some way with the court and explain why he did not make his payment. The Pay or Appear form he signed on December 8, 2003, stated:

"Payment is due by the last business day of each month. If payment is not made by that day, Defendant must appear in Court the second Friday of the following month at 8:30 am, or call the court clerk's office at 385-9124 prior to that Friday." CP 29

During the October 2, 2009, hearing, the court noted:

"You could have made a phone call, sent a letter, made some attempt to contact Superior Court here in Jefferson County. As a result of your failure to do that the County's had to issue a warrant, there's been state expense picking you up, putting you in jail, all because you couldn't pick up the phone or send a letter." RP 43.

Mr. Stone knew he had a duty to pay or communicate and he could have communicated with the court for less than one dollar. The court properly found his failure to do so was willful. This appeal is without merit and should be denied.

D. The commissioner properly advised Mr. Stone of his right to appeal the ruling on March 23, 2010.

Mr. Stone argues the court did not tell him of his rights. This is incorrect. Mr. Stone was given an Acknowledgement of Defendant's

Rights form to review before the hearing. Mr. Stone signed this form at that hearing, which contained the following statements:

“1. To be represented by a lawyer, and if I cannot afford to pay for a lawyer, to have one provided at public expense.

...

10. To appeal after a finding of guilty after trial.

...” CP 46.

Mr. Stone did not request an attorney. RP 18-19

This argument is without merit and the appeal should be denied.

E. Mr. Stone was advised of his right to an attorney by the Acknowledgment of Defendant’s Rights form which he signed on the day of the March 23, 2009, hearing.

Mr. Stone argues the trial court erred by not advising him of his right to be represented by an attorney. See preceding argument.

This appeal is without merit and should be denied.

F. The trial court did not err by taking a report from the “Pay or Appear” Coordinator during a March 23, 2009, hearing.

Mr. Stone argues the trial court’s Pay or Appear Coordinator testified at the March 23, 2010 hearing without being sworn in.

The State concedes this fact. However it is harmless.

Mr. Stone was present at this hearing. He did not ask for an attorney to represent him. He did not object to the Pay or Appear Coordinator giving unsworn testimony. Mr. Stone freely admitted he knew of his LFO obligation and did not make the required payments. RP 18-19.

Improper admission of evidence constitutes harmless error if evidence is of minor significance in reference to overall, overwhelming evidence as whole. *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997).

In this case, the unsworn testimony of the Pay or Appear Coordinator was improper, but since it was confirmed by Mr. Stone's statements, it was of minor significance.

G. The trial court did not err by not explicitly finding that Mr. Stone's failure to pay his LFO was willful.

Once the Prosecution Shows Noncompliance Through Proof of Nonpayment, the Burden Shifts to the Offender to Show Cause Why He or She Should Not be Found in Contempt and Sanctioned

In *State v. Bower*,¹ a case involving a defendant's failure to pay court costs, the court held that—

[T]he State bears the initial burden of showing noncompliance [and the burden then shifts to] the offender to “show cause”, that is, to come forward with any

¹ *State v. Bower*, 64 Wn.App. 227, 230, 823 P.2d 1171, review denied, 119 Wn.2d 1011 (Div. 1 1992).

affirmative defenses he may have in order to demonstrate why he should not be punished; and it is only if the court finds that the violation was not willful that the court need consider such alternatives to imprisonment as modifying its previous sentence to reduce the amount or to extend the time for payment of the court-ordered obligations.

*Bower*² further held that a sentencing court has no affirmative duty to explore alternatives to incarceration if the failure to comply was willful. Lastly, *Bower* discussed the burden on an offender to meet his or her obligation to “show cause” why incarceration should not be imposed once the prosecution proved nonpayment.

A defendant who claims indigency must do more than simply plead poverty in general terms as *Bower* did in this instance. He should be prepared to show the court his actual income, his reasonable living expenses, his efforts, if any, to find steady employment, his efforts, if any, to acquire resources from which to pay his court-ordered obligations ...

Appellant’s failure to justify his inability to pay is in stark contrast to the defendant in *Bearden*. *Bearden* provides an excellent example of the kind of showing a defendant needs to make, in order to demonstrate that his failure to pay was because of true indigency not by reason of failure to make a good faith effort to make the payment ...

We conclude that appellant failed to meet his burden of proof. He failed to respond directly to the court’s inquiry as to his actual income. He provided no evidence of any attempts on his part to find jobs. He failed to show that his failure to pay was justified by inability to earn the money, and the court properly found that there was a lack of evidence of any good faith effort on his party to pay the fine ...³

In *State v. Gropper*,⁴ the Court re-emphasized a trial court’s authority to impose incarceration for a willful failure to pay court-ordered

² *State v. Bower*, 64 Wn.App. at 233, citing *Bearden v. Georgia*.

³ *State v. Bowers*, 64 Wn.App. at 233-34 (citations omitted) (emphasis added).

⁴ *State v. Gropper*, 76 Wn.App. 882, 888 P.2d 1211 (Div. 1 1995).

financial obligations, and made clear that an offender's general statement asserting a lack of income does not satisfy the offender's burden of proving non-willfulness.

At the modification hearing, Gropper's attorney stated the reason Gropper had not fulfilled his financial obligation was 'that he's had absolutely no income and he has not been employed.' This statement alone is insufficient to establish a non-willful inability to fulfill a financial obligation ... We conclude that Gropper's failure to fulfill his financial obligation was willful ... [⁵]

In *State v. Campbell*,⁶ the defendant was ordered to pay court costs, a crime victim assessment, and restitution but had failed to make any payments on the obligation for several years. At the hearing on the non-compliance allegations, the defendant testified that he took home approximately \$700 a month and was responsible for the care of one child. His monthly expenses were approximately \$200 for rent, \$200 for food and \$100 for utilities. He did not explain any other expenses. In upholding the trial court's sanction order, Division 2 said—

Campbell argues that there was insufficient evidence to support the trial court's finding that he violated the conditions of his judgment and sentence. But testimony at the hearing showed by a preponderance of the evidence that Campbell violated the terms of his judgment and sentence by failing to make payments on his financial obligations. Campbell does not present any argument or facts

⁵ *State v. Gropper*, 76 Wn.App. at 887.

⁶ *State v. Campbell*, 84 Wn.App. 596, 929 P.2d 1175 (Div. 2 1997).

explaining why this evidence is insufficient to support the trial court's finding of a violation.^[7]

In *Woodward*,⁸ the defendant made no payments on his financial obligations and failed to appear for a scheduled review hearing. Woodward eventually claimed that his sole source of income was \$340 a month in government assistance. He stated he paid \$175 in rent and over \$75 monthly in electricity, utilities, and food. He claimed he could no longer work because he had emphysema, which would require removal of a lung. He also claimed he was waiting for SSI settlement money, and intended to use that money to pay his obligations and medical expenses. But on cross examination, Woodward admitted he expected the SSI money to take two to three years to arrive. No documentation was provided corroborating Woodward's SSI and disability claims. The trial court found Woodward to be impoverished, but in deciding to order 60 days in jail for nonpayment reasoned that Woodward's failure to pay any amount on the obligation exhibited a willful failure to pay.

Division 3 affirmed the trial court's 60 day jail order. After discussing the *Bearden v. Georgia* and *Bower* quotes previously mentioned, Division 3 said—

⁷ *State v. Campbell*, 84 Wn.App. at 599-600.

⁸ *State v. Woodward*, 116 Wn.App. 697, 67 P.3d 530 (Div. 3 2003).

Mr. Woodward is impoverished. The trial court did not disagree, but it reasoned Mr. Woodward could “probably afford to pay something a month, even if it's five bucks a month.” The trial court was offended that Mr. Woodward was not “even making an effort to pay five dollars a month.” Although Mr. Woodward lamented generally that he did not have enough to live on, his own testimony indicates he had approximately \$90 a month remaining after expenses, including food. That testimony supports the trial court’s assessment that Mr. Woodward could afford monthly payments of at least \$5.

Here, the trial court did not incarcerate Mr. Woodward for his alleged inability to pay, but rather because he made no effort at all to pay even a token amount. Stated another way, the trial court punished Mr. Woodward for his recalcitrance, not for his indigency. And Mr. Woodward’s vague and evasive testimony failed to establish the violation was not willful. Rather, the record reflects Mr. Woodward’s “insufficient concern for paying the debt he owes to society for his crimes.” Consequently, the trial court did not err in imposing 120 days confinement for the two most recent violations.^{9]}

In this case, in the March 23, 2009, hearing, the court found Mr. Stone’s explanation insufficient to account for eight months of nonpayment and imposed 10 days of jail time to help him understand the importance of the required payment. RP 19.

It the October 2, 2009, hearing, the court heard testimony from Mr. Stone that he received \$339 per month for his disability from DSHS, that he spent \$100 per month for rent and electricity, and that he spent money on cigarettes. RP 40. The trial court found that Mr. Stone’s failure to pay

⁹ *State v. Woodward*, 116 Wn.App. at 705-6 (citations omitted) (emphasis added).

or appear was willful. RP 43. The court noted, “You could have made a phone call, sent a letter, made some attempt to contact Superior Court here in Jefferson County. As a result of your failure to do that the County’s had to issue a warrant, there’s been state expense picking you up, putting you in jail, all because you couldn’t pick up the phone or send a letter.” RP 43.

As in *Bower*, *Gropper*, *Campbell*, and *Woodward* the court repeatedly heard evidence the Mr. Stone’s continuing failure to pay his LFOs showed “insufficient concern for paying the debt he owes to society for his crimes” rather than inability to pay.

This appeal is without merit and should be denied.

IV. CONCLUSION

The State respectfully requests that this Court deny this appeal because the evidence clearly shows that Appellant, despite his protestations to the contrary, willfully refused to pay his LFO.

Respectfully submitted this 6th day of October, 2010.

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Thomas A. Brotherton", written over a horizontal line.

By: Thomas A. Brotherton , WSBA # 37624
Deputy Prosecuting Attorney

