

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1415

September Term, 2013

---

IN RE: MICHAEL D.

---

Berger,  
Arthur,  
Kenney, James A., III  
(Retired, Specially Assigned),

JJ.

---

Opinion by Kenney, J.

---

Filed: December 15, 2014

On July 7, 2011, Michael D., appellant, entered a plea of involved to the delinquent acts alleged in a juvenile delinquency petition filed in the Circuit Court for Prince George's County. The juvenile court placed Michael on conditional probation, the terms of which, in pertinent part, required Michael to pay, within eighteen months, restitution in the amount of \$1,608.67. On August 8, 2013, the circuit court determined that Michael had violated the terms of his probation by failing to pay the assessed restitution in a timely manner. Instead of revoking Michael's probation, the court continued the case and ordered Michael to bring \$250 to the next scheduled hearing. Michael filed the instant appeal on August 8, 2013.

In his timely filed appeal, Michael raises a single question for our consideration: **Did the trial court err in finding Appellant in violation of the terms of his probation for failure to pay restitution?** Discerning no legal error or abuse of discretion, we shall affirm the judgment of the juvenile court.

#### **FACTUAL AND PROCEDURAL HISTORY**

On July 7, 2011, pursuant to a plea agreement, the juvenile court determined that Michael was delinquent based upon his admitted involvement in two burglaries in Prince George's County, in which televisions and other electronic equipment were taken. The court ordered Michael to serve a period of conditional probation and to pay restitution in the amount of \$1,608.67 for the losses sustained by one of the two burglary victims.<sup>1</sup>

On July 9, 2013, the juvenile court conducted a review hearing, during which Michael was questioned regarding his failure to pay restitution during his probationary period. At the

---

<sup>1</sup>The other victim was compensated by his insurance company.

time of the hearing, Michael still owed \$1,508.67 in restitution. Michael averred that he had made payments for court costs and restitution during the preceding twenty-four months, when he was working, but that he was currently unemployed. During the hearing, the State informed the court that Michael had been arrested for another charge and indicated that it was the State's intention to file a show cause order requesting a hearing to determine if Michael had violated the terms of his probation by failing to pay the ordered restitution and by being arrested for another offense. The juvenile court scheduled the violation of probation hearing for August 8, 2013, and ordered Michael to bring \$250 to pay toward his restitution on that date.

Michael did not bring \$250 to the violation of probation hearing on August 8, 2013, but indicated to the juvenile court that he had mailed in a payment of \$80 toward his restitution obligation prior to the hearing. Defense counsel proffered that Michael had only recently gotten a job and that he would get his first pay check in two weeks. The court ultimately determined that Michael was in violation of the terms of his probation based on his failure to pay the ordered restitution in a timely manner. The court did not revoke Michael's probation, however. Instead, the court ordered Michael to bring \$250 to the next review hearing, set for August 12, 2013.<sup>2</sup> Appellant timely filed notice of the instant appeal on August 8, 2013.

---

<sup>2</sup>Michael made additional payments toward his restitution obligation prior to hearings on August 12, 2013, September 6, 2013, and September 27, 2013. The circuit court indicated its intent to continue to schedule regular review hearings to monitor and encourage Michael's progress toward paying off the remaining balance of his restitution obligation.

## ANALYSIS

In making a restitution award, juvenile courts are obliged to consider a juvenile's ability to pay a given amount of restitution. *In re: Levon A.*, 124 Md. App. 103, 145 (1998), *rev'd on other grounds*, 361 Md. 626 (2000) (requiring the juvenile court to conduct a "reasoned inquiry" into the juvenile's ability to pay). Generally, an order of restitution should not exceed a person's ability to pay. *Coles v. State*, 290 Md. 296, 306 (1981); *In re: Levon A.*, 124 Md. App. at 145. *See also* Md. Code (2001, 2008 Repl. Vol.) §11-605(a) of the Criminal Procedure Article ("C.P.") (providing that "[a] court *need not* issue a judgment of restitution" if the court finds "that the restitution obligor does not have the ability to pay the judgment of restitution." (emphasis added)). *But see In re: Delric H.*, 150 Md. App. 234, 253 (2003) (affirming the juvenile court's imposition of restitution on twelve-year-old delinquent and his mother, opining that the juvenile, who could legally obtain a work permit at the age of fourteen, "would, before too long, be capable of earning money on a steady basis[.]" (citations omitted)).

Where a probationer fails to pay a fine or restitution, the payment of which is a condition of the individual's probation, the State may file a petition for revocation of probation. Md. Rule 4-347(a). As the Court of Appeals has previously explained:

Under Maryland law, violation of probation proceedings consist of two parts: a fact-finding inquiry into whether the probationer has violated any of the terms of probation and an inquiry into whether the probation should be revoked, a matter left to the discretion of the trial judge. *See Wink v. State*, 317 Md. 330, 332 (1989).

*Adkins v. State*, 324 Md. 641, 644 n. 3 (1991).

A court's determination that an individual has violated a condition of his or her probation "does not necessarily mandate imposition of the suspended sentence." *Hammonds v. State*, 436 Md. 22, 52 (2013) (quoting *Baynard v. State*, 318 Md. 531, 540 (1990)). "Even when conditions of probation have been violated 'the question whether to revoke probation is a matter within the discretion of the trial court.'" *Christian v. State*, 62 Md. App. 296, 309 (1985) (quoting *Humphrey v. State*, 290 Md. 164, 168 (1981)).

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

*Turner v. State*, 307 Md. 618, 627 (1986) (citing *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983)). Thus, under certain circumstances, a court may abuse its discretion if it revokes an individual's probation despite evidence that the probationer's failure to comply with the terms of his or her probation was not willful but rather "resulted from factors beyond his control and through no fault of his own. . . ." *Humphrey*, 290 Md. at 168; *see also Christian*, 62 Md. App. at 309 ("[W]hen non-compliance with conditions is caused by factors beyond the probationer's control, revocation is impermissible." (citing generally *Coles v. State*, 290

Md. 296 (1981)).<sup>3</sup> The burden of demonstrating the existence of extenuating circumstances that precluded the probationer from fulfilling the requirements of the probation remains on the probationer. *See Humphrey*, 290 Md. at 168 (“Of course, if the probationer fails to carry this burden, the question whether to revoke probation is a matter within the discretion of the trial-court.”); *Bryant*, 71 Md. App. at 146 (“the burden is allocated to the appellant to prove the inability to find work rather than to the State to prove the contrary”).

Michael D. contends that the juvenile court erred by finding him in violation of the terms of his probation for failing to pay restitution. He asserts that he “generated the issue of his inability to make the restitution payments” and thus, the trial court erred in failing to consider “whether he had an ability to pay or had voluntarily impoverished himself or willfully failed to make restitution payment.”

The State responds, first by questioning whether Michael’s claim is properly before this court. The State contends that the case law upon which Michael relies in making his

---

<sup>3</sup>*See e.g. Humphrey*, 290 Md. at 170 (concluding that the trial court erred by finding that a probationer had violated the conditions of his probation, where despite his good-faith efforts to obtain treatment, the probationer had been denied admission to multiple community-based drug treatment programs because of his prior misconduct); *Turner v. State*, 307 Md. 618, 629 (1986) (overturning revocation based on probationer’s failure to pay court costs and fines where evidence indicated that eighteen-year-old probationer, with seventh-grade education, was indigent despite his good faith efforts to find a job including registering with Man-Power and submitting applications for employment); *Bryant v State*, 71 Md. App. 143, 147 (1987) (concluding that fifty-year-old probationer, with a fifth-grade education, who presented evidence that serious medical problems, including a broken leg and seizures, had prevented him from working and paying the fines assessed against him, had met the burden of presenting at least a *prima facie* case of an inability to find work, which then shifted the burden onto the State to refute the proof).

appellate argument concerns the revocation of probation, which did not occur in the instant case. In the absence of any argument or citations to supporting authority in Michael's brief, the State questions whether "this Court may review a finding where the juvenile court took no action based on that finding." Addressing the merits of Michael's appellate argument, the State asserts that the juvenile court properly found him in violation of his probation based on his failure to pay the ordered restitution.

First, we will address the jurisdictional concerns raised by the State. The Court of Appeals has explained that both steps of the revocation of probation procedure are significant.

A finding that the probationer has violated the terms of probation has significance because it is that finding that is considered in subsequent criminal proceedings. That finding is the violation of probation equivalent to a guilty finding in a criminal case. The revocation, which may involve reimposition of a previously suspended sentence, is the equivalent to the criminal case's sentence.

*Adkins*, 324 Md. at 644 n.3 (1991).

Because a court's determination that an individual has violated the terms of his probation may have substantial direct and collateral consequences on a probationer, we are persuaded that the juvenile court's determination that Michael had violated the terms of his probation by failing to pay restitution in a timely manner is properly before this Court for appellate review. *See Adkins*, 324 Md. at 644-45 n. 4 (acknowledging that in addition to the potential reimposition of a suspended sentence, a finding that an individual violated his or

her probation may subsequently result in harsher penalties and reduced eligibility for parole if the individual later reoffends).

In reviewing a juvenile court's judgment on a petition to revoke probation:

Abuse of discretion will be found only if the trial court has erroneously construed the conditions of probation, has made factual findings that are clearly erroneous, or has acted arbitrarily or capriciously in revoking probation.

*Herold v. State*, 52 Md. App. 295, 303 (1982) (internal citations omitted). Here, we will overturn the juvenile court's factual determination that Michael violated the terms of his probation only if the evidence presented at the August 8, 2013 hearing was insufficient to prove that a violation occurred, and thus, the court's factual findings were clearly erroneous.

As noted above, on July 7, 2011, the juvenile court ordered Michael to pay restitution in the amount of \$1,608.67. Michael and his mother signed the restitution order and verbally agreed to pay the amount of restitution that was imposed by the court within eighteen months. Michael did not appeal the juvenile court's July 7, 2011 Order; therefore, the juvenile court's initial assessment of restitution against Michael is not before us in the instant appeal.

At the violation of probation hearing on August 8, 2013, the State presented evidence that Michael had only paid \$100 toward his restitution obligation of \$1,608.67, since it had been imposed more than twenty-four months earlier. Michael and his attorney admitted to the court that he had been employed at various times during his probation but noted that he did not have a job at the time of his review hearing on July 9, 2013. Defense counsel

proffered that Michael had recently started a new job, but that he would not receive his first paycheck for another two weeks.

Michael suggests that his testimony and the information proffered by his attorney indicating that he had been unable to hold down a steady job and make the restitution payments was sufficient to “raise the issue of his inability to pay.” Beyond the verbal assertions of Michael and his attorney, however, there was no evidence or arguments in the record recounting Michael’s efforts to get a job. Michael did not testify that he had submitted applications to employers or sought the assistance of agencies that could help him to find work. Michael did not assert that he had any physical or mental impairment that negatively impacted his ability to obtain or retain a position. Nor did Michael, who continued to reside with his mother, indicate that he had any other financial obligations that were more pressing than his restitution obligation.

To the contrary, the evidence before the circuit court indicated that eighteen-year-old Michael had obtained his high school diploma and was taking classes at the local community college. He had previously been gainfully employed, and despite his unemployment at the hearing in June, he had recently obtained another job and was expecting to receive a paycheck in two weeks. It is also clear from the record that once the court began actively reviewing Michael’s case and serially setting review hearings and ordering Michael to bring substantial payments toward his restitution to each hearing, Michael began to make progress toward paying off his restitution obligation.

As we have previously opined, in order to demonstrate that a probationer has failed to comply with the terms of his or her probation based on the probationer's failure to pay restitution, the State is obliged to produce some evidence other than the fact of nonpayment only if the probationer satisfies his or her burden of producing "a colorable defense of incapacity to pay," supported by "some extrinsic corroboration of that defense, and where there is no apparent inclination to disbelieve the actual events testified to by the probationer[.]" *Bryant*, 71 Md. App. at 147. We are not persuaded that Michael's sparse assertions that he was not able to hold down a job were sufficient to constitute "a colorable defense of incapacity to pay." Nor did Michael produce any extrinsic evidence to corroborate his claim. The comments of the circuit court clearly indicate that the court found Michael's explanations regarding why he had not paid the restitution to be inadequate. Under these circumstances, we are not persuaded that the juvenile court's August 8, 2013 determination that Michael had violated the terms of his probation by failing to pay the assessed restitution in a timely manner was clearly erroneous.

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE'S COUNTY  
AFFIRMED; COSTS TO BE PAID BY  
APPELLANT.**