IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN WAYNE SHUTLER,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
	)	
v.	)	No. RE-2014-732
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant was charged on July 21, 2009, with Assault and Battery with a Dangerous Weapon in Garfield County District Court Case No. CF-2009-347. On April 27, 2010, Appellant, represented by counsel Brian N. Lovell, entered a plea of guilty in Case No. CF-2009-347. Appellant was convicted and sentenced to five years imprisonment, with all but the first two years suspended.

The State filed an application to revoke Appellant's suspended sentence alleging that Appellant failed to make restitution payments. On January 17, 2014, Appellant stipulated to the application to revoke. The Honorable Paul K. Woodward, District Judge, passed the sentencing several times in order to allow Appellant to provide proof of restitution payments. Judge Woodward revoked Appellant's remaining suspended sentence in full on August 21, 2014. Appellant appeals from the revocation of his suspended sentence.

In his first proposition of error, Appellant maintains that revocation of his suspended sentence was an abuse of discretion because he was financially

unable to pay the restitution. He argues that this revocation violated his right to due process of law because his failure to make restitution payments was not willful or intentional. Appellant argues that at a minimum the trial court should have reevaluated the amount of restitution. We disagree.

In *Bearden v. Georgia,* 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), the Supreme Court held that an indigent defendant's probation could not be revoked for failure to pay restitution absent evidence and findings that the defendant was responsible for this failure, and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence. The Supreme Court in *Bearden* held that "[i]f the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." The State has the burden to prove by a preponderance of the evidence that the probationer has failed to make restitution. *McCaskey v. State,* 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837. Once the State meets this burden, the burden shifts to the probationer to show that the failure to pay was not willful, or that he has made a good faith effort to make payment. *Id.* If the probationer presents evidence showing the non-payment was not willful, the court must make a finding of fact regarding the probationer's ability to pay. *Id.* In *Tilden v. State,* 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557, this Court cited *McCaskey* when it held "[o]nce the State meets its burden of proving a probation violation, it is up to the probationer to present circumstances that might militate against revocation of the suspension order." It is Appellant's

responsibility to provide a reasonable excuse for not paying restitution. *Patterson v. State*, 1987 OK CR 255, ¶ 3, 745 P.2d 1198, 1199. "The State is not required to prove that appellant deliberately failed to pay." *Id.*

The record in this case does not support Appellant's arguments. Judge Woodward passed Appellant's sentencing several times in order for Appellant to provide proof of restitution payments. Appellant did not provide proof of the restitution payments and Judge Woodward determined that Appellant was untruthful when he claimed to have made several restitution payments. The record and evidence in this case supported Judge Woodward's decision. Appellant did not provide any evidence that supported his claim of good faith efforts to make these payments. Appellant also failed to establish that he was willing but financial unable to make the payments. This proposition is without merit.

In his second proposition, Appellant argues that *Bearden* unconstitutionally shifted the burden to Appellant in this case. *See Bearden v. Georgia,* 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). Appellant maintains that he was held to a standard of proof that violated due process in this revocation. We disagree. In *McCaskey v. State,* 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837, this Court noted that the State has the burden to prove by a preponderance of the evidence that the probationer failed to make restitution. Once the State has met its burden of proof, the burden shifts to the probationer to show the failure to pay was not willful, or that a good faith effort to make restitution payments was made. *Id.* If the probationer presents

evidence to show nonpayment was not willful, the trial court must make a finding of fact regarding the probationer's ability to pay. *Id.*

In this case, the evidence and Appellant's stipulation established that Appellant failed to pay restitution as repeatedly ordered. At his sentencing hearing, Appellant did not offer any evidence that his failure to pay was not willful. As noted above, Appellant stipulated to the allegations in the State's application to revoke and admitted that he was employed. The evidence introduced by the Appellant in this case does not establish that he made good faith efforts to pay the restitution or that his failure was not willful. We find no error.

The State must only prove one violation of probation in order to revoke Appellant's suspended sentence. *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557 (citing *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d 744, 745). The State answers that it must only prove one violation of probation in order to revoke Appellant in full and that it has done so in this case. *Id.* The State correctly notes that Appellant did not present any evidence that supports modification of this revocation. Judge Woodward showed leniency to Appellant repeatedly and Appellant could not comply while in the community on probation. Appellant did not take advantage of several opportunities to stay in the community. The State argues that revocation of Appellant's remaining suspended sentence was not an abuse of discretion in this case and the revocation should not be disturbed. This revocation is supported by the record.

Appellant stipulated to violating probation while out on a suspended sentence. The decision to revoke a suspended sentence in whole or in part is within the sound discretion of the trial court and such decision will not be disturbed absent an abuse thereof. *Jones v. State*, 1998 OK CR 20, ¶ 8, 749 P.2d 563, 565. Appellant has not shown Judge Woodward abused his discretion in this case and as a result revocation was not an abuse of discretion.

DECISION

The revocation of Appellant's suspended sentence in Garfield County District Court Case No. CF-2009-347 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

REVOCATION APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY, THE HONORABLE PAUL K. WOODWARD, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

SMITH, P.J.: Concurs
JOHNSON, J.: Concurs
LEWIS, J.: Concurs
HUDSON, J.: Concurs

RA/F