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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 08/14/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0420  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
)  
ELISE MICHELLE TOWNSEND, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

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Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20090855

The Honorable Cele Hancock, Judge

**VACATED AND REMANDED**

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**H A L L**, Judge

¶1 Elise Michelle Townsend appeals the revocation of her probation and sentence to imprisonment. We address whether the trial court failed to consider Townsend's motion to modify the terms of her probation and whether the court erred when it found that Townsend violated the terms of her probation. For the reasons that follow, we vacate the order revoking Townsend's probation and remand for proceedings consistent with this memorandum decision.

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

¶2 The trial court placed Townsend on five years' probation after she pleaded guilty to one count of theft. The trial court also ordered Townsend to pay a total of \$275,717.19 in restitution to eight victims at a rate of \$4,500 per month. Townsend personally signed the restitution order.

¶3 Approximately two months after the court ordered restitution, Townsend filed a motion to modify the terms of her probation, arguing that she could not afford to make monthly payments of \$4,500 despite her efforts to do so. Townsend sought to reduce her monthly payment "to the amount that she is able to pay, and is commensurate with the present income." Approximately three weeks later, the State filed a petition to revoke Townsend's probation based on her failure to make her monthly payments. The trial court and Townsend agreed that the

motion to modify would be "incorporated" or "subsumed" into the revocation proceedings.

¶14 The trial court held an evidentiary hearing and found Townsend willfully violated the terms of her probation when she failed to pay \$4,500 a month in restitution. The court further found Townsend failed to make reasonable efforts to obtain funds to make her monthly payments. The court revoked Townsend's probation and sentenced her to a presumptive term of 3.5 years' imprisonment. Townsend timely appealed. We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A) (2003), 13-4031 and -4033 (2010).

## **DISCUSSION**

### **I. The Motion to Modify the Terms of Probation**

¶15 Townsend argues that the trial court erred when it held the "law of the case" doctrine rendered it "powerless" to modify the manner in which Townsend paid restitution. We find no error because the trial court never held it was powerless to consider Townsend's motion to modify.

¶16 By the time of the hearing, the original trial judge had retired and a new judge presided over the case. The second court did not, as alleged by Townsend, believe it was "powerless" to modify the manner in which Townsend paid restitution based on the "law of the case" doctrine. First, as

noted above, the second trial court and Townsend agreed that the motion to modify would be "incorporated" or "subsumed" into the revocation proceedings. At the beginning of the proceedings, the court announced the hearing pertained to both the petition to revoke and the motion to modify. There is nothing in the record to indicate the court refused to consider or believed it could not consider the motion to modify at that time. The court impliedly denied the motion to modify when it held Townsend violated the terms of her probation and ultimately revoked her probation. See *State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993) (motions not expressly ruled upon are deemed denied by operation of law).

¶17 Second, the court's reference to the law of the case doctrine occurred twenty-one days after the hearing when the court denied Townsend's sister's (Sister) post-hearing motion to intervene and challenge the identities of the victims and amounts owed in restitution. The court denied Sister's motion the morning of the disposition hearing. While the court stated in its order denying the motion that "the existing restitution order is the law of this case," the court made this ruling in the context of the Sister's motion - a challenge to the identities of the victims and the amounts owed to those victims. When the court told the parties about its ruling on Sister's motion at the disposition hearing later that same day, the court

again noted Sister sought "some sort of reevaluation of the restitution" and held the prior order was the law of the case - again in the context of the motion that sought to challenge the identities of the victims and the amounts owed. There is nothing in the record to suggest the court believed the law of the case doctrine prevented it from modifying the manner in which Townsend paid restitution as she sought in her motion to modify. The court simply refused to consider an untimely challenge to the identities of victims and the amounts owed to those victims raised by a third-party with no legal standing.

## **II. The Revocation of Probation**

¶18 Townsend next argues the trial court erred when it found she violated the terms of her probation by failing to make the required restitution payments. Specifically, she contends the trial court incorrectly placed the burden of proof on her to demonstrate that she was unable to pay the restitution and had made sufficient bona fide efforts to acquire the resources to pay the restitution. Instead, she asserts that the State bore the burden of proving she had the ability to pay the restitution but chose not to do so.

¶19 We will uphold a trial court's finding that a probationer has violated probation unless the finding is arbitrary or unsupported by the evidence. *State v. Vaughn*, 217 Ariz. 518, 521, ¶ 14, 176 P.3d 716, 719 (App. 2008).

"[E]vidence is not insufficient simply because the testimony is conflicting," and it is the role of the court, as fact-finder, "to assess the credibility of witnesses." *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). Nonetheless, when the trial court's finding is contrary to the evidence presented, it is clearly erroneous. See *Matter of Appeal in Yuma J-88-201, J-88-202, J-88-203*, 172 Ariz. 50, 53-54, 833 P.2d 721, 724-25 (App. 1992).

¶10 The State must prove a probationer violated a term of probation by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3). Here, the State proved Townsend failed to comply with the term of her probation requiring payment of \$4,500 in restitution per month. The undisputed evidence reflects that Townsend paid approximately \$8,000 in restitution at the time the State filed the petition to revoke her probation and had incurred arrearages of approximately \$11,000.

¶11 Proof that a probationer failed to pay the full amount of restitution owed, however, is not the end of the inquiry. When the State seeks to revoke probation based on the failure to pay restitution, the trial court may not revoke probation and sentence the defendant to imprisonment unless the court finds "the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay[.]" *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *State v.*

*Stapley*, 167 Ariz. 462, 463, 808 P.2d 347, 348 (App. 1991). As set forth in *Bearden*, "a sentencing court must inquire into the reasons for the failure to pay . . . . 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." 461 U.S. at 472. *Bearden* does not identify which party bears the burden of proving or disproving the probationer's ability to pay, but frames the issue as a matter of inquiry for the trial court. *Id.*

¶12 The State contends that Townsend bore the burden of proving that she was unable to pay restitution. Even assuming that the State is correct, we conclude Townsend met that burden of proof here.

¶13 The undisputed evidence presented at the violation hearing demonstrated Townsend's inability to pay. Townsend paid a substantial amount toward restitution, approximately \$8,000, during the short time she was on probation before the State filed the petition to revoke probation. *Cf. Stapley*, 167 Ariz. at 463, 808 P.2d at 348 (concluding the trial court did not err by revoking defendant's probation "where, although unable to pay the full amount, [defendant] made no effort to pay any amount of restitution"); *State v. Robinson*, 142 Ariz. 296, 297, 689 P.2d 555, 556 (App. 1984) (inferring probationer "made a bona fide

effort to pay" his fines and restitution as evidenced by his payment of approximately \$1,500 at the time the petition to revoke was filed). In addition, Townsend's intensive probation officer testified that she instructed Townsend to "make as large of a payment as possible" each month and further testified that she believed Townsend had attempted to obtain employment to the best of her ability and had secured two jobs, as a cashier at a clothing store and as a newspaper deliverer. Townsend also presented evidence that she had applied for numerous jobs but had been unable to secure employment that would enable her to pay the full amount of the \$4,500 monthly restitution payment. Indeed, the record reflects that the combined monthly income of Townsend and her husband is \$5,281.32 per month. Townsend further testified that she was striving to the best of her ability to pay the restitution and stated that all of her earnings are applied to the restitution payment. Moreover, Townsend testified that she filed both personal bankruptcy and bankruptcy on behalf of her companies and the trustees determined she had no hidden assets. Townsend also testified that she borrowed money from eight family members to make restitution payments and that she did not have any savings or retirement accounts from which to draw. She testified that she and her husband rent rather than own a home and own only one vehicle that still carries a loan balance. Finally, Townsend



testified that her husband does not have any sole and separate assets. The State presented no controverting evidence.<sup>1</sup>

¶14 In finding Townsend willfully refused to make restitution payments, the trial court placed substantial emphasis on Townsend's failure to "attempt[] to open any type of her own business." The trial court found Townsend's failure to start a new business "very odd as that is how she has conducted her employment life for some time." Given the nature of the underlying crime and the absence of any evidence in the record that Townsend had the financial means to start a new company, there is no evidence to support the trial court's apparent inference that Townsend intentionally failed to obtain employment that would generate sufficient revenue to satisfy her restitution obligations. Viewing the record in its entirety, we conclude the evidence presented at the restitution hearing is contrary to the trial court's finding that Townsend willfully

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<sup>1</sup> On cross-examination, Townsend acknowledged that she formerly had a gym membership that cost \$25 per month, but testified that she cancelled the membership because she could no longer afford it. She also acknowledged that she pays between \$39 and \$78 per month for massages to treat pain in her lower back. Even assuming, as the State argues, that the money Townsend paid for massages should have been applied to her restitution payment, the amount at issue, at most \$78 per month, is de minimis in comparison to the monthly restitution payment of \$4,500 and does not undermine the overwhelming evidence that Townsend does not have the ability to pay the full monthly restitution ordered as a term of her probation.

violated the terms of her probation when she failed to pay \$4,500 per month in restitution.

**CONCLUSION**

¶15 We vacate the order revoking probation and remand for proceedings consistent with this memorandum decision.

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\_/s/ PHILIP HALL, Presiding Judge

CONCURRING:

\_\_\_\_\_  
\_/s/ ANN A. SCOTT TIMMER, Judge

\_\_\_\_\_  
\_/s/ DONN KESSLER, Judge