

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

HALE HARRIS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D09-5119

[August 17, 2011]

PER CURIAM.

Affirmed.

MAY, C.J., and POLEN, J., concur.
WARNER, J., dissents with opinion.

WARNER, J., dissenting.

I must respectfully dissent. The court found that appellant violated probation by failing to pay restitution, but it failed to make the required findings that he had the ability to pay and willfully refused to do so. See *Aidone v. State*, 763 So. 2d 1127, 1129 (Fla. 4th DCA 1999); see also *Limbaugh v. State*, 16 So. 3d 954 (Fla. 5th DCA 2009). The court should have made a determination on the record. I cannot find this error harmless, because in my view the evidence presented does not show appellant had the ability to pay. While the trial court also found that appellant had violated probation by failing to report, in accordance with *Aidone* I would reverse with directions to the trial court to make the necessary findings regarding the failure to pay restitution. If the court determines that the appellant did not have the ability to pay and willfully refused to do so, then the court should vacate that ground for revocation and reconsider whether to revoke the appellant's probation on the sole remaining charge of failure to report.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Geoffrey D. Cohen, Judge; L.T. Case No. 06-13410 CF10A.

Carey Haughwout, Public Defender, and Dea Abramschmitt, Assistant Public Defender, West Palm Beach, and Hale R. Harris, South Bay, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Mitchell A. Egber, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.