

Appellant-defendant John Jacob Campbell appeals the trial court's order revoking his probation because he failed to be placed on GPS monitoring. Specifically, Campbell argues that his due process rights under the Fourteenth Amendment to the United States Constitution and Indiana Code section 35-38-2-3(f) were violated because he was indigent and his probation was revoked solely because of his inability to pay for GPS monitoring. Finding that Campbell's probation was revoked because of his inability to pay for GPS monitoring and that the trial court failed to consider alternatives to incarceration, we reverse and remand with instructions to the trial court to accommodate Campbell's indigence consistent with this opinion.

FACTS

On October 26, 2006, Campbell pleaded guilty to one count of child molesting¹ and one count of sexual misconduct with a minor,² both class C felonies. On December 7, 2006, Campbell was sentenced to concurrent eight-year terms on each count in the Department of Correction (DOC), with five years executed and three years suspended to probation.

Campbell was released from the DOC on July 9, 2009. After his release, Campbell met with his probation officer, Teresa Brown, and acknowledged the terms of probation, including the requirement that he be “[p]laced on GPS monitoring for the full term of probation paying all associated costs.” Appellant's App. p. 170. The cost of the

¹ Ind. Code § 35-42-4-3(b).

² I.C. § 35-42-4-9(b)(1).

GPS requirement was a “Fifty Dollar (\$50.00) initial fee and Twelve Dollars (\$12.00) a day, which works out to Eighty-four Dollars (\$84.00) a week, and a Hundred and Sixty-eight Dollars (\$168.00) every two (2) weeks, and Three Hundred and Thirty-six Dollars (\$336.00) a month.” Tr. p. 21.

On August 4, 2009, the State filed a petition to revoke Campbell’s probation because he failed to be placed on GPS monitoring upon release from incarceration. On November 2, 2009, the trial court conducted a hearing where Campbell explained that his financial difficulties prevented him from being placed on GPS monitoring. Specifically, Campbell stated that he left prison with no money, that his family was unable to help him financially, and that he was unable to secure employment.

Brown testified that her “hands are tied,” because “[u]nless this Defendant has a home, GPS monitoring cannot be placed, and that is a condition of probation.” Tr. p. 27. Brown stated that there was no “alternative other than revoking [Campbell’s] probation and sentencing [him] to the Department of Corrections [sic].” Id. Thereafter the trial court revoked Campbell’s probation and ordered that he serve the previously suspended three-year term. Campbell now appeals.

DISCUSSION AND DECISION

Campbell argues that the trial court erred by revoking his probation for his failure to be placed on GPS monitoring because he is indigent and could not afford the cost of GPS monitoring. Initially, we observe that probation is a matter of grace left to the trial court’s discretion rather than a right to which a criminal defendant is entitled. Prewitt v.

State, 878 N.E.2d 184, 188 (Ind. 2007). The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Ind. Code § 35-38-2-3; Prewitt, 878 N.E.2d at 188. Accordingly, this court reviews a trial court’s sentencing decision for a probation violation for an abuse of discretion. Prewitt, 878 N.E.2d at 188. An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances. Id.

Although a trial court may revoke probation if the defendant fails to comply with any of the conditions, “[p]robation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay.” I.C. § 35-38-2-3(f). In the restitution context, we have stated that to make this determination, “the court must inquire into the reasons for the failure to pay restitution.” Garrett v. State, 680 N.E.2d 1, 2 (Ind. Ct. App. 1997). Similarly, the United States Supreme Court has stated that it is “contrary to the fundamental fairness required by the Fourteenth Amendment” to revoke probation for failure to pay a fine or restitution unless 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).

Here, Campbell testified that he was unable to be placed on GPS monitoring because he lacked the financial resources to pay the associated cost of \$336 per month. Specifically, Campbell was unable to secure employment and his family was unable to assist him. The State offered no evidence to the contrary. Additionally, although Brown

testified that Campbell could not be placed on GPS monitoring because he did not have a residence, Campbell explained that he could not secure a residence because he lacked adequate financial resources.

The State highlights the fact that GPS monitoring was not a fine or restitution, but rather a condition of probation. Although GPS monitoring is not a fine or restitution, it is a financial obligation that was imposed on Campbell, who is indigent and cannot afford the \$336 monthly GPS fee immediately after his release from imprisonment. Accordingly, the State was required to show that Campbell “recklessly, knowingly, or intentionally fail[ed] to pay,” I.C. § 35-38-2-3(f), which it failed to do.

Nevertheless, the State asserts that its interest in protecting children is extremely high and there are no alternative means to effectuate the purpose; therefore no finding of willfulness, as required by Bearden, is necessary. The State directs us to State v. McCormick, 213 P.3d 32 (Wash. 2009), in support of its argument.

In McCormick, the defendant violated the terms of his probation by frequenting areas where children congregate. Id. at 34. The McCormick court noted that unlike Bearden, the defendant’s probation was not revoked for failure to pay a fine or restitution. Id. at 37. After conducting an analysis of the competing interests between the defendant and the state, the court concluded that a finding of willfulness was not required under the Fourteenth Amendment because the state has a strong interest in protecting the public and the defendant’s interest was diminished because he was a convicted sex offender. Id. at 39.

McCormick is distinguishable from the instant case because the record demonstrates that Campbell failed to comply with a term of his probation only because he lacked the financial resources to do so. Indeed, Campbell did not simply refuse to agree to or comply with a term of his probation. See Chism v. State, 807 N.E.2d 798, 804 (Ind. Ct. App. 2004) (rejecting defendant’s argument that the trial court could not order home detention as a condition of probation unless he agreed to it because “to ensure public safety, a defendant must agree to the terms and conditions of home detention before he or she may be placed on home detention”). And in light of Campbell’s undisputed testimony that he tried unsuccessfully to secure employment during the eleven days that he was released from imprisonment, we cannot support the trial court’s conclusion that Campbell willfully refused placement on the GPS monitoring system.

In sum, because the condition of probation requiring Campbell to be placed on GPS imposed a financial obligation, the State was required to show that Campbell knowingly, recklessly, or intentionally failed to comply, which it failed to do. Therefore, the trial court erred by revoking Campbell’s probation.

The judgment of trial court is reversed and remanded with instructions to the trial court to accommodate Campbell’s indigence consistent with this opinion.

DARDEN, J., and CRONE, J., concur.