

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001134-MR

AMADOU MBAYE

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 04-CR-00656

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Amadou Mbaye appeals the judgment and order of the Boone Circuit Court revoking his probation and ordering him to serve a four-year sentence. After our review, we affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Mbaye entered a plea of guilty to three counts of theft by deception over \$300 and a misdemeanor charge of theft by deception under \$300. By the trial court's order of August 15, 2005, he was sentenced to serve four years on each felony charge with those sentences to run concurrently for a total sentence of four years. That sentence was then probated for a period of four years.

Some of the conditions of his probation required Mbaye to pay court costs of \$151.00, pay restitution to the victim in the amount of \$1,350.00 and maintain suitable employment. He admitted he failed to fulfill any of those obligations and the trial court revoked his probation and ordered the four year sentence served on June 4, 2009. He now argues that based on his indigence, it was error for the trial court to revoke his probation because of his failure to meet the financial obligations.

We review a trial court's decision to revoke previously granted probation to determine whether or not the trial court abused its discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "[W]hether the trial court revoked upon one violation or three is of no consequence to the appellant so long as the evidence supports at least one violation." *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988).

Mbaye was not "sent . . . to jail because he was a poor person who was unable to pay various court-ordered fees" as he suggests in his brief to this

court. Fines “shall not be imposed upon any person determined by the court to be indigent[.]” Kentucky Revised Statutes (KRS) 534.030(4); KRS 534.040(4); *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994). There is no question Mbaye is indigent. He was represented by a court appointed public advocate for the original charges and the probation revocation as well as this appeal.

Similarly, court costs are not appropriately levied against an indigent defendant if “the court finds the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.” KRS 23A.205(2). We agree the trial court should not have imposed fines or court costs in the original sentence or the terms of probation.

The trial court however also found Mbaye did not pay restitution or maintain suitable employment. He now argues it is the fault of the United States government that he is unable to maintain suitable employment. We do not agree. Mbaye is from the country of Mauritania. He allegedly lost his passport which he now claims prohibits him from legally working in the United States. We note however the records of this case contain a valid United States social security number assigned to him. Regardless, it was neither the trial court’s nor the United States government’s responsibility to keep up with Mbaye’s passport or to take steps necessary for him to retain suitable employment. It was his alone.

Likewise, he failed to provide restitution. Our Supreme Court has recognized that, rather than a fine exacted from the defendant as punishment for

wrongdoing or court costs collected to defray the expense of the administration of justice, restitution is “designed to restore property or the value thereof to the victim.” *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986). “It is not punishment to make the criminal give back something which was never his and which was obtained by him only by commission of a crime.” *Id.*

The trial court did not abuse its discretion when it revoked Mbaye’s probation for a failure to maintain suitable employment as well as for failure to pay court ordered restitution. Either reason was adequate to allow the court to revoke the previously granted probation and order the sentence served. There was no error in that regard. We therefore affirm the determination of the Boone Circuit Court.

TAYLOR, CHIEF JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

LAMBERT, JUDGE, DISSENTING: I respectfully dissent. In *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed2d 221 (1983), the United States Supreme Court held that:

[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 alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient or 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.

Bearden, 461 U.S. at 672-673, 103 S.Ct. at 2073.

It is undisputed that the appellant was and is an indigent person. He was represented by a court appointed attorney for the original charge and the probation revocation hearing, as well as this appeal.

The *Bearden* court directs the trial court to consider alternate measures of punishment other than imprisonment if the trial court finds the probationer could not pay restitution or find employment despite sufficient bona fide efforts to do so.

Further, particularly in periods of recession, it is often impossible for illiterate persons, as is probationer, to find employment, no matter how diligently they search.

For the foregoing reasons, I would reverse and remand this matter to the Boone Circuit Court for a new probation revocation hearing, directing the court to consider alternative punishment to incarceration.

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BRIEF FOR APPELLEE:

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