

FILED: July 9, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOSEPH DAVID BELL,
Defendant-Appellant.

Josephine County Circuit Court
09CR0150

A149112

Thomas M. Hull, Judge.

Submitted on August 28, 2013.

Peter Gartlan, Chief Defender, and Andrew D. Robinson, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Pamela J. Walsh, Assistant Attorney General, filed the brief for respondent.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Schuman, Senior Judge.

SCHUMAN, S. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 SCHUMAN, S. J.

2 Defendant was convicted of assault in the fourth degree and interference
3 with making a report, and the court sentenced him to a period of probation. One of the
4 conditions of his probation was that he pay restitution, fines, and assessments. The state
5 subsequently filed, and served defendant with, a motion to show cause why he had not
6 made any payments. At the show cause hearing, the court found that defendant was in
7 violation of the financial conditions of probation. As a consequence of that violation, the
8 court extended defendant's probation for 12 additional months, required him to perform
9 32 hours of community service, and assessed a probation violation fee of \$25. On appeal,
10 defendant argues that the court failed to hold the state to its obligation to prove that
11 defendant's failure to pay was a willful default as opposed to an unavoidable result of his
12 poverty. He relies exclusively on *Bearden v. Georgia*, 461 US 660, 662, 103 S Ct 2064,
13 76 L Ed 2d 221 (1983), in which the Supreme Court held that a state could not revoke an
14 indigent defendant's probation and imprison him for failure to pay fines and restitution
15 "without determining that [the defendant] had not made sufficient bona fide efforts to pay
16 or that adequate alternative forms of punishment did not exist." The state responds that
17 *Bearden* does not apply here because defendant was not imprisoned for failure to pay; he
18 merely had his period of probation extended and was required to perform community
19 service. Even if *Bearden* does apply, the state contends that once the state established
20 that defendant failed to meet the financial obligations of his probation, the burden to
21 establish inability to pay fell to him, and he failed to meet that burden in this case. We

1 affirm.

2 At the outset, we emphasize that the gravamen of defendant's claim is that
3 the state violated his rights under the Fourteenth Amendment to the United States
4 Constitution because the state failed to demonstrate that his failure to pay fines and
5 restitution resulted from circumstances beyond his control. He does not dispute the
6 finding that he made no payments, nor does he contend that his failure to make payments
7 resulted from indigence; rather, he argues that the *state* had the obligation to prove that he
8 could have made payments but did not and that, at the least, the court had the obligation
9 independently to ask him if his failure resulted from inability to pay. We also note that
10 defendant advances no argument under any provision of the federal constitution beyond
11 the Fourteenth Amendment, nor does he advance any argument under the Oregon
12 Constitution.

13 With that understanding, we reject defendant's assignment of error.
14 *Bearden* unequivocally does not apply to situations in which a probationer's failure to pay
15 fines or restitution results in some sanction less onerous than imprisonment. The
16 introductory paragraph of *Bearden* establishes the opinion's scope and foreshadows its
17 outcome:

18 "The question in this case is whether the Fourteenth Amendment
19 prohibits a State from *revoking* an indigent defendant's probation for failure
20 to pay a fine and restitution. Its resolution involves a delicate balance
21 between the acceptability, and indeed wisdom, of considering all relevant
22 factors when determining an appropriate sentence for an individual and the
23 impermissibility of *imprisoning* a defendant solely because of his lack of
24 financial resources. We conclude that the trial court erred in automatically
25 revoking probation because petitioner could not pay his fine, without

1 determining that petitioner had not made sufficient bona fide efforts to pay
2 or that *adequate alternative forms of punishment did not exist.*"

3 *Id.* at 661-62 (emphases added). The opinion, then, opens with a statement limiting its
4 scope to probation revocations that result in imprisonment, and it implies that imposing
5 lesser forms of punishment would not violate the Fourteenth Amendment. Both of those
6 points are repeated throughout the opinion. *See, e.g., id.* at 667-68 (precedent establishes
7 that state cannot convert fine into jail term solely because a defendant is indigent; state
8 may not imprison a person "solely because he lacked the resources to pay" a fine); *id.* at
9 668-69 ("But if the probationer has made all reasonable efforts to pay the fine or
10 restitution, and yet cannot do so thorough no fault of his own, it is fundamentally unfair
11 to revoke probation automatically without considering whether adequate alternative
12 methods of punishing the defendant are available."); *id.* at 672 ("If the probationer could
13 not pay despite sufficient bona fide efforts to acquire the resources to do so, the court
14 must consider alternate measures of punishment other than imprisonment. Only if
15 alternate measures are not adequate to meet the State's interests in punishment and
16 deterrence may the court imprison a probationer who has made sufficient bona fide
17 efforts to pay.").

18 *Bearden*, then, does not hold that the Due Process Clause of the Fourteenth
19 Amendment prohibits imposing nonincarcerative sanctions on a probationer for failing to
20 pay fines or restitution. That requires us to reject defendant's argument, because he
21 provides no other source of law from which that prohibition might emanate. *Bearden*
22 stands only for the proposition that the court cannot imprison a probationer for failure to

1 make required payments unless the probationer failed to make bona fide efforts to pay
2 and alternatives to imprisonment are inadequate in a particular situation. 461 US at 672.
3 This case does not present a situation in which the state seeks to imprison defendant for
4 failing to meet the financial obligations of probation. Consequently, this case does not
5 present the question of who has the burden of establishing bona fide indigence or its
6 absence in a case where the prosecution does seek imprisonment. Further, nothing in this
7 opinion implies that, even in a situation involving sanctions short of imprisonment, a
8 court is prohibited from inquiring into the causes of a probationer's failure to make
9 payments and adjusting its ruling accordingly.

10 Affirmed.