

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DWAN MARIE EARSLEY,)
)
 Appellant,)
)
 -vs-)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2010-572

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 17 2011

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, JUDGE:

On July 22, 2009, Appellant, Dwan Marie Earsley, represented by counsel, entered a guilty plea in Pottawatomie County District Court Case No. CF-2009-115, to Uttering Two or More Bogus Checks Exceeding \$500.00. Pursuant to a plea agreement, sentencing was deferred five years, pursuant to terms and conditions of probation.¹

On October 19, 2009, the State filed a motion to accelerate Earsley's deferred sentence.² On December 2, 2010, a hearing was held before the Honorable Douglas L. Combs, District Judge. Earsley stipulated she had not paid restitution. The court twice passed sentencing in an effort to give Earsley a chance to come into compliance with the conditions of her probation. On March 31, 2010, after finding Earsley had not paid any restitution, the court accelerated her sentence to one year incarceration. From that order of acceleration, Earsley has perfected this appeal.³

¹ Earsley's probation included completing 100 hours of community service, and paying restitution of \$9,226 and court costs of \$953.

² The State's sole allegation was that Earsley had failed to pay any restitution.

³ Earsley has already served the one year sentence.

In her first assignment of error, Earsley contends the decision to accelerate her sentence was an abuse of discretion because her failure to pay was the result of her inability to pay, not a willful refusal to pay. Therefore, Earsley asserts the District Court's acceleration was tantamount to imprisoning her for being poor.⁴

This Court reviews the evidence presented at an acceleration hearing to determine whether or not the District Court's decision to accelerate a previously deferred judgment and sentence was an abuse of discretion. *Lewis v. State*, 2001 OK CR 6, ¶ 5, 21 P.3d 64, 65.

The State has the burden to prove by a preponderance of the evidence that the probationer failed to make restitution. *McCaskey v. State*, 1989 OK CR 63, ¶4, 781 P.2d 837. Once the State meets its burden of proof, the burden shifts to the probationer to show the failure to pay was not willful, or that a good faith effort to make restitution was made. *Id.* If the probationer presents evidence to show non-payment was not willful, the hearing court must make a finding of fact regarding the probationer's ability to pay. *Id.*

In this case, there is no question Earsley failed to make restitution payments. The question is whether the failure to pay was willful. After a review of the record on appeal, we **FIND** Earsley provided sufficient evidence to raise the

⁴ In support of her argument, Earsley relies on Supreme Court holdings in *Bearden v. Georgia*, 461 U.S. 660, 663-675, 103 S.Ct. 2064, 2068-2075, 76 L.Ed.2d 221 (1983) and *Minnesota v. Murphy*, 465 U.S. 420, 438, 104 S.Ct. 1136, 1148, 79 L.Ed.2d 409 (1984), and this Court's holdings in *Stuard v. State*, 1984 OK CR 67, 681 P.2d 1120, 1121, and *Sparks v. State*, 1987 OK CR 247, 745 P.2d 751, 753.

question as to whether her failure to pay was due to an inability to pay, or a willful refusal to pay. It is well-settled that probation cannot be revoked for failure to pay fines, costs or restitution, without a showing that the failure was willful and the defendant had the ability to pay. *Bearden, supra*. See also 22 O.S.2010, §991f(M)(3). In this case, the District Court never made a finding of fact regarding Earsley's ability to pay restitution and costs. We find that error constituted an abuse of discretion.⁵

DECISION

The order of the District Court of Pottawatomie County accelerating Dwan Marie Earsley's deferred sentence in Case No. CF-2009-115 is **REVERSED** and this matter is **REMANDED** to the District Court for a hearing wherein the court is to make findings of fact regarding Earsley's ability, or lack thereof, to pay restitution and court costs. The District Court should also consider its options under 22 O.S.2010, §991f. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2011), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY THE HONORABLE DOUGLAS L. COMBS, DISTRICT JUDGE

ATTORNEYS AT TRIAL

CREGG D. WEBB
DEFENSE COUNSEL
SHAWNEE, OKLAHOMA
ATTORNEY FOR APPELLANT

ATTORNEYS ON APPEAL

KIMBERLY D. HEINZE
APPELLATE DEFENSE COUNSEL
NORMAN, OKLAHOMA
ATTORNEY FOR APPELLANT

⁵ Our finding in this proposition of error renders Earsley's other propositions of error moot.

KAHRYN R. SAVAGE
ASSISTANT DISTRICT ATTORNEY
POTTAWATOMIE COUNTY
SHAWNEE, OKLAHOMA
ATTORNEY FOR APPELLEE

LORI S. CARTER
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OKLAHOMA
ATTORNEY FOR APPELEE

OPINION BY: SMITH, J.:

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR
LUMPKIN, J.:	CONCUR
C. JOHNSON, J.:	CONCUR