

revoked three years of McGhee's five year suspended sentence in Count II. From that order of revocation, McGhee has perfected this appeal.

In her only assignment of error, McGhee contends the decision to revoke her suspended sentence was an abuse of discretion because her failure to pay was the result of an inability to pay, not a willful refusal to pay.

A District Court's decision to revoke a suspended sentence in whole or in part is reviewable under the abuse of discretion standard. *Hampton v. State*, 2009 OK CR 4, 203 P.3d 179, 182. Further, revocation of a suspended sentence is justified even if a violation of only one condition is shown by a preponderance of the evidence. *McQueen v. State*, 1987 OK CR 162, ¶2, 740 P.2d 744, 745.

In hearings regarding payment of restitution, the State has the burden to prove by a preponderance of the evidence that the probationer failed to make restitution as ordered. *McCaskey v. State*, 1989 OK CR 63, ¶4, 781 P.2d 836, 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 argument McGhee failed to make the restitution payments as ordered. The question is whether her failure to pay was willful. After a review of the record on appeal, we **FIND** McGhee provided sufficient evidence that her failure to pay was due to an inability to pay, rather than 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 v. Georgia*, 461 U.S. 660, 663-675, 103 S.Ct. 2064, 2068-2075, 76 L.Ed.2d 221 (1983). *See also* 22 O.S.2010, §991f(M)(3). In this case, the District Court never made a finding of fact regarding McGhee's ability to pay restitution and costs. We find that error constituted an abuse of discretion.

DECISION

The order of the District Court of Oklahoma County revoking three years of Cynthia McGhee's five year suspended sentence in Case No. CF-2002-5846 is **REVERSED** and this matter is **REMANDED** to the District Court for a hearing wherein the court is to make findings of fact regarding McGhee's ability, or lack thereof, to pay restitution and court costs in accordance with 22 O.S.2010, §991f(N) and (O). 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 OKLAHOMA COUNTY THE HONORABLE DONALD L. DEASON, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, P.J.:
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur
SMITH, J.: Concur