

No. 33247

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

JAMES K. HOSBY,
Appellant, Defendant below

vs.

STATE OF WEST VIRGINIA,
Appellee, Plaintiff below,

APPELLANTS' BRIEF

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KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

During the April 2004 term of the Jefferson County Grand Jury, James K. Hosby was indicted for Persistent Failure to Provide Support for a Minor Child a felony and Persistent Failure to Provide support to Minor Children in accordance with and by Virtue of a court order Where Failure Results in an Arrearage of not less than Eight Thousand Dollars (\$8,000.00).

On August 13, 2004 Petitioner plead guilty to misdemeanor Failure to Provide Child Support a lesser included offense in Count I and was sentenced to one year in jail. That jail sentence was suspended and the Petitioner was placed on five years probation.

On May 16, 2005 the court entered an order directing that the Petitioner be taken into custody for his failure to abide by the terms of his probation, in particular it was alleged A) He failed to cooperate B) He did not report as directed in January, 2005, March 2005 April 2005 and May 2005 C) did not make regular child support payments D) did not notify the probation office of his change of employment and E) did not make regular restitution payments.

On June 24, 2005 the Circuit Court of Jefferson County held a probation revocation hearing for the Petitioner. The Petitioner admitted the charges contained in paragraphs B, C, D, and E. The Petitioner testified and also presented the testimony of his mother Genevieve Hosby. At the conclusion of the hearing the court found that the Petitioner violated the terms of his probation and that he should have his probation revoked and the original sentence be

reimposed.

It is from that order entered October 24, 2005 that we appeal. This court granted the appeal of the Appellant on November 28, 2006.

STATEMENT OF THE FACTS

James K. Hosby is a resident of Jefferson County, West Virginia. He, like so many others fell behind in his child support payments. As of August 31, 2004 he owed \$13,282.14 to his ex-wife and the State of West Virginia.

On June 24, 2005 the court conducted a hearing on the probation revocation case. At that hearing Mr. Hosby first admitted the allegations contained in paragraphs 5B, 5C, 5D, and 5E. Those allegations essentially showed that the Petitioner had lost contact with the probation office from January 2005 until May 2005 except for February, 2005 when he did report.

Mr. Hosby testified that as of the date of the hearing he was current on this child support and that he was current on his periodic restitution payments. (Tr. p.7)

He agreed that he had missed his January report date and explained that his mother had a stroke and that he had taken his mother to Winchester Hospital. (Tr. P. 8) He went on to say that he told the probation officer of his excuse at the February reporting meeting.

He testified that with regard to the March and April reporting date his mother had been transferred to D.C. General Hospital and that he was a wreck. He stated that he was going back and forth and was getting everything situated. (Tr. P. 8-9)

With regard to the May reporting date he stated that he missed that date because he had been kicked by a horse. He stated that as a result of that he had been out for a couple of weeks.

He stated that because of the foregoing he had gotten behind on his child support payments. He did state that he was current. (Tr.p.9)

In his defense he stated that he had been incarcerated and that the experience made him understand the seriousness of the offense. He went on to say that he was not a person that causes trouble and that he had been recently employed at Staples and was making \$11.80 per hour. (Tr. P. 10)

Upon cross examination the Petitioner again stated that he didn't report because he was "[b]ack and forth to the hospital mainly staying up there and everything." He didn't call because he

was a nervous wreck. (Tr.p.14)

Genevieve Hosby testified that she that she was in the Winchester Hospital in January 2005. She went on to stay "...I had everything wrong with me. I was in Winchester Hospital. They gave me up, and all my arteries closed up on me." (Tr. p. 15) She went on to say "...he's been a big help to me and kept me...He was fixing my food and what I'm supposed to eat. I really think he saved my life." (Tr. P. 15)

Later on in the proceeding the court inquired of the probation officer and it was determined that he was current for the payments set forth in the petition but that he was now two payments behind. (Tr. P. 21)

Assignment of Error Relied Upon and the Manner Decided Below

Petitioner contends that the court erred in revoking his probation because his failures was as a result of factors outside his control and was not contumacious.

POINTS AND AUTHORITIES RELIED UPON

Armstead vs. Dale 176 W.Va. 319, 294 S.E. 2d 122 (1982)

Louk vs. Haynes 199 W.Va. 482, S.E. 2d 780 (1976)

State v. Duke, 200 W.Va. 356, 489 S.E. 2d 738 (1997)

State vs. Hought 179 W.Va. 557, 371 S.E. 2d 54 (1988)

State ex rel Jones v. Trent 200 W.Va. 538, 456 S.E. 2d 351 (1997)

State vs. Martin 196 W.Va. 376 472 S.E. 2d 822

State vs. Minor 176 W.Va. 92 341, S.E. 2d 838 (1986)

DISCUSSION OF THE LAW

STANDARD OF REVIEW

When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, the court applies a three-pronged standard of review. The Court reviews the decision on the probation revocation motion under an abuse of discretion standard: the underlying facts are reviewed from a clearly erroneous standard; and question of law and interpretation of statutes and rules are subject to a *de novo* review. State v. Duke, 200 W.Va. 356, 489 S.E. 2d 738 (1997)

DISCUSSION

West Virginia Code §62-12-10 states that the court, if it appears to the court that any condition of probation has been violated, may revoke the probation and re-institute the original sentence. That section goes on to say that the judge may essentially excuse the violation of probation if the interests of justice do not require that the probationer serve his sentence.

It is a general principle of law that a violation of any of the terms of the probation may result in revocation Louk vs. Haynes 199 W.Va. 482, S.E. 2d 780 (1976).

Although probation is a matter of grace and not a matter of right, procedural protection surround the revocation proceeding State vs. Martin 196 W.Va. 376 472 S.E. 2d 822 (1996).

In this case where the violation is contested then the burden is on the State to prove the violation by a clear preponderance of evidence. State ex rel Jones v. Trent 200 W.Va. 538, 456 S.E. 2d 351 (1997).

In any proceeding to revoke probation for failure to pay costs and restitution, it is imperative that the State show and the court find that the Defendant had the ability to pay. Armstead

vs. Dale 176 W. Va. 319, 294 S.E. 2d 122 (1982). The court should look at the Defendant's ability to pay weighing available assets, income, attempts to find work and reasonable family expenses Armstead supra. The court should take into consideration probationer's individual economic situation State vs. Hought 179 W.Va. 557, 371 S.E. 2d 54 (1988).

Probation should not be revoked unless the Defendant's failure is contumacious. State vs. Minor 176 W.Va. 92, 341 S.E. 2d 838 (1986).

In this case the Petitioner and his mother testified that the mother had serious health problems, was hospitalized at Jefferson Memorial Hospital and at Washington Hospital Center. As a result of this illness the Petitioner was unable to work and pay restitution as he should. He was also unable to report to his probation officer as required. He testified that he tried to report, but the illness made it impossible.

When the Petitioner took the stand it became obvious that his love for his mother overcame his rational knowledge that he needed to comply totally with the court's order. His action was compassionate not contumacious.

In evaluation the interest of justice that is mentioned in the statute we must look to the specifics of the case. Basically this case is a collection action. Since the collection effort is for child support, since the State may have to support the child in the absence of parental support, the legislature has criminalized this essentially civil action.

While the interests of justice may be served by incarceration, in this case the facts do not support that punishment.

The Petitioner got behind on his child support. He admitted that. He was charged by indictment with failure to pay child support. As was the general process, he was given the automatic probation with the provision he pay future support and some on the arrearage.

Because of his mother's illness, he fell behind. He didn't report as he should, he was upset and distraught. After the charges were laid, he attempted to catch up the payments. He thought he had, but the probation officer calculated differently.

By his attempt to cure his default, Petition showed that he was not contumacious. He exercised poor judgment in his choices.

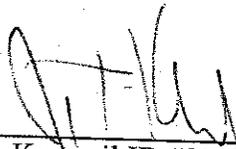
Looking at this case perspectivevely it becomes apparent that the public interest is not served by the Petitioner's incarceration. It will only increase his arrearage, cause the beneficiary of his support to suffer and make the State incur costs that the State should not be made to pay.

Continued probation will allow the Petitioner to continue working on his arrearage payments, make current payments and continue to be a productive member of society.

PRAYER FOR RELIEF

Wherefore your Petitioner prays that the court grant his a hearing on his appeal and reverse the decision of the Circuit Court of Jefferson County, West Virginia revoking his probation and sentencing him to one year in the Regional Jail.

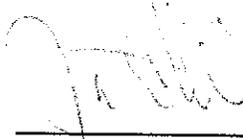
Respectfully submitted,
James K. Hosby, by
Counsel.



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CERTIFICATE OF SERVICE

I, James T. Kratovil, hereby certify that I mailed a copy of the foregoing **Appellant's Brief** to Dawn E. Warfield, Attorney General's Office, Capitol Building 1, Rm. E-26, 1900 Kanawha Blvd., Charleston, WV 25305 and to Michael Thompson, Prosecuting Attorney of Jefferson County at his address of P. O. Box 729, Charles Town, West Virginia 25414 on this the 5th day of January, 2007.



James T. Kratovil