

**NOT TO BE PUBLISHED**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Sacramento)**

----

THE PEOPLE,

Plaintiff and Respondent,

v.

JODII LE GRAND EVERETT,

Defendant and Appellant.

C066884

(Super. Ct. No. SF102351A)

In 2007, defendant Jodii Le Grand Everett pleaded guilty to infliction of corporal injury on a spouse or cohabitant and was placed on five years of formal probation. (Pen. Code, § 273.5, subd. (a).)<sup>1</sup> After being found in violation of his probation on several occasions, defendant's probation was revoked and terminated for failing to attend a domestic violence program.

---

<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of defendant's December 1, 2010 resentencing.

In December 2010, the trial court sentenced defendant to a previously suspended term of two years in state prison.<sup>2</sup>

Defendant appeals, contending the trial court violated his due process and equal protection rights by finding him in violation of his probation when the evidence established he had been unable to pay the fee for the domestic violence program. Disagreeing with this contention, we shall affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In January 2007, defendant pleaded guilty to inflicting corporal injury on a spouse or cohabitant with the understanding that sentencing in the matter would be continued for a year to give him an opportunity to complete a 52-week domestic violence program and have the offense reduced to a misdemeanor. Defendant had a prior misdemeanor conviction involving the same victim. He was referred to the domestic violence program in March 2007.

In July 2007, defendant was brought back before the trial court based on allegations that he had dropped out of the program and there were new charges pending against him involving the same victim. The court declared the offense a felony and granted defendant formal probation, with a requirement that he complete the 52-week program.

---

<sup>2</sup> Defendant was awarded 438 days of presentence credit (219 actual days and 219 conduct days). (§ 4019 [as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50]; see former § 2933, subd. (e)(1) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

Defendant's probation was revoked again in July 2008, following reports that he had failed to report to the domestic violence program and had "annoyed, threatened or harassed" the victim in violation of section 243, subdivision (e). Defendant was again referred to the program.

In January 2009, the probation department reported that defendant again had not enrolled in the domestic violence program, in addition to failing to report to the probation officer. A bench warrant was issued for his arrest. Defendant appeared in custody in the matter on July 16, 2010—one and a half years later. His probation was revoked and reinstated with the execution suspended of a two-year term in state prison. Defendant once again was referred to the program.

A probation report was filed in November 2010 alleging that defendant had again violated his probation by failing to enroll in the domestic violence program and by failing to obey the reasonable directions of his probation officer. According to the report, defendant was re-referred to the program in September 2010 and was given two weeks to enroll but failed to do so. He was given an additional day and, again, failed to enroll.

At the December 1, 2010 probation revocation hearing, the defense attorney explained that defendant's "concern is that he didn't have the money" to enroll in the domestic violence program.

The probation officer testified that defendant was given a referral to the program and two weeks to enroll. The referral indicated that the program should do a "pro bono evaluation" on defendant, although this would apply only to the weekly fee for the program, not the enrollment fee. Defendant was homeless at the time and was planning to apply for general relief.

Defendant came into the probation department on the last day to enroll in the program and to request a copy of his referral. Based on information on the probation department's "computer system," the probation officer told defendant he was already enrolled in the program. A few days later, the probation officer received information from the program that defendant had failed to make contact with them. Defendant called the probation officer the following day and told him that he could not get into the program. The probation officer "realized that there was a mistake" and gave defendant a one-day extension to enroll. The following day, defendant left the probation officer a message that he did not have the enrollment fee. The program subsequently notified the probation officer that when defendant came in to enroll, they "negotiated a lower fee" and told him to return with the money and "some financial documents." Defendant did not return.

When defendant subsequently reported to the probation department, he was arrested for violating his probation. He had several hundred dollars and a cell phone in his possession at

the time of his arrest. Defendant told the probation officer that the money was for "someone else's rent."

Defendant testified that he did not attempt to enroll in the program until the last day because he was trying to obtain general relief and "do other things to get the money to be able to pay for the class." He thought he should not try to enroll without money, but by the last day, he felt he needed "at least to show up." Defendant arrived after the program had closed for the day, then "went straight" to the probation department.

The following week, after receiving a one-day extension to enroll in the program, defendant attempted to enroll but again had no money. The person he spoke with at the program told him he needed to pay something to enroll and instructed him to return with \$5. Defendant called someone from whom he had tried to borrow money earlier, but the individual was unable to loan him the money. Defendant then called his probation officer to tell him what had happened.

Defendant testified it had "always been a monetary issue" when he did not enroll in the domestic violence program. He maintained he had no source of income and had been staying at the homeless shelter "[o]ff and on a few weeks." Defendant had been able to get food stamps but was unsuccessful in obtaining general relief. He had been denied general relief on three occasions, once because he arrived late for the appointment, another time because he was sitting in the wrong "area," and another time because he did not have the vehicle registration

for a minivan his wife had purchased for him. He stated that the minivan was nonoperational. Defendant explained that he had cash on him at the time of his arrest because he had agreed to deliver his wife's rent for her at a bank downtown while he was there to report to his probation officer. Defendant testified that he got his cell phone turned back on with \$50 his aunt had wired him so he would be able to "take care of [his] business."

The trial court found defendant in violation of his probation, commenting that, although there had been "some confusion about paperwork," defendant "waited until the last minute" to enroll and knew he would need some money to accomplish this. The court noted that defendant had been referred to the program numerous times and had completed only four sessions in the three years he had been on felony probation and the four years he had been on misdemeanor probation. The court pointed to the fact that defendant knew "the process," as he had been "able to get through the maze and get food stamps," but he had not made sufficient efforts to get enrolled in the domestic violence program.

### **DISCUSSION**

Defendant contends the trial court violated his rights to due process and equal protection by revoking his probation "without inquiring into and determining that he had the ability to pay for the [domestic violence] program." We disagree.

The trial court "may revoke and terminate . . . probation if the interests of justice so require and the court, in its

judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation . . . .” (§ 1203.2, subd. (a).) “The standard of proof in a probation revocation proceeding is proof by a preponderance of the evidence.” (*People v. Urke* (2011) 197 Cal.App.4th 766, 772.)

In *Bearden v. Georgia* (1983) 461 U.S. 660 [76 L.Ed.2d 221] (*Bearden*), the United States Supreme Court invoked due process and equal protection principles in analyzing an indigent defendant’s nonpayment of a fine as a basis for revoking probation, a situation defendant analogizes to his own. In *Bearden*, the court held: “[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 alternative measures of punishment other than imprisonment.” (*Id.* at p. 672 [76 L.Ed.2d. at p. 233].)

Turning to the present matter, the trial court revoked defendant’s probation after finding he had not made sufficient efforts to enroll in the domestic violence program. There is ample evidence to support this conclusion. According to

defendant, his inability to obtain general relief was the result of coming late to an appointment, sitting in the wrong "area," and not having vehicle registration information. Such conduct evinces a less-than-wholehearted effort on defendant's part to obtain funds to pay for the program. Defendant was able to have a relative wire him money to get his cell phone turned on. He had a nonoperational vehicle that presumably had some value. Yet, there is no evidence that defendant pursued these or any other avenues for obtaining the money necessary to enroll in the program, other than his ineffective applications for general relief and his attempt to borrow the \$5 enrollment fee from one person.

Moreover, if defendant had acted more diligently to attempt to enroll in the program, rather than waiting until after business hours on the last day, he could have contacted his probation officer or his attorney about his financial situation and sought a waiver of the fees from the trial court.

(§ 1203.097, subd. (a)(7)(A)(ii).) His dilatoriness in making initial contact with the program is further evidence that he was not doing everything possible to comply with the terms of his probation.

Defendant argues there was uncontroverted evidence that his failure to participate in the program was due to his inability to pay for the program. But the issue is broader than this. As noted in *Bearden*, "a probationer's failure to make sufficient bona fide efforts" to obtain the funds necessary to comply with

a condition of probation "may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense." (*Bearden, supra*, 461 U.S. at p. 668 [76 L.Ed.2d at p. 230].) Although it may be the case that defendant did not have the money to enroll in the program, the court was entitled to consider whether his efforts to obtain these funds were sufficient.

Defendant also claims the trial court's failure to state findings on the record regarding his ability to pay "violates [his] rights as established by Penal Code section 1203.2." Section 1203.2, subdivision (a) provides that probation may not be revoked based on a failure to pay *restitution* "unless the court determines that the defendant has willfully failed to pay and has the ability to pay." In the present matter, the probation revocation was based on defendant's failure to enroll in the domestic violence program and to obey reasonable directions of the probation officer. Defendant does not direct us to any authority, statutory or otherwise, requiring the trial court to make a determination of a defendant's ability to pay before revoking probation for failure to attend a domestic violence program. Even with regard to nonpayment of restitution, the court need not make express findings concerning a defendant's ability to pay, although it must be clear from the record that the court considered and weighed relevant factors in

making this determination. (*People v. Self* (1991)  
233 Cal.App.3d 414, 418.)

We do not disagree with defendant that if a probationer establishes to the satisfaction of the trial court his inability to pay for a domestic violence program, his probation cannot be revoked for failing to enroll in the program. Application of the principles set forth by the Supreme Court in *Bearden* would render revocation improper in most such cases. We observe only that, unlike with failure to pay fines or restitution, a trial court is required to make this determination only if the probationer puts his ability to pay for the program at issue. In the present matter, defendant's attorney did so at the commencement of the probation revocation hearing, and defendant's testimony exclusively focused on this issue.<sup>3</sup> However, as already discussed, there is ample evidence to support the trial court's conclusion that defendant did not make sufficient efforts to enroll in the program.

---

<sup>3</sup> Consequently, we reject the People's argument that defendant forfeited his claim for purposes of appeal by failing to object at the time of the hearing.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ BLEASE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.