

County Criminal Court: CRIMINAL LAW—Probation. It was error to find a willful and substantial violation of probation without first making a finding that Appellant had the ability to meet the financial requirements of probation. Reversed and remanded. *Benjamin Hill v. State of Florida*, No. 14-CF-1008-WS (Fla. 6th Cir. App. Ct. April 2, 2015).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**BENJAMIN JAMES HILL,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**UCN: 512014CF001008A000WS
Case No: CRC14001008CFAWS
Lower No: 12-2419-MM-WS**

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Appeal from Pasco County Court,

Honorable Debra Roberts,

Frank D. L. Winstead, Esq.
For Appellant,

Andrew C. Parker, Esq.
Assistant State Attorney,
for Appellee.

ORDER AND OPINION

It was error to find Appellant willfully and substantially violated probation for failure meet the financial requirements of probation, without making a specific finding of Appellant's ability to pay. The cause is reversed and remanded for further proceedings to determine Appellant's ability to meet financial probationary requirements.

STATEMENT OF THE CASE AND FACTS

Appellant was arrested for possession of marijuana, a first degree misdemeanor, in violation of § 893.13(6)(b), Fla. Stat., and entered a plea of nolo contendere as to the

charge. Appellant was also charged with petit theft in violation of § 812.014(3)(a), Fla. Stat., and entered a plea of guilty as to this charge. The trial court withheld adjudication on both charges and placed Appellant on probation for 12 months, including conditions of probation and payment of court costs and restitution.

On October 1, 2013, the Misdemeanor Probation Division filed an Affidavit of Violation of Probation. On November 8, 2013, an Amended Affidavit of Violation of Probation was filed, seeking to revoke Appellant's probation based on failure to meet financial requirements of probation, and a positive drug screen for marijuana. A hearing was held on January 7, 2014, at which Appellant testified that he began receiving \$600.00 monthly disability benefits for Crohn's disease around May, 2013,¹ that he received \$70.00 monthly in food stamps, is a Medicaid recipient, and that his monthly costs exceed his monthly benefits. Appellant testified his disability prevents him from doing most jobs requiring physical labor,² and that he made attempts to find a job which did not require physical labor, including taking college classes, but was unsuccessful in finding work. Appellant was previously employed as a telemarketer, but testified that he lost this position due to the stomach pains associated with the disability. Appellant also expressed concern at the hearing that obtaining employment would result in a termination of disability benefits. Appellant testified his monthly bills were approximately \$490.00,³ and that he pays between \$150.00 and \$200.00 monthly for medical Ostomy bags, and \$50.00 for gas and car insurance. Appellant testified he owned a car, a laptop, and an old television but did not have cable or internet. Appellant testified he had to spend an additional \$70.00 monthly on food, and would cook at home or eat fast food to save money. Appellant testified that each month he paid what he could afford of his probationary costs, that during some months he could not make any payments, but did intend to finish making the payments.

¹ Appellant's probation began on December 12, 2012.

² Testimony at trial was that typical symptoms of Appellant's disability include ulcers of the stomach and colon lining, nausea, vomiting, insomnia, pain and high fever, which Appellant testified he has suffered from since the age of ten, but only began receiving disability benefits in May, 2013.

³ Appellant's itemized average monthly bills were specifically \$200.00 monthly for water, \$150.00 monthly for electricity, \$30.00 for trash collection, \$60.00 for the phone bill and \$50.00 for miscellaneous household items.

The trial court found Appellant was not in violation of probation based on the drug screen, but found a willful violation for failure to pay supervision fees (\$220.00 owing out of \$660.00 total), failure to pay monthly court costs and fines of \$284.00, failure to pay monthly \$50.00 Public Defender fees and a \$50.00 Indigency Application fee, and failure to pay the cost of investigation (\$52.00) and the Clerk Payment Plan fee (\$25.00). Appellant was adjudicated guilty and sentenced to 100 days in jail with credit for time served, and ordered to pay court costs and a public defender fee. Appellant filed a timely Notice of Appeal in this Court.

STANDARD OF REVIEW

The trial court must find a willful and substantial violation of the conditions of probation, supported by competent evidence, prior to revoking probation. *Savage v. State*, 120 So. 3d 619, 623 (Fla. 2d DCA 2013); *Sanders v. State*, 675 So. 2d 665, 665-66 (Fla. 2d DCA 1996). When reviewing an order revoking probation, this Court first reviews the record for competent evidence to support a finding of a substantial and willful violation, and then determines “whether the trial court abused its discretion in revoking probation.” *Savage*, 120 So. 3d at 622, 624. See *Russell v. State*, 982 So. 2d 642 (Fla. 2008). An abuse of discretion occurs when the trial court acts in an arbitrary or unreasonable manner when determining whether revocation is warranted. See *Savage*, 120 So. 2d at 623; *Friddle v. State*, 989 So. 2d 1254 (Fla. 1st DCA 2008). Questions of law in a case involving probation revocation are reviewed de novo. See *Koile v. State*, 934 So. 2d 1226, 1229 (Fla. 2006).

LAW AND ANALYSIS

Appellant maintains the revocation of probation was in error on several grounds. First, the trial court failed to make a specific finding that Appellant had the ability to meet the financial requirements of probation prior to revoking probation and sentencing Appellant to 100 days in jail. The law is established that a trial court’s failure to make a specific finding that a probationer had the ability to pay financial requirements of probation, prior to a revocation of probation, is reversible error. *Del Valle v. State*, 80 So. 3d 999, 1015 (Fla. 2011); *Brown v. State*, 6 So. 3d 671, 672 (Fla. 2d DCA 2009). At

trial, the court found that based on the evidence presented, Appellant was “guilty of willful violation” of financial probationary requirements, but did not make a finding of ability to pay prior to the court’s finding of willful violation.

Second, Appellant maintains State failed to present evidence sufficient to prove by a preponderance of the evidence that the failure to fulfill conditions was willful and substantial. See *Mata v. State*, 31 So. 3d 257, 259 (Fla. 4th DCA 2010). Although at trial State argued Appellant could have performed community service specifically available for persons with disabilities such as Appellant’s in order to defray court costs, Appellant testified that he informed his probation officer his disability prevented him from performing community service, and that his probation officer never informed Appellant of available alternative community service opportunities. Appellant made efforts to pay costs despite receiving limited monetary assistance, and Appellant’s probation officer testified Appellant paid over half the cost of supervision, with \$220.00 out of \$660.00 owing. Appellant relies on the trial court’s finding that Appellant was indigent for purposes of the revocation proceedings as evidence that Appellant lacked the ability pay, and therefore revocation was inappropriate. See *Bowen v. Bowen*, 471 So. 2d 1274, 1279 (Fla. 1985); *In re N.V. v. State*, 890 So. 2d 1232 (Fla. 2d DCA 2005). Appellant’s probation officer testified Appellant completed other requirements of probation, including submitting to a substance abuse evaluation and completing recommended treatment, and promptly complying with the probation officer’s ordered drug screens.

Although probation may be revoked when a probationer willfully refuses to meet financial conditions and has the means to do so, “if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.” *Del Valle*, 80 So. 3d at 1005 (citing *Bearden v. Georgia*, 461 U.S. 660 (1983)). See *Hunter v. State*, 855 So. 2d 677 (Fla. 2d DCA 2003) (finding insufficient evidence of a willful violation where defendant’s indigency and disability status were undisputed and defendant demonstrated a willingness to comply with requirements).

Appellant further alleges it was error to find violation of three conditions of probation, because the conditions did not include a specific date by which payment was due, and Appellant's term of probation had not expired when the State filed the Amended Affidavit of Violation of Probation. See *Shipman v. State*, 903 So. 2d 386, 387 (Fla. 2d DCA 2005) (reversing revocation for failure to pay costs when the order did not include a schedule or time period for payment); *Wilkerson v. State*, 884 So. 2d 153 (Fla. 2d DCA 2004) (finding error when violation was based on noncompliance with a requirement for which no completion date is specified and time remained to fulfill the requirement).

State acknowledges that the cause must be remanded for an express finding on Appellant's ability to meet the financial obligations of probation. State contends the record supports a finding of Appellant's ability to pay, and that the trial court made this finding implicitly when the court found Appellant willfully failed to comply with probationary conditions. Specifically, that Appellant's \$60.00 monthly expenditure on a mobile phone is not a necessary expense and that Appellant could have sold the television and laptop computer to pay costs, although there is no evidence in the record as to the value of these items. State contends that proceedings on remand should be limited to require the trial court make the required specific finding before sentencing, contending that any further evidentiary hearing is unnecessary.

The determination of ability to pay is a factual determination to be made by the trial court on a case by case basis. See *Russell v. State*, 982 So. 2d 642 (Fla. 2008). This Court will not make a finding that is properly a decision for the trial court. See *id.* Because the trial court failed to make a finding as to Appellant's ability to pay, the cause must be reversed and remanded for further proceedings to determine Appellant's ability to pay, a prerequisite to finding a willful and substantial violation. This Court's review of a revocation of probation first determines whether the record contains competent evidence to support a finding of a substantial and willful violation, and "only then will we assess whether the trial court abused its discretion in revoking probation." See *Savage*, 120 So. 3d at 622, 624. Absent a specific finding on the ability to pay, there can be no

finding of a willful and substantial violation, and this Court therefore may not conduct further review of the matter.

CONCLUSION

The order is reversed and remanded for further proceedings to determine the issue of Appellant's ability to meet financial probationary requirements. The record does not demonstrate the trial court found Appellant had the requisite ability to pay prior to finding a willful and substantial violation of financial conditions of probation.

It is ORDERED AND ADJUDGED that the cause is hereby REVERSED AND REMANDED for proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 2nd day of April, 2015.

Original order entered on April 2, 2015, by Circuit Judges Daniel D. Diskey, Linda Babb and Shawn Crane.