

Supreme Court of Florida

ORIGINAL

No. 79,153

BILL H. HEWETT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

[February 4, 1993]

KOGAN, J.

We have for review Hewett v. State, 588 So. 2d 635 (Fla. 5th DCA 1991), based on express and direct conflict with Clark v. State, 579 So. 2d 109 (Fla. 1991). We have jurisdiction. Art. v, § 3(b)(3), Fla. Const.

While on two years' probation for grand theft, Bill H. Hewett allegedly violated the terms of his probation by failing to pay court-ordered restitution. An affidavit alleging the violation was filed May 3, 1990. The hearing was held August 10, 1990. The trial court found Hewett guilty of the violation but set this aside based on Hewett's undisputed inability to pay. **Over** objection, the trial court then extended Hewett's probation for two years, waived supervision costs, but reimposed the restitution requirement.

On appeal, Hewett argued that there was no authority to extend his probation in the absence of a finding of wilful violation. The district court rejected this argument on grounds that the 1984 amendments to the sentencing statutes authorized the procedure used here, Hewett v. State, 588 So. 2d 635 (Fla. 5th DCA 1991). The statute in question now provides in pertinent **part** :

If the probationer or offender cannot **pay** restitution or the cost of supervision despite sufficient bona fide efforts, the court shall consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probationer or offender in community control who has demonstrated sufficient bona fide efforts to pay restitution or the cost of supervision.

§ 948.06(4), Fla. Stat. (1991). The statutory language is strongly underscored by Florida's constitutional prohibition against imprisoning someone solely for debt except in cases of fraud. Art. I, § 11, Fla. Const.

Under Florida law, penal statutes such as the one at issue here must be strictly construed, Art. I, § 9, Fla. Const.; see Jeffries v. State, 18 Fla. L. Weekly S7 (Fla. Dec. 24, 1992); Perkins v. State, 576 So. 2d 1310 (Fla. 1991). In this light, we do not read the above statute as authorizing any extension of probation based on simple inability to pay restitution. Rather, the trial court has the choice only of "alternate measures" or imprisonment, with the latter being strongly disfavored. There is no ability to extend probation in the absence of wilful violation of the terms of probation. Clark. Had the legislature intended the term "alternate measures" to include coercive forms of detention or control, we believe it would have said *so* expressly.

Rather, we believe that in this context "alternate measures" can include imposition of a community service requirement or similar measures falling short of more coercive measures such as community control, probation, or imprisonment. If the probationer then fails to comply despite the ability to do *so*, contempt proceedings and/or revocation of any then-existing probation could be justified. Another alternative might be entry of a judgment against the probationer, which then could be enforced against the probationer's property under the applicable law. Accordingly, the opinion below is quashed, **and** this cause is remanded for further proceedings consistent with our views **here**.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW and HARDING, JJ.,
concur.

GRIMES, J., concurs with an opinion, in which OVERTON and
McDONALD, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF
FILED, DETERMINED.

GRIMES, J., concurring.

If the statute authorized it, I would see no objection to extending the time within which the defendant could make restitution beyond the probationary period. Then, if there was a failure to pay the restitution despite the ability to do so, the defendant could be held in contempt.

OVERTON and McDONALD, JJ., concur.

Application for Review of the Decision of the District Court of
Appeal - Direct Conflict of Decisions

Fifth District - Case No. 90-1724

(Brevard County)

James B. Gibson, Public Defender and Michael S. Becker, Assistant
Public Defender, Seventh Judicial Circuit, Daytona Beach,
Florida,

for Petitioner

Robert A. Butterworth, Attorney General; and David G. Mersch and
Bonnie Jean Parrish, Assistant Attorneys General, Daytona Beach,
Florida,

for Respondent