

COURT OF APPEALS OF VIRGINIA

Present: Judges Bumgardner, Humphreys and Clements
Argued at Richmond, Virginia

MICHAEL GEORGE KESELICA

v. Record No. 2270-99-4

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RUDOLPH BUMGARDNER, III
NOVEMBER 28, 2000

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Stanley P. Klein, Judge

John Kenneth Zwerling (Lisa Bondareff Kemler;
Zwerling & Kemler, P.C., on briefs), for
appellant.

Richard B. Smith, Senior Assistant Attorney
General (Mark L. Earley, Attorney General, on
brief), for appellee.

Michael G. Keselica appeals the revocation of his suspended sentence for violating the terms of his probation. He contends the trial court shifted the burden of proof to him and denied him the opportunity to present evidence at the show-cause hearing. He also contends the trial court abused its discretion in revoking seven years of his eleven-year suspended sentence. Concluding the trial court did not err, we affirm.

In 1995, the trial court convicted the defendant of embezzling \$62,000 from an elderly couple. The trial court suspended a major portion of the sentence and ordered

restitution under a plan proposed by the defendant.¹ In September 1999, the trial court issued a rule to show cause that alleged the defendant violated two conditions of probation. Condition 3 required the defendant to pay restitution of \$1,000 per month to the victims from whom he embezzled money. He admits he missed payments but asserts his failure was not willful.² Condition 6 required the defendant to cooperate and be honest with his probation officer. The defendant does not contest he violated that condition. While the defendant had made substantial payments in Virginia, he had only made two payments in the eight months preceding the hearing. The trial court found the defendant violated both conditions of probation.

The record reflects the trial judge did not shift the burden of proof or prohibit the defendant from presenting evidence. The judge noted the defendant "has the burden of showing cause why the suspended sentence should not now be put

¹ On April 21, 1995, the defendant received a sentence of twelve years with all but thirty months suspended and eight years of probation, which included restitution once work release was established. The trial court granted the defendant's June 16, 1995 motion to reconsider the sentence and amended it to all but one year, three hundred sixty four days suspended. The defendant was released in November 1995.

At about the same time, a Maryland court placed the defendant on probation for crimes similar to the one committed in Virginia. The Maryland court ordered him to pay restitution of approximately \$200,000 at the rate of \$1,000 per month.

² The defendant paid \$40,000, but still owed \$25,310 on the day of the hearing. He had only made ten payments in Virginia since 1997. The total paid from 1995 in both Virginia and Maryland was \$66,000.

into effect if I find that the Commonwealth's evidence is sufficient to prove that there's a violation of the terms of his probation." (Emphasis added). The probation officer testified about the defendant's probation adjustment. He did not pay restitution consistently in either Virginia or Maryland and deceived his probation officers. After the Commonwealth rested, the trial court asked if the defendant wished to present evidence, and the defendant elected not to do so.

The defendant argues that his failure to make restitution was not willful. He relies upon Duff v. Commonwealth, 16 Va. App. 293, 429 S.E.2d 465 (1993). In Duff, the parties agreed that the failure to pay restitution "resulted from an inability to pay . . . rather than from an unwillingness or refusal to do so." Id. at 296, 429 S.E.2d at 466. The trial judge noted there was no evidence the defendant was "holding back on us or trying to pull the wool over our eyes" and "I'm . . . confident . . . he is not perpetrating any fraud . . . on us." Id. at 295, 429 S.E.2d at 466. The revocation was unreasonable because the violation was not willful or the result of fraud. Id. at 298, 429 S.E.2d at 467 (analyzing Code §§ 19.2-305.1 and -306).

In this case, there was no evidence the defendant's failure resulted from an inability to pay. The defendant had continued making monthly payments from February to August 1998 despite being out of work. He moved to Rhode Island and earned net

wages of approximately \$2,000 per month. The defendant represented his father could pay the entire balance due.³

While the defendant suggested non-payment resulted from owing restitution in both Virginia and Maryland, the defendant had originally submitted the restitution plan. He had assured the trial court he could handle the dual obligations and he would consistently pay \$1,000 per month in Virginia. Indeed, the trial court ameliorated its original sentence based on the representation the defendant had the ability to pay consistently, and the defendant never sought to amend the order. The trial judge believed the defendant intentionally misrepresented facts to both probation officers and both courts.

While the defendant maintained his failure to pay was not willful, he did not take advantage of his opportunity to present evidence to show why he had not paid or why his sentence should not be revoked. The trial court could infer from the Commonwealth's evidence that the defendant was playing one court against the other and his non-payment was willful. The judge noted that after the Commonwealth established the defendant's failure to pay restitution, "then the burden . . . shift[ed] to the Defense to put on evidence of any inability to pay." The

³ On the day set for the show-cause hearing, the defendant moved for a continuance of one week. He had a hearing pending in Maryland the following Monday. If the Maryland court did not incarcerate him for failure to pay its restitution, the defendant represented that his father would pay the entire balance of his Virginia restitution obligation.

trial court did not abuse its discretion in finding a probation violation.

Next, we consider whether the trial court abused its discretion in revoking seven years of the defendant's suspended sentence. "A trial court has broad discretion to revoke a suspended sentence and probation based on Code § 19.2-306, which allows a court to do so 'for any cause deemed by it sufficient.' The court's findings of fact and judgment will not be reversed unless there is a clear showing of abuse of discretion." Davis v. Commonwealth, 12 Va. App. 81, 86, 402 S.E.2d 684, 687 (1991) (citations omitted).

Originally, the trial court imposed an innovative sentence enabling the defendant to rehabilitate himself by repaying the elderly couple whom he had defrauded of their life savings. The defendant failed to pay restitution as he had proposed and lied to his probation officer. The facts of this case establish the defendant violated two separate conditions of probation. The judge believed the defendant was deceiving both the courts and his probation officers. The trial court "'undoubtedly has the power to revoke [the suspension of a sentence] when the defendant has failed to comply with the conditions of the suspension.'" Russnak v. Commonwealth, 10 Va. App. 317, 321, 392 S.E.2d 491, 493 (1990) (quoting Griffin v. Cunningham, 205 Va. 349, 354, 136 S.E.2d 840, 844 (1964)).

It is within the trial court's purview to weigh any mitigating factors presented by the defendant, but the defendant chose not to present evidence. The record establishes that the trial court had sufficient cause to revoke the entire suspended sentence and did not abuse its discretion in revoking that portion it did revoke. Accordingly, we affirm.

Affirmed.