

IN THE COURT OF APPEALS OF IOWA

No. 3-588 / 12-2141
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROSEMARIE GREEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Casey D. Jones,
District Associate Judge.

Defendant appeals the court's order revoking her deferred judgment.

AFFIRMED.

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Adam Kenworthy, Student Legal Intern, Jerry Vander Sanden, County
Attorney, and Lisa Epp, Assistant County Attorney, for appellee.

Heard by Mullins, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

BOWER, J.

Rosemarie Green challenges the court's order revoking her deferred judgment. We affirm.

I. Background Facts and Proceedings

After Green was charged with a serious misdemeanor, possession of a controlled substance—marijuana, she entered a written plea of guilty in September 2011. See Iowa Code § 124.401(5) (2011). Green's plea agreement provides for "minimums or deferred" at sentencing. The court accepted Green's plea and scheduled a sentencing hearing. On November 10, 2011, the court deferred judgment until November 10, 2012, and placed Green on self-supervised probation. The court ordered Green to complete conditions of probation, including:

[Green] shall pay a supervision fee to the DCS in the amount of \$300. The supervision fee shall be paid directly to the Department of Correctional Services and shall be paid by November 10, 2012.

. . . .

Violation of these conditions or failing to complete these conditions may result in revocation of probation or contempt of court.

The court finds [Green] is unable to make full payment of the obligations due today. The financial obligations imposed by this order (with the exception of the enrollment fee) shall be paid at the rate of \$50 per month commencing December 10, 2011, and payable on the [tenth] day of each month thereafter.

Also on November 10, Green personally signed and agreed to the probation terms: "I am required to pay all fines, surcharges, court costs"; "I am required to pay a \$300.00 supervision fee payable to the Department of Correctional Services"; "I am to have paid all monies owed . . . within the time

frame specified in my sentencing order;” and, “If I do not comply, I will be ordered to appear in court to explain why, which will require additional court costs and possible incarceration.”

On May 15, 2012, Green’s probation officer sent her a letter reminding her to pay her fees and costs. The fees and costs were in bold: “**SUPERVISION FEES. \$300.00** remains due **COURT COSTS. \$357.50** remains due.” The officer warned Green her file would be reviewed in another month and if she failed to complete the “conditions of probation . . . your file will be sent to the court requesting revocation.” By June 26, 2012, Green had paid the \$357.50 owed but not the \$300 supervision fee.

In August 2012 the court, noting Green “has completed all conditions of probation except paying the \$300.00 supervision fee,” entered an order allowing Green an additional thirty days to pay the \$300 fee. The court informed Green if she failed to pay, “this matter will be scheduled for in-court hearing and revocation of probation will be considered.” Green did not pay, and the court’s September 19 order required Green to personally appear at a probation review hearing on October 12.

On October 12, at Green’s request, the court reset the “pending Application for Adjudication of Guilt and Sentencing” to November 9, 2012. The court ordered Green to “contact the [DCS] about community service and/or waiver of the supervision fee.”

At the November 9 hearing, Green admitted she was in violation of the terms of her probation but contended, “I just didn’t have a way to pay it.” Green

believed a drug charge on her record would be devastating and stated, “I just need you to give me one more month to pay this supervision fee.” Green proposed: “I’ll talk to my landlord and I’ll ask to be behind one month in rent I don’t get in any trouble, I don’t have violations. My only problem was coming up with this extra money to pay that fee.” Green stated paying the fee instead of her bills would have caused her family to become homeless.

The court pointed out, at the time Green’s deferred judgment, “I know I made it clear . . . the monetary aspects of the deferred judgment are just as important as everything else.” Further, Green was allowed 364 days to pay the supervision fee, she had received many reminders, and she had been granted several extensions of time. “[Y]ou have been given one more time at least two or three more times.” Green responded she had a plan now—“If I can talk to [my landlord] and let him know I can only give him \$400 this month and I have to pay this fee and get it over with, I believe [he will] be willing to do that.” Green’s plan was to repay the landlord at the rate of \$100 extra rent per month. “I didn’t think of this before But I know that this is an option that I do have.”

The court reminded Green she had been given one year to take care of it and “you [are] saying that this just occurred to you I don’t know how I could have made it more clear to you that it was serious to get these things paid off.” Green stated: “I wish you could just take it into consideration that something like this has never happened.”

THE COURT: I did. That’s why you got a deferred judgment and you had the option to not get a deferred judgment. But you chose that affirmatively, and that was taken into account

. . . .

THE STATE: Your Honor . . . she's had, [as] you say, 364 days to pay this. A dollar a day would have done it We [would] ask her deferred judgment be revoked at this time.

The court again noted her prior extensions and asked Green to explain “why did you ask for a reset last time?” Green stated, “I did not know that it was another additional \$300 that I had to go to the supervised place.” Also, “I did not take [the landlord] into consideration. But I know that he will do it for me.” The court ruled: “I am not going to give you more time, Ms. Green. This is ridiculous. So whatever you told the Court for your continuance a month ago, four weeks ago, you obviously had no intentions of trying anything else to get it paid off.”

The court revoked the deferred judgment, entered judgment of conviction, sentenced Green to two days in jail, and provided the jail time could be served on a weekend “to accommodate [Green’s] employment, education, or family situation.” This appeal followed.

II. Scope and Standards of Review

We review Green’s claim the court erred in revoking her probation and sentencing her to incarceration for errors at law. See *State v. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003). We will not upset Green’s sentence on appellate review unless she demonstrates an abuse of trial court discretion. See *id.* “An abuse of discretion will not be found unless we are able to discern the decision was exercised on grounds or for reasons that were clearly untenable or unreasonable.” *Id.* We review the constitutional claims Green raises de novo. See *State v. Becker*, 818 N.W.2d 135, 141 (Iowa 2012).

III. Merits

At the hearing, Green admitted she violated her probation. On appeal, Green first contends the court's revocation of her deferred judgment was an abuse of discretion because on "this record, there is no evidence Ms. Green had the ability to pay the supervision fee."

We note a sentencing judge has several *discretionary* options when a defendant violates probation, including "revoke the probation" and "require the defendant to serve the sentence imposed or any lesser sentence, and, if imposition of sentence was deferred, [the court] may impose any sentence which might originally have been imposed." Iowa Code § 909.11(5). In *Bearden v. Georgia*, 461 U.S. 660, 668 (1983), the United States Supreme Court explained:

[A] probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution 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.

Green's deferred judgment allowed monthly payments. At the hearing, she repeatedly told the court she had the ability to work out a deal with her landlord and "this is an option I do have." Green's plan involved "borrowing" the entire fee owed and repaying the landlord \$100 per month on top of her \$800 monthly rent. Accordingly, Green's own statements show she had the means to pay \$100 per month towards a debt, thus providing evidence supporting the court's conclusion her failure to pay, despite numerous extensions, was willful. We conclude the court acted within its discretion in revoking Green's probation and sentencing her to serve two days in jail.

Second, Green contends her constitutional right to equal protection was violated by the court “making a determination the passage of time alone, independent of proof of her ability to pay at any time, provided cause for revocation for non-payment of the fee.” See *State v Snyder*, 203 N.W.2d 280, 286 (Iowa 1972) (stating criminal justice distinctions “between the rich and poor are generally not likely to bear up under constitutional scrutiny”). As discussed above, Green’s probation was not revoked because she could not pay, she was ordered to jail because she would not pay. See *Bearden*, 461 U.S. at 668.

Third, Green contends the court’s order violated the Iowa Constitution provision: “No person shall be imprisoned for debt in any *civil* action.” Iowa Const. art I, § 19 (emphasis added). The language relied upon by Green is only applicable to civil actions and does not bar imprisonment for willful refusal to pay a judgment for costs in a criminal case. See *Boyer v. Kinnick*, 57 N.W. 691, 691-92 (Iowa 1894) (ruling “a judgment for costs in a criminal action is not, within the constitutional meaning, a debt”). We find no merit to this claim.

Finally, Green contends her trial counsel rendered ineffective assistance at the revocation hearing. This is not the “rare case” allowing us to decide Green’s ineffective-assistance claim on direct appeal without an evidentiary hearing. See *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We preserve her claim for possible postconviction relief proceedings.

AFFIRMED.