Can Probation Be Revoked When Probationers Do Not Willfully Violate the Terms or Conditions of Probation?

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Introduction

IT IS well settled in American criminal jurisprudence that, with rare exception, for an individual to be held liable for a criminal act, there must be some form of culpability on the part of the individual. The concept of a blameworthy state of mind as being essential to liability for a criminal act has existed for centuries. A perusal of virtually any text on substantive criminal law will lead one to the phrase *actus non facit reum, nisi sit rea,* an act does not make the actor guilty in the eyes of criminal law unless there was a guilty mind (Black, 1968).

The concepts of *actus reus* and *mens rea* were so critical under English common law that William Blackstone noted, "[T]o make a complete crime, cognizable by human laws, there must be both a will and an act" (Blackstone, 1983, p. 21). More than a century later, Oliver Wendell Holmes, Jr., was willing to identify "actual personal culpability" as the very ground spring of our entire system of legal liability (Holmes, 1982, p. 4).

Notwithstanding the growth in strict liability offenses (*see, e.g.*, Perkins, 1983), the *Model Penal Code* continues to express a clear juridical preference that blameworthiness for a criminal act find its source in the actor's state of mind. Section 2.02 of that work, for instance, provides that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently" (American Law Institute, 1985).

In the context of probation revocation, the issue is less clear as to whether probation can be revoked in instances where the offender has not willfully violated the terms or conditions of his or her sentence. This article identifies and reviews recent cases on the issue. We begin by assessing the Supreme Court's holding in *Bearden v. Georgia* (1983), the case often used as a guidepost by lower courts in determining whether probation may be revoked when an offender, ostensibly through no fault of his or her own, is unable to comply with the terms or conditions of the probationary sentence imposed. This article also surveys and analyzes those cases where courts have permitted revocation even though the offenders did not willfully violate probation. Cases where courts held that probation could not be revoked because of the absence of willfulness on the part of the offender also are discussed. The article concludes by assessing the implications of cases decided thus far in this largely unexamined area of law.

The Touchstone Case on Willfulness Relating to Financial Conditions: Bearden v. Georgia

Bearden v. Georgia (1983) is the touchstone case often referenced by lower courts in making determinations whether probation can be revoked in instances where the probationer has not willfully violated the conditions of probation. In *Bearden*, the defendant had been placed on probation following a conviction for burglary and theft by receiving stolen property. Thus, the trial court had determined that probation was the suitable disposition for the matter. As a condition of probation, the trial court ordered the defendant to pay a $500 fine and $200 in restitution. With minimal education and few job skills, Bearden apparently was unable to find work and thus could pay neither the fine nor restitution imposed by the court. Because the defendant failed to meet these financial requirements, the defendant's probation was revoked and he was sentenced to serve the remaining portion of the probationary period in prison.

On appeal, the Georgia Court of Appeals rejected Bearden's claim that the Equal Protection Clause of the 14th Amendment was violated because he was imprisoned for an inability to pay the fine levied as a part of probation. The U.S. Supreme Court granted *certiorari*.

On review, with Justice O'Connor writing for the majority, the U. S. Supreme Court ordered the revocation vacated and the matter remanded. In reaching its decision, the Court found *Williams v. Illinois* (1970) and *Tate v. Short* (1971) instructive. In both *Williams* and *Tate,* the Court had struck down state practices that allowed the jailing of indigent defendants based on their inability to satisfy the financial requirements of their sentences.

Likewise, in *Bearden*, the Court determined that the revocation order was improper, holding that a state may not automatically convert a non-prison sentence to a term of incarceration solely because the defendant is indigent and cannot meet the financial obligations of his sentence. Rather, something more was required. The Court summarized the "something more" as follows:

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> We hold, therefore, that in 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 bona fide efforts to acquire the resources to do so, the court must consider alternative 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 who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. (pp. 672–673)

In essence, the Court imposed a two-step revocation process in such cases. First, there must be an assessment of the probationer's efforts to comply with the financial conditions imposed. If those efforts are found to be bona fide, there must be an assessment of whether alternative modes of punishment will meet the state's penological interests. "Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay" (*Bearden v. Georgia*, 1983, p. 672).

Importantly, the Court went on to point out in a footnote, "We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation" (*Bearden v. Georgia*, 1983, p. 668). Citing a hypothetical of an offender being placed on probation for driving under the influence, it may be reckless for a court to permit the person to remain on probation once it becomes evident that efforts to control his chronic drunken driving had failed. "In contrast to a condition like chronic drunken driving, however, the condition at issue [in *Bearden*]–indigency–is itself no threat to the safety or welfare of society" (*Bearden v. Georgia*, 1983, p. 668).

While the Court thus suggests that its holding did not extend to situations where the probationer presents some kind of danger, serious questions are presented. For example, is a finding of willfulness unnecessary in "all" cases that do not involve financial obligations? Or is the Court suggesting that a finding of willfulness is not necessary in that very limited class of cases where the offender's continued supervision on probation would pose a risk to the community? Additionally, the Court left unanswered the crucial question of whether probation revocation can accomplish what is constitutionally prohibited in an outright criminal prosecution; namely, the punishment of an individual for a condition that is beyond his or her control. In *Robinson v. California* (1962), for example, the Court held that imposing criminal sanctions based solely on a defendant's status of being addicted to drugs violates due process. And, in *Powell v. Texas* (1968), the Court suggested that imposition of criminal liability on a diagnosed alcoholic solely for being drunk might violate due process. These cases provide at least some indication that probation revocations based on a violation that could not have been avoided by the probationer could raise serious due process concerns.

The possible due process concerns notwithstanding, several courts have rejected the notion that there must be a finding of culpability on the part of the probationer to support an order revoking probation. In the next section, we identify and discuss recent cases where courts found that probation may be revoked even though the probationer did not willfully violate the terms and conditions of the probationary sentence.

Cases Supporting Revocation Absent Findings of a Willful Violation by the Probationer

The decision in *State ex rel. Nixon v. Campbell* (1995) illustrates the rationale applied by many courts when revoking the probation of an offender who has not willfully violated probation conditions. In *Nixon*, the defendant was convicted for rape and abuse of his 14-year-old daughter. He was sentenced to concurrent sentences of 4 and 7 years. Execution of the sentence was suspended and the defendant was placed on probation for 5 years, with a special condition that he complete a 2-year inpatient sex offender program at a state hospital.

Less than 3 months after the defendant entered the inpatient treatment program, the program was discontinued by the state. The prosecuting attorney sought revocation of the defendant's probation based on the alleged violation of the conditions imposed. At the revocation hearing, the administrator of the discontinued program testified the defendant had made minimal progress in the program, that she believed he would revert to pedophilia without further treatment, and that the only remaining inpatient sex offender program was operated within the prison system by the state's department of corrections.

After offering the defendant the opportunity to withdraw his guilty plea, the trial court revoked probation and ordered the suspended sentence executed. The defendant's writ of habeas corpus was granted by the circuit court after concluding that there was no basis in the record to support a finding that the defendant violated the conditions of his probation. On appeal, the Missouri Supreme Court reinstated the defendant's sentence mandating his incarceration in the department of corrections.

The Missouri Supreme Court reached its decision after the consideration of several factors. First, the court acknowledged that the defendant, through no fault of his own, failed to comply with the conditions of probation since he was unable to complete the inpatient treatment program as ordered. Citing *Bearden v. Georgia* (1982), the court indicated that the probationer's lack of fault in violating a condition of probation would not necessarily prevent a revocation of probation. The original sentence in *Nixon* was founded not only on the defendant's "hopes of rehabilitation but also the need of society for protection from [the defendant]" (*State ex rel. Nixon v. Campbell*, 1995, p. 372). The court noted that there was further evidence that without additional inpatient treatment the defendant would revert to pedophilia. Since there was no alternate inpatient treatment

program outside of the prison, and because of the need to protect society, the court could not conclude that the order of revocation was improper.

The court noted that the present case was further complicated because the defendant's probation was part of a plea bargain. This problem was overcome, however, when the trial court offered the defendant the option of withdrawing his guilty plea and beginning the plea negotiation process anew.

The facts in *State v. Kochvi* (1996) are similar to those in the above case. In *Kochvi*, a defendant pleaded guilty to two counts of felonious sexual assault and three misdemeanor sexual assault charges. He was sentenced to a 1-year term in prison on the misdemeanor charges and 3 to 10 years on the felony charges. The sentence on the felony charges was deferred for 18 months following the defendant's release from custody on the misdemeanor sentence. The defendant was placed on probation for 5 years, with a special condition that he participate meaningfully and complete a treatment program as prescribed by corrections officials and treatment providers.

The defendant was evaluated by a psychiatrist, who concluded that it would not be appropriate to place him in an outpatient treatment program. The psychiatrist questioned the defendant's honesty and lack of impulse control, suggesting that without continued incarceration, he would be at risk of repeating his offense.

Upon release from the incarceration portion of his sentence, the defendant was referred by his probation officer to a generic treatment program. Staff at this program indicated that they would not accept the defendant into their sex offender treatment program. Because of this refusal and the information provided in the initial psychiatric assessment, a violation report was filed alleging that the defendant had violated a special condition of his probation requiring him to enter a treatment program. The trial court found that the defendant had violated a condition of probation, and the previous suspended sentence was ordered executed.

On appeal, the New Hampshire Supreme Court affirmed the order for revocation. The court concluded that a defendant's probation may be revoked even if the alleged violation was caused by factors beyond the defendant's control. The court was not convinced that because the defendant's inability to secure treatment was not his fault, the defendant's probation could not be revoked. Citing the *Nixon* case discussed above, the court held that revocation is permitted when a defendant fails to complete a sex offender treatment program for reasons beyond his control. Although in most cases a defendant's fault is of great importance in determining whether the conditions of probation have been violated, circumstances beyond the defendant's control may provide an adequate basis for revocation where such circumstances frustrate the very purposes of probation. In this case the defendant's lack of impulse control, coupled with his inability to secure treatment, frustrated the dual functions of probation: rehabilitation of the defendant and protection of society (*State v. Kochvi*, 1996).

A similar decision on probation revocation was reached in *People v. Colabello* (1997). In *Colabello*, the defendant was placed on probation for sexual assault on a child. A condition of probation was that the defendant successfully complete a treatment program identified by his therapist and probation officer. An assessment by a psychologist concluded that the defendant was a fixated pedophile, suffering from a psychosis that severely distorted his judgment and functioning. Because of these factors, the defendant was not judged to be an appropriate candidate for outpatient treatment because of the very high risk of recidivism.

The defendant was subsequently admitted to a long-term secure inpatient program for sex offenders for a 2-week trial period to evaluate whether he would be able to work and complete the program. The defendant was discharged from the program approximately 6 weeks later with a "poor prognosis." The discharge report noted that the defendant did little or nothing while in the program and that his lack of progress resulted more from a lack of commitment than ability. The defendant's probation was revoked after the trial court concluded that the defendant's failure to complete the program was a violation of the conditions of his probation. The defendant was subsequently sentenced to a term of 8 years in the department of corrections.

On appeal, the Colorado Court of Appeals held that probation could be properly revoked based on the defendant's failure to complete the program in question. The court disagreed that the trial court had to make a finding that the defendant "willfully or unreasonably" failed to complete the treatment program. Because of the defendant's high risk of recidivism, his failure to complete the prescribed treatment program presented a potential threat to the community. A careful consideration of the treatment options available led the trial court to properly conclude that there were no viable alternatives to incarceration (*People v. Colabello*, 1997).

Kupec v. State (1992) involved a case where a defendant pleaded guilty to delivery of a controlled substance. The defendant was placed on probation with the first year to be spent in the Surveillance and Treatment of Offender Program. One of the conditions of probation was that the defendant refrain from the consumption of alcohol or use of illegal drugs.

After a urine test revealed the presence of cocaine metabolites, the prosecutor moved for revocation of probation. Another allegation subsequently was added, indicating that the defendant had been arrested and had a blood alcohol content of .151 percent. At the hearing, the defendant was found to have violated probation by using alcohol and cocaine, and her probation was revoked.

On appeal to the Wyoming Supreme Court, the defendant raised several issues, including an argument that it was an error for the revocation court to rely solely on a breathalyzer test result without finding that the defendant had willfully and intentionally consumed alcohol. The defendant claimed that she had unknowingly consumed a 16-ounce glass of possibly spiked lemonade. The appellate court affirmed the revocation, citing several considerations. First, the court noted that Wyoming's statutes and rules do not

specify whether a probationer must willfully violate probation conditions before a court may revoke probation. Secondly, the court noted that while the revocation of a term of probation where the violations were not willful may not always be fair, a court cannot be prevented from revoking probation in situations where the probationer's conduct is beyond his or her control and such conduct presents a threat to society. Finally, the court was not convinced that the defendant's consumption of alcohol was not willful. There was sufficient evidence in testimony to find that it was improbable that the defendant had not consumed the alcohol willfully (*Kupec v. State*, 1992).

In addition to the cases cited above, other courts have ruled that it is not necessary to find that a probationer acted willfully or intentionally to revoke probation. In *People v. Neckopulos* (1996), the defendant was ordered to attend drug treatment as a condition of probation. After attending several treatment sessions, the defendant stopped attending treatment without permission or direction from treatment officials. The defendant's probation subsequently was revoked by the sentencing court. On appeal, the defendant claimed that the revocation was improper because there was no proof presented that she willfully conducted herself in violation of the conditions of probation.

The Illinois Court of Appeals found the defendant's argument in this regard wholly without supporting authority and an inaccurate statement of Illinois law. The court noted that under Illinois law, probation is a privilege to be employed when the defendant would present no threat to society and when the defendant's rehabilitation would be enhanced. In this case, the defendant's failure to attend treatment frustrated the purpose of her probation regardless of whether such failure was willful. Because the prosecution was not required to prove that the defendant's failure to comply with drug treatment was willful, any evidence of the defendant's incapacity for willful activity did not render the trial court's revocation of her probation improper. The court went on to suggest, however, that the defendant's lack of progress in her court-ordered treatment was not caused by the unavailability of the treatment, but rather by her own failure to take advantage of the opportunities presented to her (*People v. Neckopulos*, 1996). Thus, although the court held that a willful violation is not required, it nonetheless found the defendant's lack of effort to be a significant factor.

The final case reviewed in this section reflects a decision by an appellate court in the state of Washington. In *State v. Gropper* (1995), an offender violated conditions of his sentence by not fulfilling financial obligations and by failing to notify the department of corrections of a change in address. The sentencing court revoked the defendant's community release status and imposed a term of incarceration. On appeal, the defendant alleged that the sentencing court did not establish that his failure to satisfy community release conditions constituted a willful violation.

The appellate court rejected the defendant's argument on several grounds. First, the court noted that state statutory provisions do not require a court to consider willfulness before ordering incarceration for a violation of a condition that does not have a financial component. Thus, the state was not required to establish that the defendant's failure to report and notify the department of corrections of his change of address was willful. Secondly, insofar as the financial conditions were concerned, the same statute requires the state to show noncompliance with a probation condition by a preponderance of the evidence. In this case, the defendant stipulated to the violation of his financial obligations. Once the state met its initial burden of showing noncompliance with a financial condition, the offender then had the burden of showing that the violation was not willful. This burden was not met by a mere claim of indigency. Instead, the offender had to show that he had made a real effort to fulfill the financial obligations, but was unable to do so. Because the offender failed to meet his burden of establishing that his failure to satisfy the financial obligations was non-willful, the sentencing court's order revoking probation was affirmed (*State v. Gropper*, 1995).

Cases Concluding that Willfulness is Required In Probation Revocation Decisions

The decision in *Bennett v. State* (1996) shows the complexities surrounding any requirement of a finding of willfulness in the context of a probation revocation proceeding. In this case, the defendant was charged with one count of handling and fondling a child under the age of 16 and one count of battery. He entered a negotiated plea of guilty to two counts of battery and was placed on 2 years probation. A condition of probation required the defendant to enter into and successfully complete an outpatient sex offender treatment program.

After entering therapy, the defendant refused to admit that he had committed the deviant sexual conduct charged in one count of the information. As a result of his refusal to admit the sexual conduct, the defendant was terminated from the sex offender treatment program. The defendant's probation subsequently was revoked based on his failure to complete the treatment program.

On appeal, the defendant asserted that the evidence presented at the probation revocation hearing did not prove that he willfully and substantially violated the probation condition requiring him to complete the sex offender treatment program. The Florida District Court of Appeals agreed, relying on case law in that state that requires a violation triggering the revocation to be willful and substantial. The appellate court noted that the defendant was never advised before entering his plea that he would be required to admit the sexual acts underlying the primary charge of handling and fondling a child. The court also considered it important that no condition of probation was imposed that required the defendant to admit to a counselor the sexual acts charged. Under these circumstances, the defendant's refusal to admit to the sexual conduct did not constitute a willful and substantial violation of the terms of his probation. Because the defendant had otherwise complied with the

conditions of probation, the appellate court reversed the revocation and ordered that his probation be reinstated (*Bennett v. State*, 1996).

In *Gibbs v. State* (1992), the defendant was placed on probation following a conviction for possession of cocaine. A condition of probation required the defendant to enroll and participate in a substance abuse treatment program. After attending several treatment sessions, the defendant was removed from the program because his behavior was deemed disruptive. Probation was revoked on the basis of the defendant's failure to complete substance abuse treatment.

On appeal, the defendant requested reinstatement of probation on the grounds that his violation of the treatment condition was not willful. The appellate court found that there was sufficient evidence in the record to establish that the defendant did not willfully violate the probation condition requiring completion of drug treatment. At the revocation hearing, the treatment therapist had testified that the defendant actively participated in his own therapy. The defendant's probation officer noted at hearing that although the defendant had trouble adjusting to the program, the defendant had made several verbal commitments to continue the treatment.

The appellate court acknowledged the need to preserve order in a therapeutic setting like that at the program attended by the defendant. The court concluded, however, that the defendant's disruptive behavior at some of the treatment sessions was a manifestation of antisocial traits associated with his drug abuse problem. The defendant's inability to control the antisocial behavior for which he needed treatment did not constitute a willful and substantial refusal to participate in the program. The appellate court noted that the treatment therapist testified at the revocation hearing that the defendant was in need of treatment and that he was treatable, but that treatment might best be accomplished in some other setting. The court reasoned that if the treatment program in question was not a suitable setting for the defendant, his inability to comply with program requirements could not be considered as a willful refusal to participate (*Gibbs v. State*, 1992).

The decision in *State v. Austin* (1996) also involved the issue of whether a probationer's failure to participate in treatment to the satisfaction of corrections officials constituted grounds for revocation of probation. In this case, the defendant was placed on probation for a charge of sexual assault. Conditions of probation required the defendant to remain in the State of Vermont unless granted permission to leave by his probation officer, to submit to urinalysis testing at the request of his probation officer, and to attend and successfully complete substance abuse and sexual aggressiveness therapy. The defendant served 9 days in custody for violating probation by failing to meet with his counselors and admitting he used marijuana. Later, he served 16 days for missing meetings with his counselor and for refusing to submit to a urinalysis test. Thereafter, the defendant was charged twice with violating the drug use condition after urinalysis testing revealed the presence of cannabinoids. Ultimately, the defendant was charged with violating the conditions of probation by leaving the state without permission of his probation officer. He also was charged with violating probation by failing to participate in sex offender therapy to the satisfaction of his probation officer and by failing to put into practice what he had learned in therapy.

At the revocation hearing, the defendant claimed that he had actively participated in the sexual aggression program and that he had a 4-year history free from sexually violent behavior. The defendant's probation officer and his therapist testified that the defendant could identify his "risk factors" but suggested that he had not used this knowledge to change his lifestyle. The sentencing court found that the defendant had not integrated what he had learned in therapy into his life, concluding that he was in violation of probation in this regard.

On appeal, the Vermont Supreme Court considered, among other issues, whether the offender had violated the condition of probation requiring him to complete the sex offender therapy program to the satisfaction of his probation officer. The court noted that while a refusal to cooperate with therapy constitutes a failure to complete therapy, there was no evidence in this case that the defendant had failed to cooperate with the therapist. Importantly, the defendant's therapist expressed satisfaction with the defendant's attendance, participation, and level of intellectual understanding in his treatment. Because the defendant had not ceased his therapy, the trial court's conclusion was supportable only if it determined that continued therapy served no useful purpose. Because this view was contradicted by the defendant's therapist, this alleged violation could not form the basis for revocation of the defendant's probation (*State v. Austin*, 1996).

In *Davis v. Florida* (1998), the court considered whether a probationer had willfully violated the conditions of his probation. In *Davis*, the defendant was placed on probation for burglary of a dwelling and petty theft. While on probation, the defendant was found guilty of the sale of "imitation" cocaine and sentenced to 6 months in jail to be followed by 18 months of community control. Later, the state filed an affidavit for revocation of probation alleging that the defendant had violated conditions of his sentence by failing to remain confined at his approved residence when he was not authorized to be anywhere else and that he had failed to reimburse the county for the costs of his prosecution.

At the revocation hearing, defense counsel sought a continuance to allow the defendant to be evaluated by a mental health expert in support of the theory that the defendant suffered from drug and alcohol addiction and was therefore mentally incompetent to appreciate and comply with the conditions of community control. The motion for continuance was denied and the defendant's community control was revoked. The defendant subsequently sought review by the appellate court, contending that the trial court acted vindictively and erred by finding willful and substantial violations of community control.

The Florida Court of Appeals considered whether the defendant's probation was properly revoked following a finding by the sentencing court that he willfully violated the condition requiring him to remain at his residence. During the revocation hearing the defendant admitted that he had not remained at his residence on several occasions and that he had not obtained permission from his probation officer to leave his residence. As such, there was ample support in the record to find that the defendant willfully and substantially violated this condition of his probation. Thus, there was evidence that the defendant was not amenable to supervision outside the prison system. Based on this and other information in the record, the appellate court found no support for the defendant's claim that the sentencing court acted vindictively by revoking probation (*Davis v. Florida*, 1998).

Discussion and Conclusion

Outside of revocation of probation for failure to comply with financial conditions, the issue is less than firmly settled whether probation can be revoked when a probationer does not willfully or intentionally violate the terms or conditions of probation. Despite conflicting rulings by the various appellate courts, a review of recent cases on the issue provides indications of the factors likely to be considered in such matters.

Matters involving willfulness and compliance with the financial conditions of probation continue to be guided by the Supreme Court's decision in *Bearden v. Georgia* (1983). In *Bearden*, the Court noted that if a probationer made bona fide efforts to satisfy the financial conditions of probation, but was unable to do so, probation may not be revoked unless alternate measures are inadequate to meet the state's interests in punishment and deterrence. Hence, nonwillful probation violations that are the product of the probationer's indigency are likely to provide an insufficient basis for the revocation of probation. Yet, a probationer's mere claim that he or she is indigent does not satisfactorily establish an inability to satisfy the financial conditions of probation. In one of the cases discussed above (*State v. Gropper*, 1995), the court held that once the state met its initial burden of showing noncompliance with a financial condition, the offender then had the burden of showing the violation was not willful. In *Gropper*, the court held that the defendant had to show that he had made a real effort to fulfill the financial obligations, but was unable to do so.

When courts have held that there need not be a willful violation to support revocation, the foremost consideration in the cases reviewed centers on the issue of public safety. Three of the cases discussed above (*State v. ex rel. Nixon v. Campbell*, 1995*; State v. Kochvi*, 1996*; People v. Colabello*, 1997) involved defendants charged with sex offenses. In each of the cases, the offenders involved, through no fault of their own, were unable to complete sex offender treatment programs. Importantly, the court in each case noted that without treatment, the offenders would present public safety risks because of their likelihood of re-offending. Because of the public safety risk and the lack of alternate treatment programs, each court was able to support the revocation after finding there were no viable alternatives to incarceration. Thus, there are clear indications that willfulness is not required when revoking the probation of a potentially predatory sex offender who is unable to find, or remain in, an approved treatment program.

Another court used the same rationale in supporting the revocation of a probationer whose substance abuse patterns presented a threat to society (*Kupec v. State*, 1992). Here, the court found that there was no requirement to show that a defendant willfully consumed alcohol in violation of a condition of probation. Instead, the appellate court noted that a sentencing court cannot be prevented from revoking probation in situations where the probationer's conduct is beyond his or her control and therefore presents a threat to society.

In some states, either statutory provisions or case law mandate that the revocation of probation be founded on a violation that is willful and substantial. In *Bennett v. State* (1996), for instance, the court found that a defendant's refusal to admit in counseling to deviate sexual conduct that precipitated the original charges was neither willful nor substantial. Here, the appellate court pointed out that the defendant was never advised before entering a plea that he would be required to admit to sexual acts involving the handling and fondling of a child. Likewise, no condition of probation stated that the defendant would be required to admit to such acts. Because the defendant was otherwise in compliance with the conditions of probation—and presumably because his continued presence on probation did not present a threat to community safety—the appellate court ordered the reinstatement of probation.

Other cases suggest that mere "difficult" or repugnant conduct on the part of the probationer while attending mandatory treatment may be an insufficient basis for the revocation of probation. In *Gibbs v. State* (1992), the appellate court ruled that the defendant's disruptive conduct while in treatment sessions was a manifestation of antisocial traits for which he was receiving counseling. Since the defendant was in compliance with the conditions of probation, and his counselor admitted that the offender was participating in therapy, there was no willful violation as required by case law in that state. The court furthermore concluded that if the program in question was inappropriate for the client, his inability to comply with program requirements could not provide the foundation as a willful refusal to participate in treatment.

In a similar vein, vague or imprecise charges that an offender had failed to "put into practice" what he had learned in therapy also have been interpreted as an insufficient basis for the revocation of probation (*State v. Austin*, 1996). In this case, the defendant had participated in therapy and abstained from sexually violent behavior for 4 years. In addition, there was no evidence the defendant had failed to cooperate with his therapist.

Probation can be revoked if an offender fails to attend prescribed treatment, downright refuses to participate in

the therapy process, or engages in conduct that destroys order in a therapeutic setting. Conversely, an allegation that an offender is simply difficult in the therapy setting is unlikely to provide the basis for revocation of probation. Similarly, nonspecific, unsupported contentions that an offender has failed to capitalize or put into practice what has been taught in therapy are also unlikely to support a revocation of probation.

Several things become clear from an examination of the above cases. First, a close reading of *Bearden* makes it obvious that a two-step inquiry is required where a defendant is charged with a violation of a financial condition. There first must be a finding on the issue of willfulness. If the defendant's violation was not willful, there must then be an examination of alternative penal measures. It also is clear that most courts are willing to follow the suggestion in *Bearden* that a finding of wilfulness need not be made when the continued supervision of the offender presents a danger or risk of danger to the public. Even here, however, the courts have been careful to delineate findings regarding the lack of alternatives and the specific risks posed by the defendant.

What remains to be seen is whether courts will be willing to extend the concept of "nonwillful" revocations to violations of conditions where the offender poses no such danger. For example, if a high school dropout is convicted of theft and placed on probation with a condition that he complete his GED, may the court revoke probation without a specific finding regarding the defendant's willfulness? Given *Bearden's* specific reference to public safety, it is anticipated that the concept of nonwillful violations will be confined to only those circumstances where the defendant's continued supervision will pose a risk to the public. In all other situations, it seems most likely that the two-step process outlined in *Bearden* will be required.

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