No. 18-120477-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

KEVIN BEASLEY
Defendant-Appellant

BRIEF OF AMICUS CURIAE ACLU FOUNDATION OF KANSAS IN SUPPORT OF DEFENDANT-APPELLANT

Appeal from the District Court of Johnson County, Kansas
Honorable Thomas Kelly Ryan, Judge
District Court Case No. 09 CR 1992

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INTEREST OF AMICUS CURIAE

ACLU-KS is a non-profit and non-partisan organization dedicated to preserving and advancing the civil rights and legal freedoms guaranteed by the United States Constitution and the Bill of Rights, and the Kansas Constitution and Kansas Bill of Rights. ACLU-KS has approximately 9,000 members in Kansas.

ARGUMENTS AND AUTHORITIES

A. Mr. Beasley Was Imprisoned in Violation of Kansas Constitution Bill of Rights Section 16, Which Forbids Debt-Based Incarceration and Incorporates the Ability-to-Pay Safeguards Required by the Fourteenth Amendment to the U.S. Constitution.

In *Bearden v. Georgia*, the U.S. Supreme Court declared that the Due Process Clause of the Fourteenth Amendment bars state courts from imposing a prison sentence for non-payment of probation fines and fees without first undertaking an indigency inquiry. *See Bearden v. Georgia*, 461 U.S. 660, 667-669 (1983). A defendant's ability to pay must therefore be assessed at all probation revocation hearings. *Id.* at 672; *see also State v. Higgins*, 240 Kan. 756, 759, 732 P.2d 760 (Kan. 1987) ("it is constitutionally impermissible to incarcerate an indigent criminal defendant merely because he does not have the money to pay the fine or make restitution as a condition of his probation"). Where a defendant is found unable to pay, due process requires courts to consider every less restrictive debt-collection method before ordering incarceration, including "the propriety of reducing the fine or extending the time for payments or making alternative orders." *Bearden*, 461 U.S. at 674. The Kansas Bill of Rights goes one step further— categorically

barring poverty-based incarceration no matter the circumstances. KAN. CONST. B. OF R. § 16 ("*No person* shall be imprisoned for debt…") (emphasis added).

This Court has explicitly drawn the fundamental connection between the Fourteenth Amendment's ability-to-pay inquiry requirement and the Kansas Bill of Rights' outright ban on incarceration for indebtedness. In *State v. Casady*, this Court considered a challenge to a Kansas recoupment statute that required indigent criminal defendants to pay a fee associated with receiving court-appointed counsel. *State v. Casady*, 40 Kan. App. 2d 335, 191 P.3d 1130 (Kan. App. 2008). The Court unequivocally held that Section 16 of the Kansas Bill of Rights would prohibit courts from exercising their contempt power to incarcerate a defendant for inability to pay the court fee. *Id.* at 341 (Section 16 "specifically prohibits a person from being imprisoned for failure to pay a debt"). But the Court also noted that this concern cannot arise where trial courts first conduct the proper due process ability-to-pay analysis. *Id.* at 341 (*citing Bearden*, 461 U.S. at 660). The Court therefore concluded that "constitutionally required court consideration for the assessment and collection" of fees was sufficient to "satisfy all constitutional mandates of the Kansas Constitution Bill of Rights." *Id.* In other words, Section 16 necessarily incorporates the Fourteenth Amendment's ability-to-pay analysis and permanently forecloses imprisonment as a punishment for indigent defendants who—through no fault of their own—have outstanding court-imposed fines and fees.

The Section 16 prohibition on poverty-based incarceration applies to all court-imposed debts. *See, e.g., Westwood v. Holland*, 193 Kan. 375, 377, 394 P.2d 56 (Kan. 1964) (identifying bail security as "founded upon acknowledgement of an existing indebtedness

by the person to be bound" and noting that incarceration for non-payment would be unconstitutional under Section 16); *see also Team Logistics, Inc. v. OrderPro Logistics, Inc.*, Case No. 04-2061-JPO, 2008 U.S. Dist. LEXIS 28877, at *20 (D. Kan. Apr. 8, 2008) (money judgment is an obligation for which imprisonment is prohibited by Section 16).

Nonetheless, the trial court imprisoned Mr. Beasley for his outstanding restitution debt without identifying the reasons for his failure to pay. This amounted to automatic debt-based incarceration and was an abuse of discretion. *State v. Ferguson*, 271 Kan. 613, 618, 23 P.3d 891 (Kan. 2001) ("It is an abuse of discretion when the court automatically revokes the probation due to nonpayment of restitution"); *State v. Duke*, 10 Kan. App. 2d 392, 395, 699 P.2d 576 (Kan. App. 1985) ("It must be determined whether the probationer *willfully refused* or was responsible for the failure to pay") (emphasis added). On this basis alone, the trial court's order must be reversed. *See, e.g.*, *State v. McGee*, Case No. 89, 242, 2003 Kan. App. Unpub. LEXIS 595, at *1 (Kan. App. July 25, 2003) ("The State acknowledges the trial court abused its discretion by ordering jail time [...] The State further concedes the trial court's order should be reversed and remanded to allow the trial court to make additional inquiry and appropriate findings concerning [defendant's] ability to pay") (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04); *cf. Casady*, 40 Kan. App. 2d at 341 ("required court consideration for the assessment and collection of a[n] application fee" sufficient for Kansas Bill of Rights Section 16 purposes).

But even before imposing a prison sentence in violation of the Kansas Bill of Rights, the trial court failed to meet its basic due process obligation to exhaust all alternative debt-

collection measures. *Bearden*, 461 U.S. at 672 ("the court must consider alternative measures"). Specifically, the trial court did not consider using the civil judgment system to collect the outstanding restitution debt. *See* K.S.A. § 75-719 ("Collection of debts owed to courts or restitution"); *Puckett v. Bruce*, 276 Kan. 59, 63, 73 P.3d 736 (Kan. 2003) ("The administrative judge of each judicial district may assign such cases to an appropriate division of the court for the conduct of civil collection proceedings"); *Troff v. Utah*, 488 F.3d 1237, 1238 (10th Cir. 2007) (outstanding restitution amount converted to civil judgment debt at the conclusion of defendant's probation term); *see also Higgins*, 240 Kan. at 760 ("although costs [...] assessed in a criminal case remain a civil judgment against the defendant, a trial court may release a defendant on probation or parole without requiring the defendant to pay such costs"); K.S.A. § 21-6608 (probation "may be terminated by the court at any time").

Initiating civil collections would have made wage garnishment and property liens available as remedies to ensure that Mr. Beasley began to pay off his debts as soon as he began receiving income. K.S.A. § 21-6604 ("If the court orders restitution, the restitution shall be a judgment against the defendant, which may be collected by the court by garnishment or other execution as on judgments in civil cases"); K.S.A. § 60-2202 (money judgment "shall be a lien on the real estate of the judgment debtor within the county in which judgment is rendered"). These collection methods are far more likely to result in meaningful restitution payments than a prison sentence—which only compounds a defendant's inability to pay by eliminating the opportunity for gainful employment. *See*

Bearden, 461 U.S. at 672 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming").

Respectfully, the sentencing court should have released Mr. Beasley and enforced collections with these more precise civil debt-recovery tools unavailable in criminal court. But the court never considered "the propriety of reducing the fine" or "making alternative orders." *Bearden*, 461 U.S. at 674. In fact, the trial court spent almost a decade observing Mr. Beasley's inability to pay his restitution without taking common-sense steps to actually collect the debt. (R. 1, 2-7) (no referral to civil collections, garnishment, or other relevant order). The State's apparent disinterest in securing restitution is incongruent with its abandonment of reasonable due process alternatives in favor of imprisonment—which is the only form of punishment clearly prohibited by the Kansas Bill of Rights. KAN. CONST. B. OF R. § 16 ("*No person* shall be imprisoned for debt…") (emphasis added).

B. Punishing Beasley With Years of Additional Probation Based Solely on His Indigency Constituted Irrational Wealth-Based Punishment in Violation of the Equal Protection Clause of the Fourteenth Amendment.

After successfully serving the full 18-month probation term to which he was originally sentenced in 2009, Mr. Beasley had his probation extended solely because of his inability to pay the fines and fees that would have secured his freedom. (R. 1, 31). This is because the Kansas sentencing statute permits courts to extend probation indefinitely if restitution has not been paid in full— even if the defendant is legitimately unable to pay. *See* K.S.A. § 21-6608(c)(7). In essence, the law allows indigent defendants to remain on probation for the rest of their lives based on court debts notwithstanding Kansas Sentencing Guidelines recommending no more than a year and a half of probation. *See 2019 Sentencing Ranges,*

KANSAS SENTENCING COMMISSION (2019), *available at* https://sentencing.ks.gov/docs/default-source/2019-forms/2019_nondrug_and_drug_grid_quick_reference_guide.pdf?sfvr_sn=c881fd3f_2. The result is a system where indigent individuals are subject to an additional term of probation. This makes no practical sense when far more effective civil debt-collection remedies are available or— as in Mr. Beasley's case—have never been pursued at all. The practice of extending probation based on indigency is also clearly unconstitutional.

Wealth-based discrimination triggers strict scrutiny under the Fourteenth Amendment's Equal Protection Clause when "because of their impecunity [plaintiffs are] completely unable to pay for some desired benefit, and as a consequence, they sustain[] an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 20 (1973). In Kansas, indigent probationers are "completely unable to pay for some desired benefit" and are "absolutely deprived" of that benefit— the benefit being release from probation on-time and in accordance with their original sentence. *Id.* Courts applying heightened scrutiny have invalidated poverty-based supervision extensions on exactly these grounds. *See*, *e.g.*, *Briggs v. Montgomery*, Case No. CV-18-02684-PHX-EJM, 2019 U.S. Dist. LEXIS 101625, at *31-*32 (D. Ariz. June 18, 2019) (finding extension of supervision unconstitutional because "Plaintiffs have indeed been absolutely deprived of the ability to complete the program in 90 days like other, wealthier participants solely because they are unable to pay"); *see also McNeil v. Cmty. Prob. Servs., LLC*, Case No. 1:18-cv-00033, 2019 U.S. Dist. LEXIS 24357, at *38 (M.D. Tenn. Feb. 14, 2019) ("Turning to the equal protection claim, the Court is persuaded

heightened scrutiny is the appropriate standard to apply because Plaintiffs have demonstrated an inability to afford bail").

Indigent defendants in Kansas who have their probation extended for inability to pay fines and fees are also punished more harshly than wealthy probationers who can afford release immediately after their sentenced term of probation. *United States v. Walker*, 918 F.3d 1134, 1150 (10th Cir. 2019) ("we and the Supreme Court have consistently held that probation is not insignificant punishment [...] Offenders on probation are [...] subject to several standard conditions that substantially restrict their liberty [...] Consequently, *the increased term of probation also enhanced the severity of [defendant's] sentence*") (internal quotations omitted and emphasis added). Sentencing enhancements based purely on inability to pay have been repeatedly struck down under strict scrutiny. *See*, *e.g.*, *Jones v. Governor of Fla.*, 950 F.3d 795, 820 (11th Cir. 2020) (*citing M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996)); *United States v. Burgum*, 633 F.3d 810, 814 (9th Cir. 2011) ("the Constitution forbids imposing a longer term of imprisonment based on a defendant's inability to pay restitution").

Furthermore, it is fundamentally irrational to subject indigent defendants to additional punishment and ongoing supervision restrictions that have nothing to do with the state recovering its fines and fees. Extending probation restrictions in the name of debt-collection would therefore fail to satisfy even *rational basis* review under the Equal Protection Clause. *See Jones*, 950 F.3d at 811 ("The simple truth is that a collection-based rationale [for extending punishment against] those who genuinely cannot pay, and who offer no immediate prospects of being able to do so, erects a barrier without delivering any

money at all"); *Briggs*, 2019 U.S. Dist. LEXIS 101625, at *34 (finding requirement of continued participation in successfully completed supervision program for inability to pay program fees lacked rational relation to purported goal).

Here, where the trial court had legitimate and effective debt-collection remedies that were never pursued, K.S.A. §§ 60-2202 & 75-719, there was no basis to continue punishing Mr. Beasley with intensive supervision and associational/conduct restrictions wholly unrelated to collecting restitution. Any purported rehabilitative interest in extending poor people on probation while wealthy probationers are released on-time is inherently invalid. *Bearden*, 461 U.S. at 672 ("the State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated"). Instead, the trial court was obligated to treat indigent and wealthy probationers on an even playing field, and to use the civil judgment system to recoup Mr. Beasley's outstanding debts after he successfully completed his original probation sentence— without needlessly subjecting him to an additional term of punishment merely for being poor. *Commonwealth v. Henry*, 475 Mass. 117, 118 (Mass. 2016) ("a judge must consider a defendant's ability to pay, and may not [...] extend the length of probation because of a defendant's limited ability to pay restitution").

Making use of Kansas' non-punitive, civil debt-collection procedures is also necessary to ensure that indigent criminal defendants are treated in the same manner under the law as all other judgment debtors—which itself is a mandate of the Equal Protection Clause. *See*

James v. Strange, 407 U.S. 128, 140 (1972) (special Kansas fee-recoupment procedure authorized only against indigent criminal defendants struck down for lack of rational basis as there was no valid reason to treat criminal defendant-debtors and other state debtors differently); *Higgins*, 240 Kan. at 760 (we "require that a judgment against the defendant for court costs in a criminal case constitutes a civil judgment for the payment of money and is enforceable as such, *subject to the same protections and exemptions provided indigent defendants in civil cases*) (emphasis added). The trial court's decision to extend Mr. Beasley's probation sentence solely for inability to pay his debts therefore violated his rights under the Equal Protection Clause.

C. Extending Mr. Beasley's Probation Solely Due to His Inability to Pay Subjected Him to Cascading Constitutional Deprivations—Including Deprivation of his Physical Liberty and the Right to Vote.

The State's repeated extensions of Mr. Beasley's probation caused a string of collateral civil rights violations in addition to creating a constitutional harm in and of itself. Under Kansas law, individuals on probation are at constant risk for incarceration and forfeit a broad range of constitutional protections for the duration of their sentence.[1] Accordingly, indigent defendants like Mr. Beasely who would have successfully completed the terms of their probation—but for their inability to pay fines and fees—must endure restrictions on their fundamental rights solely because they are poor.

[1] *See, e.g.*, K.S.A. § 21-6607(c)(5) (establishing reasonable suspicion standard for warrantless searches of person and personal effects of individuals on probation).

i. *Mr. Beasley is Being Deprived of his Physical Liberty because He is Poor in Violation of Kansas Constitution Bill of Rights Section 16.*

The risk of incarceration for a Kansas probationer is far from hypothetical. Probation conditions are numerous, often unconstitutionally restrictive, and carry heavy sanctions for noncompliance—including incarceration.[2] An individual who is on probation in Kansas can have their probation revoked for committing a technical violation or a low-level new offense. Technical violations account for 40.6% of new admissions to KDOC facilities.[3] The longer an individual is on probation, the greater the risk they will be deprived of their physical liberty for conduct that would otherwise not lead to imprisonment. Under K.S.A. § 21-6608(c)(8), an indigent individual is being exposed to incarceration for conduct that does not carry a penalty of imprisonment because they are poor. That was precisely Mr. Beasley's fate.

Mr. Beasley was only on probation for a period of longer than 18 months because of his restitution debt and he would not be subject to incarceration for technical violations had his probation not been extended beyond his initial sentence. Strictly speaking, Mr. Beasley's inability to pay his restitution debt is the but-for cause of his imprisonment. Regardless of the technical violation at issue, it would not have been a cause for Mr.

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[2] *See, e.g.*, *Set Up for Failure: The Impossible Probation System in Kansas*, ACLU OF KANSAS (2019), at 2-3, *available at* https://www.aclukansas.org/sites/default/files/field_documents/mini_probation_report_-_pdf.pdf.

[3] 2,655 out of 6,542 new prison admissions in Fiscal Year 2018 were the result of people violating technical probation rules as opposed to the actual commission of any new criminal offenses. *See Fiscal Year 2018 Annual Report*, KANSAS DEPARTMENT OF CORRECTION (2018), at 7, *available at* https://www.doc.ks.gov/publications/Reports/Archived/2018/view.

Beasley's incarceration if he were not still on probation due to his poverty. Indeed converting Mr. Beasley's probation to incarceration at any time after the expiration of his initial sentence would amount to wealth-based incarceration prohibited by Section 16 of the Kansas Bill of Rights.

ii. *Extending Mr. Beasley's Probation Deprived Him of the Right to Vote Due to His Inability to Pay and Amounts to a Functional Poll Tax.*

Kansans on felony probation cannot participate in any state or federal election and will have their voter registration cancelled at the time of their conviction. *See* K.S.A. §§ 21-6613(a)-(b); *Kansas Election Standards* (2019), I-2, *available at* https://www.sos.ks.gov/elections/19elec/2019-Kansas-Election-Standards-Chapter-II-Election-Administration.pdf ("If the person is granted probation or parole, his/her term of sentence is not completed until the probation or parole is finished"). While the right to suffrage is automatically restored, an individual must complete their sentence before they are eligible to register to vote. Therefore, extending an indigent individual's felony probation because he owes fines and fees prolongs his disenfranchisement because of his poverty status.

Conditioning the right to vote on payment of a fee violates both the Equal Protection Clause of the Fourteenth Amendment and Twenty-Fourth Amendment of the U.S. Constitution. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) ("wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored"); *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965) (holding the Twenty-Fourth Amendment prohibits the imposition of the functional equivalent of a

poll tax in the form of other payment preconditions to exercise the franchise). This includes conditioning the restoration of the right to vote on one's ability to pay criminal justice debts. The Eleventh Circuit recently enjoined Florida's law requiring individuals convicted of a felony to satisfy all of their legal financial obligations before they would be eligible for re-enfranchisement. *Jones v. Florida*, 950 F.3d 795, 833 (11th Cir. 2020). The court reasoned "once a state provides an avenue to ending the punishment of disenfranchisement—as the voters of Florida plainly did—it must do so consonant with the principles of equal protection and it may not erect a wealth barrier absent a justification sufficient to overcome heightened scrutiny." *Id.* at 823.

The State's practice of extending the probation sentences of indigent defendants until they can pay their fines and fees creates the same wealth-barrier to voting that the Supreme Court has held unconstitutional for the last five decades. It also likely violates Kansas's constitutional guarantees of the right to vote. In particular, the Kansas Constitution provides only three qualifications for the right to suffrage: United States citizenship, age, and state residence. KAN. CONST. ART. V, § 1. The Kansas Supreme Court has found additional eligibility requirements unconstitutional— the wealth-based barrier created through probation extensions would raise similar concerns. *State ex rel. Gilson v. Monahan*, 72 Kan. 492, 495-96, 84 P. 130 (Kan. 1905) ("the Legislature can neither take from nor add to the qualifications there set out"); *see also State v. Beggs*, 126 Kan. 811, 815, 271 P. 400 (Kan. 1928) ("[A]ny statute that adds to the constitutional requirements of an elector, or abridges his eligibility, is unconstitutional").

Here, Mr. Beasley has been denied his constitutional right to vote in at least four federal and state elections because he could not pay restitution debts that the court could easily recover through civil debt collection practices. We respectfully urge this Court to take into account the collateral constitutional violations attendant to the extension of Mr. Beasley's probation as they animate the broader discussion about the fairness of the primary wealth-based penalty challenged in this appeal.

CONCLUSION

For the foregoing reasons, this Court should find that Mr. Beasley's debt-based imprisonment violated Section 16 of the Kansas Constitution Bill of Rights.

Respectfully submitted,

ACLU FOUNDATION OF KANSAS

/s/ Zal K. Shroff

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ATTORNEYS FOR AMICUS

CERTIFICATE OF SERVICE

I, Zal K. Shroff, do hereby certify that a true and correct copy of the above and foregoing Brief was electronically filed with the Court's electronic filing system on this 30th day of March, 2020, and on this same day a copy of this document was emailed to Attorney General Derek Schmidt (ksagappealsoffice@ag.ks.gov), Johnson County Assistant District Attorney Shawn Minihan (Shawn.Minihan@jocogov.org), and Appellate Defender Kasper Schirer (adoservice@sbids.org).

/s/ Zal K. Shroff
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CITED UNPUBLISHED DECISIONS

State v. McGee

Court of Appeals of Kansas

July 25, 2003, Opinion Filed

No. 89,242

Reporter
2003 Kan. App. Unpub. LEXIS 595 *

STATE OF KANSAS, Appellee, v. KRISTINA M. McGEE, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Reported at *State v. McGee, 73 P.3d 779, 2003 Kan. App. LEXIS 653 (Kan. Ct. App., 2003)*

Prior History: [*1] Appeal from Butler District Court; MIKE E. WARD, judge.

Disposition: Reversed and remanded.

Counsel: Darren K. Patterson, of El Dorado, for appellant.

Mary J. Ivester, assistant county attorney, and Phill Kline, attorney general, for appellee.

Judges: Before RULON, C.J., ELLIOTT and LEWIS, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Kristina M. McGee appeals the trial court's order placing her in jail until restitution is paid in full, after her diversion was revoked.

We reverse and remand.

The State acknowledges the trial court abused its discretion by ordering jail time without making the inquiries and findings mandated by *Bearden v. Georgia, 461 U.S. 660, 672-74, 76 L. Ed. 2d 221, 103 S. Ct. 2064 (1983)*, and *State v. Duke, 10 Kan. App. 2d 392, 395, 699 P.2d 576 (1985)*. The State further concedes the trial court's order should be reversed and remanded to allow the trial court to make additional inquiry and appropriate findings concerning McGee's ability to pay.

We agree.

Reversed and remanded for further proceedings in accordance with this opinion.

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