A failure to pay fees violates community supervision, but only a willful failure to pay fees supports revocation.[Gipson v. State](13-5-10)

On March 13, 2013, the Beaumont Court of Appeals held that the State had the burden to prove that probationer's failure to pay fees was willful despite his plea of true and that, because the motion to revoke did not allege that he was able to pay the fees, his plea of true does not constitute evidence of his ability to pay.

¶ 13-5-10. **Gipson v. State**, No. 09–11–00032–CR, 395 S.W.3d 910 (Tex.App.–Beaumont, 3/13/2013).

Background: State filed motion to revoke community supervision, originally imposed following conviction of assault on a family member. The 252nd District Court, Jefferson County, Layne Walker, J., revoked supervision and sentenced probationer to eight years' imprisonment. Probationer appealed. The Court of Appeals reversed, 347 S.W.3d 893, and state appealed. The Court of Criminal Appeals, 383 S.W.3d 152, reversed and remanded.

Facts: The trial court revoked appellant's community supervision on the basis of appellant's plea of true to the failure-to-pay allegation alone. The State's motion to revoke proceeded on the sole allegation that appellant had "failed to pay court assessed fees as directed by the Court," to which he pled true. Those "fees" included a court-ordered fine; court costs; and fees for supervision, pre-sentence investigation, and Crime Stoppers. He signed a stipulation of evidence acknowledging that he had violated the terms and conditions of his community supervision by failing to make these payments. Neither the motion to revoke nor the stipulation of evidence mentioned appellant's financial ability to pay the amounts due. Similarly, during the hearing on the motion to revoke, the parties stood mute regarding appellant's financial ability to pay the amounts due. Finding the failure-to-pay allegation true, the trial court revoked appellant's community supervision and sentenced him to eight years' imprisonment for his underlying conviction of felony assault.

On direct appeal, appellant raised two issues. In his first issue, he urged that the trial court erred in revoking his community supervision because, when a trial court revokes a defendant's community supervision solely for failure to make required payments, Texas Code of Criminal Procedure art. 42.12 § 21(c) requires that the State have proven that a defendant was able to pay and did not, and no evidence showed that appellant was able to pay the amounts due. FN1 See TEX.CODE CRIM. PROC. art. 42.12 § 21(c). We refer to this provision as the "ability-to-pay statute." See id. He asserted that this statute applies to all of the unpaid amounts, including those not specifically listed in it. See id. He also challenged the State's contention that his plea of true satisfied the State's burden of proof. He argued that, although he pled true to the allegation, the State's motion to revoke did not allege that he was able to pay, and, therefore, his plea of true does not constitute evidence that he was able to pay.

FN1. In relevant part, the statute states,

> **In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs,**

the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. TEX.CODE CRIM. PROC. art. 42.12 § 21(c).

In his second issue, he argued that the trial court "committed constitutional error" in failing to inquire as to appellant's reasons for not having paid. In support, he cited Bearden v. Georgia, which held that, "in a revocation proceeding for failure to pay a fine," the Fourteenth Amendment requires that "a sentencing court must inquire into the reasons for the failure to pay." 461 U.S. 660, 672 (1983).

Addressing appellant's issues together, the State responded that a defendant's plea of true precludes him from challenging the sufficiency of the evidence to support the trial court's revocation order and that a plea of true, standing alone, supports revocation of community supervision. The State explained that, "in the absence of some challenge by Appellant at the time of the hearing," the State may rely on appellant's plea of true to support any requirements under the ability-to-pay statute and Bearden. See id. at 672.

Sustaining appellant's first issue and not reaching his second, the court of appeals reversed the trial court's judgment. Gipson, 347 S.W.3d at 897. Interpreting appellant's first issue "as a challenge to the sufficiency of the evidence," the court of appeals acknowledged that a plea of true is "generally sufficient to support" revocation. Id. at 896–97 (citing Cole v. State, 578 S.W.2d 127, 128 (Tex.Crim.App.1979). The court stated, however, that "Bearden requires that to revoke community supervision and impose imprisonment, 'it must be shown that the probationer willfully refused to pay or make sufficient bona fide efforts to do so.' " Id. at 896 (quoting Lively v. State, 338 S.W.3d 140, 146 (Tex.App.—Texarkana 2011, no pet.)). The court observed that, because the motion to revoke alleged only failure to make the required payments, appellant's plea of true to that allegation did not satisfy the State's evidentiary burden under the ability-to-pay statute to prove that appellant was able to pay. Id. at 897.

Although it acknowledged that the ability-to-pay statute explicitly includes only the failure to pay fees for appointed counsel, community supervision, and court costs, the court of appeals determined that the statute must be interpreted as also applying to failure to make other payments due under community supervision in order to comply with Bearden 's constitutional requirements. Id. at 896–97. The court determined that it was obligated to implement this due-process requirement because courts must presume that the Legislature intended for statutes to comply with the constitutions of this State and the United States. Id. Based on its interpretation of the ability-to-pay statute, the court determined that the State was required to prove a willful failure to pay, despite appellant's plea of true. Id. It concluded that the record contained no evidence that appellant had willfully refused to pay and that the trial court, therefore, had erred in revoking appellant's community supervision on that basis. Id. at 897.

The State filed a motion for rehearing, contending that the court of appeals had erred by deciding the merits of appellant's sufficiency challenge without first addressing the State's procedural argument. The State asserted that, because appellant had pled true to the allegation that formed the basis of revocation, any potential error was not preserved for appeal. Without opinion, the court of appeals denied the State's motion.

Does a defendant's plea of true to the State's allegations in a motion to revoke community supervision that the defendant failed to pay the court-assessed fine, costs, and fees relieve the State and the trial court of the requirement to establish that no payment was made despite the ability to do so, the failure to pay was willful, and no bona fide effort to pay was made before supervision can be revoked?

Held: Reversed and remanded

Opinion: In issue one, Gipson challenges the revocation of his community supervision for failure to pay court-ordered fees and fines. Condition 26 of the community supervision order required Gipson to pay a $500 fine, supervision fees, court costs, a PSI fee, a $50 Crime Stoppers fee, and $1,000 in attorney's fees. The allegation to which Gipson pleaded "true" stated that Gipson "has failed to pay court assessed fees as directed by the Court and as of November 29, 2010 was $1,589.00 in arrears, in violation of Condition (26) of Defendant's Community Supervision order." Gipson contends that the trial court abused its discretion by revoking his community supervision based solely on his plea of "true" to the failure to pay court-assessed fees, absent evidence that he was able to pay and did not do so.

Generally, a defendant cannot challenge a revocation finding to which he pleaded "true." See Cole v. State, 578 S.W.2d 127, 128 (Tex.Crim.App.1979). When the State alleges only that the defendant violated the conditions of community supervision by failing to pay appointed attorney's fees, community supervision fees, or court costs, the State must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the trial court. Tex.Code Crim. Proc. Ann. art. 42.12, § 21(c) (West Supp.2012). The statute expressly applies to attorney's fees, community supervision fees, and court costs. See id. PSI and Crime Stoppers fees are often assessed as court costs; thus, we conclude these costs may be included within the statute's purview. See id. art. 42.12, § 9; see also Tex.Code Crim. Proc. Ann. art. 37.073 (West Supp.2012); Tex.Code Crim. Proc. Ann. art. 42.152 (West 2006).

Although, in general, article 42.12 applies to fees and costs, and not fines, section*915 11(b) lists the payment of fines along with fees and costs as permissible requirements of community supervision. Tex.Code Crim. Proc. Ann. art. 42.12, § 11(b). It further requires the sentencing court to "... consider the ability of the defendant to make payments in ordering the defendant to make payments under this article." Id. While this statute applies directly to the sentencing of a defendant to community supervision, it gives some guidance to appellate courts. Also, prior to the enactment of the statute, the common law generally required the state to prove that a defendant had willfully failed to pay court-ordered fees, restitution, and other costs. See Whitehead v. State, 556 S.W.2d 802, 805 (Tex.Crim.App.1977); McKnight v. State, 409 S.W.2d 858, 859–60 (Tex.Crim.App.1966); Taylor v. State, 172 Tex.Crim. 45, 353 S.W.2d 422, 424 (1962) (op. on reh'g). These cases make clear that, at common law, the state had the burden of showing that a defendant had the ability to pay court-ordered costs and willfully failed to do so. Although we can find no cases directly on point, it seems logical that the Court of Criminal Appeals, following its precedent that applies to fees, would treat the failure to pay a fine authorized by the Legislature, i.e. by the same way it has treated other fees that are authorized by

the Legislature, requiring the state to show that a defendant was able to pay and acted intentionally in not doing so.

In this case, the record is devoid of evidence showing that Gipson's failure to pay attorney's fees, community supervision fees, or court costs, including PSI and Crime Stoppers fees, was willful. See Tex.Code Crim. Proc. Ann. art. 42.12, § 21(c). Nor does the record show that Gipson intentionally failed to pay his fine. We conclude that the trial court abused its discretion by revoking Gipson's community supervision for failure to pay court-assessed fines and fees. Assuming, without deciding, that a harm analysis is required, revocation of Gipson's community supervision affected Gipson's substantial rights by subjecting Gipson to a prison sentence rather than continued community supervision. See Tex.R.App. P. 44.2(b) (No constitutional errors that do not affect substantial rights must be disregarded.); see also Rusk, at –––, 2013 WL 503957, at *6 n. 15, 2013 Tex.App. LEXIS 1274, at *21 n. 15. For these reasons, we sustain Gipson's first issue.

Constitutional Claim

In issue two, Gipson contends that the trial court committed constitutional error by revoking his community supervision based solely on his plea of "true" to the failure to pay court-assessed fees without first inquiring about the reasons for Gipson's failure to pay. Gipson maintains that the trial court's decision to impose a prison sentence resulted in a denial of due process.

When the State alleges that a defendant failed to pay court-assessed fees, a trial court must inquire as to a defendant's ability to pay and consider alternatives to imprisonment if it finds that a defendant is unable to pay. Gipson, 383 S.W.3d at 156 (citing Bearden v. Georgia, 461 U.S. 660, 672, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)). It may be unconstitutional to deprive a defendant of his liberty when he is unable to pay. Id. at 157. Unlike the ability-to-pay statute and the common law, Bearden does not impose an evidentiary burden on the State. Id. Thus, Gipson's second issue concerns the procedures utilized by the trial court when revoking Gipson's community supervision and is not a question of evidentiary sufficiency.

We first note that Gipson's plea of "true" did not expressly waive a Bearden violation. Waivers of constitutional rights must be voluntary, knowing, intelligent acts " 'done with sufficient awareness of the relevant circumstances and likely consequences.' " Rusk, at ––––, 2013 WL 503957, at *6–7, 2013 Tex.App. LEXIS 1274, at *24 (quoting Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). A failure to pay fees violates community supervision, but only a willful failure to pay fees supports revocation. Id. Gipson pleaded "true" to violating the terms of his community supervision by failing to pay court-ordered fines and fees, but this plea was neither an admission of willfulness nor a waiver of the trial court's duty to comply with Bearden. See id.

Whether Gipson implicitly waived his constitutional claim is analyzed under the framework of Marin v. State, 851 S.W.2d 275, 279 (Tex.Crim.App.1993). In Marin, the Court of Criminal Appeals identified three categories of rights. Id. at 279. First, absolute requirements and prohibitions are not forfeitable. Id. These rights must be observed even without a party's request and cannot lawfully be avoided even with a party's consent. Id. at 280. "[A]ny party entitled to

appeal is authorized to complain that an absolute requirement or prohibition was violated, and the merits of his complaint on appeal are not affected by the existence of a waiver or a forfeiture at trial." Id. Second, rights of litigants which must be implemented by the system unless expressly waived are not forfeitable. Id. A party is never deemed to have given up a waivable right unless done plainly, freely, and intelligently, sometimes in writing and always on the record. Id. The party is not required to make a request at trial for the implementation of such rights because the trial court has an independent duty to implement them absent an effective waiver. Id. The trial court's failure to implement them is an error which may be urged for the first time on appeal. Id. Third, rights of litigants which are to be implemented upon request are subject to the Texas law of procedural default. Id. at 279.

Generally, complaints concerning procedural due process are not preserved for appeal if the appellant did not make a due process objection at the time of revocation. Rogers v. State, 640 S.W.2d 248, 263–64 (Tex.Crim.App.1982) (second op. on reh'g); see Tex.R.App. P. 33.1(a). The preservation rule "ensures that trial courts are provided an opportunity to correct their own mistakes at the most convenient and appropriate time-when the mistakes are alleged to have been made." Hull v. State, 67 S.W.3d 215, 217 (Tex.Crim.App.2002). Even "constitutional rights, including those that implicate a defendant's due process rights, may be forfeited for purposes of appellate review unless properly preserved." Anderson v. State, 301 S.W.3d 276, 280 (Tex.Crim.App.2009).

We consider the right identified by the Supreme Court in Bearden—to have the court inquire as to the defendant's ability to pay—the type of procedural due process right that must be brought to the trial court's attention. The record does not indicate that Gipson complained to the trial court that revocation of his community supervision and imposition of a prison sentence would violate due process. Accordingly, Gipson's second issue is not preserved for appellate review and is overruled. See Tex.R.App. P. 33.1(a); see also Hull, 67 S.W.3d at 217; Rogers, 640 S.W.2d at 263–64.

Conclusion: Having sustained Gipson's first issue, we reverse the trial court's judgment revoking Gipson's community supervision and remand the case to the trial court for further proceedings consistent with this opinion.