

FILED

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**CAROL G. GREEN
CLERK OF APPELLATE COURTS**

No. 13-109688-A

**IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

MATHEW EVERTSON
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Richard Anderson, Judge
District Court Case No. 07 CR 1461

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Nature of the Case

Mathew Evertson appeals the revocation of his diversion agreement and his sentence. (R. I, 98).

Statement of Issues

Issue I: **The district court violated Mr. Evertson's substantive due process rights when it revoked his diversion agreement for failure to pay restitution without considering Mr. Evertson's ability to pay.**

Issue II: **The district court violated Mr. Evertson's Sixth and Fourteenth Amendment rights when it used his prior juvenile adjudication to increase his sentence without requiring it to be proved to a jury beyond a reasonable doubt.**

Statement of Facts

On July 24, 2007, Mathew Evertson was charged with criminal damage to property, and criminal trespass. (R. I, 11-14). On April 22, 2009, Mr. Evertson entered into a pre-trial diversion agreement with the State, in which the district attorney agreed to defer prosecution for a period of 60 months if Mr. Evertson abided by the terms of the agreement. (R. I, 72).

Mr. Evertson's primary responsibility under the agreement was to pay \$10,000 in restitution. (R. I, 74). Mr. Evertson was to pay \$167 a month by the tenth of each month, until the total \$10,000 in restitution was paid. (R. I, 74).

On March 25, 2011, the State filed a motion to revoke the diversion agreement on the ground that Mr. Evertson had not made payments on either court costs or restitution. (R. I, 79). A hearing was held on the motion on July 8, 2011. (R. III, 1). During the hearing, Mr. Evertson testified that during that time period, he had been living with his aunt and uncle and going to school at Washburn University. (R. III, 7). Mr. Evertson testified that in the two years since the diversion agreement was made, he had only been

employed for a period of seven months in 2010. (R. III, 6).

Mr. Evertson told the court that he had agreed to pay \$500 towards the restitution by July 1, 2011, but was unable to. (R. III, 9). While Mr. Evertson did find employment with a production company setting up stages for shows, he had not yet been paid. (R. III, 10). Mr. Evertson told the court that he would pay the \$500 as soon as he received his paycheck. (R. III, 11-12). He would also make payments of \$200 a month until the restitution was paid off. (R. III, 14). The district court continued the hearing until July 18, 2011, to allow Mr. Evertson time to receive his paycheck and make the \$500 payment. (R. III, 20).

Mr. Evertson paid \$500 cash to the district court on July 12, 2011. (R. I, 7). On August 5, 2011, Mr. Evertson paid another \$100 toward restitution. (R. I, 7). On January 4, 2012, Mr. Evertson, once again, paid \$100 towards restitution. (R. I, 8).

On March 15, 2012, Mr. Evertson's case was placed on the criminal assignment docket. (R. I, 8). On June 7, 2012, the district court, again, held a hearing on the State's original motion to revoke the diversion agreement. (R. IV, 1). At the hearing, Mr. Evertson explained to the court that he had made payments when he could. (R. IV, 3). The reason that he could not make more payments than he did was because he could not find a steady job. (R. IV, 3-4). Mr. Evertson explained that he applied for jobs, but would be rejected because of his criminal history. (R. IV, 4).

Mr. Evertson also explained to the court that since the last hearing, he had the added financial responsibility of a daughter, and prior to that a pregnant girlfriend. (R. IV, 4). Mr. Evertson worked at temp jobs to make money for food and diapers for his child. (R. IV, 4). Mr. Evertson attempted to join the military, but was unable to because

he has a felony juvenile adjudication on his record, and the military was no longer doing felony waivers. (R. IV, 4).

The district court revoked the diversion agreement, and found Mr. Evertson guilty of criminal damage to property and criminal trespass after a bench trial on stipulated facts. (R. IV, 6). The district court sentenced Mr. Evertson to 12 months probation with an underlying eight month prison term. (R. V, 19-20). It also ordered Mr. Evertson to pay the remaining balance of restitution, \$9482, in monthly payments of \$100. (R. V, 22). Mr. Evertson appealed. (R. I, 98).

Arguments and Authorities

Issue I: The district court violated Mr. Evertson's substantive due process rights when it revoked his diversion agreement for failure to pay restitution without considering Mr. Evertson's ability to pay.

Introduction

The district court revoked Mr. Evertson's diversion agreement for failing to pay restitution without first considering whether Mr. Evertson had the ability to pay. The failure to consider Mr. Evertson's ability to pay before revoking his diversion agreement violated his due process rights.

Standard of Review

The question of whether a defendant's due process rights have been violated is reviewed de novo. *State v. Wade*, 284 Kan. 527, 534, 161 P.3d 704 (2007). While Mr. Evertson did not specifically raise this issue as a due process issue in the district court, he raised the issue of his ability to pay at the hearings on July 8, 2011, and June 7, 2012. (R. III, 6-7; IV, 3-4).

As a general rule a constitutional challenge cannot be raised for the first time on appeal. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). However, there are three exceptions to this general rule:

- (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case;
- (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and
- (3) the district court is right for the wrong reason.

Gomez, 290 Kan. at 862. This issue is reviewable under the second exception.

Because Mr. Evertson's due process rights are implicated, review of this issue is necessary to prevent the denial of Mr. Evertson's fundamental right to due process of law. *See State v. Foster*, 290 Kan. 696, 702 233 P.3d 265 (2010) (Foster's due process concerns warrant review, though raised for the first time on appeal); *State v. Shopteese*, 283 Kan. 331, 339, 153 P.3d 1208 (2007) (though not raised below, the competency issue merited addressing because a court's acceptance of a plea by an incompetent defendant implicates due process); *Denning v. Johnson County, Sheriff's Civil Service Board*, 46 Kan. App. 2d 688, 707, 266 P.3d 551 (2011) (because Mr. Mauer's argument implicated due process rights, the issue may be addressed for the first time on appeal); *State v. Black*, 45 Kan. App. 2d 168, 175-76, 244 P.3d 1274 (2011) (Because Mr. Wurtz' vagueness argument concerns his due process rights, the court can decide the issue for the first time on appeal to prevent the denial of fundamental rights).

Analysis

When determining whether to revoke a defendant's probation for failure to pay fines, court costs, or restitution, the district court must consider the reason for the failure to pay. *Bearden* in *State v. Duke*, 10 Kan. App. 2d 392, 395, 699 P.2d 576 (1985).

Automatic revocation and imprisonment is prohibited by the Fourteenth Amendment to the United States Constitution. *Bearden v. Georgia*, 461 U.S. 660, 76 L.Ed.2d 221, 103 S. Ct. 2064 (1983).

While both *Duke* and *Bearden* applied to the revocation of probation, the same reasoning should apply before a district court can revoke a diversion agreement. Not only is a defendant being subjected to potential imprisonment when a diversion agreement is revoked, as with when probation is revoked, he or she will also receive a criminal conviction. In the present case, that conviction was automatic upon revocation of the diversion agreement because the diversion agreement included a provision that if the diversion agreement was revoked, Mr. Evertson stipulated to the underlying facts. If revocation of probation for failing to pay restitution when there is an inability to pay is unconstitutional, then it stands to reason that revocation of a diversion agreement for failing to pay restitution where there is an inability to pay restitution is also unconstitutional.

The only ground cited in the motion to revoke Mr. Evertson's diversion agreement was his failure to pay restitution and other costs. (R. I, 29). However, because Mr. Evertson's failure to pay his restitution and other fees was due to an inability to pay, the district court violated his Fourteenth Amendment rights when it revoked his diversion agreement and convicted him of criminal trespass and criminal damage to property based upon that failure to pay.

Mr. Evertson attempted to pay his restitution and other fees. On July 8, 2011, the district court held a hearing on the State's motion to revoke the diversion agreement for failure to pay restitution. (R. III, 1). At that hearing, Mr. Evertson explained that he was a

full-time student at Washburn University. (R. III, 6). Mr. Evertson testified that since the time he was entering into the diversion agreement, he had not been employed, except for a seven month period from April until November, 2010. (R. III, 6). He also explained that he was able to pay \$500 towards his restitution, but he had to wait to receive his paycheck from a production company he was working had been working for for approximately three weeks. (R. III, 9). He also could pay \$200 a month after that payment. (R. III, 14). The district court deferred its ruling to see if Mr. Evertson did, in fact, pay the \$500 when he received his paycheck. (R. III, 19).

On July 12, 2011, Mr. Evertson made a \$500 payment to the district court, as promised. (R. I, 7). On August 5, 2011, Mr. Evertson made another payment in the amount of \$100. (R. I, 7). On January 4, 2012, Mr. Evertson made a \$100 payment. (R. I, 8).

On June 7, 2012, another hearing was held on the motion to revoke the diversion agreement. (R. IV, 1). At that hearing, Mr. Evertson explained that he had made payments whenever he could afford to. (R. IV, 3). Mr. Evertson explained that he had trouble finding a job due to his criminal history. (R. IV, 4). He also told the court that since August, 2011, his girlfriend became pregnant and gave birth to his daughter, who was born in April, 2012. Since August, the majority of money that he had made doing odd jobs and temporary work had gone to food and diapers and expenses related to the pregnancy and his daughter. (R. IV, 4). Mr. Evertson attempted to join the military as a way to support his family and earn money to pay his restitution, but he was not permitted to join because of his criminal history. (R. IV, 4).

Mr. Evertson established that his failure to pay was not willful, but rather the result of an inability to pay. The fact that Mr. Evertson made several payments from July, 2011 until January, 2012, indicated that he was trying to make payments, despite his financial hardships. Unfortunately, because he could not find steady employment, and had unexpected family obligations arise, he could not pay the \$200 a month that he believed he would be able to pay in July, 2011. Just as revoking probation for an inability to pay is unconstitutional, revoking a diversion agreement and convicting a man of crimes for an inability to pay is also unconstitutional.

Conclusion

Revoking Mr. Evertson's diversion agreement, and convicting him of two crimes, based upon his inability to pay, violated his Fourteenth Amendment rights. Mr. Evertson's convictions should be vacated, and his diversion agreement should be reinstated.

Issue II: The district court violated Mr. Evertson's Sixth and Fourteenth Amendment rights when it used his prior juvenile adjudication to increase his sentence without requiring it to be proved to a jury beyond a reasonable doubt.

Mr. Evertson contends that the use of his prior juvenile adjudications, without putting them to a jury and proving them beyond a reasonable doubt, violated his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 120 S. Ct. 2348 (2000). Under *Apprendi*, the State must include any fact that increases the maximum penalty a defendant may receive in the charging document, put it before a jury, and prove it beyond a reasonable doubt. The State failed to meet these requirement in Mr. Evertson's case, resulting in a violation of his rights under the Sixth and Fourteenth Amendments. Mr. Evertson acknowledges that the Kansas Supreme Court has previously

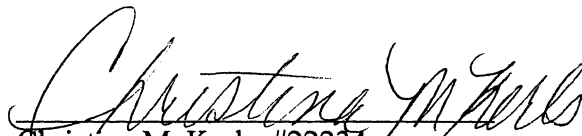
decided this issue, and includes it to preserve the issue for federal review. *See, State v. Hitt*, 273 Kan. 224, 42 P.3d 732, 740 (2002) (the use of prior juvenile adjudications in criminal history does not violate a defendant's constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 120 S. Ct. 2348 (2000)).

Conclusion

The district court violated Mr. Evertson's substantive due process rights when it revoked his diversion agreement for failure to pay restitution without considering Mr. Evertson's ability to pay. Mr. Evertson's convictions should be vacated and his diversion agreement reinstated.

Alternatively, the district court violated Mr. Evertson's Sixth and Fourteenth Amendment rights when it used his prior convictions to increase his sentence without requiring them to be proved to a jury beyond a reasonable doubt. Mr. Evertson's sentence should be vacated and his case remanded for resentencing under criminal history "I".

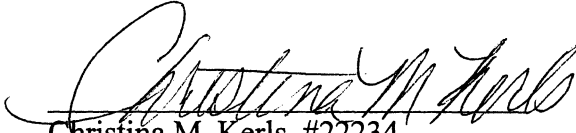
Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Chad Taylor, Shawnee County Attorney, 200 SE 7th, Suite 214, Topeka, KS 66603-3922; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ksag.org on the 10 day of October, 2013.


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