Cite as 2012 Ark. 350

SUPREME COURT OF ARKANSAS

No. CR-11-1010

KEN ALLEN MOORE
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 27, 2012

APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. CR 2008-745-4]

HON. ROBERT LEO HERZFELD, JR., JUDGE

AFFIRMED.

PAUL E. DANIELSON, Associate Justice

Appellant Ken Allen Moore appeals from the Saline County Circuit Court's order extending his probation by one year and directing him to pay the balance of previously ordered restitution in the amount of $10,708.94. His sole point on appeal is that the circuit court erred in determining that he had not made full restitution and in extending his probation. We affirm the circuit court's order.

On May 18, 2010, a judgment and disposition order was entered reflecting Moore's conviction for battery in the third degree, a misdemeanor, and sentencing him to twelve months' probation. He was further ordered to pay costs and fees, as well as restitution of $40,304.35, "less any payments received through insurance claim and/or civil recovery from defendant." On January 20, 2011, the State filed a petition for revocation of Moore's probation, alleging that, while Moore's insurance had paid $29,595.41 toward the victim's civil claim, a balance of $10,708.94 remained, toward which Moore had failed to make any payments. A hearing was held on the State's petition on May 20, 2011.

At the hearing, the State called Ms. Linda Hill, the collector of fines and restitution for the Saline County Sheriff's Department. She testified that while Moore had satisfied his judgment "on the fines and court costs," he had paid zero toward the restitution balance of $40,304.35. The State then conceded that the insurance settlement in the civil action should be credited to the balance of restitution.

In defense, Moore called the victim, who testified that he had received a settlement, to which the State stipulated. The victim also testified that he had signed a release. The circuit court heard the arguments of counsel and agreed to accept trial briefs. As already set forth, the circuit court then entered its order extending Moore's probation and directing him to make restitution of $10,708.94. Moore now brings the instant appeal.

For his sole point on appeal, Moore argues that the circuit court erred in finding that he had not made full restitution and in extending his probation. Moore contends that he did not willfully violate a condition of his probation, namely to make restitution, because the victim executed a release of all claims upon the settlement of his civil suit against Moore. He avers that the release signed by the victim not only released the insurance company, but also released him from any claims of any kind, including the judgment of restitution ordered by the circuit court.

The State responds that because a defendant whose probation is extended does not face imprisonment for the failure to pay restitution, a circuit court need not find that the failure was willful before extending probation. Instead, it urges, the circuit court must find only that the defendant failed to satisfactorily pay restitution before the conclusion of the defendant's probationary period. It further asserts that the victim's settlement in his civil suit against Moore in no way discharged Moore from the restitution ordered by the circuit

court. First, it claims, the victim was not a party to the State's criminal action against Moore and could not have discharged Moore's obligation to pay restitution. But too, the State continues, the purpose of restitution is two-fold: to make the victim whole and rehabilitate the defendant and to deter him and others. Therefore, it argues, any settlement by the victim does not reflect the State's willingness to "accept that sum in satisfaction of the defendant's rehabilitative and deterrent debt to society." *People v. Bernal*, 123 Cal. Rptr. 622, 627 (Cal. App. 2002).

At issue, here, is whether the circuit court erred in finding that Moore had not fulfilled his restitution obligation. In a hearing to revoke, the burden is upon the State to prove the violation of a condition by a preponderance of the evidence, and on appellate review, the circuit court's findings are upheld unless they are clearly against a preponderance of the evidence. *See Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986). A determination of preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony. *See id.* In those areas, we defer to the circuit court's superior position. *See id.* In the instant case, the circuit court's finding that Moore failed to pay restitution was not clearly against a preponderance of the evidence.

The record reveals no dispute (1) that Moore had not made payments toward restitution or (2) that he was entitled to a credit against the amount of restitution owed for the settlement in the civil action against him. Instead, Moore argues now, as he did below, that because the victim signed a waiver of all claims when the civil action was settled, Moore had no further obligation of restitution. Simply put, Moore is mistaken.

Here, the release signed by the victim provided, in pertinent part:

FOR THE SOLE CONSIDERATION OF twenty five thousand Dollars,

> ($25,000.00), the undersigned . . . hereby releases and forever discharges Ken Moore, hereinafter releasee, and American National Property and Casualty, hereinafter the Company, Its Subsidiaries and Affiliates, their heirs, executors, administrators, agents and assigns, . . . from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever . . . .

A release is a type of contract between parties and is interpreted pursuant to the rules of contract interpretation. *See Wal-Mart Stores, Inc. v. Coughlin*, 369 Ark. 365, 255 S.W.3d 424 (2007). Our standard of review for interpreting contracts has been often stated:

> The first rule of interpretation of a contract is to give to the language employed the meaning that the parties intended. In construing any contract, we must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it, as it may be safely assumed that such was the aspect in which the parties themselves viewed it. It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement.

Id. at 371, 255 S.W.3d at 429 (quoting *Alexander v. McEwen*, 367 Ark. 241, 244, 239 S.W.3d 519, 522 (2006) (internal citations omitted)).

An examination of the release's plain language reveals absolutely no mention of the restitution order that was entered against Moore for the victim's benefit. Moreover, the order of restitution was entered well before the release was executed, and still, no mention of it was made. We simply cannot contemplate that the "mass of mankind" would view the instant release as one including a settlement of the restitution funds already adjudged due. Therefore, we cannot say that the circuit court erred in finding that the release did not prevent it from ordering Moore to fulfill his restitution obligation.[1]

[1]We are cognizant that Ark. Code Ann. § 5-4-205(g)(3) (Supp. 2009) permits a judgment of restitution to be discharged by a settlement between a defendant and the beneficiary of the judgment; however, that statute is simply inapplicable in the instant case where the release's plain language does not include a settlement of the order of restitution.

While Moore further asserts that the circuit court erred in failing to make a requisite finding that his failure to pay was either inexcusable or willful, we disagree. Pursuant to Ark. Code Ann. § 5-4-309(d) (Supp. 2009), "[i]f a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his . . . probation, the court may revoke the . . . probation at any time prior to the expiration of the period of . . . probation." We have defined the term "revoke" as meaning "to annul by recalling or taking back." *State v. Owens*, 370 Ark. 421, 425, 260 S.W.3d 288, 291 (2007) (quoting *Webster's Third New Int'l Dictionary*, 1944 (3d ed. 2002)). The instant record makes clear that Moore's probation was not revoked by the circuit court but was merely extended. *See, e.g.*, *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993) (drawing a distinction between revocation of a suspended sentence and the mere extension of a probationary period). Accordingly, section 5-4-309(d) is simply inapplicable.

Nor was the circuit court required to make a finding of willful nonpayment, as held by this court in *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). In *Jordan*, we observed that "[w]here there is no determination that the failure to pay restitution is willful, it is clear that a probationer cannot be punished by imprisonment solely because of a failure to pay." 327 Ark. at 122, 939 S.W.2d at 257. However, as already noted, Moore was not sentenced to a term of imprisonment for failure to fulfill his restitution obligation but was only subjected to an extension of his probation. Because the circuit court did not revoke Moore's probation or sentence him to imprisonment, neither a finding of inexcusability nor of willfulness was required by the circuit court.

For the foregoing reasons, we affirm the circuit court's order.

Affirmed.

GOODSON, J., concurs.

CORBIN, J., dissents.

COURTNEY HUDSON GOODSON, Justice, concurring. I join in the majority opinion but write solely to express my concern that Arkansas Code Annotated § 5-4-205(g)(3) (Supp. 2011) potentially allows a victim, instead of a circuit court, to determine the conditions of a defendant's probation and ultimately impinges on the judge's statutory authority to render a defendant's sentence. For these reasons, I concur.

Section 5-4-205(g)(3) provides that a judgment of restitution "may be discharged by a settlement between the defendant and the beneficiary of the judgment," which is in line with our General Assembly's stated purpose of restitution—to make the victim whole with respect to the financial injury suffered. *See* Ark. Code Ann. § 16-90-301 (Repl. 2006). My concern, however, is that section 5-4-205(g)(3) might allow a victim to, in a sense, "settle around" the State and any interest it has in the circuit court's order of restitution, which can be, and often is, a condition of probation. *See, e.g.*, *State v. K.B.*, 2010 Ark. 228, 379 S.W.3d 471; *Clay v. State*, 236 Ark. 398, 366 S.W.2d 299 (1963) (both holding that the State is the party of interest in a criminal matter, not the victim). I do not believe that the General Assembly intended the State to have no say in whether a judgment of restitution may be settled. I respectfully encourage the General Assembly to examine the statute and clarify its intent.

DONALD L. CORBIN, Justice, dissenting. I must respectfully dissent. Restitution is a penalty imposed on a defendant. Paramount to its application is a recognition that it is to lessen the burden of loss to the victim. The goal of restitution is to make the victim whole or as near to whole as possible. If a victim wishes to enter into a settlement for an

amount less than that ordered by the circuit court, it is the victim's right to do so. Such a settlement may be more beneficial to the victim than waiting for a series of payments that may span a period of years.

The statute governing restitution in criminal matters is codified at Ark. Code Ann. § 5-4-205 (Supp. 2011). This statute is unique in that it specifically allows the victim to enter into a settlement with a defendant for restitution owed. Specifically, it provides that

> [a] judgment under this section may be discharged by a settlement between the defendant and the beneficiary of the judgment.

Ark. Code Ann. § 5-4-205(g)(3). Clearly, the public policy behind this provision is to promote the making of the victim whole.

Here, the majority ignores this statutory provision on the basis that the settlement agreement did not specifically mention that the settlement was made in satisfaction of, or in lieu of, the restitution ordered. The absence of such language is irrelevant in my opinion. The victim accepted the restitution offered, making no demands for the difference between what the insurance company paid in the settlement and the amount ordered to be paid by the circuit court. If the victim was satisfied with the settlement, I would go no further. To hold as the majority does, in my opinion, circumvents the purpose of the statute and the proposed benefits to the victim. Therefore, I respectfully dissent.

Richard Grasby, for appellant.

Dustin McDaniel, Att'y Gen., by: *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellee.