

IN THE SUPREME COURT OF THE STATE OF NEVADA

HIMMAKONE MICHAEL PHOMMALY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49226

**FILED**

DEC 10 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

This is an appeal from an order revoking probation. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

The district court sentenced appellant Himmakone Michael Phommaly to serve two consecutive terms of 24 to 60 months in prison for securities fraud against a person 60 years of age or older and a consecutive prison term of 24 to 60 months for theft by embezzlement. Phommaly was further ordered to pay \$555,864.49 in restitution. The district court suspended the sentences and placed Phommaly on probation.

At the sentencing hearing on June 29, 2006, the district court ordered Phommaly to pay \$50,000 in restitution by January 4, 2007, based upon Phommaly's representations that he could meet such an obligation. This \$50,000 payment was not included in the judgment of conviction prepared by the Attorney General. The record shows that Phommaly failed to pay the \$50,000 by the required date. Subsequently, the State filed a motion to amend the judgment of conviction to include the \$50,000 restitution payment and sought to revoke Phommaly's probation for violating several conditions of his probation. The district court conducted a hearing, after which it granted the State's motion to amend the

judgment of conviction and revoked Phommaly's probation.<sup>1</sup> This appeal followed.

Phommaly argues that because the judgment of conviction failed to include the \$50,000 restitution payment, it was not part of the sentence. He further argues that the district court erred in concluding that he willfully failed to make the \$50,000 restitution payment without affording him a hearing respecting whether his inability to pay restitution was caused by economic hardship.<sup>2</sup> We conclude, however, that Phommaly is not entitled to relief.

A Division of Parole and Probation (P&P) officer testified at the revocation hearing that getting Phommaly to pay the necessary restitution and attend impulse control counseling "has been a struggle." The officer explained that Phommaly had executed a restitution schedule with P&P whereby he was obligated to pay \$1,000 per month beginning in September 2006. As of the hearing date on January 30, 2007, Phommaly had paid only \$2,700 in restitution. The officer also stated that although Phommaly had submitted to the required DNA testing, he had not paid the \$150 fee. The officer further testified that Phommaly was not suitable for continued community service. A P&P report noted that Phommaly's supervising officer directed him to report to impulse counseling in July 2006 and that during each monthly visit with Phommaly, the officer

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<sup>1</sup>We note that the district court's order for revocation of probation and amended judgment of conviction does not include as a condition of probation that Phommaly was to pay \$50,000 in restitution by January 4, 2007.

<sup>2</sup>See NRS 176A.430(4).

advised him to "enter/complete the required counseling." The report, dated January 8, 2007, stated that P&P had received no documentation respecting completion of the counseling.

Phommaly testified about his efforts to satisfy restitution and other probation conditions, explaining that he was working 12 to 13 hours a day, seven days a week and that he had not paid the DNA fee or attended counseling, which required the payment of a fee, because he had been paying toward restitution.

The decision to revoke probation rests within the district court's broad discretionary power, and we will not disturb such a decision absent a clear showing of an abuse of that discretion.<sup>3</sup> Even assuming the district court erred in granting the State's motion to amend the judgment of conviction to reflect the \$50,000 restitution payment as a condition of probation and determining that he willfully failed to satisfy this condition, we conclude that Phommaly is not entitled to relief. His revocation was based on other violations supported by the evidence adduced at the hearing, notably his failure to abide by P&P's restitution schedule to pay \$1,000 per month and his repeated disregard of P&P's direction to enter and complete impulse counseling.

To the extent Phommaly contends that the district court abused its discretion in denying him a hearing on whether his failure to make the \$50,000 restitution payment was a result of economic hardship, we conclude this claim is without merit. The revocation hearing provided Phommaly a suitable opportunity to present evidence demonstrating

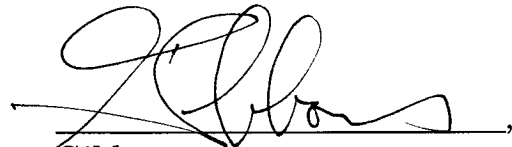
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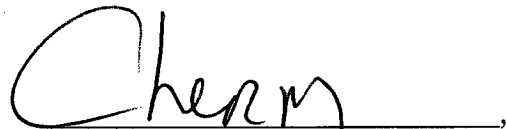
<sup>3</sup>Lewis v. State, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974).

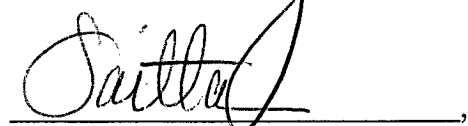
economic hardship. And in fact, Phommaly testified about his financial circumstances, and he cross-examined a P&P officer regarding the officer's observations of Phommaly's sparse living conditions. Moreover, as noted above, the grounds upon which Phommaly's probation was revoked were not solely related to his failure to pay restitution.

Based on the record before us, we conclude that the district court did not err in revoking Phommaly's probation. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Michelle Leavitt, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Consumer Protection  
Bureau/Las Vegas  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk