

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY GRECO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 72754

**FILED**

DEC 29 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER VACATING JUDGMENT AND REMANDING*

Anthony Greco appeals from a district court order revoking probation and reinstating his judgment of conviction. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Greco contends the district court erred in revoking his probation solely because he was unable to pay the court-ordered restitution. Probation may be properly revoked when “[t]he evidence and facts . . . reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.” *Lewis v. State*, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974).

A state may “imprison[ ] an indigent who wilfully fails or refuses to make a good faith effort to comply with an alternative payment plan established by the court.” *Gilbert v. State*, 99 Nev. 702, 708, 669 P.2d 699, 703 (1983). However, probation may not be revoked simply because the probationer, because of his indigency, is not able to pay restitution. *Burke v. State*, 96 Nev. 449, 451, 611 P.2d 203, 204 (1980). To that end, before revoking probation due to a failure to pay, a district court must

conduct a hearing as to the defendant's financial ability to pay. *Gilbert*, 99 Nev. at 708, 669 P.2d at 703.

Here, the State sought to revoke Greco's probation for his failure to make any payments toward restitution.<sup>1</sup> Following the first two revocation hearings, the district court filed orders reinstating probation and set status hearings to monitor Greco's restitution-payment progress. At those hearings, Greco stated he had little income, was on Medicaid, received food stamps, and was over a year behind in paying his rent. He also provided documentation of his multiple medical issues and that they prevented him from being able to work, and he represented he had filed for disability. At his third and final hearing, Greco noted he continued to have medical issues, and he represented he had no means to make any restitution payments and recently filed for bankruptcy protection. The State never argued Greco had the ability to pay restitution.

The district court did not conduct an evidentiary hearing regarding Greco's indigency or his ability to make even a good faith restitution payment. Rather, it stated, "He's declared bankruptcy, he has medical problems; he's just not going to pay restitution." It then ordered Greco's probation revoked and remanded him into custody.

We conclude the district court abused its discretion in revoking Greco's probation without first conducting an evidentiary


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<sup>1</sup>We note the probation violation report also alleged Greco failed to provide proof of employment. The State never argued this as a ground for probation revocation, and the district court did not indicate it was a consideration in its decision.

hearing and making specific findings as to his ability to pay. *See Lewis*, 90 Nev. at 438, 529 P.2d at 797. Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for a hearing consistent with this order.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Robert W. Lane, District Judge  
Michael P. Printy  
Attorney General/Carson City  
Attorney General/Las Vegas  
Nye County District Attorney  
Nye County Clerk