

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34496
O/prt

_____AD3d_____

Argued - March 5, 2012

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2009-03489

DECISION & ORDER

The People, etc., respondent,
v Mardouche Souffrance, appellant.

(Ind. No. 2883/06)

Lynn W. L. Fahey, New York, N.Y., for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Leonard Koerner and Edward F. X. Hart of counsel), for respondent.

Appeal by the defendant from an amended judgment of the Supreme Court, Queens County (Wong, J.), rendered March 26, 2009, revoking a sentence of probation previously imposed by the same court (Mullings, J.), upon a finding that he had violated a condition thereof, and imposing a sentence of imprisonment upon his previous conviction of rape in the second degree.

ORDERED that the amended judgment is reversed, on the law and in the exercise of discretion, and the matter is remitted for further proceedings consistent herewith, before a different Justice, and for a new determination thereafter.

The defendant was originally sentenced, upon his conviction of rape in the second degree, inter alia, to a term of probation. The defendant's term of probation was subsequently revoked based, in large part, upon the defendant's failure to pay fees for required sex offender and substance abuse treatment programs, and he was sentenced to a prison term of 2½ to 7 years.

When a probationer cannot make court-ordered payments "despite sufficient good faith efforts to acquire the resources to do so," a court "must consider measures of punishment other than imprisonment" (*People v Amorosi*, 96 NY2d 180, 184; see *Bearden v Georgia*, 461 US 660, 672-673; *People v Brandon F.*, 299 AD2d 962, 963; see also *People v Hassman*, 70 AD3d 716).

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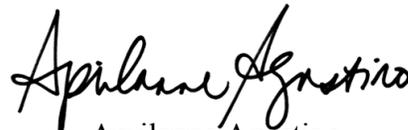
“[D]epriving probationers of conditional freedom based simply on their indigence” constitutes a violation of their rights under the Fourteenth Amendment of the United States Constitution (*People v Amorosi*, 96 NY2d at 184; *see Bearden v Georgia*, 461 US at 672-673). Here, the defendant correctly contends that, absent a finding that his failure to pay the program fees was willful, the revocation of his probation and sentence to a term of imprisonment based upon his failure to pay program fees violated his constitutional rights (*see Bearden v Georgia*, 461 US at 672-673; *People v Amorosi*, 96 NY2d at 184; *People v Brandon F.*, 299 AD2d at 963).

Accordingly, we remit the matter for further proceedings, before a different Justice, to determine whether the defendant’s failure to pay the program fees was willful, and to determine whether other grounds relied upon by the Supreme Court in revoking the defendant’s probation may, by themselves and consistent with the defendant’s due process rights, serve as a valid basis for revocation of his probation and the imposition of a sentence of imprisonment, and for a new determination thereafter.

In light of our determination, we need not reach the parties’ remaining contentions.

SKELOS, J.P., DICKERSON, ENG and LEVENTHAL, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court