

Roger Williams University Law Review

Volume 28
Issue 3 *Vol. 28, No. 3: Summer 2023*

Article 24

Spring 2023

State v. Regan, 273 A.3d 116 (R.I. 2022)

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Recommended Citation

Costello, Rebecca (2023) "State v. Regan, 273 A.3d 116 (R.I. 2022)," *Roger Williams University Law Review*. Vol. 28: Iss. 3, Article 24.

Available at: https://docs.rwu.edu/rwu_LR/vol28/iss3/24

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Criminal Law. *State v. Regan*, 273 A.3d 116 (R.I. 2022). Trial judges cannot extend probation nor declare the defendant a probation violator if the defendant has complied with their probation's terms but cannot repay their court-ordered restitution in full by the date their probation expires.

FACTS AND TRAVEL

In 2008, Geoffrey Regan, a real estate lawyer, unlawfully diverted over half a million dollars from real estate closings for his own use¹ and two years later was charged with unlawful appropriation in an amount greater than \$1,000.² In January 2011, after pleading *nolo contendere* to the charge, he was sentenced to ten years—one year to serve in prison, a second year to be served on home confinement, and the remaining eight years were suspended with probation.³ The defendant also had to complete 250 hours of community service and pay \$520,295.46 in court-ordered restitution.⁴ Notably, there was never a hearing to determine the defendant's ability to pay the court-ordered restitution.⁵ Six-and-a-half years later, in June 2017, the defendant signed a payment plan outlining that he would pay \$200 monthly.⁶ The defendant remained compliant with the restitution payment plan.⁷

In December 2020, the defendant had a restitution balance of \$488,000.⁸ In anticipation of his probation expiring the next month, January 2021, the Superior Court found the defendant to

1. Katie Mulvaney, *Failing to Pay Full Restitution Has Kept People on Probation Indefinitely in RI. No More.*, PROVIDENCE J. (May 31, 2022; 9:45 AM), <https://www.providencejournal.com/story/news/courts/2022/05/31/ri-state-supreme-court-ruling-probation-sentences-restitution/9994701002/>.

2. *State v. Regan*, 273 A.3d 116, 118 (R.I. 2022).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

be a probation violator.⁹ While the defendant was fully compliant with his restitution payment plan, “[t]he trial justice reasoned that [the defendant’s] sentence obligated him ‘to pay restitution in the time period in which [he] w[as] sentenced . . . [and] short of a miracle[,]’ he would be unable to pay the remaining \$488,000 balance before the sentence expired in January 2021.”¹⁰ As a result, the trial justice effectively extended the defendant’s probationary period to monitor the defendant’s continued payments, noting that at any point prior to the defendant’s full repayment of restitution, the court could order the defendant to serve the remaining eight years suspended time at the Adult Correctional Institutions.¹¹ The defendant timely appealed the order declaring him a probation violator.¹²

ANALYSIS AND HOLDING

For a violation of probation, “the state must demonstrate ‘by a fair preponderance of the evidence that the defendant breached a condition of the defendant’s probation.’”¹³ Upon review, the Rhode Island Supreme Court will only “reverse a probation-violation finding only if the hearing justice acted arbitrarily or capriciously.”¹⁴ The Court vacated the Superior Court order finding that the defendant was a probation violator, holding that the trial justice’s decision “was arbitrary and capricious.”¹⁵ The Court emphasized that a fundamental condition of probation “is for a defendant to ‘[p]ay restitution . . . based on the defendant’s ability to pay.’”¹⁶ The Court noted that before declaring the defendant a probation violator, the trial justice failed to make any findings on the defendant’s ability to pay or whether the defendant’s failure to pay “was willful, deliberate, or in defiance of his obligations.”¹⁷ Thus, while the defendant remains civilly liable for the remaining restitution after his

9. *Id.*

10. *Id.* (last four alterations in original).

11. *Id.*

12. *Id.*

13. *Id.* at 118-19 (quoting Super. R. Crim. P. 32(f)).

14. *Id.* at 119 (quoting *State v. LaRoche*, 883 A.2d 1151, 1154 (R.I. 2005)).

15. *Id.*

16. *Id.* (alteration in original) (quoting R.I. Gen. Laws § 12-19-8.1(a)(8) (1956)).

17. *Id.* at 120.

probation expired in January 2021, “his sentence and the Superior Court’s jurisdiction to oversee his probation for the offense for which he was convicted . . . concluded.”¹⁸

COMMENTARY

Prior to this decision, it was usual practice for lower courts to indefinitely extend probationary periods for defendants unable to pay restitution in full.¹⁹ With this decision, the Court stressed the need to determine the defendants’ ability to pay when determining restitution amounts.²⁰ Specifically, the Court emphasizes that the state can recoup any remaining restitution through civil litigation rather than prolonging probationary periods and subjecting defendants to further criminal sanctions.²¹ Critically, the Court distinguishes between willful violations of restitution payments and cases where defendants are compliant with court-ordered restitution payments but will not be able to fully repay in the probationary period.²² The Court emphasized that the state should continue to file probation violations against defendants who willfully violate the terms of their restitution repayment.²³ However, before a court can find that a defendant violated their probation for failing to repay restitution, the court must first determine the defendant’s ability to pay and review the defendant’s efforts to repay.²⁴ Failing to first determine the defendant’s ability to pay would criminalize poverty by specifically targeting indigent defendants. This decision prevents the state from imprisoning indigent defendants simply because they cannot afford restitution. Furthermore, the Court soundly rejected the widespread practice of trial courts extending a defendant’s probation period beyond the expiration date.²⁵ This decision prevents a trial justice from extending a defendant’s

18. *Id.* at 121.

19. *See* Mulvaney, *supra* note 1.

20. *Regan*, 273 A.3d at 119.

21. *Id.* at 120.

22. *Id.* at 119-20.

23. *Id.* at 119 (“On the other hand, if the probationer has either refused to pay or has not made ‘sufficient bona fide efforts’ to acquire the resources to pay, then the sentencing court may revoke probation and impose a prison sentence.” quoting *LaRoche*, 883 A.2d at 1154).

24. *Id.*

25. *Id.* at 121.

probation period and subsequent suspended time, indefinitely. This is a critical safeguard of individual liberties.

CONCLUSION

The Rhode Island Supreme Court held that a defendant does not violate their probation simply because they cannot pay their court-ordered restitution before their probation expires. The defendant is civilly liable for the remaining restitution; however, a court cannot extend the probationary period or threaten the defendant with incarceration for failing to finish paying restitution before the probationary period is over.

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