Cite as 2009 Ark. App. 551

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-1001

CLARENCE E. WILLIAMS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** September 2, 2009 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-2006-1396] HONORABLE JAMES O. COX, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

This case is once more before us after we ordered re-briefing in an unpublished April 22, 2009 opinion. Clarence E. Williams appeals from an order of the Sebastian County Circuit Court revoking his suspended sentence for Class C felony theft of property. The trial court found that he had violated the terms and conditions of his suspended imposition of sentence (SIS) by possessing and using marijuana, committing aggravated robbery, and failing to make payments on his fees and costs. It sentenced Williams to ten years in the Arkansas Department of Correction. On appeal, Williams argues that the State failed to prove by a preponderance of the evidence that he violated the terms and conditions of his SIS. We affirm.

In a revocation proceeding, the State must prove the violation of a condition of the SIS by a preponderance of the evidence. Ark. Code Ann. § 5-4-309 (Repl. 2006). On appeal, the trial court's findings will be upheld unless they are clearly against a preponderance

of the evidence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). In our review, we defer to the trial judge's superior position to determine the credibility of the witnesses. *Id.* The State need only prove that the appellant committed one violation of the conditions of the SIS in order to revoke the SIS. *Id.*

Williams argues that the three grounds the trial court found for revoking were not proven by a preponderance of the evidence. He asserts that the proof that he committed aggravated robbery was insufficient because "the testimony of the robbery victim was not very strong" based on the fact that the robber's face was almost completely covered up by clothing. He contends that the proof of his marijuana use and possession was insufficient because it came from his un-Mirandized statements that he objected to at the hearing, and the trial court "arbitrarily disregarded" testimony that another person committed these offenses. Finally, Williams argues that his failure to pay his fines and court costs did not constitute a proper basis for the revocation of his SIS because no testimony was presented to show that his failure to pay was willful. We disagree.

Regarding the aggravated robbery, Williams largely mischaracterizes the proof adduced at the revocation hearing. While it is true that convenience store clerk Jennifer Ellis testified that Williams's face was partially covered by a hat, hoodie, and glasses, she nonetheless asserted that Williams was "very recognizable" because of his scars and light skin tone. Prior to making her in-court identification of Williams as the robber, Ms. Ellis was able to pick Williams out of an eight-person photo array, and Williams did not move to suppress that identification. Furthermore, Fort Smith Police Officer Dewey Young testified that he

recognized Williams from the convenience store surveillance tape, and when he conducted a Mirandized interview with Williams, he obtained a confession. According to Officer Young, Williams told him that he robbed the convenience store with a BB pistol because he wanted money to buy drugs. We cannot say that the proof that Williams committed aggravated robbery was clearly against the preponderance of the evidence.

We likewise hold that the trial court's finding that Williams possessed and used marijuana was not clearly against the preponderance of the evidence. Williams's parole officer, Amber Allig, testified that when she conducted a "parole search" of the motel room where Williams was staying, "possible marijuana," cocaine, and drug paraphernalia were found in the room.[1] Williams admitted to her that he would test positive for marijuana. Discovery of the contraband along with Williams's admission that he used marijuana support the trial court's finding that Williams breached this condition of his SIS. As to whether the trial court erred in considering his admission to Allig, although Williams did object to the statement, he did not move below to suppress it. It is Williams's duty to properly preserve this issue for appeal. *Swanigan v. State*, 336 Ark. 285, 984 S.W.2d 799 (1999). Furthermore, Williams has not separately argued for the suppression of the admission on appeal, and we decline to make that argument for him.

Finally, we reject Williams's contention that the trial court's finding that he inexcusably failed to pay his fines and costs was not a proper basis for the revocation of his SIS because no

[1]The cocaine and drug paraphernalia were found in the personal effects of Williams's companion. The trial judge did not make cocaine possession a basis for revocation.

testimony was presented to show that his failure to pay was willful. In the first place, we held in *Reese v. State*, 26 Ark. App. 42, 44, 759 S.W.2d 576, 577 (1988), that while it is always the State's burden to prove by a preponderance of the evidence that the failure to pay was inexcusable, once the State has introduced evidence of nonpayment, the burden of going forward shifts to the defendant to offer some reasonable excuse for his failure to pay. We reasoned that to hold otherwise would place a burden upon the State that it could never meet—it would require the State, as part of its case-in-chief, to negate any possible excuses for nonpayment. Here, Williams did not meet his burden of going forward with any excuse, reasonable or otherwise. Furthermore, we believe that Williams mischaracterizes the proof. There was ample evidence that while Williams had failed to make even a single payment that was required by the terms and conditions of his SIS, he was indulging in the use of illegal drugs. Obviously, using one's resources for the acquisition of illegal drugs is not a justification for failing to pay fines and costs.

Affirmed.

GLOVER and MARSHALL, JJ., agree.