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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-486

	Opinion Delivered December 2, 2009
SHARON KAY GILMORE APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [Nos. CR-03-1210-1, CR-08-1778-1]
V.	HONORABLE WILLIAM A. STOREY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Sharon Kay Gilmore appeals from an order finding that she violated the terms and conditions of her probation. She argues that there was insufficient evidence to support a conclusion that she violated her probation and that the trial court abused its discretion in its failure to grant her a continuance. She also claims that the trial court erred in its denial of her due-process claim and her motion to suppress and dismiss due to the destruction of evidence.[1] We see no error and affirm the decision of the trial court.

On January 30, 2004, Gilmore pleaded guilty to possession of methamphetamine and possession of pseudoephedrine in Washington County Circuit Court. She received five-years' probation. A condition of her probation required that she "not commit a criminal offense

[1]Because Gilmore failed to secure a ruling from the trial court on her due-process claim and she failed to timely object to the allegedly infirm evidence, she has waived these arguments for appeal. *Costes v. State*, 103 Ark. App. 171, 174–75, 287 S.W.3d 639, 642–43 (2008).

punishable by imprisonment." The State filed a petition to revoke on December 12, 2008, alleging that Gilmore had committed a new offense—possession of drug paraphernalia with intent to manufacture. The trial court ultimately revoked her probation and sentenced her to ten-years' imprisonment. Once her probation was revoked, upon the State's motion, the court entered an order of nolle prosequi for the new charges. She now appeals.

Relating to her first point on appeal, in order to revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of release by a preponderance of the evidence. Ark. Code Ann. § 5-4-309(d) (Repl. 2005). On review, we will uphold the trial court's findings unless they are clearly against the preponderance of the evidence. *Bradley v. State*, 347 Ark. 518, 521, 65 S.W.3d 874, 876 (2002). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. Thus, the burden on the State is not as great in a revocation hearing. *Lemons v. State*, 310 Ark. 381, 383, 836 S.W.2d 861, 862 (1992). Because determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial court's superior position. *Id.*, 836 S.W.2d at 862.

Here, Jeremiah Shultz, a probation officer with the Arkansas Department of Correction testified that he went to Gilmore's property on August 28, 2008, for a "home visit" on her son, Michael Smith—a parolee—after learning that Smith had purchased pseudoephedrine seven times within a four-month period. Smith listed Gilmore's address as his home address. When the officer arrived, he did not locate Smith but did notice a "burn pile" in a fifty-gallon drum located in the front yard of the residence. The drum was positioned approximately forty to fifty yards from the house and about ten yards from "where you park the cars." Shultz testified that

the drum contained plastic tubing, battery casings, and various bottles containing substances such as acetone and denatured alcohol. The testifying officer opined that burn piles were "typically used to get rid of anything that was used to make methamphetamine."

The following day, Shultz returned to the property with drug-task-force officers. This time, Gilmore was at home. According to officers' testimony, she told them that Smith had not been on the property since "about a week ago" and that he "comes out very infrequently" and "doesn't stay very long." While on the property the officers smelled "a very strong chemical odor" and found a bucket that contained an HCL generator[2] (which appellant conceded is used to manufacture methamphetamine). Inside a shed, the officers found a bucket that contained residue-laced tubing material and two containers of muriatic acid. The officers also found various portions of a methamphetamine lab secreted in several old vehicles parked on the property. Officers testified that inside of a broken-down truck was a "near-operational meth lab." The officers also noted that the truck was in close proximity to the main drive of the home and that one would have to pass the truck in order to enter the home. Officers noted that Gilmore "showed no surprise" when the "significant"-sized methamphetamine lab was discovered and that they observed no other persons on the property or any signs that anyone other than Gilmore lived there. Finally, according to the hearing record, the officers saw none of Gilmore's son's clothing during the "walkthrough" of the home.

After a review of the evidence adduced at the hearing, it was reasonable to conclude that Gilmore had both knowledge and control of the methamphetamine lab found on her property.

[2]An HCL generator is a device used to process hydrochloric acid.

This was particularly true based on the fact that the State was not required to prove that Gilmore actually physically possessed the contraband; the State only had to show that it was under her dominion and control. *Polk v. State*, 348 Ark. 446, 452, 73 S.W.3d 609, 613–14 (2002). And, this "control" can be inferred from the circumstances, such as proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Nichols v. State*, 306 Ark. 417, 419, 815 S.W.2d 382, 383 (1991). Here, the evidence showed that Gilmore was the only person living on a property that was overwhelmed with a chemical odor, and contained a laboratory of significant size, with component parts positioned along a necessary ingress and egress to the property. Based on this evidence, the trial court's finding that Gilmore violated a condition of her probation is not clearly erroneous.

Next, we consider Gilmore's argument that the trial court erred in its failure to grant her a continuance so that she could properly prepare her defense. We review the ruling under an abuse-of-discretion standard. *Smith v. State*, 352 Ark. 92, 106, 98 S.W.3d 433, 441–42 (2003). Here, Gilmore requested a continuance at the beginning of the proceeding on December 10, 2008, so that she could listen to a CD that, according to Gilmore, may have been "exculpatory in nature." The judge expressed frustration with the fact that she waited until the day of trial to raise a discovery issue that allegedly required more investigation. However, despite the late notice of her need for "a little more time," the judge agreed to give her until December 15, 2008. And, the hearing did not actually take place until December 18, 2008. Therefore, Gilmore had eight days to listen to the CD. As such, Gilmore neither showed that she was denied a continuance nor prejudiced in any way. We find no abuse of discretion and affirm on this point as well.

Affirmed.

GLADWIN and MARSHALL, JJ., agree.

Jouett Law Firm, by: *Jason Andrew Jouett*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Rachel M. Hurst*, Ass't Att'y Gen., for appellee.