Cite as 2011 Ark. App. 358

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 10-974

	Opinion Delivered May 11, 2011
JUSTIN CURTIS CALDWELL APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR-06-1499]
V.	HONORABLE JAMES O. COX, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

DOUG MARTIN, Judge

Appellant Justin Caldwell pled guilty on May 3, 2006, to one count of possession of cocaine and one count of possession of marijuana. The Sebastian County Circuit Court sentenced him to two-and-a-half years' imprisonment with an additional seven-and-a-half years' suspended imposition of sentence (SIS). In addition, on March 2, 2007, Caldwell pled guilty to one count of possession of cocaine with intent to deliver, one count of possession of marijuana with intent to deliver, and possession of drug paraphernalia. At that time, the circuit court sentenced him to ten years' imprisonment in the Arkansas Department of Correction with an additional ten years' SIS. Caldwell was released from the Department of Correction on February 23, 2009.

On February 24, 2010, the State filed a petition to revoke Caldwell's SIS, alleging that he had committed the offense of theft by receiving in Sebastian County. After a revocation hearing on June 8, 2010, the circuit court found that Caldwell had violated the terms and conditions of his SIS, revoked his SIS, and sentenced him to ten years' imprisonment in the Arkansas Department of Correction. Caldwell filed a timely notice of appeal on June 28, 2010, and now argues that the State failed to show by a preponderance of the evidence that he violated the terms and conditions of his SIS. We disagree and affirm.

In a probation-revocation hearing, the State must prove its case by a preponderance of the evidence. *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006); *Smith v. State*, 9 Ark. App. 55, 652 S.W.2d 641 (1983). To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Repl. 2006); *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). The State bears the burden of proof, but it need only prove that the defendant committed one violation of the conditions. *Haley*, *supra.* When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id.* Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id.*; *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). Since the determination of a preponderance of the evidence turns on questions of credibility and the

weight to be given testimony, we defer to the trial judge's superior position. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Caldwell argues on appeal that the State failed to show by a preponderance of the evidence that he violated the terms and conditions of his SIS. He urges that there was insufficient evidence that he committed the offense of theft by receiving, in that there was no proof that he knew or had good reason to know that the property was stolen. In addition, Caldwell contends that the State failed to give him sufficient notice that the alleged violation of the terms and conditions of his SIS occurred in Oklahoma, rather than in Arkansas.

As noted above, the offense underlying the revocation petition was that of theft by receiving. A person commits the offense of theft by receiving if he "receives, retains, or disposes of stolen property of another person: (1) knowing that the property was stolen; or (2) having good reason to believe the property was stolen." Ark. Code Ann. § 5-36-106(a) (Repl. 2006). The unexplained possession or control by a person of recently stolen property or the acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that he knows or believes that the property was stolen. Ark. Code Ann. § 5-36-106(c).

At the revocation hearing, the State's first witness was Billy Wright, a resident of Fort Smith. Wright testified that, on September 25, 2009, he had a car for sale that he had parked in a lot next to a bus being offered for sale by Clarence Smith. About ten or eleven o'clock that morning, Wright saw four men "messing around with the bus and the car." Wright

explained that one man was under the bus "like he was trying to loosen the brakes up, beating around on it underneath it." He was concerned, so he drove over and spoke to one of the men, whom Wright identified at the hearing as Caldwell. Caldwell asked Wright who owned the bus, and Wright told him. Wright left but came back a few hours later, and the bus was gone; when he came back again, the bus was there; and when he drove by one more time, the bus was gone. Before leaving the stand, Wright identified a photograph of the bus.

Clarence Smith, who described himself as a private investigator, also identified the same photograph of the bus. Smith testified that he purchased the bus from the First Assembly of God Church in Van Buren and was looking to sell it for $5,500. He realized the next day that the bus was missing, along with approximately 21,000 pounds of steel that he had been planning to use on a home-improvement project. Smith filed a police report but also did some investigating on his own.

Mark Lewallen of Yaffe Iron and Metal testified that, on September 25, 2009, he purchased a school-bus body for scrap for $585. Lewallen explained that when a person selling scrap metal to Yaffe is ready to be paid, that person will provide Yaffe with a driver's license, which is swiped through a card reader that scans the information on the license and uploads it to the computer. Lewallen said that he would look at the picture on the license, make sure it is the person who handed over the identification, have the person sign the ticket, and then pay the person. If this procedure was not followed, Lewallen said, the

computer would not let him continue with the transaction. Through Lewallen, the State introduced a purchase ticket bearing the signature of Justin Caldwell.

Lewallen said on cross-examination that he remembered the day in question because "they had a lot of trouble getting the tires off of the bus." When asked who "they" were, Lewallen stated that there were three people who brought the bus in; of those three people, the one who presented the driver's license to complete the transaction was "sitting right over there" at counsel table, he said, identifying Caldwell. Lewallen said he also recognized Caldwell because Caldwell had concluded perhaps three or four previous transactions with Yaffe.

On redirect, Lewallen identified a picture of the remnants of the bus, noting that he remembered it because they did not get many buses at Yaffe. On recross, Lewallen explained that Yaffe's office is on Wheeler Avenue in Fort Smith, although the company's shredding site was across the state line in Arkoma, Oklahoma.

On this evidence, the court found by a preponderance of the evidence that Caldwell had committed the offense of theft by receiving. On appeal, Caldwell argues that there was no evidence demonstrating that he knew that the property he sold to Yaffe Iron and Metal was stolen, nor was there evidence that he acquired the property for consideration known to be far below the property's reasonable value. He asserts that the evidence showed that the scrap value of the bus was what it was worth at the time, and he argues that the fact that he

sold a bus for the amount that it was worth is insufficient to demonstrate that he knew or had good reason to know that the property he was selling was stolen.

There is no merit to Caldwell's argument. As noted above, section 5-36-103(a) provides that the "unexplained possession or control by the person of recently stolen property" gives rise to a presumption that the person knows or believes the property was stolen. As the State points out, at about ten or eleven o'clock in the morning on September 25, 2009, Caldwell was informed that Clarence Smith owned the bus, but, according to the purchase ticket, Caldwell sold the bus for scrap shortly after one o'clock p.m. that day, and no evidence indicates how or why Caldwell would be in possession of a bus that Smith reported stolen. Thus, there was clearly sufficient evidence from which the circuit court could find by a preponderance of the evidence that Caldwell committed the offense of theft by receiving.

In a second argument, Caldwell asserts that the revocation petition alleged that the offense of theft by receiving occurred in Arkansas, but the evidence presented at trial "indicated that the bus, at the time of the sale, was located in Arkoma, which is Oklahoma." He argues that he was "given no notice that the alleged violation of the terms and conditions of the suspended [imposition of] sentence occurred in Oklahoma rather than in Arkansas" and that to allow the revocation to be upheld "based upon allegations that are not alleged in the petition would amount to a violation of the appellant's due process rights."

Caldwell's argument is not preserved for appeal. At no point during the revocation hearing did he raise the issue posed in his brief on appeal. In moving for directed verdict, Caldwell stated only the following:

> Your Honor, we would move for directed verdict on the case. And, Your Honor, the basis would be insufficient evidence that a theft by receiving was committed. Your Honor, the evidence presented in this case was there was an item that belonged to the Assembly of God Church and Carol Smith [Clarence Smith's wife]. We would move for directed verdict of acquittal based upon that, lack of the evidence to establish that.

Moreover, during his closing arguments, Caldwell never mentioned the scrapping of the vehicle in Oklahoma, the alleged lack of notice in the revocation petition, or his due-process rights.

It is axiomatic that the appellate court will not address an argument, even a constitutional one, that is raised for the first time on appeal. *Rhodes v. State*, 2011 Ark. 146 (declining to consider a due-process argument because the argument had not been articulated to the circuit court); *Rogers v. State*, 2011 Ark. App. 2 (holding that a constitutional due-process argument must be raised before the circuit court to preserve the argument for appeal and thus declining to address the merits of appellant's due-process argument on appeal). Because Caldwell has failed to preserve this argument for review, we do not address it.

Affirmed.

HART and GRUBER, JJ., agree.