

James Odis GOSSETT, Jr. *v.* STATE of Arkansas

CA CR 03-1419

191 S.W.3d 548

Court of Appeals of Arkansas

Division IV

Opinion delivered September 15, 2004

1. CRIMINAL LAW — REVOCATION PROCEEDINGS — BURDEN ON STATE. — In revocation proceedings, the burden is on the State to prove by a preponderance of the evidence that the defendant has violated a condition of his suspension.
2. EVIDENCE — CHALLENGE TO SUFFICIENCY ON APPEAL FROM ORDER OF REVOCATION — STANDARD OF REVIEW. — Where sufficiency of the evidence is challenged on appeal from an order of revocation, the appellate court will not reverse the trial court's decision unless its findings are clearly against the preponderance of the evidence; in making its review, the court defers to the superior position of the trial court to determine questions of credibility and the weight to be given to the evidence.
3. CRIMINAL LAW — REVOCATION OF PROBATION — WHEN FAILURE TO PAY RESTITUTION MAY BE PUNISHED. — A probationer cannot be punished by imprisonment solely because of a failure to pay restitu-

tion in the absence of a determination that the failure to pay is willful; a defendant's failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment.

4. CRIMINAL LAW — INTENT — MAY BE INFERRED FROM FLIGHT. — Flight is a circumstance from which criminal intent may be inferred.
5. CRIMINAL LAW — FAILURE TO PAY CHILD SUPPORT FOUND WILLFUL — REVOCATION OF SUSPENSION AFFIRMED. — Where appellant was \$20,000 in arrears on child-support payments, he had made only three fifty-dollar payments during the year following his conviction for non-support, which payments were made only after he had been arrested and detained on charges of failure to pay child support, appellant secured his release by posting a cash bond in the amount of \$500, which he forfeited by failing to appear in court, appellant was an able-bodied and skilled welder capable of earning a good wage, he was able to quickly raise \$500 to secure his release from jail following his arrest in Arkansas, and his failure to appear and subsequent apprehension in the state of Washington could properly be viewed as flight, the trial court's finding that appellant violated the terms of his suspension by willfully failing to pay the arrearages owed, and its sentencing him to a term of six years imprisonment was affirmed.

Appeal from Sebastian Circuit Court; *James R. Marschewski*, Judge, affirmed.

David L. Dunagin, for appellant.

Mike Beebe, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

JOHAN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with non-support, a Class-D felony. He pled guilty to that offense and received a six-year suspended imposition of sentence on September 18, 2002. As a condition of his suspension, appellant was ordered to pay arrearages in the amount of sixty dollars per week in addition to child support in the amount of fifty dollars per week as ordered by the court. He failed to make these payments as ordered, and a petition to revoke his suspension was filed. After a revocation hearing September 10, 2003, the trial court found that appellant violated the terms of his suspension by willfully failing to pay these amounts, and sentenced the appellant to six years' imprisonment, with an additional three years' suspended imposition of sentence. This appeal followed.

For reversal, appellant contends that the evidence adduced at trial was insufficient to support a finding that he violated the conditions of his suspended imposition of sentence. We affirm.

[1, 2] In revocation proceedings, the burden is on the State to prove by a preponderance of the evidence that the defendant has violated a condition of his suspension. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996). Where the sufficiency of the evidence is challenged on appeal from an order of revocation, we will not reverse the trial court's decision unless its findings are clearly against the preponderance of the evidence; in making our review, we defer to the superior position of the trial court to determine questions of credibility and the weight to be given to the evidence. *Id.*

[3] In the present case, there was evidence that appellant was \$20,000 in arrears, and that he had made only three fifty-dollar payments during the year following his conviction for non-support. There was also evidence that these payments were made only after appellant had been arrested and detained in Fort Smith, Arkansas, on charges of failure to pay child support. On February 10, 2003, appellant secured his release by posting a cash bond in the amount of \$500. Appellant forfeited this bond by failing to appear in court as ordered. He was located through N.C.I.C. and arrested in the state of Washington on charges of failure to appear and non-support on April 23, 2003, and was extradited to Arkansas on August 2, 2003. Appellant testified at trial, asserting that he had been unable to make the ordered payments because he was unemployed and was unable to find work during the period in question.

[4, 5] We do not think that the trial court erred in declining to believe appellant's testimony. There was evidence that appellant was an able-bodied and skilled welder capable of earning a good wage. Although we recognize that a probationer cannot be punished by imprisonment solely because of a failure to pay restitution in the absence of a determination that the failure to pay is willful, a defendant's failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). Here there was evidence that appellant was able to quickly raise \$500 to secure his release from jail following his arrest in Arkansas. Furthermore, appellant's failure to appear and subse-

quent apprehension in the state of Washington can properly be viewed as flight, and it is well-settled that flight is a circumstance from which criminal intent may be inferred. *See, e.g., Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990); *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985).

Affirmed.

GLADWIN and NEAL, JJ., agree.
