

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 11-25

JACK WAGNER BASS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered June 22, 2011

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. CR-03-2520]

HONORABLE CHARLES E.
CLAWSON, JR., JUDGE

AFFIRMED

DOUG MARTIN, Judge

The Faulkner County Circuit Court revoked appellant Joe (Jack) Bass's probation upon finding that he violated the terms and conditions of his probation by failing to report to his probation officer, and the trial court sentenced appellant to four years' imprisonment. Appellant argues on appeal that the trial court erred in revoking his probation because the testimony shows that he did not inexcusably violate the terms and conditions of his probation given that he was incarcerated and on parole in Louisiana during his probationary period. We affirm.

On May 25, 2004, appellant pleaded guilty to theft of property and was sentenced to five years' probation and ordered to pay a \$2,500 fine, \$1,200 in restitution, and various costs. One condition of appellant's probation provided: "That you shall report to the Probation Office of the Circuit Court as directed and shall permit the Probation Office to visit you in your residence, place of employment or other property"

The prosecuting attorney filed a “Motion for Revocation Warrant” on July 12, 2004, alleging that appellant had violated the terms and conditions of his probation by failing to report as directed. A bench warrant was subsequently issued for appellant’s arrest but was not served on him until August 18, 2010, when appellant appeared in Hot Springs, Arkansas.

At the probation-revocation hearing held on September 3, 2010, appellant’s probation officer, Dana Otto, testified that appellant signed the terms and conditions of his probation on May 25, 2004. According to Otto, another officer conducted the initial intake on appellant on May 27, 2004, and appellant was informed at that time to contact Otto or else a warrant would be issued for his arrest. Otto testified that appellant, however, did not contact the probation office and that she in fact had never seen appellant until the day of the hearing. Otto testified that a warrant was issued for appellant’s arrest on July 14, 2004. In addition, Otto testified that documentation showed that there was a fugitive warrant out for appellant from Caldwell Parish in Louisiana at the time appellant entered his plea to the theft-of-property charge. Otto testified on cross-examination that it was possible that appellant was extradited to Louisiana without the knowledge of the Arkansas probation office.

Appellant testified that he was arrested in August 2010 when he was in Hot Springs for his daughter’s birthday and to get supplies for the company that employed him. The company, which had gotten into “some trouble,” ran a background check on its employees and discovered that appellant had an outstanding warrant for his arrest.

Appellant further testified that, at the time of his initial intake in Arkansas, he had outstanding charges in Louisiana and was awaiting extradition to Louisiana. According to

appellant, two probation officers present at the initial intake told him to contact them when he got through with his obligations in Louisiana. Appellant testified that, six or seven days after he received probation in Arkansas, Louisiana officials took him to Louisiana. Appellant testified that he remained in jail in Louisiana until around October 28, 2004. Appellant further testified that, in December 2006, he went to the penitentiary in Louisiana and was not released until 2008 or 2009. Appellant conceded that, from October 2004 to December 2006, he was on parole in Louisiana but did not contact the probation office in Arkansas to inquire about his obligations in Faulkner County. Appellant, however, insisted that he did not think he could do probation and parole in two different states. Appellant stated that he had only five months left in Louisiana and would then be able to satisfy his obligations in Arkansas. Finally, appellant conceded that he had made no payments toward his fines, costs, and restitution since he was placed on probation.

In revoking appellant's probation, the trial judge noted that appellant was not incarcerated at the penitentiary in Louisiana from October 2004 to December 2006, yet had done absolutely nothing to discharge his obligations to the State of Arkansas. The trial judge stated that he doubted that appellant would have contacted the Arkansas probation office in January when he had completed his obligations in Louisiana. The trial judge said, "I don't believe we'd heard from you again short of you coming to Hot Springs to pick up something and just happened to wander up on you. I think you'd flown below the radar and kept away out of our sight for a long time."

If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his probation, the court may revoke the probation at any time prior to the expiration of the period of probation. *See* Ark. Code Ann. § 5-4-309(d) (Supp. 2009). A court may revoke a probation subsequent to the expiration of the period of probation if, before expiration of the period, a warrant is issued for the defendant's arrest for violation of probation. Ark. Code Ann. § 5-4-309(f)(2). The State must prove that the defendant has inexcusably failed to comply with at least one of his conditions of probation. *Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000). The burden of proof is by a preponderance of the evidence, and the trial court's findings of fact will not be reversed unless they are clearly erroneous. *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998). Any question concerning credibility is left to the finder of fact. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002).

Appellant argues that the State offered no witnesses to rebut his testimony that Arkansas probation officers advised him to finish his obligations in Louisiana before he reported to probation in Arkansas and that he was on parole and reporting in Louisiana. Further, appellant relies on *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001), for the proposition that his failure to report in Arkansas was excusable because the probation office was aware of his extradition to Louisiana and because he was in custody and on parole in Louisiana during the time he was required to report in Arkansas. Appellant argues that, even if he was in error as to when he was to report in Arkansas, he relied upon instructions by the

probation office and believed he was not to report until he finished his supervision in Louisiana.

Barbee is readily distinguishable as that decision was based on “unique facts.” *Barbee*, who was on five years’ probation after pleading guilty to three counts of negligent homicide, went to the Chicot County Revenue Office to obtain an identification card in order to get a marriage license. The employee at the revenue office told *Barbee* that, because his driving record was “clean,” he was required to get a driver’s license, instead of an identification card. *Barbee* asked the employee to check again and was assured that his driving privileges were not suspended. As a result, *Barbee* got a driver’s license and was driving during his probationary period, in violation of the terms and conditions of his probation. Significantly, the revenue office employee testified that the information in the computer could not be manipulated and that she had no choice but to issue a driver’s license to *Barbee* because his license was not suspended. In reversing the trial court’s revocation of *Barbee*’s probation, our supreme court noted that *Barbee* was incorrectly given a driver’s license by the State and that *Barbee* had relied on information by the revenue office employee that his driving privileges were not suspended. Moreover, the supreme court noted that *Barbee* had complied with every other term of his probation, had been “an exemplary probationer,” and was “tremendously rehabilitated.”

The trial court was not required to believe appellant’s testimony that two unidentified probation officers, who did not testify at the probation–revocation hearing as the revenue

office employee did in *Barbee*, told appellant that he did not need to report in Arkansas until he finished his obligations in Louisiana. In fact, the trial court specifically found appellant's testimony not credible. As noted by the trial court, there was a two-year period in which appellant was not incarcerated in Louisiana and could have, but did not, make any effort to contact the probation office in Arkansas. Moreover, unlike the situation in *Barbee*, appellant admitted that he did not make any payments toward his fines, costs, and restitution during the entire time since he was placed on probation in 2004. Under these circumstances, we cannot say that the trial court was clearly erroneous in finding that appellant inexcusably violated at least one condition of his probation. Accordingly, we affirm the trial court's revocation of appellant's probation.

Affirmed.

ROBBINS and BROWN, JJ., agree.