

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR11-567

DENNIS LEMON D ARMSTRONG
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered January 11, 2012

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[NO. CR-2008-362]

HONORABLE JOHN N. FOGLEMAN,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

ROBIN F. WYNNE, Judge

Appellant Dennis Armstrong appeals from his probation revocation. Appellant's attorney, having identified no meritorious grounds for appeal, has filed a motion to withdraw and a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(k) (2011). Appellant has not filed any pro se points for reversal. We grant counsel's motion and affirm the revocation.

Appellant was placed on four years of probation following his June 10, 2008 conviction for theft by receiving, a Class B felony. Among the terms and conditions of his probation were the requirements that appellant pay certain fines and costs, pay probation fees, report to his probation officer as directed, and notify the officer of any change in address or employment. On February 26, 2010, the State moved to revoke probation because appellant



had failed to pay his fines and costs as directed, failed to report to probation, failed to pay probation fees, and failed to notify probation of his current address and employment.

At the revocation hearing, the sheriff's office collector testified that appellant owed a fine of \$750 and costs totaling \$800 but that appellant had made no payments toward those balances. Appellant's probation officer testified that appellant had failed to report for the months of January, March, May, August, November, and December 2009 and from January through October 2010. She further testified that appellant owed \$350 in probation fees, having last paid in April 2009. During direct examination of the probation officer, the State inquired about appellant's employment since he had been on probation, to which the officer replied that appellant was unemployed. Appellant did not object to this question. On cross-examination, appellant's counsel also asked about appellant's employment. However, when the State revisited the issue of appellant's employment on re-direct examination, appellant's counsel objected on the grounds that failure to remain employed was not alleged in the revocation petition. The court overruled the objection.

Appellant then testified and admitted that he had failed to report on several occasions but claimed that the reason he did not report was because he lacked money. He acknowledged, however, that not having any money and not working had nothing to do with reporting to his probation officer. He stated that his failure to report was "just a foolish mistake." The court found that appellant had inexcusably violated the terms and conditions of his probation and sentenced him to five years in the Arkansas Department of Correction.



The judgment and commitment order was entered on March 15, 2011, and this timely appeal followed.

In a revocation proceeding, 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 its expiration. Ark. Code Ann. § 5-4-309(d) (Supp. 2009).¹ When probation is revoked, the court may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he was found guilty. Ark. Code Ann. § 5-4-309(g)(1)(A).² We will affirm a revocation unless the trial court's decision is clearly against the preponderance of evidence. *Bradley v. State*, 347 Ark. 518, 521, 65 S.W.3d 874, 876 (2002). The State need only prove that a defendant violated one condition of the probation in order to revoke. *Ramsey v. State*, 60 Ark. App. 206, 209, 959 S.W.2d 765, 767 (1998). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation. *Vick v. State*, 2010 Ark. App. 29, at 3. 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 with regard to those matters. *Id.*

Appellant admittedly failed to abide by the terms and conditions of his probation, particularly with respect to his obligation to report, and the court found that his excuses for doing so were less than credible. Because only one violation is necessary to revoke probation,

¹This statute was subsequently repealed by Act 570 of 2011 and is now codified at Arkansas Code Annotated section 16-93-308(d).

²This statute is now codified at Arkansas Code Annotated section 16-93-308(g)(1)(A).



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appellant's failure to report alone is sufficient to support the court's ruling. Further, the sentence imposed by the court was within the statutory range for which appellant could have been originally sentenced. For a Class B felony, the sentence range is five to twenty years. Ark. Code Ann. § 5-4-401(a)(3). Appellant's sentence of five years was appropriate.

The only other adverse ruling was the court's response to appellant's objection to questioning about his employment. Counsel's no-merit brief characterizes this ruling as a harmless error, but we see no error here. A defendant has an obligation to object to a perceived error at the first opportunity. *Vaughn v. State*, 338 Ark. 220, 225, 992 S.W.2d 785, 787 (1999). Here, appellant's counsel failed to object when the State first questioned the probation officer about appellant's employment. Furthermore, appellant opened the door to questioning about his employment on cross-examination. Therefore, there was no error in allowing such questioning to continue. *See Robinson v. State*, 348 Ark. 280, 294, 72 S.W.3d 827, 835 (2002). Nevertheless, even if the ruling had constituted an error, it would have been harmless because, as discussed above, other grounds supported the revocation.

Affirmed; motion granted.

PITTMAN and MARTIN, JJ., agree.

C. Brian Williams, for appellant.

No response.