

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-323

JEROME SCOTT MCPHERSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered JANUARY 11, 2012

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT,
[NO. CR-07-681]

HONORABLE JOHN N.
FOGLEMAN, JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

CLIFF HOOFFMAN, Judge

Appellant Jerome Scott McPherson's probation was revoked after the trial court found that he had violated the conditions of his probation by failing to report to his probation officer and by using cocaine. He was sentenced by the trial court to three years' imprisonment. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k) of the Rules of the Arkansas Supreme Court and Court of Appeals, McPherson's counsel has filed a motion to withdraw, alleging that this appeal is wholly without merit. Counsel has also filed a brief in which all adverse rulings are abstracted and discussed. McPherson was notified of his right to file pro se points for reversal; however, he has not done so. We grant counsel's motion to withdraw and affirm the revocation.

On October 7, 2007, McPherson entered a negotiated plea of guilty to the offense of possession of a controlled substance, cocaine, and was sentenced to twenty-four months'



probation. He also signed a document outlining the written terms and conditions governing his behavior during the period of his probation. These conditions included the requirement that McPherson report to his probation officer and that he not use or possess any illegal drug or controlled substance during the period of his probation. On June 19, 2009, the State filed a petition to revoke McPherson's probation, alleging multiple grounds for revocation, including that he had failed to report as directed and that he had used marijuana and cocaine.

At the revocation hearing held on November 2, 2010, Shereka Montgomery, McPherson's probation officer, testified that he had not reported since February 14, 2008. She stated that McPherson had attempted to transfer his case to Tennessee but that he was instructed to continue reporting to her until his transfer was accepted. Montgomery testified that the transfer was eventually denied in October 2008. She further testified that McPherson tested positive for marijuana at his initial intake visit in October 2007 and that he also tested positive for cocaine at his last visit in February 2008.

McPherson testified that he had moved to Tennessee and admitted that he had not reported to his probation officer since February 2008, although he was aware that he had an obligation to do so. He also admitted that he had tested positive for cocaine at his last visit with Montgomery and explained that he had fallen in with "the wrong crowd." He stated that he moved out of state because he was afraid that he would be arrested, have his probation revoked, and be sent back to the penitentiary. Since that time, McPherson testified that he had completed drug-rehabilitation treatment in Tennessee and that he had remained clean. He also stated that he had been attending church and that he had learned his lesson. McPherson's father and his pastor also testified that he had turned his life around and that he



was no longer a threat to society.

At the conclusion of the hearing, McPherson asked the trial court to take into consideration the changes that he had made and to defer sentencing for a period of time to see if he “stays straight.” The trial court stated that McPherson should be given credit for his honesty and his efforts in rehabilitating himself. However, the court found that it had no choice but to find that McPherson had inexcusably violated the conditions of his probation by using cocaine and by failing to report to his probation officer as directed. In making this decision, the trial court noted that McPherson had already been given a “substantial break” by being sentenced to only twenty-four months’ probation for his original offense. The trial court sentenced McPherson to three years’ imprisonment, and he has timely appealed from this decision.

As counsel correctly contends, the only ruling adverse to McPherson in this case was the revocation of his probation, and therefore, the only issue to be discussed is the sufficiency of the evidence supporting the revocation.

According to Ark. Code Ann. § 5-4-309(d) (Supp. 2009), a trial court may revoke a defendant’s probation at any time prior to the expiration of the probationary period if the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of probation. The burden is on the State to prove a violation of a condition of probation by a preponderance of the evidence. *Sanders v. State*, 2010 Ark. App. 563. On appeal, the trial court’s findings will be upheld unless they are clearly against the preponderance of the evidence. *Cargill v. State*, 2011 Ark. App. 322. Because a



Cite as 2012 Ark. App. 50

determination of the preponderance of the evidence turns heavily on questions of credibility and weight to be given to the testimony, the appellate courts defer to the trial court's superior position in this regard. *Id.*

The conditions of McPherson's probation required that he report to his probation officer as directed and that he refrain from using or possessing a controlled substance. McPherson's probation officer testified that he had stopped reporting and that he had tested positive for cocaine use. McPherson also admitted to both of these violations during his testimony. Therefore, the trial court's revocation of his probation was not clearly against the preponderance of the evidence, and we agree with counsel that there would be no merit to an appeal. We affirm the revocation and grant counsel's motion to withdraw.

Affirmed; motion granted.

GRUBER and GLOVER, JJ., agree.

C. Brian Williams, for appellant.

No response.