

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR11-568

FELIPE REYES

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 23, 2012

APPEAL FROM THE MILLER
COUNTY CIRCUIT COURT
[NO. CR 2000-553-3]

HONORABLE KIRK JOHNSON,
JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Felipe Reyes appeals the circuit court’s 2011 revocation of his suspended imposition of sentence for breaking or entering, which resulted in a sentence of four years’ imprisonment in the Arkansas Department of Correction. The revocation was based upon the court’s finding that Reyes failed to pay any monies toward his fines, fees, restitution, and costs even though he was employed for many months. The court found that Reyes presented no reasonable excuse other than his unbelievable explanation that he was released from the financial obligations by his parole officer. Reyes contends on appeal that the State offered no evidence that his failure to pay was willful, and he concludes that the court abused its discretion by revoking his suspended sentence.

This appeal is before us for the second time. In *Reyes v. State*, 2012 Ark. App. 125, we remanded for the circuit court to settle the record with necessary judgment and commitment orders, as well as the conditions of probation, and we ordered Reyes to file a



substituted abstract, addendum, and brief. *See also* Ark. R. App. P.–Civ. 6(e) (2011) (allowing us to sua sponte direct parties to supply omitted material by filing a certified, supplemental record—made applicable to criminal cases by Ark. R. App. P.–Crim. 4(a) (2011)); and Ark. Sup. Ct. R. 4–2(a)(8) (2011) (requiring that the addendum include “any document essential to an understanding of the case and the issues on appeal”). The supplemental record and substituted brief, submitted in this second appeal, enable us to address the merits of the case.¹ We affirm.

A March 2001 judgment and disposition order reveals that Reyes was found guilty in a negotiated plea to a charge of breaking or entering. He was placed on six years’ probation and ordered to pay a fine of \$1000, court costs of \$150, and restitution of \$490, with \$400 due immediately and installment payments to be determined by his probation officer. He paid the initial \$400 as required. In April 2001, the court approved and executed the conditions of probation, requiring Reyes to pay \$50 each month on the previous financial obligations and to pay within thirty days the \$90 remaining for restitution.

The State subsequently filed a petition to revoke probation based on alleged violations including a failure to pay as ordered. In February 2008, the circuit court accepted Reyes’s plea of “true” and granted the petition to revoke. By a judgment and commitment order of March 12, 2008, Reyes was sentenced to two years’ imprisonment in the Arkansas Department of Correction and to an additional four years’ suspended imposition of sentence.

¹An abstractor’s note in Reyes’s substituted brief informs us that the actual documents reflecting the judgments and conditions were not introduced during the revocation hearing.



The judgment required him upon release from prison to immediately report to the Miller County Department of Community Correction, which would supervise him during his suspended sentence, and required that he pay his previously assessed financial obligations as well as new assessments given by the court. The conditions of suspended sentence, which Reyes initialed, directed him to pay \$75 a month on the court-ordered financial obligations, to be monitored by the Department of Community Correction.

Next, in September 2010, the State filed a petition to revoke Reyes's suspended sentence based upon his probation officer's allegation that Reyes failed to pay court-ordered financial obligations. The officer reported that Reyes made no payments after his release from the Arkansas Department of Correction on August 13, 2008; that he was arrested and extradited to Pennsylvania in September 2008 to answer a criminal charge; that when he was released from custody there, he reportedly returned to Arkansas, but he did not report to the Department of Community Correction; that he was discovered in April 2009 to have been living in St. Louis; and that he was ordered to report to a supervising officer in Pulaski County in May 2009, but he did not report. On February 1, 2011, a revocation hearing was conducted on the State's petition.

Probation and parole officer Jason Johnson testified that Reyes had paid nothing since his release from the Arkansas Department of Correction and that he owed \$3156.00 on his obligations at the time of the hearing. Concerning what might have happened when Reyes was released in Pennsylvania, Officer Johnson stated that nothing in his records indicated that Reyes was ever told he had no further financial obligations in Arkansas. Reyes testified in



contrast that he did not pay because in 2008, upon being released from Pennsylvania custody, he was told that he owed nothing in Arkansas. He testified, “You can call Tom Haley from the Cumberland County Prison right now . . . , and he will tell you that he told me I was a free man when I was released from Pennsylvania.” Reyes recited a ten-digit phone number as Haley’s direct line. Reyes stated, “Out of the last ten years, I have not been incarcerated for maybe two and a half months. I have been in four state hospitals. I have a job now and . . . will start making payments.” He explained that he traveled with a carnival, making \$900–\$1200 at every stop and with daily draws of \$30.

The circuit court revoked the suspended sentence upon finding the violation regarding payment of court-ordered financial obligations. The court noted that Reyes executed the conditions of his suspended sentence in 2008, which “clearly stated that he owed all previously assessed fines, fees, restitution and costs at his original plea and the additional fees, transport costs and court costs assessed in the first revocation proceedings.” The court noted that Reyes was currently earning \$900–\$1200 but had made no payments. The court stated that there was “no way to verify” Reyes’s claim that he had not paid because of being told upon release from Pennsylvania that he was clear in Arkansas, and it stated its disbelief that any parole officer would have made a statement leading a person to believe that court-ordered obligations could be countermanded by a state employee. The court found no merit to Reyes’s argument and found that his failure to pay was inexcusable.

In order to revoke probation, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation. *Westbrook v.*



State, 2011 Ark. App. 615. Where the alleged violation is a failure to make payments as ordered, it is the State's burden to prove that the failure to pay was inexcusable; once the State has introduced evidence of nonpayment, the burden of going forward shifts to the defendant to offer some reasonable excuse for failing to pay. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). Factors to be considered in determining whether to revoke probation for failure to pay are the defendant's employment status, earning ability, and financial resources; the willfulness of the defendant's failure to pay; and other special circumstances. Ark. Code Ann. § 5-4-205(f)(3) (Supp. 2011).

Because the burden of proof in a revocation proceeding is less than that required to convict in a criminal trial, evidence that is insufficient for a conviction may be sufficient for a revocation. *Pitchford v. State*, 2011 Ark. App. 188. When the sufficiency of the evidence is challenged on appeal, we will not reverse a trial court's decision to revoke unless its findings are clearly against the preponderance of the evidence. *Id.* Because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the superior position of the trial court to decide these matters. *Id.*

Reyes argues that a preponderance of the evidence did not indicate that he inexcusably failed to pay his court-ordered financial obligations. He relies upon his own testimony that he was told in Pennsylvania that he had no further obligation in Arkansas. The trial court, however, gave no credence to this statement. Reyes does not dispute that he failed to pay obligations of which he was aware, and he acknowledged at the hearing that his income enabled him to pay. It was up to the trial court to determine the credibility and weight of the



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evidence, and we cannot say that the court's findings were clearly against a preponderance of the evidence.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Jason Horton Law Firm, by: *Jason Horton*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Pamela A. Rumpz*, Ass't Att'y Gen., for appellee.