

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CACR12-731

FRED LEE BOHLMAN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** March 6, 2013

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT, FORT  
SMITH DISTRICT  
[NO. CR2006-910; CR2008-470]

HONORABLE J. MICHAEL  
FITZHUGH, JUDGE

AFFIRMED

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**PHILLIP T. WHITEAKER, Judge**

Appellant Fred Lee Bohlman appeals from the Sebastian County Circuit Court's order revoking his suspended imposition of sentence. Because there was sufficient evidence to support revocation, we affirm.

Bohlman received two separate suspended sentences. In CR 2006-910, he received a five-year suspended sentence. In CR 2008-470, he received a two-year sentence in the Arkansas Department of Correction and a four-year suspended imposition of sentence. Both were conditioned upon payment of restitution. In CR 2006-910, he was ordered to pay \$800 in restitution. In CR 2008-470, he was ordered to pay \$400 in restitution.

On April 6, 2010, the State filed a petition to revoke the suspended sentences based on Bohlman's failure to pay restitution as ordered by the court. Bohlman requested an extension of time in which to pay his restitution and agreed to extend his suspended sentence



to May 27, 2015. The trial court granted his request, and the petition was withdrawn.

The petition to revoke, from which this appeal arose, was filed on April 12, 2011. Again, the State alleged that Bohlman had failed to pay his restitution as ordered. A revocation hearing was held on June 28, 2012. The trial court found that the State had met its burden of proving that Bohlman had violated the terms and conditions of his suspended sentences by failing to pay his restitution. The trial court sentenced Bohlman to twenty years' suspended imposition of sentence in CR 2006-910 and two years in the Arkansas Department of Correction followed by two years' suspended imposition of sentence in CR 2008-470. Bohlman appeals the revocation, arguing that his failure to pay was the result of his indigency and was therefore not willful.

A circuit court may revoke a defendant's suspension at any time during its pendency if it finds by a preponderance of the evidence that the defendant inexcusably failed to comply with a condition of suspension. *E.g., Graydon v. State*, 2012 Ark. App. 587. The State has the burden of proof by the preponderance of the evidence but need prove only one violation; we will not reverse the trial court's decision to revoke unless it is clearly against the preponderance of the evidence. *Upshaw v. State*, 2013 Ark. App. 41. Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Knotts v. State*, 2012 Ark. App. 121.

The trial court found that Bohlman had violated the conditions of his suspended sentence by failing to pay restitution. Where the alleged violation of conditions is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the



evidence that the failure to pay was inexcusable. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). The burden of proof does not shift from the State. However, once the State has introduced evidence of nonpayment, the burden of going forward does shift to the defendant to offer some reasonable excuse for the failure to pay. *Id.* If an assertion of inability to pay is made, the State can then carry its burden in various ways, e.g., it can undermine the probationer's credibility, or it can show a lack of effort, such as a failure to make bona fide efforts to seek employment or to borrow money to make payments. *Newsom v. State*, 2011 Ark. App. 760. In determining whether to revoke a suspended sentence for nonpayment, the court is required to consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. *See, e.g., Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997).

The State presented evidence of nonpayment through computer printouts. Bohlman responded with evidence of an inability to pay. He testified that he was homeless and unemployed during much of his suspended sentence. He asserts that his failure was excusable and would not support revocation. A defendant cannot be imprisoned solely because of a failure to pay restitution if the failure to pay was not willful. *See Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004). However, the failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *Id.* Bohlman admitted that he had worked sporadically in the past and could probably find some type of employment in the future. He also admitted that he could have made payments toward



restitution during the times he was employed, but he just did not do so. He further indicated that he could probably borrow money from his former employer, who had helped him financially in the past.

The trial court considered Bohlman's employment status, earning ability, financial resources, and willfulness. The court concluded that Bohlman had failed to make sufficient attempts to comply with the conditions of his suspended sentence and had failed to provide a reasonable excuse for the noncompliance. In light of the deference we afford to the superior opportunity of the trial judge to determine the credibility of a witness's testimony and the weight of the evidence, *see Barringer v. State*, 2010 Ark. App. 369, we cannot say that the trial court clearly erred in finding that Bohlman inexcusably failed to comply with a condition of his suspended sentences.

Affirmed.

PITTMAN and GRUBER, JJ., agree.

*Myliissia M. Blankenship*, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Valerie Glover Fortner*, Ass't Att'y Gen., for appellee.