

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR12-930

JOSHUA DANIEL MARS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 13, 2013

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT [NOS. CR-2003-
212; CR-2007-1364; CR2009-1189(a)]

HONORABLE STEPHEN TABOR,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant committed numerous criminal offenses, several of which involved possession of methamphetamine, and received suspended sentences in five separate cases between 2003 and 2009. The State filed a petition to revoke appellant's suspended sentences in 2012, alleging that he violated the conditions of his suspensions by failing to pay restitution and fees and by committing new offenses of delivery of methamphetamine and possession of methamphetamine with intent to deliver. After a hearing on July 18, 2012, the trial court found that appellant violated the conditions of his suspensions by committing all of the acts alleged, revoked the suspensions as to three of the prior offenses, and sentenced him to consecutive terms of imprisonment totaling thirty-two years. Appellant argues on appeal that the evidence was insufficient to support the trial court's findings that he violated the conditions of his suspensions. We affirm.



In order to revoke a suspended sentence, the State must prove a violation of a condition by a preponderance of the evidence; on appellate review, the circuit court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Alexander v. State*, 2013 Ark. App. 16. Because a determination of a preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony, we defer to the trial judge's superior position in that regard. *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984).

Here, appellant admitted that he had gone to his girlfriend's apartment because he was "on the run" and was sleeping in her bed when he was awakened by a parole officer. The parole officer testified that he and a police officer knocked at the door of appellant's girlfriend's apartment and that she told them that appellant was sleeping in the bedroom. When the parole officer entered the bedroom, he saw appellant asleep right next to two small plastic baggies containing a white crystal-like substance. The substance tested positive for methamphetamine. Appellant did not deny that methamphetamine was found next to him on the bed but instead testified that the drugs did not belong to him and that he believed that his girlfriend had placed the drugs there to "save herself."

Appellant argues, *inter alia*, that, because there was no evidence of the quantity of methamphetamine found beside him in the bed, the evidence was insufficient to prove that he intended to deliver the drugs. Even assuming for the purpose of argument that appellant's contention regarding intent to deliver had merit, the discovery of methamphetamine immediately adjacent to the sleeping appellant in an apartment where he was admittedly



hiding out is clearly sufficient to establish his possession of methamphetamine by a preponderance of the evidence. A revocation may be based on proof of the commission of a lesser-included offense of the crime alleged in the petition to revoke. *Willis v. State*, 76 Ark. App. 81, 62 S.W.3d 3 (2001). Possession of a controlled substance is a lesser-included offense of possession of a controlled substance with intent to deliver, *see Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987), and our holding that the evidence is sufficient to establish this offense thus supports the trial court's finding that appellant violated the conditions of his suspension by commission of a crime.

Because proof of one violation of the conditions of suspension is sufficient to support revocation, *e.g.*, *Love v. State*, 2012 Ark. App. 600, appellant's arguments concerning the remaining violations need not be addressed.

Affirmed.

GRUBER and WHITEAKER, JJ., agree.

DWSA Law Group, by: *Nick Churchill*, for appellant.

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