

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR12-809

JOHN DAVID PEVETOE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 6, 2013

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. 17-CR-2008-246]

HONORABLE GARY R. COTTRELL,
JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Appellant John David Pevetoe appeals the revocation of his suspended sentence. He argues that the trial court erred when it denied his motion for directed verdict on the basis that the State had failed to prove that his failure to pay restitution was willful. We affirm the revocation.

On October 6, 2008, Pevetoe pleaded guilty to the offense of leaving the scene of a personal-injury accident. He was sentenced to four years' incarceration in the Arkansas Department of Correction, with an additional two years' suspended imposition of sentence. He was also ordered to pay restitution in the amount of \$2,545.76, at the rate of \$50 per month, to commence sixty days after he was released from prison. On October 5,



2011, the State filed a petition to revoke Pevetoe's suspended sentence, alleging that he had failed to pay restitution.¹

A trial court may revoke a defendant's suspended sentence at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). In a hearing to revoke, the burden is on the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence. *Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005). On appellate review, the trial court's findings are upheld unless they are clearly against the preponderance of the evidence. *Id.* Our appellate courts defer to the trial court's superior position to determine credibility and the weight to be accorded testimony. *Id.* Where the alleged violation is failure to make court-ordered payments, it is the State's burden, by a preponderance of the evidence, to prove that the failure to pay was inexcusable. *Phillips v. State*, 101 Ark. App. 190, 272 S.W.3d 123 (2008). Once the State introduces evidence of nonpayment, the defendant then bears the burden of going forward with some reasonable excuse for his failure to pay. *Id.* Failure on the part of the defendant "to make bona fide efforts to seek employment or to borrow money to pay restitution may justify

¹Because Pevetoe was ordered to pay restitution as a condition of his suspended sentence and had not done so during his suspended sentence, jurisdiction continued under Arkansas Code Annotated section 5-4-303(h)(2) (Repl. 2006) (trial court may continue to assert jurisdiction over defendant after suspended period has ended and may revoke suspended sentence if defendant has not satisfactorily made all restitution payments at end of suspension period).



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imprisonment.” *Gossett v. State*, 87 Ark. App. 317, 319, 191 S.W.3d 548, 549–50 (2004).

Here, the State presented the testimony of Lisa Whetstine, the fines-and-restitution coordinator for Crawford County. Whetstine testified that she obtained a release date of May 8, 2009, for Pevetoe, and she sent him a postcard reminder that he needed to begin making restitution payments on September 1, 2009. Whetstine said that Pevetoe was also advised in court as to when his restitution obligation began, and that he was further advised of this obligation by Sober Living, the facility to which he was paroled out of prison. She testified that she began receiving payments from him in October 2009 and that Pevetoe made five \$50 payments from October 2009 to March 2010. According to Whetstine, she made a note in Pevetoe’s file in May 2010 that she had talked to him by telephone, that he told her that his job only lasted a “couple” of days, and that he would pay in a couple of weeks; however, he never made another payment, despite her also sending him a letter in September 2010.

Pevetoe did not testify. He then made a motion for directed verdict on the basis that the State had not proved that his failure to pay was willful. The State countered, stating that it had shown a willful failure to pay because Pevetoe had told Whetstine that he would pay in a couple of weeks and then paid nothing, and Pevetoe had offered no legitimate excuse, or any evidence whatsoever, as to why he had not paid. The trial court stated that it did not believe a general statement from Pevetoe that he would pay when he



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could and that he had lost his job raised a permanent defense of inability to pay, and it revoked Pevetoe's suspended sentence.

On appeal, Pevetoe cites *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997), for the proposition that a defendant cannot be punished by imprisonment solely because of failure to pay if there is no determination that the failure to pay restitution is willful. However, once the State introduces evidence of nonpayment, a defendant then bears the burden of going forward with some reasonable excuse for his failure to pay. *Phillips, supra*. The shifting burden draws out the reason for nonpayment, and the defendant may not "sit back and rely totally upon the trial court to make inquiry into his excuse for nonpayment." *Hanna v. State*, 2009 Ark. App. 809, at 5, 372 S.W.3d 375, 379 (citing *Brown v. State*, 10 Ark. App. 387, 389, 664 S.W.2d 507, 508 (1984)).

In this case, Pevetoe offered no evidence at the revocation hearing held in June 2012 as to why he had failed to make payments on his restitution; instead, he relied on a single statement attributed to him by Lisa Whetstine in the State's case in chief—a May 2010 telephone conversation in which he stated that his job had only lasted a couple of days—as proof of his inability to pay. The trial court specifically found that a general statement from Pevetoe that he would pay when he could and that he had lost his job (in 2010) did not raise a permanent defense of inability to pay. In *Hanna*, this court held that a defendant must explain his failure to pay, and if he asserts an inability to pay, the State must then carry its ultimate burden of demonstrating no good-faith effort by a



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preponderance of the evidence. Citing *Jordan*, *supra*, the *Hanna* court also held that when the defendant asserts an inability to pay, the State may not stand on the fact of nonpayment alone. However, in this case, Pevetoe failed to take the stand and assert any reason why he did not make his restitution payments, including an inability to pay. Because he did not offer any reason as to why he had failed to make his restitution payments, he did not sustain his burden of proving a reasonable excuse for nonpayment. We hold that the trial court's findings are not clearly against the preponderance of the evidence and affirm the revocation.

Affirmed.

WALMSLEY and BROWN, JJ., agree.

Norris Legal Drafting, by: *Lisa-Marie Norris*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Jake H. Jones*, Ass't Att'y Gen., for appellee.