

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CACR 12-630

CINDY L. MCLANE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 17, 2013

APPEAL FROM THE CRITTENDEN  
COUNTY CIRCUIT COURT  
[NO. CR-08-914]

HONORABLE JOHN N.  
FOGLEMAN, JUDGE

AFFIRMED

---

**KENNETH S. HIXSON, Judge**

Appellant Cindy McLane was sentenced to four years in the Regional Correctional Facility followed by five years' suspended sentence after the Crittenden County Circuit Court found by a preponderance of the evidence that she had violated the terms and conditions of her probation. She brings this appeal contending that her due-process rights were violated by the trial court's allowance of evidence of an alleged probation violation that was not enumerated in the revocation petition. We affirm.

On November 3, 2008, appellant pled guilty in the Circuit Court of Crittenden County to the charge of possession of anhydrous ammonia in an unlawful container in violation of Arkansas Code Annotated section 5-64-1301 (Repl. 2005), a Class B felony, and was sentenced to five years' probation and ordered to pay \$1,000 in fines as well as court costs and fees. As part of her negotiated plea, McLane's probation terms consisted of: paying



all fines, court costs, and restitution; living a law-abiding life; being of good behavior and not violating any state, federal, or municipal law; and not using or possessing any alcoholic beverages, marijuana, narcotic, or any illegal drug or controlled substance or associating with those that do.

On November 21, 2011, the State filed a petition for revocation of McLane's probation alleging that she had failed to pay fines, costs, and fees as directed; failed to report to probation; failed to pay probation fees; failed to notify the sheriff and probation officer of her current address and employment; possessed and used methamphetamine; possessed Oxycontin; possessed hydromorphone; possessed and used drug paraphernalia; and possessed hydrocodone.

At the probation-revocation hearing in March 2012, Dustin Burnett, an employee of the Crittenden County Sheriff's Office, testified that when he conducted a probation search of a home at 504 North Oak Street, appellant answered the door. Burnett asked appellant if anything was in the house, and appellant showed him a glass pipe and pills. Burnett testified that the pills tested positive for methamphetamine.

During the revocation hearing, the State asked appellant for whom she bought the pseudoephedrine pills twenty-five times in 2010 and 2011. Appellant objected, stating that the allegation was not set forth in the petition for revocation. The court overruled the objection, stating that the question could go to the use and possession of paraphernalia allegation. Appellant's counsel asked whether the court was saying that pseudoephedrine was considered paraphernalia and the court stated that it could be and "the petition for revocation



is not restricted to whatever an officer chose to arrest somebody for.” Again, appellant objected and the objection was overruled.

The court found that appellant had violated the terms and conditions of her probation by possessing and using controlled substances and sentenced her to four years in the Regional Correction Facility. She brings this appeal, contending that the court violated her due-process rights by permitting evidence of probation violations that were not enumerated in the revocation petition.

If a court finds by a preponderance of the evidence that a defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation. Ark. Code Ann. § 5-4-309(d) (Repl. 1997).<sup>1</sup> When appealing a revocation, the appellant has the burden of showing that the trial court’s findings are against the preponderance of the evidence. *Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998). On appellate review, we uphold a revocation unless the trial court’s findings are clearly against the preponderance of the evidence. *Id.* We give due regard to the trial court’s superior position to determine the credibility of the witnesses and the weight to be given to their testimony. *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. Thus, the burden on the State is not as great in a revocation hearing. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). In *Phillips v. State*, 40 Ark.

---

<sup>1</sup>This statute is now codified at Ark. Code Ann. § 16-93-308 (Supp. 2011).



App. 19, 840 S.W.2d 808 (1992), we held that when error is alleged, prejudice must be shown because we do not reverse for harmless error. It is appellant's burden to demonstrate prejudicial error, not merely allege it. *Id.*

Appellant argues that the trial court violated her due-process rights by allowing cross-examination testimony from appellant regarding the fact that she purchased pseudoephedrine twenty-five times over a two-year period. She states the revocation petition did not allege that she had violated state laws or her probationary terms by improperly purchasing pseudoephedrine. She argues that procedural due process entitles her to notice of the charges against her. Therefore, she states, that the court erred by allowing cross-examination over issues that were not set forth in the petition to revoke. We disagree. We cannot say that this was prejudicial error. *Cf. Hill v. State*, 65 Ark. App. 131, 985 S.W.2d 342 (1999) (holding that reversible error existed when the State submitted evidence relating to allegations that were not in the State's petition to revoke and the trial court solely relied on that evidence to revoke the defendant's probation.)

The State need only prove that the appellant committed one violation of her conditions. *Ramsey v. State, supra*. Here, appellant admitted to using methamphetamine, admitted to failing to pay her court fines and costs, and there was testimony by the police officer that he found narcotics and two pipes at her residence. Further, the court based its finding of a violation of probation on the appellant's possessing and using controlled substances. Therefore, we cannot say that the cross-examination concerning the appellant's alleged purchase of pseudoephedrine pills constituted prejudicial error.



Cite as 2013 Ark. App. 258

Affirmed.

WYNNE and WOOD, JJ., agree.

*Shaun Hair*, for appellant.

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