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ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-13-642

TIMOTHY RANDALL JONES APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 12, 2014 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH AND GREENWOOD DISTRICTS [NOS. CR-2008-292; CR-2012-715] HONORABLE JAMES O. COX AND STEPHEN TABOR, JUDGES AFFIRMED

RITA W. GRUBER, Judge

Timothy Randall Jones appeals the revocation of his suspended impositions of sentence (SIS) for two felonies: Circuit Court of Sebastian County case No. CR-2008-292, failure to comply with reporting requirements of our Sex and Child Offender Registration Act; and case No. CR-2012-715, delivery of marijuana. Jones contends that the circuit court erred (1) by finding that he violated conditions of his SIS by committing the offense of possession of oxycodone with purpose of delivery, and (2) by imposing a sentence that included two consecutive suspended sentences. We affirm.

Jones pleaded guilty to each of the underlying felonies. He was sentenced on March 19, 2008, in CR-2008-292 to two years' imprisonment in the Arkansas Department of Correction plus eight years' SIS; was ordered to register as a sex offender and to abide by the rules of the Department of Community Correction's sex-offender program; and was released

from the Arkansas Department of Correction on January 13, 2010. He was sentenced on January 16, 2013, in CR-2012-715 to five years' SIS subject to paying fines, court costs, and fees; and he was placed on two years' probation.

The State filed a petition to revoke SIS in both cases on February 13, 2013, alleging that Jones violated terms and conditions on February 7, 2013, by committing "the offenses of possessing oxycodone with the purpose to deliver and habitual criminal." A revocation hearing was conducted on June 3, 2013. Upon finding that the State had proved by a preponderance of the evidence that Jones possessed oxycodone with the purpose to deliver,[1] the circuit court orally granted the petition to revoke and pronounced sentence in CR-2008-292. At a June 12, 2013 re-sentencing hearing, the court set aside its previously pronounced sentence and orally sentenced Jones in both felony cases. Jones timely filed his appeal from the resultant sentencing order that was entered on June 18, 2013.

I. *Whether the Circuit Court Erred by Finding that Jones Violated Conditions by Committing the Offense of Possession of Oxycodone With Purpose of Delivery.*

In order to revoke suspension or probation, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of the suspension or probation. Ark. Code Ann. § 16-93-308(d) (Supp. 2013). The circuit court's decision to revoke will not be reversed unless it is clearly against the preponderance of the evidence. *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001). The State need show only one violation. *Phillips v. State*, 101 Ark. App. 190, 272 S.W.3d 123 (2008).

[1]The circuit court granted Jones's motion for directed verdict on the habitual-criminal offense.

Neither the same quality nor degree of proof is required for the exercise of the court's discretion to revoke the suspension of a sentence as is required for a finding of guilt beyond a reasonable doubt on a criminal charge. *Seals v. State*, 2013 Ark. App. 326. Deference is given to the trial court's superior position to weigh the evidence and to determine witness credibility. *Id*. Because intent to commit a crime is not ordinarily susceptible of direct proof, it may be inferred from the circumstances. *Hurvey v. State*, 298 Ark. 289, 766 S.W.2d 926 (1989). Circumstantial evidence may include the fact that the defendant was shown to have sold the controlled substance on prior occasions, *see id.*, and an uncorroborated confession can be sufficient for a revocation. *Freeman v. State*, 2010 Ark. App. 8 (citing *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978)).

Law-enforcement officers testified at the revocation hearing to events that occurred on February 7, 2013. Officer Joey Boyd, a member of the Fort Smith Police Department's canine unit, made a traffic stop of a car he observed being driven left of center in the rain. Jones was a passenger in the car, and his girlfriend was driving. After receiving the girlfriend's permission to search the car, Officer Boyd searched it but found no contraband. During a pat-down for officer safety, Sgt. Brian Rice received Jones's permission to search his pockets and found a prescription bottle containing two or three oxycodone pills along with $296. The prescription was for Jones and had been filled three days earlier for 120 pills.

Sgt. Rice read Jones his *Miranda* rights and told him that he (Rice) knew Jones "was selling those pills" and that there would be "no reason why he would only have two left." Jones first said that just before the car was pulled over, he had gone to the Regency Hotel

to collect $100 he had loaned a friend; subsequently, however, he said that he had sold ten pills at the Regency for $10 each. Jones indicated that he was a confidential informant for the narcotics unit, but his story was determined to be untrue and he was arrested.

Jones moved for a directed verdict at the conclusion of the State's case, arguing that the State had not established that he possessed the two pills in his prescription bottle with intent to deliver. The circuit court denied the motion, remarking that Jones's statement "I just sold ten pills for $100" was an indication of intent or purpose to deliver.

Jones and his girlfriend testified in the case for the defense that oxycodone was prescribed to help Jones deal with pain caused by Marfan's syndrome; he lied to her about abusing the prescription, and she hid pills from him; he often took many pills at a time and had done so for three days before February 7; a friend phoned Jones that day to say he wanted to repay a $100 loan; Jones had no pills with him when he went into the Regency to collect the debt; and Jones was high when officers questioned him. Jones further testified that he had taken 87 of the pills from 10:30 a.m. on February 4, the day he picked up the prescription, through the time of the February 7 traffic stop—when he was incoherent and stumbling—and that the officers lied in their testimony to make themselves look better. Sgt. Rice testified on rebuttal that Jones was not incoherent, stumbling, or high on February 7 and that his conversation was lucid.

At the conclusion of all the evidence, Jones again moved for a directed verdict. He argued that "three pills in somebody's own pill bottle" did not indicate a purpose to deliver. The court again denied the motion, finding proof from Jones himself of purpose to deliver.

The court noted that although he denied dealing drugs, he had pleaded guilty to selling drugs; it found the officer's testimony that Jones said he sold ten pills for $100 to be more believable than Jones's testimony that he had gone to the Regency to pick up his $100 from a loan to a friend; and it rejected Jones's testimony that the officers were lying. The court concluded that Jones's statement to the officer about selling pills was, alone, "sufficient to sustain the State's rather meager burden of showing by a preponderance of the evidence that you possessed these drugs with the purpose to deliver, perhaps not the three that were in your pocket but the ten that you confessed to having sold to someone else." On this basis, the court granted the revocation.

On appeal, Jones points to testimony that the oxycodone was prescribed for pain associated with his Marfan's Syndrome, that he took far more medication per day than was prescribed and hid pills from his girlfriend, that he was high at the time of his alleged confession, and that he left his pill bottle in the car while he went into the hotel. He asserts that his alleged confession was related to an offense not charged in the petition to revoke and of which he had no notice—the offense of actually selling the ten pills—and was not related to intent to sell the two pills in his possession at the time of arrest, which were introduced into evidence at his hearing.

The circuit court was free to reject testimony regarding Jones's personal use of oxycodone and to assess conflicting testimony about his actions at the Regency and his behavior at time of the traffic stop. It was up to the court to decide the credibility and weight of the testimony regarding the intent to sell. The court did not clearly err in finding that

Jones's confession about selling ten oxycodone pills was sufficient to show that he possessed the drugs with the purpose to deliver.

II. *Whether the Court Erred by Imposing a Sentence that Included Two Consecutive Suspended Sentences.*

An appellant may challenge an illegal sentence for the first time on appeal because it is an issue of subject-matter jurisdiction. *Richie v. State*, 2009 Ark. 602, at 4, 357 S.W.3d 909, 912. Jones contends on appeal that the sentence is illegal insofar as it orders the two periods of SIS to run consecutively, and the State concedes that the sentence is illegal. The parties' agreement, however, does not prohibit our own examination of the question. We find no illegality.

Jones and the State rely on words of explanation from the bench at the re-sentencing hearing, where the court orally pronounced consecutive sentences of three years' imprisonment with an additional five years' SIS in CR-2008-292 and three years' imprisonment with an additional SIS of three years in CR-2012-715. The judge explained, "Here is the bottom line. You have six years in prison to do and when you get out you will be on a suspended sentence for eight years." This explanation was incorrect, but it does not control our decision because it was merely an oral ruling.

Even after pronouncing sentence from the bench, the circuit court retains jurisdiction and may modify its pronounced sentence prior to entry of the sentencing order. *Hogue v. State*, 2013 Ark. App. 638 (citing *Marshall v. State*, 2010 Ark. 500 (per curiam), and *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003)). A judgment is effective upon entry of record. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). Here, the written sentencing order

shows that Jones was sentenced in CR-2008-292 to thirty-six months' imprisonment in the Arkansas Department of Correction and sixty months' SIS. In CR-2012-715, he was sentenced to thirty-six months' imprisonment in the Arkansas Department of Correction and thirty-six months' SIS. The two sentences were to run consecutively.

It is true that multiple periods of suspension or probation must run concurrently. *See* Ark. Code Ann. § 5-4-307 (b)(1) (Repl. 2013). Additionally, "[i]f a court sentences a defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment, the period of the suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment." Ark. Code Ann. § 5-4-307 (c) (Repl. 2013). The correct explanation of the written sentencing order in this case is that Jones has six years to do in prison from the consecutive running of his terms of imprisonment and that when he is released from imprisonment, he will be on SIS for a concurrent total of five years. The sentencing order comports with our statutes, and it is not illegal.

Affirmed.

WALMSLEY and GLOVER, JJ., agree.

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