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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-308

TIMOTHY H. PRATT II APPELLANT	**Opinion Delivered** March 9, 2011 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. CR-2006-3069]
V.	HONORABLE CHARLES E. CLAWSON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was ordered to serve five years' probation after pleading guilty in May 2007 to possession of a controlled substance, possession of drug paraphernalia, criminal mischief, and battery. In December 2009, he was found to have violated the conditions of his probation; his probation was revoked, and he was sentenced to fourteen years' imprisonment. On appeal, appellant asserts that the trial court lacked jurisdiction to revoke his probation; that the evidence does not support the trial court's finding that he violated the conditions of his probation; that the State did not afford him due process because it failed to give him adequate notice of the grounds for which revocation was sought; and that he was detained in jail for an unreasonable length of time because the revocation hearing was not held within sixty days of his arrest. We affirm.

We first discuss the jurisdictional question. Appellant, citing Ark. Code Ann. § 5-4-309(e)(3) (Repl. 2006),[1] contends that the trial court lacked jurisdiction to revoke his probation because appellant was arrested on a bench warrant for failure to appear at the initially scheduled revocation hearing rather than on an arrest warrant based on violation of probation. We do not agree. The code section cited by appellant provides that a court may revoke probation *subsequent to the expiration of the period of probation* if a petition to revoke the defendant's probation has been filed before expiration of the probationary period. However, in the present case, the five-year period of probation ordered in 2007 had not expired when probation was revoked in 2009, and the trial court therefore did not revoke probation "subsequent to the period of probation." Because appellant's probationary term had not yet expired at the time of revocation, the statutory provision cited by appellant is inapplicable.

We next address the sufficiency of the evidence to support the trial court's finding that appellant violated the conditions of his probation. It is the State's burden to prove the violation of a condition of probation by a preponderance of the evidence; on appeal, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Autrand v. State*, 2010 Ark. App. 245. A violation of a single condition is enough to support a revocation. *Berry v. State*, 2010 Ark. App. 217. Here, appellant's probation was conditioned on his refraining from violating any local, state, or federal law. The trial court found that appellant violated this condition by committing two misdemeanor offenses, as evidenced by

[1]Under the current 2009 supplement, this section is 5-4-309(f)(3).

certified records of the Saline County District Court showing that appellant pled guilty to possession of a controlled substance and was found guilty of driving with a suspended license. We hold that the trial court did not clearly err in finding that appellant violated the conditions of his probation.

Appellant argues that he did not receive adequate notice sufficient to comport with due process because the petition to revoke alleged that he violated his probationary conditions by possession of marijuana, whereas the State offered evidence to show only that appellant had illegally possessed an unnamed controlled substance. We find no reversible error. Appellant had pled guilty to the drug offense in question. As the State argues, appellant did not claim surprise, seek a continuance, or explain how he might alter his defense at the revocation hearing. The condition of probation alleged to have been violated was the proscription against further violations of local, state, or federal law, and appellant does not explain how alleging that he violated state law by possession of marijuana but proving only that he illegally possessed a controlled substance could possibly work to his prejudice. It is settled law that, although the evidence may be insufficient in a probation-revocation proceeding to sustain an allegation that appellant committed a specific offense, revocation will be sustained if the evidence establishes a lesser-included offense. *Willis v. State*, 76 Ark. App. 81, 62 S.W.3d 3 (2001).

In any event, the State proved and the trial court found that appellant also violated the conditions of his probation by committing the misdemeanor of driving on a suspended

license. While this violation was not pled in the State's petition, appellant neither objected to the admission of the evidence on this offense nor complained when the trial court expressly based its decision to revoke upon the proof of that offense. Under these circumstances, appellant waived any due-process argument as to the use of the offense of driving on a suspended license. *Josenberger v. State*, 2010 Ark. App. 243, 303 S.W.3d 54; *Cheshire v. State*, 80 Ark. App. 327, 95 S.W.3d 820 (2003); *cf. Hill v. State* 65 Ark. App. 131, 985 S.W.2d 342 (1999) (issue preserved when evidence was admitted over appellant's objection to lack of notice); *Robinson v. State*, 14 Ark. App. 38, 41 n.1, 684 S.W.2d 824, 825 n.1 (1985) (issue preserved where appellant made it known to the court in clear terms that he had not been charged with the violation that the court found him to have committed). Therefore, since the evidence and finding on this latter violation are sufficient to sustain the revocation, any notice issue regarding the controlled-substance allegation would be of no moment.

Finally, appellant argues that he was not provided with a hearing within the period established in Ark. Code Ann. § 5-4-310(b)(2) (Repl. 2006), which requires that a revocation hearing be conducted within a reasonable time after the defendant's arrest, not to exceed sixty days. We look to the rules providing for speedy trial of criminal charges for guidance in cases involving the application of the statutory sixty-day period for revocation hearings, including the rule that a period of delay is excludable when a continuance is granted at a defendant's request and the period of delay shall be from the day the continuance is granted. *Lark v. State*, 276 Ark. 441, 637 S.W.2d 529 (1982). Here, appellant was arrested on August 3, 2009, and

the revocation hearing was conducted on December 22, 2009. This is 141 days. However, there were six continuances granted by the trial court, fifty-two days of which were charged to the State, and eighty-nine days of which were charged to appellant.

Appellant argues that this computation is incorrect because there is no evidence that the ten-day continuance granted on September 11, 2009, was had upon appellant's motion. This is puzzling, because the transcript contains a letter written by appellant's attorney to the trial judge and filed on September 11, 2009, that contains an express request for a continuance in order to prepare for the hearing. Appellant also argues that the thirty-two-day continuance granted by the trial court on September 28, 2009, should not have been charged to him because it was requested by the State. An examination of the transcript, however, shows that the State requested this continuance in order to prepare a response to a motion to dismiss for lack of jurisdiction presented to the trial court by appellant on the day that the revocation hearing had been scheduled to be heard. Appellant also challenges a thirty-five-day continuance granted on October 30, 2009, and charged to appellant. However, the continuance was granted on appellant's motion, and, contrary to appellant's assertion, appellant failed to make a contemporaneous objection to the time being charged to appellant.[2] *See Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000) (a contemporaneous objection to the excluded period is necessary to preserve the argument in a subsequent speedy-trial

[2]The record page reference that appellant cites for the proposition that he did so object actually relates to a hearing had in December 2009 on a separate continuance.

motion). Finally, appellant argues that the trial court erred in charging a twelve-day continuance granted on December 10, 2009, to the defense. This continuance was granted upon appellant's request for additional time for discovery and investigation. While appellant claimed that it was necessary due to a discovery violation by the State, the trial court accepted the State's assertion that the material in question had been in the open file for a lengthy period of time. On this record, we cannot say that the trial court erred in charging eighty-nine days to appellant or that the revocation hearing was not conducted within a reasonable time after his arrest.

Affirmed.

HART and MARTIN, JJ., agree.