

**ARKANSAS COURT OF APPEALS**

DIVISION III  
No. CACR10-848

PAUL FRANKLIN PITCHFORD  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

OPINION DELIVERED MARCH 9, 2011

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT, FORT  
SMITH DISTRICT  
[NO. CR-2007-702]

HONORABLE STEPHEN TABOR,  
JUDGE

AFFIRMED

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**ROBERT J. GLADWIN, Judge**

Appellant Paul Franklin Pitchford appeals the May 6, 2010 revocation of his suspended imposition of sentence in Sebastian County Circuit Court, contending that the trial court erred in finding that he violated the terms and conditions<sup>1</sup> of his suspended sentence because there was no testimony that his failure to pay restitution and fines was willful. We affirm the revocation.

Appellant pled guilty on May 30, 2007, to second-degree battery, and the trial court withheld imposition of a sentence for a period of five years conditioned upon, among other

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<sup>1</sup>Appellant failed to include in his addendum the terms and conditions of his suspended sentence from his June 14, 2007 conviction of second-degree battery—the terms of which he was accused of violating. However, the State included those terms and conditions in its supplemental addendum. *See* Ark. Sup. Ct. R. 4-2(a)(8)(C) (2010).

things, appellant committing no further violations of law and paying restitution in the amount of \$16,858.55 at the rate of \$75 per month. The State filed a petition to revoke appellant's suspended sentence on February 3, 2010, alleging that appellant committed domestic aggravated assault, third-degree domestic battery, and interference with emergency communications on January 29, 2010. Further, the State claimed that, as of the date of the filing of the petition, appellant had failed to pay restitution as ordered, leaving an unpaid balance of \$15,772.55.

At the revocation hearing on May 5, 2010, the State introduced evidence including appellant's payment record for restitution, which showed no payments since 2008. Testimony from Kelly Pitchford, appellant's wife and alleged victim in this matter, was that appellant physically abused her by throwing her into a chair where she hit her head, swinging a baseball bat at her, slinging a skillet full of hot rice at her, and knocking out her tooth by hitting her. She testified that he had ripped the telephone out of the wall, hit the desk with a baseball bat, and kicked the dog. She claimed that she was afraid of him and that they had both been drinking. She denied taking drugs. She explained that she had been paying his fines and restitution but had stopped paying when appellant went to jail. She said that appellant had not worked for the past two-and-a-half years.

Steven Hutchinson, an officer with the Fort Smith Police Department, testified that he responded to a call on the evening of January 29, 2010, and found Kelly Pitchford with her hair and clothes disheveled and claiming to be afraid of her husband. He saw the bump

on her head, which had a bloody spot on it. Carson Addis, another Forth Smith police officer, testified that he was called out to appellant's residence on a second call on January 29, 2010. Kelly Pitchford reported to him that her husband had knocked out her tooth. He saw that her tooth had been broken and that there was blood around the gumline.

The trial court found that Kelly Pitchford did not have the guile to manipulate the crime scene depicted in the photographs that had been introduced. Further, the trial court found that police officers witnessed her broken tooth and the bloody bump on her head. Based on this evidence, the trial court found that appellant had committed the offenses of domestic aggravated assault and third-degree domestic battery and that he had willfully failed to pay his restitution as ordered. The trial court revoked appellant's suspended sentence, sentencing him to three years' imprisonment in the Arkansas Department of Correction, with an additional three-year-suspended sentence. This appeal timely followed.

In revocation proceedings, the burden is on the State to prove a violation of a condition by a preponderance of the evidence. *Dooly v. State*, 2010 Ark. App. 591, 377 S.W.3d 471. The State's burden of proof in a revocation proceeding is less than that required to convict in a criminal trial, and thus evidence that is insufficient for a conviction may be sufficient for a revocation. *Id.* In order to revoke a suspended sentence, the State need only prove one violation. *Id.* When the sufficiency of the evidence is challenged on appeal, we will not reverse a trial court's decision to revoke unless its findings are clearly against the preponderance of the evidence. *Id.* Because the determination of a preponderance of the

evidence turns on questions of credibility and weight to be given testimony, we defer to the superior position of the trial court to decide these matters. *Id.*

When one of the bases for revocation is the failure to make payments as ordered, it is the State's burden to prove, by a preponderance of the evidence, that such failure to pay was inexcusable; once the State introduces evidence of nonpayment, the burden is then shifted to the defendant to provide a reasonable excuse for failing to make the payments. *Owens v. State*, 2009 Ark. App. 876, 372 S.W.3d 415. Although a defendant cannot be imprisoned solely because of a failure to pay restitution in the absence of a determination that the failure to pay is willful, the failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004).

Appellant contends that the State did not introduce any evidence to show that his failure to pay was in fact willful. He argues that, under *Gossett, supra*, a probationer cannot be punished by imprisonment solely because of a failure to pay in the absence of a determination that the failure to pay is willful. He contends that the State did not meet its burden of proof because it introduced no evidence to indicate that his failure to pay was willful. Finally, appellant also argues that Kelly Pitchford's story was not credible.

This court defers to the circuit court's superior position for questions of credibility and weight to be given to testimony. *Dooly, supra*. Both of the officers testified that they witnessed the injuries Kelly Pitchford had sustained, and the trial court noted that she did not

have the guile to manipulate the scene. We hold that the trial court's findings were not clearly against the preponderance of the evidence.

The State contends that, once it introduced evidence of non-payment, it was appellant's burden to offer some reasonable excuse for his failure to pay. *Owens, supra*. Despite the shift in the burden of proof, the State always retained the ultimate burden of persuading the fact-finder, of proving that appellant's failure to pay was inexcusable. *Barringer v. State*, 2010 Ark. App. 369. It is the probationer's obligation to justify his failure to pay, and this shifting burden of production draws out the probationer's reason for nonpayment. *Id.* If he asserts an inability to pay, and provides evidence demonstrating that inability, then the State must carry its ultimate burden of demonstrating no good-faith effort by a preponderance of the evidence. *See id.*

Appellant offered no evidence to excuse his failure to pay after the State introduced the restitution-payment record. Kelly Pitchford testified that she had paid appellant's restitution but had stopped when appellant went to jail. She also said that he had not worked for the past two-and-a-half years. Appellant offered no reasonable explanation for his failure to pay. Therefore, the trial court's finding that appellant inexcusably failed to pay his restitution is not clearly erroneous. *See Forrest v. State*, 2010 Ark. App. 288.

Affirmed.

VAUGHT, C.J., and MARTIN, J., agree.