

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR10-1067

KEVIN SMITH

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered MARCH 30, 2011

APPEAL FROM THE DREW
COUNTY CIRCUIT COURT
[NO. CR-2008-192-3]

HONORABLE ROBERT BYNUM
GIBSON, JR., JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Kevin Smith appeals from the revocation of his probation. The circuit court found that Smith had violated the conditions of his probation by committing a felony—specifically, battery—revoked his probation, and sentenced him to a total of twenty-five years' imprisonment on the underlying counts. On appeal, he contends that there was insufficient evidence to revoke his probation. We find no error and affirm the circuit court's order of revocation.

On February 9, 2009, Smith entered a plea agreement, pleading guilty to theft of property,¹ a Class B felony, and theft of controlled substance,² a Class C felony. An order was entered reflecting this conviction and sentencing him to thirty-six months' supervised

¹Ark. Code Ann. § 5-36-103 (Supp. 2007).

²Ark. Code Ann. § 5-64-403 (Repl. 2005).

probation followed by twenty-four months' unsupervised probation. On May 19, 2010, the State filed an amended revocation petition alleging that Smith violated the following conditions of his probation: committing a new felony, failing to remain gainfully employed, missing a mandatory class, failing to pay fees and court costs as required, and failing to comply with the conditions of the drug-court program.

At the revocation hearing, Smith's probation officer, Chris Studdard, testified that Smith was charged with first-degree battery on April 2, 2010. The victim of the battery, Andre Peer, testified that he was hospitalized for eight days—on life support for two and one-half of those days—after being beaten by Smith and his brother. Peer testified that, on the day of the incident, he was at a friend's house in Monticello shooting pool and playing cards. When he got ready to leave, he noticed that Smith and his brother were trying to jump on him, so he took off running. They "chased him down" and knocked him unconscious. He testified that he was flown by medflight to UAMS in Little Rock, where he was treated for swelling on the brain, bleeding on the brain, and severe damage to his lungs. He testified that he had not been able to return to work, that he had blood clots in both of his legs, that his feet continued to swell, and that he suffered from severe headaches, for which he takes medication to prevent seizures.

Smith and his sister-in-law Artie Miller testified for the defense. Smith testified that he did not get into a fight with Andre Peer but that he "almost did." He testified that Peer was drunk and slapped Smith. He said that when Peer came out of the house Smith swung at him

but missed. Smith claimed that Peer ran and then fell and hit his head in the ditch, which knocked him unconscious. Smith then said that his brother was stomping and kicking Peer and that a lot of people were kicking him. He explained that everyone was kicking him, even though he was “out cold,” because he had been “talking bad” to everyone. Miller testified that she never saw Smith hit Peer. She said that other people, whom she did not know, were kicking and stomping on Peer but Smith was not.

At the end of the hearing, the court said that it found the victim, Andre Peer, more believable than Smith. The court also found that the crime was heinous and unmerciful. It then entered an amended order on August 24, 2010, sentencing Smith to twenty years’ imprisonment on the conviction for theft of property and five years’ imprisonment on the conviction for theft of controlled substance. Smith filed this appeal.

In order to revoke probation, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). We do not reverse a trial court’s findings on appeal unless they are clearly against the preponderance of the evidence, *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003), and, because a determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge’s superior position. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

Smith contends that the evidence was insufficient to revoke his probation and that the trial court erred in doing so. He argues that only one witness, Andre Peer, testified for the State about the incident and that two witnesses, he and Artie Miller, testified for the defense. He also points to evidence that Peer's blood-alcohol content was .33 from a test taken at the hospital on the night of the beating. Finally, he argues that Peer admitted that he lost consciousness during the fight and therefore could not have been certain that it was Smith who attacked him. The court listened to all of the testimony and believed the victim's version of the facts and not the defense's version. A determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony. We defer to the trial judge's superior position in such matters. Accordingly, we affirm.

Affirmed.

VAUGHT, C.J., and BROWN, J., agree.