Cite as 2009 Ark. App. 856

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR09-624

Opinion Delivered DECEMBER 16, 2009

DAVID TYSON APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-2008-67]
V.	HONORABLE J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

The Sebastian County Circuit Court revoked appellant David Tyson's suspended sentence on March 5, 2009. Appellant contends that the State failed to prove by a preponderance of the evidence that he violated the terms and conditions of his suspended sentence. We affirm the circuit court's order.

A petition to revoke was filed September 2, 2008, that alleged appellant, serving a five-year suspended sentence for nonsupport, committed the offenses of possession of marijuana with intent to deliver and possession of drug paraphernalia. Further, the petition alleged that appellant had failed to pay fines, court costs, DNA fees, and public-defender fees as ordered, all of which were in violation of the terms and conditions of his suspended sentence. At the February 27, 2009 hearing to revoke, the State alleged that appellant failed to pay as ordered and introduced the fine and cost ledger, showing $150 had been paid and a balance of $850

was owed. The latest payment shown was dated June 19, 2008.

Officer Hendrickson of the Fort Smith police testified that on August 26, 2008, he was patrolling the back of an apartment complex because there had been drug activity in the area. Appellant was in a vehicle along with a juvenile female, and another car was parked next to them. The cars were not near an apartment, and it was 11:45 p.m. Both the driver of the second car and the female occupant of appellant's car told the officer that they were meeting about a laptop computer. The officer testified that he asked for consent to search the vehicle and it was given. Pursuant to the search, he found burned marijuana cigarettes under the driver's seat and three individual bags of marijuana in a CD face-plate case, along with baggies of a tar-like substance in the female's wallet. The driver of the second car, Terry Ridenhour, testified that he heard appellant refuse consent to search, and that appellant told the officer he wanted the supervisor.

Officer Williams of the Fort Smith police testified that on September 28, 2008, he stopped appellant and placed him under arrest based upon a revocation warrant. He searched appellant's car and found three small marijuana cigarettes in the ash tray and a digital scale in the glove box. There was no crime-lab report submitted to prove that the cigarettes found were marijuana, and the trial court did not receive the cigarettes as being marijuana.

The trial court rejected appellant's argument that he had not given consent to the search on August 26, 2008, and that the police officer had no probable cause to search. However, the trial court did rule that the State failed to prove that marijuana was found at the

traffic stop on September 28, 2008. The trial court ruled that the digital scale found during that stop was to be considered drug paraphernalia.

After denying appellant's renewed motions for directed verdict, the trial court held that appellant had failed to pay as ordered and had violated his suspended-sentence conditions based upon his involvement in the August 26, 2008 incident. Appellant was then sentenced to four years in the Arkansas Department of Correction, with an additional six years suspended. A notice of appeal was filed on March 19, 2009, and this appeal followed.

If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence or probation, the court may revoke the probation at any time prior to the expiration of the period of probation. Ark. Code Ann. § 5-4-309(d) (Repl. 2008). The burden on the State is not as great in a revocation proceeding because the burdens of proof are different; evidence that is insufficient to support a criminal conviction may thus be sufficient to sustain a probation revocation. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). On appeal, we do not reverse the trial court's decision unless it is clearly against the preponderance of the evidence. *Anglin v. State*, 98 Ark. App. 34, 249 S.W.3d 836 (2007). In making our review, we defer to the superior position of the trial court to determine questions of credibility and the weight to be given to the evidence. *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004).

Appellant first argues that the State failed to prove that his failure to pay was in fact willful, citing *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997), where the Arkansas

Supreme Court held that a defendant cannot be punished by imprisonment solely because of failure to pay restitution absent a determination that the failure to pay was willful. Next, appellant contends that the results of the search on August 26, 2008, that resulted in the possession charges, should be suppressed. He contends that the officer was not given permission to search, and the officer had no probable cause to make contact with them. He argued that the story given to the officer would not have given rise to probable cause or even reasonable suspicion. Appellant claims that his being in the car with the girl was joint occupancy, and that joint occupancy alone is insufficient to establish possession or joint possession. *See Loy v. State*, 88 Ark. App. 91, 195 S.W.3d 370 (2004). Finally, appellant argues that circumstantial evidence must be sufficient to show that a preponderance has been met. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). He insists that a preponderance has not been met here, and that the trial court engaged in speculation in reaching its ruling.

The State points out that where the alleged violation of the conditions of suspension or probation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was inexcusable. *See Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984). The burden of proof does not shift. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). However, once the State has introduced evidence of nonpayment, the burden of going forward does shift to the defendant to offer some reasonable excuse for his failure to pay. *Id.*

In the case before us, the State introduced, without objection, the fine-payment records showing that appellant was behind in payment of his fines and fees. The record reflected that he had made no payment since June 19, 2008. Appellant provided no excuse for his failure to follow the orders of the court. Therefore, pursuant to *Reese*, the trial court's revocation is affirmed.

Because the State need only prove that the defendant committed one violation of the conditions, *Haley v. State*, 96 Ark. App. 256, 240 S.W.3d 615 (2006), this court need not address the State's well-received arguments regarding the trial court's determination of credibility regarding the search of appellant's vehicle. Accordingly, we affirm.

Affirmed.

PITTMAN and HART, JJ., agree.

David L. Dunagin, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.