

Cite as 2018 Ark. App. 300
ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-17-803

JERRY JOSEPH OLIVER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: May 9, 2018

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NOS. 17CR-12-548, 17CR-15-700]

HONORABLE MICHAEL MEDLOCK,
JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

After appellant Jerry Joseph Oliver pleaded guilty to residential burglary and theft of property, the trial court entered a sentencing order on November 6, 2013, sentencing Mr. Oliver to five years' imprisonment followed by a fifteen-year suspended imposition of sentence for the residential burglary conviction and a ten-year suspended imposition of sentence for the theft conviction. On December 16, 2015, the State filed a petition to revoke the suspended sentences, alleging that Mr. Oliver had violated the conditions of his suspensions by committing the new offenses of fleeing and driving on a suspended license. After a revocation hearing, the trial court found that Mr. Oliver had violated his conditions and it revoked his suspensions. The trial court entered a sentencing order on July 25, 2017, sentencing Mr. Oliver to fifteen years in prison for residential burglary and a ten-year suspended imposition of sentence for theft.

Mr. Oliver now appeals from his revocation and resulting sentences. He argues on appeal that there was insufficient evidence to revoke his suspensions because the only identification of him as the perpetrator of the new offenses was made from a suggestive and unreliable out-of-court identification. We affirm.

To revoke a suspended sentence, the trial court must find by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of the suspension. Ark. Code Ann. § 16-93-308(d) (Supp. 2017). We do not reverse a trial court's decision to revoke unless it is clearly against the preponderance of the evidence. *Daffron v. State*, 2016 Ark. App. 486, 505 S.W.3d 209. Because the burdens of proof are different, evidence that is insufficient for a criminal conviction may be sufficient for a revocation. *Id.* Since determinations of a preponderance of the evidence turn on questions of credibility and weight to be given testimony, we defer to the trial court's superior position. *Id.*

The first witness to testify at the revocation hearing was Officer Joseph Porter, an investigator for the Crawford County Sheriff's Department. Officer Porter was on patrol with Officer Bradley Carney when they clocked a white truck traveling at fifty-four m.p.h. in a twenty-five-m.p.h. zone. The white truck sped through a stop sign, and the officers activated the emergency lights and siren and gave pursuit. According to Officer Porter, the driver of the truck refused to pull over and continued to speed up, taking the officers on a high-speed chase. Eventually the white truck veered off the road, crashed through a fence, and stopped in a field. The occupant of the truck fled on foot. Officer Porter stated that they followed footprints from the truck across a creek into a wooded area, but they could not locate the suspect. A short time later, Officer Porter was informed that a state patrolman

had located Mr. Oliver in a ditch and arrested him. According to the report, when Mr. Oliver was arrested he was carrying a double-sided hand tool and he provided an insurance card for a Ford Escort. The only thing Officer Porter could recall about Mr. Oliver from the chase was that he was wearing a baseball cap and had long hair. Officer Porter testified that he did not see the driver of the truck exit the vehicle, and he could not say whether Mr. Oliver was the person who was driving the truck.

Officer Carney also testified that the driver of the truck was wearing a baseball cap and had long hair, but he did not see the driver exit the truck and could not identify him. Officer Carney believed that the tags on the truck identified the truck as being owned by Mr. Oliver's sister.

Officer Sam Bass, an investigator for the Arkansas State Police, also became involved in the pursuit of the white truck that day. Officer Bass testified that, after learning about the pursuit of the white truck by other law enforcement, he gave chase in his unmarked vehicle. Officer Bass activated his lights and siren, but the driver of the white truck refused to stop. According to Officer Bass, he then pulled his vehicle beside the truck with his passenger window down, and he motioned for the man to pull over. The driver of the white truck looked at Officer Bass, nodded his head, and Officer Bass fell back in behind him. Instead of pulling over, the white truck went through a ditch and then a fence. Officer Bass did not see the suspect exit the truck nor was he the officer who arrested him.

Officer Bass testified that when he had pulled up beside the truck, he got a good visual of the driver. Officer Bass identified Mr. Oliver in court as the driver of the white truck. He stated further, "I was asked to identify the subject, and I identified Jerry Oliver."

At that point Mr. Oliver's counsel objected, stating, "I believe this identification is made out of court and there's been no foundation as to whether it was a lineup, picture or anything like that. I would argue it violates my client's due process." The trial court admonished the prosecutor that "you might give a little more foundation." Officer Bass then testified that he was shown a photograph of Mr. Oliver at the jail the next morning, that he recognized the man, and that there was no doubt in his mind that Mr. Oliver was the driver of the truck. There was no further objection, and Mr. Oliver proceeded to cross-examine Officer Bass about the identification.

On cross-examination, Officer Bass testified that they were traveling at about sixty m.p.h. when he pulled his vehicle beside the truck, that he was beside the truck for five or ten seconds, and that it was "long enough for me to acknowledge that he acknowledged seeing me." Officer Bass stated that the only photograph he was shown the next day at the jail was that of Mr. Oliver and that he recognized his face. Officer Bass acknowledged that he did not describe any facial features in his police report, and he could not remember what color clothing Mr. Oliver was wearing.

At the conclusion of the revocation hearing, Mr. Oliver's counsel made a motion to dismiss, stating:

Your Honor, we're going to move to dismiss based in part on the illegal lineup. The officer was shown merely one photo. It was overly suggestive. It violates my client's due process rights. There's been no evidence presented here today of who that vehicle actually belongs to. There's just some speculation of one officer about another officer that may have done some sort of digging as to who the vehicle belonged to. We've got two officers here that they didn't see—they didn't have a good look at the individual. A third officer that put nothing in his report about facial features, he just went down to the police station the next day and identified a single-person lineup basically. And there's no evidence—there's no confessions, no evidence that that vehicle belonged to my client and he had an insurance card of

another vehicle. My client wasn't found in the vehicle. Your Honor, I'd argue that they have not met their burden here and shown by a preponderance of the evidence that my client is the individual they were in pursuit of that day.

The trial court found that, based on the testimony presented, Mr. Oliver had violated the conditions of his suspended sentences.

In this appeal, Mr. Oliver's only argument is that there was insufficient evidence to support the revocation. However, conflated with this argument is Mr. Oliver's claim that the out-of-court identification of him by Officer Bass from a photograph was impermissibly suggestive and violated due process. Mr. Oliver submits that, without the suggestive and unreliable out-of-court identification and what he claims was a tainted in-court identification, there was a lack of evidence that he was the driver of the truck that fled from the police.

To the extent Mr. Oliver is arguing that Officer Bass's identification of him was inadmissible because it violated due process, we hold that this argument is not preserved for review. It is an appellant's obligation to obtain a ruling to preserve an issue for appellate review. *Fisher v. State*, 364 Ark. 216, 217 S.W.3d 117 (2005). During direct examination, Officer Bass testified without objection that he got a good visual of the man in the truck, and he identified him as Mr. Oliver. Later in his testimony, Officer Bass was asked about a previous out-of-court identification, to which Mr. Oliver objected because "there's been no foundation as to whether it was a lineup, picture, or anything like that." Instead of ruling on the objection, the trial court admonished the prosecutor to "give a little more foundation." The prosecutor did as instructed, and Officer Bass went on to testify that he was shown a photo the next morning at the jail, that he recognized the man in the photo

as Mr. Oliver, and that there was no doubt in his mind that Mr. Oliver was the driver of the vehicle. After this foundation was developed, Mr. Oliver made no further objection; thus, the trial court never ruled on the issue of whether the identification procedure was unreliable. Although Mr. Oliver attempted to argue that the photo identification was overly suggestive and violated due process after the State had rested its case, this argument was made in his motion to dismiss for insufficient evidence after the testimony about the identification was already in evidence. At this point the argument came too late, and again no ruling was obtained. Therefore, we do not reach the merits of Mr. Oliver's claim that the identification testimony should not have been admitted.

With respect to the sufficiency of the evidence, we conclude that the trial court's decision to revoke Mr. Oliver's suspended sentences was not clearly against the preponderance of the evidence. In this case, Officer Bass identified Mr. Oliver as the man who was driving the white truck and fleeing from the police, stating that he had obtained a good visual of the person and that there was no doubt in his mind that Mr. Oliver was the driver of the vehicle. Credibility determinations are left to the trial court. *See Daffron, supra*. Leaving credibility determinations to the trial court, as we must, the evidence demonstrated that Mr. Oliver violated his conditions by committing a new criminal offense during his suspensions. Therefore, we affirm the revocation.

Affirmed.

WHITEAKER and MURPHY, JJ., agree.